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

In the matter of an Appeal under Section 331 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 Democratic Socialist Republic of Sri Lanka

Court of Appeal Case No. CA/HCC/0069-0070/2019

High Court of Panadura Case No. HC/2656/2009

Complainant

V.

1. Meregngnage Daminda Lakmal Fernando
2. Suddathvarige Sandaruwan Fernando

Accused

AND NOW BETWEEN

1. Meregngnage Daminda Lakmal Fernando
2. Suddathvarige Sandaruwan Fernando

Accused–Appellants

V.

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

Complainant–Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J. (P/CA)**
WICKUM A. KALUARACHCHI, J.

COUNSEL : Duminde De Alwis with Charuni De Alwis for the Accused – Appellants.

Riyaz Bary, Deputy Solicitor General for the Complainant–Respondent.

ARGUED ON : 10.08.2022

WRITTEN SUBMISSIONS
FILED ON : 25.11.2019 by the Accused – Appellants.

16.03.2021 by the Complainant–Respondent.

JUDGMENT ON : 21.09.2022

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K. PRIYANTHA FERNANDO, J.(P/CA)

1. The 1st and the 2nd accused appellants (hereinafter referred to as the 1st and the 2nd appellants) were indicted in the High Court of *Panadura* on two counts of robbery, punishable in terms of section 380 of the Penal Code. Upon conviction after trial, both the appellants were sentenced to 8 years rigorous imprisonment on each count to run concurrently. Further, both the appellants were imposed with a fine of Rs. 20,000/- on each count with a default sentence of six months simple

imprisonment. Being aggrieved by the above conviction and the sentence, the appellants preferred the instant appeal.

2. In his written submissions, the learned Counsel for the appellants has urged the following grounds of appeal.

   I. The learned trial Judge failed to consider on the evidence pertaining to the identity of the appellants.
   II. The learned trial Judge misdirected himself to hold a fair trial.
   III. The learned trial Judge failed to consider the inconsistencies and contradictions in the evidence of the prosecution case.
   IV. The learned trial Judge failed to consider that the evidence of the PW7 has not been corroborated by PW1, PW2 and PW3.
   V. The learned trial Judge failed to consider the credibility of the evidence of the prosecution witnesses.
   VI. The learned trial Judge failed to analyze the prosecution case properly.
   VII. The learned trial Judge came to an erroneous finding based on speculations and surmises.

3. **Facts in brief**

   As per the evidence of the prosecution, the PW1 (husband) and PW2 (PW1's wife) had been cleaning the front portion of the garden at about 7.00pm with PW3 who was the sister of PW2. Suddenly, three people have entered the compound through the front gate and one person has fired a few gunshots in the air. When the PW1 hit the robbers with a stone, one of the robbers have hit him on the head with the weapon he was holding. The PW1 has then felt that he was bleeding from his head. They have snatched the two gold chains that were worn

by PW2 and PW3 and run off. Although the PW1 chased behind the robbers, halfway through he has stopped as the family members screamed persisting him not to run behind the robbers. When the PW1 was being taken to the hospital, the PW1 has seen the crowd in the neighborhood bringing along two robbers that were caught by them. However, he has not seen them properly because of the crowd and therefore he has not identified them.

4. Upon hearing about the robbery, when the police officers came to the scene, they have observed two people being held by the neighbors. Upon searching the suspects, the police have recovered the gold chain that was snatched from PW2 from the 1st appellant's trouser pocket. The police have also recovered a hand bomb from the 2nd accused appellant's trouser pocket.

5. When the defence was called, the 1st accused appellant has made an unsworn statement from the dock. He had been an army soldier who was injured during the war. In his statement, he has mentioned in detail about his involvement in the war and has said that he had a confused state of mind due to some incidents that happened during the war. He has said that he did not snatch any chain. The 2nd appellant has also made a statement from the dock. His position was that, he was at the beach with some friends when he heard the police coming and when he started running, he was arrested by the police. He denied any involvement in this robbery.

6. **Grounds of appeal No. 1, 6 and 7**
It was the contention of the learned Counsel for the appellants that none of the witnesses have identified the 2nd accused appellant at the trial. He further submitted that, the learned trial Judge has failed to give due consideration to the dock statement made

by the 2nd appellant as to the manner in which he was arrested by the police. It was the submission of the learned Deputy Solicitor General, that both the appellants were arrested together when they were fleeing from the crime scene.

7. Both the accused appellants were indicted on the basis that they committed the alleged offences of robbery in furtherance of their common intention. However, none of the eye witnesses PW1, PW2 or PW3 has identified the 2nd appellant to be a person who was involved in the robbery. The only evidence against the 2nd appellant was that he was arrested and brought by the crowd in the neighborhood soon after the robbery. There was evidence to the effect that the PW1's son has played a major role in catching the robbers. However, he was not called to give evidence by the prosecution. None of the persons who were involved in apprehending the robbers were called to give evidence. The evidence of the police officer PW7 was that, he went to the crime scene upon information by the Officer in Charge that two robbers had been apprehended by civilians. Therefore, the PW7 was not in a position to testify as to how and where the appellants were arrested. Hence, the prosecution has clearly failed to prove beyond reasonable doubt the fact that the 2nd appellant was involved in the robbery.

8. In his judgment, at pages 15 and 17 (Pages 359 and 360 of the appeal brief) the learned High Court Judge has said;

> "පැමිණිල්ලේ වැදගත්ම සාක්ෂිකරු වන්නේ පොලිස් කොස්තාපල් ගාමිණි දිසානායකගේ සාක්ෂියයි. වෙලාව අනුව මංකොල්ලයට ඉතාමත් ආසන්න අවස්ථාවක මංකොල්ලකෑම සිදු වූ තැන ආසන්නයේ අසල්වාසීන් විසින් මෙල්ලකරන ලද පුද්ගලයන් දෙදෙනෙකු ගෙන් එක් අයෙක් වෙත තිබී සුළු කාලයකට ඉහත මංකොල්ලකන ලද බවට හඳුනා ගන්නා ලද මාලයක් හා සුරයක් සොයා ගැනීම තුළින් 01 වන විත්තිකරු මෙම මංකොල්ලයට සම්බන්ධ බවත් දෙවන විත්තිකරු ඔහු

සමඟම එකට ආයුධ සන්නද්දව සිටියේදී අල්ලාගෙන ඇති බැවින් එම දෙදෙනා කන්ඩායමක් වශයෙන් සිටි බවත් පැහැදිලිව පෙනී යයි.''

9. The learned High Court Judge has come to the above conclusion on the assumption that, both the appellants were apprehended by the crowd when they were acting together. None of the persons who apprehended the appellants have given evidence. The only evidence in that regard is that the two suspects were brought to the scene by the crowd of persons. In their evidence at the trial, witnesses PW1 and PW3 have failed to identify any of the appellants to be those who were involved in the robbery. However, the PW2 has identified only the 1st appellant to be a person who was involved in the robbery at the police station. (Page 223 of the brief).

10. In case of ***The Queen v. M.G. Sumanasena [1963] 66 NLR 350***, it was held;

> *"In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence."*

11. Evidently, the 2nd appellant has been arrested by the police under suspicious circumstances. None of the eye witnesses to the robbery have identified him. Further, none of the persons who apprehended the appellant including the son of the PW1, has not given evidence at the trial. When the police officers went to the crime scene, the appellant has already been apprehended by the crowd of people. Hence, the grounds of appeal No. 1, 6 and 7 have to be dealt with in favour of the 2nd appellant.

12. With regard to the 1st appellant, the PW2 has clearly said in her evidence that she identified the 1st appellant to be a person who was involved in the robbery, at the police station soon after the incident. (Pages 223 and 234 of the brief). Apart from that, immediately after the robbery, the gold chain "P1" that was robbed from the PW3 was found in the possession of the 1st appellant and was recovered by the police. This evidence of PW7 (the police officer) has not been challenged in cross examination.

13. In case of ***Sarwan Singh v. State of Panjab [2002] INSC 431*** **(7 October 2002)**, it was held;

> *"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination it must follow that the evidence tendered on that issue ought to be accepted.'*

14. Hence, the evidence of the PW7 that the gold chain that was robbed from the possession of PW3 was recovered from the possession of the 1st appellant ought to be accepted by the 1st appellant as it was unchallenged in cross examination.

15. In terms of illustration (a) to section 114 of the Evidence Ordinance, The Court may presume that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. In the instant case, the gold chain that was robbed from the PW3 was found in the possession of the 1st appellant soon after the robbery. As I have mentioned before, that evidence was unchallenged. The 1st appellant has not been accounted for such possession of the chain. Thus, it is presumed that the 1st appellant robbed the gold chain "P1" from the PW3. Hence, in respect of the

1st appellant, the grounds of appeal No. 1, 6 and 7 are devoid of merit.

16. **Ground of appeal No. 2.**
The learned Counsel for the appellants submitted that, the learned High Court Judge has deprived the appellant of a fair trial as the learned High Court Judge adjourned the trial to enable the PW2 to bring the gold chain to Court for identification of the same. I regret to state that I am unable to accept the argument of the learned Counsel for the appellants for the following reasons. The PW2 has commenced her examination in chief at the trial on 19.02.2018. Half way through, it was observed that the gold chain that was a production which was handed over to the PW2 by Court, has not been brought to Court by the witness for identification. The learned High Court Judge, on the application made by the State Counsel has rightly adjourned the trial until the next date to enable the witness to bring the production gold chain for identification. Section 263(1) of the Code of Criminal Procedure Act provides for such adjournment.

17. On the next date of the trial, the Counsel for the defence has questioned PW2 as to whether she discussed the case with the family members. The PW2 has given a genuine answer in the affirmative, stating that they discussed about the date and time of the robbery. It is obvious that being family members they are prone to discuss matters of this nature among themselves and the PW2 has been truthful about it.

18. It would have been unfair by the prosecution if the learned High Court Judge refused to grant an adjournment upon an application being made by the prosecution to enable the PW2 to bring the gold chain for identification of the same in evidence. As

per the Court record of the High Court, the Counsel for the defence has not objected to the application for adjournment. Thus, the adjournment until the next date has not caused any prejudice to the appellants as they had the full opportunity to cross examine the witness on the next date. The learned High Court Judge also had the opportunity to listen to the PW2's evidence in full that includes examination in chief, cross examination and re-examination. Hence, the ground of appeal No.2 has no merit.

19. **Grounds of appeal No. 3, 4 and 5**
Although the learned Counsel for the appellants has preferred these grounds of appeal in his written submissions, the learned Counsel failed to highlight any contradiction inter-se or per-se in evidence that goes to the root of the case and affects the credibility of the witnesses.

20. In case of ***State of UP v. M.K. Anthony 1985 Cri LJ 493*** it was observed that minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, would not ordinarily permit rejection of the evidence as a whole.

21. The learned High Court Judge has sufficiently discussed the omissions and the contradictions in the evidence at Pages 14 and 15 of his judgment, and rightly concluded that those do not go to the root of the matter and would not affect the credibility of the witnesses. The learned High Court Judge has given good and sufficient reasons to accept the evidence of the eye witnesses and the police witnesses. Therefore, the grounds of appeal No. 3, 4 and 5 should necessarily fail.

22. The main argument that was advanced by the learned Counsel for the appellants was that, the appellants have not been properly identified as the persons who committed the robbery. As reasoned out in this judgment, the prosecution has failed to prove beyond reasonable doubt that the 2nd appellant has taken part in the robbery. His identification has not been properly established. Therefore, as mentioned before, the ground of appeal No. 1 has merit with regard to the issue of identification of the 2nd appellant. Hence, the appeal by the 2nd appellant is allowed. The 2nd appellant is acquitted of both counts 1 and 2.

23. For the reasons stated above, the convictions and the sentences imposed on the 1st appellant on both counts 1 and 2 are affirmed. The appeal by the 1st appellant is dismissed.

The 1st appellant's appeal is dismissed.

The 2nd appellant's appeal is allowed.

PRESIDENT OF THE COURT OF APPEAL

WICKUM A. KALUARACHCHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL