

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

*In the matter of an Appeal in terms of  
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/0074/2015

Democratic Socialist Republic of Sri Lanka

**COMPLAINANT**

**Vs.**

**High Court of Tangalle Case No:**

HC/03/2006

Mana Bandanage Premasiri

Kosgahagoda Durage Champika Manoj

Kosgahagoda Durage Chandana Sujeewa

**ACCUSED**

**AND NOW BETWEEN**

Kosgahagoda Durage Champika Manoj

**2<sup>nd</sup> ACCUSED-APPELLANT**

**Vs.**

The Attorney General

Attorney General's Department

Colombo 12

**RESPONDENT**

**Before** : Sampath B Abayakoon, J.  
: P. Kumararatnam, J.  
**Counsel** : Indika Mallawaratchy for Accused Appellant  
: Riyaz Bary, D.S.G. for the Respondent  
**Argued on** : 20-05-2022  
**Written Submissions** : 11-09-2017 (By the 1<sup>st</sup> Accused-Appellant)  
: 04-10-2017 (By the Respondent)  
**Decided on** : 19-07-2022

**Sampath B Abayakoon, J.**

This is an appeal by the second accused appellant Kosgahagoda Durage Champika Manoj (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the Learned High Court Judge of Tangalle, where he was sentenced to death.

The appellant was indicted along with Mana Bandanage Premasiri who was the first accused and now deceased, and Kosgahagoda Durage Chandana Sujeewa who was the third accused, but absconded during the trial. The trial has proceeded against the third accused after taking due steps in terms of Section 241 of the Code of Criminal Procedure Act.

After trial without a jury, the appellant along with the third accused were convicted as charged and were sentenced accordingly.

The facts that led to the incident, briefly, are as follows:

This incident has happened on 26-01-2003. According to the evidence of PW-02 Balage Lucina, she was at her home which is situated on an upper elevation to Walasmulla-Weerakatiya main road and her husband was away from the house around 6.00 and 7.00 in the evening. While attending to her household work,

she has heard somebody shouting “ගාන්ත අයිගේ, ගාන්ත අයිගේ” meaning her husband.

When looked at the main road, she has seen Susantha, the deceased, who was a relative, running towards her house and being pursued by three others. She has clearly identified all of them as there was good light condition at that time. One of the persons who pursued the deceased was Premasiri, who was also a relative, and the now deceased first accused. She has seen him carrying a manna knife.

The deceased Susantha who came running inside the house has attempted to hide under a bed in one of the rooms. However, the persons who came after him had dragged him out, assaulted, and cut him with the knives they were carrying. She has been specific that the appellant assaulted him physically.

Although the neighbours, including PW-03 Indrani has come and has attempted to rescue the deceased, it has failed. In her evidence the witness has clearly stated that the incident happened for about half an hour to forty-five minutes inside and outside of her house. This shows that she had a good opportunity of seeing and identifying the assailants clearly.

However, it was her evidence that apart from the deceased and the first accused Premasiri, the other two came and assaulted the deceased were unknown to her. At the trial, she has identified the second appellant as one of the persons who came and caused injuries to the deceased. After they left, she has found the deceased dead and has also found the two knives identified and marked as P-01 and P-02 near the body of the deceased.

It was also her evidence that she was able to identify the two unknown persons who participated in the crime at the identification parade held in the Magistrate Court of Wallasmulla. However, under cross examination, she has admitted that she was shown some persons at the Walasmulla police station and was asked to

identify whether any of the persons who came to assault the deceased are present.

She has stated that she identified only the third accused at the police station and the appellant was not shown to her at the Walasmulla police station.

PW-03 who was the other eye witness has given evidence consistent with the version of events as stated by PW-02. It was her evidence that she was clearly able to identify that the three persons who were assaulting the deceased in front of the house of PW-02 which was at a higher elevation to the main road. It was also her evidence that of the three persons, only the first accused Premasiri was known to her and the other two were unknown. She has identified the unknown persons at the identification parade held at the Magistrate Court for that purpose as the persons who participated in the crime.

Apart from the above eyewitnesses, the police officers who conducted the investigation as to the crime have given evidence in this matter. In his evidence, the District Medical Officer (DMO) of Walasmulla (PW-07), has marked his Post Mortem Report as P-06. He has observed four cut injuries on the body of the deceased and had opined that death of the deceased was due to a deep cut injury to the back of his head.

In this matter, I view the evidence of PW-11 Chief Inspector of Police Lakshman Wettasighe, of paramount importance in relation to the identification of the appellant at the identification parade held in that regard.

According to his evidence, while on routine patrol duty at about 5:10 a.m. on 25-04-2003, he has arrested Kosgahagoda Durage Champika Manoj who is the appellant in this case in the town of Beliatta on suspicion. This was a date three months after the date of the incident where the deceased was killed. After his arrest, the appellant has been taken to the Beliatta police station and later he has been produced at Tangalle Magistrate Court as a person arrested on suspicion that needed further investigations.

The appellant has been thereafter remanded by the Magistrate of Tangalle. It appears from evidence that subsequent to an application made by Walasmulla police a statement from the appellant has been recorded while he was in remand custody, and later produced for an identification parade before the Magistrate of Walasmulla, where he was identified by PW-02 and PW-03 as one of the persons instrumental in assaulting the deceased on the day of the incident.

After the conclusion of the prosecution case, the Learned High Court Judge of Tangalle has decided to call for a defence from the appellant and the appellant, making a dock statement, has stated that while was in remand custody officers from Walasmulla police came and recorded a statement from him in relation to a murder where he has no connection.

It was his position that he was shown to various persons and number of photos of him was taken away by the police from his home before the identification parade was held at the Walasmulla Magistrate Court. It has been his position that he is innocent of the crime and is unaware of anything in relation to the incident.

### **The Grounds of Appeal: -**

At the hearing of this appeal, the learned Counsel on behalf of the appellant formulated the following grounds of appeal for the consideration of the Court:

1. In the backdrop of the evidence of the eyewitnesses that the accused appellant was a total stranger, the prosecution has failed to explain as to the manner in which his name surfaced as a suspect at the crime scene, thereby creating a serious doubt in the prosecution case.
2. The prosecution has failed to explain the unlawful detention of the accused appellant for fourteen days.
3. The Learned High Court Judge has failed to address his judicial mind to the above facts and therefore, the appellant was denied of a fair trial.
4. Admission by the eye witnesses that they were summoned to the police station prior to the identification parade and shown several suspects

creates a reasonable doubt with regard to the legality of the identification parade.

It was the submission of the learned Counsel that the admission by the witnesses that the suspects were shown to them before the identification parade was a matter that goes into the root of the action which creates a doubt as to the identification of the accused.

Referring to the evidence of PW-03 and PW-02, it was the submission of the learned Counsel that the infirmities in the evidence of the said witnesses have not been considered by the Learned High Court Judge and had that been considered in the correct perspective, there was sufficient basis to conclude that a reasonable doubt has been created as to the culpability of the appellant to the crime, which should have been considered in favour of him. It was her contention that the appeal of the appellant should succeed as the prosecution has failed to prove the charge beyond reasonable doubt against the appellant.

It was the submission of the learned Deputy Solicitor General (DSG) that the evidence clearly provides that the witnesses never had an opportunity of seeing the appellant after the incident and before he was identified at the identification parade. Although the identification parade had been held more than three months after the actual incident since the incident has taken place over a period of about forty-five minutes and the witnesses have had the clear opportunity of looking at the assailants, was his position. It was his submission that the appeal is devoid of any merit.

### **Consideration for Grounds of Appeal**

As the above four grounds of appeal are interrelated, I will now proceed to consider the said grounds of appeal together.

There cannot be any dispute that the deceased was attacked and killed on 26-01-2003 in front of the house belonging to Balage Lucina, who was the PW-02 in this action. It is also undisputed that Balage Lucina and Manage Indrani (PW-

03) are eye witnesses to the incident and that they have been able to witness the incident clearly as there was sufficient light throughout. It is undoubted that the now deceased first accused Premasiri has been clearly identified by both the witnesses because he was a relative. According to the witnesses he is the person who came armed with a Manna knife, and it was he and the third accused who used sharp cutting weapons to attack the deceased.

It was their evidence that the appellant who chased after the deceased was instrumental in physically attacking the deceased. Their evidence clearly establishes the fact that all the three persons who came and attacked the deceased were acting in pursuance of a common intention. The evidence of the eyewitnesses is clear that the appellant as well as the third accused were persons unknown to them. They have identified them at an identification parade held before the Magistrate of Walasmulla some three months after the incident. I am unable to conclude that there are infirmities in the evidence of PW-02 and PW-03 as contended by the learned Counsel.

I am in no position to agree that the prosecution has a duty to prove that on what basis the suspect was considered as a suspect for the crime before the trial Court, because he was a total stranger to the witnesses.

Section 125 of the Evidence Ordinance reads as follows;

**125. No Magistrate or police officer shall be compelled to say whence he got the information as to the commission of any offence, and no revenue officer shall be compelled to say whence he got any information as to the commission of any offence against the public revenue or excise laws.**

It is obvious that once the appellant was arrested by the Beliatta police on suspicion as they are legally entitled to do, that information has been passed on to other police stations in order to find out whether the arrested person is wanted in relation to any crime, following the usual practice. As a result, the Walasmulla police who were investigating the crime where the death of the deceased

occurred, has taken steps to record a statement from the appellant in that regard, while he was in the prison custody. After he being named as a suspect, the police have taken due steps to file further reports before the Magistrate of Walasmulla and to hold a due identification parade through the Magistrate, where PW-02 and PW-03 has identified the appellant as one of the two persons who assaulted the deceased Susantha.

Although PW-12 who has recorded a further statement from the appellant has stated in his evidence that he recorded the statement at the Walasmulla police station, the original non-summary case record of the Walasmulla Magistrate Court which is available before this Court provides that it was not so, and he has given wrong evidence, which the prosecuting State Counsel has failed to notice or correct. It is clear from the Magistrate Court record that the appellant has never been released after his arrest on suspicion by the Beliatta police and remanded. By the further B report filed by the OIC of Beliatta police on 04-05-2003, he has requested the Magistrate to hold an identification parade in relation to the appellant, who was in remand custody by then for identification parades for several other cases as a suspect. This goes on to show that the witnesses have had no opportunity of seeing him before the parade at any of the police stations.

I find no basis whatsoever for the claim of the learned Counsel for the appellant that he was detained unlawfully and it has denied him a fair trial, since he has been duly produced within the legally stipulated period before a competent Court after his arrest as a suspect, and remanded to proper legal custody.

In view of the admission by the eye witnesses that some persons were shown to them at the Walasmulla police station and they identified the third accused at the police station and never saw the appellant before the identification parade it becomes necessary to consider whether the witnesses had an opportunity of seeing the appellant as well, before the identification parade was held.



If it can be so determined, the identification of the appellant by the witnesses will be of no value, and it is a matter that needs to be considered in favour of the appellant.

However, I find that as correctly pointed out by the learned DSG, the appellant has been arrested on suspicion of being involved in crimes by PW-11 some three months after the incident. It is clear that his initial arrest was not as a suspect for the murder of the deceased. Following the normal practice, the appellant has been sent for remand custody through Tangalle Magistrate until the further investigations are being completed as to whether he is needed as a suspect of a crime.

It appears that the Walasmulla police, when informed that such a person has been arrested on suspicion has found after investigations, that the appellant was a suspect in the killing that happened on 26-01-2003.

In the judgment of **Regina Vs. Turnbull and Another (1997) QB 224**, it was held:

*“Where the case against an accused depends wholly on the correctness of the identity of the accused, the judge should warn the jury of the special need to for caution before relying on the correctness of the identification by the witness.”*

The judge should tell the jury 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 well, may be wrong.

Some of the circumstances a judge should direct the jury to examine in order to find out whether a correct identification has been made include;

- The length of time the accused was observed by the witness;
- The distance the witness from the accused;
- The state of the light;
- The length of time elapsed between the original observation and the subsequent identification to the police.

**E.R.S.R. Coomaraswamy** in his book **‘The Law of Evidence’ Volume 1 at page 663** discusses the mistaken identity in the following manner.

*“A fundamental requisite in a criminal case is to establish the identity of the accused as the guilty party. The text-books abound with instances of what were supposed to be clear identifications which proved to be fallacious and defective. These include the case where an honest witness was deceived by the broad glare of sunlight, (R. Vs. Wood and Brown [Ann-Reg. 1784])...*

*...Much of the value of direct evidence of identification will depend on the personal appearance of the subject of identification. Many persons cannot be easily distinguished from others. The liability mistake is greater where the questionable identity is a matter of deduction and inference and the expression of an opinion than where it is the subject of direct evidence. (Wills, op. cit., 7<sup>th</sup> edition., pp 197-200)”*

Although this identification has happened more than three months after the incident, it is clear from the evidence that the witnesses had ample opportunity to see the assailants at the scene of the crime since the incident has continued for about 45 minutes in front of them.

This gives a clear idea that the witnesses were in a clear position to identify the appellant even after three months into the actual incident. It is also clear from

the evidence that the witnesses never had any opportunity of seeing the appellant before they were called for the identification parade by the Magistrate of Walasmulla, as I have reasoned out before.

Although it is an admitted fact that the third accused named in the indictment has been shown to the witnesses at the Walasmulla police station, the appellant was never held at the Walasmulla police station as the evidence provides and also admitted by him in his dock statement. It is to be noted the third accused who was also convicted for the charge has not appealed against the conviction.

I am of the view that the appellant is in no position to take the advantage of the fact that the third accused named in the indictment was shown to the witnesses before the identification parade was held, as it is not a matter that has created a doubt with regard to the identification of him by the witnesses.

Legality of the identification parade is a matter that has never been challenged at the trial and in fact, an admitted fact, in terms of section 420 of the Code of Criminal Procedure Act.

In view of the above findings, I find no merit in any of the grounds of appeal urged. The appeal therefore is dismissed. The conviction and the sentence affirmed.

Judge of the Court of Appeal

**P Kumararatnam, J.**

I agree.

Judge of the Court of Appeal