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

In the matter of an Appeal made in terms of Section 331 of the Code of Criminal Procedure.

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs

1. Nambukara Thanthrige Wimal Chandrasiri
2. Hetti Thanthrige Don Priyantha Pushpakumara Wijeratna
3. Bethgamage Terrance Priyawansha
4. Rangedara Liyanarachchige Sarath Jayalal
5. Pillada Arachchige Sarath Pushpakumara

ACCUSED

Case No. CA 192-193/2009

HC (Panadura) Case No. HC 1765/03 **AND NOW BETWEEN**

Nambukara Thanthrige Wimal Chandrasiri

1st ACCUSED – APPELLANT

Vs

Hon. The Attorney General

RESPONDENT

BEFORE	: Deepali Wijesundera J.
	: Achala Wengappuli J.
COUNSEL	: Anuja Premaratne PC with Naushalya Rajapaksha for the Accused – Appellant.
	A.R.H. Bary SSC for the AG.
ARGUED ON	: 03rd September, 2018
DECIDED ON	: 14th September, 2018

Deepali Wijesundera J.

The appellant together with four others were indicted in the High Court of Panadura for committing an offence punishable under section 2 (4) of the Convention Against Torture Act no. 22 of 1994 read with section 32 of the Penal Code. After trial the appellant was convicted for committing torture and was sentenced to 2 years RI suspended for 10 years. He was also ordered to pay Rs. 100,000/= as compensation to the victim carrying a default term of 2 years.

The appellant has filed the instant application against the said conviction and the learned Attorney General has filed another application

to enhance the sentence imposed against the appellant. Both appeals were taken up for argument together.

The appellant with four others has gone to the house of one Piyadasa the father of prosecution witness no. 2 to inquire into a complaint made against them regarding an incident where the witness number 2 and his father is alleged to have abused a staff assistant at the Diamond Jubilee College. According to prosecution witness no. 1 and his sister's evidence out of the 5 who came in search of their father only one was in police uniform. Milantha (prosecution witness 1) has stated that the police officers who came to their house assaulted him and his father while they were taking them to the school premises. At the school premises his father and Milantha were asked to worship a peon and was then asked to crawl on their knees to the road which was about 100 meters away. After that they were taken to the police station and assaulted again. He does not say who assaulted them at the police station. After keeping them in the police station for over one day they were produced before the DMO. The DMO has stated the victim had simple abrasions on the left knee and contusions on the left elbow. The consultant Judicial Medical Officer who examined them later after 11 days have not given an opinion on how the injuries would have been caused.

None of the witness have seen the appellant prior to this incident and he was identified by the witness from the dock. These two witnesses who are family members of Piyadasa are interested witnesses. Therefore their evidence has to be considered with utmost caution.

The main witness in this case is prosecution witness no. 2 Milantha his evidence on the incident does not corroborate other evidence. Prosecution witness number two's evidence can be taken into account if his evidence corroborates with the medical evidence. Medical evidence does not corroborate assault. The doctor who examined them first was told by the witness that they had a fall.

There is no evidence to say that the others acted on the instructions of the appellant. No identification parade was held for the witnesses to identify the appellant. All the witnesses have said that they saw the appellant for the first time when he came to this house in search of Piyadasa.

The learned counsel for the appellant argued since there was no identification parade and the witness did not know the accused only one accused could not have been convicted. He cited the judgments in

Kuruppiah servai vs The King 52 NLR 227, Kirihamulage Nihal vs AG.

The appellant's counsel stated that the prosecution witnesses three, four, five's evidence should have been considered with caution by the learned High Court Judge since they were seated inside the court house when prosecution witness number two was giving evidence (p 152),

The learned counsel for the respondent argued that the question of identity does not arise since this was not a spur of the moment incident and that the persons who went to Piyadasa's house were in civil and one was in uniform and that they were identified by the witness as police officers.

Since there is an appeal by the state also against the instant judgment the learned counsel stated that there is a mandatory sentence for the said offence therefore the sentence given to the appellant should be enhanced.

On the question of mandatory sentence I refer to the judgment of Her Ladyship Justice Wanasundera in **Ambagala Mudiyanselage Samantha Sampath vs AG S.C. No. 17/2013 delivered on 12/03/2015** where it was held *"sentencing is the most important part of a criminal case and I find that provision in any law with a minimum mandatory sentence goes against the judicial discretion to be exercised by the judge".*

It was also held in this case that;

"In these circumstances I hold that the Learned High Court Judge had correctly imposed a suspended sentence of "2 years RI. Suspended for 10 years". I agree with the decision of the Supreme Court in S.C. Reference 03/2008 and uphold the conclusion of that case that the minimum mandatory sentence in Section 364 (2) (e) is in conflict with Articles 4 (c), 11 and 12 (1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.

Therefore the minimum mandatory sentence no longer applies to this case.

In the instant case the learned High Court Judge has accepted the evidence of the prosecution witnesses regarding the first accused in the same incident and rejected the same evidence with regard to the other accused. Learned High Court Judge has merely convicted the appellant without considering at what point the actual torture took place, and without specifically stating for which incident the appellant is convicted.

The medical evidence produced by the prosecution is not convincing, the victim was produced at the Kalubowila hospital 11 days after the incident. He was treated by another doctor soon after the alleged incident where he has stated there were 2 injuries which are 2 abrasions on the left and right knees.

The learned High Court Judge has failed to consider the identification of the accused when the witnesses have stated that the accused were previously not known to them. As stated in Kuruppiah's case when there is more than one accused there should be enough evidence to exculpate the only accused being convicted.

For the afore stated reasons we decide that the judgment of the learned High Court Judge should be set aside. We allow the appeal of the accused appellant and dismiss the appeal filed by the Hon. Attorney General.

Judgment dated 03/07/2009 is set aside.

JUDGE OF THE COURT OF APPEAL

Achala Wengappuli J.

I agree.

JUDGE OF THE COURT OF APPEAL