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.

Court of Appeal No:
CA/HCC/0079-80/2023
High Court of Homagama
Case No: HC/138/2018

1. Pelige Suranjith Kumara
2. Batugahage Lewis Dinesh Kumara

ACCUSED-APPELLANTS

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **P. Kumararatnam, J.**
R. P. Hettiarachchi, J.

COUNSEL : **Rajinda Kandegedara for the 1st Appellant.**

Priyantha Nawana with Ravihansa Wijesinghe for the 2nd Appellant.
Hiranjan Peiris, ASG for the Respondent.

ARGUED ON : **07/10/2025**

DECIDED ON : **27/11/2025**

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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 Homagama on the following charges:

1. On or before 15th February 2011, the Accused for committing robbery of cash in the amount of Rs.60,000/- in the possession of Padukkage Don Upendra Heshan Padukka, thereby committing an offence punishable under Section 380 read with Section 32 of the Penal Code.
2. In the course of the same transaction, the First Accused did possess a deadly weapon, namely a firearm, which is an offence punishable under Section 383 of the Penal Code.
3. In the course of the same transaction, the Second Accused did possess a deadly weapon, namely a firearm, which is an offence punishable under Section 383 of the Penal Code.

At the trial, the prosecution had called six witnesses and marked exhibits and closed their case. In the course of the trial, the prosecution had withdrawn the 2nd count against the 1st Appellant. After the conclusion of the prosecution's case, the learned High Court Judge had called for the defence and the Appellants had made dock statements 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 Appellant was imposed a term of 08 years rigorous imprisonment. Further, the Appellants were imposed a fine of Rs.10,000/- each with a default sentence of 03 months simple imprisonment.

For the third count, the 2nd Appellant was imposed 15 years rigorous imprisonment with a fine of Rs.10,000/- along with a default sentence of 03 months simple imprisonment.

Further, the Appellants were ordered to pay a compensation of Rs.100,000/ to PW1. This carries a default sentence of 02 years rigorous imprisonment.

As the 3rd Accused named in the indictment had absconded the court before the pronouncement of the judgment, evidence was presented under Section 241 of the Code of Criminal Procedure Act No.15 of 1979 and fixed the case in absentia of him. He too was sentenced for the 1st count and an open warrant against him was issued.

Being aggrieved by the aforesaid conviction and sentence, the Appellants preferred this appeal to this court. The 3rd Accused had not appealed against the conviction and the sentence.

The Learned Counsel for the Appellants informed this court that the Appellants have given consent to argue this matter in their absence. At the time of argument, the Appellants were connected via the Zoom platform from prison.

Background of the Case.

According to PW1, he is a businessman by profession and runs his business at Athurugiriya. On the day of the incident, while he was in his shop as usual with three of his assistants, a car was stopped at his shop, and three people alighted from the car out of which two came towards the witness, while the other went towards the assistants. The 2nd Appellant pulled out a gun and one of the others demanded PW1 to show where his money was kept. The Appellant had shouted at PW1 and his assistants not to make any noise. While the 2nd Appellant was pointing the gun at them, the 1st and the 3rd Appellants had gone into the room where the money was kept. The 1st Appellant got the money which was in a tulip bag and all of them had escaped thereafter. PW1 had noted down the car number, when the false number plate had fallen off. According to PW1, the original number plate was WP KB 5563 and the fallen number plate was KA 3334.

When the robbers escaped after the robbery, one of the employees had given a chase in the company vehicle. In the meantime, PW1 had called the police and informed about the robbery. The robbers had looted Rs. 60,000/- from the shop. PW1 had identified the Appellants and the 3rd Accused at the identification parade held after the arrest of the Appellants and the 3rd Accused. PW1 had identified the gun which was in the possession of the 2nd Appellant. During the robbery, no customers had come to his shop.

PW2, Aloka Bandara, a partner of PW1 who was also present at the time of the robbery, corroborated the evidence given by PW1.

The police had uncovered that the vehicle which had been used for the robbery was rented by the 1st Appellant. Upon further inquiry, the Appellants and the 3rd Accused were arrested by the police and two guns were recovered from them.

At the hearing of this appeal the Counsel for the 1st Appellant had raised the following grounds of appeal.

1. The prosecution has failed to prove the charge beyond reasonable doubt. (1st count).

The learned President's Counsel for the 2nd Appellant had raised the following grounds for the Appellant.

1. Serious misdirection on the law with regard to the burden of proof.
2. Wrongful consideration of evidence i.e. Parade evidence; identity of accused; identification of weapons etc.
3. Impropriety of charge in the 3rd count i.e. Section 383 charge

At the very outset, the learned President Counsel appearing for the 2nd Appellant strenuously argued that the 3rd count raised against the Appellant is not in conformity with the spirit of law as the two offences had arisen in the course of the same transaction. Therefore, the learned President's Counsel contended that the conviction and the sentence imposed against the 2nd Appellant is unlawful, in view of the provisions of Section 67 of the Penal Code.

Section 67 of the Penal Code sates;

> Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.
>
> Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished; or
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> Where several acts of which one, or more than one, would by itself or themselves constitute an offence, constitute when combined a different offence; the offender shall not be punished with a more severe

punishment that the Court which tries him could award for any one of such offences.

In **King v Weerasinghe** 39 NLR 270 the Court held that:

"Where an accused is convicted of robbery under section 380 and of causing hurt under section 382, consecutive sentences should not be imposed as hurt punishable under the section is a necessary ingredient of the offence of robbery".

In the case of **Rex v R.P.D Hotha and Another 34 CLW 11**, the two appellants were convicted under 6 counts for offences committed in the course of the same transaction. The sentences imposed were ordered to run consecutively, but the total of the sentences did not exceed the total which would have been passed for the most serious of those offences. On appeal against the sentence, the Court expressed the view that it would be better in such cases to make sentences run concurrently, and varied the sentence giving effect to the opinion of the Presiding Judge that the accused merited a sentence of at least 10 years.

In this case the 2nd Appellant had been convicted for committing robbery under Section 380 of the Penal Code and was sentenced to 08 years rigorous imprisonment. Additionally, he had been convicted under Section 383 of the Penal Code, which is, of course an aggravated version of the charge of robbery. Considering the ingredients of Section 67 of the Penal Code, the 2nd Appellant should not have been convicted under Section 383 of the Penal Code.

The learned ASG in keeping with the highest tradition of the Attorney General's Department admitted that the conviction against the 2nd Accused under Section 383 of Penal Code is unsafe to be allowed to be in force.

Considering the argument put forward by the learned President's Counsel and the reply submission of learned ASG, I set aside the conviction and the sentence imposed on the 2nd Appellant in respect of the third count. Therefore, he is acquitted from the 3rd charge.

The 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 the correct identity of an accused to secure a criminal conviction. If the identification evidence is challenged successfully, where there is limited or no other evidence, the outcome will be an acquittal of the accused.

In this case, the lay witnesses called by the prosecution had identified the Appellants at the identification parade. No doubt had been created of their identity at the trial. Two identification parade notes had been marked in the trial through the Court translator before the closure of the prosecution's case.

Considering the evidence presented in this case by the prosecution, a prima facie case has been established against the Appellants by the prosecution. Having considered the evidence led by the prosecution I am inclined to accept that the prosecution has adequately established the 1st charge against the Appellants. I am of the view that the Learned High Court Judge has rightly convicted the Appellants for the 1st charge.
Therefore, I affirm the conviction against the Appellants and the 3rd Accused in respect of the 1st charge.

Both the Counsel argued that in view of the Amendment No. 25 of 2024 to the Code of Criminal Procedure Act No. 15 of 1979, the learned Trial Judge had failed to give due consideration to the time already spent in custody when the Appellants were sentenced. Both the Counsel, by way of a motion, submitted the breakdown of the pre and post detention periods in prison,

and moved this Court in the event the Court dismisses their appeal, to consider the time period already spent in remand to be deducted from the sentence passed by the Trial Judge.

The proviso to Section 333 (5) of the Code of Criminal Procedure (Amendment) Act (Supra) states;

> "Provided that, the Court of Appeal may, in appropriate cases, order that the time spent by an appellant in custody pending the determination of his appeal and any time spent in custody prior to the conviction, such time not having been considered as part of his sentence passed at the time of his conviction by the court of first instance, be considered as part of his sentence ordered at the conclusion of his appeal'.

According to the motion filed by the Counsel for the 1st Appellant, he has spent 4 years in remand prior to the conviction in the High Court of Homagama. After the conviction, from the date of sentence to the date of the Judgment of his appeal, (16.01.2016 to 27.11.2025) he would have served another 2 years and 6 months. Hence, his total period of pre- and post-prison custody is 6 years and six months.

According to the motion filed by the learned President's Counsel for the 2nd Appellant, he has spent 5 years and 06 months in remand prior to the conviction in the High Court of Homagama. After conviction, from the date of sentence to date of the Judgment of his appeal, (16.01.2016 to 27.11.2025) he would have served another 2 years and 6 months. Hence, his total period of pre- and post-prison custody is 08 years and 06 months.

The first Appellant is sentenced to 8 years rigorous imprisonment for the 1st Count. But he has already served 6 years and 6 months in prison prior to the conviction and after the conviction. The said 6 years and 06 months is deducted from the 8-year sentence. The 1st Appellant is only sentenced to the remaining 18 months from the date of judgment from today.

The second Appellant is sentenced to 8 years rigorous imprisonment for the 1st Count. But he has already served 08 years and 6 months in prison prior to the conviction and after the conviction. As he has already served his sentence, he is released from this case.

The fine imposed and the compensation ordered by the learned High Court Judge to remain same.

The Prison Authority is hereby directed to consider the activation of the suspended sentence imposed in case No. 83222/03 by the Magistrate Court of Gampaha on the 2nd Appellant, considering the period he had already served.

The Registrar of this Court is directed to send this judgement to the High Court of Homagama along with the original case record. The learned High Court Judge is directed to comply with this judgment.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL