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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal
Case No. 214/2016

Vs,

1. Rajapakse Arachchige Thushara Ranjan Rajapakse
2. Ratnayake Mudiyanselage Ajith Prasanna
3. Horathal Pedige Chaminda Priyadharshana
4. Kandawala Pathirannahalage Sanjeewa

Accused

And Now Between

1. Rajapakse Arachchige Thushara Ranjan Rajapakse

Accused-Appellant

High Court of Kuliyapitiya
Case No. HC 176/2013 Vs,

The Attorney General of the
Democratic Socialist Republic of Sri
Lanka

Complainant-Respondent

Before : S. Devika de L. Tennekoon, J &
S. Thurairaja PC, J

Counsel : Dharshana Kuruppu, for the Accused-Appellant
P.Kumararatnam, DSG for the Complainant-Respondent

Judgment on : 16th February 2018

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Judgment

S. Thurairaja PC J

The Accused Appellant (Hereinafter sometimes referred as the Appellant) together with others was originally indicted before the High Court of Kuliyapitya under case number HC/176/13 for Robbery. The 4th Accused Kandawala Pathirannalahe Upul Sanjeeva who was indicted for retention of stolen property, pleaded guilty at the beginning and sentenced accordingly. The 1st Accused Rajapakse Arachchige Thushara Ranjan Rajapakse was found guilty under section 380 of the Penal Code and sentenced to 8 years Rigorous Imprisonment. The 2nd and the 3rd accused persons were acquitted from the charges for want of evidence.

Being aggrieved with the said conviction and Sentence the appellant preferred this appeal to the Court of Appeal and submitted following grounds of appeal;

I. The learned trial Judge has failed to consider that the Prosecution has not proved the identification of the accused appellant beyond reasonable doubt.
II. The Judge has not considered inadmissible evidence, particularly section 27 evidence at arriving the said decision.
III. The Judge has failed to consider the inter se and per se contradictions of the prosecution witness.
IV. The learned High Court Judge has failed to consider the evidence favourable to the Accused Appellant.
V. The right to a fair trial had been denied to the Accused, when the learned trial judge directed the state to treat a prosecution witness as a friendly witness, after the State Counsel cross examined him under section 154 of the Evidence Ordinance.

At this stage, it will be appropriate to have some knowledge about the case for the Prosecution.

At the trial before the High Court of Kuliyapitiya the State lead the evidence of ten witnesses namely, PW 24. Kandawala Pathiranehelage Upul Sanjeewa, PW 01 Hetti arachchilage Namal Sujeewa, PW 05 Kokma Duwa Liyanage Don Mahinda Sumith, PW 08 Janitha Fernando, PW 03 Raufdeen Mohamed Irshad, PW 13 Chief Inspector Athula Shyaman Chrishantha Karunapala, PW 02 Deepal kumara Ratnasekara, PW 11 Police Inspector Koswatte Liyanage Shiral Perera, PW 22 Police Seargent 57525 Edirisinghe, PW 26 Police Seargent 32626 Kularatne and the Court interpreter When the Defence was called the Appellant and two other accused persons made Dock Statements and closed their case.

Prosecution Witness Mohamed Irshad was involved in transport business, Traders from far places like North and East buy their trade commodities in Colombo in small quantity, and hands it over to Irshad, he transports all the items in big lorries for a fee.

On the 1st March 2010, as usual the lorry bearing registration number LG- 5767 was sent to north with goods. Namal Sujeewa was the driver of the said lorry. They travelled through Negombo. Wariyapola and reached Hettipola Police area there a white coloured Town Ace van came across their vehicle and made them to stop the same. When they stopped gang of people who were covering their faces came up to the lorry and said that they are from the Finance Company and they came to seize the lorry. The driver replied them saying that there is no finance to their lorry, then the assailants took control of them and the lorry by force, it was noted by witnesses that they were armed with swords and things like hockey sticks. The Lorry Driver had seen the face of the Appellant and identified him at the identification parade conducted by the Magistrate and from the dock at the High Court. Police conducted investigations and arrested the Appellant and other accused persons. They also recovered most of the goods and a white van similar to the description given by the witnesses.

The 1st ground of appeal is that the Identity of the Appellant was not proved beyond reasonable doubt. The Counsel for the Appellant submits that there are contradictions among the prosecution witnesses, therefore the identity was not proved.

Counsel submits that the prosecution witness Upul Kumara Ratnasekara had informed the Court that the assailants were seen covering their face at the time of the incident, but the other witness said that he saw the face of the assailant of whom he identified as the Appellant. The Counsel Submits that this is a contradiction between two witnesses.

Considering the evidence of all prosecution witnesses specially the driver who claims that he saw the appellant, it reveals that all of them didn't have the same view. One is on the Driver's side and the other one was seated in the passenger (Cleaners) side. Cleaner says that he saw the people covered their faces, but the driver who had a long encounter with the appellant says that he could see the face and he clearly identified the appellant not only the face on a glance he describes the appellant in the trial and

clear identification at the identification parade also. There is no doubt created in the minds of the trial judge and our mind sitting in appeal.

Section 124 of the Code of Criminal Procedure Act (CCPA) provides for identification parade. Even though there are no procedural steps spelled out in the relevant law, it was developed by case laws.

Attorney General vs. Joseph Aloysius and Others 1992 (2) SLR 264, it was held that "an identification parade is a means by which evidence of identity is obtained. But it is certainly not the only means by which it could be established that a witness identified the 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."

The Appellant had admitted the identification parade notes under section 420 of the CCPA, and filed of record.

Considering the evidence of the persons who were present at the time of the incident, it is clear that the Appellant was clearly identified therefore the findings of the learned Trial Judge is acceptable.

Considering the 2nd grounds of appeal, the Appellant submits that the Learned Trial Judge had considered inadmissible evidence, particularly section 27 of the Evidence Ordinance. The Counsel submits that the Prosecution did not properly produced the 27(1) statement. Generally, a confession made to a Police Officer is inadmissible under the Evidence Ordinance. But Section 27 (1) is an exception to that rule, because if a fact is recovered (found) the statement becomes a well-found information.

In the present case the accused appellant was accompanied by the Police Investigation Officers, had given information to recover some productions. Considering the facts in this case, it is revealed that some goods were recovered with the assistance of the

Appellant's conduct. The learned Trial Judge had considered section 8(2) of the Evidence Ordinance, not section 27 of the said ordinance.

Section 8 is reproduced for easy reference.

Section 8 Motive, or preparation.

> *(1) Any fact is relevant, which shows or constitutes a motive or preparation for any fact in issue or relevant fact. Previous or subsequent conduct.*
>
> *(2) The conduct of any party, or of any agent to any party, to any suit or proceeding in reference to such suit or proceeding or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent therein.*

Considering the situation of this case in our view the Learned Trial Judge is correct in considering section 8 (2) of the Evidence Ordinance than section 27. It is also appropriate to consider the goods recovered and the explanation given by the Appellant.

Considering the Judgment delivered by the Learned High Court Judge, we are of the view that he was well advised on this issue. Therefore, we have no reason to interfere with his findings. Accordingly, this ground of appeal also fails in its own merits.

3rd and 4th grounds of appeal submitted by the Counsel was that the trial Judge had failed to consider the contradictions *per se* and *inter se* which were favourable to the appellant.

This issue mostly discussed in identification, recovery of productions and some other issues. Identification of the Appellant was sufficiently discussed above. It was our considered finding that the learned Trial Judge had addressed these issues and satisfied himself regarding the identity of the Appellant. It is also observed that the

Learned Judge of the High Court was not satisfied of the identity of the 2nd and 3rd accused persons at the trial hence he had acquitted them for want of evidence.

Counsel also submits that the evidence in favour of the Appellant was not considered. Prosecution witness Upul Sanjeewa (who was the 4th Accused in this case) revealed many facts in connection with this case. One of them was that the Appellant around 11 – 12 in the night came in a Container type full bodied big lorry and instructed them to unload the goods. That factor was not contradicted in fact, it was corroborated by the prosecution witnesses. Further goods recovered also tallies with the goods loaded and the list of the lorry in question.

Similarly, many other facts submitted by the Counsel were considered by this court, we also observed that the learned trial Judge had considered almost all the factors in his judgment. Considering the submissions, evidence and the judgment, we find that there is no necessity for us to interfere with the findings of the Learned Judge of the High Court. Hence, these two grounds of appeal also fail in its own merits.

Last ground of appeal submitted by the Counsel for the Appellant is that the Appellant was denied a fair trial. In support the Counsel submits that the procedure adopted under section 154 of the Evidence Ordinance is unacceptable.

It will be appropriate to refer the relevant section. For easy reference section 154 is re produced below;

> Section 154 - *The court may in its discretion permit the person who calls a witness to put any question to him which might be put in cross-examination by the adverse party.*

The above section is used in the court under certain circumstances. This section is provided there to provide reasonableness to both prosecution and accused persons.

Moncrieff J in King vs. Thegis 57 NLR 107 at page 113 stated that "it may be that the evidence of the party or his witness is very adverse to his own contention, and possibly it may be in favour somebody else, or even of the other party in the suit. But it is not

therefore excluded as evidence and questions may be put. And the answers of an adverse character elicited by them are admissible. It is true that in England a party may not cross examine his own witnesses unless hostile, but section 154 of our Evidence Ordinance has released him from that restriction"

Most of the grounds of appeal and the argument advanced by the Counsel for the Appellant were considerably dealt by the Learned Trial Judge in his judgment. Considering all Facts, Evidence and the submissions of both Counsels we find the Learned Judge of the High Court is justified in coming to the decision he arrived. We have no reason to interfere with the same.

Regarding the sentence the Counsel did not challenge it. According to the evidence this offence of Robbery had occurred at night at the Highway. Further if this type actions are allowed, it will be detrimental to the Right of free movement of the people of this country. Considering the sentence imposed, we find that the Learned trial judge had imposed a reasonable sentence, we have no reason to reconsider the same. We affirm the Conviction and the Sentence, and dismiss the appeal.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree,

JUDGE OF THE COURT OF APPEAL