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

In the matter of an Appeal under section 331 of the Criminal Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka.

Plaintiff

Court of Appeal Case No: **CA / HCC / 0051 / 0052 / 2016**

High Court of Rathnapura Case No: **HCR / 10 /2007**

Vs.

1. Prabu Kotalawala

1st Accused Appellant

Ratnayake Mudiyanselage Nayanananda Ratnayake.

2nd Accused Appellant

AND

Ratnayake Mudiyanselage Nayanananda Ratnayake.

2nd Accused Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Plaintiff – Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Palitha Fernando, P.C. for the 01st Accused – Appellant.

Neranjan Jayasinghe for the 2nd Accused – Appellant.

Azard Navavi, D.S.G. for the State.

Argued on: 30.03.2023

Decided on: 17.05.2023

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 11.2.2016 of the High Court of Rathnapura.

The accused Appellants (hereinafter referred to as the appellants) were indicted for committing murder on 12.7.1999 and upon the conclusion of the trial they had been convicted and sentenced for the offence of murder.

The prosecution had led the evidence of three lay witnesses the doctor and the evidence of the investigative officers.

When the defense was called the appellants had made statements from the dock.

The main grounds of appeal of the two appellants had been,

1) the evidence of the identification parade should never have been placed before Court,

2) the trial judge erroneously seeking corroboration from the police statement,

3) conclusion of the trial judge against the norms of the evidence ordinance.

According to the version of the deceased wife namely Mallika Kulathunga who says that the deceased had been a gem dealer, on the day of the incident the deceased had been watching television with the two elder children when two people had come to the house in a motor bicycle and she had identified them to be the tall and the short man and the tall man had given a letter to the hand of the deceased and had squeezed the mouth of the deceased and the children had started to shout and the short man who had been a little away had shot at the deceased. Then the deceased had been stabbed by the tall man.

She had identified the appellants in the dock and had said that she had identified them at the identification parade which had been held one year after the incident.

The incident had taken place at around 7 30 in the night and she had claimed that there was enough illumination inside the house.

The assailants have claimed before leaving that they did it on the instruction of one Gunasekera and the wife said that the said Gunasekera has had a grudge with the deceased.

Two omissions and one contradiction had been brought to the notice of Court in her evidence which this Court is of the opinion has not gone to the root of the case, as per the cases so far decided.

But it had been suggested to her that she had not seen the incident which she had denied and furthermore she had said that there were several other people who also had been taken into custody in the Magistrate Court.

According to the evidence of Kalyani Katunga who had been in the deceased house and who is the sister of the previous witness had seen the tall man stabbing the deceased and she had identified him in the parade and in the dock.

The other assailant had been near the cycle when she had come out of the house after seeing the stabbing of the deceased.

It had been suggested to her in cross examination that she is lying and furthermore that she had failed to state to police that in the morning of the day of the incident she had seen the short assailant going in front of their house in a suspicious manner.

The brother of the deceased had informed the matter to the police. The investigative officers had given evidence and upon the conclusion of the case for the prosecution the defense had been called and both the appellants had made statements from the dock in which they had pleaded ignorance of the incident and had denied totally the identification at the parade.

The trial judge in her evaluation of the evidence had basically reproduced the evidence led by the prosecution and had said that she relies on the evidence of the identification parade in spite of the absence of the notes pertaining to the parade and had concluded that in the light of the cogent evidence led by the prosecution the defense had not placed an acceptable version to Court and had moved to convict the appellants.

But we observe that to arrive at this decision she had sought corroboration from the statements made to the police by the witnesses and furthermore had failed to consider the omissions and the contradictions in the evidence of the prosecution.

One of the main grounds of appeal is that the prosecution failed to produce the identification parade notes as evidence during the trial. The prosecution had led the evidence of the acting Magistrate who had conducted the raid but she had given evidence

after 15 years and she too had misplaced her personal notes and thereby she had given evidence by memory. Hence the Counsel for the appellants raised the position that she had no note to refresh her memory and that she had conducted about 40 parades and that she had been unable to remember details of the said parades but remembers the details pertaining to the instant parade which is very unusual.

Hence this Court observes that the prosecution had failed to provide before Court as to how the parade had been held, the number of objections that may have been taken on behalf of the appellants , the formations of the parade and how the witnesses and the appellants were brought in to the parade.

At this juncture this Court draws its attention to the case of Attorney General Vs Joseph Alloysius and other1992 2 SriLR 264 where S.N. Silva J had stated with regard to identification parade notes that

"In the case of Perera V. The State (supra) as noted above, the questions had references to the appearance and physical characteristics of the suspects. Therefore, we are of the view that the observation of walgampaya, J. as to the "Proper Procedure" to be adopted at an identification parade should be understood only in the context of the objectionable features as noted in that case. Indeed, the procedure as stated by walgampiaya J. that a witness should only be asked to identify any suspect if he is in the parade, is with due respect, one that may lead to practical difficulties in many cases. Where several persons are alleged to have committed an offence, if a witness is merely asked "to identify any suspect" he would be confused and would not know what he is expected to do at the parade. His attention must necessarily be drawn to the acts done by the different participants, in the course of committing the offence, so as to facilitate a proper identification. However, at all times caution should be taken to ensure that the question do not contain any indication of the appearance or physical characteristics of a particular participant so as to facilitate an identification.

For the reasons stated above, we hold, that the identity of the accused as the person who committed the offence is a fact in issue in a criminal case and evidence of identification is relevant and admissible in the absence of any statuary provision excluding such evidence. The rules contained in the Manual for Judicial Officers and the "Proper procedure" stated by Walagampaya,J. in the case of Perera V. The State (Supra) are guidelines to ensure that an identification parade is held in a manner that is fair to the suspect and that a witness does not have any aid or assistance as to identification other than his recollection of the appearance and physical characteristics of the person. Whose acts or presence is at issue, to identify the suspect. It would not be objectionable to request a witness at a parade, to identify any person, with reference to the acts or presence, of the persons who participated in the commission of the offence. However, in addressing such a request or question to a witness, reference should not be made to the appearance or physical characteristics of any particular participant, as would facilitate his identification at the parade. Where an objection is taken to evidence of identification that is otherwise relevant and admissible the Court has to consider not only weather there is a breach of what is generally observed as the proper procedure but also the extent to which such breach has impaired the fairness of the proceedings.

Such evidence of identification may be excluded only if the court finds that its admission would have an adverse effect on the fairness of the proceedings."

The acting Magistrate when giving evidence about the identification parade had reiterated that she remembered the details of the parade well because of the anteriority of the incident in the area and the suspects produced at the parade had been seen by her during her legal practice in the area, but she had been unable to remember the details of the other parades she had conducted.

But we note that she had given evidence entirely based on her memory and not by reading a single note she had kept, therefore the question arises whether she had been speaking

on information collected from the area because it had been a well-known incident in the area. As such this Court is of the view that it is unsafe to accept her evidence with regard to the identification parade.

The police officer who assisted in producing the suspects at the parade had given evidence but he is not in a position to speak with regard to the details as to the acceptability of the parade.

If the identification parade notes are done away with the identification of the appellants are solely based on the dock identification of the appellants by the witnesses.

At this point we draw our attention to the judgment of his Lordship the Chief Justice ,Jayasuriya J where it has been held in the case of SC (spl)Appeal 7/2018 dated 4.10.2019 that "to establish the identity of an accused it is not mandatory that the witnesses should have known him by his name or otherwise, prior to the incident, even in a situation where a witness had seen a person at an incident for the first time , his evidence in Court identifying the accused in the dock for the first time should not be rejected merely because the witness had neither seen him before nor had known him by the name.....A dock identification is a valid form of identification. However, time and again Courts have considered the dangers in dock identification".

The judgment had referred the E.R.S.R.Coomarswamy in Law of evidence where it has discussed that dock identification is "undesirable and unsafe and should be avoided if possible".

The above quoted judgement had further held to say that what really matters is the quality of the evidence and the visual identification of the accused by the witnesses becomes a relevant fact under section 9 of the Evidence Ordinance.

In the instant matter we note that as this Court has decided to disregard the evidence at the parade the only other form of evidence left is the identification of the witnesses in Court of the appellants.

We observe that the witnesses have said that the appellants were not known to them by name but the sister of the deceased persons wife's had said that she had seen the short person who had come to their house had been seen going on a motor bike passing their house the previous day. But this position she had failed to state to the police, and this position the learned trial judge had failed to consider.

The deceased person's wife had said that the entire incident had taken place within a matter of few seconds hence the question arises whether she had ample time to make definite identification of the appellants especially in view of the immense trauma seeing her husband being stabbed and shot in the presence of her children. Hence actually the deceased persons wife had to identify the assailants while tackling her own shock and grief and naturally being concerned for the safety of her young children. Therefore, her dock identification is in the opinion of this Court is unsafe to act although the learned trial judge had failed to consider the same. At this point we refer to the important paragraph in the above quoted judgment by **Jayasuriya CJ where** he had said about dock identification as being "**facts leading to assess the quality of evidence of visual identification are important facts a Court needs to take in to account in deciding the identity of the accused. What matters is the quality of the evidence. In such a situation the evidence of the witnesses should demonstrate that there was sufficient opportunity for the witnesses to have seen the person the concerned at the time of the incident and thereafter had the ability to identify the person concerned during his testimony in Court. Factors such as the duration of the interaction between the witness and the suspect distance between them and the nature of the light under which the witnesses observed,"**

The judgement further refers to the special conditions that may have prevailed at the time of the identification which may have affected the identification which can have a bearing on the dock identification.

As such as mentioned above this Court disregarded the evidence of the identification parade for the reasons stated above what this Court has to consider is whether the dock identification of the witnesses is sufficient to prove the allegations levelled against the appellants. But as already discussed above the mentally daunting experience of the deceased's wife had to undergo during the incident, that is having to witness her husband being killed while having the security of her young children in mind and with the incident taking place within a matter of a seconds makes it extremely unsafe to accept her evidence against the appellants for the first time in the dock.

The other witness is the sister of the deceased wife who had in fact had walked in to the scene at the noise of the shooting also had identified the appellants for the first time in the dock as the evidence of the parade has already been disregarded , also is unsafe to act for the reasons sated above.

Therefore, we observe that the learned trial judge had failed to consider all these aspects but had decided that the prosecution had led very cogent evidence without observing the above mentioned matters. Hence it would have been better if the trial judge had been guided by law and facts rather than emotions and sympathy which we all like to practice but not while on the bench.

As such we allow the instant appeal and set aside the conviction and the sentence of the appellants.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.