

**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(1) of the Code of Criminal Procedure
Act No. 15/1979.

Hon Attorney General

Complainant

CA. No. 05-09/2016

High Court of

Tangalle

Case No.14/2001

Vs.

1. Juwana Hannedige Lal alias
Lokka (deceased)
2. Rathubaduge Wilson alias Wilson Bas
3. Saundra Hannedige Priyantha Seenimodara
Priyantha
4. Abraham Galapaththige Rahula
5. Weligassethuge Wimalasena
6. Abeweera Gunaratna Thusitha Dilum alias
Dilum (deceased)
7. Weligassethuge Pradeep Priyantha alias
Hatadasage Putha
8. Loku Marakkalage Sarath
9. Juwana Hannadige Pradeep Jayantha alias
Bolo Priyantha

Accused

And Now Between

2. Rathubaduge Wilson alias Wilson Bas
3. Saundra Hannedige Priyantha Seenimodara
Priyantha
4. Abraham Galapaththige Rahula
5. Weligassethuge Wimalasena
7. Weligassethuge Pradeep Priyantha alias
Hatadasage Putha
8. Loku Marakkalage Sarath
9. Juwana Hannadige Pradeep Jayantha alias
Bolo Priyantha

Accused-Appellants

Vs.

Hon Attorney General

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.
: R. Gurusinghe, J.

COUNSEL : Nayantha Wijesundara for the 2nd and 5th
Accused-Appellants.

Rasik Zarook PC., with Rohana Deshapriya, Helani de Silva and Chanakya Liyanage for the 3rd Accused-Appellant.

Anil Silva PC., for the 4th and 8th Accused-Appellants.

Indika Mallawarachchi for the 7th Accused-Appellant.

Shanaka Ranasinghe PC., with Anusika Ranasinghe and R. Fernando for the 9th Accused-Appellant.

Madhawa Tennakoon SSC., for Respondent.

ARGUED ON : 23.02.2021

DECIDED ON : 01.04.2021

C.A. No. 05-09/2016

H.C. Tangalle No. 14/2001

R. Gurusinghe, J.

The seven Accused-Appellants together with two others (who were deceased at the time of the trial) were indicted in the High Court of Tangalle on five counts.

On the first count the Accused-Appellants were charged with being the members of an unlawful assembly on or about 19.03.1989, in which the common object was to abduct L.M. Andirishamy an offence punishable under Section 140 of the Penal Code.

On the second count they were charged with the abduction of the said Andirishamy with the common intention to murder the said Andirishamy an offence punishable under Section 296 read with Section 32 of the Penal Code.

On the third count they were charged with being members of the said unlawful assembly in which the common object was to kill the said Andirishamy an offence punishable under Section 355 read with Section 146 of the Penal Code.

On the fourth count they were charged with committing the murder of the said Andiris Appuhamy in the same transaction, an offence punishable under Section 296 read with Section 32 of the Penal Code.

The fifth count was for being members of the said unlawful assembly whose common object was to murder L.M. Andirishamy an offence punishable under Section 296 read with Section 146 of the Penal Code.

At the trial, the prosecution led evidence of PW1, a son of the deceased and PW2, a daughter of the deceased. The rest of the witnesses were official witnesses.

The evidence of PW1 was that at the time of the incident there was no electricity; they were using a bottle lamp (කුප්පි ලාම්පුව). Around 9.30 p.m. upon hearing the dogs barking he had gone up to the stile (කඩුල්ල). At that point he had seen a crowd of about 15-12 people gathered around his house. He could not identify them and as he was trying to come inside, one person had poked a gun inside his ear. PW1 further said that he could not identify that person as that person had covered his face. He further stated that the people had come in search of his father, the deceased. After a while PW1 called out to the deceased and the deceased had come out. The witness had followed his father for about 20 feet and at that moment he had lost consciousness upon being attacked on the head and when he regained consciousness, he was inside the house.

This witness had further stated that the persons who had abducted his father were armed with guns and swords, and about five minutes later he heard two-

or three-gun shots from the direction of the main road. He and his brother had come out from a window and had gone towards the direction of the beach, as his brother had said to him that the sound of earlier gunshots came from the direction of the beach. He had seen his father's body and another person's body on the beach.

It was the evidence of PW1 that he had identified the persons who had abducted his father through their voice. He made a complaint to the police on the following day. He did not mention the names of the persons who had abducted his father out of fear that they would kill him and other members of the family. He had made a second statement to the police in 1992, mentioning the names of nine persons as the people who had abducted his father. The Attorney General indicted those nine people in the High Court of Tangalle.

The main ground of appeal of the accused-appellants is that the evidence relating to identity of the accused-appellants is wholly unsafe. They also urged the belatedness of the complaint and few other grounds of appeal.

PW1 stated in his evidence in chief that he had identified the accused by their voice as the accused were from the same village and the adjoining village.

He had stated as follows at page 187 of the brief.

ප්‍ර: දැන් ඔය ඒ අවස්ථාවේදී තමාගේ පියා ගෙනී යන්න ආව අය තමාට අඳුර ගන්න පුලුවන් වුනාද?

උ: අපේ ගමේ අයත්, අල්ලපු ගමේ අයත් නිසා මම කලා කලා. මම අඳුර ගන්නා කට හඬින්.

This is the evidence with regard to the identification of the accused.

At page 206 of the brief, PW1 had stated thus:

ප්‍ර: සාක්ෂිකරු තමා මූලික සාක්ෂියේදී කිවවා, ආපු පුද්ගලයෝ ඔක්කොම කථා කළේ නෑ කියලා?

උ: නෑ.

ප්‍ර: තමන් සමග කථා කළේ එක් අයෙක්, දෙනෙනෙක්?

උ: එක් කෙනෙක් දෙනෙනෙක් තමා කථා කළේ.

.....

ප්‍ර සාක්ෂිකරු මේ පුද්ගලයින් හඳුනා ගන්නා නව දෙනෙක් විතර මහේස්ත්‍රාත් අධිකරණයේ හිටියා කියලා?

උ: ඔව්.

ප්‍ර: ඔක්කෝම කට හඬින් අඳුර ගත්තේ?

උ: නෑ.

At page 211, he had further stated as follows:

ප්‍ර: තමා කට හඬින් අඳුනා ගන්නා කියලා කියන්නේ සැකයට. ටිකක් කට හඬින් මේ පුද්ගලයන් කියලා නිගමනය කළේ?

උ: කිට්ටුව පහත අය කට හඬින් හඳුනනවා.

ප්‍ර: ඔය පුද්ගලයින් නව දෙනා වෙන වෙනම කට හඬින් අඳුනා ගත්තේ?

උ: සමහරක් කට හඬින් අඳුනා ගන්න පුළුවන්. මුනේ රෙදි කැල්ලක් බැන්දම කියන්න පුළුවන් අභවලා කියලා ඇගෙන් කියන්න පුළුවන්.

.....

ප්‍ර: ඇගෙන් සහ කට හඬින් තමයි අඳුර ගත්තේ?

උ: ඔව්.

ප්‍ර: එතකොට ගමේ කීදෙනෙක් විතර ඉන්නවද පුද්ගලයෝ? තමාගේ ගම පැරණි ගමක් නේද?

උ: සෑහෙන්න ඉන්නවා පුද්ගලයෝ.

ප්‍ර: 600 ක් 700 ක් විතර?

උ: ඉන්නව.

.....

PW2 in her evidence had said that she had identified Lal, the 1st accused.

(1st accused was deceased when the trial took place in the High Court)

However, even after three years later when she had made a second statement to the police, she had not mentioned the name of Lal in her statement.

At page 255 of the brief, she had stated as follows:

ප්‍ර: තමාගේ ගෙදරට ආව කාණ්ඩයෙන් මුලින් අඳුනා ගත්තේ ලාල් නේද?

උ: ඔව්.

ප්‍ර: පොලීසියට අවුරුදු ගානකට පස්සේ ගිහිල්ලා කියන කොට, ලාල් තමා කලා කලේ කියල කියන්න තිබුණා නේද?

උ: ඒ වෙලාවේ මතක නැති වුනා.

At page 269 of the brief, she had stated as follows:

ප්‍ර: දැන් තමා කිව්වා කලින් ලාල් අඳුර ගත්තා දොර ලග ඉදලා, ඊට පස්සේ පපුවට තුවක්කුව තැබුවා කියල?

උ: ඔව්.

Q: කවුද ඒ?

A: ලාල්.

PW2 had stated that the 1st accused, Lal had questioned, ‘අන්දිට්ස් අන්කල් ඉන්නවද?’.

She further said that the 1st accused had put the gun point to her chest. However, her position was that she had forgotten to mention Lal’s name in her statement to the police.

PW1 made a complaint to the police on the 20th March 1992 where he said that about 20-25 people had come to his house and abducted his father and later his father’s body was found on the beach. He further stated that all the people who had come to his house were either wearing sun glasses or covering their faces with black cloths and he could not identify anyone of them. He had made a further statement in January 1992 naming about ten people as the persons who abducted his father.

In his evidence in the High Court his position was that although the persons who had come to his house were covering their faces with black cloths, he had identified them through their voice and their body shape.

PW2 had also given evidence and stated that the accused were there among the people who abducted her father. She had conveniently omitted to say that the people who had come to her house were covering their faces. However, it was the position of both PW1 and PW2 that all the accused were either from their village or the adjoining village and they could be identified by their voice.

The learned High Court Judge had quoted a passage from E.R.S.R. Coomaraswamy's book on "The Law of Evidence Volume 1 page 257".

Passage is as follows:

"Identification of accused by voice

Some witnesses purport to identify a person by his voice. It is not safe to rely on such identification and the liability to error is great. This is particularly for when the identification was at night. But when the accused was intimately known to the witnesses who identify him by his voice and gait, the Supreme Court of India decline to hold that identification was unsafe. In South Africa voice identification parades have been held with dubious results"

This passage also emphasises the fact that generally voice identification is unsafe to rely on. It is to be noted that accurate voice identification is very difficult than visual identification.

In *Nilesh Dinkar Paradkar vs State of Maharashtra* on 9 March, 2011 (<https://indiankanoon.org/docfragment/187034258>, accessed on 18.032021.)

The Supreme Court of India Stated as follows;

"31. Chapter 14 of Archbold Criminal Pleading, Evidence and Practice discuss the law in England with regard to Evidence of Identification. Section 1 of this Chapter deals with Visual Identification and Section II relates to Voice Identification. Here again, it is emphasized that voice identification is more difficult than visual identification. Therefore, the precautions to be observed should be even more stringent than the precautions which ought to be taken in relation to visual identification. Speaking of lay listeners (including police

officers), it enumerates the factors which would be relevant to judge the ability of such lay listener to correctly identify the voices”

In Pratap Singh vs The State of M.P. decided on 17 May, 2017, paragraph 23 states as follow;

“23. Identification by voice has to be considered carefully by the court as accurate voice identification is much more difficult than visual identification. The Courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. Voice identification alone, that too from the chorus voices of quarrel or scuffle, without any corroborative evidence is always risky to relied upon to base the conviction. The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances. The ability of the individual to identify voices in general and the familiarity of the listener with the known voice; and even a confident recognition of a familiar voice by a listener must be established beyond all reasonable doubts by cogent, positive, affirmative and evidence.”

(<https://indiankanoon.org/docfragment/102967741/>)

Courts have emphasized that Courts have to be extremely cautious in basing a conviction purely on the evidence of voice identification. Before relying on voice identification, a witness should be examined as to how he was acquainted with the accused and how he knew the voice of the accused. Identification from the voice of the accused may be possible, if there had been sufficient evidence to show that the witness was sufficiently acquainted with the accused in order to recognize him by voice.

In this case, PW1 and PW2 only stated that the accused were from their village or from the adjoining village. PW1 admitted in evidence that there were about 600 to 700 people in his village alone. Even though the accused were from the same village or from the adjoining village, there was no sufficient evidence to show that any of the accused were intimately known to him to recognize them by their voice. No questions were put to PW1 as to how he knew the voice of each of the accused. Furthermore, PW1 has admitted that only one or two persons had spoken to him at the incident. Out of these one or two people, one was the first accused who had deceased by the time when the trial started.

PW1 had stated that only two persons had spoken to him. One of them was Lal, the first accused who is dead. The position of both PW1 and PW2 was that the 1st accused Lal had asked “අන්දිරිස් අන්කල් ඉන්නවද?” This is the only specific thing that had uttered by any of the accused. Since the first accused is dead, if at all, there can only be one other person who had spoken to PW1. PW1 has not specified that any other person spoken to him. Leaving the 1st accused, there are eight others as accused. PW1 or PW2 has not described how they had identified each of the accused.

The incident occurred at about 9.30 p.m. There was no electricity, only a bottle lamp was burning inside the house. Moon light was there as per the evidence of PW1 and PW2. However, none of the accused was identified by visually recognizing their faces. According to PW2 there were about 20-25 people and as per PW1, there were about 15-20 people. Almost after three years PW1 had given a statement to the police isolating the nine accused out of that 15-25 people.

Except for the bare statement that all the accused were from their village or from the adjoining village, the prosecution has not led evidence to show that

there was sufficient opportunity for the witnesses to identify the accused by voice.

E.R.S.R. Coomaraswamy states, “when the accused was intimately known to the witness who identify him by his voice and gait, the Supreme Court of India decline to hold identification unsafe”.

The incident of this case happened at night and there was no electricity, there was no face recognition. Witnesses had not spoken about gait, height, complexion, limp or any other physical features of body or special character of voice of any of the accused. Witness No. 2 being a woman probably could not have known the voice of the accused intimately. She had not given evidence with regard to the opportunities that would allow her to acquaint with the accused so closely in order to identify them by voice. Furthermore, the people who had come to their house were covering their faces and that would distort their voice. These two witnesses had not described how each accused could be identified by voice or by body shape or silhouette.

Therefore, the proposition is that identification by voice is a weak piece of evidence. It is the duty of the prosecution to lead cogent and affirmative evidence to prove the case for the prosecution beyond reasonable doubt. The opportunity to make errors regarding the identities of the accused in a situation like the incident in this case is great.

It is to be noted that the witness had stated to the police in 1989 that they could not identify the assailants. They have given the names of the accused almost three years after the incident. Their position was that they had not divulged the names of the accused out of fear of their life. This could be

accepted as reasonable. However, they had given the names of the accused in January 1992. There was a considerable delay. However, I do not wish to go into whether the delay is reasonable or sufficiently explained because the identities of the accused were not established beyond reasonable doubt.

For the reasons set out above, I hold that the identities of the persons who had come to abduct the deceased were not established beyond reasonable doubt. Therefore, I set aside the conviction and the sentence imposed on the accused and acquit them of all the charges. Appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal