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

In the matter of an application for leave to appeal and an Appeal to the Court of Appeal in terms of s.331 of the Criminal Procedure Act read with s.15 and 16 of the Judicature Act.

The Hon. The Attorney – General

Hulftsdorp

Colombo 12.

COMPLAINANT

Vs

1. Mahinda Gamini Samarakoon
   Aluthwatta, Narammala.
2. Devatha Periyaduwalage Piyal Kusumsiri
   No. 172, Saliyawewa Junction
   Neelabamma, Ottupallama.

ACCUSED

Daundalage Pushpakumara
21, Miles Post, Saliyawewa Junction
Ranawarapitiya, Puttalam.

AGGRIEVED PARTY

Case NO. CALA 12/2016

HC Puttalam Case No. 24/2004

AND NOW BETWEEN

Daundalage Pushpakumara

21 Mile Post, Saliyawewa Junction

Ranawarapitiya, Puttalam.

AGGRIEVED PARTY-APPELLANT-PETTITIONER

Vs

1. Mahinda Gamini Samarakoon
   Aluthwatta, Narammala.
2. Devatha Periyaduwalage Piyal
   Kusumsiri
   No, 172, Saliyawewa Junction
   Neelabamma, Ottupallama.

ACCUSED – RESPONDENTS

The Attorney – General
Hulftsdorp
Colombo 12.

COMPLAINANT – RESPONDENT

BEFORE : Deepali Wijesundera J.

L.U. Jayasuriya J.

COUNSEL : J.C. Weliamuna PC with

P. Hewamanna for the Aggrieved

Party Appellant Petitioner.

N. Ladduwahetti PC with

V. Ranasinghe for the Respondents

Chanaka Wijesinghe DSG for the

Attorney General.

ARGUED ON : 12th July, 2017

DECIDED ON : 17th July, 2017

L.U. Jayasuriya J.

The first and second accused appellants were indicted in the High Court of Puttalam for torturing the aggrieved party-appellant which is an

offence punishable under section 2 (4) of the convention against the *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment Act no. 22 of 1994.*

The story of the prosecution is that the appellant was arrested by Saliyapura Police for an allegation of a theft of a chain, he was tied and hung and was assaulted by "Rathu Mahatthaya" at the said Police station. The evidence reveals that an identification parade was not held to identify the suspects but the first and second accused were identified in the dock whilst the appellant was testifying before the High Court.

After the case for the prosecution was closed the defence had made an application under *section 200 (1) of the Code of Criminal Procedure Act* and the learned High Court Judge had delivered the impugned judgment on that basis. This appeal is from the said acquittal. It appears from the proceedings that the state counsel has not objected to the application made by the defence.

Section 200 (1) of the Code of Criminal Procedure Act provides thus;

"If the Judge wholly discredits the evidence on the part of the prosecution or is of the opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offences of which he might be convicted or such indictment he shall record a verdict of acquittal".

The counsel for the appellant argued that the first accused set up a false alibi, on a perusal of the proceedings we find that this position is not correct.

Under cross examination there was a suggestion to the effect that the first accused was not physically present at the police station when the assault took place which does not amount to a defence of alibi.

If an accused person takes up the defence of alibi such person should take steps set out under section *126 A of the Code of Criminal Procedure Act.* Learned counsel for the appellant argued that the learned High Court Judge has correctly concluded that the prosecution has established that the offence set out in the indictment had been committed.

He further argued that the finding that there remains a doubt as to who committed the offence is erronious. The appellant's counsel argued that the identification of the first accused and second accused was a proper identification and therefore the learned High Court Judge should have acted upon such evidence.

On a perusal of the indictment the offence was committed on 01.09.2003 and the identification in the dock was made only on 29.08.2007 nearly four years after the commission of the offence. It was held in **Dayananda Lokugalappaththi and eight others vs The State 2003 3 SLR 362** that *"Law relating to identification does not shut out evidence of dock identifications. The trial Judge must examine clearly the circumstance under which the identifications by the witness came to be made".*

On a perusal of the evidence of the appellant we find that he refers to the first accused as "රතු මහත්තයා" and second accused as "ග්‍රාමාරක්ෂක". In the statement made to the police on 10.09.2003 the appellant refers to a person called "ලොකු මහත්තයා" and has stated that he can identify the officer who assaulted him. Further he has not stated a word about "ග්‍රාමාරක්ෂක".

When a person states in a statement made to the police that he can identify a person who committed a particular offence it is the normal practice of the police to include the description of the appearance of the offender in the said statement.

Although the appellant had stated in the complaint that he can identify the offender the officers conducting the investigations have failed to hold an identification parade in the Magistrate Court as provided for under s*ection 124 of the Code of Criminal Procedure Act.* If an identification parade was held the Judge would have observed whether there was any material discrepancy between the discription of the accused given to the police by the witness when first seen by him and his actual appearance. (Turnbul guidelines)

It was held in the **Attorney General vs Joseph Aloysius 1992 (2) SLR 264** that *"An identification parade is a means by which evidence of identify is obtained. But it is certainly not the only means by which it could be established that a witness identified accused as the person who committed the offence. Identification can take place, depending on the circumstances even where in the course of an investigation the witness points out the person who committed the offence to the police. That evidence too would be*

relevant and admissible subject however to any statutory provision that may specifically exclude it at the trial."

In the attendant circumstances of this case the learned High Court Judge has correctly concluded that the identity of the accused has not been established by the prosecution. It was held in The **Attorney General vs Baranage** that *"in a trial by a Judge without a jury, the Judge is the trier of facts and as such at the end of the prosecution case in order to decide whether he should call upon the accused for has defence he is entitled to consider such matters as the credibility of the witnesses, the probability of the prosecution case, the weight of the evidence and the reasonable inferences to be drawn from the proven facts. Having considered those matters, if the judge comes to the conclusion that he connot place any reliance on the prosecution evidence, then the resulting position is that the judge has wholly discredited the evidence for the prosecution. In such a situation the judge shall enter a verdict of acquittal."*

However I think it is fit to set out guidelines when a complaint of torture is received by the police. The officer conducting the investigation or recording the statement should include in the

complaint a description of the appearance of the offender. Such officer should take steps to conduct an identification parade in the Magistrate Court as soon as the complaint is received. The Honorable Attorney General should be notified about such complaint so that he can supervise the investigation right from the beginning.

After a conviction is pronounced the duty officer of the police station should be severely penalized for not making notes about abuse of authority if the High Court concludes that an assault has taken place in the police station.

Whilst condemning the acts done by the police I quote a verse in Dhammapada.

"සබ්බේ තසන්ති දණ්ඩස්ස
සබ්බේසං ජීවිතං පියං
අත්තානං උපමං කත්වා
න හනෙය්‍ය න ඝාතයෙ"

Which means, all are afraid of the stick, all hold their lives dear. Putting oneself in anothers place, one should not beat or kill others.

Long before the Torture Act came into operation Buddha preached little over two thousand five hundred years ago that one should not torture others.

For the foregoing reasons I refuse to grant leave and proceed to dismiss this application.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I Agree

JUDGE OF THE COURT OF APPEAL