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.

CA No: CA/HCC/ 0317/2017
HC: Negombo: HC 382/2000

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Warnakulasuriya Arachchige Primsan Sarath Stanley
2. Warnakulasuriya Arachchige Tennyson Felix Fernando
3. Warnakulasuriya Ichchampilige Sisil Fernando
4. Warnakulasuriya Winifrida Thamel

Accused

And now between

Warnakulasuriya Arachchige Primsan Sarath Stanley

Accused- Appellant

Vs.

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

Complainant-Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: G.S. Edirisinghe AAL with Nagitha Wijesekara AAL for the accused-appellants

Madhawa Tennakoon, SDSG for the complainant-respondent

Written Submissions: By the accused-appellant on 04.07.2018

By the complainant-respondent 09.07.2018

Argued on : 06.05.2022

Decided on : **19.10.2022.**

N. Bandula Karunarathna J.

This appeal is from the judgment, delivered by the learned Judge of the High Court of Negombo, dated 19.09.2017, by which, the 1st accused-appellant, was convicted and sentenced to 2 years' rigorous imprisonment, suspending for 5 years for each count and fined Rs. 5,000/- with 3 months' simple imprisonment in default for each count.

The first accused-appellant (hereinafter referred to as the appellant) had been indicted for cheating; an offence punishable under section 400 of the Penal Code and for forgery; an offence punishable under section 454 of the Penal Code. The 2nd, 3rd and 4th accused persons had been indicted for abetting the appellant to commit the said offence of forgery which is an offence punishable under section 454 read with section 102 of the Penal Code. The offences were alleged to have been committed on or about the 01.12.1993.

The 2nd, 3rd and 4th appellants pleaded guilty to the charges. They were, accordingly convicted and sentenced by the learned High Court Judge. The prosecution led the evidence of five witnesses in order to prove the case of the prosecution against the accused-appellant. He had given evidence under oath.

Evidence for the prosecution revealed that the appellant had, on or about the 01.12.1993, cheated the plaintiff regarding the transfer of a deed of the disputed land consisting of 2 Roods and 36.5 Perches subject to latter's life interest. It was alleged that the appellant had also forged the signature of the plaintiff by making him sign on 3 blank papers, stating that it was to be sent to the Land Registry. Instead, he had executed a new deed renouncing the life interest of the plaintiff and transferring all rights to the 4th accused person.

The case of the prosecution started by calling Minnipurage Ratnasoma Sepali (PW 1). This witness stated that the deed relating to Kalugahawatta alias Gangewatta attested by Notary Public A.S. Peiris on 09.04.1978 had belonged to PW 1. The land consisted of two houses; one bearing number 433/1, where the witness lived with his mother and another bearing number 433/1A, which had been given on rent. It was revealed that PW 1 had mortgaged this property on several occasions in order to obtain money for his business purposes.

On one such occasion, he had mortgaged it to Upali Alponso (PW 3) on 04.05.1993 and his wife had settled this mortgage from the money she earned. Therefore, on her request, he had decided to transfer the land to her subject to his life interest on 01.12.1993, through deed bearing number 2025 attested by 1st accused-appellant. The sister of the witness PW 1, namely Minnipurage Susila Kanthi Sepali (Pw 2) and Mervin Perera, who is the 4th accused person's adopted father had signed as witnesses to the deed. He has identified his sister's signature on that deed. He further stated that on 30.11.1993 when the 1st accused-appellant asked PW 3 to sign on blank papers, he had refused to do so and on the date of the incident, the 1st accused-appellant had asked PW 1 to sign on 3 blank papers stating that it had to be shown to the Land Registry as proof of his life interest. The witness had signed those papers believing the accused who had affirmed to him that he is a Catholic and will not cheat the witness showing the cross on his neck.

PW 1 had stated that his wife had left the matrimonial home after the transfer of the property and avoided him when he went to pay rent. He had later got to know that she had harassed the tenant in their land. Therefore, he had made a complaint regarding the matter to the Negombo Police Station and it had been at that time that she had arrived and stated that she could evict her husband at any time producing Deed No. 2026 renouncing his life interest dated 01.12.1993. It was at this time had he realized that they had made a false deed without his knowledge. PW 1 had complained about this to the Crime Investigation Unit on 20.10.1995. He identified Deed No. 2025 marked as P1 and Deed No.2026 marked as P2 in open court.

He further asserted that he did not sign Deed No. 2026 renouncing his life interest and he had then realized that the accused had used his signature on the blank sheets to forge this deed. During cross-examination, he had stated that he inherited the disputed property and he rejected the suggestion made by the defence counsel that he had signed Deed No. 2026. He further stated that he was given 35 perches of land and his wife was given 20 perches of land together with Rs. 1.2 million following a settlement of a civil case in the District Court. PW 1 also stated that he complained to the police since his wife tried to evict him and sell the land. When it was suggested that he had transferred the land to Mr. Kiriella renouncing his life interest on the request of his wife, he stated that if he had done so he wouldn't take it back.

Additional Land Registrar of Marawila Land Registry, Uduwewa Herathge Anusha Hemamali Siriwardena (PW 7) identified P 1 as Deed No. 2026 and presented a certified copy of the original document in the Land Registry marked as P 1A. She identified Deed No. 2025 attested by the 1st accused person on 01.12.1993 and issued by the Land Registry. A certified copy of this deed had been marked and submitted as P3.

Minipurage Susila Kanthi Sepali (PW 2) is the sister of the plaintiff. She has signed as a witness to Deed No. 2025. According to the learned High Court Judge, her testimony corroborated evidence of PW 1 on many aspects. She stated that the land was their ancestral property and the 1st appellant got the plaintiff's signature on 3 blank papers on the date of the incident. She had not signed any other deed apart from Deed No. 2025.

During cross-examination, she stated that her brother had complained to the police after the 4th accused person evicted the brother and her mother living in that property and elaborated on this saying that she got to know that the 4th accused had thrown away their mother's belongings from the disputed house. She stated that only at that time she became aware of the existence of Deed No. 2026 attested on 01.12.1993 and that this property had been sold to a lawyer.

Witness Weeramundage Alponso Upali (PW 3) has stated that he is the seller in the deed and the 4th accused person was the buyer and that the deed was executed subject to PW 1's life interest. He stated that 1st accused person did not attest any other deed simultaneously. He further stated that the 1st accused-appellant had asked him to sign on 3 blank papers which he had refused to do. During cross-examination, PW 3 stated that since he refused to sign the blank papers, on the date of the incident, he had signed the deed subject to PW 1's life interest. He further said that this land was mortgaged to him and he had obtained an interest for this and that the 4th accused person asked this land to be transferred solely to him.

Police Sergeant Jinadasa (PW 7) was a police officer in the special crimes branch unit in Negombo. He had taken down PW 1's complaint on 20.11.1995. He had presented the original Deed No. 2025 and a certified copy of the deed upon instructions of PW 1.

During cross-examination, he had stated that he identified Deed No. 2025 and 2026 and had taken Deed No. 2026 into his custody. Folios of the Land Registry have been presented and marked as P 5. The defence had not contested this evidence and therefore under section 420 of the Code of Criminal Procedure Act, this was tantamount to an implied admission. Since the accused had not arrived upon police summons, they had issued a warrant under section 106 of the Code of Criminal Procedure Act against the accused-appellant.

After the prosecution case was concluded, the appellant gave evidence under oath for the defence. The 1st accused-appellant stated that he had attested Deed No. 2025 on the date of the incident subject to PW 1's life interest and later on, the same day, PW 1, the 2nd and 4th accused persons had returned requesting to change the deed to obtain a bank mortgage for the 4th the accused person and to renounce the life interest of PW 1. He further stated that it was not possible to do so and instead he could execute a Deed of Renunciation. He had therefore made a Deed No. 2026 renouncing PW 1's life interest on that date itself and registered both deeds.

Appellant stated that the witnesses of Deed No. 2026 were 2nd and 3rd accused persons. He also stated that 2nd, 3rd and 4th accused persons had pleaded guilty due to pressure and ended court proceedings. During cross-examination, appellant rejected charges 1 and 2 in the indictment and stated that the renouncing of life interest was done upon instructions of the other three accused persons. When questioned whether Deed No. 2026 was attested on 15.12.1993, he had stated that it was a typographical error. He had rejected the suggestion that he obtained PW 1’s signature on 3 blank papers.

The learned High Court Judge, having considered the evidence of the prosecution witnesses and the evidence of the accused-appellant, was satisfied as to the proof beyond reasonable doubt to bring home a finding of guilt, which the learned High Court Judge did in his verdict. The learned counsel for the respondent argued that the evidence led before the learned Trial Judge, without any adverse remark concerning the creditworthiness of the witnesses, was sufficient to convict the appellant. As there was no material to interfere with the finding of guilt, learned Deputy Solicitor General for the respondent urged that in the circumstances, this Court should dismiss the appeal of the accused-appellant and affirm the conviction and sentence.

Learned Counsel for the 1st accused-appellant submitted that under the first charge punishable under section 400 of the Penal Code, the court had to look into whether the first accused-appellant deceived Ratnasoma Sepali (PW 1) to signing Deed No. 2026, 'P3' so as to sever his life interest granted by Deed No. 2025 'P1(A)'. If there is no assessable value of his life interest enforceable by law because PW 3 had no legal status as the vendor to reserve a right in deed 2025, 'P1 (A)' to PW 1 being a third party outside the transaction.

Section 21(2) of the Penal Code is as follows;

> "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.

Under section 21(2) of the Penal Code, there is no wrongful loss to PW 1 as he admitted.

Section 22 of the Penal Code is as follows;

> "Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly"

PW 1 had been dishonest under section 22 of the said Code because PW 1 is not lawfully entitled to such life interest at the time of attesting 'P3'.

Section 23 of the Penal Code is as follows;

> A person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise.

It was further argued by the learned counsel for the appellant that he had no intention to defraud as provided by section 23 of the aforesaid code, because he acted according to instructions given by the parties for each deed namely, P1 (A) and P3. The learned counsel for the appellant says that in section 23 of the said code, the words "but not otherwise" mean an exceptional situation to the intention of defrauding under which the appellant seeks refuge.

At this stage it is important to note that section 398 of the Penal Code sets out that whoever by deceiving any person fraudulently or dishonestly induces the person so deceived intentionally, induces the person so deceived to do or omit to do anything which he would not or omit if he were not so deceived and which act or omission causes damage or harm to that person in property is said to "cheat"..

The 1st accused-appellant had sworn before court for his innocence with great conviction and denied the suggestion by the prosecution that he made PW 1 to sign Deed No. 2026, 'P3' in blank sheets. Appellant further said that he had no any gain attesting such a deed dishonestly. However, the civil action in respect of the rights in 'P1(A)' and 'P3' was resolved between the parties PW 1 and the 4th accused person at the District Court in 1995. The indictment was read over to the accused-appellant and it was before commencing the trial at the High Court on 27.10.2011.

Section 452 of the Penal Code provides that to cause to make any false document with intent to cause damage or injury to cause any person and to part with property with intent to commit fraud as forgery. When PW 1 could not claim life interest at the time of making Deed No. 2025, PW 1 had already departed from his right to any interest in the property which is the subject matter.

On behalf of the accused-appellant it was submitted that in applying the test given in section 453 of the Penal Code in respect of the present charge alleging revocation of life interest by deed 2026 is not a false document but it was mistaken as the parties including PW 1 insisted to attest it. There was no unlawful gain for the first accused-appellant and unlawful loss for the PW1. Act of attesting does not mean that Deed No. 2025 or any material part thereof after Deed No. 2026 has been made or executed by the appellant dishonestly or fraudulently.

With regard to life interest claimed by PW 1 he had no legal status to have life interest because the vendor could not reserve such right to a third party. PW 1 is not a party to the main transaction in the transfer. Hence no object of right to commit the offence. In the perspective

of section 24 of the Penal Code, PW1 had no reason to believe the existence of life interest when he had no sufficient cause to believe such interest in the transfer.

It was revealed that PW 1 knew he was signing deed 2026 `P3' with his own consent to ease and facilitate his wife, 4th accused person to draw a loan at her request. On the face of the record by misapprehending that Munnipurage Ratnasoma Sepali (PW 1) had a legal fiduciary relationship to retain right to life interest in favour of him who is not a party to the transaction of selling and buying of the land in Deed of Transfer 2025 dated 01.12.1993, 'P1-(A)' between Weeramunadage Alponse Upali Piyatilake 'PW3' and Warnakulasuriya Winifrida Thamel '4th accused-person'.

It is evident that Munnipurage Ratnasoma Sepali (PW 1) and Warnakulasuriya Winifrida Thamel '4th accused-person' have been husband and wife. Ratnasoma Sepali PW 1 consented at the execution of the said deed of transfer No.2025 'P1(A)', the land and property In the said 'P1(A)', to be transferred to wife Winifrida '4th accused' inasmuch as husband Ratnasoma Sepal' 'PW1' sold same property to Upali Piyatilake `PW3' on a deed of transfer previously. PW 1 admitted that he consented and requested wife Winifrida `4th accused-person' ' to pay PW 3 Rs. 119,000/- on the property 'P 1(A)' belonged to PW 3 on the basis of an outright purchase of the said property.

Although PW 1 required from PW 3 to reserve his right to life interest, against formalities in execution of a transfer, since PW 3 had necessarily and legally sold the property outright to the 4th accused-person', no informal reservation could be executed to a third Party. PW 1 who had no legal status being a third party in the deed of transfer to require neither the vendor nor vendee to reserve right to life interest. In the case of Mohammed Vs Mohammed 30 NLR 225, it was held that our law permits a conveyance by way of sale could be made subject to the life interest of the vendor only.

In the present criminal prosecution, that is on evidence, PW 3 had reserved life interest in 'P1(A)', but PW 3 having no fiduciary interest or legal obligation cannot reserve a life interest for PW 1. If there is no legality of right to life interest, executing another instrument such as 'P3' over the same right at the request of the third-party, PW 1 who made to insert such right in a deed of transfer between different parties, PW 3 and 4th accused person, such life interest had no legal efficacy to enforce cancellation of such right.

The following decisions demonstrate that no third-party interests could be accompanied by or carried in with the deed of transfer when dominium passes to the transferee or the vendee.

In Appuhamy Vs Appuhamy(1880) 3 SCC 61 at page 63 Cayley C.J. observed: "when a person signs in the manner required by the Ordinance of Frauds, and delivers for good consideration a conveyance of all his interest in land, such a conveyance, as it appears to me, will pass the dominium, if the seller has it, although such dominium may not have been accompanied by physical possession, in the same way as the Dutch transport effected a transfer of all right which the transferor had in the subject matter of the conveyance, whatever might have been the nature of such right.".

In the case of Fernando Vs Perera(1914) 17 NLR 161 at page 165 Lascelles C.J. held that "In Ceylon, since the enactment of Ordinance No.7 of 1840, the transfer of immovable property can be made only by means of notarial conveyance. The notarial conveyance is thus the

'contract of sale', and it is by virtue of the effect which the law attributes to a notarial conveyance that the purchaser obtains his right to be placed in possession of the property".

It was held in Perera Vs Perera(1956) 57 NLR 440 at 443 and 444 Gratiaen J. observed that "Apart from the expressed under takings and assurances contained in the contract of sale, and obligation is imposed upon a vendor by the Roman Dutch law not only to guarantee to his purchaser the peaceful possession of the thing sold, but also to give an implied guarantee against every form of molestation on the part of the vendor himself and of third parties.".

It is my view that in the light of those decisions, this had been a totally unacceptable state of affairs not recognized by law. The subject of the transaction was fully under PW 3's control, and the consideration paid by the 4th accused person had no contributory interest by the PW 1. His status was a broker or an intermediator as a third party. When the object of life interest is ineffective and not legally recognized, cancellation of such interest does not amount to a forgery.

Void condition of life interest which is the subject matter of 'P3' does not pave way for prosecution when there is no legal effect of such condition in a subsequent deed of revocation to impute criminal intention of forgery on the attestator, the Notary Public. In such a situation no criminal intention could be imposed over either of executants or the attestor, on the Notary of the deed, when a life interest is not acceptable to law and PW 1 is a stranger to such legal transaction. Any other fake or genuine instrument to revoke such as an unlawful life interest had no effect to impute criminal intention of defrauding punishable under section 400 or committing forgery punishable under 454 of the Penal Code subject to test under section 21, 22 and 23 of the Penal Code.

The Law of Contracts Vol 1. (1999) New Delhi. para 80 of page 78 is as follows;

> "Obligatio est juris vinculum quo necessitate adstringimur alicuius rei solvendae secundum nostrae civilatis jura" Justice C.G Weeramanthry referring to Justinians definition of obligation opined that ".. we are concerned with not all obligations but only with such obligations as receive binding force from the law. ... We must, therefore, first mark off such obligations as do not receive legal recognition." which are "social obligations and duties of honour".
>
> Hence, there is no "actionable personal right against determinate individuals" para 84 of page 81.

Therefore, there is no valid legal agreement between PW 1 and PW 3 with an intention to create a legal obligation in 'P1 (A)1. When PW 3 and the 4th accused person being vendor and vendee contracted only for selling and buying respectively the property became the object of the agreement. The consideration of the property was paid before the first accused-appellant on 01.12.1993 as stated in the attestation of the P1(A). This consideration meant to be the purchase price as agreed by 4th accused person, no either fraction of the consideration had passed to be the consideration of life interest of PW 1.

At the time of execution P 3, appellant had no valid agreement with PW 1 to reserve life interest when the consideration was paid by 4th accused person. There is no fiduciary obligation on the part of the vendor PW 3 to compromise such reservation other than a

transfer of the deed outright although informal and ineffective clauses had been insisted by the PW 1 in the P 1(A). PW 1 had no capacity to contract on the basis of no consideration passed by the PW 1. Therefore, PW 1 had not established legality and possibility of the object of 'P 1(A)' for which PW 1 had not followed due observance of prescribed form or modes of agreement.

PW 1 in his evidence said that he was given 35 perches by wife; 4th accused person out of wife's entire entitlement over Deed No. 2025 and he paid Rs. 120,000/- to her in resolving the dispute. The 1st accused-appellant also said the same thing to court in his dock statement as it was informed by Winifrida; 4th accused person. Jinadasa PC 21377, (PW 5) adducing evidence before court said a settlement was reported by parties on 28.11.1995, so that when the deed P 3 was not based on valid right to life interest at the time of attesting to form a criminal intention in the mind of the accused-appellant, the settlement reached by the parties before presenting the indictment on 20.12.2000 and reading over the indictment on 24.02.2004 intensified reasonable doubt in the existence of criminal intention in the appellant. Although parties have invited the appellant to include a social obligation, he had no intention to deceive either party causing an unlawful loss to anybody whereas PW 3 had no legal capacity to impose a reservation of life interest on the property while causing an outright sale of the said property.

The appellant had attested P 3 to satisfy the request of parties PW 1 and the 4th accused person within lawful parameters in good faith. As the right to life interest in the said 'P3' was not existing at the time of attestation, whereas PW 3 had no legal capacity to reserve such interest when he transferred to purchaser; 4th accused person who claimed an outright sale.

An invalid right to life interest has no value to be assessed physically so that the first accused-appellant has not caused any loss to PW 1 or anybody else and he had not earned unlawful gain. PW 1 said that he did not suffer any unlawful loss in respect of property which was the subject of Deed No. 2025 and 2026 *inter alia*.

It is a valid defence to forgery if the appellant had good reason to believe in good faith that, although he had mistaken the facts, he could make such a document. If the appellant did not have the required specific intent to use the document to deceive PW 1, it is a valid defence. Throughout evidence given by the appellant, he paid heed to PW 1 and 4th accused person namely husband and wife on their instructions while being together to safeguard their property in which both were involved and the family relationship and bondage in good faith.

Section 72 of the Penal Code enacts that "nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself justified by law in doing it".

In Gunasekere Vs Dias Bandaranaike 39 NLR 17, Soertz J. held that "the accused plea came within the exception created by section 72 of the Penal Code, nothing is an offence which is done by a person, who by reason of a mistake of fact in good faith believes himself justified in doing it.

Referred to Weerakoon Vs Ranhamy 23 NLR 33

In Perera Vs Munaweera 56 NLR 433 the Supreme Court held that " it was not open to convict the appellant unless it rejected the appellant's evidence that he believed in good faith, and by reason of a mistake of fact, that he was justified in law in charging 26 cents for a loaf of bread which he honestly but erroneously believed to be 16 ounces in weight".

Creating a forged document such as 'P 3' occurs if the accused-appellant makes reference to a forged document. Yet, with reference to contents other than invalid life interest in the 'P1(A)', neither 4th accused person who had the sole rights over P1(A)' nor the PW 1 disputed over genuineness or the validity of the said 'P1(A)' had a valid agreement. Learned counsel for the accused-appellant argued that the 1st accused-appellant had a mistaken identification of the PW 1 in regard to legal entitlement and status of PW 1 when PW 3 could not secure such entitlement and status within the parameters of vendor-vendee relationship between PW 3 and 4th accused person. In criminal law, a mistake of fact usually operates as a defence so long as it is reasonable in good faith under section 72 of the Penal Code,

When no valid and effective life interest for another person, nor a third party could be reserved such by the vendor in a deed of transfer because it impedes transfusing totality of his rights and obligations to the grantee. On the other hand, such immoral, undesirable and unlawful right impairs the purchaser enjoying the property.

In Edwards Vs Butler, 244 N.C. 205, 92 S.E.2d 922 (1956), it was held that where the court held that when a fee was conveyed in the granting clause and a specific reservation of a life estate was made in a paragraph inserted between the granting and habendum clause, such reservation was repugnant to the granting clause.

Prosecution led evidence of PW 5. PC 21377 Jinadasa (PW 5) in his cross-examination stated that he received the first complaint on 20.11.1995. Deed No. 2025 marked as 'P1(A)' and Deed No. 2026 marked as 'P 3' had been attested on 01.12.1993. It is important to note that the first complaint was made after two years from the date of attestation. Prosecution has not given any explanation by way of evidence as to why there was a delay of complaining the demeanour on the part of the first accused-appellant until PW 1 made the complaint on 20.11.1995.

PW 1 was residing with his wife Winifrida Thamel: 4th accused person. At this time his wife urged to sell a portion of the land to Attorney-at-Law Shantha Niriallea who was a tenant at this time at the same premises. Susila Kanthi Sepali (PW 2) who witnessed to Deed No. 2025 'P1(A)' said there had been a dispute with tenants, it triggered PW1 to make the first complaint dated 20.11.1995. By the time Deed No. 2026, 'P 3' was executed by PW1, he must have known that his wife wanted to have a bank loan so that, he admitted his life interest in 'P1A' was revoked.

Therefore, PW 1 had direct or tacit understanding of revocation on the date signing the `P 3', although he said there had been a cheating, this situation raises a reasonable doubt whether the accused appellant committed an offence alleged. PW 1 himself, around the date of complaining, witnessed that lawyer Niriella paid Rs 120,000 to the wife Thamel: 4th accused person around 1995. This reflects a plot that PW1 complained to the police inasmuch as Niriella Attorney at law who was interested in buying the land in which PW 1 was placed in the dominion over property belonged to his former wife Thamel. Thus, first accused-appellant

well explained this situation in his evidence for defence. Learned Trial Judge had not attended these circumstances to ascertain why the PW 1 made such a complaint after two years.

The delay of 2 years to make the first complaint, if he knew his wife played mischief detrimental to his impugned life interest; such situation could not have been excused by the Trial Judge. The learned Judge ignored the fact from the inception, the idea of wife urging to revoke life interest which was well aware of by the PW 1. Witness PW 1 had ample opportunity from the date close to the date of executing 'P3' to complain of the revocation, but intriguingly with his sister Susila PW 2 in concert, after getting vindicated the property from PW 3, and in ulterior motive to have grabbed the property from the wife Thamel 4th accused person, PW 1 complained to the Police after two years.

PC 21377 Jinadasa (PW 5) in his evidence in chief said the complaint was made after two years on 20.11.1995 from the date of attestation on 01-12-1993. He erroneously said there had been no signatures in the copy of the deed 2026, 'P 3'. He misled the learned Trial Judge when he did not properly peruse the copy of said Deed No. 2026 which was registered in the Land Registry at relevant folio 'P 5'. He failed to record the statement of the first accused-appellant

It is evident that until 31.10.1996 by which the parties to the dispute informed the police that their differences were resolved. Therefore, the learned Trial Judge could not have held `P 2' and 'P 3' had been a forged document when it had implied sanction for two years by the PW 1 until the complaint was engineered for the reason having differences with his wife the 4th accused person. Learned Trial Judge failed to have due consideration and regard to the infirmities of the evidence of prosecution. The lack of spontaneity aggravates improbability of the events in said evidence of which no corroboration offered by the prosecution.

Kodituwakku Chaminda Vs Republic of Sri Lanka CA /248/2004,dated 19.11.2009; the court referring to Alwis Vs Piyasena Fernando 1993 (1) SLR 119 by GPS De Silva J. observed thus: " It is well established that findings of primary facts by a trial judge who hears and sees witnesses are not to be lightly disturbed on appeal. But when a judge after observing demeanour and deportment of witnesses decides to convict an accused person in a criminal case and if his decision is proved to be wrong, Court of Appeal should interfere with such decision."

Wijekoon Mudiyanselage Appuhamy Vs Republic CA 61/98 dated, 11.01.2001, it was held;

> “it is to be observed from the judgment of the learned Trial Judge that, he has gone on the basis that the prosecution could profit from the weaknesses in the defence case. However, it must be remembered that the case for the prosecution must be convincing no matter how weak the defence case is, before court is entitled to convict an accused person. What the court has done in the case perhaps unwittingly, is to bolster up a weak case for the prosecution by referring to the weakness in the defence case. This is not permissible. The prosecution must establish its case beyond reasonable doubt. There is no escape from this requirement".

This was referred in Kamal Addaraarachchi Vs state 2000 (3) SLLR 394.

It is very clear that the appellant had been cautious professionally to attest 2024 deeds when he attested deed number 2025 and 2026. He had attested around 8200 deeds at the time he

was making the sworn evidence during his thirty-year notarial practice. When there was no *prima facie* evidence sufficient to prove ingredients of each offence beyond reasonable doubt, learned Trial Judge erroneously decided to call defence and convicted the appellant.

Those reasons given by the learned Trial Judge are not tenable because Article 13(3) of the constitution guarantees a fair trial against an accused on the basis of presumption of innocence as set out in Article 13(5). Evidence for defence in Law is meant to raise doubt in evidence towards burden of proof by the prosecution. Burden of proof is with the prosecution beyond reasonable doubt to convict a person where the Judge is entrusted with the task of administering justice in delivering its judgement.

In the present case, instead of an analysis, the Trial Judge has given a summary of favourable evidence to the prosecution. Learned Judge throughout the judgment used the indefinite term 'ඛවකි', which does not amount to certainty and determination of the Judge. Every point the learned Trial Judge relies on for conviction must be investigated into ascertaining the proof beyond reasonable doubt, instead the Trial Judge relied on probability of belief which is a strange concept introduced to criminal law.

In Mahinda Herath Vs AG CA 21/2001, dated 13-09-2005 it was observed thus;

> "The Trial Judge must always bear in mind that the accused is presumed to be innocent until the charge against the accused is proved beyond reasonable doubt. What happens when a plea ... of complete denial taken up by an accused person is rejected? The Trial Judge then should not forget the above legal principles regarding the burden of proof and the presumption of innocence".

Justice Salam in Shavul Hameed Badurdeen Vs AG CA 167/2006, dated 23.02.2010 observed that "... the misapplication of Ellenborough theory has caused serious prejudice to the accused-appellant and ended up in a travesty of justice." This principle is corollary to the procedural effect under section 200(1) of the Criminal Procedure Code which was not followed by the learned Trial Judge".

Followed in Dr. Karunadasa Vs Open University of Sri Lanka 2006 (3) SLR 226.

Learned Trial Judge has not given reason why she rejected the explanation given by the 1st accused-appellant that PW 1 instructed the appellant to attest the deed 2026 by revoking the life interest. Witness PW 1 instructed the appellant directly or tacitly having the knowledge that the wife 4th accused person required PW 1 to revoke his impugned life interest to ease her to draw a bank loan. This reason was not looked into by the Trial Judge. PW 1 in conformity with the above explanation of the appellant said in his cross-examination that he signed the revocation at the request of PW 1 in his presence and need of the wife Winifrida, 4th accused person who was the outright purchaser. Prosecution did not dispute this stand taken by the appellant as a lie and did not apply theory in Rex Vs Lucas [1981 2AER 1008].

> "When the Trial Judge has to consider prominently the clarity and veracity of the evidence at the cross-examination it was deliberately unattended. Hence it is submitted on behalf of the appellant there is no reasoning to effect proof beyond reasonable doubt attached to findings of learned Trial Judge."

S.T.Piyasena Vs The Director General, Bribery Commission CA31/98, dated 29.01.2001.

> "The Judgement of this case was prepared and delivered by the last Trial Judge who had no opportunity to observe demeanour and deportment of the prosecution witnesses. This fact alone made this judgment a handicapped. Thus, learned Trial Judge failed to consider contradictions and vital discrepancies between evidence of PW 1, PW 2 and PW 3."

In sentencing, the learned Trial Judge erroneously imposed two years' imprisonment on the first count exceeding the maximum one-year period set out in section 400 of the Penal Code. Apart from that, rigorous imprisonment of two years imposed on each count on the appellant is conflicting the current sentencing policy. Appellant's status being a professional without previous convictions, had to be taken into consideration. He had been a legal professional for 30 years, who attested more than 8000 deeds. Process of the prosecution had been prolonging for 17 years. He as well as PW 1 stated about strange interference with the property by another attorney- at- law and how PW1 and 4th accused person lost their property.

The prosecution was unsuccessful in proving all the elements of the offence beyond reasonable doubt. The prosecution has not even attempted to prove the *mens rea* on the part of the 1st accused-appellant. However, as per the judgments cited above, the only burden on the defence was to create a reasonable doubt on the existence of *mens rea* as opposed to proving beyond reasonable doubt the non-existence of necessary *mens rea.*

The infirmities in the judgment support the contention that the finding of the learned Trial Judge's judgment is unsound in law. For the reasons set out above, I conclude that the learned Trial Judge had misdirected himself by failing to evaluate the said material in favour of the 1st accused-appellant.

I, therefore, decide to set aside the conviction and sentence dated 19.09.2017. Appellant is acquitted from all charges against him in the indictment.

The appeal of the 1st accused-appellant is allowed.

Judge of the Court of Appeal

R. Gurusinghe J

I agree.

Judge of the Court of Appeal