

**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.

The Attorney General

Court of Appeal No:
CA/HCC/0101/2022
High Court of Balapitiya
Case No: HC/674/2004

COMPLAINANT

Vs.

1. Agampodi Herbert Perera
Rajakaruna (Dead)
2. Demuni Janaka De Zoysa
3. Demuni Sudath Ashoka De Zoysa

ACCUSED

NOW BETWEEN

1. Demuni Sudath Ashoka De Zoysa

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Akkila Jayasundara with Akhila Mathishi**
for the Appellant.
Sudharshana De Silva, ASG for the
Respondent.

ARGUED ON : **29/07/2025**

DECIDED ON : **03/09/2025**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) along with the 1st and 2nd Accused were indicted jointly in the High Court of Balapitiya as follows:

1. On or before 02.09.1999 for committing the attempted murder of Kirimadura Upali Mendis punishable under Section 4(2) of the Offensive Weapon Act read together with Section 32 of the Penal Code.
2. In the course of the same transaction committing attempted murder on Kirimadura Upali Mendis punishable under Section 300 read together with Section 32 of the Penal Code.

The trial commenced before the High Court Judge of Balapitiya as the Appellant and the 1st and 2nd Accused had opted for a non-jury trial. The 1st Accused had died during the pendency of the trial. The prosecution had called 06 witnesses and marked productions P1-P4. After the conclusion of the prosecution case, the learned High Court Judge had called for the defence and the Appellant and the 2nd Accused had given evidence under oath and closed their case. After considering the evidence presented by both parties, the learned High Court Judge had convicted the Appellant for the 1st and 2nd counts and acquitted the 2nd Accused from the case.

The Appellant was sentenced as follows on 09/07/2021:

- For the 1st count the Appellant was sentenced to 12 years rigorous imprisonment with a fine of Rs.5000/- in default of which a sentence of 03 months simple imprisonment was imposed. Further a compensation of Rs.150,000/- was ordered to be paid to the wife of the 1st Witness with a default sentence of 9 months simple imprisonment.
- For the 2nd count the Appellant was sentenced to 02 years rigorous imprisonment with a fine of Rs.5000/- in default of which a sentence of 03 months simple imprisonment was imposed. Further a compensation of Rs.150,000/- was ordered to be paid to the wife of the 1st Witness with a default sentence of 9 months simple imprisonment.

- The Court further ordered for the sentences imposed for the 1st and 2nd counts to run concurrently.

Being aggrieved by the aforesaid conviction and sentence, the Appellant preferred this appeal to this court.

The learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in their absence. At the time of argument, the Appellant was connected via Zoom platform from prison.

Background of the Case albeit briefly is as follows:

PW1, Upali Mendis was working as a security officer at the Municipal Council of Galle at the time of the incident. On the day of the incident although he was on leave, he had gone to Galle to attend to some personal matters. When he was returning home, he was ambushed by the Accused and attacked with a hand grenade and the accused had fired shots at him. He had sustained injuries and had been hospitalized subsequently.

PW1 had gone missing before he could conclude his evidence. After much deliberation and applications, the learned High Court Judge of Balapitiya allowed the prosecution to mark his non summary deposition under Section 33 of the Evidence Ordinance.

According to PW04, the JMO who examined PW1, stated that injuries No. 01, 02, 03 and 04 are non-grievous and not sufficient to cause death in the ordinary cause of nature. In the history to the doctor, the 1st Witness had stated that an unidentified person had thrown an object at him which exploded and inflicted injuries to him.

The Appellant had raised five grounds of appeal which are set out below:

1. The learned Trial Judge had failed to apply her judicial mind in arriving at a finding whether the prosecution has proved its case beyond a reasonable doubt.

2. The learned Trial Judge had misdirected herself by failing to judicially evaluate the inter se and per se contradictions and omissions which casts a reasonable doubt on the prosecution's case with regard to the credibility of the witnesses and thereby the conviction is bad in law.
3. The learned Trial Judge had failed legally to consider and evaluate the evidence of PW1 elicited at the non-summary trial adopted in terms of Section 33 of the Evidence Ordinance. Further, the learned Trial Judge had also failed to legally consider and evaluate the incomplete testimony of PW1 placed on record and had thereby erred in fact and in law.
4. The conviction is contrary to law and against the weight of the evidence thereby the learned Trial Judge had erroneously determined the culpability of each accused.
5. The learned Trial Judge had failed to properly and legally consider the totality of evidence and thereby deprived a fair trial to the Appellant.

As the grounds of appeal raised by the Appellant are interconnected, all grounds will be considered together hereinafter.

In this case a serious misdirection by the learned High Court Judge had caused great prejudice to the Appellant. Before the prosecution could conclude the evidence of PW1, he had gone missing without a trace. After a lengthy inquiry the learned High Court Judge had allowed the prosecution to mark the non-summary deposition of PW1 and to continue the case.

Although the learned High Court Judge, in her judgment had mentioned that the evidence given by PW1 is incomplete, she had acted on that incomplete deposition to convict the Appellant and pass the sentence. The learned Counsel for the Appellant, highlighting this procedural discrepancy strenuously argued that the judgment of the learned High Court Judge is not

tenable in view of this irregularity. The relevant portion of the judgement is re-produced below:

Page 660-661 of the brief.

නඩු විභාගය අතරතුරදී 01 වන වූදින මියගොස් ඇති අතර පැ. සා. 01 ගෙන් හරස් ප්‍රශ්න දීර්ඝ ලෙස අසා ඇතිව තිබියදී, 2010.07.21 වන දින වනවිට නාදූනන පිරිසක් විසින් පැ. සා. 01 පැහැරගෙන ගොස් ඇත. මෙම නඩුවේදී පැවැත්වුනු ලැබූ අතුරු විමසීමේදී සාක්ෂිකරුවන්ගේ සාක්ෂි සලකා බැලීමෙන් අනතුරුව, පූර්වගාමී මහාධිකරණ විනිසුරුතුමා විසින්, පැ. සා. 01 අතුරුදහන්ව, කැඳවාගත නොහැකි සාක්ෂිකරුවකු බවට තීරණය කරමින් බලපිටිය මහෙස්ත්‍රාත් අධිකරණයේ පැවති අංක 14816 දරන ලඝු නොවන නඩුවේදී පැ. සා. 01 විසින් හරස් ප්‍රශ්නවලට භාජනය වෙමින් දී ඇති සාක්ෂිය මෙම නඩුවේ සාක්ෂියක් ලෙස සාක්ෂි ආඥා පනතේ 33 වන වගන්තිය ප්‍රකාරව අනුකූල කර ගැනීමට 2017.10.31 දිනදී නියෝග කර ඇති අතර එකී නියෝග අභියෝගයට ලක් කර නැත.

The learned Additional Solicitor General in keeping with the highest tradition of the Attorney General's Department, conceded the argument put forward by the Counsel for the Appellant. He was also of the view that the learned High Court Judge has wrongfully adopted the evidence given by PW1 at the non-summary inquiry under Section 33 of the Evidence Ordinance.

Hence, I conclude that the evidence given by PW1 at the non-summary inquiry is incomplete and cannot be considered to make a case against the Appellant. Other evidence provided by the witnesses called by the prosecution had also failed to establish the charges levelled against the Appellant beyond a reasonable doubt. It is noteworthy that PW1, had failed to mentioned the names of the assailants in his history given to the doctor. Considering all of the above, I hereby set aside the conviction and sentence imposed on the Appellant and he is therefore acquitted from this case.

The appeal is allowed.

The Registrar is directed to send this judgment to the High Court of Balapitiya along with the original case record.

JUDGE OF THE COURT OF APPEAL

R. P. Hettiarachchi, J.

I agree.

JUDGE OF THE COURT OF APPEAL