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

CA 286 A-B-287/08

HC-Badulla-91/2003

01. Weerasinha Mudiyanselage Weerasinha
127/1,
Athimale Wewa,
Monaragala

02. Rathnayaka Mudiyanselage Jayasinha Bandara
No: 25,
Wawkubura Road,
Monaragala.

03. Ekanayaka Weerasinha Athapattu Mudiyanselage
Kalubanda
No:296,
Mahaweli Niwasa,
Giraduru Kotte.

Petitioners

Vs.

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

Respondent

CA 286 A-B-287/08 **HC-Badulla-91/2003**

Before	:	**Rohini Marasinghe, J. &** **H.N.J.Perera, J**
Counsel	:	Nalin Ladduwahetty with Chathura Amaratunga and Thusitha Ranasinghe for 1st & 2nd Accused Appellants Neranjan Jayasinghe for 3rd Accused Appellant Dileepa Peeris, SSC for the State
Argued & Decided on	:	08.10.2012

Rohini Marasinghe, J,

The three appellants in this case were charged with kidnapping of one Dharmasena and one Jayantha on 24th November 1989 according to section 356 of the Penal Code read with section 32 of the Penal Code.

The sole eye witness was one Jayaratne. He was the elder brother of the victim Jayantha. The witness was in the house

with his father. Around 1.30 in the night when the witness was asleep four persons had forcibly entered the house by kicking open the front door. The victim was also asleep. The witness said that one person had kept a gun to his chest. He identified the three appellants. He said that the 1st appellant was in school with the witness and lives in the village. The second appellant was known to him and his father. The third appellant was a member of the Pradeshiya Sabha. He said that he knew all three appellants by their names at the time of the abduction. They had first held the witness and tied his hands. But subsequently released him and went to get the victim who was asleep. The victim had been abducted by these three appellants who were known to the witness and was later found to have been killed. This evidence was contradicted by the witness himself not only in evidence under cross examination but in the evidence in chief as well. I am mindful of the fact that the incident had taken place in 1989 during the height of the insurrection in the country. The people were killed by unidentified people and some were alleged to have killed by those who were participating the insurrection, while some were alleged to have been killed by the armed forces. This situation continued until 1991. But after 1991 some form of normalcy prevailed in the country.

The case of the appellants had been reviewed against this back ground. When the abduction took place, the father made a statement promptly to the police. He went to the police very next day with the eldest son who was the sole eye witness. The father died before hearing of the trial. The witness said that he was by the side of his father when the father made the statement to the police. The witness had not made a statement to the police at that time. In the statement the father had not mentioned anything about the suspects. The statement had proceeded on the basis that the suspects could not be identified. Ten years later in 1999 the sole eye witness made a statement to the Presidential Commission. A Presidential Commission was constituted to inquire into disappearances during the period of the insurgency. In that statement the witness had stated the names of the present appellants. In his evidence he mentioned the circumstances under which he came to know the appellants. At certain points in the evidence the witness had said that he recognized the appellants as they had been known to him before. At certain points he said that he identified them from the manner they spoke, in the sense in that at one time he appeared to have identified the appellants visually and at another time he appeared to have identified them

not visually but by their voices. The following are excerpts of his testimony on this very material fact.

ප්‍ර: ඒ වෙලාවෙ අදුර ගත්තද?.

උ: ඒ වෙලාවෙ මම දැන ගත්තා කථා කරන ශෛලයෙන්. මම පොඩි කාලේ ඉඳලා ආශ්‍රය කරන, නිසා.

ප්‍ර: කවුද තමුන් අදුරගත්ත පුද්ගලයෝ?

උ: විරසිංහ.

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ප්‍ර: තුවක්කුවක් තමුන්ගේ පපුවට එල්ල කරා කිව්වා?

උ: ඔව්. තුවක්කුව තිබුනේ පී. පී කලුබංඩා මහත්තයා ලඟ. ඒ වෙලාවේ මම අදුරගත්තා. අද උසාවියේ ඉන්නවා.

(සාක්ෂිකරු, තුන් වන වුදිත හඳුනා ගනී,)

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අධිකරණයෙන් :-

ප්‍ර: 2 වෙනි විත්තිකරු හඳුනා ගත්තාද?

කලුබංඩා තමයි පපුවේ තිබ්බේ?

උ: ඔව්

ප්‍ර: 3 වෙනි විත්තිකරු කවිද?

උ: අංගොඩ සෝමේ කියන අය දැනට මිය ගිහිල්ලා?

ප්‍ර: ඒ තුන්දෙනා තමයි තමාගේ ගේ ඇතුලට ආවේ?

උ: ඔව්.

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ප්‍ර: තමුන් මේ 03 වෙනි වුදිත සිද්ධිය වෙන්න කලින් හදුනනවාද?

උ: අපේ ගමේ පුද්ගලයෙක්. එකට ගමේම පංසලට, පාසලට යන අවස්ථාවලදී පොඩි කාලේ සිටම ඒ ගමේම සිටි පුද්ගලයෙක්. ඒ නිසා ස්වාමිණි මම හදුනනවා.

ප්‍ර: ඒ නිසා තමුන් අපහසුවක් නැතිව හදුනගත්තා?

උ: ඔව්.

(Pge 82)

ප්‍ර: මෙහි පැමිණිල්ලේ කොහේ හෝ තියෙනවාද කියලා බලන්න?

මෙම චිත්තිකරුවන් තුන්දෙනාගේ නම්?

උ: නම් ඇතුලත් කරලා නැහැ.

ප්‍ර: මෙම පැමිණිල්ල තමන්ගේ පියා විසින් ඉදිරිපත් කරන විට ඔබත්, ඔබගේ පියා සමග සියඔලාණ්ඩුව පොලිසියට ගියා?

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ප්‍ර: නමුත් පොලිසියට කරන ලද පැමිණිල්ලේ තාත්තා කිව්වේ නැහැ, මේ අය දැක්කා කියලා?

උ: ඒ අවස්ථාවේදී කිව්වේ නැහැ පැමිණිල්ලක් දැම්මා.

අධිකරණයට:-

ප්‍ර: ඔබ ඉතා පැහැදිලිව කිව්වා සිද්ධිය දැක්කා, සිද්ධිය කළ අය හදුනා ගත්තා කියලා?

උ: ඔව්

ප්‍ර: ඒ අයගේ නම් සඳහන් කලාද?

උ: නැහැ.

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ප්‍ර: නම් වශයෙන් කියන්න පුළුවන්ද?

උ: කටහඬින් හඳුනා ගත්තා. ඒ වගේම පාසැල් යන දවස් වල අපි එකට සිටියේ. අපි එක ගමේ පදිංචි අය.

ප්‍ර: තමන්ගේ වයස කීයද?

උ: 46යි.

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ප්‍ර: තමන් මෙම විත්තිකරුවන් අතරින් පාසැල් ගියේ කා සමගද?

උ: 1 වන විත්තිකරු සමග.

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ප්‍ර: මෙම තුන් දෙනා තමයි නිවසට ඇතුල් වුනේ?

උ: ඔව්.

ප්‍ර: ඒ අය හඳුනා ගත්තේ කටහඬින්?

උ: ඔව්.

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In answer to a question asked by court the witness stated that he had clearly identified the accused but that he had not told the police the names of the appellants. (110).

The witness had filled a form on 23.06.2006 which had been marked as Y in that from he had stated that Jayasinghe Bandara (3rd accused appellant) along with three others had committed the offence mentioned. Accordingly the witness had not stated the names of the other two appellants.

This case rested solely on eyewitness identification evidence standing alone without any supporting evidence. The sole eye witness throughout the evidence had given very evasive and inconsistent answers with regard to the identity of the three appellants. This was not a situation where the witness had not been able to recognize the persons on the relevant date but on some subsequent occasion he had seen the accused at some place and identified them as the culprits. The witness had said that he had identified the appellants from the manner of speech at the time the offence was committed. The witness had been able to do so as they were his school mates. But the witness admitted that the 2nd and 3rd appellants were not his school mates. His identification evidence throughout the testimony was

perverse. In this case it was important to establish the identity of the persons whom the witness testified that he saw at the relevant day. The witness appears to be stating in ambiguous ways that he had well known the appellants earlier and therefore, recognized the persons observed on that date. The witness does not say that he could not recognize the suspects initially but had seen them on a subsequent occasion and had identified them as the persons who came into the house that night. The suspects appears to have been in the house for some time. It was not a fleeting glance as mentioned in the Turnbull case (**R. V Turnbul [1977] QB 224 CA**) Therefore, if the appellants were well known to the witness there was no reason for the witness to state that he identified the appellants only by the manner they spoke. As pointed out above the witness thereafter changed his position and said that he identified them visually.

The eye witness identification has a chequered history of association with miscarriage of justice. Following two well publicized miscarriages of justice (On March 14, 1974 Mr. Dougherty's conviction was quashed as unsafe and on April 5, 1974, Mr. Virag was discharged from prison with a free pardon. See, P. Devlin, The judge (1979) , pp 190 -191.) the Devlin

Committee was asked to report on this type of evidence. This land mark official inquiry in to errors of identification in criminal proceedings was published in 1976. (**Report of the Devlin Committee on identification in Criminal Cases, HC 338, April 26, 1976)** In that report it was concluded that a criminal conviction should not normally rest on eyewitness identification evidence standing alone. Whilst it was conceded that eyewitness identification might be sufficient to convict an accused in exceptional circumstances – and for normal run of cases it was recommended that 'substantial' supporting evidence was also required.

One of the two cases mentioned above was that of Laszlo Virag. Mr. Virag was convicted of theft and of unlawfully wounding a police officer whilst attempting to resist arrest. Virag was identified as the perpetrator in three different identification parades by eight eye witnesses, including several police officers who had attempted to catch the thief. The most impressive of all was PC Smith, the officer wounded in the raid. PC Smith testifying in court said that Virag's face was ' imprinted in my brain". On this evidence Virag was convicted and sentenced to ten years imprisonment in 1969. But he was released on 14th March 1974 and granted a free pardon after the correct

perpetrator was linked by scientific evidence. In Reid v. R (1990)1 AC 363, 378 it was stated that the "danger in identification is hidden".

Shortly after the Devlin committee's report was published the Court of Appeal in R v Turnbull (1977) 1 QB 224 CA laid down the guide lines for cases where evidence of identification was given. The Court stated that it was trying to follow the Devlin Committee's recommendations, but it did not adopt the committee's view that other than in ' exceptional circumstances' no person should be convicted on visual evidence alone. Instead the court insisted that normally the dangers of identification evidence are to be dealt by careful direction to the jury, and that a case should be withdrawn from the jury if the identification evidence is of an unacceptably low standard. The Court of Appeal recently had occasion to state "Turnbull is the seminal decision and it is where the law is to be found". **(R v Mussell and Dalton (1955)Crim. L.R. 887, CA. Quotation from transcript p, 14 per Evans L.J).**

As the judicial precedents have indicated it is incumbent upon the trial judges to take the trouble of applying and where necessary modifying the general criteria of good and bad

identification evidence to the facts of the instant case. (**R v Fergus (1994) 98 Cr. App R 313 CA**) It is important for the trial judges to work systematically through all the relevant evidence presented at the trial emphasizing the circumstances of the offence or of its investigation which might have affected the quality and therefore, the reliability of the evidence led. However, it must also be stated here that though the jurisprudence arising out of Turnbull had been staunchly adopted in our jurisprudence it must not be extended by mechanical analogy to cases in which the risk of misidentification does not rise. (**vide R v Forbes (2001) 1 Cr. App. R 430 HL. And R v Oakwell (1978) 1 WLR 32 CA)** It is of utmost importance for the trial judge to assess the quality of the identifying evidence. When the identifying evidence is poor, as for example, when it depends on a fleeting glance or on a larger observation made in difficult conditions, the situations is very different. The judge should then withdraw the case from the jury if it was a jury trial, or if it was not a jury trial at the end of the prosecution case acquit the accused on the basis that there is ' no case to answer' unless there is other evidence which goes to support the correctness of the identification.

In this case it can hardly be said that the trial judge had eliminated the risk of mistaken identification leading to an unsustainable conviction. The evidence of the sole eye witness was clearly clouded with inconsistencies. The trial judge had failed to address the circumstances under which the evidence leading to identification had been given by the witness and the quality of that evidence when the identity had been challenged by the defence. The trial judge should have cautiously assessed the evidence having in his mind that identification evidence has a chequered history of association with miscarriages of justice. Experience has shown that even honest and convincing witnesses can make mistakes in identification. In this case the trial judge ought to have taken into account not only the nature of the witness's opportunity to witness the relevant event but also the nature of the opportunity that he may have had to witness and observe any matters relating to the conduct of subsequent identification procedures – such as that had after 10 years had lapsed. That was when the witness for the first time had mentioned the names of the appellants whom he purported to have identified at the time of the commission of the offence. Notwithstanding the infirmities regarding that identification evidence whether it was visual or voice identification, the witness took 10 years to mention the names to any authority.

The witness failed to give any reason for this unduly long delay. The learned trial judge had failed to address this infirmity in the judgment which was a material fact going to the root of the identification. For the foregoing reasons I am of the view that the identification evidence was weak and a conviction could not be sustained on that evidence.

For all these reasons the conviction of the appellants was unsafe. Accordingly, the appeal would be allowed and the conviction quashed.

Judge of the Court of Appeal.

I agree.

H.N.J. Perera, J.

Judge of the Court of Appeal.

LA/-