

**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.

Democratic Socialist Republic of Sri
Lanka

COMPLAINANT

Court of Appeal No:

CA/HCC/403/2017

High Court of Gampaha

Case No: HC/07/2000

1. Imiyage Don Vipula Hemantha
Kumara alias Wasantha
2. Imiyage Don Vijitha Saman Kumara
3. Karunawallaba Bodhipakshalage
Gunasekara Bodhipasha
4. Loku Hetti Arachchige Jayapala alias
Nilame
5. Imiyage Don Gunasekara alias Daniel
6. Semasinghe Mudiyansele Sarath
Rajakaruna
7. Hewawasam Pallelage Gunarathne

ACCUSED

Vs.

AND NOW BETWEEN

Imiyage Don Vipula Hemantha
Kumara alias Wasantha

1st ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Shavindra Fernando, PC with Amanda**
Imbulana for the 1st Accused- Appellant.
Tharaka Kodagoda, SC for the Respondent.

ARGUED ON : **30/03/2026**

DECIDED ON : **09/06/2026**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused with some others unknown to the prosecution were indicted in the High Court of Gampaha on following counts:

1. Being a member of an unlawful assembly having the common object of causing hurt to Imiyage Don Rosalin Nona, an offence punishable under Section 140 of the Penal Code.
2. Whilst being a member of the said unlawful assembly, committing the murder of the said the said Imiyage Don Rosalin Nona an offence punishable under Section 296 read with Section 146 of the Penal Code.
3. Whilst being a member of the said unlawful assembly, committing the murder of Ratmalgodage Wimal Ranjith, an offence punishable under Section 296 read with Section 146 of the Penal Code.
4. Whilst being a member of the said unlawful assembly, causing grievous hurt to Imiyage Dona Karunawathi, an offence punishable under Section 317 read with Section 146 of the Penal Code.

Count numbers 5,6 and 7 were the alternative counts for counts 2,3,4 under Section 32 of the Penal Code.

The trial commenced before the Judge of the High Court of Gampaha as the Accused had opted for a non-jury trial. During the pendency of the trial, the 4th and 6th Accused had died and the trial had proceeded against the remaining Accused. After the conclusion of the prosecution's case, the Learned High Court Judge had called for the defence and all the Accused had made dock statements and denied their charges. The Appellant who is the 1st Accused listed in the indictment called his wife, and PW11 and PW14, who are both police officers listed as prosecution witnesses. After considering the evidence presented by both parties, the Learned High Court Judge had

convicted only the 1st Accused (Hereinafter referred to as the Appellant) for the charges 5,6 and 7 and sentenced him to death on the 5th and 6th counts and had imposed two years rigorous imprisonment with a fine of Rs.5000/- subject to a default sentence of 1 month simple imprisonment, for count number 7 on 29/11/2017.

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

The Learned Counsel for the Appellant informed this court that the Appellant has given consent for this matter to be argued in his absence. At the time of argument, the Appellant was connected via the Zoom platform from prison.

At the very outset it is pertinent to note that PW1 and PW2, who are said to be eye witnesses had implicated all the Accused persons including the Appellant in their statements to the police and at the non-summary proceedings. Further, the prosecution had indicted the Accused along with persons unknown to the prosecution. Hence, it is very clear that several persons had participated in the incident.

The 6th Accused, who had died during pending the trial, was the husband of a girl who had died due to a snake bite. The girl lived in the neighbouring house of PW1. It was alleged by the deceased's party that the girl died due to black magic performed by the deceased Rosalyn Nona and PW1.

Background of the Case.

PW1, Karunawathie is the wife of the deceased Wimal Ranjith and the sister of the deceased Rosalyn Nona. PW1 was running a praying house (Dewalaya) adjoining to her house. She used to be the priest of the praying house. According to her, on the day of the incident, when she was inside her house with her deceased sister, at about 7.00pm, she had heard a noise similar to falling trees coming from behind the praying house. The deceased sister of PW1 opened the door and went out and walked towards the Devalaya and PW1 had followed her. At that time the husband of PW1 was in the toilet

which was behind her house. According to PW1, she had seen the Appellant standing in front of them with the other Accused, who had been acquitted by the court, with arms. When PW1's sister inquired about why they were destroying the banana trees, the Appellant had cut her deceased sister with a cutting instrument, either by a sword or a knife. Hearing the commotion, when the deceased Wimal Ranjith came to the spot, the Appellant had cut him as well using the same knife. Thereafter, he had cut PW1 as well. With the cut injury, PW1 had rushed to the Nittambuwa Police Station using a shortcut with PW2 and her children.

PW2, Chamila Ishanthi, too said that she witnessed the murder of Rosalyn Nona when she followed PW1. After seeing the incident, she had run into the house to save her children.

PW12, Sgt 19488 Sunil Premachandra had received the first complaint from PW1 when she went to Nittambuwa Police. At that time, PW1 had only said that the Appellant had cut him. As she was injured, this witness had advised her to go to Hospital and had passed the message to PW11 SI/ Perera and PW14 PC 9018 Ajith about the incident. Although PW11 and PW14 are listed in the indictment as prosecution witnesses, they were not called by the prosecution. As such, defence had called them as defence witnesses.

PW 09, IP/Samithasiri had visited the scene of crime and conducted the investigation.

PW7, JMO Premaratne who conducted the post mortem examination of both deceased opined that the deaths had been caused due to injuries caused by a heavy sharp cutting object.

PW7 also examined PW1 and categorised the injury she sustained as a non-grievous injury. PW1 in her history to the JMO, only mentioned that the injury was caused by the Appellant.

Having been satisfied that the prosecution had made out a prima facie case against the Appellant, the Learned Trial Judge had called for the defence and

the Appellant had made a dock statement, called his wife and two police officers who were listed in the witness list in the indictment.

When PW12 received first information from PW1, he had passed the same to PW11 and PW14 to conduct investigations. PW11 had gone to the house of PW1 at 9.45pm with PW14 but had only observed some blood patches, human hair and disturbed soil. Neither of them had witnessed any dead body at that time. Since PW1 was hospitalized, he had gone to the hospital and inquired from PW1 about the incident and had come to know about two persons being missing. Hence, he had again gone to PW1's house and had made a search with the help of the villagers using his torch as no light was available. Even at that time, he could not locate the dead bodies of the deceased. PW14 who went along with PW11 too narrated the same.

The Appellant had filed following grounds of appeal.

1. Whether there was sufficient light as claimed by some of the prosecution witnesses.
2. Whether PW1 Karunawathie is a reliable witness.
3. Whether PW2 Chamila Ishanthi has actually witnessed the incident.
4. Whether the defence version was unjustifiably rejected by the Learned High Court Judge.
5. Did the Learned High Court Judge wrongly conclude that the prosecution had proved the case beyond reasonable doubt.
6. Did the Learned High Court Judge fail to consider vital contradictions in favor of the defence.

As the appeal grounds raised are interconnected, all grounds will be considered together hereinafter.

In the first ground of appeal the learned President's Counsel strenuously contended that the identification of the Appellant has not been proved

beyond a reasonable doubt due to the poor light condition of the scene of crime.

Proper identification of the accused persons is a fundamental point that needs to be determined at the beginning of a criminal trial. In this case it is very important to discuss whether the prosecution has established the identity of the Appellant beyond reasonable doubt. If the identification is compromised, the net result would be the acquittal of the accused person from the case. Hence evidence of identification should be considered very seriously due to its delicate nature. In this case an identification parade had not been held in respect of the Appellant.

The following judgments are of utmost importance as they elaborate the vitality of identification evidence and discuss how the fate of a case depends upon it.

In **Karunaratne Mudiyansege Madduma Bandara v. The Attorney General** CA/190-192/11 decided on 15/03/2013, the court acquitted the accused on the ground that the identification of the accused persons have not been proved beyond reasonable doubt because the prosecutrix failed to divulge the names of the accused persons to the police who was known to her prior to the incident.

Gorle S. Naidu v. State of A.P. [1997] Appeal (crl) 232-234. In this case the facts related to the murder of two individuals. In the FIR, the prosecution witness merely mentioned that the assailants were followers of one of the appellants, but none were specifically named. However, later in court, they stated the name of the assailants. The Court held that such an omission was a vital omission.

In **R v. Turnbull** [1977] QB 224 the court held that:

“Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused-which the

defence alleges to be mistaken-the judge should be cautious before convicting the accused in reliance on the correctness of the identification(s). The judge should take into consideration that:

- *Caution is required to avoid the risk of injustice;*
- *A witness who is honest may be wrong even if they are convinced, they are right;*
- *A witness who is convincing may still be wrong;*
- *More than one witness may be wrong;*
- *A witness who recognizes the defendant, even when the witness knows the defendant very well, may be wrong.*

In the case of **Vinod @ Nasmulla v. State of Chhattisgarh** [2025] INSC 220 it was noted that:

“The purpose of holding a test identification parade during the stage of investigation is, firstly, to ensure that the investigating agency is proceeding in the right direction where the accused is unknown and, secondly, to serve as a corroborative piece of evidence when the witness identifies the accused during trial. The evidence of identification merely corroborates and strengthens the oral testimony in court which alone is the primary and substantive evidence as to identity.”

In relation to identification in Court after a delay, in the case of **Raj Kumar @ Bheema v. State of NCT of Delhi**, 2025 INSC 1322 it was held that:

“It is trite that the evidence of an eye-witness must be of sterling quality and unimpeachable character. It should not only inspire the confidence of the Court but must also be of such a nature that is acceptable at its face value.”

In criminal trials such as this, lighting conditions are of utmost importance as they are essential in determining the reliability of eyewitness

identification. As such, poor lighting would diminish the ability of a witness to grasp visual details, resulting in an increased risk of false identification. Such misidentifications being the leading cause of wrongful convictions have resulted in courts carefully examining the quality, duration and source of light at crime scenes.

According to PW1, she testified that she identified the Appellant with the aid of a bulb fixed under the portico of her house and the light emanating from the Devalaya. Although the house lights were on, all windows were covered with curtains.

Page 165 and 238 of the brief.

ප්‍ර : තමා මොන ඵලියෙන් ද දැක්කේ ?

උ : බල්බ් දාලා තිබුණා.

ප්‍ර : කෙසෙල් ගස් වලට ද බල්බ් දාලා තිබුණේ ?

උ : හුඬි එක යට තිබුණා. මල ගෙදර බල්බ් තිබුණා. දේවාරය පිටපස්සේ ලයිට් තිබුණා.

In the evidence of PW2, she too endorsed the evidence given by PW1 that she identified the Appellant with the aid of the light under the hood of the house.

However, PW9 IP/Samithasiri had noted that there was no light fixed to the hood of the portico and there was only a wire but no holder attached to the hood.

Page 561 of the brief.

ප්‍ර : එතකොට හෝල්ඩරයේ බල්බය තිබුණේ නැති එක ගැන ප්‍රශ්න කළා ද ?

උ : ඒක කලින් ඉඳලා තිබුණේ නැහැ කියලා මට දැනුම් දුන්නා.

ප්‍ර : මහත්මයා යන අවස්ථාවේ දී නිවසේ අනෙක් විදුලි බුබුලු දැල්වෙමින් තිබුණා ද ?

උ : ඔව්.

The evidence given by the investigating officer clearly cut across the evidence given by PW1 and PW2 with regard to the light condition as the incident had happened between 7.30- 8.00pm on the date of the incident.

Although the prosecution had listed PW11 and PW14 as prosecuting witnesses, the prosecution had not called them to give evidence on behalf of them. As such, the defence had called them as defence witnesses. As stated earlier, although these two witnesses rushed to the scene of the crime twice after receiving information from the police, due to the poor light condition they could not locate the bodies of the deceased persons. The investigation officer, PW9, too could not locate the dead bodies during the said night. He only located the dead bodies on the following day. It is very important to note that a group of people with some who are unknown to the prosecution had come there with arms at that time.

According to PW1, the incident had happened at the rear of the Devalaya and her husband had fallen at a spot about 21 ½ meters from the house doorframe. The deceased Rosalyn Nona was lying at a spot which was one meter away from her husband's body.

PW9 testified that when one observes from the portico of the house, the locations at where the bodies were lying had been covered by bushes.

Defence had marked a very important contradiction of the evidence given by PW1 and which was marked as 1V-21. The relevant contradiction was reproduced below:

Page 239 of the brief.

ප්‍ර : තමා මෙහෙම කිව්ව ද “ අක්කා කතා කරමින් සිටිය පැත්ත කලුවර නිසා හරියට මුකුත් පෙනුණේ නැහැ ?

පොලීසියට එහෙම කිව්ව ද?

උ : කිව්වේ නැහැ.

එම කොටස ‘1වී.21’ වශයෙන් ලකුණු කර ඉදිරිපත් කරනවා.

This means, that PW1 had not seen the incident because of the darkness. In her evidence before court, she went on to say that she identified the incident with the non-existing light under portico and with the aid of Devalaya light. Although the Learned High Court Judge conceded that the said contradiction had some bearing on the prosecution case, it was then disregarded and simply stated that it was not a material contradiction. The relevant portion of the judgment is re-produced below:

Page 904 of the brief.

යම්නාක් දුරට අදාල කරගත හැකි පරස්පර විරෝධතාවයක් වින්තිකරුවන් හඳුනා ගැනීමට අදාලව මෙම සාක්ෂිකාරියගෙන් අසා ඇති අතර එය 1.වී.21 වශයෙන් ලකුණු කර ඇති පරස්පර විරෝධතාවයයි. එනම් “අක්කා කතා කරමින් සිටිය පැත්ත කලුවර නිසා මොකුත් පෙනුණේ නැහැ” කියා ඇය කී බවට පරස්පර විරෝධතාවයක් ලකුණු කර තිබුණ ද එය ස්ථානයේ තිබූ ආලෝකය සම්බන්ධයෙන් නොමග යවන සුළු පරස්පර විරෝධතාවයක් බව පෙනී යයි. එනම් මෙම සාක්ෂිකාරිය කියා ඇත්තේ “අක්කා කතා කරමින් සිටිය පැත්ත කලුවර නිසා මොකුත් පෙනුණේ නැහැ” බවත් ඒ එක්කම “අක්කේ අක්කේ” කියමින් ඇය ඉස්සරහට දුවගෙන ගිය බවත් ය.

This contradiction is very important in this case as when PW1 lodged her first complaint to police nothing was mentioned about the deceased persons. She only told PW12 that the Appellant had cut her with a knife-like instrument. Further PW9 stated that at the hospital PW1 had told him she was not aware as to what happened to the two deceased. Even to PW7, JMO, PW1 had only stated that the Appellant had cut her. Nothing had been mentioned about the incident nor about the two deceased.

Although, PW2 claimed to be an eye witness, she had only identified the Appellant at that time. Although PW2 had said that she saw the Appellant attacking the deceased Rosalyn with the light emanating from a bulb fixed on the hood of the house, her evidence is doubtful, as PW9 had said that there was no light seen on the hood. This contradiction contradicts the

prosecution evidence materially in this case. Further, PW2 had said that she ran into the house to safeguard her children. Hence, she had not seen who attacked PW1 and the two deceased.

Under cross examination, PW2 was confronted with the deposition she made before the Magistrate Court of Attanagalle. A vital contradiction 1V-41 was marked on her evidence to say that she did not see correctly about the cutting. The relevant portion is re-produced below:

Page 472-473 of the brief.

ප්‍ර : ඔබ මරණ පරීක්ෂණයේ දී පිටු 44 හි මෙහෙම කිව්වා ද, කොටනවා හරියට මම දැක්කේ නැහැ, කිව්ව ද එහෙම ?

උ : සමහර විට එහෙම කියන්න ඇති, මම බොහොම බයෙන් සිටියේ.

ප්‍ර : කොටනවා හරියට මම දැක්කේ නැහැ කියා සටහන් වෙලා තිබෙනවා ?

උ : සමහර විට සඳහන් වෙලා ඇති.

PW2 is a niece of the deceased Rosalyn Nona and is residing at a different village. Although she went along with PW1 after the incident, she did not go to Nittambuwa Police station with PW1. Instead, she had gone home and had come only on the following day. But she never went to the police station to give her statement. She only made her statement on 21.09.1995 at 3.30pm when the police came after her and recorded her statement. Further, although she went home immediately after the incident, she did not inform about the incident to her husband. Hence, it is doubtful whether she had witnessed the murder incident as testified in her evidence.

Considering the evidence given by PW1, PW2, PW9, PW12 and defence witness PW11 and PW14 with regard to the identity of the Appellant, there are contradictions and omissions which certainly affect the outcome of the

decision with regard to the Appellant committing the murder of the two deceased.

The proof of contradiction is vital to destroy the credibility of the case of the prosecution. Proved contradictions and omissions which can affect the case of the prosecution plays a vital role in a criminal case.

PW1 is the most important witness in this case. The contradictions marked in her evidence are vital and certainly affects her credibility. They also raise doubts about the probability of the incident as described by the PW1. What she told to the police at the very outset needs to be considered carefully as group of people, some who are unknown to the prosecution had participated in the incident. Further, as per PW1 and PW2, all had carried arms. Failing to mention important facts which result in the failure to accurately identify the accused certainly affects the prosecution case.

Further, in the first information to police, PW1's omission in mentioning the Appellant had cut the two deceased to the police affects her credibility in this case. Further, she had mentioned nothing about committing murder in her short history to the doctor. These omissions should not be considered lightly, as it certainly affects the conviction of the Appellant in respect of committing murder.

The contradictions and omissions marked on PW2's evidence certainly have a negative impact on the evidence given by PW1 as she had said that the identity of the Appellant was established though the light emanating from the hood of the house. Whereas, investigations had revealed that no such light had existed on the hood. Although the Learned High Court Judge too admitted that the contradiction marked 1V-21 is vital, he had not given it due consideration as it affect the root of the case.

In the case of **AG v. Sandanam Pitchai Mary Theresa** (2011) 2 Sri L.R. 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 should consider whether they are material to the fact in issue”.

In the case of **K. Padmathilaka alias Sergeant Elpitiya v. The Director General of Commission to Investigate Allegation of Bribery and Corruption** [2010] BLR 67 the court held that:

“Credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the judge. When witness makes an inconsistent statement in their evidence either at one stage or two stages, the testimony of such witness is unreliable.....It is a cardinal principle that unreliable evidence cannot be rendered credible, simply because there is some corroboration material”.

In **Jayaseelan V T.N.** AIR 2009 SC 1091 the court held that:

“Normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence and those are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal, and not expected of a normal person. Courts have to label the category to which a discrepancy may be categorized. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.”

In the case of **Wickremasuriya vs. Dedoleena and Others** [(1996) 2 Sri L.R 95] held that:

“After a considerable lapse of time, as has resulted on this application, it is customary to come across contradictions in the testimony of witnesses. This is a characteristic feature of human testimony which is full of infirmities and weaknesses especially when proceedings are held long after the events spoken to by witnesses; a judge must expect such contradictions to exist in the testimony. The issue is whether the contradiction or inconsistency goes to the root of the case or relates to the core of a party's case. If the contradiction is not of that character, the court ought to accept the evidence of witnesses whose evidence is otherwise cogent, having regard to the Test of Probability and Improbability and having regard to the demeanour and deportment manifested by witnesses.”

The evidence of PW1 and PW2 as to the incident creates serious doubt with regard to the identity of the Appellant. The contradictory positions taken by witnesses are vital and certainly goes to the root of the case and is sufficient to create a reasonable doubt in the prosecution's case.

Under the landmark U.S. Supreme Court ruling in **Brady v. Maryland 373 U.S. 83 (1963)** a failure by the state to disclose evidence favourable to the defence results in a legal violation that can invalidate a conviction.

In this case two police witnesses PW11 and PW14 were not called by the prosecution, but was called by the defence. Although the Learned Trial Judge summarily dismissed their evidence given, their evidence is vital to ascertain the situation and the state of light condition prevailing at the scene of crime in the night in question.

A trial judge is responsible for considering any evidence which is available in the defence's favour, provided it has been legally admitted into the trial. In

common law systems, the judge is responsible for evaluating all evidence; which includes both for the prosecution and the defence, in order to ascertain if the prosecution has in fact successfully discharged its burden of proving the guilt of the Accused beyond a reasonable doubt.

The defence does not bear the weight of needing to prove anything; rather, the judge must consider any favourable evidence available to ascertain whether the prosecution has completely and accurately overcome the presumption of innocence of the Accused. As such, where a judge entirely ignores or fails to consider any admissible and credible evidence supporting the defendant's innocence, the verdict can very well be overturned on appeal for failure of proper evaluation of trial evidence.

Thus, appellate courts would always require trial judges to act impartially and consider the "totality of the circumstances", which consists of considering the defence's perspective along with any rebutting evidence brought forward.

The evidence led by the prosecution only established that the Appellant is known to PW1 and that he had cut PW1. Further, PW1 had seen the Appellant within a close proximity.

As stated earlier, there were several people with arms and the indictment has vouched for that. According to both the Learned High Court Judge and the Learned State Counsel, the contradiction marked 1V- 21 is very vital but was not considered in favour of the Appellant. Considering the evidence given by PW2, she is not a credible witness. Further, the police officers who went to the scene of crime were not able to detect the dead bodies until the following day. This clearly suggests the poor light condition that existed at that time. Further, PW1 had mentioned in her first information to the police that she did not know what happened to the two deceased and she had failed to mention in her short history to the JMO about the incident.

As such the grounds of appeal considered above by the Counsel for the Appellant is sufficient to affect the credibility of prosecution's case with regards to committing the murders of the deceased, as the doubt created certainly disturbs the findings of the Learned High Court Judge with regard to the murder of the two deceased.

Due to the aforesaid reasons, I set aside the conviction and the death sentence imposed in respect of counts number 5 and 6. I affirm the conviction and sentence imposed on count number 7. The fine imposed by the Learned High Court Judge will remain same with the default sentence.

Considering all the circumstances of this case, I order the sentence imposed on count number 7 to be operative from the date of conviction, i.e., from 29.11.2017.

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

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL