

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

*In the matter of an Appeal in terms of  
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.*

**Court of Appeal No:**

Democratic Socialist Republic of Sri Lanka

CA/HCC/0156/0161/17

**COMPLAINANT**

**Vs.**

**High Court of Vavuniya**

1. Francis Dharshanan

**Case No:** HC/2645/2016

2. Sadasiwam Neranjan

3. Sivalingam Udayasooriyan

4. Jeyakumar Yathukumar

5. Sivalingam Udayan

6. Dharmalingam Subharaj

**ACCUSED**

**AND NOW BETWEEN**

1. Francis Dharshanan
2. Sadasiwam Neranjan
3. Sivalingam Udayasooriyan
4. Jeyakumar Yathukumar
5. Sivalingam Udayan
6. Dharmalingam Subharaj

**ACCUSED-APPELLANTS**

**Vs.**

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

**RESPONDENT**

Before : Sampath B. Abayakoon, J.  
: P. Kumararatnam, J.

Counsel : Rienzie Arsecularatne, P.C. with Thilina Punchihewa,  
Punsisi Gamage, Eranga Kakandawela for the 1<sup>st</sup> – 6<sup>th</sup>  
Accused Appellants  
: Hiranjan Pieris, SDSG for the Respondent

Argued on : 15-02-2023

Written Submissions : 18-05-2020 (By the Accused-Appellants)  
: 14-02-2023 (By the Respondent)

Decided on : 29-03-2023

**Sampath B Abayakoon, J.**

This is an appeal by the accused appellants (hereinafter referred to as the appellants) being aggrieved of their conviction and the sentence by the learned High Court Judge of Vavuniya.

The appellants were indicted before the High Court of Vavuniya for having in their possession an offensive weapon (a hand grenade) on or about 16<sup>th</sup> July 2013, an offence punishable in terms of section 2 (1) (b) of the Offensive Weapons Act No.18 of 1996.

After trial, all of them were found guilty as charged of the judgement dated 15-06-2017 by the learned High Court Judge of Vavuniya.

Accordingly, they have been sentenced to 10 years each rigorous imprisonment and to a fine of Rs. 10000/- each, and in default, to one month each rigorous imprisonment.

The facts relevant to this matter can be briefly summarized as follows.

Witness number 01 was a Sub-Inspector of Police attached to the Poonthottam security post which functioned under the Vavuniya police station on the day relevant to this incident.

While involved in patrol duty near Poonthottam Vidyalaya along with PW-02 and several other police officers, he has observed a three-wheeler with a registered number NP-YM 9853 approaching them. This was about 7-7.30 p.m. in the night. He has signaled the vehicle to stop, and has found six occupants in the three-wheeler including the driver. Of the five occupants on the rear seat, two of them were on the laps of the other three. PW-01 has instructed all the occupants of the vehicle to get own, and according to him, when they got down, each of the five occupants of the rear seat had weapons like swords, knives, a rope and a club in their hands.

It was his evidence that upon inspecting the rear seat, he found a hand grenade wrapped in a cloth on it.

Thereafter, PW-01 had taken steps to arrest all the occupants of the vehicle on the basis that they possessed an offensive weapon. This has led to the indictment against them.

It needs to be noted that although PW-01 speaks of finding the hand grenade on the rear seat in his examination in chief, under cross-examination, he also speaks of finding it above the rear seat of the three-wheeler, which leads to a conclusion that it was found in the space behind the rear seat. However, PW-02's evidence was that it was found on the rear seat.

It appears from the judgment, that the learned High Court Judge has convicted all the six appellants on the basis that the joint possession of the offensive weapon is proven against them beyond reasonable doubt.

### **The Grounds of Appeal**

At the hearing of the appeal, the learned President's Counsel for the appellants urged the following grounds of appeal for the consideration of the Court.

1. The learned High Court Judge concluded that the prosecution has established exclusive joint possession without there being adequate evidence in that regard.
2. The learned High Court Judge took into account extraneous considerations to hold that the accused were guilty of the charge.
3. The learned High Court Judge shifted the burden of proof to the accused.
4. The learned High Court Judge failed to afford a fair trial to the accused by accepting evidence purportedly in terms of section 420 of the Criminal Procedure Code without any reference to what exactly is being admitted.

5. The learned High Court Judge failed to consider the dock statements of the accused in its correct perspective.
6. The learned High Court Judge did not appreciate that the prosecution failed to establish the passage of the debris of the hand grenade to the Government Analyst Department.

This Court had the opportunity of listening to the learned President's Counsel with regard to the grounds of appeal taken up by him. This Court also had the opportunity of listening to the learned Senior Deputy Solicitor General (SDSG) as well in this regard.

It was the submission of the learned President's Counsel that although the judgement of the learned High Court Judge runs to some 29 pages, almost 25 pages had been devoted to reproducing the evidence of PW-01 and 02, and another one and a half page to consider the facts of the decided case of **Alagaratnam and Others Vs. The Republic of Sri Lanka (1986) 1 SLR 237**.

It was his contention that the learned High Court Judge has devoted only two pages of the judgement to analyze the evidence, if it can be termed as such, and to come to the finding of guilt.

However, it was his position that the learned High Court Judge was totally misdirected as to the joint possession that should be proved by the prosecution against the appellants. It was pointed out that the learned High Court Judge has determined that because of the other weapons the appellants allegedly had in their hands when they got down from the three-wheeler, the appellants had the knowledge of the hand grenade as well. It was pointed out that the learned High Court Judge appears to have convicted the appellants on the basis of knowledge. It was contended further that the judgement clearly establishes that the conviction has been on the basis of the violence taking place in that region among the youth and with the intention of setting an example to those who behave in violent manner in general, rather than based on evidence adduced in the case.

Referring to several instances where the admissions have been wrongly recorded and misdirections in that regard, it was the view of the learned President's Counsel that this is a matter where the exclusive possession should have been proved by circumstantial evidence as the grenade was found abandoned according to the police witnesses. It was pointed out that the learned High Court Judge has totally failed to consider whether there was circumstantial evidence to point directly towards the appellants for the offence for which they were found guilty.

The learned SDSG in his submissions took up the position that there was no discrepancy as to the place from where the hand grenade was recovered. It was his position that although the PW-01 has spoken to the effect where it appears that the hand grenade has been recovered from the rear of the back seat of the three-wheeler, when the evidence taken in its totality it becomes clear that it was not so. His contention was that the evidence clearly points to the fact that the recovery of the hand grenade has been from the rear seat of the vehicle.

However, the learned SDSG conceded that there had been several misdirections as to the recording of admissions in terms of section 420 of the Code of Criminal Procedure Act.

It was his view that, given the evidence against the appellants, this is a fit case where the provisions of the proviso of Article 138 of The Constitution should be applied.

Furthermore, in the alternative, it was his view that this is a fit case to order a re-trial given the facts and the circumstances of the matter.

### **Consideration of the Grounds of Appeal**

Before proceeding to consider the other grounds of appeal, I would now proceed to consider the 1<sup>st</sup> ground of appeal urged, namely, the prosecution has failed to establish the exclusive joint possession, since if it was so, considering the other grounds of appeal would be a futile exercise.

The evidence led in this action clearly establishes the fact that when the police officers alleged to have found the hand grenade wrapped in a cloth inside the vehicle, it was not in possession of any single individual. Hence, this is a matter that has to be proved basically on other circumstantial evidence to establish the joint possession of the accused appellants.

In the case of **Alagaratnam and Others Vs. The Republic of Sri Lanka (1986) 1 SLR 237**, it was determined that the question of joint possession must be determined on the facts and the circumstances of each case.

**De Sampayo, J.** quoted from **page 1892** of the **2<sup>nd</sup> Volume** of **Gour on Penal Law** where it has been stated that,

*“Possession to be criminal must be actual or exclusive for criminal liability does not attach to constructive possession...from this it follows that where property is found in a house in the possession of it for the purpose of this offence unless there is evidence of exclusive conscious control against them.*

*This passage is a comment on the provision of the Penal Code as to the receipt or retention of stolen property, but the principle appears to be applicable generally.”*

In this matter, there is an ambiguity in the evidence of PW-01 as to whether the hand grenade was actually found on the back seat of the vehicle or on the space behind the back seat. Hence, the learned High Court Judge should have considered that fact in coming to a definite finding as to the place from where the hand grenade had been recovered, rather than assuming that it was from the back seat of the three-wheeler that the grenade was recovered.

This becomes relevant, since the same fact can be capable of giving some other inference as well.

In the case of **Alim Vs. Wijesinghe (S.I. Police, Batticaloa) 38 CLW 95, Basnayake, J.** held;

*“Where the same facts are capable of an inference in favour of the accused and also an inference against him, the inference consistent with the accused’s innocence should be preferred.”*

I find that the learned High Court Judge, rather than considering the evidence as to whether the joint possession has been established against all the accused, has taken into his consideration extraneous matters to find the appellants guilty to the charge of possessing a hand grenade.

It also clearly appears that the learned High Court Judge has based his conviction on the basis of knowledge, but not on actual possession.

I would like to reproduce the relevant portion from the translation of the judgement provided to this Court which appears in page 147 of the appeal brief.

*“In addition, when Court takes into consideration the weapons which were in possession of the accused, Court is of the view that accused were of the knowledge that the said hand grenade was there.*

*For the past two years, there have been anti-social activities such as attacks with swords and physical assaults among the youth, taking place in these regions. Ordinarily innocent persons have been the victims of these incidents. There have been no judgements delivered by any Court in relation to similar cases. Due to these reasons, Court is of the view that punishment has to be metered out to those who are guilty. It is nobodies guess what the accused would have resorted to if the accused was not apprehended on the particular day. Court is able to understand the mentality with which the said accused were brazenly travelling carrying weapons. Based on the reasons stated above and due to the reason that the prosecution has proven the charge beyond reasonable doubt, I find all the accused guilty of the said charge.”*



It is clear from the above reasoning that because of the other weapons allegedly carried by the appellants, and based on the personal knowledge of the learned High Court Judge, they have been found guilty rather than after a proper analysis of the evidence against them with regard to the charge preferred.

I am of the view that although there is merit in several other grounds of appeal urged as well, considering them separately would not be necessary as the appeal should succeed on the above considered matters alone.

Therefore, this Court has no option, but to set aside the conviction and the sentence imposed against the appellants.

The next matter that needs the consideration of the Court is whether this is a fit and proper case to send for a re-trial as urged by the learned SDSG.

This is an offence that has been allegedly committed some 10 years ago, the indictment of this matter has been filed in 2016 and the judgement has been delivered in the year 2017. Considering the passage of time and the other relevant facts and the circumstances into account, this Court is of the view that this is not a case fit to order for a re-trial.

Accordingly, the appellants are acquitted of the charge preferred against them.

The appeal allowed.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal