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

In the matter of a Petition of Appeal under and in terms of Section 331 of the Code of Criminal Procedure Act No.15/1979 read together with Section 11 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990.

**C.A.No.229/2017**

**H.C. Colombo No.HC 6607/2013**

Seethawakage Sujith Kumara Seram

**Accused-Appellant**

**Vs.**

Hon. Attorney General,

Attorney General's Department,

Colombo 12

**Complainant-Respondent**

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**BEFORE** : **DEEPALI WIJESUNDERA, J.**

**ACHALA WENGAPPULI, J.**

**COUNSEL** : Sachithra Harshana with Romesh Newshan for the Accused-Appellant.

S. Herath S.S.C. for the respondent

**ARGUED ON** : 03rd June, 2019

**DECIDED ON** : 26th July, 2019

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**ACHALA WENGAPPULI, J.**

The appellant was indicted by the Hon. Attorney General before the High Court of Colombo for committing theft of two security cameras belong to Fisheries Corporation and causing mischief to its security camera system under the Offences against Public Property Act No. 12 of 1982 and also for the theft of two mobile phones from two of its employees under the Penal Code.

After trial, the appellant was found guilty to all four counts by the High Court and was sentenced to four year terms of imprisonment in respect of the offences that are committed under the Public Property Act with a fine, three times the value of the damage to the property of Government, coupled with a default term of two years. He was also sentenced to serve a term of one-year imprisonment in respect of each of

the two counts of theft under the Penal Code. The trial Court made further order that all sentences of imprisonment to run concurrently.

Being aggrieved by the said conviction and sentence, the appellant sought to challenge them primarily on the following basis that;

a. the trial Court failed to consider the identity of the appellant was not proved by the prosecution,
b. the trial Court failed to properly evaluate the prosecution evidence for its credibility,
c. the trial Court had convicted the appellant upon the inferences it had erroneously drawn upon the prosecution case which was presented upon several items of circumstantial evidence.

The prosecution evidence is the appellant, who was employed at the Fish Processing Facility of the Fisheries Corporation at *Mutwal,* had arrived at the gate of the said facility at about 2.30 or 3.00 a.m. on 07.06.2012. Witness *Buddhika Kumara,* the security guard who manned the security point of the main gate, allowed the appellant in, on sympathetic grounds at that time since the appellant claimed that he had rushed there upon a phone call by a fellow employee who had played a practical on him and any way he had to report to work for the morning shift. At that time the appellant was clad in a white coloured T shirt and a pair of long trousers. He then walked towards the rest rooms.

The security officer was instructed by the Management to let employees in if they arrive at the facility a few hours prior to the commencement of their respective shifts on account of their coming to

work from distant places. There were rest rooms available within the facility for such employees.

Witnesses *Senadheera* and *Chaturanga* have stayed in the rest room that night as they have arrived late in the previous evening. One of them had left his phone for charging and the other had it on his bed. The door to the rest room could not be locked and the witnesses have kept a table across the door to prevent any outsider coming in during their sleep. As they woke up in the morning at about 6.30 a.m., they found out that both the phones have gone missing and had reported to security at 8.30 a.m. about the loss.

Witness *Kumarapperuma,* the security manager of the facility, was altered by the security guards firstly about the loss of phones and then of the two security cameras that had been forcibly removed from the mounts as they discovered its removal subsequently. Suspicion centred around the appellant since his entry into the facility is unusual and the witness decided to inspect the CCTV footage of the previous night. It was seen by the witness that a person in a T shirt walking at 3.45 a.m. and at 3.54 removing a security camera with a rod used to shut roller shutters. At 3.56 a.m. all cameras have gone blank.

Having replayed the CCTV recordings the witness *Kumarapperuma* called up the appellant to his office and questioned him. He then decided to call Police. The Police, having arrived at the facility, again played back the CCTV footage. They noted that the person who removed the security cameras with a rod was wearing a necklace of a particular shape similar to the one worn by the appellant who was with his manager at that time.

He was arrested and questioned by the police along with the two witnesses whose phones were lost.

IP *Padmalal* of *Mutwal* police investigated this incident and recorded the statements of the appellant as well as the two witnesses. The appellant thereafter pointed out a locker to the officer and opened it with his key and the two missing phones were recovered from it. The locker also contained personal belongings of the appellant. He also pointed out the place where two security cameras were found, concealed behind an unused wooden cupboard, close to the point they had been removed and in addition, an iron pole used in opening roller shutters was also recovered.

The lay witnesses also saw the discovery of these items made by the police, in the presence of the appellant.

In his statement from the dock, the appellant stated that he reported to work at 7.30/8.00 a.m. and was called by the security manager at 10.00 a.m. in relation to the missing phones and was thereafter taken to *Mutwal* police where he was assaulted with cricket poles in the night. He did not show anything and the locker used is a common one. He was framed for this due to his union activities and also for organising a protest campaign against his Chairman. He claimed his innocence to the allegation.

The appellant's challenge on the identity was mounted on the selected items of evidence where the witnesses have admitted that they could not identify the person who was seen in CCTV footage and the apparent inconsistency of the clothing worn by the appellant. It was also contended that the necklace which had provided the nexus between the

appellant and the person who was seen on CCTV footage was not produced in Court.

Learned Senior State Counsel, in her reply referred to the other items of evidence that explained the basis on which the trial Court had decided issue of identity against the appellant. She referred to the two instances the appellant was seen by witnesses. Initially, the appellant had entered the facility wearing a white T shirt with a pair of long trousers. The fact that subsequent reference to his clothing differed from this description could be explained as the appellant had changed into his working attire after reporting to work. The police took charge only his working attire and not the clothing he wore as he entered the premises early in the morning.

Clearly there is no reasonable doubt exists as to the identity of the appellant. The necklace and talisman were clearly referred to by the security manager and the police officer after viewing CCTV footage and it was found that similar necklace was worn by the appellant even at that time. Contrary to the claim of the appellant, the necklace and the talisman worn by the appellant at the time of his arrest was in fact produced before the trial Court marked as P7 and P8 respectively. There was no challenge by the appellant on this item of evidence.

The trial Court had correctly drawn the necessary and inescapable inference that it was the appellant and none other who was responsible for the theft of phones, security cameras and for the damage since he had the knowledge where those items were within 8 hours of its removal. In applying the principle enunciated by *Amaratunga* J in ***Ariyasinghe and***

*Others v Attorney General* (2004) 2 Sri LR 357, to the instant appeal, there were three ways in which the appellant could have acquired such knowledge.

1. He acquired the said knowledge by an act done by him.
2. He saw another person disposing of the items.
3. A person who had seen another person disposing of the items and told the appellant about it.

The circumstances justify the inference that the appellant had the knowledge as to where the phones and security cameras were because he himself had placed them at the places where it was subsequently recovered. This inference is fortified with the drawing of an inference under Section 114(a) of the Evidence Ordinance upon considering the fact that he was with his senior officers from morning until the police arrived there and due to that reason had no opportunity of acquiring that knowledge during this period of time. Therefore, in all probability he would have acquired that knowledge between the time of its removal and prior to his arrival at the Manager's Office, thereby narrowing the time gap to mere four hours.

Hence, the question of identity of the appellant had clearly been proved before the trial Court by the prosecution beyond reasonable doubt.

In shifting the focus to the other grounds of appeal, as urged by the learned Counsel for the appellant, this Court finds that the inconsistencies that are highlighted off the prosecution case has no adverse effect on the prosecution case in view of the strong case it had established before the

trial Court by placing several incriminating items of circumstantial evidence that only points to his guilt.

The contention that the prosecution had failed to establish that the appellant had entered the facility since it had failed to tender any documentary proof has no merit since the prosecution relied on direct evidence led through the security officers who were on duty at that time to prove this fact. The CCTV footage was consistent with the claim of these witnesses although it lacked clarity as to the identity of the individual.

Another point urged by the learned Counsel for the appellant is that the evidence of PW6 and PW8 are contradictory to each other in respect of the colour of the T shirt. This aspect had already been considered in this judgment in relation to the question of identity and the apparent contradiction is not a contradiction since the appellant had changed into his official attire after his entry into the facility.

The appellant sought to challenge the recovery of the two mobile phones from a common locker on the basis that it is not probable for a person to conceal stolen items in a locker which is meant for common use. The appellant in his statement from the dock claimed that the said locker is used commonly by several other co-workers as well. However, the appellant when he cross-examined IP *Padmalal* was not consistent on this position. Having suggested that the phones and cameras were handed over to police by one *Chandana* (at p.253), the appellant, after a short while again suggested to the same witness that those items were handed over to police by the security manager *Kumarapperuma* (at p. 255).

IP *Padmalal* was emphatic that those items were recovered from a secured locker which was under appellants control as he had the key. The appellant's suggestion that it was commonly used one was denied by the witness. In answer to the question as to his failure to take charge of the key the witness replied since there were other personal belongings of the appellant in the said locker he had let the appellant to keep its key. This was also not denied by the appellant. PC 2963 *Priyadharshana* had recorded the statement of the appellant and had participated in the recovery of the phones and cameras. The appellant did suggest that these items were handed over to police not by *Kumarapperuma* or *Chandradana* but by one *Rangana* (at p.268). Thus, it is clear that the appellant's challenge of the recovery of the items is done on a whimsical manner. In all, he had suggested three names as the persons who had allegedly handed over these items of productions to police. The appellant, however, is silent in his dock statement over the allegation of introduction of the productions items.

The trial Court was mindful of its responsibility in evaluating a case presented by the prosecution on items of circumstantial evidence. Contrary to the contention of the appellant that it had applied Ellenborough dictum erroneously, the trial Court had at the very end of its judgment clearly indicated that even if the appellant's case is totally rejected due to its falsity, the prosecution had proved its case beyond reasonable doubt.

This Court, after a careful consideration of the several grounds of appeal as raised by the learned Counsel for the appellant in the light of the totality of the evidence presented before the trial Court, finds that there is no merit in the appeal of the appellant.

Therefore, this Court affirms the conviction and the appropriate sentence that had been imposed on the appellant by the High Court of Colombo.

Appeal of the appellant is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

**DEEPALI WIJESUNDERA, J.**

I agree.

JUDGE OF THE COURT OF APPEAL