

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

In the matter of an application for appeal under  
and in terms of Section 331 of the Criminal  
Procedure Code Act No. 15 of 1979.

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

**CA 100/2013**

**H.C. Gampaha – HC: 245/2004**

**Complainant**

**Vs.**

1. Katulandage Nihal Amarakoon
2. Katulandage Upul Sisira Kumara
3. Katulandage Kanthi Wijethunga
4. Katulandage Ranjith Arunasiri

**Accused**

**AND NOW BETWEEN**

Katulandage Upul Sisira Kumara

**2<sup>nd</sup> Accused – Appellant**

**Vs.**

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

**Complainant – Respondent**

**BEFORE: S. DEVIKA DE LIVERA TENNEKOON J**

**S. THURAIRAJA, PC, J**

**COUNSEL:**

For the 2<sup>nd</sup> Accused – Appellant –  
Prasanth Lal de Alwis PC with Chamara  
Wannisekara, W.P. Asela Wijesinghe and  
Oshan Ubhayaratna  
Complainant – Respondent – DSG  
Shanaka Wijesinghe

**RE-ARGUED ON**

15.11.2017 & 08.12.2017

**WRITTEN SUBMISSIONS –**

2<sup>nd</sup> Accused – Appellant – 26.02.2017

Complainant–Respondent – 03.05.2017

**DECIDED ON:**

15.03.2018

**S. DEVIKA DE LIVERA TENNEKOON J.**

The 2<sup>nd</sup> Accused-Appellant (hereinafter sometimes referred to as the Appellant) in the instant case was indicted in the High Court of Gampaha on 28.01.2004 along with the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused for allegedly committing 9 offences. The 1<sup>st</sup> and 4<sup>th</sup> Accused were acquitted from all charges and the 3<sup>rd</sup> Accused died during the pendency of the trial. The Appellant was found guilty of the 2<sup>nd</sup> and 3<sup>rd</sup> charges and convicted and sentenced to death. The said charges are as follows;

Count 2:

Committing the murder of W. Kulasiri Wijerathna by the 2<sup>nd</sup> Accused – Appellant with others unknown to the Prosecution on or about 26.11.1994 and offence punishable under Section 296 of the Penal Code read together with Section 32 of the Penal Code.

Count 3:

Committing the murder of Kolambage Irin by the 2<sup>nd</sup> Accused – Appellant with others unknown to the Prosecution on or about 26.11.1994 and offence punishable under Section 296 of the Penal Code read together with Section 32 of the Penal Code.

The prosecution led the evidence of number of witnesses but the only eye witness to the incident was one Nadeesha Hysinth Wijerathna (PW2) who was the daughter of the deceased Kolambage Irin.

The case in brief for the prosecution was that on or about 26.11.1994 both W. Kulasiri Wijerathna, Kolambage Irin and PW2 were at the said Irin's house when, at around 4.00am there had been a knock on the door asking that the door be opened. According to the narrative of the prosecution the Appellant had come into the house and taken Kulasiri Wijerathna and Kolambage Irin out of the house at gun point and thereafter got them to kneel down at which point PW2 had gone back into the house after which she heard gun shots. When she went back she had found both Kulasiri Wijerathna and Kolambage Irin lying dead on the ground.

The Accused in this case were suspected of having committed the aforementioned murders as a result of a statement made by the 3<sup>rd</sup> Accused to PW1, who was the mother of the said Kulasiri Wijerathna. On the date of the incident the 3<sup>rd</sup> Accused who was the wife of Kulasiri Wijerathna had heard the gun shots and remarked 'did you hear gun shots? I wonder if my brothers are here.'

During that period Kulasiri Wijerathna was having an affair with Kolambage Irin. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Accused are brothers of the 3<sup>rd</sup> Accused. The Appellant opted to make a dock statement by which he stated 'I don't know anything, I have never even held a gun before.'

Although the learned President's Counsel for the Appellant had raised a number of grounds of Appeal, I will focus on the reliability of PW2's evidence, in particular the dock identification, which formed the basis for the conviction of the Appellant. PW2 identified the Appellant from the Dock at the non-summary injury as the person who entered and thereafter committed the aforementioned murders.

The learned President's Counsel for the Appellant submits that PW2 was only 7 years old at the time of the incident and that the Dock Identification was made by her at the stage of the non-summary injury which was around 5 years since the date of the incident and that it is unsafe to rely on the same.

As per PW15 (the investigating Police Officer) the identification parade was not held to identify the Appellant as the sole eye witness to the incident, PW2, had identified the 1<sup>st</sup> and 2<sup>nd</sup> Accused by name.

It was revealed in evidence that the 1<sup>st</sup> Accused was stationed at the Maduruoya Army Camp during the time of the incident and as such the 1<sup>st</sup> Accused was acquitted.

PW15 also states that the first statement by PW2 to the Police indicated that she could not identify the assailants if she saw them again. When cross-examined PW2 states that she identified the Appellant as the assailant. When asked whether she stated to the Police soon after the incident that she could not identify the assailants if she saw them again, she says that she can't remember. When asked whether if it is correct to say that she made such a statement to the Police she answers in the negative and says that she can identify the assailant/s (vide page 92 of the appeal brief). This contradiction was marked and proved as 2V1 by the defence.

This is a material contradiction that effects the roots of this case. The learned Trial Judge in evaluating this contradiction had presumed that the reason for PW2 to state to the Police that she could not identify the assailant/s was that she may have been coached by her elders to not reveal the identity of the assailant/s for her own safety. However, this Court is of the view that the presumption arrived at by the learned Trial Judge is not based on any propositions that were elucidated at trial but merely one possible reason, out of many, for this contradiction which is not based on any legal principles.

It was held in the case of **Munirathne and others v. The State** 2001 (2) SLR 382 that;

"Jurists on evidence have expressed the view that it is undesirable and unsafe for the Court to rely upon the identification of an accused in Court for the first time or dock identification, the reason being that a witness may think to himself that the Police must have got hold of the right person and it is, so easy for a witness to point to the accused in a dock."

Further, it was revealed during the cross-examination of PW2, who had never seen the Appellant prior to the incident, identified the Appellant at two instances (vide page 89 and 93 of the appeal brief). She specifically mentions that there was an 'identification parade'. She states that she was asked to identify the Appellant once whilst inside a room and thereafter in open Court. She also testifies that there were others in this room. She categorially states that she identified the Appellant twice.

In the absence of an identification parade as confirmed by the prosecution it is reasonable to question how and why PW2, the sole eye witness to the aforementioned murders, was exposed to the identity of the Appellant before she identified him in open Court.

It is evident that the entire case for the prosecution hinges on a dock identification of the Appellant and when considering the above circumstances in its totality it gives rise to a reasonable doubt on which the conviction and sentence of the Appellant cannot stand.

Therefore, for the reasons morefully discussed above this appeal is allowed and we set aside the conviction and sentence of the learned Trial Judge and acquit the Accused-Appellant.

*Appeal Allowed.*

Judge of the Court of Appeal

**S. THURAIRAJA, PC, J**

I Agree.

Judge of the Court of Appeal