
**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

In the matter of an Appeal made under
Section 331(1) of the Code of Criminal
Procedure Act No.15 of 1979, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Court of Appeal No:
CA/HCC/ 0294/2017
High Court of Kurunegala
Case No. HC/125/2009

Rajapaksha Durayalage Jayathilake
alias Podde

ACCUSED-APPELLANT

vs.

The Hon. Attorney General
Attorney General's Department
Colombo-12

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Nihara Randeniya for the Appellant.**
Janaka Bandara, DSG for the Respondent.

ARGUED ON : **26/09/2022**

DECIDED ON : **17/10/2022**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General under Section 296 of the Penal Code for committing the murder of Abeysinghe Mudiyansele Ariyaratna Banda on 16/04/2007 in the High court of Kurunegala.

As the Appellant opted for a non-jury trial, the trial commenced before a judge and the prosecution had led seven witnesses and marked production P1-10 and closed the case. After concluding that evidence presented by the prosecution warranted a case to answer, the Learned High Court Judge called for defence and explained the rights of the accused. He had chosen the right to give evidence from the witness box and had closed his case.

After considering the evidence presented by both the prosecution and the defence, the Learned High Court Judge had convicted the Appellant as charged and imposed death sentence on 24/07/2017.

Being aggrieved by the aforesaid conviction and the sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant had given consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing the Appellant was connected via Zoom platform from prison.

The following Grounds of Appeal were raised on behalf of the Appellant.

1. The High Court Judge has failed to consider the contradictions and omissions of the evidence given by PW1.
2. The Learned High Court Judge has not considered the evidence favourable to the Appellant in his judgment.
3. The Learned High Court Judge has rejected the defence evidence at the wrong premises and failed to consider the evidence of the Appellant which suffices to create a reasonable doubt on the prosecution case.

The background of the case *albeit* briefly is as follows:

According to PW1, the wife of the deceased, when she was watching TV with the deceased and her granddaughter in her house, she heard a knock on the boutique door owned by her son. It is situated about 100 meters away from her house. As it was in the night, both the witness and the deceased had gone up to the boutique to check who had knocked the door, however she was unable to see anybody there at that time. When they came back home, they heard another loud knock on the door again from the same direction. They went again to check if anybody was there, yet there was no one at that time. When they reached home, the knock on the boutique door resumed and both, the deceased and the witness proceeded to the boutique. The deceased was walking 10-15 feet ahead of PW1 and he suddenly screamed that "Podde" had cut him. Then PW1 saw "Podde", the Appellant was fleeing the scene. The witness was able to see the Appellant through the torch light which she was holding and through the boutique's light. She also mentioned that the deceased was carrying a torch at that time. The deceased had died on the spot.

Officers from the Gokarella Police Station had conducted investigations, visited the scene, and recovered a pole, two torch lights and a small knife

from the crime scene. Also noted the damages caused to the boutique. Accordingly, the Appellant was arrested on 18/04/2007 at his residence.

PW4 Nilmini was called to give evidence regarding a knife which had been taken from her by the Appellant. She was shown the knife which had been recovered from the crime scene and she identified the knife as the knife which had been taken away by the Appellant some time back. The said knife was marked as PW2.

The JMO who conducted the post-mortem of the deceased revealed that the death was caused by stab injuries to the neck and the chest.

After the closure of the prosecution case, the defence was called and the Appellant had given evidence from witness box and denied the charge.

As the Appellant's proposed grounds of appeal are interrelated with regard to the admission of the evidence in this case, it is determined to analyse all the grounds of appeal together in this appeal.

According to PW1, the deceased had screamed that the Appellant had cut him when they went to check the boutique after hearing banging on the door third time in quick succession. At the cross examination, the witness had said that she heard like several people had knocked the door on the third time. At the inquest PW1 had stated that she heard the sound about 7-8 people knocking the door. However, during the trial before High Court the witness had said that she was unaware as to how many people had knocked up to now. The said contradiction was marked as X-1 by the prosecution.

