

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

In the matter of an Appeal made under
Section 331(1) of the Code of Criminal
Procedure Act No.15 of 1979, read with
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

Marasinghe Siriwardenalage Nilantha

Kumara

APPELLANT

Vs.

Court of Appeal No:

The Attorney General

CA/HCC/0238/20

Attorney General's Department

High Court of Colombo

Colombo-12

Case No. HC 1862/2004

RESPONDENT

BEFORE

**: Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL

**: Kasun Chamara Munasinghe for the
Appellant.
Sudharshana De Silva, DSG for the
Respondent.**

ARGUED ON : **12/10/2023**

DECIDED ON : **09/02/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Appellant was indicted along with three other accused by the Attorney General for committing the offences as mentioned below.

1. On or about the 08th of June 2001, at Mattakkuliya, by causing death of Wickramasinghe Arachchige Sumith alias Sunith committed an offence punishable under Section 296 read with Section 32 of the Penal Code.
2. In the course of the same transaction, committed an offence of Robbery of a three-wheeler from the possession of Ponniah Mahendiran an offence punishable under Section 380 read with Section 32 of the Penal Code.

The trial commenced before the High Court Judge of Colombo as the Appellant and other accused who had been numbered as 1st, 2nd and 4th accused opted for a non-jury trial. The indictment was amended after the commencement of the trial as the 1st and 2nd accused had passed away during the pendency of the trial. The case against the Appellant who was

named as 3rd accused and the 4th accused continued, and the prosecution had led 16 witnesses and marking productions closed the case.

The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the Appellant and the 4th accused.

The Appellant and the 4th Accused remained silent and did not offer any defence evidence.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant on the 1st count only and sentenced him to death on 30/07/2020. The 4th accused was acquitted from all the charges.

Being aggrieved by the aforesaid conviction and the sentence, the Appellant had preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant had given his consent to argue this matter in his absence due to the Covid 19 pandemic. At the hearing, the Appellant was connected via Zoom platform from prison.

The background of the case *albeit* briefly is as follows:

PW2, Vijay Kumara, the three-wheeler driver is the only eyewitness to the incident in which the deceased was allegedly killed by the Appellant and others named in the indictment. On the day of the incident, 08.06.2001, the deceased had gone to the Modera Temple at about 5.00 pm and returned to the three-wheeler in 15 minutes. On his way, the deceased had given lift to his brother's daughters and dropped them at Pokkunuwatte and proceeded to his home situated at Samithpura, Mattakuliya. As there was a traffic congestion near the Mattakkuliya bus stand, the witness (PW2) had slowed down the three-wheeler. Suddenly, two persons got into the rear part of the three-wheeler and had begun to stab the deceased using sharp knives.

At that time, PW2 identified the Appellant as one of the assailants as he too resides at Samithpura. But he could not identify the other person. At that time, PW2 could not identify the other person. When he tried to prevent the stabbing, the Appellant had pointed the knife at him. Due to fear, he had run from the three-wheeler and observed the continuation of the incident from a distance of 10 feet. The Appellant and the other dragged the deceased out of the three-wheeler and stabbed further.

A few minutes later, he took the three-wheeler from the scene of crime and rushed to Samithpura and conveyed the incident to PW1, Mallika, who is the wife of the deceased. Thereafter, the deceased was taken to hospital by PW1. In the evening, he had taken PW1 to the Modera Police Station. According to PW1, half an hour from the occurrence of the incident, she was informed about the incident, and she rushed to the place of incident but found the deceased with bleeding injuries in a culvert. PW1 fainted when she saw her husband and she was brought home and was hospitalized as she was six months pregnant at that time. The day before the incident, the deceased had gone to attend a case in the High Court of Colombo-05 and while he was returning home, a group of four persons had surrounded him and told the deceased to breath slowly. No complaint was lodged to police regarding this incident. As she is not an eye witness to the incident, she could not identify the Appellant during the trial.

According to PW5, Ponniah Mahendiran, while he was going in his three-wheeler, close to the bus stand of Mattakkuliya, four persons with blood-stained clothes and knives appeared in front of his three-wheeler and due to fear he had given the three-wheeler to them. On the following day, he had received the same from the Modera Police.

As PW3 and PW4 went back to their statements to police at the trial, both had been treated as adverse witness.

PW9, JMO Kumudu Kumari who held the postmortem examination stated that she had noted 35 injuries on the deceased's body and the cause of death

is due to haemorrhage and shock following multiple stab injuries on the chest and abdomen penetrating lungs, liver and severing the inferno vane Cora.

The Learned High Court Judge had concluded that the evidence given by PW2 is convincing and acted upon the said evidence to convict the Appellant for the charge of murder. The Appellant was acquitted from the 2nd charge and the 4th accused was acquitted from the case.

In his solitary ground of appeal, the Appellant contends that the evidence of sole eyewitness PW2 fails the test of credibility, probability and does not inspire the confidence of the Court.

The Counsel appearing for the Appellant mainly argued that the evidence of sole eyewitness does not inspire the confidence of the Court as it fails the test of credibility and probability. Hence, it is very important to consider the evidence given by PW2 who had been the sole eyewitness to this case.

The Learned High Court Judge in his judgment had concluded that the evidence of PW2 is convincing and proved the murder charge beyond reasonable doubt.

Eyewitness testimony is one of the most important kinds of criminal evidence. In criminal cases, the judges regularly face the difficult but crucial task of evaluating eyewitness's testimony. This sometimes means checking whether the witness's story fits with other established facts of the case. However, the veracity of such a story cannot always be verified or falsified directly. In such cases judges will have to look at whether the statement comes from a reliable source.

Further, an eyewitness's testimony is probably the most persuasive form of evidence presented in court, but in many cases, its accuracy is dubious. There is also evidence that mistaken eyewitness evidence can lead to wrongful conviction sending people to prison for years or decades, even to death row, for crimes they did not commit.

In considering the evidence of an eye witness, the Court should look at the demeanour of the witness, the inherent probability of the account, any internal inconsistencies in the account, whether the account is consistent with previous statements by the witness, whether the witness has any bias against the accused or any family or group to which the accused belongs, whether the evidence at the crime scene supports the account, and whether the witness's testimony is supported by the testimony of other witnesses. These factors are very important as the burden of proof is on the prosecution in all criminal cases.

In **The Queen v. K.A. Santin Singho 65 NLR 447** the court held that:

“It is fundamental that the burden is on the prosecution. Whether the evidence the prosecution relies on is direct or circumstantial, the burden is the same. This burden is not altered by the failure of the appellant to give evidence and explain the circumstances.

PW2 is a three-wheeler driver who also lives in Samithpura where the deceased and the Appellant live. The Appellant was a well-known person to PW2. When the deceased was returning from the temple, the Appellant and another waylaid and had attacked the deceased with sharp knives by forcibly entering his three-wheeler. This witness identified the Appellant positively but failed to identify the other person.

Although the Learned Counsel for the Appellant highlighted some portions of PW2 and submitted to court that highlighted portions are contradictory to the evidence given in evidence in compared to his statement to the police. But the Counsel who appeared in trial court failed to mark those portions as contradictions. The Learned High Court Judge in judgment had very correctly penned down that he has no reason to disbelieve the evidence given by PW2 in the trial. The relevant portion of the judgment is re-produced below:

Page 485 of the brief.

3 වන වූදිතට එරෙහිව අසත්‍යය සාක්ෂියක් ලබා දීමට තරම් හේතුවක් පැ.සා.02ට පැවති බවට කිසිදු කරුණක් සාක්ෂි මගින් අනාවරණය වන්නේද නැත. පැ.සා.02 ගේ සාක්ෂිය මගින් කිසිදු පරස්පරතාවයක් ලකුණු කිරීමට හෝ ඌණතාවයන් කෙරෙහි අවදානය යොමු කිරීමටද විත්තිය සමත්ව නැත. ඉහත සියලු කරුණු සලකා බැලීමේදී පැ.සා.02 විශ්වාසනීයත්වයෙන් යුතු සහ සත්‍යවාදී සාක්ෂිකරුවෙකු බව මෙම අදිකරණය තීරණය කරයි. ඔහුගේ සාක්ෂිය ප්‍රතික්ෂේප කිරීම සඳහා කිසිදු හේතුවක් නැත.

The credibility of the witness does not stand impeached merely by proving contradictions on record. It is required for the defence side to establish that prosecution witnesses may deliberately depose change or improve their original statement to cause prejudice to the accused. Similarly, minor omission or discrepancy in evidence is not enough to hold the accused not guilty. Thus, by striking out balance and by evaluating evidence in proper perspective justice can be done. The following cases are very important in this regard.

1. **State Rep. by Inspector of Police v. Saravanan** AIR 2009 SC 152
2. **Acharaparambath Pradeepan & Anr. v. State of Kerala** 2006 13 SCC 643
3. **Kehar Singh & Ors v. State (Delhi Admn.)** [3] AIR 1988 SC 1883

As the evidence given by the sole eyewitness does not create a doubt or ambiguity over the prosecution version, the ground raised by the Appellant does not sufficient to create a reasonable doubt in favour of the Appellant.

Hence, I conclude that the appeal ground raised by the Appellant has no merit.

As discussed under the appeal ground advanced by the Appellant, the prosecution had adduced strong and incriminating evidence against the Appellant. The Learned High Court Judge had very correctly analyzed all the evidence presented by both parties and had concluded that the Appellant is guilty to the murder charge.

As the Learned High Court Judge had rightly convicted the Appellant for the charge levelled against him in the indictment, I affirm the conviction and dismiss the Appeal of the Appellant.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL