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 No:
CA/HCC/ 0152/2016
High Court of Panadura
Case No. HC/ 2547/2009

Sellapperumage Anoj Kumara
Yasantha Fernando

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE	:	**Sampath B. Abayakoon, J.** **P. Kumararatnam, J.**
COUNSEL	:	**Indica Mallawaratchy for the Appellant.** **Hiranjan Peiris, SDSG for the Respondent.**
ARGUED ON	:	**18/10/2022**
DECIDED ON	:	**28/11/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General for committing the offence as mentioned below.

The Appellant was indicted along with another named Saranga Pradeep Fernando for committing murder and robbery with a common intention for causing death and robbery of one Thelge Sumith Peiris on 04/05/2006.

Trial proceeded against the Appellant only as the 1st accused had died before the commencement of the trial. As the Appellant opted for a non-jury trial, the trial commenced before a judge and the prosecution had led twelve witnesses and marked production P1-13 and X and closed the case. The Learned High Court Judge having satisfied that evidence presented by the prosecution warranted a case to answer, called for the defence and explained the rights of the accused. Having selected the right to make a statement from the dock, the Appellant had proceeded to deny the charge.

After considering the evidence presented by both the prosecution and the defence, the Learned High Court Judge had convicted the Appellant as charged and sentenced him to death on 02/08/2016.

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. At the hearing the Appellant was connected via Zoom platform from prison.

The Counsel for the Appellant has raised only one ground of appeal and argued under nine sub headings mentioned below.

The Conviction of the Appellant is wholly unsafe for the following reasons, namely;

a) Conviction is wholly based on the uncorroborated evidence of a sole child eye witness.
b) No police statement was given by the sole eye witness.
c) Contradictory reasons were adduced by the eye witness and his mother for the failure in making a police complaint.
d) Statement of the eye witness did not lead to the arrest of the accused.
e) Version of the eye witness does not favour the test of probability.
f) Version of the eye witness is contradicted by PW1.
g) Trial court failed to assess the testimonial trustworthiness of the eye witness.
h) Learned Judge was deprived of observing the demeanour and deportment of the sole eye witness.
i) Identification parade was held after nearly a month from the date of the incident. No specific feature of the accused being mentioned by the eye witness.

The background of the case *albeit* **briefly is as follows:**

The eye witness PW2 was 11 years old when the incident had occurred. He is a relation of the deceased-accused. After school he was employed at a wood workshop. According to the eye witness, who was 17 years of age at the time of giving evidence before the High Court, when he was walking down near his home on the date of the incident, the deceased-accused who is a relation of this witness asked him to stop to buy cigarettes for him. The Appellant also was there at that time. After some time, the deceased had come along the road on a motor bike. The deceased-accused stopped him and dealt a

blow on his head with a club. Immediately, the Appellant had stabbed the deceased with a knife. The deceased had pleaded not to assault him at that time. Seeing this gruesome incident, the witness had run home and divulged the incident to his mother. Fearing reprisal from the offenders his mother PW10 had sent her eye witness son to her home town fearing his safety. Hence, this witness could not give a statement to the police. Later, he gave evidence at the inquest and identified the Appellant at the identification parade held on 02/06/2006.

PW10 also gave evidence and corroborated what her eye witness son had told her on that day and what she did thereafter.

According to PW18 the investigator of this case, he had received the first information about the death of the deceased from PW3 Asitha Fernando. Upon further investigation he had received information about the offenders from PW10 who is the mother of the eye witness. However, she did not produce her son to the police due to fear of his life. The eye witness had given evidence at the inquest held in the Magistrate Court directly.

Under the appeal ground stated above, the Counsel for the Appellant contends that as the conviction is wholly based on the uncorroborated evidence of a sole child eye witness the conviction is wholly unsafe.

In **The Attorney General v. Devunderage Nihal SC/Appeal/145/2010** decided on 03/01/2019 Aluvihare, J. had held that:

a) *"An accused can be convicted on a single witness in a prosecution based on a police detection, if the judge forms the view that the evidence of such witness can, with caution, be relied upon, after probing the testimony.*
b) *Corroboration is not sine qua non for a conviction in a police detection case, if the judge, after probing, is of the opinion that the witness is credible and the evidence can be acted upon without hesitation".*

E.R.S.R Coomaraswami in his treatise "Law of Evidence" Vol 2 book 2 at page 658 has stated as follows referring to child witnesses:

> "There is no requirement in English Law, that the sworn evidence of a child witness needs to be corroborated as matter of law. But the jury should be warned, not to look for corroboration, but of the risk involved in acting on the sole evidence of young girls or boys, though they may do so if convinced of the truth of such evidence…….. This requirement is based on the susceptibility of children to the influence of others and to the surrender to their imagination".

At page 659 it states:

> "As regards the sworn testimony of children, there is no requirement as in England to warn of the risks involved in acting on their sole testimony, though it may be desirable to issue such a warning, though the failure to do so will generally not affect the conviction".

Although the Learned Trial Judge had not considered Section 134 of the Evidence Ordinance, he had assessed the evidence given by PW2 and his mother PW10 in its correct perspective. The eye witness's evidence very well tallied with the medical evidence especially, with regard to the injuries sustained by the deceased and coming to the conclusion that the prosecution had presented trustworthy, cogent and impressive evidence has not occasioned any failure of justice in this case.

Further, the Counsel for the Appellant argued that the no police statement was given by the sole eye witness and contradictory reasons were adduced by the eye witness and his mother for the failure in making a police complaint.

As mentioned above, the eye witness was evacuated to his mother's home town for his safely immediately after the incident. Hence no prompt statement was not recorded. But on 08/05/2006 the eye witness PW2 had given a very comprehensive statement at the inquest. The eye witness had

very clearly mentioned that he had seen the Appellant with the deceased accused previously and therefore he could identify him if he sees him again. During the High Court trial, the defence was issued with a copy of the statement the witness made during the inquest proceedings.

Section 110(1) of the Code of Criminal Procedure Act No. 15 of 1979 states thus;

> "Any police officer or inquirer making an investigation under this chapter may examine orally any person supposed to be acquainted with the facts and circumstances of the case, and shall reduce into writing any statement made by the person so examined, but any oaths or affirmation shall not be administer to any such person….."

In this case, the eye witness had immediately divulged this incident to his mother. Fearing his safety, she had sent him away to her home town. Hence the police could not record his statement. But on 08/05/2006, four days after the incident he had given a statement before the inquest proceeding. At the High Court trial, the said statement was made available to the defence and the eye witness was subjected to lengthy cross-examination. Although three contradictions were marked on the statement made at the inquest by the eye witness, the Learned High Court Judge had very correctly declared that contradictions would not have any bearing on PW2's evidence.

When the eye witness PW2 had given cogent evidence against the Appellant, the mere fact that the statement of PW2 was not taken down in writing is not a fatal procedural irregularity as argued by the Counsel for the Appellant. Nowhere in the proceedings the eye witness and his mother had given contradictory reasons for failure to give a police statement by the eye witness.

In addition, the Counsel for the Appellant contends that the statement of the eye witness did not lead to the arrest of the accused.

The position of the eye witness was that immediately after the incident, he had disclosed the incident to her mother, PW10 and thereafter he was evacuated to her mother's village for his safety.

According to PW18 CI/Kodithuwakku, who had conducted the investigation into the death of the deceased confirmed that he received information about the perpetrators of this crime from PW10, the mother of the eye witness. PW10 also admitted that she made her statement to the police two days after the incident.

According to Section 109 of the Code of Criminal Procedure Act No.15 of 1979, every information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer. In this case, the mother of the eye witness had given information about the commission of the murder by the Appellant. She had received this information from the eye witness who is her son. Both had given evidence and corroborated this fact during the trial. The police had commenced investigation upon the information passed by PW10. Hence it is incorrect to say that eye witnesses' evidence did not lead to the arrest of the Appellant. Further this has not caused any prejudice to the Appellant.

In addition, the Counsel for the Appellant argued that the version of the eye witness does not favour the test of probability and his version is contradicted by PW1. She further argued that the trial court failed to assess the testimonial trustworthiness of the eye witness.

The eye witness was 11 years old when he witnessed the gruesome incident pertaining to this case. But his evidence was not contradicted on material particulars. His evidence pertaining to stabbing and assault with a club is very well corroborated by the medical evidence.

PW1 is the wife of the deceased who had only come to the place of incident after hearing the cries that her husband had been beaten by some body. When she went there had seen her deceased husband was lying on the

ground. She had not seen anything else. Hence it is incorrect to say that the evidence of the eye witness had been contradicted by the evidence of PW1.

The Learned High Court Judge in his judgement had considered the probability factors of this case very extensively. Further, he had analysed the eye witness's evidence in its correct perspective and correctly believed and satisfied his evidence to come to his decision.

The Learned Counsel for the Appellant also argued that the Learned Judge was deprived of observing the demeanour and deportment of the sole eye witness.

It is correct that the evidence of the eye witness was led before his predecessor of the learned judge who wrote the judgment. The Learned High Court Judge who wrote the judgment had properly adopted the evidence led up to that point with the consent of both parties on 08/02/2016.There had been no application by the defence to re-call PW2 in terms of Section 48 of the Judicature Act. Once the proceedings are adopted and continued, the deprivation of observing the demeanour and deportment cannot be taken as an appeal ground. Further, the Learned Trial Judge who wrote the judgment had very correctly considered the evidence of eye witness with utmost care and caution. He had reasoned for the acceptance of his evidence as reliable and trustworthy. Hence, even though the Learned Judge who wrote the judgment did not have the benefit of observing the demeanour and deportment of the eye witness, he had very extensively considered his evidence without causing any prejudice to the Appellant.

Finally, the Counsel for the Appellant had contended that as the identification parade was held after nearly a month from the date of the incident and no specific feature of the accused being mentioned by the eye witness, the acceptance of the identification parade notes creates a reasonable doubt about the identity of the Appellant.

It was the position of the eye witness that he had witnessed the incident very clearly with the available light on that date. Immediately he had informed the incident to his mother. He had also stated that he had no difficulty in identifying the Appellant at the identification parade. At the trial, he had identified the Appellant in open court.

In the cross examination, the eye witness had reiterated that he saw the Appellant 15-20 minutes prior to the incident. As the deceased-accused asked him to wait, he had waited there till the occurrence of the incident. According to eye witness, he has not faced any difficult circumstances when he witnessed the incident and identified the Appellant.

As this is not a case of fleeting glance identification following principles enunciated in **Turnbull case** is not necessary. The Learned High Court Judge had accurately discussed the circumstances upon which PW2 had identified the Appellant. He had very correctly disregarded the contradictions marked on the evidence given by PW2, stating that the said contradictions are not forceful enough to create a doubt about the identity of the Appellant Hence no substantial miscarriage of justice had occurred to the Appellant.

The Learned High Court Judge in his judgment very extensively analysed the evidence of PW2 who is the sole eye witness in this case. Eye witness had no connection whatsoever with the Appellant up to the time of the incident. This witness had clearly witnessed the attack carried on the deceased by the Appellant using a knife. He had witnessed the incident from close proximity in a condition of good lighting.

The incident happened on 04/05/2006 and the eye witness gave evidence in the High Court on 11/01//2011 and 27/02/2012 after about 06 years of the incident. When the incident happened, he was only 11 years of age. As the memory of a person fades with the lapse of time, recalling each and every minute detail of a gruesome incident that which happened suddenly and unexpectedly is humanely impossible. Hence, the argument advanced by the

Learned Counsel for the Appellant under appeal ground one is without any merit.

When the evidence presented against the Appellant is considered, I conclude that the prosecution had succeeded in adducing highly incriminating evidence against the Appellant and thereby established the 1st charge beyond reasonable doubt.

As such, I conclude, that this is not an appropriate case in which to interfere with the findings of the Learned High Court Judge of Panadura dated 02/08/2016. Hence, I dismiss the Appeal.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree

JUDGE OF THE COURT OF APPEAL