PW10 was the Officer-in-Charge of the Gokarella Police Station. Upon receiving the complaint regarding the death of the Appellant, he had gone to the place of incident at about 23.40 hours on the same day. Only a torch light that had fallen at the scene of crime was lighting at the time. The main switch board and the bulbs of the shop had been damaged. A pole, two torch lights, a small knife and an iron rod had been recovered from the scene. The Appellant was arrested on 18/04/2007 at his residence.

With the evidence of the investigating officer, it is quite clear that several people had participated in the crime. But PW1 restricting the identity to one person, told court that the deceased had uttered that “Podde” had cut him.

Although, this case rests on the dying declaration of the deceased, the Learned High Court Judge had not discussed the law pertaining to the acceptance of dying declaration of the deceased in the judgment.

As this case solely relies on the dying declaration made by the deceased, it is very important to discuss the applicable laws pertaining to the acceptance of dying declaration as evidence, which had not been done in this case. Hence, it is appropriate to mention following decided cases.

In **Dharmawansa Silva and Another v. The Republic of Sri Lanka** [1981] 2 Sri.L.R.439 it was held:

“When a dying statement is produced, three questions arise for the Court. Firstly, whether it is authentic. Secondly, if it is authentic whether it is admissible in whole or part. Thirdly, the value of the whole or part that is admitted. A dying deposition is not inferior evidence but it is wrong to give it added sanctity”

In **Sigera v Attorney General** [2011] 1 Sri.L.R. 201 it was held that:

“An accused can be convicted of murder based mainly and solely on a dying declaration made by a deceased”.

In this case, although PW1 stated that the deceased had only said that “Podde” had cut him, the Learned High Court Judge, in her judgment had stated that PW1 had seen the Appellant cutting the deceased. Upon perusal of the evidence given by PW1, nowhere had stated that she had witnessed that the Appellant had cut the deceased. This is entirely the creation of the court. The relevant portion of the Judgment is re-produced below:

පැමිණිල්ලේ සාක්ෂි වලට අනුව මෙම සිද්ධියට පෙර කීප වාරයක් මරණාකරුගේ කඩේ දොරටු ගසා ඇත. ඔවුන් එය බැලීමට කීප සැරයක් ගොස් ඇත. ඉන්පසු එක විටක් පැමිණි විට විත්තිකරු

මහුට කොටා ඇත. එය මරණකරුගේ බිටිද දැක ඇත. ඇය එය පොලිසියට ප්‍රකාශ කර ඇති අතර ඇය ප්‍රචාරිත ප්‍රකාශ කර ඇත.

(Page 246 of the brief)

The Learned High Court Judge’s aforementioned decision has prejudiced the Appellant’s right to a fair trial.

As stated above, no suitable lighting conditions were present when the investigating officer arrived at the crime scene. The boutique’s main switch was broken, and there was insufficient light to adequately recognize a person properly.

Further, consideration of third-party involvement had been completely escaped from the attention of the Learned High Court Judge. According to PW1, she had stated at the inquest that 7-8 people would have had knocked the door of the boutique. According to the investigating officer, he had observed damages had been done to the boutique and he had recovered two torch lights and a pole from the crime scene. This demonstrates evidence of involvement of multiple persons. But the prosecution had failed to mention in the indictment the participation of individuals unknown to the prosecution.

In **Emperor v. Brown** [1917] 18 Cri.L.J. 482 the court held that:

“the jury must decide whether the facts proven exclude the possibility that the act was done by some other person, and if they have doubts the prisoner must have the benefits of those doubts”.

The Learned Deputy Solicitor General in keeping with the highest tradition of the Attorney General Department had left the matter to be decided by this court.

With all the evidence presented by the prosecution and the defence, it appears that the Learned High Court Judge had not appropriately evaluated the evidence in delivering her verdict.

In this case, the evidence given by the PW1 is tainted with uncertainty and ambiguity and it certainly does not pass the probability test.

Therefore, I conclude that the prosecution had not succeeded in adducing highly incriminating evidence against the Appellant and thereby has not established the charge beyond reasonable doubt.

Taking into consideration all these circumstances, I am of the view that the conviction of the Appellant cannot be allowed to stand as the prosecution had failed to prove the case beyond all reasonable doubt. The Appeal is allowed and the Appellant is acquitted from the charge.

The appeal is allowed.

The Registrar of this Court is directed to send a copy of this judgment to the High Court of Kurunegala along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL