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

In the matter of an Appeal under Section 154 (P) of the Constitution read with Section 331 of the Criminal Procedure Act No. 15 of 1979.

Jayasekera Mudiyanselage Jayatissa alias

Bella Eda Nilame

No. 321, Mailankulama,

Ismailpuram, Puttalam

Court of Appeal **Accused – Appellant**

Case No. CA/HCC/181/2018

High Court Case No. Vs.

H.C. 12/2016- Puttalam Hon. Attorney General

Attorney's General Department

Colombo 12.

Plaintiff-Respondent

Before : Menaka Wijesundera J.

Wickum A. Kaluarachchi J.

Counsel : Neranjan Jayasinghe with Randula Heelage and I. Senarath for the Accused-Appellant.

Udara Karunathilake, SSC for the State.

Argued on : 31.01.2024

Decided on : 28.02.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 9.8.2018 of the High Court of Puttalam.

The accused appellant (appellant) has been indicted along with the 2nd accused for robbery and murder under the provisions of the Penal Code.

Upon the conclusion of the trial, the 2nd accused has been acquitted and the appellant has been convicted for both the charges.

The prosecution has based its case on circumstantial evidence.

The grounds of appeal raised by the appellant were that the,

1) Circumstantial evidence led at the trial by the prosecution being wholly insufficient to prove the appellant's guilt beyond a reasonable doubt.

2) Presumption under section 114 (a) of the Evidence Ordinance being wrongly applied.

3) Chain of productions not being complete.

The prosecution had led the evidence of the mother of the deceased who had said that the deceased had been mentally retarded and she had been living alone with the deceased as she had been separated from the husband.

On the day of the incident, she had gone to work leaving the deceased alone at home. She had returned home at about 12.45 in the afternoon and she had found the deceased dead in a pool of blood lying on the floor and the rooms had been opened and the almirah had been pulled out.

Her immediate reaction had been to shout and on hearing her shouting a lot of people living nearby had come in to the house.

The matter had been reported to the police and the police had come at about 3.25 in the afternoon. Until such time she had not realized that her jewelry had been stolen.

The prosecution had led the evidence of the wife of the 2nd accused who had said that she pawned certain items of jewellary on the request of the appellant. Her husband and the appellant had been brothers.

According to the mother of the deceased, both the appellant and the 2nd accused had been in the neighborhood.

The police had commenced the investigations and had subsequently arrested the appellant and the 2nd accused and on the statement of the appellant the name of the jewelry shop which had been used to pawn the jewelry had been discovered and also the pawning receipts.

The said receipts had carried the Identification number of the appellant.

The evidence of the bank officials and the jewelry shop owners had only divulged the contents of the pawning receipts and with regard to the identification number of the appellant.

The items recovered had been handed over to the complainant but there is no record of any written document or evidence led at the Magistrates Court to say that they were the items lost during the incident. Hence, the Counsel for the appellant stated that there is no proper identification of the items lost during the incident.

At the conclusion of the trial, the appellant has made a dock statement in which he had said that the 2nd accused and the appellant had been working together and the 2nd accused had handed him over some jewelry to be pawned and he had done so.

The trial judge at the conclusion of the evidence of both parties had stated that since the pawning receipts had carried the national identification number of the appellant and in view of the evidence of witness Susila who had said that the appellant gave her jewelry to be pawned, under section 114 illustration (a) of the Evidence Ordinance that he can draw the inference that the appellant was guilty of the robbery and the murder charges in the indictment.

The Counsel for the appellant submitted that is a clear misinterpretation of section 114 illustration (a) of the Evidence Ordinance.

The section 114 of the EO says as below,

The Court may presume the existence of any fact which it thinks is 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 theft or has received the goods knowing them to be stolen unless he accounts for his possession."

In the instant matter, the appellant has said in his dock statement that the items of jewelry were given to him by the 2nd accused and that he pawned it.

But the trial judge had failed to consider the explanation by the appellant but has rejected the same on the basis that he was trying to display his innocence. But what the trial judge had forgotten is that in a criminal case the accused is presumed to be innocent until he is proven otherwise.

In the instant matter, we note that the jewelry which were supposed to be stolen had been in the almirah of the complainant's house. But the witness has not checked it before she left the house in the morning for work during which time the incident of murder had taken place and soon after she returned home also on seeing the massacre in the house, she had not checked the house instead she had shouted and several people had come in to the house and then after a lapse of about three hours that the police had come and then only the complainant has checked the almirah.

Hence, just because the appellant has been having in his possession items lost during the incident soon after the death of the deceased, the trial judge concluding that he was guilty of the murder and the robbery does not draw the irresistible conclusion that he was the culprit, because there had been so many people who had come to the scene soon after the incident and furthermore when the alleged articles were handed over to the appellant in the Magistrates Court proper identification had not been done.

Hence the conclusion of the trial judge based on the presumption under section 114 of the EO is erroneous.

In the book of Law of Evidence by G.L Piris at page 495 it has been discussed that "possession of stolen goods by the accused must be established by the prosecution before the presumption becomes applicable. In Wimalasena vs Inspector of Police Hambantota (1967)74 NLR 176 Sive Supramaniam J had said that on the evidence led it was not possible to draw a presumption against the 2nd or the 3rd accused under section 114 (a) of the Evidence Ordinance .It is only if prosecution succeeded in establishing conclusively that the accused were in possession of the stolen article that the question of a reasonable explanation by the accused would have arisen for consideration".

Hence it is very clear from the above that the Court has to act under section 114 illustration (a) only if there is no reasonable explanation by the accused who had been in possession of the stolen articles.

But in the instant matter the trial judge had totally rejected the explanation without giving it a thought.

Hence, we are unable to agree with the finding of the trial judge that the appellant being guilty for the murder and the robbery and we find it that he has really misdirected himself in considering the provisions of the evidence ordinance.

As such we are of the opinion that on the evidence of the prosecution as it is a case based on circumstantial evidence the only irresistible inference that can be drawn is definitely not that of murder or robbery.

But in view of the evidence of witness Susila and the evidence of the jewelry shop owner we draw our attention to section 176 and 177 of the Code of Criminal Procedure Act No. 15 of 1978 (CPC) and the two illustrations pertaining to the said sections which reads as,

Illustration of section 177 says as, "A is charged with theft but it appears that he has committed criminal breach of trust of that of receiving stolen property. He may be charged with criminal breach of trust or receiving stolen property though he was not charged with the same."

At this point I draw my attention to the case of CA-176-2007 by Justice Lekamvasam in which it has been held where it has to be decided after being convicted and indicted for Grave sexual abuse but the appellate Court decided that it should be under section 345 of the Penal code and decided thus,

"In a case of this nature when the facts clearly show that the accused cannot be brought under 365 B(2)b, learned judges should not hesitate to use their prudence in deciding whether a particular set of facts does constitute the offence contained in the indictment or not. If not, without mechanically passing the sentence on the indictment already filled they must have the audacity to act under 177 or 178 of the CPC and convict the accused accordingly for a different offence."

As such, having considered the submissions of both parties and the evidence and the law analyzed above, we are of the view that the conviction and the sentence entered by the trial judge is not supported by the evidence led at the trial but nevertheless the appellant should be convicted under section 394 of the Penal Code although he has not been charged with the same at the trial.

Hence, the conviction and the sentence entered by the trial judge is hereby set aside and we convict the appellant for section 394 of the Penal Code and sentence him to 3 years rigorous imprisonment to be operative from the date of conviction which is 9.8.2018 and a fine of Rs. 50000/ in default one year imprisonment.

As such the appeal against the conviction for murder and robbery is hereby allowed but we find the appellant guilty under section 394 of the Penal Code a sentenced as above.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal