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.

The Democratic Socialist
Republic of Sri Lanka.

Court of Appeal Case No.
CA/HCC/0051-51A/2023

Complainant

High Court of Colombo
Case No. HC/2239/2005

Vs.

1. Kudagamage Iran Chaminda Francisku.
2. Amugoda Kariyawasam Sittharage Manjula Sanjeewa.
3. Somasundaram Shashikumar.
4. Jelabdeen Ali Khan.
5. Punchi Banda Herathlage Naweendra Herath.

Accused

AND NOW BETWEEN

2. Amugoda Kariyawasam
Siththarage Manjula Sanjeewa.

4.Jelabdeen Ali Khan.

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J
K.M.G.H. KULATUNGA, J

COUNSEL : Nihara Randeniya for the 2nd Accused-Appellant.
Sachithra Harshana for the 4th Accused-Appellant.
Udara Karunathilaka, SSC for the Respondent.

ARGUED ON : 30.10.2024

DECIDED ON : 04.12.2024

K.M.G.H. KULATUNGA, J.

1. The 2nd and 4th accused-appellants along with three other accused were indicted before the High Court of Colombo for committing robbery, on 27.11.1997 punishable under the Firearms Ordinance No. 33 of 1916,

as amended, read with the section 383 of the Penal Code. The High Court trial proceeded *in absentia* against the 1st accused under s.241 of the Criminal Procedure Code and the 5th accused died during the pendency of the trial. The learned trial judge did not call for the defense in respect of charges 3, 5, and 7 owing to the lack of evidence and also concluded that there was no *prima facie* case made out under the Firearms Ordinance and proceeded to call for the defence only under the Penal Code offences. The 3rd accused was acquitted for want of evidence and the defence was called for from the 2nd and 4th accused-Appellants. Upon calling the defence, the 2nd and 4th accused were convicted of counts 6 and 8, and were acquitted of counts 1, 2, and 4.

2. The trial judge sentenced the 2nd and 4th accused-appellants to life imprisonment and imposed a fine of Rs. 20,000/- with a default sentence of nine months' imprisonment for non-payment of the fines for each of the counts 6 and 8 separately to each of the appellants. These appeals are preferred against the Judgment dated 16.01.2023.

3. The 2nd and 4th accused-appellants preferred two separate appeals bearing number 51/2023 and 51A/2023 respectively, against the convictions as well as the sentences. However, when these appeals were taken up for argument, Mr. Nihara Randeniya, AAL for the 2nd accused-appellant, and Mr. Sachithra Harshana, AAL for the 4th accused-appellant informed that they are only pursuing with the appeals against the sentences and that they are abandoning the appeals against the convictions. Accordingly, both these matters will be taken up and considered together and this judgement will bind them both the appeals.

Facts

4. The Accused appellants were initially indicted for being members of an unlawful assembly and committing robbery of Rs. 7,500/- from the possession of Champika Gunasekara, a gold necklace worth Rs. 11,000/- from Kuttan Dharmaraja and another necklace worth Rs. 4,800/- from Basthiram Pedige Upali Somawera, using a pistol and a knife.

5. The prosecution called several witnesses to support its case. Witnesses included (2) Champika, a sales assistant at the boutique named "Kandy Sweet"; (3) Dharmarajah, a bystander; (4) Upali, an employee of the sweet factory; (5) Gunapala, another employee; (7) Dammika, the cashier of the boutique; and (16) N.P. Wijekoon, (17) Shani Abeysekara, and (19) Gamini Keerthiratne, Police Officers, among others. Exhibits presented included statements admitted under Section 27 of the Evidence Ordinance, gold pieces, and notes from an identification parade held on 06.01.1998.

The Incident

6. The incident occurred on 27.11.1997 at approximately 4:30 PM at the Kandy Sweet boutique in Sedawatta. The premises consisted of three small buildings: the boutique, a sweet factory, and a house. Champika testified that four individuals were loitering outside the boutique and, upon being questioned, stated they were waiting for the owner. Shortly after, one of the accused pointed a knife at her, while another held a pistol to her head and demanded the cashier drawer be opened. They then robbed Rs. 7,500/- and her necklace. Other witnesses corroborated Champika's testimony, describing the group's coordinated actions during the robbery.

7. Police officers testified about their investigations, arrests, and the identification parade conducted within two months of the incident. Witnesses identified the accused during the parade as the perpetrators.

8. Both the appellant and the 4th accused made dock statements. The appellant claimed he was arrested near Grandpass in December 1997, taken to the sweet factory, and shown to prosecution witnesses before being produced at the identification parade. The defense did not challenge this during cross-examination of the police witnesses or raise objections during the trial.

9. The main argument advanced is that when the defence was called at the Section 200 stage, the learned Trial Judge had specifically come to a finding that the use of a firearm had not been proved and as such, the charges under the Firearms Ordinance does not have be considered. Accordingly. The defence has been called for counts 1, 2, and 4, and the corresponding counts 6 and 8, limited to the Penal Code offences.

10. Upon calling the defence, the learned Trial Judge had finally convicted the 2nd and the 4th accused only in respect of counts 6 and 8 of the indictment. According to the judgement dated 16.01.2023, the 2nd and 4th accused have been convicted for counts 6 and 8 but there is no reference to the Firearms Ordinance. At the commencement of the judgement, the charges as originally framed with reference to Section 44 (a) of the Firearms Ordinance had been mentioned. Though the defence was called for only in respect of the Penal Code offences the trial judge has convicted the 2nd and the 4th accused for counts 4 and 6 of the indictment that is framed under Section 44(a) of the Firearms Ordinance. However, through calling of the defence and according to the body and reasoning of the judgement it is apparent and obvious that the Trial Judge has intended to convict the accused-appellants for the lesser offences under Section 383 of the Penal Code, read with Section 32. This has not been specifically stated so when the convictions were entered as stated in the Judgment. The learned Senior State Counsel conceded this fact. Accordingly, the said portion of the judgement, is varied to

read as follows; ***That the 2nd and the 4th accused are separately convicted for the lesser offence of counts 6 and 8 being the offence of robbery committed under the Section 383 of the Penal Code read with Section 32.***

Sentence

11. Now, it is to consider the sentences. Both the appellants' Counsel and the learned Senior State Counsel submitted that the sentence of life imprisonment cannot be maintained and a suitable sentence under Section 383 of the Penal Code should be substituted accordingly.

12. The learned Trial Judge has by his order dated 16.01.2023, upon hearing the counsel on sentencing, imposed life imprisonment in respect of each count for both the appellants separately, and also, a fine of Rs. 20,000.00 each in addition thereto, with a default term of nine months each.

13. As the conviction is now varied to offences punishable under Section 383 of the Penal Code, the maximum sentence prescribed by Section 383 is 20 years imprisonment. This is on the basis of using knives to commit robbery. I will now advert to the relevant facts in respect of each of the appellants has evident from the record. These offences have been committed in 1997. The appellants had been indicted in 2004. After a long-drawn-out trial, the appellants have been convicted and sentenced on 16.01.2023. Accordingly, the accused-appellants have been convicted after the lapse of 16 years and since 16.01.2023, both of them have been in remand pending the appeals. If I may consider the nature of the offending, these two appellants along with several others have entered into a business premises where a confectionary manufacturing business was being run by the complainant, having so entered and been armed robbed cash and gold jewellery from those who were employed there as well as from the cashier. This clearly has been a pre-planned and pre-meditated crime

committed for profit. It is also relevant to note that the victims have been vulnerable as they were engaged in employment in a shop where public has access for business purposes. This robbery has been committed around 4:00 PM. Entering into a premises of another with impunity in this manner is extremely serious and high handed to say the least. They were armed. The seriousness is amply reflected by the maximum sentence prescribed under Section 383 of the Penal Code which is 20 years imprisonment. The very manner of the executing of this crime with impunity is serious and demands a considerable sentence to be imposed from the point of view of the society. As stated above, this strikes at the very heart of the society, its commercial activities and creates a great degree of insecurity. However, I am mindful of the fact that this criminal trial has been hanging over the head of these appellants for 17 years, which by itself constitutes some form of punishments. Considering all these facts, this Court is under a duty to impose a sentence which is commensurate with the seriousness of the offence.

14. As for the personal circumstances, the 2nd accused-appellant is around 46 years and claims that he does not have any previous convictions. He is said to be a father of a 13-year-old child and appears to have been employed as a driver. Similarly, the 4th accused-appellant is around 44 years of age without any similar previous convictions. He is a father of two children around 21 and 18 years. He also appears to have been employed as a labourer. This information was extracted from the submissions made by their Counsels prior to sentencing on 16.10.2023.

15. In determining an appropriate sentence, the Court is required to consider the sentences from the point of view of society and the public as well as the accused-appellants'. As the facts clearly demand a considerable sentence on the one hand the fact that sentencing is now considered after 18 years is also a relevant fact, of which I am mindful.

It appears that the accused-appellants have reached their middle ages and settling down to a way of peaceful life when they were sentenced in 2023. Considering all the above said facts and circumstances, we sentence the accused-appellants as follows;

i. Each of the accused-appellants are imposed with sentences of 04 years rigorous imprisonment for 04th and 06th counts separately.

ii. In addition thereto, each of the appellants is also ordered to pay a sum of Rs. 12,500.00 as compensation to PW-3, Kuttan Dharmaraja in respect of count No. 04; and also, ordered to pay a sum of Rs. 12,500.00 as compensation to PW-1, Munasinghe Pathirage Ariyadasa, in respect of count No.06.

iii. If the payment of the said compensation is defaulted, it is to be recovered as a fine and in default thereof further one-year's imprisonment is ordered in respect of each count separately.

iv. The jail terms ordered in respect of counts 04 and 06 against both the accused-appellants is ordered to run concurrently. Accordingly, the aggregate sentence would be 04 years.

16. Having so determined the sentence, I observed that the accused-appellants have been in remand pending appeal from the date of conviction and sentence i.e. 16.01.2023. Thus, it is now necessary act under proviso to Section 333(5) of the Criminal Procedure Act as amended by Act No. 25 of 2024. Said provision reads as follows;

> *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.*

17. According to which the Court of Appeal is vested with a discretion to consider the time spent in remand pending the appeal as well as time spent in custody prior to the conviction as being a part of the sentence ordered.

18. On the perusal of the record and the brief, I am unable to ascertain the pre conviction periods of remand of the appellants. However, upon the conviction the appellants have been in remand for one year, ten months and seventeen days up until today. Accordingly, I would consider a period of two years as being the period in custody both pre and post-conviction. Accordingly, said period of two years will be considered as a part of the sentence which will be given credit to. Accordingly, the final aggregate sentences of each of the accused-appellants will be two years rigorous imprisonment.

19. Accordingly, the appeals are partially allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL