

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.

Democratic Socialist Republic of Sri Lanka

Complainant

Vs

Court of Appeal Case No:
CA/HCC/0241-244/2025

High Court of Polonnaruwa

Case No: **HC/38/2012**

1. Attanayaka Mudiyanseelage Vijerathne
2. Attanayaka Mudiyanseelage Rasika Pradeep Bandara
3. Attanayaka Mudiyanseelage Roshan Pradeep Bandara
4. Abakola Gedara Sisira Kumara
5. Dissanayake Mudiyanseelage Nimal Dissanayake (dead)
6. Abahela Gedara Heenbanda *alias* Kadera (dead)

Accused

AND NOW BETWEEN

1. Attanayaka Mudiyanseelage Vijerathne
2. Attanayaka Mudiyanseelage Rasika Pradeep Bandara
3. Attanayaka Mudiyanseelage Roshan Pradeep Bandara

4. Abakola Gedara Sisira Kumara

Accused – Appellants

Vs

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

Complainant - Respondent

Before : **P. Kumararatnam, J.**

Pradeep Hettiarachchi, J.

Counsel : Amila Palliyage with Sandeepani Wijesooriya, Savani Udugampola,
Lakitha Wakishta Arachchi, Subaj De Silva and Gayathrika De Silva
for the Accused – Appellants.
: Dileepa Peiris, PC, ASG for the Respondent.

Argued on : 05.08.2026

Decided on : 01.10.2026

Pradeep Hettiarachchi, J

Judgment

1. This appeal arises from the judgment and sentence dated 22.07.2025 of the learned High Court Judge of Polonnaruwa. Initially, 6 accused were indicted in the High Court of Polonnaruwa on three counts, namely:

- a. On or about 14.05.2006, within the jurisdiction of the High Court of Polonnaruwa, the Accused, being members of an unlawful assembly with

the common intention of causing injury to one Mandalawalli Kuda Radala Patabadi Hangiligedara Nimal Jayathilaka, thereby committing an offence punishable under Section 140 of the Penal Code;

- b. During the same time, place, and in the course of the same transaction as mentioned in the first count, being members of the unlawful assembly caused the death of Mandalawalli Kuda Radala Patabadi Hangiligedara Nimal Jayathilaka and that this offence was committed in furtherance of the common object of the said unlawful assembly, or alternatively, that the members of the said unlawful assembly knew that such offence was likely to be committed, and therefore, by being members of the said unlawful assembly at the time of committing the offence, thereby committed an offence punishable under Section 296 read with Section 146 of the Penal Code; and
 - a. During the same time, place, and in the course of the same transaction, the Accused, by causing the death of Mandalawalli Kuda Radala Patabadi Hangiligedara Nimal Jayathilaka, committed an offence of murder punishable under Section 296 read with Section 32 of the Penal Code.
2. Before the commencement of the trial, the 5th and 6th accused were reported dead. Thus, the trial proceeded only against the 1st to 4th accused. At the conclusion of the trial, the learned High Court Judge found them guilty of the 1st and 2nd counts, and accordingly convicted them. Consequently, all the accused were sentenced to death.
3. Being aggrieved by the said convictions and sentences, the 1st to 4th accused-Appellants (hereinafter referred to as the Appellants) have preferred the present appeal.
4. The grounds of appeal advanced by the Appellants are as follows:

- a. The learned Trial Judge has erred in law by failing to consider the delay of four months by the only eyewitness in recording his statement, which delay fails the test of spontaneity;
- b. The learned Judge failed to consider the strong animosity, elicited at the trial, that the eyewitness had to falsely implicate the Appellants in the offence of murder;
- c. The Trial Judge has erred in law by failing to consider that there had been no proper identification of the Appellants in the circumstances described by the eyewitness in his testimony;
- d. The learned Trial Judge has erred in law by failing to consider that the story narrated by the eyewitness is improbable;
- e. The learned Trial Judge has erred by failing to consider that the evidence adduced during the trial fails the test of consistency and the test of credibility; and
- f. The learned Trial Judge has erred in law by considering the prosecution evidence on the wrong premise without giving any reasonable explanation and has failed to consider the test of reasonable doubt cast on the prosecution.

Consideration of the grounds of appeal:

Has the testimony of PW1 failed the test of spontaneity?

- 5. Evidently, PW1, who claimed to be the sole eyewitness to the incident, made his statement to the police four months after the alleged incident. The Appellants contended that the testimony of PW1 did not satisfy the test of spontaneity. There was, admittedly, a considerable delay on the part of PW1 in making his statement to the police. However, delay alone does not necessarily corrode the probative value of a witness's testimony, provided that a plausible explanation is forthcoming to justify such delay.

6. It is also significant to note that, where there is a delay in making a statement to the law enforcement authorities, there is always a possibility of false material being introduced or evidence being fabricated in the intervening period. Therefore, a Trial Judge should exercise greater caution before placing reliance on such evidence. The trial Judge must be satisfied that the delay has been satisfactorily explained by a plausible explanation acceptable to the Court.
7. Evidently, there was an illicit affair between the deceased and Buddhika, the wife of the 2nd Appellant. Buddhika and the deceased were accustomed to meeting in secret locations. PW1 was in the habit of stealthily watching the couple during these encounters.
8. According to PW1, on the day of the incident, he secretly followed the deceased to the meeting spot and climbed a nearby coconut tree to observe the couple. While there, he heard a whistle and identified it as coming from Roshan, the 3rd Appellant. Five individuals then arrived at the scene: Kadir, Jalor, Rasika, Sisira, and Wijerathna. As the deceased approached, Kadir, the 6th Accused, shone a torchlight directly into his face. The deceased asked who they were, whereupon the witness heard a noise and saw the deceased collapse.
9. Shortly thereafter, a red three-wheeler arrived from the direction of the 1st Appellant's house, and the deceased was loaded into it. All the individuals, except the 2nd Appellant, got into the three-wheeler and drove away. The 2nd Appellant then took the deceased's bicycle and proceeded toward a paddy field belonging to the deceased. Subsequently, the witness climbed down from the coconut tree and went to his workplace at a rice mill.
10. It is noteworthy that PW1 merely stated he did not report the incident to the police due to fear instilled by the Appellants on a different occasion. Significantly, PW1 was a laborer at a local rice mill who, by his own admission, routinely traveled across the island in lorries distributing rice. According to his testimony, he reported to work the day after the alleged incident and departed in

a rice delivery lorry. Had he been distressed by witnessing the alleged incident, it is highly improbable that he would have reported to work and traveled to distant locations as usual. Furthermore, had he truly witnessed the incident, he could have informed at least one of the deceased's relatives rather than waiting four months to speak out.

11. It is pertinent to note that, when PW1 was questioned as to why he had waited four months before making a complaint, he simply stated that he had been in a state of shock and, consequently, had not disclosed the incident to anyone. In my view, this explanation is difficult to accept for the following reasons.
12. Evidently, PW1 reported for work on the following day and continued to perform his duties, including travelling in the lorry which distributed rice to outstation areas. There is no evidence to suggest that PW1 had neglected or was unable to perform his duties at his workplace as a result of the alleged state of shock following the incident. It is also significant that the deceased was PW1's next-door neighbour and that PW1 attended the funeral of the deceased. These circumstances, when considered cumulatively, make it difficult to accept that PW1 remained in such a state of shock for a period of four months as to prevent him from making a complaint or disclosing the incident to anyone.
13. When no plausible reason is forthcoming to justify the inordinate delay in making the statement, it is unsafe to secure a conviction based on the evidence of a belated witness.
14. In ***Dharmasiri vs Republic of Sri Lanka [2012] (1) Sri L.R. 268***, it was held inter alia:

“Two critical tests before considering belated evidence as reliable evidence are: firstly, reasons for delay and secondly, whether those reasons are justifiable....”

15. In *Udagama vs Attorney General [2000] (2) Sri L.R.* it was held:

“Evidence is infirm, unsafe and unreliable to act upon considering the following:

(i) the belated statement made to the Police with delay not explained with acceptable reasons.

(ii) material questions and contradictions go to the very root of the prosecution case.

(iii) failure to evaluate and consider the dock statement of accused.”

16. Accordingly, I am unable to accept that the four-month delay in making the complaint was occasioned by the state of shock alleged by PW1.

17. It is also pertinent to note that, as admitted by the Appellants, he had previously been charged with sexually abusing a cow belonging to the 6th Appellant. PW1 was subsequently convicted by the court and fined in respect of that offence. This circumstance assumes significance when assessing the credibility of PW1, particularly as most of the Appellants are siblings. It is therefore reasonably possible that PW1 harboured animosity towards the Appellants and that such animosity may have provided him with a motive to falsely implicate them in the present case.

18. The other notable infirmity in the prosecution case relates to the manner in which PW1 claimed to have identified the Appellants. According to PW1, at the time of the incident, he was on top of a coconut tree and identified the Appellants by the timbre of their voices. PW1 testified as follows:

“ප්‍ර: ඔබ මේ 6 දෙනා හඳුනා ගත්තේ කොහොමද?

උ: මට නිතර දැකල තිබුන නිසා අඳුරගන්න පුළුවන්.

ප්‍ර: කටහඬින් අඳුර ගත්තේ නැහැ?

උ: කටහඬින් අදුරගන්නේ.

ප්‍ර: කවද කටහඬින් අදුරගන්නේ?

උ: විචේරන්නයි, රසිකයි, රොෂානුයි, කදිරයි, ඉතිරි දෙන්නා අදුර ගන්නේ පාරට ගියාට පස්සේ.

ප්‍ර: මේ 6 දෙනා කතා කලේ මේ සිද්ධිය වුනාට පස්සෙද, පෙරද?

උ: ඔව්.

ප්‍ර: අර විසිල් ශබ්දයත් එක්ක මට කටහඬ ඇහුනේ.” (at vide page 151 of the Appeal Brief)

19. In **R. v. Devlin [1997] EWCA Crim 739**, decided on 14 March 1997, the English Court of Appeal also considered the issue of voice identification. The Court approached the evidence of recognition or identification in the same manner as it would approach identification evidence in a case governed by the principles in *R v Turnbull*. The Court concluded that hearing the two words, “money, money”, was no more than the equivalent of a fleeting glance and that the identification evidence was therefore poor. In the circumstances, the Court held that the trial Judge ought to have withdrawn the case from the jury.

20. The Turnbull guidelines provided in the case of **Regina Vs. Turnbull (1977) QB 224**, laid down important guidelines for judges as to the manner in which they should assess evidence in relation to a situation where the identity of an accused person comes into question. The said guidelines read as follows;

It requires a trial judge to be mindful that;

- i. *Caution is required to avoid the risk of injustice.*
- ii. *A witness who is honest may be wrong even if they are convinced, they are right.*
- iii. *A witness who is convincing may still be wrong.*
- iv. *More than one witness may be wrong.*

- v. *A witness who recognizes the defendant even when the witness knows the defendant well may be wrong.*

Some of the circumstances a Judge should direct the jury to examine in order to find out whether a correct identification has been made include;

- i. *The length of time the accused was observed by the witnesses.*
- ii. *The distance the witness was from the accused.*
- iii. *The state of the light.*
- iv. *The length of time elapsed between the original observation and the subsequent identification.*

21. I have carefully considered the submissions made on this issue and the evidence relating to the alleged voice recognition. In my view, the identification of the Appellants by their voices in the present case essentially depended upon the whistle which PW1 stated had been blown by the 2nd Appellant and the conversations which PW1 claimed to have overheard among the other Appellants. Although PW1 stated that he identified the Appellants by their voices, no specific words or expressions allegedly spoken by any of the Appellants were elicited in his evidence. In these circumstances, the alleged voice identification evidence is of such a limited and uncertain nature that it cannot safely be acted upon and cannot provide a proper basis upon which to sustain a conviction.

22. In these circumstances, the alleged voice identification evidence is of such a limited and uncertain nature that it cannot safely be acted upon. I am therefore of the view that such evidence cannot, either by itself or in the absence of other reliable identification evidence, provide a safe basis upon which to sustain the convictions of the Appellants.

23. Furthermore, it is important to emphasize that the possibility of genuine mistake in voice identification is a matter which must be carefully considered, particularly where the opportunity for observation or recognition is limited. Having regard to the totality of the evidence, I am of the considered view that the quality of the identification evidence, both visual and by voice, was poor. In the circumstances, the learned Trial Judge ought not to have acted upon such evidence to find the Appellants guilty and should have acquitted them of the charges.

24. Furthermore, the testimony of PW1 is not consistent on several material aspects. In his statement to the police, PW1 stated that he went to Buddhika's compound and hid in a banana plantation, expecting the deceased to arrive. However, when giving evidence before the Court, PW1 departed entirely from that account and stated that he had followed the deceased up to the paddy field where the deceased was working.

25. The inconsistency in PW1's evidence is further apparent when he was questioned regarding the place from which he observed the Appellants approaching the scene. PW1 was unable to state with certainty whether he had been hiding in the banana plantation or was on the coconut tree when the Appellants passed by him. This uncertainty is particularly significant, having regard to his claim that he was able to identify the Appellants by their voices and, therefore, materially affects the reliability of his identification evidence. PW1 testified as follows:

“ප්‍ර: පිරිසක් එන වෙලාව වන විට තමුන් කෙහෙල් පැදුරක් අසියේ නෙවේද නිවියේ? පොල් ගහේද නිවියේ?

උ: පිළිතුරක් නැත.

ප්‍ර: යම් පිරිසක් එනවා දැක්කද?

උ: ඔව්.

ප්‍ර: ඒ වනවිට තමුන් නිවියේ පොල් ගහේද කෙහෙල් පැදුර අසියේද?

උ: මතක නෑ.

ප්‍ර: තමුන් මේ සිද්ධිය බලන් හිටියේ පොල් ගහේ ඉදලද කෙසෙල් පැදුර අස්සේ ඉදලද කියල මතක නෑ?

උ: පොල්ගහේ

ප්‍ර: තමුන් කොහෙද හිටියේ.

උ: පොල්ගහේ

ප්‍ර: කෙසෙල් ගස් අස්සේ හිටියේ නැහැ?

උ: ඉදල තියෙනවා ඉස්සර.” (at vide page 202 of the Appeal Brief)

.....

“ප්‍ර: පොල් ගහ උඩද හිටියේ?

උ: ඔව්.

ප්‍ර: තමුන් කිව්වද පොලිසියට කටඋත්තර දෙන වෙලාවේ කෙසෙල් ගස් අස්සේ පරඩැල්වලට මා මුවාවී සිටි නිසා ඔවුන් මාව දැක්කේ නෑ කියල?

උ: මතක නෑ. දැන් මතක නෑ.” (at vide page 203 of the Appeal Brief)

26. Furthermore, PW1 did not state in his statement to the police that he had been on a coconut tree at the time of the incident. This omission was brought to the attention of the Court during the trial. The omission assumes significance, particularly as PW1’s evidence before the Court was that he had observed the Appellants from the coconut tree and had identified them by their voices.

27. According to PW1, the red-coloured three-wheeler in which the deceased was taken proceeded towards the hospital. Nevertheless, despite the fact that the members of the deceased’s family were neighbours of PW1, he did not inform any of them about the incident. This conduct of PW1 is also a circumstance which requires consideration when assessing the reliability of his evidence.

28. According to the evidence of PW1, no one had witnessed his presence at the scene of the crime. In these circumstances, it is difficult, if not impossible, to infer that PW1 was under any fear or threat which prevented him from disclosing the alleged incident to anyone.

29. PW2, Sarath Kumarasiri, is the brother of the deceased. According to his evidence, the 1st Appellant had maintained a very close friendship with the deceased. PW2 stated that he had come to know that the deceased was having an affair with the wife of the 2nd Appellant, although he had not made any further inquiries into the matter. According to PW2, the Appellants subsequently distanced themselves from the deceased on account of this issue. Nevertheless, the evidence of PW2 does not disclose any incriminating circumstance against any of the Appellants.
30. PW6 is the wife of PW2. According to her evidence, when she attended a meeting convened in connection with the granting of loans, the 1st Appellant approached her and threatened that the deceased would be killed very soon. PW6 stated that she subsequently informed the deceased of the threat, but that the deceased did not take the matter seriously.
31. It is, however, significant that PW6 did not disclose this alleged threat to the police until 6 August 2024. This raises an important question: if PW6 had in fact been threatened by the 1st Appellant that the deceased would be killed, and if she genuinely believed that the threat was significant, why did she not inform the police of the threat, particularly soon after the death of the deceased? No plausible explanation has been forthcoming for this considerable delay.
32. This unexplained delay assumes significance when assessing the reliability and probative value of PW6's testimony. In my view, the failure to disclose the alleged threat at the earliest opportunity materially affects the weight that can safely be attached to her evidence.
33. PC 35964 Mahinda Abeykoon was the police officer who first proceeded to the place where the body of the deceased was found. The body was lying on a cart road, on which there was well-grown grass approximately two inches in height. It is significant that, according to his observations, the grass had not been trampled, pressed down, or otherwise disturbed.

34. This observation assumes particular significance when considered in the light of the evidence of PW1, who stated that, after assaulting the deceased, the Appellants transported him in a three-wheeler. If the deceased had in fact been transported in a three-wheeler to that location, or had been carried there by the Appellants, one would reasonably expect some disturbance or compression of the grass at or around the place where the body was found. However, according to PW7, no such disturbance was observed. This circumstance is therefore inconsistent with the account given by PW1 and further casts doubt upon the reliability of his testimony.
35. Even the learned Trial Judge has observed in the judgment that the grass at the place where the body was found showed no signs of having been trampled or pressed. This observation further casts doubt on the evidence of PW1, who stated that the deceased was placed in a three-wheeler and taken away by the Appellants.
36. At the trial, the contradictions marked by the defence and the omissions highlighted therein were admitted by the parties. The most significant omission, from the standpoint of the prosecution case, is PW1's failure to mention the place from which he allegedly witnessed the assault on the deceased by the Appellants. In his testimony, PW1 stated that he climbed a coconut tree and, from there, witnessed the assault. However, he had failed to mention this material fact in his statement to the police.
37. The learned Trial Judge misdirected himself when considering the above omission. The learned Judge observed that the PW1 had initially been hiding in a banana plantation and, upon seeing the deceased approaching the Appellants, had climbed a coconut tree. However, this version was never supported by the evidence of PW1. There was no evidence to establish that the Appellant was hiding in a banana plantation and he climbed the coconut tree upon seeing the deceased approaching PW1. The learned trial Judge therefore appears to have

attributed to the evidence a factual position which was not established by the testimony of PW1.

38. The Judicial Medical Officer who conducted the autopsy also testified, marking the Post Mortem Report as Y1. In the report said report, he opined that the cause of death was trauma to the head and fall front, which is compatible with an assault.

39. In the aforesaid circumstances, I conclude that it is not safe to affirm the conviction against the Appellants.

40. For the reasons set out above, we allow the appeal and we proceed to quash the convictions and sentences imposed on the Appellants by the Learned High Court Judge of Polonnaruwa.

41. Accordingly, we acquit the Appellants of all the charges leveled against them.

42. The appeal is allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.,

I agree

Judge of the Court of Appeal