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

CA 202/2003

HC Kalutara Case No: 182/02

Agampody Don Manoj Chandima de Zoysa.

Accused-appellant.

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent.

Before : Sisira J. de Abrew, J &

P.W.D.C Jayathilake, J

Counsel : Dr. Ranjith Fernando for the accused-appellant.

Jayantha Jayasooriya PC, ASG for the State.

Argued & Decided on: 30.10.2013

Sisira J. de Abrew, J.

The Attorney General forwarded the indictment against both accused-appellants containing six counts. Count No.1 is conspiracy to commit extortion of Rs. 2.5 Million from Sydney de Zoysa and his family by threatening bodily injury to their daughter Dinuka de Zoysa which is an offence punishable under Section 376 of the Penal Code read with Section 113(b) and 102 of the Penal Code.

Count No 2 is conspiracy to kidnap said Dinuka de Zoysa using fire arms thereby committing an offence punishable under Section 44 (a) of the Firearms Act as amended by Act No 22 of 1996 read with Section 113(b), 102 and 355 of the Penal Code.

Count No 3 is robbery of a vehicle bearing registration No 253-5359 from the possession of said Sydney de Zoysa using firearms which is an offence punishable under Section 44(a) of the Firearms Act as amended by Act No22 of 1996 read with Section 380 of the Penal Code.

Count No 4 is kidnapping of said Dinuka de Zoysa threatening her with death using firearms which is an offence punishable under Section 44(a)

of the Firearms Act as amended by Act No 22 of 1996 read with Section 355 of the Penal Code.

Count No 5 is extorting a sum of Rs. 2.5 Million from said Sydney de Zoysa by threatening him with bodily injury which is an offence punishable under Section 376 of the Penal Code.

Count No 6 is committing the offence of retention of stolen property in respect of a motor cycle bearing registration No 154-1853 which is an offence punishable under Section 394 of the Penal Code.

After trial the learned trial judge convicted both accused-appellants of count No 1-5 but acquitted them of count No 6. On count No 1 the punishment on both accused was 5 years rigorous imprisonment and to pay a fine of Rs. 10000/- carrying a default sentence of 2 years imprisonment. On count No 2 learned trial judge imposed life imprisonment on both accused-appellants and ordered to pay a fine of Rs. 10000/- carrying a default sentence of 2 years imprisonment. On count 3 learned trial judge sentenced both accused-appellants to life imprisonment and to pay a fine of Rs. 10000/- carrying a default sentence of 2 years imprisonment. On count No 4 learned trial judge sentenced both accused-appellants to life imprisonment and to pay a fine

of Rs, 10000/- carrying a default sentence of 2 years imprisonment. On count No 5 learned trial judge sentenced both accused-appellants to a term of 5 years rigorous imprisonment and to pay a fine of Rs.10000/- carrying a default sentence of 2 years rigorous imprisonment.

Being aggrieved by the said conviction and the sentences both accused-appellants appealed to this Court. The 2nd accused-appellant withdrew the appeal. Arguments with regard to the appeal filed by the 1st accused-appellant was heard by this Court. Facts of this case may be briefly summarized as follows.

On 30.05.2002 around 7 a.m. Dinuka de Zoysa was travelling to her school in her family vehicle bearing registration No 253-5359 driven by her father Sydney de Zoysa. On being signaled by two people who were armed with a gun and a pistol, Sydney de Zoysa stopped his vehicle. Thereafter both of them got into the vehicle and sat on the rear seat. One was a fair short person and the other person was a tall dark person. Both of them were wearing helmets. The fair short person kept a gun at the neck of the wife of Sydney de Zoysa and the dark tall person kept a gun at the neck of Sydney de Zoysa who was driving. After driving for about 1/2 a km Sydney de Zoysa stopped his vehicle on orders of both accused-appellants. Thereupon both Mr. and Mrs. Sydney de Zoysa were

pushed out of the vehicle and demanded a ransom of Rs. 3 Million in order to release their daughter. This demand was made by the dark tall person. When the mother of the girl (wife of Sydney de Zoysa) was trying to run away from the scene the dark tall person said "shoot shoot". The fair short person thereupon addressed the mother of the girl in the following language "Whether you stop running or would receive a bullet?". Thereafter, mother of the girl did not run. The fair short person drove the vehicle away carrying Dinuka de Zoysa. The dark tall person was seated on the rear seat. Dinuka de Zoysa says that the fair short person adjusted the rear mirror of the vehicle while driving. It is to be noted here that the officers attached to the department of finger prints found finger prints on the said rear mirror and the said finger prints tallied with the finger prints of the 2nd accused-appellant. The 2nd accused-appellant withdrew his appeal.

The parents of said Dinuka de Zoysa were pushed out of the vehicle. The dark tall person instructed Sydney de Zoysa to give his telephone number to which he agreed. According to the evidence of Dinuka de Zoysa the vehicle stopped at a certain location and she was asked to write a letter to her father. The dark tall person gave a pen and a paper to

write the letter. She in a letter addressed to her father requested the father to give money to the brothers.

Sydney de Zoysa however on the same day collected Rs.2.5 Million. Before he handed over money as instructed, he got his relations and friends to write the serial numbers of the currency notes which he was bundling. Later around 3 p.m. Sydney de Zoysa received a telephone call. He identified the voice of this caller as the voice of the dark tall person. As instructed by the caller, Sydney de Zoysa between 8 p.m and 8.30 p.m. kept a parcel containing Rs.2.5 Million at a place near Hegalle Cemetery. It has to be noted that he did so after he received a call from the said caller around 7.30 p.m. It is significant to note what the 1st accused-appellant in this case did on 30th of May around 5.30 p.m. Ujith Zoysa who is a brother in law of the 1st accused-appellant is a Sergeant attached to Sri Lanka Army. He used to travel every day to his army camp which is known as Rock House Camp in Colombo by train. He takes the journey from Kosgoda Railway Station. On 30th of May 2002 when Ujith Zoysa got down from the train at Kosgoda Railway Station the 1st accused-appellant requested him to go to Ambalangoda on a motorcycle brought by him. On the way to Ambalangoda the 1st accused-appellant got down from the motorcycle and made a call at Balapitiya.

Thereafter without going to Ambalangoda they both went towards Hegalle Cemetery. At a place near Hegalle Cemetery the 1st accused-appellant got down from the motorcycle and requested his brother in law Ujith Zoysa to come after one hour as he (the 1st accused-appellant) wanted to meet a friend. Around 8.30 p.m. Ujith Zoysa came back on the said motorcycle and the 1st accused-appellant got on to the motorcycle carrying a parcel. This was the summary of the evidence of Ujith Zoysa. Dinuka de Zoysa says around 7.30 p.m. the dark tall person who was guarding her went little away from the place he was guarding her and came back little later and told that her father had given money. Sydney de Zoysa says around 8 p.m. he kept a parcel containing 2.5 Million at a place near Hegalle Cemetery. It is around this time that, according to Ujith Zoysa, the 1st accused-appellant from a place near Hegalle Cemetery came back to his motorcycle carrying a parcel. Ujith Zoysa further says that on instructions given by the 1st accused-appellant (his brother in law) somewhere on the 9th or 10th he collected a parcel from the house of the 1st accused-appellant and kept the said parcel in his trunk box in Rock House Camp. Later on 13.06.2002, on the instructions given by the 1st accused-appellant, he handed over the said parcel to the investigating police officers in this case. He admits that there was 1.3

Million in the said parcel. It has to be emphasized here that this is the parcel that was collected by him from the 1st accused-appellant on the instruction given by the 1st accused-appellant. The investigating officers checked the serial numbers of the currency notes found in the said parcel. As I pointed out earlier Sydney de Zoysa before he kept the parcel containing money noted down the serial numbers of the currency notes. The serial numbers of the currency notes found in the parcel given by Ujith Zoysa tallied with the serial numbers of the currency notes kept by Sydney de Zoysa at Hegalle Cemetery. Thus, the money kept by Sydney de Zoysa at a place near Hegalle Cemetery was found in the parcel collected by Ujith Zoysa from the 1st accused-appellant's house.

The 1st accused made a dock statement denying the charges. He admits that he gave a parcel to his brother in law Ujith Zoysa but takes up the position that there was only clothes in the said parcel. He does not admit that there was money in the said parcel. But as I pointed out earlier this parcel contained 1.3 Million and currency notes kept by Sydney de Zoysa at a place near Hegalle Cemetery found in this parcel. Thus, the position taken up by the accused-appellant in the dock statement is false. What is the position when an accused-appellant utters a lie in Court?. In this connection it is relevant to consider the judgment of the Court of

Appeal of England. Rex vs. Lucas 1981 (2) All England Report 1008. In the said judgment Court of Appeal of England held ''for a lie told by a defendant out of court to provide corroboration against him that lie must be deliberate, it must relate to a material issue, the motive for it must be a realization of guilt and a fear of the truth, and it must be clearly shown to be a lie by evidence other than that of an accomplice to be corroborated. i.e by admission or by evidence from the independent witness''.

In Karunanayake vs. Karunasiri Perera 1986 (2) SLR page 27 Supreme Court of Sri Lanka held thus; "For a lie to be capable of amounting to corroboration firstly it must be deliberate secondary it must relate to a material issue, thirdly the motive for the lie must be a realization of guilt and a fear of the truth and not merely an attempt to bolster up a just cause or out of shame or a wish to conceal disgraceful behavior from the family and fourthly the statement must be clearly shown to be a lie by evidence other than that of the person who is to be corroborated. ."

In Haramanis vs. Somalatha 1998 3 SLR page 365 His Lordship Jayasuriya held thus, ''Where a party litigant intentionally utters a falsehood in court, such falsehood weakens his case and advances in strength the case of his adversary. Lies uttered by a party could amount

to corroboration of the case of his adversary". Applying the principles laid down in the above judicial decisions, I hold that a lie uttered by an accused person in court can be considered against him. In the present case the accused-appellant as I pointed out earlier, has uttered a lie in his dock statement. Therefore, the fact that he uttered a lie in his dock statement can be considered against him. Learned Counsel for the accused-appellant contended that the identity of the accused-appellant has not been proved. I now advert to the said contention. In considering whether the identity of the accused-appellant has been proved or not, the following matters should be considered. Dinuka de Zoysa says that when she was guarded by the dark tall person he was wearing a wrist watch. She further says that this wrist watch could be identified if seen again. The investigating officers found a wrist watch marked P11 in a box called kit box kept by the 1st accused-appellant. This kit box was found by the investigators in the 1st accused-appellant's camp. The 1st accused-appellant was a police officer attached to the Special Task Force (STF). This wrist watch marked P11 was identified by Dinuka de Zoysa as the wrist watch that the dark tall person was wearing on 30.05.2002 when she was being guarded by the dark tall person. Thus I hold that with this item of evidence the identity of the 1st accused-appellant has been proved

beyond reasonable doubt. From this evidence it can be concluded that the dark tall person is the 1st accused in this case.

The currency notes kept by Sydney de Zoysa at a place near Hegalle Cemetery was recovered from a parcel kept by the brother in law of the 1st accused-appellant. This parcel had been collected by the brother in law of the 1st accused-appellant (Ujith Zoysa) on the instructions given by the 1st accused-appellant from the house of the 1st accused-appellant. Thus with this evidence I hold that the identity of the 1st accused-appellant has been proved beyond reasonable doubt as the person who committed the crime in this case.

The 1st accused-appellant around 8.p.m. on 30.05.2002 got down from the motorcycle at a place near Hegalle Cemetery. He instructed his brother in law to come back in one hour's time. Around 8.30 p.m. his brother in law Ujith Zoysa came and picked him up from a place near Hegalle Cemetery. Sydney de Zoysa says that he kept a parcel containing money at a place near Hegalle Cemetery. Thus it is seen that around the time that Sydney de Zoysa kept the parcel containing money at a place near Hegalle Cemetery the 1st accused-appellant was present.

When I consider all these matters, I hold that the identity of the 1st accused-appellant has been proved beyond reasonable doubt as the person who committed the crime in this case.

Learned Counsel for the 1st accused-appellant contended that the 1st accused-appellant may be only the collector of money but not the abductor of Dinuka de Zoysa. I now advert to this contention. As I pointed out earlier the parcel of money kept by Ujith Zoysa was recovered by police. In that parcel the money given by Sydney de Zoysa was found. If the 1st accused-appellant was only the collector of money why didn't he disclose this fact in his dock statement. He is silent on this matter in his dock statement.

When I consider these matters, I am unable to agree with the submissions of the learned Counsel for the accused-appellant that he was only the collector of money. For the above reasons I reject the argument of the learned Counsel for the accused appellant. It is necessary to note here that Dinuka de Zoysa says at the time she was abducted the dark tall person was wearing a red helmet. This red helmet was recovered by the police in consequence of a statement made by the 1st accused-appellant. This red helmet was identified by Dinuka de Zoysa as the helmet that the dark tall person was wearing at the time of the abduction. Police also

recovered a pistol, M5 gun and some cartridges buried in the back garden of the 1st accused-appellant. These items were recovered in consequence of a statement made by the 1st accused-appellant. Accused-appellant has failed to offer any explanation to the recovery of the said items.

Learned Counsel in this case contented that the gun has not been used by the offenders. He therefore contended that the 1st accused-appellant cannot be convicted of count No 2, 3 and 4. He contended that for a person to be convicted under Section 44 of the Firearms Act as amended by Section 22 of 1996 the person accused of must discharge a bullet from the gun. Section 44(a) of the Firearms Act reads as follows. ''notwithstanding anything in this ordinance or any other law, any person who uses a gun in the commission of an offence specified in schedule 'c' of this ordinance shall be punished on conviction for such offence with death or imprisonment for life, and shall also be liable to a fine not exceeding Rs.20000/-''. The word (uses) needs consideration. If a person discharges a bullet from the gun there is no doubt that he has used the gun. What happens if a person points a gun at the victim of a crime or any other persons present at the scene of crime and commits a crime? Cannot it be said that he has used the gun? I now advert to this

contention. When I consider this matter I am guided by the judgment in Delhi High Court Jayaprakash vs. State 1981 Criminal Law Journal page 1340, wherein Delhi High Court concluded that an accused threatening with a pistol is sufficient to constitute that he used the weapon. In the present case the dark tall person and the fair short person after getting into the vehicle of Sydney de Zoysa kept the gun at Sydney de Zoysa's neck and at the neck of Mrs. Sydney de Zoysa. When Mrs. Sydney de Zoysa started to run away from the place dark tall person addressed in the following language. ''shoot shoot''. Thereupon the fair short person addressed her in the following language ''whether you stop running or would receive a bullet''. I therefore hold that the dark tall person and the fair short person have used the guns. From the evidence that I have discussed above it is clear that this dark tall person is the 1st accused-appellant in this case. Thus the 1st accused-appellant has used the gun. When I consider Section 44(a) of the Firearms Ordinance I hold that if a person points a gun at the victim of a crime or any other person present at the scene of crime he is deemed to have used the gun within the meaning of Section 44(a) of the Firearms Ordinance as amended by Act No 22 of 1996. I have earlier discussed the evidence relating to the identity of the 1st accused-appellant. Although the learned trial judge has

not given adequate consideration to these items of evidence that I have discussed above his decision that the identity of the accused-appellant has been proved beyond reasonable doubt is, in my view, correct. I have discussed the evidence led at the trial. When I consider the evidence led at the trial the one and only irresistible and inescapable conclusion that can be reached is that the 1st and the 2nd accused-appellants committed the offences set out in charge Nos. 1-5. Therefore, I affirm the convictions of the 1st accused-appellant. The 2nd accused-appellant has already withdrawn his appeal. Learned trial judge has imposed 2 years default sentence in respect of count No1. Maximum sentence that can be imposed on Section 357 is 7 years. Under Section 291 of the Code of Criminal Procedure Act No 15 of 1979 the default sentence should be 1/4th of the maximum sentence. Therefore, the default sentence of 2 years rigorous imprisonment on count No1 imposed by learned trial judge is illegal. I therefore, set aside the default sentence and substitute a default sentence of six months simple imprisonment.

Learned trial judge on count No 5 imposed a default sentence of 2 years imprisonment. Here again the maximum sentence that can be imposed under Section 376 of the Penal Code is 7 years. Under Section 291 of the Criminal Procedure Code default sentence cannot exceed 1/4th of the

maximum sentence. Therefore the default sentence in count No.1 is illegal. I therefore set aside the default sentence and substitute six months imprisonment. I affirm the convictions of 1st to 5th counts. I also affirm the sentence imposed by the learned trial judge subject to the above variation in the default sentences. For the above reasons I dismiss the appeal of the accused-appellant.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL.

P.W.D.C Jayathilake, J.

I agree.

JUDGE OF THE COURT OF APPEAL.

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