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

In the matter of an application for Special Leave to Appeal in terms of Articles 128 and 154P(3)(b) of the Constitution read with the proviso to Section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC (Spl) Appeal No. 07/2018
SC (Special) LA/296/2017
High Court Jaffna Case No. 2136/17
M.C. Jaffna case No. MC. 27153

1. Rathnasingham Janushan
   No. 27/6, Thuraiyappa Road,
   Eechchamoddai, Chundikuli.

2. Benedict Wesley Abraham
   No. 399, Main Street
   Jaffna.

Accused-Appellant-Petitioners

VS.

The Officer In charge
Headquarters Police
Station
Jaffna.

Complainant-Respondent-Respondent

1. Pakyanaathan Antenistan or Dillu
   No. 442/07, Madam Road,
   Jaffna.

2. Aravinthan Alex
   No. 9, Temple Road,
   Jaffna.

3. Jegatheeshvaran Dineshkanth
   Thaavadi, South Thavadi,
   Kokkuvil.

4. Aanantharasa Senthooran
   Thaavadi, South Thavadi,

5. Thevarasa Karishan
   Champion Lane,
   Kokkuvil West.

6. Theiventhiran Anistan Or Eric
   No. 281/16, Kandy Road,
   Jaffna.

Accused-Respondents-Respondents

Before : Hon. Jayantha Jayasuriya, PC, CJ
Hon. Priyantha Jayawardena, PC, J &
Hon. Murdu N.B. Fernando, PC, J.

Counsel : M.A. Sumanthiran, PC with J. Arulanantham and D. Mascarange for the Accused-Appellant-Petitioners.
P. Kumararatnam, SDSG for Hon. Attorney General.

Argued on : 11.06.2019 and 19.06.2019.

Decided on : 04.10.2019

Jayantha Jayasuriya, PC.CJ.

The two Accused-Appellant-Petitioners (hereinafter called Appellants) were charged along with six others in the Magistrate's Court of Jaffna. They were charged for "Joining an Unlawful Assembly armed with any deadly weapon", an offence punishable under section 141 of the Penal Code, "Voluntarily Causing Grievous Hurt by dangerous weapons or means" while being members of an unlawful assembly an offence punishable under section 317 read with section 146 of the Penal Code and "Voluntarily Causing Grievous Hurt by dangerous weapons or means" punishable under section 317 read with section 32 of the Penal Code. The Learned Magistrate convicted all eight accused for the first two counts, after trial. Three of those accused were sentenced to one-year rigorous imprisonment on count one and the same three accused were sentenced to two years rigorous imprisonment on count two. The remaining five accused including the two appellants were sentenced to six months rigorous imprisonment on count one and the same term of imprisonment was imposed on them for count two as well. All sentences of imprisonment were ordered to run consecutively. In addition, each accused was ordered to pay Fifty Thousand Rupees as compensation with a default term of one-year imprisonment.

The two appellants being aggrieved with the conviction and the sentence, appealed to the High Court of Jaffna. The Learned High Court Judge having affirmed the conviction and sentence, imposed on each accused a fine of One Thousand Five Hundred Rupees on the Second Count with a default term of one-month simple imprisonment.

The two appellants out of the eight convicted accused, sought special leave to appeal from this Court. On 1st February 2018, this Court granted Special Leave to Appeal to the two accused-appellants on the following three questions of law:

(1). Has the Learned Judge of the High Court of Jaffna erred and / or misdirected himself in law in finding the 1st and 2nd Petitioners guilty, contrary to

the clear and unrefuted evidence of the 1st and 2nd Petitioners before the learned Magistrate of Jaffna ?

(2). Has the Learned Judge of the High Court of Jaffna erred and / or misdirected himself in law in sentencing the 1st and 2nd petitioners to varying sentences from the other accused, in finding them guilty of the same offences ?

(3). Has the Learned High Court Judge of Jaffna erred and / or misdirected himself in law in not evaluating the several important questions of law raised at the hearing of the Appeal, particularly with regard to:

(i) Liability of several persons for unlawful assembly;

(ii) Dock identification, in this case, lack of even dock identification

(iii) The occasions when an *alibi* is necessary?

The Learned Counsel of the Appellants at the hearing of this Appeal submitted that he would not pursue the second question mentioned above. His main focus was on question of law raised in 3(ii) above. Therefore, first I will address this issue namely whether there is sufficient evidence to establish the identity of the two appellants and whether the learned Magistrate and the High Court Judge have erred and / or misdirected themselves in resolving this issue.

The prosecution case is, that the victim Vimalarajan Vicknarajah who was around thirty years of age was surrounded and attacked by a group of persons armed with swords causing injuries to him. The alleged incident took place around noon on 05th June 2012. On behalf of the prosecution several witnesses including the victim, an elder sister of the victim, a person living in close proximity to the place of incident and the investigating officer testified. Several swords recovered by the investigation officer were marked P1a, P1b, P1c, P1d, P2a, P2b, P3a, P3b, P4a, P4b, P5a, P5b, P6a and P6b and produced in Court. The Medico-Legal Report relating

to the injured-victim was marked P7 and produced as evidence through the Court Interpreter.

The 1st and the 2nd Appellants stood trial as the 3rd and the 6th accused, respectively.

According to the evidence of the investigating officer, second to the seventh accused, were arrested by him. The 1st accused – Dillu had surrendered to police. This witness testified that he recovered two swords from the 3rd accused-appellant at the time of his arrest. Those two swords were produced marked as P2a and P2b and other swords were recovered from 2nd, 4th and 5th accused. According to his evidence these accused were arrested around 6.45 pm on 05th June 2012 and a group of about eight police officers took part in the arrest. This witness said that the first appellant was in possession of two swords at the time of the arrest. However he is unable to say as to which police officer made the arrest of the first appellant. Through the cross-examination of this witness defence challenged his evidence on the alleged recovery of swords. Counsel for the two accused-appellants drew the attention of this court to a specific question and the answer, which is reproduced below, in this regard.

> "Q - I further put it to you that you have recovered the thirteen swords in some other place, and out of which you have taken two swords and give false evidence that it was recovered from the Third Accused ?"
>
> "A - I admit"

However, in the re-examination the witness had said

"There is no necessity for me to arrest the said suspects and to produce the productions against them"

In the defence case, first accused made a dock statement and all other accused including the two appellants testified from the witness-box.

The first appellant in his evidence said that he along with the 5th accused went to the esplanade and at that point a team of police officers came and arrested them. Further there had been about three others also arrested by the police. Thereafter they were loaded to the jeep and the productions were also loaded. He claims that he is unaware as to who brought swords and further claims that there is no connection whatsoever to him and the sword. He had further said that he does not know the 2nd, 4th, 7th and 8th accused.

The second appellant in his evidence said that he along with the 3rd Accused (first appellant) went to the esplanade and that a team of police officers arrested them, at that point. He claims that the two of them were taken in a jeep. They saw 4th, 5th and 7th accused too in the jeep. He denied the recovery of a sword from him. He further claims that he did not know Dillu or Alex prior to the arrest.

Main evidence pertaining to the identity of the assailants comes from the prosecution witness Vimalarajan Vicknarajah who was subjected to a brutal attack. According to him a group of about 15 persons who came on five motor cycles surrounded and attacked him with swords. Initially this witness at the examination-in-chief identified two of the assailants by name. "Dillu" who was from the same village was identified as the 1st accused and "Alex" was identified as the 2nd accused. Later in the cross-examination and in the re-examination the witness said that he knew one more person by name and identified the 8th accused as "Eric". His position at the examination in chief is that he "knew the others" and he could identify the persons who cut him with the swords, if seen again. Further, he said that he did not know from which place they are from.

The main issue raised before this Court, is whether there is evidence of identification against the two appellants. The learned Presidents Counsel for the appellants submitted that there was not even a proper "dock identification"

relating to the two appellants in this case. The learned Presidents Counsel relied upon a series of judicial pronouncements in support of his contention.

There is no dispute that neither the victim nor any other witness in this case knew the two appellants (who stood trial as 3rd and 6th accused) by name. However, the victim identified, the 1st, 2nd and 8th accused by name. The victim in his testimony made a sweeping statement that he "knew the others" and further said that *"All those who are in the accused dock in this court came and cut me"* (emphasis added).

In *Dayananda Lokugalappaththi and eight others v The State* [2003] 3 S.L.R 362 at 388, the Court of Appeal citing with approval E.R.S.R. Coomaraswamy's "Law of Evidence" Vol.1 page 256 observed "If the witness did not know the accused earlier and in the absence of an identification parade, the identification in court becomes a "first time" identification in court or a dock identification".

However, to the contrary, the process of identification of a person who is known to a witness by name or otherwise is described as "recognition" as opposed to "identification". Situations of "recognition" are considered more satisfactory than instances of identification. However, even in situations of "recognition" the court should analyse the evidence of the witness who claims that the accused is a known person and examine whether the evidence is satisfactory to bring home a conviction. In *K. Don Anton Gratien v The Attorney-General*, C.A 226/2007 decided on 01.07.2010, the Court of Appeal analysed the evidence of the sole eye witness who claimed that he knew the accused, and arrived at the conclusion that the evidence was unsatisfactory. Therefore, the court held that the evidence is not sufficient to establish the identity of the appellant to the required standard namely, beyond reasonable doubt.

To establish the identity of an accused, it is not mandatory 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 courts have ben 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 *Munirathne & Others v The State*, [2001] 2 SLR 382 observed the undesirability of conviction based on dock identification and in *K.M.Premachandra & others v The 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 The 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, unless there are other supervening and compelling reasons to justify".

Section 9 of the Evidence Ordinance recognizes the relevancy of "facts 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".

Facts 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 the 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.

Factors such as, the duration of the interaction between the witness and the suspect, distance between them, the nature of light under which the witness observed, whether there are any special reasons to remember the suspect such as presence of unique physical features, existence of any factors impeding the opportunity for clear and uninterrupted observation, whether the witness had seen the suspect before and if so the number of occasions and whether the suspect was known by name or not, are relevant to determine the quality of visual identification evidence. *Dayananda Lokugalappaththi and eight others v The State*, [2003] 3 SLR 362 at 390, *R v Turnbull (C.A.)*, [1977] 1 Q.B. 224 at 228. This list of factors is not exhaustive, but could vary according to the facts and circumstances of each case.

These factors are equally relevant and important in situations of both "identification" and "recognition".

In *Turnbull*, guidelines were laid down in regard to evidence of visual identification in situations of "fleeting glance" or "identification in difficult circumstances" and subsequent jurisprudence clarified, that such guidelines need not be adopted in each and every case of visual identification. *R v Courtnell* [1990] Cr. Law Review 115, *R v Oakwell*, 66 Cr. App. R. 174, *R v Curry and Keeble* [1983] Crim. L.R. 737, *Keerthi Bandara v AG* [2000] 2 SLR 245.

However, in *R v Bowden* [1993] Crim. L. R. 379 and *Beckford and others v R*, 97 Cr. App. R. 409 at 415, the importance of *Turnbull Guidelines* in cases of visual identification was re-emphasized.

A trial court in determining the guilt or innocence of an accused need to examine and analyse the evidence of "visual identification" of any witness, bearing in mind the factors discussed hereinbefore and make an assessment on the quality of evidence and decide whether the identity of the accused had been proved or not.

It is significant to note, that the examination in chief of the main witness in this case had been conducted without giving an opportunity to identify each accused

in the dock separately, other than the 1st, 2nd and the 8th accused. Nor an opportunity was given to the witness to describe the circumstances under which the identification was made. In the cross examination the witness was asked in reference to the two appellants (3rd & 6th accused) and three other accused (5th, 6th and 7th accused) as to how many times he has seen them during his life time. The witness answered "I only know Dillu, the first accused, the second accused and Eric the 8th Accused who is standing last. *I do not know any of the others*". Answering the next question "If so, you have only identified these three accused at the time of the incident?" witness said "As I already knew these three persons, I identified them".

The Learned Magistrate in deciding the guilt of the appellants in this case has not only failed to analyse the evidence of the principle witness and consider the quality of visual identification evidence taking into account all aspects of the testimony of the witness. The Learned Magistrate erred, when he failed to consider all these facts before reaching the decision. The Learned High Court Judge failed to consider these errors in the judgment of the original court, when affirmed the conviction while exercising appellate jurisdiction.

One other important item of evidence that had escaped the attention of the learned Magistrate and the Learned High Court judge emanates from the evidence of two other lay witnesses. Witness Suresh Pragaspathy, an elder cousin of the victim who rushed to the scene has witnessed the attack. Her description of the incident is transcribed in the following way:

"Brother Vicnarajah was cut by sword by Dillu and his people. Dillu is standing in the first place in the accused dock. When the said incident occurred, 15 persons came in the motorcycles. I cannot identify all the persons. They were wearing helmets"

Witness Thirunavukkarasu Thevika, near whose house the incident took place in the examination in chief said "When I ran after hearing the noise, Dillu raised the sword to me. At that place in about 6 or 7 motorcycles they were riding. I saw only

Dillu and Eric. They were having swords and clubs". In the cross examination answering a question as to in which appearance the assailants came the witness said "They came in the motor cycles wearing helmets and covering their faces". The further question "Did they come in the motor cycles wearing helmets and covering their faces?" was answered in the affirmative.

A careful consideration of these items of evidence together with the evidence of the victim, should have played a vital aspect in the analysis of evidence of "visual identification" in this case. It is unfortunate both the trial judge as well as the judge of the High Court who exercised appellate jurisdiction, failed to adopt such process. This error in my view has a serious impact in the final outcome of the case, adversely affecting the two appellants.

In view of these findings, this court will not proceed to examine the other questions of law raised in this appeal.

Maintaining law and order, bringing in perpetrators to justice, convicting accused whose guilt is proved according to law and subsequent sentencing are important stages that has to be preserved and protected to ensure that members of the society enjoy rule of law and democracy. The victim in this case has been subjected to a gruesome attack by a group of people. The manner in which this attack was carried out in broad daylight could have had a serious impact on the society. There is no doubt that the brutal attack the victim was subjected to in this case cannot be condoned, but should be subjected to strong condemnation.

However, a heavy responsibility lies on the court to ensure that an accused who is brought to trial, is convicted according to established legal principles irrespective of the seriousness and the gravity of the incident.

When all these factors are taken together with the evidence of this case I am of the view, that the evidence is unsatisfactory, and it is unsafe to affirm the conviction of the two appellants. Hence the appeals of the two appellants are allowed and the conviction and the sentence of the two appellants (3rd Accused-Appellant and

the 6th Accused Appellant) on both counts are set aside. Accordingly, the two Appellants are acquitted from count one and count two.

Following the best traditions and highest standards, the learned Senior Deputy Solicitor General who represented the Attorney-General in this case, drew our attention to various aspects of the evidence discussed herein before and, assisted this court to make its determination.

Appeals of the two Appellants allowed.

Chief Justice

Priyantha Jayawardena, PC, J,
I agree.

Judge of the Supreme Court

Murdu N.B. Fernando, PC, J.
I agree.

Judge of the Supreme Court