

**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 Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Kalubowilage Nishantha Perera  
**ACCUSED – APPELLANT**

**Case No. CA 115/2017**

**HC (Kuliyapitiya) Case No. HC 036/15**

**VS**

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

**BEFORE**

: Deepali Wijesundera J.

: Achala Wengappuli J.

**COUNSEL**

: Neranjan Jayasinghe for the

Accused – Appellant

Anoopa De Silva S.S.C. for the

Attorney General

**ARGUED ON**

: 12<sup>th</sup> March, 2018

**DECIDED ON**

: 23<sup>rd</sup> March, 2018

**Deepali Wijesundera J.**

The appellant was indicted in the High Court of Kuliyaipitiya under Sec. 383 of the Penal Code read with Sec. 32 and 380 of the Penal Code for robbery. After trial the appellant was found guilty and convicted for robbery and sentenced to 15 years RI.

The appellant is alleged have robbed Rs. 255,500/= in cash and mobile phones from the complainant Attanayake. At the trial Attanayake has testified that on 21/03/2011 around 8.30 p.m. two unidentified persons one armed with a gun and the other with a knife had entered his house and held the gun to his head and robbed his house. They have taken money, phones and jewellery from the house but only one phone has been marked and produced at the trial.

The points of argument taken up by the learned counsel for the appellant was that it is not safe to rely on the evidence given by the witness regarding the identification. He also stated that the complainant giving evidence has stated that the appellant took three phones from the house but the prosecution has produced only one phone marked as P1.

The appellant argued that the prosecution failed to establish that P1 was the phone taken from Attanayake's house which was recovered from witness Pradeep Kumara, whose wife has used it. Giving evidence she said it was a silver colored phone. But the phone produced in court was black and according to the police officer who investigate it was a black phone. There is an inconsistency regarding the IMEI number of P1.

We find on perusal of the record that the appellant had objected to the holding of the identification parade on the basis that he was brought to Wariyapola prison from Kuruwita by public transport. The learned counsel for the appellant stated that Attanayake in his testimony to court has said when he went to the Kuliypitiya police station after hearing that the suspects were arrested he was taken to the cell and the appellant was shown by the light of a torch. We find that the identification of the accused appellant had not been done properly. The learned High Court Judge himself in his judgment concedes (page 431 of the appeal brief) this fact.

The appellant has given evidence and was cross examined by the prosecution and he has called two witnesses to give evidence for the defence. The appellant's counsel argued that this evidence was not considered by the learned High Court Judge. The learned Senior State

Counsel conceded the fact that the defence evidence was not considered by the learned High Court Judge.

We find that the learned High Court Judge has failed to evaluate the defence evidence and he has not even mentioned the evidence given on behalf of the defence. It is not safe to allow this conviction to stand considering the nature of the evidence. Therefore we decide to set aside the judgment dated 13/07/2017 and the sentence.

Appeal allowed.

**JUDGE OF THE COURT OF APPEAL**

**Achala Wengappuli J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**