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

In the matter of an Appeal against an Order of the High Court under section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

1. Jagath Kumar De Silva
2. Rathna Chaminda Gunathilaka

(2nd Accused is deceased)

Accused

Court of Appeal Case No:
CA/HCC/0041/23

High Court of Balapitiya Case No:
CRI 1307/10

And now between

Jagath Kumar De Silva
(Presently in Welikada Prison)

Accused-Appellant

Vs

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

Respondent

Before	:	**Hon. P Kumararathnam, J.** **Hon. Pradeep Hettiarachchi, J.**
Counsel	:	Anoopa De Silva for the Respondent Sarath Jayamanne PC with Asith Siriwardene, Vineshka Mendis, Prashan Wickremaratne, Sanjeewa Meegahawaththa and M.A. Noorie for the Accused-Appellant
Argued on	:	30-04-2025
Written Submission filed on	:	04-08-2023 by the Accused Appellant 29-02-2024 by the Respondent
Decided on	:	04-07-2025

Pradeep Hettiarachchi, J

JUDGEMENT

Background

1. The Accused-Appellant, Jagath Kumar De Silva (hereinafter referred to as the "Appellant") and the 2nd Accused Hakkini Chaminda Gunathileke (hereinafter referred to as the "2nd Accused") were indicted before the High Court of Balapitiya on 01-06-2010, under section 296 read with section 32 of the Penal Code for the sole charge of causing the death of Bodhandi Anil De Silva ("Deceased") on or about 23-01-2004.

2. The 2nd Accused passed away during the pendency of the trial, and thereafter, the Indictment was amended on 07-02-2022 to reflect this change.

3. The trial commenced without a jury by the High Court Judge. At the conclusion of the trial, the Appellant was found guilty of the charge of murder and was convicted on 19-01-2023. Accordingly, the Appellant was sentenced to death for the charge of murder.

4. Being aggrieved by the aforesaid conviction and sentence, the Appellant has preferred this Appeal.

5. The shooting incident that caused the death of the Deceased had taken place on 23-01-2004, near the Rajjawatte culvert at around 10:10 am. At the trial before the High Court, following witnesses had given evidence for the prosecution;

   (a) PW1 (Wife of the Deceased)- Yagama Kamani Ranjani De Silva
   (b) PW2 (Daughter of the Deceased)- Bodahandi Asika Niranji
   (c) PW4 (Officer-in-Charge, Ahungalla Police)- IP K.G. Kamal Kiriella
   (d) PW5 (District Medical Officer)- Dr. Jayathilaka
   (e) PW6 –SI Buddheen Godahewa (Retd.)
   (f) PW7- SI Malliyawadu Nevil Rohana
   (g) PW9- PS S.L.K. Ranjan De Silva
   (h) Court Interpreter- summoned to admit the statutory declaration in terms of section 199(3) of the Code of Criminal Procedure Code Act No. 15 of 1979 (as amended)

6. PW 3 namely Kalumith Lasantha (also referred to as "Podi Sudda" by PW1 and PW2 in their evidence) who was listed in the Indictment was not summoned as a witness.

7. After the close of the prosecution's case, the Appellant made a dock statement denying his involvement in the alleged crime and further proceeded to call one Dehinga Amitha Mendis (hereinafter referred to as "DW1") to give evidence on his behalf.

Summary of Evidence

8. As per the evidence given by PW 1, on the day of incident PW 2 (i.e. the daughter of the Deceased) was to be admitted to a new school namely "Prajapathiya" on 23-01-2004. The Deceased was already seated in the driving seat of the van with the engine on, around 70-80 meters away from their house, when PW1 and PW2 walked to the van and got into the rear of the van. The van was facing the direction of Colombo at that time. PW 1 had sat behind the Deceased, while PW 2 sat next to her. One 'Podi Sudda' (i.e. PW3) was also seated on the passenger seat at the front and the shutters of both sides were open. Three persons namely, Shantha Ravindra and Pradeep had been seated on the culvert and they had been talking with the Deceased before the shooting incident took place. Thereafter, the Appellant and the 2nd Accused had arrived there from the sea side. The Appellant had chased away the aforesaid persons who were seated near the culvert and gone to the right side of the van. The 2nd Accused had gone to the left side of the van. The Appellant put his hands through the open window and shot the Deceased using a small black weapon which she said was crumpled up in his hand. According to PW1, the Appellant had fired 7-8 shots at the Deceased. The 2nd Accused who was also on the left side of the van shot the Deceased.

9. After both the Accused shot the Deceased, PW3, remained seated and did not do anything when the Deceased was shot. The Deceased had fallen towards PW3. The Appellant and the 2nd Accused had threatened her saying "සාක්ෂි දුන්නොත් බලාගෙනයි මරනවා". Thereafter, the Appellant and the 2nd Accused ran away towards the beach side and PW3 quietly left the scene.

10. Thereafter, she had cried for help and one Kapila had come to assist. She and Kapila had taken the Deceased to the hospital and the Deceased had not spoken to her on the way. PW1 had gone to the Police Station at around 10.50 am and lodged the first complaint. The incident had taken place at around 10.10 am.

11. According to PW2, she was supposed to be admitted to a new school "Prajapathiya" that morning. PW1 accompanied her to the van, which was about 75 meters away from their residence, and the engine of the van was on. PW2 got inside the van first and then PW1 followed her. They seated at the back of the van. The Deceased was seated on the driver's seat and was smoking a cigarette. PW3 was also seated on the front passenger seat. She stated that the shutter on the left side was open and that the shutters on the right side were closed. She had seen both the accused persons coming from the sea side and the Appellant came to the right side of the van while the 2nd Accused came to the left side of the van. Thereafter, the Appellant fired 4 shots with a gun which seemed like a toy gun; around 4-5 inches in length. Thereafter, PW3 got down from the van and walked away. The 2nd Accused came and then shot the Deceased. She had stated that soon after the incident, PW1 took her home and thereafter she was taken to the home of one Basiya Mama. She had also stated that she had given a statement to the police on the same day.

12. PW4, Officer-in-Charge of Ahungalla Police had given evidence stating that first information was received on 23-01-2004 by PS 11699 Godahewa (i.e.PW6) and was informed to him. PW4 had arrived at the crime scene at around 11.15 am. The first statement was recorded from PW1 at around 10.50 am on the day of the incident and statements of PW3 and DW1 had also been recorded on the same day at around 11.30 am and 11.55 am respectively. However, the statement of PW2 had been recorded on 07-02-2004, two weeks after the incident.

13. PW5, the District Medical Officer who conducted the post mortem examination of the Deceased, had given evidence stating that there were three categories of wounds on the body of the Deceased. 1st category was the burn marks from right to left behind the head resulting from the sparks that came from the gun. According to him, there were 3 gun shots, but there was no penetration to the skull, only the skin of the head was burnt. This category of wounds was a result of shooting of aimed at the head by keeping the gun on the head and the shooting was from the right side of the Deceased. The 2nd category of wounds could be observed in the chest area of the Deceased. The bullet had penetrated into the chest from the direction of, top left to the bottom. The shooting was from the left side of the Deceased, from 3-4 feet away. The 3rd category of wounds could be observed in the abdomen area of the Deceased. The bullet had penetrated into the left side of the abdomen. Shooting was from the left side of the Deceased. He had also stated that while the 2nd and 3rd categories of wounds would cause death in the ordinary cause of nature, the 2nd category would immediately result in death. The Deceased had been shot from opposite directions simultaneously.

14. PW9 had testified stating that he was present at the postmortem examination at the Balapitiya Hospital on 23-01-2004. He had stated that two bullets were recovered by the District Medical Officer and were handed over to him. PW9 had also confirmed that the statement of PW2 was recorded on 07-02-2004 on the orders of the Officer-in-Charge of Ahungalla Police on that same day.

15. I now proceed to deal with the several grounds of appeal advanced by the learned President's Counsel appearing for the Appellant.

Grounds of Appeal

16. The grounds of appeal advanced by the Appellant are as follows:

    (a) Due to his failure to evaluate the credibility of the prosecution witnesses using the accepted tests of consistency, probability and spontaneity the learned trial judge has failed to conclude that the case of the prosecution has failed;

    (b) The learned trial judge has failed to evaluate the role that the eye witness PW3' s testimony would have played had he been called a witness, and has failed to draw an adverse inference against the prosecution for their failure to call PW3;

    (c) The learned trial judge has failed to identify that a fair investigation had not been conducted, as the statements of the witnesses at the scene have not been recorded;

(d) The learned trial judge had failed to analyze the defense case in a lawful manner and has failed to reject the evidence of the defense witness and;

(e) The learned trial judge has erroneously arrived at the finding that the case is proved beyond reasonable doubt.

17. However, in the argument, the Appellant limited his grounds of appeal to three grounds, i.e.,

(a) Due to the learned High Court Judge's failure to evaluate the credibility of the prosecution witnesses using the accepted tests of consistency, probability and spontaneity he has failed to conclude that the case of the prosecution has failed;

(b) The learned trial judge has failed to evaluate the role that the eye witness PW3's testimony would have played had he been called a witness, and has failed to draw an adverse inference against the prosecution for their failure to call PW3;

(c) The defense witness Amitha Mendis's evidence was not taken into consideration and the learned trial judge has failed to reject her evidence and;

Consideration of Grounds of Appeal

(a) Has the learned trial judge failed to evaluate the credibility of the prosecution witnesses using the accepted tests of consistency, probability and spontaneity consider contradictions?

18. It is the contention of the learned President's Counsel for the Appellant that the testimonies of the key prosecution witnesses, do not pass the tests of consistency, spontaneity and probability and as such cannot be considered as credible. It has been further submitted that in the absence of any credible witnesses regarding how the incident took place, the prosecution has failed to discharge their duty which has not been considered by the learned trial judge.

19. It was contended by the learned President's Counsel that there exist serious *inter se* contradictions in the evidence given by PW1 and PW2, regarding the main incident and also the events taken place subsequent to the main incident.

20. According to PW1, the shutters on both sides of the vehicle were open. However, quite contrarily, PW2 states that all the shutters except the one on the left were closed (වම් පැත්තේ එක ඇරලා තිබුණා අනිත් පැත්තේ ඒවා වහලා තිබුණා). Therefore, if the PW2's version is relied on (i.e. that there had been shooting from the right side while the shutter was closed) there has to be broken shards recovered from crime scene, as the shooting had taken place while the shutter on the right side was still closed. However, neither does the investigating officer speak of such fact, there is no mention of any shards being recovered from the crime scene. Also, the post mortem report of the District Medical Officer doesn't refer to any such cuts or lacerations possibly caused due to the broken shards.

21. Furthermore, according to PW1, both the Appellant and the 2nd Accused came simultaneously and shot the Deceased while PW3 was seated in the front seat. However, according to PW2's evidence, after the Appellant shot at the Deceased PW3 opened the door and walked away from the scene. Only then the 2nd Accused shot the Deceased from the left side of the vehicle.

22. The learned trial judge has also noticed the above contradictions highlighted by the Defense Counsel, but proceeded on the basis that the above contradictions do not go to the root of the case. With regard to the first contradiction mentioned above, the learned trial judge in his judgment has stated that PW2 has not made a definitive statement regarding whether the shutter on the right side of the van was open or not and therefore, whether right-side shutters were closed at the time of shooting was not very clear. Whilst noting that the Appellant would not have been able to shoot the Deceased if the shutter near the driving seat had been closed, he has glossed over the said contradiction as a minor contradiction that does not go to the root of the case.

23. Furthermore, the learned trial judge was of the opinion that, at the time the aforesaid shooting incident took place, PW2 was only 8 years old and that considering the traumatic experience that she had to undergo as a child, it is quite probable that her evidence might contain some discrepancies/inconsistencies. The learned trial judge, has accepted the evidence of PW2, in spite of the above contradictions highlighted by the defense and attempted to reconcile the evidence of PW2 with that of PW1.

24. The case law authorities decided by the Supreme Court provide some guidelines regarding how a contradiction should be evaluated. In ***Bandaranayake vs. Jagathsena*** [1984] 2 SLR 397 it was held by Colin Thome J that;

> *"In evaluating and analyzing contradictions inter-se of two witnesses, the Judge must probe whether discrepancy is due to dishonesty, or defective memory or whether witness's power of observation was limited"*

25. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be given too much importance. ***Boghi Bhai Hirji Bhai vs. State of Gujarat*** AIR 1983 SC 753.

26. In the case of ***Veerasamy Sivathasan vs. AG*** SC Appeal 208/2012 (15 December 2021) which cited the case of ***State of Uttar Pradesh vs. M. K. Anthony*** and held that;

> ***"****While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view of the deficiencies, draw-backs and infirmities pointed out in evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily*

permit rejection of the evidence as a whole. ... Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals..."

27. Once the Court finds that the eye witness account is corroborated by material particulars and is reliable, it cannot discard his evidence only on the ground that there are some discrepancies in the evidence of witnesses.

28. As has been held by the Court in ***State of Rajasthan v. Smt. Kalki and Another*** (1981) 2 SCC 752, *in the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition of the witnesses and the like. Unless, therefore, the discrepancies are ―material discrepancies so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses.*

29. In my opinion, above mentioned contradictions go to the root of the case as they cast doubts on the credibility of the two key witnesses of the prosecution and their version of events. The learned trial judge has failed to accept the fact that these contradictions are material in nature, casting serious doubts on the prosecution's version of events.

30. Also, it should be noted that PW2 had made her statement to the police two weeks after the incident, while all other eye witnesses' statements had been recorded on the day the incident took place. She testified that the police recorded her statement on the evening of the date of the incident. However, both PW4 and PW9 stated that the police recorded her statement on 07-02-2004 at around 10.10 am at her residence.

31. As stated earlier, PW1 and PW2 are the wife and the daughter of the Deceased. Therefore, there was ample opportunity for PW1 to coach PW2 in order to tally PW2's version with PW1's narration of events and also covering the improbableness/gaps in PW1's statement.

32. In the case of ***Haramanis v Somalatha*** [1983] 3 Sri.LR 365 which was quoted with approval in ***Mohamed Rasik Mohamad Minaur Alias Seenu v The Attorney General*** CA HCC/0185/2017 (CA Minutes of 03-03-2022) it was held that;

"...The law in its wisdom requires that the statement should be made within a reasonable time. The test is whether it was made as early as could reasonably be expected in the circumstances and whether there was or was not time for tutoring and concoction. It is a question of fact depending on the attendant circumstances of the case. No hard and fast rule can be laid down as to when a statement is sufficiently contemporaneous. ..."

33. Furthermore, in ***Panchi and Others v State of Uttar Pradesh*** (1998) 7 SCC 177 the Indian Supreme Court held that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. It was further held that "the law is that the evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible."

34. It is also important to note that this delay has not been explained by the prosecution and that the learned trial judge has failed to inquire into the delay or require a justifiable and plausible explanation for the same. The necessity for such probing has been established in Sri Lankan jurisprudence as follows;

35. In ***Sumanasena v Attorney-General*** [1999] 3 Sri.LR 137 it was held that;

> *"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 belated witness."*

36. Also, in ***Ajith Samarakoon v The Republic*** [2004] 2 Sri.LR 209 (at pg 220), it was held by Jayasuriya J 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 examine the reasons for the delay. If the reasons for the delay adduced by the witness are justifiable and probable the trial Judge is entitled to act on the evidence of a witness who had made a belated statement."*

37. In the case of ***Kahandagamage Dharmasiri v AG*** SC Appeal 4 of 2009, SC/SPL/LA 165 of 2008, it was held that;

> *"...When considering the belated evidence or a belated statement, one cannot neglect the basis for such delay which transpired in the evidence. ..."*

38. Therefore, in light of the authorities cited above, it is clear that the judge could have acted on the evidence of PW2 only if the prosecution had shown plausible and justifiable reasons explaining the cause for such delay. However, the learned trial judge has not mentioned anywhere in his judgment that he has done that necessary probing that was required before acting on evidence of PW2. Instead, he has mentioned that no contradictions were marked by the defense, between PW2's initial statement to the police on 07-02-2004 and her evidence given at the trial.

39. Moreover, PW1 testified that when the two Accused shot the Deceased, PW3 remained seated in the front passenger seat. I find it highly improbable that in a situation where two gunmen were firing shots at the Deceased simultaneously from both sides PW3, being a very young boy, was able to maintain his calm composure without making any effort to save PW1, PW2, the Deceased or PW3 himself or even cry for help.

40. Also, the fact that PW3 was not hit by any of the bullets fired at the Deceased was improbable. According to the evidence given by the District Medical Officer, 3 shots were fired from the right towards the head of the Deceased and while the wounds on the skin were visible, there was no penetration to the skull. Therefore, there was a probability that the 3-gun shots that were aimed at the Deceased, must have missed the Deceased hitting PW3, if the prosecution's narration of events was true. In fact, if the two Accused

shot the Deceased simultaneously from both directions, as PW1 had stated, it was quite probable that PW3 could have also got hurt.

41. In light of the above, the only reasonable inference that could be drawn is that PW1 was not there at the crime scene when the shooting incident had taken place and after realizing certain improbabilities contained in her version of events to the police, PW1 coached PW2 to recite a slightly different version of events according to which PW3 had left the vehicle prior to the shooting by the 2nd Accused.

42. Accordingly, I conclude that the evidence of the two key witnesses of the prosecution has failed the test of consistency, spontaneity and probability. The learned trial judge has failed to properly evaluate the evidence of these witnesses in line with the tests of consistency, spontaneity and probability, which if done, would result in a rejection of the evidence of two key prosecution witnesses.

(b) Has the learned trial judge failed to evaluate the role that eyewitness PW3's testimony would have played?

43. It was the position of the learned President's Counsel for the Appellant that the learned trial judge has failed to evaluate the role that eyewitness PW3's testimony would have played and that the failure of the prosecution to call PW3 should have resulted in the adverse inference under section 114(f) of the Evidence Ordinance being adopted against the prosecution.

44. The learned trial judge has also observed that PW3 is a crucial witness according to the prosecution version as he was the person who was seated close to the Deceased at the time of the shooting and would have seen the shooting incident clearly. Nevertheless, the learned trial judge had concluded that the PW3 was an unfavorable witness to the prosecution and was biased, and as such, there was no necessity for the adverse presumption under section 114 (f) of the Evidence Ordinance to be drawn against the prosecution. He has also arrived at the finding that the evidence given by PW3 is actually favorable for the Accused.

45. It appears that the learned trial judge has arrived at this finding based on the final submission made by the learned State Counsel. In the final submissions, the learned State Counsel has informed the Court that the position taken up by PW3 at the non-summary inquiry was false and that they should find out who is getting benefitted from such changing of the position.

46. Furthermore, the learned trial judge, by taking into consideration PW3's evidence that was given at the non-summary inquiry and not led at the trial before the High Court, has deviated from the standard/accepted procedure. He was wrong to base his decision on the State Counsel's speculations and the unfounded interpretation of PW3's evidence at the non-summary inquiry. By entirely relying on the final submissions made by the State Counsel, the learned trial judge has deprived the Accused of the opportunity to be heard.

47. Section 114(f) of the Evidence Ordinance reads as follows;

> *The Court may presume that the evidence which could be and is not produced, would if produced be unfavorable to the person who withholds it.*

48. However, section 134 of the Evidence Ordinance does not provide for any particular number of witnesses and it would be permissible for the Court to record and sustain a conviction on the evidence of a solitary eye witness. But, at the same time, such a course can be adopted only if evidence tendered by such a witness is credible, reliable, in tune with the case of prosecution and inspires implicit confidence.

49. This position has been elaborated in the case of ***Sinnathamby Ganeshan and Another v The Republic of Sri Lanka*** C.A. Appeal No. 57-58/2003 wherein the Court cited with approval ***Walimunige John & Another v The State*** 76 NLR 488;

> *"The prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross examination. Further it is not incumbent on the trial judge to direct the jury, save in exceptional circumstances that, they may draw a presumption under section 114(f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all.*
>
> *The question of presumption arises only where a witness whose evidence is necessary to unfold the narrative that is withheld by the prosecution and the failure to call such a witness constitutes a vital missing link in the prosecution case ad where a reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be mere repetition of the narrative."*

50. The above principle was enunciated in the case of ***Walimunige John v The State*** was also followed in ***Kumara de Silva v Attorney General*** [2010] 2 Sri.LR 169 and ***Ajith Fernando alias Konda Ajith and Others v Attorney General*** [2004] 1 Sri LR 288.

51. Accordingly, the prosecution is not bound to call all the witnesses listed in their list of witnesses and as the learned trial judge has correctly observed, the pertinent question to be asked is whether a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witness therefore constitutes a vital missing link in the prosecution case.

52. PW3 Kalumith Lasantha Kumara De Silva (also referred to as "Podi Sudda" by PW1 and PW2) had not been called to give evidence though he was listed in the list of prosecution witnesses and being referred to in the testimony of both PW1 and PW2 as having been at the crime scene. He was the person who occupied the left front seat when the Deceased was shot, and evidence of PW1 and PW2 shows that he had been in the vehicle at least when the Appellant shot the Deceased, and the 2nd Accused arrived at the scene, and therefore, he would have been the best witness. Especially, when two contradictory versions were given by the PW1 and PW2 as to the manner in which the Appellant and the 2nd Accused shot the Deceased, PW3 would have been the best eye witness to testify

and to eliminate any doubt about the way the Deceased was shot. To elaborate further, PW1's evidence is that PW3 was seated until both Accused shot the Deceased as opposed to the testimony of PW2 who stated that after firing a shot by the Appellant the 2nd Accused came from the left side of the vehicle and chased away PW3 before shooting the Deceased. In other words, considering the fact that there are *inter se* contradictions between the evidence given by PW1 and PW2 as regards the manner in which the shooting incident took place that ultimately resulted in the death of the Deceased it cannot be sensibly argued that PW3's narrative is not required to unfold the truthfulness of prosecution's version of events.

53. Furthermore, the fact that PW3 was listed as a witness leads to the reasonable assumption that his statement has been evaluated by the prosecution, and deemed to be of value to the case, despite the availability of other two witnesses. Therefore, I am of the opinion that, regardless of the nature of PW3's testimony, PW3 should have been called by the prosecution in the interests of justice and to unfold the truthfulness of the prosecution's narrative.

54. Therefore, in the attendant circumstances of this case this Court entitled to apply the presumption set forth in Section 114(f) of the Evidence Ordinance to the non-production of PW3's evidence at the trial which is to the following effect: "That evidence which could be and is not produced would if produced, be unfavorable to the person who withholds it."

(c) Has the learned trial judge failed to evaluate the evidence of the DW1 properly?

55. The learned President Counsel for the 1st Accused contended that the learned trial judge had failed to reject the evidence of DW1. Upon perusal of the judgment, it appears that the sole basis on which the learned trial judge has based his decision to discredit the evidence of DW1 was that DW1 had attempted to conceal the relationship that she had with the Appellant when giving evidence. He has further stated that DW1's intention to save the Appellant was clear as she had tried to give evidence in a manner that was favorable for the Appellant. Accordingly, he has arrived at the conclusion that DW1 is not a reliable witness and the evidence given by DW1 has not created a reasonable doubt on the prosecution's narration of events.

56. However, it is important to note that, when the Defense Counsel asked DW1 whether she knew the Appellant, she had answered in the affirmative. Furthermore, at the cross examination, when DW1 was specifically asked whether she was related to the Appellant, DW 1 had answered that the Appellant was distantly related to her. According to DW 1, the relationship is that the Appellant is the brother of DW1's husband's sister's husband. Therefore, *ex facie*, the relationship between DW1 and the Appellant seems to be quite distant.

57. Furthermore, when cross-examined by the learned State Counsel, DW1 admitted that the Deceased was also related to her. According to her evidence, the Deceased was married to the sister of one of her brother-in-law's wife. DW1's evidence regarding her relationship to the Appellant and the Deceased is produced below:

ප්‍ර	:	මේ 1 වන විත්තිකරු ඔබ දන්න කියන කෙනෙක් ද ?
උ	:	ඔව්
ප්‍ර	:	කොහොමද දන්නේ ?
උ	:	අපේ ගෙවල් වලට ඒහායින් ටිකක් ඉන්නේ.
ප්‍ර	:	ඊට අමතරව වෙන මොනා හරි දැන ඇදුනුම් තිබෙනවා ද ?
උ	:	ඒහෙම නැහැ. ගමේ කතා බහ කරනවා.
ප්‍ර	:	ඥාතිකමක් ඒහෙම තිබෙනවා ද ?
උ	:	දෙගොල්ලොම ඥාති වෙනවා. දුරින් ඉතිං.
ප්‍ර	:	දුරින් හරි ඥාති වෙනව ද ?
උ	:	ඔව්
ප්‍ර	:	ගමේ කමට නෙවෙයි 1 වන විත්තිකරු ඥාතියෙක් නේ ඔබේ ?
උ	:	දුරින් ඥාති වෙනවා.
ප්‍ර	:	දුරින් කියන්නේ කොච්චර විතර දුරින් ද කියන්න කෝ ?
උ	:	ජගත් කියන ඒක්කෙනා මගේ මහත්තයාගේ, නංගි බැදපු මහත්තයාගේ මල්ලි. අනිල් කියන කියන ඒක්කෙනා මගේ මහත්තයාගේ ලොකු මල්ලි බැදපු නෝනාගේ නංගි බැදපු ඒක්කෙනා

58. The fact that DW1 was related to the Deceased as well as to the Appellant had escaped the attention of the learned trial judge. The learned trial judge had discriminatingly used the relationship between the Appellant and DW1 to discredit the evidence of DW1.

59. Also, at the trial before the High Court, it had never been put to DW1 whether DW1 had any kind of animosity towards the Deceased or any special bias towards the Appellant. Therefore, the learned trial judge's conclusion that DW1 was trying to save the Appellant when she was testifying at the High Court as she was related to the Appellant is devoid of merit/ without any rational basis. In fact, if the same logic is applied to the prosecution's case, then evidence of PW1 and PW2 should also have to be rejected on the basis of bias to the prosecution, as they are closely related to the Deceased, being the wife and the daughter of the Deceased.

60. Moreover, it was submitted by the learned President's Counsel for the Appellant that the learned trial judge has failed to analyze DW1's evidence in the light of accepted tests of consistency, probability and spontaneity. According to the evidence, DW1 was living next to the place where the incident took place. DW1 had been sweeping the backyard of her house when she first heard the sound of the shooting, which she mistook for the sound of firecrackers. After approximately, 10-15 minutes after hearing this sound, she had

heard a woman crying and coming from the right side of her house through the fence and realized it was PW1. DW1 had then arrived at the crime scene. Considering the fact that DW1 lived close to both the crime scene and the house of the Deceased, it is not improbable that DW1 had seen PW1 approaching the crime scene.

61. However, given the fact that the Deceased's house was situated about 70-100 meters away from the crime scene, the learned trial judge has come into the conclusion that, that window of 10-15 minutes after DW1 heard the sound of the shooting was enough for the PW1 to go home and come back once again to the crime scene and that PW2 has in fact stated that her mother, PW1, went back home soon after the incident. In this regard, it is important to note that, when giving evidence PW1 had not mentioned that she went back home after the incident. Nevertheless, when trying to explain the probableness of PW1 going back to her house after the shooting incident and returning to the crime scene within that window of 10-15 minutes with PW2's evidence, it had escaped the attention of the learned trial judge that there exist *inter se* contradictions between the evidence of PW1 and PW2 that go to the root of the prosecution's case, that PW2's statement to the police was a belated one and therefore, there are serious doubts with regard to her credibility as a witness.

62. Also, no contradictions or omissions have been elicited by the prosecution regarding her version of events.

63. The police had arrived at the crime scene about an hour after the shooting incident and had recorded the statement of DW1 with her consent in less than two hours. This shows the spontaneity of her statement. It is unlikely that anyone had the opportunity to influence her or instigate her. Furthermore, no evidence is forthcoming from the prosecution to establish the fact that she was aware of the involvement of the Appellant at the time of giving the initial statement to the police. In fact, it appears that DW1 has merely stated what she had observed.

64. In view of the foregoing, I am of the opinion that the failure of the learned trial judge to properly evaluate the evidence of DW1 is a fatal error.

65. In the aforesaid circumstances, I answer the above grounds of appeal advanced by the Appellant in the affirmative.

Conclusion

66. In the aforesaid circumstances, I conclude that the prosecution has failed to prove its case beyond reasonable doubt.

67. For the reasons set out above, we allow the Appeal and we proceed to quash the convictions and sentences imposed on the Appellant by the learned High Court Judge of Balapitiya. Accordingly, we acquit the Appellant of all the charges leveled against him.

Judge of the Court of Appeal

Hon. P. Kumararatnam,J (CA)

I agree,

Judge of the Court of Appeal