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

In the matter of an Appeal made in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Poruthotage Nalin Sujanaka Perera
2. Lokubalasuriyage Lal Premasiri

Accused

C.A. Case No: **CA 108/2003**

H.C. Kurunegala Case No: **HC 100/2000**

AND NOW BETWEEN

Poruthotage Nalin Sujanaka Perera

Accused-Appellant

Vs.

The Attorney General
Attorney-General's Department,
Colombo 12.

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	Tirantha Walaliyadde, PC with AAL R. Abeywardhana for the Accused-Appellant Janaka Bandara, SSC for the Complainant-Respondent
ARGUED ON	:	22.07.2019
WRITTEN SUBMISSIONS	:	The Accused-Appellant – On 02.09.2019 The Complainant-Respondent– On 10.12.2015
DECIDED ON	:	27.11.2019

K.K.WICKREMASINGHE, J.

The Accused-Appellant has filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Kurunegala dated 12.11.2003 and sentencing order dated 27.11.2003 in case No. HC 100/2000.

Facts of the case:

The Accused-Appellant (hereinafter referred to as the 'appellant') and another were indicted in the High Court of Kurunegala under 12 charges, for using criminal force on people named in the indictment, intending thereby to dishonor them, an offence punishable under Section 346 read with Section 32 of the Penal Code and for committing Robbery on those people using deadly weapon with some others who were not known to the prosecution, an offence punishable under section 383 read with section 32 of the Penal Code. Since the 2nd accused passed away prior to the commencement of the trial, the indictment was amended that the appellant committed the said offences with the 2nd accused who was deceased and others not known to the prosecution.

At the trial, four witnesses gave evidence for the prosecution, namely;

- PW 02 - Basnayaka Mudiyanselage Chandrawathi - A victim of the criminal force
- PW 01 - Justin Gallappaththi - a victim of the criminal force and robbery
- PW 05 – J.W. Upali – A victim of criminal force and robbery
- PW 10 - Sargent K. Piyasena - The Chief Investigating Officer of the incident from Katupotha Police Station.

The prosecution marked the Identification Parade notes through the Court translator and closed its case. When the defence was called, three witnesses testified for the defence case and the appellant gave evidence under oath.

At the conclusion of the trial, the Learned High Court Judge convicted the appellant for charges under Section 346 of the Penal Code (Charge No. 1, 2, 5) and acquitted him from the charges under Section 383 of the Penal Code (Charge No. 8, 9, 12). The rest of the charges were not pursued during the trial and accordingly no judgment was delivered on them. The Learned High Court Judge imposed a term of 02 years rigorous imprisonment for each charge and ordered the sentence of 5th charge to run concurrently with 1st and 2nd charges. Further, a fine of Rs.3000/= for each charge was imposed with a default term of 01 year rigorous imprisonment.

Being aggrieved by the said convictions and the sentences, dated 12.11.2003 and 27.11.2003, the appellant filed this appeal.

The Learned President's Counsel for the appellant submitted following grounds of appeal;

1. The Legal issue of Divisibility of credibility
2. There is no independent corroboration

As per the evidence of prosecution, the incident relevant to the instant case can be summarized as follows;

On 19.01.1999, PW 01, 02 and 05 with several others were engaged in election campaign for the North Western Provincial Council Elections and the appellant came in a white color van with the 2nd accused (deceased) and some other people who were not known to the prosecution and assaulted the victims with iron pipes. The appellant was armed with several firearms. Thereafter, the victims were forced to kneel down on the road and they were forcefully stripped naked to their underwear. PW 01 was a then sitting member of Southern Provincial Council and PW 02 was a 50 years old woman. The appellant had thereafter, robbed the money and jewelry of the victims and made them run on the road for nearly ½ a mile. As per the evidence, the said gang of attackers were led by the appellant and the 2nd accused who is now deceased. It was further revealed that they attacked PW 01, 02 and 05 with iron pipes, stripped them naked and robbed their jewelry while the others were present at the scene with firearms.

The defence took up the position that the appellant was falsely implicated due to political rivalry between the two parties. Defence witness Nishantha Kumara testified that he witnessed the incident and the appellant was not among those who came for the attack. One Janayalage Wijepala testified that the appellant was with him at a different location at the time of the incident and the father of the appellant testified that one 'Podi Gamini' committed the said offences and his son did not commit said offences.

The Learned President's Counsel for the appellant contended that since the appellant was acquitted from the robbery charges, evidence of the same witnesses relating to the other charges cannot be believed and acted upon unless there is independent corroboration. The Learned President's Counsel submitted following case law to support his contention;

1. **The Queen V. Vellasamy and 04 others [63 NLR 265]**
2. **Siriwardena and another V. The Attorney General (1998) 2 Sri LR 222**
3. **Samaraweera V. The Attorney General (1990) 1 Sri LR 256**
4. **The Queen V. V.P. Julis and 02 others [65 NLR 505]**
5. **S.D. Francis Appuhamy and 03 others V. The Queen [68 NLR 437]**

The Learned SSC for the complainant-respondent (hereinafter referred to as the 'respondent'), replied to the above contention that there is no such strict rule that evidence of the same witnesses relating to the other charges cannot be believed and acted upon unless there is independent corroboration but only a requirement of compelling reasons. The Learned SSC further argued that the first three cases submitted by the Learned President's Counsel for the appellant, are not applicable and not relevant to the instant case since the circumstances of those case are different from the instant case.

In the case of The **Queen V. Vellasamy and 04 others [63 NLR 265],** it was held that,

> *" Where the evidence of a witness is disbelieved in respect of one offence it cannot be accepted to convict the accused of any other offence. Accordingly, if a witness's evidence is disbelieved in respect of a charge of murder it cannot sustain the conviction of the accused in respect of a charge under section 198 of the Penal Code."*

The said **Vellasamy** case was based completely on the testimony of a single witness named Maniccam who had seen the accused was carrying the lifeless body of the deceased prior to recovering the dead body from a nearby canal. Upon perusal of the said judgment, it is clear that the said case was a case of where the jury believed and disbelieved the same witness, at the same time.

Therefore, I am of the view that it was not a case involving the principal of divisibility of credibility which could be applied to the instant case.

Both cases of **Siriwardena and another V. The Attorney General (1998) 2 Sri LR 222 and Samaraweera V. The Attorney General (1990) 1 Sri LR 256,** had referred to the principle mentioned in the case of '**Mohamed Fiaz Baksh V. The Queen [1958] AC 167 (PC)**'. In the said case of **Baksh**, it was held that,

> *"Their credibility cannot be treated as divisible and accepted against one and rejected against the other. Their honesty having been shown to be open to question, it cannot be right to accept their verdict against one and reopen it in the case of the other..."*

However, in the case of **The Queen V. V.P. Julis and 02 others [65 NLR 505],** it was held that,

> *"The maxim falsus in uno, falsus in omnibus, is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. But when such evidence is given by a witness, the question whether other portions of his evidence can be accepted as true should not be resolved in his favour unless there is some compelling reason for doing so..."*

Further, in the case of **S.D. Francis Appuhamy and 03 others V. the Queen [68 NLR 437],** it was held that,

> *"The remarks contained in the judgment of the Privy Council in Mohamed Fiaz Baltsh v. The Queen (1058) A.C. 167 that the credibility of witnesses cannot be treated as divisible and accepted against one accused and rejected against another (a) was inapplicable in the circumstances of the present case and (b) cannot be the foundation for a principal that the evidence of a witness must be accepted completely or not at all".*

Following the above said two cases of **V.P. Julis (supra)** and **Francis Appuhamy (supra),** Justice P.R.P. Perera in the case of **Samaraweera (supra)** held that,

> *"The maxim falsus in uno, falsus in omnibus could not be applied in such circumstances. Further all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."*

Therefore, it is manifestly clear there is no concrete rule that a witness should be disbelieved completely if he is disbelieved at one point. The practice of the Court has been to act upon such evidence, if there are compelling reasons to do so. Therefore, the Trial Judge should be cautious to consider whether the witness is deliberately giving false evidence or whether the mistakes are committed due to poor memory of the witness.

I observe that in the instant case, the issue is not the fact that a witness was disbelieved at one point and believed at one point, but the fact that there were

not sufficient evidence to prove that it was in fact the appellant who committed the robbery among all the perpetrators in the incident.

As I have already mentioned, the incident in the instant case consisted of two main offences, namely, using criminal force and robbery. I observe that the Learned High Court Judge proceeded to acquit the appellant from robbery charges since the evidence of the prosecution did not prove beyond reasonable doubt it was the appellant who robbed the victims.

The Learned SSC for the respondent contended that throughout the trial, the defence admitted the occurrence of the incident and the defence never suggested that any of the witnesses were not present in the scene or that they have not been victimized.

I observe that as per the prosecution version, the witnesses lodged a complaint with the Police, implicating the accused, as soon as they managed to find some clothes, after the incident. It is highly unlikely that victims, who underwent such public humiliation and disgrace, made a complaint to the Police Station implicating some person who was not even at the scene and would let go of the person who actually stripped them naked.

Further, PW 02 was a resident of the same area with the appellant, and she clearly identified the appellant since she knew him even prior to the incident. PW 01 and 05 too identified the appellant in the Identification Parade even though the appellant was not a known character to them. It is noteworthy that the Identification Parade Notes were admitted by the defence during the trial under Section 420 of the Code of Criminal Procedure Act and therefore, such identification remains unchallenged.

The Learned High Court Judge was of the view that the evidence was not consistent **only** with regard to the robbery incident. This does not any manner suggest that the incident of dishonouring the victims did not take place. Since

the indictment carried two types of charges, the Learned High Court Judge was in a position to consider whether to convict the appellant for both charges or for only one or to acquit him of all charges. Considering all these facts, the Learned High Court Judge came to the conclusion that a group of people including the appellant participated in the charges in the indictment, and the prosecution has proved beyond reasonable doubt that the appellant committed an offence punishable under section 346 even though the prosecution failed to prove the robbery charge against the appellant.

The above conclusion was well within law and the Learned High Court Judge was not prevented from believing the prosecution evidence with regard to the dishonouring incident and being unsatisfied with the evidence on the fact that whether the appellant himself committed the robbery.

Considering above, it is my view that the first ground of appeal of the appellant should fail.

The Learned President's Counsel for the appellant contended that there was not sufficient independent corroboration.

As I have already discussed under the first ground of appeal, there were compelling reasons to believe the version of the prosecution.

Upon perusing the prosecution evidence, it is manifested that the evidence of PW 01 and PW 02 were consistent and they were in fact corroborating each other on material facts. The evidence of PW 05 too was well consistent with the prosecution version.

Even though the defence witnesses testified that the appellant was either with them or it was one 'Podi Gamini' who committed the offence, all the witnesses admitted that they did not reveal the said fact to any authority prior to giving evidence in the High Court. The father of the appellant testified that he was an eye witness where the said 'Podi Gamini' committed the offence. However, it is noteworthy that father of the appellant never took any step to bring this matter

to the attention of any law enforcement authority (Page 211 – 213 of the brief), thereby his son could have been proved innocent very easily.

In such a backdrop, it is manifestly clear that there were compelling reasons to believe the prosecution evidence with regard to the participation of the appellant in the incident in question and therefore, the culpability of the appellant in the instant incident was well proved.

In the case of **The AG V. Potta Naufer and others (2007) 2 Sri L.R. 144,** it was observed that,

> *"When faced with contradictions in a witness's testimonial, the court must bear in mind the nature and significance of the contradictions, viwed in light of the whole of the evidence given by the witness. The court must also come to a determination regarding whether this contradiction was an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead court..."*

In the case of **Vadivelu Thevar V. State of Madras [1957 AIR 614]**, it was held that,

> *"On a consideration of the relevant authorities and the provisions of the Indian Evidence Act, the following propositions may be safely stated as firmly established:*
>
> *(1) As a general rule, a court can and may act on the testimony of a single witness though uncorroborated. One credible witness outweighs the testimony of a number of other witnesses of indifferent character...*
>
> *(3)* ***Whether corroboration of the testimony of a single witness is or is not necessary, must depend upon facts and circumstances of each case and no general rule can be laid down in a matter like this and much***

depends upon the judicial discretion of the Judge before whom the case comes... " (Emphasis added)

It is trite law that an appellate court shall not disturb findings of a trial Judge unless such finding is manifestly wrong. I observe that the Learned High Court Judge has correctly evaluated all contradictions and concluded that none of them affected the credibility of witnesses and the same did not go to root of the case. Therefore, I see no merits in the above argument as well.

Considering above, I am of the view that there is no reason to interfere with the findings of the Learned High Court Judge and therefore, I affirm the conviction dated 12.11.2003 and sentence dated 27.11.2003.

Accordingly, the appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Samaraweera V. The Attorney General (1990) 1 Sri LR 256
2. Siriwardena and another V. The Attorney General (1998) 2 Sri LR 222
3. Mohamed Fiaz Baksh V. The Queen [1958] AC 167 (PC)
4. The Queen V. V.P. Julis and 02 others [65 NLR 505]
5. S.D. Francis Appuhamy and 03 others V. the Queen [68 NLR 437]
6. The AG V. Potta Naufer and others (2007) 2 Sri L.R. 144
7. Vadivelu Thevar V. State of Madras [1957 AIR 614]