

**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.

**Court of Appeal Case No:**

**CA-HCC-13/21**

*HC of Hambanthota Case No:*

*HC 249/2007*

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

**Complainant**

**Vs.**

Ajith Priyantha Weerathunga,  
No. 406/A, Jayasiri Road,  
Rabar Watta,  
Tissamaharama.

**Accused**

**AND NOW BETWEEN**

Ajith Priyantha Weerathunga,  
No. 406/A, Jayasiri Road,  
Rabar Watta,  
Tissamaharama.

**Accused-Appellant**

**Vs.**

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

**Complainant-Respondent**

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

**Counsel:** Darshana Kuruppu with Buddhika Thilakaratne and Sahan Sanketha  
Weerasinghe for the Accused-Appellant  
Azard Navavi, SDSG for the State

**Written** 21.03.2022 (by the Accused-Appellant)

**Submissions:** 26.06.2023 (by the Respondent)

**On**

**Argued On:** 26.06.2023

**Decided On:** 31.08.2023

**Sasi Mahendran, J.**

The Accused-Appellant (hereinafter referred to as 'the Accused') was indicted before the High Court of Hambantota for having committed the offence of murder of one Katapodi Kankanamge Bandula Senarathna(the Deceased) on the 7<sup>th</sup> of April 2005 an offence made punishable under Section 296 of the Penal Code.

Prosecution led the evidence of ten witnesses and production marked as P1 to P6. The Accused gave evidence under oath and called one defense witness, Rathnayaka Weerakoonge Padmakumara. At the conclusion of the trial, the Learned High Court Judge by his judgement dated 1<sup>st</sup> of August 2021 found the Accused guilty of murder, convicting him and imposing the death sentence.

Being aggrieved by the said conviction the Accused has appealed to this court.

**The Following are the Grounds of Appeal set out in the written submission:**

1. The learned High Court Judge has failed to consider that the identification of the Accused-Appellant has not been established beyond reasonable doubt.
2. The learned High Court Judge has not properly considered the evidence led at the trial but has written the judgment based on the written submissions filed by the defence.
3. The learned High Court Judge has erred in law by rejecting the defence of Alibi and by shifting the burden to the defence to prove the defence of Alibi.
4. The learned High Court Judge has failed to consider the inherent weaknesses of the prosecution case.

The Facts and Circumstances are that:

According to PW1, Katapodi Kankanamge Gamini (the brother of the Deceased who resides in the house adjacent to that of the Deceased), he had spoken to the Deceased prior to the tragic incident at approximately 10:15 p.m. During this conversation, the Deceased informed him that he would be departing for Colombo at 10:30 p.m. Subsequently, upon returning to his home, PW1 heard a gunshot emanating from the direction of the Deceased's residence. He immediately rushed to the scene and found his brother lying on the kitchen floor, with his sister-in-law (PW2) tending to him.

PW1 noted that although there was sufficient light at the rear end of the house from an external source, the kitchen—specifically the area where the Deceased was found—was unlit. He observed two bleeding wounds on the Deceased's chest. The Deceased was subsequently transported to the hospital, where he was pronounced dead. According to PW1,

the Deceased's wife (PW2) informed him that the Deceased had stated "Ajith shot him," and that she had witnessed Ajith fleeing the scene.

On page 98 of the brief;

ප්‍ර : ඇය තමුන්ට මොනවා හරි ප්‍රකාශ කලාද?

උ : මෙයා වගේ කෙනෙක් හඳුනා ගන්නා කියලා කිව්වා.

ප්‍ර : නමක් කිව්වාද?

උ : පීටිපස්ස හැරිලා යනකොට අපේ කියන කෙනෙක් වෙඩි තිබ්බා කියල පීටිපස්ස පැත්ත හැරිලා යනකොට හඳුනාගන්නා කියලා කිව්වා.

According to PW1, two days before the incident, the Deceased had informed him of an unresolved dispute between the Deceased and the Accused that escalated into a physical altercation. During his cross-examination, PW1 revealed that the Deceased's residence is located 50 meters from his own home. He elaborated that the conflict between Ajith and his brother remained unresolved and had been ongoing. He also indicated that the distance between the toilet and the kitchen in the Deceased's house was approximately 15 feet, and that the property was surrounded by trees. PW1 reiterated that PW2 had informed him that the Deceased had identified his assailant as 'Kalu Ajith.'

Additionally, PW1 stated that he was made aware that Ajith had been seen near Chinthaka's house, located 1 1/4 km away from the Deceased's residence, in the vicinity of a three-wheeler. We note that when this evidence was presented in court, it was unchallenged by the Accused, although the Accused later introduced an alibi during his dock statement.

PW2, Gajaman Kankanamge Latha (the Deceased's wife), testified that her husband arrived home at 9:00 p.m. and was preparing to depart for Colombo. After dining, he proceeded to the toilet to wash his hands, which she stated was approximately 10 to 12 feet from the kitchen. Subsequent to hearing a gunshot accompanied by smoke, her husband rushed back into the house proclaiming that he had been shot by Ajith. He was visibly bleeding and collapsed onto the kitchen floor. Before collapsing, he told PW2 that it was Ajith who had shot him.

On page 69 of the brief;

ප්‍ර : ඊට පස්සේ මොකද උනේ?

උ : අපිත් මට වෙඩි තිබ්බා කියලා මගේ ඉස්සරහට දුවගෙන ආවා.

ප්‍ර : ඒ වෙලාවේ ස්වාමිපුරුෂයාගේ ඇගේ ලේ තිබුනාද?

උ : ඔව්. අපිත් මට වෙඩි තිබ්බා කියලා කිව්වා.

Subsequently, PW2 went outside and observed Ajith fleeing from the vicinity of the toilet, holding an object resembling a gun. She was able to identify him due to sufficient lighting in the area. According to PW2, she was familiar with Ajith, as he was a neighbor living in the same locality, and they had maintained a good relationship.

On pages 70 – 71 of the brief;

ප්‍ර : කවිද දුවනවා දැක්කේ?

උ : අපිත් තමයි දැක්කේ.

ප්‍ර : කොතනින්ද අපිත් ගියේ?

උ : ලැටි එක පිටිපස්සෙන් පහලට දිව්වා.

ප්‍ර : අපිත් කියලා තමුන් අදුරගත්තේ කොහොමද?

උ : ලයිට් දෙපැත්තේම දාලා තිබුනා.

ප්‍ර : තමුන්ට තමුන්ගේ ස්වාමිපුරුෂයා කිව්වා අපිත් වෙඩි තිබ්බා කියලා. තමුන් අපිත් කියලා දැක්කා. තමුන් අපිත් ඊට කලින් දන්නවාද?

උ : ඔව්.

ප්‍ර : අපිත් කොහෙද ඉන්නේ?

උ : අපේ ගෙවල් වලට ටිකක් එහායින් ඉන්න කෙනෙක්.

However, prior to these events, the Accused had not visited their house recently. PW2 was aware that a dispute had occurred between the Accused and the Deceased on April 2, 2005. Subsequent to the incident, the Deceased was transported to the hospital by PW1 and was there pronounced dead.

In her cross-examination, PW2 disclosed that her husband had been taken into remand as a suspect in a murder case. The Defense sought to establish that multiple individuals named Ajith resided in the area. They also questioned the feasibility of accurately identifying anyone at a distance of 26 1/2 feet, particularly given the time of day. However,

PW2 maintained that she had successfully identified the Accused fleeing the scene, as he had been a frequent visitor to their house prior to these events. When the Defense suggested that trees near the toilet could have obstructed her view, she refuted the claim.

PW4, Katapodi Kankanamge Suseema Priyangika (Sister of the Deceased), testified that a few days before the incident, the Deceased had informed her during a visit to her house that he had an unresolved dispute with the Accused, who had threatened to kill him. She added that the Accused's residence was situated six to seven houses away from theirs.

In her cross-examination, PW4 revealed that she had reported the Accused's threat to kill her brother to the police. She noted that upon hearing the gunshot, she immediately went to her brother's house, located 170 feet from her own. She admitted to having no recollection of the events that transpired subsequently, as she was emotionally disturbed and therefore not in a state to notice details. She confirmed that both her brother and sister-in-law were unconscious at that time.

They primarily corroborate the fact that a dispute existed between the Accused and the Deceased prior to this incident. It is also clear that this animosity had not been resolved between the two parties. To further strengthen this allegation, the Deceased had informed PW4 that the Accused had threatened to kill him. Additionally, when considering the testimony of PW2, it is important to note that she has been consistent and truthful regarding the identification of the Accused, as the defense was unable to cast any doubt.

Moreover, the defense has not challenged the dying declaration made by the Deceased. While it is true that a dying declaration is not a statement made under oath, it can be deemed acceptable if the defense fails to show any infirmities or weaknesses that would cast doubt upon it. In the present case, PW2's version corroborates the dying declaration, as she saw the Accused fleeing the scene. According to the Prosecution, the Deceased had made a dying declaration to PW2, implicating the Accused, named Ajith, as the shooter. PW2, the sole eyewitness present with the Deceased at the time of the incident, clearly identified the Accused, stating that the location of the incident was well-lit, providing ample light for her to identify him. She further stated that, as she knew the Accused to be a neighbor who had frequently visited their house prior to these events, she had no difficulty in identifying him.

During her cross-examination, she remained consistent and affirmative with regard to the identity of the Accused.

I am of the view that the testimony of this witness is sufficient to establish the identity of the Accused beyond a reasonable doubt.

Turning our attention to the statements of other official witnesses:

PW6, Dr. Dissanayaka Mudiyansele Dharmasiri, the Judicial Medical Officer, observed five entry wounds and two exit wounds in his evidence. He detailed the nature and degree of these inflicted wounds on pages 86 to 87 of the brief. He clarified that these internal injuries were fatal and acted as a catalyst to cause death. These wounds were identified as gunshot wounds, and remnants of broken bullets were scattered inside the Deceased's body. According to him, the Deceased was shot from a close range of approximately 3 meters, as evidenced by observed burn wounds. He further stated that the victim could walk and talk for up to five minutes after sustaining such injuries. His expert opinion attributed the cause of death to excessive loss of blood and hemorrhagic shock.

From this evidence, we can establish the following facts:

1. The doctor observed that the gunshot came from a close range, making it clear that the Deceased would have seen the Accused.
2. According to PW6, the victim was capable of walking and talking after sustaining such fatal injuries. This evidence corroborates with that of PW2.

PW8, IP Prabath Deshabandu, stated that he received information about the murder at 23:30 pm on April 7, 2005, and arrived at the crime scene at 23:55 pm. The Deceased's wife guided PW8 to the crime scene, where he observed blood stains extending from the living room to the kitchen.

The toilet was situated 20 ft away from the rear end of the house, and the surrounding area was well-lit by a light bulb, sufficient for identifying anyone present. Four Busi cubes were recovered from the floor of the dining room.

On page 120 of the brief;

ප්‍ර : කුස්සියේ ඉඳලා බලනකොට එම වැසිකිලිය ආසන්නව ඡේනවද?

උ : එහෙමයි . ඒ සම්බන්ධයෙන් සටහන් ඇතුල් කළා. වැසිකිලියේ සිට වම්පස දෙසට ගස් කොළන් අඩු විවෘත ප්‍රදේශයකි. නිවසේ පිටුපස විදුලි ආලෝකය එම ප්‍රදේශයේ පතිත වී ඇත යනුවෙන් නිරීක්ෂණ සටහන් ඇතුළත් කර තිබෙනවා.

Taking into account the evidence presented by the prosecution regarding the adequate lighting in the area, there is sufficient corroboration. Upon analyzing the testimonies of the aforementioned witnesses, it is evident that their evidence is credible. The substance of their information is adequate to qualify as admissible evidence. Therefore, we hold that the testimonies of these witnesses are consistent and trustworthy.

According to the Accused, who testified under oath, he was at Chinthaka's party at the time of the incident. This claim was corroborated by DW1 Ratnayaka, who testified on behalf of the Accused. However, the Accused failed to present any suggestion to the witnesses regarding his defense of alibi. It is important to note that the Accused also failed to specify who had assaulted him. In his evidence in chief, he did not identify his assailant; however, during cross-examination, he stated that the Deceased and his relatives had assaulted him. The Accused did successfully establish that animosity existed between him and the Deceased prior to the incident.

The court found no infirmities in the evidence of the prosecution witnesses. However, based on the observations made regarding the defense of alibi raised by the Accused, the court has rejected this defense on the grounds that it appears to be a mere afterthought. The failure to suggest this to the prosecution witness was dealt, in the case of **Gunasiri, Jayarathna Silva, Gnanasiri v. Republic of Sri Lanka 2009 (1) SLR 39 at page 46, Sisira de Abrew, J** held that;

*“Although the 3rd accused appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused appellant. What is the effect of such silence on the part of the counsel. In this connection I*



*would like to consider certain judicial decisions. In the case of Sarwan Singh vs. State of Punjab at 3656 Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in Bobby Mathew vs. State of Kamataka."*

On the perusal of evidence led before the Learned Trial Judge, the Learned Trial Judge has correctly analysed and evaluated the evidence and arrived that the Accused had committed the offence. Furthermore, we observe that the Learned Trial Judge had correctly rejected the evidence of the Accused.

For the aforementioned reasons, I find that there is no merit in this appeal. Accordingly, I uphold the judgment, conviction, and sentence of the Learned Trial Judge. Therefore, this appeal is dismissed as devoid of merit.

**JUDGE OF THE COURT OF APPEAL**

**Menaka Wijesundera, J.**

**I AGREE.**

**JUDGE OF THE COURT OF APPEAL**