

1974 Present : Walgampaya, J., Ismail, J., and Vythialingam, J.
C. M. PERERA and 12 others, Appellants, and THE STATE,
Respondent

APPEALS NOS. 121-127/72, WITH APPLICATIONS 137-143

S. C. 173/71—M. C. Colombo, 69827

Criminal procedure—Identification parade—Proper procedure that should be adopted.

Eleven prison officers of Welikade prison were suspects in the commission of the offence of causing the death of a prisoner in the same prison on 22.9.69. On receipt of various B reports from the Police, the Magistrate of the area recorded the statements of certain

witnesses on 24.9.69. At an identification parade held on 9.10.69. fifty-three of the prison officers and twenty-three persons from the public were all lined up in a room in the well of the Court, and the identifying witnesses were called up one by one to point out the various persons who committed various acts of assault on the deceased.

Before the three identifying witnesses were questioned, they were reminded by the Magistrate of the contents of the statements made by them on 24.9.69.

Held, that with 53 prison officers in the parade and only 23 persons from the public, the parade was not properly constituted. Although the 53 prison officers were not all suspects, still it was evident that the ratio of one outsider to two prison officers was inappropriate and unfair. The proper procedure that the Magistrate should have adopted was—

- (a) that he should have held several parades in conformity with the practice followed in similar circumstances ;
- (b) to have asked the particular witnesses 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.

APPEALS against certain convictions at a trial before the Supreme Court.

G. E. Chitty, with *C. Chandrahasan*, *Jayakumar* and *C. Motilal Nehru* (assigned), for the 1st to 4th accused-appellants.

E. R. S. R. Coomaraswamy, with *T. Joganathan*, *C. Chandrahasan*, *E. R. S. R. Coomaraswamy* (Jnr.) and *C. Motilal Nehru* (assigned), for the 8th, 9th and 10 accused-appellants.

T. D. Bandaranayake, Senior State Counsel, for the Attorney-General.

Cur. adv. vult.

May 23, 1974. WALGAMPAYA, J.—

The events that preceded the filing of this action in the Magistrate's Court, and the sequel thereto by an indictment filed in the Supreme Court, were shortly as follows :—

In September 1969, when the prosecution witness Kuttilan was Chief Jailor at the Welikade Prisons, the 3rd accused Vernon Fernando, a jailor, was the next most senior officer, the 4th and 5th accused were jailors, the 1st, 2nd and 7th to 13th accused were guards at the same prisons, and the 6th accused was overseer.

The deceased Dissanayake was a prisoner at the Welikade jail. He had a case pending against him in the Kalmunai Courts, and he had cited two fellow prisoners of his, Hemachandra and Ratnasiri, as witnesses. All three of them were provided with an escort party to Batticaloa. That escort took the three prisoners to Batticaloa and a new escort party took the prisoners to Kalmunai, and on the return journey to Colombo on the 20th of September, 1969.

Kuttilan received information, probably from the Maho Police, that the three persons referred to earlier, while being escorted by train to Colombo, had assaulted the escort party and the deceased had jumped off the train. Hemachandra and Ratnasiri were handed over to the Maho Police as the injured persons in the escort party had got warded at the Maho Hospital.

Hemachandra and Ratnasiri were brought back to Welikade jail under prison escort on 21.9.1969. The deceased was arrested on 22.9.1969, and a prison escort was sent from Welikade jail to bring him by prison van. On that day the 1st and 2nd accused had to do escort duty on the orders of Kuttilan who said that very probably the 3rd accused was in charge of the van. On the journey from Maho to the Welikade jail an assault appears to have taken place on Dissanayake inside the van, and stains of blood and pieces of hair were found inside the van, although it has not been established that it was the deceased's blood or deceased's hair that was found in the van ; but it was not relevant at the Supreme Court trial to ascertain who assaulted the deceased in the prison van.

The matters that became relevant at the Supreme Court trial were as to what happened after Dissanayake was handed over to the custody of the prison officials who were in charge of the admissions of prisoners. That was at 7.20 p.m. on 22nd September, according to document P22.

The original indictment charged all thirteen accused with the murder of Dissanayake between Maho and Welikade on the relevant date. That indictment was amended and in the result the accused were charged with the murder of Dissanayake in the Welikade jail. Therefore, what happened inside the jail after the admission of Dissanayake became a fact in issue. The prosecution therefore very correctly focussed its attention on the acts of assault on Dissanayake after his admission, and in the process eliminated the possibility of any injuries having been caused on Dissanayake by a fall from the train, or an assault in the van contributing to the cause of death or resulting in death.

The prosecution witness Bastian in his evidence has spoken to an assault on Dissanayake in the admission room at point H in the sketch. The witness Hemachandra spoke of an assault on Dissanayake in the corridor of the Basement cell, and the witness Gamini spoke of assaults on Dissanayake in the visit room. Gamini claimed to have seen the assault from the position he had taken on a lavatory seat in a room on the second floor of 'H' ward. I shall later in this order analyse the evidence of these three witnesses in regard to the identification by them of the persons who they claim assaulted the deceased in the several places referred to earlier.

Shortly after mid-night on the 22nd of September, the Prison doctor, Appuhamy, was sent for, and at 1.30 a.m. on 23rd September one of the prison officers opened the cell door of Dissanayake. The doctor's evidence was that there was no light inside that cell, and that the corridors were dimly lit (by some hurricane lanterns in the corner). He felt the pulse of Dissanayake and he found that there was stiffness in the hands. He did not test him for rigor mortis. The doctor was there inside that cell only for 2 or 3 minutes and when he flashed his torch inside that cell he found that the floor was damp, but he did not investigate the cause for the dampness. It was dark inside the cell, except for a little light coming through the bars. The lamps that he spoke of were kept on something at the end of the corridor.

The same doctor examined the prisoner Hemachandra and asked him whether he had any complaints. His reply was that he had pains in his chest, and on the doctor's orders the prisoner was removed to the prison hospital. Hemachandra had made no complaint to the doctor of an assault on him by any one or more prison officials.

The investigations in regard to the death of the deceased commenced immediately under the direction of Mr. Gaffoor, who was the Officer-in-Charge, of the Borella Police. It was he who has submitted various B reports to the Magistrate of the area, who visited the scene at about noon on the 24th of September. The Magistrate went to the Basement cell section, to the last cell on the right-hand side. He saw some circular marks drawn in chalk inside the cell. He was also shown some discoloured patch on the right wall of the cell. It was dark inside the cell and he examined the inside with the aid of a torch. At that stage, there were no suspects. He was informed that there were prisoners who claimed to have some knowledge of the facts, and

that those prisoners were prepared to make statements to him. He then recorded the statements of the following witnesses, Alphonso, Gamini and Hemachandra.

The prisoner Alphonso was not available at the inquiry stage in the Magistrate's Court, because he had committed suicide. The other three prisoners referred to earlier had given evidence in the Magistrate's Court which evidence will be analysed later in this order.

On 8.10.1969 a B report was filed in the Magistrate's Court under Section 121 of the Criminal Procedure Code. The application contained in that report was that an identification parade may be held on 9.10.1969 either in Court or some other premises with all the suspects on remand custody, except jailors Fernando, Leelasena and Rajapakse, namely, the 3rd, 4th and 5th accused respectively, together with all the prison officers who were there present on duty and off duty, within the Welikade prison on 22.9.1969 between 6 p.m. and mid-night.

The Magistrate made order that an identification parade be held on 9.10.1969 in the Court premises of Maligakande. He made order that precautions should be taken to ensure that the suspects who were to be placed in the parade should not be seen earlier by the identifying witnesses. His order was that the suspects be brought to Court in a closed van under escort. He was not sure whether that order took in the other officers who were not suspects at that time, but who were on duty and off duty on the relevant date between 6 p.m. and mid-night. So that, we do not know with certainty how the latter category of prison officers came to Court, but certainly it is clear from the evidence that all these prison officials who were not suspects were kept outside the Magistrate's Court premises in a closed van ; but, that was a place different to where the 11 suspects were kept in a closed van. When the parade commenced, 53 of the prison officials and 23 persons from the public were all lined up in the well of the Court, and witnesses were called up one by one to point out the various persons who committed various acts of assault on the deceased.

In considering the manner in which this identification parade was held, the primary matter that strikes one is with 53 prison officers in the parade and only 23 persons from the public, whether the parade was properly constituted. The Manual for Judicial Officers which was printed at the Ceylon Government Press in 1939, at page 33 thereof lays down certain guidelines to Magistrates who hold parades of this type. At page 33, Section 165 (b) (II) : "The suspect shall never be presented to the

witnesses alone. He shall be placed in a line consisting of five or more persons of the same class as himself and be given an opportunity of taking any position he likes in the line.”

“ (III) The witnesses shall be presented singly and requested to examine the line and state whether the man or men they identified are there.”

Nowhere in the Criminal Procedure Code (which has since been repealed by the Administration of Justice Law No. 44 of 1973) is there any principle which applies to the holding of identification parades. Archbold on Criminal Pleading, Evidence & Practice, 38th Edition, Chapter 15, page 653, refers to a Home Office circular No. 9/1969, and states: “ (i) the object of an identification parade is to make sure that the ability of the witness to recognise the suspect has been fairly and adequately tested. (ii) identification parades should be fair, and should be seen to be fair. Every precaution should be taken to see that they are so, and, in particular, to exclude any suspicion of unfairness or risk of erroneous identification through the witness’s attention being directed specially to the suspected person instead of equally to all the persons paraded.”

“ (VIII) The suspect should be placed among persons (if practicable 8 or more)..... ”

“ (IX) Occasionally all members of a group are possible suspects. This may happen where police officers are involved (e.g., an allegation concerning a police officer which can be narrowed down to a number of officers who were on duty at the time and place in question.) In such circumstances, an identification parade should not include more than two of the possible suspects ; e.g. if there were 12 police officers on duty at the time and place in question, there should be at least six parades, each including ten officers who were not implicated and not more than two who might have been ; twelve possible suspects should not be paraded together.”

The Home Office circular No. 9/1969 had been prepared on the basis of a memorandum by the Chief Officer of the Metropolitan Police in consultation with the Lord Chief Justice (Vide 6th Supplement to the 37th Edition of Archbold on Pleadings, paragraph 1009).

That paragraph also refers to the undesirability of inviting witnesses to identify accused persons for the first time when they are in the dock—(*Rex v. Hunter*¹ (1969) Criminal Law Review 262, which was a decision of the Court of Criminal

¹(1969) *Criminal Law Review* 262.

Appeal, and *Rex v. Howick*¹ (1970), *Criminal Law Review* 403.) The latter case which was decided by the Court of Appeal, Criminal Division, held: "It is usually unfair to ask a witness to make an identification for the first time in Court because it is so easy for the witness to point to the defendant in the dock."

Although the 53 prison officers were not all suspects at that time still it is evident that the ratio of one outsider to two prison officers was inappropriate and unfair. The chances of a member of the public being pointed out was just 1 to 2. The situation looks more unfair when one sees that the identifying witnesses were persons who met the prisoners 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.

It is relevant at this stage to consider the procedure that was adopted by the Magistrate who held the parade. As I said before, 53 prison officers and 23 members of the public were lined up in a row in the well of the Court. The requirement that all persons who were lined up had to be similarly dressed was observed in this case, except that 3 or 4 of them were in shorts and the rest were presumably dressed in shirts and long trousers. The 8th accused Peiris who was also known as Kannadi Peiris was wearing glasses. There were two Counsel who were watching the interests of all suspects. The Magistrate called the witnesses one by one and he put certain questions to them to point out the suspects. Those questions were presumably put on the statements those witnesses had made to the Magistrate on the afternoon of 24.9.1969. When questioned: "The reason why you kept the 3rd, 4th and 5th accused out of the parade is because they had been specifically named by the witnesses?" his answer was: "So I was informed."

The first identifying witness who was called was Bastian. To him the Magistrate put the question to point out the person whom he referred to as Boxing Mahattaya in his statement, and Bastian pointed out the 1st accused. When the Magistrate asked Bastian to point out the person whom he referred to as Kannadi Peiris, Bastian pointed out the 8th accused.

The Magistrate then asked Bastian to point out the person who came into the visit room and washed his hands, and he pointed out the 2nd accused. The Magistrate then asked Bastian the question: "Did he point out Wimalasiri?" and Bastian

¹ (1970) *Criminal Law Review* 403.

said that that was the person whom he saw about the place. Wimalasiri was the 9th accused. Bastian could not identify the person who kicked the deceased.

The next identifying witness who was called into the Court room was Gamini. The Magistrate asked Gamini to point out the person whom he saw assault the deceased in the visit room, and the witness pointed out the five persons, 13th, 9th, 1st, 10th and the 6th accused. Later the witness pointed out the 8th accused. So that, according to witness Gamini he saw six persons assault the deceased in the visit room. The Magistrate then asked Gamini to point out the person whom he saw pulling out the hair from the head of the deceased, and he pointed out the 1st accused. The Magistrate then asked Gamini to point out the person who applied something on the head of the deceased, but the answer to that question is not on record.

Witness Hemachandra was then brought into the Court room, and the Magistrate asked him to point out the person whom he saw assaulting the deceased on the corridor of the Basement cell, and he pointed out the 1st, 7th and the 9th accused. The Magistrate then asked witness Hemachandra to point out the persons who brought the deceased to the Basement cell, and he pointed out the 1st and 7th accused. The Magistrate then asked Hemachandra to identify the persons who "removed the body of the deceased that night" and he pointed out the 12th, 11th and the 10th accused.

It is our considered view that when the Magistrate used the statements made by various witnesses to him on 24th September, and asked them to point out the various persons who did various acts, he was in effect refreshing the memory of those witnesses in regard to what they had told him on the 24th of September. In our view, that process of questioning gave the identifying witnesses an opportunity of knowing what they had told the Magistrate on the 24th of September, 1969—especially as the inquiry in the Magistrate's Court commenced on 26.10.69 and terminated on 22.11.71.

We are of the view that unless these particular witnesses had photographic memories it would have been very difficult for them to remember what they had told the Magistrate earlier. The questions put 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 24.9.1969 and consequently they would have been reluctant to resile from the position they had taken earlier.

The procedure adopted by the Magistrate was in our view quite unfair by the accused who were tried for murder. It is our view that the proper procedure that the Magistrate should have adopted was :—

- (a) that he should have held several parades as indicated earlier in this order ;
- (b) to have asked the particular witnesses 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.

The failure on the part of the Magistrate to have adopted the procedure referred to a while ago constitutes a serious irregularity which has vitiated the purpose of the parade.

Dr. Chandra Amarasekera, Judicial Medical Officer, Colombo, held a post mortem examination on the deceased on 23.9.1969, commencing at 2.45 p.m. at the Medico Legal Morgue, Colombo. The body was that of a well nourished male person, 5 feet 10 inches tall, and about 27 years of age. The doctor has spoken to the numerous injuries on the deceased man, some of which could have been caused on the 20th of September, possibly when the man jumped off the train, and some were more recent injuries caused within a period of about 24 hours prior to the post mortem examination.

The fatal injury was a depressed fracture of the 2nd rib, torn pericardium, bruised heart, bruised aorta, and bruised pulmonary artery. The doctor's view was that a very great degree of external force was necessary to cause that fatal injury. He described the manner in which that fatal injury could have been caused as if a vehicle had run over him, or by stamping on the chest with or without shoes, or by jumping on the body. The doctor further said that either kicking, stamping, or blows with the fist or baton, could have caused the fatal injury. He could have cried out for two or three minutes after receiving the fracture, and there would have been involuntary groaning, the doctor said. There would have been a certain amount of plucking of hair from the head of the deceased. All the injuries were suggestive of the deceased having been beaten by a number of persons. The deceased would have had his last solid meal earlier than 2 or 3 hours prior to his death, and the doctor's view was that no medical or surgical skill could have saved the life of the deceased after he received the fatal injury. He

was of the view that the deceased had come by his death within a period of 14 to 18 hours prior to 2 p.m. on 23.9.1969. He placed a maximum limit of 18 hours and said that death could have occurred between 8 p.m. and mid-night on 22.9.1969. In the result, it must necessarily follow that the fatal injury was caused probably in the visit room.

The documents produced in the case which were not challenged by the Prosecution, prove that the keys of the Basement cell were removed by Sugathadasa at 8.10 p.m. on 22nd September, and returned at 8.35 p.m.—25 minutes later. In the light of the medical evidence that after receiving the fatal injury the deceased would not have been able to be in a standing posture for a long time and he would have collapsed within a short time, one can draw the necessary inference that the deceased was pulled along or dragged to the Basement cell.

It is relevant at this stage to consider the evidence of witness Hemachandra who was in the train when the deceased jumped off the train somewhere at Maho. On the relevant day at about 5.30 or 6 p.m. Hemachandra was put into his cell. Sometime later the deceased was also brought to the Basement cell. According to Hemachandra, the deceased was dragged by the 1st, 7th, 8th and the 9th accused, and both of them were assaulted, but to Dr. Appuhamy, Hemachandra had only complained of pain and not of an assault. We are of the view that the medical evidence referred to earlier negatives Hemachandra's evidence of an assault on the deceased in the corridor of the Basement Cell. The more so, because the place was very dimly lit and identification of persons, if any, assaulting would not necessarily be accurate.

The evidence of Bastian is subject to numerous infirmities. In his evidence the Magistrate has said that Bastian wanted to make a statement to him, but he asked Bastian to make the statement to the inquiring officer, but Bastian in his evidence in the Magistrate's Court has said that the first person to whom he made his statement was to the Magistrate, and that he signed it. Later he said that he went up to the Magistrate and made a statement, but the Magistrate did not record the statement. In that state of Bastian's evidence one cannot say with certainty that Bastian was a reliable witness.

When one analyses the evidence of Gamini, the primary matter to be considered is whether, when he was standing on the lavatory seat on the 2nd floor of H ward, he could have seen with certainty what was happening in the visit room at point F in the sketch. According to the key to the sketch the distance from the H ward to the visit room outer wall is 21 feet. There is

no indication in the key to the sketch in regard to the height of the 2nd floor of H ward, but certainly taking into consideration the fact that Gamini claims to have seen into the visit room by standing on the lavatory seat in the 2nd floor, it would be reasonable to say that his eyes were at a distance of at least 30 feet from the wire mesh window in the visit room.

We hesitate to say that he could have identified persons clearly from that distance, specially in view of the fact that he had to identify persons (who he said assaulted the deceased) through the wire mesh window. According to him at the time he watched for more than one hour, and the accused whom he saw assaulting were the 1st, 3rd, 4th, 5th, 6th, 8th, 9th, 10th and the 13th accused. In giving details of that he said that he could not say what the 1st accused was wearing, but he saw the 1st accused striking the deceased. He saw the 3rd, 4th, 5th and the 6th accused striking the deceased with clubs. He saw the 8th accused bringing something in a vessel and applying on the head of the deceased. He saw the 1st and 9th accused pulling out hairs from the head and the chest of the deceased. He saw the 13th accused striking the deceased.

One infirmity in the evidence of Gamini is that, of the persons he claimed to have identified, it has been proved affirmatively that the 5th accused was off duty on the day in question, and at the close of the trial, the 5th, 6th and the 13th accused have been acquitted, and another infirmity is that he told the Magistrate he saw some persons pulling out the hair of the deceased, but he had not mentioned the names of any of those persons to the Magistrate. However, at the inquiry he improved on his story and said he saw the 1st and the 9th accused pulling out hairs.

Gamini in his evidence at the inquiry has stated that he heard the deceased shouting out not to apply chillie powder, and that it was smarting, but there is no evidence at all of the application of chillie powder, or presence of chillie powder in the samples sent to the Government Analyst according to the evidence and report by the Analyst.

Learned Counsel who appeared for the 1st to the 4th accused, and the 8th, 9th and the 10th accused, has stressed very strongly that in the state of the evidence led for the prosecution in regard to identification that there should have been very clear directions by the learned Commissioner of Assizes, not only regarding the effect of the evidence of these three witnesses, namely, Gamini, Bastian, and Hemachandra, and although the evidence of the first two witnesses was not accepted in regard to certain accused, then the only evidence against the 8th accused was the evidence

of Bastian, and there should have been very clear direction as to how that evidence should have been approached, for it was Bastian alone who had referred to the 8th accused, as having assaulted the deceased. It was also submitted by learned Defence Counsel that when the prosecution alleged the different acts of assault on the deceased at different places, namely, the admission room, the visit room, and the corridor in the Basement cell, there should have been very cogent evidence of common intention for all accused who were convicted to have been found to have shared a common intention.

In 69 N.L.R. page 166, Manicavasagar J., has held :

“In order to sustain the charge based on common intention it is essential that both accused persons must have participated in the offence, in the sense that they must be physically present at or about the scene of offence.”

The trial in the Assize Court had commenced on 21.8.1972 and the verdict of the Jury was given on 7.11.1972. The summing up of the learned Commissioner had lasted nine hours. After such a lengthy summing up, one does not see how the Jury could have reasonably and properly returned the verdict in forty minutes. It is not at all clear from their verdict, in regard to the basis on which they had arrived at their verdict.

Learned Defence Counsel has further submitted that certain passages in the summing up are conflicting and highly prejudicial to the 8th, 9th and the 10th accused. It certainly appears from the summing up that there had been a strong emphasis in regard to the participation of those accused in the commission of some offence, whether it was murder, culpable homicide not amounting to murder, or grievous hurt. It does appear to us that when, in the latter part of the summing up the 8th, 9th and 10th accused are stressed and grouped together, the Jury would have had it prominent in their minds, and probably thereafter looked for other accused. If it happened that way, and there is a strong possibility that was so in view of the fact that the Jury returned their verdict in forty minutes, then it is quite clear that that verdict was unreasonable and it would be unsafe to allow it to stand.

For all these reasons I am of the view that the convictions of the accused for simple hurt and the sentences should be set aside and the accused are acquitted and discharged.

ISMAL, J.—I agree.

VYTHIALINGAM, J.—I agree.

Accused acquitted.