

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

The Democratic Socialist Republic of
Sri Lanka.

COMPLAINANT

Vs

Yahalagamage Nishantha Saman
Rohitha

ACCUSED

Case No. CA 167/12

High Court of Ambilipitiya

Case No. HC 260/06

AND NOW BETWEEN

Yahalagamage Nishantha Saman
Rohitha

ACCUSED – APPELLANT

Vs

The Attorney General
Attorney General's Department
Colombo 12.

RESPONDENT

BEFORE : Deepali Wijesundera J.
L.U. Jayasuriya J.

COUNSEL : Tenny Fernando for the
Accused – Appellant
A.Jinasena S.D.S.G. for the
Attorney General

ARGUED ON : 08th November, 2016

DECIDED ON : 14th February, 2017

Deepali Wijesundera J.

The accused appellant was indicted in the High Court for the murder of one P.K. Nimalawathi under Sec. 296 read with Sec. 32 of the Penal Code and also for causing injury to one A.G. Dingiri Appuhamy under Sec. 315 read with Sec. 32 of the Penal Code, and convicted and sentenced for murder and death sentence was given for the first charge and 6 moth RI for the second charge.

The story of the prosecution was that the accused appellant had come to the deceased's house around eight in the night asking for a match stick, and demanded money from the injured person. Subsequently the deceased and the injured were stabled by the accused appellant after forcing himself inside the house.

The only eye witness Niluka Senani has testified before the High Court and narrated the whole incident in detail. The learned counsel for the appellant argued that the identity of the accused appellant had not been established beyond reasonable doubt. He further argued that there was not enough light inside the house to identify the appellant. His argument was the entire house had only two bottle lamps which were not sufficient to identify the accused appellant. He referred to a contradiction in page 100 of the brief where the witness has admitted in the Magistrates Court that the bottle lamp was blown off before the appellant stabbed the deceased and the injured as well. Before dealing with this contradiction we will have to refer to the admission recorded before the learned High Court Judge.

The identification parade was held on 30/10/2000 and the proceedings were marked as P3 in the High Court. We find that the defence had admitted the parade notes in the High Court under Sec. 420 of the Code of Criminal Procedure Act. Therefore the learned High Court Judge shouldn't have allowed the defence to dispute the admitted facts. On this basis we disregard the contradictions with regard to the identity marked at the trial. It appears from the evidence of the sole eye witness that the deceased was holding a bottle lamp when they were attacked.

The counsel for the appellant further argued citing the judgment in **Wijepala vs AG** that when there is only one eye witness the evidence has to be established as wholly reliable. On a careful perusal of the sole eye witness's evidence we find that her evidence pass the tests of spontaneity and probability.

The counsel for the accused appellant referred to page 98 of the brief and said that the deceased had uttered the word "Appu Putha" which he argued shows that the assailant was a third party. Even if the deceased has uttered the words "Appu Putha" the sole eye witness has identified the accused appellant and she has specifically stated she could identify the person who attacked the deceased and the injured. Moreover she has categorically stated in her evidence only one person forcibly entered the house demanding for money she also referred to a person who stayed outside who's hand she had seen.

The learned Deputy Solicitor General submitted that the eye witness was 22 years of age at the time she testified before the High Court, and that her evidence was corroborated by the police officer's evidence. He also stated that the witness had ample time to identify the accused appellant from the time he entered the house and that the incident had taken place in close proximity to where she stood.

The learned Deputy Solicitor General referred to page 69 of the brief and said the eye witness had stated that there was a light burning in the neighbor's house which fell on to their kitchen. This light has been observed by the investigating officer, this was not disputed in the High Court. Citing the judgment in **Thillipu Mandige Nalaka Chrishantha Kumara Thisera vs AG C.A. Appeal 87/2005 decided on 17/05/07** stated that it was decided when the evidence has not been challenged by the defence such evidence is considered as proved.

The Deputy Solicitor General further submitted that the investigating officer has found two pairs of slippers outside which did not belong to the inmates of the house, which prompted them to frame charges under Sec. 32 of the Penal Code.

The main argument of the counsel for the appellant was that this is a case of mistaken identity. We do not agree with this argument since the eye witness has specifically stated she witnessed the entire incident at close proximity and the admission of the identification parade proceedings strengthens her story.

The medical evidence reveals that the deceased had sustained one stab injury which caused her death, this shows the murderess intentions

and the force used by the accused appellant. There had been no provocation, no sudden fight. We find that the doctor's evidence has not been challenged by the defence.

For the afore stated reasons we are not inclined to set aside a well considered judgment by the High Court. We affirm the judgment delivered on 15/02/2012 and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

L.U. Jayasuriya J.

I agree.

JUDGE OF THE COURT OF APPEAL