

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

In a matter of an appeal made under section 331 of the Code of Criminal Procedure Act No. 15 of 1979 against the judgment, conviction and sentences imposed by the High Court of Kalmunai in case No HC/Kal/36/08.

Yaseen Bawa Niyas alias Mansoor

(Presently remanded at the Bogambara Prison)

Court of Appeal Case No:

CA-HCC-244/2010

HC of Kalmunai Case No:

HC/Kal/36/08

Accused-Appellant

v.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

Before: **Menaka Wijesundera, J.**

B. Sasi Mahendran, J.

Counsel: M. Nizam Kariapper ,PC with M.I.M. Inynullah and Ms. Nasrina for the Accused-Appellant

Maheshika Silva, DSG for the State.

Written Accused-Appellant Filed
Submissions: 30.01.2017 (by the Respondent)
On

Argued On: 04.09.2023

Decided On: 25.10.2023

Sasi Mahendran, J.

The 2nd Accused Appellant (hereinafter referred to as “the Accused”) was indicted together with Mohamed Faleel (1st Accused) and Abdul Majeed (3rd Accused) before the High Court of Kalmunai on the 15th of December 2010, on two counts:

Count 1- On or about 06.05.2003 at Kalmunai the Accused together with the said 1st and 3rd Accused Allegedly conspired to murder one Athambawa Sahul Hameed an offence punishable under Section 113(b) and 102 of the Penal Code.

Count 2- On the said date, time and place the Accused together with the 3rd Accused caused the death of one Athambawa Sahul Hameed, an offence punishable under Section 296 of the Penal Code.

After the trial, The Learned High Court Judge Convicted the 2nd Accused for murder and was sentenced to death and the other two were acquitted.

Being aggrieved by the said conviction the Accused has appealed to this court.

The following are the grounds of appeal as per the written submission:

- i. The learned High Court Judge had failed to consider the discrepancies in the evidence tendered by the witnesses of the prosecution.
- ii. The learned High Court Judge had attached probative value to the evidence of the 1st Witness, especially regarding the identity of the accused despite the omission and contradiction of her (1st Witness's) evidence, misdirected herself (the learned

High Court Judge), *and concluded that the identity of the accused was proven beyond reasonable doubt.*

- iii. The learned High Court Judge erred in law and in fact, and misdirected herself when stating in her judgment that the omissions and contradictions that were marked did not affect the root of the case whereas the same had cast a serious doubt regarding the identity of the accused.
- iv. The learned High Court Judge had erred in law by rejecting the dock statement of the Accused before the High Court trial, by comparing the dock statement by the Accused before the learned Magistrate of Kalmunai at the non summary inquiry on the basis that there were differences between the dock statements whereas it was not so.
- v. The learned High Court Judge had utilized the weaknesses of the case of the defense in order to strengthen the case of the prosecution, which is contrary to the norms of criminal prosecution.

The following are the facts and circumstances of this case;

Upon scrutiny of the testimony provided by PW1 Sahul Hameed, the daughter of the deceased and the sole eye-witness to this case, several salient points emerge. According to her testimony, she was awakened by an explosive sound, which she later confirmed as a gunshot during her cross-examination. She saw an individual fleeing from her parent's room and subsequently encountered another individual who knocked her shoulder and fled, jumping over the parapet wall. PW1 asserts that she saw a portion of the Accused's face and later identified him at the Identification Parade conducted at the Kalmunai Lower Court.

During cross-examination by the Counsel for the Accused, PW1 maintained her account. She elaborated that although she did not see the second individual's face directly, she did see it from a side angle and described specific facial features. She also stated that the area had sufficient light from a nearby lavatory and streetlight, further confirmed when her younger sister (PW2) switched on additional lights.

The principal issue for this court's consideration is the adequacy of the lighting conditions at the time of the incident, which directly correlates to the

credibility of PW1's identification of the Accused. Specifically, the court is concerned with whether the lighting conditions were sufficient to enable an accurate identification by the witness.

In addressing this issue, we take note of the specific queries put forth by the Counsel for the Accused concerning the lighting conditions during cross-examination.

On page 136 of the brief:

Q: Did you put the light on when you ran?

A: No

On page 137 of the brief:

Q: Did you put the light on when you went out?

A: I did not put the light

Q: On that occasion you said you saw somebody else also ran?

A: yes

Q: How did you see that?

A: When he knocked against my shoulder and I turned somebody else also ran

On page 142 of the brief:

Q: In the statement you gave the police you had said you did not see the person. At present when you give evidence you say that you have seen his face. Which is correct? You have said, a thin man that you have not seen his face.

A: I did not say so. I did not see his face directly,

Q: That means what did you see?

A: I saw his face sideways

On page 148 of the brief:

Q: You getting up on hearing the noise a person resembling your father running. Later another one knocking against your shoulder and your mother and sister coming and putting the light, within the duration of how soon all this happened?

A: Continuously within 1, 1 ½ minutes it happened.

....

Q: Did you get the opportunity to identify his face?

A: No

In further analyzing the testimony related to the lighting conditions at the time of the incident, it is instructive to also consider the evidence given by PW2. She confirms that she woke up and proceeded toward PW1, stating that only the bathroom light was on during this time. This assertion provides supplementary context to PW1's claim about the adequacy of the lighting conditions, which she says were further augmented by a streetlight.

The Defense's main objection centers around the accuracy of PW1's identification of the 2nd Accused. This is a pivotal point in the trial given that PW1 is the sole eyewitness to the crime. The issue of identification is paramount and necessitates rigorous scrutiny, especially in a criminal trial where the stakes are exceedingly high and could significantly impact the prosecution's case.

In the recent judgement of **Dassanayake Lekamlage Somapala alias Gangabada Sudu and others v A.G, C. A 208 – 210/2011, decided on 02.09.2014, His Lordship Anil Goonaratne J**, echoed our concern:

“A very important aspect of a criminal trial is that the perpetrators of the crime need to be identified with certainty. Absence of identity of accused would be fatal to the prosecution case. The learned High Court Judge has merely referred to the items of evidence of the declaration (P5) but has not considered its probative value.”

With regard to the identity of the Accused our courts have followed the principles set out by **His Lordship, Lord Widgrey CJ, in R v Turnbull and another [1977] (1) QB 224 at page 228;**

“First, whenever 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 or identifications. In addition he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?"

It should be noted that when the 2nd Accused was produced before the identification parade, PW9, who conducted the parade, stated that the witness had identified the Accused who was standing directly in front of her. However, according to PW1, she identified the Accused from a sideways angle.

For the instant case, we shall concurrently compare the evidence with that of the principles laid out in **R v Turnbull (Supra)**. According to PW1's evidence

1. She was only able to identify the 2nd Accused within the span of 1 ½ minutes as she had only seen the side portion of his face
2. She had not observed his face in close proximity as the 2nd Accused had knocked on her shoulder while fleeing
3. The area had poor lighting conditions which was established by the evidence of PW2
4. She had not known the 2nd Accused as he is a complete stranger to her

In the case of **Opatha Widanapathiranege Wasantha and 3 Others v. Attorney General, CA 179/2006, decided on 29.04.2010, His Lordship W.L. Ranjith Silva, J**, held that:

"The Learned Trial Judge ought to have followed the standard guidelines with regard to his directions to the jury. On the issue of identification evidence the judges must give accurate directions regarding the identification evidence and direct the jury that they must be satisfied beyond reasonable doubt that the accused were correctly identified and give the benefit of any doubt to the accused. The Jury must be directed as to the possibility

of a mistaken identity even by honest witnesses and if they cannot make up their minds as to whether the witnesses were lying or mistaken the accused must be given the benefit of the doubt and should be acquitted. The trial judge must direct the jury to examine closely the circumstances under which the identification came to be made and the means of identification. The trial judge should direct the jury on the rules laid down in Rex v. Turnbull. “

The aforementioned judgement was referred to in the recent case of **Shamila Ishan Gunasinghe v A.G, C. A 209/2015, decided on 30.10.2017, by Her Ladyship S.Devika De Livera Tennekoon J.**

Upon scrutinizing the evidence provided by PW1, along with the above observations, I am of the view that her testimony regarding identification casts doubt due to a lack of cogent evidence concerning the identification of the Accused. In this instance, the Learned High Court Judge has convicted the Accused of the murder of the Deceased primarily based on PW1's evidence. However, we find that this evidence is insufficient to establish the prosecution's case beyond a reasonable doubt.

In light of the above facts and circumstances, it is unsafe to allow the conviction to stand. When the Accused are facing a capital charge, every point in favor of the Accused needs to be considered. Therefore, we set aside the conviction and sentence and allow this appeal.

This appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL