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

In the matter of an Appeal against on Order of the High Court under Section 331 of the Criminal Procedure Act No 15 of 1979.

CA No: HCC 104/2017

High Court of Anuradhapura Case No: 210/2013

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

Complainant

Vs.

Dematapaksha Hewage Randika Nuwansiri
No.18,
Janahitha Mawatha,
Pothanegama,
Anuradhapura.

Accused

AND NOW

Dematapaksha Hewage Randika Nuwansiri
No.18,
Janahitha Mawatha,
Pothanegama,Anuradhapura.
(Presently at Welikada Prison)

Accused Appellant

Vs.

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

Complainant-Respondent

Before	**:**	**Devika Abeyratne,J** **P.Kumararatnam,J**
Counsel	**:**	Anil silva PC with S.Kulathunga for the Accused- Appellant Chethiya Gunasekara, DSG for the AG
Written Submissions on	**:**	04.04.2018 and 03.06.2020 (by the Accused-appellant) 04.06.2018 (by the Complainant Respondent)
Argued On	**:**	19.01.2021
Decided On	**:**	18.02.2021

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Devika Abeyratne,J

The accused appellant in this case was charged with having committed the murder of *Rankoth Pedige Pieris* an offence punishable under section 296 of the Penal Code and he was also charged in the

course of the same transaction with having made an attempt to commit the robbery of a gold chain an offence punishable under Section 381 of the Penal Code.

At the end of the trial, the learned High Court Judge found the accused appellant guilty of both charges and sentenced him to death in respect of the first count and imposed a sentence of 2 years rigorous imprisonment and a fine of Rs. 5000/- with a default sentence of 03 months of imprisonment in respect of the second count.

It is against the said conviction and sentence the accused appellant has preferred this appeal.

At the trial, the prosecution led the evidence of six witnesses of whom, PW 01 *Sachindra Nirmani Ariyaratne* the grand daughter of the deceased is the purported eye witness to the incident.

The conviction and sentence were contested mainly on the ground that there was no identification of the accused and that as per the medical evidence, whether the cause of death was purely due to the stab injury. or whether the heart and lung condition of the deceased attributed to his death. Further, it was contended that inadmissible evidence which was obnoxious to section 27 of the Evidence Ordinance regarding a recovery of a weapon by the accused appellant and evidence of bad character where evidence was led that the accused was arrested for housebreaking which is in addition to the charge referred to in the

indictment, has been allowed by the learned trial judge, thus, the accused was deprived of a fair trial.

The factual circumstances are briefly as follows;

According to PW 01, on the day in question 12.02.2009, she was at home with her mother and the grandparents studying around 8 pm at night when she heard someone talking outside the house and after informing the mother and switching on all the lights around the house, she has gone out of the house with her mother with her grand father who is now deceased following them. She has observed a person seated under the lime tree who had then come out, showing some card purporting to be an identity card saying, "ඇන්ටි ඇන්ටි කෑ ගහන්න එපා පොලිසියෙන්".

That person has at first held her mother by the collar of her blouse and thereafter, had grabbed the chain the witness was wearing, when her grand father hit the intruder with the torch he was carrying and the witness who fell at that point was helped up by her mother. The man had then run away without the chain, and the witness and her mother had run inside the house. Then she had seen the grandfather holding on to his stomach in pain, and when inquired, has stated "අර කොල්ලා මට පිහියෙන් ඇන්නා". At the *Anuradhapura* hospital he has succumbed to his injuries.

The witness has admitted that she did not recognize the intruder on the night of the incident, however, had identified him at the identification parade held at the *Thambuththegama* Magistrate's Court approximately one year later and also in the Dock, at the trial.

In cross examination she has admitted not seeing the grand father being stabbed, but has testified that there was only one person at the scene of the incident and that person was the accused who she identified as the person who tried to rob her chain and stabbed the grandfather.

The witness has been questioned at length about the identification of the accused and it has been suggested by the counsel for the accused, that the witness has been shown the accused/ his photograph by the Police, prior to the identification parade. This suggestion she has vehemently denied.

At the hearing of the appeal the learned President's Counsel made a valiant attempt to convince court that there is no reliable identification of the accused by the main witness PW 01 especially as the alleged incident would not have taken much time, and that the principle enunciated in *Regina vs Turnbull* should be applied on the basis that in the absence of any corroboration regarding the identification of the assailant, it is unsafe to act on the evidence of PW 01.

The identification parade was held on 22.03.2019, more than a year after the alleged incident and the learned President's Counsel referred to the following authorities in the Indian Supreme Court and the decision in *Ranamuka Arachchilage Chaminda Roshan vs The Attorney-General* CA 120/ 2014 decided on 14.09.2011, to support his argument.

In *Chaminda Roshan's* case, Court held that the identification parade, if it is to be of value, must be held at the earliest opportunity, and rejected the identification parade, stating that there is no plausible reason adduced holding the identification parade 50 days after the event and on the ability of the complainant to make a genuine identification.

In Daya Singhe Vs. State of Haryana the Indian Supreme Court dealing with the holding of an Identification Parade belatedly has held ;

> *" At this stage we would first refer to the decisions upon which reliance is placed. In the case of Soni Vs State UP (1982)3 SC 368, this court observed that delay of 42 days in holding the identification parade throws doubt on genuineness thereof. Apart from the fact that it is difficult that after a lapse of such a long time the witnesses would be remembering facial expression of the appellant".*

> *In Harinnath and another Vs State of UP AIR 1988 SC 345 the Court observed that evidence of test identification is admissible under section 09 of the Evidence Act. But the value of test identification, apart from the other safeguards appropriate for a fair test identification depends upon the Promptitude in point of time with which the suspected persons are put up for test identification. If there is an unexplained and unreasonable delay in putting up the accused persons for a test identification, the delay by itself detracts from the credibility of the test. The court further referred to (para 9)*

Prof. Borchards " convicting the innocent of the basis of error in identification of the accused" the learned author has observed the emotional balance of the victim or eye witness by his extraordinary experience that his powers of perception become distorted and his identification frequently most untrustworthy. In to the identification enter other motives not necessarily stimulated originally by the accused personally, the desire to requite a crime, to exact vengeance upon the person believed guilty, to find a scapegoat, to support consciously or unconsciously an identification already made by another. Thus doubts are resolved against the accused".

Relying on the above authorities the learned President' s Counsel contended that the delay in holding the identification parade after one year, a reasonable doubt is created in the identification and it was unsafe to rely on that evidence.

The evidence of PW 01 is that she identified the accused as the person who tried to rob her chain and as the person who stabbed the deceased. The evidence led was that they switched on all the lights before leaving the house. Therefore, it is safe to assume that the area was well illuminated. The accused was first sighted under the lime tree, then he had come forward to show his identity card and asking the mother not to shout. He had first grabbed the collar of the mother's blouse, thereafter, the chain that the witness was wearing. When the sequence of events is considered, although it may have been a traumatic situation, there was sufficient time for the witness to have a close look at the accused. It is obvious from the evidence, that the face of the accused was uncovered and was at arms length of the witness as he

was grabbing her chain. According to the evidence, PW 1 became aware of the injury to the grand father after the intruder ran away. There is no reason to believe that this young witness did not gain an enduring impression of the intruder.

In Roshan Vs Attorney General Supra has referred to the necessity of holding an identification parade at the earliest opportunity and has also referred to the importance of **' *the quality of the evidence'.*** *(emphasis added)*

In *Dayanada Lokugalappatthi and eight others v The State, [2003] 3 SLR 362 at 390, R V Turnbull (C.A), [1977] 1 Q.B 224 at page 228* also refers to the factors that are relevant to be considered when determining the quality of evidence and that these factors could vary according to the facts and circumstances of each case.

Rathnasingham Janushan and Benedict Wesley Abraham V OIC, Jaffna (SC (Spl) Appeal No. 07/2018- Decided on 04.10.2019) his Lordship Jayantha Jayasuriya CJ has held as follows.

> *"To establish the identify of an accused, it is not mandatory the witness should have known him by his name or otherwise, prior to the incident. Even in a situation where a witness had seen a person at an incident for the first time, his evidence in court identifying the accused in the dock as the person whom he saw at the incident should not be rejected merely because the witness had neither seen him before nor had known his*

name prior to the incident. A "Dock identification" is a valid form of identification."

In *Raja V State by the Inspector of Police* (Criminal Appeal No. 740 of 2018- 10.12.2019) (Indian Supreme Court) "…..*It is neither possible nor prudent to lay down any invariable rule as to the period within which a test identification parade must be held, or the number of witnesses who must correctly identify the accused, to sustain his conviction. These matters must be left to the courts of fact to decide in the facts and circumstances of each case. If a rule is laid down prescribing a period within which the test parade must be held. It would only benefit the professional criminals in whose cases the arrests are delayed as the police have no clear clue about their identity, they being persons unknown to the victims….."*

In the instant case the accused was unknown to the victims. It appears that the police had taken time to arrest the accused and after the arrest, without any further delay, has taken steps to hold the identification parade. Therefore, the delay in holding the identification parade in this case is explained and as PW 1 had clearly identified the accused appellant as the person who attempted to rob her chain and stabbed her grand father, the principle in *Chaminda Roshan's* case regarding the delay does not apply to the instant case. However, as far as the quality of evidence is concerned, the evidence of PW 1 is convincing and consistent.

The identification parade notes were marked as P8 without further proof. The learned trial judge at no point has come to a finding that the identification parade was conducted in an un unfair manner.

Furthermore, the following order dated 28.09.2015 in page 44 of the brief is of much relevance. (emphasis added in the order)

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ඒ සම්බන්ධයෙන් විත්තියේ විරෝධතාවයක් නොමැති බව දන්වා සිටී. හඳුනා ගැනීමේ පෙරට්ටුවක් පැවැත්වූ බවටත් **එම පෙරට්ටුවේ දී විත්තිකරු හඳුනා ගන්නා ලද බවටත්, එය පිළිගැනිමක් වශයෙන් වාර්තා ගත කිරීමට එකග වන බවත්**, විත්තිය දන්වා සිටී. එය පිළිගැනිමක් වශයෙන් වාර්තා ගත කිරීමට අවසර දෙමි.

මහාධිකරණ විනිසුරු-අනුරාධපුරය

Therefore, it is apparent that the appellant who has not challenged the identification parade and voluntarily conceding that he was identified at the identification parade at the trial, cannot now be allowed to challenge his identification at the appeal stage.

Further, the above quoted authorities reiterate that there has to be an assessment on the quality of the evidence when it is to be decided whether the identity of the accused has been proved or not.

It is also significant to note that in the Dock statement of the accused, although there was ample opportunity to appraise Court, that he was pointed out to the witnesses prior to holding of the identification parade or that it was conducted in an unfair manner, he has failed to do so.

Therefore, considering the evidence adduced before Court, there is no reason to believe that the evidence of PW1 who identified the accused at the identification parade should be disbelieved. It is also not established that she has seen either the accused or his photograph prior to the identification parade as suggested by the counsel for the accused.

Considering all of the above, this Court is of the opinion that the evidence of PW 01 has clearly established without a doubt, the identity of the accused. Therefore, the learned trial judges' conclusion that the witness' evidence that she identified the accused can be believed, even though the identification parade was held almost an year later after the alleged incident. Thus, the argument of the learned President's Counsel that the accused was not identified by the witness is not tenable.

With regard to the cause of death the argument for the defense was on the basis that the cause of death should be proved beyond reasonable doubt and as per the evidence of PW 7 *Dr Jayasena* in page 82 of the brief, the medical evidence refers to two possible causes of death as the deceased was suffering from a heart ailment and thus, a doubt is created whether a charge of murder could be sustained.

It is correct that PW 7 has mentioned bleeding which would have been caused by injury by a weapon with a sharp edge and that the weakness of the heart and lung along with excessive bleeding could have contributed to the death.

At page 79 of the brief PW 7 has explained the injuries, that the stab wound has made the large bowel to protrude and that it has penetrated the soft tissues and muscles of the anterior abdominal wall, peritoneum, omental fat, anterior and posterior wall of the stomach cystic artery (artery supplying the gall bladder), hepatic vein and the undersurface of the liver. According to the post mortem report the cause of death is stated as follows;

1a. Haemorrhage and Shock.
1b. Single stab injury to the abdomen
2 . Ischaemic heart disease, chronic lung disease.

Therefore, although there may have been a possibility of an operation saving the deceased if it was done within a specific time, it was established that the excessive bleeding was due to the injuries caused by a sharp weapon that was inflicted by the accused. The fact that the deceased had a weak heart and lungs is secondary. As such, I am of the considered view that the argument advanced by the learned Presidents Counsel on that point is not tenable.

With regard to the ground of appeal that the accused appellant was denied a fair trial, it is abundantly clear that the evidence referred to by the learned President's Counsel as detrimental to the appellant, was due to the questions posed by the defense Counsel at the trial and thus, cannot be attributed to the prosecution. However, it is apparent from the reasoning in the Judgment, that the learned trial judge has not considered that evidence to come to his finale conclusion.

It was also contended by the counsel for the appellant that the alleged statement "අර කොල්ලා මට පිහියෙන් ඇන්නා"is not admissible as a dying declaration, as that statement should relate to the death of the deceased and in the given circumstances of this case, as the deceased was suffering from a heart ailment the cause of death was not proved beyond reasonable doubt. As stated earlier in this judgment this Court has affirmed the conclusion of the trial judge that death was caused by the injury inflicted by the accused, who is the person referred to as "අර කොල්ලා" therefore, the argument of the Presidents Counsel on this point also fails.

In the Dock Statement, the accused appellant has merely denied any involvement in the incident and had merely stated he had been arrested on information given by one *Asanka.*

It is apparent that the learned trial judge has assessed and evaluated the evidence before Court in the correct perspective.

The totality of the evidence led in the case leads to an inescapable and irresistible inference and conclusion that it was the accused appellant who inflicted the injuries stated earlier and there is no doubt that death was caused by heavy bleeding which culminated in his death and that it was the accused who attempted to rob the chain PW 01 was wearing.

For the reasons stated above, I find no justification to interfere with the judgment of the learned High Court Judge of *Anuradhapura*

dated 10.07.2017. Accordingly, I affirm the conviction and the sentence and dismiss the appeal.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL