

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

In the matter of an appeal in terms of Article 13 8(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 331 of the High Court of the of Provinces (Special Provisions) Act, No. 19 of 1990.

**CA No: CA/HCC/ 213/2016**  
**HC: Kuliypitiya: HC 16/2013**

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

**Complainant**

**Vs.**

Dasanayaka Gunaratne Basnayake  
Mudiyanselage Deepthi Wijebandara

**Accused**

**And now between**

Dasanayaka Gunaratne Basnayake  
Mudiyanselage Deepthi Wijebandara

**Accused- Appellants**

**Vs.**

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

**Complainant-Respondent**

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

**&**

**R. Gurusinghe J.**

**Counsel:** Yalith Wijesundera, AAL for the Accused-Appellant

Sudharshana de Silva, DSG for the Complainant-Respondent

**Written Submissions:** By the accused-appellant – Not filed

By the complainant-respondent – 18.10.2019

**Argued on :** 19.10.2022

**Decided on :** 31.10.2022

**N. Bandula Karunarathna J.**

This appeal is from the judgment, delivered by the learned Judge of the High Court of Kuliyaipitiya, dated 02.11.2016, by which, the accused-appellant, was convicted and sentenced to 16 years rigorous imprisonment and a fine of Rs. 10,000/- and in default, 2 years simple imprisonment.

Further a sum of Rs. 20,000/- compensation was ordered to be paid to PW 2 and in default 2 years rigorous imprisonment.

All sentences were imposed consecutively.

The accused appellant was indicted in the High Court of Kuliyaipitiya on the following counts;

- (1) That on or about 28.11.2010 within the jurisdiction of this court, in a place called Munamaldeniya, committed the robbery of a motorcycle to the value of Rs. 80,000/- from the possession of Balasuriya Mudiyansele Dayarathna, an offence punishable under section 383 of the Penal Code.
- (2) During the same course of the transaction, he committed the robbery of a gold ring and a chain in the possession of Ranjani Kusumalatha an offence punishable under section 383 of the Penal Code.

Further according to the said charges, the appellant used a gun while committing the said robbery.

After the conclusion of the trial, the appellant was convicted on 02.11.2016 for 08 years of rigorous imprisonment for each count. Further, the appellant was ordered to pay Rs. 5,000/- as a fine and Rs. 20,000/- as compensation.

To prove its case, apart from the police witnesses the prosecution led the evidence of the said Balasuriya Mudiyansele Dayarathna (PW 1) and Ranjani Kusumalatha (PW 2) who are husband and wife, and one Mohammed Sadan (PW 4) who is the owner of Lucky Jewellers.

According to the main two eyewitnesses PW 1 and PW 2, a person came into their house armed with a weapon like a pistol and took away PW 1's Motor Cycle and PW 2's chain and the ring. PW 2 specifically says that out of fear she removed the chain and the ring and kept them on the table and handed it over to the accused-appellant. According to both of them, the person who came had covered his face.

This case mainly rests on the identification of the accused and other connecting evidence. According to these two witnesses PW 1 and PW 2, the accused was a neighbour whom they knew for about 15-20 years and has identified him from his eyes, voice and figure. PW 1 has also previously spoken to the accused-appellant.

The witnesses further say that the accused had a sharp voice and had heard him fighting in his house which was in the neighbourhood. According, to PW 1 and PW 2, when the accused was inside the house, the lights were on. A complaint was made immediately to the Police regarding the incident implicating the name of the accused-appellant.

When going through the evidence of these two witnesses, it could be seen that their evidence has not been challenged substantially and one could see consistency in the evidence of the two witnesses.

In the case of Kirpal Singh Vs. the State Uttar Pradesh AIR (1965) 712 it was held that;

“But where the accused is intimately known to the witness and for more than a fortnight before the date of the offence, he had met the accused on several occasions in connection with the dispute, it cannot be said that the identification of the assailant by the witness from what he heard and observed was”

This dictum was followed in the local cases of;

- (i.) Hatangala Ariyasena vs. AG CA 68/2011 decided on 21.02.2013,
- (ii.) Pallawa Lekamlage Gayan Sanjeewa alias Asanka Wewellawala and Two Others vs. AG in CA 246/2009 decided on 01.09.2015,

The prosecution is not solely depending on voice identification. There were some other independent evidences to connect the appellant to the Crime.

After the appellant was arrested, the police found a pair of Ear Rings purchased by the appellant from Lucky Jewellers and a receipt of Rs 4,000/- for the same which was issued on the day after the robbery that was 29.11.2010.

According to the evidence of PW 4, Mohammed Sadan, the Owner of Lucky Jewellers, the appellant had come with a chain and a ring which was sold to him for a sum of Rs. 22,000/-. He has then deducted Rs. 4,000/- for the pair of earrings and given the balance Rs. 18,000/- to the appellant. This witness identifies the appellant and the receipt he issued, but has melted the chain and the ring the appellant sold to him for Rs. 22,000/-.

PW 4 is an independent witness. He has no connection either to PW 1, PW 2 or the appellant. As correctly analysed by the Learned High Court Judge, there is no reason to disbelieve his evidence. The defence has not challenged the accused-appellant coming to his Jewellers on 29.11.2010. According to the Police evidence the appellant was arrested 3 days later, the recoveries made at his house, and then taking him to the Lucky Jewellers has never been challenged by the defence.

Both the appellant and his wife has given evidence on behalf of the defence. According to them, PW 1 is an uncle of theirs and they had a dispute regarding land and an accident pertaining to the complainant's son. This happened about 4 years prior to the incident in the year 2006.

Further, a number of contradictions had been marked from the evidence of the appellant and it has been established that he is an army deserter, the fact which he tried to hide. He also had been in remand for about one year. Some discrepancies between the evidence of the appellant and his wife have been highlighted.

The evidence of the appellant completely contradicts the evidence of his wife which was correctly analysed by the Learned High Court Judge. The defence taken by the appellant is not

regarding identification but only about a bogus complainant. As very correctly analysed by the Learned High Court Judge the position taken by the appellant cannot be believed.

When this appeal was taken up for argument learned counsel for the accused-appellant informed court that he is not challenging the conviction. Learned Counsel for the accused appellant indicated that he is canvassing only the sentence.

The learned Trial Judge has imposed 8 years of rigorous imprisonment for each count, to run consecutively.

The learned counsel for the accused-appellant requested to impose the said rigorous imprisonment concurrently. The learned Deputy Solicitor General who appeared for the respondent did not object to the said application of the appellant. The maximum sentence is 10 years of rigorous imprisonment and learned counsel for the respondent agreed to impose 8 years of rigorous imprisonment for each count to run concurrently.

The accused-appellant was convicted and sentenced on 02.11.2016. He has completed almost 6 years in prison and therefore it is my view that 8 years of rigorous imprisonment should be backdated up to 02.11.2016 enabling him to go back to society and stay with his family members in near future.

Considering the circumstances of the case we alter the sentence to run concurrently as mentioned above and dismissed this appeal.

The fine and the compensation will remain the same. The default term for the fine is altered as 3 months simple imprisonment and the default sentence for the compensation is altered as 1-year simple imprisonment

Appeal dismissed.

Sentence altered.

**Judge of the Court of Appeal**

**R. Gurusinghe J.**

**I agree.**

**Judge of the Court of Appeal**