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

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

Court of Appeal No:

CA/HCC/180/2020

High Court of Kandy

Case No: HC/57/2019

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Bogayagama Chandrasenage Suren Perera

ACCUSED

AND NOW BETWEEN

Bogayagama Chandrasenage Suren Perera

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Asela Serasinghe for the Accused Appellant

: Riyaz Bary, DSG for the Respondent

Argued on : 09-01-2023

Written Submissions : 14-03-2022 (By the Accused-Appellant)

: 02-08-2022 (By the Respondent)

Decided on : 13-02-2023

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the accused) filed this appeal on the basis of being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Kandy.

The appellant was indicted before the High Court of Kandy for committing 9 acts of pawning fake jewellery at the Kandy branch of the Peoples Bank between the period of 28th August 2010 and 25th June 2011, and thereby committing offences punishable in terms of section 5(1) of the Offences Against Public Property Act as amended.

After trial, he was found guilty of all nine counts preferred against him by the judgement dated 30-07-2020, and he was sentenced to two years each rigorous imprisonment for all 9 counts, apart from the respective fines imposed on all the counts.

The jail term imposed was ordered to be effective concurrently.

Grounds Of Appeal

At the hearing of this appeal, the learned Counsel for the appellant formulated the following grounds of appeal for the consideration of the Court.

1. The penal sections under which the accused was charged and proceeded to trial was defective and there was no basis for the learned trial judge to convict the appellant for offences punishable in terms of section 5(1) of the Offences Against Public Property Act.
2. The prosecution has failed to establish the appellant's identity as the person who pawned fake jewellery to the bank beyond reasonable doubt.
3. The learned High Court Judge has failed to consider the defence of the appellant.

Making submissions before the Court, the learned Counsel for the appellant pointed out that it was before a single Judge, the trial has taken place on day-to-day basis and the said trial has taken place on the basis of the original charges filed against the appellant in the indictment for which he has pleaded not guilty.

After the conclusion of the trial on 22nd July 2020, the judgement had been set to be pronounced on 30th July 2020. It was pointed out that on the said day, before the pronouncement of the judgement, the prosecuting State Counsel has made an application to the Court informing that the charges upon which the trial proceeded was defective in relation to the penal sections. It has been pointed out that the correct penal section should have been section 5(2) of the Offences Against Public Property Act and not section 5(1) as mentioned in the charges preferred against the appellant. The learned State Counsel has made an application to amend the charges in terms of section 167 of the Code of Criminal Procedure Act No. 15 of 1979.

It was shown that although the indictment has been amended accordingly on the date of the judgement and the judgement has been pronounced, the judgement does not reflect the amended charges or that the evidence has been considered on the basis of cheating. Pointing to the analysis of the evidence by the learned High Court Judge in her judgement, it was submitted by the learned Counsel that the evidence has been considered on the basis of criminal breach

of trust and the accused has been convicted on the same basis and not on the basis of cheating where the penal section would be section 5(2) of the Offences Against Public Property Act.

It was his view that this was a total misdirection, and there is no basis to allow the conviction of the appellant to stand, as it has been reached by considering the evidence on a wrong basis.

He also contended that during the trial, the accused has been identified only as a dock identification and the prosecution has failed to lead any evidence how the relevant witnesses can identify him in such a manner. He also contended that the prosecution has failed to establish the appellant's identity as the person who pawned fake jewellery to the bank by producing evidence to establish his identity through his National Identity Card, as he is alleged to have produced it to the bank for the purpose of pawning the said fake jewellery.

The learned Deputy Solicitor General (DSG) representing the respondent Hon. Attorney General conceded that by going through the judgement, it appears to be that the evidence has been considered by the learned High Court Judge on the basis of an offence in relation to a criminal breach of trust and conviction appears in the judgement also has been based on section 5(1) of the Offences Against Public Property Act.

However, he pointed out to the last four lines of the page 33 of the judgement (page 483 of the appeal brief) where the learned High Court Judge has referred that the appellant has fraudulently and dishonestly induced the bank officials and taken the money belonging to the government, in justifying the conviction.

Considerations of The Grounds of Appeal

As pointed out correctly and agreed, the entire trial against the appellant has taken place on the basis that he has committed the offences punishable in terms of section 5(1) of the Offences Against Public Property Act. For matters of clarity,

I would now reproduce the first count preferred against the appellant where the other 8 counts are also on similar line.

> **Count 1-** වරෂ **2010**ක් වූ අගෝස්තු මස **28** වන දින සහ වරෂ **2011**ක් වූ ජුනි මස **25** වන දින අතර කාල සීමාව තුල දිනයකදී මෙම අධිකරණයේ බල සීමාව තුල පිහිටි මහනුවරදී යුෂ්මතා සැබෑ රත්‍රං බව හඟවා ව්‍යාජ රත්‍රං භාණ්ඩ මහජන බැංකුවේ ප්‍රාදේශීය කළමනාකරු කොස්වත්ත කන්කානම්ලාගේ ජයසිංහ යන අය වෙත උකස් කර යුෂ්මතා වෙත රුපියල් **14200/=** ක මුදලක් ලබා දීමට වංකව හෝ වංචනිකව පෙළඹූ බැවින් **1999** අංක **28** දරන සංශෝදිත පනතින් සංශෝදිත වූ **1982** අංක **12** දරන පොදු දේපල විෂයෙහිලා සිදු කරනු ලබන වැරදි පිලිබඳ පනතේ **5(1)** වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් සිදු කල බවය.

As agreed by the learned Counsel for the appellant and the learned DSG, in consideration of the facts and the circumstances, this is a case where the charges against the appellant should have been on the basis that he committed the offence of cheating, although the charges laid in the indictment does not refer directly to the offence of cheating. However, it was agreed that the way the alleged acts have been committed had been adequately described in the charges.

The relevant section 164 of the Code of Criminal Procedure Act where the essential requisites of a charge are described, reads as follows.

> **164 (1) Every charge under this code shall state the offence with which the accused is charged.**
>
> **(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.**
>
> **(3) If the law which creates the offence does not give any specific name, so much of the definition of the offence must be stated as will give the accused notice of the matter with which he is charged.**

(4) The law and section of the law under which the offence said to have been committed is punishable shall be mentioned in the charge.

(5) The fact that the charge is made equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

(6) The charge shall when it is preferred, whether at the inquiry preliminary to committal for trial or at the trial, be read to the accused in a language which he understands.

The above requirements of a charge clearly show that it is mandatory to mention the punishable section of the offence committed by an accused person in a charge. It is clear from the proceedings that the trial has taken place entirely on a wrong punishable section when the matter was set for judgement on 30th July 2020.

It appears that after realizing this defect in the indictment, the learned prosecuting State Counsel has brought it to the notice of the Court and had invited the Court to act under section 167 of the Code of Criminal Procedure Act where the Court may alter any indictment or charge at any time before the judgement is pronounced or in the case of trials before the High Court by a jury before the verdict of the jury is returned.

When this matter was brought to the attention of the learned High Court Judge on the day of the judgement, the learned High Court Judge has correctly decided to act in terms of section 167 and 168 of the Code of Criminal Procedure Act. The relevant order made by the learned High Court Judge, which appears on page 487 of the appeal brief, reads as follows.

> **"චිත්තිය විරුද්ධ නොවන බව සඳහන් කර සිටි. ඊට හේතු වන්නේ චෝදනාවේ අන්තර් ගතයෙහි වංචාව කිරීම පිළිබඳව චෝදනාව නිරවචනය වී ඇති නමුත් උපවගන්තිය පමණක් නිවැරදි කිරීමට ඉල්ලා සිටින බැවිනි.**

ඒ අනුව අධිචෝදනා උපවගන්ති **5(2)** වශයෙන් සියලුම චෝදනාවන් සංශෝදනය කිරීමට විත්තිය විරුද්ධ වන්නේ නැත. කෙසේ වෙතත් සංශෝදිත අධිචෝදන විත්තිකරුට නැවත කියා දෙමි.

ඒ අනුව දැනට විත්තිකරු මෙම සංශෝදනයට විරුද්ධ නොවන බැවින් සහ මෙම සංශෝදනයෙන් විත්තිකරුට අගතියක් සිදු නොවන බව පෙනී යන හෙයින් තීන්දුව ප්‍රකාශයට පත් කරමි.

විත්තිකරු සියලු චෝදනාවන්ට වරදකරු කරමි."

