**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 Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.*

**Court of Appeal No:**

HCC/0088/17

**High Court of Negombo**

**Case No:** HC/437/2013

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

**1.** Chandra Marakkalage Thusitha Eranda Silva
**2.** Chandra Marakkalage Meril Krishantha
**3.** Chandra Marakkalage Rex Mervin
**4.** Hugo Joseph Perera (deceased)

**ACCUSED**

**AND NOW BETWEEN**

Chandra Marakkalage Thusitha Eranda Silva

**1st ACCUSED-APPELLANT**

**Vs.**

The Attorney General

Attorney General's Department

Colombo 12

**RESPONDENT**

**Before** : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

**Counsel** : Nalin Ladduwahetty, P.C. with Kavithri Ubeysekara

For the Accused Appellant

: Azard Navavi, DSG for the Respondent

**Argued on** : 13-09-2022

**Written Submissions** : 08-05-2018 (By the Accused-Appellant)

: 12-09-2022 (By the Respondent)

**Decided on** : 20-10-2022

**Sampath B Abayakoon, J.**

The 1st accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Negombo along with three others for causing injuries to one Anton Manoj Suranga by shooting at him using a firearm on 12th July 2005, and thereby committing the offence of attempted murder, punishable in terms of section 300 read with section 32 of the Penal Code.

After trial, the learned High Court Judge of Negombo, by the judgement dated 19-05-2017, found the appellant guilty as charged. However, the 2nd, 3rd and the 4th accused indicted were acquitted of the charge due to lack of evidence against them.

Upon the conviction, the appellant was sentenced to four years rigorous imprisonment and in addition, he was ordered to pay a fine of Rs. 10,000/-. In default, he was sentenced to 6 months simple imprisonment.

He was also ordered to pay a sum of Rs. 50,000/- as compensation to PW-01, and in default was sentenced to 10 months simple imprisonment.

Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

The facts relating to this incident, in brief, are as follows.

According to the evidence of PW-01, on 12-06-2005 around 7.00-7.30 in the night, he was returning home in his foot bicycle after attending Church. While nearing the house of the appellant, he has seen the appellant standing with folded hands. It has been his evidence that, at that time, there were street lights and although initially he did not see the appellant, when he saw him, he never expected that the appellant would shoot at him until he fired shots. It was his evidence that two shots were fired, one of which struck his leg.

After that, the PW-01 has ran towards the Church and then to the beach in order to escape. The appellant, although chased him could not find him at the beach and later he has managed to reach his home which was about 500 meters away. He had been categorical that although, the 2nd, 3rd and 4th accused were present about 50 meters away from the place where he was shot at, and though they had weapons in their hands, they never took part in the incident. It was his evidence that his injuries were to his leg above the knee and he saw that the appellant had a gun in his hand.

Under cross-examination, PW-01 has maintained that there were street lights at the place of the incident and he was able to identify the appellant clearly. It had been the suggestion on behalf of the accused that the witness did not see who fired at him because it was dark at the time of the incident and he is accusing the appellant and the other accused because of the previous enmity that existed

between them. Although the witness has admitted that they had a previous enmity, he has maintained the position that it was the appellant who fired at him. Under cross-examination, it becomes clear that the witness was not certain as to what type of a gun the assailant was carrying.

The doctor who examined the PW-01 three days after the incident at the Negombo General Hospital has given evidence and had marked his Medico-Legal Report (MLR) as P-01. When narrating the incident to the doctor, PW-01 has informed him the incident which was consistent with what the PW-01 had said in the Court. The doctor has observed two injuries on his right thigh, which he has observed as an entry wound and exit wound. However, he has stated that by the time he examined the patient, the wounds had already been treated, therefore, he was unable to determine whether the wounds were gunshot wounds. However, he has stated that the two wounds were parallel to each other, and has expressed the opinion that if not treated promptly, they could be fatal due to the loss of blood.

The police officer who has conducted the investigations has also given evidence in this action. He had been the Officer-in-Charge (OIC) of the Negombo police station when this incident was reported to him around 21.00 hours on 12-07-2005. Upon the receipt of the first information, he had visited the scene of the crime around 21.45 hours and had recorded his observations. It was his evidence that he could not find evidence of a gun being fired at that time, and he could not find any blood stains as well. It had been his evidence that he inspected the area using the torch he was carrying and since the injured had been taken to the hospital, he took steps to record his statement and came to know about four suspects involved in the incident. Although he looked for them, he could not find them in their houses, but later came to know that they have surrendered to the Magistrate Court somewhere in August.

Under cross-examination, when asked as to what type of light was available and how he made his observations at the scene of crime, he has stated that there

were sufficient street lights and he used the available light as well as the torch he was carrying for the purposes of his investigation. The defence has brought to the notice of the Court that the witness had failed to mention that there were street lights available at the crime scene when he filed his affidavit evidence at the non-summary inquiry in this regard before the Magistrate Court.

At the conclusion of the prosecution evidence, the learned High Court Judge had decided to call for a defence from the accused. The appellant had made a dock statement and had stated that he was unaware of this incident and during the time relevant to this incident he was at home. It had been his position that the complainant had an animosity with him because he killed one of his relatives on 13-06-2004, and because of that animosity, he falsely implicated him to this incident.

**The Grounds of Appeal**

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

1. The learned High Court Judge has failed to consider whether the identity of the appellant has been properly established by the prosecution.
2. The defence put forward by the appellant has been wrongly evaluated and rejected.
3. The learned High Court Judge has failed to come to a finding whether the charge has been proved beyond reasonable doubt.
4. The learned High Court Judge has taken into consideration extraneous and irrelevant material which was not in evidence.
5. The learned High Court Judge has failed to fulfill the requirements of section 283 of the Code of Criminal Procedure Act.
6. In any event, the sentence was excessive given the facts and the circumstances of the case.

It was the submission of the learned President's Counsel that although it was the evidence of PW-01 that two shots were fired at him, the medical report marked P-01 speaks about only one injury. It was his position that the police investigator did not find any evidence of an altercation or the foot bicycle the PW-01 was allegedly riding at the time, and even no empty shells were found at the scene of crime, which points to the possibility that this incident was not something that happened as stated by the PW-01.

It was his contention that PW-01 has not given clear evidence as to how he identified the appellant and had only stated that there was street light and he did not see the appellant initially. The learned President's Counsel points out that the evidence of the investigating officer was not satisfactory as to the light condition for him to observe things at the scene of the crime, where he has given contradictory evidence before the High Court and at the non-summary inquiry. It was his stand that since the OIC of the Negombo police station has reached the scene of the crime few hours after the incident, if there was an incident as alleged, he could have observed relevant evidence in this regard whereas he has not, which should have been considered in favour of the appellant.

Commenting on the judgement of the learned High Court Judge, it was the stand of the learned President's Counsel that it was a total misdirection for the learned trial Judge to conclude that the PW-01 was able to identify the accused from the light available in the nearby houses which was not a matter in evidence. He also contends that the contradiction marked V-01 had been considered by the learned High Court Judge on a completely wrong basis. Another contention of the learned President's Counsel was that the learned High Court Judge has failed to consider the dock statement of the appellant, in its correct perspective, which in his view was a misdirection by the learned High Court Judge. He also points out that the learned High Court Judge's determination that the PW-01's evidence had been corroborated by the evidence of the doctor was also a misdirection in law. It was his contention that the learned High Court Judge has failed to examine the nexus between the appellant and the injured and has failed to

determine whether the prosecution has proved the case against the appellant beyond reasonable doubt.

It was his position that the learned High Court Judge has failed to follow the essential requirements of a judgement as envisaged in section 283 of the Code of Criminal Procedure Act and thereby failed to afford a fair trial to the appellant, and it was dangerous to allow such a judgement to stand.

The position of the learned Deputy Solicitor General (DSG) in this regard was that it was unfair to argue that there was no proper evaluation of the evidence. It was his position that the learned High Court Judge has considered the evidence of PW-01 who was the injured and that of the doctor who examined him and the investigating officer in its correct perspective. It was his position that even the position of the appellant had been that there was a previous enmity between the parties, and PW-01 has given cogent and trustworthy evidence as to the incident and that he has clearly identified the appellant as the person who shot at him. It was his position that if one takes care to read the judgment as a whole, it becomes clear that the learned High Court Judge has come to a correct finding as to the guilt of the appellant, which needs no disturbance from this Court.

He was also of the view that given the facts and the circumstances, the sentence imposed by the learned High Court Judge was very much fair and adequate.

**Consideration of the Grounds of Appeal**

I will now consider all the grounds of appeal urged by the learned President's Counsel together, as they are interconnected.

Establishing the identity of an accused as the person who committed the crime is an essential requirement in a criminal action.

In the judgement of **Rex Vs. Turnbull and Another (1977) QB 224**, it was observed that;

> "*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 was 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 question of 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)"*

It is my view that the question of identification has to be determined by a trial judge depending on the facts and the circumstances of each case.

When it comes to the facts of the case under consideration, the PW-01 who was the injured and the only witness who speaks as to what happened, has given clear evidence that he identified the appellant because there was sufficient street light at that time.

There cannot be any dispute that the injured and the appellant as well as other accused indicted were well known to each other. It has been the evidence of the PW-01 that the other accused are the brothers of the appellant. It was the evidence of the PW-01 that while paddling the foot bicycle towards his house he did not see the appellant initially, which is understandable. He has stated in his evidence that he saw the appellant at a close range, but never believed that he will shoot at him. As soon as he was shot at, he has run towards the church and the beach leaving his foot bicycle. Even under cross examination, he has been consistent in his evidence that he was able to identify the appellant because of the street light available. He has given clear evidence that the other accused was standing about fifty meters away and they were not involved in the shooting.

I do not find any reason to doubt the evidence of the PW-01 that it was the appellant who shot at him, as his evidence has been cogent and trustworthy in that regard, although he was the only witness who speaks about the incident.

I find no basis for the argument that the learned High Court Judge has failed to consider whether the identity of the appellant has been properly established. I

find that aspect has been well considered by the learned High Court Judge at page 04 of the judgment. (Page 163 of the brief).

However, as pointed out correctly by the learned President's Counsel, I find a misdirection as to the evidence considered in that regard, when it was determined that apart from the street light available, there were lights available in the houses nearby. I find that the mind of the learned High Court Judge has been influenced because of the way the learned State Counsel who prosecuted the matter has questioned the witness.

Although the learned State Counsel has posed a question as such, his answer has been that he saw the appellant because of the street light available.

For matters of clarity, I will now reproduce the relevant question and the answer which appears at page 57 of the brief.

> ප්‍ර : එරන්ද සිල්වා කියන අය ඒ ස්ථානයේ හිටියා කියලා කියන්න ප්‍රමාණවත් ආලෝකයක් තිබුනද? ගෙවල් වල තිබුන ආලෝකයෙන්ද දැක්කේ?
>
> උ : පාරේ බල්බ් දාලා තිබුනා.

It is clear from the judgment that the above consideration by the learned High Court Judge had been in addition to the proven source of light available at the time of the incident, which has not caused any prejudice to the appellant as the identity is a matter that has been established beyond reasonable doubt as considered earlier.

Although the learned High Court Judge has considered medical evidence as corroboration of the evidence of the injured, in fact, it needs to be considered as evidence consistent with that of the injured, and not corroboration in its strict sense.

The proviso of Article 138 of the Constitution which confers appellate jurisdiction to the Court of Appeal reads as follows;

**"Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

The PW-03, the main investigation officer, has stated in his evidence that he inspected the scene of the crime in the night itself using the torch he was carrying and the available street light. In his affidavit evidence tendered to the Magistrate Court for the purposes of the non-summary inquiry, he has failed to mention that there was a street light, as pointed by the learned President's Counsel in his submissions to this Court. I find that when the witness was confronted at the trial in this regard, he has admitted that it was an omission, but has stated that it was an oversight in the affidavit evidence, but in fact he has made notes in that regard.

I am unable to agree that it was a material omission on the part of the investigating officer that has the effect of vitiating the evidence of PW-01 that there was a street light at the scene of the crime. Similarly, the failure of the police who came to the scene of the crime few hours after the incident to find any spent bullets and the foot bicycle of the injured, is not a matter that can be held against the evidence of the PW-01, or a reason to believe such an incident did not take place.

I do not find merit in the contention that the learned High Court Judge has failed to follow the essential requirements of a judgment as provided for by section 283 of the Code of Criminal Procedure Act.

In the judgment, the learned High Court Judge has considered the evidence with a clear understanding that looking for proof whether the PW-01 has identified the person who shot at him was paramount in this action. After deciding on the identity of the appellant, the learned trial judge has considered the evidence as a whole to come to the finding that the appellant was guilty as charged, while acquitting the other accused for reasons recorded.

As I have stated before, the mentioned infirmities in the judgment have not caused prejudice to the appellant or has occasioned a failure of justice, as even if considered in its correct perspective, the only conclusion that can be reached was that of the guilt of the appellant and nothing else.

For the reasons as considered above, I find no merit in the first five grounds of appeal urged by the learned President's Counsel on behalf of the appellant.

The last ground of appeal urged is that the sentence was excessive, given the facts and the circumstances of the case.

In this matter, the appellant has been sentenced to four years rigorous imprisonment, for a fine, and in addition a compensation of Rs. 50000/- has been ordered. This was after a full trial. Given the fact that a firearm has been used to commit the crime, I am of the view that the learned High Court Judge had been very lenient towards the appellant in her sentencing order, which need no disturbance from this Court.

The appeal is dismissed, as it is devoid of merit. The conviction and the sentence affirmed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal