

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

In the matter of an appeal under Section 331 of  
the Criminal Procedure Code of 15 of 1979.

**Court of Appeal**  
**Case No: 184/2013**

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

**Complainant**

-Vs-

Ediriweera Gamage Karunaratne

**Accused**

-And Now Between-

Ediriweera Gamage Karunaratne

**Accused-Appellant**

**High Court of Matara**  
**Case No: 276/07**

-Vs-

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

**Complainant-Respondent**

**Before : S. Thurairaja PC, J**

**&**

**A.L. Shiran Gooneratne J.**

**Counsel :** Faiz Musthapha, PC with Keerthi Thilakaratna for the Accused-Appellant.

Chethiya Gunasekara, DSG for the Respondent.

**Written Submissions of the Accused-Appellant filed on:** 14/05/2018

**Written Submissions of the Complainant-Respondent filed on:** 17/02/2018

**Argued on :** 03/10/2018 and 17/10/2017

**Judgment on :** 26/11/2018

**A.L. Shiran Gooneratne J.**

The Accused-Appellant (hereinafter referred to as the Appellant) was charged on two counts for having committed the murder of Ediriweera Gamage Nandasena, an offence punishable under Section 296 of the Penal Code and for committing the offence of attempted murder of Somawathie Vidanagamage, an offence punishable under Section 300 of the Penal Code. At the conclusion of the trial, by judgment dated 28/11/2013, the Learned High Court Judge convicted the Appellant on both charges and sentenced the Appellant to death on the 1<sup>st</sup> count and imposed a sentence of 20 year's rigorous imprisonment on the 2<sup>nd</sup> count.

The solitary ground of appeal raised by the Appellant is that the Learned High Court Judge has not adequately considered the evidence in relation to the visual identification of the Appellant.

The said ground of appeal has been urged on the basis that the trial judge has failed to;

- evaluate the inherent contradictions inter se of the evidence of Ediriweera Gamage Sanjeewa Ruwanjeewa (PWI)
- consider the witness evidence regarding the identification of the Appellant with the existing day light at the material time.
- consider the Turnbull principles, with reference to R Vs. Turnbull and others (1976) 3 AER 549, in evaluating evidence relating to the identification of the Appellant.

The Appellant is the younger brother of the deceased and lives two doors next to the deceased house. The deceased and the Appellant has had a long standing land dispute. Ediriweera Gamage Sanjeewa (PW1), a son of the deceased returning home around 6:30 PM had met the deceased and his brother Asanka Dilshan (PW3), at the turn off to their house on the Hakmana, Matara road. The deceased had told PW1 that the Appellant had threatened to assault his brother with a sword. Around this time, PW1 has heard a sound of a gunshot from the direction of the elluke shrub, which was at a higher elevation across the road. At that moment the deceased had claimed that he had been shot at. Thereafter, PW1 had run to the house and had returned armed with a sword.

Liyanage Dayawathi (PW2), the deceased wife and Somawathie Vidanagamage (PW4), the injured who were in the house had also arrived at the scene. PW1 had raised his voice and challenged the person who fired the gun to own up. At this moment the witness had heard another shot been fired from about 30 meters away, from the same direction and at that point had seen the Appellant crouching in the 3½ feet high, elluke shrub, and later had seen the Appellant in a standing position. The second shot fired had caused injury to PW4.

PW1, was not certain about the material time the firing took place. He relates to a time period between 6.15 PM and 7.15 PM. However, he was certain that the existing light sufficiently facilitated him to identify the Appellant as the person who was seen in the direction from where the firing took place. The witness describes the light which prevailed at the time he identified the Appellant as “normal evening sun light”. In cross examination the witness describes the light as “normal light”, “light from the setting sun”, and “twilight”.

Asanka Dilshan (PW3) in his evidence states that, when he heard the first gunshot he saw the deceased running towards the house, stating that the Appellant was shooting. At this moment he had seen the Appellant at a distance of 45 feet, across the road, rising from the shrubs armed with a gun. He further states that he saw the Appellant from his knee upwards. This witness has also identified the Appellant when he fired his gun for the 2<sup>nd</sup> time as well. In cross examination, several questions were put to this witness regarding the light condition which prevailed at that time. He described the light condition as evening sunlight.

Liyanaga Dayawathi (PW2) in her evidence stated that she heard a sound similar to that of a fire cracker, she rushed towards the road and had seen the deceased and her two sons in a state of confusion. Closer to the road she had seen the deceased running towards the house stating “දසෝ පාරට එන්න එපා. මුට් වෙඩි තියනව.”

The Appellant’s main contention is that the accused was convicted on a mistaken identity. The Counsel for the Appellant points out that the trial judge has failed to consider the discrepancies arising out of material witnesses regarding the time of the incident and contends that the failure of the trial judge to consider such evidence in accordance with the Turnbull principles is a misdirection on his part.

*Prof. Ian Dennis, in his book titled “The Law of Evidence” 3<sup>rd</sup> Ed., at page 286, has made reference to the Turnbull Guidelines, where he states;*

*“Despite the strength of these words, it seems that, where the quality of the identification evidence is exceptionally good and the challenge is only to the witness’s credibility, the absence of a Turnbull direction is not fatal to a conviction.”*

When evaluating evidence in this case, we are mindful that there should not be room for the slightest doubt as to the identity of the Appellant. We observe that the learned Trial Judge has considered each and every contradiction separately. The trial judge when analyzing evidence relating to the identity of the Appellant, has mainly focused his attention to the contradictions marked by the defence. In that, the

learned judge has come to a strong finding that with the prevalent light condition, the witnesses had sufficiently identified the accused. Special reference has been made to the fact that PW3 had identified the accused with the prevailing light and with the help of the street light, whereas the evidence of PW1 was that the street light was not switched on at the time in question. The trial judge has also given thought to the contradictions marked regarding the time of the incident, where he finds that the time would be material only to ascertain the relevant time of the incident and would not cast any doubt regarding the prevalent light condition observed by the witnesses at the material time. The trial judge after due consideration, has rejected to act on the said contradictions on the basis that they are not material contradictions which goes to the root of the case.

Taking into consideration the totality of the evidence we observe that the eye witnesses to this incident have been consistent throughout, in that, they have seen the Appellant emerge from the eulake shrub with the prevalent light conditions. As the Appellant stood up, PW3 had seen the Appellant from his knee upwards from a distance of 40 feet. He had also seen the Appellant bare bodied clad in a sarong and holding a cylinder like object upwards.

In this case, we observe that all the witnesses are familiar with the appearance of the Appellant. The deceased is the younger brother of the Appellant who lived 500 meters away from the house of the deceased. Visual identification could be attributed to that of the quickness of the individual sight, and also the time period under observation of the individual. According to the evidence of IP Gamini

Hallawa, investigating officer (PW8), the Appellant was identified by the witnesses within 2 hours of the shooting incident. There is no discrepancy of the identity of the Appellant in their statements to the police or in the evidence given at the trial. No questions have been put to the witnesses by the defence that the identification of the Appellant was founded upon a false premise.

We observe that the trial judge has analyzed the contradictions marked by the defence and taking into consideration, the totality of the evidence has come to a finding that the accused was clearly identified by the witnesses in the prevailing light conditions. The said findings are based on direct eyewitness evidence of positive identification of the Appellant at the time material to this incident. We observe that the evidence given by PW1 and PW2 are consistent with no material contradictions of identification of the Appellant. In the circumstances, we see no reason to interfere with the said findings regarding the identity of the Appellant by the trial judge or to decide to the contrary.

The counsel for the Appellant has also raised objection to the evaluation of evidence of PW2, in the light of a deposition alleged to have been made by the victim. According to PW1 soon after hearing the first gunshot the deceased had shouted at the Appellant stating "come out to the open without hiding". However, the evidence of PW2 is that the deceased had told her not to go close to the road, since chuti (the Appellant) is firing, a moving incident perceived by two eye witnesses. PW2, in her evidence has described the condition at the time as "disturbed". The reference made by the deceased to PW1 is corroborated by PW3. It

is also relevant to point out that no particular stand was suggested to the witness and questioned whether or not he made such a statement, in order to clarify their respective positions or to suggest the stand taken by the defence.

The defence refers to contradiction marked P4 to impeach the credit of PW1. The reference to the deceased taking the first shot fired is clearly demonstrated in his testimony. Therefore, there is no contradiction borne out by the said statement. However, to the contrary the defence insists that there is a material contradiction which the trial judge failed to act upon. As held in,

***The Queen Vs. Hethuhamy 57 NLR 255,***

*“where there is a contradiction on a materiel point and demonstratively unreliable it cannot be acted upon. But this does not mean the opposite of what he said is true.”*

Accordingly, we see no variance to the existing conviction and sentence other than to conclude that the Appellant is guilty as charged. Therefore, we affirm the conviction and the sentence given to the Accused-Appellant.

Appeal dismissed.

**JUDGE OF THE COURT OF APPEAL**

**S.Thurairaja PC, J**

**I agree.**

**JUDGE OF THE COURT OF APPEAL**