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

In the matter of an appeal against the Order of the High Court under sec.331 Of the Code of Criminal Procedure Act N0.15 of 1979 as amended.

H.M.Sujith Kithsiri

Accused-Appellant

C.A.Case No:- 94/2013

H.C.Matara Case No:-69/2007

V.

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

Respondent

Before:- H.N.J.Perera, J &

K.K.Wickremasinghe, J.

Counsel:- Dr.Ranjith Fernando for the Accused-Appellant

Rohantha Abeysuriya D.S.G.for the Respondent

Argued On:-17.03.2015

Written Submissions:-06.05.2015

Decided On:-19.06.2015

H.N.J.Perera, J.

The accused-appellant was indicted before the High Court of Matara for committing robbery of cash Rs.75,000/-and cigarettes valued at Rs. 14,560/-from the possession of Munidasa Thabrew on or about the 14th January 2003 with unknown persons whilst being armed, an offence punishable under section 383 read with section 32 of the Penal Code.

After trial the learned High Court Judge by his judgment dated 25th June 2013 convicted the accused-appellant and sentenced him to a term of 10 years R.I. A fine of Rs.10,000/- and in lieu 6 months R.I. Aggrieved by the said conviction and sentence the accused-appellant had preferred this appeal to this court.

The main contention of the Counsel for the accused-appellant was that the learned trial Judge erred in law by concluding that the identification of the accused-appellant was established beyond reasonable ground on laid down legal criteria.

According to the prosecution this robbery had taken place at a road side boutique around 7.00 p.m on the 14th of January which was a Thaipongal day. The boutique owner witness No. 1 Thabrew, his uncle and employees Thilak and Sarath together with several customers and witness No.4 Ariyawansha had been present at that time. Three persons had arrived on a motor bike. The bike was parked outside the boutique and one had pushed the customers inside and had stood guard outside whilst another robbed the cashiers till and cigarettes. Thereafter all had left. One of them had shot into the air when leaving. According to the prosecution witnesses the whole incident had taken only 5 to 10 minutes.

Two months later the accused-appellant had been arrested and Identification Parade held on 21st March, 2003. Witness No1 Thabrew and witness No.4 Ariyawansha had participated at the Parade where the accused-appellant had been identified.

The witness Thabrew whilst giving evidence in court had admitted the fact that prior to the holding of the Identification Parade in courts on 21st March 2003, the accused-appellant was seen by him at the Hiniduma police station. Therefore the learned trial Judge had quite correctly disregarded the evidence of the said witness regarding the identity of the accused-appellant. But the learned trial Judge had carefully considered the evidence led in this case and had held that the witness Ariyawansha had sufficient time and light to identify the accused-appellant. The learned trial Judge state's that even if the Identification Parade evidence of the accused-appellant is not considered with regard to the identification by witness Thabrew, the charges however have been proved.

It is the contention of the Counsel for the accused-appellant that the learned trial Judge appears to have misdirected himself regarding the infirmity relating to the identification of accused-appellant by witness Ariyawansha and also his failure to make a positive dock identification , and whether it was safe to act on the identification, and whether it was safe to act on the Parade notes relating to witness Ariyawansha which is not substantive evidence and also considering that witness Thabrew had been shown to the accused-appellant. It was the contention of the Counsel for the Respondent that there was positive evidence not only with regard to the identification if the accused-appellant but also clear evidence as to the means of identification established by the prosecution.

In the present case witness Amerawansha did identify the accused-appellant at the parade and in court. On being asked whether he could identify the person who had a knife in his hand and who took money from the cashier's till. Amerawansha first said, in his evidence that he was not certain and the accused looked fat now but proceeded to identify the accused-appellant immediately thereafter. Counsel for accused-appellant contented that in view of the above evidence Amerawansha's evidence could not be accepted beyond reasonable doubt and that the learned trial Judge should not have acted on this evidence. In reply, the learned D.S.G contended that the evidence of this witness should be considered in wider context by leaving a reasonable allowance to a possible fade of memory when testifying 11 years after the incident.

The learned Counsel for the accused-appellant further submitted that it is not safe to act on the Identification Parade notes relating to witness Amerawansha which is not substantive evidence.

In Regina V. Obsourue QB 678, both witnesses attended the parades and identified the defendants. In her evidence witness Mrs.Brooks said that "she did not remember that she had picked out anyone on the last parade." The other witness Mrs. Head said in the witness box that "the man I picked out, I don't think he is in the dock today." Despite the defence objection the Officer-in Charge of both parades, was permitted to testify and establish the fact that both witnesses identified the defendants at the parade. Court of Appeal held that, "the evidence of the Officer-in-Charge of the Identification parade was admissible, for it did not contradict women's evidence it was of identification other than identification in the witness box, and prosecution was seeking only to establish the fact of identification at the parade." Even though both witnesses failed to identify the defendants in court, the identification of the defendants at the parade by two witnesses were admitted in

evidence. In that case, there was no identification of the accused persons in court, but the Court of Appeal of England affirmed the convictions.

In the instant case the witness Amerawansha had identified the accused-appellant in the witness box after about 11 years. There is also an admission recorded in court on 18.06.2012 under section 320 of the Criminal Procedure Code that the said parades were properly held. And the prosecution had led further evidence to prove that the said witness Amerawansha identified the accused-appellant at the said parade held on 21st March 2003.

In Perera V. The State 77 N.L.R. 224 eleven prison officers of the Welikada prison were suspects in the commission of the offence of causing the death of a prisoner. An identification parade was held with 54 prison officers and 23 persons from the public. Before the three identifying witnesses were questioned, they were reminded by the Magistrate of the contents of the statements made by them. It was held that, 53 prison officers in the parade and only 23 persons from the public, the parade was not properly constituted. It was further held that:-

(1)That the magistrate should have held several parades in conformity with the practice followed in similar circumstances;
(2)To have asked the particular witnesses to identify any suspect if he was in the parade;
(3)If a witness pointed out any person , then only should the Magistrate have asked the witness whether that accused whom he pointed out did anything , and
(4)If so, details of what he did.

In that case the court was of the view that the Magistrate used the statement made by various witnesses to him and ask them to point out the various persons who did various acts, he was in effect refreshing the memory of those witnesses. The court held that the procedure adopted

by the Magistrate was unfair by the accused-appellants who were tried for murder.

But in the instant case the Magistrate had simply asked the witnesses to point out and identify any person who participated at the robbery and to state as to what he did. The said witness Amerawansha had pointed out the accused and stated that he is the person who cut the phone wires and took the cash from the cashier's till and who sent him towards the weighing scale left after firing a gun shot towards the sky.

In the instant case the evidence clearly shows that on the date of the incident took place the owner of the boutique conducted business as usual. The evidence led in this case clearly indicate apart from the two witnesses who gave evidence in this case that there were several other customers who had come to do business in the said boutique. The evidence indicate that the said witness Thabrew had enough light to conduct business with his customers and he would not have conducted business in the dark and that he and the other witness Amerawansha had ample light and time to recognize the accused-appellant. The identification parade had been held after four months and the witness Amerawansha had clearly identified the accused-appellant as the person who cut the telephone wires and who took money from the cashier's till and as the person who sent him towards the weighing scale and fled after firing a gun shot in to the air.

Our law does not require the prosecution to call a number of witnesses to prove a case against an accused. Evidence given by one witness is sufficient. It is the quality of the evidence given by the said witness that matters. Thus the court could have acted on the evidence of the witness Amerawansha provided the trial Judge was convinced that he was giving cogent, inspiring and truthful testimony in court. The learned trial Judge had considered the entirety of the evidence that has been led before him

and has carefully considered whether the two omissions marked were material and had held that they are too trivial to effect the credibility of the witness Amerawansha's evidence.

In King V. Musthapha Lebbe 44 N.L.R 505 Court of Criminal Appeal held that:-

"The court of Criminal Appeal will not interfere with the verdict of a Jury unless it has a real doubt as to the guilt of the accused or is of the opinion that on the whole it is safer that the conviction should not be allowed to stand."

For the above reasons, I refuse to interfere with the judgment of the learned trial Judge and affirm the conviction and the sentence. I dismiss the appeal.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL