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

In the matter of an Appeal
Against an order of the High
Court under Sec. 331 of the
Code of Criminal Procedure
Act No. 15 of 1979 and in terms of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

The Hon. Attorney General

Attorney General's Department,
Colombo 12.

Complainant

Vs

Punchiwedikkarage Aruna Felix
Perera, 7/21, Dharmarathana
Mawatha

Accused

C. A. Case No. : 323 /2007

H. C. Badulla Case No. : 1044 /2002

And Now between

Punchiwedikkarage Aruna Felix
Perera

Accused-Appellant

Vs

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

Complainant Respondent

BEFORE : **P. R. Walgama, J &**

K. K. Wickramasinghe, J

COUNSEL : AAL Shanaka Ranasinghe P.C. with AAL Sandamali Peiris for the Accused- Appellant.

Dilan Ratnayake DSG for the Attorney General.

ARGUED ON : 04th August 2016

DECIDED ON : 07th June 2017

K. K. WICKRAMASINGHE, J.

The Accused Appellant (herein after referred to as the Appellant) was indicted in the High Court of Colombo on the following charges:-

(1) On or about 1st of February 1999 at Lotus Road, Colombo, within the jurisdiction of this court the accused cheated H. Kamitsuma, to issue a cheque of RS.12,960,026.50 which amounts to an offence punishable under section 403 of the Penal Code.
(2) On or about 27th May 1999 at the same place and during the course of the same transaction, the accused tendered a forged document as genuine to Jayantha Sarath Kumara of Sri Lanka Telecom. Thereby he committed an offence punishable under section 456 of the Penal Code read with section 459 of the Penal Code.
(3) On or between 1st February 1999 and 27th May 1999 within the course of the same transaction and jurisdiction of this court, the accused committed an offence of misappropriation of Rs. 6,437,888/= from Sri Lanka Telecom, an offence punishable under section 386 of the Penal Code.

When the indictment was read over to the Accused Appellant he pleaded 'not guilty' to the charge and accordingly the trial was commenced before the Llearned High Court Judge.

After trial the learned High Court Judge of Colombo found the Accused Appellant guilty of all three charges levelled against him. Accordingly he was convicted and sentenced as follows:-

On Charge 1- Sentenced to a term of 3 years rigorous imprisonment and a fine of Rs. 10,000.00 with a default sentence of 6 months.

On Charge 2- Sentenced to a term of 3 years rigorous imprisonment and a fine of Rs. 10,000.00 with a default sentence of 6 months.

On Charge 3- Sentenced to a term of 3 years rigorous imprisonment and a fine of Rs. 6,437,888 with a default sentence of 6 months.

The instant appeal is arising in pursuant to a conviction and the sentence imposed on the Accused-Appellant.

During the course of the argument counsel for the accused appellant raised following grounds of Appeal:-

(1)The prosecution has failed to call H.Kamitsuma as a witness, the person described as being deceived in the cheating charge. he was not only not called but not even listed as a witness in the indictment.

(2)The prosecution has failed to prove the 2nd charge on the indictment beyond reasonable doubt.

(3)The prosecution has failed to call a crucial witness in presenting their case.It was submitted on behalf of the appellant that it was witness Atapattu (PW16) on the indictment) who was instrumental in authorising the cheque issued to the Appellant.

(4) The learned High Court Judge has failed to analyse the defence evidence and has misdirected himself on the burden of proof.

The trial has commenced by calling prosecution witness No.3 Jayantha Sarath Kumara Jayasooriya, the Accountain of Sri Lanka Telecom. Thereafter five other witnesses namely Kusumawathi Hiyarapitiya- retired Finance Manager, Internal Auditor Sri Lanka Telecom, Manager People's Bank, former Manager Operations of Sri Lanka Logistics and Investigating Officer were called to give evidence on behalf of the prosecution. After the proseuction case the accused appellant has given evidence. Registrar of the District Court of Colombo has given evidence as a defence witness.

The counsel for the accused appellant submitted that in order to prove charge No.1 the prosecution has to prove that the said Mr. Kamitsuma was deceived by the appellant beyond reasonable doubt. Therefore without his evidence, the prosecution was unable to prove charge one beyond reasonable doubt.

He further submitted that the fact whether he was under deception when the decision was made is fact solely within his mind unless it is expressed in some document written by him. In the case of **ABEYWARDENE Vs MUTHUNAYAGAM 47 NLR 12,** following the dictum of **Rowlet J.** in the English case **LIGHT (1913-1915 24 COX 718)** decided *"It is quite clear that on a charge of obtaining goods or money by false pretences, no conviction is possible unless it is shown that the mind of the prosecutor was misled by the false pretence and that he was thereby induced to part with his money or goods"*

Also submitted that neither Mr. Athapaththu nor Mr. D.W.R. Wijeweera was called as witnesses. Version of the prosecution was that hand written note at the end of the document P2 submitted that the said document had been forwarded to Mr. Kamitsuma (CEO of Sri Lanka Telecom) by Mr. Athapaththu head of the division Procurement. He further submitted that P1 did not contain any reference of that to the CEO Mr. Kamitsuma though there was a reference written by Mr. Athapaththu seeking approval from CEO in the Document P2 these documents do not have any reference made by Mr. Kamitsuma to prove that the said documents had been actually seen or perused by the CEO by the time he made the endorsement in P8.

Since Mr. Athapaththu was also not called as a witness for the prosecution, the learned counsel is invited this court to draw an adverse inference in terms of illustration (f) of section 114 of the Evidence Ordinance that Athapaththu's evidence would if produced, be unfavourable to the prosecution. He further submitted that no evidence was placed by the prosecution to prove that P1, P2 was sent to the CEO together with document P8. Therefore the prosecution has failed to prove that the 1st ingredient of count No. 1, that is the appellant had deceived Kamitsuma. Further mentioned, that the mental element (mens rea) of the charge of cheating was not proved beyond reasonable doubt.

It is pertinent to note that the document P1 – P8 is available in the file of record. When perusing the same it is evident that the witness has received the approval of CEO and it contains that the said approval is already attached. The approval of Mr. Kamitsuma is endorsed at document P8.Document marked P3(voucher) and P4(cheque) confirm that Rs. 12,960,026/50 was paid to the appellant's company as a result of this deception.

Definition of "proved" is stipulated in **Section 3 of the evidence ordinance**. It states that *"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists"*

Section 59 of the Evidence ordinance states that all facts except the contents of documents may be proved by oral evidence.

Section 61 states that contents of documents need to be proven by primary or secondary evidence. **Section 62 of the Evidence ordinance** states that primary evidence is the document itself presented to the court.

When considering the first count, the prosecution has established this count on the basis of documents which were produced before court supported by oral evidence.

In this transaction the Appellant submitted to the Sri Lanka Telecom (SLT) two documents making out a monetary figure which was much more than due to him asking that a cheque be issued to make Port Authority payments. This request is found in documents P1 and P2 signed under the hand of the appellant. This is accepted by the appellant.

After submitting these documents by the appellant, the SLT authorities have obtained the authority of the CEO by way of minutes, to issue the relevant cheque to the appellant.

Therefore the person deceived H.Kamitsuma need not be called to give oral evidence, when the fact that he was deceived was clearly reflected on the documents marked as "P1" and "P2" by the prosecution.

The approval would not have been granted if not for the deception on the CEO by the Appellant therefore the ingredients of the cheating charges are established.

Further documents marked as P3 (voucher) and P4 (cheque) confirm that Rs.12,960,026/50 was paid out to the appellants company as a result of this deception.

Thus where the documents speak for themselves the oral evidence of the CEO Kamitsuma would not be necessary to prove the ingredients of cheating. (Vide also document marked P8)

The learned trial Judge also has considered this position in his Judgement (vide pages 415 – last 5 lines from the bottom and top 7 lines) and held that the appellant's dishonest or fraudulent representation deceived the CEO of Telecom to authorize this payment.

In **PERERA Vs. ATTORNEY GENERAL 1985 2 SLLR 156** it was held that,

"It is the inducement and not the delivery that constitutes the gist of the crime. The words ' induces the person so deceived to deliver any property to any person in the penal section ' are wide enough to include not only property in the ownership or possession of the person so induced but also any property under the control of the person so induced on whose authorization the property shall be delivered."

Thus the submission of the learned precedence counsel has no merit in the light of the evidence led in the trial.

(1) The learned President's counsels next submission was that the prosecution has failed to prove the second charge on the indictment beyond a reasonable doubt.

It was the contention of the learned president's counsel that the forged invoice tendered to the accountant procurement at Sri Lanka Telecom (P5) was not identified clearly as the document he tendered by Lalith Wijesekera (PW 13). By perusing proceedings very carefully, it is apparent that this was because (at page 336 of the brief) the witness appears to be confused as to whether he saw the forged receipt (p5) or the genuine receipt (p12).

PW 13 as the appellants operations manager at the time was used by the accused-appellant to tender the forged receipt (P5) to the SLT to show that the appellants company has paid to the Sri Lankan Ports Authority (SLPA) Rs. 11,884,562/-.

However the actual receipt which was issued for the payment really made by the appellants company to the SLPA was only Rs. 5,446.674/-(vide P12)

Thus the Appellant had deceived the SLT's accountant (PW3) that Rs. 6,437.888/- more than the amount was really paid to the SLPA. This had enabled the accused-appellant to reimburse his port expenses from the SLT by deception and thereby make a wrongful gain.

PW 4 witness Kusumawathie Hiripitiya, who was the finance manager at the SLPA at the time relevant to this incident has given clear evidence to say that receipt marked P5 in court was not a Genuine receipt issued by the SLPA (vide pages 233-234 of the brief).She also has identified the genuine receipt issued by the SLPA as P11 which related to a transaction unconnected to this incident. She also has identified the genuine receipt as P12.

When the evidence of PW3 Jayantha Sarathkumara Jayasuriya of the SLT, evidence of PW 13 Lalith Wijesekera and evidence of PW4 of the SLPA are considered along with the documents

P5 and P12 it is clear that the prosecution has proved the offence of dishonestly tendering a false document beyond any reasonable doubt.

This evidence has been carefully considered and appreciated by the learned trial judge in his Judgement (vide pages 416-417 of the brief). Therefore the Appellants second ground of appeal ought to fail.

(2.) The next ground advanced on behalf of the appellant was that the prosecution has failed to call a crucial witness in presenting their case. It was submitted on behalf of the Appellant that it was Witness Atapattu (PW 16 on the indictment) who was instrumental in authorising the cheque issued to the Appellant.

However one cannot say that he is an essential witness to the prosecution to prove the necessary ingredients on the offences on the indictment. The prosecution will have to decide on the witnesses. Therefore it is clear that the court cannot be called upon to come to the presumption stated in section 114(f) of the Evidence ordinance.

In **WALIMUNIGE JOHNN vs. THE STATE 76 NLR 488 @ 496** G.P.A. Silva SPJ(president) of the court of criminal Appeal having considered the leading authorities on this point **R vs. CHALO SINGHO 42 NLR 269 and K vs. SENEVIRATNE 38 NLR 221 (PRIVY COUNCIL)** held as follows:-

"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the prosecution and the failure to call such witnesses constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witnesses evidence is cumulative of the other and would be a mere repetition of the narrative ,it would be wrong to direct a jury that the failure to call such witness gives rise to the presumption under section 114(f) of the Evidence Ordinance."

Thus it is abundantly clear that witness Atapattu's evidence would hav,e if led by the prosecution would merely burden the court record by been a repetition of the narrative as opposed to a missing link in the prosecution case. Therefore there was no necessity to lead this witness without whose testimony the prosecution case was established.

(3.) The appellants counsel also submitted to court that the learned trial judge has failed to analyze the Defence evidence and has misdirected himself on the burden of proof.

The learned trial judge has considered the Defence position along with the analysis of the prosecution evidence. (Vide pages 413,414,415, 416 para1, 416 Para 4, 417)

The trial judge has also correctly considered the accused appellants admission under oath to accepting the Cheque marked as P4 (vide pg 414 Para 2) and the fact that the cheque obtained by cheating for an excessive amount than the appellant was entitled to be deposited in the appellants account. This very clearly proves the dishonest misappropriation of approximately 6.4 million rupees with regard to the charge no 3 on the indictment.

In the light of the aforesaid reasons, the Prosecution has proved all 3 counts on the indictment and not only the 3rd charge (as submitted on behalf of the appellant). Therefore this court is of the view that the judgment and conviction of the learned High Court Judge is supported by oral as well as documentary evidence which is un contradicted and un assailed.

The appellants counsel also urged this court to consider a lenient sentence for the appellant, if not the appeal is allowed. The learned President's counsel argued that considerable time has lapsed since the alleged incident (17 years since the date of offence in 1999), (14 years since indictment in 2002 and 9 years since conviction in 2007), the age of the accused and the fact that the Appellant had two children as grounds of mitigation. However these grounds cannot be seriously considered as the appellant has been on post-conviction bail since 08.01.2008 despite the above custodial terms been imposed by the trial court.

The appellant has enjoyed freedom even till the date of this appeal been argued having only spent two months in remand despite been convicted for a serious fraud case where premeditation was manifest.

In the case of **DHANANJOY CHATTERJEE-Vs- STATE OF W.B. (1994) 2 SCC 220,** it was held that, *"The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Court should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment".*

SEVAKA PERUMAL etc. Vs. STATE OF TAMIL NADU AIR (1991) SC 1463, held that, *"Undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is therefore the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc."*

MAHESH Vs STATE OF MP (1987) 2 SCR 710, In refusing to reduce the death sentence observed that *"It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment*

for the appellants would be to render the justice system of the country 'suspect'. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon".

By considering above, it is abundantly clear that there is no reason to reverse the conviction or reduce the sentence imposed by the learned High Court Judge and thereby we affirm the conviction and the sentence.

Hereby the Appeal is dismissed.

Judge of the Court of Appeal

P.R.Walgama, J

I Agree

Judge of the Court of Appeal

Cases referred to:-

(1) **LIGHT (1913-1915 24 COX 718)**
(2) **ABEYWARDENE Vs MUTHUNAYAGAM 47 NLR 12,**
(3) **PERERA Vs. ATTORNEY GENERAL 1985 2 SLLR 156**
(4) **WALIMUNIGE JOHNN vs. THE STATE 76 NLR 488 @ 496**
(5) **R vs. CHALO SINGHO 42 NLR 269 and K vs. SENEVIRATNE 38 NLR 221 (PRIVY COUNCIL)**
(6) **DHANANJOY CHATTERJEE-Vs- STATE OF W.B. (1994) 2 SCC 220**
(7) **SEVAKA PERUMAL etc. Vs. STATE OF TAMIL NADU AIR (1991) SC 1463**
(8) **MAHESH Vs STATE OF MP (1987) 2 SCR 710**