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/ 0196/2018
High Court of Panadura
Case No. HC/2694/2010

Hithanadurage Karunasena Silva
alias Karuna

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B.Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **K.Kugarajah for the Appellant.**
Maheshika Silva, DSG for the Respondent.

ARGUED ON : **14/12/2022**

DECIDED ON : **21/02/2023**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted in the High Court of Panadura under Section 296 of the Penal Code for committing the murder of Balapuwaduge Antony Mendis on or about 1st November 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 made a dock statement and closed his case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant and sentenced him to death on 25/04/2018.

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.

On behalf of the Appellant the following Ground of Appeal is raised.

1. The conviction arising solely on the evidence of PW2, namely Thelge Sunil Lakxman Peiris is unsafe as the purported identification of the Appellant was made under difficult external circumstances.

Background of the case

According to PW02, he does carpentry work for his living. After work he used to spent his night either at the Indibedda Community Centre or at Lunawa Government Hospital, as he received treatment for his wound in his leg. He knew the deceased as the deceased too used to sleep in the dressing room of the Indibedda Community Centre. Although the deceased's house is situated close to the community centre, but he preferred to spent nights in the community centre for unknown reasons.

On the date of the incident, as usual when the deceased went to the community centre at about 7.00 p.m., he met the deceased there. After dinner when both had been talking to each other in a seating position, the Appellant had come there and assaulted the deceased on his head with a wooden pole. Although he had aimed the witness first but he jumped aside and saved himself. Even though the deceased pleaded and worshiped the Appellant not to harm him, the Appellant had dealt about 7-8 blows on his head. As a result, the deceased had fallen on the ground unconscious with his tongue out from his mouth. The wooden pole had been broken in to several pieces. He had witnessed this incident from light emanating from a street light which fell inside the room. As the Appellant is a known person to him, he could identify him properly with that light condition.

PW1 is the son of the deceased. As he was a trishaw driver, he was called to transport his father to the hospital. After going some distance only, he realized that the patient he took into his trishaw was his father. He does not give any evidence regarding the condition at the crime scene.

PW9 had conducted the post mortem examination and noted 10 injuries over the head of the deceased. He had opined that the noted injuries on the deceased's head could have been caused by the broken club shown to him.

According to him, the death had caused due to Cranio-cerebral injuries following blunt impact.

PW6 had conducted the investigation and visited the scene on the following day. Several parts of the broken wooden pole were recovered from the crime scene by the witness. His evidence further established that the light of the street lamp would reach the scene of crime as the nearest street lamp is 10 meters away from the crime scene.

After the conclusion of the prosecution case, the Appellant made a dock statement and closed his case. Although he denied the charge levelled against him, but he admitted that he was at the crime scene on that day watching a group singing there.

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 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.

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".*

Guided by the above-mentioned judgment, 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.

PW02 is an eye witness to the incident. In his evidence he had very clearly identified the Appellant when he assaulted the deceased. As the Appellant is known person, the identification of the Appellant had been very well established by the prosecution. Although several omissions are marked on the evidence of PW2, his evidence could be accepted as cogent and trustworthy. His evidence had been corroborated by the medical evidence and the police evidence.

The Learned Counsel also contended that the sole eye witness's evidence needs to be considered with utmost care and caution.

Section 134 of the Evidence Ordinance states:

> "No particular number of witnesses shall in any case be required for proof of any fact.

In **Sumanasena v. The Attorney General [1999] 3 SLR 137** the court held that:

> *"……evidence must not be counted but weighted and the evidence of a single witness if cogent and impressive could acted upon by a court of law".*

In this case the evidence given by PW2 is cogent and no doubt has arisen about the veracity or truthfulness of his evidence.

For the foregoing reasons adduced on the facts and the law, I am of the view that there is no justifiable reason to interfere with the judgment of the Learned Trial Judge. Accordingly, I affirm the conviction and the sentence and dismiss this appeal.

Appeal is dismissed.

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