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

In the matter of an appeal under Section 14 of the Judicature Act, No. 2 of 1978 read with the provisions of Section 11 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 331 of the Code of Criminal Procedure Act, No 15 of 1979.

Court of Appeal Case No:
CA HCC 131/20

HC of Chilaw Case No:
HC 49/17

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

Complainant

Vs.

Thelakaragedara Kelum Lakmal Rathnayake

Accused

AND NOW BETWEEN

Thelakara Gedara Kelum Lakmal Rathnayake

Accused-Appellant

Vs.

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

Complainant-Respondent

Before: **Menaka Wijesundera,J.**
B. Sasi Mahendran, J.

Counsel: Samantha Premachandra Assigned Counsel for the Accused-Appellant
Dishna Warnakula, DSG for the Respondent

Written Submissions On: 17.12.2021(by the Accused-Appellant)
13.02.2022 (by the Respondent)

Argued On: 09.03.2023

Decided On : 17.05.2023

B. Sasi Mahendran, J.

The Accused-Appellant (hereinafter referred to as "the Accused") was indicted in the High Court of Chilaw under Section 296 of the Penal Code for committing the murder of one Perumal Sarath Murugadasa (hereinafter referred to as "the deceased") on or around 24th of September 2015.

The Prosecution led evidence of six witnesses and concluded its case. After the conclusion of the Prosecution's case, the Accused made a dock statement and led the evidence of one police officer, namely PS 26688 Ranpathi Dewage Keerthi Chandrathne.

After considering the evidence presented by both parties, the learned High Court Judge by his judgment dated 18th of September 2020 convicted the Accused and sentenced him to death.

Being aggrieved by the aforesaid conviction, the Accused preferred this appeal. Learned Counsel appearing for the Accused submitted the following grounds of appeal:

a) The conviction and sentence are illegal;

b) The conviction and sentence cannot be supported having regard to the weight of the evidence at the trial;

c) The Learned Trial Judge failed to analyse the evidence before Court;

d) The Learned Trial Judge failed to appreciate the legal issues and the concepts involved in a charge under Section 296 in the indictment;

e) The Learned Trial Judge failed to appreciate that the evidence of PW1 was not adequate to support the identification of the Accused through voice identification alone;

f) The Learned Trial Judge had wrongfully considered extraneous circumstances in concluding that the voice identified by PW1 is positively that of the Accused;

g) The Learned Trial Judge had wrongfully applied the law in coming to the conclusion that the voice identified by PW1 was that of the Accused;

h) The Learned Trial Judge failed to appreciate that PW2 had failed to identify the voice of the Accused despite also closely associating with the Accused;

i) The Learned Trial Judge had failed to appreciate that PW2 had a second encounter with the purported murderer when PW2 had gone back to the house yet failed to identify the said murderer by voice;

j) The Learned Trial Judge had failed to consider that there was insufficient evidence led by the Prosecution in relation to the motive of the Accused;

k) The Learned Trial Judge did not give adequate consideration to the contradictions and omissions marked at the trial;

l) The Learned Trial Judge failed to consider the belatedness of the statement given by PW5 to the Police and the numerous material omissions and contradictions contained in the evidence of PW5;

m) The Learned Trial Judge failed to appreciate the credibility of the evidence of PW5;

n) The Learned Trial Judge failed to appreciate that the evidence of one or more material witnesses was not by the Prosecution at the trial stage;

o) The Learned trial Judge failed to identify the scope and applicability of a Section 27 statement under the Evidence Ordinance which is a material factor upon which the conviction is based;

p) The Learned Trial Judge failed to appreciate the applicability and scope of Sections 24,25,26,27 and 28 of the Evidence Ordinance;

q) The Learned Trial Judge failed to appreciate that the duty of discharging the burden of proof is on the Prosecution;

r) The Learned Trial Judge misdirected himself by imposing an unnecessary burden on the Defence in a case of denial;

s) The Learned Trial Judge failed to Appreciate that the evidence led at the trial was insufficient to rebut the presumption of innocence and the duty of the Prosecution to prove the case beyond reasonable doubt.

The facts of the case may be briefly stated as follows.

According to the evidence of PW1, the wife of the deceased namely Hitihami Mudiyanselage Nilmini Kumari, on the day in question; 24th of September 2015, along with her husband and their children were living in their house, situated in the middle of a coconut estate. On the night of the murder at around 19.00hrs, she heard a voice shouting "*maranawa, kotanawa, kapanawa*" which she claims emanated from about 100m away from the house. She could not see the person since it was pitch-black. According to PW1, there was no electricity in the area. As the voice drew closer the deceased came out of the room pushed the family behind, and told them to run away. PW1 ran away with the smallest child in one direction, while PW2, the son of PW1 namely Murugadas Akash

Maduwantha, ran away with the other daughter. She claimed to hear shouting from the house and while she could not make out what they were saying exactly, she heard the deceased call out her name.

After some time, she reunited with her eldest son near the entrance and they both returned to the house. She stopped at the gate in fear for her life as PW2 went inside and checked. PW2 told her that the deceased had fallen on the floor. They tried to look for a three-wheeler to take the deceased to the hospital. Both failed to find one. By the time PW1 returned to the gate PW2 had returned with some Police Officers.

PW1 identified the voice of the person who yelled the words "*maranawa, kotanawa, kapanawa"* as the Accused. The Accused had been living with the family of the deceased for two years. Further, she indicated that she had an intimate affair during this time which continued after the Accused left their home. It is further contended by PW1 that she met the Accused at hospital on the day of the murder when the Accused visited her husband who had been hospitalized following an attack by unknown persons. (According to PW1 this was due to an illicit affair the deceased had with an individual named Kumari, who was also visiting the deceased at the time PW1 went to see him.)

PW2 in his evidence narrates a similar story. Though in contrast to PW1's evidence, PW2 claims that PW1 was not at the scene when the yelling of those words was heard as she had gone to take a bath when they heard the shouting. On returning to the house after running away first when he heard the voice, though unable to see in the dark, PW2 heard the deceased shout "*ammo*" near the living area who then asked PW2 to take him to the hospital. PW2 claims that he could not get close as he heard a voice telling him "*avoth maranawa, kotanawa*". It should be noted that in both instances although he heard the voice, he could not identify the voice on either occasion.

PW5, namely Kanakaratnam Rajesh, is a person known to the deceased and a neighbour who resided at his sister's house 500m away from the deceased's residence. In his evidence, PW5 stated that the two daughters of the deceased came to their house at 19.30-1945hrs saying "*nande nande mama enawa passen*". PW5 claims that he took steps to hide the children. Around 19.45-20.00hrs the Accused then came to the house asking if the children came. PW5 opened the door and saw the Accused trying to hide a knife, which after a scuffle he took from the Accused but gave back to him since it was pointed

out by the Accused that PW5's fingerprints on the knife could be problematic. There had been blood on the knife as well as on the Accused's clothes. The Accused then told PW5 that he cut the deceased with the knife. He further stated that he slashed the tires of the children's bikes. After spending about 10-15 minutes there the Accused left. This Court is mindful of the fact that this statement is recorded only on the 27th of September 2015, three days after the incident.

PW8, namely Ratnasekara Randunu Wasantha Kumara was the OIC - Crime Division at Chilaw Police at the time and had been in charge of the resulting investigation. He arrested the Accused the next morning, who was found hiding in a forest area in Singhapura located approximately 2km away from the crime scene. PW8 recorded a statement from the Accused. He was able to recover the weapon used for the murder from that statement. The purported statement marked P5 reads as follows (on page 230 of the Brief – proceedings dated 12/06/2019):

"පොල් කඩන පිහිය හැඟූ තැන මට පොලිසියට පෙන්වා දෙන්න පුලුවන්."

The Accused made a statement from the dock rejecting the Prosecution's version, claiming that he was at Halawatha during the time of the incident. The Defence then called one witness to the stand, Police Sargent 26688 Keerthi Chandrasena (DW1). He is the Police Officer who recorded PW1's initial statement on the night of the incident.

We must be mindful that this case is based on circumstantial evidence. Therefore, we are guided by the well-established principles of law on circumstantial evidence. To elaborate, these principles have been clearly set out in the following judgments.

In King v. Abeywickrema 44 NLR 254 his Lordship Soertsz S.P.J. observed:

"*In order to base a conviction on circumstantial evidence the Jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence.*"

In King v. Appuhamy 46 NLR 128 his Lordship Keuneman J. held:

"*in order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable-hypothesis than that of his guilt."*

In B.R.R.A. Jagath Pramawansha v. The Attorney General CA Appeal No. 173/2005, decided on 19.03.2009, his Lordship Sisira de Abrew J. analysed a few of the leading authorities on this point thus:

"Having regard to the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence, if an inference of guilt is to be drawn, such an inference must be the one and only irresistible and inescapably conclusion that the accused committed the offence. When the evidence adduced at the trial is considered, the one and only irresistible and inescapable conclusion that can be arrived at is that the accused committed the murder..."

Similarly, His Lordship Sisira de Abrew J. in Sudu Hakuruge Jamis and another v. The Attorney General, CA 204/2010 decided on 13.11.2013, held further:

"Applying the principles laid down in the above judicial decisions, I hold that in a case of circumstantial evidence if the Court is going to arrive at a conclusion that the accused is guilty of the offence, such an inference must be the one and only irresistible and inescapable conclusion that the accused himself committed the crime. Further I hold that if the proved facts are not consistent with the guilt of the accused, he must be acquitted"

The main contention of the Accused was that the learned Trial Judge arrived at the conclusion that the Accused is the murderer without analyzing the evidence of PW1, who claimed to recognise the voice of the Accused.

In his treatise 'Law of Evidence' (Volume 1) E. R. S. R. Coomaraswamy (at page 257), sets out the principle of voice recognition thus:

"Some witnesses purport to identify a person by his voice. It is not safe to rely on such identification and the liability to error is great. This is particularly so when the identification was done at night. But when the accused was intimately known to the witness, who identified him by his voice and gait, the Supreme Court of India declined to hold that the identification was unsafe. In South Africa, voice identification parades have been held with dubious results."

The following judgments were used to buttress the views of the learned author: In Nga Aung Khin v. Emperor AIR (1937) Rangoon 407 BA:

"Now it is never safe to rely on the identification of a person by his voice. One is always liable to make a mistake. In the present case it becomes more unreliable when one finds that this witness never said to the headman U Tun Peo, who examined her not long after the robbery, that

she recognized one of the other two, what is most remarkable is that they denounced the appellant as one of the robbers only a few days after the robbery."

In Bhagtu v. Emperor, Criminal law Journal Vol.29 1928 page 758, it was held:

"Now remains the question of Santa Singh's evidence. He says that while he was running away, he recognized Bhagtu and two other persons, with whom we are not concerned, by their voices. Now if this statement was to be believed then it would not be necessary at all to consider the evidence of Baru, the approver, because that alone would be direct evidence of the complicity of Bhagtu in the murder of Inder Singh. But there are difficulties in the way of prosecution before it can induce this court to accept the evidence of Santa Singh. Santa Singh, immediately after the attack of Inder Singh's party commenced., ran away to the Railway Station for protection, and it does not appear that he mentioned the names of these three persons, whom he has named now, to any one of the Railway employees at the Railway Station, as some of the assailants of Inder Singh. Immediately after the attack he met Banta Singh Lambardar who deposes that he does not know if Santa Singh made any statement to this effect. Besides, to recognize a person in a pitch dark night, as the night in question undoubtedly was, merely by the modulations of his voice is a very risky experiment, and, even if Santa Singh's statement be accepted for what it is worth."

Sri Lankan jurisprudence is not unfamiliar with the use of voice identification evidence in criminal trials. For instance, his Lordship Sisira de Abrew J. in Hatangalage Ariyasena v. Attorney General CA 68/2011 decided on 21.2.2013, considered this point (at p. 5):

"Next question that arises for consideration is whether the accused appellant could be convicted on voice identification…The accused appellant, prior to the separation from his wife, was living in his wife's house which was in the same land where the ancestral house was located. Kalyani was living in the ancestral house. She says that the accused appellant and Nalani were living together for several months. The accused appellant made utterances which I have referred to earlier. When I consider all these matters I hold the view that there was no difficulty for her to identify the voice of the accused appellant."

His Lordship cited the following passage from the judgment of Kirpal Singh v. State of Uttar Pradesh AIR (1965) 712 in which Justice Shah held:

"It is true that the evidence about identification of a person by the timbre of his voice depending upon subtle variations in the overtones when the person recognizing is not familiar with the person

recognized may be somewhat risky in a criminal trial. But where the accused is intimately known to the witness and for more than a fortnight before the date of the offence he had met the accused on several occasions in connection with the dispute, it cannot be said that identification of the assailant by the witness from what he heard and observed was so improbable that the Supreme Court would be justified in disagreeing with the opinion of the Court which saw the witness and formed its opinion as to his credibility and of the High Court which considered the evidence against the appellant and accepted the testimony"

Having cited the same, his Lordship concluded thus:

"Applying the principles in the above judicial decision and the above observations, I hold that Kalyani had identified the accused appellant by his voice. What did the accused appellant say when he came near the ancestral house of Kalyani. "Your family destroyed me. One was killed. I will kill all of you. Open the door." These were the words used by him. Little before she heard these words the deceased was shouting in pain and later she heard the groaning sound of the deceased person. The above items of evidence clearly show that the accused appellant had killed the deceased person."

Similarly in Attorney General v. Pallawa Lekamlage Gayan Sanjeewa alias Asanka Wewellawela CA 246/2009 decided on 01.09.2015 his Lordship Vijith K. Malalgoda P.C. J. in addition to the positive identification by the Prosecutrix observed that her recognition of the voices of the suspects was also helpful for her to identify them. Reliance was placed on the judgment of Kirpal Singh (supra). His Lordship concluded thus (at p. 8):

"I see no reason to disbelieve the prosecutrix when she said that the voices of the accused too have helped her to identify the accused when considering the relationship she had with all three accused."

Recently, a noteworthy distinction between identification and recognition was alluded to by his Lordship the Chief Justice Jayasuriya P.C. in Rathnasingham Janushan and Benedict Weasley Abraham v. Pakyanaathan Antenistan and Others SC (Special) LA/296/2017 decided on 04.10.2019, in which it was stated:

***"However, to the contrary, the process of identification of a person who is known to a witness by name or otherwise is described as "recognition" as opposed to "identification". Situations of "recognition" are considered more satisfactory than instances of identification**.*

However, even in situations of "recognition" the court should analyse the evidence of the witness who claims that the accused is a known person and examine whether the evidence is satisfactory to bring home a conviction. In K. Don Anton Gratien v The Attorney-General, C.A 226/2007 decided on 01.07.2010, the Court of Appeal analysed the evidence of the sole eye witness

who claimed that he knew the accused, and arrived at the conclusion that the evidence was unsatisfactory. Therefore, the court held that the evidence is not sufficient to establish the identity of the appellant to the required standard namely, beyond reasonable doubt." [emphasis added]

On the subject of voice identification, we may also refer to the foremost text on criminal law Archbold (2019 Ed.) 14-71, which states at page 1862:

*"**Where voice identification** (now commonly referred to by speech scientists as "speaker comparisons") **is in issue, the jury should be given the full Turnbull warning, appropriately modified**: R v Hersey (1998) Crim.L.R. 281, CA; Phillips v. DPP (2012) UKPC 24; (2013) Crim.L.R. 263. Accurate voice identification is more difficult than visual identification (although it is more likely to be reliable when carried out by experts (as to which, see below) using acoustic, spectrographic and sophisticated auditory techniques: R v. Flynn and St John (2008) EWCA Crim 970; (2008) 2 Cr.App.R. 20); accordingly, a warning to a jury should be even more stringent than that given in relation to visual identification: R v Roberts (2000) Crim.L.R. 183, CA."* [emphasid added]

In R v. Hersey (1998) Crim.L.R. 281 it was held:

"There was not a great deal of authority on how a judge should direct a jury in respect of voice identification. A judge should direct the jury on the basis laid down by the court of appeal and in the judicial studies board specimen directions in respect of visual identification, but tailored for the purpose of voice identification or recognition. That would follow, suitably adapted, the guidelines in Turnbull (1976) 63 Cr.App.R. 132. It was vital that the judge spelt out the risk of mistaken identification and the reason why a witness may be mistaken, pointed out that a truthful witness may yet be mistaken, and dealt with the strengths and weaknesses in the case before him. In this case, the judge dealt fully with the issue in his summing up."

The judgment of R v. Kris Ronald Flynn [2008] EWCA Crim 970 provides a helpful discussion on the issue of voice identification. The judgment considered the evidence of experts in voice identification (first category) and the evidence of lay witnesses (second category). The Court of Appeal observed:

"*The first category, expert evidence, in this field can be of two types: firstly, auditory analysis and secondly acoustic/spectrographic analysis.* ***The second category of evidence falls into a group described by the experts in this case as lay listener evidence. The latter requires that the witness possesses some special knowledge of the suspect that enables him or her to recognise the suspect's voice. The most common example of such evidence is the knowledge of a close relative or friend. However, there are other persons who may acquire sufficient special knowledge by their familiarity with the suspect's voice. For example, a person may acquire such familiarity by the***

frequency of his or her contact with the suspect. *A yet further group may comprise those who acquire specialist knowledge by listening to a sample of the speech of a known person and comparing it with a recording of a disputed voice. The latter are referred to in some judgments and academic papers on this topic as ad hoc experts. In our opinion, this description is unhelpful, since those who acquire the specialist knowledge cannot in our view properly be referred to as experts*."

The Court further observed:

"the ability of a lay listener correctly to identify voices is subject to a number of variables. There is at present little research about the effect of variability but the following factors are relevant:
(i) the quality of the recording of the disputed voice or voices;
(ii) the gap in time between the listener hearing the known voice and his attempt to recognise the disputed voice;
(iii) the ability of the individual lay listener to identify voices in general. Research shows that the ability of an individual to identify voices varies from person to person.
(iv) the nature and duration of the speech which is sought to be identified is important. Obviously, some voices are more distinctive than others and the longer the sample of speech the better the prospect of identification.
(v) ***the greater the familiarity of the listener with the known voice the better his or her chance of accurately identifying a disputed voice.*** *"* [emphasis added]

In a noteworthy observation, the Court alluded to the difference in appreciation of visual and voice identification, especially the latter being more difficult for a lay witness to describe:

"Dr Holmes states that the crucial difference between a lay listener and expert speech analysis is that the expert is able to draw up an overall profile of the individual's speech patterns, in which the significance of each parameter is assessed individually, backed up with instrumental analysis and reference research. ***In contrast, the lay listener's response is fundamentally opaque. The lay listener cannot know and has no way of explaining, which aspects of the speaker's speech patterns he is responding to. He also has no way of assessing the significance of individual observed features relative to the overall speech profile. We add, the latter is a difference between visual identification and voice recognition; and the opaque nature of the lay listener's voice recognitions will make it more difficult to challenge the accuracy of their evidence.*** *"* [emphasis added]

We are mindful of the utmost importance of correct identification of an Accused in a criminal trial primarily for the severity of the penalties imposed, which curtails one's liberty. In the recent judgement of Dassanayake Lekamlage Somapala alias Gangabada Sudu and others v. Attorney General, CA 208-210/2011 decided on 02.09.2014, his Lordship Anil Goonarathne J. echoed our concern:

"A very important aspect of a criminal trial is that the perpetrators of the crime need to be identified with certainty. Absence of identity of accused would be fatal to the prosecution case. The learned High Court Judge has merely referred to the items of evidence of the declaration (P5) but has not considered its probative value."

As there must be an abundance of caution that must be exercised in carefully combing through the evidence and given the absence of any guidance similar to that of the Turnbull principles, this Court is of the view that it would be in the interests of justice and clarity to set out certain safeguards to assist a court that is tasked with the unenviable task of having to determine conviction or acquittal of an Accused which is based on voice identification (or "ear witness evidence" as referred to in legal literature). Having examined several foreign authorities on this point we are of the view the primary safeguard that can be gleaned from the same is the availability of evidence to establish the relationship between the Accused and the witness. As noted in the aforesaid judgment of R v. Kris Ronald Flynn: *"So far as lay listener evidence is concerned, in our opinion, the key to admissibility is the degree of familiarity of the witness with the suspect's voice."* Legal literature also points to a similar safeguard: The only precondition, if one can call it that, is that the Crown must lay a foundation for the witness' ability to identify the voice (by adducing evidence that the witness had more than fleeting exposure to the voice outside of the criminal encounter in circumstances where the witness could connect the voice to a particular person) (vide Christopher Sherrin, 'Earwitness evidence; the reliability of voice identifications' Osgoode Hall Law Journal 52.3 (2015) : 819-862.)

With the foregoing in mind, we will now consider whether the learned High Court Judge has correctly analysed the evidence of PW1 who claims to have identified the voice of the Accused, and examine whether the evidence is satisfactory to bring home a conviction. We will reproduce the relevant portion of the judgement in this regard (on page 350 of the Brief):

"විශේෂයෙන්ම මෙම හඳුනාගැනීම පිළිබඳ සලකා බැලීමේදී කිපර්ාල් සිං එරෙහිව උත්තර ප්‍රදේශ් ප්‍රාන්තය (Kirpal Singh v. State of Uttara Pradesh) AIR 1965 712 නඩුවේදී මේ සම්බන්ධයෙන් නීතිමය තත්වය සාකච්ඡා කර ඇති අතර එහි අවධානම පිළිබඳවද විග්‍රහ කර ඇත. පුද්ගලයෙකු රූපයෙන් හඳුනාගැනීමක් නොවන අතර කටහඬින් හඳුනාගැනීම එහි නිශ්චිතභාවය පිළිබඳව සලකා බැලීමේදී වැදගත් වේ. මෙහෙදී නිරන්තරයෙන් වුදිත හමුවූ තැනැත්තෙක් වන අතර එදිනද රෝහලේදී ඔහු දුටු බවට පැහැදිලිව සාක්ෂ්‍ය ඉදිරිපත් කර ඇත. වසර දෙකකට වැඩි කාලයක් ඔවුන් සමග වුදිත නිවසේ සිට ඇති අතර මාස හයකට පෙර ඉවත් වුවද ඇය සමග අනියම් ඇසුරක් පැවැත්වූ බව දක්වා ඇත. ඒ අනුව නිරන්තරයෙන් හමුවූ දන්නා පුද්ගලයෙකු වූවෙන්ද සමීප ඇසුර තිබූ බැවින්ද කටහඬින් හඳුනාගත් බව දක්වා ඇත. එලෙස වුදිත රූපයෙන් නොදුටුවද කටහඬෙන් ඇය හඳුනාගත් බවට වූ සාක්ෂි සම්බන්ධයෙන් සැහීමකට පත්විය හැක. එබැවින් බාධාවකින් තොරව එම අවස්ථාවේදී වුදිත කටහඬ හඳුනාගෙන ඇත. වැඩිදුරට පැ.සා.2 දරුවා ඉදිරිපත් කර ඇති සාක්ෂි පරිදිද දීසර් කාලයක් ඔවුන් සමග වුදිත සිටි බව එකී සාක්ෂි තහවුරු කරමින් සඳහන් කර ඇත."

Having regard to the above excerpt, it is evident that the learned trial judge has not considered the rather unusual reaction of PW1 purporting to recognize the voice of the Accused. This Court guided by the dictates of logic and common sense finds it rather strange as to why PW1 who claimed to have known the Accused so intimately would run away from the scene in the absence of any rational justification such as the existence of animosity between herself and the Accused, or the possession of any weapon in the hands of the Accused, or any incident which transpired during the time from leaving the hospital to the incident. The conduct or reaction of a witness having heard a voice that the witness claims to recognise might be helpful to determine the veracity of her claim.

The conduct of PW1 is not that which is expected of a prudent, reasonable person in the position of PW1 who claims to have intimately known the Accused. At the least, she could have responded to the familiar voice by enquiring the purpose for him to shout outside their residence, or to try to calm him down. Neither did she inquire from her husband, the reason he required her to immediately run away given that she could have informed her deceased husband that this was the voice of the Accused.

Even assuming that the deceased's reaction in asking his family to run away was prompted by his fear of another attack like that which occurred a week ago, she did not for a moment stop to inform him that this was supposedly the voice of the Accused. What is further striking is that the deceased himself and PW2 who lived with Accused for two years could not identify the voice of the stranger.

A further reason to disbelieve her account of events is the evidence of PW2, according to whom, his mother that is PW1 was away taking a bath at the time of shouting. If PW1 was confident that it was the voice of the Accused her failure to inform the same to her son at the first instance upon then reconvening after running away creates a doubt in our minds about the truth of her claim.

The inescapable conclusion, therefore, is to reject the evidence of PW1.

With regard to PW5's evidence, he has not explained the delay in making a statement to the Police. We are mindful that in such events a court is reluctant to accept the evidence. We are guided by the following judgment of this Court.

Attorney General v. Shamila Ishan Gunasinghe, CA 209/2015 decided on 30.10.2017 which analysed the authorities on this matter.

"In the case of Dharmasiri vs. The Republic of Sri Lanka 2012 (1) SLR 268 Tilakawardane, J held inter alia;

"Two critical tests before considering belated evidence as reliable " evidence are: firstly reasons for delay and secondly, whether those reasons are justifiable."

In the same case in the Court of Appeal (2010 (2) SLR 241) Sisira de Abrew, J held inter alia;

"Because the witness is a belated witness, Court ought not to reject his testimony on that score alone. Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of the belated witness."

Further, in the case of Udagam Vs. AG 2000 (2) SLR 103 relied by the learned Counsel for the Appellant it was held that;

Evidence is infirm, unsafe and unreliable to act upon considering the following;

- *The belated statement made to the Police with delay not explained with acceptable reasons.*

Therefore, when considering the evidentiary value of the belated statement of PWI made to the Magistrate, what this Court must consider first are the reasons for the delay and secondly whether the reasons are justifiable.

It is clear that the reason for PWI 's delay in implicating the Appellant was fear for his own safety. However, this reason has not been elaborated on by the Prosecution. The fact that the learned High Court Judge has directed the Police to provide police protection to PWI, in my view, serves no real purpose since such protection was provided to the witness after his testimony. Any person who sought to intimidate PWI may have done so before his testimony since after PWI's statement to the Magistrate the nature of his evidence was clear. No such intimidation and I or a threat of intimidation was placed on record by the prosecution before the evidence of PWI was led and as such this Court is of the view that the reasons given by PWI for the belated statement to the Magistrate is not justifiable.

In the aforementioned case Dharmasiri vs. The Republic of Sri Lanka 2012 (1) SLR 268 Tilakawardane, J further held that;

"When considering the belated evidence or a belated statement, one cannot neglect the basis for such delay which transpired in the evidence. " In the instant Appeal no such evidence has transpired for this Court to consider and as such this Court finds that the evidence of PWI implicating the Appellant is of low evidentiary value.""

We are mindful that the statement was recorded after a lapse of two days since the arrest of the Accused. He has not given any reason for this delay. He is a neighbour who should have gone to the scene when he came to know. Therefore, in the absence of any rational explanation for this undue delay, the question that arises is whether this narration of events by PW5 was merely to fill the gaps in the Prosecution's case. In the light of the same relying on the said evidence is imprudent and therefore must be rejected.

We will now assess the statement marked "**P5**" in the Prosecution's evidence. Providing an exception to the general rule under Section 25(1) of the Evidence Ordinance which prohibits confessionary statements from being proved, Section 27 reads

Provided that, when any fact is disposed to as discovered in consequence of information received from a person accused of any offense, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved.;

The statement in question, "පොල් කඩන පිහිය හැංගූ තැන මට පොලිසියට පෙන්වා දෙන්න පුලුවන්..." is a part of the statement, made to PW8 by the Accused in terms of Section 110 of the Criminal Procedure Code as a statement recorded during the course of the investigation.

In Weerapulige Somapala v. Attorney General, SC (Spl.) LA. No. 232/2006, decided on 02.04.2008 her Ladyship Shirani Bandaranayake, J. (as she was then) held:

"The matter was again considered in Krishnapillai v The Queen (1968) 74 N.L.R. 438), where H.N.G. Fernando, CJ, stated that,

"... whenever a statement which is proved under S27 can reasonably lead the jury to infer that a confession may have been made to a police officer, the trial judge should clearly warn the jury that the law prohibits such an inference being reached."

A perusal of that particular statement makes it demonstrably clear that it constitutes a statement of a confessionary nature which is prohibited from being proved by Section 25(1) of the Evidence Ordinance. We hold that the learned High Court Judge misdirected himself in accepting this evidence. Therefore, we reject this particular evidence.

Considering all of the above we are of the view the evidence is unsatisfactory and it is unsafe to affirm the conviction of the Accused. Hence, this appeal is allowed. The conviction and sentence are set aside.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL