

**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

C.A. Case No: 160/2013

**H.C. Monaragala Case No:
515/2008 - Criminal**

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant

-Vs-

1. Rajapaksha Karunawantha Davayalage
Piyadasa
2. Karunawantha Davayalage John
3. Mohomed Niyaas
4. Rajapaksha Karunawantha Davayalage
Chaminda Rajapaksha
5. Karunasundara Davayalage Upul Kumara
alias Chuti
6. Rajapaksha Karunawantha Davayalage
Sugathadasa *alias* Raja

Accused

-And Now Between-

1. Rajapaksha Karunawantha Davayalage
Piyadasa
2. Karunawantha Davayalage John
3. Mohomed Niyaas
4. Karunasundara Davayalage Upul Kumara
alias Chuti
5. Rajapaksha Karunawantha Davayalage
Sugathadasa *alias* Raja

Accused-Appellants

-Vs-

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

Before : **A.L. Shiran Gooneratne J.**

&

K. Priyantha Fernando J.

Counsel : Jeffrey Zeinudeen for the 1st Accused-Appellant.
Indica Mallawaratchchi with K. Kugaraja for the 2nd, 3rd and 4th Accused-Appellants.
Saliya Peiris, P.C., with Amila Suyama Egodamahawatta for the 5th Accused-Appellant.
Hiranjan Peiris, DSG for the Respondent.

Written Submissions filed on: 08/05/2018- 2nd to 4th Accused-Appellants

18/06/2018- 1st Accused-Appellant

20/06/2018- 5th Accused-Appellant

17/10/2018- Complainant-Respondent

Argued on : 06/03/2019

Judgment on : **03/04/2019**

A.L. Shiran Gooneratne J.

The 1st to 5th Accused-Appellants (hereinafter referred to as the 1st, 2nd, 3rd, 4th and 5th Appellants) together with the 4th accused, were indicted in the High Court of Monaragala, on 5 counts, namely,

Charge 1. being members of an unlawful assembly, together with persons unknown to the prosecution, with common object to assault and cause hurt to Disanayake Mudiyanselage Mahinda alias Kumara, (the deceased) an offence punishable under Section 140 of the Penal Code.

Charge 2. kidnapped or abducted the deceased with intent to murder, an offence punishable in terms of Section 32 read with Section 355 of the Penal Code.

Charge 3. being members of such unlawful assembly, kidnapped or abducted the deceased with the common object of committing murder, an offence

punishable in terms of Section 146 read with Section 355 of the Penal Code.

Charge 4. with common intention caused the death of the deceased, an offence punishable in terms of Section 32 read with Section 296 of the Penal Code.

Charge 5. being members of such unlawful assembly with common object of casing the death of the deceased, an offence punishable under Section 146 read with Section 296 of the Penal Code.

At the conclusion of the trial, the 1st to 5th Appellants were convicted on all charges and were sentenced to death on counts 4 and 5 and prison sentences were imposed on the rest of the counts. The 4th accused was acquitted from all charges.

I will now briefly set out the facts of the case:

Rathnayake Mudiyanseilage Seelawathi (PW1), the wife of the deceased in her evidence stated that around 2.00 AM on the date material to this incident, two persons armed with knives identifying themselves as officers of the Madagama police had entered their house and called out for the deceased in a threatening manner and thereafter, had tied the hands of the deceased with a towel and taken him out of the house. The persons who entered the house had also taken with them a gun which belonged to the deceased. PW1 re-calls several persons outside their house and has identified the 1st and 5th Appellants among them. PW1 has also stated that the deceased and the 1st Appellant had a dispute regarding a tree which both had

claimed ownership. PW1 knew the 1st and 5th Appellants, prior to this incident and states that the 1st Appellant was armed with a katty knife. She identified the Appellants from the light of a bottle lamp. She has identified the 2nd and 3rd Appellants at an identification parade held in the Magistrate's Court and at a subsequent dock identification in the trial Court, as the two persons who entered their house that night.

Mutukeliyagala Watte Senevirathne (PW3), in his evidence stated that around 2.30 AM, on the date of the incident, he was woken up by the sound of a large stone which was pelted on to his front door and when he rushed to hold on to the door, he had seen a person flashing a torch light and saw two persons accompanying the deceased, holding on to him on either side. He had pleaded with them to release the deceased. PW3 had identified the 1st Appellant by voice when he had stated that they wanted to do the same thing to him. The deceased with his hands tied had been dragged down the road accompanied by 5 other persons. He had identified the deceased, and the 4th and 5th Appellants with the aid of a torch light.

Retired Police Officer R. M. Wijesuriya (PW9), in his evidence stated that a complaint was made by PW1 to the Madagama Police at 3.30 AM, on the following morning regarding this incident and the body of the deceased had been recovered 100 meters away from the house of the deceased with cut injuries on the body.

The grounds of appeal raised by the respective counsels are as follows;

1. has the prosecution proved the identity of the Appellants

2. has the Learned High Court Judge given proper consideration to the contradictions and omissions highlighted by the defence

The Appellants have been identified by PW1 and PW3. Nowhere has it been suggested by the defence that the witnesses did not identify the Appellants. In her evidence PW1 testifies to two persons entering her house. At a subsequent identification parade, she identified the two persons who entered the house as the 2nd and 3rd Appellants. The defence contends that, prior to the said identification parade the police had shown the Appellants to the witness, a suggestion PW1 has denied. However, the defence did not put to the witness of any opportunity where the Appellants could have seen the witness.

PW1 and PW3 identified the 1st and 5th Appellants. According to the evidence of PW1, the 2nd and 3rd Appellants had been in very close proximity to the witness, where she had observed the clothes that were worn by the Appellants in detail. She has identified both Appellants armed with knives and also identified the colour of the towel used by the 2nd Appellant to tie the hands of the deceased before leading him out of the house. PW1 states that, out of the persons outside her house, she identified the 1st and 5th Appellants, who were known to her and had visited their house prior to this incident. It is observed that even though in difficult circumstances, this witness has been a keen observer of events which took place, the night in question. In her evidence she also claimed that the bottle lamp light, sufficiently assisted her to identify the Appellants. The defence at no time questioned PW1 regarding the light conditions which prevailed at the time of

identification nor suggested that the prevalent light conditions were not adequate to identify the Appellants.

The 1st, 4th and 5th Appellants were identified by PW3. The counsel appearing for the said Appellant submits that the said identification made in difficult circumstances should exclude all possibility of mistaken identity as visual recognition is vulnerable to mistakes.

According to the evidence of PW3, a torch light flashed from a distance of two feet by a person among the Appellants made it possible for him to identify the 4th Appellant. PW3 claims that he sees the 1st Appellant day in and day out and is well known to him. He also claims that the 4th Appellant and the 5th Appellant are from the same village and are well known to him. PW3 had the opportunity of observing the said Appellants for about 10 minutes. He further stated that he identified the 5th Appellant from the posterior and also identified him when he turned his face. He also testifies to the fact that although the 1st Appellant had been identified by voice, he had known the said Appellant for 15 to 20 years. Evaluating the evidence given by PW1 and PW3, the learned trial judge has given due consideration to the fact that the Appellants have failed to suggest a mistaken identity of the Appellants due to prevailing light conditions.

When correctness of an identification of an accused is in issue, it is of paramount importance that a trial judge takes utmost care in arriving at a conclusive finding that the perpetrator of the offence is no other than the accused and thereby

exclude all possibility of mistaken identity. The tendency to make mistakes especially in evidence of identity should be cautiously approached. The rules and procedure to be applied in this endeavor is set out in numerous judgments and academic texts.

It is observed that the 1st and 5th Appellants have been identified by both eye witnesses, PW1 and PW3. At the time of abduction of the deceased, PW3 has identified the 2nd, 3rd and 4th Appellants.

Section 134 of the Evidence Ordinance states that no particular number of witnesses are required for the proof of any fact.

It is noted that, eye witnesses to this incident have been consistent in their identification of the respective Appellants and have maintained the same position throughout the examination-in-chief as well as in cross-examination. In regard to the identification of the 1st and 5th Appellants, the counsel has posed the question to PW1 (at page 149) as to whether the 1st or 5th Appellants cause any harm to her or to the deceased in word or by any other means at the time they entered the house. The witness replied in the negative. This suggestion posed to PW1 alone, is indicative of the presence of the said Appellants at the material time. The counsel for the Appellants contended that the delay in holding the identification parade puts into question the credibility of evidence of PW1 regarding the identity of the 2nd and 3rd Appellants. However, the basis on which credibility is challenged has not been put to the witness.

The counsel for the 2nd, 3rd and 4th Appellants in the written submissions has drawn attention to an article written by *Justice J.F.A. Soza to the “Judges Journal” of December 1991, at page 49*, where it is noted that the reliability of the identification will depend on;

- The length of time during which the witness saw the offender
- How much of the face was seen and for how long
- The type and brightness of the light available
- The characteristics of the scene
- The nature of the incident itself, and the interest of the observer
- Birthmarks, scars, hairstyles, beards, peculiarities of gait and numerous other factors
- Fallibility

The deceased was the husband and the nephew of PW1 and PW3 respectively. The 1st and 5th Appellants were known to PW1 prior to this incident and re-calls that the 5th Appellant had visited their house prior to this incident. At the time of the incident the 2nd and 3rd Appellants had been in close proximity to this witness and later was identified at an identification parade. This witness has also identified the 1st Appellant as the person who entered the house and removed the gun, which belonged to the deceased. The Appellants were present in this location for 4 to 5 minutes. It is also noted that the defence never suggested to any of the eye witnesses that they were giving false evidence that they identified the Appellants.

Therefore, when evidence against the Appellants are considered in totality, we are of the view that evidence of PW1 and PW3 identifying the Appellants as offenders are credible and accordingly, safe to act upon. Therefore, we reject the ground of mistaken identity contended by the counsel for the Appellants.

The counsel for the 5th Appellant has drawn attention of Court to pages 114 and 115 of the case record, where he contends that the learned trial judge has failed to consider vital contradictions and omissions in evidence.

The contradiction marked in evidence as against the previous statement made by PW1 is whether the 1st Appellant had an altercation regarding the forest tree every day of the week or whether, it was confined to a day.

In *Aadam Kasam Shaikh Vs. State of Maharashtra, 2006 Cr LJ 4585 (4589)*, the Court held that;

“the evidence of a witness cannot be discarded merely because he has made improvements over his police statements by stating some of the facts for the first time in his deposition before the court, if the facts stated for the first time before the court are in the nature of elaboration, do not amount to contradiction, and the evidence of witness does not militate against his earlier version”.

We observe that, from page 60 to 65 of the judgment, the learned trial judge has taken into consideration and has arrived at a conclusive finding that the

contradictions and the omissions highlighted does not create any doubt in the witness evidence.

In *Mohamed Niyas Naufer and others v. Attorney General (Sc. 01/2006 decided on 08/12/2006)*, the Court observed that;

"when faced with contradictions in a witness's testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness."

When evaluating the weight of the evidence, the learned trial judge has considered the trustworthiness of the testimony and the demeanor and deportment of witnesses, and has rightly concluded that the contradictions and omissions do not go to the root of this case. Therefore, the 2nd ground of appeal is also rejected.

Accordingly, we affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree.

JUDGE OF THE COURT OF APPEAL