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

In the matter of an Appeal made
under Section 331 of the Code of
Criminal Procedure Act No.15 of
1979.

CA 68/2017

HC/ KULIYAPITIYA/ 35/2015

Kanugawatte Shamila Harsha
Perera

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B.Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Rienzie Arseculeratne,PC with Eranga**
Yahandawala for the Appellant.
Sudharshana De Silva DSG for the
Respondent.

ARGUED ON : **21/01/2022**

DECIDED ON : **02/03/2022**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Kuliyaipitiya under Section 296 of the Penal Code for committing the murder of Mudiyansele Susil Premasiriwardene on or about 20th April 2014.

Trial commenced before the High Court Judge of Kuliyaipitiya as the Appellant had opted for a non-jury trial. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant had given evidence from the witness box and called witnesses on his behalf. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant as charged and sentenced him to death on 02/05/2017.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom from prison.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. The Learned trial Judge has held that the prosecution witness Premasiri had identified the Appellant despite several weaknesses pertaining to the identity of the Appellant.
2. The Learned Trial Judge did not address his mind regarding the light condition that prevailed at the time of the incident.

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3. The Learned Trial Judge instead of considering the entirety of the evidence led before him to decide the guilt or innocence of the Appellant, has decided to accept the evidence of prosecution witness Premasiri thereby slighting the defence evidence led at the trial.
 4. The Learned Trial Judge did not address his mind regarding the unreliable nature of evidence of prosecution witness Premasiri.
 5. The Learned trial Judge has failed to address inter-se contradiction between prosecution witnesses Premasiri and IP Vijitha Kumara.
 6. The learned High Court judge had delivered the judgment after three and half months of the conclusion of the case.

Background of the case

PW01 Premasiri and the deceased had been friends for a long time. On the day of the incident this witness had met the deceased at a gambling den (Locally known as 'Keta Pola'). There were about 15 persons engaged in gambling at that time. The two of them left the place around 6.30pm as it started to become dark outside. On their way home on a motor bike ridden by the deceased, when passing a 'Kumbuk' tree two persons wearing helmets that covered their faces suddenly jumped on to the road and one of the assailants had attacked the deceased with a sword like weapon. Due to fear of attack on himself, PW01 had run away from the scene immediately. He had seen the deceased falling into the paddy field after the attack. Initially he had told the police that the person who attacked the deceased looked like the 2nd son of Michael Mudalali. He also stated that the incident happened during dusk and that the light was fading away. When he returned to the place of incident after being in hiding for about 10 minutes, the deceased had already been taken to the Kandanedara Hospital. When he went there, he was told that the deceased had been transferred to

Kuliyapitiya Base Hospital. Then he had rushed to Kuliyapitiya Base Hospital but by then the deceased had already succumbed to his injuries.

Thereafter he had gone home and remained there until police arrived at 7.00pm. He was taken to Pannala Police Station and detained there until the following day. He had been taken to the place of incident when the magistrate visited it and his statement has been recorded by the police. According to him there is a dispute with Micheal Mudalali as the deceased had cut him one and half years before this incident.

PW04 IP Vijitha Kumara had conducted the investigation, visited the scene, recovered the motor bike and recorded the statement of Premasiri and looked for the Appellant whom he had not been able to apprehend on that night.

According to PW08 Dr.Bandara, the deceased had sustained about 06 injuries and the cause of death is due to haemorrhagic shock following multiple deep cut wounds to the body.

When the defence was called, the Appellant had given evidence from the witness box and called 04 witnesses on his behalf.

During the argument, the learned President's Counsel who appeared for the Appellant mainly argued that the prosecution has failed to prove the identity of the Appellant as the perpetrator beyond reasonable doubt and applicability of evidence of sole eye witness. As the 1st to 5th appeal grounds are inter related to the identification of the Appellant as perpetrator and the integrity of the evidence of PW01 Premasiri the said grounds will be considered together hereinafter.

As most of the time the proper identification of an accused person is the fundamental important issue that needs to be determined in a criminal trial. In this case it is very important to discuss whether the prosecution

has established the identity of the Appellant beyond reasonable doubt. In this case no identification parade was held as witness PW01 Premasiri had testified that he had seen a person like Michael Mudalali's 2nd son cut the deceased at that time.

Phipson, in his book titled Phipson on Evidence (Sweet & Maxwell Thomson Reuters, 17th Edn. 2015) states that:

“it is often important to establish the identity of a person who a witness testifies that he saw on a relevant occasion. Sometimes, the witness will testify that he had seen the person before, or even know the person well, and therefore recognised the person observed on the relevant occasion”.

Like in this case, many crimes are committed under poor light conditions when none is able to identify the accused person properly. In those circumstances the case will entirely rest on the proper identification of the accused person. If the identification is compromised, the net result would be the acquittal of the accused person from the case. Hence identification evidence should be considered very seriously due to its delicate nature.

In **Alexander v. R** (1981) 145 CLR 395 at 426, Mason, J stated that:

“Identification is notoriously uncertain. It depends upon so many variables. They include the difficulty one has in recognising on a subsequent occasion a person observed, perhaps fleetingly, on a former occasion; the extent of the opportunity for observation on a variety of circumstances; the vagaries of human perception and recollection; and the tendency of the mind to respond to suggestions, notably the tendency to substitute a photographic image once seen for a hazy recollection of the person initially observed”.

In **Visveswaran v State** (2003) 6 SCC 73 the court held that:

“Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that the approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity. (.....) Further, the evidence is required to be appreciated having regards to the background of the entire case and not in isolation”.

In **Turnbull** [1977] QB 224 the Court of Appeal laid down the following guidelines for judges in trials that involve disputed identification evidence.

“Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s)”.

The judge should tell the jury that:

- (i) caution is required to avoid the risk of injustice;
- (ii) a witness who is honest may be wrong even if they are convinced, they are right;
- (iii) a witness who is convincing may still be wrong;
- (iv) more than one witness may be wrong;
- (v) a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.

“The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made”.

Some of these circumstances may include:

- (i) the length of time the accused was observed by the witness;
- (ii) the distance the witness was from the accused;
- (iii) the state of the light;
- (iv) the length of time elapsed between the original observation and the subsequent identification to the police.

Guided by the above-mentioned judgments and writings now I consider whether the identity of the Appellant was established beyond reasonable doubt by the prosecution in this case.

PW01 in his cross examination stated that it was dark under the Kumbuk tree when the incident happened. Further the assailants were wearing helmets with a vizor and he had run away from the place of incident when the assault was initiated upon the deceased. Further his initial observation regarding the identity of the Appellant was that a person who resembled Micheal Mudalali's 2nd son had cut the deceased. He had not taken any endeavour to inform about the identity of the Appellant to the deceased's family. He had gone home and remained there until the police had arrived at his residence. Further he had not seen the weapon and where deceased sustained injuries. Soon after the incident PW01 was taken to the police kept there and released after the inquest proceedings.

Further the Appellant and the deceased had left the gambling den due to it getting dark outside. The incident happened 10 minutes after they left the gambling den. As per PW01 it was getting dark and the light condition was not perfect to identify anybody clearly. Even the motorbike of the deceased had a weak head light.

Considering PW01's evidence it is apparent that the light condition was not perfect. But the learned High Court judge in his judgment mentioned that the Appellant had been properly identified by PW01. He had not discussed

about the light condition as described by PW01 initially. The learned High Court judge had failed to consider how long PW01 had observed the Appellant in a light which was fading away.

1st to 5th grounds of appeal have merit as the learned High Court judge has failed to appreciate the weak evidence pertaining to the identity of the Appellant. As the Appellant's identity is highly doubted in this case, the benefit of the doubt should be accrued to the Appellant. The 6th appeal ground will not be considered as the Appellant has successfully established that he was not properly identified by the eye witness PW01 Premasiri in this case.

Accordingly, we allow the appeal and acquit the Appellant from the murder charge.

The Registrar is directed to send a copy of this judgment to the High Court of Kuliyaipitiya along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

JUDGE OF THE COURT OF APPEAL