

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

Kankanang Thanthrige Noel Gamini
No 20/7, Pasiwaththa, Kundasale

Accused

C. A. Case No. : 158 /2006

H. Kandy Case No.: 1226/1997 And Now between

Kankanang Thanthrige Noel Gamini
No 20/7 Pasiwaththa, Kundasale

Accused-Appellant

Vs

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

Complainant Respondent

BEFORE : M.M.A. Gaffoor, J &
K. K. Wickramasinghe, J

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

Wasantha Nawarathna Bandara ASG for the Attorney General.

ARGUED ON : 08th August 2016

WRITTEN SUBMISSIONS ON: 28th October 2016 and 23rd May 2017

DECIDED ON : 2nd August 2017

K. K. WICKRAMASINGHE, J.

The Accused Appellant (herein after referred to as the Appellant) was indicted in the High Court of Colombo on six charges. First charge for Dishonest Misappropriation, punishable under Section 386 of the Penal Code between 07.01.1991 and 24.07.1991. Other five charges for falsification of accounts, punishable under Section 467 of the Penal Code between 20.02.1991 and 13.03.1991.

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

After trial the Learned High Court Judge of Kandy found the Accused Appellant guilty of only two charges charge numbers 3 and 5 levelled against him and acquitted from charge numbers 1, 2, 4, and 6. Accordingly, he was convicted and sentenced as follows:-

On Charge 3- Sentenced to a term of 18 months rigorous imprisonment suspended for 5 years and a fine of Rs.10, 000.00 with a default sentence of 6 months rigorous imprisonment.

On Charge 5- Sentenced to a term of 2 years rigorous imprisonment suspended for 5 years and a fine of Rs.15,000.00 with a default sentence of 6 months rigorous imprisonment.

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) Whether Learned Trial Judge considered the credibility of the particular witnesses.
- (2) Whether Learned Trial Judge's Judgement is contrary to the evidence given by the prosecution witnesses.
- (3) Whether Learned Trial Judge has failed to give reasons to reject the defence version.
- (4) Whether Learned Trial Judge has failed to consider the custody of the documents especially P1 and P2.
- (5) Whether the Learned High Court Judge has failed to consider that P55(marked by the prosecution) as a confessionary statement. Also submitted that piece of that evidence cannot be admitted.

The trial has commenced by calling prosecution witness No.1-Singhara Dhananjaya Silva, Audit officer, Audit officer (during the period of the time of offence). Thereafter witness No. 2 Don Chandrasiri Ariyapperuma the Manager of Bank of Ceylon (during the period of the time of offence). He was one of the key witnesses who testified before the Learned High Court Judge. Thereafter few other witnesses namely Victor Wijewickrema (PW50, K.M. Dayarathna-Grama Sevaka Bowala,Gampola (PW6), Mahinda Aththanayake - Bank Officer (PW4), J.A. Ranbanda - Bank Officer (PW16), M. Senevirathne- Legal Officer, The Finance Pvt. Ltd., E.Q.D and Investigating Officer were called to give evidence on behalf of the prosecution. After the prosecution case, the accused appellant has given evidence.

The counsel for the accused appellant submitted that in order to prove charge No. 3 and 5 the prosecution has to prove that the said alterations were done by the Accused Appellant beyond reasonable doubt. Therefore in the absence of that evidence, the prosecution was unable to prove charge number 3 and 5 beyond reasonable doubt.

He further submitted that the EQD Rathnavelu specifically testified that the signature in the cheque was different and that one Thilakeratne has signed the particular cheque and it was Thilakerathne's signature (who was earlier listed as a suspect in Magistrates court and discharged).

Synopsis of the Prosecution case:-

PW1 Singhara Dhananjaya Silva, audit officer had conducted an audit in response to a complaint received regarding irregularities in the Gampola Branch of Bank of Ceylon. Accordingly, he along with his team has initiated a general audit of the said branch.

During the course of investigation he has discovered certain irregularities mainly on the cheque collection register (P1) and on several collections slips (P1a).

This register contains the records of the cheques pending collection of credit for 07/03/1991 from Bank of Ceylon branches in Geliyoa, Kandy, Katugastota, Nawalapitiya, Peradeniya, Pilimathalawa and Kandy -2nd branch. It is being indicated that a total of Rs. 722,799.70 was pending collection. Out of the total sum the register indicated that Rs.569, 758.52 was to be collected from the Kandy branch. The investigation revealed that the actual amount which should have been collected from the Kandy branch was in fact Rs.519, 758.52 and therefor a sum of Rs. 50,000 less. But the corresponding collection slip (P1a) has accurately shown that the amount to be collected from the Kandy branch as RS.513, 758.52.

Witness further stated that he had familiarized himself with the handwriting of the accused having worked with him for over 3 years, during which the accused functioned as a clerk. He states that the alterations made to documents marked P1 and P1a are ones made by the accused as the handwriting on the said documents belongs to him.
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Similarly, during his testimony the witness had identified in court that the documents that carry signs of alterations which are submitted as evidence, all contain the handwritings and signatures of the accused.

The testimony of Don Chandrasiri Ariyapperuma - Branch Manager (PW2)

During the period of time in question, the witness had been employed as the Branch Manager of Bank of Ceylon, Gampola Branch. He states that during the said period of time, accused was employed as a clerk in the Cheque Clearance Division. The accused was responsible for sorting cheques received to the bank, preparing necessary documentation and then submitting them to respective banks for transfer of credit accordingly. This includes all authority regarding the handling of collection slips.

During the period of time in question, an employee of the bank named Jayasinghe has brought to his attention the existence of a suspicious account under no. 2209. The said officer was suspicious since the handwriting on the deposit vouchers corresponding to transactions of the said accounts was familiar to him. Upon receiving the complaint, he had passed it on to the Regional Manager and the Internal Audit Department. This had led to the aforementioned investigation spear headed by PW1.

He stated that the account in question bearing no. 2209 belongs to one Manathungalage Thilakarathna. Once the investigation commenced, they had taken steps to freeze the account. Thereupon they had sent notices informing about the account being frozen to the addresses that was listed in corresponding details of the account. No responses had been made regarding the said freezing, nor had any person come forward claiming to be the owner of the account and inquiring about the issue despite the account in question having a balance of Rs.182, 503.34.

The testimony of Victor Wijewickrama - (PW5)

When the witness went to the BOC Gampola branch on 15/04/1987, the accused had approached him requesting his aid in opening up a bank account. The accused had told PW5 that the account is being opened for his brother-in-law. The accused had further instructed the PW 5 to fill out the necessary forms (P3) in his own handwriting using his own details but with the exception of name of the intended account holder; which was to be M. Thilakarathna.

ප්‍ර : පැ 3 දරණ ලේඛණය තමා අත්සන් කොට ඉදිරිපත් කර තිබෙන්නේ කවර කටයුත්තක් සඳහාද ?

උ : මෙක මම ඉස්සර වෙලාව කලේ , අත්සන වතරක් යෙදුවා. ඊට පසුව අපේ වග උත්තරකරු, මට ඔහුගේ මස්සිනා කෙනෙකුට ගිණුමක් ආරම්භ කරන්න තිබෙනවා කියා වම්.තිලකරත්න කියා ඔහුගේ නම ලියා මෙක අත්සන් කර දෙන්න කිව්වා

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He stated that a person called M. Thilakarathna (personally not known to him) came with the document marked P3, the accused had also given another document for him to sign (marked P4). This document in question usually contains the signature of person intending to open a bank account. But in this instance, both the name and signature of intended account holder was not to be seen.

According to the testimony K. M. Dayarathna - Gramasevaka Bowala, Gampola (PW6) M. Thilakarathna was not a resident of his division and he has never met such a person in his official or personal capacity.

Manunda Aththanayake - Bank Officer (PW4) had been employed in Bank of Ceylon, Gampola Branch from 1991 to 1992 under the supervision of PW2. He had worked closely with the accused during the said period of time. He stated that the accused had been given the responsibility of collecting cheques deposited to the bank and other

documents that were needed for the process of obtaining funds as per the amounts mentioned in the aforementioned cheques.

When he was shown the documents lead as evidence, he had accurately identified those at ones as handled by the accused. When questioned as the probability of the said documents being altered unknown to him, he stated that the accused had sufficient opportunity to make such alterations in a manner that was not subjected to his supervision.

ප්‍ර: එම තුණ්ඩුව ගම්පොල ලංකා බැංකු ශාඛාව වෙත ලගා වුනාට පස්සේ මුලින්ම යැවෙන්නේ කා ළගටද?

උ: පලමු අවස්ථාවේම විවෘත කරලා කළමනාකාරවරිය ඉදිරිපිට තමයි ලියුම් කඩන්නේ. ඊට පස්සේ තුණ්ඩුව ගිනුම් බැර කරන ගිනුම් ලිපිකරු ලගට යනවා . ඒ අවස්ථාවේ එය මට ලගා වෙන්නේ නැහැ.

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He further corroborated the amounts mentioned by PW1 as funds that have been received in excess through altered documents in his testimony.

The testimony of J. A. Ranbanda - Bank Officer (PW16)

Who had been employed in BOC, Gampola Branch as a cashier. He has received a cheque bearing account number 2209, dated 25/02/1991 for Rs.1000 (marked P7). The identity of the bearer of the cheque had been certified by the accused. He has identified the sign to be belonging to the accused having been familiar with the handwritings and the signature of him. He further identifies similar cheques signed by the accused on multiple times.

Documents marked PI to P4, P4.1 to P5, P5.1 to P5.19, P6, P6.1 to P7, P7.1, X, X-I, Y, Z, ZI, P and Q had been submitted to the N. Thangarathnaveil - Examiner of Questionable Documents by Gampola Magistrate to be examined. He has compiled a report bearing no. H.24/92 and submitted on 12/12/1994.

Along with the aforementioned documents, he had been sent two samples of handwriting and signatures belonging to two suspects namely, Noel Gamini (accused) and one D. G. Thilakarathna. He had been able to conclude that some of the documents submitted as evidence contained the handwriting that are compatible with the

handwriting sample belonging to the accused. Suspect D.G.Thilakeratne was acquitted in the Magistrate Court.

Hewa Godage Chandradasa - Inspector of Police, Criminal Investigations Department, has conducted the investigation regarding the misappropriation of funds worth of 1.4 million rupees in the Gampola Branch of Bank of Ceylon. Accordingly, he has taken statements from relevant parties and initiated an investigation. He has compiled an initial report containing specimens of hand writing of the accused and submitted to the Gampola Magistrate. The Magistrate has taken steps to submit the said specimens to be inspected further.

The testimony of M. Senevirathna, AAL - Legal Officer, The Finance (Pvt) Ltd.

The witness also being a licensed Notary Public has executed a Deed of Sale bearing number 2087 in 22/0811991 (marked P20). The Vendee of the Deed is the accused. The accused had bought a land for an amount of Rs.125, 000 in Sudhuhumpola, Kandy. The transaction had been carried out once the accused makes due payments to the The Finance Ltd, whereupon the company instructs the witness to execute the Deed. A similar Deed bearing no. 2089 dated 22/08/1991 (marked P21) has been executed by the witness under similar conditions with the same parties.

Therefor it is evident that the above mentioned property was bought after the date of offence and therefore prosecution had built up a prima facie case against the accused. When the Defence was called by the Learned High Court Judge, the Accused Appellant had testified upon the documents that were marked and submitted as evidence. He admitted that they contained his handwritings.

(පැ 1 පෙන්නවයි)

ප්‍ර : එහි තමාගේ අකුරු තිබෙනවා.

උ : එම ලේඛනයේ මගේ අකුරු තිබෙනවා.

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He further recognized his signature that has been placed on the said document. But he denied making any alterations and stated that he had no knowledge of the person who made such alterations. He further denied having any exclusive knowledge regarding the details of bank account no. 2209.

Counsel for the Accused Appellant submitted that if the Accused Appellant failed to explain that all these documents were not under his custody, in the absence of the explanation court can presume that offence has been committed by the accused. In support of argument 1 Counsel cited the decided case **Christian Vs the King 46 NLR at page 4** where court held that court was entitled to hold in the absence of the explanation by the accused the only reasonable inference was that the accused that had made the alterations. He further stated that with regard to the judgement in this case is very ambiguous because Learned Trial Judge started in his judgement that the procedures adopted by the superior officers were merely questionable. .

It is pertinent to note that the document P1 and P1a are once made by the accused appellant, as the hand writing of the said documents belongs to him. Other than the EQD, the accused appellant himself had admitted that fact but denied the fact that he made alterations.

When considering available evidence stated above, it is abundantly clear that the Defence was unable to shake the creditworthiness of any of the prosecution witnesses. Thus, their testimonies stand absolutely unchallenged. Further, the Defence had not been able to cast any doubt to the accuracy of the documents submitted as evidence, as well as the report compiled by the Examiner of Questionable Documents. Having regard to the above, it is evident that the prosecution had proven the case beyond reasonable doubt.

In the case of **Dhananjothy 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"*.

Sevake 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 reformatory jargon”*.

The Bank of Ceylon belongs to the State and therefore the funds misappropriated by the accused belong to the State.

Therefore, there is no reason to reverse the conviction or reduce the sentence imposed by the learned High Court Judge Even though the learned Senior ASG submitted that the suspended sentence imposed does not commensurate with the offence committed, at this juncture I do not wish to enhance the sentence since this is an appeal by the appellant.

Thus we affirm the conviction and the sentence.

Hereby the Appeal is dismissed.

Judge of the Court of Appeal

M.M.A. Gaffoor, J

I Agree

Judge of the Court of Appeal