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

In the matter of an Appeal made under 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 Case No.
CA/HCC/ 0332/2017
High Court of Puttalam
Case No. HC/36/2007

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

COMPLAINANAT

1. Seiyudu Gows Monammed Munaf
2. Seiyudu Gows Monammed Nausad

ACCUSED

AND NOW BETWEEN

1. Seiyudu Gows Monammed Munaf

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B.Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Harishke Samaranayake for the Appellant.** **Janaka Bandara, DSG for the Respondent.**
ARGUED ON	:	**20/09/2022**
DECIDED ON	:	**04/10/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named 1st Accused-Appellant (hereinafter referred to as the Appellant) was indicted along with 2nd accused and others unknown to the prosecution, in the High Court of Puttalam under Section 296 read with Section 32 of the Penal Code for committing the murder of Mohammed Nauf Mohammed Naim on or about 27th April 2002.

As the 2nd accused absconded the court before commencement of the trial, an inquiry was held under Section 241 of the Code of Criminal Procedure Act No.15 of 1979 and fixed the case in absentia of 2nd accused on 29/05/2008.

Trial commenced before the High Court Judge 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 closed his case. After considering

the evidence presented by both parties, the learned High Court Judge had convicted the Appellant and the 2nd accused as charged and sentenced them to death on 09/11/2017.

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. The 2nd accused was not represented by a counsel.

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

1. The Learned Trial Judge erred on facts and law.
2. The prosecution had failed to establish the identity of the Appellant.
3. The Learned Trial Judge had misdirected himself as to the proof of ingredients of the Section 32 of the Penal Code.
4. Relying on the evidence of PW1, the purported eye witness, is highly unsafe given the impeached character.

Background of the case

According to PW01 Abdul Mohamed, on the day of the incident he had gone to meet the deceased who had been a candidate of the Local Government Election. He had met the deceased at about 9.00 p.m. at a Mosque namely Thakkiya. As it was raining heavily with lightning and both had sheltered there until the ceasing of the rain. At that time, another three to four people also remained there due to gusty weather. He named three persons by name. According to him Nusrul, Huq and Siyan were there. The place was dark as the electricity had gone off due to bad weather.

At that time, a car had arrived there and stopped about 88 feet away from them. The head light of the car was turned off when it arrived there. He had seen three to four people were inside the car through the hood light when the doors were opened. About three people had got down the car and started firing towards them. As the boundary wall of the mosque was covered with roofing sheets, the bullets struck on the roofing sheet and created loud noise. Due to the darkness, he could not identify the type of the gun. According to the witness, he had identified the Appellant and his brother, the 2nd accused, when they alighted from the car with the help of the hood light of the car. He had witnessed an object similar to a gun was in the possession of 2nd accused. When the shooting commenced, the deceased shouting "Allah" had fallen on the ground. According to him, lightning also helped him to identify the appellant and his brother properly. But at the High Court trial he had added lights of the passing vehicle too helped him to identify the assailants.

As he feared, he had run into the mosque and washed his leg. At that time, he had noticed that he too had sustained injuries on one of his legs. He had stayed there for nearly two hours due to fear before being taken to the hospital. Further, he stated that he received threats after the incident. He had given a statement but was not sure whether he had named the Appellant and his brother at that time. There was no charge in the indictment for his injuries.

During the cross examination, the witness was unable to determine which side of the car the Appellant and his brother exited from. However, he admitted in the non-summary proceedings that he had told court that the Appellant had alighted from the driving seat of the car before firing. This contradiction was marked as V1 by the defence. At the inquest proceedings, the PW1 had said that the Appellant had come in a red car whereas, at the High Court he had said that the Appellant and others had

come in a nickel-coloured car. This contradiction had been marked as V2 by the defence.

When the trial was resumed before a new High Court Judge, PW1 was recalled and subjected to cross examination by the defence. At the cross examination, the witness admitted that he did not mention anybody's name to the doctor. He also admitted that once he was arrested for possession of arms by the police.

When the defence was called, the Appellant had given evidence from the witness box and denied the charge. According to him, he was at his mother's place with his wife and children when the incident had taken place. He also called 02 witnesses on his behalf.

During the argument, the learned Counsel who appeared for the Appellant mainly argued that the prosecution had failed to prove the identity of the Appellant as the perpetrator, beyond reasonable doubt and applicability of evidence of sole eye witness as cogent.

As this case is rests on the proper and correct identification of the Appellant as perpetrator and its high persuasive nature, this Court invited the Counsel for the Appellant to argue on the second ground of appeal which states that the prosecution had failed to establish the identity of the Appellant beyond reasonable doubt.

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 had established the identity of the Appellant beyond reasonable doubt.

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 owing to its persuasive 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, I now assess whether the prosecution in this instance has proven the Appellant's identification beyond reasonable doubt, as mistaken identity occurs frequently in good faith, but the consequences can be extremely serious for the Appellant. Therefore, the cases of this nature must be dealt with utmost sensitivity.

PW01 in his evidence stated that it was pitch dark due to gusty weather when the incident had happened. Further, power failure also aggravated the bad light condition. Importantly, according to PW1, the firing had originated from about 88 feet distance. When the car in which the Appellant and others arrived, the headlights of the car had been switched off immediately. Hence, PW1 had identified the Appellant and the 2nd accused from the hood light of the car when its doors were opened. Although he had said that the 2nd accused had a gun in his possession, but he was unable to confirm whether the Appellant too had possessed any weapon. Further, in the non-summary proceedings, PW1 had said that the Appellant was in the driving seat when the car arrived at the scene. But during the High Court trial he had taken up the position that the Appellant alighted from the rear side of the car and not from the driving seat. This contradiction was marked as V1. Further, at the inquest proceedings, the witness had said that the Appellant and others had arrived in a red coloured car. But in the High Court he had said that a nickel-coloured car had arrived. This contradiction was marked as V2. These two contradictions are very important as the incident had happened under

cover of the darkness. This has escaped from the consideration of the trial judge.

The investigating officer had only recorded the statement of PW1 whereas, PW1 had named several other people who were also there at the time of the incident. Hence, I consider it is a serious lapse on the part of investigation to collect all evidence necessary for consideration by the court.

The Learned High Court Judge had admitted that the evidence presented by the prosecution does not reveal as to who fired at the deceased, whereas, PW1 had said that he saw a gun in the possession of 2nd accused. The relevant portion of the judgment is re-produced below:

ඉදිරිපත් වී ඇති සාක්ෂි අනුව මෙම නඩුවේ චූදිතයින් නිෂ්චිතවම වෙඩි තැබූ බවට සාක්ෂිකරු පවසා නැත. එම කරුණ ද ඉතා වැදගත් කරුණකි. සාක්ෂිකරු හිතාමතාම මෙම චූදිතයන් මෙම සිද්ධියට පටලැවීමේ චේතනාවෙන් කටයුතු කලේ නම් මෙම චූදතයන් දෙදෙනාම වෙඩි තැබූ බව හෝ මෙම චූදිතයන්ගෙන් කෙනෙකු වෙඩි තැබූ බව පැවසීමට හැකියාව තිබුණි. නමුත් සාක්ෂිකරු එසේ කටයුතු නොකිරීමෙන්ම පෙනී යන්නේ එවැනි චේතනාවකින් සාක්ෂිකරු කටයුතු කර නොමැති බවයි.

(Page No. 273 of the brief).

Although the charge is framed that “the Appellant and the 2nd accused with others unknown to the prosecution” had committed the murder of the deceased, but the evidence given by PW01 well established that the light condition was not perfect at all. But the learned High Court judge in his judgment mentioned that the Appellant had been properly identified by PW01.The learned High Court Judge had failed to take into account the duration taken by PW1 to observe the Appellant in the light of the hood of the car.

The Learned Deputy Solicitor General in his reply submitted to this Court that he leaves the question of proper identity of the Appellant as the perpetrator to the consideration of this Court. Also submitted to this Court

that relying on the evidence of the sole eye witness is not safe, considering the probability factor.

Hence, I conclude that the second ground of appeal has 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 remaining grounds of appeal will not be considered as the Appellant has successfully established that he was not properly identified by the sole eye witness PW01 which is a substantial fact in this case.

Accordingly, I allow the appeal and acquit the Appellant and the 2nd accused, although he has not lodged an appeal, from the murder charge.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL