

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

Officer in Charge,
Special Crimes Investigation Unit,
Anuradhapura.

Complainant

Vs.

MC Case No: 10509
NC PHC RA No: 13/2003
**CA (PHC) Appeal
No: 11/2005**

Disanayaka Mudiyansele
Chandana Bandara
Kele Diwul wewa, Eppawala.

Accused

AND

Disanayaka Mudiyansele
Chandana Bandara
Kele Diwul wewa, Eppawala.

Accused – Petitioner

Vs.

1. Officer in Charge,
Special Crimes Investigation
Unit,
Anuradhapura.

2. Meragalage Winsent Fernando,
Aluth Dambewtana,
Senapura.

3. Attorney General,
Attorney General's Department
Colombo 12.

And now between

Disanayaka Mudiyanseelage
Chandana Bandara
Kele Diwul wewa, Eppawala.

Accused – Petitioner

Vs.

1. Officer in Charge,
Special Crimes Investigation
Unit,
Anuradhapura.

2. Meragalage Winsent Fernando,
Aluth Dambewtana,
Senapura.

3. Attorney General,
Attorney General's Department
Colombo 12.

**Complainant – Respondent –
Respondents**

**Before : P.R.Walgama, J
: L.T.B. Dehideniya, J**

**Counsel : Piyatissa Abeykoon & H.B. Ratnayake for the
Accused – Petitioner – Appellant.
: Isuru Samadasa for the Complainant Respondent –
Respondents.**

**Argued on : 16.05.2016
Decided on : 07.07.2016.**

CASE- NO- CA (PHC)- 11-2005- JUDGMENT- 07.07.2016

P.R.Walgama, J

The instant appeal falls to be determined the accuracy and legality of the order of the Learned Magistrate, dated 09.01.2003, and the order of the Learned High Court Judge dated 01.07.2004.

The instant appeal refers to an order made under Section 425 (1) of the Criminal Procedure Code, which states thus;

425(1)

“when an inquiry or trial in any criminal court is concluded the court may make such order as it thinks fit for the disposal of any document or other property produced before it regarding which any offence appears to have been used for the commission of any offence.”.

The Accused -Appellant was charged in the Magistrate Court of Tambuthegama for an offence punishable under Section 403 of the Penal Code for cheating the Plaintiff for sum of Rs. 9,90,000/-, by paying the Plaintiff only Rs. 10,000/- when in fact the value of the said lottery was Rs. 10,000,000/-, and alternatively was charged for criminal misappropriation of the said amount.

After the conclusion of trial the Learned Magistrate convicted the Accused – Appellant of the said charges and imposed the sentence on 1998.02.29. Being aggrieved by the said order of the Learned Magistrate , the Accused – Appellant moved the High Court holden at Anuradhapura to have the conviction and sentence set aside.

The Learned High Court Judge has acquitted the Accused – Appellant in the case bearing No. 04/98 , a copy of which is marked as P2.

Pursuant to the said acquittal of the Accused – Appellant an application has been made for the release of the items in terms of Section 425 of the Criminal Procedure Code. After the said inquiry the Learned Magistrate has release the money in issue to the Plaintiff – 2ND Respondent accordingly.

Being aggrieved by the said order, the Accused – Appellant has appealed to this Court to have the said impugned order set aside/ vacate.

The Learned High Court Judge has observed that the Learned Magistrate commented on the fact that the Learned Magistrate has decided to release the money to the Plaintiff- 2nd Respondent after due consideration of the evidence and documents produced by the Plaintiff, which are marked as P1 and P2.

There fore the Learned High Court Judge was of the view that the Learned Magistrate has arrived at the said determination in the correct perspective and has concluded that the necessity has not arisen to vary or set aside the same.

In addition to the stated above the Learned High Court Judge has also observed the fact that the Accused – Appellant has not tendered the necessary documents vis-a vis the plaint, charge sheet, P1and P2.

Being aggrieved by the said order of the Learned High Court Judge, the Accused - Appellant had appealed to this Court to have said order set aside/ vacate.

It is seen from the submissions tendered by the Accused - Appellant, the grounds for appeal as stated in the petition, among other grounds has specially pleaded the fact that the inquiry held under Section 425 of the Criminal Procedure Code by the Learned Magistrate, is null and void as the Learned Magistrate has released the money in issue to the Plaintiff - 2nd Respondent, before the said inquiry was held.

The thrust of the submission of the Counsel was that the Accused - Appellant has failed to tender the entire case record of the HC appeal No. 4/98, and the Revision Application 13/99, and also the documents marked P1, and P2.

Further it is submitted by the Counsel for the 2nd Respondent that the Appellant has failed to tender the documents marked P1 and P2 even in the revision application to the High Court.

It is a procedural requirement that in an application in revision the Rule 3 (1)(b) of Court of Appeal Rules 1990 should apply which states thus;

“Every application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by

way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may ex mero motu or at the instant of any party, dismiss such application”

The Rule 3 (1) (b)

“Every application by way of revision or restitution in integrum under Article 138 of the Constitution shall be made in the like manner together with copies of the relevant proceedings (including pleadings and documents produced) in the Court of first instance, tribunal or other institution to which such application relates”

Therefore on that account alone the counsel for the 2nd Respondent moves for a dismissal of the appeal.

Further it is noted that the Accused – Appellant was afforded a fair hearing at the said inquiry before the Learned Magistrate arrived at the determination that the Plaintiff- 2nd Respondent is entitled to the money in issue.

Therefore in the said back drop this court is of the view that there is no reason to set aside or vacate the orders of the Learned Magistrate and the order of the Learned High Court Judge as stated above.

Accordingly we dismiss the appeal subject to a cost of Rs.5000/-

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

L.T.B. Dehideniya, J

I agree.

JUDGE OF THE COURT OF APPEAL