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

In the matter of an appeal in terms of Section 331 (1) of the Code of Criminal Procedure Act No.15 of 1979, read with Article138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC-0065/2013 **Vs.**

High Court of Gampaha
Case No: 18/2010

1) Gammpodi Marakkalage Prasad Asela Karunarathne

2) Mallawa Archchige Ruwan Kumara Samarasekera

Accused

And Now Between

1) Gampodi Marakkalage Prasad Asela Karunarathne

2) Mallawa Archchige Ruwan Kumara Samarasekera

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Indica Mallawaratchy
for the Accused-Appellant.

Wasantha Perera, SSC.
for the Respondent.

ARGUED ON : 19/01/2022

DECIDED ON : 03/03/2022

R. Gurusinghe, J.

Two accused-appellants (the appellants) were indicted in the High Court of Gampaha for committing the murder of Paularachchige Mahinda Gerard, on or about the 19th of May 2009 at Udugampola, an offence punishable under section 296 of the Penal Code. After pleading not guilty to the charge, the appellants preferred to have the trial before the Judge without a jury.

The prosecution led the evidence of PW1, PW3, PW7, PW8, PW6, PW10, PW9 and the court interpreter. At the conclusion of the case for the prosecution, the two appellants made a dock statement denying the allegation levelled against them.

The case for the prosecution is as follows:

The deceased had been transporting a pile of wood in a hand tractor along Sanasa Road that leads to Minuwangoda. The daughter of the deceased PW1 and two other children had been in the tractor at the time of the incident. On the way, two men covering their faces armed with swords ambushed the deceased. The deceased then ran along the Sanasa Road as the assailants chased him. The tractor hit a pole and the children also jumped out of the tractor. PW1 had recognized the attackers as the appellants. PW1 had also run after them and witnessed the incident about fifteen feet away from the other side of the road, where the appellants struck the deceased on his neck with the sword. The first appellant's face covering was removed for a while. The second appellant was also identified. The second appellant had a missing finger. The two appellants were neighbours of PW1. She knew them since her childhood. The appellants then fled the place of the crime, and PW3 had taken the deceased to the hospital, where he was pronounced dead.

The case for the Defense is as follows –

The first appellant in his dock statement took up the position that he was at his wife's parents' house on the day of the incident. He further said that the police forced him to furnish the knife. The second appellant stated in his dock statement that he had worked with the deceased about three years ago and when he had tried to remove a log, he lost a finger. At that time, the deceased had taken him to the hospital. He said that

the deceased had many enemies, and he had nothing to do with the murder of the deceased.

After the trial, the appellants were found guilty and sentenced to death by the learned High Court Judge.

Three grounds of appeal relied on by the appellants are set out as follows:

1) The evidence relating to identification suffers from serious infirmities, which renders the conviction unsafe.

2) The Learned Trial Judge has failed to evaluate the evidence relating to the identification in its correct judicial perspective, addressing her mind to the inherent weaknesses in the evidence relating to the identification.

3) The evidence relating to the government analyst report is inadmissible.

It was argued for the appellants that the evidence of a sole child eyewitness, is not reliable relating to the identification. The reason for this argument was based on the fact that at the time of the incident, the assailants covered their faces revealing only their eyes. Further, it was submitted that where the conviction revolves around identification, the duty is cast upon the Trial Judge to examine very closely and cautiously the circumstances under which the identification came to be made and the basis of the identification so as to exclude all probabilities of mistaken identity as visual identification is susceptible to mistake. Even honest witnesses are liable to be mistaken.

PW1 was thirteen years old at the time of the incident and she was sixteen years old at the time of giving evidence in court. In the case of

Tehal Singh and others vs the state of Punjab AIR 1979 SC 1347, the Supreme Court of India held that common sense and progress of the witness at the age of thirteen may be equivalent to that of a perfectly natural person.

PW1's evidence does not suffer from any infirmity as argued for the appellant. She was cross-examined at length, and nothing elicited from her, which could attribute to the mistaken identity of the appellants. There was nothing to show that she was lying or tutored. She had given a statement to the police on the same evening. The defence elicited from a police officer PW7, that PW1 had made a statement to the police on the 20th of May 2009. But he said that he had not recorded her statement. The person who recorded her statement was PW9. He categorically stated that he had recorded the statement from PW1 at 20.10 on the 19thof May 2009, that is, on the same day of the incident. The defence did not contest this position. PW1 said that she had made a statement on the same day on which her father was killed. That was also not disputed in the cross-examination.

The defence never suggested to PW1 that she was not able to identify the assailants as their faces were covered. PW1 never referred to the appellants as somebody. She always referred to them as අසේල මාමා and රුවන් මාමා. The appellants are neighbours and are known people to PW1 since her childhood. PW1 had said that the first appellant had removed the cloth he had used to cover his face at one point.

The only contradiction marked as V1 is as follows:

“මෙ දෙන්නා කලු පාටරෙදිවලින් ඇස් දෙක විතරක් පේන්ඩ මුහුණ බැඳගෙන ආවා”.

She said මම කිව්වෙ කලු පාට රෙද්දකින් මුහුණ බැඳගෙන ආවා කියලා. It seems to be a vital contradiction when this portion is taken in isolation. However, her statement regarding the identity of assailants is thus:

(Question by the police)

ප්‍ර: **තාත්තාට පිහියෙන් කෙටුවෙ කවුද**

උ: **පනහ වත්තෙ පදිංචි රුවන් මාමයි අසේල මාමයි. මේ දෙන්නා කලු පාට රෙදිකැබිලි වලින් ඇස් දෙක විතරක් පේන්ඩ මුහුණ බැඳගෙන ආවා. අසේල මාමා බැඳගෙන සිටි රෙදිකැබිල්ල තාත්තා පිටුපස එලවන විට, ගැලුවුන නමුත්, මම මෙ දෙන්නාව පැහැදිලිව හඳුනා ගත්තා.**

When considering the entire answer to the question, the portion marked as contradiction is not a vital contradiction. This discrepancy, therefore, does not go to the root of the prosecution case. In the cross-examination, the only suggestion put to PW1 was that;

"**ප්‍ර:** **තමා ඒ සිද්ධිය දැක්කෙ නැහ. තමා නොදැකපු දෙයක් උසාවියට කයන්නෙ**

උ: **ඔයා දන්නෙ කොහොමද? මම දැක්කා මෙ දෙන්නා තමයි මගෙ තාත්තාව මැරුවෙ. (සාක්ෂිකාරයා ප්‍රකොපවී හඬමින් සාක්ෂි දෙයි).**"

The defence has carefully avoided asking PW1 whether she was not able to identify the assailants, as their faces were covered with cloth. Even the defence inquired from PW1 whether the appellants were very well known to her.

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ප්‍ර: **මෙ අධිකරණයේ ඉන්න විත්තිකරු දෙන්නා තමාගෙ තාත්තා එක්ක වැඩ කලා නේද?**

උ: **වැඩ කලා කියන්නෙ**

ප්‍ර: **තමාගෙ තාත්තා කරපු රැකියාව ගස් කපන, ලී ඉරන වැඩ කළේ**

උ: **ඔව්**

ප්‍ර: **තමාගෙ ගෙදර ඇවිල්ලා එහෙම තිබෙනවාද?**

උ: **ඔව්**

This shows that the appellants are not strangers to PW1. PW1 never said that she believes that these two appellants committed this incident. Howeverdefence counsel asked the following questions:

"**ප්‍ර:** **තමා මෙ පුද්ගලයන් දෙන්නා, එනම්, මෙ රුවන් සහ අසේල, මෙ සිද්දිය කලා කියාම විශ්වාසය් කියා කිවාද?**

උ: **මා දැක්කා හොඳටම**

ප්‍ර: **මම තමාට යොජනා කරනවා තමා මේසිද්දිය පැහැදිලිව දුටුවෙ නැහැ. තමා ගොතලා තමය් සාක්ෂි දෙනවා කියලා**

උ: **නැහැ මම පැහැදිලිව දැක්කා ඒක. මේ දෙන්නා කොටනවා මා ඇස්වලටම දැක්කා. (සාක්ෂි කාරයා හඬමින් සාක්ෂිදෙය්)**"

(Page 73)

The answers PW1 has given to the aforementioned questions that were asked shows that she did in fact witness the incident in which her father was murdered.

The defence of the first appellant stated in his dock statement is that he was not in the village on that day of the incident. However, this was not taken up when examining PW1 or any other witnesses. Similarly, the defence of the second appellant was also not put forward to PW1.

In the case of *Gunasiri and two others vs Republic of Sri Lanka 2009 1 SRI LR 39*, Sisira de Abrew J. held as follows:

"Although the 3rd accused-appellant raised an alibi in his dock statement, he failed to suggest this position to prosecution witnesses. The Learned Counsel who appeared for the defence did not suggest to the prosecution witnesses the alibi raised by the 3rd accused-appellant. What is the effect of such silence on the part of the Counsel. In this connection, I would like to consider certain judicial decisions. In the case of *Sarwan Singh vs. State of Punjab* at 3656 Indian Supreme Court held thus: "It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted." This judgment was cited with approval in *Bobby Mathew vs. State of Kamatakal*. Applying the principles laid down in the above judicial decision, I may express the following view. Failure to suggest the defence of alibi to the prosecution witnesses who implicated the accused indicates that it was a false one. Considering all these matters, I am of the opinion that the defence of alibi raised by the 3rd accused-appellant is an after thought."

Therefore, the positions taken up in the dock statements of the appellants do not create a reasonable doubt in the prosecution case.

Another point taken up by the appellants was that PW1 being a thirteen-year-old girl, does not have the capability to run a distance of two hundred and fifty feet, keeping pace with the assailants. A 13-year-old

child's capability of running depends on various factors. She may even be able to run faster than the appellants. These are subjective factors that do not warrant a doubt on the evidence of PW1.

The Counsel for the appellants argued that the evidence is that the assailants attacked the deceased on the posterior of the neck. Still, the medical evidence is that the deceased had three injuries, only one being on the posterior of the neck, whilst the other two were on the arm and on the front of the neck. Therefore, the argument with the evidence of the eyewitness conflicts with the medical evidence. This argument is not correct.

At page 47 PW1 said as follows:

තාත්තා දිව්වා. ඊටපස්සෙ තාත්තා ව මිනුවන්ගොඩට යන පාරේ මාළු කඩයක් තිබෙනවා . එතන දී රුවන් මාමා තාත්තාගේ කොළර් එකෙන් අල්ලාගෙන බෙල්ලට දෙපාරක් කෙටුවා. තාත්තා කෑ ගැහැව්වා. ඒ වෙලාවේ අසේල මාමා එතන සිටියා. දෙන්නාම තාත්තාට කෙටුවා.

ප්‍ර: අසේල මාමා කොහාටද කෙටුවේ දැක්කාද?

උ: ඔව්

එයත් බෙල්ලට කෙටුවා.

At Page 48

ප්‍ර: ඒ වෙලාවේ තාත්තාගෙ මොනවා හරි තුවාල දැක්කාද?

උ: තාත්තාගෙ මේ හිරිය හොදටම බෙල්ල කැපිලා තිබුනා. (සාක්ෂිකාරිය බෙල්ල ඉදිරිපස පෙන්වා සිටී).

Thus, there is no conflict between the eyewitness's account and the medical evidence.

The next argument is that PW1 said that her father's sarong had come out and fallen while running, and at the time of the attack, he was clad only in a shirt and underwear. As per the police and medical evidence, the deceased had a sarong. Both the police officer and the doctor inspected the body of the deceased at the hospital. PW3 had taken the deceased to the hospital. PW3 would have definitely put the sarong on the deceased before taking him to the hospital. If there was a doubt on the evidence of PW1, the defence should have questioned PW1. This position was not even put forward to PW3. Without such being questioned by either PW1 or PW3, the argument of the appellants cannot be sustained to create doubt in the evidence of PW1. Further, it is highly unlikely that someone would take an injured person to a hospital naked without covering him first. This argument, therefore, cannot be accepted.

The next argument is that PW1 had not mentioned any physical features on the assailant, such as height, gait or other particulars in her statement, to the police. The necessity for such things did not arise here as she had categorically stated the names of the appellants and the police had no reason to ask about the physical features when the witness named the assailants. PW1 knew the assailant very well as they were neighbours.

It was argued that no reasons had been adduced by the Learned Trial Judge for placing reliance on the evidence of the eyewitness. This is not so. The Learned Trial Judge has given reasons as to why she relied on the evidence of PW1. We also do not see reasons to doubt the evidence of PW1. The Learned Trial Judge has observed that, at the time the deceased was taken to the hospital, the names of the assailants were made known to the hospital police post. They have informed the incident

to the Gampaha police station at 6.50 pm with the names of the assailants. There was no delay by PW1. PW1 had given a statement on the same day within a few hours, stating the appellant's name as the assailants. The cross-examination did not shake the evidence of PW1.

A knife was recovered in consequence of the information received from the first appellant. There was human blood on the knife. The government analyst's report marked as P11 proves this fact. In the appeal,it was argued that the government analyst's report should not have been admitted without calling the analyst.

The prosecution has called the police witness PW9, who had taken the knife to the Government analyst and had marked the receipt issued by the government analyst as P7. A clerk who was entrusted to the productions of the Magistrate Court of Gampaha wasalso called to prove this fact. The interpreter of the court has produced the letter issued by the Magistrate Court of Gampaha as P10 and the Government Analyst report as P11. These witnesses were not cross-examined. No objection was taken to marking the government analyst report.

Section 414 of the Criminal Procedure Code Act No. 15 of 1979, as amended by Act No.11 of 1998, are as follows:

Amendment of section 414 of the principal enactment

6. Section 414 of the principal enactment is hereby amended as follows:-

(a) by the repeal of subsection (1) of that section and the substitution therefore, of the following subsection:

‘ (1) Any document purporting to be a report under the land of the Government Analyst, the Government Examiner of Questioned

> Documents, the Registrar of Finger Prints, Examiner of Motor Vehicles or Government Medical Officer upon any person, matter or thing duly submitted to him for examination or analysis and report, or the report of a Government Medical Officer based upon any skiagraph purporting to have been made by a Government Radiologist or such skiagraph itself and any document purporting to be a report under the band of such Radiologist upon such skiagraph, may be used as evidence in any inquiry, trial or other proceeding under this Code although such officer is not called as a witness.'

Therefore this argument cannot be accepted. However, there is sufficient evidence to justify the verdict of the Trial Judge even without the evidence of the Government Analyst's report.

The evidence of PW1 does not suffer from any infirmity, which warrants to doubt the evidence. The identities of the appellants were proved beyond reasonable doubt.

For the reasons set out above, the appeals of the appellants are dismissed.

Appeal Dismissed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal