

**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:

Democratic Socialist Republic of Sri Lanka

CA/HCC/0129/2019

COMPLAINANT

Vs.

High Court of Colombo

Thajudeen Mohomad Fahim

Case No: HC/6046/2012

ACCUSED

AND NOW BETWEEN

Thajudeen Mohomad Fahim

ACCUSED-APPELLANT

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Ranil Samarasooriya with Nalaka Samarakoon and
Rajinda Kandegedara for the Accused-Appellant
: Janaka Bandara, DSG for the Respondent

Argued on : 28-11-2022

Written Submissions : 08-02-2021 (By the Accused-Appellant)
: 24-03-2021 (By the Respondent)

Decided on : 26-01-2023

Sampath B Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo for committing the offence of cheating on or about 11th October 2007, by fraudulently and dishonestly deceiving one Mohomad Marshum and inducing him to deposit Rs. 25 million to the bank accounts named with the promise of delivering two jeeps, and intentionally inducing the said person so deceived to do or omit to do anything which he would not do or omit if he was not so deceived, and thereby committing an offence punishable in terms of section 403 of the Penal Code.

After trial, the learned High Court Judge of Colombo, by his judgement dated 19-03-2019 found the appellant guilty as charged and he was sentenced to 4 years simple imprisonment and was ordered to pay a fine of Rs. 25000/-. He was sentenced to 5 months simple imprisonment in default of paying the fine.

The appellant was also ordered to pay Rs. 25 million, which was the amount so cheated as a compensation to PW-01 in terms of section 17 of the Code of Criminal Procedure Act. If he fails to pay, it was ordered to recover the said

compensation as a fine, and a default sentence of 18 months simple imprisonment was ordered.

Being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

The facts that led to the indictment and the conviction can be summarized as follows.

PW-01 who is the person alleged to have been deceived by the appellant was a businessman primarily dealing in electrical goods. Later, he has commenced a partnership business of dealing in vehicles where he was the main partner. He had that business in Colombo, which he has commenced in the year 2005.

The appellant was also a person dealing in vehicles, and both the appellant and PW-01 have been doing business with each other based on trust. According to the evidence of PW-01, they have had transactions of over 50 vehicles by the time the incident relevant to this charge occurred. It was his evidence that the appellant informed him that he is in possession of two Toyota Prado vehicles and that he can give them to him for Rs. 25 million. Agreeing to have the vehicles, PW-01 has deposited the above mentioned Rs. 25 million in two bank accounts owned by PW-02 and 03, as instructed by the appellant. After the appellant obtained the money, he has failed to deliver the vehicles as promised. Since his attempts to obtain the vehicles from the appellant failed, and realizing that he was cheated, PW-01 has made a written complaint to the Criminal Investigations Department. After investigations, the appellant was indicted for the offence of cheating.

PW-02 and 03, to whose accounts PW-01 had deposited the money has given evidence and confirmed that the money was deposited as claimed by PW-01 and they handed over the money to the appellant. The evidence establishes that PW-01 has deposited the money on 11th October 2007. He has deposited Rs. 12,470,000 to the account of PW-03 and another sum of Rs. 12,530,000 to the account of PW-02.

In this matter, the appellant has never denied that the money was given to him by PW-01 in the manner stated by him in his evidence. When PW-01 gave evidence, the position taken up by the appellant was that the mentioned Rs. 25 million and the promise to hand over two Prado jeeps to PW-01 had no connection, and the transaction in relation to Rs. 25 million had already been concluded in full and the PW-01 falsely implicated the appellant in this regard.

PW-01 has dismissed the claim that the transaction was not in relation to the two jeeps. It has also been the position of the PW-01 that as a businessman dealing in vehicles, his intention was to obtain the two jeeps for the sum mentioned and sell it later at a profit, and thereby he suffered a loss due to the fraudulent actions of the appellant.

When called for a defence after the prosecution case was closed, the appellant has made a statement from the dock. It has been his position that he and PW-01 engaged in electrical goods business and were also vehicle dealers. He has admitted that he has given over 50-60 vehicles to the PW-01. He has admitted that PW-01 wanted to have two Prado vehicles and has claimed that the vehicles were delivered to him and he paid money for the two vehicles. He has claimed that when he needed money to be invested in his business, PW-01 agreed to do so and deposited the disputed amount of Rs.25 million to the two accounts of PW-02 and 03 who were vehicle importers at his request. He has claimed the intention of PW-01 and himself was to make a profit out of the importation and sale of the vehicles, and share the profits. He has claimed that after the vehicles were imported to Sri Lanka, he sold the vehicles through vehicle sales agents, but could not derive any profit out of the sale. Because of PW-01's belief that he is hiding the profits earned through this transaction, he has made a complaint of cheating against him was his position.

The Grounds of Appeal

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

1. The prosecution failed to prove the case beyond reasonable doubt against the appellant.
2. The learned High Court Judge has failed to give due concession to the contradiction marked V-01.
3. The learned High Court Judge has predetermined the matter.

It was the contention of the learned Counsel for the appellant that in order to prove this case, it was imperative to the prosecution to prove that the appellant deceived the PW-01 fraudulently or dishonestly and induced him to hand over the money as alleged.

It was his view that the prosecution has failed to prove that the deposit of the money was for the transaction as claimed by PW-01. It was his contention that as partners in a business, PW-01 and the appellant had engaged in transactions upon trust, and the transaction in relation to handing over of two Prado jeeps was a transaction that had been concluded between the parties. It was his position that the evidence of PW-07, the investigating officer shows that the transaction was an investment and not a matter of cheating as claimed.

It was his argument that this was a transaction that is civil in nature and there was no basis to charge the appellant for cheating. He also points to the fact that even if the defence taken up by an accused person is weak, that is not a matter that can lead to a conclusion that the prosecution has proved its case.

Referring to the contradiction marked V-01 and the views expressed by the learned High Court Judge in the judgement where it has been concluded that the said contradiction may be a result of forgetfulness of PW-01, was not warranted, it was his position that the learned High Court Judge cannot come to such a conclusion in the absence of any evidence that can lead to such an inference. It was also his contention that the learned High Court Judge has mainly considered the infirmities in the defence of the appellant in order to find the appellant guilty, which was not the correct way of analyzing evidence. He

moved for an acquittal of the appellant on the basis that the prosecution has failed to prove the case beyond reasonable doubt against the appellant.

Making submissions before this Court on behalf of the respondent, it was the view of the learned Deputy Solicitor General (DSG) that in order to prove a charge of cheating, it becomes necessary for the prosecution to prove that the person concerned was deceived fraudulently and dishonestly induced to do or not to do the act mentioned in the charge.

It was his view that since the appellant has admitted having received the money, his claim that the money was received for a different purpose has no basis. It was his contention that the learned High Court Judge has considered the defence evidence and the defence put forward by the appellant in order to find whether it has created a reasonable doubt or has provided an explanation in relation to the allegation against the appellant, in view of the admissions. It was his position that the learned High Court Judge has not predetermined the matter, but has only considered the evidence in the manner required in a criminal case.

Consideration of The Grounds of Appeal

As the three grounds of appeal are grounds mainly based on the premise that the prosecution has failed to prove its case beyond reasonable doubt, and the learned High Court Judge was misdirected in that regard, I will now proceed to consider all the three grounds of appeal together.

The offence of cheating as described in section 398 of the Penal Code reads;

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 cause damage or harm

to that person in body, mind, reputation, or property or damage or loss to the government, is said to “cheat”.

When considering the charge preferred against the appellant, it is clear that it has been on the basis that the appellant intentionally induced the PW-01 who was so deceived to do anything which he would not do if he was not so deceived.

I am of the view that in order to prove the charge against the appellant, the prosecution needs to prove that the deceiving was done fraudulently or dishonestly with the intention of cheating.

In the case of **Zahir Vs. Cooray (1941) 42 NLR 263**, it was stated by **Howard C.J.:**

“The offence of cheating is defined in section 398 of the Penal Code. In order to establish such an offence, it must be proved that the deceit induced the person deceived to do or omit to do something which he would not do or omit if he were not so deceived and which act or omission causes or is likely to cause damage to that person in body, mind, reputation or property.”

When it comes to the facts of the matter under appeal, it is clear that the PW-01 and the appellant had been doing business together based on trust. As both of them were in the business of dealing in vehicles. There had been vehicle transactions between them and money in relation to such transactions has been regularly transacted between them. The evidence also undisputed that they have transacted money through various third parties for the purpose of conducting business.

The appellant has not denied that Rs. 25 million was given to him by PW-01 through PW-02 and 03. His initial claim has been that transaction in relation to the two vehicles allegedly promised to be supplied by him was over, and handing over of 25 million to him by PW-01 was in relation to another transaction.

However, in his dock statement, it has been his position that this was done on the basis of sharing profit, but he could not return the money as he was unable to make a profit out of the said vehicle transaction.

It is well settled law that if an accused person is taking up a position in a case where he was criminally charged, that position must be put to the relevant witnesses at the appropriate time.

When PW-01 who was the person alleged to have been fraudulently and dishonestly deceived by the appellant was giving evidence, the appellant's position had been that there was no connection between Rs. 25 million and two Prado vehicles and the transaction in relation to Rs. 25 million has been completed without any due and that is the reason why the appellant is in no possession of any documents in relation to the alleged vehicle transaction.

He has failed to put any questions to the appellant in the manner which would support his position taken in his dock statement where he has referred in detail about the money being given to him by PW-01 to import vehicles and sell them at a profit and share the proceeds. It had been the position of the appellant that money was given to PW-02 and 03 who were vehicle importers to import vehicles through them. However, he has failed to put that position to PW-01 when he gave evidence.

The said persons mentioned by the appellant, namely, PW-02 and 03 have given evidence in this matter. They have confirmed that the money deposited by PW-01 into their accounts was handed over to the appellant. It appears from their evidence that they are relatives of the appellant and through their accounts, money had been regularly transacted by the appellant. If it was the position of the appellant that they are vehicle importers and the amount relevant to this action was deposited to their accounts for such a purpose, the appellant should have put that position when they were giving evidence so that they can answer such a claim, which the appellant has failed to do.

The contradiction marked V-01 needs to be considered under these circumstances to find whether it has created any doubt as to the evidence of the prosecution.

I find that the learned High Court Judge has considered the said contradiction in that context, and in doing so, he has considered the admitted facts to come to a finding that the said contradiction is not a matter that goes into the root of the action.

In the first information letter provided by the PW-01 to the police, which is the document marked P-01, he has stated that he had firm orders for two Prado vehicles and that was the reason why he deposited the money as instructed by the appellant. However, in his evidence before the Court, he has stated that he had no firm orders, but his intention was to have the two vehicles and sell it at a profit.

As determined correctly by the learned High Court Judge, I am not in a position to conclude that this was a contradiction that creates a doubt in relation to the evidence when taken in its totality, as the handing over of Rs. 25 million to the appellant by PW-01 was not a disputed fact. This transaction has taken place in the year 2005. Given the value of money that can be attributed to that year, 25 million is an amount that nobody would give to a third party without any purpose. It is clear from the evidence of PW-01, that he has given this money in order to have two vehicles as promised by the appellant. Although appellant has admitted having taken the money, his position has been that the money was given to him not for the purpose of giving two Prado jeeps to PW-01, but for the purpose of importing other vehicles and selling and sharing profits. According to his own admission, even that has not been done which shows that the appellant had no intention of returning the money or the profits he claimed, under any circumstance.

I find that the learned High Court Judge has considered the version of events put forward by the appellant in order to find whether the story has created a

doubt as to the evidence of the prosecution or at least it has provided a sufficient explanation by the appellant and for nothing else.

I find no reason to believe that the learned High Court Judge had predetermined the matter. I am of the view that the learned High Court Judge was well possessed of the relevant legal principles as to the proof of a charge against an accused person in a criminal matter. He has well considered the evidence of the prosecution to come to his finding that the evidence of the prosecution can be accepted beyond reasonable doubt and hence the charge has been proved against the appellant.

I have no reason to disagree with the determination of the learned High Court Judge and find no merit in the considered grounds of appeal.

The appeal therefore is dismissed. The conviction and the sentence affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal