

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

In the matter of an appeal in terms of Section
33 (1) of the Criminal Procedure Code read
with Article 138 of the Constitution of the
Democratic Socialist Republic of Sri Lanka.

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

Complainant

CA Appeal No: HCC-39-41/2018

HC of Jaffna Case No: HC2181/17

Vs.

1. Kasinathan Muhunathan
2. Balasubramanium Sivaruban
3. Peduru Ranepura Hewa Gunasena

Accused

AND NOW BETWEEN

1. Kasinathan Muhunathan
2. Balasubramanium Sivaruban
3. Peduru Ranepura Hewa Gunasena

Accused-Appellants

Vs.

Hon. Attorney General,

Attorney General's Department,
Colombo 12.

Complainant- Respondent

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

Counsel: Nayantha Wijesundera for the 3rd Accused-Appellant
Azard Navavi, DSG for the Respondent

Written 17.05.2023 (by the 1st and 2nd Accused-Appellant)

Submissions: 13.12.2021 (by the 3rd Accused-Appellant)

On 13.07.2023 (by the Respondent)

Argued On : 18.05.2023

Decided On : 28.07.2023

Sasi Mahendran, J.

The 1st,2nd and 3rd Accused Appellants (herein after referred to as “the accused”)were indicted before the High Court of Jaffna on the 22nd of March 2018, for the following charges:

Count 1- Offence of Criminal Trespass by trespassing into the land on which the house occupied by Sivanantha Kurukkal Nithyanantha Kurukkal was residing in was situated, punishable under Section 433 of the Penal Code read with Section 32 of the Penal Code.

Count 2- Offence of Robbery using a firearm by committing robbery of the gold jewellery which were in the possession of Sivanantha Kurukkal Nithyanantha Kurukkal punishable under Section 44 (a) of the Firearms Ordinance Act No.22 of 1996 read together with Sections 32 and 383 of the Penal Code.

Count 3- Offence of Murder of Sivanantha Kurukkal Nithyanantha Kurukkal punishable under Section 296 of the Penal Code read together with Section 32 of the Penal Code.

Count 4- Offence of Causing Grievous Hurt to Nithyanantha Kurukkal Sivanantha Sarma punishable under Section 317 of the Penal Code read together with Section 32 of the Penal Code.

Count 5- Offence of Causing Grievous Hurt to Nithyanantha Kurukkal Jehanantha Sarma punishable under Section 317 of the Penal Code read together with Section 32 of the Penal Code.

Prosecution led evidence of seventeen witnesses PW1 to PW17 and closed its case wherein marked productions from P1 to P12. The Accused gave evidence from the evidence box. At the conclusion of the trial, The Learned High Court Judge convicted all three Accused guilty on all five counts, and the death sentence was imposed.

The following grounds were set out in the written submission as grounds for appeal.

1. Evidence of eye witness who witnessed the killing of the deceased are untrustworthy
2. Failure of the trial judge to consider doubts regarding number of bullets which have been fired.
3. Failure to consider the unseen hand (possibly a police touch) behind the investigation and even the trial in the High Court
4. How during the trial common intention of the 1st and 2nd accused has been proved beyond reasonable doubt
5. The Learned High Court Judge has been misguided by the narrated story made up by the hidden hand (Army and Police touch)

The facts and circumstances giving rise to this appeal are that:

The younger son of the deceased, Nithyantha Kurukkal Jehanantha Sarma (known as PW1 in court proceedings), who was an eyewitness and also sustained injuries on the unfortunate day of December 11, 2010, provides significant evidence. He narrates that he was accosted by three individuals who menacingly warned him against shouting,

threatening to shoot him if he did. Despite this, he yelled, "Appa, Appa," attracting his father's attention. Upon his father's arrival, the men immediately shot him. Subsequently, they targeted PW1, causing him to sustain two to three chest injuries. In his desperate attempt to escape the line of fire, he fled, vaulting over the parapet wall to his elder brother's (identified as PW4 in the case) residence for sanctuary. Once safe, he contacted his friends and instructed them to alert the police.

Subsequently, PW1 climbed the water tank, and due to the adequate light provided by a nearby lamppost, he observed the 2nd and 3rd Accused fleeing the scene on a motorcycle. At that moment, only the 2nd and 3rd Accused were recognizable as they had removed the cloth covering their eyes. It is interesting to note that he alleged that he identified the 3rd Accused as the shooter who targeted both him and his father, and the 2nd Accused who stood there even though both the Accused were wearing the cloth.

In the cross-examination conducted on the same day, he stated that he couldn't describe the appearance of the 2nd and 3rd Accused as they were clad in raincoats (black jackets). However, he provided descriptions of their physical appearance during the identification parade. Furthermore, when giving evidence, he reaffirmed this identification.

We note that during cross-examination, PW1 mentioned he was hiding in the bathroom of PW4's house, located at the rear, and from there, he saw the Accused (1st and 2nd) remove their masks before departing on the motorcycle. Given the adequate lighting, he was able to identify the features of the 2nd and 3rd Accused, even if he couldn't see their faces clearly.

The Counsel for the Accused brought to notice that this item of evidence was not stated by this witness when he made a statement to the Police. At the Trial, this was brought to notice as an Omission. But the Learned High Court Judge had not considered this omission. One of the allegations made by the Counsel was that only after the Police recovered the cloth which was found at the crime scene this piece of evidence was introduced to the witness.

When we consider the above said evidence of PW1, we are of the view that there has been an omission brought up which has not been taken into consideration by the Learned Trial Judge. The lack of consistency, in this witness statement is questionable.

Upon scrutinizing PW1's cross-examination and identifying inconsistencies and discrepancies with his original witness statement, it is clear that his evidence is not consistent. For instance, he claims to have witnessed the incident from the bathroom of PW4's house during his cross-examination, yet in his original statement, he states he observed the scene from atop the water tank. Analyzing his testimony in conjunction with PW4's, it's clear that the incident occurring in front of PW4's house couldn't be seen from the house's rear. This casts doubt on the credibility of PW1's statement in regards to identifying the Accused.

This testimony contradicts his initial version, in which he stated that the assailants covered their faces while shooting, and only removed their coverings when escaping. Furthermore, it's unclear how he identified the 3rd Accused as the one who shot at him and his father if it is to be believed that their faces were covered at the time of the shooting.

According to the second son of the deceased, Nithyantha Kurukkal Sivanantha Sarma (known as PW4), who also sustained injuries, he heard a distressing noise from his father's house and therefore he rushed to his father's aid. He was shot in the leg and hand near Thulsai Maadam, shortly after which his jewellery was stolen by the Accused. He was subsequently taken to the hospital. He could identify his assailant as they hadn't covered their face. He stated that he did not participate in the identification parade, yet PW6, the Magistrate, recorded that he had participated but didn't identify anyone.

When we juxtapose the testimonies of PW1 and PW4, we find discrepancies. One witness claims he identified the suspects, who were not wearing masks, but failed to do so during the identification parade. Meanwhile, PW1, who did identify the suspects during the parade, had stated that their faces were masked during the shooting. The court thus concludes that the witnesses contradict each other on this crucial point.

Our central concern is whether PW1 accurately identified the 2nd and 3rd Accused. We understand the utmost importance of precise identification in a criminal trial, given the potential severity of the penalties, which can significantly limit an individual's freedom.

In the recent judgment of Dassanayake Lekamlage Somapala alias Gangabada Sudu and others v. Attorney General, CA 208-210/2011 decided on 02.09.2014, his Lordship Anil Goonaratne 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.”

It is pertinent to note that in the witness statements given PW1 and PW2, they had identified the Accused involved, however this raises doubt as to whether they had actually identified the said Accused. PW1 states that he identified the 2nd and 3rd Accused however did not see their faces because they were wearing black coats, but on the other hand, he had identified that the 3rd Accused had fired the gun and that the 2nd Accused was present alongside the gunman. He further contradicted himself stating that he had originally identified them from the top of the water tank. Later he states that he had identified them from the bathroom. Further, he stated that he had identified them while they were leaving on the motorcycle.

