

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

**In the matter of an Appeal in terms of
Section 331 (1) of the Code of Criminal
Procedure Act No 15 of 1979.**

Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT

CA/67/2007

H/C Galle case No. 2177

Nagoda Gamage Ratnasiri

ACCUSED

And,

Nagoda Gamage Ratnasiri

ACCUSED-APPELLANT

Vs,

Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

**Before: Vijith K. Malalgoda PC J (P/CA) &
H.C.J. Madawala**

Counsel: Indika Mallawarachchi for the Accused-Appellant

Wasantha Nawaratne Bandara PC, ASG with Himali Jayanetti SC for the AG

Argued on: 20.03.2015, 09.06.2015

Written Submission on: 14.08.2015, 18.01.2016

Judgment on: 29.04.2016

Order

Vijith K. Malalgoda PC J

The accused-appellant Nagoda Gamage Ratnasiri was indicted before the High Court of Galle for having committed the murder of Ediriweera Dayarathana on or about 11.04.1995 an offence punishable under section 296 of the Penal Code.

The accused-appellant elected to be tried before the High Court Judge without a jury and the trial was commenced in the said High Court of Galle on 03.08.2004. After trial the Learned High Court Judge of Galle had convicted the accused-appellant of the indictment and sentenced him to death. Being dissatisfied with the said conviction and sentence the accused-appellant had preferred this appeal before this court.

The prosecution in the case in hand had mainly relied on the evidence of two witnesses who had testified at the N.S. inquiry, who were deceased at the trial, when it was taken up for trial in the year 2004, 09 years after the commission of the offence. Their evidence was properly adopted before the High Court Trial since the High Court Judge was satisfied that the requirements under section 33 of the Evidence Ordinance were fulfilled.

The Learned Counsel for the accused-appellant did not challenge the said decision of the Learned High Court Judge before this court.

Out of the said witnesses, witness Kandagoda Gamage Nandasena was an eye witness to the incident and the other witness Adawatte Kankanamage Ranjith had witnessed a previous incident which took place little prior to the main incident between him and the accused-appellant.

In addition to the above witnesses few other witnesses including the Judicial Medical Officer Gamini Senevirathne, Inspector Cyril Rodrigo and Anawatte Kanakanamge Nihal – brother –in-law of the deceased was called as prosecution witnesses at the High Court Trial.

Since the two important witnesses referred to above are deceased at the time of the trial, it is important to consider the evidence of the remaining witness who gave evidence at the Trial, and the other independent material placed before the trial court and considers the extent to which the said material corroborates the version of the other witnesses.

According to the evidence of Anawatte Kanakanamge Nihal, on the day of the incident around 11.00 pm when he was at home, witness Nandasena had called him to his house. When he went to Nandasena's house he had seen his brother Ranjith with a bleeding injury on his arm. They took him to a nearby dispensary for medical treatment, thinking that they would take Ranjith to a hospital on the following day. After taking treatment to Ranjith witness Nihal had gone home.

Around 2.30 in the morning, he came out from his house after hearing a noise. At that time he observed two people running towards him. They were identified as the deceased and the accused-appellant. When the deceased had fallen near the lamp post, accused-appellant went away saying “ඔබ දෙනෙක් එළිවෙන්න ඉස්සවෙලා මරණවා”. At that time he had seen a knife with the accused-appellant. Even though this witness had seen the accused-appellant running behind the deceased and deceased falling down, he had not seen the accused-appellant doing anything to the deceased, but he saw the accused-appellant with a knife and heard saying that he will kill two others before dawn.

According to the deposition of witness Nandasena which was produced at the High Court Trial, he was suffering from a demonic possessions and that there was a thovil ceremony conducted at his place day prior to the incident. Some people who could not come to attend the said event had come to his house on the following day, and when he was playing cards with some of them, around 12.00 the accused-appellant who came to his place had given few blows to one Ranjith who had been at Nandasena's house and went away having stabbing him in his arm.

After hearing the said incident several others gathered at his place, including the deceased Dayarathne. Some attended to the injured and taken him for treatment. The second incident took place sometime after, when the accused-appellant came to his place again armed with a knife and stabbed the deceased. The deceased having received the said injury had ran towards the lamp post and held on to the lamp post.

Witness Ranjith whose deposition was also produced at the High Court Trial had said at the N.S. inquiry that he had gone to the house of Nandasena having taken some sugar since he could not attend the thovil ceremony on the previous day. While he was in conversation with Nandasena the accused-appellant who has come to the house of Nandasena had delt three blows on him and thereafter stabbed him on his arm and went away threatening him not to go to the hospital or to the police.

During the argument before this court the Learned Counsel for the accused-appellant relied her case on the following grounds;

- a) Very vital omissions and the material contradiction on critical issues of fact in the evidence of prosecution witness no 3 Nihal renders his evidence unworthy of credence
- b) Learned trial Judge seriously flawed with regard to the assessment of the testimonial trustworthiness of the said witness Nihal
- c) In the event the evidence of witness Nihal is rejected, the conviction which is solely based on the deposition of witness Nandasena is wholly unsafe
- e) The basis of the conviction being that the deposition of witness Nandasena is amply corroborated by the evidence of witness Nihal is legally and factually untenable

During the argument, the Learned Counsel for the accused-appellant brought to the notice of court of 03 items of evidence from the evidence of witness Nihal where, the witness had failed to refer in his statement to police or evidence at the inquest.

The said three items had been identified by the Learned Counsel as follows;

- 1. Not mentioned that he saw the accused-appellant running towards him
- 2. Not mentioned that the accused was armed with a knife
- 3. Not mentioned in the police statement that the appellant made an utterance to the effect that "before dawn he will kill 2 more persons"

As observed by this court, the 1st and the 2nd omissions were marked in the evidence of the 3rd witness from his statement to police and evidence before the inquirer but no omission was marked with regard to his evidence before the Magistrate. The third omission was only with regard to the police statement of the said witness but no such omission was proved with regard to his evidence at the inquest or the Non- Summary Inquiry.

When considering the importance of the above omissions, it is necessary for this court to consider the deposition made by the sole eye witness Nandasena at the N.S. inquiry and to consider whether, witness Nihal had changed his original version in order to corroborate the said evidence or not.

As referred to above, witness Nandasena's evidence before the Non Summary Inquiry was that, after Ranjith received a stab injury, he was taken to a doctor. Deceased Dayarathne who had come to his house after hearing the 1st stabbing was seated on a half wall when the accused-appellant came for the 2nd time to his house and stabbed Dayarathne. After receiving the injury the deceased ran up to a lamp post and hold on to the lamp post.

In this evidence witness Nandasena speaks of, the accused-appellant coming to his house twice with a knife but did not speak of making any statement or running behind the deceased. The fact that the deceased had gone and hold on to the lamp post is corroborated by the evidence of the investigating officer IP Rodrigo.

The fact that the accused-appellant had come to the house of Nandasena on a previous occasion on the same day and stabbed Ranjith was corroborated by the deposition of witness Ranjith made at the Non Summary Inquiry.

Witness Nihal whose evidence was highly challenged before us, was not an eye witness to the stabbing on the deceased Dayarathna and therefore his evidence cannot be considered as evidence which corroborates the evidence of witness Nandasena with regard to stabbing of the deceased.

When considering the omissions referred to above, in the light of the said evidence of witness Nandasena, I see no reason to reject the conclusion of the Learned High Court Judge when he concluded that the omissions referred to above does not go to the root of the prosecution case.

The Learned Counsel for the accused-appellant had further argued that, if the evidence given by Nihal is rejected, the conviction which is solely based on the deposition of witness Nandasena is wholly unsafe.

As I have referred earlier in this judgment, the accused-appellant had never challenged the adoption of the evidence of witnesses Nandasena and Ranjith under section 33 of the Evidence Ordinance.

When acting on the said deposition this court is always mindful of the fact that admissibility of evidence under section 33 of the Evidence Ordinance as an exception to the general rule.

However it is observed by us that the Learned High Court Judge was mindful of this fact, but as argued by the Learned Counsel for the accused-appellant, the Trial Judge had relied heavily on the evidence of witness Nihal as corroborative evidence to the deposition of witness Nandasena.

As observed by me earlier, in this judgment, witness Nihal cannot be considered as an eye witness to the main incident of stabbing. The only person who witnessed the main incident of stabbing was

witness Nandasena who was dead at the time of the High Court Trial. As discussed earlier in this judgment, the deposition of witness Nandasena was not only corroborated by the evidence of witness Nihal but also corroborated by the deposition of Ranjith and independent material such as Medical Evidence and Police Observation.

In this regard the court is mindful of the principles laid down by the Supreme Court in the case of *Mannar Mannan V. The Republic 1990 (1) Sri LR 280*, to the effect;

“Despite the non direction in regard to the appellant’s dock statement a reasonable jury properly directed would inevitably and without doubt have returned the same verdict.”

As observed by me earlier in this judgment, even though the Learned Trial Judge had heavily relied on the evidence of witness Nihal which amounts to a misdirection, the said misdirection alone is insufficient to vitiate the conviction and sentence imposed by the Learned High Court Judge.

During the argument before us the Learned Counsel for the accused-appellant had further challenged the credibility of the deposition made by witness Nandasena and argued that it is unsafe to act upon the evidence of witness Nandasena even if it was corroborated by other material. In the dock statement made by the accused-appellant he had taken up for the first time, that witness Nandasena was a person with unsound mind and therefore he had to undergo a “thovil” to recover himself.

However at the time witness Nandasena made the deposition before the Magistrate, the accused-appellant was represented by counsel and the said witness was subject to cross examination by the said counsel, but this position was not put to the witness during the cross examination. The Learned Trial Judge had correctly considered this aspect and rejected the said argument. When considering the material already discussed, we see no merit in the arguments placed before us by the Learned Counsel for the accused-appellant. Therefore we decide to dismiss this appeal and to affirm the conviction and sentence.

Appeal dismissed. Conviction and sentence affirmed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL