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

In the matter of an appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka, against a judgment of the Court of Appeal.

SC APPEAL NO. 64/2021

SC(SPL) LA NO. 216/2019

CA Case No. CA 213/2014

HC Chillaw Case No. HC 25/2001

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

COMPLAINANT

-Vs-

Geekiyanage Kamalananda Sanath Prasanna Pathma Kumara Fernando
No.71/A1, Carvial Waththa,
Kadawala,
Dunugaha.

1ST ACCUSED

Warnakulasuriya Neriya Adapparage Padmasiri

2ND ACCUSED

AND THEN BETWEEN

Geekiyanage Kamalananda Sanath Prasanna Pathma Kumara Fernando
No. 71/A1, Carvial Waththa,
Kadawala,
Dunugaha.

1ST ACCUSED-APPELLANT

-Vs-

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

COMPLAINANT-RESPONDENT

AND NOW BETWEEN

Geekiyanage Kamalananda Sanath Prasanna Pathma Kumara Fernando
No.71/A1, Carvial Waththa,
Kadawala,
Dunugaha.
(Presently at Welikada Prison)

1ST ACCUSED-APPELLANT-APPELLANT

-Vs-

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

COMPLAINANT-RESPONDENT-RESPONDENT

BEFORE : **P. PADMAN SURASENA, J**
ACHALA WENGAPPULI, J
ARJUNA OBEYESEKERE, J

COUNSEL : Darshana Kuruppu with Tharushi Gamage for the Accused-Appellant-Appellant.
Madawa Thennakoon DSG for the Complainant-Respondent-Respondent.

ARGUED & DECIDED ON: 12-03-2024.

P. PADMAN SURASENA J.

Court heard the submissions of the learned Counsel for the Accused-Appellant-Appellant and also the submissions of the learned Deputy Solicitor General for the Complainant-Respondent-Respondent and concluded the argument.

Accused-Appellant-Appellant who was named as the 1st Accused in this case (hereinafter referred to as the 1st Accused) stood indicted along with another (2nd Accused of the case) under 3 counts.

Count No. 01 has alleged that the Accused, on or about 22nd June 1994, in Mahawewa, had committed the murder of *Roland George De Alwis Kulasekara*, an offence punishable under Section 296 of the Penal Code.

Count No. 02 has alleged that the Accused, at the same time and at the same place, during the course of the same transaction, had committed the murder of a person unknown to the prosecution, an offence punishable under Section 296 of the Penal Code.

Count No. 03 has alleged that the Accused, at the same time and at the same place, during the course of the same transaction, had committed the murder of a person unknown to the prosecution, an offence punishable under Section 296 of the Penal Code.

After the indictment was read over to them, both the Accused had pleaded not guilty to the charges and the learned High Court Judge had commenced and concluded the trial.

After the conclusion of the trial the learned High Court Judge by his judgment dated 22-09-2014, had convicted the 1st Accused for all three counts. The learned High Court Judge had proceeded to acquit and discharge the 2nd Accused from all the counts in the indictment.

Being aggrieved by the judgment dated 22-09-2014 of the High Court, the 1st Accused had appealed to the Court of Appeal. The Court of Appeal by its judgment dated 13-05-2019, having rejected all the grounds of appeal, had proceeded to affirm the conviction and the sentence of the 1st Accused and dismissed his appeal.

Being aggrieved by the judgment of the Court of Appeal, the 1st Accused had appealed to this Court. Upon the Special Leave to Appeal Petition relevant to this appeal was supported, this Court by its order dated 20-07-2021, had granted Special Leave to Appeal in respect of the questions of law set out in paragraphs 12(B), 12(C), 12(D), 12(E), 12(F) and 12(H) of the Petition dated 20-06-2019. The said questions of law are as follows:[1]

1) *Have their Lordships of the Court of Appeal erred in law and fact in failing to consider that the evidence of PW 02 - Nishantha Fernando is wholly contradicted by the evidence of other witnesses and therefore the conviction of the Petitioner*

[1] Re-numbered by me.

which hangs entirely on the uncorroborated testimony of PW 02 is wholly unsafe?

2) *Have their Lordships of the Court of Appeal erred by accepting the evidence of PW 02 -Nishantha Fernando without considering the infirmities and the uncorroborated nature of his testimony and thereby has deprived the Petitioner the substance of a fair trial guaranteed under Article 13 of the Constitution?*
3) *Have their Lordships of the Court of Appeal erred in law and in fact by failing to consider that the version of the sole eye witness is not credible and creates a serious doubt in the prosecution case?*
4) *Have their Lordships of the Court of Appeal erred in law and in fact in failing to consider that it is clear and apparent from the evidence of prosecution witnesses PW 05 - Kotage Violet Mallika Fernando, PW 04 - Wijerathne Walulage Sisira Nihal, PW 13 - Ganegoda Arachchige Sujith Dhammika and PW 14 - Wedamuhandiramlage Chaminda Lanka Thilaka that the 2nd Accused is the real perpetrator of the crime?*
5) *Have their Lordships of the Court of Appeal erred in law by failing to consider that it is highly unsafe to convict the Petitioner only on the dock identification of the Petitioner at the non-summary inquiry by PW 02 - Nishantha Fernando in the absence of an identification parade being held?*
6) *Has the Court of Appeal erred in law by failing to evaluate the evidence in the case in its totality and on an impartial basis and to appreciate that there was clearly, at the very least a reasonable doubt as to the guilt of the Petitioner?*

In order to consider and answer the afore-mentioned questions of law, let me now turn to the evidence adduced in this case at the trial.

The case against the 1st Accused totally depends on the evidence of the sole eye witness Kana Nishantha Kumara Fernando (hereinafter referred to as *Nishantha Kumara*). The said sole eye witness *Nishantha Kumara* was around nine years of age at the time of this incident. According to his evidence, when he was staying close to *Mahawewa* fair, he had seen the 1st Accused armed with a club assaulting the three persons who appeared to him to be beggars who had used to stay in the verandas of the shops/buildings situated in the street. Indeed, it was not disputed in the trial that at least two out of the three persons who had succumbed to their injuries were beggars. The eye witness *Nishantha Kumara* had identified the other person whose identity/name has been mentioned in the charge *(Roland George De Alwis*

Kulasekara), as *"Insurance Seeya"*. Therefore, it is rather doubtful whether that person is a beggar in true sense of that word.

In the course of the hearing before us, the learned Counsel for the 1st Accused advanced two primary arguments. The first argument is that, the investigators had not taken any step to hold an identification parade to enable the sole eye witness *Nishantha Kumara* to identify the 1st Accused. The 2nd argument advanced by the learned Counsel for the 1st Accused is that it is unsafe to allow the conviction of the 1st Accused to stand as it is a conviction based only on the dock identity made by the sole eye witness *Nishantha Kumara*.

As it is opportune to do so, let us first deal with the 2nd argument advanced by the learned Counsel for the 1st Accused. It is true that this case is primarily based on a dock identity of the 1st Accused made by the sole eye witness *Nishantha Kumara*. However, let me at the outset underscore the fact that the sole eye witness Nishantha Kumara was a small boy at the time of this incident. This fact assumes great importance as it has a direct impact on the credibility of the witness. According to the evidence, he had witnessed the assault launched by the 1st Accused on the deceased persons at somewhat close range. This incident had happened around 2 PM in the afternoon of the relevant day. Therefore, there has been no obstruction for the eye witness to clearly observe this incident happening.

The evidence of the said eye witness reveals that he had seen the 1st Accused twisting the hand of one of the victims. This was after the 1st Accused had assaulted that victim with a club. However, he was unable to pinpoint as to which of the victim's hand was subjected to twisting by the 1st Accused. Having perused the Post Mortem Report, we observe that there have been fractures on the hands of some of the victims. In addition to the above, the Chief Investigating Officer who conducted the investigation into this crime (prosecution witness No. 18 - IP *Dorawakage Premaratne*) in his evidence had stated that he had observed that the hand of one of the victims was twisted to its rear side. Thus, consideration of the above evidence together in its entirety would compel us to conclude that the evidence of the sole eye witness stands corroborated by the medical evidence and the evidence of the Chief Investigating Officer adduced in the trial.

It is the evidence of the sole eye witness that he ran away from the scene after the assault, as the assailant came to attack him also. However, the eye witness *Nishantha Kumara* states that subsequently when the Police Jeep arrived at the scene in the same evening, he was

present there again. It was at that time that the witness *Nishantha Kumara* had seen the 1st Accused inside that Police Jeep. This is the second occasion at which the said sole eye witness *Nishantha Kumara* had seen and identified the 1st Accused. Unlike in the first occasion, we note that there had been ample opportunity for the sole eye witness to clearly see, identify and be familiar with the facial identity of the 1st Accused at the second occasion.

Although the learned Counsel for the 1st Accused sought to argue that the eye witness had thereafter only made a dock identity in the High Court, a number of years after the incident, we observe that the said sole eye witness had identified the 1st Accused at the non-summary inquiry held just five months after the incident. That is the third occasion at which the sole eye witness had the opportunity of identifying the 1st Accused within a period of five months since the date of the incident. We also observe that during the non-summary inquiry, there had been two Accused present in the dock in the Magistrate's Court. We therefore observe that it was under those circumstances that the sole eye witness had managed to clearly distinguish, identify and pick on the 1st Accused (out of the two Accused present in the dock) as the person who had assaulted the victims on the date of the incident.

Moreover, the evidence of the Chief Investigating Officer has confirmed that the sole eye witness accidently identified the 1st Accused when they brought him in the Jeep to the scene of crime in the evening of the date of the incident for the purpose of further investigation. We also observe that the Chief Investigating Officer had entered this fact in his observation notes in the Information Book maintained at the Police Station.

According to the sole eye witness, the 1st Accused had worn a denim trouser at the time of the assault. According to the evidence of the Chief Investigating Officer, a denim Trouser and a club have been recovered subsequent to the statement made by the 1st Accused to Police. The relevant extract of the statement of the 1st Accused has been produced in the trial by the Prosecution under Section 27 of the Evidence Ordinance. The Prosecution has also produced the items recovered subsequent to the relevant statement of the 1st Accused in the trial as productions. The sole eye witness in the course of his evidence before the High Court has identified these items.

We observe that the Government Analyst had identified the presence of human blood on this denim Trouser which was produced marked **P 1** and also the presence of human blood on the club which was produced marked **P 2** in the trial.

We also observe that in the course of the trial, the defence had admitted the relevant Government Analyst Report.[2] Therefore in terms of section 420 of the Code of Criminal Procedure Act No. 15 of 1979 (as amended), it shall not be necessary for the prosecution to lead proof of such facts which are so admitted by the opposite party.

After the prosecution had closed its case, the 1st Accused had made a dock statement. We observe that in the dock statement, the 1st Accused had admitted his presence in the vicinity of the relevant location at which this incident had occurred. We are also mindful that his presence in the vicinity on its own cannot be taken as a conclusion as to his participation in the crime. Thus, this fact has to be viewed in the light of the other evidence adduced against the 1st Accused in the trial.

We also note that the Chief Investigating Officer in the course of his evidence has explained the reason as to why he did not proceed to take steps for holding of an identification parade to enable the sole eye witness to identify the 1st Accused. According to the evidence of the said Chief Investigating Officer, when he was taking the 1st Accused in the Jeep to carry out further investigations into this crime, the sole eye witness who happened to be there had suddenly pointed out the 1st Accused as the person who had assaulted the victims. It was thereafter that the Chief Investigating Officer had decided that any subsequent holding of an identification parade under those circumstances would not have served any useful purpose. In the light of the facts and circumstances of this case, we are unable to either reject this explanation or reject the dock identification of the 1st Accused made by the sole eye witness in Court as untrustworthy.

Furthermore, as has already been adverted to above, the Chief Investigating Officer had found the denim trouser and the club subsequent to the statement of the 1st Accused, upon which he had observed blood stains. Therefore, the Chief Investigating Officer had taken steps to have the recovered productions sent to the Government Analyst for report. The Government Analyst in his analysis had identified the presence of human blood on this denim Trouser (**P 1**) and also the presence of human blood on the club (**P 2**).

[2] At page 279 of the Appeal Brief.

The fact that the Chief Investigating Officer had not failed to send the recovered productions to the Government Analyst for examination and report is in our view, a factor which would militate against the argument advanced by the learned Counsel for the 1st Accused that the Chief Investigating Officer had deliberately failed and ignored his duty to ensure holding an identification parade. We note that the Chief Investigating Officer has provided in his evidence an acceptable explanation for not holding an identification parade in the circumstances of this case. We also note that despite the observation of the presence of blood on the recovered productions, the Chief Investigating Officer had taken the right decision to forward them to the Government Analyst who had subsequently confirmed the presence of blood on both of those items. Thus, this would also serve to enhance the credibility of the evidence of the Chief Investigating Officer, which can be safely used to corroborate the evidence against the 1st Accused adduced by the prosecution through the sole eye witness. Similarly, as has been mentioned before, we note that the medical evidence too has corroborated the testimonies of both the Chief Investigating Officer and the sole eye witness.

Moreover, according to the Chief Investigating Officer's observations he also had observed blunt trauma injuries on the body of the deceased and not injuries caused by a sharp weapon. We observe that this observation too is in line with the eye witness' version and the medical evidence adduced in the case by the prosecution. In view of the above situation, we are unable to uphold the argument advanced by the learned Counsel for the 1st Accused, that the failure of the investigators to hold an identification parade in this instance has vitiated the whole investigation process and therefore has vitiated the conclusions reached by both the learned High Court Judge and the learned Justices of the Court of Appeal, that the 1st accused should be convicted on all the counts in the indictment.

For the foregoing reasons, we decide to answer the afore-mentioned questions of law (1), (2), (3), (4) and (6) in the negative.

The afore-mentioned question of law No. (5) is whether the Court of Appeal had erred in law and in fact in failing to consider the evidence of the prosecution witnesses; PW 05 - Kotage Violet Mallika Fernando, PW 04 - Wijerathne Walulage Sisira Nihal, PW 13 - Ganegoda Arachchige Sujith Dhammika and PW 14 - Wedamuhandiramlage Chaminda Lanka Thilaka, which suggest that it is the 2nd Accused who is the real perpetrator of the crime. We have considered the evidence of those witnesses. Firstly, none of those witnesses had excluded the presence of the 1st Accused in the episodes described by them. Secondly, those episodes are

either incidents before or after the attack on the three victims. Thus, we are unable to accept the argument that prosecution witnesses PW 05 - Kotage Violet Mallika Fernando, PW 04 - Wijerathne Walulage Sisira Nihal, PW 13 - Ganegoda Arachchige Sujith Dhammika and PW 14 - Wedamuhandiramlage Chaminda Lanka Thilaka had suggested that it is the 2nd Accused who is the real perpetrator of the crime. Therefore, we decide to answer the afore-mentioned question of law No. (5) also in the negative.

In view of the foregoing reasoning, we have no basis to disagree with the conclusion arrived at by both the learned High Court Judge and the learned Justices of the Court of Appeal that the 1st accused should be convicted on all the counts in the indictment.

In these circumstances, we decide to dismiss this appeal. We proceed to affirm the judgment dated 22-09-2014 pronounced by the High Court and the judgment dated 13-05-2019 pronounced by the Court of Appeal.

JUDGE OF THE SUPREME COURT

ACHALA WENGAPPULI J.

I agree.

JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE J.

I agree.

JUDGE OF THE SUPREME COURT

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