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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

Court of Appeal Case No. CA HCC 142/2019

High Court of Balapitiya Case No. HCB 1134/2008

1. Hegoda Arachchige Piyal Kamantha
2. Mapalagama Manage Susantha
3. Nanayakkara Liyana Arachchi Nalaka Wajira Jayawardena

Accused

AND NOW BETWEEN

Nanayakkara Liyana Arachchi Nalaka Wajira Jayawardena

Accused Appellant

V.

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

Complainant Respondent

BEFORE	:	**ACHALA WENGAPPULI, J** **K. PRIYANTHA FERNANDO, J**
COUNSEL	:	Neranjan Jayasinghe for the Accused Appellant. Lakmali Karunanayaka DSG for the Respondent.
ARGUED ON	:	25.06.2020
WRITTEN SUBMISSIONS FILED ON	:	17.01.2020 by the Accused Appellant. 23.06.2020 by the Respondent.
JUDGMENT ON	:	21.07.2020

K. PRIYANTHA FERNANDO, J.

01. The 3rd Accused-Appellant (Appellant) with two others was indicted in the High Court of Balapitiya with one count of Robbery punishable in terms of section 380 of the Penal Code. The Appellant was the 3rd Accused in the case and the trial proceeded in the absence of the Appellant and the 2nd Accused. Only the 1st Accused was present at the trial. After the trial the learned High Court Judge found the 1st Accused not guilty of the charge, and the 2nd Accused and the Appellant were convicted. The Appellant was sentenced to 5 years rigorous imprisonment and was also imposed a fine of Rs. 5,000/-. Being aggrieved by the said conviction, the Appellant preferred the instant appeal.

02. Learned counsel for the Appellant urged the following grounds of appeal;

    1. The learned High Court Judge relied on the identification parade evidence that has not been proved by the prosecution.

2. The learned High Court Judge failed to take into consideration the infirmities in the evidence regarding the identification and the objection taken by the Accused at the identification parade.

3. The learned High Court Judge failed to analyze the evidence against the Accused-Appellant and failed to give reasons as to why she acted on the evidence of the identification parade.

As all three grounds urged relate to the identification of the Appellant, they will be considered together.

03. As per the version of the prosecution, on 03.07.2006, witnesses *G.D. Nimal* (PW1) and *Pieris Singo Jayasinghe* (PW2) were distributing cigarettes in a van. *Pieris* had been the driver and *Nimal* was the salesman. There had been a safe box in the van where they kept the collected money. When they stopped at a junction to distribute cigarettes to a shop, three or four people who were armed had come and dragged the driver out of the driving seat and put him at the back of the van. They had also put *Nimal* inside the van and had driven the vehicle for about 20 minutes and had stopped at an isolated area, where they were thrown out of the van. The robbers had left driving the van with the cigarettes and the money. They had called the police and the organization they worked for, and reported the matter to the police. On a later date they both had identified some of the robbers at an identification parade held in the Magistrate's Court.

04. Learned counsel for the Appellant submitted that the Acting Magistrate who conducted the identification parade was not called as a witness and none of the officers who assisted in holding the parade testified at the trial either. Only the 1st Accused who appeared at the trial admitted the identification parade notes and the other Accused including the Appellant cannot be bound by that admission. Therefore, it is the contention of the learned counsel that the identification parade notes were not properly admitted in evidence.

05. Section 414(2) of the Code of Criminal Procedure Act provides for admission of identification parade notes even if the Magistrate who conducted the parade is not called to testify as a witness.

Section 414(2);

> "....*The depositions regarding an identification parade (or the notes thereof) held by a Magistrate or Justice of the Peace and the depositions of the witnesses who assisted the Magistrate or the Justice of the Peace to hold the parade or affidavits by them may be given in evidence in any inquiry, trial or proceeding under this Code although the deponents or the Magistrate or the Justice of the Peace or the witnesses referred to are not called to testify as witnesses.*"

06. As the learned counsel for the Appellant rightly submitted, the admission made by the 1st Accused admitting the identification parade notes cannot be taken as an admission made by the Appellant as well. However, as the Appellant was absconding and the trial proceeded in his absence, no objection on the part of the Appellant was raised for admitting the identification parade notes in terms of section 414(2). Therefore, the learned Trial Judge was well within his powers when he admitted the identification parade notes in evidence without calling the Acting Magistrate who held the identification parade as a witness, in terms of section 414(2). The notes of the identification parade were unchallenged. Hence, the ground of appeal No.1 urged by the Appellant should necessarily fail.

07. Learned counsel for the Appellant submitted that the evidence of all witnesses listed, who assisted in holding the identification parade must be led in evidence to show that the identification parade was properly held. Counsel further submitted that at the identification parade the Appellant was not afforded the opportunity to change places when the 2nd witness was called to identify the suspects. There are inconsistencies in the evidence of witness *Pieris* in Court and the statement made to the Acting Magistrate who held the identification parade, about the Accused who drove the van. Counsel submitted that the learned High Court Judge has failed to analyze the evidence.

08. The learned Deputy Solicitor General appearing for the Respondent submitted that as the Appellant absconded, there was no opportunity to identify the Appellant from the dock. Witness *Pieris* had been 79 years old at the time he testified in Court on the robbery that had taken place 11 years ago.

09. Learned DSG further submitted that the inconsistency in the evidence referred to by the learned counsel for the Appellant was in the evidence of one witness, however, two witnesses testified about the incident.

10. The notes of the identification parade held by the learned Acting Magistrate were lawfully admitted in evidence, as I mentioned before. The notes of the said parade were unchallenged. On careful scrutiny of the parade notes admitted in evidence, it is observed that the learned Acting Magistrate had taken all precautions to see that the parade was held fairly. He had specifically mentioned that all doors and windows of the hall were closed and that no one outside could see what was happening inside. Further, witnesses and the Accused were kept separately and also witnesses who participated in the parade were also kept separately. These notes as to the procedure that was followed in holding the parade were unchallenged.

11. As submitted by the learned counsel for the Appellant, the suspects including the Appellant had taken up an objection to the parade being held before the Acting Magistrate. The objection was that at the Pitigala police station they were shown to some unknown persons. Nothing was mentioned about the two witnesses even after they were called to identify the suspects at the identification parade. No such objection or even a suggestion was made to the officers of the Pitigala police station who testified at the trial. Hence, there is no merit in that objection.

12. Both witnesses *Nimal* and *Pieris Jayasinghe* identified the Appellant at the identification parade, as a person who participated in the robbery. *Nimal* in his evidence at the trial said that he identified some of the suspects at the identification parade. Witness *Pieris Jayasinghe* also in his evidence at the trial said that he identified two suspects at the identification parade. When the State Counsel asked him whether the person who dragged him from the van is in Court, he said, "*මට මතක හැටියට මෙයා.*" (page 164 of the brief). In Court he had identified the 1st Accused from the dock, as the person who dragged him out of the van (page 164 of the brief).

" ප්‍ර : ඊට පස්සේ මොකක්ද වුනේ?

උ : ඊට පස්සේ ටික දුරක් ගිහින් දොර ඇරලා මම දොට්ට දැම්මා.

ප්‍ර : තමා ඇඳල ගත්ත අය නැවත දැක්කොත් හඳුනගන්න පුළුවන්ද?

උ : පුළුවන්.

ප්‍ර : මේ ඇඳලගත්ත පුද්ගලයා මේ අධිකරණයේ ඉන්නවද බලන්න?

උ : මට මතක හැටියට මෙයා.

ප්‍ර : එයා අධිකරණයේ ඉන්නවද?

උ : ඉන්නවා.

ප්‍ර : කොහෙද ඉන්නේ?

උ : කූඩුවේ."

13. It is pertinent to note that there had been two instances where witness *Pieris* was dragged out of the vehicle. The first was when he was dragged out of the driving seat and put in the back seat. The second was where he was dragged out of the vehicle at an isolated area.

The above evidence of *Pieris* at page 164 clearly refers to the incident when he was thrown out to the road after they were taken in the back seat to an isolated area, not the incident of initially taking him out of the driving seat. At page 163, he referred to the initial incident of him being taken out of the driving seat, but did not identify the person who dragged him out of the driving seat. In his examination in chief witness *Pieris* never identified the 1st Accused from the dock as the person who drove the van after putting them in the back of the van.

14. His evidence on him being dragged out of the driving seat was (page 163 of the brief);

" ප්‍ර : අනෙක් දෙන්නා ආවේ කොහෙ ඉඳලද?

උ : ඒ දෙන්නා මම ඉන්න පැත්තට ආවා. ඇවිත් මාව ඇදලා ගත්තා. මම වැටුණා. අනෙක් එක්කෙනා මම ඇදගෙන ගිහින් වෑන් එකේ පිටුපස්ස ට දැම්මා.

ප්‍ර : තමා වෑන් එක පිටුපස්ස ට දැම්මා?

උ : ඔව්.

ප්‍ර : නමා ඇඳ ගත්තේ කවුද කියලා නමාට මතකද?

උ : ඒ වේලාවේ මතක නැහැ.

ප්‍ර : නමා ඇදලා ගත්තා ?

උ : ඔව්.

ප්‍ර : නමා ට ඇදලා ගත්තා එක්කෙනා මතක නැහැ ?

උ : නැහැ."

15. Referring to the first incident where he was taken out of the driving seat, he said that the van was driven after he was removed from the driving seat by the person who was at the bus halt. However, in his examination in chief he never pointed to the first Accused as the person who was at the bus halt who later drove the van.

16. However, in cross examination (at page 166 of the brief, last question), it seems that the defence counsel has put a misleading question to *Peiris*, assuming that he identified in examination in chief that the 1st Accused was the person who drove the vehicle, when he had not.

" ප්‍ර : දැන් ජයසිංහ මහතා සාක්ෂි දීලා කිව්වා විත්ති කූඩුවේ ඉන්න කෙනා එදා ආවාය කොල්ල කෑමට වාහනය එලවා ගෙන කියලා?

උ : එහෙමයි."

17. Section 143 of the Evidence Ordinance provides that;

"143(1) Leading questions may be asked in cross-examination, subject to the following qualifications:-

(a). ...

(b). the question must not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact."

When this question was put to the witness, the learned State counsel had failed to object to the above question in terms of the above section 143(1)b. It appears to have escaped the mind of the learned Trial Judge as well. Thus, although it has not been objected to in terms of section 143(1)b, the question is inadmissible. It will not be made admissible merely because no objection was taken, as it contravenes section 143(1)b of the Evidence Ordinance.

18. However, answering the above misleading question, *Pieris* conceded that he identified in Court that the 1st Accused drove the vehicle. Under those circumstances, the learned defence counsel had tried to show an inconsistency in his evidence in Court and what he said at the parade to the Acting Magistrate. However, *Pieris* explained the circumstances in Court and said (page 167 of the brief);

" ප්‍ර : චින්තිය වෙනුවෙන් යෝජනා කරනවා මේ පුද්ගලයා එදා පෙරෙට්ටුවේදී හඳුනා ගත්තේ නැහැය කියලා. හඳුනා ගත්තේ වෙන පුද්ගලයෝ දෙන්නෙක් කියලා යෝජනා කරනවා චින්තිය වෙනුවෙන්?

උ : කොහොම හරි දෙන්නෙක් හඳුනා ගත්තා. මෙයාය කියලා හරියට ම කියන්න බැහැ.

ප්‍ර : ඒ වගේම ජයසිංහ මහත්තයා, එදා පෙරෙට්ටුවේදී විනිශ්චයකාරතුමා ට කිව්වා වාහනය අරගෙන ආවාය කියලා, පෙන්නා සිටියේ වෙන පුද්ගලයෙක් කියලා චින්තිය වෙනුවෙන් යෝජනා කරනවා ?

උ : මට හරියටම මතක නැහැ. දැන් අවුරුදු ගණනක්."

19. An identical issue was discussed at length in case of ***Athuloralalage Nihal Perera and another V. The Attorney General CA Appeal No. 43-44/2002 on 05.08.2005.***

In that case the witness identified at the identification parade, the 2nd Appellant as the person who shot and snatched the bag containing cash, but after 6 years, in Court he identified the 1st Appellant as the person who did so. The other witness identified the 1st Appellant as the person who was on the motor cycle. His Lordship Justice Sisira de Abrew said;

> *"Taking into account the above observations and the period of time passed after the identification parade, I am of the opinion that it was possible for Saman Fernando to make a mistake on the identity of the Appellants and his mistake is not capable of creating a doubt in the evidence of Dharmaratne."*

20. In the instant case, witness *Pieris* was 79 years old when he testified in the Court on the incident that had taken place 11 years ago. In such circumstances his memory may fade. We are dealing with human beings and some allowance must to be left for such weaknesses. *Pieris* was not the only witness who identified the Appellant at the identification parade. *Nimal* also identified the Appellant. Evidence of witness *Nimal* at the trial on the identification of suspects in the identification parade, and the notes of the Acting Magistrate who held the identification parade were unchallenged. Therefore, the learned High Court Judge was entitled to conclude that the Appellant was properly identified as a person who took part in the robbery.

21. In case of ***Joseph Aloysius V. AG 1992 2 Sri L.R.254***, the law relating to identification parades were considered. It was held that even though there were no express provisions regarding identification parades in our country, it should be conducted in a manner that would befit the interest of justice. Evidence of identification would only be excluded if the Court finds that its admission would have an adverse effect on the fairness of the proceedings.

22. Having carefully gone through the notes of the identification parade that were unchallenged, I am of the considered view that the identification parade had been held fairly, and no prejudice has caused to the Appellant. Although the analyzing part on identification in her

judgment is concise, the learned High Court Judge has considered the above aspects in her judgment. On the evidence placed before her, the learned High Court Judge could not have come to a conclusion other than that of finding the Appellant guilty of the offence as charged. I find that the grounds of appeal are without merit.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

ACHALA WENGAPPULI, J

I agree.

JUDGE OF THE COURT OF APPEAL