

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

In the matter of a petition of appeal
in terms of section 331 (1) of the
Code of Criminal Procedure Act No
15 of 1979 in the Democratic
Socialist Republic of Sri Lanka.

C.A. Case No. 76/2012

Vs.

H.C. (Kegalla)

Dissananyaka Mudiyansele

Case No. 2902/09

Samarasekara.

And 03 others.

Accused

AND NOW

Dissananyaka Mudiyansele

Samarasekara.

And three others 1st to 4th

Accused Appellants

Vs.

Attorney General,

Attorney General's Department,

Colombo 12.

Complainant – Respondent

BEFORE

: H.N.J. PERERA, J

P.W.D.C. JAYATHILAKE, J

COUNSEL

: Anil Silva PC for the 1st

Accused Appellant.

Indika Mallawarachchi for the

2nd and 3rd Accused

Appellants.

Tenny Fernando for the 4th

Accused Appellant.

H.L. Peiris SSC for the

Respondent.

ARGUED ON

: 21.01.2015, 27.05.2015

DECIDED ON

: 23.07.2015

P.W.D.C. Jayathilake, J

On 19.07.2004 at 15 hours, Police Station Mawanella received a telephone call about a robbery of cigarettes. According to the information, the robbery had taken place at Buttawa Junction. Chief Inspector, Jagath Pushpakumara who was the officer-in-charge immediately arranged four teams of police officers to arrest the robbers. He himself went along with a team of officers for investigation. On information gathered from several places ultimately he reached the place called Kempitiyakanda where he found the white colour van which was delivering cigarettes.

The person in-charge of sale, his assistant and the driver were there. After questioning them, the chief inspector advised them to go the police station. Thereafter, he went in search of the robbers towards

Halagiriya. On the way, he stopped a three wheeler moving in the opposite direction. There were 3 persons except the driver in it. He searched the three of them. The 1st person was wearing a green colour T-shirt and carrying a cream colour bag, on which the word, "Adidas" had been written.

In searching the bag, the Chief Inspector found a hand grenade with letters "SFG", a pointed knife, a bunch of keys and two cigarette bundles. The person was identified as Adigodagamage Samarasekara alias Dissanayaka Mudiyanseelage Samarasekara of Kahagollakade, Kumbawela Ella, Bandarawela. The 2nd person he searched was Nishantha Samaranayaka of Ihala Kotte Makehelwala. He was wearing a brown trouser. He too had a handgranade, a pointed knife with him. The identity card of Wasantha Kumara Jayasinghe was found in his possession. There was a cellular phone also in his trouser pocket. The 3rd person who was wearing a red t-shirt and a light ash colour pair of trousers had a toy pistol in his waist. Another person has been arrested by sub inspector Dhammika Lal in the same night. The person by the name Shantha Samaranayaka of Ihala Kotte,

Makelwala was arrested when he was travelling in a private bus. A toy pistol and cash worth Rs. 1080/= had been found in his possession. The four suspects arrested were produced to the Police Station with the productions recovered from them.

Dissanayake Mudiyanseelage Samarasekera, Thunivepura Devayalage Nishantha Samaranayaka, Jayathilakalage Anil Tharanga and Thunivepura Devayalage Shantha Samaranayaka were indicted under four counts. All four Accused were indicted for committing the robbery of cash and cigarettes to the value of Rs. 350000/= punishable under Sec. 380 read with Sec.32 of the Penal Code. Count No.2 and 3 were against the 1st Accused for having in possession a knife at the time of the said robbery punishable under Sec. 383 and having in possession a hand bomb punishable under the offensive Weapon Act. The 4th Count was against the 2nd Accused for having in possession a hand bomb punishable under the offensive Weapons Act. All four Accused were found guilty of the 1st Count levelled against them.

The 1st Accused had been acquitted of the 2nd Count. The 1st Accused had been found guilty of the 3rd Count and the 2nd Accused had been found guilty of 4th Count. They had been sentenced in the following manner.

“All four Accused were sentenced to ten years rigorous imprisonment with a fine of Rs. 25000/= carrying a default term of two and a half years imprisonment for the 1st count. The 1st Accused was sentenced to five years, rigorous imprisonment with a fine of Rs. 25000/= carrying a default term of one and a half years imprisonment for the 3rd count. The 2nd Accused was sentenced to five years, rigorous imprisonment with a fine of Rs. 25000/= carrying a default term of one and a half years imprisonment for the 4th count. Being dissatisfied with the said convictions and the sentences Accused Appellants have preferred this Appeal to this court.”

Though the learned counsel for the 2nd and 3rd Appellants initially made submissions challenging the conviction, subsequently confined her submissions to the question of sentence. The learned President’s

Counsel who appeared for the 1st Accused Appellant and the learned counsel who appeared for the 4th Accused Appellant made submissions challenging the conviction.

The salesman Thilak, and van driver Anuruddha and a boutique owner Siddik have given evidence as the eye witnesses to the incident. The evidence of Siddik was that four persons had come to his boutique prior to the incident and had tea. Thereafter, he had seen one of those persons getting on the driver's seat of the van and had driven towards Rambukkana passing his boutique. Siddik had identified the 1st Accused Appellant at the identification parade as the person who asked whether tea was available in his boutique. Thilak had identified the 1st, 2nd and 3rd Accused at the parade as the persons who were inside the van at the time of the incident. Thilak had failed to identify the 4th Accused according to the parade notes. Instead, he had shown one of the assisting people in the parade. But, it is stated in the parade notes that the witness had seen the suspect Shantha Samaranayaka going away from the van carrying cigarettes. The witness had identified the 1st, 2nd and 3rd Accused Appellants

when testifying in court. The 3rd Accused Appellant had been identified as the person who pushed him into the van, lifting by his legs. And the 2nd Accused Appellant as the person who had been going away carrying cigarettes. Anuruddha had identified all four Accused Appellants at the parade. He had identified the 4th Accused Appellant as the person who had left the van and the 1st Accused Appellant as the person who had placed the knife on the neck. Anuruddha too had been unable to identify the Accused Appellants when giving evidence.

The learned counsel for the 1st Accused Appellant submitted that there is a serious doubt whether the witnesses had seen the persons who were in the van. He raised the question whether the witnesses had seen momentarily the persons and whether it was a safe identification, but whether the witnesses had actually seen the Accused. The learned trial judge had not appreciated this distinction, he argues.

The evidence revealed on identification at the trial was the testimony of Siddik. He was the one who stated that the 1st Accused Appellant came to the boutique and asked for tea and then saw him driving towards Rambukkana passing his boutique. But, the learned trial judge had stated her opinion about the reliability of his evidence in the following manner.

When studying the demeanour and deportment of this witness, the memory of this witness was found to be unreliable. Therefore, the evidence of Siddik does not attach any evidentiary value to the prosecution case. The other allegation brought against the identification of Accused Appellants was that Tilak and Anuruddha were at the police station when the Accused Appellants were brought there. Therefore, the submission is that a situation where there is strong possibility that witnesses have seen the Accused before the identification parade.

The 4th Accused Appellant has been arrested when he was travelling in a bus. Though it is clear that when he was arrested, the police

officer who arrested him knew the person who was wanted to be arrested by name, it is not clear how the said police officer found that a person called Shantha Samaranayaka was involved in this case. Even the chief investigating officer, namely, A.S.P Jagath Pushpakumara has not clarified this matter. The learned counsel for the 4th Accused Appellant contended that there is discrepancy between the evidence of Tilak and Anuruddha in regard to the person who had left the van carrying cigarettes because while Anuruddha had identified the 4th Accused at the parade as the said person Tilak, testifying in court, had identified the 2nd Accused as the person who had done so. The learned counsel refers to R.Vs Turnbull 1977 QB 224 and Arch bold Criminal Proceeding and practice 2008 chapter 14 p 1425, in order to show the guideline to be followed when there is “mistaken identification”. It is stated that the judge should warn the jury of the special need for caution before convicting the Accused in reliance on the correctness of the identification or identifications. The other item of evidence available against the 4th Accused Appellant is recovery of cigarettes under Sec.

27(1) of the Evidence Ordinance. The relevant statement had been marked as "I can show the police the fertilizer bag containing cigarettes". The counsel for the 4th Accused Appellant alleged that the material produced in evidence, in connection with the said statement was a cardboard box and not a fertilizer bag. Referring to Queen Vs D.L. Albert 66 NLR 543, submits that the fact recovered must be strictly construed or/and confined to the fact deposed by the Accused in the police custody. Therefore, his argument is that evidence with regard to recovery under Sec.27 of the Evidence Ordinance cannot be admitted against the 4th Accused Appellant. When the evidence revealed against the 4th Accused Appellant is carefully considered the question arises whether there are items of evidence that could be relied upon undoubtedly.

The 1st, 2nd and 3rd Accused Appellants had been arrested immediately after the incident by the police while they were travelling in a three wheeler within a distance of 2 ½ km from the place of incident. The 1st Accused Appellant had admitted the fact that he had been arrested when he was in the three wheeler, though

the 2nd and 3rd Accused Appellants had stated nothing specifically about the place where they had been arrested nor had they denied the fact that their arrest had taken place while travelling in a three wheeler.

But the 4th Accused Appellant had stated that he had been arrested at his sister's place at Peradeniya.

When considering the matters discussed above in respect of the evidence against the 4th Accused Appellant we are of the opinion that there is no evidence to convict him for the charge of robbery. Therefore this court set aside the conviction and the sentence against the 4th Accused Appellant and acquit him from the charge levelled against him.

The counsel for the 2nd and 3rd Accused Appellants submitted the following facts in order to mitigate the sentences passed on them.

- I. The 2nd and 3rd Appellants were the 1st offenders with no criminal offenses whatsoever.

- II. The 2nd Accused Appellant was 18 years at the time of incident whilst the 3rd Accused Appellant was 22 years then.
- III. As it is borne out by the proceedings, the 2nd and 3rd Appellants at the time of trial were national boxers undergoing international training and participating at international matches having successfully represented Sri Lanka at International Boxing Competitions.
- IV. Consequent to the said incident of robbery, the Appellants were sponsored by Mas Holdings (Pvt) Ltd who to date are the sole sponsors of their careers in the field of sports.

In this Appeal, while the 1st Accused Appellant maintained his appeal against both, the conviction and the sentence, the 2nd and 3rd Accused Appellants confined their Appeals only to the sentence. This situation has given rise to the question that when the 1st Accused Appellant's Appeal is dismissed, in case the reliefs are granted to the 2nd and 3rd Accused Appellants in respect to the sentence, whether these grants are applicable to the 1st Accused Appellant as well. My answer is that it depends on the facts and the circumstances of the

case. As far as the facts and the circumstances of this case are concerned, it is not fair that the 1st Accused Appellant is subject to punishment in one way and the 2nd and the 3rd in another way. On the other hand, we do not intend to interfere with the term of imprisonment and the fine imposed by the learned trial judge except making the custodial sentences passed on 1st and 2nd Accused Appellant effective concurrently. Accordingly, this court dismisses the Appeals of 1st, 2nd and 3rd Accused Appellants subject to the above variation.

Appeal of the 1,2,3 Accused Appellants dismissed.

Appeal of the 4th Accused Appellant Allowed.

JUDGE OF THE COURT OF APPEAL

H.N.J. PERERA, J

I agree

JUDGE OF THE COURT OF APPEAL