

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

In the matter of an Appeal against an order
of the High Court under Section 331 of the
Code of Criminal Procedure Act No.15 of
1979.

C.A.No. HCC No.74/2012

H.C. Tangalle No. HC 25 / 2009

01. Palawatta Gamage Priyantha
02. Walawa Durage Samantha

Accused-Appellants

Vs.

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

Complainant- Respondent

BEFORE : ACHALA WENGAPPULI, J.
K. PRIYANTHA FERNANDO, J.

COUNSEL : Indica Mallawaratchy for the 1st Accused-Appellant.
Tenny Fernando for the 2nd Accused-Appellant
Suharshi Herath Jayaweera S.S.C. for the respondent

ARGUED ON : 11th March, 2020

DECIDED ON : 03rd July, 2020

ACHALA WENGAPPULI, J.

The 1st and 2nd accused-appellants (hereinafter referred to as the 1st and 2nd Appellants) were indicted before the High Court of *Tangalle* for committing robbery of Rs. 125,000.00 and a mobile phone worth Rs.10,000.00 from *Vidane Arachchige Gunadasa* on or about 08.09.2007 at *Walasmulla*.

Upon entering a plea of not guilty, the trial against the Appellants proceeded with the evidence of the virtual complainant *Gunadasa*, his son *Pushpa Kumara* and *Ariyapala* as the three lay witnesses who testified for the prosecution.

It is the prosecution version of events that on the day of the robbery, the two Appellants, who arrived in a motor cycle, entered the trading store of *Gunadasa* and threatened him with a gun and robbed his cash and phone. It was the 2nd Appellant who robbed *Gunadasa* at gun point while the 1st Appellant held his son *Kumara* and *Ariyapala* in the store room, facilitating the act of his colleague. Having robbed *Gunadasa* the two Appellants have sped off in the motor cycle.

A complaint of robbery was lodged in *Walasmulla* Police on the same day by the virtual complainant and his son claiming that they could identify the two robbers if seen again. *Ariyapala* too made a statement.

After about 6 weeks since the robbery, *Deniyaya* police had alerted *Walasmulla* Police of the arrest of two Appellants, on 21.10.2007. An officer from *Walasmulla* Police recorded statements of the two Appellants on 22.10.2007.

The two Appellants were identified by the three witnesses at an identification parade held in the Magistrate's Court of *Walasmulla* on 29.10.2007. During the trial, it was admitted among the prosecution and the Appellants that the said identification parade was held properly except to the reservation that there were multiple parades held, under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979.

It was elicited through the Registrar that the identification parade notes indicate that *Gunadasa* identified both the Appellants while *Kumara* and *Ariyapala* only identified the 2nd Appellant.

When the trial Court called for the defence, at the close of prosecution the Appellants made statements from the dock. The 1st Appellant stated that he was arrested by *Urubokka* Police on 14.10.2007 and handed over to *Deniyaya* Police, having assaulted him. He was kept in *Deniyaya* Police for five days and this allegation was foisted on him. The 2nd Appellant too made a statement on the same lines and claimed that he was arrested on 16.10.2007.

The trial Court found the two Appellants guilty to Robbery and sentenced each of them to serve a term of 12 years imprisonment, in addition to the imposition of a fine of Rs. 10,000.00 with a two-year default term.

Being aggrieved by the said conviction and sentence, the Appellants have preferred the instant appeal. At the hearing of their appeal the Appellants have primarily challenged the evidence of the prosecution in relation to proving of their identity.

Learned Counsel for the 1st Appellant contended that the claim of identification by the prosecution witnesses were made under “traumatic and difficult circumstances” and when considered against the fact that the robbers were wearing “full face helmets” at the time of committing robbery, the purported claim of identity is rendered highly unreliable. She referred to the evidence where *Pushpa Kumara*, although claimed that the robber had held him at gun point, failed to identify that person at the identification parade and only pointed out the 2nd Appellant, who allegedly robbed his father. Learned Counsel also referred to the evidence of the “independent witness” where he described the 2nd Appellant to the Police as a “lean person about six feet tall” but pointed out a person who had a overlapping or impacted tooth “නළ දත” at the identification parade because only the 2nd Appellant had such a tooth, among the persons who were paraded in front of the witness.

Learned Counsel for the 2nd Appellant invited attention of Court to the evidence of *Pushpa Kumara* who said that he remembered the 2nd Appellant since he was “well built” person with curly hair and looked like an “OIC”. He also referred to the witnesses claim that the 2nd Appellant had a “*စစ် ငုတ်*”. This evidence, according to learned Counsel, is in conflict with the description of the 2nd Appellant, as provided by witness *Ariyapala*, who claims it was a “tall lean man”.

In her reply, learned Senior State Counsel referred to the admission of the Appellants that the identification parades were held properly and none of them made any adverse remark to the said parade or to the manner in which they were identified. She also submitted none of the complaints to the identification, made by the Appellants in this Court, were mentioned by them before the trial Court, in marking the said admission. She further submitted though the witnesses admitted the Appellant wore helmets, there was no material before the trial Court to conclude that they were fitted with visors which made it difficult to observe the facial features of its wearers and therefore the Appellants were properly identified by the witnesses at the identification parade and thereafter during the trial.

When the evidence of the lay prosecution witnesses is examined, it is revealed that all of them have admitted that the Appellants were wearing helmets.

The evidence indicate that the two Appellants have arrived at the scene riding motor cycles. It is therefore natural for one to wear a helmet especially it is an offence not to wear one, when riding on a motor cycle. However, the prosecution did not clarify as to, when they entered the trading store of *Gunadasa* whether they continued to wear them.

Witness *Gunadasa* was emphatic that when they entered his store only one of them had a helmet on. His son *Pushpa Kumara* supports this claim. His evidence is only the 2nd Appellant had his helmet on. The witness admits the helmet had a dark coloured visor but he could see the face of its wearer. Witness *Ariyapala* in his cross- examination admitted that both of them wore helmets and did not remove them. He identified the 2nd Appellant on his height and “ඳෙණ”.

It is significant to note that, though the three witnesses attributed different roles to each of the Appellants during the act of robbery, there was no single contradiction marked off their evidence in relation to that aspect. They were consistent with the accusation from the identification parade to the trial before the High Court. The conduct of the witnesses during the identification parade, as recorded by the Magistrate, indicates that they identified the Appellant without making a misidentification by pointing to a participant instead of an Appellant.

The Appellant’s collective challenge on the claim of the prosecution that they were identified by the prosecution witnesses during the identification parade, was mounted on two planks. The Appellants challenge that the claim of identification of persons, seen with helmets, is unreliable. They also challenge the

identification on the basis that they were shown to the prosecution witnesses by the Police, after their arrest.

In relation to the first of these two contentions, this Court notes that despite the submission by the learned Counsel for the Appellants that the identification is improbable because the robbers wore "full face helmets" that fact is not supported by evidence. All three prosecution witnesses agree that the two Appellants had their helmets on. Only *Ariyapala* said in evidence that both of them had their helmets on during the time they were in the stores of *Gunadasa*. Even then, the witness claimed that he identified the 2nd Appellant, owing to a facial feature and also by his stature, which had etched in the mind of the witness. Of the three witnesses, *Gunadasa* could be considered as a disinterested witness, as indicative by his conduct when the news reached that the two robbers were arrested. He had shown no interest to know who they were and had merely participated in the identification parade. The notes of the identification parade indicate that *Ariyapala* had shown no hesitation in identifying the 2nd Appellant as he had pointed out the latter no sooner he inspected the parade. Having indicated there was another, at the time of robbery he did not venture to identify the 1st Appellant, nor did he pointed out to a wrong person in the belief he identified the 1st Appellant.

This witness was emphatic that he saw the 2nd Appellant only at the identification parade since the robbery and there is no material before the trial Court to reach an inference contrary to that claim.

In addition to *Ariyapala*, *PushpaKumara* also identified the 2nd Appellant at the identification parade, while *Gunadasa* identified both the Appellants. These two witnesses also assert that they saw the faces of the two robbers at the time of commission of the offence and had identified them at the identification parade held after their arrest.

In view of the consistent position of the three witnesses have noted facial features of the two robbers at the time of the commission of the offence and which claim had been subsequently confirmed by their positive identification of the two Appellants without making a mistake during the identification parade, this Court concurs with the conclusion reached by the trial Court that the witnesses have properly identified the Appellants at the identification parade.

With the view expressed in the preceding paragraph, in relation to the 1st challenge this Court now proceeds to consider the other complaint of the Appellants that they were shown to the prosecution witnesses by the Police after their arrest.

This contention is founded on the evidence of the witness *Pushpakumara* who stated that he was asked to come to Police as they have arrested two suspects. Apparently only his father had complied with the directive. *Ariyapala* too had received a similar direction from the Police which he preferred to ignore. He also knew that *Gunadasa* and *Pushpakumara* too were also called by *Walasmulla* Police, but the witness was confident none of them went to Police in compliance

with the said directive. *Gunadasa* never said he was called by the Police nor he was suggested on those lines by the Appellants.

Learned Counsel for the Appellants, therefore contends that the subsequent identification is tainted since there was evidence that the suspects were shown to the witnesses.

The evidence does not extend to infer that there was a real opportunity for the witnesses to observe the features of the Appellants, when they were being held as suspects in Police custody.

IP *Ariyawansha* of *Walasmulla* Police gave evidence before the trial Court. His evidence was to the effect that the 1st information about this robbery was received by his station at about 7.30 a.m. by telephone, on 07.09.2007. *Deniyaya* Police arrested the Appellants after about 1 ½ months from the robbery. Their statements were recorded on 22.10.2007 by PC 26479 *Mahanama* of *Walasmulla* Police, who testified that he recorded the Appellants' statements just before they were being produced before Court in *Deniyaya*. The identification parade was held at the Magistrate's Court of *Walasmulla* on 29.10.2007.

During cross-examination of the Police witnesses, the Appellants did not suggest that they were kept in detention for days and were shown to the prosecution witnesses. During the identification parade, where the Appellants were represented by their Counsel, they have taken up the position that they were shown to the prosecution witnesses. A specific allegation was made by the 2nd Appellant to the Magistrate to the effect that they were photographed by the

prosecution witness No. 1, using a mobile phone. Strangely, none of the Appellants cross -examined any of the three prosecution witnesses on the basis that they have seen them whilst in detention in the police cell, prior to the identification parade. There was no suggestion to *Gunadasa* that he had taken photograph of the Appellants using a mobile phone, either. Although both Appellants accused *Deniyaya* Police for keeping them in detention for several days in the Police, in their statements from the dock, they did not assert that they were shown to the prosecution witnesses and were photographed. When the notes of the identification parade were admitted under Section 420, the Appellant did not add any qualification that the said admission was subject to the disqualification of being shown to the prosecution witnesses during police detention. Prosecution witnesses *Gunadasa* and *Pushpakumara* testified that they did not go to Police, although they were sent for, after the arrest of the Appellants. The Appellants chose not to challenge that position.

The only instance where this position was put across by the Appellants appear during cross-examination of *Ariyapala* (at p.108 of the brief) where the witness merely said “yes”, when he was suggested with three different positions interwoven in one suggestion. Learned Counsel for the Appellant asked the question;

Q: තමන්ගේ හිත දන්නවා ඇත්තටම උනේ මොකක්ද කියලා. ඒක නිසා යෝජනා කරන්නේ තමන් මේ අද දෙන සාක්ෂිය ඇත්තක් නෙව්. මේ අය පොලීසියෙදි පෙනෙනා සිටීම තුළ නළ දතක් තිබුණු සලකුණ මත හඳුනා ගත්තා. ඒක නේද වුනේ?

A: ඔව්.

This particular witness admitted that it was his maiden experience as a witness testifying in Court, and obviously was in an state of stress. He would not have known the importance of answering into the three different suggestions put to him by the Counsel, separately. The above suggestions referred to the fact that the witness is lying. Then it refers to two positions in one sentence that the Appellant was shown at the Police and it was due to his “*ඔළු දඬ*” only the witness did identify the 2nd Appellant.

Probably the witness could only comprehend the question whether he did identify the 2nd Appellant due to “*ඔළු දඬ*”, among the three contentions advanced by the learned Counsel, since that had been his consistent position throughout, in examination in chief as well as in cross-examination.

In view of these considerations, there was no material before the trial Court to conclude that the prosecution witnesses had any opportunity of seeing the Appellants prior to the identification parade, which gave them an opportunity to closely observe the facial features of the two robbers, unhindered by the obstacle in the form of helmets.

Having anxiously considered the evidence of the prosecution witnesses *vis a vis* the position of the Appellants, this Court is of the considered view that no reasonable doubt arises on the prosecution claim of identity upon the proposition that the witnesses have had an opportunity of seeing the Appellants, whilst in police custody, before they were identified at the identification parade held at the Magistrate’s Court of *Walamulla*.

In the circumstances, this Court finds that there is no merit in the appeals of the 1st and 2nd Appellants. The conviction of the Appellants and the sentence imposed on them is therefore affirmed by this Court.

Accordingly, the appeals of the 1st and 2nd Appellants stand dismissed.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL