IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal made in terms of Article 331(1) of the Code of Criminal Procedure Act. No.15 of 1979 read with Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka,

C.A. HCC No. 29-30/2015

H.C. Matara No.176/2007.

01. Dayarathne Wijesundera
02. Wellappilige Saman alias Konda Saman
03. Subasinghage Premasiri

Accused-Appellants

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12

Complainant-Respondent

****

BEFORE : **HON. JUSTICE ACHALA WENGAPPULI**

HON. JUSTICE DR. RUWAN FERNANDO

COUNSEL : Nihal Gunasighe for the 1st Accused-Appellant.

N.A. Chandana Sri Nissanka for the 2nd Accused-Appellant.

Amila Palliyage with Nihara Randeniya , Sandeepani Wijesuriya and Duminda de Alwis for the 3rd Accused-Appellant.

Chethiya Goonesekera D.S.G. for the Respondent

ARGUED ON : 12th December 2019, 13th December 2019 & 16th December 2019.

DECIDED ON : 13th February, 2020

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HON. JUSTICE ACHALA WENGAPPULI

The 1st, 2nd and 3rd accused -appellants were indicted before the High Court of *Matara* for committing the murder of *Wickramarachchi Kankanamge Jinadasa* on 8th April 2005, and, in the course of the same

transaction, causing grievous hurt to *Walpita Gamage Sriyalatha* and *Wickramarachchi Kankanamge Krishna Geethanjalie,* in addition to committing robbery on each of these injured women.

Upon election by the appellants, they were tried by the High Court without a jury. The prosecution relied heavily on the eye witness testimony of said *Walpita Gamage Sriyalatha,* the wife of the deceased and *Wickramarachchi Kankanamge Krishna Geethanjalie,* one of their two daughters, in proof of the accusations that are levelled against these appellants. At the close of the prosecution case, the trial Court ruled that the three accused-appellants had a case to answer. The 1st and 2nd accused-appellants have given evidence under oath while the 3rd accused-appellant made a statement from the dock. They also called several witnesses in support of their claims of *alibi.*

In delivering its judgment, the trial Court found all three accused-appellants guilty as charged and upon being convicted they were imposed with the death penalty in addition to the imposition of terms of imprisonment of eight years in respect of each of the counts of grievous hurt and robbery. They were also fined a sum of Rs. 2000.00 on each of the grievous hurt and robbery counts, and in default, a six-month term of imprisonment.

All three accused-appellants have filed petitions of appeal challenging the said conviction and sentence imposed on them. At the hearing of their appeal, learned Counsel who represented the appellants, sought to challenge the conviction on the common ground of appeal that the trial Court had erroneously concluded that the prosecution had proved

the question of identity of the accused- appellants to the required degree of proof. The appellants have claimed before the trial Court that they were falsely accused of these offences. Learned Counsel for the 1st accused-appellant had explained this ground of appeal by making an additional basis that it was a case of a "mistaken identity". The 1st and 3rd accused-appellants also have raised another ground of appeal in support of their appeals on the basis that the trial Court had erroneously rejected the evidence of *Sriyalatha*, a vital witness for the prosecution, in convicting them on several counts, which included an allegation of commission of a capital offence. It is their contention that the trial Court did so in view of the irreconcilable inconsistencies that exists between the evidence of the mother and her daughter in their evidence thereby causing grave prejudice to them.

The prosecution version of the sequence of events that led to the death of the deceased is that in the evening of the day of the incident, the deceased, *Sriyalatha* and *Geethanjalie* were watching television in the hall of their house. At about 7.30 p.m., having heard a noise coming from outside, the deceased went out to investigate. *Geethanjalie* followed her father up to the front veranda and the deceased had proceeded to the place where the dog was tied. After a few minutes, the deceased was brought home held by three persons. One of them had a cap on him while the other two had face masks made of some stretchable material to conceal their faces. One of them had a gun with him and another had a knife. As they entered the hall, the electric light was switched off but their black and white television set was left on. The small red colour bulb burning in front of the Buddha statue also provided some light. Having entered the hall and

switched off the lights, the intruders have then separated the deceased and the two women, made them to sit and tied them with strips of fabric torn off a curtain. Thereafter, two of the intruders have ransacked their almirahs and removed any valuable items they could lay their hands on. They also took personal jewellery items worn by the two witnesses. The deceased pleaded with the intruders to take what they want and leave them without causing any bodily harm.

However, at some point of time, the deceased had struggled with the intruders and in the process the face masks worn by two of the intruders came off. The witnesses claim they noted the physical features of the intruders from the light of the television set and the bulb burning before the Buddha statue. The two women joined the deceased in his struggle and *Geethanjalie* was struck on her eye. *Sriyalatha* too had sustained cut injuries. During this melee, one of the intruders had stabbed the deceased repeatedly. Then they made their getaway with the items they had robbed. The witnesses have thereafter raised cries and, as a result, one of the sons of the deceased had rushed home and taken the injured to hospital.

The deceased had died almost immediately due to multiple stab injuries he had received and *Geethanjalie* had lost vision in one of her eyes due to the cut injury she had sustained. *Sriyalatha* too had suffered a cut injury on the frontal bone of her forehead.

Learned Counsel for the three appellants, in their collective submissions on the common ground of appeal raised on the question of identity, contended that one of the sons of the deceased was involved with

a fight a few days prior to this particular incident in which the deceased had died. It is their contention that due to that previous animosity, the prosecution witnesses had falsely implicated them of this crime in order to supplement their inability to make an identification of the true assailants that evening. The appellants sought to substantiate their contention by placing reliance on the item of evidence that the son of the deceased, listed as the prosecution witness No. 1, but not called by the prosecution, was the first person to make a statement to Police that very night when the Police visited the crime scene. He had implicated only the 1st accused-appellant at that point of time and acting on this information, the 1st accused-appellant was arrested by the Police on the following day itself at his residence.

The two witnesses who claimed to have identified the three appellants at an identification parade, made their statements rather belatedly. In fact, it was stressed by the appellants that *Sriyalatha,* in narrating the incident to the examining medical officer in her short history had stated that she identified only one person and the other two were unknown individuals. *Geethanjalie* made her statement to Police only after the arrest of three accused-appellants and after the identification parade.

It was also highlighted that; owing to the limited availability of light and the circumstances under which the witnesses are alleged to have identified their attackers had made their claim of identity of the attackers a highly improbable one to accept. It is also highlighted by the appellants that *Sriyalatha* had admitted that she knew at least two of the appellants, who are also from the same village, prior to the attack on her husband but did not mention that fact when she made statements to Police or to the

medical officer who had examined her. She had consistently maintained that they were previously unknown individuals and saw them for the first time only on the day of the incident, in her examination in chief before the High Court.

In support of the 2nd ground of appeal, as relied upon by the 1st and 3rd accused-appellants, learned Counsel contended that owing to the irreconcilable inconsistencies and other deficiencies of the testimony of witness *Sriyalatha,* the trial Court had concluded that her evidence should be rejected. Having rejected *Sriyalatha's* evidence, the trial Court had proceeded to convict the appellants only on the evidence of *Githanjalie.* Learned Counsel contended that the adoption of this unorthodox approach by the trial Court was to get over the difficulty it had encountered with, in reconciling the two conflicting versions of events as spoken to by the two witnesses.

Learned Counsel for the appellants contended that any doubt as to the trustworthiness or reliability of a prosecution witness should have been resolved in favour of the appellants, but the failure to resolve any such doubt in favour of the prosecution by rejecting *Sriyalatha's* evidence by the trial Court, because it contradicted the evidence of the other witness *Githanjalie,* had resulted in causing grave prejudice to the appellants. It was also contended that the learned trial Judge who delivered the impugned judgment, neither had the opportunity of observing the demeanour and deportment of any of the prosecution witnesses nor the 1st and 2nd accused-appellants or their witnesses and that fact clearly exacerbates the error committed by the trial Court in rejecting *Sriyalatha's* evidence.

Learned Deputy Solicitor General, who appeared for the Respondent, supported the decision of the trial Court to reject the evidence of *Sriyalatha* on the basis of unreliability and contended that the appellants have not challenged the identification parade and therefore the identity of the three appellants were established beyond reasonable doubt. However, no authority was relied upon by the learned Deputy Solicitor General in support of his submissions that it was open for the trial Court to select the evidence of one witness from the evidence of the prosecution and reject it in the way as highlighted by the appellants in the appeal before this Court.

These several grounds of appeal, as raised by the learned Counsel for the accused-appellants, are concerned with two important issues in relation to evaluation of evidence. Firstly, they raised concerns over the issue of the assessment of the testimonial creditworthiness of witnesses *Sriyalatha* and *Geetanjanlie*, as undertaken by the trial Court on the question of identity of the assailants. This aspect has two inbuilt components to it. According to the 3rd accused- appellant, these witnesses have implicated them to this murder due to their involvement in the scuffle they had with *Geeth Nadishan* (PW1) a few days earlier. Then in addition, the 1st accused-appellant claimed in his submissions before this Court it was a case of mistaken identity.

Secondly, the accused-appellants claim that the trial Court had selected evidence from the case for the prosecution in order to convict them when it left out *Sriyalatha's* evidence from its consideration on the basis of her evidence is "unsafe" to act upon.

Of these issues that had been raised at the hearing, it is proposed to deal with the rejection of *Sriyalatha's* evidence by the trial Court at this stage of the judgment, leaving the consideration of the other ground to be considered at a later stage.

The segment of the judgment of the trial Court which gave rise to this particular ground of appeal is reproduced below.

> " සිරියලතාගේ සාක්ෂිය හා එහි දුර්වලතා මා විසින් මෙයට පෙර දක්වා ඇත. ඇය විසින් සාක්ෂි දී ඇති ආකාරයට ඇය කරුණු වසන් කිරීමට හෝ අසත්‍යයක් දැක්වීමට ගන්නා උත්සාහයක් ඇයගේ සාක්ෂියේ පරස්පරතාවයන්ට හේතු වී නැති බව මා විසින් තීරණය කර ඇත. ඇයගේ සාක්ෂියේ යම් කරුණු පිලිබඳ ස්ථාවරයන් නොවෙනස්ව පවතින අතර ඒවා දුව වන ගීතාංජලීගේ සාක්ෂියෙන්ද තහවුරුව ඇත. කෙසේ වෙතත් ඇයගේ සාක්ෂියේ කිසිදු කොටසක් මත රඳා කටයුතු කිරීම අනාරක්ෂිත බව තීරණය කරමි. ඒ අනුව එම සාක්ෂිය සම්පූර්ණයෙන්ම බැහැර කරමි."

When the reasons that are attributed by the trial Court for leaving out *Sriyalatha's* evidence as it is "unsafe" to act upon is considered, it is noted that the Court had treated the witness as a truthful and reliable witness and not a witness who had uttered deliberate falsehood. The trial Court had noted consistency in her evidence over certain aspects, while her evidence is supported or corroborated by *Geethanjalie's* evidence. However, the trial Court had left out her evidence in its final analysis as it found it is "unsafe" to act upon that evidence.

The legality of the approach taken by the trial Court in leaving out her evidence should be examined in the light of the relevant judicial precedents.

The superior Courts have consistently laid emphasis on the duty to consider the evidence as a whole, irrespective of whether the trial was held before a jury or Judge. In ***The King v* Appuhamy** 37 NLR 281, it is stated that "*One has to look at the whole case*". A similar approach was adopted by the Court of Criminal Appeal in ***King v Buckley*** 43 NLR 474, which imposed a duty on the jurors that they should view the evidence as a whole. The judgments of ***King v de Silva*** 41 NLR 337, ***King v Perera*** 41 NLR 389, ***The Queen v Abadda*** 66 NLR 397 had adopted a similar view.

In ***James Silva v Republic of Sri Lanka*** (1980) 2 Sri L.R. 167, it was clearly stated that;

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalising and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

The Supreme Court, in determining the instances where the proviso to Section 334(1) of the Code of Criminal Procedure Act No. 15 of 1979 should be applied, thought it fit to adopt the reasoning of ***Stirland v DPP*** 30 Cri App Rep 237, where *Viscount Simon* LC stated;

> *"A perverse jury might conceivably announce a verdict of acquittal* ***in the teeth of all the evidence****, but the provision that the Court of Criminal Appeal may dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred in convicting the accused assumes a situation where a reasonable jury, after being properly directed, would, on the evidence properly admissible, without doubt convict."*(emphasis added).

This being the legal position that had been clearly stated by the superior Courts, this Court now endeavours to consider the legality of the approach of the trial Court.

The trial Court, quite strangely did not reject *Sriyalatha's* evidence on credibility. Instead it had found the witness is a truthful witness. The prosecution relied on her evidence as well as the evidence of her daughter to prove its case. There was no application by the prosecution under Section 154 of the Evidence Ordinance to treat her as an witness adverse to its case and to cross examine her in order to assail her credibility. The prosecution had in fact relied heavily on her evidence. Therefore, her evidence is clearly an integral part of the prosecution case.

When the trial Court had found her to be a truthful witness, that simply means her evidence is credible. A witness is credible if his evidence is found to be truthful as well as reliable. If the trial Court had found her evidence is credible, then it must consider it to determine whether by that evidence relevant facts in issue have been established.

A trial Court is at liberty to reject evidence of a witness on the basis of his testimonial trustworthiness. But it cannot reject evidence of a witness which it had found to be truthful, but "unsafe" to act. If the evidence of the prosecution is "unsafe" to act, then that benefit should accrue in favour of the accused. A trial Court cannot pick and choose from the prosecution case to reach a verdict of guilt.

The Court of Criminal Appeal had frowned upon this approach of selecting parts of the prosecution evidence in order to arrive at a finding of guilt. In ***King v Buckley*** (supra), it was stated that;

> *"We are of opinion that in arriving at a verdict of guilty the majority of the Jury must have viewed the evidence in sections and accepted and convicted the appellant on those parts that were satisfactory and disregarded those facts that pointed to the improbability of the story put forward by the Crown. The Jury should have viewed the evidence as a whole. If they had done so, we are of opinion that they must have had a reasonable doubt as to the guilt of the appellant."*

In view of the above reasoning, this Court is of the view that the ground of appeal as raised by the 3rd accused-appellant should succeed.

Having determined merits and demerits of the said ground of appeal, this Court should now venture to consider the other ground of appeal which had raised concerns as to the credibility of the witness and the question of mistaken identity.

The considerations that had to be applied, in relation to instances where the identity of accused is disputed and the defence of mistaken identity, as enunciated in the judgment of ***R v Turnbull & Another*** [1977] 1 QB 224, was introduced to Sri Lanka through several judicial pronouncements. These considerations had received further clarifications by subsequent judgments that were pronounced both locally as well as in England.

It is held in ***Sigera v Attorney General*** (2011) 1 Sri L.R. 201, *"To apply Turnbull principles the identification had to be made under difficult circumstances."* The judgment of ***Keerthi Bandara v Attorney General*** (2000) 2 Sri L.R. 245 also highlighted this restriction in the applicability of "Turnbull principles". The superior Courts also have recognised that if the identity of the accused is disputed, then the trial Courts must first consider whether the evidence of the witness on identity is credible. If that evidence is credible then it should thereafter proceed to consider whether there is a mistake made by the witness in identifying the accused. A clear distinction was made where the witness had recognised an accused already known to him (recognition) and the instances where he had seen the accused for the first time at the time of the offence.

The judgment of Turnbull itself issued a caution that even in a case of recognition, it is advisable to consider the issue whether there had been a mistake in identifying the accused, although the witness's evidence is truthful. Lord *Widgery* stated *"Recognition may be more reliable than identification of a stranger, but even when the witness is purporting to recognise*

someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made."

In, ***Beckford v R*** (1993) 97 Cr App R 409, Lord Lowry stated;

> *"The need to give the general warning even in recognition cases where the main challenge is to the truthfulness of the witness should be obvious. The first question for the jury is whether the witness is honest. If the answer to that question is yes, the next question is the same as that which must be asked concerning every honest witness who purports to make an identification, namely is he right or could he be mistaken?"*

The emphasis by the English Courts on the issues that the evidence of identity must first be credible and if it is so, then such credible evidence should be further considered for any mistaken identity is clearly indicative, if one carefully peruses these judgments.

The Privy Council, in its judgment of ***Capron v The Queen*** [2006] UKPC 34, has explained this consideration in more explicit terms. It is stated that "... *even though the defence was saying that the witnesses were lying and was not saying that they were mistaken about the accused being the person who shot the deceased, nonetheless the jury had to be sure that the witnesses were telling the truth and that they were not mistaken about the identity of the person who shot the deceased.*" Their Lordships have added, referring to the functions of the jury, that "... *even if they rejected the defence position and came*

to the view that the witnesses were telling the truth, they still had to be sure that the witnesses were not mistaken about the identity of the killer."

A similar approach was adopted in Sri Lanka in, ***Keerthi Bandara v Attorney General*** (supra), where this Court considered the question *"If the testimony of the prosecution witnesses is true, is this an identification effected under difficult conditions or circumstances?".*

In ***Sigera v AG*** (supra) this Court considered the question whether the consideration of Turnbull principles arises when the accused claims that there is fabrication of evidence as to his identity as in the instant appeal. The question posed by the Court was;

> *"The accused's position was that the charges have been fabricated and foisted on him on account of a certain motive which had been specifically imputed by him. Thus the assertion of the accused in his testimony is that these charges have been falsely and fraudulently fabricated and framed up against him. In view of the persistent assertion of the accused of a frame up and fabrication in regard to the charges levelled against him, the question arises in law whether the consideration and application of the Turnbull guide lines ever arises for consideration in these attendant circumstances."*

Adopting the reasoning of ***Regina vs Curtnel*** (1990) Cr. Law Review 115, it was stated by Court that *"... where the accused asserts and alleges is not a*

mistake but a frame up, no useful purpose would be served by considering the Turnbull guide lines."

Turning to the appeal before this Court, it is noted that the 1st, 2nd and 3rd accused-appellants have suggested to *Siriyalatha* that she knew all of them prior to the incident. The witness was evasive in her answer initially as she replied that she had left her village where she lived for over 25 years, for a four-year period, having taken up foreign employment. Yet she admitted that she was familiar with them prior to the identification parade but later added she came to know them after she saw them at the parade. However, she had met them on several occasions when on her way to the village fair and to the bus stand. She also admitted that the 1st accused-appellant lived about ½ mile away from her house. The witness was silent when it was suggested that some others have committed this offence but denied when the suggestion was repeated to her for the 2nd time.

The accused-appellants have also suggested to the witness that she had suspected them for the murder of her husband, because they were involved with a fight with her son, the PW1. It was also suggested to her that soon after the incident the witness shouted a name of neighbour as the person who had attacked them. The witness had denied the said suggestion.

Thus, it is clear that the accused-appellants have consistently maintained that the claim of their identity to the murder by the prosecution witnesses is a total fabrication, owing to the prior incident involving PW1. Given the position adopted by the 1st accused-appellant

during the trial that he was falsely implicated, the submission that there was a mistaken identity in the instant appeal seemed a disjointed argument. However, the 3rd accused-appellant raised the issue of credibility of the evidence on identity and that factor should be considered by this Court.

Learned trial Judge who delivered the impugned judgment had no opportunity of observing the demeanour and deportment of any of the witnesses or the accused-appellants who gave evidence. Hence, this Court is equally capable of assessing the evidence of the witnesses by examining the transcript of their evidence.

It is clear that the first claim of identity of any person was made by PW1, when the Police visited the scene that night itself. He had implicated the 1st accused- appellant. The 1st accused- appellant was arrested on the following day. In the absence of the evidence of PW1 as to how he implicated the name of the 1st accused- appellant, not being a witness to the incident, should be inferred from the available evidence. There exists at least two possibilities in the mention of the 1st accused-appellant at the earliest opportunity. Firstly, PW1 may have learnt it from his mother. Secondly, he may have implicated the 1st accused-appellant over the previous animosity as the appellants' claim. There is no evidence to suggest that PW(1) had arrived home soon after the incident. The first possibility could be discarded on the basis that *Siriyalatha* told her son about the 1st accused-appellant simply because, even in the short history, though made few days after the incident, she did not mention any name but only said a known person. This statement is in line with the second possibility that it was her son who first came up with the name of the 1st

accused-appellant as her short history to the medical officer merely refers to a single person she knew among the three assailants.

The said admission of the witness, although made with reluctance after persistent cross examination, that she knew the three accused-appellants prior to the incident, renders the weightage that could be attached to her claim of identifying them at the identification parade to a negligible minimum. Her clear assertion during the examination in chief that she saw the three accused-appellants for the first time that evening was contradicted by herself when she admitted that she knew them prior to the incident. Then the question arises as to why she suppressed this factor in her evidence. Whether there was a fight between the accused-appellants and her son or not, her suppression of this important factor in identification seriously challenges her trustworthiness as a witness.

Situation could have been quite difficult, if she had said that she had seen the three intruders a few times before, but is unaware as to their names or whereabouts. It is a common experience that a person would see another on few occasions and would recognise if seen again but yet cannot provide names or other details.

Sriyalatha deliberately did not take that line. Instead she stated that the accused-appellants were seen for the first time during the attack. According to what she claim it is a case of an identification and not of recognition. Her subsequent admission had dealt a fatal blow to her honesty. When her honesty or truthfulness is in doubt about this important aspect, especially when the accused-appellants challenged the claim of

identification at the identification parade, is of no value for she knew before hand whom she expect to see and to point out at such a parade.

If *Sriyalatha* had not admitted that she knew the three accused-appellants before the incident, then it would have been necessary to use Turnbull principles to evaluate her claim of identifying the accused-appellants under "difficult circumstances."

According to *Sriyalatha* the face covers the other two assailants used to conceal their identity came off when her husband started to struggle when the intruders attempted to tie him down. But the witness in the same breath stated that when her husband was stabbed, his hands and feet were already tied by the appellants using the strips of fabric ripped off from the curtain. At that time, she too was tied along with her daughter. She also stated that her daughter had sustained an eye injury after the stabbing of her husband. But *Geethanjali* said in her evidence that she received her injury during the struggle. If that is the case, then it is questionable for *Geethanjali* to have witnessed the remaining part of the incident, owing to this serious eye injury which resulted in losing her sight. She made a statement to Police only after pointing out the appellants at the identification parade. As admitted by the mother, the three accused-appellants, being fellow villagers, she would not have had any difficulty in pointing out, perhaps on the instructions of her brother.

The incident is no doubt a gruesome one. An innocent family who lived peacefully was attacked and had their father killed for no reason. But the Courts, in determining the guilt or the innocence of the accused, are duty bound to apply the safeguards that had been put in place to prevent

any errors in identifying the real offender. The evidence of the mother and daughter are at variance in vital points along the sequence of events they narrated. These instances include inconsistencies in vital areas as to who did what. After careful analysis of the evidence on the point of identity, this Court is of the view that the evidence of the prosecution on identity is of questionable character and therefore could not be relied upon. In the particular circumstances of this case, applying Turnbull principles to the evaluation of the evidence of the prosecution witnesses does not arise.

It is the view of this Court that the conviction of the three accused-appellants should not be allowed to stand as it is not safe to do so owing to the inherent infirmities of the evidence referred to above.

The conviction and the sentences imposed on the 1st to 3rd accused-appellants are hereby set aside.

Accordingly their appeals are allowed.

JUDGE OF THE COURT OF APPEAL

HON. JUSTICE DR. RUWAN FERNANDO

I agree.

JUDGE OF THE COURT OF APPEAL