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

In the matter of an Appeal made under Section 331(1) of the Code of Criminal Procedure Act No.15 of 1979.

**Court of Appeal Case No.**
**CA/HCC/ 0178/2015**

**High Court of Embilipitiya**
**Case No. HC/28/2013**

The Democratic Socialist Republic of Sri Lanka.

**Complainant**

**Vs.**

1. Madurasinghage Wijitha alias Ranmalli
2. Ramanayakage Chaminda Kumara

**Accused**

**Now And Between**

Ramanayakage Chaminda Kumara

**Accused-Appellant**

**Vs.**

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

**Respondent**

**BEFORE** : **Sampath B. Abayakoon, J.**
**P. Kumararatnam, J.**

**COUNSEL** : **Ashan Fernando for the Appellant.**
**Chetiya Gunasekera, ASG, PC., for the Respondent.**

**ARGUED ON** : **18/09/2023**

**DECIDED ON** : **15/12/2023**

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**JUDGMENT**

**P. Kumararatnam, J.**

The above-named Accused-Appellant (hereinafter after referred to as the Appellant) along with 1st Accused mentioned in the indictment were indicted by the Attorney General in the High Court of Embilipitiya as follows:

1. The 2nd Accused being a member of an unlawful assembly with persons unknown to the prosecution, and of which the common object was Robbery, committed an offence punishable under Section 140 of the Penal Code.
2. On the same transaction a member or members of unlawful assembly committed Robbery of money, jewelleries and a mobile phone worth of

Rs.494,000/- from Peduru Arachchilage Padmasiri alias Somapala, an offence punishable under Section 380 to be read with Section 146 of the Penal Code.

3. The 2nd Accused with others unknown to the prosecution committed Robbery of money, jewelleries and a mobile phone worth of Rs.494,000/- from Peduru Arachchilage Padmasiri alias Somapala, an offence punishable under Section 380 to be read with Section 32 of the Penal Code.
4. The 1st Accused knowingly it was a stolen property, possessed a mobile phone which was Sony Ericsson made and thereby committed an offence punishable under Section 394 of the Penal Code.

The prosecution had closed the case after calling 14 witnesses and marking production P1-2. When the Learned High Court Judge called for the defence, the Appellant and the 1st Accused had made dock statements. Additionally, the Appellant had called three witnesses on his behalf.

The Learned High Court Judge, after considering the evidence presented by both parties, convicted the Appellant as charged and imposed following sentences:

1st Count- 06 months rigorous imprisonment and a fine of Rs.5000/- with a default sentence of 06 months simple imprisonment.

2nd Court – 03 years rigorous imprisonment and a fine of Rs.5000/- with a default sentence of 01-year simple imprisonment.

The sentences imposed above are to run concurrently.

The 1st Accused was acquitted from the 4th charge solely due to the fact that the mobile phone recovered from him was not a product of Sony Ericsson.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Appellant is on bail pending appeal granted by the Learned High Court Judge.

The Appellant raising solitary ground of appeal contended that the charges preferred against him by the Hon. Attorney General in the indictment are not in accordance with the law.

**Background of the case.**

According to PW3, Nayana Padmakumari, on the day of the incident while she was sleeping in the early hours a person had come to her room shouted to raise her hands. When her sister switched on the light, she had seen a tall person brandishing a gun directed them to go to the hall where her parents were guarded by some unknown persons. The person who brought her to the hall not covered his face while others had their faces covered. After about six months, she identified the Appellant at the identification parade. The group had robbed a mobile phone a Sony Ericsson model, and gold jewelleries worn by her and her father.

The witness had identified the Appellant at the identification parade after taking sometime. Although she identified the Appellant, she said that she was not very sure about the identity of the Appellant.

PW1, Padmasiri is the head of the family. While he was sleeping, a person had switch on the light and blind folded him. The persons who entered his room had covered their faces beyond identification. Hence, he could not identify anybody at the parade. He had given description of items mentioned in the indictment.

PW2, Somalatha also narrated the same as PW3 and she too identified the Appellant at the identification parade. According to her, the identification parade was held after about 07 months of the incident.

Further, the Counsel for the Appellant strenuously argued that the prosecution had failed to prove Unlawful Assembly charge beyond reasonable doubt.

Section 138 of the Penal Code reads as;

> "An assembly of five or more persons is designated an unlawful assembly if the common object of the persons…"

In this case, the evidence given by the prosecution witnesses are not quite sure whether the assembly consisted of five or more persons.

PW3 in her evidence only referred to four persons and she categorically said that nobody was seen standing outside of the house at time of the incident happened. The relevant portions are re-produced below:

Page 66 of the brief.

ප්‍ර : කී දෙනෙක් දැක්ක ද?

උ : හතර දෙනෙක්.

ප්‍ර : හතර දෙනාගෙන් මූණ නිරාවරණය කරගෙන කීදෙනෙක් හිටිය ද?

උ : දෙන්නෙක් හරි තුන්දෙනෙක් හරි.

ප්‍ර : මූණ ආවරණය කරගෙනත් කට්ටිය හිටිය ද?

උ : ඔව්.

Page 82-83 of the brief.

ප්‍ර : හතර දෙනෙක් ආවා කිව්වා?

උ : ඔව්.

ප්‍ර : 04 දෙනාගෙන් 03 දෙනෙක් මුහුණ ආවරණය කර සිටියා නම් එක්කෙනෙක් ආවරණය නොකර ඉන්න පුළුවන් ?

උ : ඔව්.

Page 94 of the brief.

ප්‍ර : ඔබ කිව්වා 04 දෙනෙක් දැක්කා කිව්වා?

උ : ඔව්.

ප්‍ර : ගෙදරින් එළියෙත් සිටියා කිව්වා ඇතුලෙත් සිටියා කිව්වා?

උ : එළියේ කට්ටිය දැක්කේ නැහැ.

PW1 had not identified anybody as he was blind folded immediately after he fell in the clutches of the Appellant.

Only PW2 referred to the presence of five persons at the time of the offence. But in the cross examination, this witness had said that the intruders had switched off the lights immediately after entering to the house. PW1 was blind folded and the house was in the dark. As such she could not exactly say how many persons had entered her house at that time.

Considering the evidence given by these witnesses, a serious doubt had been cast upon the prosecution version about the composition of the unlawful assembly.

In **Rex v Silva (1940) 18 CLW 51 CCA,** the Appellants were convicted of:

1. *Being members of an unlawful assembly, the common object of which was to cause serious bodily injury to one Welisarage Rogus Fernando, did thereby commit an offence under Section 140 of Penal Code.*
2. *Being members of the said unlawful assembly who in prosecution of the said common object did commit murder by causing the death of the said Rogus Fernando, and offence punishable under Sections 146 and 296 of the Penal Code.*

*After the jury returned its verdict Crown Counsel withdrew a third count in the indictment, which charged the accused that they were acting in furtherance of a common intention, did commit murder by causing the death of the said Welisarage Rogus Fernando and that they thereby committed an offence under Section 296 of the Penal Code read with Section 32 of the Penal Code.*

a) *The appeal was based on the main ground that there was no legal proof of the charge or unlawful assembly. Counsel for the Crown argued that even if the charge of unlawful assembly and the charge of murder in the course of the unlawful assembly failed, it was open to the court of Criminal Appeal to convict the accused or some of them on the 3rd count that was withdrawn, or*
b) *to order a new trial, or*
c) *even if common intention or the existence of an unlawful assembly were not proved, to convict anyone of the accused against whom an offence was proved of that offence.*

*Held: (1) That the evidence established neither the existence of an unlawful assembly nor a common intention on the part of the accused to commit murder,*

*(2) That the fact a conviction under count (3) as framed is not warranted by the evidence does not preclude the Court of Criminal Appeal from finding the accused guilty of offences arising out of individual acts committed by them.*

Additionally, the Learned Counsel for the Appellant contended that the 3rd charge is bad for want of particulars since the charge does not specify the articles that were alleged to have been stolen.

In this case, as per the evidence of prosecution witnesses, only one mobile phone had been reported to be stolen. PW3, in her evidence stated that the stolen phone of her father is a product of Sony Ericson. Further, in her

evidence she stated that the phone marked as P1 is not her father's phone. The Learned High Court Judge in his judgment had correctly taken his cognisance of this fact.

It is quite clear that the intention of the prosecution is to charge the 1st Accused in this case stating that the production P1 the mobile was the mobile phone robbed from PW1 by the Appellant and others unknown to the prosecution. However, if the prosecution is unable to prove it, the benefit of doubt should be accrued to the Appellant.

The Learned High Court Judge reasons out the below in his judgment, to find the Appellant guilty.

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අධිකරණයට ඉදිරිපත් කර ඇති ජංගම දුරකථනයේ වර්ගය සම්බන්ධයෙන් ගැටළුවක් පැන නගින නමුත්, ජංගම දුරකථනයක් මංකොල්ලකා ඇති බවට පැමිණිල්ල විසින් නඩුවක් සංස්ථාපනය කර ඇත. එම නිසා දෙවන චූදිතට එරෙහිව තුන්වන චෝදනාවද පැමිණිල්ල විසින් ඔප්පු කර ඇති බවට තීරණය කරමි. ඔහු තුන්වන චෝදනාවටද වරදකරු කරමි.

Further, with regard to the acquittal of the 1st Accused, the Learned High Court Judge reasons out as follows:

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එහෙත් පළවන චූදිත සම්බන්ධයෙන් මෙම නඩුවේ ඇති එකම සාක්ෂිය ඔහු සන්තකයේ තිබූ ජංගම දුරකථනය වන අතර, පැමිණිල්ලේ සාක්ෂිකරු සාක්ෂි දෙමින් කියා සිටින්නේ කොල්ලකන ලද්දේ සොනී එරික්ෂන් වර්ගයේ ජංගම දුරකථනයක් බවයි. අධිකරණයේදී තමාගේ නැති වූ නඩු භාණ්ඩය ලෙස පැ.සා. 01 නඩු භාණ්ඩ හඳුනා ගත්තද, පොලිසිය විසින් පළමු වන චූදිත සන්තකයේ තිබූ බවට නඩු භාණ්ඩ ඉදිරිපත් කලද, එය සෝනී එරික්ෂන් වර්ගයේ ජංගම දුරකථනයක් නොවේ. ඒ හෙයින් නඩු භාණ්ඩ හඳුනා ගැනීම සම්බන්ධයෙන් බරපතල සැකයක් ඇති වන බැවින්, පළවන විත්තිකරුට එරෙහිව නඩුව සාධාරණ සැකයෙන් ඔබ්බට ඔප්පු වන්නේ නැත. එබැවින් නඩුවේ විත්තියේ සාක්ෂි පිළිබඳ වැඩිදුර විශ්ලේෂණය කිරීම අනවශ්‍ය නිසා එකී සාක්ෂි පිළිබඳ කරුණු නොදක්වන අතර, පළවන චූදිත ඔහුට එරෙහි සිව්වන චෝදනාවට නිදොස් කොට නිදහස් කරමි.

In a criminal trial the primary task in front of the prosecution is to gather evidence and to collect this evidence, there must be assumptions which help to finally get access to the evidence. Hence, these assumptions are based on the principle of probability**.** Also, it is a prerequisite in criminal cases to prove a case beyond reasonable doubt so it further enhances the principle of Probability. This principle holds a very important role when it comes to convincing the judge on specific points as higher the probability of the assumption, higher will be the chances for the jury to get convinced.

**In Iswari Prasad v. Mohamed Isa** 1963 AIR (SC) 1728 at 1734 it was held that;

> *"In considering whether evidence given by a witness should be accepted or not, the court has to examine whether he is, in fact, an interested witness and to inquire whether the story deposed to by him is probable and whether it has been shaken in cross-examination. That is -whether there is a ring of truth surrounding his testimony."*

As the prosecution indicted the 1st accused and the Appellant in one and the same indictment and produced only one mobile phone, and the evidence revealed that the said mobile phone is not a stolen item, the benefit of doubt should have been accrued to both of them. Using this piece of evidence to convict the Appellant and to acquit 1st Accused clearly demonstrates that the Appellant had been denied a fair trial in this case.

In every criminal case, the burden is on the prosecution to prove the case beyond reasonable doubt against the accused person.

As for the reasons stated above, it is quite clear that the charges levelled against the Appellant are not proven beyond reasonable doubt. Hence, the benefit of doubt should be accrued to the Appellant as well.

I therefore, set aside the conviction and the sentence dated 13/08/2015 imposed on the Appellant by the learned High Court Judge of Embilipitiya. Therefore, I acquit him from the charges.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Embilipitiya along with the original case record.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**