

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 code of Criminal Procedure Act No.15 of 1979 (as amended) read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

Court of Appeal
Case No: 0026/2018

High Court of Kurunegala
Case No: 240/2008

Complainant

Vs.

Rathnayake Mudiyanseelage Jayantha
Rathnayake

Accused

AND NOW BETWEEN

Rathnayake Mudiyanseelage Jayantha
Rathnayake

Accused-Appellant

Vs.

The Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

BEFORE : Hon. Justice K. K. Wickremasinghe
Hon. Justice Priyantha Fernando

COUNSEL : AAL Neranjan Jayasinghe for the Accused-
Appellant
Lakmali Karunanayake DSG for the Complainant-
Respondent

ARGUED ON : 10-06-2019

WRITTEN SUBMISSIONS : The Accused-Appellant submitted on 18-09-2018
and further Written Submission submitted on 26-06-
2019
The Complainant-Respondent submitted on 08-10-
2019

DECIDED ON : 30-01-2020

Hon. Justice K.K.Wickremasinghe

The Accused-Appellant was indicted in the High Court of Kurunegala dated 12-02-2018 under three charges of murder. (Triple murder)

- i. On or around 29-03-2004 committed the murder of Chandrasekara Mudiyansele Dharmasinghe and thereby committed an offence punishable under Section 296 of the Penal Code.
- ii. On or around 29-03-2004 committed the murder of Chandrasekara Mudiyansele Abeyratne and thereby committed an offence punishable under Section 296 of the Penal Code.
- iii. On or around 29-03-2004 committed the murder of Chandrasekara Mudiyansele Chandana Kumara Jayaratne and thereby committed an offence punishable under Section 296 of the Penal Code.

After reading out the indictment to the Accused Appellant, he opted for a non-jury trial. Prosecution led evidence of six witnesses including an eye witness Gnanawathi (PW1). Upon closing the prosecution case the Accused-Appellant has made a dock statement and one witness Rajaguru Mudiyansele Rohitha (ex-army officer) testified in support of the alibi taken up by the Accused Appellant.

After trial the Accused was convicted for all three charges by the Learned High Court Judge and imposed death sentences. Being aggrieved by the aforementioned convictions and sentences, the Accused-Appellant preferred the instant appeal to this Court.

In the written submissions dated 26-06-2019 the separate grounds of appeal were not urged by the Appellant, but following infirmities were brought to the notice as grounds of appeal for the Accused-Appellant:-

1. Infirmities in the evidence of the sole eye witness.
 - 1.1. Per-se Contradictions in her evidence in examination-in-chief and in cross examination
 - 1.2. Belated statement of the eye witness to the Police
2. Doubt about the light emanated from the bulb which was near the back door was not sufficient to identify the person who was 10ft away from the witness and the deceased.
3. There's no evidence to convict the accused for the 03rd charge.
4. Rejecting the defence of alibi is highly unreasonable.

The trial was taken up before three Judges, accordingly proceedings were duly adopted.

The Prosecution led the evidence of Gnanawathi (wife of the 1st deceased Dharmasinghe), Jayaratne Banda (Brother of the deceased Dharmasinghe and the father of the 3rd deceased Chandana), JMO, ASP, Udayachandra- Retired Police Officer, Susil Senaratne (Judicial Translator)

Facts of the Case

According to the prosecution it was revealed that the deceased Abeyratne was a relative of Gnanawathi and he was living with the deceased Dharmasinghe and Gnanawathi at their boutique. On 29-03-2004 the day of the alleged incident, three of them have gone to Dharmasinghe's brother's house (Jayaratne Banda's) and returned home around 9.30 pm. Thereafter 1st deceased Dharmasinghe and wife Gnanawathi have gone towards the rear door

(kitchen door) of their boutique while deceased Abeyratne was taking a bedsheet and a pillow and proceeded towards the front side of the boutique to sleep. (she stated that all the lights were illuminated at that time)

After entering the boutique from the rear door, deceased Dharmasinghe has asked for a glass of water from Gnanawathi and she asked him to take water and gone to the room to take the torch. At that time deceased Dharmasinghe was near the kitchen door.

Thereafter she heard a sound of a gunshot and she has gone to her husband deceased Dharmasinghe and screamed. Then another shot was fired. Just then Abeyratne had come to that place. When the assailant was about to shoot Abeyratne, Gnanawathi had run away. Then she has heard a sound of the third gunshot. She ran to Jayaratne Banda's house but she heard a scream from there and then she has returned back to the boutique. After she returned to the boutique her husband was taken to the hospital by a vehicle. She has not seen deceased Abeyratne.

Jayaratne Banda stated that after his brother, Gnanawathi and Abeyratne left he heard 3 gunshots and after a while he went towards his brother's boutique to inspect. At that time deceased Chandana Kumara was sleeping in the house. Thereafter without going to the boutique he has stayed for 10-12 minutes near the "samithi shalawa" and at that time his two sons – Wasantha Kumara and deceased Chandana Kumara had come to that place. When they were trying to go near the boutique Jayaratne Banda had stopped them and he has gone all by himself towards the tank. He asked both his sons not to go anywhere. Before going to the boutique he heard another firing and heard his son Chandana Kumara's scream. When he returned near the said hall the deceased Chandana Kumara was lying on the ground with bleeding injuries. His other son – Wasantha Kumara had come near them after that and at the trial when he was questioned by the prosecution whether he asked him what happened, he has answered as "Yes" but has not been questioned further on Wasantha's reply. And he has not seen either the Accused or the person who shot his son Chandana Kumara and no dying declaration available.

The JMO, testified that all three murders were caused by gunshots with smooth bore gun.

In the evidence of the ASP, he stated inter alia that when he went to the boutique around 1.15 am on the following day, deceased Dharmasinghe's dead body was not there and only deceased Abeyratne's dead body was lying in a corner of the kitchen. As per some information, he has inquired about the Accused, but he was unable to arrest the Accused since he was not available at his residence. On the following month the Accused had come to the police station and surrendered himself. He has testified with regard to the previous incident which has taken place (bombing incident) on 2003-10-10 or 13th (two dates were stated in Gnanawathi's evidence) at deceased Dharmasinghe's boutique, the Accused-Appellant of the instant case was not a suspect in the bombing incident. Further, when the Learned High Court Judge questioned him whether he was able to find the occupation of the Accused he has stated that it was revealed, that the Accused was an Army deserter (pg no.245)

When carrying out the investigations, the OIC has instructed the investigating team not to conduct investigations regarding the alleged incident since Gnanawathi and Jayaratne Banda has complained the SSP for conducting further investigations when having an eye witness. It was revealed by the evidence of the retired Police Officer – Udayachandra (vide pages 254-255) An investigation was conducted by the Military Police regarding the alleged incident.

The Accused-Appellant has taken the defence of alibi and made a dock statement. Rajaguru Mudiyanse Rohitha was called as a defence witness to prove that on the day of the alleged incident Accused was in the Army Camp.

Counsel for the Accused-Appellant contended following infirmities in the prosecution case:-

- 1) Following contradictions of Gnanawathi
 - a) On pg no. 147 in the appeal brief she testifies that she has seen Abeyratne being shot and after that she ran away. But in pg no. 111 she testifies that after the second firing she ran away and after she fell down near the fence she has seen the accused running away towards the tank after shooting to Abeyratne. Again in pg no. 148 she has testified that the Accused has chased behind her.
 - b) Gnanawathi testified that Abeyratne has been shot once but in contrary to the said evidence the JMO testified in pg no.197 that as per the autopsy done by him seems like three shots had been fired at Abeyratne
 - c) Evidence given in pg no. 108,109 contradicted to the evidence given in pg no. 144 as the exact place where the witness was and the deceased Dharmasinghe was at the time of shooting
- 2) Other than Gnanawathi, prosecution has not called any witnesses to prove that the Accused was there in the village when the alleged incident took place.
- 3) No DNA evidence has been taken on the blood stains found in the kitchen or no Government Analyst has been called or produced the bullets for inspection to check whether all the bullets are from the same gun.
- 4) No weapon found.
- 5) The police investigations have been stopped due to a complaint by Gnanawathi and Jayaratne Banda on the basis that there's no reason to carry out further investigations when there is an eye witness.

The following infirmities elicited by the DSG for the Respondent in the defence case:-

- 1) No documentary evidence on the plea of alibi.
- 2) Summonses were issued on three witnesses but only one has given evidence for the defence.

The only available witness for Chandana Kumara's murder was his brother Wasantha Kumara, but either his evidence or his father Jayarathne Banda's evidence was not led adequately by the

prosecution and not cross examined by the defence questioning about what happened thereafter (vide pages 170, 180,181) When considering the available evidence, it is clear that either Gnanawathi or father of the 3rd deceased – Chandana Kumara merely seen the assailant who shot at the 3rd deceased. Therefore 3rd charge should fail due to non-availability of evidence.

I wish to draw my attention to the contradictions of the witnesses cited by the Learned Counsel for the Accused-Appellant.

When contradictions are considered the above mentioned contradictions cannot be given so much of weight since those contradictions do not go to the root of the case. As per **Sriskandarajah, J. in *Premasiri and another V. Republic of Sri Lanka* [2012] 1 SLR 43**

“Keerthi Bandara’s case and Muniratne’s case, are in relation to omission or contradiction of witness in relation to the identity of the accused. The identity of the accused goes to the very root of the case, but in the instant case the so called contradiction or omission is in relation to a statement of fact. Therefore this omission or contradiction cannot be treated as vital and it will not affect the credibility of the witness in any way”

The Learned Counsel for the appellant has drawn the attention of court for the delay of the 1st complaint by the wife of the 1st deceased. It is proved from the available evidence that the funeral of the 1st deceased was held on the 31st and the 1st complaint was made on the day of the funeral and therefore the reason for the delay speaks to itself.

In ***Sumanasena V. AG* [1999] 3 SLR 137** it was held that:

“1) Evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law.

2) Just because the witness is a belated witness Court ought not to reject his testimony on that score alone, Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable the Court could act on the evidence of a belated witness”

In ***Ajit Samarakoon V. The Republic (Kobaigane Murder Case)* [2004] 2 SLR 209** it was held that,

“Just because the statement of a witness is belated the Court is not entitled to reject such testimony. In applying the test of spontaneity, the test of contemporaneity and the test of promptness the court ought to scrupulously proceed to exercise the reasons for the delay. If the reasons for the delay are justifiable and probable the trial judge is entitled to act on the evidence of a witness who had made a belated statement.”

Therefore it is evident that there aren't any infirmities in the evidence of the eye witness with regard to the 1st and the 2nd incidents of Murder. Also it is evident that Court ought not to reject a testimony of a belated witness, when reasons for the delay are justifiable and probable.

Further the Learned Counsel for the Appellant has drawn attention of Court to the defence of alibi taken up by the Accused-Appellant in his doc statement. He has not taken up this position at the non-summary stage other than the doc statement.

In the case of **Jayatissa V. Hon. Attorney General [2010] 1 SLR 279**

"When alibi is set up as a defence, there are certain fundamentals to be observed:-

- a) If an alibi is established by unsuspected testimony, that will be satisfactory and conclusive.*
- b) An alibi should cover the time of the alleged offence so as to exclude the Accused's presence at the crime scene at the relevant time.*
- c) The credibility of an alibi is greatly enhanced, if it was set up at the time the accusation was first made and was constantly maintained. If it is taken up belatedly-the effect of the alibi will be less.*
- d) An alibi can be falsified by mistaken identity and the difference of time in the clocks. A few minutes will make all the difference.*

A false alibi will weaken the defence case and strengthen the prosecution case."

It is evident that there was a previous enmity between the 1st deceased and the Accused-Appellant. Thereby there is a motive.

When considering the non-production of the Weapon I would like to draw the attention to the observation of **Ranjith Silva, J.** in **Wanakku Arachchilage Gunapala V. Attorney General [2007] 1 SLR 273**

"I hold that non-production of a material object is not fatal to a conviction. The provisions of the Evidence Ordinance itself have made a clear distinction with regard to documentary evidence on the one hand and real evidence on the other. Section 91 of the Evidence Ordinance excludes parole evidence whereas section 60(1) and (2) of the Evidence Ordinance enacts that if the oral evidence refers to a fact which could be seen or perceived by any other sense or in any other way, it must be the evidence of the witness who says that he saw or perceived that fact by that sense or in that manner, that should be led to prove that fact, although the Court may, if it thinks fit, require the production of such material thing for

its inspection, (Section 165 of the Evidence Ordinance) Thus the prosecution was entitled to lead oral evidence of a witness without producing the material object"

Therefore considering above I set aside the conviction and sentence imposed on the Accused-Appellant with regard to the 3rd charge of Murder and affirm the conviction and sentences imposed on the Accused-Appellant with regard to the 1st and the 2nd charges of Murder.

Appeal is partly allowed.



JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,



JUDGE OF THE COURT OF APPEAL

Cases Referred to :-

- 1) Premasiri and another V. Republic of Sri Lanka [2012] 1 SLR 43
- 2) Sumanasena V. AG [1999] 3 SLR 137
- 3) Ajit Samarakoon V. The Republic (Kobaigane Murder Case) [2004] 2 SLR 209
- 4) Jayatissa V. Hon. Attorney General [2010] 1 SLR 279
- 5) Wanakku Arachchilage Gunapala V. Attorney General [2007] 1 SLR 273