

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

**In the matter of an Appeal against the  
Conviction/Sentence of the High  
Court of Hambantota under the  
Provisions of the Code of Criminal  
Procedure Act No. 15 of 1979.**

Democratic Socialist Republic of  
Sri Lanka.

**Complainant**

**CA HCC 0328/2019**

High Court of Hambantota  
Case No. HC 181/2007

Vs.

Puwakdandawe Ajith Kithsiri

**Accused**

**AND NOW BETWEEN**

Puwakdandawe Ajith Kithsiri

**Accused- Appellant**

Vs.

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

**Complainant -Respondent**

**Before:**    **Sampath B. Abayakoon, J.**  
                  **Amal Ranaraja, J.**

**Counsel:**   Mahinda Jayawardena for the Accused-Appellant,  
                  Shanaka Wijesinghe A.S.G., P.C., for the State.

**Argued on:**   24.10.2024

**Decided on:** 16.12.2024

## **JUDGMENT**

### **AMAL RANARAJA, J.**

1. The Accused-Appellant (hereinafter referred to as the ‘*appellant*’) was indicted in the *High Court of Hambantota* on the following count:

That, on or about 18.04.1999, the appellant committed the murder of one *Gamage Somawathie*, which is an offence punishable under Section 296 of the Penal Code.

2. The appellant has pleaded not guilty to the count and the matter has proceeded to trial without a jury.
3. At the conclusion of the trial, the Learned High Court Judge has found the appellant guilty to the count, convicted and sentenced him to death. The appellant, aggrieved by the judgement and the sentencing order, has preferred the instant appeal to this Court.

4. When the matter was taken up for argument, the Learned Counsel for the appellant formulated the following grounds of appeal;
- i) Has the prosecution failed to prove its case beyond reasonable doubt?
  - ii) Did the appellant get an opportunity for a fair trial as he was not allowed to cross-examine **PW-02**, **PW-03** and **PW-05**?
  - iii) Were **PW-01**, **PW-03**, **PW-04** not eye-witnesses? Therefore, did the Learned Trial Judge misdirect himself in considering them as eye-witnesses?
  - iv) Was the condition of light not satisfactory? However, did the Learned Trial Judge consider light as sufficient?
  - v) Was the alibi not taken into consideration and/or analysed in the correct legal perspective by the Learned Trial Judge?

**Facts in Brief:**

5. The deceased is the wife of **PW-01**. **PW-01** is attached to the prisons department, while the deceased had been a house-wife. **PW-01** and the deceased have been living in their house in *Chitragalla, Ambalantota* with their children. **PW-03** is the daughter of **PW-01** and the deceased. On 18.04.1999, around 21.30 hrs, the appellant had come to the house of **PW-01**,

damaged its fuse board, shut out the electricity supply to the house, challenged **PW-01** and threatened to kill the persons living inside the house. **PW-01**, the deceased and **PW-03** have called out for help from the neighbours.

6. **PW-02**, *Dharmasena Jayawickrama* has gone to **PW-01**'s house and upon inquiry, invited **PW-01** and the others to come over to his house until some action is taken to thwart the uncouth behavior of the appellant. **PW-01**, the deceased and **PW-03** have walked up to the access road (which was abutting the lands of **PW-01**, **PW-02** and others) and stood there expecting the son of **PW-01** and the deceased to come back from the city after dropping off a person known to them for the bus.
7. The appellant at about that time has struck **PW-04**, the friend of the son of **PW-01**, with an iron pole while returning with the former from the city. The appellant has also struck the deceased on the forehead with the iron pole and when the deceased fell onto the ground, the appellant has struck the deceased again with the same device and run away.

The deceased has died on the spot.

**PW-09** [ R.P.C. 1179, *Wimalasena*] has recorded the first complaint.

**PW-08** [ IP *Ayub Khan*] upon being informed about the first complaint, has visited the scene of the crime in the early hours of the morning on **19.04.1999** and made notes of his observations.

8. **PW-11** [P.C. 29001, *Dayarathe*], as an officer involved in the investigation of the crime has recorded the statements of **PW-02** and **PW-04** on **19.04.1999**.
9. The post-mortem on the deceased has been conducted by **PW-05**, *Dr. D. A. R. J. Kumara*, the medical officer of the Hambantota hospital at that time. *Dr. Kumara* has observed six injuries on the body of the deceased. A deep laceration, an abrasion and contusions have been the nature of those injuries. Two contusions on the head of the deceased have correspondingly resulted in carnio-cerebral injuries. *Dr. Kumara* has expressed an opinion that the carnio-cerebral injuries have caused the death of the deceased.
10. The Counsel for the appellant has complained that, the appellant has been denied a fair trial as the Learned High Court Judge has disallowed an application on the behalf of the appellant to re-call **PW-02**, **PW-03** and **PW-05** to be presented for cross-examination.
11. The appellant has been absconding from the time of the crime. The appellant has not been arrested by the police. The 'non-summary proceedings' too have commenced and proceeded in the absence of the appellant. When the indictment was forwarded to the *High Court of Hambantota*, the appellant has not appeared or has not been caused to be brought before the relevant High Court. The Court has satisfied itself that the appellant is absconding and therefore, it was not possible to serve the indictment of the appellant. The trial in the High Court has commenced in the

absence of the appellant and **PW-01, PW-02, PW-03, PW-05, PW-08**, and **PW-09** have testified on behalf of the prosecution under such circumstances.

12. On **20.03.2013**, an Attorney-at-Law, by the name of *Sunil R De Silva* has informed Court that he has received instructions to defend the appellant henceforth and made an application to recall **PW-01** to be presented for cross-examination. The Learned High Court Judge has allowed such application. **PW-01**, has been re-called and cross-examined on behalf of the appellant. Subsequently, **PW-04, PW-08, PW-09, PW10, PW-11** and the mudaliyar of the Court have been examined in chief, cross-examined, re-examined and the evidence of those witnesses concluded. The case of the prosecution has been concluded on **07.12.2016** after the evidence of the mudaliyar of the Court was led as its final witness.

13. On **15.02.2017**, [DW-02 *Sabapathi Ranhotti Gamage Kaushalya*] has been examined by the Counsel of the appellant and the testimony of **DW-02** concluded subsequent to the cross-examination and re-examination of such witness.

14. Thereafter, on **11.10.2017**, the Counsel for the appellant has made a further application in Court. In making such application, drawn the attention of the Learned High Court Judge to the provisions in Section 138 (4) of the Evidence Ordinance No.14 of 1895 and Section 241(3) of the Code of Criminal Procedure Act No. 15 of 1979. In construing the provisions in those sections, the Learned Counsel has contended that the appellant is entitled to

recall **PW-02**, **PW-03** and the other witnesses who had been examined by the Learned State Counsel but not cross-examined by the former. The Learned High Court Judge has refused such application.

15. Proviso to **Section 138(4)** of the **Evidence Ordinance No.14 of 1895** is as follows;

*“The Court may in all cases permit a witness to be recalled either for further examination-in-chief or for further cross-examination, and if it does so the parties have the right of further cross-examination respectively.”*

16. In **R vs. Pinhamy [57 NLR page 169]**, Basnayake A.C.J. has stated,

*“The court is not bound to permit a witness to be recalled whenever an application is made in that behalf under section 138 (4) of the Evidence Ordinance, unless the party making the application gives satisfactory reasons”.*

17. When I draw my attention to the proceedings in the *High Court of Hambantota* in the instant case dated **11.10.2017**, it is clear to me that that the Counsel for the appellant has merely drawn the attention of the Court to the provisions in Section 138 (4) of the Evidence Ordinance and stated that the Court in using its discretion could recall those witnesses to be presented for cross-examination. No satisfactory reason has been given to explain as

to why the Counsel for the appellant could not make such an application when he did so to have **PW-01** re-called to be presented for cross-examination. The delay in making such an application has not been explained. In those circumstances, satisfactory reasons have not been drawn out by the Counsel for appellant to re-call those witnesses as per the provision in Section 138 (4) of the Evidence Ordinance.

18. **Section 241 (3)** of the **Code of Criminal Procedure Act No.15 of 1979** is as follows;

*“(3) Where in the course of or after the conclusion of the trial of an accused person under sub-paragraph (i) of paragraph (a) of subsection (1) or under paragraph (b) of that subsection he appears before court and satisfied the court that his absence from the whole or part of the trial was bona fide then –*

*(a) where the trial has not been concluded, the evidence led against the accused up to the time of his appearance before court shall be read to him and an opportunity afforded to him to cross-examine the witnesses who gave such evidence; and*

*(b) where the trial has been concluded, the court shall set aside the conviction and sentence, if any, and order that the accused be tried de novo.”*



19. In ***Rajapakse vs. The State*** [2001 2 SLR 161 at page 166] Kulathilaka J, has stated,

*“According to Section 241(3) of the Code of Criminal Procedure Act, No. 15 of 1979 after the conclusion of the trial of an accused person in his absence if he appears before Court and satisfies the Court that his absence at the trial was bona fide the Court shall set aside the conviction and sentence and order that the accused be tried de novo”.*

20. Due to the matters discussed above, it is very clear that an application under **Section 241(3)** of the **Code of Criminal Procedure Act** could be made when the relevant accused is present in person in a High Court and not when a Counsel defending an accused is only present in Court without his client. Accordingly, the complaint that the appellant has been denied a fair trial must fail.

21. **PW-01** has stated that though the only street light which was situated close to the scene of the crime was out of order, the lights from the nearby houses have lit up the road on which the incident took place. Though **PW-02** has stated that the lights of his house did not light up the road, the lights of the other houses abutting the road on which the crime took place have been functioning. **PW-08** [IP Ayub Khan] who visited the scene of the crime when examined has confirmed the fact that the lights of the houses of *Adlin Nona* and *Samarapala* were functioning at that time and those lights lit up the place where the body of the deceased was

lying. Hence, there is ample evidence to conclude that the scene of crime was illuminated in a sufficient manner to identify the appellant whose identity was known to **PW-01** and the other witnesses' as the appellant was a resident of the same neighbourhood.

22. **PW-01** and **PW-03** have stated that the appellant came to their house on the particular day and threatened to kill them. Further, the electricity supply to the house has been disconnected as soon as the appellant came that way. **PW-01**, the deceased and **PW-03** have called out for help from the neighbours when the appellant threatened to kill them. **PW-01** has identified the voice of the appellant when **PW-01** and the others in the household were threatened. **PW-01** and the others in his household on occasions have spoken to the appellant and his voice has been familiar to them. **PW-02** has come to the house of **PW-01** and inquired from him what the matter was, then invited **PW-01**, the deceased and **PW-03** to go to his house until the uncouth behavior of the appellant settles down. **PW-01**, **PW-03** and the deceased have walked towards the road that abutted the plots of land in which the witnesses lived in. Such road has been the access road to the respective plots of land. The deceased had been on the road when the appellant struck the deceased with an iron pole. **PW-01** has witnessed the appellant striking the deceased. Though **PW-03** has said that the appellant had in his possession a device similar to a crow-bar, she has not stated that it was actually a crow-bar. In those circumstances the similarities of a crow-bar

and an iron pole should be looked at in a proper perspective. The possibility of mistaken identity of the weapon in such a situation should also be looked at in a proper perspective. It is narrated that the deceased was struck on her forehead in the first instance, when she fell to the ground she has been struck again by the appellant. **PW-05** i.e. *Dr. Kumara* has during the post-mortem examination observed two contusions on the head of the deceased and the corresponding carnio-cerebral injuries had caused the death of the deceased. They have been necessarily fatal injuries. **PW-01** in his evidence has stated the fact that he left **PW-03** in a house close by that night just before the appellant struck the deceased. However, **PW-03** has stated that she was at the scene when the appellant struck her mother. **PW-03** has also stated that she saw the appellant striking her mother. The Learned Counsel for the appellant has complained that **PW-03** had not been at the scene of the incident and had not seen the appellant strike the deceased. **PW-02** in his evidence has stated that **PW-01**, **PW-03** and the deceased stopped on the road in anticipation of the arrival of their/her son/brother who had gone to the city. **PW-02** does not state of an incident where **PW-01** took **PW-03** to a house close by. Further, **PW-02** has heard a commotion within a short period of time of his going into his house. When he came out to see what the commotion was he has seen the appellant strike the deceased. **PW-02** has also observed the fact that the fuse box of **PW-01's** house was damaged when he went there to inquire from **PW-01** as to what the calls for help were. **PW-03** in her evidence has stated that after seeing her mother (the deceased) being struck, she fainted. She being a fourteen-year old girl at the time of the incident, the distressing experience of seeing her mother being

struck by the appellant, the scenario described by **PW-03** cannot be ruled out. It is a possibility. This Court also finds the testimony of **PW-03** to be natural and straightforward. There is no material on record to show that **PW-03** was tutored or influenced by **PW-01** or any other person of concern. Therefore, the testimony of **PW-03** should be accepted and acted upon. **PW-04** also has stated that the appellant struck him with an iron pole when he was returning with the son of **PW-01** to the house of the latter. In those circumstances, the discrepancy could be attributed to lack of precise narration.

23. In **Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat [A. I. R. 1983 SC 753]** it was held,

*“...a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen...Discrepancies which do not go to the root of the matter and shake the version of the witness, therefore cannot be annexed with undue importance.”*

24. In consideration of the above it is the view of this Court, that the evidence of eye-witnesses i.e. **PW-01** and **PW-03** are consistent and conclusive in respect of the material facts of the case. There are no inconsistencies which affect the substance of the case.

25. **DW-01** has stated that the appellant had told her that he was going to Colombo for five days beginning **16.04.1999**. **DW-01** has also stated that she did not see the appellant leaving for Colombo but only stated so to her. **PW-01**, **PW-02** and **PW-04** have corroborated the fact that the appellant was seen at the scene of the crime on the date the crime was committed by him. Hence, the evidence of **DW-01** cannot be relied upon as her evidence has been countered by those of **PW-01**, **PW-02** and **PW-04**. Further, the appellant through **DW-01** has suddenly introduced the 'defense of alibi' at the tail end of the case. Such an eventuality or an event has not been suggested to the prosecution witnesses in cross examination by the appellant. I draw my attention to such inconsistency on the part of the appellant.

26. The Learned High Court Judge has in the disputed judgement referred to a deceased name, *Ellawala Pahalage Wimal Weerasinghe*, who was murdered on 11.02.1982. It appears the typographical error has been made in page 310 of the brief in reference to a different case. This error appears to have taken place when the Learned High Court Judge attempted to list the elements required to be proven to constitute the offence of murder. The Learned High Court Judge at the beginning of the disputed judgement has referred to the count in the indictment forwarded in this case. Further, the Learned High Court Judge has also evaluated the evidence led in this case, decided that the evidence led by the prosecution in this case was cogent and convincing. Acting upon such evidence, has convicted the appellant for the count in the indictment forwarded in this case. Hence, it is my view that such error has not occasioned in a failure of justice.

27. Due to the preceding reasons I am not inclined to interfere with the disputed judgement. We affirm to the conviction and the sentence imposed by the Learned High Court Judge and dismiss the appeal.

The Registrar of this Court is directed to communicate the judgment to the *High Court of Hambantota* for compliance.

*Appeal dismissed.*

**Judge of the Court of Appeal**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**Judge of the Court of Appeal**