

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

1. A. A. Kamal Nishantha
2. A. Nandana Chandrakumara

**ACCUSED-APPELLANT**

C.A. No. 96/2010

H.C. Anuradhapura 149/2004

Vs.

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

**COMPLAINANT-RESPONDENT**

**BEFORE:** Anil Gooneratne J. &  
P. R. Walgama J.

**COUNSEL:** Suranga Bandara for the Accused-Appellants  
Anoopa de Silva S.S.C., for the Complainant-Respondent

**ARGUED ON:** 10.11.2014 & 27.11.2014

**DECIDED ON:** 05.12.2014

**GOONERATNE J.**

The two Accused-Appellants were indicted in the High Court of Anuradhapura on a charge of attempt to commit robbery of a van bearing No. 251-5680 which was in the possession of one Jayasinghe Arachchilage Luxman Shantha kumara by the use of a deadly weapon on or about 01.01.1999, an offence punishable under Section 384 read with Section 32 of the Penal Code. Both Accused-Appellants were convicted and sentenced to 20 years rigorous imprisonment, and a fine of Rs. 50,000/= was imposed which carries a default sentence of 5 years rigorous imprisonment. We heard submissions of both counsel on either side. The following facts are not in dispute.

On the day of the incident the complainant named in the indictment was in a vehicle park awaiting hires. The two Accused-Appellants approached the complainant and wanted to hire the above van being No. 251-5680 to proceed to Habarana from Polonnaruwa. A fee of Rs. 800/= was agreed and they proceeded on the Polonnaruwa-Habarana road. The 1<sup>st</sup> Accused was seated in the rear seat and the 2<sup>nd</sup> Accused in the front seat with the complainant driver. Closer to the Minneriya jungle the 1<sup>st</sup> Accused told the

complainant driver to stop the vehicle as he had to answer a call of nature. However the complainant fell suspicion about such request and proceeded. A little while later the 1<sup>st</sup> Accused from behind held the complainant driver by the neck and the 2<sup>nd</sup> Accused showed a knife and threatened the complainant, who stopped the vehicle and got down. Thereafter a there was a scuffle between the parties and the Accused party attempted to drag the complainant to the nearby jungle, when another bus was seen on the main road and the complainant had raised cries. As a result the bus stopped and the crowd in the bus came to his assistance. At that moment the Accused party fled the scene of the crime.

In the submission of both learned Senior State Counsel and the learned counsel for the two Accused-Appellant the following matters were highlighted.

- (a) The identification parade held 5 months after the incident.
- (b) Prior to the above parade the police had shown the two Accused-Appellants to the complainant.
- (c) In view of (a) & (b) above both learned counsel agree that the identification parade is flawed.
- (d) The learned trial Judge rejected the position of the identification parade but relied upon a dock identification to convict the Accused party.

- (e) Dock identification, was at the trial which had been held 10 years after the date of incident (1.1.1999).
- (f) It is unsafe to rely on a dock identification after a lapse of so many years and after a flawed identification parade.
- (g) Trial Judge who heard the evidence did not write the Judgment. The trial Judge who wrote the judgment had not adopted the proceedings and merely continued with the trial held before her predecessor or in office.

This court observes that in view of (a) to (g) above and having perused the evidence led in this case, we are of the view that the conviction against the two Appellants cannot be permitted to stand. The identity of Accused person are highly doubtful and suspicious. Further there is a clear breach of Section 48 of the Judicature Act.

Whatever the provisions contained in Section 48 of the Judicature Act, an Accused party is entitled to a fair hearing. Even if no application was made for a fresh trial or to recall some witnesses by the Accused-Appellant, when a Judge is on a transfer order or is unable to perform due to the reasons contained in Section 48 of the Judicature Act, the succeeding trial Judge is under an obligation and duty to adopt the proceedings and proceed with the trial, having ascertained from either party. If proceedings are not adopted it would be a basic violation of a fundamental right of the Accused party.

In these circumstances there is no purpose in sending the case for a trial de nova. In any event identity being in doubt and identified under suspicious circumstances it is unsafe to convict and as such we proceed to set aside the conviction and sentence. As at today over 15 years have lapsed from the date of incident. The two Accused-Appellants are serving a term of imprisonment since the year 2010. We quash the conviction and sentence, and acquit both Accused-Appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P. R. Walgama J.

I agree.

JUDGE OF THE COURT OF APPEAL