

**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.

The Attorney General  
Attorney General's Department  
Colombo-12

**COMPLAINANT**

**Vs.**

**Court of Appeal No:**

**CA/HCC/0263/2020**

**High Court of Balapitiya**

**Case No. HC 2138/2018**

1. Peduru Hewa Cyril Kulatunga
2. Koththigoda Kankanamge Nandasiri
3. Koththigoda Kankanamge Chanaka  
Nanda Kumara
4. Koththigoda Kankanamge Indrajith  
Waruna Kulatunga

**ACCUSED**

**AND NOW BETWEEN**

Peduru Hewa Cyril Kulatunga

**ACCUSED- APPELLANT**

**Vs.**

The Attorney General

Attorney General's Department

Colombo-12.

**COMPLAINANT-RESPONDENT**

**BEFORE** : **P. Kumararatnam, J.**  
**R. P. Hettiarachchi, J.**

**COUNSEL** : **Sanath Singhage for the Appellant.**  
**Maheshika Silva, DSG for the Respondent.**

**ARGUED ON** : **12/01/2026**

**DECIDED ON** : **10/03/2026**

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## **JUDGMENT**

### **P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter referred to as the Appellant) together with the second, third and fourth Accused were indicted by the Attorney General for committing the double murder of Rambuka Vithanage Gunawathie and Koththigoda Kankanamge Kevin Nandakumara, an offence punishable under Section 296 read with Section 32 of the Penal Code on 14.01.2002.

They were also charged with the attempted murder of one Gonapinuwala Vithanage Ginadasa during the course of the same transaction, thereby committing an offence punishable under Section 300 read with Section 32 of the Penal Code.

The trial commenced before the High Court Judge of Balapitiya as the Appellant and the other two Accused opted for a non-jury trial. The prosecution had led 06 witnesses and marked productions P1 to P10 and closed the case.

The learned High Court Judge being satisfied that the evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the Accused. The 1<sup>st</sup> Appellant had given evidence from the witness box. The 2<sup>nd</sup> to 4<sup>th</sup> had provided dock statements and closed their case.

After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant as charged and sentenced him to

death on the 1<sup>st</sup> and 2<sup>nd</sup> count. For the third count, the Appellant was sentenced to life imprisonment with a fine of Rs. 20,000/-.

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused had been acquitted from all the charges by the learned High Court Judge of Balapitiya.

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. At the hearing, the Appellant was connected via the Zoom platform from prison.

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

According to PW2 Harendra, the incident sparked off as a result of a money transaction, locally known as 'Seettu'. On the day of the incident, in the morning an argument had erupted between the deceased Kevin Kumar and deceased Gunawathie over the nonpayment of the 'Seettu' money on time. The deceased Kevin Kumar, using foul language, scolded the deceased Gunawathie who happens to be the mother of the PW2. The deceased Gunawathie had conveyed about the incident to PW2 at around 9.30 am on the date of incident. PW2 had gone to the deceased Kevin Kumar and inquired as to why he had used inappropriate language against his mother. The deceased Kevin Kumar refused the payment of the money and challenged the witness to collect it by any means. Thereafter, the deceased Kevin Kumar attacked PW2 with a Katty. At this point, the 2<sup>nd</sup> Accused who is the brother of Kevin Kumar, had attacked Kevin Kumar. PW2 had lodged a complaint with the Meetiyyagoda Police regarding the assault.

According to PW7, Harendra, the 2<sup>nd</sup> Accused had come to PW2's house to discuss a settlement with PW1. After praying for mercy from PW1, Jinadasa, the 2<sup>nd</sup> Accused promised that the money due to PW1 would be settled in

due course. After initiating the settlement, when the 2<sup>nd</sup> Accused left the house, PW7 had followed him up to the road. At that time, he saw the Appellant on the road in front of their house. The Appellant challenged the witnesses to come for a fight and pushed the 4<sup>th</sup> Accused in front. Thereafter, the Appellant had walked up to lamp post and taken a firearm which had been close to the lamp post. After hearing a sound emanating as 'Chatas' the deceased Kevin Kumara had hung on the hand of the Appellant and pleaded not to shoot. But the firing had continued and the deceased Kevin Kumara had fallen down thereafter. The continuous firing resulted in both the mother and father of PW7 and PW2 falling down with gunshot injuries, and the mother of PW7 and PW2 had died on the spot. PW1, the husband of deceased Gunawathie had sustained gunshot injuries.

PW7 had picked up a pole and attacked the Appellant to prevent further firing. After attacking the Appellant with the pole, PW7 had also taken the gun in to his custody to prevent further firing by the Appellant.

The post mortem examination of both the deceased revealed that the death was caused due to firearm injuries. Further, the injuries sustained by PW1 were also caused by a firearm.

The Appellant had raised the following grounds of appeal.

1. Is the Judgment contrary to law?
2. Has the learned High Court Judge failed to evaluate that according to the medical evidence led with regard to the injuries sustained by said Kevin Nanda Kumara, the imposition of criminal liability to the appellant is highly improbable?
3. Has the learned High Court Judge failed to evaluate the geographical locations of the scene of crime and nature of injuries caused to persons are incompatible with the guilt of the accused?
4. Has the learned High Court Judge failed to recognise that the evidence led with regard to the opportunity of the appellant to possess a gun is

highly inconsistent with the evidence led by the prosecution witnesses?

5. Has the learned High Court Judge failed to evaluate the large number of contradictions and omissions of the prosecution to create a reasonable doubt with regards to the guilt of the accused?
6. Has the learned High Court Judge failed to recognise that the imposition of criminal liability to the appellant is highly improbable given the totality of evidence led by the prosecution?

As the Appeal grounds raised by the Appellants are interconnected, all grounds will be considered together hereinafter.

The Appellant in this case was an army soldier while the deceased was an army deserter. The Appellant giving evidence admitted that he had received firearm training. It was the stance of both PW1 and PW7 that the Appellant had taken a weapon from a lamp post. When both witnesses heard the firing sound, the deceased Kevin Kumara held onto the Appellant shouting not to shoot. After a few minutes, the deceased Kevin Kumara had fallen down with a gunshot injury. The gun was recovered from PW7.

The learned Counsel for the Appellant strenuously argued that considering the entry point of the gunshot injury of Kevin Kumara, the injury caused to the deceased Kevin Kumara could never be possible from a shooter standing in front of him with a very close proximity.

As per the Post Mortem Report of the deceased Kevin Kumara, by the Judicial Medical Officer, the death has been caused by chest injuries and it has been noted that such an injury pattern is compatible with the injuries caused by a discharged rifled firearm. The Post Mortem Report, marked P2, considers the available evidence and notes down the entry point and exit point of the gun wound.

It has been noted that the entry point of the gunshot injury (Injury No 1) was on the posterior aspect of the left shoulder (the 3<sup>rd</sup> intercostal space). As a

result, the bullet had entered his body from the left posterior side and had traversed downward across the body towards the right side of the body. The bullet had injured his tract, marked as Injury II. The exit point of the bullet has been noted down as the lateral aspect of the right upper arm (the 4<sup>th</sup> intercostal space).

According to the Post Mortem Report of the deceased Gunawathie, which was marked as P3, the death was caused due to pelvic injuries and here too it was noted that the injury pattern was compatible with the injuries by a discharge from a rifled firearm. The injuries sustained by Gunawathi involved major internal damage and indicates that a shot was fired from a lower position towards a victim standing at a higher elevation, which confirms the location details given by the witnesses.

Accordingly, the Judicial Medical Officer's testimony confirms that it was possible that the person who shot at the deceased was at a lower elevation, and that the deceased was at a higher elevation when the deceased Gunawathi was shot at. Another possibility brought forward by the JMO is that the deceased had turned back and run away. As per the medical evidence, the deceased would have been located at a minimum of 63m of a higher elevation but it is possible that the elevation was higher than that. The medical evidence also indicates that the distance between the origin of the bullet and the deceased would have been a minimum of 3 feet.

The medical opinion given by PW5; Dr Ruhul Haq indicates that the Black T-shirt worn by the deceased had clear tears which indicates firearm injuries. Further, when inquired if the nature of the injuries on the deceased Kevin Nanda Kumara were consistent with the shot being fired when the deceased and the person holding the firearm were face to face, the reply was in the affirmative. The JMO, further demonstrated how such would take place.

The Learned Counsel for the Appellant contends that the Learned High Court Judge in the Judgment dated 18.12.2020, has failed to evaluate the evidence, which includes the medical evidence presented in the case along

with the other factual circumstances. It is further contended that such a double murder of two individuals of rival parties with one single weapon could only be possible in a situation of a misfire, unless it is proved by providing convincing evidence in relation to the specific manner in which the shooting occurred. In the given circumstances, the Learned Counsel for the Appellant contends that it is unlikely that the Appellant, being an officer serving in the army who must have had adequate training in using firearms, could have taken such a non-aimed target.

In criminal cases, the prosecution bears the burden of proving the case against the accused person beyond reasonable doubt, and it is pertinent to note that this burden does not shift. Therefore, unless the accused pleads a general or special exception within the Penal Code, the accused will not bear the burden of proving his case.

In the case of **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.*

In the case of **Miller v. Minister of Pensions** (1947) 2 All E.R. 372 the court held that:

*“...the evidence must reach the same degree of cogency as is required in a criminal case before an accused person is found guilty. That degree is well settled. It need not reach certainty, but it must carry high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the*

*sentence, “of course it is possible, but not in the least probable,” the case is proved beyond reasonable doubt, but nothing short of that will suffice”.*

In the case of **Mohamed Nimnaz V. Attorney General** CA/95/94 held:

*“A criminal case has to be proved beyond reasonable doubt. Although we take serious view in regard to offences in relation to drugs, we are of the view that the prosecutor should not be given a second chance to fill the gaps of badly handled prosecutions....”*

In the **Attorney-General v. Rawther** 25 NLR 385, Ennis, J. states thus:  
[1987} 1 SLR 155

*“The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed in law, from the start of the case, and his guilt must be established beyond a reasonable doubt”.*

Therefore, the burden of proof would lie on the person bringing a claim in a dispute, as reflected in the Latin maxim *semper necessitas probandi incumbit ei qui agit* which translates to: "The necessity of proof always lies with the person who lays charges."

In this case, considering the available medical evidence, it is highly doubtful that the bullet injury sustained by the deceased Kevin Kumara could have been caused by the gun produced to court. Further, considering the exact entry point and exit point of the bullet wound, it is highly questionable how the Appellant could have shot the deceased Kevin Kumara, considering his geographical position. It has been noted that it is not practically possible for the Appellant to have shot at such an angle as noted by the medical evidence. Therefore, the evidence given by the prosecution witnesses are incompatible with the wounds noted.

As such it can be seen that the available evidence has not been correctly analysed by the Learned High Court Judge, and as such standard of beyond

reasonable doubt has not sufficiently been established by the prosecution, thus failing to correctly discharge the burden of proof.

Circumstantial evidence refers to proof of a fact or a set of facts through which the facts in question can be inferred. In such a situation, an accused can be convicted of a crime based on the available circumstantial evidence. Given the challenges that arise due to direct evidence such as false testimony and mistaken identification, circumstantial proof can in fact be more reliable than direct evidence.

In **AG v. Potta Nauffer & others** 2007 2 SLR 144 the court held that:

*“When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence”.*

In the case of **King Vs. Gunaratne** 47 NLR 145, it was held:

*“In a case of circumstantial evidence, the facts given in evidence may, taken cumulatively, be sufficient to rebut the presumption of innocence, although each fact, when taken separately, may be a circumstance only of suspicion. The jury are entitled to draw inferences unfavourable to an accused where he is not called to establish an innocent explanation of evidence given by the prosecution, which, without such explanation, tells for his guilt.”*

Considering the circumstances of this incident, it is alleged that the Appellant had shot the deceased by using a T56 gun. However, considering the size, length and width of such a firearm, it is highly improbable that the Appellant was in fact able to shoot the deceased. Further, as brought forward by the prosecution, the deceased Kevin Nanda Kumara had held onto the shooter at this time. When considering these factors; the close proximity between the shooter and the deceased, the gunshot wound on the deceased,

and the size of the firearm, it is practically not possible for the Appellant to have shot the deceased.

Further, considering the firearm training received by the Appellant, it can reasonably be inferred that it is not possible for the Appellant to have shot the deceased carelessly.

Another doubtful point that has been brought into question is the Appellant's intention. As there is no motive for the Appellant considering the relationship between the Appellant and the other relatives involved in the incident, an intent to commit such a murder is questionable. As there has not been any animosity between these specific individuals, it is doubtful that there was a motive by the Appellant.

As such, it is evident that the available circumstantial evidence has not been fully evaluated and considered by the Learned High Court Judge, thus this appeal ground has merit.

Further, the Learned Counsel for the Appellant notes the contradictions and omissions in terms of the evidence given by the witnesses during the trial.

As per the established legal provisions and judicial precedents, it is evident that contradictions and omissions could impact the credibility of a witness. While not every single contradiction would be sufficient to shake the prosecution case, only the most significant and substantial contradictions which affect the root of the case would raise doubts on the prosecution case. The court must take into consideration the facts of the case in order to ascertain whether a certain contradiction would affect the root of the case.

In the case of **The Attorney General v. Sandanam Pitchai Mary Theresa** [2011] 2 SLR 292 the court held that:

*“Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that*

*the Court must exercise its judgment on the nature of the inconsistency or contradiction and whether they are material to the facts in issue”.*

In the case of **State of Uttar Pradesh v. M. K. Anthony** [AIR 1985 SC 48] the court 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 scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the 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. Cross examination is an unequal duel between a rustic and refined lawyer.”*

The Learned Counsel for the Appellant has brought forward a number of omissions and contradictions made by the prosecution witnesses, such as the omissions and contradictions made by PW1 and PW7 in relation to the possession of the gun and in relation to the location the gun was retrieved from.

As per the evidence given by PW07, PW04 and PW01 contradictions relating to how the Appellant was in possession of the T56 gun, where it was stated that the Appellant had picked up a gun from a light post on the side of the road.

Further, it has also been noted that there are contradictions regarding the evidence about the light condition of the road of the incident. As per the evidence given, there is a contradiction in their evidence that a streetlight had enabled them to spot the Appellant was picking up a gun. Considering the time the incident took place, at around 9 – 10 pm, it is highly doubtful that these witnesses could have noticed such an incident taking place within a distance of 20 – 28 feet.

Further, the evidence given by the Prosecution witnesses in relation to the alleged shooting does not tally with the evidence given by other witnesses, in relation to the injuries sustained by the 2<sup>nd</sup> Accused and the 3<sup>rd</sup> Accused. It is evident that the prosecution witnesses have failed to mention of the injuries sustained by the 2<sup>nd</sup> and 3<sup>rd</sup> Accused.

Such omissions and contradictions affect the root of the case and would materially affect the case. It is therefore noted by this Court that the High Court Judge has erred in disregarding such discrepancies, therefore, this appeal ground has merit.

An accused has the right to a fair trial, where the accused's innocence or guilt in respect of the alleged crime will be ascertained. This right remains an internationally recognised and respected human right, as fair trials are essential in discovering the truth and would therefore be of utmost importance to each party involved in a case. Fair trials are a major cornerstone of democracy, as such fair trials assist in ensuring fairness and justice, and to limit abuse of powers of governments and other state authorities and institutions.

In **the Attorney General v Segulebbe Latheef & Another** [2008] (1) SLR 225 the court held that:

*“The right of an accused person to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally*

*proof enough that justice is denied. The right to a fair trial was formally recognised in international law in 1948 in the United Nations Declaration of Human Rights. Since 1948 the right to a fair trial has been incorporated into many national, regional and international instruments.*

*Like the concept of fairness, a fair trial is also not capable of a clear definition, but there are certain aspects or qualities of a fair trial that could be easily identified.*

*The right to a fair trial amongst other things includes the following: -*

- 1. The equality of all persons before the court.*
- 2. A fair and public hearing by a competent, independent and impartial court/tribunal established by law.*
- 3. Presumption of innocence until guilt is proven according to law.*
- 4. The right of an accused person to be informed or promptly and in detail in a language he understands of the nature and cause of the charge against him.*
- 5. The right of an accused to have time and facilities for preparation for the trial.*
- 6. The right to have a counsel and to communicate with him.*
- 7. The right of an accused to be tried without much delay.*
- 8. The right of an accused to be tried in his presence and to defend himself or through counsel.*
- 9. The accused has a right to be informed of his rights.*
- 10. If the accused is in indigent circumstances to provide legal assistance without any charge from the accused.*
- 11. The right of an accused to examine or have examined the witnesses against him and to obtain the evidence and examination of witnesses*

*on his behalf under the same conditions as witnesses against him.*  
*12. If the accused cannot understand or speak the language in which proceedings are conducted to have the assistance of an interpreter*  
*13. The right of an accused not to be compelled to testify against himself or to confess guilty.*

As seen above, the lack of proper considerations of the available evidence, as well as the many contradictions and omissions caused by the prosecution witnesses, has caused an injustice to the Appellant, and has deprived the Appellant of a fair trial. The prosecution has failed to establish the burden of proof beyond a reasonable doubt, which has unfairly imposed legal culpability on the Appellant.

It is therefore my view that the Appeal grounds produced have merit, and that the Learned High Court Judge had erred in convicting the Appellant. Therefore, this Appeal is allowed, and the Appellant is acquitted from the charges.

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

**JUDGE OF THE COURT OF APPEAL**

**R. P. HETTIARACHCHI, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**