

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

1. Alagiyawanne Mohottalage Nalaka Pushpa Kumara
2. Tilak Samarawickrama
3. Liverige Nevile Roshan Fernando
4. Singakkarage Luxman Kumara alis Indunil
5. Singakkarage Nimal Gunaratne
6. Hewa Kuruwage Dilantha Niroshan alias Dila

C.A. 78-83/2005

H.C. Avissawella 97/2003

ACCUSED-APPELLANT

Vs.

The Attorney General
Attorney General's Department
Colombo 12.

COMPLAINANT-RESPONDENT

BEFORE: Anil gooneratne J. &
P.W.D.C. Jayathilake J.

COUNSEL: Dr. Ranjit Fernando for the 1st Accused-Appellant
G.P. Janaka Silva for the 2nd Accused-Appellant
Neranjan Jayasinghe for the 3rd Accused-Appellant
Ranjith Meegahawatte for the 4th & 5th Accused-Appellant
Kapila Waidyaratne ASG for the Complainant-Respondent

ARGUED ON: 18.03.2014

DECIDED ON: 25.06.2014

GOONERATNE J.

Six Accused-Appellants were indicted in the High Court of Avissawella on the following 8 counts. All of them were convicted and sentenced to life imprisonment. I would list the several counts/charges as follows:

- (a) Conspiracy to commit robbery against all Accused - Section 113 A read with 102/380 of the Penal Code
- (b) Robbery of Rs. 56,88,000/- with fire arms against 1st 2nd and 3rd Accused-Appellants – Section 380 and 32 of Penal Code read with Section 44 A of the Fire Arms Ordinance.
- (c) Aiding and abetting 1st to 3rd Accused-Appellants to commit robbery against 4th Accused-Appellant – Section 380 read with 102 of the Penal Code with Section 44 A of the Fire Arms Ordinance.
- (d) Same as above against 5th Accused-Appellant
- (e) Same as above against 6th Accused-Appellant
- (f) Retention of stolen property – Rs. 4,10,000/- against 4th Accused-Appellant – Section 394 of the Penal Code.

I will refer at this point of the judgment, to the position and submissions on behalf of the Accused-Appellants. All counsel who appeared for the Accused-Appellants, were very much concerned and made it a point to highlight lapses, irregularities of identification of Accused-Appellants. The 6th Accused-Appellant expired prior to the argument stage in this court.

The learned counsel Dr. Ranjith Fernando urged the following matters, on behalf of the 1st Accused-Appellant.

(a) Trial Judge's failure to address on the infirmities in the identification parade pertaining to the 1st Accused-Appellant.

In this connection learned counsel submitted that the parade was held about 4 months after the incident. Parade held on 6th & 7th May 2003. 1st Accused was arrested and kept in custody since 21st March 2003. Another allegation was the showing of photographs. In a gist I would refer to the following as submitted by learned counsel.

P.W. Rodney Perera – Manager, HSBC -

states that he did not/could not identify those who entered.

P.W. Kumari – Cashier ,HSBC-

states that she was not able to identify anyone at the parade.

P.W.Seneviratne Employee ,HSBC-

testifies that photographs had been shown to him at the police station Thalangama. He had participated at the IDP but unable to identify anyone.

P.W.Bandara - Employee, HSBC-

states that he identified A1, A2 and A3 at the parade. He further states that photographs had been shown to him at the police station.

P.W. Wickramasinghe, Cashier, HSBC-

testifies that photograph shown to them by the CID and that he identified three of the persons who came for the robbery.

P.W.Perera, Asst. Manager, HSBC-

states that he identified A1, A2 and A3 at the parade. He also states that photographs had been shown to them at the police station.

P.W.Anura, Employee HSBC-

states that he participated at the IDP and identified the 1st accused. He further states that photographs had been shown to him at the police station .

P.W.Rajaratne (Magistrate) -

states that two IDP's had been held and that the 1st, 2nd and 3rd accused had been identified by some of the witnesses on the two days and the reports produced in Court as P3 and P4 .

(b) Based on the above infirmities counsel also referred to the question of showing photograph by the police to the witnesses. Some witnesses were unable to identify in spite of close proximity encounter on broad day light. As such it is unsafe to act on such evidence. Trial Judge has not considered such lapses.

(c) Further the evidence relating to use of fire arms not established by the prosecution beyond reasonable doubt. The learned counsel categorize the evidence on point as follows:

P.W.Rodney Perera, Manager HSBC-

He testifies that at one stage he sees only two persons entering the bank armed with a 'pistol'. He also says he heard the noise of the 'gunshot'. His evidence indicates that 1st Accused was at the main door and that he did not do anything. However he states that 3rd Accused had a 'gun' in his hand and he entered a bank. He further testifies later that four persons entered the bank and that three of them had been armed with 'firearm'.

P.W.Kulasingham, Customer, at HSBC-

States that there were three persons with 'firearms'. Further he states that one of them 'fired' a shot.

P.W.Kumari, Cashier HSBC-

States that she hears noise of 'shooting' and that one of the men had a 'weapon'. She further states that four people were involved and that only one of them was armed with a weapon.

P.W.Fernando, Employee HSBC-

States that there were four to five people who entered bank and that they had 'weapons' with them.

P.W.Bandara, Employee HSBC-

States that several people entered bank. That they had 'weapons' in their hands. That one of them fired a shot. That the 1st accused had a T56

weapon and a 3rd accused had a weapon. He had in his statement to the police stated he cannot say who fired a weapon .

P.W. Wickramasinghe, Cashier HSBC –

States that two persons entered the bank and one of them had a weapon.

P.W.Perera, Asst. Manager, HSBC-

States that three persons entered the bank and that two of them had weapons which he described as 'T56" and a 'repeater" This witness further testified that 1st accused had a 'T56" and that 3rd accused also had a T 56 with him. However in his statement to the police and he stated that he was unable to say the type of weapon marked '3V2'.

P.W.Lalith, Customer, HSBC-

States that whilst at the bank he saw a person with a gun.

P.W.Anura, Employee HSBC-

States that he saw people entering the bank with guns. His further state that he heard a gun shot sound from inside the bank as he was outside bank. This witness further goes to the extent of stating that he saw A1 firing a T56 which was with him.

P.W.Pathirana, Police officer-

Testifies that on inspecting the scene he had found two live bullets and one empty cartridge. These had been given to him by another police officer. It is to be noted that finding live bullets of different caliber measurement purportedly fired from a repeater automatic T56 weapon would be highly improbable unlike a use of single shot at a time fire arm It is further to be noted that these bullets/cartridges had not been reported upon by any

Government Analysis or Ballistic Expert to confirm recent usage and type of weapon.

P.W.Udaya Kumara, Police Officer-

States that there was a mark of a gunshot inside bank and that a glass pane had been broken . He further states that he recovered two live T56 bullets and also a single empty cartridge. These are the items he had handed over to P.W.Pathirana.

Learned counsel for 1st Accused-Appellant argues there was no Section 27 recovery as per the Evidence Ordinance of any fire arm, or cash from the statement made by the 1st Accused. No experts report obtained on recovery of ammunition or bullets marks on the wall. In view of (c) above it is essential to have a report from an expert.

Learned counsel for the 2nd Accused-Appellant argued that there is no evidence to support that the Appellant committed an offence under the Fire Arms Ordinance. He also states that there is an absence of common intention. Trial Judge does not give cogent reasons to convict his client under the Fire Arms Ordinance. 2nd Accused-Appellant relies on the evidence of prosecution witness Abeyratne Banda and Dilshan Shaminda Perera which corroborate that the Accused did not carry a fire arm. Further on the point of

common intention the prosecution had failed to lead evidence of a previous pure plan.

The learned counsel for the 3rd Accused-Appellant associated with the submissions made on behalf of the 1st Accused-Appellant. He emphasized that the witnesses were not able to identify the Accused-Appellant. An omission was marked on witness Rodney Perera 's evidence and that he failed to give a description to the police. Omissions not considered by the trial Judge. The learned counsel relies on Rex. Vs. Turnbull. Trial Judge has ignored such dicta.

Learned counsel for 4th & 5th Accused commenced their submissions by stating that 4th & 5th Accused-Appellants were not identified. On the question of Section 27 recovery of Rs. 4,10,000/- from 4th Accused and the 5th Accused a sum of Rs. 7,92,000/- could only infer knowledge and nothing more. Counsel is critical of trial Judge's views on the dock statements.

The learned Additional Solicitor General contends that one of the main witness Rodney Perera the Manager of the Bank without any difficulty identified the 1st & 3rd Accused-Appellants at the identification parade and in open court also identified both the 1st & 3rd Accused. The 1st Accused was identified with a automatic weapon standing near the door, and the 3rd

Accused armed with a gun inside the bank hall. In cross-examination the position of the defence that 1st Accused was shown to him and the suggestion on behalf of 3rd Accused shown were denied by the witness. Showing of any photographs were admitted only for investigation purposes by the police. Photographs shown long before the arrest of Accused person. In fact the photographs shown were not that of the Accused. There was no cross-examination by the counsel for 2nd Accused of this witness. It was the position of the other witness that photographs were shown only for investigation purposes and that the photographs were not that of the Accused person. All these happened prior to arrest of Accused persons (showing of photograph) and as such it cannot harm the prosecution case in any event and this cannot be objectionable in the context of the case.

It was the position of the learned Additional Solicitor General that many witnesses were able to identify the Accused persons more particular 1st to 3rd Accused and the 6th Accused. Learned counsel for the Respondent also dealt with the police evidence and also the defence case in detail. Dock statement of 1st & 2nd Accused and the 3rd Accused were analysed and he placed material to reject or disbelieve same.

The evidence led in this case through several prosecution witnesses create or produce vivid impressions of the incident of robbery at the HSBC Pelawatta branch. The question of robbery of a large sum of money in broad day light from the above bank or the incident of robbery of money is not in doubt but it is the identity of the perpetration of the crime that needs to be examined carefully. Especially when the indictment had been forwarded connecting robbery with firearms. The main witness the Bank Manager.

Mr. Rodney Perera having described the incident was able to identify the 1st and 3rd accused-appellants at the Identification parade and as well as in Open Court. This witness identified the 1st accused-appellant at the trial who was armed with an Automatic weapon and standing near the door. The 3rd accused was armed with an automatic weapon inside the Bank hall. I find that in cross examination the witness categorically denied suggestions made on behalf of the several accused and maintained his position right through the trial as regards identity of accused. The question posed by the Defense that the witness visited the police on several occasions was not denied but it was done so for investigation purposes. The allegation of the defence of showing photographs was not denied but he explained that the photographs were shown which were not of the accused persons. This had happened

immediately after the incident for investigations purposes. The trial judge observes that there were no contradiction or omissions.

This witness Rodney Perera was not cross-examined by the 2nd accused-appellant, may be since the witness did not bring the 2nd accused as a person identified by him. The trial Judge has given his mind to the position as regards the material elicited in cross-examination on behalf of the 3rd accused-appellant. It is stated by the trial judge that the witness could not identify the person who came into the glass cubicle armed with a weapon who came near the safe/valet. Learned High Court Judge also referred to the omission connecting the tags P1 and P1a (pgs 925-926). Although counsel for the 1st accused-appellant was referring to the trial judge's lapses, it does not appear to be so, since whatever material elicited on behalf of the appellants have been considered. This Court observes that the witness Rodney Perera cannot be an untruthful witness and his testimony adds certain items of evidence to establish the consistency of the prosecution case. I do not think that the trial Judge as regards the identity projected by the prosecution witness No.1 need to go to the extent of comparing same with the Dicta in Rex Vs Turnbull though one could gather points on visual identification.

The lay witness Sivajothi who was a customer of the Bank who witnessed the entire incident as at the material time and he was inside the bank making arrangement with witness No.1 Rodney Perera to open an account. He saw the persons entering the Bank with weapons, how the Bank official were threatened, opening of the safe and collection of money by the robbers. As the prosecution describes, his evidence was unassailed and unchallenged. Bank witness Dilhani Bandula Kumari was in the counter with cashier Niranjani. This evidence unchallenged as regards the amount of money she received at the beginning of the day kept in her custody amounting to Rs. 9,00,000/- plus bait money Rs. 100,000/- The bank tags identified with signature, recovered from the 5th accused-appellant (P1a) However this witness could not identify any of the accused persons at the identification parade. The suggestion in cross examination of showing photographs admitted for investigation purposes, but not that of the several accused. The trial Judge had carefully examined evidence of witness Sivajothi, which description of the incident from the beginning to the end which could not be contested by the Defence irrespective of identifying the accused by this witness and satisfied as to the number of robbers who were armed and where the robbers were positioned and what they did

and uttered as well as collecting and taking possession of bank money from the safe and counters.

The trial judge has also given his mind to the testimony of the other witness Dilhani Bandula Kumari . The material aspect of this part of the evidence is based on the amount of money she recovered and the sums of money handed over to the accused persons under threat. The tag marked P1a was identified. Trial Judge analyses the defence suggestion made to witnesses, showing of photographs, recording of statements, and showing of accused persons in the Police. Trial Judge very correctly concludes that by the time the suggested allegation that surfaced, the accused were not even arrested. Trial Judge rejects the position of the defense. As regard witness Sayomi Sanjana Ehellepola, does not reveal much evidence for the prosecution and the witness cannot remember many details. Witness Reinze Fernando describes the incident but his position of 4 armed persons entering the premises was subject to cross examination by the defence. He was not taken to Thalangama and Mirihana Police. Witness Niranjali Wickramasinghe could not identify any accused person, but support Dilhani on other aspects.

The trial Judge has also referred to the other two important witnesses for the prosecution namely Abeyratne Banda and Asst. Manager Dilhara Perera. Abeyratne Banda testified that 4 persons entered the Bank and two were armed. He identified the 1st, 2nd and 3rd accused at the parade. 1st and 3rd were identified as armed robbers. The person who was holding bundles of cash against his stomach as the 2nd accused-appellant. The above defence position were denied and rejected by this witness as considered by the trial Judge. Photographs shows for investigation purposes. The several items of evidence led through this witness seem to be closely observed by the trial judge.

Dilhan Perera testified that 3 persons entered the Bank and two were armed. The 3rd suspect was near the counter. Manager called him to bring the keys of the safe. At the parade he identified 1st accused armed with a T 56 and 2nd accused was unarmed, he jumped over the counter and later brought the fertilizer bag to collect money from the safe. The 3rd accused identified as the person who threatened with a gun in hand. In cross examination the suggestion of defence denied. This witness by assisting in opening of the safe since he had the keys with him was in close proximity to the entire incident. As such he would have had a better picture and an

understanding of what really took place. The employee Anura who was a cleaner employed of the bank identified the 1st accused –appellant at a parade. The other important item of evidence is from the Police party who arrested the suspects after about 2 months from the date of incident and recovery of the Bank money at various points based on Section 27 of the Evidence Ordinance statements. I have to comment that all the evidence that transpired from the official police witnesses had been well considered by the trial judge. However the defence position concerns this Court, is the requirement of an experts report essential when and adopting the provisions of the Firearms Ordinance to the case in hand ? I will deal with this aspect at a later stage in this Judgment. The type of police evidence (unchallenged) could be summarized as follows.

S.I. Udaya Kumara - observe the scene of the crime recovered to T.56 live bullets and one used T.56 bullet casing. Imprint of rubber slippers on top of the counter. Details of currency obtains.

I.P.Jayaweera - copy of the list of serial numbers pertaining to bait money.

S.I-Abdeah arrested - 4th and 5th accused (brothers) on 07.03.2003 at Udawalawe in 5th accused house. On 4th accused statement recovered Rs. 400,000/- in Rs.1000/- notes.

S.I.Abdeen- another Rs. 10,000/- recovered inside a spectacle

case. P1 tag recovered. Based on the 5th accused statement recovered Rs. 292,000/- Tag produced as P1c. Bait money in Rs. 1000/-

S.I.Amarasinghe - arrested 1st and 3rd accused statement

recovered Rs. 1,25,000/-

The Defense case also cannot be considered lightly in the background of all the facts and circumstances that surfaced from the prosecution version. The 1st and 2nd accused-appellants made dock statements stating that they have nothing to say. I do agree with the submissions of learned Addl. Solicitor General that explanation should have been forthcoming from those two appellants based on the aspects of facts connecting the cross examination by them of the prosecution witnesses. The story of showing photographs would be an important aspect to be explained.

The 3rd accused-appellant in his dock statement denies any involvement. His position is that he was in the house of the 1st accused and to repair a trishaw. He alleges that he was shown to witnesses prior to the parade at the Mirihana Police. As the prosecution submits this accused could not say who the witness who saw him. The 4th and 5th accused also made a

dock statements. They have not explained as to how the large sum of money was in their possession.

The Appeal before us is a case of armed robbery of a reputed bank involving a large sum of money. I do not think it is necessary to once again describe the incident and the incident of robbery was well explained by many witnesses who gave evidence from the Bank and the lay witness Sivajothi. As such there cannot be a denial of such an incident, with evidence which remain unchallenged of the incident. However the defence attacks the entire episode based mainly on identification from which certain aspects connected to it i.e showing of photographs, showing of accused persons have been projected by the accused party to create a reasonable doubt, and if successful all concerned have to be acquitted.

One must always bear in mind that the incident of robbery in a Bank cannot be detected easily unless the Police team is assisted by the Public, Bank officials and customers who were within the vicinity of the robbery. As such investigations play a major role and might be somewhat time consuming considering the nature and magnitude of the act of robbery itself. In this regard I will divert the attention of all concerned to the following extract from

a passage dealing with successful investigation from the Hand Book of 'Criminal Investigations'- by Col. Maurice, J Fitzgerald MPC. U. S. Army, at pg.3.

"The modern successful investigator must be skilled in obtaining information from both physical evidence and the testimony of those concerned with a crime. He must know just what evidence lends itself to scientific evaluation in the police laboratory by skilled technicians, as well as how to preserve and transport such evidence. And he must also be skilled in the interviewing of victims and witnesses of crime, and the interrogating of suspects. Lastly, he must know what evidence is necessary to prove the essential elements of the crime charged.

Criminal investigation has three initial phases that the successful investigator must always bear in mind. First, has a crime been committed? Second, if so, what crime? Third, who committed such crime?

When it is determined what crime has been committed, all efforts are directed toward recording the facts of the crime, identification of the perpetrator and his apprehension and arrest, as well as the collection and preservation of sufficient evidence for conviction. The investigator must procure testimony and physical evidence that will be admissible – evidence that will withstand the attacks of the defendant's counsel and that will be understood by a jury.

Where at an identification parade, the accused was identified by a witness and the later in the course of his evidence stated that he was not quite certain of the identity of the accused held that the evidence of a person who was present at the parade was admissible to establish that the accused was

identified by the witness Bertholomeuse vs Kularatne 34 NLR 317. Identification of an arrested person must be carried out in such a way that not only must the identifying witness be given every reasonable chance of being right, but must also be given every reasonable chance of being wrong 39 NLR 65 (1937).

The Magistrate who held the identification parade on 06.05.2003 and 07.05.2003 confirmed that 1st, 2nd and 3rd accused-appellants were identified at the parade. Further the main witnesses for the prosecution called from the Bank too identified these accused-appellants in open Court as and when the witnesses were questioned regarding identity. Whatever suggestions in cross examination were answered in favour of the prosecution by the Bank witnesses and some of them who were not sure of the position gave correct answers by admitting the questions put to them. What has been elicited by the Defense had not harmed the prosecution case, as described above. Trial Judge has no doubt involved in hearing a long trial which went on for several days and in his judgment dealt with all important aspects and held that the prosecution has proved the case beyond reasonable doubt. However this Court wish to observe the following based on the Firearms Ordinance, connecting counts Nos.2,3 and 4 of the indictment.

Sec. 44A of the Firearms (Amendment) Act No.22 of 1996 reads thus:- “Notwithstanding anything in this Ordinance or any other law, any person who uses a gun in the commission an offense specified in Schedule ‘c’ of this Ordinance shall be punished on conviction for such offence with death or imprisonment for life, and shall also be liable to a fine not exceeding twenty thousand rupees.”

Schedule ‘C’ above include section 380-385 (robbery). The term ‘Gun’ is defined in Sec. 2 of the Firearms Ordinance as follows.

“Gun” includes- (a) any barreled weapon of any description from which any shot, pellet or other missile can be discharged with sufficient force to penetrate not less than eight strawboards, each of three sixty-fourth of an inch thickness placed one-half of an inch apart, the first such strawboard being at a distance of fifty feet from the muzzle of the weapon, the plane of the strawboards being perpendicular to the line of fire; or
(b) any component part of any such weapon; or
(c) any accessory to any such weapon designed or adapted.

- (i) To diminish the noise or flash caused by firing the weapon; or
- (ii) To facilitate the aiming of the weapon; or

(d) Any weapon of whatever description designed or adapted for the discharge of any noxious substance.

No doubt there is evidence both from official and lay witnesses that Firearms were used for the commission of the offence. Learned Addl. Solicitor General has cited the case of Wijeratne Banda Vs The State 1998 (3) SLR 86 that the testimonial trustworthiness of the prosecution witness is sufficient to arrive at a favorable conclusion that in fact a gun was used. Nevertheless when I peruse the definition of 'gun' as in the Firearms Ordinance, (a) to (d) of the definition contemplate a variety of meanings, and it is essential to form an opinion that (a) to (d) (either of it) whether it need to be verified by an expert, if the prosecution includes a charge under sec. 44A of the Firearms Ordinance, more so as it involves life punishment. It is essential to prove this aspect beyond reasonable doubt. In the absence of a report of an expert would not mean that the prosecution case is not proved. It is my view that it would be desirable to have a report, but not essential to prove the case beyond reasonable doubt. The official and lay witnesses testified with ample material and evidence as to the type of weapon/gun that was used in committing the act of robbery. A gun shot fired and damaged a glass pane, and from the scene of the crime T-56 live bullets and one used T-56 bullet casing

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recovered. The identification of the type of gun, its use at the scene of the crime and recovering empty bullets would be sufficient to bring the case within the provisions of the Fire Arms Ordinance. As such an experts report would not be essential.

The several items of evidence collected and placed before the trial court and considering all in its entirety no doubt is directed to the commission of the offence of robbery with a common plan and design involving all the Accused. It is evident that looking at the entire episode the 1st to 3rd had a role to play with restraint/threat caused to the Bank officials and customers and the collection of money with threat and to have fled the scene with others (4th to 6th Accused). The 4th to 6th Accused-Appellant took hold and custody of the money robbed from the bank and kept with them the entire loot at a faraway place, may be put it for good use and share it among themselves at some point of time. The anticipated plan of all the Accused were successful, until arrested by the police. The items of evidence led at the trial does not stand alone but connected to each other thus proving the prosecution case beyond reasonable doubt.

In the above circumstances we are not inclined to interfere with the findings of the learned High Court Judge. We affirm the conviction and sentence. Appeal dismissed.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

P.W.D.C. Jayathilake J.

I agree.

JUDGE OF THE COURT OF APPEAL