

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

In the matter of an appeal in terms of 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.

1. The Hon. Attorney General,  
Attorney General Department,  
Colombo 12.

**COMPLAINANT**

**CA No. CA/HCC/0179/2015  
HC Trincomalee Case No.  
HCT/590/14**

v.

1. Nijabdeen Nazeer
2. Madhar Zaiyadeen Nazeer

**ACCUSED**

**And Now Between**

1. Nijabdeen Nazeer

**1<sup>st</sup> ACCUSED - APPELLANT**

**BEFORE** : M. Sampath K. B. Wijeratne J. &  
M. Ahsan. R. Marikar J.

**COUNSEL** : Shavindra Fernando, PC. with Thivanka  
Attygalle and Rikaz Riffard for the 1<sup>st</sup>  
Accused - Appellant.

Dileepa Pieris, SDSG for the Respondent.

**WRITTEN SUBMISSIONS** : 15.01.2019 (by the Appellant)  
10.06.2019 (by the Respondent)

**ARGUED ON** : 28.11.2023

**DECIDED ON** : 19.01.2024

**M. Sampath K. B. Wijeratne J.**

**Introduction**

The Appellant is the 1<sup>st</sup> Accused who was indicted together with the 2<sup>nd</sup> Accused in the High Court of Trincomalee for the commission of murder of Maiudeen Izzadeen, an offence punishable under Section 296 read with Section 32 of the Penal Code. The trial proceeded before the High Court Judge sitting without a Jury.

After the closure of the prosecution case, the learned High Court Judge acquitted the 2<sup>nd</sup> Accused. The 1<sup>st</sup> Accused – Appellant was found guilty of murder by the judgement delivered on the 12<sup>th</sup> of August 2015 and the learned High Court Judge proceeded to sentence the 1<sup>st</sup> Accused Appellant to death. The 1<sup>st</sup> Accused-Appellant appealed therefrom to this Court.

The appeal is based on the following grounds:

1. The learned High Court Judge failed to give due credit to the *alibi* of the Appellant and totally rejected the evidence of the 1<sup>st</sup> Accused – Appellant.

2. The learned High Court Judge misdirected himself as to the burden of proof.
3. The learned High Court Judge failed to direct himself according to the *turnbull* principle.
4. The learned High Court Judge failed to consider the presumption of innocence.

The learned President's Counsel for the Appellant contended that the learned High Court Judge discredited the *alibi* raised by the 1<sup>st</sup> Accused-Appellant in his evidence for the reason that no evidence has been presented before Court as to who was with the 1<sup>st</sup> Accused-Appellant at the time of the incident. Accordingly, it was argued that placing the burden on the Accused is against the general principles with regard to the defence of *alibi*. When a defence of *alibi* is taken, there is no burden of proof on the Accused. The defence evidence on *alibi* has to be merely weighed with the prosecution evidence. If the *alibi* is not believed it fails. If it is believed it succeeds. If it is neither believed nor disbelieved, but holds that it creates a reasonable doubt on the prosecution case, the 1<sup>st</sup> Accused is entitled to be acquitted.

The learned President's Counsel for the 1<sup>st</sup> Accused-Appellant argued that the 1<sup>st</sup> Accused-Appellant was an unknown person to the 2<sup>nd</sup> witness who was the eye witness to the shooting. The 1<sup>st</sup> Accused – Appellant was seen by her for the first time in the same afternoon whilst engaged in an argument with the deceased. The learned President's Counsel submitted that at the time of shooting she had only managed to obtain a side glance of the gunman who was on a moving motorcycle. Accordingly, he contended that the *turnbull* principle has a paramount importance in this case. As per this well-established principle Court has to consider,

- i. The duration for which the witness observed the Accused.
- ii. The distance between the witness and the Accused.
- iii. The lighting conditions prevailed at time of identification.
- iv. The time elapsed between the initial observation and the subsequent identification.

In this particular instance, the witness had a brief encounter with the gunman. Despite the relatively short distance, it is crucial to note that the lighting conditions near a lamppost differ significantly from those during the daytime. Furthermore, the witness identified the 1<sup>st</sup> Accused - Appellant from the dock,

a substantial amount of time after the incident. The prosecution did not conduct an identification parade. Consequently, as argued by the learned President's Counsel for the 1<sup>st</sup> Accused – Appellant, the identification of the 1<sup>st</sup> Accused is unsatisfactory.

In the instant case, the prosecution led the evidence of witnesses Abdul Sameedu Sithy Nisa the 1<sup>st</sup> witness, who is the wife of the deceased, Alavudeen Jezeema, the 2<sup>nd</sup> witness, step daughter of the deceased, the Judicial Medical Officer, Ekanayake Mudiyanseelage Gamini Gunathunga, the 4<sup>th</sup> witness Chief Inspector Lokuya Dehige Aruna Shiyamantha Chandrapala, the 6<sup>th</sup> witness Sub Inspector, Kalubandage Thilakarathne, and the 7<sup>th</sup> witness Police Sargent Widanagedara Bandula Piyasoma, on behalf of the prosecution. The case record of the non-summary inquiry at the Magistrate's Court was submitted to Court through the interpreter of the Court.

The relevant facts of this case are as follows. On the fatal day, the deceased, accompanied by his wife (the 1<sup>st</sup> witness), step-daughter (the 2<sup>nd</sup> witness), and his own son, visited the mother's house of the 1<sup>st</sup> witness. They returned home around 8:30 p.m., with the deceased and the 1<sup>st</sup> witness arriving on a motorcycle, while the two children followed on a bicycle. The motorcycle came to a stop in front of their residence.

As they arrived, the 1<sup>st</sup> witness disembarked from the motorcycle and walked towards the entrance of the house. According to her statement, she initially mentioned hearing the sound of a gunshot as she stepped off the motorcycle. However, in a subsequent instance, she stated that the gunshot was heard after she had reached the door of the house, having dismounted the motorcycle.

When the 1<sup>st</sup> witness observed her husband, she noticed him leaning against the motorcycle, and the two children had also approached the motorcycle. At that moment, the witness observed three individuals riding away on a motorcycle via a different road. However, she could not identify any of them. Notably, the witness mentioned that the third person on the motorcycle was carrying a gun. The incident transpired near an electric lamppost where there was illumination.

In response to a question from the prosecution, the witness disclosed that the deceased had an ongoing land dispute with the 1<sup>st</sup> Accused - Appellant. She identified the 1<sup>st</sup> Accused- Appellant as Nazeer, also known as Dhoni's son, the witness had known him for a long time.

On that evening, there had been an altercation between the 1<sup>st</sup> Accused - Appellant and the deceased in the neighbouring land. During this confrontation, the 1<sup>st</sup> Accused, while abusing the deceased, threatened of a potential bloodbath. It's noteworthy, however, that the witness did not identify the 1<sup>st</sup> Accused - Appellant at the scene of the crime. This information suggests a prior conflict between the 1<sup>st</sup> Accused and the deceased, adding a potential motive tied to a pre-existing dispute between the deceased and the 1<sup>st</sup> Accused - Appellant.

The 2<sup>nd</sup> witness, the step-daughter of the deceased, affirmed that on the fateful evening, she, along with the deceased, the 1<sup>st</sup> witness, and her brother, travelled to her maternal grandmother's house in a bicycle and a motorcycle. The learned President's Counsel for the 1<sup>st</sup> Accused, sought to challenge the credibility of her account, arguing that it's improbable for her to cover a distance of six kilometres on a bicycle, especially following a motorcycle. However, it is within common knowledge that such practices are not uncommon in rural areas, and the 2<sup>nd</sup> witness stated that the motorcycle travelled at a slower speed.

According to the 2<sup>nd</sup> witness, upon returning around 8:30 p.m., the 1<sup>st</sup> witness dismounted the motorcycle and walked up to the gate, while the deceased remained seated on the motorcycle. At that moment, three individuals arrived on a motorcycle from behind and shot the deceased while he was still seated. The witness stated that the person with the gun and who fired the shot was the third individual on the motorcycle. The 1<sup>st</sup> witness confirmed that it was the third person on the motorcycle who had the gun. The 2<sup>nd</sup> witness identified the person as the 1<sup>st</sup> Accused of this case.

However, it's important to note that the 2<sup>nd</sup> witness admitted to not knowing the 1<sup>st</sup> Accused – Appellant prior to the incident and was unaware of the name of the 1<sup>st</sup> Accused's father. She stated that the first encounter with the 1<sup>st</sup> Accused - Appellant occurred on the same afternoon when her deceased stepfather had a dispute over land with the 1<sup>st</sup> Accused – Appellant and three others. Despite the presence of another individual, including the 1<sup>st</sup> Accused - Appellant, at the land dispute scene, and the fact that the witness did not know the 1<sup>st</sup> Accused - Appellant by name, no identification parade was conducted to identify the Accused.

It is important to highlight that in one instance, the 1<sup>st</sup> witness mentioned that people referred to the 1<sup>st</sup> Accused – Appellant as Dhoni's son, but she did not

specify whether this information was known before or after the incident. Overall, the 2<sup>nd</sup> witness maintained that she did not know the name of the 1<sup>st</sup> Accused or his father's name prior to the shooting. This complexity in the witness's identification and knowledge raises questions about the reliability of the identification process and the clarity of the witness's pre-existing knowledge about the 1<sup>st</sup> Accused – Appellant.

The 4<sup>th</sup> witness; Judicial Medical Officer, testified on the post-mortem examination he conducted on the deceased. According to the post-mortem report, marked as 'P1,' the deceased had suffered a total of seven gunshot injuries.

The first injury, identified as an entry wound, was located at the back of the body and resulted from penetration into the middle part of the chest, near the shoulder. The witness also identified the corresponding exit wound on the right side of the front chest. According to the evidence, this particular injury inflicted severe damage to the right lung.

The second injury was identified as an entry wound in the back of the body, close to the centre of the shoulder. According to the witness, this injury resulted in damage to the muscles only. Consequently, the exit wound was also located on the back of the body.

The third injury was described as an entry wound in the back of the body. The witness stated that the bullet causing this injury did not exit the body but penetrated to the bones.

Moving on to the fourth injury, it was described as an entry wound in the lower part of the right ear. The witness pinpointed the exit wound of this bullet on the forehead, close to the crown of the head. According to the witness, this injury caused severe damage to the inner parts of the brain.

The fifth injury was identified as an entry wound behind the lower part of the right ear. The witness indicated that the exit wound for this bullet was near the crown of the skull, towards the right side. This injury, too, caused damage to the inner parts of the brain.

The sixth injury, similarly an entry wound behind the right ear, had its exit wound identified on the back of the head itself. The witness testified that this injury resulted in damage to the internal parts of the brain.

The seventh injury was described as an entry wound on the front of the body, situated above the left eye. According to the witness, the bullet causing this injury penetrated the inner parts of the brain, leading to mutilation. Notably, the witness did not identify an exit wound corresponding to this particular injury.

During cross-examination, the witness provided the opinion that the gunshots were fired in an upward trajectory on the right back side of the body. Additionally, the witness explicitly stated that the gunshots would have been discharged by raising the gun higher from a lower position. This could have occurred either while the deceased was standing or, if not, when he was in a fallen position.

According to the eyewitness, the gunshot was fired while both the deceased and the gunman were seated on their respective motorcycles. On the other hand, the expert's opinion suggests a different scenario, indicating that the gunshot was fired in an upward trajectory on the right back side of the deceased's body. Accordingly, the contradiction between the testimony of the eyewitness (witness No. 2) and the expert's opinion is apparent.

The 1<sup>st</sup> witness, who is also an eyewitness, stated that when she looked at the deceased after hearing the gunshot, he was leaning towards the motorcycle. These discrepancies between the eyewitness account and the expert's opinion were highlighted by the learned President's Counsel for the 1<sup>st</sup> Accused-Appellant. He argued that the version presented by the eyewitness does not align with the expert's analysis, raising questions about the consistency and accuracy of the testimonies.

The learned President's Counsel raised a pertinent argument regarding the inconsistency in the number of gunshots mentioned by the witnesses. Although both the 1<sup>st</sup> and 2<sup>nd</sup> witnesses spoke of one gunshot, the medical examination revealed multiple entry wounds, including six on the back and one on the front of the body.

I observe that injuries No. 1, 2, 3, 4, 5 and 6 are on the back of the body. The corresponding exit wounds of injury No.2 and 6 are also on the back itself. However, since the witness has expressed the opinion that gunshots had been fired on the back right side of the body, court cannot rule out the possibility of having an entry wound as well as an exit wound on the same side of the

body. Nevertheless, Injury No. 7 is an entry wound above left eye, on the front of the body.

Considering the existence of numerous entry wounds on the back, caused by one gunshot, it appears implausible for the same gunshot to cause injury No. 7 above the left eye. The prosecution did not question the Judicial Medical Officer about this particular injury, and the witness also did not offer an explanation.

This inconsistency raises questions about the accuracy of the eyewitness testimonies and the possibility of more than one gunshot.

As a result, substantial doubt arises concerning the truthfulness of the alleged gunshot, as described by the 1<sup>st</sup> and 2<sup>nd</sup> witnesses.

In the plaint presented to the Magistrate's Court on the 3<sup>rd</sup> April 2008, the prosecution listed an empty cartridge from a 9mm pistol and a melted lead bullet. The High Court called for the same productions from the Magistrate's Court<sup>1</sup>. However, as per the communication from the Registrar of the Magistrate's Court of Trincomalee, the prosecution had submitted six empty cartridges to the Magistrate's Court. Notably, none of these productions were produced or identified by the witnesses. Moreover, the prosecutions failed to obtain a Government Analyst report concerning the pistol, bullets, and empty cartridges, which could have established whether they were discharged from the recovered pistol.

If six empty cartridges were found at the crime scene, it logically implies that at least six shots were discharged from the pistol. However, the testimony of the two witnesses only mentions a single gunshot. This inconsistency raises a significant doubt regarding both the firearm employed and the number of shots fired.

In view of the analysis above, I am of the view that the conviction and the sentence imposed by the trial Judge is not supported by evidence and is clearly against the weight of the evidence lead at the trial.

The learned Senior Deputy Solicitor General for the Complainant-Respondents at the hearing rightly conceded that the judgement of this case cannot be upheld and should be set aside.

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<sup>1</sup> At page 520 of the Docket.



For the reasons stated above in this judgement I hold that the judgement cannot be allowed to stand and therefore, I set aside the conviction and the sentence of the High Court Judge.

The 1<sup>st</sup> Accused-Appellant is acquitted of the charge against him.

**JUDGE OF THE COURT OF APPEAL**

**M. Ahsan. R. Marikar J.**

I Agree.

**JUDGE OF THE COURT OF APPEAL**