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 Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0182/20

High Court of Kalutara

Case No: HC/510/05

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

1. Liyana Arachchige Don Gunasena
2. Kuruppu Arachchige Lal Pathmasiri Gunathilake

ACCUSED

AND NOW BETWEEN

Liyana Arachchige Don Gunasena

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Darshana Kuruppu with Buddhika Thilakarathne and Dineru Bandara for the Accused Appellant

: Dileepa Pieris, SDSG for the Respondent

Argued on : 05-10-2022

Written Submissions : 26-10-2021 (By the Accused-Appellant)

: 31-01-2022 (By the Respondent)

Decided on : 17-11-2022

Sampath B Abayakoon, J.

The 1st accused appellant (hereinafter referred to as the appellant) was indicted along with another, in the High Court of Kalutara for committing the following offences.

1. That on 10th May 1998, he, along with the other accused, caused the death of Imiyage Don Sirisena and thereby committed the offence of murder, punishable in terms of section 296 read with section 32 of the Penal Code.
2. At the same time and at the same transaction, caused grievous injuries to Nathandalage Hemapala using a manna knife and thereby committed an offence punishable in terms of section 317 read with section 32 of the Penal Code.

After trial without a jury, the appellant was found guilty of the judgement dated 28-07-2020 for both the charges preferred against him by the learned High Court Judge of Kalutara, while the 2nd accused indicted was acquitted of the charges.

Accordingly, the appellant was sentenced to death on the 1st count. He was sentenced to 10 years rigorous imprisonment on the 2nd count, and ordered to

pay a fine of Rs. 10,000/- and a compensation of Rs. 300,000/- to PW-02, who was the injured in the incident. In default, he was ordered to serve six months each simple imprisonment as well.

The Grounds of Appeal

At the hearing of this appeal, the learned Counsel for the appellant urged the following grounds of appeal for the consideration of the Court.

1. The learned High Court Judge failed to consider that it is highly unsafe to rely on the evidence of PW-02 Hemapala as his evidence was contradicted by PW-01 and other witnesses called on behalf of the prosecution.
2. The identification of the appellant has not been proved beyond reasonable doubt and the possibility of mistaken identity of the appellant has not been ruled out.
3. The learned High Court Judge has failed to consider that the defence of the appellant is more probable, as the appellant has taken an alibi at the time of his arrest and has maintained it right throughout, which has been corroborated by the prosecution and the defence witnesses as well.
4. There was several misdirection in the judgement with regard to the burden of proof in a criminal case.

The Facts in Brief

The deceased Sirisena was a person who had a small business at a place called Digadara junction. PW-02, who was the injured and the main witness for the prosecution was his long serving servant. On the day of the incident, the deceased and PW-02 along with the 16-year-old daughter of the deceased (PW-01) has left around 8-8.30 in the night to go home after closing the business for the day. PW-01 has come to the shop after attending a tuition class. They were walking along the road to reach the house of the deceased, which was about a kilometer away. According to PW-02, both he and the deceased were carrying

torches that were lit at the time of the incident. He has identified the torch carried by the deceased marked as P-02 at the trial.

It had been his evidence that he was walking a little distance behind the deceased and his daughter, and heard somebody approaching them from behind. He has testified that when he turned back and pointed the torch towards the person approaching, he saw the appellant Gunasena running towards them wearing a short and after going past him, attacking the deceased using a short, flat weapon.

It was his evidence that after the 1st attack, he went and grabbed the assailant and grappled with him and the 2nd accused too came to assault the deceased. He has stated that he identified both of them because of the torch light since both of them are well-known to him. It was his position that during the struggle with the appellant, the appellant attacked him with the manna knife he was carrying and as a result his hands got injured. He has testified further that after the 1st assault, the assailants went away and the deceased asked from his daughter whether the persons who attacked were identified. At that point, the appellant returned and attacked the deceased again using the same weapon he previously used and ran away was his evidence.

The daughter of the deceased namely PW-01 has confirmed in her evidence that her father and the PW-02 were attacked while they were walking toward their house. Her evidence had been that although they had torches with them, they were not lit because it was near the Poya day and there was sufficient moonlight which enabled them to walk. It had been her evidence that the persons who attacked her father and PW-02 were wearing dark clothes and she could not identify any of them.

According to the evidence led at the trial, it is clear that soon after the incident, several villagers had come and assisted the injured. However, PW-01 has failed to reveal that it was the appellant and the 2nd accused indicted that attacked them even after inquired by those who came to assist them. It appears that PW-

02 has revealed the names of the assailants only when he made his police statement.

Consideration of the Grounds of Appeal

The learned Counsel for the appellant was of the view that relying on the evidence of PW-02 for the purposes of identification of the appellant was highly unreliable and the learned High Court Judge has failed to consider the inherent infirmities in his evidence before finding the appellant guilty for the charges.

He referred to the evidence of PW-08 and 09 who has come immediately after hearing the cries of the injured and assisted them. PW-08 was a former employee of the deceased. He has assisted PW-02 to cover his bleeding wounds and also had inquired as to what happened. However, the PW-02 has not answered, but has run away. Even to PW-09, who was a fellow villager and a police officer, the PW-02 has not revealed anything as to who assaulted them. It was the view of the learned Counsel that the learned High Court Judge has wrongly applied the guidelines provided in the case of **Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat 1983 AIR 753.**

It was contended that the learned High Court Judge has failed to consider the relevant principles as to whether the prosecution has positively established the identity of the appellant and also whether the prosecution has established that the alibi taken up by the appellant cannot be accepted. It was his position that the conviction cannot stand on the question of the identity alone.

The learned Senior Deputy Solicitor General (SDSG) making submissions on behalf of the respondent, the Honorable Attorney General, agreed that this is not a case where the conviction can be considered as a safe conviction due to the serious infirmities in the identification of the appellant by the PW-02.

It was his submission that since PW-02 has been the only witness who has said that he identified the appellant and the second accused, it was necessary for the

learned trial Judge to apply Turnbull guidelines and consider whether the evidence of PW-02 as to the identity can be accepted beyond reasonable doubt.

Learned SDSG admitted that the prosecution has failed to exclude the alibi of the appellant as well.

Having considered the relevant evidence and the judgement of the learned High Court Judge, the learned SDSG conceded that he is in no position to support the conviction and the sentence of the appellant.

This Court would like to express appreciation to the learned SDSG for making submissions before this Court with a clear understanding of his duty to assist the Court in dispensing justice.

As pointed out above, this is a matter where the prosecution has solely relied on the evidence of PW-02 as to the identity of the appellant, as well as the 2nd accused indicted as the persons who attacked the deceased and PW-02.

Having considered the evidence and as agreed by the learned Counsel, I am of the view that this is a clear case where Turnbull guidelines should have been strictly applied by the learned High Court Judge.

In the judgement of **Rex Vs. Turnbull (1977) 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 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 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 of 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

In this matter, it is clear from the judgement of the learned High Court Judge, the question of identity has not been considered in line with the Turnbull guidelines. The learned High Court Judge has brushed aside the infirmities in the evidence of PW-02 on the basis that those infirmities do not go into the root of the matter and such infirmities can occur in a case of this nature.

However, as agreed by the learned Counsel for the appellant as well as the learned SDSG, this is not a case where the learned High Court Judge can disregard the question of identity in the manner it was done. The evidence of PW-01, the daughter of the deceased, who was nearest to the decease when the attack took place clearly shows that she could not identify the assailants because they were wearing dark clothes and since she saw them from behind. The evidence of PW02 was also that the two assailants were wearing dark raincoat like clothes when he saw them rushing pass him towards the deceased.

According to the evidence led, both the appellant and the other accused were fellow villagers who were well-known to PW-01 and the deceased as well. It is abundantly clear that the PW-01 had told the absolute truth as to what she saw when this incident happened. According to her evidence, although her father carried a torch and PW-02 may have too, they were not lit at the time this incident occurred. This piece of evidence cut across the evidence of PW-02 who

says both the torches were lit and he identified the appellant because of the torchlight. Besides that, it is clear that even the deceased had failed to identify the assailants, The evidence shows that he has questioned as to who assaulted him, after the assailants ran away from the scene.

It is also necessary to consider the evidence of PW-08 and 09 in the light of the evidence of PW-02 as to the identity. Both the said witnesses have reached the place of the incident soon after it happened. PW-08 had been a former employee of the deceased. He is the person who has helped PW-02 to cover his wounds He has been specific that he questioned PW-02 as to what happened, for which he has not got a reply. PW-09 was another villager lived nearby and also a police officer. PW-02 has failed to reveal to none of them as to who assaulted him and the deceased.

It is my view that it would be the natural reaction of a person who faced with this kind of a situation to reveal to the persons who arrive to help him as to who was responsible for the injuries caused to him, which has not happened in this incident. This goes on to show that the identification of the appellants and the other accused by PW-02 at a later stage was an afterthought as argued correctly by the learned Counsel for the appellant.

It is clear that the appellant has maintained an alibi from the very moment of his arrest and throughout the case. He has given evidence on oath and has faced the test of cross-examination, where he has maintained the same position. Although it was not necessary for him to prove his alibi, he has called witnesses in support, to establish that he was elsewhere during the time the witnesses say this incident happened. It has been an admitted fact that there was a wedding function in the village at the alleged time of the incident.

E.R.S.R. Coomaraswamy in his book **The Law of Evidence Vol-01 at 279** states thus;

> *"The credibility of an alibi is greatly strengthened if it be set up at the time when accusation is first made and is consistently maintained thereafter.*

Conversely, the weight of the defence is weakened if it is not resorted to until sometime after the charge was made.

An alibi is not an exception to penal liability like the general exception and special exceptions laid down in the Penal Code…

When the defence of alibi is taken, there is no burden of proof for the accused. The defence evidence on alibi has merely to be weighed in the balance with the prosecution evidence. If the evidence of alibi is not believed, it fails. If it is believed, it succeeds. But if it is neither believed nor disbelieved, but creates a reasonable doubt as to the prosecution case on identity, the accused is entitled to be acquitted."

Under these circumstances, I am of the view that letting the conviction to stand is highly unsafe because of the prosecution's failure to establish the identity of the appellant beyond reasonable doubt.

Therefore, I allow the appeal of the appellant, and acquit him of the charges for which he was convicted.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal