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

In the matter of an Appeal

Horathal Pedi Durayalage
Nimal Ranasinghe
Ambagahagedera, Nagollagoda.

Accused-Appellant-Appellant

SC Appeal 149/2017
SC(SPl.L.A) 50/2017
HC Kuliyapitiya HCA 03 /2016
MC Hettipola 51052

Vs

Officer-in-Charge
Police Station
Hettipola

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

Respondent-Respondents

Before : Sisira J De Abrew J
V.K. Malalgoda PC J
L.T.B. Dehideniya J

Counsel : W. Dayaratne PC for the Accused-Appellant-Appellant.
Suharshi Herath SSC for the Respondents

Argued on : 4.4.2018

Written Submission
Tendered on : 5.3.2018 by the Accused-Appellant-Appellant.
23.2.2018 by the Respondent-Respondent

Decided on : 21.6.2018

Sisira J De Abrew J

In this case the accused-appellant-appellant (hereinafter referred to as the accused-appellant) was convicted for an offence punishable under Section 386 of the Penal Code (disposing of stolen property) and sentenced to a term of 15 months rigorous imprisonment (RI) and to pay a fine of Rs.1500/- carrying a default sentence of 3months simple imprisonment (SI). In addition to the above punishment, he was ordered to pay a sum of Rs.7500/- to the complainant carrying a default sentence of 3months simple imprisonment (SI).

Being aggrieved by the said conviction and the sentence, the accused-appellant appealed to the High Court. The learned High Court Judge by judgment dated 8.2.2017 affirmed the conviction and the sentence and dismissed the appeal.

Being aggrieved by the said judgment of the High Court, the accused-appellant has appealed to this court. This court by its order dated 17.7.2017 granted leave to appeal on questions of law set out in paragraph 15(c) and 15(f) of the Petition of Appeal dated 20.3.2017 which are set out below.

1. Did the learned High Court Judge fail to consider that according to the prosecution case Vajira Pushpa Kumara was totally involved in the disposal of the stolen property of five water motors in which event he becomes an accomplice who should be charged for the 3rd offence, but the complainant has not made him as an accused and police have used him as a witness which is the power given to the honourable Attorney General and not the police?

2. Did the learned High Court Judge seriously misdirect himself when he affirmed the custodial sentence of 15 months rigorous imprisonment when it is mandatory to impose a suspended sentence to the accused as he is a first offender?

This court also granted leave on the following question of law.

3. Has the prosecution failed to establish the charge No.3 with regard to the date of the commission of the offence?

Facts of this case may be briefly summarized as follows.

The water motor installed near the well of the complainant Mahinda Dharmasena disappeared from his garden on 25.8.2008. Police discovered the said water motor from the possession of Gamini Gunathilake who stated in evidence that he purchased the said water motor from Puspakumara.

Puspakumara in his evidence stated that the accused-appellant gave him the water motor; that he sold it to Gamini Gunathilake for Rs.6000/-; and that he gave the said Rs.6000/- to the accused-appellant. The water motor was produced in court and was identified by all the aforementioned witnesses. One of the main contentions of learned President's Counsel was that Puspakumara was an accomplice and that therefore the learned Magistrate could not have acted on the evidence of Puspakumara. In considering the above contention, the most important question that must be considered is whether Puspakumara is an accomplice or not. Who is an accomplice? Basnayake CJ in Peiris Vs Dole 49 NLR 142 at page 143 made the following observation. "An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is, admittedly, not every participation in a crime which

makes a party an accomplice in it so as to require his testimony to be confirmed." Basnayake CJ in the above judgment considered the following passage of the judgment in the case of Emperor Vs Burn 11 Bombay Law Reports which reads as follows. "No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admission of the facts showing that he had such a hand. If the evidence of a witness falls short of these tests, he is not an accomplice; and his testimony must be judged on principles applicable to ordinary witnesses."

Pushpakumara in his evidence states that he sold the water motor to Gamini Gunathilake for a sum of Rs.6000/- and gave the same amount to the accused-appellant. There is no evidence to suggest that Puspakumara knew that the water motor was a stolen item. It appears from the above evidence that Puspakumara had not kept any commission or had gained any profit from the sale of the water motor. When I consider the above evidence and the legal literature, I am unable to conclude that Puspakumara was an accomplice. For the above reasons, I reject the above contention of learned President's Counsel.

Prosecution leveled three charges against the accused-appellant. The 1st charge was that on 25.8.2008 the accused-appellant by entering the land of Mahinda Dharmasena, committed the offence of criminal trespass. The 2nd and 3rd charges were that on the same day in the course of the same transaction the accused-appellant committed the theft on water motor of Mahinda Dharmasena and sold it. The accused-appellant was acquitted from the 1st and the 2nd charges. Learned PC contended that since the accused-appellant was acquitted from the 1st and 2nd charge, he could not be convicted on the 3rd charge as the date of offence in the 3rd charge was on the same day (25.8.2008). Police recovered the water motor

on 24.5.2009. Therefore the selling of water motor should have taken place prior to 24.5.2009. Puspakumara says that the sale of water motor took place in 2008 or 2009. The 1st charge states that the offence of trespass was committed on or **about** 25.8.2008. It does not state that the offence was committed only on 25.8.2008. Since the 1st charge states that the offence of trespass was committed on or about 25.8.2008, the date of offence can be any closer date (however within one year) to 25.8.2008. For the above reasons, I reject the above contention of learned President's Counsel.

Learned President's Counsel for the accused-appellant next contended that although the accused-appellant was charged for disposing of stolen property, penal section according to the charge sheet is section 394 of the Penal Code which deals with offence relating to retention of stolen property and that the proper section should have been Section 396 of the Penal Code. He therefore contended that the conviction could not be permitted to stand. I now advert to this contention. Although according to charge No.3, the Penal Section is 394, the wording of the charge is in conformity with Section 396 of the Penal Code. The learned Magistrate has also, in his judgment, stated that he convicted the accused appellant for selling stolen property. The question that must be decided is whether any prejudice was caused to the accused-appellant as a result of the said defect in the charge sheet or whether he was misled by the said defect. It has to be noted here that the accused-appellant, at the trial, had not taken up an objection to the charge sheet on the basis of the said defect. In this connection judicial decision in the case of Wickramasinghe Vs Chandradasa 67 NLR 550 is important. Justice Sri Skanda Rajah in the said case observed the following facts.

"Where in a report made to Court under Section 148(1)(b) of the Criminal Procedure Code, the Penal Provision was mentioned but, in the charge sheet from which the accused was charged, the penal section was not mentioned."

His Lordship held as follows.

"*The omission to mention in a charge sheet the penal section is not a fatal irregularity if the accused has not been misled by such omission. In such a case Section 171 of the Criminal Procedure Code is applicable."*

In considering the argument of learned President's Counsel Section 166 of the Criminal Procedure Code is important. It reads as follows

> *"Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or these particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission."*

There is nothing to indicate that the accused-appellant was misled by the above defect. Considering all the above matters, I reject the above contention of learned President's Counsel.

Learned President's Counsel next contended that imposition of a custodial sentence on the accused-appellant who did not have previous convictions is wrong. But this argument is nullified by the observations made by the learned Magistrate at page 26. The learned Magistrate has observed that the accused-appellant has one previous conviction. I therefore reject the above contention. When I consider all the above matters, I hold that the conclusion reached by the learned High Court Judge is correct. In view of the conclusion reached above, I answer the question of law raised above in the negative.

For the above reasons, I affirm the judgment of the High Court Judge and dismiss this appeal.

Judge of the Supreme Court.

V.K. Malalgoda J

I agree.

Judge of the Supreme Court.

L.T.B Dehideniya J

I agree.

Judge of the Supreme Court.