It is clear from the indictment that the learned High Court Judge had amended the penal sections of the charges accordingly to read as section 5(2) of the Offences Against Public Property Act. I do not find any reason to disagree with the procedure adopted by the learned High Court Judge as it has been provided for in the Code of Criminal Procedure Act.

However, the issue arises when reading what was stated in the judgement as contended by the learned Counsel for the appellant. It is clear that when the learned prosecuting State Counsel made the application to amend the penal section of the charges, the judgement has already been prepared and ready to be pronounced on that day, as it was the date fixed for the pronouncement of the judgement. It appears that after the said amendment was made, read and explained to the accused, the learned High Court Judge has straight away proceeded to pronounce the judgement.

In the judgement which appears on page 451 of the appeal brief, the learned High Court Judge has commenced by reproducing the nine charges under which the appellant was indicted as stated in the original indictment upon which the trial proceeded to its conclusion, where the penal section has been mentioned as section 5(1) of the Offences Against Public Property Act.

Section 5(1) of the Offences Against Public Property Act is the section whether a person misappropriates or causes the criminal breach of trust in relation to a public property can be punished.

As the Penal sections of the nine charges had been amended by the time the judgement was pronounced, the judgement should mention the nine charges

with the penal section as section 5(2) of the Offences Against Public Property Act. If the evidence was considered in terms of section 5(2), the considerations should have been to find whether the offence of cheating has been committed by the appellant.

However, as pointed out correctly by the learned Counsel for the appellant, in analyzing the evidence at page 31 of the judgement (page 481 of the appeal brief), it appears that the consideration has been on the basis that the appellant has committed the criminal breach of trust. The relevant portion of the judgment reads as follows:

> **"එම නිසා එවැනි භාණ්ඩ මෙම බැංකුවට ඉදිරිපත් කිරීමෙන් මෙම භාණ්ඩ වලට අදාළ උකස්කරු මත තිබූ විශ්වාසය ඔහු විසින් කඩකර ඇති අතර, එම භාණ්ඩ වලට ලබා දුන් මුදල් එම උකස්කරු ලබාගැනීමෙන් ඔහු විසින් සාපරාදී විශ්වාසය කඩකර ඇති බවට මෙම අධිකරණයට පෙනී යයි."**

Furthermore, at page 33 of the judgement (page 483 of the appeal brief), it has been stated thus;

> **"දැනට ව්‍යාජ බවට ඔප්පු වී ඇති රන් භාණ්ඩ ඉදිරිපත් කර ඇත්තේ එකම ආයතනයට එනම් මහජන බැංකුව මහනුවර සහ එහි බැංකු නිලධාරීන් ඔහු මත තිබූ විශ්වාසය කඩකර රජයේ මුදල් ලබා ගෙන ඇත."**

This goes on to amply demonstrate that the judgement had been on the basis of criminal breach of trust and not on the basis of cheating as for the amended indictment. I am in no position to agree with the contention of the learned DSG to otherwise. It is clear that, the judgement upon which the appellant was convicted was not a judgement based on the indictment as amended. Therefore, the conviction and the sentence cannot be allowed to stand.

Accordingly, I set aside the conviction and the sentence dated 30-07-2020.

The next matter that arises is whether this is a fit and proper case to send for a retrial. This is an action instituted based on offences committed between the period of 28-08-2010 and 25-11-2011, some 13 years ago.

When considering the evidence placed before the Court, it is apparent that the appellant had been arrested not while committing the act but subsequently on a tip-off. There had been no identification parade held to identify the appellant by the officers of the bank who transacted with him. Only a dock identification has been made. As pointed out at the hearing of this appeal, the prosecution has merely asked the witnesses to identify the appellant without first clarifying from whether they are in a position to identify the person who pawned jewellery, if seen again and the basis for such an identification. As there is a tendency for a witness to believe that the accused person may be the person who committed the crime, such a dock identification is highly unreliable which cannot be a basis for a conviction.

Although the indictment speaks about a one single officer being cheated on all nine occasions, the evidence had been that apart from five occasions, two other officers also have been cheated. It appears that in the indictment, it has been only mentioned that one bank official has been cheated on all nine occasions.

Given the time period that has lapsed and the mentioned infirmities in the evidence and the investigations, I am of the view that this is not a fit and a proper case to send for a retrial.

Therefore, I acquit the appellant of the charges preferred against him.

The appeal allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal