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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Kandegedara Sudath De Silva
2. Nanayakkara Vithange Pathmasiri

Court of Appeal No:
CA/HCC/0302-A, B/2015
High Court of Galle
Case No: HC/2814/2006

ACCUSED-APPELLANTS

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **U.R.D.Silva, PC with Savithri Fernando for the 2nd Accused-Appellant.**
Shaminda Wickrama, SC for the Respondent.

ARGUED ON : **11/10/2022**

DECIDED ON : **18/11/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) with another were indicted in the High Court of Galle on following charges:

1. On or before 24th January 1998, the accused attempted to commit robbery on the property belonging to 'Sinharaja' Tea Factory being armed with a deadly weapon, an offence punishable under Section 384 read with Section 32 of the Penal Code.
2. In the same transaction the second accused did possess an offensive weapon namely a hand grenade which is an offence punishable under Section 2(1) (b) of the Offensive Weapons Act, No. 18 of 1996.

As the 2nd Appellant absconded the court in this case, after an inquiry this case was fixed in absentia of him under Section 241 of the Code of Criminal Procedure Act No. 15 of 1979. After the conclusion of the prosecution's case, the learned High Court Judge had called for the defence and the 1st Appellant had made a dock statement denying the charge. After considering the

evidence presented by both parties, the learned High Court Judge had convicted the Appellants as charged and sentenced them as follows:

For the 1st count each Appellants were imposed 10 years rigorous imprisonment. Further, the 1st Appellant was imposed with a fine of Rs.7500/- with a default sentence of 01-year rigorous imprisonment. The 2nd Appellant was imposed a fine of Rs.10000/- with a default sentence of 01-year rigorous imprisonment.

For the second count the 2nd Appellant was imposed 05 years rigorous imprisonment with a fine of Rs.7500/-. In default 01-year rigorous imprisonment was imposed. According to the Learned High Court Judge, the sentences imposed on the 2nd Appellant will run concurrently to each other.

Being aggrieved by the aforesaid conviction and sentence, the Appellants preferred this appeal to this court. The 1st Appellant had withdrawn his appeal on 23/05/2022 and his appeal was accordingly dismissed.

The Learned Counsel for the 2nd Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via Zoom platform from prison.

The 2nd Appellant hereinafter will be referred to as the Appellant in this case.

Background of the Case.

According to PW4, he was the Deputy Superintendent of Sinharaja Tea Factory at the relevant time. On the day of the incident, as he was not feeling well, he went to upper story rest room to take a rest. At that time no electricity was available in the factory. In the early hours of the incident, a person had approached him with a torch, jolted him awake, and directed him to come to the ground floor. The person who woke him up was wearing a T-shirt and a denim trouser and was in possession of a knife at that time.PW4

had also seen six other persons among his employees who were seated there at the ground floor. Among the people in the ground floor, he had seen two unknown persons with covered faces. The intruders remained in the tea factory until about 6.00 a.m. This witness somehow managed to escape from the strangers and got refuge from a nearby house. In the meantime, a person had been dispatched to the Neluwa Police Station to lodge a complaint. An identification parade was held and he had identified two persons at the parade. As the 2nd Appellant had absconded the court, only 1st Appellant was present in the court but he could not identify him as he gave evidence after about 15-16 years of the incident.

PW2 had rushed to the tea factory after seeing several individuals running towards the tea factory in the early hours and saw three new faces among those claiming to be CID officers looking for PW4. He had seen weapons in their possession. PW4 had fled the scene at that time. After some time, he found that three people had been arrested by the police. He did not attend in the identification.

PW10, had rushed to the scene at about 7.00 a.m. as per the direction of Officer-in-charge of Neluwa Police Station. As the people who were assembled at the scene informed that a group of men numbering three had entered the Singharaja Forest, the police team also entered the forest immediately. They had seen the unknown persons on an elevated place about half a mile from the entrance of the forest. At that time the police had seen one person making a call and others standing close to him. After seeing them one of the men had opened fire at them. In retaliation, the police had opened fire twice on air and requested them to surrender. The men were arrested and weapons were recovered from them. A hand bomb was recovered from the Appellant.

According to PW18, the Government Analyst, the bomb recovered from the Appellant was confirmed to be one coming under the offensive weapons Act.

Witness PW14 who held the identification parade had stated that PW4 had identified 1st and 2nd Appellants in the parade.

After the closure of the prosecution's case, the defense was called and as the Appellant had absconded the court, his counsel had made submission on behalf of him.

At the hearing of this appeal the Counsel for the Appellant had raised following grounds of appeal.

1. The identity of the Appellant had not been established beyond reasonable doubt.
2. Possession of hand bomb by the Appellant have not been proved by the prosecution.

Identity of an accused is very important in a criminal trial. Wrong identity may cost irreparable damage to the accused. Hence the prosecution has to prove correct identity of an accused to secure a criminal conviction. If the identification evidence is challenged successfully, where there is no or limited other evidence, the outcome will be an acquittal of the accused.

In **Turnbull [1977] QB 224** the Court of Appeal laid down the following guidelines for judges in trials that involve disputed identification evidence.

> *"Where the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused, which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification(s)".*

The judge should tell the jury that:

(i) caution is required to avoid the risk of injustice;

(ii) a witness who is honest may be wrong even if they are convinced, they are right;

(iii) a witness who is convincing may still be wrong;

(iv) *more than one witness may be wrong;*

(v) *a witness who recognises the defendant, even when the witness knows the defendant very well, may be wrong.*

"The Judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made".

Some of these circumstances may include:

(i) the length of time the accused was observed by the witness;

(ii) the distance of the witness was from the accused;

(iii) the state of the light;

(iv) the length of time elapsed between the original observation and the subsequent identification to the police.

Guided by the above-mentioned judgment, I now assess whether the prosecution in this instance has proven the Appellant's identification beyond reasonable doubt, as mistaken identity occurs frequently in good faith, but the consequences can be extremely serious for the Appellant. Therefore, the cases of this nature must be dealt with utmost sensitivity.

PW14, the Additional District Judge of Magistrate Court Udugama had held the identification parade pertaining to this case. He also gave evidence before the High Court of Galle. The said identification parade note was marked as "X" by the prosecution. The Appellant was identified by PW1 who had passed away before he could give evidence before the High Court.

According to PW10, upon the direction of the Officer-in-charge of the Neluwa Police Station, along with a police team, had gone to the place of incident at about 7.00 a.m. He was informed that three persons with arms had gone in to the Sinharaja Forest. Acting on this information he had gone in to the forest and arrested three persons with arms. Before he could arrest them, one of three had opened fire at them. After the arrest, a hand bomb had been

among other items which were recovered from the Appellant. The 1st Appellant was identified by PW4 at the identification parade. The Appellant was arrested along with the 1st Appellant with arms within a very shorter period of the attempted robbery incident. This evidence clearly proves that the Appellant was also a member of the robbery group.

The lay witnesses who gave evidence told that three persons had entered the Singharaja Forest upon failing their mission to rob the tea factory. With this evidence followed by the apprehension of the Appellant by the police with a hand bomb among the other items recovered from him clearly establishes the participation of the Appellant in their failed robbery attempt. The circumstantial evidence led by the prosecution adequately infers the facts in issue and could reasonably conclude that the critical fact occurred.

Considering the evidence presented in this case by the prosecution, a prima facie case had been established against the Appellant. Hence, I conclude that the first ground advanced by the Appellant has no merit.

In the second ground the Appellant contends that the possession of hand bomb by the Appellant had not been proved by the prosecution.

The prosecution through PW10, clearly established that the Appellant had possessed a hand bomb among the other items recovered from him upon his arrest. Further, the recovered hand bomb with another bomb recovered closed to the crime scene subsequently were sent to the Government Analyst for confirmation. The report which had been marked as P5 confirmed that the grenades were offensive weapons. Hence, it is not true that the prosecution had not proven the possession of a hand bomb by the Appellant. During the trial, the remains of the hand bombs were not available, as all the productions pertaining to this case had been destroyed due to a flood that had destroyed the production room of the Magistrate Court. Hence, this ground also has no merit.

Having considered the circumstantial evidence led by the prosecution I am inclined to accept that the prosecution had adequately established the charges level against the Appellant. I am of the view that the Learned High court judge has rightly convicted the Appellant as charged.

Therefore, I affirm the conviction and dismiss the Appeal of the Appellant. Considering the circumstances of this case I order the sentence will deem to have taken effect from the date of incarceration of the Appellant, namely on 10/11/2021.

The Registrar of this Court is directed to send a copy of this judgement to the High Court of Galle along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B.Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL