

THE ATTORNEY-GENERAL
v.
JOSEPH ALOYSIUS AND OTHERS

COURT OF APPEAL
S. N. SILVA, J. AND
D. P. S. GUNASEKERA, J.
C.A. APPLICATION NO. 1700/84
H.C. AVISSAWELLA NO. 27/82
MAY 29 AND JULY 27, 1992.

Criminal Law – Identification – Identification Parade – Proper procedure – Propriety of Magistrate Addressing questions to the Witnesses at the parade based on statements made during the investigation – Admission of identification evidence.

The identity of the accused, as a person who committed the offence is a fact in issue at a criminal trial and evidence as to identification of the accused by a witness, is relevant and admissible.

The first statutory provision regarding the holding of identification parades was contained in section 74(1) of the Administration of Justice Law No. 44 of 1973. This provision was reproduced verbatim in the Code of Criminal Procedure Act No. 15 of 1979, as section 124. But even without specific statutory provision authorising such procedure, identification parades were held as a step in the process of investigation.

An Identification parade is a means by which evidence of identity is obtained. But it is certainly not the only means by which it could be established that a witness identified the accused as the person who committed the offence. Identification can take place, depending on the circumstances, even where in the course of an investigation the witness points out the person who committed the offence to the police. That evidence too would be relevant and admissible subject however to any statutory provision that may specifically exclude it at the trial.

Rules contained in the local manual for judicial officers (1939), the Home Officer Office Circular and Code D now operative in England are designed to ensure that an identification, by parade or otherwise, is done in a manner that is not unfair to the suspect and that the witness has no aid or assistance other than his recollection of the appearance and physical characteristics of the person, whose act or presence, is at issue, to identify the suspect.

The witness should not see or be reminded of any photograph or description of the suspect or, be given any other indication of his identity. If a witness is asked to identify a suspect at a parade with reference to the act done by a person in the commission of the offence, it would not be objectionable, in relation to the provisions of the Manual, Circular or the Code.

The proper procedure to be adopted at an identification parade as stated by Walgampaya, J. in the case of *Perera v. The State* 77 NLR 224 should be understood only in the context of the objectionable features as noted in that case.

It would not be objectionable to request a witness at a parade, to identify any person, with reference to the acts or presence of the persons who participated in the commission of the offence. However, in addressing such a request or question to a witness, reference should not be made to the appearance or physical characteristics of any particular participant, as would facilitate his identification, at the parade. Where an objection is taken to evidence of identification that is otherwise relevant and admissible, the Court has to consider not only whether there is a breach of what is generally observed as the proper procedure but also the extent to which such breach has impaired the fairness of the proceedings. Such evidence of identification may be excluded only if the Court finds that its admission would have an adverse effect on the fairness of the proceedings.

Cases referred to:

1. *Perera v. The State* 77 NLR 224, 229, 231, 232.
2. *Bartholomeusz v. Kularatne* 34 NLR 317.
3. *Queen v. Sivanathan* 68 NLR 351.
4. *Rex v. Hunter* (1969) Criminal Law Review 262.
5. *Rex v. Howick* (1970) Criminal Appeal Review 403.
6. *R v. Grannell* (1990) 90 Criminal Appeal Reports 149.

Perera v. The State 77 NLR 217 distinguished.

APPEAL from order of High Court Judge.

D. P. Kumarasinghe, D.S.G. for Attorney-General.

Ranjith Devapura, for accused Respondent.

Cur. adv. vult.

3rd September, 1992.

S. N. SILVA, J.

This is an application in revision filed by the Attorney-General from the order, dated 11.09.1984 of learned High Court Judge, Avissawella.

The three accused-respondents were indicted in the High Court with having committed the offences, of being members of an unlawful assembly and of armed robbery under sections 140, 380 and 384 of the Penal Code. At the trial the prosecution sought to lead the evidence of two identification parades held on 19.10.1977 and 23.11.1977. At the first parade the 1st and 2nd accused were identified and at the second, the 3rd accused were identified. Learned counsel appearing for the accused objected to evidence being led of the identification parades on the basis that they were held contrary to the procedure stated in the judgment of Walgampaya, J. in the case of *Perera v. The State*⁽¹⁾. The objection was based on the premise that the Magistrate holding the parade referred to the contents of the statements made by the witnesses to the police, in formulating the questions addressed to the witnesses at the parades. Learned High Court Judge upheld the objection and by the impugned order ruled out evidence of the parades.

In the case of *Perera v. The state (supra)* certain Prison Officers were indicted with having committed the murder of a suspect, in prison, who had previously escaped from custody. The officers convicted, were implicated by other prisoners and were identified at a parade held on 9.12.1969 by the Magistrate. At that parade there were 53 prison officers, including 11 who were treated as suspects and, 23 members of the public. It appears that learned Magistrate had, a few days prior to the parade, recorded the statements of the witnesses (presumably in the course of the inquest) and the questions addressed by him to the witnesses at the parade were

based on statements made by these witnesses, to him. A perusal of the judgment of Walgampaya, J. shows that two features of that parade were found to be objectionable :

- (1) The composition of the parade. It was observed that the composition was inappropriate and unfair since the ratio of the suspected prison officers to outsiders was just 1 to 2. It was observed as follows : "The situation looks more unfair when one sees that the identifying witnesses were persons who met the prisoners (suspects) day in and day out and if anyone of these witnesses had a grudge against any prison officer he could well have pointed out that officer as having committed some act of assault." (at p.230).
- (2) That the questions put by the Magistrate to the respective witnesses were based on statements made to him five days prior to the date of the parade. It was observed as follows :

"The questions by the Magistrate to those identifying witnesses were inappropriate for the reason that those questions would have enabled them to know what they had told the Magistrate on 24.9.69 and consequently they would have been reluctant to resile from the position they had taken earlier. (at p.231).

It is also to be noted that the questions were based on certain physical characteristics of the persons alleged to have committed the assault. One question was to point out the person who was referred to as "Boxing Mahattaya." Another question was to point out the person who was referred to as "Kannadi Peiris".

On the basis of these objectionable features it was held that the procedure adopted by the Magistrate was "quite unfair by the accused who were tried for murder" (p.232). In this context Walgampaya, J. observed that the "proper procedure" that the Magistrate should have adopted was :-

- (a) that he should have held several parades...;

(b) to have asked the particular witness to identify any suspect if he was in the parade;

(c) if a witness pointed out any person, then only should the Magistrate have asked the witness whether that accused whom he pointed out did anything, and

(d) if so, the details of what he did. (p.232).

Learned Counsel for the accused-respondents relied on the matters stated in (b), (c) and (d). There is no objection in this case to the composition of the parades. The questions addressed to the witnesses in this case were in the following manner :

“If the person who was armed with a kris knife and demanded the bag of money or the person who was armed with a pistol and walked about in the office or the person who was armed with a pistol and who stayed at the gate or the person who broke the telephone, is in this parade, please point out that person.”

It is seen that the questions were based on the particular acts that were alleged to have been done by the persons who committed the robbery. As submitted by learned Deputy Solicitor General the questions do not contain any reference to the physical characteristics of the persons who are alleged to have committed the robbery so as to facilitate their identification. Indeed, the questions bear no comparison with those addressed in the case of *Perera v. The State*. However, learned Counsel for the accused-respondents submitted that on the basis of paragraph 'b' in the "proper procedure" as stated by Walgampaya, J. a witness should only be asked to identify any suspect if he was in the parade. In terms of paragraphs 'c' and 'd' witnesses should be asked to specify what was done by that person only after the person is identified.

It has to be borne in mind that the observations were made by Walgampaya, J. regarding a "proper procedure" in a situation that is totally different from the facts of this case. The composition of the parade in the case of *Perera v. The State*⁽¹⁾ was plainly objectionable.

Similarly the questions addressed to the witness, based on statements made to the same Magistrate, had references mainly to physical characteristics of the persons who were alleged to have participated in the assault. The submission of learned Deputy Solicitor General is that the observations of Walgampaya, J. characterised as "the proper procedure" should be understood in the context of the particularly objectionable features as to the manner in which the parade was conducted in that case.

Walgampaya, J. in his judgment (at p.229) observed that there is no principle which applies to the holding of identification parades, in the Criminal Procedure Code or in the Administration of Justice Law and in this context referred to the preamble and certain parts of the Home Office Circular No. 9/1969 as appearing in Archbold on "Criminal Pleading, Evidence and Practice" 38th Edition p. 653. It appears that in England, Home Office Circulars were issued from time to time, that relate *inter alia* to the holding of identification parades and, the currently operative circular was reproduced in the respective editions of Archbold. These circulars were not based on any provision of law and were meant to be used as guidelines. Subsequently, in England, the Police and Criminal Evidence Act was enacted in 1984 and in terms of section 66 and 67 of that Act, the Secretary of State is empowered to issue Codes of Practice with regard to specific matters, including the identification of persons. In terms of this statutory provision a Code of Practice described as Code D, relating to identification of persons by Police Officers and by witnesses was made in 1985 which was superseded by another Code with effect from April 1991. This Code is reproduced in Archbold, Criminal Pleading Evidence and Practice 44th Edition (1992) pages 1628 and 1631. Annex A of the Code relates to identification parades (p.1637). The code is more specific and exhaustive than the Home Office Circular to which reference was made in the case of *Perera v. The State (supra)*. It is also to be noted that the Code does not contain the preamble to the Circular, which was couched in general terms, and was cited by Walgampaya, J.

As noted above, the only basis on which learned High Court Judge ruled out the evidence of the identification parade is that the questions addressed to the witnesses at the parade were based on

statements that had been made by the witnesses in the course of the investigation. The questions relate only to the acts done by each of the persons in the commission of the offence. Hence the particular matters to be considered are whether the decision in the case of *Perera v. The State (supra)* can support the order of learned High Court Judge and whether "the proper procedure" as stated by Walgampaya, J. should be taken as laying down inflexible rules that should apply in all situations, any breach of which will result in evidence of the parade being excluded.

An identification parade is held for the purpose of ascertaining whether any suspect arrested by the police in the course of an investigation, is the person seen by the witness as doing a particular act or being present, at or about the time the offence was committed. It is a step in the process of investigation and does not form part of the trial. The old Criminal Procedure Code did not contain any provision that authorised the holding of an identification parade by a Magistrate. However, it is seen that as a matter of practice identification parades were held for the purpose stated above. In the case of *Bartholomeusz v. Kularatne*⁽²⁾ (decided in 1932), Macdonell, C.J. held that "where at an identification parade the accused was identified by the witness who later stated in evidence that he was not quite certain of the identity of the accused, the evidence of a person who was present at the parade was admissible to establish that the accused was identified by the witness". Section 165 of the Manual for Judicial Officers issued in 1939 contains provisions regarding the holding of identification parades. In the case of *Queen v. Sivanathan*⁽³⁾, the Court of Criminal Appeal held that it would be a suspicious circumstance if a witness were shown a photograph of the accused at the police station prior to the identification parade being held. These matters clearly establish that even without specific statutory provision authorising such procedure, identification parades were held for the purpose stated above, as a step in the process of investigation.

The first statutory provision regarding the holding of identification parades was contained in section 74(1) of the Administration of Justice Law No. 44 of 1973. This provision was later incorporated verbatim in section 124 of the Code of Criminal Procedure Act No. 15 of 1979, which reads as follows :

"Every Magistrate to whom application is made in that behalf shall assist the conduct of an investigation by making and issuing appropriate orders and processes of court, and may, in particular hold, or authorize the holding of, an identification parade for the purpose of ascertaining the identity of the offender, and for such purpose require a suspect or any other person to participate in such parade, and make or cause to be made a record of the proceedings of such parade."

The identity of the accused, as a person who committed the offence is a fact in issue at a criminal trial and evidence as to the identification of the accused by a witness, is relevant and admissible. This is amply supported by the judgment of Macdonell, C.J. in the case of *Bartholomeuz v. Kularatne (supra)*. Section 124 of the Code of Criminal Procedure Act referred to above, which requires a Magistrate to hold an identification parade, provides for the means by which such evidence is obtained. It is certainly not the only means by which it could be established that a witness identified the accused as the person who committed the offence. Identification can take place, depending on the Circumstances, even where in the course of an investigation the witness points out the person who committed the offence, to the police. That evidence too would be relevant and admissible subject however to any statutory provision that may specifically exclude it at the trial.

Rules contained in the Manual for Judicial Officers, the Home Office Circular and Code D now operative in England, are designed to ensure that an identification, by parade or otherwise, is done in a manner that is not unfair to the suspect and that the witness has no aid or assistance other than his recollection of the appearance and physical characteristics of the person, whose act or presence, is at issue, to identify the suspect. The question is whether the evidence of a parade should be excluded solely on the basis that there is a failure to follow any provision of the Manual, Circular or the Code. The judgment in the case of *Perera v. The State (supra)* does not state any decision in England or in this country, in which evidence of a parade was excluded solely on the ground that there has been a failure to follow any of these provisions. The decisions in the cases of *Rex v. Hunter*⁽⁴⁾ and *Rex v. Howick*⁽⁵⁾ cited by Walgampaya, J. only

support the proposition that it is usually unfair to ask a witness to make an identification for the first time in court, because it is so easy for a witness to point to the accused in the dock. On the contrary, the consistent trend of authority, in England has been that, evidence of an identification made by a witness is not excluded solely due to the failure to follow the provisions of the Circular or the Code. In the Case of *R v. Grannell* ⁽⁶⁾, the Court of Criminal Appeal of England considered whether evidence of a "group identification" done by a witness should have been excluded. In that case, the police had arranged an identification parade for a suspect who was not in custody but due to certain circumstances the parade was not held as scheduled. Thereafter, when the suspect was due to appear in the Magistrate Court the witness, who was not informed of the presence of the suspect, was positioned in the cafeteria on the court premises from where she could see people coming in through the foyer. At one stage the suspect and certain other persons walked in and the witness pointed out to the suspect and stated "I think that is the man but wait a minute". Then after a little while, she said "I am sure it is him". Lord Tucker in his judgment (p.153) observed that there were breaches of the provisions of the Code in that none of that procedure was followed. He further stated as follows".

"Accepting, as we do, that breaches occurred in this case, it becomes a matter for the discretion of the trial judge on submissions made to him to decide whether or not to allow the evidence to be given. He has to consider in his discretion whether the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

It was held in that case that there was no unfairness to the accused that resulted from the admission of evidence with regard to the identification which took place in the circumstances stated above.

Thus it is seen that in England, where rules have been made for the conduct of parades in the form of a Code based on a statute, even a failure to follow all the relevant rules would not, *per se*, render the evidence of identification inadmissible. The Court of Appeal

there, considered the admissibility of such evidence of identification, from the point of the provisions of section 78 of the Police and Criminal Evidence Act 1984 which gives a discretion to the court to exclude unfair evidence. We do not have a parallel legislative provision. However our courts have, similar to the courts in England, the jurisdiction at common law to exclude relevant and admissible evidence where the admission of evidence would have an adverse effect on the fairness of the proceedings. The decision in the case of *Perera v. The State (supra)* is referable to this common law jurisdiction of our courts. This is borne out by the fact that the decision in the case that the parade was vitiated, was preceded by a clear finding that the procedure adopted by the Magistrate was in their Lordships view "quite unfair by the accused who were tried for murder" (p.232).

According to the "proper procedure" as stated in the judgment of Walgampaya, J. a witness, should only be asked to identify a suspect if he was in the parade and only upon identification requested to state what the suspect did. We have to observe that the manner of framing a question to a witness is not stated anywhere in the Manual for Judicial Officers, the Circular or the Code operative in England. However, there are provisions in the negative, in that, they state as to what should be excluded in the form of questions. In the Manual section 165(a) it is stated as follows : "It is improper to point out the suspect to the witness and to ask "is that the man?". In the preamble to the Circular, cited by Walgampaya, J. (at p.229) it is stated that precaution should be taken to exclude any suspicion of unfairness or risk of erroneous identification "through the witness attention being directed specially to the suspected person instead of equally to all the persons in the parade". The only relevant matter in the Code is contained in section 12 (III) which states that witnesses should not see or be reminded of any photograph or description of the suspect or, be given any other indication of his identity. Thus it is seen that if a witness is asked to identify a suspect at a parade with reference to the act done by a person in the commission of the offence, it would not be objectionable, in relation to the provisions of the Manual, Circular or the Code, referred to above.

In the case of *Perera v. The State (supra)* as noted above, the questions had references to the appearance and physical

characteristics of the suspects. Therefore we are of the view that the observation of Walgampaya, J. as to the "proper procedure" to be adopted at an identification parade should be understood only in the context of the objectionable features as noted in that case. Indeed, the procedure as stated by Walgampaya, J. that a witness should only be asked to identify any suspect if he is in the parade, is with due respect, one that may lead to practical difficulties in many cases. Where several persons are alleged to have committed an offence, if a witness is merely asked "to identify any suspect" he would be confused and would not know what he is expected to do at the parade. His attention must necessarily be drawn to the acts done by the different participants, in the course of committing the offence, so as to facilitate a proper identification. However, at all times caution should be taken to ensure that the questions do not contain any indication of the appearance or physical characteristics of a particular participant so as to facilitate an identification.

For the reasons stated above, we hold, that the identity of the accused as the person who committed the offence is a fact in issue in a criminal case and evidence of identification is relevant and admissible in the absence of any statutory provision excluding such evidence. The rules contained in the Manual for Judicial Officers and the "proper procedure" stated by Walgampaya, J. in the case of *Perera v. The State (supra)* are guidelines to ensure that an identification parade is held in a manner that is fair to the suspect and that a witness does not have any aid or assistance as to identification other than his recollection of the appearance and physical characteristics of the person, whose acts or presence is at issue, to identify the suspect. It would not be objectionable to request a witness at a parade, to identify any person, with reference to the acts or presence, of the persons who participated in the commission of the offence. However, in addressing such a request or question to a witness, reference should not be made to the appearance or physical characteristics of any particular participant, as would facilitate his identification at the parade. Where an objection is taken to evidence of identification that is otherwise relevant and admissible, the Court has to consider not only whether there is a breach of what is generally observed as the proper procedure but also the extent to which such breach has impaired the fairness of the proceedings.

Such evidence of identification may be excluded only if the court finds that its admission would have an adverse effect on the fairness of the proceedings.

In this case, as noted above, the questions merely draw attention of the witness to the particular acts that were done by the several persons who participated in the robbery. The questions do not contain any indication as to the appearance or physical characteristics of the persons who committed the offence. Therefore we see no unfairness in the manner in which the parade was conducted. Furthermore, it is to be noted that learned High Court Judge did not come to a finding that the parade had been conducted in an unfair manner. The only basis of his decision is that there has been a contravention of the "proper procedure" as stated by Walgampaya, J. in that the questions addressed to the witnesses have reference to particular acts done by the persons who committed the offence. We find that the basis stated by learned High Court Judge is not correct in law. Therefore we set aside the order of learned High Court Judge dated 11.09.1984 and direct that the trial proceed against the accused-respondents by permitting the prosecution to lead evidence of the identification parades that were held.

D. P. S. GUNASEKERA, J. – I agree.

Order of High Court Judgment set aside.