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

In the matter of an appeal in terms of Section 331 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.

The Democratic Socialist
Republic of Sri Lanka

**Complainant**

**C.A. Case No. HCC - 38/21**

**High Court of Embilipitiya**

**Case No. 21/2015**

**Vs.**

Kasthuri Aarachchilage
Rupasena alias "Papol Ukkung"

**Accused**

**AND NOW BETWEEN**

Kasthuri Aarachchilage
Rupasena alias "Papol Ukkung"

**Accused –Appellant**

**Vs.**

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

**Respondent**

**BEFORE :** **K. PRIYANTHA FERNANDO, J (P/CA)**

**WICKUM A. KALUARACHCHI, J**

**COUNSEL :** Chaminda Athukorala with Hafeel Fariz, Veenashveri Jayathilaka, Maldini Herath for the Accused-Appellant.

Azard Navavi, DSG for the Respondent.

**WRITTEN SUBMISSIONS**

**TENDERED ON :** 27.05.2022 (On behalf of the Accused-Appellant)

09.11.2022 (On behalf of the Respondent)

**ARGUED ON :** 11.10.2022

**DECIDED ON :** 01.12.2022

**WICKUM A. KALUARACHCHI, J.**

The accused-appellant was indicted in the High Court of Embilipitiya for committing the offence of Murder of Geeganage Piyarathne on or about 13.04.2006, an offence punishable under section 296 of the Penal Code. After the trial, the learned High Court Judge convicted the appellant and imposed death sentence by his judgment dated 20.07.2021. This appeal is preferred against the said conviction and sentence.

According to the prosecution, an altercation occurred in front of the accused-appellant's house on the day before the Sinhala-Hindu new year in 2006, around 9.00 p.m.. Geeganage Piyarathne died as a result of cranio-cerebral injuries sustained following a gunshot.

The appellant was seen armed with a gun at the place of the incident, according to evidence. A bomb explosion also occurred shortly after the firing. As a result of the explosion, three prosecution witnesses, PW-1, PW-2, and PW-3, were injured.

After the prosecution case, the accused-appellant (hereinafter referred to as the "appellant") opted to testify under oath and also called his sister to give evidence on his behalf. The appellant took the defence of alibi that he was at his sister's house on the night of the alleged incident.

Both parties have tendered their written submissions, prior to the hearing. At the hearing of this appeal, the learned Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions. Although five grounds of appeal have been set out in the written submissions tendered on behalf of the appellant, the learned Counsel for the appellant confined his arguments to the following three grounds at the hearing of the appeal.

I. The learned High Court Judge rejected the defence of alibi on illegal and factually incorrect grounds.
II. The learned High Court Judge has relied on testimony not given in arriving at the finding of guilt.
III. The learned High Court Judge has failed to evaluate the evidence in its totality with specific regard to the contradictions both *inter se* and *per se* of the witnesses.

The learned counsel for the appellant pointed out certain *inter se* and *per se* contradictions and contended that the prosecution witnesses are not credible. Also, he advanced an argument to demonstrate that the identification of the accused-appellant is doubtful.

The learned Deputy Solicitor General (DSG) for the respondent conceded that there was a bomb explosion and it has been done by someone other than the appellant. Also, the learned DSG admitted that there was an altercation between two groups at that time. However, he contended that when the entire evidence is considered, it can be concluded that the appellant shot the deceased because the appellant was the only person carrying a gun at the time and the judicial medical officer's opinion was that the deceased died as a result of a gunshot injury.

Before considering the defence of alibi, I wish to consider the case presented by the prosecution. The judicial medical officer (JMO) expressed his opinion that the deceased died as a result of a gunshot injury. According to the postmortem report, it was a single gunshot. Undisputedly, no one has seen the appellant shooting the deceased. Also, no weapon has been recovered. However, the prosecution presented evidence to establish the fact that the appellant was present with a gun in hand when the incident occurred.

PW-1, PW-2, and PW-3 were injured as a result of the bomb explosion that occurred immediately after the gunshot was fired. The Government Analyst's report marked P-6, states that it is a hand grenade. However, it has not been revealed who exploded this hand grenade. When considering the incident of shooting, according to the JMO, he observed cranio-cerebral injuries on the body of the deceased following a discharge of a single gunshot. PW-3 stated that he saw the appellant armed with a gun. PW-4, his wife, has also stated the same. However, PW-1 has not stated that the appellant carried a gun. PW-1 has stated that he heard two gunshots and saw the appellant at the scene with three others carrying a club or a long pipe (පොල්ලක් හෝ දිග බටයක්). PW-2 stated that he looked at the appellant's house and yard but did not see the appellant at the time of the incident. According to him, the appellant was not even to be seen at the place of the incident.

Therefore, the prosecution relies on PW-3's evidence in establishing the charge in the absence of any eyewitness to the incident of the shooting. According to the JMO, death occurred as a result of injury No-9, which was caused by firing from a very close distance. The JMO expressed his opinion that it should be a distance like two feet (pages 331 and 332 of the appeal brief). Hence, it is apparent that the person who shot the deceased should have been in very close proximity to him.

According to the testimony of PW-3, he had seen the appellant within a distance of 20 feet. Further, he stated when he moved two or three feet, he heard a gunshot, and shortly afterward, he heard a big sound. It is vital to be noted that when PW-3 was asked what was the appellant doing with the gun in hand, PW-3 said he was doing nothing.

ප්‍ර: මොනවා කරමින්ද ඔහු සිටියේ?

උ: මොකුත් කරමින් හිටියේ නැහැ. අතේ තියාගෙන ඉන්නවා දැක්කා තුවක්කුවක්.

(Page 150 of the appeal brief)

When the gunshot was heard, PW-3 was very close to the appellant. The distance between them was 20 feet or less. If the appellant fired at that time, undoubtedly, PW-3 could see him firing. But PW-3 has never stated that he saw the appellant firing. Instead, as mentioned above, he stated that although the appellant carried a gun, he was doing nothing. In addition, when PW-3 stated that he could not even say from which direction the gunshot was heard (pages 154 and 169 of the appeal brief), the inference that could be drawn from that evidence is that the firing had taken place somewhere else, but not in the place where the appellant was.

There is another important factor to be considered. PW-3 has never stated that he saw the deceased when he saw the appellant and heard

the gunshot. If the deceased was shot from a very close distance like two feet as per the JMO's expert opinion, it is amply clear that the deceased and the shooter were somewhere, other than the place where PW-3 was. Also, it should not be forgotten that the hand grenade had also been exploded by a person who could not be traced. The aforesaid prosecution evidence strongly invites to come to the conclusion that the appellant could not be the person who shot at the deceased.

In Emperor V. Browning - (1917) 18 Cr.L.J. 482, it was held that "the jury must decide whether the facts proved 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".

Also, in Don Sunny V. Attorney General (Amarapala murder case) – (1998) 2 Sri L.R. 1, it was held that "the prosecution must prove that no one else other than the accused had the opportunity of committing the offence".

In addition, it is vital to be noted that in the case of The Queen V. M.G. Sumanasena – 66 NLR 350, it was held that "In a criminal case, suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence".

In the case at hand, not only has the prosecution not excluded the possibility that a third person committed the offence, but also demonstrated by their own evidence, especially by the evidence of PW-3, that the appellant could not have committed the offence. Hence, I hold that the charge of murder against the accused-appellant has not been proved beyond a reasonable doubt.

Therefore, I hold that the learned High Court Judge's decision to convict the appellant for the offence of murder is bad in law. Accordingly, I set aside the judgment dated 20.07.2021, the conviction, and the sentence imposed on the appellant. The appellant is acquitted of the charge against him.

The appeal is allowed.

**JUDGE OF THE COURT OF APPEAL**

K. Priyantha Fernando, J (P/CA)

I agree.

**JUDGE OF THE COURT OF APPEAL**