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 Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

Complainant

Court of Appeal No:

CA 113/2014

Nuwaraeliya High Court No.

HC 40/2010

Vs.

1. Edirisinghe Peruma Arachchilage Sanjeewa Nishantha alias Kasthuri
2. Raluwe Don Iran Saminda
3. Medawala Mudiyanselage Udaya Shantha Bandara
4. Halielle Gedara Buddhika Samapriya Samarajeewa
5. Kadar Anwar Nasleem alias Bai
6. Rannethithige Henri Jayasena
7. Thuwan Muvin Farook

Accused

AND NOW BETWEEN

1. Edirisinghe Peruma Arachchilage Sanjeewa Nishantha alias Kasthuri
2. Medawala Mudiyanselage Udaya Shantha Bandara
3. Halielle Gedara Buddhika Samapriya Samarajeewa

Accused – Appellants

Vs.

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

Complainant- Respondent

Before : MenakaWijesundera J.
Wickum A. Kaluarachchi J.

Counsel : U. R. De Silva P.C. with Savithri Fernando and Pradeepa Kaluarachchi for the 1st Accused-Appellant.

Chathura Amarathunga for the 3rd Accused-Appellant.

Anuja Premaratne, P.C. with Nayana Dissanayake and Natasha De Alwis for the 4th Accused-Appellant.

Azard Navavi, S.D.S.G. for the State.

Argued on : 22.02.2024

Decided on : 19.03.2024

MENAKAWIJESUNDERA J.

The instant appeal has been filed of set aside the judgment dated 15.07.2014 of the High Court of Nuwara-Eliya.

In the High Court, seven accused had been indicted under sections 140,104-435,146-296,146-382 of three charges, 146-383 and in the alternative on the basis of common intention the same charges of murder, 382 and 383 of the Penal Code.

Out of the seven accused who had been indicted, the second and the fifth had been absconding and they were tried in absentia.

At the end of the trial, the learned trial judge found the 1st to the 5th accused guilty for all the charges based on common object.

Hence, being aggrieved by the said judgment the instant appeal has been filed by the 1st 3rd and the 4th accused appellants. (appellants).

The grounds of appeal raised by the 1st appellant were that,

1) **The evidence of the identification parades held not being adequately considered,**
2) **The evidence in entirety not being properly considered,**

The ground of appeal raised by the 3rd appellant was that,

1) **Identification of the 3rd appellant not being reliable.**

The grounds of appeal raised by the 4th appellant were that,

1) **Non evaluation of the identification of the 4th appellant,**
2) **Non evaluation of the common object.**

The incident which had taken place is that on the 12.2.2000 in the heart of the Nuwara-Eliya town there had been a jewelry shop and around 2.30 in the afternoon this shop had been looted by a group of people of about five persons who had been armed with a pistol, and knives and had injured the people inside and had fled. When they had come out of the jewelry shop to flee from the scene,the 3rd appellant had dropped some of the items he had robbed and at that time the deceased who had been in the vicinity had come running and

had tried to assault him and the 3rd appellant had stabbed the deceased and all the appellants had fled together.

The witnesses who had been present at the time of the incident had said in evidence that the 1st, 3rd and the 4th had come in to the jewelry shop and had shown knives and a pistolhad robbed the gold items. These witnesses had given evidence after 14 years from the incident but had stood the test of cross-examination well.

The police had received the 1st information on the same day around 2.45 in the afternoon and had received the tip off that the appellants had fled in a vehicle towards Haggala and the police had given chase to the vehicle and just near the Gregory Lake the vehicle in which the appellants had been escaping had toppled down a precipice and the Welimada police had found and arrested the 3rd, 4th and the 5th accused. The 3rd appellant and the 4th has had injuries and from the custody of the 3rd the police had recovered some items of jewelry. The said jewelry items had been produced in Court and had been later identified by the complainant.

Thereafter, on the information received from the above appellants, the police had arrested at the Borella Dezoysa maternity hospital three wheeler park the 1st appellant and from his custody the police had recovereda jewelry pawning receipt. The police had traced the jewelry shop mentioned in the receipt and had recovered some jewelry items which had been later produced and identified by the Complainant during the trial.

The police also had searched the house of the wife of the 1st appellant and from the said house also they had recovered some jewelry and the said items also had been identified by the Complainant in Court.

The arrested appellants had been produced before the Magistrate on the 13 of February around 17.40 hours and they had been remanded.

There had been two identification parades held on the 27th of March and in late April.

The said identification parades had been held by AAL Gamage and AAL Ramaraja. Both these persons had given evidence and the three appellants had been identified at the said parades.

But all three appellants challenged the credibility of the parades for the reason that, according to the evidence of the two acting magistrates who have conducted the parades had said in evidence that inside the hall where the parades were held,there had been an office assistant who had been helping out on both days and he had gone near the door to call for the witnesses and had later taken them to the door.

Hence, the learned Counsel for the 1st appellant submitted that it is not proper procedure and submitted further that the witnesseswere brought to the parade from the room of the Court registrar and also were dropped back to the same place which he submitted gave the witnesses an opportunity to speak with each other which is not done during ID parades.

He also further submitted that the both the acting magistrates who had conducted the parades had not personally gone to the prison bus and observed the physical characteristics of the suspect which he submitted is required for the reason that then he can see whether the people who were brought to the parade to participate were suitable or not.

He further submitted that the trial judge having considered the infirmities in the parades have given the benefit of the same to the 6th and the 7th accused but not to his client who is the 1st appellant.

This Court also observes that both the parades have been held in the same manner and if the office assistant had been used to go near the door to collect and drop the witnesses the best thing that could have been done was for the prosecution to call for the evidence of the said witnesses which the prosecution has failed to do.

The Counsel for the 1st appellant further submitted that if the procedure followed in the ID parades is not proper the evidence of the same cannot be counted in.

We also observe that at the end of the two parades the conclusions of the two acting magistrates have not been recorded.

In the unreported case of CA-120-2004 Ranmuka Arachchige Chaminda Roshan vs The Attorney General Justice Sarath De Abrew has held that "it is unsafe to base a conviction on evidence of an improperly held identification parade." And has gone on to lay down certain guidelines as to how an identification parade should be conducted. It says as follows,

a) **The identification parade if it is to be of value should be held at the earliest, so that the impression of the witnesses remains fresh in their mindsand do not have the opportunity to compare notes with the others,**
b) **The accused should not be pointed out to the witness nor his photograph be shown before the parade.**
c) **The accused should be afforded the right to be presented by Counsel to safeguard his interests at the parade.**
d) **The identification parade itself should be properly and fairly constituted with regards to the age, sex, number of participants and mode of dress in order to obviate any unfair disadvantage to the**

accused and un unfair advantage to the witness, the responsibility for which devolves on the Magistrate or acting Magistrate who conducts the parade and not on the court police officer who selects and hustles in the first available persons at random as participants at the parade.

e) **The witness must be questioned and his description according to his recollection of the preparator extracted and recorded before he is invited to examine the parade and point out.**
f) **In view a of the provision in Article 13(3) of the Constitution recognizing the right of an accused person to a fair trial by the competent court, evidence of improper identification must be excluded if court is of the view that its admission would have an adverse effect on the fairness of the proceedings.**

In the instant matter we observe that both the ID parades have been held well beyond a month but we note that prior to the parades the suspects have been in remand custody since 13th of February which is only a day away from the incident and prior to that they had been in police custody.
Hence it would have been ideal if the parades were held with in close proximity of the incident.
As such we find the evidence of the ID parades is subjected to certain infirmities but we observe that they are not grave enough to reject the evidence of the parades.
Nevertheless, we are mindful of the fact that the evidence ata parade is not substantive evidence but is of only corroborative evidence.

Hence in addition to the evidence of the ID parade notes, the appellants had been identified by the witnesses in court.

According to the evidence led in Court the 1st 3rd and the 4th had been identified from the dock as of coming in to the jewelry shop on the date of the incident and robbing the place of its sale items. The 1st and the 3rd were seen carrying knives and the 3rd had stabbed the deceased out side the shop when the assailants were trying to escape.

The learned Counsel for the 4th appellant submitted to Court that by the time the murder took place the unlawful assembly was over because they were out of the alleged premises and one of the witnesses were trying to close the shop in fear.

At this point we draw our attention to the case of TanayakeMudiyanselage Sunil Ratnayake vs Attorney General SC TAB 1-2006 in which Aluvihare J

had said in a case of Unlawful assembly that "when one considers the participation of the accused appellants coupled with the evidence with regard to the participation of the others , it is clear that the accused appellant is not only liable for the acts committed by him , but also for the acts committed by the otherswho were with him by virtue of section 32 of the Penal Code."

But it in our opinion the evidence is that all five who came together were trying to leave when the 3rd appellant had dropped some of the items he had robbed when the deceased had approached him and the 3rd appellant had stabbed him.Hence the subsequent behavior of the assailantsclearly shows their intentions, and furthermore the 3rd and the4th appellants along with the 5th accused had fled ina vehicle and had been arrested when the vehicle had toppled off the road five kilometers away from the town of Nuwara-Eliya, and the 3rd appellant had been in the possession of gold jewelry which were later identified by the complainant.

Hence when the stabbing took place the unlawful assembly had been in progression.

The 3rd appellant in his dock statement has admitted that he had been in the vehicle but had denied the rest. But in view of section 114 (a) of the evidence he can be held liable for robbery and the 4th appellant who also had been found inside the vehicle can be held liable for the same because he had been caught fleeing from the scene of crime in the compony of the 3rd appellant and he had been identified at the scene as of looting place taking away the gold items.

Hence, now what this Court must consider is whether the dock identification of the 1st3rd and the 4th appellants is sufficient.

According to the witnesses, the entire incident had taken place within a matter of 10 minutes and in broad day light. Hence it is not a fleeting glance but a glance which had lasted at least for ten minutes or even more in broad day light and the place of incident had been 17 feet by 15 feet which means that the three appellants had been in very close proximity and the scene of crime had been jewelry shop which would have additional lighting in view of the nature of their business. Hence as submitted by the learned senior Counsel for the respondents it is not a fleeting glance of recognition but one of which has lasted for nearly ten minutes according to evidence.

The reliability of dock identification has been considered in the case of SC Special Appeal 7-2018 by His Lordship Justice Jayantha Jayasuriya where he has held that "**To establish the identity of an accused, it is not mandatory that the witness should have known him by his name or otherwise, prior to the incident. Even in a situation where a witness had seen a person at**

an incident for the first time, his evidence in court identifying the accused in the dock as the person whom he saw at the incident should not be rejected merely because the witness had neither seen him before nor had known his name prior to the incident. A "Dock Identification" is a valid form of identification. However, time and again court have been mindful of the dangers in convicting an accused solely based on a 'dock identification'. At page 256 in Volume 1 "The Law of Evidence" by E.R.S.R.Coomaraswamy, in the context of "dock identification", it is observed, "This practice is undesirable and unsafe and should be avoided, if possible". Court of Appeal in Muniratne & Others v State, [2001] 2 SLR 382 observed the undesirability of conviction based on dock identification and in *K.M. Premachandra &Others v Attorney General* , C.A. 39-41/97, decided on 13.10.1996, set aside the conviction of one accused whose conviction was based on a dock identification. In *Roshan v Attorney General* , [2011] 1 SLR 364 at 377, held "...in the backdrop of an acknowledged disparity in the complexion and appearance of the accused at the trial stage, the assailant being a total stranger to the complainant who had a mere 04 hour visual contact with the assailant, the evidence of subsequent dock identification several years later would not eliminate the generation of a reasonable and justifiable doubt as to the veracity and genuiness of the identification, unlessthere are other supervening and compelling reasons to justify".

Section 9 of the Evidence Ordinance recognizes the relevancy of "fact necessary to explain or introduce relevant facts". Said section provides *inter alia* that, facts which establish the identity of any person whose identity is relevant, as a "relevant fact".

Fact leading to assess the quality of evidence of visual identification are important facts a court needs to take into account in deciding on the identity of an accused. What matters is the quality of the evidence. In such situations the evidence of witness should demonstrate that there was sufficient opportunity for the witness to have seen the person concerned at the time of the incident and thereafter had the ability to identify the person concerned during his testimony in court".

In the instant matter as discussed above the witnesses who were inside the shop in broad day light with the added illumination of the shop had the ample opportunity to identify the appellants.

Hence it can be concluded that the 3rd and the4th appellants can be held liable for the robbery and the next question to be decided is whether the stabbing of the deceased by the 3rd appellant during the unlawful assembly.

According to evidence as said before it had been done when the appellants were trying to flee together after committing the robbery hence the only conclusion the Court can draw is that it had been done during the furtherance of the common object.

The appellants had pleaded ignorance of the incident but this had not been put to the witnesses in cross-examination as such they cannot be exonerated from the common object of the unlawful assembly.

The next position to be considered is the position of the 1st appellant who had come to the jewelry shop with a knife and had taken gold and furthermore on the very same day he had been arrested at Borella with pawning receipts of gold items which had been later recovered from the shop and marked and identified in Court.

In the premises of the 1st appellants wife on the very same day gold items had been recovered and they too had been identified during the trial

Hence, considering the close proximity of time to the alleged incident and the dock identification of the 1st appellant at the scene, there is ground for this Court to conclude that he acted in furtherance of the common object of the 3rd and the 4th appellants.

As such,the conclusion of the trial judge that the 1st along with the 3rd and the 4th were members of an unlawful assembly and committed the offences set out in the indictment.

Hence, we see no merit raised by the learned Counsel for the appellants as such the instant appeal is dismissed and the sentence and the conviction entered by the trial judge is hereby affirmed.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal