

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

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

**COMPLAINANT**

**Vs**

1. Gonyamalimage Chaminda Manoj  
Aponso alias Chaminda (dead)
2. Maggae Suranga Fernando alias  
Magage Shaminda Fernando
3. Horana Hendilage Indu Janaka

**ACCUSED**

**Case No. CA 292/2014**

**HC (Colombo) Case No. 3216/2006**

**AND NOW**

1. Maggae Suranga Fernando alias  
Magage Shaminda Fernando
2. Horana Hendilage Indu Janaka

**ACCUSED – APPELLANTS**

**Vs**

The Attorney – General  
Attorney General's Department  
Colombo 12.

**COMPLAINANT - RESPONDENT**

**BEFORE**

: Deepali Wijesundera J.

: Achala Wengappuli J.

**COUNSEL**

: Anil Silva P.C. for the 1<sup>st</sup> Accused

Appellant

Indika Mallawarachchi for the

2<sup>nd</sup> Accused – Appellant

Hari Priya Jayasundera D.S.G. for

The Attorney - General

**ARGUED ON**

: 21<sup>st</sup> May, 2018

**DECIDED ON**

: 1<sup>st</sup> June, 2018

**Deepali Wijesundera J.**

The appellants were indicted in the High Court of Colombo for the murder of Magalage Ariyapala punishable under section 296 of the Penal Code. After trial they were convicted for the said offence, and sentenced to death.

Witness Dammika who is an eye witness and the daughter of the deceased had been doing her homework seated in the balcony close to the deceased around 7.30 p.m., when some people have jumped into their balcony from the next door roof and kicked the chair the deceased was seated on. After the deceased fell on the floor he was first stabbed by 'Ata' Chaminda followed by Suranga the first appellant and Janaka the second appellant had been there with them. Dammika has gone inside and hidden in a pantry cupboard. Other

inmates of the house have come to the balcony after the incident. Dammika was only ten years old at that time. The assailants were previously known to her.

Witness Dammika has been consistent in her evidence and categorically stated that she saw the incident as she was seated by the side of her father. It was put to her that the appellants did not come to attack her father but she has denied the said position.

Witness Mangalika the wife of the deceased who had come to the balcony after hearing a commotion had seen three persons getting onto the adjoining roof and has identified one of them as 'Ata' Chaminda armed with a knife and the first appellant. She had only seen the second appellant's shadow whom her daughter Dammika identified as the second appellant.

These two witnesses have stated that they saw the people who came from the light of the street lamp and that the first witness did her homework from this light. According to the prosecution this house had been built on 2.2 perches of land and one could touch the street lamp from the balcony. The prosecution witness Mangalika had said that they did not have to switch on the lights in the house since they got enough light from the street lamp.

Witness Sumanawathi sister of the deceased had been downstairs and hearing cries she has rushed out to the road in front and seen two persons stabbing the deceased. This witness has said that the street lamp was not burning at the time of the incident (vide page 176 and 178 of the brief) and that she did not identify the persons who attacked the deceased and that she only saw their shadows. Sumanawathi's evidence has contradicted the evidence of Dammika's and Mangalika's evidence on the issue of light.

The learned counsels for the appellant argued that there wasn't sufficient light for witness Dammika to identify the appellants therefore one can not say that the appellants were properly identified by the witnesses. It was further argued that the Learned High Court Judge holding that the appellants did not explain about lighting is a miscarriage of justice. The appellants have stated in evidence that they were not there hence how can they explain about lighting? This is a wrong finding on the part of the learned High Court Judge.

The learned counsels for the appellants argued that Sumanawathi's evidence is beneficial to the appellants and the learned High Court Judge failed to consider her evidence.

Witness Dammika's and Sumanawathi's evidence contradicts on the evidence regarding light and the Learned High Court Judge has failed to consider this item of evidence which amounts to the appellant's being denied of a fair hearing.

All the witnesses have testified before the Learned High Court Judge who delivered the judgment. Therefore she had the opportunity to see the demeanor and deportment of the witnesses. **Vide Bandara vs AG 1999 (3) SLR 168.** Evidence of Sumanawathi is not there in the narration of evidence by the High Court Judge. The narration of evidence runs into 17 pages out of 21 pages in the judgment. But the learned High Court Judge omitted totally the evidence of Sumanawathi from her consideration.

Though Dammika's evidence have discrepancies on the availability of light she can not be disbelieved. But her evidence and the evidence of Sumanawathi has to be analysed by the trial judge who could see the demeanor and deportment of the witnesses which this court can not do. Therefore we have to agree with the learned President's counsel for the appellants that they did not have a fair trial. **Vide Banda vs AG 1999 (3) SLR 168.**

Considering the fact that the appellants were in remand custody after conviction since October 2014, we decide to send this case back to the High Court for a retrial. We set aside the judgment and conviction dated 23/10/2014. The Learned High Court Judge is directed to give priority to this case.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL