

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

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

The Attorney General of the Democratic
Socialist Republic of Sri Lanka.

Complainant

Roshan Gallage.

**Court of Appeal
Case No. CA 298/2012**

Accused

Vs.

And Now Between

Roshan Gallage.

Accused-Appellant

**High Court of Matara.
Case No. HC 96/ 2009.**

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

**Before : S. Thurairaja PC, J &
A.L. Shiran Gooneratne J**

**Counsel : Saliya Pieris PC with Pasindu Tilakeratne Attorney at Law for the
Appellant.**

R. Bary SSC with Lakmali Dissanayake SC for the Respondent.

Written Submissions : Accused Appellant-6th June 2017.

Complainant Respondent-03rd December 2018.

Argument on : 6th December 2018.

Judgment on : 12th December 2018.

JUDGMENT

S. Thurairaja, PC. J

Honourable Attorney General had preferred an indictment against the Accused-Appellant, Roshan Gallage (hereinafter sometimes called and referred to as the Appellant) for committing the murder of Egodagamage Dayawathie Gunasinghe, which is punishable under Section 296 of the Penal Code. After the trial the Appellant was found guilty and sentenced to death.

Being aggrieved with the said conviction and the sentence the Appellant preferred this appeal to the Court of Appeal. The Learned President's Counsel who is appearing for the Appellant submitted to Court that, the appeal was preferred through the Prison Authority and grounds of appeal was not properly formed. Hence, he submits the following grounds of appeal.

- 1) The identity of the Appellant was not established.
- 2) Contradictions were not properly considered by the Learned Trial Judge.
- 3) The defence of the Appellant was not considered by the Learned Trial Judge.

The prosecution led the evidence of Welupille Arachchige Bandula Gunasinghe, Nirosha Dilrukshi Gunasinghe, Dr. Lekamge Berty Maximus Fernando, Hewa Baddage Daminda Pradeep, Upul Nishantha Suduarachchi, Abesuriya Gunasekara Upali Chandrasiri and Dikson Mirend Abesekara.

According to the witnesses of the prosecution, the incident has occurred on 19th January 2007 at around 8.00 pm. The deceased was a retired nurse. Husband who is the eye-witness to the incident was a retired English teacher; daughter who is also

eye-witness, is a medical practitioner. On the day of the incident the deceased was preparing dinner and her husband Welupille Arachchige Bandula Gunasinghe was standing nearby, ironing clothes. The daughter was watching television. On hearing a groaning noise, husband rushed to the kitchen. There he found the Appellant was holding the hands of the deceased with a pointed knife like a weapon in his hand. The Appellant had tried to stab the eye-witness too. The deceased on receiving the stab injury fell on the ground. In the meantime, on hearing the noise and the cry, the daughter who was in the hall rushed and noticed the Appellant was standing there with the weapon in hand and running away. Both father and the daughter cried for help and the neighbours came there. Daughter who was a medical practitioner gave cardiopulmonary resuscitation (CPR) to recover her mother. Unfortunately it failed. In the meantime, the Police was informed via emergency hotline and the police rushed to the place immediately. She was taken to the hospital and found dead on admission. Post-mortem revealed that, the deceased had four stab injuries and the cause of death was due to haemorrhage due to stab injuries on the right chest.

At the very outset, we wish to place on record the Learned President's Counsel for the Appellant had filed comprehensive written submissions. Unfortunately, the Senior State Counsel had filed written submissions just narrating the facts. For the prosecution, there is no legal submission that could assist the Court in determining this appeal.

Considering 1st ground of appeal, namely the identity of the Accused is not established.

The fact that the incident was occurred on the 19th of January 2007 at around 7.45-8.00 pm and there was sufficient light at the place of the incident is not doubted by any party.

There are two eye-witnesses to the incident. Both claimed that, they had clearly saw the Appellant with the available light on the said day. Both witnesses say that, they do not know him previously. But they had seen him holding the hand of the

deceased at the kitchen, which is an unusual thing for them to witness. Therefore, both said that, they had a clear look on the Appellant. Further both witnesses had identified the Appellant at the Identification Parade held by the Learned Magistrate.

Further Hewa Baddage Daminda Pradeep who was listed as sixth witness on the indictment gave evidence and said he is a three-wheeler driver and he knows the Appellant. On the day of the incident at around 8.30-9.00 pm he had seen the Appellant a kilo meter away from the place of the incident.

Witness Upul Nishantha Suduarachchi who is working in a pharmacy, listed as witness No. 5 in the indictment gave evidence and said that, on the day of the incident at around 7.30 pm he had seen the Appellant with the cap near their shop, which is situated close to the place of the incident.

The Counsel, who appeared in the Original Court on behalf of the Appellant, had extensively cross-examined all witnesses. Even though, some contradictions were marked on the 1st witness, Wellappili Arachchige Bandusena Gunasinghe in his evidence and the others testimony, revealed the fact that, the Appellant was properly identified by the witnesses.

The Counsel advances the argument with the contradictions which I intent to discuss after this issue, had submitted in many cases including of **Regina vs. Turnbull [1976 3 All E.R. 549, Cr. Ap. Reports 132]**. One of the important guidelines set out was whether there was any material discrepancy between the description of the accused given to the Police by the witness when first seen by him and his actual appearance. Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused – which the defence alleges to be mistaken – the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s). The judge should tell the jury that:

- caution is required to avoid the risk of injustice;

- a witness who is honest may be wrong even if they are convinced they are right;
- a witness who is convincing may still be wrong;
- more than one witness may be wrong;
- a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.

The judge should direct the jury to examine the circumstances in which the identification by each witness can be made. Some of these circumstances may include:

- the length of time the accused was observed by the witness;
- the distance the witness was from the accused;
- the state of the light;
- the length of time elapsed between the original observation and the subsequent identification to the police.

Considering the facts of this case, this is not a chance meeting or fleeting glance. Both eye-witnesses are educated and elderly and a younger witnesses. Both had powers to observe differently and made their assessment. Considering the evidence including piercing cross-examination, I find that these two witnesses were consistent and firm in their evidence. There is no doubt created regarding the identity of the Appellant. Hence, we find that, this ground of appeal fails on its own merits.

The next two grounds of appeal are that, the contradictions were not considered and the defence was not considered by the Learned Trial Judge.

The Learned Trial Judge had delivered his judgment, consisting of 56 pages. Initially, he had narrated the evidence of the witnesses. Thereafter, he had considered the evidence of the witnesses. The Learned Trial Judge had gone into minute details of the contradictions and the omissions brought before the Trial Court and made his

determination. We find that, the Learned Trial Judge had adequately considered the contradictions by going through each and every contradictions and omissions separately. Further he had considered the Section 27(1) statement which led them to recover the weapon also being considered sufficiently. Considering all circumstances, we find that, the 2nd ground of appeal fails on its own merits. Further the Accused-Appellant made a dock statement and denied his involvement in the case. It is observed that, certain stands taken by the Appellant is either not taken with the witnesses nor the prosecution or contradict with the defence taken at the trial.

Considering the dock statement, the Learned Trial Judge has considered within the framework of Section 283 of the Code of Criminal Procedure Act and decided that, it cannot be accepted. Considering the overwhelming evidence against the Appellant and the defence, we find the last ground of appeal also fails on its own merits.

After carefully considering all grounds, we find that there was a reasonable trial held before the High Court of Matara and the findings of the Learned Trial Judge is warranted in the light of the evidence before him. Therefore, we affirm the conviction and the sentence and dismissed the appeal.

Appeal Dismissed.

JUDGE OF THE COURT OF APPEAL

A.L. Shiran Gooneratne, J

I agree,

JUDGE OF THE COURT OF APPEAL