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

In the matter of an appeal in the terms of Section 331 (1) 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.

Hon. Attorney General.

CA No: CA/HCC/ 281 - 282/2015
HC Colombo: HC 6850/2013

Complainant

Vs

01. Hamsa Nawas Milar
02. Kongahawattage Ravindra Upul Dhammika

Accused

And Now Between

Kongahawattage Ravindra Upul Dhammika

Accused - Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Harendra Perera for the 02nd Accused-Appellant

Rajindra Jayaratne SC for the Complainant-Respondent

Written Submissions: By the Accused-Appellant on 28.11.2017

By the Complainant-Respondent 12.11.2018

Argued on : 26.01.2022

Decided on : **25.02.2022**

N. Bandula Karunarathna J.

The accused-appellants (hereinafter referred to as the appellants) were indicted before the High Court of Colombo for robbery on or about 03.09.2006 at Borella, an offence punishable under the section, 380 of the Penal Code read with section 32.

The trial against the appellants was commenced before the High Court Judge of Colombo on 04.09.2014 and at the conclusion of the said trial, the learned High Court Judge had convicted the appellants and sentenced each of them on 30.04.2015 to 4 years rigorous imprisonment and a fine of Rs. 5,000/- with a default term of 3 months jail. Being dissatisfied with the said conviction and sentence, the accused-appellants had preferred this appeal to the Court of Appeal seeking to set aside the conviction and sentence imposed upon them.

The 1st and the 02nd accused-appellants were released on bail and the 1st accused-appellant was absconding thereafter. The Learned Counsel for the 1st accused-appellant informed this court on 02.07.2018 that he has no instructions from the 1st accused-appellant and he wants to relinquish from this case. The Learned Counsel who filed the appeal on behalf of the accused-appellant V. Govinnage AAL was present in court on 19.09.2018 and informed this court that he has no instruction from the 1st accused-appellant.

On 03.08.2017 this court issued notice on the 1st accused-appellant through the SSP who is in-charge of Borella Police Station and it was reported back on 25.09.2017 indicating that the 1st accused-appellant, Hamsa Nawaz Milar's whereabouts are not known. The previous addresses where he was residing earlier namely, house number 167/88, Wickramasinghepura, Baththaramulla and house number 19/4A, IDH Road, Salamulla, Kolonnawa were searched and investigated by the officers from the relevant Police Stations and found that the 1st accused-appellant is not residing in those addresses anymore. It was reported by the SSP Nugegoda in his letter dated 25.09.2017 that his mother and his aunt who were the sureties for 1st accused-appellant and signed the bail bond on his behalf were residing in the above-mentioned addresses respectively.

This court issued notice to the 1st accused-appellant to the address in the original High Court case record on 14.11.2018. The notice was returned with the endorsement saying that "the 1st accused-appellant had left the said address sometime back and his whereabouts were unknown". Accordingly, it was revealed that the 1st accused-appellant is absconding and he has no interest in this appeal. There was no representation on behalf of the 1st accused-appellant and therefore no written submission was filed on behalf of the 1st accused-appellant.

The 02nd accused-appellant was released on bail and right throughout he was represented by a Learned Counsel. The written submission was filed on behalf of the 02nd accused-appellant and the appeal was argued on his behalf on 26.01.2022.

The indictment was read to the accused-appellants on 04.09.2014, they pleaded not guilty and the trial proceeded against them. The prosecution led the evidence of the complainant Gayan Indika (PW 1), Police Constable Don Nimal (PW2), Police Inspector Gamini (PW3), Police Sergeant Tikiri Bandara Ratnayake (PW13) and the Court Mudliyar. Upon the conclusion of the case for the prosecution, an application was made by the defence counsel in terms of Section 200 of the Criminal

Procedure code but the High Court Judge being satisfied with the evidence led before him called for the defence.

The accused-appellants made statements from the dock. On 30.04.2015 the learned high court Judge convicted the accused-appellants to the indictment and sentenced the accused-appellants in the following manner;

(i) 4 Years Rigorous Imprisonment
(ii) A fine of Rs. 5,000/- with a default term of 3 months.

Being aggrieved by the said judgement the accused-appellants have filed this appeal.

The main witness for the prosecution was PW 1. It was his shop that the accused-appellants are alleged to have robbed. During his testimony identified the two accused-appellants as the robbers. He stated that the accused-appellants took his money, grabbed his chain and other things that he could take from the shop. He also stated that he identified the accused persons at the identification parade.

During the cross-examination, it has been suggested that he saw the accused-appellants at the Police station. Having admitted that he saw the Accused at the Police station he clearly stated that there were other men in the cell and the police only wanted him to see if only the robbers were there and then when he saw the accused persons, he informed the Police that they were there.

This witness has further stated that he remembered the two accused persons after the robbery and that is how he identified them. He denied that the identification was done under the influence of the Police. PW 1 stated that his shop was well lit at the time of the robbery. He also stated that the two accused-appellants spent a considerable time in his shop. The accused persons were arrested in less than a month. As such, this witness may not have had any difficulty in identifying the accused at the police and the parade.

It is important to note that the defence has not objected to the ID parade notes being marked through the Mudliyar without calling the Magistrate. The accused-appellants in their submissions raised that no fingerprints were found at the scene the absence of fingerprints does not necessarily mean that the accused did not commit the offence. It only shows that they had been very careful not to leave any prints when committing the offence.

The key issue raised by the accused-appellants is the identification of the accused-appellants by PW 1, as demonstrated by the aforementioned facts PW 1's identification is valid and plausible. There were no fingerprints of the appellants in the place that is said that a robbery took place and the only evidence that connects the appellant is that the victim or PW1 recognized the appellants at the time of the incident.

Pages **80** and **81** of the appeal brief is as follows;

ප්‍ර :මේ සිද්ධියෙන් පසුව, සාක්ෂිකරු හඳුනාගැනීමේ පෙරෙට්ටුවකට සහභාගි උනාද?

උ :එහෙමයි.

ප්‍ර :මෙම හඳුනාගැනිමේ පෙරෙට්ටුවේද, සාක්ෂිකරු විසින් මෙම විත්තිකරුවන් හඳුනාගත්තේ කුමන හේතුවක් මතද?

උ :මගේ මතකේ හැටියට එම සිද්ධිය වෙන වෙලාවේදී මේ අය හිටිය හින්ද හඳුනාගත්තා. ෂොප් එකට ආපු වෙලාවේ මම ඒ දෙන්නාම දැක්කා. නමුත් මට පැහැදිලිවම කියන්න බැහැ මේ විදිහේ කෙනෙක් කියලා. මීට කලින් නොදැක්ක නිසා හිතේ නොසිටි නිසා. ඒ වුනාට දැක්කහම මට මතක් වුනා. එතකොටයි මම හඳුනා ගත්තේ මේ දෙන්නා කියලා.

ප්‍ර :සාක්ෂිකරු, හඳුනාගැනීමේ පෙරෙට්ටුවේදි තමුන් මේ පුද්ගලයින් හඳුනාගත්තේ පොලිසියේ බලපෑම මතද?

උ :පොලීසිය මට කිසිම බලපෑමක් කලේ නැහැ. පොලීසිය ඇවිල්ලා කිව්වා මේ වගේ කට්ටියක් අල්ලගෙන ඇවිල්ලා ඉන්නවා කියලා. මට කිව්වා අර කට්ටියත් ඉන්නවාද බලන්න කියලා. මම ගිහිල්ලා බලලා කිව්වා ඉන්නවා කියලා. හුඟ දෙනෙක් එදින කූඩුවේ හිටියා.

ප්‍ර :සාක්ෂිකරු හඳුනාගැනීමේ පෙරෙට්ටුවේදි, තමුන් මෙම පුද්ගලයන් හඳුනාගත්තේ මොන පදනමක් යටතේද?

උ :ඒ වෙලාවේ, සිද්ධිය වුන වෙලාවේ ආපු පුද්ගලයින් දෙදෙනා මතකේ තිබෙනවා.

The Learned Counsel for the 2nd accused-appellant argued that the learned trial Judge has misdirected herself by wrongly applying the decided case of AG vs. Joseph Aloysious and another 1992 (2) SLR 264. The said judgment does not permit or allow the investigation officers to show a suspect to a victim before the identification parade who are intended to go before an identification parade.

It was held in the above-mentioned case that the identity of the accused, as a person who committed the offence, is a fact in issue at a criminal trial and evidence as to the identification of the accused by a witness, is relevant and admissible.

The first statutory provision regarding the holding of identification parades were contained in section 74(1) of the Administration of Justice Law No. 44 of 1973. This, provision was reproduced verbatim in the Code of Criminal Procedure Act No. 15 of 1979, as section 124. But even without specific statutory provisions authorising such procedure, identification parades were held as a step in the process of investigation.

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.

It was decided in Perera v. The State 77 NLR 224;

> "The Magistrate made an order that an identification parade is held on 9.10.1969 in the Court premises of Maligakande. He made an order that precautions should be taken to ensure that the suspects who were to be placed in the parade should not be seen earlier "by the identifying witnesses. His order was that the suspects be brought to Court in a closed van under escort. He was not sure whether that order took in the other officers who were not suspects at that time, but who were on duty and off duty on the relevant date between 6 p.m. and midnight. So that, we do not know with certainty how the latter category of prison officers came to Court, but certainly, it is clear from the evidence that all these prison officials who were not suspects were kept outside the Magistrate's Court premises in a closed van; but that was a place different to where the 11 suspects

were kept in a closed van. When the parade commenced, 53 of the prison officials and 23 persons from the public were all lined up in the well of the Court, and witnesses were called up one by one to point out the various persons who committed various acts of assault on the deceased."

"In considering the manner in which this identification parade was held, the primary matter that strikes one is with 53 prison officers in the parade and only 23 persons from the public, whether the parade was properly constituted. The Manual for Judicial Officers which was printed at the Ceylon Government Press in 1939, at page 33 thereof lays down certain guidelines to Magistrates who hold parades of this type".

"At page 33, Section 165 (b) "The suspect shall never be presented to the witnesses alone. He shall be placed in a line consisting of five or more persons of the same class as himself and be given an opportunity of taking any position he likes in the line."

"The witnesses shall be presented singly and requested to examine the line and state whether the man or men they identified are there."

"Nowhere in the Criminal Procedure Code (which has since been repealed by the Administration of Justice Law No. 44 of 1973) is there any principle which applies to the holding of identification parades? Archbold on Criminal Pleading, Evidence & Practice, 38th Edition, Chapter 15, page 853, refers to a Home Office circular No. 9/1969 and states " the object of an identification parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested, identification parades should be fair and should be seen to be fair. Every precaution should be taken to see that they are so, and, in particular, to exclude any suspicion of unfairness or risk of erroneous identification through the witness's attention is directed especially to the suspected person instead of equally to all the persons paraded."

"The suspect should be placed among persons (if practicable 8 or more)."

"Occasionally all members of a group are possible suspects. This may happen where police officers are involved (e.g., an allegation concerning a police officer which can be narrowed down to many officers who were on duty at the time and place in question.) In such circumstances, an identification parade should not include more than two of the possible suspects; e.g., if there were 12 police officers on duty at the time and place in question, there should be at least six parades, each including ten officers who were not implicated and not more than two who might have been; twelve possible suspects should not be paraded together."

"The Home Office circular No. 9/1969 had been prepared on the basis of a memorandum by the Chief Officer of the Metropolitan Police in consultation with the Lord Chief Justice (Vide 6th Supplement to the 37th Edition of Archbold on Pleadings, paragraph 1009)."

"That paragraph also refers to the undesirability of inviting witnesses to identify accused persons for the first time when they are in the dock-(Rex v. Hunter [1 (1969) Criminal Law Review 262.] (1969) Criminal Law Review 262, which was a decision of the Court of Criminal Appeal, and Rex v. Howick [*1 (1970) Criminal Law Review 403.*] (1970), Criminal Law Review 403.) The latter case which was decided by the Court of Appeal Criminal Division, held: "It is usually unfair to ask a witness to make an identification for the first time in Court because it is so easy for the witness to point to the defendant in the dock."

"Although the 53 prison officers were not all suspects at that time still it is evident that the ratio of one outsider to two prison officers was inappropriate and unfair. The chances of a member of the public being pointed out were just 1 to 2. The situation looks more unfair when one sees that the identifying witnesses were persons who met the prisoners day in and day out, and if anyone of these

witnesses had a grudge against any prison officer, he could well have pointed out that officer as having committed some act of assault."

"It is relevant at this stage to consider the procedure that was adopted by the Magistrate who held the parade. As I said before, 53 prison officers and 23 members of the public were lined up in a row in the well of the Court."

It was held in Dana Yadav v. the State of Bihar, (2002) 7 SCC 295, evidence of Identification Parade is not substantive evidence whereas evidence given in the court, is. However, when a witness correctly identified the accused at the parade but not in court the evidence of the Magistrate, who conducted the parade that the witness correctly identified the accused at the parade, supported by the remarks of the trial Judge regarding the demeanour of the witness that he was frightened and was unable to recognise the accused at the trial, was sufficient to convict the accused.

In the case of R. Shaji v. the State of Kerala, (2013) 14 SCC 266, it was held that it is pertinent to note that the holding of Identification parade is not compulsory. Where the witnesses were well acquainted with the accused and the incident was also widely covered by media, it was held that the non-holding of the identification parade was not fatal to the prosecution case.

As to when an identification parade may be necessary was explained by the Supreme Court of India in Jadunath Singh v. the State of U.P. (1970) 3 SCC 518 that " Of course, if the prosecution fails to hold an identification parade on the plea that the witnesses already knew the accused well and it transpires in the court of trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case. It seems to us that if there is any doubt in the matter, the prosecution should hold an identification parade".

In Rajesh Govind Jagesha vs the State of Maharashtra (1999) 8 SCC 428, where identification parade was held after an inordinate delay of about five weeks from the arrest of the accused, the explanation for the delay was not trustworthy. Plea as to the non-availability of a Magistrate in a city like Bombay though the investigating agency was not obliged to get the parade conducted from a specified Magistrate, was not accepted. It was held that the accused was entitled to benefit of the doubt.

Thus, the identification parades belong to the stage of the investigation, and there is no provision in the Code of Criminal Procedure that obliges the investigating agency to hold, or confers a right upon the accused to claim a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Indian Code of Criminal Procedure. Failure to hold an identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact and it was held in the case of Malkhan Singh v. the State of M.P., (2003) 5 SCC 746.

In the present case, PW 1 testified that the appellants were shown to him in the police station before the identification parade was held. The police officer who testified tried to hide the fact that the police showed the appellants to PW 1 inside the police station. The learned counsel for the 2nd accused-appellant says that the state has not proved its case beyond a reasonable doubt. The only evidence to connect the appellant with the offence he is accused of is the identification and the said identification cannot be relied upon.

Pages 58**,** **59** and **60** of the appeal brief is as follows;

ප්‍ර :සාක්ෂිකරුට මෙම සිද්ධියට පැමිණි පුද්ගලයන් හොඳට හඳුනාගන්න පුළුවන් කියා ප්‍රකාශ කලා නේද?

උ :එහෙමයි.

ප්‍ර :මෙම සිද්ධියට පැමිණි පුද්ගලයන් මොන වගේද?

උ :එක්කෙනෙක් කෙට්ටුයි. එක්කෙනෙක් මහතයි. කොණ්ඩය ක්‍රේල්. කෙට්ටු එක්කෙනාගෙ චුට්ටක් මූණ ඇතුලට ගිහින් වගේ.

ප්‍ර :මෙම පුද්ගලයන් නැවත දුටුවොත් හඳුනාගන්න පුළුවන්ද?

උ :එහෙමයි.

ප්‍ර :මෙම පුද්ගලයින් දෙදෙනා අද දින ගරු අධිකරණයේ සිටිනවාද ?

උ :එහෙමයි.

ප්‍ර :ඔවුන් පෙන්වන්න ?

උ :1 වන සහ 2 විත්තිකරුවන්. (සාක්ෂිකරු 1, 2 චූදිතයන් හඳුනා ගනී.)

ප්‍ර :සාක්ෂිකරු මුලින් ප්‍රකාශ කළා නේද මෙම පුද්ගලයන් හඳුනා ගත්තා, මෙම පුද්ගලයන් අධිකරණයේ ඉන්න බව?

උ :එහෙමයි.

ප්‍ර :විත්ති කූඩුවේ පලවෙනියට ඉන්න පුද්ගලයා එදින මොනවද කළේ ?

උ :ඔහු තමයි පළමුව ව්‍යාපාර ස්ථානයට පැමිණ කාඩ් පතක් ඉල්ලා සිටියේ. පස්සෙ ඔහු තව කෙනෙකුට කතා කළා.

ප්‍ර :ඉන්පසුව ?

උ :ඉන්පසුව දෙදෙනාම ව්‍යාපාර ස්ථානයට ඇතුල් වුනා. ඔවුන් දෙදෙනාම කැෂියර් මේසය ලඟට ආවා.

ප්‍ර :දෙදෙනාම කියන්නේ සාක්ෂිකරු හඳුනා ගත්තද, දෙවෙනියට ඉන්න පුද්ගලයා ?

උ :1 වෙනි සහ 2 වෙනි විත්තිකරුවන්. 1 වෙනි විත්තිකරු තමයි 2 වෙනි විත්තිකරුට කතා කළේ. 1 වෙනි විත්තිකරු තමයි පළමුව ව්‍යාපාරික ස්ථානයට පැමිණියේ. ඔහු තමයි 2 වෙනි විත්තිකරුට කතා කළේ.

ප්‍ර :2 වෙනි විත්තිකරු අද දින හඳුනා ගත්තා. ඔහු එදින කරපු ක්‍රියාව මොකක්ද?

උ :එයා මුදල් එක්රැස් කළා. මගේ මාලය කඩා ගත්තා. එම ස්ථානයේ තිබුනු ගන්න පුළුවන් දේවල් ඔහු ගත්තා.

ප්‍ර :සාක්ෂිකරු මුලින් ප්‍රකාශ කළා නේද යම්කිසි පුද්ගලයෙක් තමාට බඩට පිස්තෝලයක් දික් කළා කියලා?

උ :එහෙමයි.

ප්‍ර :ඒ මෙම විත්ති කූඩුවේ සිටින කුමන පුද්ගලයාද ?

උ :1 වෙනි විත්තිකරු.

ප්‍ර :සාක්ෂිකරු, ඉන්පසුව හඳුනා ගැනීමේ පෙරෙට්ටුවට ඉදිරිපත් වුනා නේද?

උ :එහෙමයි.

ප්‍ර :එහිදී මෙම විත්ති කුඩුවේ ඉන්න පුද්ගලයින් හඳුනා ගත්තාද ?

උ :එහෙමයි.

Identification of the accused made in court, is substantive evidence, whereas identification of the accused in identification parade is through primary evidence but not substantive and the same can be used only to corroborate the identification of the accused by the witness in court.

Considering the evidence mentioned above, it can be concluded with certainty that the complainant identified the two accused-appellants inside the shop at the time of the robbery. Therefore, there can be no doubt about the identification of two accused-appellants considering the above-mentioned authorities. I am satisfied that the prosecution has proved this case beyond a reasonable doubt.

In my view, there is overwhelming evidence in this case of the presence of the first and second accused-appellants at the scene of the crime during the time of the robbery.

For all these reasons the conviction of the two appellants is affirmed. Having regard to the facts and legal principles involved in the present matter in question, this appeal has failed to hold any merit. Thus, the conviction and the sentence should stand and therefore is affirmed.

Appeal dismissed.

Registrar is directed to send a copy of this judgement along with the original case record to the High Court of Colombo forthwith.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal