

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

In the matter of an application made in terms of Section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Vs

1. Hapugoda Arachchi Kankanamlage
Jayalath
2. Pinnagodage Danapala

ACCUSED

CA Case No. 251 A-B/2009

HC (Balapitiya) Case No. 421/1992 **AND NOW BETWEEN**

1. Hapugoda Arachchi Kankanamlage
Jayalath
2. Pinnagodage Dhanapala

ACCUSED – APPELLANTS

Vs

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

RESPONDENT

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

COUNSEL : Anil Silva PC for the 1st Accused-
Appellant.
N. Jayasinghe for the 2nd Accused-
Appellant.
A. Jinasena S.D.S.G. for the
Attorney – General.

ARGUED ON : 13th November, 2017

DECIDED ON : 29th November, 2017

Deepali Wijesundera J.

The accused appellants were indicted in the High Court of Balapitiya for the murders of R.A. Punyadasa and R.A. Gunawathi under section 296 of the Penal Code read with section 32. They were also indicted under section 317 read with section 32 of the Penal Code for voluntarily causing hurt with dangerous weapons to R.A. Sarath and R.A. Hemalatha. After trial both appellants were convicted on all the charges and sentenced to death and 10 years RI, each for the second charges.

The case for the prosecution was that prosecution witness number one Wijethilake who is the father of the deceased and injured persons was

seated in the verandah of their house on 07/08/1992 the day of the incident when he heard some unfamiliar voices coming from inside of the house. He had heard them ordering the people inside the house that they were from the police and to sit down. He has recognized the voice of the first appellant who had come to rob this house on a previous occasion and he had gone round the house and peeped inside and seen the first appellant. Then he had jumped over the parapet wall and raised cries that thieves had come to his house, which made the villagers to come to his house when the witness came towards the house after raising cries his son Punyadasa had come towards him saying he was stabbed. He had said “අරු මට පිහියෙන් අත්තා” and dropped to the floor. The witness had gone to the police station in his motorbike and while he was there heard that two of his children had died in the incident.

At the time of the incident the house did not have an electricity supply and was lit by chimney lamps. Prosecution witness number three Sarath who was also injured had been studying with a chimney lamp near the grill from where he could see the house. He had seen the first accused coming with another person who carried a gun. His brother who died had been eating rice seated close to him when these people entered the house saying they are from the police. His brother Punyadasa had run towards the hall and the witness had gone behind him and tried to go out and he was stabbed and he had run behind the person who stabbed him and has

identified him. When he came inside again he had seen his brother and sister fallen inside the house in a pool of blood. He has said he knew the first appellant as the person who came to this house earlier and the second appellant also he had identified as the person who came with a gun with the first accused. Wijethilake testified that the villagers who came after hearing his cries had apprehended the first appellant on a previous occasion when he came to rob his house.

Both appellants had denied the incident and said that they were falsely implicated. The first appellant said that he was suspected of having committed this offence because of a previous incident. He had also taken up the defence of alibi. A witness named Louisa has testified in the Magistrates Court that he watched television at her house that night but she was dead by the time the trial was taken up in the High Court and her son was called to testify in the High Court.

The second appellant's counsel argued that to convict the second appellant for murder the prosecution should prove that at the time of the incident the second appellant had a common intention and that there is no evidence to say the second appellant participated in the attack on the dead. The counsel argued that the second appellant was convicted based on Sarath's evidence. Sarath was stabbed from behind and he could not

have seen who stabbed him. Both counsels argued that there are infirmities in the evidence and that the evidence on the number of people who entered the house is inconsistent.

The appellants have taken up the argument that there was not enough light to identify the appellants in the house, therefore it has been a case of mistaken identity. Both Wijethilake and Sarath has stated they had a clear view from the chimney lamps burning inside the house. The house of the deceased is a house without electricity therefore the inmates would have been used to the lights of the lamps in the night their eyes would have been accustomed to the light from the lamps. Witness Sarath had been studying with a chimney lamp therefore he would have easily seen the people who came into the house with that light.

In **Kalika Thiwani vs State of Bihhar 1997 AIR S.C. p2186** it was held that *"visibility capacity of urburn people should not be applied to village folk"*. **Machhi Singh and others vs State of Punjab 1983 AR S.C. 957** it was held that *"villagers where electricity has not reached as yet get accustomed to seeing things in the light shed by the lantern. Their eye sight gets conditioned and becomes accustomed to the situation"*. Therefore the argument of not sufficient light to identify the appellants fails.

Both Wijethilake and Sarath said that the first appellant was apprehended by the villagers and was tied to the gate and subsequently handed over to the police on a previous occasion. This shows that the first appellant was a known party. Therefore the issue of mistaken identity does not arise.

Witness Sarath has seen the second appellant coming with the first appellant and he has testified he saw him with the light of the lamps clearly. Later on he had run behind the people who came to the house and had identified the second accused whilst running behind him. The appellants counsel argued that these are contradictions in Sarath's evidence which we find is not important since he was only a child of 17 years at the time of the incident.

The counsel for the appellants argued that the names of the prison officers were not recorded. The Magistrate who conducted the Identification parade has given evidence in the High Court and he has been cross examined. Therefore the question of not calling the prison officers does not arise. Even if one disregards the identification parade notes the second accused appellant was identified in the dock.

In **Dayananda Lokugalappaththi and eight others vs The State** 3 SLR 362 it was held that *“Law relating to identification does not shut out evidence of dock identification. The Trial Judge must examine clearly the circumstances under which the identification by the witness came to be made”*.

Section 414 (2) of the Code of Criminal Procedure Act states thus;

“The depositions regarding an identification parade (or the notes thereof) held by a Magistrate or Justice of the Peace and the depositions of the witnesses who assisted the Magistrate or the Justice of the Peace to hold the parade or affidavits by them may be given in evidence in any inquiry, trial or proceeding under this Code although the deponents or the Magistrate or the Justice of the Peace or the witnesses referred to are not called to testify as witnesses”.

For the afore stated reasons we are not inclined to set aside the judgment dated 16/12/2009.

The judgment of the High Court is affirmed. Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

L.U. Jayasuriya J.

I agree.

JUDGE OF THE COURT OF APPEAL