

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

1. Karalainge Prematilaka,
2. Maddumage Gardiyes
Vs.
The Attorney –General.

C.A 14-15/2003

High Court Hambantota

Case No: 15/97

Before : Sisira J. de Abrew J. &
P.W.D.C. Jayathilaka, J.

Counsel : J.P. Gamage for the 1st
Accused- Appellant.

Ranjith Meegahawatta for the 2nd
Accused-Appellant.

Kapila Waidyarathna D.S.G for the
Attorney –General.

Argued & decided on : 27.05.2013.

Sisira J. de Abrew J.

The Accused-Appellants produced by the Prison Authorities are present in court.

Heard both counsel in support of their respective cases. The two accused-appellants in this case were convicted of the murder of a woman named Korale Jayasinghe Arachchige Maryhamy and the murder of a girl named Korale Jayasinghege Champika Surangani. The learned Trial Judge after conviction sentenced both Accused-Appellants to death. Being aggrieved by the said convictions and the sentences they have appealed to this court.

Facts of this case may be briefly summarized as follows. The incident in this case took place on 27.05.1991 which was a vesak full moon Poya day. The villagers in Walasmulla had organized a musical show on this day. The deceased woman Maryhamy with her three sons and the daughter was returning home after attending the said musical show.

When they were returning home Pushpakumara and Padmakumara heard shouts of their sister. When they turned back they saw the two accused persons holding their sister Champika Surangani. When the mother Maryhamy went near the two accused- appellants asking for her daughter, the 2nd accused-appellant attacked Maryhamy. Thereafter they both took Champika Surangani towards a shrub jungle. Mother fell on the ground with bleeding injuries. The two boys Pushpakumara and Padmakumara were 11 years and 9 years old at that time. On hearing the shouts of two boys one Kurunde Mama came to the scene and on learning what has happened he went and informed the Gramasevaka of the area who was at the musical show at that time. Grama Sevaka immediately informed the crime to the police and the police officers who came to the scene found the dead body of Champika Suranganie around 4.00 a.m. in a shrub jungle which was around 300 meters away from the place where Maryhamy was lying fallen. The two accused-appellants who were unknown to Pushpakumara and Padmakumara were later

identified by them at an identification parade held by the learned Magistrate. The only ground urged on behalf of the 1st accused-appellant was that the identification parade was not conducted in accordance with the rules laid down in Perera Vs. State 77 N.L.R. page 224. I now advert to the said ground of appeal urged on behalf of the 1st accused-appellant . In Perera Vs. State His Lordship Justice Walgampaya observed the following facts. “ Eleven prison officers of Walikada Prison were suspects in the commission of the offence of causing the death of a prisoner in the same prison on 22.09.69. On receipt of various B reports from the police, the Magistrate of the area recorded the statements of certain witnesses on 24.09.69. At an identification parade held on 09.10.69, 53 of the prison officers and 23 persons from the public were all lined up in a room in the well of the court, and identifying witnesses were called up one by one to point out the various persons who committed the various acts of assault on the deceased. Before the three identifying witnesses were questioned they were reminded

by the Magistrate of the contents of the statements made by them on 24.09.69.

Held, that with 53 prison officers in the parade and only 23 persons from the public, the parade was not properly constituted. Although the 53 prison officers were not all suspects, still it was evident that the ratio of one outsider to two prison officers was inappropriate and unfair. The proper procedure that the Magistrate should have adopted was-

- (a) that he should have held several parades in conformity with the practice followed in similar circumstances,
- (b) to have asked the particular witnesses to identify any suspect if he was in the parade.
- (c) If a witness pointed out any person, then only should the Magistrate have asked the witness whether that the accused whom he pointed out did any thing, and
- (d) If so, the details of what he did.”

In the present case when the two witnesses were brought to the well of the court for the purpose of identifying the witnesses, the Magistrate addressed the witnesses in the following language. "On Vesak day you with your mother, sister and brother went to see a musical show. On your way back some people took your sister away after assaulting the mother. Point out them if they are present here". This was the language used by the learned Magistrate addressing the witnesses. In Perera Vs. State 77 NLR 224 the witnesses had made statements to the Learned Magistrate who held the parade. The learned Magistrate when holding the identification parade referring to the statements made by the witnesses told them to identify the accused with reference to certain features of the suspects stated in their statements. In that case the learned Magistrate told the witness point out the person whom he referred to as Boxing Mahatthaya in his statement. Further the learned Magistrate told the witness to point out the person whom he referred to as Kannadi Peiris in his statement. Kannadi Peiris and Boxing

Mahaththaya were suspects at the parade and the witnesses identified Kannadi Peiris and Boxing Mahatthaya. It is therefore seen in the case of Perera Vs. State the Magistrate had told the witnesses to identify the suspects with reference to certain features of the suspects. In the present case, the Magistrate had not taken such a step and further the witnesses had not made statements to the Magistrate. I therefore hold that the facts of Perera Vs. State are different from the facts of this case. At this stage it is pertinent to consider the judgment in the case of the Attorney – General Vs. Joseph Alloysius and others [1992] 2 SLR page 264. A bench comprising Justices S.N. Silva and D.P.S. Gunasekera considered the procedure that should be followed in conducting an identification parade with reference to Perera Vs. State 77 NLR page 224. His Lordship Justice S.N. Silva in the said case held thus: “ the witness should not see or be reminded of any photograph or description of the suspect or, be given any other indication of his identity. If a witness is asked to identify a suspect at a parade with reference to the act done by a person in the

commission of the offence, it would not be objectionable, in relation to the provisions of the manual, circular or the Code.

The proper procedure to be adopted at an identification parade as stated by Walgamapaya J in the case of Perera Vs. State 77 NLR 224 should be understood only in the context of the objectionable features as noted in that case.

It would not be objectionable to request a witness at a parade, to identify any person, with reference to the acts or presence of persons who participated in the commission of the offence. However, in addressing such a request or question to a witness, reference should not be made to the appearance or physical characteristic of any particular participant, as would facilitate his identification at the parade. Where an objection is taken to the evidence of identification that is otherwise relevant and admissible, the court has to consider not only whether there is a breach of what is generally observed as the proper procedure but also

the extent to which such breach has impaired the fairness of the proceedings. Such evidence of identification may be excluded only if the court finds that its admission to have an adverse effect on the fairness of the proceedings.”

In the present case the Learned Magistrate at the identification parade had only referred to the incident and requested the witnesses who were 9 years and 11 years old at that time to point out them. He has not made any reference to the appearance or physical characteristic of any suspect. I therefore hold that the procedure adopted by the learned Magistrate in the present case is not objectionable and is in accordance with the guidelines set out in the Attorney –General Vs. Joseph Alloysius and others [1992] 2 SLR page 264. For the above reasons I reject the submissions of learned counsel for the 1st accused-appellant.

Learned counsel for the 2nd accused-appellant took up the same objection with regard to the holding of the

identification parade. In addition to the said objection learned counsel for the 2nd accused -appellant tried to contend that it was easier for the witnesses to identify the 2nd accused-appellant at the parade since he had lost his right arm. I now advert to this contention. Did the witnesses, at the parade, identify the 2nd accused -appellant because he had lost his arm. The answer is no. It is admitted that, at the time that the 2nd accused-appellant was produced at the identification parade, he did not have his right arm. Have the two eye witnesses at the stage of investigation, said that a person without an arm attacked their mother or carried their sister? The answer is no. Therefore the fact that the 2nd accused was a person who was without an arm has not helped the two eye witnesses Pushpakumara and Padmakumara to identify the 2nd accused-appellant. In fact the 2nd accused at the parade had not said that the two eye witnesses were able to identify him due to his defect. What he had taken up at the parade was that the witnesses were able to identify him as they had come to his brother's place quite often. When I consider the

above matters I am unable to agree with the submissions of the learned counsel for 2nd accused-appellant. Both counsel did not urge any other matters before us. We have considered the evidence led at the trial and see no reason to interfere with the judgment of the learned trial Judge. For the above reasons, we affirm the convictions and the sentences and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C Jayathilaka.

I agree.

JUDGE OF THE COURT OF APPEAL

Vkg/-