

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

In the matter of an Appeal Against
an order of the High Court under
Sec. 331(1) of the Code of Criminal
Procedure Act No. 15 of 1979.

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

Complainant

C. A. Case No. : 12/14

Vs.

H. C. Embilipitiya Case No.: 50/2012

**(1) Maththaka Gamage Rasantha
Manoj Kumara Indika
(2) Wijesinghe Niroshan alias
Suranga
Accused**

and now

Maththaka Gamage Rasantha
Manoj Kumara Indika

Accused - Appellant

Vs.

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

Complainant-Respondent

BEFORE : P.R. Walgama J &
K. K. Wickramasinghe, J

COUNSEL : A. A. L. Niranjan Jayasinghe for the Accused-Respondant
Ms. Anooa de Silva S.S.C for the Attorney General.

ARGUED ON : 24.10.2016

DECIDED ON :27.01.2017

K. K. WICKRAMASINGHE, J.

The Accused – Appellant (herein after referred to as the accused) in this case was indicted in the High Court of Embilipitiya on following charges:-

(A) Charge 1:- On or about 3rd of March 2010 the 1st accused Appellant conspired with the 2nd accused to commit robbery punishable under section 113 (B) of the Penal code read with section 380 of the Penal Code.

(B) Charge 2:- At the same time and place, during the course of the same transaction the 1st Accused Appellant committed robbery, using a deadly weapon of money's worth, Rs. 4, 46, 000/= from the possession of Gamage Don Palitha Abeysinghe an offence punishable under section 102 of the Penal Code (read with section 383 of the Penal Code.)

After trial, the learned High Court Judge convicted the 1st Accused Appellant for both charges, and the following sentences were imposed on the 19th February 2014 :-

(A) Charge 1:- 5 year RI and a fine of Rs. 10,000/= (default. sentence of 1 year Rigorous Imprisonment)

(B) Charge 3:- 5 year RI and a fine of Rs. 10,000/= (default. sentence of 1 year Rigorous Imprisonment)

When this matter was taken up for argument certain questions of law were submitted by the learned counsel for the accused appellant. However, the counsel moved court only to make order with regard to the terms of imprisonment imposed on the Accused Appellant in respect of charges 1 and 3 to run concurrently on the following grounds:-

1. The offence set out in charge No.3 is a cognate offence of the charge set out in charge 1 and the charge 2 should have been drafted in the alternative charge.
2. The learned trial judge erred in casting a burden on the accused appellant to prove a fact which is especially within the knowledge of the accused appellant in the light of section 106 of the evidence ordinance.
3. The learned trial judge erred in holding that the accused appellant committed the offences set out in charge 1 and charge 3 based on the premise that the accused appellant failed to cross examine the prosecution witnesses explaining his position. As it was only an adverse inference that can be drawn when an accused failed to cross examine prosecution witnesses explaining his position.

Submissions of the respondent is that there is no merit in the grounds relied upon by the counsel for the accused appellant since the counsel for the appellant has not challenge the evaluation of evidence.

However, it is pertinent to note that the appellant is incarcerated since 19th February 2014.

The counsel for the respondent has no objection for the above sentences to run concurrent but she urges this court to grant following:-

- (1) Grant adequate compensation to the complainant
- (2) Reject the position taken up by the counsel for the accused appellant
- (3) Imposed an adequate fine.

Considering submissions made by both parties, we are of the view that the victim should be compensated adequately.

We make order that, 5 years rigorous imprisonment imposed by the learned High Court Judge on each charge to run concurrently and order the appellant to pay compensation of Rs. 25,000 on each charge with a default sentence of 1 year rigorous imprisonment to run consecutively.

Further, to pay a fine of Rs. 5,000 on each charge, with a default sentence of 6 months to run consecutively.

Considering the period of incarceration, we order that the conviction and the sentence of the accused appellant by the learned High Court Judge be effective from the date of conviction namely the 19th February 2014.

Subject to above variations, the appeal stands dismissed.

Judge of the Court of Appeal

P.R. Walgama J

I agree

Judge of the Court of Appeal