IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an appeal in terms of Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 331 of the Criminal Procedure Code and Section 19 (B) of the High Courts of the Provinces (Special Provision) Act No. 19 of 1990.

Court of Appeal Case No:

CA / HCC / 229 / 2014

High Court of Gampaha Case No:

HC 121 / 2006

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant – Respondents

Vs.

Ajith Nishantha

Accused

AND NOW BETWEEN

Ajith Nishantha

Accused – Appellant

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Respondent

Before: Menaka Wijesundera J.

B. Sasi Mahendran J.

Counsel: Dr. Jayatissa de Costa, PC with Chamila Ekanayaka and D.D.P Dasanayake for the Accused – Appellant.

Riyaz Bary, D.S.G for the State.

Argued on: 14.03.2023

Decided on: 16.05.2023

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 17.12.2014 of the High Court of Gampaha.

The appellant in the instant had been indicted in the High Court for the theft of a case record under the provisions of the Public Property act, the appellant had been serving in the Attangalla Magistrates Court when he is alleged to have committed the instant offence.

The main grounds of appeal had been that the learned trial judge had not,

1) Considered the evidence led by the prosecution,
2) The trial judge had failed to consider the dock statement by the appellant,
3) Not givben reasons for her findings.

The evidence of the prosecution is that the case records are handled by three clerks and they are the,

1) the subject clerk.

2) the day book clerk

3) the record keeper.

The case records are not handled by the peons in the Court house other than for the reason of taking the case records from one branch to another. But for that purpose, it had to be entered in to a delivery book of the respective clerk. The case record in question bears the no 26213. The said case record had been filed on 25.7.2000. The case record had been last called on 24.10.200 and the Magistrate had issued an open warrant against the accused. The case record had been misplaced and it had not been called thereafter and subsequently the case record had been found on top of a cupboard in the office, which had been allocated to keep letters in the office.

In the evidence of the registrar, it had been brought to the notice of him of a possible contradiction where he had said that the alleged case record was found from the drawer of Rosy Ekanayake who was a clerk in the Court house which he had denied.

It was also suggested to him that Menke Ratnayake was responsible for the misplacement of the record.

The clerk who maintains the day book Ashoka Jayasekera had given evidence and according to her evidence she had been told by another colleague that he had seen the appellant talking to some outsiders and thereafter opening a drawer and going through some files and thereafter had been seen tearing off a page from the delivery book which is used to send the records relating to the day on which the accused had been warranted. When she had confronted the appellant, he had admitted that he did so. According to the day book clerk the alleged case record had been called in open Court on 24th of October and an open warrant had been issued to the accused. Thereafter the record had gone missing.

The explanation given by the appellant is that the case record was found from the drawer of Rosy Ekanayake who is the subject clerk and the appellant had admitted of tearing off a page in the delivery book of the day book clerk and rewriting on the same. The missing page according to the record keeper is the page pertaining to the impugned date and the appellant had admitted that particular page had been torn off after it had been recovered from the drawer of the subject clerk to whose custody the record had been sent by the record keeper. The said page had been page no 160 and the page no 161 which had been rewritten by the appellant who had admitted of doing so to the witness Ashoka Jayasekera.

But in cross examination the day book clerk had admitted that she was saying this for the first time in Court. She had further said that she herself had not seen the appellant tearing off the page in the delivery book pertaining to 24th of October. But the witness had said that she only answered the questions that were put to her by the police.

The next witness led by the prosecution is the person who had told to the day book keeper about a page being torn off and removed by the appellant had given evidence and he had reiterated his position but he cannot remember a date. In his cross examination it has been suggested to him that he had been lying.

The prosecution has then led the evidence of the record keeper, she had sent the case record to the subject clerk on 24.10.2000 and thereafter the record had not reached the record room.

The appellant had been absconding soon after the incident and the police had taken him in to custody on 29.11.2000 and subsequent to his statement the police had recovered the case record on top of the filling cabinet in the office of the Magistrates

Court of Attanangalla. The defense has challenged the said statement of the appellant.

The appellant had denied the incident and the section 27 recovery in his dock statement.

The main contention of the Counsel for the appellant was that the learned trial judge had only reproduced the evidence of the prosecution in the judgment and had not analyzed the evidence.

But we observe that the learned trial judge had analyzed the implications of the section 27 recovery under the Evidence Ordinance and had concluded that by applying the presumption under section 114 of the Evidence Ordinance the appellant can be found guilty for the charge in the indictment.

The charge in the indictment is a charge of theft under the Public Property act, and according to the Penal Code the charge of theft has been defined as below,

"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft"

In the instant matter the appellant has had knowledge of the where abouts of the case record (section 27 recovery of the record) and he was seen taking out a case record and going through and putting it inside again not during office hours (he was not entitled to do it) and his subsequent conduct once the case record was purported to be lost and thereafter tearing off the page of the delivery book of the clerk who has had custody of the alleged record and it is the page which had been assigned for the alleged day of the offence which was the 24th of October are the factors which had been led against the appellant by the prosecution witnesses and

they have all been lengthily cross examined but the defense had not been able to raise a reasonable doubt in their evidence although it had been subject to certain contradictions.

Hence in view of the above facts which had been placed before Court proves the fact that the appellant had moved the alleged property from the possession of the clerk who was entitled to have a case record without her consent thereby has committed the offence of theft.

But we are unable to agree with the way she has applied the presumption under section 114 of the Evidence Ordinance along with section 27 recovery of the case record under the provisions of the Evidence Ordinance to prover the charge of theft.

But the above mentioned factors placed before Court by the prosecution has amply shown that the appellant has committed the offence.

The dock statement made by the appellant is lengthy and has denied his involvement but in view of the evidence lead at the trial the contents in the dock statement does not create a reasonable doubt in the prosecution case.

The learned trial judge has very much said the same thing with regard to the statement from the dock of the appellant. Hence it has been rejected for good reasons by the trial judge.

Hence although the trial judge had wrongfully analyzed the evidence to prove the charge of theft, we conclude that the prosecution has ample evidence which had not been reasonably contradicted placed before Court to prove the charge in the indictment against the appellant.

As such we hold that even for the wrong reasons the learned trial judge had concluded correctly, as such the conviction and the sentence is affirmed but we order that the sentence to be operative from the date of the conviction.

Subject to the above the instant appeal is dismissed.

Judge of the Court of Appeal.

I agree.

B. Sasi Mahendran J.

Judge of the Court of Appeal.