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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No. HCC 98/2003

High Court of Chilaw Case No. HC 63/1998

Rajapaksha Arachchilage Dias alias Marcus

Accused

AND NOW BETWEEN

Rajapaksha Arachchilage Dias alias Marcus

Accused Appellant

V.

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

Complainant Respondent

BEFORE : **K.K. WICKREMASINGHE, J**

K. PRIYANTHA FERNANDO, J

COUNSEL : Rienzie Arseculeratne PC for the Accused Appellant.

Janaka Bandara SSC for the Respondent.

ARGUED ON : 05.12.2019

WRITTEN SUBMISSIONS

FILED ON : 14.10.2019 by the Accused Appellant.

14.10.2019 by the Respondent.

JUDGMENT ON : 14.02.2020

K. PRIYANTHA FERNANDO, J.

01. Appellant was indicted in the High Court of Chilaw on one count of murder punishable under section 296 of the Penal Code and one count of attempted murder punishable under section 300 of the Penal Code. After trial the learned High Court Judge convicted the Appellant on both counts. The Appellant was sentenced to death for count No.1 and was sentenced to 10 years imprisonment and a Rs. 5,000/- fine for count No.2. The instant appeal was preferred against the said conviction. Following grounds of appeal were urged by the counsel for the Appellant in his written submissions.

    1. The learned Trial Judge failed to consider weaknesses in the testimony of Baby Nona.

    2. The learned Trial Judge failed to consider the weaknesses in the testimony of Anusha Nimali.

    3. The learned Trial Judge failed to consider the adequacy of light to facilitate identification of the person who shot applying Turnbull principles, specially having regard to the failure of the police to take charge of the lamp.

    4. The learned Trial Judge failed to consider that the prosecution failed to lead in evidence the sketch drawn by the OIC of the Anamaduwa Police Station, IP Indram when he gave evidence.

5. The learned Trial Judge in her Judgment at page 274 held that either Anusha Nimali (PW1) or Baby Nona (PW2) should have had the ability to identify the Accused Appellant, thereby misdirecting herself on the law.

6. The learned Trial Judge failed to consider whether the animosity or the displeasure that the Accused Appellant had with the deceased, (vide pages 35-36, 106, 155 and 123 of the brief) paved the way for false implication of the Accused Appellant.

7. The learned Trial Judge failed to separately consider the two counts set out in the indictment.

8. The learned Trial Judge considered the bad character of the Accused. (vide page 282)

9. The learned Trial Judge misdirected herself on the law pertaining to the burden of proof that an Accused Appellant should discharge in a case of this nature by holding that the Accused had not established that the shooting was carried out by an unknown gunman. (vide page 272)

10. The learned Trial Judge failed to properly discharge the burden caused on her to properly analyze the evidence led in the case for the Judgment does not contain an analytical examination of the evidence led at the trial.

02. I have carefully considered the evidence adduced at the trial, the judgment of the learned High Court Judge and the submissions made by the counsel for the Appellant as well as the Respondent.

03. Brief facts of the case as narrated by the witnesses for the prosecution are, that the deceased and the wife (PW2) were living with their 3 children in their house where the shooting incident took place. The incident had taken place around 7.30 p.m. According to PW2, the three children had been serving their food in the kitchen that was outside close to the main house. Deceased and PW2 had been in the room inside the house that was close to the kitchen

having their dinner. PW2 heard a gunshot and when she looked at the door, she had seen the Appellant standing near the door holding a gun. Deceased had fallen on to the bed, bleeding. Deceased had then shot at her injuring her arm.

Ground of Appeal No.1

04. Learned President's counsel for the Appellant submitted that in her evidence in the non-summary inquiry Baby Nona (PW2) has said that she did not see properly who shot at her husband. Contradiction was marked as V1. Baby Nona's evidence had been very clear and consistent. She had been having dinner facing the back-door. As she heard the gunshot, she had looked at the back-door side where she saw the Appellant holding the gun. Then the Appellant had shot at her as well. The evidence makes it clear that when she saw the Appellant, the husband was already shot at. Appellant had been holding the gun. It is obvious that it was the reason why she said in the non-summary inquiry that she did not see the Appellant firing the shot at the husband. That portion of evidence or the contradiction V1 will not affect the credibility of the witness Baby Nona. Counsel has made the witness confused by unfair way of cross examination.

05. Contradictions *inter se* as well as *per se* should not be considered to discredit a witness unless those are materials that go to the root of the case. Indian Supreme Court in ***State of Uttar Pradesh V. M. K. Anthony [1984] SCJ 236/ [1985] CRI. LJ. 493 at 498/499*** held;

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks 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 and there from 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. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. 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."

06. This was referred to and followed in case of ***Oliver Dayananda Kalansuriya V. Republic of Sri Lanka CA 28/2009 (13.02.2013)***.

07. Learned President's counsel referred to some inconsistencies between the evidence of Baby Nona and her daughter Thushari (PW3) on the issue of meeting Thushari (PW3) who was in the kitchen after the incident. Evidence taken as a whole makes it clear that Baby Nona was in the room inside the main house close to the kitchen and the three children had been in the kitchen. Witnesses cannot be expected to narrate the incident like replaying a video recording. Evidence taken together makes it clear that Baby Nona witnessed the incident as she testified. She also was shot at and injured by the Appellant. Learned Trial Judge has rightly acted upon the evidence of Baby Nona.

08. Learned President's counsel further submitted that Baby Nona has looked back when she heard the gunshot, which means she had not been facing the door while having dinner. Baby Nona clearly said that she was facing the door while having dinner. As submitted by the learned SSC, when she said she looked back, she has referred to the back-door. Her evidence was; (page 74 of the brief),

උ: කොහෙන්ද ඒ වෙඩි ශබ්දය ඇහුණේ කියල මම පිටිපස්ස බැලුවා. ළමයි කුස්සියේ ඉන්නවා. දොර පැත්තෙන් ඇහුණේ.

ප්‍ර: තමනුයි තමන්ගේ ස්වාමී පුරුෂයායි ඇඳේ ඉඳගෙන හිටියේ දොරට මුහුණ දාලාද, දොරට පිටුපාලාද?

උ: දොරට මුහුණ හරවලා ඇඳේ ඉඳගෙන හිටියේ.

Therefore, her evidence is clear that she had been facing the back-door while having dinner.

09. Learned President's counsel submitted that the police have delayed recording the statement and therefore, Baby Nona had time to concoct a story. It is evident that although the incident took place at about 7.30 p.m., Baby Nona was taken to the hospital only after 4 a.m. the following day, the reason being, it was during the insurgency period that she could not be taken in the night. She was suffering from the gunshot injury. Medical Report testifies to that fact. The daughters of Baby Nona have made statements to the police in the morning itself clearly implicating the Appellant. Hence, the delay in the police to record the statement till the same day afternoon will not affect her testimony.

10. Learned counsel submitted that the witness Baby Nona had not told the doctor who examined her that she was shot by the Appellant. Baby Nona's Medical Report was tendered in evidence as P2 (Page 288 of the brief). In the Medical Report (M.L.R.), there is a column where the doctor has to fill the short history given by the patient. The doctor has not recorded any short history given by the patient but has written as to how the patient was admitted and transferred in terms of the bed-head-ticket. Therefore, merely because the doctor who prepared the M.L.R. did not mention the history given by the patient, it will not affect the credibility of the testimony of the injured Baby Nona.

11. Learned President's counsel for the Appellant further argued that the wife of the deceased has accepted a sum of Rs. 50,000/- as compensation on the basis that her husband (deceased) was murdered by an unknown gunman. It is common knowledge that the heirs of persons killed by unknown gunmen during the insurgency period were given compensation by the government. If the murder was committed by a known person, heirs would not be entitled to that compensation from the government. This incident has taken place during the insurgency period. The same day the witnesses including Baby Nona have made statements to the police clearly identifying the Appellant as the gunman who killed the deceased. Therefore, Baby

Nona accepting compensation for the killing of her husband from the government on the basis that the deceased was killed by an unknown gunman, will not be a reason to reject the evidence of Baby Nona and the Children that it was the Appellant who shot the deceased. As rightly submitted by the learned SSC for the Respondent, the evidence of PW1 (elder daughter of the deceased) that she saw the Appellant firing towards inside the house was never challenged in cross examination by the defence.

Hence, the ground of appeal No.1 which includes 7 sub grounds has no merit.

Ground of Appeal No.2

12. Learned President's counsel for the Appellant contended that it is doubtful whether the statement of the witness Anusha Nimali was recorded at 8.30 a.m. as testified by the police, for the reason that she was not produced before the learned Magistrate at 10.15 a.m. for the inquest citing security reasons and had sought permission to tender her testimony later.

13. As I mentioned before in this Judgment, this incident has taken place during the insurgency period. Anusha Nimali (PW1) had given evidence at the trial. This issue was never taken up by the defence at the trial and never even suggested to the witness. So much so, her evidence on the incident was never challenged in cross examination although she was cross examined. Investigating officer Wipularatnam Indram (PW10) giving evidence said that the 1st information was given by the said witness, daughter of the deceased (Anusha) at 8 a.m. on 03.08.1989. He was cross examined on the issue of not producing the PW1 at 10.15 a.m. before the Magistrate. He said that due to the situation prevailed at that time and as the father of PW1 was killed and mother too was shot, PW1 was in a state of shock. Although, this officer was cross examined on that issue, his evidence that the first information was given by the PW1 at 8 a.m. was never challenged by the defence. Hence, this contention of the learned President's counsel is untenable.

14. Learned President's counsel further argued that the statement of PW1 was marked as 'P3' without putting the contents to PW1. It is pertinent to note as I mentioned before, the evidence of PW1 was never challenged by the defence although she was cross examined. Obviously the first information was disclosed to the defence with the indictment. Not a single

contradiction was marked in her evidence with the statement made to the police (P3). Therefore, not producing the P3 through PW1 has caused no prejudice to the defence.

Hence, ground of appeal No. 2 is devoid of merit.

Ground of Appeal No. 3

15. It is the contention of the learned President's counsel that the learned Trial Judge failed to consider the adequacy of light to facilitate the identification of the assailant. Police have also failed to take charge of the lamp, counsel submitted.

16. Prosecution must prove that there was sufficient light for the witnesses to identify the Appellant. In case of ***Turnbull [1977] QB 224***, laid down important guidelines for Judges in trials that involve disputed identification evidence. The question that arose in this case was whether there was sufficient light for the witnesses to identify the Appellant without mistake. PW2 (Baby Nona) said in evidence that there was a hurricane lamp lit in the room where she was with the husband. There had been lamps lit in other rooms as well. She said that even the kitchen could be seen if one comes to the door in the room. That door had been opened. The children had been in the kitchen. The person who shot the deceased and the PW2 had come up to the door step of the room (2 to 3 feet) to shoot. Door was opened. PW2 has therefore clearly identified the Appellant from the light emanated from the lamp lit in the room. In villages where they do not have electricity, eyes of the villagers are adjusted to the light emanates from the lamps. It is evident that the witnesses were known to the Appellant.

17. Evidence of PW2 (Baby Nona) that the lamps were lit in the rooms was not even challenged by the defence in cross examination. Therefore, mere failure of the police to take the lamps as productions would not create any doubt on the evidence of the witnesses that the lamps were lit. As I repeatedly mentioned, the evidence of PW1 on the identity of the Appellant and the shooting by the Appellant was not challenged by the defence. This ground of appeal should necessarily fail.

Ground of Appeal No. 4

18. Learned President's counsel brought to the notice of the court that the prosecution failed to submit the sketch of the house drawn by the Police Officer in evidence. Prosecution witnesses PW1, PW2, and PW3 gave clear evidence about the house. Those evidence were not challenged. If there were any questions on the plan of the house favourable to the defence, counsel could have posed them to the witnesses, which they did not. The Police Officer not producing the sketch drawn by him has not caused any prejudice to the defence. This ground has no merit.

Ground of Appeal No. 5

19. Learned Trial Judge has said that either Baby Nona or Anusha Nimali should have had the ability to identify the Appellant. As I said before, the evidence of Anusha Nimali (PW1) on the identity of the Appellant was never challenged by the defence. Hence, this ground also has no merit.

Ground of Appeal No. 6

20. Baby Nona in her evidence said that the Appellant was not in good terms with her husband due to some issues in the Village Development Society. However, she did not know much detail about it. PW1 (Anusha Nimali) also said the same thing in evidence. It is the contention of the counsel for the Appellant that the learned Trial Judge has not taken that into consideration. However, evidence of PW1 was not challenged by the defence at the trial.

21. Merely because a witness is a close relative of the deceased, he or she cannot be regarded as an interested witness. There is no evidence to suggest that PW1 and PW2 had any animosity with the Appellant, other than the fact they knew that the deceased had an issue with the Appellant at the Village Society.

22. A close relative of the deceased does not, *per se*, become an interested witness. (***Ram Bharosey V. State of UP AIR [1954] SC 704)***

23. In the above premise the learned Trial Judge has no reason to reject the evidence of PW1 and PW2. This ground is devoid of merit.

Ground of Appeal No. 7

24. It is the submission of the Appellant's counsel that the learned Trial Judge has not considered the two counts separately. The learned Trial Judge has considered the evidence of PW1 and PW2 on the incident upon which the offences in both counts were committed by the Appellant. It was at the same time, one after the other, the Appellant had shot at the deceased and the PW2. Deceased in count No.1 succumbed to his injuries and PW2 was also injured by the gunshot fired by the Appellant. Intentions of the Appellant were clear. Hence, this ground of appeal should fail.

Ground of Appeal No. 8

25. This ground has no basis. At page 282 of the brief, in her judgment, the learned Trial Judge has narrated the evidence as to how the Appellant was arrested. She has not taken any previous bad conduct of the Appellant into account. However, at page 277 of the brief, in her judgment, the learned Trial Judge has narrated the evidence of the Police Officer that the Accused had left the village after the incident and that he was arrested after four and a half years. The post conduct of the Accused is admissible.

Ground of Appeal No. 9

26. In her Judgment (at page 276 of the appeal brief), the learned Trial Judge has referred to the evidence on the fact that PW2 has received compensation from the government, on the basis that the deceased was killed by an unknown gunman. On analyzing that point, the learned Judge has said that defence has not proved that the compensation was taken on the basis that the deceased was killed by an unknown gunman. The learned Trial Judge did not shift the burden to the Accused. There is no such shifting of burden in her Judgment at page 272 of the brief as submitted by the counsel for the Appellant. This ground has no merit.

Ground of Appeal No.10

27. This ground should necessarily fail as the learned Trial Judge has, while narrating the evidence, has discussed and analyzed the evidence and has come to the correct conclusion.

28. Although no specific ground of appeal was preferred. The learned counsel for the Appellant, at the argument stage submitted that the amended charge was not read to the Accused on 02.03.2000 (page 66 of the brief). Learned President's counsel further submitted that the learned Trial Judge failed to discuss circumstantial evidence in her Judgment.

29. On that day, the words 'පැමිණිල්ල නොදත් අන් අයෙකු සමඟ' was added to the charge. Counsel for the Accused has also agreed to the said amendment. However, after the amendment upon agreement, it was not read to the Accused. As the Accused clearly agreed to the above amendment (පැමිණිල්ල නොදත් අන් අයෙකු සමඟ), it has not caused any prejudice to the Accused Appellant. Trial proceeded on the basis that the Appellant pleaded not guilty upon the Accused agreeing to the amendment. Proviso to the Article 138 of the constitution reads;

> *"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."*

30. Section 436 of the Code of Criminal Procedure Act provides;

> *"Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account-*
>
> *(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or*
>
> *(b) of the want of any sanction required by section 135,*
>
> *unless such error, omission, irregularity, or want has occasioned a failure of justice."*

31. As the amendment was made in agreement of both parties, failure to read the amended charge back to the Appellant has not caused any prejudice to the Appellant, nor it has occasioned a failure of justice.

32. Baby Nona in her evidence did not state that she saw other persons as well with the Appellant. What she said was from the noises she felt that there were other people as well. However, her evidence was clear that it was the Appellant who came up to the door step and shot. As she heard the first gunshot, when she looked at the door, there was the Appellant holding the gun. Then the Appellant also had shot at her. That was why she said that the Appellant shot the husband. The only and inescapable inference that could be drawn from the proved circumstances is that it was the Appellant who shot the deceased. There was no other conclusion that the Trial Judge could have come to.

Hence, this court has no reason to interfere with the judgment of the learned High Court Judge.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL