

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 of Code of Criminal Procedure Act No. 15 of 1979.

1. A.G. Ranjith Ambagaspitiya
2. L. Sujith Ranga Kumara

C.A. Case No. 169-170/2017
Trincomalee HC 441/2011

ACCUSED APPELLANT

Vs

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

RESPONDENT

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: J.P. Gamage AAL for the 02nd & 03rd Accused – Appellant
Dilan Rathnayaka DSG for the Respondent

Written Submissions: By the the 02nd & 03rd Accused – Appellant on 08.12.2017
By the Respondent on 25.01.2018.

Argued on: 19.02.2021

Decided on: 31.03.2021

N. Bandula Karunarathna J.

The accused-appellants (2nd and 3rd accused) along with the 1st accused (who is not and appellant in this case) were indicted in the High Court of Trincomalee on 4th January 2011 under following counts:

1. For conspiring to rob Rs.743,000/- belonging to the State Engineering Corporation under section 380 read with sections 113(b) and 102 of the Penal Code punishable under sections 4 and 10 of the Offences Against Public Property Act No.12 of 1982 as amended by Act No. 76 of 1988.
2. The 2nd and 3rd accused were indicted for committing robbery of the said Rs.743,000 under section 380 of the Penal Code punishable under sections 4 and 10 of the Offences Against Public Property Act No.12 of 1982 as amended by Act No. 76 of 1988.
3. In addition to the above counts the 1st accused was indicted for abetting 2nd and 3rd accused under section 102 of the Penal Code to commit the offence specified in count 2.

The prosecution called 9 witnesses and concluded the case marking productions “p1” to “P5” and the three accused did not give evidence.

After the trial, the 2nd and 3rd accused were acquitted by the learned High Court Judge by his judgement dated 29.03.2017 from all charges stated in the indictment and were convicted for a lesser offence of theft under section 366 of the Penal Code punishable under section 3 of the Offences Against Public Property Act No 12 of 1982.

The 2nd and 3rd accused (hereinafter referred to as appellants) were sentenced to 3 years of rigorous imprisonment and a fine of Rs.743,000 carrying a default sentence of 3 years of simple imprisonment.

Being aggrieved by the said conviction and sentence the appellants have preferred this appeal on the following grounds:

- (a) The learned High Court Judge has failed to evaluate the evidence.
- (b) The learned High Court Judge has failed to consider the inconsistency of the evidence of the investigation officer (PW9) who recorded the statements of the appellants.
- (c) The learned High Court Judge has failed to consider that there are no independent evidence against the appellants to convict them.
- (d) The learned High Court Judge has failed to consider that there is no “property” specific or identified, revealed to establish the charge of theft.
- (e) The learned High Court Judge has failed to consider the main components of the offence of “theft”.

Considering the first ground of appeal, the contention that the counsel for the appellants makes can be put to test by analysing rest of the grounds put forward by the appellant. However, it is worth noting that the evidence relied on by the learned trial Judge in convicting the appellants are circumstantial since no direct evidence of eye witnesses were lead at the trial, how much weight do such evidence carry is a matter to be diligently considered by the trial Judge.

The manner in which circumstantial evidence should be dealt with is illustrated thus “...in order to justify the inference of guilt from purely circumstantial evidence the inculpatory facts must

be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt..." (Sarath Fernando V Attorney General 2014(1) SLR 16)

In the second ground of appeal the counsel for the appellants contends that the learned trial Judge has failed to consider the inconsistency of the evidence of the investigation officer (PW9) on whose evidence the entire case of the prosecution mainly hinges on. PW 9 at one stage in his evidence stated that the amount of money recovered on the statement of the 2nd accused was Rs.150,850 consisting of 150 Rs.1000 notes, 4 Rs.500 notes and 4 Rs.10 notes, but later he stated that the amount of money recovered was Rs.118,850. As regards money recovered on the statement of the 3rd accused the witness stated the amount to be Rs.70,000 and later stated the amount to be Rs.20,000 consisting of 2 Rs.2000 notes, 7 Rs.1000 notes, 3 Rs.500 notes and 5 Rs.100 notes. Thereafter, changing his stance once again in his evidence, PW9 had stated the amount of money recovered to be Rs.118,850 with 150 Rs.100 notes and finally this witness had stated that the amount of money recovered on the statement of the 3rd accused was Rs.70,000.

At this point if at all there is any inference that can be drawn through the evidence of the above mentioned witness, it would be to the effect that the said witness had very little to no knowledge about the amount of money recovered following the alleged theft. Emphasizing the fact that the two appellants were convicted for theft and the property in question was money, failure to identify the recovered amount with a certain amount of accuracy, firstly, diminishes the credibility and the reliability of the said prosecution witness since his testimony is hardly consistent with itself, does not seem to stand the test of cross examination and to a great extent does not fit in with the rest of the evidence and circumstances of the above case. (Bhojraj V Sita Ram: (1936) 38 BOMLR 344)

Credibility is defined by Black's Law Dictionary as "the quality that makes something (as a witness or some evidence) worthy of belief." A witness whose evidence on a point is not credible cannot give reliable evidence on that point. The Ontario Court of Appeal describes the relationship between reliability and credibility as follows: "Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point..." (R V Morrissey; (1995), 22 O.R. (3d) 514, 80 O.A.C. 161 (Ont. C.A.).)

Secondly, it casts a doubt on the ability of the prosecution in identifying the subject matter of the alleged theft. This issue is raised as a ground of appeal by the appellant stating that there is no property specific, identified or revealed to establish the charge of theft.

According to section 12 of the Offences Against Public Property Act No. 12 of 1982 public property means the property of the Government, any Department, Statutory Board, Public Corporation, Bank, Co-operative Society or Co-operative union. This definition is exhaustive in view of the word "means" being used. Considering this definition," for an offence to come within

this act there should be tangible or identifiable public property in respect of which the offence is committed" (Rev Kananke Dhammadinna Thero V Attorney General; CA 310/92)

As per the evidence of PW9 even though money alleged to have been stolen by the appellants were recovered, as shown above, the prosecution has utterly failed in stating with precision the amount so recovered. Furthermore, the green bag containing the stolen cash which was recovered by PW9 was never marked shown or identified at the trial. Undoubtedly, currency notes are unidentifiable items. However, the onus is with the prosecution to establish identification of the recovered money or to adduce evidence showing that the recovered money actually belonged to the complainant. (Biswanath Satpathy v The State; AIR 1967 Ori 46)

Counsel for the appellants contends in his third ground of appeal that due consideration was not given to the fact that no independent evidence was adduced at the trial against the 2nd and 3rd accused to convict them. In this regard, apart from the evidence of PW5 and PW7 which revealed that the appellants had borrowed a motor cycle, the entirety of the conviction was based on the statements made by the accused under section 27(1) of the Evidence Ordinance. A long line of authority has held that securing a conviction purely based on statements made by the accused is bad in law.

Courts have held that "...where part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the trial Judge to consider that such statement is only evidence of the fact that accused know where the article discovered could be found, and nothing more" (Heen Banda V The Queen; 75 NLR 54)

The mere fact that the stolen property was found at the instance of an accused from a place where the cash was concealed was rather unusual and may indicate that it did not belong to the accused, but that by itself, would not lead to the inference that it belonged to the complainant. It is in fact the duty of the prosecution to establish that the cash belonged to the complainant. (Pahalli Das V The State; AIR 1952 Orissa 162)

The final ground of appeal put forward by the counsel for the appellants is in relation to the elements of the offence of theft that has to be established in order to make good, a conviction.

Section 366 of the Penal Code declares that "Whoever, intending to take dishonestly any movable property out of the possession of any person without the person's consent, moves that property in order to such taking, is said to commit theft." The elements of the offence are the following:

- (a) The property in question must be movable property.
- (b) There must be a moving of the property by the accused in order to the taking of such property.
- (c) The property should be moved out of the possession of another.
- (d) The moving of the property should have been done without the consent of the person possessing the property.
- (e) The accused should have the intention of taking the property dishonestly.

In order to secure a conviction under section 366 of the Penal Code, the prosecution bears the burden in satisfying the above. The first element states that the property must be movable. Applying to this matter at hand, the inadequacy of the evidence adduced by the prosecution in identifying the subject matter of the alleged theft has already been considered above. Whether the property has been moved by the accused is to be considered next. Counsel for the respondent argues that the money has been taken from the possession of the 1st accused by the other two accused as per the evidence of prosecution witnesses. It is worth noting in this regard that the offence the two accused were charged with was in relation to the money stolen from the State Engineering Corporation and the prosecution has failed to provide any evidence in relation to money being taken away from the possession of the said corporation.

Moreover, the third element demands proof of property being moved out of possession of the said corporation in order to establish theft. Therefore, unless it is shown by way of evidence that the 1st accused was authorized to be in possession of the said money on behalf of the corporation the third element of the offence remains incomplete. (Section 366 of the Penal Code, illustrations (e), (n), (o))

The last two elements involve consent and the relevant *mensrea* in committing theft which is dishonesty; the prosecution had once again failed to lead evidence to establish that there was Rs.743000 in the possession of a person authorized by the State Engineering Corporation and the 2nd and 3rd accused with dishonest intention of taking the money had taken the money without the consent of the person in whose possession the money belonging to the said corporation was.

Owing to the above circumstances, this Court, is of the view that the learned trial Judge has lamentably failed in evaluating the entirety of the evidence that were before him and therefore, the convictions of the appellants are quashed.

02nd and 3rd Accused Appellants are acquitted.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal