**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/0415/2019**

**High Court of Kurunegala Case No. HC/340/17**

**Complainant**

V.

1. Abeykoon Mudiyanselage Chaminda Kumara Abeykoon

2. Wannaku Mudiyanselage Sugath Ruwan Kumara

**Accused**

AND NOW BETWEEN

1. Abeykoon Mudiyanselage Chaminda Kumara Abeykoon

2. Wannaku Mudiyanselage Sugath Ruwan Kumara

**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** : Chathura Amaratunga for the Accused – Appellants.

Wasantha Perera, Deputy Solicitor General for the Respondent.

**ARGUED ON** : 26.10.2022

**WRITTEN SUBMISSIONS**
**FILED ON** : 11.11.2021 by the Accused – Appellants.

07.04.2022 by the Respondent.

**JUDGMENT ON** : 09.12.2022

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

1. The first and the second accused appellants (hereinafter referred to as the first and the second appellants) were indicted in the High Court of *Kurunegala,* on count no.1, for committing an offence punishable in terms of section 113B and section 102 to be read with section 380 of the Penal Code. On count no.2, the first accused appellant was charged for committing the offence of robbery punishable in terms of section 380 of the Penal Code, and on count no.3,

the second accused appellant was also charged for aiding and abetting the first accused appellant in committing the offence mentioned in count no.2, thereby committing an offence punishable in terms of section 380 to be read with section 102 of the Penal Code. After trial, both the first and the second appellants were convicted for count no.1, the first appellant was convicted for count no.2 and the second appellant was convicted for count no.3 by the learned High Court Judge.

2. For count no.1, both the first and the second appellants were sentenced to 7 years rigorous imprisonment and in addition, they were ordered to pay a fine of Rs. 10,000/- each. For count no.2, the first appellant was sentenced to 7 years rigorous imprisonment and in addition, was also ordered to pay a fine of Rs. 10,000/-. For count no.3, the second appellant was sentenced to 7 years imprisonment and in addition, was ordered to pay a fine of Rs. 10,000/-. The sentences of imprisonment imposed on both the appellants were ordered to run concurrently by the learned High Court Judge.

3. Being aggrieved by the above convictions and the sentences, the appellants have preferred the instant appeal. At the stage of the hearing of this appeal, the learned Counsel for the appellants, as submitted in his written submissions urged two grounds of appeal.

    I. The items of evidence are not sufficient to prove the prosecution's case against the appellant beyond reasonable doubt.

    II. The rejection of the evidence of the accused is wrongful and the learned Judge of the High Court has failed to correctly apply the principles governing the evaluation of dock statements.

4. The brief facts of the case as per the evidence led by the prosecution are as follows,
   The main witness *Thennakoon Arachchilage Asanka Pradeep* (PW1) has been transporting a load of rice bags in a lorry, from *Kalmunei* to *Colombo*. He has been the driver of the lorry. *Nihal Senarathne* (PW4) has been the assistant to the PW1. On their way to *Colombo*, they have stopped at *Malsiripura* for tea. Three persons have come and asked them whether they could get a lift to *Colombo*, to which they have agreed. In *Kurunegala*, the PW2 has got down from the vehicle with some goods. The PW1 has proceeded with the 3 persons to whom they agreed to give a lift to *Colombo*.

5. Thereafter, they have made another stop for tea at *Rathmalgoda*. After having tea, one person to whom they agreed to give a lift has held a pistol against his stomach, and another has held a knife against his neck. Thereafter, they have tied him up and strapped his mouth with tape. His eyes have also been covered with tape. However, as his ears were intact, he could hear the noises around him. The lorry was driven for about one hour before he was moved into another vehicle. He has got the feeling that it was a car. Then, he was taken to a house where he heard noises of children. Later, he has heard the sound of his lorry also being brought to the same place. He has also heard the sound of goods being unloaded from his lorry. Thereafter, they have moved him back to the lorry and stranded him off at a jungle. After getting himself unstrapped, he has driven the lorry to the nearest police station which was the *Dodamgaslanda* Police Station. They have finally referred to him to the *Polgahawela* Police Station.

6. He has been asked to come for an identification parade, and he has identified both the appellants at

the identification parade which was held in the Magistrate Court.

7. When the defence was called, both the 1st and the 2nd appellants have made unsworn statements from the dock. The 1st appellant, while denying all the charges against him said that, the police had kept him under detention for about a month. It was his evidence that, the PW1 came and saw him at the police station. He further stated that, although he told at the identification parade that he was shown to PW1 at the police station, it has not been recorded in the parade notes.

8. The 2nd appellant in his statement from the dock, while denying all the charges against him said that, when he was arrested in *Mahiyanganaya*, the PW1 was also in the police van. Thereafter, he was once again shown to the PW1 in *Negombo* when he was under detention.

9. **Ground of appeal No. 1**
The learned Counsel for the appellant submitted that, the police officers have shown the appellants to PW1 while they were under detention. The learned Counsel further submitted that, the mobile phone that was said to have been recovered from the 1st appellant was never identified by the PW1 to be his own mobile phone. Therefore, the learned Counsel submitted that, the prosecution has failed to prove the identity of the appellants to be the persons who committed the robbery, beyond reasonable doubt.

10. It was the submission of the learned Deputy Solicitor General (DSG) for the respondent that, there is no evidence to establish that the appellants were shown to the PW1 at the police station. Further, it was submitted that, there is unchallenged evidence that the *sim* card of the mobile phone that was registered under the name of the 1st appellant was found by the *Polgahawela* police officers (PW18) on the following day

itself, even before the appellants were arrested. Therefore, it is the contention of the learned DSG that the prosecution has proved the charges against both the appellants beyond reasonable doubt.

11. The PW1, who was faced with the full incident of robbery, has been consistent in his evidence. The PW1 has had ample time for being acquainted with the appellants from the time the appellants got into his lorry. Not only were they travelling together, but they have also had tea together before the PW1 was blind folded by the appellants.

12. In *"Turnbull"* [1977] QB 224 English Court of Appeal laid down important guidelines for the Judges on trials that involve disputed identification evidence. The purpose of those guidelines were to avoid the risk of injustice, as even an honest witness may be wrong in identifying a suspect on being convinced that he is right. The Court may consider the length of time for which the witness could observe the accused, the distance between the accused and the witness when he saw him, the state of the light and any obstacles between the accused and the witness to obstruct the witness from seeing the accused.

13. As I have stated before, the PW1 has had ample time, good lighting conditions, and has been in close proximity to see the appellants when he was travelling and having tea with the appellants.

14. The PW1 has gone to the *Negombo* police station to make his statement. He denied seeing the appellants at the *Negombo* police station. The appellants had been kept under detention. The appellants have failed to inform the acting Magistrate who conducted the identification parade that, they were seen by the witnesses at the police station. In their dock statements, both the appellants have said that, although they informed the same at the identification

parade, it has not been recorded in the parade notes. If that objection was in fact raised, the learned acting Magistrate had no reason not to record the same. This is a common allegation made by the suspects when they are produced in an identification parade. Further, even at the trial, the appellants have failed to suggest the time on which they were seen by the PW1.

15. Apart from the appellants being identified by the PW1 to be the persons who committed the robbery, there is further evidence led at the trial against the 1st appellant. The *sim* card of a mobile phone, which was registered in the name of the 1st appellant, was found in the lorry on the following day. Upon investigation, the police officers confirmed that the *sim* card was registered under the name of the 1st appellant. That evidence was unchallenged. Although the appellants have no burden to prove anything, the 1st appellant could have explained as to how his *sim* card was left in the lorry or at least explained as to whether he has given it to some other person. The evidence led by the prosecution on the *sim* card was never challenged by the defence.

16. The learned High Court Judge while giving her reasons, has rightly concluded the PW1 to be a credible witness and that his evidence could be acted upon. Therefore, the 1st ground of appeal should fail.

17. **Ground of appeal No.2**
The learned Counsel for the appellant submitted that, the learned High Court Judge has failed to consider the dock statements made by the appellants when they both said that they were shown to the witnesses at the police station. However, the learned DSG submitted that, the learned High Court Judge has in fact considered the dock statements made by the appellants.

18. The PW1 in his evidence said that, he went to the *Negombo* police station with the PW4. Although the PW1 identified the appellants at the parade, the PW4 failed to identify them. If the appellants were shown to the witnesses at the police station, the PW4 could also have identified the appellants at the parade. It is also to be noted that, it was the PW1 who faced the whole episode of robbery as the PW4 had left before the robbery took place. The learned High Court Judge at pages 14 and 15 of her judgment has considered the statement that the appellants made from the dock and has rightly accepted the evidence on identification, rejecting the position taken up by the defence. Hence, I find that this ground of appeal also has no merit.

19. In the above premise, I find no reason to interfere with the convictions of the appellants and the sentences imposed on them by the learned High Court Judge. Thus, I affirm the convictions and the sentences imposed.

Appeals of both appellants dismissed.

**PRESIDENT OF THE COURT OF APPEAL**

**WICKUM A. KALUARACHCHI, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**