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

The petition of Appeal under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka and in terms of Section 331of the Code of Criminal Procedure Act No.15/1979 against the order of the learned High Court Judge in Case No. 100/99.

C.A.No.290/2006
H.C. Colombo No.100/99

Mawala Arachchige Leelananda

Accused-Appellant

Vs.

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

Respondent

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| **BEFORE** | : | **DEEPALI WIJESUNDERA, J.**<br>**ACHALA WENGAPPULI J.** |
| **COUNSEL** | : | Dr. Ranjith Fernando for the Accused-Appellant<br>Dileepa Peeris D.S.G for the respondent |
| **ARGUED ON** | : | 10.09. 2018 and 17.09.2018 |
| **DECIDED ON** | : | 16th November, 2018 |

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**ACHALA WENGAPPULI J.**

The Accused-Appellant who was the acting Registrar of the Magistrate's Court of *Maligakanda* at the relevant time. was indicted before the High Court of Colombo for committing Criminal Breach of Trust, an offence punishable under Section 392 of the Penal Code read with Section 5(1) of the Offences against the Public Property Act No. 12 of 1982, in respect of a sum of Rs. 206,320.00

After trial, he was convicted as charged and was imposed a five-year term of imprisonment and a fine of Rs. 618,960.00 coupled with a default sentence of two years of imprisonment.

Being aggrieved by the said conviction and sentence the Accused-Appellant preferred the instant appeal, seeking intervention of this Court to set aside the said conviction and sentence.

At the hearing of his appeal, Learned Counsel for the Accused-Appellant, raised only one ground of appeal by presenting a contention

that the evidence led by the prosecution revealed an "illegal" entrustment of the amount of money in respect of which the offence of CBT is said to have been committed. Since there is no legally acceptable entrustment, learned Counsel contended that the Accused-Appellant is entitled to be acquitted of the offence he was found guilty.

The case presented by the prosecution is that the Accused-Appellant was handed over Rs. 206,320.00 whilst he was serving as the acting Registrar of *Maligakanda* Magistrate's Court. These amounts of monies are production items of case Nos. 3854/C and 125224 that were pending before the said Court. The prosecution relied on the evidence of witnesses including the production officer, the Magistrate who served during the time period, and the auditor who conducted the audit investigation to establish the charge levelled against the Accused-Appellant.

According to the Counsel, the evidence revealed that the Accused-Appellant was "entrusted" with the amount specified in the indictment by a clerk who was attached to the Registry of the relevant Magistrate's Court as its production officer. The said amount of money was handed over to the custody of the Accused-Appellant by the said production officer without following proper procedures and had no authority to do so. Learned Counsel submitted that therefore the evidence presented by the prosecution before the trial Court raises the important issue whether the production officer had the authority to handover monies to the Accused-Appellant legally. He further raised the question that if the answer to that issue is in the negative then could there be Criminal Breach of Trust of property illegally obtained as a subject matter of Robbery ?

Learned Deputy Solicitor General, in his reply submitted that there was clear evidence presented by the prosecution in relation to the element of entrustment and the conduct of the Accused-Appellant during the audit investigation clearly established his complicity in committing CBT on items of productions which are related to criminal prosecutions that are pending before the relevant Magistrate's Court. He invited the attention of this Court to the relevant segment in the judgment of the trial Court, where it has been held that there was no necessity for a Magistrate to make a specific order in relation to the items of productions for its safekeeping and the Accused- Appellant failed to specify any regulation that had imposed such a requirement.

In the light of the above matters, we now proceed to consider the solitary ground of appeal that had been relied upon by the Accused-Appellant in support of his appeal.

The said ground of the Accused-Appellant is apparently based on the following items of evidence presented before the trial Court;

a. the Accused-Appellant was the acting Registrar of the Magistrate's Court of *Maligakanda* during the relevant period as specified in the indictment,
b. the production officer ( PW4 *Abeysinghe Bandara*) has handed over cash amounting to Rs. 59,320.00 along with several other items of productions in respect of case No. 125224 in the said Court to the Accused-Appellant on 15.07.1997,
c. PW4 also handed over cash amounting to Rs. 1,48,480.00 in respect of case No. 3854 in the said Court to the Accused-

Appellant with an entry in the case record, which reads to the effect that as per the order of the Magistrate, Rs. 1,48,480.00 was handed over to the Accused-Appellant to be retained in the safe on 9.09.1996,

d. there are entries made in the production register as well as in the relevant case records confirming the act of handing over cash in respect of these two cases by PW4 and its acceptance by the Accused -Appellant,

e. there are no requests made by the production officer or the Accused-Appellant to the Magistrate, informing him of the difficulty in retaining cash and, to grant authorisation for the cash to be deposited in the bank account,

f. there are no orders by the Magistrate directing the Registrar to deposit the cash that had been accepted by the production officer in the bank account,

g. PW4 claims that he had obtained verbal instructions from PW3 *A.M.M. Saheeb*, who was serving as the Magistrate of the said Court to hand over cash to the Accused-Appellant in the steel safe under his custody,

h. PW3 contradicts PW4 on this point by stating in evidence he never gave any verbal instructions to the witness directing him to handover cash to the Accused-Appellant,

i. PW7 *Gunasekara* who conducted audit investigation in respect of this detection stated in evidence that he had perused the relevant case records and found that even though the cases were called before the Magistrate on

several days no order was made directing the cash to be deposited in the bank by the Magistrate,

j. PW7 also said in evidence that the cash should have been with the production officer (PW4) who claimed that he handed over cash to the Accused-Appellant for safe keeping as he had no such facility.

Thus, the Accused-Appellant claims that the element of "entrustment" in the offence of CBT has not been made out by the prosecution owing to the "illegality" of the process of handing over cash by PW4, the production officer, to him.

Section 392 of the Penal Code states that;

> *"Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or in the way of his business, as a banker, merchant, factor, broker, attorney, or agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

There is no challenge to the fact that the Accused-Appellant was indicted for committing CBT as a "public servant" as per section 392 of the Penal Code. The only element that had been contested by the Accused-Appellant is the element of entrustment.

In ***M.E.A. Cooray v The Queen*** 54 N.L.R. 409 the Privy Council considered the scope of the offences of CBT in its order of aggravation upon the sentence prescribed in each of the situations mentioned in the different sections starting from section 388 to section 392(B) of the Penal Code.

Their lordships observed that;

> *"It will be observed that the widest and most general provision is that contained in section 388 inasmuch as it applies to all members of the public.*
>
> *On the other hand sections 390 to 392 (A) apply to limited classes, treat their behaviour as more heinous and impose a heavier penalty. The final section 392 (B) which like 392 (A) is a later addition, creates a different crime and treats it as subject to the same penalties as those prescribed by section 389.*

In our view this judgment deals with somewhat similar factual situation that had arisen for consideration by this Court in the instant appeal. It is evident from the text that the appellant before their Lordships was the President of a Co-operative Union which supplied goods to retail stores of the Union through wholesale depots. He was also the President of the Committee which controlled the depot at *Moratuwa* in addition to be the Vice President of the Colombo Co-operative Central Bank.

Their Lordships, considered the method by which the business was carried on by these establishments. In order to identify the similarity with the instant appeal, the process of "entrustment" had to be reproduced below in detail.

It was observed by the Privy Council that;

> *"... the Colombo Co-operative Central Bank advanced monies to member business societies to enable them to buy their stocks. These advances were repaid weekly and except in the case of small sums should have been so paid by money orders and cheques and not in the shape of cash. The Central Bank in its turn paid in the money orders, cheques and any cash which might have been received in that firm to its account with the bank of Ceylon.*
>
> *... it appears that the appellant secured the appointment of a certain Ranatunga to be manager of the Moratuwa depot. Through him as manager payments of sums due from that depot had to be made to and deposited promptly with the Co-operative Central Bank.*
>
> *The appellant appears to have instructed Ranatunga, instead of following out the prescribed routine, to collect large sums from the retail stores in cash and hand them over to him to be transmitted to the bank. Ranatunga acted upon those instructions and transferred the cash which he had collected to the appellant, who instead of paying it over appropriated the cash and substituted for it his own cheques for the amount due.*
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> *All cheques received by the Co-operative Central Bank should have been immediately sent to the Bank of Ceylon for collection. The appellant however as vice president of the Central Bank ensured that in many instances his cheques were not sent forward for collection, with the result that when ultimately his activities were discovered some thirty-five cheques had not been presented. These cheques were some of those which the appellant had substituted for the cash which he had received from Ranatunga*

*and it was for misappropriation of Rs. 57,500 being part of this cash that the appellant was ultimately convicted for criminal breach of trust as an agent."*

The question of law that had been presented before the Privy Council by the appellant in support of his appeal was whether he was entrusted with property in the way of his business as an "agent" and converted it into his own use and consequently comes directly within the words of the statute.

Having considered the said question of law, their Lordships have allowed the appeal of the appellant on the footing that the appellant had not acted as an "agent" and thereby the prosecution has failed to prove the aggravated form of the offence he was charged with.

What is relevant to the instant appeal in that judgment is that their Lordships, having found that the appellant in the said appeal is "*... in no sense entitled to receive the money entrusted to him in any capacity nor indeed had Mr. Ranatunga authority to make him agent to hand it over to the bank*", nonetheless concluded that "*the appellant has however plainly been guilty of a criminal breach of trust under section 389 of the Penal Code* " and therefore recommended to "*discharge the conviction under section 392 and substitute for it a conviction under section 389.*"

This is a clear instance where the Court has accepted that the applicability of the term "entrustment", in relation to the offence of Criminal Breach of Trust, should not be restricted only to the instances where the offender was "legally" entitled to receive any property as the Accused- Appellant contends. Section 392 of the Penal Code does not recognise such a qualification since the applicable phrase of the said

section is "whoever, being **in any manner** entrusted with property..."(emphasis added). The said phrase does not imply a restricted scope of the manner in which the entrustment could take place. Since the use of the words "in any manner" clearly connotes an all-encompassing notion of entrustment, without attaching any adjectives such as immoral, irregular or illegal to it, we are not inclined to accept the Accused-Appellant's contention on this point.

As referred to by the learned Deputy Solicitor General in his submissions, the trial Court had already concluded that there is no "illegality" of handing over the production items in the form of cash to the Accused-Appellant by the production officer without prior approval of the Magistrate.

It is for the purpose of clarity, this finding of the trial Court needed to be considered in reference to relevant factors. The terms "illegality" or "contrary to law" used in the judgment of the trial Court originated from the position taken up by the Accused-Appellant before it. The trial Court had used these terms merely to reject the claim of the Accused-Appellant that the entrustment is not legal. Therefore, the trial Court had correctly refrained from examining the "legality" of the entrustment and merely made references to them in a rather loose sense and not in relation to actual violation of any statutory provision.

The evidence before the trial Court, as elicited by the Accused-Appellant during cross examination of the prosecution witnesses, is that PW4 had acted in violation of the procedures that govern handling of cash and not in violation of any statutorily laid down provision of law. Even if the Accused-Appellant's submission is accepted at most his claim could

only be termed as an instance of "irregular" entrustment and not an "illegal" entrustment.

It is evident that the applicable procedure governing instances where the productions included cash are found in the Financial Regulations.

Chapter X of the Financial Regulations deals with "Accounts of Courts". FR 580(1) lays down the instances where Court officers are authorised to accept moneys and FR 580(1)(f) refers to "productions in criminal cases". The indictment refers to two instances where the cash that had been accepted by the Court are in fact "productions in criminal cases". FR 316(1)(e) and FR 587(2) imposes duty on the Court officers to deposit "cash" which are items of productions in "iron safes". Note 1 to FR 316(1) further emphasises this requirement by stating "valuable Court productions" such as cash "should always be kept in the Court safe." The presiding Judges of Courts, who are considered as Accounting Officers, are required under FR. 128(1)(e) to ensure adequate and proper arrangements for the safe custody and preservation of money.

PW4 in his evidence had explained as to what compelled him to handover the cash received as productions to the Accused-Appellant. He had stated in evidence that during the relevant time the Court house was shifted to a location in Colombo 7 and he had to shuttle back to *Maligakanda* where the Registry continued to function. He had cash kept in separate but sealed envelopes. The production room of the Court in Colombo 7 premises was a small temporary unit, partitioned with wooden planks and valuable items were kept in a steel cupboard. Due to exposure to rain water the partition had rotted away posing a threat of security

breach. This segment of evidence remains unchallenged by the Accused-Appellant.

The witness also claims that this insecure environment to valuable productions compelled him to hand them over to the Accused-Appellant with the concurrence of the presiding Judge. Of course, the Magistrate in his evidence, had denied that he was ever consulted, or he gave his approval for such a change of custody. However, the fact remained that the cash was handed over to the Accused-Appellant with entries made in the productions register and in the relevant case records with written acknowledgement by the Accused-Appellant. In these circumstances, the mere absence of the Magistrate's concurrence does not render the act of transfer of custody by PW4 to the Accused-Appellant as an instance of irregular transfer of custody of cash, when viewed in the light of the applicable Financial Regulations. As the trial Court notes there cannot be any artificial boundaries that exist, in discharging of the responsibility of ensuring the safe keeping of valuable items of productions, between the Court officers who are entrusted with its custody.

Lastly the factual position in relation to the alleged acknowledgment by the Accused-Appellant should be considered.

Learned Counsel highlighted that the Accused-Appellant had denied the signatures that are claimed by the prosecution as proof of entrustment in his evidence and the manner in which these signatures appear on paper raises issues in relation to its authenticity.

Learned Deputy Solicitor General sought to counter this challenge on the basis that the said question of fact that had already been decided in

favour of the prosecution by the trial Court. He further submitted that those signatures are in fact of the Accused-Appellant's, by referring to his subsequent conduct to the detection of the fraud.

All the prosecution witnesses, whose evidence had already been referred to, are consistent in their evidence in relation to the conduct of the Accused-Appellant. It is revealed that the Accused-Appellant, although reported to work on the day the auditors were to examine the contents of the steel safe, deliberately avoided them by remaining in the canteen area disregarding the direction by the Magistrate to be present. The Accused-Appellant thereafter did not report to work and requested that he be placed under medical leave. He was thereupon notified at his residential address through the Police to be present for an audit investigation. But he opted not to. The steel safe to which only the Accused-Appellant had a key, had to be opened without his participation by employing a lock smith for that purpose by the auditors. Until then it had been sealed off by the auditors and when it was opened in the presence of the Magistrate and PW4, they found empty envelops which had the markings of the case numbers that are specified in the indictment on them. The fact of finding these empty envelops with case numbers written on them in the safe to which only the Accused-Appellant had a key, amply support the claim of the PW4 that he had handed them over to the Accused-Appellant for safe keeping.

Therefore, the denial of the authorship of the acknowledgement of cash from PW4 was raised by the Accused-Appellant for the first time in Court was rightly rejected by the trial Court. The witnesses called by the prosecution are familiar with the handwriting of the Accused-Appellant

and had no difficulty in identifying his signature. Witness *Gunasekara* who is not familiar with the handwriting of the Accused-Appellant had taken extra care to compare them with his other signatures that appear in the attendance register and was satisfied that it was similar.

During the cross examination of the Accused-Appellant, he had admitted that he did not participate in the audit inquiry. He also admitted that he did not make any statement affirming his position taken up before the trial Court. The trial Court, having considered the evidence presented on behalf of the Accused-Appellant, correctly finds that it did not result in raising a reasonable doubt in the prosecution's case.

We have carefully considered the submissions of the Counsel and are of the considered view that for the reasons stated in the preceding paragraphs, the appeal of the Accused-Appellant is without any merit and therefore ought to be dismissed.

Accordingly, the conviction and sentence of the Accused-Appellant is affirmed and his appeal is thereby dismissed.

JUDGE OF THE COURT OF APPEAL

**DEEPALI WIJESUNDERA, J.**

I agree.

JUDGE OF THE COURT OF APPEAL