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

In the matter of an Appeal under and in terms of section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

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

Complainant

Court of Appeal Case No. HCC/232/19

High Court of Colombo Case No. HC/2837/06

Vs.

Rajasinghe Gamage Ashoka Udaya Nayanananda

Accused

AND NOW BETWEEN

Rajasinghe Gamage Ashoka Udaya Nayanananda

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : **K. PRIYANTHA FERNANDO, J (P/CA)**

WICKUM A. KALUARACHCHI, J

COUNSEL : Srinath Perera, PC for the Accused-Appellant

Maheshika Silva, DSG for the Respondent

WRITTEN SUBMISSION

TENDERED ON : 04.10.2021 (On behalf of the Accused-Appellant)

21.10.2021 (On behalf of the Respondent)

ARGUED ON : 07.06.2022

DECIDED ON : 01.08.2022

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted on three counts. He was acquitted on the first and third counts, but convicted and sentenced on the second count. The second count is for fraudulently or dishonestly using as genuine, a document that he knew or had reason to believe to be a forged document by handing over a cheque valued at Rs. 480,000 to Joseph Thambirajah, Manager of the Hatton National Bank, Chetty Street, an offence punishable under section 454 read with 459 of the Penal Code.

At the time of the incident, the accused-appellant was a peon employed in the Colombo Municipal Council. He was attached to the Accounts Division of the Municipal Treasurer's Department. According to the prosecution, two cheques marked පැ1 and පැ2 which purported to be forged cheques, were credited into two separate accounts at the Seylan

Bank and Hatton National Bank. P1 is the cheque relating to the second count that was presented to the Hatton National Bank.

Evidence had been led to establish that the account in HNB has been opened in the name of one Murdala Ralalage Kumara Wijesighe. Such a person, however, could not be found. The cheque for Rs.480,000/-, marked P1, had been deposited into this account and subsequently, Rs.455,000/- was withdrawn. The representative from the Registration of Persons Department stated that they had not issued the Identity Card that was found to have been presented to the HNB in the course of opening the said account. Although the second count was that, use of a cheque bearing number 015197, which the appellant had reason to believe to be a forged document, the said cheque was not sent to the EQD for examination. In proving the second charge, the prosecution relied on mandate card, deposits and withdrawal slips. The EQD's opinion was that the handwriting on the mandate card, deposit slips, and withdrawal slips (which were marked as P1 to P5 and P10, when sent to the EQD) is similar to the specimen handwriting of the accused-appellant.

Written submissions have been filed on behalf of both parties prior to the hearing of the appeal. At the hearing, the learned President's Counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions. At the outset of his submissions, the learned President's Counsel informed the court that he would pursue only one ground of appeal. The said ground is whether there is enough evidence to connect the accused-appellant to the offence.

While not admitting it, the learned President's Counsel did not challenge the correctness of the EQD's opinion stated in his report. The contention of the learned President's Counsel for the appellant was that the EQD's opinion could only be used as corroborative evidence

and there was no substantive evidence to prove the second charge against the appellant. Therefore, he contended that the accused-appellant should be acquitted of the second count as well, because there is no evidence that the appellant used a forged document as genuine.

The second count to which the appellant was convicted is using as genuine a forged document. EQD formed his opinion that the aforesaid documents tendered to the Hatton National Bank were forged documents. As the EQD's opinion is not an issue in this appeal, this court has to consider whether the appellant used the cheque bearing the number 015197 knowing that it was a forged document.

Apart from the EQD report, the only items of evidence against the appellant, as admitted by the learned Deputy Solicitor General and the learned President's Counsel, are evidence that the appellant had the opportunity to tender the forged document to the bank and evidence of his subsequent conduct, namely that on 01.01.1997, the day this fraud was detected, the accused left his workplace early and failed to report to work after 01.01.1997. It is to be noted that the aforementioned two matters create only suspicion, and this evidence does not establish the fact that he used a forged document as genuine. It was held in Queen V. Sumanasena – 66 NLR 351 that "suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence. The burden of establishing circumstances which not only establish the accused's guilt but are also inconsistent with his innocence remains on the prosecution throughout the trial."

According to this decision, the aforesaid two items of evidence that create only a suspicion could not be conclusively used to prove the

second charge. Therefore, I proceed to consider the legal issue of whether the appellant could only be convicted on the EQD's opinion without any other evidence being adduced to establish that the appellant used forged documents.

The learned Deputy Solicitor General contended that EQD's evidence is scientific evidence and that the second charge could be proved on his report in the same manner that a rape case is proved on a doctor's Medico-Legal report and a murder case is proved on a Judicial Medical Officer's post-mortem report. The learned Deputy Solicitor General contended further that the EQD's expert opinion could be considered as conclusive proof.

Now, I wish to consider the decided authorities in respect of the expert opinion. In the case of Chandrasena alias Rale V. Attorney General – (2008) 2 Sri L.R. 255 it was held that "A medical witness called in as an expert is not a witness of fact. His evidence is really of an advisory character given on the facts submitted to him. Whilst the opinion of expert being a guide to Court, it is the Court which must come to its own conclusion with regard to the issues of the case. A Court is not justified in delegating its function to an expert and acting solely on latter's opinion."

It is to be noted that in a rape case, the doctor can express his or her opinion on whether sexual intercourse has taken place or not. He could sometimes express his opinion on whether some sort of violence had occurred. However, the issue of whether the accused in that case committed the rape has to be decided based on the other evidence. In a murder case, the Judicial Medical Officer could express his opinion on whether it was a natural death or a crime, the nature of the crime, and the cause of death. Evidence of other witnesses should be adduced to determine whether it is a murder or culpable homicide not amounting to murder or death caused by negligence. In addition, the

fact that the offence has been committed by the accused should also be proved by the other evidence. Therefore, in the instant action too, it has to be proved by the evidence of other witnesses that the accused committed the offence set out in the indictment and no one else.

In the case of A. Gratiaen Perera V. The Queen – 61 NLR 522 identical issue, hand-writing expert's evidence regarding a forgery has been discussed and held that "where a hand-writing expert testifies of forgery, his testimony should be accepted only if there is some other evidence, direct or circumstantial which tends to show that the conclusion reached by the expert is correct." The relevant portion of the decision of *Mendis V. Jayasuriya* – (1930) 12 C.L.R 44 has been cited in this case as follows: "*Akbar J.* took the view that the expert evidence should be used only in corroboration of a conclusion arrived at independently and not to convict a person on a charge of forgery if the other evidence is not conclusive. It would create some kind of suspicion but would not go beyond it." This is the answer to the issue we're discussing. The expert's opinion is basically corroborating. Other substantive evidence is needed to convict an accused of forgery or using a forged document as genuine. As previously stated, no such evidence has been adduced in this case.

In the case of H. A. Charles Perera and another V. M. L. Motha and another – 65 NLR 294 also it was held that "The evidence of a handwriting expert must be treated as only a relevant fact and not as conclusive of the fact of genuineness or otherwise of the hand-writing in question. The expert's opinion is relevant but only in order to enable the Judge himself to form his own opinion."

In Samarakoon V. The Public Trustee – 65 NLR 100, it was held that "on an issue of forgery, the court may accept a hand-writing expert's testimony, provided that there is some other evidence, direct or

circumstantial, which tends to show that the conclusion reached by the expert is correct".

In the case of Lily Perera V. Chandani Perera and others – (1990) 1 Sri L.R. 246 it was held that "the evidence of the hand-writing expert is a relevant fact but will to use only to assist the Judge himself to form his opinion".

The following portion stated in this Judgment is also important to determine the issue before us. "*The law of evidence" 2nd Edition (1989) Volume 1 in summing up the effect of the authorities, E. R. S. R. Coomaraswamy* (on page 627) states thus: The correct position as to the value of the evidence of the hand-writing expert seems to be that his evidence must be treated as a relevant fact and not as conclusive of the fact of genuineness or otherwise of the hand-writing: His opinion is relevant but only in order to enable the Judge himself to form his opinion. (Charles Perera V. Motha) (1961) 65 N.L.R. 294 at 296, State of Gujarat V. Vinaya Lal Pathi AIR (1967) S.C. 778; (1967) Crim L.J. 668.

In Charles de Silva V. Ariyawathie de Silva and another – (1987) 1 Sri L.R. 261 it was held that "Evidence of a handwriting expert is to be considered only as relevant fact and not conclusive of the genuineness or otherwise of the handwriting in dispute and that it is only relevant to enable the Judge to form his opinion".

It is apparent from the aforesaid long line of Judicial Authorities that the expert's evidence is only relevant evidence of advisory character. Expert evidence should only be used to corroborate. However, in order to reach a conclusion, there must be some other evidence, either direct or circumstantial. Therefore, I agree with the contention of the learned President's Counsel that the accused-appellant could not be convicted for this offence only on an expert's evidence without any substantial evidence being adduced to establish that the aforesaid forged

documents have been used by the appellant. As explained previously, the only other evidence adduced in this case does not infer that the appellant used forged documents but creates only a suspicion. In view of the decisions of the aforesaid judicial authorities, I regret that I am unable to agree with the contention of the learned Deputy Solicitor General that the expert's evidence and opinion could be considered as conclusive proof.

Apart from the aforesaid two matters that raise only suspicion, HNB Manager's evidence is also vital in coming to a conclusion in this case. Giving evidence on behalf of the prosecution, he said that his officer in the bank who handled the work relating to the opening of the questionable account had checked the identity card and confirmed the identity of the account holder, Murdala Ralalage Kumara Wijesighe. Confirmed the identification means that the said officer had obtained confirmation that the photograph on the National Identity Card produced to the bank is that of the person who came to the bank to open the account. The Bank Manager also stated that a photocopy of the identity card is retained with the bank. However, the prosecution never claimed that the identity card used to open the account at the bank contained the appellant's photograph. If that were the case, the prosecution could easily produce a copy of the identity card kept by the bank and show that the appellant came to open the account using a forged document. Hence, it is apparent a person called Wijesinghe or somebody else appeared by the name of Wijesinghe submitted the forged document to the bank but certainly not the appellant. In the circumstances, it is apparent that rather than corroborate EQD's opinion, this prosecution witness contradicts EQD's opinion because this bank manager's evidence indicates that someone else other than the appellant submitted the forged application (mandate card) to the bank to open the account.

For the reasons stated above, I hold that the second count against the appellant has also not been proved beyond a reasonable doubt.

Accordingly, I allow the appeal and set aside the conviction and sentence dated 22.03.2019 imposed on the second count by the learned High Court Judge and direct that the accused-appellant be acquitted of the Second Count.

The appeal is allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL