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

Weerasinghe Arachchige Dona Ariyasena

(Katuwana Madduma Mahaththaya)

C.A.No.58/2009

H.C.Rathnapura No.02/99 **Accused-Appellant.**

Hon. Attorney-General

Attorney General's Department

Colombo 12.

Respondent.

C.A. No 58/2009 **H.C. Ratnapuara No: 02/99**

Before : Rohini Marasinghe, J and

H.N.J. Perera,J

Counsel : Indika Mallawarachchi for the Appellant.

Thusith Mudalige S.S.C. for A.G.

Argued and

Decided on : 03.10.2012

Rohini Marasinghe, J

The appellant was convicted for the murder of one Abeysekara Liyarachchi Sirisena and sentenced to death.

Three of the prosecution witnesses were Rupawahtie who was the wife of the deceased, and the two daughters named Nirosha and Dinesha. The case of the prosecution briefly was that on the day of the incident the wife had accompanied the eldest daughter Nirosha to the toilet whilst the deceased and the other two were in the house. All three of them had been together at the time their mother Rupawathie left the house to go to the toilet with the elder daughter. Around 7.30 p.m. Rupawathie had heard a noise and she had rushed to the house. At that point she had seen the deceased fallen with gun shot injuries. The two daughters who had been with their father had rushed to the arm of their mother Rupawahtie.. As they do not have electricity the house had a small lamp which is called a chimney lamp lit at that time of the incident. The said Rupawathie made a statement to the police promptly,

when the police visited the crime scene. According to her testimony the youngest daughter had informed her (Rupawathie) that it was the appellant who had shot the deceased. On this very material point the testimony of the witness Rupawahie was inconsistent. At one point she says that the daughter had informed her at the moment of the incident that it was the appellant who had shot the deceased.. In the same testimony she says that the daughter had first told their grand mother who had come to their house on the next day evening, and not on the same day as told earlier. However, in the statement to the police which was a prompt statement, Rupawathiew had not mentioned that her daughter had told it was the appellant who had shot the deceased. It was a vital omission. The statement of Rupawathie to the police had been recorded on the basis that the person who had shot the deceased had not been identified by those who were present in the house.

The next witness was the eldest daughter Nirosha. She was outside the house with the mother when a noise was heard from inside the house. This witness and the mother Rupawathie had rushed into the house. They had seen the deceased fallen with blood on the body. The sister named Nadeesha had come running out while the younger sister Dinesha remained inside the house. This witness also told that the sister Dinesha was

questioned by the grand mother. On being questioned the sister had told the grand mother that she saw the appellant shoot their father. The grand mother was not called as a witness. Therefore, from this evidence what could be gathered would be that at the time the police came to visit the murder scene, none of the witnesses have informed the police who the assailant was. The only conclusion the court could arrive from this omission would be that the witnesses had not seen the assailant or for a reason unknown felt it was best not to divulge the name of the assailant.

The case of the prosecution rested on a sole eye witness's evidence of identification. The witness Dinesha was 7 years at the time of the incident. The sister who was older to her and who also in the house with the deceased and Dinesha at the time of the incident had not seen the appellant shooting. The evidence of the sole eyewitness as led in evidence was as follows in brief:

On the day of the incident she was on the lap of her father on the bed. Her other sister Nadeesah was on a chair in the same room. Then Nadeesha had said in sinhala to the effect "there sister' (**පොඩි අක්කා ඔන් නංගි**). (page 124) When Dinesha looked towards the door she said that she saw the appellant fire the shot that killed the deceased. A specific and a

very important question was asked by the prosecution from this witness with regard to the identity of the appellant. The question was as follows: (page 128)

"ප්‍ර මේ සිද්ධියට කලින් බේකරියේ මාමා දැකලා තියෙනවාද?

උ එක දවසක් දැකලා තියෙනවා"

ප්‍ර එයා කොහේද ඉන්නේ?

උ අපේ ගෙදරට එහා පැත්තේ හිටියේ ''

Neither the prosecution nor the trial judge had addressed this position beyond this point. The witness was very young child. The trial judge ought to have been mindful of that fact. The Witness had stated that she identified the assailant as " Bakery Mama" (බේකරියේ මාමා) When the witness was purporting to identify someone who she had seen only once in her life time the trial judge should very carefully assess that vital piece of evidence. The trial judge should consider the quality of that identification evidence. If the quality was good and remains good at the close of the accused's case, the danger of a mistaken identification is lessened, but poorer the quality, the greater the danger to rely on such evidence of identification. The court is not aware as to when the eye witness had last seen the appellant, whether it was after a long period of time or whether it was recently. The court was also not

aware as to the circumstances under which the witness had seen the appellant for the last time before the relevant day.. If the witness had seen the appellant after a long time the court is not aware as to the reasons for keeping the identity of that person in mind. All these matters go to the quality of identification evidence. It is also important to find out how long the witness was able to see the appellant at the time of the incident, whether it was a fleeting glance or on a longer observation under difficult conditions, or whether the witness was able to identify without any difficulty at all are matters that go to the quality of identification. It is important for the trial judges to have in mind as an evidentiary guidance the components laid down in the case of **R v Turnbull [1977] QB 224, CA).** These guide lines are known as 'Turnbull Warning".

The present case under review depended wholly on the correctness of the evidence of identification of the appellant. The judge should have been very mindful of the quality of the identification before convicting the accused. The trial judge should reject all possibilities that the witness may be mistaken. The trial judge should also consider *inter alia* the following facts when assessing the evidence of identification

At what distance did the witness identify the appellant.

In what light did the witness identify?

Was the observations impeded in any way.

Had the witness ever seen the accused before? How often? If the witness had seen the appellant only once had the witness any special reason for remembering the accused?

How long before the incident had the witness last seen the accused?

How long was the witness able to see the witness on this day? Was it a fleeting glance? Or was it under difficult condition. In this case the witness seems to have identified the appellant at the time the shot was fired. Neither the prosecution nor the trial judge had asked any questions as to the manner of identification- in the sense whether the witness saw the appellant before the shot was fired or after the shot was fired. I do not intend to elaborate on this point as the counsel for the State also conceded that the quality of the evidence of identification in this case was poor. And since that was the only evidence in this case it was unsafe to have convicted the appellant solely on that evidence. As mentioned earlier it is not necessary to substantiate these positions with judicial precedents as State was rightly not supporting the evidence of identification led in this case.

At the identification parade the witness had not identified the appellant. (vide the evidence of 12-06-2006 page 3). It is very important to note that if

the appellant was a person known to the witness as stated in her evidence at the trial it is strange that this witness was unable to identify the appellant at the subsequent identification parade. All these matters have not been dealt in the impugned judgment. Therefore, for the foregoing reasons the conviction and sentence would be quashed.

The Appeal allowed

Judge of the Court of Appeal.

H.N.J. Perera, J.

I agree.

Judge of the Court of Appeal

WC/-