IN THE COURT OF APPEAL OF THE DEMOCRETIC 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 Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0032/2017

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court of Kurunegala Case No:

HC/116/2002

Mapa Mudiyanselage Sisira Kumara
Bogamuwa

ACCUSED

AND NOW BETWEEN

Mapa Mudiyanselage Sisira Kumara
Bogamuwa

ACCUSED-APPELLANT

Vs.

The Attorney General
Attorney General's Department
Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: U. R. De Silva, P.C. with Savithri Fernando
	For the Accused-Appellant
	: Riyaz Bary, SSC for the Respondent
Argued on	: 11-02-2022
Written Submissions	: 30-03-2018 (By the Accused-Appellant)
	: 25-10-2017 (By the Respondent)
Decided on	: 30-03-2022

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) filed this appeal on being aggrieved by the conviction and the sentence dated 20-02-2017 by the learned High Court Judge of Kurunegala.

The appellant was indicted before the High Court of Kurunegala on the following counts;

(1) Causing the death of one Ranpatidevage Podihamy alias Somawathi on 13th February 1999, an offence punishable in terms of section 296 of the Penal Code.
(2) At the same time and at the same transaction causing injuries to one Alawaladevage Sevwandi by throwing a bomb at her, an offence punishable in terms of section 4(2) of the Offensive Weapons Act No 18 of 1966.
(3) At the same time and at the same transaction causing injuries to one Punchadevage Sunethra Fernando by throwing a bomb at her, an

offence punishable in terms of section 4(2) of the Offensive Weapons Act No 18 of 1966.

(4) At the same time and at the same transaction causing injuries to one Punchadevage Chandra Indrani by throwing a bomb at her, an offence punishable in terms of section 4(2) of the Offensive Weapons Act No 18 of 1966.

(5) At the same time and at the same transaction causing injuries to one Alawaladevage Pathum by throwing a bomb at him, an offence punishable in terms of section 4(2) of the Offensive Weapons Act No 18 of 1966.

After trial, the appellant was found guilty as charged and was sentenced to death on the 1st count. He was sentenced to 10 years rigorous imprisonment on each of the other four counts to be served concurrently, and was also imposed a fine of rupees 10000/- on each of the said counts. In default three months imprisonment on each of the counts was ordered.

Facts in brief: -

The only eyewitness in the case Punchadevage Sunethra (PW-02) was sleeping in the inner living area of her home along with her two Children and her sister. Their mother was sleeping in the outer living area of the house. As they were preparing the house for a visit by a prospective husband for her younger sister, they have gone to sleep late in the night around midnight. The outer living area of the house was about 10 feet away from where she was sleeping. About five minutes after she went to sleep, she has heard the sound of one of the front windows being opened and some noise within the house. Upon hearing the sound, she has switched on the light near the window and has seen two persons running away from the window. She has seen a dark, tall and fat person whom she has identified as the appellant and another whom she could not identify. She has stated that she did not open the window, but saw the two

persons running away when she looked outside from the closed window, which was a tinted one.

It had been her evidence that after hearing the sound of the opening of a window, she saw some ball shaped thing rolling in towards them and it was that which prompted her to switch on the light. No sooner, she switched on the light, the thing which was thrown in has exploded, which resulted in causing injuries to all the inmates of the house including the deceased, her mother.

She Has given evidence stating that she told her husband that it was the appellant who ran away from the window in the same night at the hospital, and gave her statement to police only on the 17th as she was hospitalized and was not in a position to make a statement until then.

It had been the position taken by the defence that as her sister had an affair with a person who works in the Army the appellant's name was given to the police only on suspicion. She has denied that her sister had an affair with anybody and it was her stand that she gave the name of the appellant to the police because she saw him running away from the house. In her evidence she has stated that the appellant was not a person who had any association with her or her family members, and although she knew his name, she has only seen him in the area where they live.

According to the evidence of PW-08, who was the investigating police officer, the first information as to the crime has been provided by the husband of PW-02. He was not in a position to record the statements of the injured since they were receiving treatment at the hospital, he has arrested the appellant on the 14th of February at 6.15 hours on an information received. This goes on to establish the fact that the arrest of the appellant has been prior to the recording of the statement of the only eyewitness PW-02 and may be on the information provided by the husband of hers. The husband of the eyewitness

PW-02, who was the PW-01 named in the indictment, has not been called as a witness at the trial.

Grounds of Appeal: -

At the hearing of the appeal, the learned President's Counsel for the appellant formulated the following two main grounds for the consideration of the Court.

(1) The learned High Court Judge failed to give adequate consideration to the fact that whether there was evidence to prove beyond reasonable doubt, the identity of the appellant.

(2) The learned High Court Judge has considered several inaccurate facts as evidence, when there was no such evidence, which has resulted in a miscarriage of justice towards the appellant.

Consideration of the Grounds of Appeal

Both the grounds of appeal will be considered together as they are interrelated.

It appears that the learned High Court Judge has gone on the basis that PW-02 was able to identify the appellant when the bomb was thrown into the house, which was factually wrong. Her evidence has been that after hearing the sound of the opening of a front window, and after hearing something being rolled on the floor, she switched on the light and saw two persons running away from the window. It is clear from the evidence of PW-02 that her identification has been mainly on the body features of one of the persons she saw running away from the window and not because she saw the face of the appellant. It is obvious that there was no way for her to see the faces of those who ran away as a person who looks at someone who is running away from that person can only expect to see the person from his behind under normal circumstances. The evidence of PW-02 provides no inference that can be drawn in order to conclude that the witness may have seen the face of the appellant and identified him.

In her evidence, the PW-02, who was the only witness who is supposed to have seen the appellant has not said that she saw the persons coming near the window and running away after throwing the bomb into the house.

Therefore, I find that the following conclusions reached by the learned High Court Judge in the judgment were factually wrong as pointed out correctly by the learned President's Counsel for the appellant.

(a) "ලයිට් එක දාන කොට දෙන්නෙක් දුවගෙන ආපු බවත් සඳහන් කර ඇත. එම ජනේලය ලග සිට දෙන්නෙක් දුවනවා ඇය දැක ඇත. එම දෙදෙනාගෙන් මෙම විත්තිකරුව ඇය හඳුනාගෙන ඇත." (At page 5 of the judgment and page 187 of the appeal brief)

(b) "තමන්ගේ ගේ තුලට බෝලයත් වැනි දෙයක් විසිකර එම තැනැත්තා දිව්ව බවත් සඳහන් කර ඇත."(At page 6 of the judgment and page 188 of the appeal brief)

(c) "එහි තවත් පුද්ගලයෙක් සිටි අතර ඔවුන් ගේ තුලට යමක් විසිකල බවත්" (At page 11 of the judgment and page 193 of the appeal brief)

(d) "ඇසින් දුටු සාක්ෂි කාරිය සඳහන් කර සිටියේ ඇය ඉතා පැහැදිලිව මෙම විත්තිකරුට හඳුනා ගත් බවය." (At page 11 of the judgment and at page 193 of the appeal brief)

(e) "පොලිස් හා වෛද්‍ය සාක්ෂි වලින් ඇසින් දුටු සාක්ෂිකාකාරියගේ සාක්ෂිය තවදුරටත් තහවුරුවී ඇත" (At page 11 of the judgment and page 193 of the appeal brief)

It is clear from the above conclusions reached by the learned High Court Judge that the evidence has been considered on the basis that there was a clear identification of the appellant, before the bomb was thrown into the house, when it was thrown and while running away. I find that this was a total misdirection as to the evidence made available in this case.

It was clear from the evidence of the only eyewitness that she has seen two persons running away only after the bomb was thrown into the house. She has been alerted and got up from her sleep and switched on the light only after hearing the opening of a window and feeling that something been rolling on the floor of the house. It was her evidence that she saw two persons running away from the window and she saw a dark, tall, fat person, whom she was able to identify as the appellant.

I am of the view that had the learned High Court Judge addressed her mind correctly to the evidence of PW-02, what the learned Judge should have considered was whether the identity of the appellant has been sufficiently established under the circumstances, for which no consideration has been given in the judgment. I am unable to agree with the contention of the learned Senior State Counsel (SSC) for the respondent that sufficient attention has been given by the learned High Court Judge in the judgment with regard to the identification of the appellant by the witness.

It is clear from the evidence of PW-02 that the appellant was not a person well known to her, although she has seen him walking on the road and knew his name. The evidence establishes the fact that PW-02 may have taken at least a few seconds from the time she heard the opening of a window and hearing the sound of something being rolled on the floor to get up from where she was sleeping and to reach the light switch, switch it on and to look outside. It needs to be noted that any reasonably prudent person's instinctive reaction would be to get away as much as possible from a place where a bomb was thrown by him with the intent of causing injury to others, if not, since he would also be in all probabilities get injured in the process.

In my view it was therefore necessary for the learned trial judge to consider whether there was evidence as to the distance from where the appellant was alleged to have seen and identified, as stated by the witness. The availability of the light, and whether it was possible for the light to extend to such a distance

for the witness to make a positive identification, was another factor that should have been considered.

In the judgment of **Regina Vs. Turnbul and Another (1997) QB 224**, it was held:

> *"Where the case against an accused depends wholly on the correctness of the identity of the accused, the judge should warn the jury of the special need to for caution before relying on the correctness of the identification by the witness."*
>
> The judge should tell the jury that;
>
> - Caution is required to avoid the risk of injustice.
> - A witness who is honest may be wrong even if they are convinced, they are right.
> - A witness who is convincing may still be wrong.
> - More than one witness may be wrong.
> - A witness who recognizes the defendant, even when the witness knows the defendant well, may be wrong.
>
> Some of the circumstances a judge should direct the jury to examine in order to find out whether a correct identification has been made include;
>
> - The length of time the accused was observed by the witness;
> - The distance the witness from the accused;
> - The state of the light;
> - The length of time elapsed between the original observation and the subsequent identification to the police.

E.R.S.R. Coomaraswamy in his book **'The Law of Evidence' Volume 1 at page 663** discusses the mistaken identity in the following manner.

> *"A fundamental requisite in a criminal case is to establish the identity of the accused as the guilty party. The text-books abound with instances of what were supposed to be clear identifications which proved to be fallacious and defective. These include the case where an honest witness was deceived by the broad glare of sunlight, (R. Vs. Wood and Brown [Ann-Reg. 1784])…*
>
> *…Much of the value of direct evidence of identification will depend on the personal appearance of the subject of identification. Many persons cannot be easily distinguished from others. The liability mistake is greater where the questionable identity is a matter of deduction and inference and the expression of an opinion than where it is the subject of direct evidence. (Wills, op. cit., 7th edition., pp 197-200)"*

I find that in this action there was no evidence to consider those possibilities beyond reasonable doubt to conclude that it was the appellant who ran away from the scene of the crime. I find that the learned High Court Judge's conclusions in that regard had been reached without a basis and on wrong assumptions as to the facts.

Another factor that attracted the attention of this Court is the failure of the prosecution to call the husband of PW-02 who was the listed PW-01 in the indictment. According to the evidence of PW-02, it was to him she informed first, that she identified the appellant. It was her evidence that as she was hospitalized, she gave her statement to the police only of the 17th, about four days after the incident. However, according to the evidence of the main investigating officer, PW-08, the appellant had been arrested on a tip off on the 14th morning. If that was so, there must be evidence to establish on what basis the appellant was arrested without recording a statement of the only eyewitness. In my view without such an explanation the alleged identification of

the appellant by PW-02 becomes highly unreliable to act on that alone, because, by the time the statement was recorded the appellant was under arrest. Under the circumstances, it may also be possible that the PW-02's identification of the appellant may have been influenced by the fact of the appellant being in the custody of the police. The only way to eliminate such a doubt would have been to call the PW-01 to give evidence and establish that his wife informed him the identity of the person who came and it was he who informed it to the police in his first information. I find that this failure was a fatal error by the prosecution that goes into the root of the credibility of the only eyewitness of the case.

It is well established law that an accused has nothing to prove in a criminal case and it is the duty of the prosecution to prove its case beyond reasonable doubt. Hence, however much poor the case put forward by the defence is, it is not a reason to consider that fact in favour of the prosecution and the prosecution's duty of proving the case beyond reasonable doubt remains the same.

For the aforementioned reasons, I find that this is a conviction that cannot be allowed to stand as it is not safe to convict the appellant based on the testimony of the sole eyewitness who gave evidence in the matter as to the identification of the appellant.

Therefore, I set aside the conviction and the sentence imposed on the appellant. The appellant is acquitted from the charges preferred against him.

Appeal allowed.

Judge of the Court of Appeal.

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal