

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

*In the matter of an Application for Special  
Leave to Appeal from the Judgment of the  
High Court of Gampaha and exercising  
Criminal (Appellate) Jurisdiction in case No.  
32/14 on 24.11.2014*

**Case No. S.C. Appeal No. 41/2016**

S.C. (S.P.L.) L.A. No. 02/2015

High Court of Gampaha Case No.  
32/14

MC Pugoda Case No. 10620

Officer-in-Charge,  
Kirindiwela Police Station,  
Kirindiwela.

**PLAINTIFF**

Vs.

Rupassara Pedige Shamal Indunil  
Ruapassara,  
No. 92, Happitiya,  
Wathurugama.

**ACCUSED**

AND BETWEEN

Rupassara Pedige Shamal Indunil  
Ruapassara,

No. 92, Happitiya,  
Wathurugama.

**ACCUSED-APPELLANT**

Vs.

1. Hon. Attorney General,  
Attorney-General's Department,  
Colombo 12.
2. Officer-in-Charge,  
Kirindiwela Police Station,  
Kirindiwela.

**PLAINTIFF-RESPONDENTS**

AND NOW BETWEEN

Rupassara Pedige Shamal Indunil  
Ruapassara,  
No. 92, Happitiya,  
Wathurugama.

**ACCUSED-APPELLANT-APPELLANT**

Vs.

1. Hon. Attorney General,  
Attorney-General's Department,  
Colombo 12.

2. Officer-in-Charge,  
Kirindiwela Police Station,  
Kirindiwela.

**PLAINTIFF-RESPONDENT-**  
**RESPONDENTS**

**BEFORE:** JAYANTHA JAYASURIYA, PC, CJ.

S. THURAIRAJA, PC, J. AND

A. L. SHIRAN GOONERATNE, J.

**COUNSEL:** Chula Bandara with W. V. S. B. Gunawardhana instructed by S. Lakshika Samarakoon for the Accused-Appellant-Appellant.

Induni Punchihewa, SC for the Attorney-General.

**WRITTEN** 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff-Respondent-Respondent on 23<sup>rd</sup> March 2018

**SUBMISSIONS:** Accused-Appellant-Appellant on 27<sup>th</sup> September 2022 and 10<sup>th</sup> July 2023.

**ARGUED ON:** 06<sup>th</sup> September 2024.

**DECIDED ON:** 20<sup>th</sup> November 2024.

**THURAIRAJA, PC, J.**

1. The background to this case arises from the conviction of the Appellant, one Rupassara Pedige Shamal Indunil Ruapassara (hereinafter referred to as the "Appellant"), in the Magistrate Court of Pugoda by judgment dated 28<sup>th</sup> June 2013 on two counts: first, the offence of housebreaking and theft punishable under sections 443 and 396 of the Penal Code and, second, retention of stolen property punishable under section 394 of the Penal Code.
2. The Appellant preferred an appeal to the High Court of Gampaha, and by judgment dated 24<sup>th</sup> November 2014, the learned High Court Judge acquitted the Appellant of the 1<sup>st</sup> count but upheld the conviction of the Appellant on the 2<sup>nd</sup> count. Subsequently, by petition dated 5<sup>th</sup> January 2015, the Appellant prayed for special leave to appeal before this Court. On 26<sup>th</sup> February 2016, this Court granted special leave to appeal on the following question of law set forth in Paragraph 16(d) of the petition:

*"Did [the] Judgments of the Learned Provincial High Court Judge of Gampaha and the Additional Magistrate of Purged erred [sic] in law by failing to take into consideration that the alleged statement made by the Appellant to the Police, marked 374 is dated 24.06.2010 which is long before the Appellant's arrest?"*

3. The factual matrix underlying the Appellant's preliminary convictions pronounced by the learned Additional Magistrate commences with a complaint received by the Kiridiwela Police Station from one E. M. H. Kumara Dissanayake (PW01), the virtual-complainant, on 04<sup>th</sup> December 2009 which subsequently led to the Appellant's arrest by an Officer-in-Charge attached to the Kirindiwela Police Station, IP Lionel Senanayake (PW05) on 04<sup>th</sup> July 2010.

4. A statement<sup>1</sup> by the Appellant was recorded by a Police Constable, subsequent to which certain jewellery items, and later, a mobile phone, were discovered in the Appellant's residence.
5. The Appellant contests the authenticity of පැ4 on two grounds. First, the Appellant categorically denies having made such a statement. Second, the Appellant seeks to cast doubt on the legitimacy of පැ4, citing a discrepancy in dates: the statement is dated 24<sup>th</sup> June 2010, whereas the Appellant's arrest occurred on 4<sup>th</sup> July 2010. This temporal gap, the Appellant argues, raises a question as to why the arrest did not follow promptly after the recording of such a statement.
6. Before analysing the merits of the Appellant's case, it is pertinent to trace the trial, the evidence led and the findings of, firstly, the learned Additional Magistrate and, subsequently, those of the learned High Court Judge.
7. In the trial before the Magistrate Court, the Appellant pleaded not guilty to the charges, and the following witnesses were called on behalf of the prosecution: the Complainant (PW01), wife of PW01, IP Pathmina Illangakoon (PW02), AAN Kamal Adhikari (PW03) Investigating Officer IP Shaminda Perera (PW04), and the Arresting Officer (PW05).
8. PW05, in giving evidence, categorically stated the following: a complaint was received from PW01 in respect of a housebreaking and theft in December 2009, and subsequent to investigations, the Appellant was arrested on 4<sup>th</sup> July 2010. He further stated that, the Appellant's statement was recorded by one P.C. 39184 Sirisena. Subsequent to the recording of such statement, certain jewellery items and eventually a mobile phone were found in the possession of the Appellant, more specifically in his residence, and produced to the respective police station.

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<sup>1</sup> Marked පැ 4.

9. Thereafter, the Appellant was identified in the dock, the stolen items, too were identified, and the relevant portion of the Appellant's statement, admissible under s27 of the Evidence Ordinance, was marked as "පැ4".
10. It is evident upon perusal of the cross-examination of PW05, that the dates pertaining to the arrest, recording of the statement, or the authenticity of such statement, were not questioned or challenged by the defence. In fact, the Appellant did not even raise a challenge or present a denial to the fact that the statement was recorded.
11. Accordingly, the Learned Additional Magistrate, finding the Appellant guilty on both counts, pronounced a sentence of 8 months imprisonment and a fine of Rs. 1,000/- (failing to pay which would result in an additional month of imprisonment) for the 1<sup>st</sup> count and, further, a term of 1 year imprisonment and a fine of Rs. 1500/- (failing to pay which would result in additional two months of imprisonment).
12. When the Appellant preferred an appeal to the High Court of Gampaha, the learned High Court Judge, by judgment dated 24<sup>th</sup> November 2014, acquitted the Appellant of the 1<sup>st</sup> count but upheld the conviction of the Appellant on the 2<sup>nd</sup> count. In the judgment, the learned High Court Judge draws attention to the well-known presumption codified in s114(a) of the Evidence Ordinance, which reads as follows:

*"114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case.*

*The Court may presume:*

*(a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession;”*

13. The learned High Court Judge reasons that, in failing to adduce evidence to reasonably explain how the goods that form the subject of the theft came to be in his possession, the Appellant has failed to rebut the evidence of the prosecution to prove that he did not commit the offences he is accused of, namely the offence of retaining stolen property under s394 of the Penal Code.
14. The learned High. Court Judge considered, amongst other considerations, the fact that the prosecution had led the evidence of the virtual complainant, the officers who investigated the complaint and closed the case. When the defence was called, the Appellant neither gave evidence nor called any witnesses to offer an explanation as to his possession of the stolen articles. Accordingly, the learned High Court Judge took the view that, in the absence of such explanation, a presumption against the Appellant has been raised, and was not successfully rebutted.
15. The Appellant disputes the operation of the above presumption on the basis that the statement, 374, upon which the stolen goods were recovered, is dated prior to his arrest and, further, as a result, further raises doubts as to why his arrest did not occur earlier.
16. The written submissions of the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff-Respondents-Respondents (hereinafter referred to as the “Respondents”) dated 23<sup>rd</sup> March 2018 reiterate the narration of events presented in the evidence of PW05; the Appellant was arrested on 04<sup>th</sup> July 2010 following a complaint, and a statement was recorded on the same day soon after the Appellant’s arrest.

17. It is hardly a revelation that the Respondents clarify the discrepancy in the date to be a clerical oversight, which is supported by the submission of the relevant excerpt from the Original Information Book.<sup>2</sup> R3, of which 374 is a reproduction, clearly reflects the recorded date as 04<sup>th</sup> July 2010. In addition, the Respondents have submitted an affidavit<sup>3</sup> confirming this fact by PW05. The Appellant objects to the submission of both R3 and R4 in his additional written submissions dated 10<sup>th</sup> July 2023 on the basis that a party to an action is not permitted to submit any new documents not previously presented to a lower court, and the Respondents' submission of the extract and affidavit thus place the Appellant in a position of disadvantage by not affording him an opportunity to examine and cross-examine this particular evidence.
18. Having established the relevant facts, my task now is to analyse them and render an opinion. While the issue before this Court is elementary and arguably requires minimal deliberation, it remains the duty of this Court to consider earnestly any grievances alleging a violation of rights or an error in law. However, it is evident from the circumstances of this case that the Appellant seeks to exploit a mere clerical error in an attempt to evade the legal consequences of his actions. Although such an oversight is regrettable and warrants disapproval, it does not afford the accused a basis to circumvent accountability for his unlawful conduct.
19. When this case was heard before the Magistrate Court, the Appellant elected to remain silent on the belief that the prosecution had failed to prove the charges against him beyond reasonable doubt. This includes the failure to cross-examine or raise a challenge to the evidence of PW 05 pertaining to dates with respect to the Appellant's arrest or recording of his statement.

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<sup>2</sup> Marked R3.

<sup>3</sup> Marked R4.



20. Further, the Respondents have satisfied to this Court that at the instance evidence relating to the date of arrest and recording of the statement was tendered, the Original Information Book was available to the perusal of the learned Magistrate and the defence in open court. In such instance, the Appellant cannot credibly contend that the Respondents are precluded from submitting documents which merely confirm the unchallenged evidence that the Appellant, was, in fact, arrested on 04<sup>th</sup> July 2010, and his statement was recorded thereafter – a minuscule typographical inconsistency in the nature presented in this case is not, in my view, a material error capable of extinguishing the strength of the evidence posed against the Appellant in establishing his guilt.
21. For the purposes of completeness, I will briefly deal with the Appellant’s challenge to the application of s114 of the Evidence Ordinance. It is trite law that a man in possession of stolen goods following the theft raises the presumption that he is the thief or received the goods knowing them to be stolen unless he can account for his possession. The Appellant, when presented the opportunity in the Magistrate Court, did not present any evidence to offer an explanation to his possession nor did he dispute the evidence of the prosecution and therefore failed to rebut such a presumption. I am inclined to agree, as a result, with the Respondents’ position, and the subsequent opinions of the Learned Additional Magistrate and Judge of the High Court, that the case against the Appellant has been proved upon sufficient, adequate and uncontradictory evidence, notwithstanding the discrepancy in the dating of the Appellant’s recorded statement arising from a mere typographical mistake common in the act of manual data entry.
22. The Respondents have cited a line of authorities in the written submissions dated 23<sup>rd</sup> March 2018 in support of the position that evidence not challenged in cross-examination can be considered to be an undisputed fact and, in given circumstances, can lead to an inference of admission of that fact.

23. In the Court of Appeal judgment, **P.V. Hemalatha Kulasiri v Republic of Sri Lanka**,<sup>4</sup> His Lordship Sisira De Abrew J opined:

*"In my view, when an item of evidence is led in a criminal trial through a reliable witness and the opportunity to challenge such an item of evidence is not availed of by the opposing party it is justifiable to conclude that he does not do so for the reason that, if challenged, it would be unfavourable to the opposing party.*

24. His Lordship Sisira De Abrew J cites the Indian judicial decision in **Sarwan Singh v State of Punjab**<sup>5</sup> in support of his reasoning, in which the Supreme Court held that:

*"It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross-examination it must follow that the evidence tendered on that issue ought to be accepted.*

25. Likewise, the Appellant's failure, or rather, election to fail to challenge the evidence of the prosecution renders the belated complaint of the Appellant only upon appeal to be futile; this Court cannot assist an accused whose silence at the trial stage has been correctly interpreted to infer an admittance by the accused of the evidence presented against him. Manifestly, even in a situation where the erroneously dated recorded statement was not presented, the Learned Additional Magistrate and learned Judge of the High Court would still be correct in their respective findings that the charges against the Appellant on the second count have been proven beyond reasonable doubt by the prosecution.
26. In agreement with such findings, I conclude that there is no merit to the Appellant's case, and accordingly dismiss the appeal.

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<sup>4</sup> CA Minutes dated 01<sup>st</sup> October 2007.

<sup>5</sup> AIR 2022 SC 3652.

27. The learned Magistrate is directed to implement the sentence as ordered by the High Court of Gampaha.

***Appeal Dismissed.***

**JUDGE OF THE SUPREME COURT**

**JAYANTHA JAYASURIYA, PC, CJ.**

I agree.

**CHIEF JUSTICE**

**A. L. SHIRAN GOONERATNE, J.**

I agree.

**JUDGE OF THE SUPREME COURT**