

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

L. Nimal alias
Chootiya,

Accused-Appellant.

Vs.

The Attorney General.

Respondent.

CA 233/2007

HC COLOMBO CASE NO. 08/2000.

Before: Sisira J De Abrew, J. &
 P.W.D.C. Jayathilake, J.

Counsel: Amila Palliyage for the Accused-Appellant.
 Rohantha Abeysooriya DSG for the State.

Argued &

Decided on: 19.11.2013.

Sisira J De Abrew, J.

Heard both Counsel in support of their respective cases. The accused-appellant in this case was convicted of the murder of a man named Gamcharige Dharmadasa alias Nandapala and was sentenced

to death. Being aggrieved by the said conviction and the sentence he has appealed to this court. The facts of this case may be briefly summarized as follows:-

The accused-appellant in this case was known to the deceased person. The deceased person used to call the accused -appellant as 'Chootiya'. On the day of the incident around 3.30 p.m the deceased person left for Jayasiri's boutique to buy certain things. Little later the wife of the deceased person ran near Jayasiri's boutique on hearing that her husband was lying fallen on the road. On seeing that her husband was lying fallen near Jayasiri's boutique she (wife of the deceased-Indrani) questioned him as to who committed this crime. Her husband (the deceased person) replied in the following language. "Chootiya is the person who cut. He attacked three times on the neck". Thereafter she took her husband to the hospital. He died five days after the incident.

The Investigating Officer, in consequence of the statement made by the accused- appellant, recovered a manna knife which could not be seen under a bush in a marshy land. Police Officer says that the accused-appellant pointed out the knife which could not be seen.

Doctor says that the deceased person, after receiving injuries, was able to speak. The accused-appellant too gave evidence.

According to him it was Kammalwatte Chootiya who had attacked the deceased person. He had received this information while he was playing in the playground. It is significant to note that learned defence counsel who appeared for the accused –appellant did not suggest to the wife of the deceased person that it was Kammalwatte Chootiya who attacked the deceased person. There was no suggestion whatsoever on behalf of the accused that it was Kammalwatte Chootiya who attacked the deceased person. If this was his defence, it would have been quite natural for the accused appellant to make this suggestion to the prosecution witnesses. I therefore hold that the accused –appellant has not challenged the evidence of Indrani (wife of the deceased person) on a very vital point. Wife of the deceased person made a prompt statement to the police. The learned defence counsel failed to mark vital contradictions with her statement to the police. I therefore hold that the evidence of the wife of the deceased person satisfies the test of promptness and the test of consistency. The fact that deceased person was able to speak after he sustained injuries must be considered in favour of the witness Indrani (wife of the deceased person) when considering her credibility. When I consider all these matters, I hold that Indrani is a reliable witness. As I pointed out earlier the accused –appellant has not challenged the evidence of Indrani on a very vital point. What happens when evidence given by a reliable witness is not challenged in cross-examination. What is the effect of such silence on the part of the defence counsel. In this

regard I would like to consider certain judicial decisions. In the case of *Sarwan Singh Vs State of Punjab* 2002 AIR Supreme Court (III) 3652 at 3655 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 the case of *Boby Mathew Vs. State of Karanataka* 2004 (3) Criminal Law Journal page 3003. In the case of *State of Himachal Pradesh Vs. Thakur Dass* (1983) 2 Criminal Law Journal 1694 at 1701 V.D. Visva C.J. held:

“Whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed”

In the light of the above judicial decision, I hold that whenever evidence given by a witness on a material point is not challenged in cross-examination it has to be concluded that such evidence is not disputed and accepted by the opponent subject of course to the qualification that the witness is a reliable witness. The accused – appellant, as I pointed out earlier, failed to suggest his defence to the wife of the deceased person Indrani who gave evidence. This suggests that the defence taken up by the accused-appellant is a false defence. His evidence therefore has to be rejected. Learned

trial judge has rightly rejected the evidence of the accused appellant. In our view the evidence of the accused- appellant is not even capable of creating a reasonable doubt in the prosecution case. Learned Counsel for the accused-appellant contended that Premasiri did not hear the deceased person's dying declaration which was made to his wife. He therefore, contended that the dying declaration made to the wife of the deceased person cannot be accepted. It has to be noted here that wife of the deceased person does not, in her evidence, say that Premasiri was present at the time the dying declaration was made. Therefore the above argument has to be rejected and is hereby rejected. We have gone through the evidence led at the trial. We are of the opinion that the prosecution has proved its case beyond reasonable doubt. We hold that there is no merit in this appeal. For the above reasons, we affirm the conviction and the death sentence imposed on the accused-appellant and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL.

P.W.D.C. Jayathilake, J.

I agree.

JUDGE OF THE COURT OF APPEAL.

Mm/-.