

**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/0016/2018
High Court of Balapitiya
Case No: HCB/1268/2009

1. Ganegamage Sarath Samarajeeva
2. Kirinde Dissanayake Indra
Kumari

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Amila Palliyage with Sandeepani
Wijesooriya, S. Udugampola, Lakitha
Wakishta Arachchi and Subaj De Silva for
the Appellants.
Hiranjan Pieris, SDSG for the Respondent.**

ARGUED ON : **07/06/2024**

DECIDED ON : **11/09/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted jointly in the High Court of Balapitiya for committing grievous hurt by throwing acid on Withanachchi Gunawardena Siriyalatha punishable under Section 317 of the Penal Code on 09th November 2006.

The trial commenced before the High Court Judge of Balapitiya after serving indictment on the Appellants on 24/03/2010. The prosecution had called 05 witnesses and marked productions P1-P2 and P2(a). After the conclusion of the prosecution case, the learned High Court Judge had called for the

defence and the Appellants had made dock statements and called a witness on their behalf and closed their case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged.

The Appellants were sentenced as follows on 03/04/2018:

- Each Appellant was sentenced to 7 1/2 years rigorous imprisonment and a fine of Rs.1500/- with a default sentence of 03 months rigorous imprisonment.
- In addition, the learned High Court Judge had directed the Appellants to pay a compensation of Rs.150,000/- each to PW1 with a default sentence of 01 years simple imprisonment.

Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

The learned Counsel for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence. At the time of argument, the Appellants were connected via Zoom platform from prison.

Background of the Case.

PW1 was living with her husband in a separate house. The Appellants were living as tenants in a house owned by PW1's husband. As the Appellants were involved in selling cannabis and illicit liquor based from this rental house a dispute had arisen between them which ended in the Appellants verbally abusing PW1 and her husband on several occasions. PW1 and her husband had lodged several complaints with the police regarding this dispute and had requested the Appellants to vacate the rental premises.

On the day of the incident when PW1 was walking towards the toilet which was situated at the rear of her house, the Appellants had ambushed her and had thrown acid at her. She had clearly seen that both the Appellants were present when she was attacked with acid.

Due to the serious nature of the injury sustained on her body, particularly on her face, the victim, PW1 had lost eyesight in both her eyes and was blind when she appeared before the High Court to give evidence. As such, PW1 could not identify the Appellants at the trial. Therefore, the prosecution case solely rested on the evidence of PW1, who is supposed to be the purported eye witness to the incident.

According to PW6, the JMO who examined PW1, the victim had told him that two known persons had attacked her with acid. He had observed blackish brown first and second-degree corrosive burns on her face (4.5%), front aspect of the neck, upper chest (6%), right upper limb (5%) and left upper limb (3%). The total percentage of burn injuries were 18.5%.

There were splash burns on the face, front aspect of upper chest and right upper limb. There were vertical chip marks on both upper limbs and front aspect of the chest. There were burns on both ear lobes, lips and tongue. Periorbital oedema was present around the eyes.

Both Appellants in their dock statements denied charges levelled against them.

The learned Counsel for the Appellants had raised three grounds of appeal which are set out below:

1. The learned High Court Judge erred in law by failing to consider the material discrepancy with regard to the visual identification of the Appellants beyond reasonable doubt.
2. The learned High Court Judge erred in law by rejecting the defence on wrong premise.

3. The learned High Court Judge erred in law by considering the unreliable evidence of the victim to convict the Appellants.

As the grounds of appeal raised by the Appellants are interconnected, all grounds will be considered together hereinafter. This case, as claimed by the learned Counsel entirely rests on evidence given by PW1.

The alleged incident had happened due to the warning given to the Appellants by PW1's husband to vacate the rental premises they were occupying as they suspected that the Appellants were selling Cannabis and illicit liquor from the rental house. This was the sole reason for the incident. The husband and the mother-in-law of PW1 had passed away before they could give evidence at the trial.

PW1 had identified both the Appellants when they were standing behind a wall. She had not been able to take any cover or protect herself as the 1st Appellant had thrown acid on her quite suddenly.

The identity of the accused, as a person who committed the offence is a fact in issue at a criminal trial and evidence as to identification of the accused by a witness, is relevant and admissible.

The prosecution should provide proper evidence to establish the identity of the alleged perpetrator and his presence at the crime scene as the burden falls on the prosecution to prove that the accused in fact is the person who committed the crime, and that too, at a very high standard of proof – beyond reasonable doubt. They should do this by leading direct, indirect or circumstantial evidence of identification which would more often than not include direct evidence of state witnesses who saw the accused committing the said criminal act at the scene of crime at the given time.

However, it is very important that the Court should always be aware of the danger that is of a seemingly honest witness being able to falsely implicate an accused in a crime due to various reasons including but not limited to bias and malice. Therefore, the Court should always be cautious to require careful scrutiny of the honesty and credibility of the witnesses, especially if he is a single eye witness.

In this case, the Appellants are well known to the witness as they were the tenants of a house which was owned by the husband of PW1. Further, regular disputes persisted over the suspected criminal activities allegedly committed by the Appellants in their rental house. As such, PW1 did not have any difficulty in identifying the Appellants at the crime scene.

In **R v. Turnbull** [1977] QB 224 the court held that:

“Where 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 be cautious before convicting the accused in reliance on the correctness of the identification(s). The judge should take into consideration 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 very well, may be wrong.*

The learned High Court Judge, in his judgment had extensively discussed the identification of the Appellants by PW1. The defense did not succeed in creating a doubt with regard to the identification of the Appellants. Hence, in this case, the identification of the Appellants is not an issue as claimed by the Respondent.

Further, I consider it worthy to mention the remorse expressed by the Appellant to PW1. The 2nd Appellant along with the 1st Appellant had gone to PW1's house after her return from the hospital. The 2nd Appellant had confessed to PW1 revealing facts about the way they planned the attack and their motive. She had also told her the composition of the acid that was used in the attack. Although the 1st Appellant denied the offence he failed to answer the question put forward by PW1 regarding the clothes he was wearing when he attacked her with acid. This had also been considered by the learned High Court Judge to arrive at his decision.

The principle of the 'Common Intention' is that if two or more people who possess the same intention get together for the purpose of achieving their common target and they act in furtherance of the common intention of all, in such an instance all persons who have participated in the commission of the act would become jointly liable and will face criminal charges together.

In this case evidence transpired that the Appellants had actuated common intention at the time of committing the offence. They had the common intention to achieve the particular consequences. As long as they entertain such intention jointly, they will be held jointly responsible for their actions.

In **King v. Ranasinghe et al 47 NLR 373** the court held that:

“Common intention within the meaning of section 32 of the penal Code is different from same or similar intention. The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case”.

For the reasons elaborated above, the learned High Court Judge had been accurate in attributing common intention to both the 1st and 2nd Appellants. He had considered the evidence presented by the defense very extensively and had given plausible reasons as to why he believes that the prosecution version has merit and why the defense version lacks merit. Hence, it is incorrect to say that the learned High Court Judge had not considered the evidence presented by the defense.

The learned High Court Judge had not considered unreliable evidence when arriving at his judgment. He had acted on reliable evidence after considering the contradictions marked by the defense. When the contradictions are not capable to attack the core of the case, the learned High Court Judge is entitled to conclude that the prosecution had proved the case beyond reasonable doubt.

Notably, the trial court had relied on the injured witness PW1 whose injuries had not been challenged. Although the case was based on the evidence of a solitary eye witness and the witness had enmity with the appellants, her evidence was not challenged on material facts. It is not the quantity of the witnesses but the quality of the witnesses which matters, in a criminal trial. As discussed under the grounds of appeal advanced by the Appellants, I conclude that the prosecution had adduced strong and incriminating evidence against the Appellants. The learned High Court Judge had accurately analyzed all the evidence presented by all the parties and had

finally arrived at the correct finding that the Appellants are guilty of committing voluntary grievous hurt on the victim in this case.

Therefore, I affirm the conviction and dismiss the appeal of the Appellants. Since the Appellants are on bail pending appeal, I order that their sentence should commence from the day this judgment is pronounced upon the Appellants by the learned High Court Judge of Balapitiya.

The Registrar is directed to send this judgement to the High Court of Balapitiya along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL