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.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Court of Appeal No:
CA/HCC/0151/2020
High Court of Colombo
Case No: HC/6916/2013

1. Mohomed Nawshad Doole Nawshad
2. Mohomed Sali Mohomed Faize alias Sori Faize

ACCUSED

AND BETWEEN

Mohomed Naushad Doole Naushad

ACCUSED-APPELLANNT

Vs.

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

RESPONDENT

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

COUNSEL : **Asitha Vipulanayake for the Appellant.**
Sudharshana De Silva, DSG for the Respondent.

ARGUED ON : **22/11/2023**

DECIDED ON : **01/04/2024**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) along with the 2nd Accused were indicted in the High Court of Colombo as follows:

1. That on or about the 20.04.2004 the accused named in the indictment with some others unknown to the prosecution were members of an unlawful assembly with the common object of causing hurt to Jesu Nasarenu Felix Fernando alias Tony thereby committing an offence punishable under Section 140 of the Penal Code.
2. At the same time and same place and in the course of the same transaction the accused committed the murder of afore named Jesu Nasarenu Felix Fernando alias Tony thereby committing an offence punishable under Section 296 read with Section 146 of the Penal Code.
3. At the same time and same place and in the course of the same transaction the accused committed the grievous hurt of Godauda Pathiranage Indrasiri thereby committing an offence punishable under Section 315 read with Section 146 of the Penal Code.
4. Section 296 read with Section 32 of the Penal Code. (Alternative common intention charge to count 02).
5. Section 315 read with Section 32 of the Penal Code. (Alternative common intention charge to count 03).

The trial commenced before the Judge of the High Court of Colombo as the Appellant and other Accused had opted for a non-jury trial. After the conclusion of the prosecution's witnesses, when the case was adjourned to mark statutory statements of the Appellant and the 2nd Accused, the Appellant had absconded the Court. Hence, evidence led under 241(1) of the Code of Criminal Procedure Act No.15 of 1979 and fixed the case in absentia of the Appellant. But he was arrested and produced before the defence was called.

When the defence was called the Appellant remained silent and the 2nd Accused had made dock statement and had denied the charges. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant for 1st,2nd and 3rd counts and sentenced him as follows:

- **First Count** 06 months rigorous imprisonment.
- **Second Count** death sentence imposed.
- **Third Count** 02 years rigorous imprisonment.

As no sufficient evidence was led against the 2nd Accused, the Learned High Court Judge had acquitted him from the case.

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 had given consent for this matter to be argued in his absence due to the Covid 19 pandemic restrictions. Further, at the time of argument the Appellant was connected via Zoom platform from prison.

Background of the Case.

According to PW2, Rupa Matilda, the mother of the deceased, on the date of the incident, at about 7.00 pm she had gone to fetch water from a public

water tap located on the Ginthupitiya Road. When she set off from her home, she had seen the deceased leaning against a wall close by. The place where the deceased was illuminated with the light emanating from a church. While she was filling the water from the tap, had heard her son shouting to save him. When she ran to the place where the deceased was and she had seen about six persons surrounding her son and stabbing him mercilessly. She could not identify any body at that time, but told police that she could identify if see them again. She had seen the incident with aid of light emanating from the church and from the street. She had also seen the assailants stabbing PW1 Indrasiri as well. As she fainted, the deceased had been taken to the hospital by the neighbors but he died on admission. She had identified the Appellant at the identification parade.

According to PW1, Indrasiri he was talking to the deceased at the place of incident. Suddenly about six people had surrounded the deceased and stabbed him with draggers. He too was stabbed when he tried to rescue the deceased. Initially he had said that he had identified the Appellant and the 2nd Accused among the crowd. But under cross examination he had said that he saw only 2nd Accused stabbing the deceased.

PW7, JMO Ajith Jayasena had held the post mortem examination on the deceased and had noted 27 injuries on the deceased's body. According to the JMO, the injury number 18 was fatal and was sufficient to cause instant death.

PW17, CI/Chandratilaka had arrested the Appellant along with three others and handed them over to the Pettah Police Station for further investigations. The Appellant was identified at the identification parade held on 09.11.2004 by PW21 and he was identified by PW2 at the parade. The Appellant was unrepresented when the identification was held. The identification was held after about months of the incident.

In respect of the 2nd Accused, an identification was held on 15.06.2005, after about 14 months of the incident. PW2 had identified the 2nd Accused at the parade. He too was not represented by an Attorney-a-law at that time.

The Appellant had filed the following grounds of appeal.

1. The judgment pronounced by the Learned High Court Judge is contrary to law and the judgment entered is not in accordance with the evidence adduced in this case.
2. The Learned High Court Judge has failed to adequately consider, assess, and evaluate the evidence led in the case.
3. The Learned High Court Judge has failed to offer due regard to the doubts raised on the prosecution case.
4. The Appellant has been deprived of a fair trial that is recognized by Article 13(3) of the Constitution as a result of not assigning a Counsel for the Appellant.

As the Appeal grounds 1-3 are interconnected, those grounds will be considered together in this appeal.

The Learned High Court Judge, in her judgment had come to the finding that the prosecution had not established the identity of the 2nd Accused beyond reasonable doubt. Hence, he was acquitted from this case.

The Learned High Court Judge in her judgment reasoned out why she proceeded to acquit the 2nd Accused in following manner:

Pages 416-417 of the brief.

මෙම නඩුවේ 2 වන චූදිත, දකුණු පස සිට පළමු ස්ථානයේ සිට ගනිමින් පෙරෙට්ටුවට සහභාගී වී ඇති අතර, රැවුල වවා සිටි එකම පුද්ගලයා මොහු බවට ද කරුණු දක්වා ඇත. ඒ අනුව වසරකටත් අධික කාලයකින් පසු 2005.06.15 වන දින 2 වන චූදිතව පැ.සා. 2 විසින් හඳුනා ගැනීම යම් පෙර පෙන්වාදීමක් මත කරන හඳුනා ගැනීමක් බව මෙම අධිකරණයේ ස්ථාවරය වේ. ඒ අනුව 2 වන චූදිත විත්තිකූඩුවේ සිට කර ඇති ප්‍රකාශය සැලකීමේ දී ඔහු ඉදිරිපත් කර ඇති කරුණු, මෙම කරුණු හා සමපාත වන අතර 2 වන චූදිතව හඳුනා ගැනීම, මෙම අධිකරණයේ තදබල සැකයට භාජනය වන්නක් බව අධිකරණයේ නිරීක්ෂණයයි.

ඒ අනුව නිශ්චිත හඳුනා ගැනීමකින් තොරව යම් චූදිතයෙකු වරදකරුවෙකු කිරීම අවධානම් ක්‍රියාවක් බව අපරාධ නීතිය අනුව පිළිගෙන ඇති කරුණකි. සාධාරණ සැකයෙන් ඔබ්බට චෝදනා

ඔප්පු කිරීමේ භාරය පැමිණිල්ල සතු වන අතර, යම් හෙයකින් සැකයේ සේයාවක් උද්ගත වන්නේ නම් එහි වාසිය අදාළ චූදිත වෙත ලබා දිය යුතු බව පිළිගත් අපරාධ නීති මූලධර්මය වේ.

ඒ අනුව පැ.සා. 1 සහ පැ.සා. 2 විසින් 1 වන චූදිතව හඳුනා ගැනීමට අදාළව ඉදිරිපත් කරන ලද සාක්ෂි මුලින්ම සලකා බැලීමට තීරණය කර සිටී. පැ.සා. 2 විසින් 1 වන චූදිතව සිද්ධිය වූ ස්ථානයේදී දුටු බවට ඉදිරිපත් කර ඇති සාක්ෂි කිසිසේත් අභියෝගයට ලක් වී නොමැත. මෙම සිද්ධියේදී මරණයට පත්වී ඇත්තේ පැ.සා. 2 ගේ පුතා වන අතර, මෙවැනි සිද්ධියක් ඇයගේ මතකයේ තැන්පත්වීම, සාමාන්‍ය සිද්ධියකට වඩා සිදුවීමේ සම්භාවිතාව වැඩි බව තීරණය කළහැකි. ඒ අනුව පැමිණි පුද්ගලයින් හයදෙනාගෙන් 1 වන චූදිත එම ස්ථානයේ සිටි බවට පැ.සා. 2 විසින් හඳුනා ගැනීමක් සිදු කොට ඇත්තේ සිද්ධිය සිදුවී මාස හයකට පමණ පසුව වේ. පැ.සා. 1 පෙරෙට්ටු සඳහා සහභාගී වී නොමැති අතර හරස් ප්‍රශ්නවලදී යෝජනා කොට ඇත්තේ එම පුද්ගලයින් හඳුනා නොගත් බවට පොලිසියට දෙන ලද ප්‍රකාශය හේතුවෙන් පෙරෙට්ටුවට සහභාගී කර නොමැති බවයි. ඔහු විවෘත අධිකරණයේදී සාක්ෂි දීමේ දී ප්‍රකාශ කොට ඇත්තේ මෙම චූදිතයින් දෙදෙනා නඩු වාර ගණනාවක් අධිකරණයේ පෙනී සිටීම මත හඳුනා ගත් බවකි. ඒ අනුව සත්‍ය වශයෙන්ම 1 වන චූදිත මෙම සිද්ධියේදී පැ.සා. 1 නිවැරදිව දර්ශනය කර ගත්තාද යන කරුණ යම් ගැටළු සහගත තත්ත්වයක් බව මෙම අධිකරණයේ තීරණයයි.

As the Learned High Court Judge acquitted the 2nd Accused, exclusively due to poor identification by PW1 and PW2. Now, in this case, the paramount question needs to be addressed is to consider whether PW2, mother of the deceased had properly identified the Appellant at the time of committing the murder.

To obtain a criminal conviction, the burden lies on the prosecution to demonstrate their case, typically relying on evidence collected by law enforcement. This evidence may encompass diverse types such as eyewitness accounts, defendant confessions, mobile phone records, medical records, and forensic findings.

Accurate identification of a suspect in a criminal proceeding holds significant weight. Recent years have seen a rise in the scrutiny of the trustworthiness of identification evidence, particularly that of eyewitness identification. Courts consistently stress the importance of thoroughly assessing the circumstances surrounding the identification, including the witness's opportunity to observe the suspect and the procedures employed during the

identification process. Identification parades, commonly used in investigations, are often regarded as credible evidence in court. Nevertheless, concerns have been raised regarding the adequacy of safeguards provided to defendants in cases involving eyewitness identification, prompting scrutiny of psychological research to evaluate the reliability of identification parades.

In criminal cases, the case of **R v Turnbull [1977] QB 224 (CA)** provides that whenever the case against an accused depends wholly or substantially on the correctness of an identification of the accused that 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. The judge should also direct the jury to examine closely the circumstances in which the identification was made. When the quality of the identification evidence is good, the jury can be left to assess the value of the identifying evidence even though there is no other evidence to support it. However, when the quality of the identified evidence is poor, as for example when it depends solely on a fleeting glance or on a longer observation made in difficult conditions, the judge should withdraw the case from the jury and direct an acquittal unless there is other evidence that goes to support the correctness of the identification.

In this case, according to PW2, the mother of the deceased, the incident had taken place in the night and she identified the Appellant and the 2nd Accused with the aid of street light and the light which was emanating from a church situated close by.

The relevant portion of the evidence pf PW2 is re-produced below:

Page 96 of the brief.

ප්‍ර : දැන් තමුන් ඔය සිද්ධිය වෙන වෙලාවේ ඒක දකින්න මොනවා හරි එළියක් තිබුනාද ?

උ : පාරේ ලයිට් එළිය තිබුනා. ලොකු පල්ලියක් තියනවා, ඒ පල්ලියේ ලයිට් එළිය හොඳට වැටෙනවා පාරට. පල්ලිය ලඟ තමයි ඇන්නේ.

ප්‍ර : එතකොට පල්ලිය ලඟ කියලා අදහස් කරන්නේ පල්ලිය ඉස්සරහද පල්ලිය පිටුපස්සේ ද කොහේද ?

උ : ඉස්සරහ.

Page 100 of the brief.

ප්‍ර : ඒ හඳුනාගැනීමේ පෙරෙට්ටුවලදී තමුන් කාව හරි අඳුරගත්තාද එදා හිටිය අයගෙන් ?

උ : ඔව්.

ප්‍ර : කී දෙනෙක්ව අඳුරගත්තාද ?

උ : දෙන්නෙක්ව අඳුරගත්තා.

ප්‍ර : ඒ අඳුරගත්ත දෙන්නා අද උසාවියේ ඉන්නවාද ?

උ : ඉන්නවා.

ප්‍ර : කොහේද ඉන්නේ ?

උ : අර විත්ති කූඩුවේ ඉන්නවා.

Although, PW2 stated that she witnessed the incident with the aid of light which emanating from a church, in the cross examination she admitted she identified with a small light fixed to a chapel built on the side of the road. She also admitted that the place where the incident happened was dark. The relevant portion is re-produced below:

Pages 112-113 of the brief.

ප්‍ර : තමා ප්‍රකාශ කර සිටියා එතන එළියක් තිබුනා කියලා ?

උ : එයා මරපු තැන කළුවරයි.

ප්‍ර : දැන් ඔය සුරුවම ළඟද සිද්ධිය වුනා කියලා සාක්ෂිකාරිය කියන්නේ ?

උ : සුරුවම තිබෙන්නේ මේ පැත්තේ. වම්පැත්තේ සුරුවම තිබෙන්නේ. වම් පැත්තේ ටිකක් කළුවරයි.

ප්‍ර : එතකොට ඔය සිද්ධිය වෙච්ච ස්ථානයේ කියට විතරද සාක්ෂිකාරිය එදා සිද්ධිය සිද්ධ වුනේ?

උ : 8.00 විතර.

ප්‍ර : ඒ කියන්නේ රාත්‍රී කාලයේදී තමයි මේ සිද්ධිය සිද්ධ වුනේ ?

උ : එහෙමයි.

ප්‍ර : එතකොට තමා පොලීසියට කරන ලද ප්‍රකාශයේ එළියක් තිබුනා කියලා කිව්වාද ?

උ : මම කිව්වා. එයා හිටගෙන හිටියේ කළුවරයි.

ප්‍ර : පල්ලියක් නෙමේනේ සාක්ෂිකාරිය සුරුවමක්නේ තිබෙන්නේ ?

උ : නැහැ ලොකුවට හදලා තිබෙනවා.

ප්‍ර : පල්ලියක් කියන්නේ පාදිලිතුමෙක් ඉන්නවානේ. එතන තිබෙන්නේ වේලකන්නි දේව මෑණියන්ගේ පින්තූරයක් නේද, සුරුවමක්නේ ?

උ : නැහැ. දේව මෑණියන්ගේ නෙමේ. ලොකු සුරුවමක්.

ප්‍ර : තමාට මා 01 වන චිත්තිකරු වෙනුවෙන් යෝජනා කරනවා තමුන් එදා පොලිසියට ප්‍රකාශයක් කරන විට එතන එළියක් තිබ්බා කියන එකට ප්‍රකාශයක් කියලා නැහැ කියලා සඳහන් කරලා නැහැ කියලා යෝජනා කරනවා පිළිගන්නවාද ඒක ?

උ : පොඩි ලයිට් එකක් තමයි දාලා තිබෙන්නේ.

ප්‍ර : තමා එදා කරපු ප්‍රකාශයේ මෙතන මේ ආලෝකයක් ඒ කියන්නේ එළියක් තිබ්බා කියලා ප්‍රකාශයක් කලේ නැහැ නේද ?

උ : නැහැ. කළුවරයි.

ප්‍ර : ගියපාර උසාවි ආවාට පස්සේ තමයි එළියක් තිබෙනවා කියලා ඉස්සෙල්ලාම උසාට්යට කිව්වේ නේද ?

උ : කළුවර වෙලා තිබුනේ. ඒ පැත්ත කළුවරයි.

The above re-produced portions of evidence clearly demonstrate that there was no proper light condition existed at the time of happening the incident. PW13, CI/Ovitigama the investigating officer in this case had gone to the crime scene immediately after receiving the first complaint about the incident at about 7.30pm. Although the eyewitness PW2 stated that she witnessed

the incident with the aid of light emanating from a church and with street light, the examination-in-chief and the cross examination on behalf of the Appellant of the investigating officer does not contain a single mention about the light condition nor the existence of a church and street light.
The relevant portion is re-produced below:

Page 237 of the breief.

ප්‍ර : සාක්ෂිකරු තමා තමා එම අදාළ ස්ථානය සම්බන්ධයෙන් ක්ෂේත්‍ර සටහන, දළ සටහන පිළියෙල කිරීමේ දී එහි සුරුවමක් සම්බන්ධයෙන් යම් නිරීක්ෂණයක් තමා කළාද ?

උ : නැහැ.

ප්‍ර : සුරුවමක් සම්බන්ධයෙන් සටහනක් තමාගේ දළ සටහනේ නැහැ ?

උ : නැහැ.

Analysing the crime scene is a vital stage in all investigations. To effectively decipher the information conveyed by material evidence, it is essential to conduct a thorough examination of the crime scene, identifying and collecting traces in a systematic manner.

In this case, identification evidence of PW2 is very important as the prosecution case solely rests on the correct identification of the perpetrator. Although, PW2 stated that she identified the Appellant with the aid of a small light of a chapel, in her evidence, she admitted that the place of incident was dark.
PW13, the investigating officer who went to the place of incident immediately after the incident had fail to mention the light condition of the place incident. This is very serious lacuna in the prosecution's case, as the identification of the Appellant solely rest on the light condition that existed at that time. Further, PW2 had taken two different stances with regard to the light condition that existed at time of the incident.
Further, the Learned High Court Judge had acquitted the 2nd Accused disbelieving the identification evidence of PW2 who had identified him at the

identification parade. This benefit of doubt was not awarded to the Appellant in this case.

In **SC (SPL) Appeal 07/2018** decided on 04.10.2019, His Lordship Jayantha Jayasuriya, PC, CJ stated that:

> *"Facts leading to assess the quality of evidence of visual identification are important facts a court needs to take into account in deciding on the identity of an accused. What matters is the quality of the evidence. In such situations the evidence of the witness should demonstrate that there was sufficient opportunity for the witness to have seen the person concerned at the time of the incident and thereafter had the ability to identify the person concerned during his testimony in court.*
>
> *Factors such as, the duration of the interaction between the witness and the suspect, distance between them**, the nature of light under which the witness observed,** whether there are any special reasons to remember the suspect such as presence of unique physical features, existence of any factors impeding the opportunity for clear and uninterrupted observation, whether the witness had seen the suspect before and if so the number of occasions and whether the suspect was known by name or not, are relevant to determine the quality of visual identification evidence. Dayananda Lokugalappaththi and eight others v The State, [2003] 3 SLR 362 at 390, R v Turnbull (C.A.), [1977] 1 Q.B. 224 at 228. This list of factors is not exhaustive, but could vary according to the facts and circumstances of each case."* [Empasis added]

In this case, the prosecution has not sufficiently established the visual identification of the Appellant beyond reasonable doubt by. The Learned High Court Judge had failed to evaluate this point which, no doubt, favours the Appellant. Hence, is deprived of a fair trial which is guaranteed in the Constitution of the Democratic Socialist Republic of Sri Lanka.

As the prosecution had failed in its duty to prove this case beyond reasonable doubt, I set aside the conviction and sentence imposed by the Learned High Court Judge of Colombo dated 06/10/2020 on the Appellant. Therefore, he is acquitted from this case.

Accordingly, the appeal is allowed.

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

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL