

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

In the matter of an Appeal under and in terms of the Section 331 of the Code of Criminal Procedure Act.

Attorney General of the  
Democratic Socialist Republic of Sri  
Lanka

**COMPLAINANT**

**Vs**

1. Belibopage Sarath Kumara
2. Aruna Lakmal Vidanage

**ACCUSED**

**Case No. CA 93/2016**

**HC (Matara) Case No. HC 143/2007**

**AND NOW BETWEEN**

Belibopage Sarath Kumara

**ACCUSED – APPELLANT**

**Vs**

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

**COMPLAINANT – RESPONDENT**

**BEFORE**

: Deepali Wijesundera J.

: Achala Wengappuli J.

**COUNSEL**

: Palitha Fernando PC with

Athula Malwattage for the

Accused – Appellant.

Priyantha Nawana A.S.G. for the

Respondent.

**ARGUED ON**

: 09<sup>th</sup> July, 2018

**DECIDED ON**

: 03<sup>rd</sup> August, 2018

**Deepali Wijesundera J.**

The appellant was indicted in the High Court of Matara for robbery of Rs. 23,65,262/47 from an employee of the Commercial Bank of Matara whilst attempting to cause death or grievous hurt to the said person punishable under section 383 read with section 32 and section 380 of the Penal Code. After trial the appellant was convicted under section 380 and sentenced to 7 years RI and a fine of Rs. 10,000/= was also imposed.

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The prosecution story was that on the day in question around eleven in the morning the appellant had entered the Bank along with the customers and had suddenly jumped over the counter and collected the said sum of money from the cashiers while another person had been holding the security officer at gun point. The appellant too had been armed and all this had taken place within a very short time. The appellant was identified at an identification parade by the security officer first after two weeks and the Bank employees after four months at a consequent parade. The incident had taken place in April 2003 and the second identification parade was held in August 2003.

The learned president's counsel for the appellant argued that the learned High Court Judge has not properly evaluated the evidence thereby denied a fair trial to the appellant. He stated that the evidence of the appellant was rejected by the learned High Court Judge on the basis that he had not offered an explanation in the face of the prosecution evidence. The learned counsel stated that according to the evidence of the investigating police officers they were informed by some persons working in an estate that two persons whom they identified by name were seen running carrying a fertilizer sack, and that there is no evidence to say that the appellants emptied the money into a fertilizer bag in fact the

evidence was that they emptied the money into a black plastic bag. He further stated that the two persons identified by the witnesses had bleeding injuries where as there was no evidence to say the appellant was sustained bleeding injuries. The investigating officer has said there was a motorcycle near a parapet wall and a person standing next to it took to his heels when he saw the witness and he was arrested after giving chase. The counsel argued that the learned High Court Judge failed to consider this evidence which shows that the appellant was framed without any evidence to implicate him. He also said that the whole operation had taken only five minutes and the learned High Court Judge has failed to consider whether in the circumstances the witnesses could have made a proper identification under the conditions and whether it is safe to act upon the identification made at a subsequent parade.

The appellant had informed the Magistrate when he was produced for a parade that he was shown to the witnesses. The learned High Court Judge has failed to give due consideration to this fact and also to consider the evidence of witnesses who stated that they can not say with certainty whether the person in the dock was the person who came to the bank on that day.

The learned counsel for the respondent in his submissions stated that the appellant was identified by the witness and that it should be noted that the facts of the instant case are not representative of a case of fleeting glance and that it involves a case where the appellant had intruded the bank premises with a pistol.

Identification at a parade alone is not enough to convict a person. In the instant case some of the witnesses have said they identified a person who came to the bank at a parade but they are not sure whether it's the same person who is in the dock. (vide p.288 of the brief). Here the test of consistency fails.

The appellants also argued that many matters that are in favour of the appellant have not been given consideration by the learned High Court Judge. Instead inadmissible evidence prejudicial to the appellants have been led and the learned High Court Judge has failed to state in his judgment that he disregarded such evidence thus denying him a fair trial.

The learned Additional Solicitor General for the respondent argued that the appellants did not make a precise disclosure about the allegation regarding the Identification parade in his dock statement. He also stated

that the instant case involves the testimony of eye witnesses. Hence the principles enunciated in Ellenborough dictum should not be brought to this case, since what matters is the eye witness testimony. But the said eye witnesses were not certain whether the person they identified at the identification parade was the same person they saw in the dock, in the High Court.

The learned counsel for the appellant stated that the prosecution failed to call as witness those who gave information to the police. They have said a person carrying a fertilizer bag had run across the estate but the bank witnesses have said the appellants emptied the money into a black shopping bag.

The motorcycle recovered by the police officers had the same registration number of the motorcycle in which the suspects escaped after the robbery. The security officer at the bank has gave the number to the police. But the police officers have failed to trace the registered owner of the motorcycle. They did not produce any documents regarding this motorcycle. They failed to prove that the motorcycle recovered was the motorcycle used for the robbery.

The investigating officers did not find any money alleged to have been robbed from the Bank in the appellant's possession. There were no productions in the High Court.

The learned High Court Judge has said the appellants failed to give an explanation to court in his dock statement. An accused had to explain his position to court when there is strong evidence against him led by the prosecution to cast a doubt on the prosecution case. In the instant case there is a doubt regarding the identification of the appellant. He was produced for a parade after four months and he alleged he was shown to the witnesses at the police station. Some of the witnesses giving evidence have said that they are not sure whether it is the same person they identified in the parade. This throws a grave doubt about the identity of the appellant which had to be considered by the learned High Court Judge.

The evidence of the police officers also contradicted on the recovery of the motorcycle. Nothing was recovered from the possession of the appellant. The learned High Court Judge has failed to consider these facts in the judgment thus denying the appellant a fair trial.

For the afore stated reasons we decide to set aside the judgment dated 25/04/2016 by the High Court of Matara, and allow the appeal. Appellant is acquitted and appeal is allowed.

**JUDGE OF THE COURT OF APPEAL**

**Achala Wengappuli J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**