

**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.**

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**CA/328/2007**

Hennayaka Mudiyanseleage Darmadasa alias Lal

**H/C Kurunegala case No. 13/2004**

**ACCUSED**

And,

Hennayaka Mudiyanseleage Darmadasa alias Lal

**ACCUSED-APPELLANT**

Vs,

Attorney General

Attorney General's Department

Colombo 12.

**RESPONDENT**

**Before: Vijith K. Malalgoda PC J (P/CA) &  
S. Devika De L. Tennakoon J**

**Counsel:** Tirantha Walaliyadda PC for the Accused-Appellant  
Shanil Kularatne SSC for the Attorney General

Argued on: 11.01.2016

Written Submissions on: 31.03.2016

**Decided on: 15.09.2016**

## **Order**

### **Vijith K. Malalgoda PC**

The accused-appellant was indicted before the High Court of Kurunegala for committing the murder of one Meragal Pedige Janaka Sampath at Giriulla on or about 25<sup>th</sup> March 2002, an offence punishable under section 296 of the Penal Code.

When the indictment was served on the accused-appellant, he elected to be tried by the Learned High Court Judge without the jury. The trial proceeded in the High Court of Kurunegala before the High Court Judge where the prosecution mainly relied on the evidence of a single eye witness. At the conclusion of the said trial the Learned High Court Judge convicted the accused-appellant on the indictment and sentenced to death. Being dissatisfied with the said conviction and sentence, the accused-appellant had preferred the present appeal before us.

As observed above, the prosecution case is solely depend on the evidence of the single eye witness namely Rohitha Vidyarthne. The Learned President's Counsel who represented the accused-appellant had raised several grounds of appeal, and that can be summarized as follows;

1. Accused was shown to the witness at the police station
2. Proper procedure was not adopted at the identification parade and it should have been rejected at the first place

3. Identity of 'Lal'
4. Learned High Court Judge misdirected himself and had used portions of evidence in the inquest and non summary inquiry without having led at the trial to assist him in his judgment
5. The accused arrested at his house and there was no absconding
6. The Learned High Court Judge misdirected himself and had a wrong inference that the accused-appellant volunteered a confession before the Kuliyaipitiya Magistrate on 28.03.2002.

The first three grounds of appeal referred to above are based on the identity and the said identity of the accused-appellant is emanating from the evidence of witness Rohitha Vidyaratne. It is important to consider his evidence before going in to the grounds of appeal referred to above.

As revealed before this court, the sole eye witness Rohitha Vidyaratne, was at his house which was situated in the Giriulla Town on that day, when he met the deceased around 5.00-5.30 pm. Since the witness was after an accident he could not walk on that day and he was seated in front of his house. The deceased who came on a cycle had stopped after seeing him and came up to him. The deceased too had sat on a stool and while they were talking to each other, a person had come and cut the deceased and went away. In his evidence he has narrated the incident which took place at that time as follows;

Page 46-47,

ප්‍ර: කොහොමද තමන් ජනකට කැපුලා කියන එක දැක්කේ?

උ: මම කුරුණෑගල පැත්තට මුහුණ දාල ඉඳගෙන හිටියේ. ජනක ගිරිඋල්ල පැත්තට මුහුණ දාල හිටියේ. අපේ කඩේ ඉස්සරහ බැමීමක් තියෙනවා. මහපාර ජෙන්නේ නැති නිසා ඔහු ඔලුව දාගෙන හිටියේ ඒ පැත්තට. එතකොට මම එකපාරටම දැක්කා කුණුහරුපයක් කියලා වම් අත ජනකගේ ඔලුවට තියලා දකුණු අතින් කෙටුවා

ප්‍ර: තමන්ට එම පුද්ගලයාට මතක තිබුණද?

උ: මම කලින් දැකලා තබුණේ නැ ඒ වුනාට මතක තිබුණා

- ප්‍ර: කොහොමද මතක තිබුණේ?
- උ: මම පුරුදු මුණක් වගේ මතකයක් තිබුණා
- ප්‍ර: එම පුද්ගලයා එතනට කොහොමද ආවේ කියලා දැක්කද?
- උ: නැහැ
- ප්‍ර: වාහනයකින් ආවා කියලා දැක්කද?
- උ: නෑ ඒ කොටන වෙලාවේ පයින් ආවේ
- ප්‍ර: කොහොමද කෙටුවේ කියලා දැක්කද?
- උ: වම් අතින් ඔලව අල්ලාගෙන දකුණු අතින් පහරවල් තුනක් කෙටුවා
- ප්‍ර: කෙහෙටද ඒ පහරවල් එල්ලකලේ?
- උ: බෙල්ලට
- ප්‍ර: මොකෙන්ද ඒ කෙටුවේ?
- උ: මන්නයකින්
- ප්‍ර: කොපමන දිගද එම මන්නය
- උ: අඩි 2, ½ ක් විතර
- ප්‍ර: ඒ පහරවල් එල්ලකලාට පසුව මොකද ජනකට වුණේ?
- උ: කැගහගෙන බීමට වැටුණා
- ප්‍ර: එම පුද්ගලයා මොකද කලේ පහරදීමට?
- උ: කුරුණෑගල පැත්තට ගියා
- ප්‍ර: කොපමණ වෙලාවක් ගතවුණාද පහරදීමට
- උ: තත්පර 2ක් 3ක් වගේ සුළු වෙලාවක්
- ප්‍ර: ඒ පැමිණි පුද්ගලයා මොන විදියේ තැනැත්තෙක්ද කියලා තමුන්ට හඳුනාන්න බැරිකමක් තිබුණාද?
- උ: නැහැ
- ප්‍ර: ඔහු මුහුණ ආවරණය කරලා තිබුණාද?

උ: නැහැ

ප්‍ර: සම්පූර්ණයෙන්ම මුහුණ නිරාවරණය වෙලා තිබුණේ

උ: ඔව්

ප්‍ර: ඔහු ඇඳගෙන හිටියේ මොකක්ද?

උ: සරමක් සහ අර්ථි එකක්

From the above evidence it is clear that the incident which had taken place somewhere around 5.30 pm was only witnessed by him, and the accused had walked away after the attack which took place within few seconds, but he could remember the face since it was a familiar face to him.

The witness during his evidence speaks of two occasions he had seen the accused thereafter. According to the witness, on the following morning he had gone to the hospital to see the body of the deceased in a friend's vehicle. On his return he received a message through a friend and gone to the police station.

At the police station he met two police officers and they showed a person and asked whether he is the killer. The relevant portion of evidence reads thus;

Page 48

ප්‍ර: ඊට පස්සේ මොකද වුණේ?

උ: දෙන්නෙක් ඇවිදිනි මගෙන් ඇහුවා අරු නේද මැරුවේ කියලා. මම දැනගන්නා ඔහු තමයි කියලා. මම කිව්වා ඔව්' කියලා.

As observed by this court this is the first time he saw the accused after the attack on the deceased on the previous evening. Thereafter he was taken for an identification parade and at the parade he identified the accused-appellant.

With regard to the conduct of the said identification parade, the Learned Counsel for the accused-appellant had raised several objections and in fact his 2<sup>nd</sup> ground of appeal was based on the irregularities of the said parade.

During the arguments before us the Learned Senior State Counsel who represented the Attorney General keeping to the best traditions of the Attorney General's Department informed that he would not be depend on the identification parade but would be solely depend on the identity of the accused based on the identification made at the police station.

In this regard he placed before this court the concept of "Street Identification" which is also be considered as a mode of identification around the world.

As observed by this court a "street identification" or "live show up" provides an eye witness with an opportunity to identify a suspect shortly after a crime and this is used widely by police mainly in the western world sometimes with the help of video recorded evidence. This court has no reason to reject the concept of street identification if the evidence available reveals the said position.

For an example if the witness had come across the accused shortly after the incident at a public place or even at a police station and identified him as the culprit, he can show him to the police, or taken him to the police station with the help of police or with the help of general public. This identification can be permissible since the said identification has helped the witness to identify the suspect after the incident when the suspect was among the public.

The purpose of having an identification parade is to give an opportunity for the witness to identify a suspect among a group, where the witness can make mistakes too. One of the main advantages of a street identification is that the identification is made within a short period, when the memory of the witness is fresh, rather than going before an identification parade after several days or more.

The Learned Senior State Counsel explained the identification made by witness Rohitha Vidyaratne as street identification and requested this court to act upon the said identification. In this regard we would like to analyze the evidence given by witness, with regard to the identification he made at the police station.

ප්‍ර: මෙම සිද්ධිය වුන දිනයේ හෝ ඊට පසුව මෙම පහර එල්ලකල පුද්ගලයා නැවත දැක්කාද?

උ: මම පහුවදා ඉස්පිරිතාලේ මෝටරියට ගියා ජනකට බලන්න ඊටපස්සේ ඕන්නෑ කියලා හිතියා වෑන් එකට ආවා ඊටපස්සේ වෑන් එකේ යාච්චොත් එක්ක ජනකගේ ගෙදර ගියා ඒ යද්දී වෑන් එක නතරකරලා යාච්චොත් කීවා පොලිසියෙන් එන්න කීවා මොකද දන්නේ නෑ කියලා ඊටපස්සේ මම වෑන් එකෙන් බැහැලා ඒ යාච්චොත් එක්ක පොලිසියට ගියා

ප්‍ර: මොන පොලිසියටද ගියේ?

උ: හිරිඋල්ල පොලිසියට

ප්‍ර: ඊටපස්සේ මොකද වුනේ?

උ: දෙන්නෙක් ඇවිත් මගෙන් ඇහුවා අරු නේද මැරුවේ කියලා

ඔම දැනගත්තා ඔහුතමයි කියලා මම කීවා ඔව් කියලා

ප්‍ර: තමුන්ට එම පුද්ගලයා දැක්කට පසුව හඳුනාගන්න පුළුවන් වුනා?

උ: ඔව්

ප්‍ර: ඒ කවුරුන් වශයෙන්ද?

උ: ජනක මරපු පුද්ගලයා හැටියට

ප්‍ර: තමා කුලියාපිටිය මහේස්ත්‍රාත් අධිකරණයේ පැවති ලඝු නොවන නඩුවේදී සාක්ෂි දුන්නා මතකද?

උ: ඔව්

ප්‍ර: තමාගෙන් එහිදී හරස් ප්‍රශ්න ඇහුවා මතකද විත්තිය වෙනුවෙන්?

උ: ඔව්

ප්‍ර: තමාට යාඵවෙකු පැමිණ කීවා තමාට කෙනෙකු අනුවෙලා ඉන්නවා පොලිසියට ඇවිත් ඔහුද කියලා බලන්න කීවා පොලිසියට ඇවිත්?

උ: ඔව්

ප්‍ර: තමාට මෙම පණිවිඩය කීවේ තුෂාර?

උ: ඔව්

Page 52

ප්‍ර: එම අවස්ථාවේදී පොලිස් ස්ථානයේ සිටිය සැකකරු තමාට පෙන්නා දුන්නේ කවුද?

උ: එස් අයි මහතුන් දෙදෙනකු ඇවිත් හිටියා මගේ වැන්රථය ලඟට ඇහුවා අර පුද්ගලයා නේද මැරුවේ කියලා

ප්‍ර: ඒ ලෙස කීවේ එස් අයි මහතුන් දෙන්නා?

උ: ඔව්

.....

ප්‍ර: තමා පොලිස් ස්ථානයට ගියාට පසුව පොලිසියෙන් කීවා මේ පුද්ගලයාද කෙටුවේ කියලා බලන්න කියලා

උ: ඔව් මා එම අවස්ථාවේදී හඳුනාගන්නා මේ පුද්ගලයා පොලිසියට ඇවිත් පීසීලා දෙදෙනකු සමඟ කතාකලා මම ඒ පුද්ගලයා හඳුනාගන්නා පුද්ගලයා බවට

.....

Page 53

ප්‍ර: තමා පොලිසියට ගියවිට පොලිස් නිලධාරීන් තමාට මේ චිත්තිකරු පෙන්වා සිටියා පසුව මේ පුද්ගලයා තමා මැරුවේ යනුවෙන් පෙන්නා හිටියද?

උ: මම හඳුනාගන්නා ඔහු බවට



.....

Page 55

ප්‍ර: පොලීසියෙන් පෙන්වා සිටිය පසුවද හඳුනාගත්තේ තමා ඇස් දෙකින් දැකලද හඳුනාගත්තේ?

උ: මට කෙටුවීම එම පුද්ගලයාගේ මුහුණ මතක තිබුණා පොලීසියෙන් මේ පුද්ගලයාද කියලා ඇසුවීම මම ඔව්කීවා

When the above evidence given by the witness Vidyaratne is considered, it appears that, the witness was got down to the police station in order to identify the accused. However this fact is not revealed from the evidence of the investigating officers. If the above evidence given by witness Vidyaratne is accepted the accused was in the police station, on the following day, i.e. 26.03.2002 but according to the evidence of the investigating officer the suspect was arrested at his house on 28.03.2002 at 2.00 pm.

In a case of street identification, the suspect is arrested on him being identified as the culprit by the witness. However in the present case there is no evidence before this court that the suspect was arrested on 26.03.2002 at the Giriulla Police Station.

With regard to the identification made by witness Vidyaratne at the police station, it is further observed by this court, that the witness was prompted to identify the accused by asking a direct question “Is this the man who killed the deceased?”

In this regard the Learned Senior State Counsel had argued that the said direct question had two answers i.e. yes or no; and the answers by the witness in affirmation was good evidence to establish that the said identification was made without any interference on the witness.

As previously observed by this court one of the main purposes of having an identification parade was to make sure that the witness did not make any mistake when identifying the suspect. Even in street identification we observe that the said element is present since the identification was made at a

public place. But the circumstances under which the suspect in the present case is identified by the main witness, does not fulfill the said requirement, since the person was directed to him, even though the witness now states that he identified him, since he could remember the face.

The evidence of the eye witness Vidyaratne at the High Court Trial was that, subsequent to the suspect being seen at the police station the suspect was later identified at the identification parade. This identification parade was seriously challenged before us and as observed earlier the Learned Senior State Counsel did not rely on the said parade.

In the said circumstances, the only evidence with regard to identification available in the present case, is the evidence of witness Vidyaratne, to the effect that he saw and identified the suspect at the police station when two Sub-Inspectors asked him "Is this the person who killed the deceased?"

In addition to the infirmity which was already discussed above it is also important to note that the said evidence of witness Vidyaratne is not corroborated by the evidence of any other witness. It is only witness Vidyaratne says that he saw and identified the suspect at the police station when the suspect in the company of two police constables on 26.02.2002, but according to police the suspect was arrested at his residence on 28.03.2002.

As observed by this court the entire case for the prosecution is solely depending on the evidence of the single eye witness Vidyaratne. During the trial before the High Court the prosecution was not being able to place any other evidence to link the accused –appellant to this case. Even according to the evidence of the family members of the deceased, the accused-appellant was a stranger to them.

When considering the material discussed above this court is of the opinion that it is unsafe to act on the evidence given by the single eye witness Vidyaratne with regard to the identification of the accused-appellant.

We are not inclined to discuss the other grounds of appeal raised by the Learned Counsel for the accused-appellant since, the above finding of this court is sufficient to reach a decision in the case before this court on the finding that, it is unsafe to act on the evidence of witness Vidyaratne on the identification of the suspect and also in the absence of any other evidence against the accused-appellant to convict him for the murder of the deceased Meragal Pedige Janaka Sampath. We are of the view that the Learned Trial Judge misdirected himself when he concluded that there was sufficient evidence to convict the accused-appellant for the murder of the deceased. We therefore set aside the conviction and sentence imposed on the accused-appellant. Accused is acquitted.

Appeal allowed. Accused acquitted.

**PRESIDENT OF THE COURT OF APPEAL**

**S. Devika De L. Tennakoon J**

I agree,

**JUDGE OF THE COURT OF APPEAL**