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

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

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs,

Wikrama Hennayaka.

CA/148/1997 **ACCUSED**

HC Colombo Case No 5195/1992

And,

Wikrama Hennayaka.

ACCUSED-APPELLANT

Vs,

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT- RESPONDENT

Before : **Vijith K. Malalgoda PC J (P/CA) &**

H. C. J. Madawala

Counsel: Anil Silva PC for the Accused-Appellant,

Rohantha Abeysooriya DSG, for the A.G.

Argued On: 26.05.2015

Written Submissions On: 12.08.2015

Order On: 02.10.2015

Order

Vijith K. Malalgoda PC J (P/CA)

The accused-Appellant was indicted before the High Court of Colombo on two counts namely,

1. Cheating of one Nagur Adumei Nona Hanina the Accountant of Education Employees Thrift and Lending Society for a sum of Rupees 50, 000 and there by committed an offence punishable under section 5 (2) of the Offence Against Public Property Act No 12 of 1982 read with section 398 of the Penal Code.

2. In the alternative to the above count, misappropriated a sum of Rs. 50.000/- obtained from one Nagur Adumei Nona Hanina, the Accountant of Education Employees Thrift and Lending Society an offence punishable under section 5 (1) of the Offence Against Public Property Act No.12 of 1982 read with section 386 of the Penal Code.

According to the Prosecution the alleged offence had committed on 11.11.1990, 25 years ago and the evidence of five lay witnesses were led at the trial including the evidence of witness Nagur Adumei Nona Hanina who was the Accountant of the said society during the time relevant to this case,

At the conclusion of the prosecution case, when the defence was called by the Learned Trial Judge the accused preferred to make a dock statement, and called one witness namely Mankotte Kankanamge Mallika.

The Learned Trial Judge acquitted the Accused-Appellant on the 1st count and convicted him for the 2nd count (which is an alternative count to the 1st count) and sentenced him for two years Rigorous Imprisonment and a fine of Rs. 150,000 with a default sentence of 08 months Rigorous Imprisonment.

Being dissatisfied with the above conviction and sentence the Accused-Appellant had preferred this Appeal.

Prosecution version of this case can be summarized as follows. The Accused-Appellant was the Secretary and the CEO of the Education Employees Thrift and Lending Society during the time relevant to this case. Witness Nagur Adumei Nona Hanina was the Accountant of the said Society. The said Nona Hanina was the main witness for the prosecution. During her evidence she had given evidence to the effect that on number of occasions the Accused-Appellant had requested her to issue money to him on chits submitted by him, and since she knew that the said monies were obtained not for any official work, she maintained a private book to enter the said transactions. However when the accused got to know that she maintained a private book, he took the said book from her custody. Since the Accused-Appellant held a very powerful position she had no alternative but to carry out his orders.

However in this instance, instead of a chit, the Accused-Appellant had presented a voucher for Rs. 50,000/- and the said voucher was prepared to make a payment to the National Paper Corporation for 250 paper packets.

The said voucher was prepared in the handwriting of the Accused-Appellant and it was approved by him. Generally the vouchers are prepared by the branch which requires the money and it was to be approved

by the General Manager, but since the Accused-Appellant had prepared and approved the said voucher she was bound to carry out his direction and therefore she had made the payment to him.

An audit officer of the National Paper Corporation one Vidanalage Daiwin Siripala Soysa was called as a witness for the prosecution and according to him the Corporation did not supply paper to the Society as referred to in P-11.

The next witness summoned by the prosecution was Yalagalage Wimal Ratnasiri Peiris. This witness was a Co-operative Inspector attached to the Department of Co- operative Development, and he was entrusted with the conduct of an audit at the complainant society. According to him the said society was a registered Co- operative Society with the Department of Co-operative Development and therefore the Commissioner of Co-operative Development had authority under the Co-operative Societies act to conduct an audit quarry.

According to this witness a cash shortage was discovered during his audit quarry and according to the books maintained by Ms. Hanina (the previous witness) total receipts during this period was Rs. 10,202,908.01 and total Deposit was Rs. 9, 331, 994.08 and the cash is hand was 249,185.82. Therefore the shortage discovered during his audit quarry was Rs. 705,399.10.

But when the books maintained by her were further perused, he observed serious lapses from the part of the accountant and he discover 27 cheques to the value of Rs. 405,987.31 encashed on the instruction of the Director Board and CEO and another 10 cheques to the value of Rs. 37,387.50 were found to be deposited but not entered in the books. With these discoveries shortage was reduced to Rs. 262,026.29.

According to the witness, the accountant's explanation to the said shortage was that she gave money on notes submitted to her and P 11, the voucher in question in the present case was produced as one of such notes received by her.

Witness Peiris during his evidence had admitted that he questioned the Accused-Appellant with regard to P-11 and a statement was recorded to that effect and the said statement was produced marked P-14.

The explanation given by the Accused-Appellant was that, the said money was obtained to be given to one Anura Perera of Dinesha Enterprises in order to purchase printing papers for an urgent printing work undertaken by the said Dinesha Enterprises and the money was given to Anura Perera by Ms. Hanina in his presence and two days later, the said money was returned to Hanina by the said Anura Perera in his presence.

Even though this position was not confronted with witness Hanina, a letter send by the said Hanina to this witness was marked under cross examination as "ඊ-19".

Witness Peiris admitted receiving the said letter from Hanina during his investigation [Page 168] and according to the said letter, Hanina had admitted receiving Rs. 100,000/- from Anura Perera of Dinesha Enterprises.

When the case for the prosecution was closed, the Accused-Appellant preferred to make a statement from the dock. According to his dock statement, the amount referred to this indictment was obtained to be given to one Anura Perera of Dinesha Enterprises. According to the Accused-Appellant there was a shortage of papers during this period due to setting fire to Embilipitiya Paper Factory and since the society was in a hurry to get 10,000 children's saving books printed through Dinesha Enterprises, on the request of Mr. Anura Perera for an advance of Rs. 50,000/- to purchase paper, the said money was given to him by witness Hanina in his presence and the said money was return to the Accountant in his presence few days later.

The position taken by the counsel for the Accused-Appellant before this court was that the Learned Trial Judge had failed to consider the said Dock statement, which was corroborated by document P-14

and ඵ-19 a letter written by the main prosecution witness Ms. Hanina to witness Ratnasiri Peiris who conducted the audit quarry.

In the case of ***Chandradasa V. Queen 72 NLR 160*** the Court of Criminal Appeal concluded that it is the duty of the Trial Judge to place a defence, however weak and insubstantial it may appear to be fairly and adequately before the Jury.

Even though this is a trial before Judge, the trial judge has a duty to fairly and adequately consider the said defence before rejecting the same.

In the present case we observe that the Learned Trial Judge had narrated the dock statement at length but rejected the said statement for the reason that it cannot be believed that, the accountant, had failed to make any note when the money was returned, by the Accused who is the CEO of the society. In this regard the Learned Trial Judge had failed to consider document marked ඵ-19.

Learned Counsel for the defence further Argued before us that the Learned Trial Judge had heavily relied on the evidence of witness Hanina and decided to act upon her evidence purely based on her demeanour in court. When considering the serious lapses observed by the officer who conducted the audit with regard to the work of Hanina, I agree with the submissions made by the Learned Counsel that it is unsafe to act on the uncorroborated testimony of Hanina.

The next issue before us is, to consider whether the prosecution has established the charge of misappropriation in this case.

The Learned Trial Judge after analyzing the evidence had proceeded to discharge the Accused-Appellant from the count of cheating which is the 1st count in the Indictment. Since the two counts in the Indictment are alternative counts, I see no reason for the trial judge to record a discharge in the 1st count, since the court had the discretion to convict the accused for either of the offences.

The second count is one under section 386 of the Penal Code, read with the provisions of section 5 of the Offences against Public Property Act No 12 of 1982.

Section 386 of the Penal Code reads as follows;

"Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

In a case of Criminal Misappropriation actus reuse comprise three facets namely,

a. There should be misappropriation or conversion of the property by the accused
b. The properly must be movable property
c. The property should belong to a person other there the accused

The requisite mens rea of this offence derives from the element of dishonesty and it was considered as an initial innocent taking of the property followed by a guilty state of mind at a later stage in a series of decided cases including ***Kanavadipillai Vs. Koswotte (1914) 4 Balasingham's Notes 74, Peiris Vs. Anderson (1928) 6 Times of Ceylon Reports 49*** and ***Gratiaen Perera 61 NLR 522,*** until it was overturned in the case of ***Attorney General Vs. Menthis 61 NLR 561***. In the case of Menthis Sinnethamby J observed that "The Penal Code departed in this respect from the English law and made it an offence to misappropriate property even if the original possession was honest. Explanation 2, it seems to me, was merely intended to emphasize the difference between the law in England and under the Code but it does not postulate that in order to constitute criminal misappropriation the initial taking must always be honest. Indeed it suggests that an initial dishonest taking also amounts to criminal misappropriation for it states that a person who finds property and takes it "for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly", thereby suggesting

that if the finder does not take it for such a purpose he will be guilty of the offence. The main provisions of Section 386 make dishonest misappropriation at any stage an offence; Explanation 2 only provides for a special case where the initial taking is honest and its intended to protect the finder of property not in the possession of anyone so long, and only so long, as his continued possession of that property is honest. If, of course, the property taken was in the possession of some person the resulting offence would be theft.

In my opinion, therefore in order to constitute misappropriation under our law it is not necessary that there should be an innocent initial taking. If the initial taking of the property not in the possession of anyone is dishonest then too the offence is made out. In regard to this, I agree with the view expressed by Justice Moseley in *Salgado V. Mudali Pulle (supra).*"

However when going through the judgment of the Learned High Court Judge I observe that instead of considering the legal provisions required to be established a charge under section 386, the trial judge had proceeded to consider the requirement to establish a charge under section 388 a charge under Criminal Breach of Trust.

Whilst discussing the provision of section 388 of the Penal Code Learned Trial Judge had applied the evidence led in the trial for the legal requirement in a charge of Criminal Breach of Trust and concluded that the Accused had used or disposed of that property in violation of any legal contract expressed or implied which he has made touching the discharge of such trust (Page 29 and 30 of the Judgment).

In the absence of consideration under section 386 of the Penal Code, whether the Accused-Appellant "dishonestly misappropriated or converts to his own use" the said money, specially in the light of documents marked P-14 and ඵ-19 I observe that it is unsafe to conclude that the available material is sufficient to convict the Accused-Appellant for the second count.

For the reasons adduced above I allow the appeal and set aside the conviction and sentence imposed on the Accused-Appellant.

Appeal allowed.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. MADAWALA,

I agree,

JUDGE OF THE CUORT OF APPEAL