

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

**In the matter of an Appeal in terms of
Section 320 of the Code of Criminal
Procedure Act No. 16 of 1979.**

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

Court of Appeal
Case No. CA HCC 0086/2016

Complainant

Vs.

High Court of Anuradhapura
Case No. HC/0133/2008

1. Sawsiri Gedera Nishantha,
Samanala Palama,
Suriyapura,
Bingiriya.
2. Thendalu Mudiyanseelage Ajith Sisira
Kumara,
Ruwan Eliya,
Thisogama,
Bingiriya.
3. Marasinghe Pedige Kapila
Sudharshana,
Thimbiriwewa,
Bingiriya.
4. Herath Mudiyanseelage Abeysinghe,
Malpanawa,
Monnekulama.
5. Pawaram Pedige Upasena,
Gallidawatte,
Yatigammana,
Menikdiwela.
6. Hitibandaralage Abeyratne
Hitibandara,
Ratmale,
Nagollagama.

Accused

AND NOW BETWEEN

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

Complainant-Appellant

Vs.

1. Sawsiri Gedera Nishantha,
Samanala Palama,
Suriyapura,
Bingiriya.
2. Thendalu Mudiyanseelage Ajith Sisira
Kumara,
Ruwan Eliya,
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Yatigammana,
Menikdiwela.
6. Hitibandaralage Abeyratne
Hitibandara,
Ratmale,
Nagollagama.

Accused-Respondents

Before: **Amal Ranaraja, J.**
 Dr. Sumudu Premachandra, J.

Counsel: Sudharshana De Silva, A.S.G for the Appellant.

Tirantha Walaliyadde, P.C. with Sarith Pathirathne for the
Accused-Respondent.

Argued on: 30.06.2026

Judgment on: 30.07.2026

JUDGMENT

AMAL RANARAJA, J.

1. The accused respondents (hereinafter referred to as the “Respondents”) had been indicted for being members of an unlawful assembly, murder and attempted murder, offences punishable under sections 140, 296 and 300 of the Penal Code of Sri Lanka, in the *High Court of Anuradhapura*, in case number HC 133/2008.
2. Consequent upon a jury trial, the respondents have been acquitted of all charges. The Attorney General being dissatisfied with the acquittal, have preferred the instant appeal to this Court.
3. When the matter was taken up for argument, the learned Additional Solicitor General appearing on behalf of the appellant urged the following ground of appeal, on a question of law.
 - i. The learned High Court Judge had, by order dated July 12, 2016, erred in his judgment by refusing the application of the prosecution to mark part of the notes of the identification parades relevant to the case.
4. An identification parade in Sri Lanka is governed by section 124 of the Code of Criminal Procedure Act No. 15 of 1979, and judicial precedent to ensure fairness and prevent false identification. The procedure rules for preparation and signature protocol must be strictly followed to make identification parade notes to be legally admissible.

5. The police must submit a “B” report to the Magistrates Court requesting permission to hold an identification parade. Thereafter, the Magistrate shall conduct the parade.
6. Witnesses must be kept securely outside the premises in which the parade is to be held and must not see the suspect being brought in. Five or more individuals who are similar to the suspect in height, age and appearance must be selected from the public (e.g.; people in Court) and produced to be lined up at the parade.
7. The suspect and the five or more persons will be given designated numbers. The suspect is permitted to choose his position in the lineup and may change his clothing or hairstyle beforehand.
8. Witnesses are brought in one by one. If a witness identifies the suspect, he must go forward and touch or point at him. Then the Magistrate will ask the witness to explain where the perpetrator was during the incident and what actions he took. Once the parade concludes, the Magistrate will ask the suspect if he had any complaint about the parades conducted, where such remarks shall be recorded and verified.
9. The Magistrate will record all observations, including both correct and incorrect identifications. He must also compile the identification parade notes detailing the parade layout, the persons involved and witness statements.
10. The Magistrate must sign and date the identification parade notes for the document to serve as corroborative evidence at a trial.
11. In the case of *Perera v. The State* [1974] 77 NLR 224, Walgampaya, J. cited *The Manual for Judicial Officers* printed at the *Ceylon Government Press in 1939*, which outlined guidelines for Magistrates when holding identification parades :

“At page 33, Section 165 (b) (II): “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.” “(III) The witnesses shall be presented singly and requested to examine the line and state whether the man or men they identified are there.””

He further prescribed the procedure to ensure that the purpose of an identification parade could be effectively fulfilled:

“proper procedure that the Magistrate should have adopted was : —

(a) that he should have held several parades as indicated earlier in this order ;

(b) to have asked the particular witnesses to identify any suspect if he was in the parade;

(c) 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

(d) if so, the details of what he did.”

12. Regarding the matter at hand, the learned Magistrate in *Muttur Magistrates Court* has conducted thirteen identification parades consecutively on March 09, 1996 in case number BR291/96, two of which have been relevant to this case. The learned Magistrate has compiled notes describing the conduct and the layout of the parades, the identifying of the suspects who were produced for identification and recording the relevant witness statements.

13. Although the learned Magistrate has signed and dated those notes, he has done so only at the conclusion of the thirteenth and final parade

conducted on that date rather than signing each set of notes immediately after each individual parade. The notes referred to herein have been compiled in both Tamil and Sinhala languages.

14. These notes are included in the Magistrates Court brief and can be located on pages 135 to 166 and 265 to 284. This reference is provided to clearly identify where the relevant material appears in the Magistrates Court brief.
15. The prosecution has sought to tender the contemporaneous notes relating to the respondent's identification from the identification parade notes dated March 09, 1996, and applied for them to be marked as evidence. That application has been disallowed by the learned High Court Judge solely on the ground that the learned Magistrate had not signed and dated each set of notes after each individual identification parade.
16. This approach elevates form over substance and treats a procedural irregularity as fatal despite the note's apparent relevance and probative value. The absence of a signature and date on each separate set of notes, at most, is a technical non-compliance. It does not necessarily undermine the reliability of the identification process, particularly where the surrounding circumstances can be proven by other means (e.g.; oral testimony of the identifying witnesses).
17. In such circumstances, the proper question should be whether the note is authentic, accurate and trustworthy, not whether every procedural formality has been complied with in a strict and literal manner.

18. In the case of *Vellupillai v. The Chairman, Urban District Council* [1936] 39 NLR 464, Sidney Abrahams C.J. has held:

“This is a Court of Justice, it is not an Academy of Law.”

19. Accordingly, the order of the learned High Court Judge dated July 12, 2016, appears overly technical because it focuses on the absence of formal signing and dating as a decisive bar rather than assessing whether the evidence can be safely received and evaluated in light of all the circumstances.

20. In light of the foregoing, I am satisfied that the learned High Court Judge has fallen into a material misdirection when issuing the impugned order dated July 12, 2016. That misdirection, in my view, undermines the safety of the acquittal. In the circumstances, I am minded to allow the appeal, set aside the acquittal and remit the matter for retrial.

Appeal allowed; Retrial ordered.

21. The Registrar of this Court is directed to send this judgment to the *High Court of Anuradhapura* for compliance.

Judge of the Court of Appeal

DR. SUMUDU PREMACHANDRA, J.

1. I had an opportunity to read my brother His Lordship Justice Ranaraja's judgement. I fully agree with the reasoning and conclusion. However, I wish to express my reasoning in the manner of refusal to the parade notes by the Learned High Court Judge. This incident occurred on 11/02/1996, at *Kumarapuram*, a small Tamil village in the *Maritimepattu* division of the Mullaitivu District, killing 24 civilians (section 296 of the Penal Code) and injuring 25 civilians (section 301 of the Penal Code) and mischief (section 410 of the Penal Code) with common intention (section 32 of the Penal Code including the section 146). Indictment bears 101 counts. The accused opted the trial with a Sinhala Speaking Jury. The jury trial started on 27/06/2016, after ten years of the incident, and lasted till 27/07/2016, exactly one month. At the trial all 6 accused were acquitted and discharged for all counts (101 counts). I now detail my reasoning.
2. The issue here is that not allowing to mark particular portion of identification at identification parade notes at the trial. In our law, an identification parade serves only as corroborative evidence to test a witness's memory and is not considered substantive proof of guilt on its own. Uncorroborated "dock identification" (identifying the suspect for the first time in court) is widely viewed by Sri Lankan Appellate Courts as inherently weak or worthless.
3. It should be noted criminal law is based on substantive evidence. The section 3 of the Evidence Ordinance interprets what is evidence. It says;

“Evidence' means and includes –

(a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence:

(b) all documents produced for the inspection of the court; such documents are called documentary evidence.”¹

4. The reception of evidence is fundamentally a procedural law, but in certain parts, it acts as substantive law as well. The evidence offered to support a fact in issue², as to the necessary elements of the case, as opposed to evidence that goes to procedural or collateral issues are considered as substantive evidence. Reliance must be placed on such evidence to arrive at a decision. Non-substantive evidence is such that it either corroborates the substantive evidence to increase its credibility or contradicts substantive evidence to discredit it. Substantive evidence can take many forms; such as witness testimony and, statements made by individuals who have firsthand knowledge of the facts³, events in question. Witness testimony can be either direct (witness saw or heard something through his own senses) or circumstantial (witnesses can provide information that indirectly supports a claim or allegation). Physical evidence; objects, documents or other materials can be presented to the court to support a claim or allegation. Expert testimony is opinions given by qualified experts in a particular field that can help explain complex issues or provide insights into technical matters.
5. If a witness testifies that he saw the accused committing the crime, his testimony would be considered substantive evidence that supports

¹ Section 3 of Evidence Ordinance : **‘Document’** interprets as; 'Document' means any matter expressed or described upon any substance by means of letters, figures, or marks or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.

² **‘Facts in issue’** means and includes any facts from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows. (Section 3 Evidence Ordinance)

³ 'Fact' means and includes - (a) anything, state of things, or relation of things capable of being perceived by the senses ; (b) any mental condition of which any person is conscious ; Illustrations (a) That there are certain objects arranged in a certain order in a certain place is a fact. (b) That a man heard or saw something is a fact. (c) That a man said certain words is a fact. (d) That a man holds a certain opinion, has a certain intention, acts in good faith, or fraudulently, or uses a particular word, or is or was at a specified time conscious of a particular sensation, is a fact. (e) That a man has a certain reputation is a fact. (section 3 of Evidence Ordinance and illustration)

the prosecution's case. In the instant case, several witnesses have testified that they saw some accused committed this gruesome crime. The learned trial judge had not charged the jury with regard to the identification and simply guided that since identifications had bore single certification, the question of authenticity arises. It should be noted parades were held at the *Muttur* Magistrate's Court on 09th March 1996, in consecutive, contemporaneous manner. Thus, placing signature at last cannot invalidate the identification, and it would be a mere technicality, and does not bear any merits. Thus, refusal is a misdirection and not charging the jury is a non-direction. Thus, the direction of the trial judge with regard to the identity is tainted with illegality. In **Dassanayake Lekamlage Somapala alias Gangabada Sudu and others** v A.G, C. A 208 – 210/2011, decided on 02.09.2014, His Lordship Anil Goonaratne J, held:

“A very important aspect of a criminal trial is that the perpetrators of the crime need to be identified with certainty. Absence of identity of accused would be fatal to the prosecution case. The learned High Court Judge has merely referred to the items of evidence of the declaration (P5) but has not considered its probative value.”

6. In criminal law, holding and marking identification parades is to cement the identification as identification must be proved by the prosecution beyond reasonable doubt. In **Gamini Sugathasena vs State** [1988] 1 SLR 405 Justice Asoka Z. Gunawardene held that the identity of the accused that he committed the offence should be proved beyond reasonable doubt.
7. In this case, 13 identification parades were held to identify the accused. The learned President Counsel had not objected the manner where the identification parades were held. He pointed out the parades were held 20 years ago, it does not serve justice, if a re-trial is

ordered. He further said if a re trial is ordered, fair trial would be denied to the accused. It should be noted that the learned trial judge has made these refusals on haste as extempore orders, which cannot focus the gravity of the refusal and address the real issue, resulting in an abortive trial.

8. As the learned President Counsel noted, it is true the accused should be afforded a fair trial and it has been accepted by judicial authorities and statutes⁴ in our law⁵. On the other hand, I am of the strong view that in Criminal Law fair trial must be afforded not only to the accused but also to the prosecution, in delivering justice to the victims. Why I am saying is that the probative value of identification parades is high in Criminal Law. In **Keerthi Bandara u. Attorney General** [2000] 2 SLR 245, Ninian Jayasuriya, J. held that identification at a parade creates substantive evidence. His Lordship noted;

“Evidence given by the witness at the trial relating to his identification of the accused at a parade is substantive evidence establishing identity in terms of Section 9 Evidence Ordinance. The proceedings of the identification parade including the evidence given at the parade by the witness would only be admissible to establish consistency on the part of the witness and thereby advance his credibility in terms of S. 157 Evidence Ordinance.”

⁴ Under section 4(1) of International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007 fair trial principles has been enacted.

⁵ Right to have a fair trial is a paramount right of the accused and cardinal rule of our Criminal Law . J.A.N. De Silva J (as he then) in **Attorney General vs. Aponso** (SC appeal No. 24/2008) 2008 BLR 145. Held that;

“the right of an accused person to a fair trial is recognised in all the criminal justice systems in the civilised world Its denial is generally proof enough that justice is denied The right to a fair trial was formally recognised in International Law in 1948 in the United Nations Declaration of Human Rights”

9. In this case, the witnesses were called and they have identified the perpetrators. These witnesses were called at the trial. In **Abeysekera v. Attorney General** [1981] 1 SLR 376, addressed the admissibility of circumstantial evidence and the reliability of identification parades. It established foundational precedents for criminal identification, common intention under Section 32 of the Penal Code. In that WIMALARATNE, J. held;

“Identification parades are held to enable persons to identify suspects who had not been known to them earlier. It is therefore of the utmost importance that the identifying witnesses should be called as witnesses at the trial and asked the specific question as to whom they identified at the earlier parade. The best evidence is not obtained by simply asking the officer who held the identification parade to testify as to who identified whom.”

10. If the learned trial judge allowed to mark the portion of identifications, it would be of much reliance and more corroborative and enhance the credibility of the witness and result of the jury may vary. Thus, this is a denial of a fair trial and miscarriage of justice. Thus, in the interest of justice, a re-trial is demanded.
11. For the said reasoning, I set aside the findings and acquittal of the jury and order re-trial to give priority and conclude the trial expeditiously within 3 months.

Judge of the Court of Appeal