Our courts have considered how to accept the visual identification in criminal cases.

In the case of **Pallawa Lekamlage Gayan Sanjeewa alias Asanka wellawela and 2 Others v. Attorney General**, CA 246/2009, decided On 01.09.2015, Vijith K. Malalgoda PC.J (P/CA) held that;

“In the land mark case on identification Regina V. Turnbull and another 1977 (1) QB 224 at 228 the question of visual identification in Criminal cases was discussed as follows; Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in anyway, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused”

Also in the case of **Opatha Widanapathiranege Wasantha and 3 Others v. Attorney General**, CA 179/2006, decided on 29.04.2010, (2010. V. II Unreported), W.L. Ranjith Silva, J, held that

“The Learned Trial Judge ought to have followed the standard guidelines with regard to his directions to the jury. On the issue of identification evidence the judges must give accurate directions regarding the identification evidence and direct the jury that they

must be satisfied beyond reasonable doubt that the accused were correctly identified and give the benefit of any doubt to the accused. The Jury must be directed as to the possibility of a mistaken identify even by honest witnesses and if they cannot make up their minds as to whether the witnesses were lying or mistaken the accused must be given the benefit of the doubt and should be acquitted. The trial judge must direct the jury to examine closely the circumstances under which the identification came to be made and the means of identification. The trial judge should direct the jury on the rules laid down in Rex v. Turnbull. “

I am of the view that PW1’s evidence with regard to the identification has created doubt as he wasn’t consistent with his evidence.

In the witness testimony of PW2, Nithyantha Kurukkal Nithiyasivathandawa Sarma (the eldest son of the Deceased), he stated that he heard gunshot sounds and wailing noises. Upon reaching his father’s house, he found him fallen at the gate. As he tried to lift his father, he was held at gunpoint, threatened not to attend to his injured father, and was robbed of his jewellery. Although he claimed to have identified the Accused due to their unmasked faces and assault, he was not present at the Identification parade.

In his cross-examination, he stated that he did not witness his father's fall nor the Accused's threats. Although he claimed to have seen the Accused, he was unable to identify any of them during the trial.

According to PW7, Chief Inspector of Police Sumithakumara Liyanagama, a person call Ramanan informed him of the shooting at 20:55. He along with other police officers arrived at the crime scene around 21:30. Meanwhile, PW1 and PW2's evidence was recorded at the police station at 22:10.

He stated that he seized a bike bearing no. 55573390 found at the scene of the crime under custody. From the information he had received on 12.12.2010, at 16:00 he had arrested the 1st Accused, and later at 17:15 he had arrested the 2nd Accused. According to him, the 3rd Accused was handed over to his custody on 13.12.2010 by Major Gunaratne. Based on the statement of the 2nd Accused the jewellery was recovered.

In his cross examination he had stated that there was a crowd at the crime scene,

he also stated that he found the black cloth at the scene. According to him the 1st Accused was arrested near the Temple however there was a suggestion made by defence that both the 1st and 2nd Accused were handed over by the Army. And further, they suggested that no jewellery was found within the possession of the 1st Accused. The 3rd Accused was handed over to him on 13.12.2010.

He further stated in his cross examination that it was he who had arrested the three Accused and denies that it was the Army that had handed the 1st and 2nd Accused to his custody.

Based on the directions given by the 2nd Accused, PR 71/2010 was taken from the shrine room behind the picture of the deity where it was concealed and additionally had also seized the 2nd Accused bike from the scene of the crime. It should be noted that nothing was proved regarding the ownership of the bike. He also stated that the custody of the 3rd Accused was handed over to him on 13.12.2010 and he was entrusted the rifle from PW12.

PW5, the Judicial Medical Officer Dr. Sinnaiah Sivaruban, identified two injuries on the Deceased: one being a circular injury on the right side of the neck, caused by a bullet entering and exiting from the middle back part of the neck, and the second being two cut injuries inflicted by a sharp object such as a knife and stated that the bullet wound could have been inflicted from a short distance. The cause of death was recorded as a gunshot injury damaging the vertebral column of the neck area, the spinal cord, and affecting the brain stem.

PW17, former Major Bangala Prabha Ramanayake, testified that upon receiving information about an army officer's involvement in a Hindu priest's shooting, he searched the Alaveddy Army camp's Guardrooms. Upon suspicion, he took the 3rd Accused into custody and held him at the Army Headquarters on the same night. After examining the gun, he entrusted the rifle to PW12 to hand it over to the Manipay Police station.

In his cross-examination, he confirmed that he arrested the 3rd Accused within 2 to 3 hours, after receiving the information and seized his rifle. He said that he personally handed the 3rd Accused to the Police from the Army camp.

In the evidence of PW3 Ajantha Wimalasuriya testified that he saw the 3rd and 1st Accused conversing for 10 minutes on the day in question and 3rd Accused had gone along with the 1st Accused on his motorcycle to a boutique nearby. This was however denied in his cross examination. Thereafter when the 3rd Accused returned, he was walking up and down the camp and stalled a motorcycle traveling on the road to get a bottle of Arrack which he consumed sharing it with PW3 and one Senanayake. Afterward, he said he was going to get some rest and took his rifle along with him and after a while, he brought his mattress and went to sleep. After the investigation conducted by PW17 on the same night in question, PW3 states that it was the CO-Investigation unit that examined their rifles. In his cross examination he stated that he did not see 3rd Accused give the gun to anyone.

It must be noted that his statement was recorded one year after the incident. No reason was given for this delay. We are mindful of the Accused's allegation in their grounds of appeal that there is foul play by the Army. This allegation will be considered later.

The Accused's version.

The 1st Accused testified, stating that he and the 2nd Accused were arrested by the Army on December 11, 2010, for the alleged shooting of the Deceased. He claims they were assaulted while held at the Uduvil camp before being transferred to the Manipay police station. PW7 stated that he arrested the 1st Accused, contradicting the 1st Accused's claim of being first arrested by the army. The 1st Accused maintained that he was held at the Manipay police station for a month and that no jewellery was seized from him.

In cross-examination, the 1st Accused stated that he only met the 3rd Accused face-to-face three or four times while at the Alaveddy camp. Their interactions were limited to procuring cigarettes and kit cards. Notably, the 3rd Accused spoke only a little Tamil.

The 2nd Accused also testified, echoing the 1st Accused's account of being arrested by the army and transferred to the Manipay police station. They were reportedly apprehended after work while on their way to pick up the 2nd Accused's child. He denied that no jewellery was recovered from them.

The 3rd Accused testified under oath, stating that he was on guard duty on the day of the incident. He was taken into custody by PW17 and kept at the Chunakam Headquarters. According to him, he was transferred to the Manipay Police the next day,

where he was held for 20 days and subjected to torture. He affirmed that no jewellery was seized from him.

He further testified that he lent the rifle to the 1st and 2nd Accused for hunting pork and that it was returned after 1 ½ hours. He revealed that during this time, Sergeant Kamal informed him about the shooting incident, but the 1st and 2nd Accused had not returned the rifle by then.

During cross-examination, he admitted to lending the gun to the 1st and 2nd Accused. It's crucial to note that when the rifle was returned, it was short three magazines and three or four bullets. This rifle was seized by PW17. Furthermore, he acknowledged that no one else witnessed him handing over the rifle — only the 1st and 2nd Accused were aware of it.

Upon scrutinizing the 3rd Accused's statement, we must determine whether it suggests that the Accused is testifying in a self-exculpatory manner while implicating the co-accused. From his judgment, it is evident that the Trial Judge failed to emphasize the testimony given by the 3rd Accused.

We are mindful of the dictum of Chandrachud, CJ in the case of **Dudh Nath Pandey v. State of Uttar Pradesh AIR 1981 page 911**, held that: “We do not want to attribute motives to them merely because they were examined by the defence. Defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses.”

In the case of **C.A. Sisira Bandula alias Mahathun v. Attorney General. CA 122/2006, decided on 09.10.2014, Gooneratne, J** held that:

“It is very unfortunate that this court has to observe that the trial Judge has not considered and given his mind to the defence case properly. If there were contradictions, it is the duty of the trial Judge to deal with them in the same manner he dealt with the prosecution case and decide as to whether such infirmities go to the root of the defence case. The prime duty of the trial Judge is to weigh the evidence correctly and decide whether the defence case is capable of creating a reasonable doubt in the prosecution case. Instead he has allowed himself to be influenced by importing his personal knowledge. However good or bad the witness or whether he has a bad track record should be forgotten

and not the deciding factor. Trial Judge should only concentrate on the evidence before court.”

The point to be considered here is that the Learned Trial Judge had not put any emphasis on the evidence postulated by the 3rd Accused from the evidence box. Especially when PW3 provided evidence he admitted the fact that the 1st and 2nd Accused came to see the 3rd Accused. Where the 3rd Accused indicated in his evidence, he had given the gun to the 1st Accused. This evidence was not considered by the Learned High Court Judge. Therefore, there has been a misdirection of the law for not evaluating information that is indispensable for the instant trial.

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 the case of **CA 204/2010 Sudu Hakuruge Jamis and 1 Other v. The Attorney General, decided on 13.11.2013**, his Lordship **Sisira De Abrew, J** held that; “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.”

This was further analysed in the case of **H.K.K.Habakkala v. Attorney General CA Appeal 107/2005**, his Lordship **Sisira De Abrew, J** held that; “The case against the appellant entirely depended on circumstantial evidence. Therefore it is necessary to consider the principles governing cases of circumstantial evidence.” In his judgement referred the following case of *Don Sunny v. AG 1998 2 SLR Page Gunasekara J held that*

1. when a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence. On a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only.

2. If on a consideration of the items of circumstantial evidence if an inference can be drawn which is consistent with the innocence of the accused, then one cannot say that the charges have been proved beyond reasonable doubt.
3. If upon a consideration of the proved items of circumstantial evidence if the only inference that can be drawn is that the accused committed the offence then they can be found guilty.

The prosecution must prove that no one else other than the accused had the opportunity of committing the offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their guilt and inconsistent with their innocence.”

We are of the view that the Learned High Court Judge did not adequately analyze the case's evidence and uncritically accepted PW1's testimony, including the late addition of the part about the cloth found at the scene. It is crucial to note that we have already expressed doubts about the credibility of PW1. The Trial Judge overlooked this issue, resulting in serious questions about whether the 2nd and 3rd Accused were actually identified at the crime scene.

The sole evidence against the 1st Accused was that upon his arrest, some pieces of jewellery, later identified by witnesses, were allegedly found in his possession. The key question for us is whether this evidence alone is sufficient for a murder conviction. According to the evidence presented to us, he was arrested around 16:00 the following day. However, he denied in his testimony that anything was seized from him and maintained that his arrest was carried out by the Army. The question that emerges before us concerns the reason for the Army officers' three-day delay in handing over the 3rd accused to the police, given their knowledge of the accused's involvement in a shooting. This situation raises doubts about potential involvement of the Army officers in this investigation.

I am mindful of the dictum expressed in **Jose v Joy 2008 3 KLT 512 on page 515**, held that: “The probability of the prosecution case does not depend upon the improbability or falsity of the defence case. Irrespective of the falsity of improbability of the defence case, the prosecution has to prove its case beyond reasonable doubt. What the court has to consider is whether the prosecution has proved all the ingredients of the offence or not and not whether the accused has failed to establish his case to come to conclusion whether

prosecution has established its case.” This was followed in **Jaysenage Janaka v A.G C. A 192/2017 decided on 27.02.19, by A.L Shiran Gonnaratne J**

In our view, the case against the 1st, 2nd, and 3rd Accused has not been established beyond reasonable doubt. For the reasons stated above we set aside the conviction and the death sentences of the 1st, 2nd, and 3rd Accused-Appellants and acquit them of the charge levelled against them. The appeal of the 1st, 2nd, and 3rd appellants is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE.

JUDGE OF THE COURT OF APPEAL