

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

In the matter of an appeal from the High Court in terms of section 331(3) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of the constitution of The Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA/HCC/0219/2017

VS

High Court of Hambantota
Case No: HC/349/2007

Weeratunga Arachchige Manjula

Accused

And now between

Weeratunga Arachchige Manjula

Accused- Appellant

VS

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

Complainant -Respondent

BEFORE : N. Bandula Karunaratna, J.

: R. Gurusinghe, J.

COUNSEL : Amila Palliyage with K. Doralagoda

for the accused-appellant

Riyaz Bary DSG

for the respondent

ARGUED ON : 27/10/2021

DECIDED ON : 26/01/2022

R. Gurusinghe, J.

The accused-appellant (the appellant) was indicted in the High Court of Hambantota for committing the robbery of Rupees Forty One Thousand Five Hundred, belonging to R.M. Gunadasa along with the others who are unknown to the prosecution, on or about the 21st of August 2000, an offence punishable under section 380 of the Penal Code and for the possession of a firearm at the time of committing the robbery, an offence punishable under section 383 of the Penal Code.

After the trial, the appellant was found guilty to the charge and sentenced to seven years imprisonment with a fine of a sum of Rupees Two Thousand Five Hundred, with a default sentence of two months, and in addition, ordered to pay a sum of Rupees Fifty Thousand to PW1 with a default term.

The principal argument for the appellant in this Court is that the identity of the appellant was not proved beyond reasonable doubt and it is unsafe to allow the conviction to stand. Some other grounds were also urged.

The prosecution has called PW1 and PW3 as eye witnesses together with the police witnesses. Notes of the identification parade was marked as P1. PW1 stated that four people came into the house covering their faces with black cloths and as a result he was unable to identify any of them. He further stated that he could not identify anyone at the identification parade. They had taken a sum of rupees ten thousand and jewellery worth about fifty thousand by force.

PW3 is the only witness who said that she was able to see the face of the appellant, when the appellant made her open a drawer and took the money and jewellery using a small torch. PW3 has admitted that the appellant was not a known person before the incident. On one occasion, she said that the person she had identified at the identification parade was not in the court house.

A contradiction was marked as V1 during the cross-examination. On page 76 and 77 of the brief, PW3 answered as follows:

ප්‍ර: තමුන් පොලීසියට දිසු කට උත්තරේ මෙහෙම කිව්වා ද? ඒ අය පැමිණියේ මුහුණ බැඳගෙන කියලා?

උ: මට මතක නැහැ.

ප්‍ර: තමුන් දිසු කට උත්තරේ එහෙම ලියවිලා තිබෙනවා නම් පැමිණි අය මුහුණ බැඳගෙන ආවා කියලා ලියවිලා තිබෙනවා නම්, තමුන් එක පිලිගන්නව ද?

උ: පිලිගන්නෙ නැහැ.

මෙම සාක්ෂිකාරිය විසින් පොලිසියට කරන ලද කට උත්තරයේ.. ඒ අය පැමිණියේ මුහුණ බැඳගෙන යන කොටස වී.1 ලෙස සලකුණු කිරීමට අවසර පතනවා.

This is a vital contradiction with regard to the identity of the robbers. The evidence of her (PW3) father, PW1 clearly stated that all the persons who entered his house were covering their faces with black cloths, and he was not able to identify them. The position of PW3 was that the persons who entered the house had applied some black substance on their faces to conceal their identity. There were a large number of omissions in her testimony, including a vital omission. She had not mentioned in her statement to the police that she was able to see the face of any persons or she had seen the features of the appellant's face, which enabled her to recognize him later. As per the evidence of PW1, four persons entered the house. If she could identify or recognize any of them, then that is a vital piece of information, and she should have mentioned it to the police.

The appellant's position is that he was shown to the witnesses at the police station with a particular reference to a mark on his face. When this position was put to PW3, she said that only her father PW1 had gone to the police station to see the suspect. This shows that the appellant was shown to the witnesses at the police station. In the notes of the identification parade, the counsel for the appellant stated as follows:

On page 338

“සැකකරුවන් වෙනුවෙන් ශිරාස් යුසුප් මහතා සමග ඉක්බාල රඹින් මහතා පෙනී සිටිමින් කියා සිටින්නේ, මැතිතුමනි මෙම නඩුවේ, 2වන සැකකරු වන ඩබ්. ඒ.මංජුල නැමති අය අම්බලන්තොට පොලිසිය මගින් අත්අඩංගුවට ගැනීමෙන් පසු හම්බන්තොට පොලිස් නිලධාරීන් සමග පැමිණි 2වන සාක්ෂිකාරියට අම්බලන්තොට පොලිස්සියෙදී මෙම

සැකකරුව පෙන්වා සිටි බැවින් මෙම පෙරෙට්ටුව පැවැත්වීමෙන් අවශ්‍ය කරන සැකකරුවන් හඳුනාගැනීම සම්බන්ධයෙන් යුක්තිය ඉෂ්ඨ නොවන බවත්, ඒමගින් පෙරෙට්ටුවේ අභිප්‍රාය පිළිබඳව සාධාරණයක් ඉටුනොවන බවත්, මෙම පෙරෙට්ටුව පැවැත්වීම නිෂ්චල කාර්යක් බවත් ගෞරවයෙන් කියා සිටිමි”.

The Judge who wrote the judgment had heard only the dock statement of the appellant. None of the witnesses for the prosecution were led before him. Therefore, the Learned High Court Judge who wrote the judgment had no opportunity to see the witnesses and therefore, deportment and demeanor of witnesses are of no importance in this case.

PW3 has stated to the police that as the robbers were covering their faces with black cloths, she was not able to identify any of them. However, her position in the evidence in Court is that one of the persons who came to her house was the appellant. When she was asked to open a drawer and take the money, she identified the appellant. When she was questioned whether she had mentioned to the police that the robbers were covering their faces with black cloths, she denied it. That portion of her statement was marked as V1. This is a very vital contradiction that goes to the root of the case and diminishes the credibility of PW3. PW3 had changed her position regarding the identities of the robbers completely. PW3 has not mentioned anything that would be helpful to identify the robbers in her statement to the police.

Furthermore, in her statement to the police, PW3 has mentioned that she could not identify any of the persons who entered the house. The defense has drawn the attention of the Trial Judge to this fact. These omissions are vital regarding the identity of the persons who entered their house. The evidence of PW1 is that all the robbers came to their home, covering their faces with black cloths. The position of PW3 in this regard changed. She and her father both stated to

the police that all the robbers were covering their faces with black cloths and they were not able to identify any of them

The appellant's position is that he was shown to the witnesses in the police station before the identification parade was held. As there was a unique mark on the appellant's face, police have asked the witnesses also to take note of that mark. At the identification parade, the counsel for the appellant recorded this position before the Learned Magistrate who held the identification parade. This was duly recorded.

When considering the issue of the identity of the appellant, only PW3 stated that she identified the appellant. However, as pointed out above, the evidence of PW3 regarding the identity of the appellant is not reliable when compared with her own statement to the police and the evidence of PW1. It is clear that none of them could identify any of the robbers.

When PW3 was questioned as to whether she had gone to the police station after the arrest of the appellant, her position was that only her father PW1 had gone to the police station. It is possible that PW3 had gone to the police station with his father and the appellant was shown to PW3, and from the mark on the appellant's face, PW3 had identified him at the identification parade.

In *King Vs. Tholis Silva* (1937) 39 NLR 267, Hearne J., in regard to questions on identification, stated that 'It is improper to allow witnesses the opportunity of seeing beforehand persons whom they will later be ordered to identify in an identification parade.

The evidence of PW3 regarding the identity of the appellant is not reliable, considering the vital contradictions and omissions regarding the identity of the persons who came to their house. The police could not recover any article from the appellant's possession.

The evidence is insufficient to support the appellant's conviction in the circumstances. I, therefore, set aside the conviction and the sentence imposed on the appellant.

The appellant is acquitted

The appeal is allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal