

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

In the matter of an appeal under
Section 331 of the Code of Criminal
Procedure Act No. 15 of 1979.

Hon. Attorney General
Attorney General's Department
Colombo 12.

Complainant

Vs

1. Herath Mudiyanseelage Pushpa
Kumara alias 'Pushpe'
2. Pulingu Hewa Dewayalage
Karunathileke alias 'Karu'

Accused

Case No. CA 273/2014

HC Polonnaruwa Case No. 292/2006 AND NOW

1. Herath Mudiyanseelage Pushpa
Kumara alias 'Pushpe'
2. Pulingu Hewa Dewayalage
Karunathileke alias 'Karu'

Accused - Appellants

Vs

Hon. Attorney General
Attorney General's Department
Colombo 12.

Complainant – Respondent

BEFORE

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

COUNSEL

: Kalinga Indatissa PC with Kinkini
Withthagamuwa and Dhanushika
Sigera for the 1st Accused-Appellant
Tenny Fernando for the 2nd
Accused – Appellant
Shanaka Wijesinghe D.S.G. for the
Attorney General

ARGUED ON

: 27th September, 2017

DECIDED ON

: 27th October, 2017

L.U. Jayasuriya J.

The accused appellants were indicted in the High Court of Polonnaruwa along with another person for committing house trespass in order to commit robbery under Section 436 of the Penal Code read with Section 32 of the Penal Code.

They were also indicted for committing robbery of cash and jewellery which is an offence punishable under Section 380 of the Penal Code and for using a firearm in the course of the same transaction which is an offence punishable under Section 44 (a) of the Firearms Ordinance read with Section 32 of the Penal Code.

They were convicted for trespass and robbery and sentenced to 5 years RI with a fine of Rs. 5,000/= carrying a default sentence of 1 year for the first count. They were also sentenced for 8 years RI with a fine of Rs. 5,000/= with a default sentence of 1 year RI for the second count.

This appeal is from the said sentence and the conviction. The story of the prosecution is that on the day in question three persons have gone to the complainant's house, whilst one was holding the occupants at gun point the others have demanded that the money in the house be handed over. Prosecution Witness No. 1 has said that he identified the accused when the cloth covering their face dropped. (vide page 134 of the brief).

The counsel argued that the prosecution has failed to elicit from the witness under what light the accused were identified. We find that there is no evidence to establish that the accused were identified under sufficient light. Therefore we agree with the argument of the counsel of

the appellants on this issue of identification. The counsel for the appellants argued that the accused were arrested three months after the incident and they were kept in the police station under a detention order for another two months and the identification parade was held thereafter.

Although the parade notes have been admitted by the appellants in the High Court they have challenged holding of the said parade, on the basis that they were taken out on several occasion whilst they were being held in the Matale Police Station. The prosecution has not given a reasonable explanation as to why the parade was held two months after the appellants were arrested.

It was held in **Roshan vs AG 2011 1 SLR 364** that; *“The identification parade, if it is to be of value, must be held at the earliest opportunity, so that the impression of the witness remains fresh in his mind and he does not have the chance of comparing notes with others.”*

Therefore since the parade had been held two months after the arrest of the appellants we decide that there has been no proper identification of the appellants as stated by the counsel for the appellants. Although not mentioned by the appellants or the respondent we find that

the second charge is defective and the appellants have not been properly charged.

Section 173 of the Code of Criminal Procedure Act states thus;

“For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 174,175,176 and 180 which said sections may be applied either severally or in combination.”

For the forgoing reasons the conviction and sentence dated 21.10.2014 are both set aside. I acquit first and second appellants.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Deepali Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL