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

C.A. Appeal No. 127/2011

HC. Hambantota No.101/2007

Jinendradasa Wanigasinghe alias Peeter Chuti alias Tangalle Chuti .

1st Accused-appellant.

-Vs-

Republic of Sri Lanka

Respondent

Before: **Sisira J. de Abrew, J &**

P.W.D.C. Jayathilaka, J

Counsel: S.L. Bulathsinghalage for the accused-appellant.

Shanil Kularatne SSC for the A.G.

Argued and

Decided on: 22.10.2013 & 23.10.2013

Sisira J. de Abrew, J.

Heard both counsel in support of their respective cases. The accused-appellant in this case was convicted for the offence of robbery which is an offence punishable under section 380 read with section 383 of the Penal Code. The prosecution alleges that the accused-appellant with persons unknown to the prosecution robbed jewellery, radio and watches worth of Rs. 200,000/-. After trial the learned Trial Judge convicted the accused-appellant and sentenced him to a term of 15 years R.I and to pay a fine of Rs. 10,000/- carrying a default term of 06 months imprisonment. The facts of this case may be briefly summarized as follows. Sunanda the main witness was living in his wife's house. Sunanda's sister-in-law and mother-in-law were also living in the same house. On the day of the incident in the night (witnesses do not specify a time), two people entered the house of Sunanda and they (people entered) ordered all inmates of the house to go to one room. One person pressed a pillow on the face of Sunanda. According to the witness this person was armed with a pistol. Thereafter the other person entered into the house and took away Jewellery, cassette radio , watches and cash. The accused-appellant and the other accused who was tried in abtentia were later identified at an identification parade as the people who entered the house .

Learned counsel appearing for the accused-appellant contends that the accused-appellant and the other accused were shown to the witnesses prior to the identification parade being held. He therefore contends that the identification parade was not properly conducted. Although he contends so, Learned counsel who appeared for the accused-appellant at the trial failed to make this suggestion to the witnesses. Further we note that 03 suspects had been produced at the identification parade. The witnesses identified only 2 suspects at the parade. If the argument of the learned counsel that the suspects were shown to the witness prior to the identification parade, the question arises as to why they did not identify the 3rd person. When we consider these matters, the contention of learned counsel for the accused-appellant that the suspects were shown to the witnesses prior to the identification parade being held cannot be accepted. We therefore reject the said contention. Learned counsel next contended that the finger prints taken at the scene were sent to the Registrar of Finger Prints but the report of the Registrar of the Finger Prints was not produced. He therefore contends that a reasonable doubt has arisen with regard to the culpability of the accused-appellant. Merely because the report of the Registrar of the Finger Prints was not produced at the trial, it cannot be said that a reasonable doubt with regard to the culpability of the accused-appellant has arisen. What happens if the

finger prints found at the scene tally with the finger prints of the inmates of the house ? When we consider all these matters we hold that there is no merit in the said argument.

Learned counsel next contended that although the witnesses (Sunanda, Sumanawathie and Ariyawathie) identified the accused-appellant at the parade, they failed to identify the accused-appellant at the trial. He therefore contends that there is no identification of the accused-appellant at the trial.On the strength of this argument he contends that the accused-appellant should be discharged. It is true that the witnesses who identified the accused-appellant at the identification parade did not identify him at the trial. What happens when a witness, having identified the accused at an identification parade, fails to identify the accused at the trial ? Can the conviction be sustained. This question was discussed by the Court of Appeal of England in ***Regina Vs Obsourne and Virtue 1973 QB 678.*** In the said case Obsourne and Virtue were accused of having taken part in an armed robbery. Mrs. Brookes ad Mrs. Head were eye witnesses to the robbery. Obsourne and Virtue were put up for identification on separate identification parades. Both ladies attended the parades and identified the defendants. They testified at the trial which commenced seven and a half months after the identification parade.

Mrs. Brookes testimony related to Obsourne. In her evidence Mrs. Brookes said that ' she did not remember that she had picked out anyone on the last parade'. Mrs. Head said in the witness box that ' the man I picked out, I don't think he is in the dock today'. Despite the defence objection Chief Inspector Stevenson who was the officer in charge of both parades, was permitted to testify to establish the fact that both ladies identified Obsourne and Virtue at the parade . Court of Appeal held that ' the evidence of the officer in charge of the identification parade was admissible, for it did not contradict women's evidence. It was evidence of identification other than identification in the witness box, and prosecution was seeking only to establish the fact of identification at the parade.' Court of Appeal of England dismissed both appeals of Obsourne and Virtue. It is therefore seen from the decision in the case of Obsourne and Virtue even though both witnesses failed to identify the accused persons in Court, the identification of the accused persons at the parade by two witnesses was admitted in evidence. In that case, there was no identification of the accused persons in Court, but the Court of Appeal of England affirmed the convictions. It is important to consider a decision of the Indian Supreme Court on this point. In the case of ***Ram Nath Mahto Vs State of Bihar 1996 A.I.R Supreme Court (ii)*** 2511 a robbery was committed in a running train. Witness Divakar Yadav identified the accused as one of the

robbers, carrying a revolver, at the identification parade but failed to identify him in Court. The Magistrate who conducted the parade gave evidence to the effect that witness Divakar Yadev identified the accused at the parade. The trial court, relying on the evidence of the identification parade, convicted the appellant. In his appeal before the Supreme Court of India, counsel for the appellant contended that the evidence of the identification parade did not constitute by itself substantive evidence. The Supreme Court of India rejecting this contention, dismissed the appeal and affirmed the conviction of the appellant. In ***Queen Vs Julis 65 NLR 505*** Basnayake CJ held as follows. 'Under Section 157 of the Evidence Ordinance a former statement made by a witness identifying an accused at an identification parade is relevant as corroboration of any evidence to the like effect given by the witness at the trial of the accused, provided that the statement was made before ' an authority legally competent to investigate the fact' other than an officer investigating under chapter xii of the Criminal Procedure Code.'The above legal literature was considered by me in my judgment in the case of ***Athukoralage Nihal Perera Vs The Attorney-General*** CA. 43-44/2002-05.08.2005. On appeal, the Supreme Court in SC (Spl) LA 203/2005 (decided on 25.04.2006) refused leave to appeal. Considering the principles laid down in the above judicial decisions, I hold that if a witness having identified the

accused at an identification parade fails to identify the accused at the trial, conviction of the accused can be sustained. Learned counsel next contended that the learned trial judge had not considered the dock statement of the accused. I now advert to this contention. The learned trial judge at page 146of the brief (1st para) has considered the dock statement. I note that in the next paragraph the learned trial judge had considered the dock statement and the prosecution evidence and had come to the conclusion that the evidence of the prosecution could be accepted. When we consider the judgment, we are unable to agree with the learned counsel that the learned trial judge had not evaluated the dock statement. We have considered the evidence led at the trial and are of the opinion that the prosecution has proved the case beyond reasonable doubt. We therefore affirm the conviction.

The accused-appellant has been sentenced to a term of 15 years R. I on a charge where he had robbed goods worth of Rs. 200,000/-. We feel that the sentence imposed by the trial judge is excessive. We therefore decide to interfere with the sentence imposed by the learned trial Judge. We set aside the term of 15 years R.I imposed by the learned trial Judge and sentence the accused-appellant to a term of 10 years R.I. The fine ordered by the learned

Trial Judge remains unaltered. Subject to the above variation of the sentence the appeal of the appellant is dismissed.

The accused-appellant who is on bail should submit to his bail. The sentence imposed by this Court should be implemented from the date on which the accused-appellant surrenders to Court or is brought before the Court.

Appeal dismissed

Judge of the Court of Appeal

P.W.D.C. Jayathilaka, J

I agree.

Judge of the Court of Appeal

Kpm/