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

In the matter of an Appeal in terms of section 331 (1) of the Criminal Procedure Code No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:	Democratic Socialist Republic of Sri
HCC-0230-2019	Lanka
	COMPLAINANT
	Vs.
High Court of Colombo	Abdul Kalam Mohammed Careem
Case No:	
HC/5365/2010	**ACCUSED**
	AND NOW BETWEEN
	Abdul Kalam Mohommed Careem
	ACCUSED-APPELLANT
	Vs.
	The Attorney General
	Attorney General's Department
	Colombo 12
	RESPONDENT

Before	: K Priyantha Fernando, J. (P. /C.A.)
	: Sampath B Abayakoon, J.
Counsel	: Nalinda Indatissa PC with Umayangi Wijasuriya, for Accused-Appellant
	: Maheshika Silva SSC, for the Respondent.
Argued on	: 13-07-2021
Written Submissions	: 16-07-2020 (By the Accused-Appellant)
	: 04-09-2020 (By the Respondent)
Decided on	: 16-09-2021

Sampath B Abayakoon, J.

This is an appeal by the accused-appellant (hereinafter referred to as the accused) being aggrieved by the conviction and sentence of him by the learned High Court judge of Colombo, where he was sentenced for four years rigorous imprisonment. He was also ordered to pay a fine and compensation.

The accused was indicted before the High Court of Colombo for dishonestly deceiving and inducing one Mohomed Riyas to deliver 400 computer parts valued at 3,840,000/-to him by cheating, an offence punishable under section 403 of the Penal Code.

After trial, he was found guilty as charged and sentenced as above by the learned High Court judge.

Although the learned President's Counsel for the accused has not raised specific grounds of appeal in his written submissions, he informed the Court that he is relying on the following grounds of appeal at the hearing of the appeal.

(1) The document marked P-01 has been admitted as evidence in contravention of the principles of evidence.
(2) Whether the learned High Court judge has failed to appreciate vital contradictions between the evidence of PW-01, PW-02 and PW-11 who was the investigating officer.
(3) The prosecution has failed to prove the estimated loss caused to the complainant as stated in the indictment.

The facts relating to the action briefly, are as follows:

PW-02 was the owner of the business called Tech Information Solutions Pte. Ltd situated at the Unity Plaza Building in Bambalapitiya, whose principal business was to sell and supply computers and parts in bulk or retail. It was his evidence that on the day of the incident, namely 23-11-2009, when he came to his shop to check on the days business, he came to know that money has not been received for a cash sale done by one of his sales assistants namely, Mohamed Riyas (PW-01) for an amount of 3,840,000/- rupees as stated in the sales invoice marked P-01 for the supply of 400 Computer Central Processing Units (CPU).

According to the evidence of the sales assistant of the establishment (PW-01), the accused was a person introduced by a similar business establishment, who gained their confidence by making a prompt cash payment for a previous supply of 200 units of CPU. As a result, when the accused ordered 400 units on the day of the incident on a cash payment basis, he and his manager had no reason to suspect the accused's bona fides. Agreeing to pay upon delivery, the accused has requested that the goods be delivered to a place near the Liberty Plaza Building in Kollupitiya and it was the driver of the establishment

Thuwan Rafaideeen (PW-03) who delivered the goods. The accused has taken delivery of 35 CPUs at a place near Liberty Plaza building and has asked the driver to deliver the balance to a place near Kolonnawa, promising to pay for the goods upon full delivery. After receiving the goods and the cash payment receipt from PW-03, the accused has asked the driver to wait for five minutes until he brings the money. However, since the accused failed to return as agreed, the driver has informed PW-01, the person who tasked him to deliver the goods to the accused. The driver, and PW-01 who arrived at the place of delivery subsequently, has been made to wait until 11.30 in the night by the accused with the promise to pay and had later informed them that he will make the payment on the following day.

Since the accused had failed to pay even on the following day, it was the PW-02, the owner of the establishment who has made the relevant complaint to the Police. It is also evidence that the accused has handed back the invoice marked P-01 which was in his possession at the Police station. He has also given the letter marked P-02, undertaking to pay the sum due.

It appears that the accused has taken several contradictory stands during the cross examination of the witnesses for the prosecution as well as in his dock statement when called for a defence.

It has been suggested to the owner of the establishment, namely PW-02 that the accused never received the goods mentioned in the sales invoice P-01. However, in cross examining PW-01 who in fact sold the goods to the accused, the position of the accused had been that he has to pay only a small amount more for the goods delivered, which gives the inference that he in fact received the goods as mentioned. Making a dock statement, it has been his stand that he paid cash for all the goods mentioned in the charge against him and the receipt issued to him was taken over by the complainant at the Police station.

Although the learned President's Counsel for the accused formulated three grounds of appeal for consideration, I would now proceed to consider them together since all the grounds urged are interwoven.

It was the contention of the learned President's Counsel that the prosecution has failed to call the storekeeper of the business establishment to prove that in fact the goods mentioned in the cash voucher P-01 were delivered to the defendant and also evidence from the accounts division of the company to establish that the amount claimed was not settled. It was his view that the prosecution has failed to establish the main ingredients of the charge by failing to prove the value of the goods claimed to be cheated by the accused.

It was also his contention that vital contradictions revealed in evidence as to the document marked P-01 has escaped the attention of the learned trial judge. It was his position, that according to the evidence of PW-03, the receipt for the goods delivered to the accused has been handed over to the accused at the point of delivery. However, the investigating officer PW-11's evidence had been that the receipt P-01 was handed over to him by the complainant PW-02, which in his view was a major contradiction and it was not safe to convict a person on such unsafe evidence.

It was the contention of the learned SSC for the Attorney General that it is the totality of the evidence that has to be considered in a trial of this nature and the document marked P-01 was an admitted document in several ways. It was her view that admitted facts need no further proof in accordance with the provisions of the Evidence Ordinance and the Criminal Procedure Code and the prosecution has proved its case beyond reasonable doubt, hence no basis for the appeal.

It is well settled law that it is the totality of the evidence that has to be considered in a trial and not pieces of evidence in its isolation. I am of the view that the totality of the evidence means the evidence of the prosecution as well

as the evidence for the defence, which includes any dock statement made by an accused.

It was held in the case of **James Silva Vs. Republic of Sri Lanka (1980) 2 SLR 167** that;

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

The offence of Cheating as defined by section 398 of the Penal Code reads as follows;

Section 398

> **Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to causes damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government is said to " cheat".**
>
> ***Explanation-*** **A dishonest concealment of facts is a deception within the meaning of this section.**

The section 403 of the Code under which the accused was charged described the punishment for Cheating and dishonestly inducing a delivery of property.

In the case of **Perera Vs. The Attorney General (1985) 2 SLR 156** it was held:

> *"It is the inducement and not the delivery that constitutes the gist of the crime. The words "induces the person so deceived to deliver to 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."*

When it comes to the evidence of the matter under appeal, I am unable to find any basis for the contention that the prosecution has failed to establish the value of the goods and that the goods were actually delivered to the accused. Although it was the position of the accused that the goods were not delivered to him when PW-02 who was the owner of the company gave evidence, it has been the position of the accused that he made a part payment for the goods received when PW-01 gave evidence. In his dock statement he has specifically stated that he paid for the goods mentioned in the charge and he received a cash receipt because of that. The own admissions of the accused establishes that the accused obtained goods as mentioned in the charge to its value. Hence, these facts are undisputed and admitted facts, which needs no further proof.

E. R. S. R. Coomaraswamy in his book **The Law of Evidence Vol-01 at page 135**, considering the relevancy of Section 58 of the Evidence Ordinance where it stipulates that the facts admitted need not be further proved and the provisions of section 420(2) of the Criminal Procedure Code, which has similar provisions in relation to criminal trials, states as follows:

> **"It shall not be necessary in any summary prosecution or trial on indictment for either party**
>
> **a) To lead proof of any fact which is admitted by the opposite party, or**
>
> **b) To prove any documents the authenticity and the terms of which are not in dispute, and**

c) Copies of any documents may be agreement of the parties be accepted as equivalent to the originals.

Such admissions may be made before or during the trial and shall be sufficient proof of the fact or facts admitted without other evidence. But the section is subject to two provisos:

i. The section shall not apply unless the accused person was represented by an attorney-at-law at the time the admission was made;

ii. Where such admissions have been made before the trial, they shall be in writing, signed by the accused and attested as to their accuracy and the identity and signature of the accused by an attorney-at-law."

The above provisos have no application for the instant appeal as the accused was represented by counsel throughout and the considered admissions were admissions made during the trial.

I am unable to agree with the learned President's Counsel on his argument that there are vital contradictions as to in whose custody the document marked P-01 (the receipt) was when it was taken over by the investigating officer either. If one reads the evidence as a whole, it becomes clear as to how the receipt given for the goods delivered to the accused by PW-03, happens to be with PW-02 when it was handed over to the Police.

In his dock statement the accused states that the receipt issued to him (P-01) for the goods purchased was taken back by them and thereafter they went to the Police station and lodged a complaint against him. He has referred as 'them' meaning the witnesses who testified as to what happened on that day. This sufficiently explains the reason as to why the receipt was handed over to the Police by PW-02 who was the owner of the establishment which sold the goods to the accused. It has been proved that the accused deceived PW-01 to

believe that he is going to pay for the goods upon the delivery by establishing a trust of himself in the minds of the sellers by previously buying similar articles and making prompt cash payment for the same. It is clear from the evidence led in this action that the accused had induced the sales person PW-01 and his manager to deliver the property mentioned in the charge to the accused. The evidence also has established that after taking charge of the goods, the accused dishonestly and fraudulently failed to pay for the 400 CPUs he obtained.

I do not find any basis for his claim that he paid cash for the goods and that was the reason why he was given a cash receipt. The evidence clearly establishes that because of the belief that the accused is going to pay for the goods upon delivery, a cash payment receipt has been prepared and given to the driver who delivered the goods as for the normal practices of the trade. It has been taken over by the accused, with the clear intention of not paying for the goods.

I find that the prosecution has proven all the necessary ingredients of the offence of Cheating beyond reasonable doubt.

For the reasons stated above, I find no basis to disturb the conviction and the sentence of the accused by the learned trial judge.

The appeal therefore is dismissed as it is devoid of merit.

Judge of the Court of Appeal

K. Priyantha Ferando, J. (P/C.A.)

I agree.

President of the Court of Appeal