

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

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

CA Case No: CA -HCC- 168-169/24

HC of Embilipitiya Cas NO: HC/73/2020

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Udwela Arachchige Pushpakumara
2. Dahanayaka Indika Deshapriya

Accused

AND NOW BETWEEN

1. Udwela Arachchige Pushpakumara

Accused-Appellants

Vs.

The Attorney General

Attorney General's Department

Colombo 12

Complainant- Respondent

Before: **B. Sasi Mahendran, J.**

Amal Ranaraja, J

Counsel: Keerthi Thilakaratne for the 1st Accused-Appellant
Razik Zarrok, PC with Wasim Ackram for the 2nd Accused-Appellant

Written

Submissions : 15.07.2025 (by the 1st Accused Appellant)

On 06.01.2025 (by the 2nd Accused Appellant)

13.11.2025 (by the Respondent)

Argued On : 03.12.2025

Judgment On: 22.01.2026

JUDGEMENT

B. Sasi Mahendran, J.

The Accused- Appellants (hereinafter referred to as the 1st and the 2nd Appellant) were indicted before the High Court of Embilipitiya on the charge of committing the offence of robbery on or about 29.09.2012, punishable under Section 383 read with Section 32 of the Penal Code.

At the trial, the prosecution presented evidence through ten witnesses and marking productions P1-P6 and thereafter closed its case. Both Appellants, in their defence, made dock statements.

Upon conclusion of the trial, the Learned Judge of the High Court delivered judgment on 02.04.2024. Both Appellants were found guilty on the charge of robbery and were imposed a sentence of 10 years of rigorous imprisonment and a fine of Rs. 10,000/- and 12 months of simple imprisonment in default. And for the 2nd Appellant imposed a sentence of 5 years

of rigorous imprisonment and a fine of Rs. 10,000/- and 12 months of simple imprisonment in default. Further, compensation of Rs. 500,000/- was ordered to be paid to the victim.

Being dissatisfied with both the conviction and the sentence imposed by the Learned High Court Judge, the Appellants preferred an appeal before this Court, articulating the following grounds in support of their challenge.

The 1st Appellant's grounds are as follows,

- a. The Learned High Court Judge of Ambilipitiya has failed to apply his judicial mind in considering the substantial delay in holding the Identification Parade.
- b. The Learned High Court Judge has not taken into account material contradictions and Omissions made by the Prosecution Witnesses.
- c. The Learned High Court Judge has not given due weightage to the accused Dock Statements
- d. The Prosecution has failed to establish the necessary elements in which the offence of Robbery must be proved under the Penal Code.

The 2nd Appellant's grounds of appeal are as follows,

1. That the Learned High Court Judge failed to appreciate the factual and legal issues;
2. That the learned High Court Judge failed to consider the objections raised by the 2nd accused appellant during the identification parade and failed to take into consideration the time period;
3. That the learned High Court Judge failed to appreciate the way in which the accused was arrested, and failed to analyze the evidence against the accused.
4. That the learned High Court Judge failed to consider the contradictions emerged in the evidence given by PW1, PW2 and failed to appreciate the inconsistencies which were material to the accused;
5. That the Learned High Court Judge has misdirected himself with regard to the consistencies and probabilities of the Prosecution evidence in giving the judgment;
6. That the learned High Court Judge failed to relate the facts and circumstances that emerged from facts and evidence transpired in this case and thereby failing to give protection to the accused appellant under justice;

7. That the Learned High Court Judge failed to consider the fact that some of the evidence given by the prosecution witness were mere assumptions and not legally sustainable evidence;
8. That the Learned High Court Judge failed to consider the fact that the investigations in this case was inadequately conducted and no productions were recovered in the possession of the 2nd accused- appellant;
9. That the Learned High Court Judge convicted the 2nd accused appellant without giving reasonable consideration to the dock statement provided by the 2nd accused appellant.

The facts and circumstances of this case are as follows,

PW 01 K.Sisira Kumara on the day of the incident, his wife and two children were at home with a plan to go to Rathnapura. At approximately 5:50 a.m., he went to fill water into his lorry and observed both Appellants passing by his house. After filling the lorry with water, he noticed the two Appellants standing at his gate. They inquired whether he knew a person named Dammika, who had allegedly deserted the Army, to which he replied in the negative. After conversing with the Appellants, who identified themselves as Army officers, and along with the witness, they entered through the gate. Upon hearing them, PW 2 came out of the house. The second Appellant requested a glass of water, which PW 2 provided. PW2 then inquired whether they possessed Army identity cards, where the second Appellant was presented. At that time, PW 1's son was present in the living room. At one point, the second accused placed his hand in his pocket, and a bullet fell out, causing them to panic.

Suddenly, the 1st accused entered the house holding a firearm. The 1st accused threatened to kill his son and ordered the family to come inside. Upon entering, the 1st accused struck him with the gun. gun. The 2nd accused remained at the door with his wife and daughter. Subsequently, all four family members were taken into a room.

One of the accused tore a bedsheets and forced it into the victim's mouth, while also binding his hands behind his back. His wife's mouth was similarly covered with the bedsheets. The 1st accused then pointed the firearm at them, while the 2nd Appellant searched the house. The Appellants seized money and jewellery. Both possessed firearms and threatened the family. After collecting the valuables, the 2nd accused took the key to the family's motorcycle and left it in the bike.

His son's hands had not been tied, and he subsequently untied him. They observed chili flakes scattered across the house. They screamed, and their neighbors gathered. He was then taken to Godakawela Hospital. Someone had called 119, and the police arrived at the hospital to record his statement. Later, he identified the two accused at an identification parade conducted in court. He noted that the firearm carried by the accused resembled a pistol, although he could not recall it in detail.

During cross-examination, counsel for the 1st accused suggested that the Hakmana police had shown the Appellant to the witness with a photograph prior to the identification parade. The witness denied this suggestion and affirmed that he identified the 1st accused during the parade itself. Counsel further suggested that the victim had informed the police that the accused had taken jewellery from the Almira. The witness clarified that the jewellery had been placed on the table, and it was the money that the accused had taken from the Almira. The defence counsel also suggested that the witness had not informed the police about the scar on the 1st accused's forehead, and the prosecution counsel drew the court's attention to the fact that this was recorded in the official notes. Finally, defence counsel suggested that the victim was falsely accusing the 1st accused of robbery. The witness rejected this suggestion, stating that he was able to clearly identify the accused, as they were not wearing masks at the time of the incident.

During cross-examination, counsel for the 2nd accused questioned the witness about whether he possessed any receipts for the items or held a license to pawn them in exchange for money. The witness replied that he had only given a small amount of money and therefore did not have any receipts for the items. With regard to the 2nd accused, counsel suggested that during the identification parade, it was noted that the 2nd accused had taken the motorcycle while the 1st accused rode on the back. The witness, however, clarified that he had not directly observed this, as he was inside the house at the time, and only heard the sound of the accused leaving.

The objections taken by the 1st Appellant regarding the identification parade were that, following his arrest at the Hakmana Police Station, the Embilipitiya Police had shown him to five women and two men prior to the parade. The 2nd Appellant stated that the police had also shown him to the witnesses and taken photographs of him.

PW2, Sandya Kumari, testified that on the alleged day, she overheard her husband speaking with someone and went to investigate. She observed PW1 conversing with two men, who informed her that they were Army officers searching for an individual who had

deserted the Army. PW1 mentioned that he would invite them in for tea and proceeded to open the gate. During this exchange, she heard the men refer to a person named Dammika. After changing her clothes, the witness stepped outside, at which point the 2nd accused requested a glass of water. Upon returning with it, she saw the 1st Appellant seated on a chair in the living room, while the 2nd accused remained standing near the main door. She handed the water to him and asked about their identities, requesting to see their Army identity cards. The 2nd accused produced a card from a distance but did not hand it over, prompting her to take it directly from his hand.

At that moment, the 1st accused suddenly pointed a gun at her son and issued threats. PW1 then entered the house. The witness, who was holding their daughter, stood beside the 2nd accused. The 2nd accused ordered her to go inside. Upon entering, she observed PW1 bleeding from the head, while her son pleaded with the 1st accused not to harm his father. The 2nd accused proceeded to tie them up, as the 1st Appellant continued to aim the firearm at them. Meanwhile, the 2nd accused searched the house. She further stated that three bags were placed on the table containing approximately Rs. 125,000 along with several items of jewellery that belonged to their family, while others were items they had accepted as pawns.

She was subsequently taken out of the room and asked to indicate where the motorcycle key was kept. At that moment, she observed that the bags which had been on the dining table were no longer there. She further stated that the 2nd accused continued to search the house and removed money from the Almira. The 2nd accused then instructed the 1st accused to take the necklace worn by her daughter; however, the 1st accused refused, remarking that he too had a daughter of the same age. Before departing, both accused threatened the family not to inform the police. She then heard them close the door and leave on the motorcycle.

Afterwards, she instructed her son to bring a knife. Since her hands had not been tied, she managed to untie her legs and subsequently freed PW1. Upon leaving the room, they noticed chili flakes scattered across the floor. They immediately ran outside, shouting for help. Neighbors gathered at the scene, and after contacting the emergency number 119, PW1 was taken to the hospital.

During cross-examination, the witness stated that she had been informed of the suspects' arrest by the Godakawela Police. Counsel for the 1st Appellant suggested that she and PW1 had visited the Hakmana Police Station, where the police allegedly showed them the

1st Appellant. The witness denied this suggestion and maintained that she identified the accused during an identification parade conducted at the Embilipitiya Magistrate's Court. She further testified that none of the stolen jewellery or money was returned by the police.

PW7, IPS Sepala Pushpakumara, testified that he became aware of the robbery on 29.09.2020 due to a complaint to 119 and thereafter proceeded to PW1's residence. At the scene, he observed traces of blood as well as chilli powder inside the house. He further stated that armed individuals had entered the premises, tied the PW 1's and PW 2's hands, and committed the robbery. According to the witnesses, they would be able to identify the perpetrators if they saw them again.

During cross-examination, the defence contended that when the appellants were arrested at the Hakmana Police Station, the witness had provided their photographs to the other witnesses and thereby assisted them in identifying the appellants during the identification parade. The witness denied this allegation. The defence further suggested that the investigation had not been conducted properly and that the complaint itself was false.

PW7(a), OIC Chandana Wijesekara, testified that on 02.11.2012, he received information concerning the transportation of illegal ganja and weapons. Acting on this tip, at a roadblock, four individuals were apprehended. Among those arrested was the 1st Appellant, who was found in possession of a firearm and five bullets.

During cross-examination, the defence suggested that, following the arrest, the witness had introduced the 1st Appellant to the other witnesses. The witness denied this allegation. The defence further contended that the witness had shown photographs of the appellants to the witnesses beforehand, thereby influencing their identification during the identification parade.

Upon the conclusion of the prosecution, the defence was called. The 1st Appellant stated that he had been arrested along with four others and that nine cases had been filed against him. He further claimed that he was detained at the Hakmana Police Station for nine days, during which the police showed him to numerous people and took photographs of him. According to the Appellant, the police instructed those individuals to remember his scar if they forgot his appearance. He also alleged that, prior to the identification parade, the witnesses in this case had spoken with the Godakawela Police while he was being held in the Ambilipitiya fiscal cell.

In the dock statement, the 2nd Appellant stated that he had previously engaged in a fight with Police Officer Wickremasinghe, after which the officer threatened him again while he was in the village. He further claimed that, upon the request of the police, the Navy handed him over police to give a statement on allegations of possessing firearms. The Appellant alleged that, during open court proceedings, he was shown to the witnesses and photographs of him were taken. He maintained that he had no involvement in the matter and asserted that the complaint was fabricated by the officer due to personal animosity.

During the argument stage, the principal objection raised by counsel was that both witnesses had been shown photographs of the Appellants by the police prior to the identification parade. In considering this objection, I am mindful of the following judgments relating to the conduct and evidentiary value of identification parades.

Pallawa Lekamlage Gayan Sanjeewa alias Asanka Wellawela and 2 Others v. Attorney General, CA 246/2009, Decided On 01.09.2015, Vijith K. Malalgoda PC. J (P/CA) held that;

“In the land mark case on identification Regina V. Turnbull and another 1977 (1) QB 224 at 228 the question of visual identification in Criminal cases was discussed as follows; Secondly the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in anyway, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused.”

Opatha Widanapathiranage Wasantha and 3 Others v. Attorney General (2010. V. II Unreported), CA 179/2006 , Decided on 29.04.2010, W.L. Ranjith Silva, J

“The Learned Trial Judge ought to have followed the standard guidelines with regard to his directions to the jury. On the issue of identification evidence, the judges must give accurate directions regarding the identification evidence and direct the jury that they must be satisfied beyond a reasonable doubt that the accused was correctly identified and give the benefit of any doubt to the accused. The Jury must be directed as to the possibility of a mistaken identify even by

*honest witnesses and if they cannot make up their minds as to whether the witnesses were lying or mistaken the accused must be given the benefit of the doubt and should be acquitted. The trial judge must direct the jury to examine closely the circumstances under which the identification came to be made and the means of identification. The trial judge should direct the jury on the rules laid down in *Rex v. Turnbull*.”*

It is noted that neither of the Appellants claimed that they were wrongly identified. Their position, rather, was that prior to the identification parade, they had been shown to the witnesses. Under Section 9 of the Evidence Ordinance, the identification of any person at such a parade, where the identity of that person is relevant, is recognized as a relevant fact.

With regard to visual identification, our courts have consistently held that a witness must demonstrate that there was sufficient opportunity to observe the person concerned at the time of the incident. The witness should thereafter be able to identify that individual when giving evidence and be able to narrate how he was able to identify the person before the court. The rationale behind this principle is that, if an innocent person is wrongly identified, he could be convicted solely on the basis of the identification made at the parade.

I am mindful of the guidelines which were laid down in *R v Turnbull*(C.A.), [1977] 1 Q.B. 224 at page 228.

“Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be

given particulars of such descriptions, the prosecution should supply them. Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence."

In the instant case, both PW1 and PW2 remained consistent from the very beginning, starting with their statements at the police station.

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පු : වෙනත් තැනැත්තෙකු සිදු කරපු මංකාල්ලයක් සම්බන්ධයෙන් පොලිසියේ දැනුම් දීම මත තමුන් 1 වන වූදිත සම්බන්ධයෙන් අසත්‍ය පැමිණිල්ලක් සිදු කරලා තියෙන්නේ කියලා යෝජනා කරනවා ?

උ : අසත්‍ය පැමිණිල්ලක් නෙමෙයි. මේ දෙන්නා අවා. මම ගේ අස්සේ ගොඩක් වෙලා හිටියා. මම මේ දෙන්නා භෞද්‍ය අදුරගත්තා. මොකද මේ දෙන්නා මූණට මුකුන් ආගෙන තිබියෙන් නැහැ. අපේ ඇය බැඳීදෙන් නැහැ.

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පු : ඊට පස්සේ මොකද වූතෙන්?

උ : ඒ දෙන්නා ඇවිල්ල භෞද්‍ය කතා කළා. වතුර එකකුත් ඉල්ලුවා. අපේ නොනත් ඊට පස්සේ ඉල්ලුවා. ඊට පස්සේ එක කෙනෙක් එලියට ගියා. අපේ නොනා හමුදාවේ හැදුනුම්පත ඇහුවා. ඊට පස්සේ නිල පාට එකක් පෙන්වුවා හැදුනුම්පත කියලා. ඊට පස්සේ කෙනෙක්ගේ සාක්ෂිවෙන් පොඩි මේවා එකක් වැටුනා. ඊට පස්සේ එයාල කළබල වුනා. එතකොට වක්ගලා පිස්තෝලය ඇදලා ගත්තා. ඒ ඇදලා අරගෙන මට ගේ අස්සට එන්න කිවුවා. ඊට පස්සේ මටත් ගැහුවා

When considering the evidence of PW1 and PW2, it is clear that both witnesses had ample opportunity to identify the Appellants. At the identification parade, they explained the basis upon which they recognized the Appellants, and they reiterated the same explanation during the trial. Counsel for the Appellants was unable to establish any contradictions in their testimony. It is further noted that the faces of the Appellants were not covered at the time of the incident, and both had conversed with the witnesses. We observe that PW1 and PW2 had sufficient time to have a close look at both Appellants. In addition, PW1 testified that the 1st Appellant bore a scar on his forehead.

For the said reasons, we reject the defence version that they were shown before the parade to the witnesses. We hold that both witnesses correctly identified both Appellants.

Therefore, having considered the evidence adduced before this Court, we find no reason to reject the identification parade at which both witnesses identified the Appellants.

Considering all of the above, this court is of the opinion that the evidence of PW 1 and PW 2 has clearly established without a doubt the identity of both Accused. Therefore, the learned trial judges conclude that the witness's evidence, which identifies both the Appellants, can be believed.

In those circumstances, I am not inclined to interfere with the judgment delivered by the Learned High Court Judge together with the sentencing order and dismiss the appeal.

The Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja J,

I AGREE

JUDGE OF THE COURT OF APPEAL