

**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.

**CA No: CA/HCC/267/2009**  
**HC: Colombo: HC9833/1999**

The Democratic Socialist Republic of Sri  
Lanka

**Complainant**

**Vs.**

Aluthbaduge Srimathi Jayantha Rodrigo

**Accused**

**And now between**

Aluthbaduge Srimathi Jayantha Rodrigo

**Accused- Appellant**

**Vs.**

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

**Complainant-Respondent**

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

**&**

**R. Gurusinghe J.**

**Counsel:** Razik Zarook, PC with Rohana Deshapriya AAL and Chanakya  
Liyanage AAL for the Accused-Appellant

Haripriya Jayasundara, PC, ASG for the Complainant-  
Respondent

**Written Submissions:** By the Accused-Appellant on 15.02.2017

By the Complainant-Respondent 31.05.2017

**Argued on :** 26.10.2022

**Decided on :** **31.01.2023.**

**N. Bandula Karunarathna J.**

This appeal is from the judgment, delivered by the learned Trial Judge of the High Court of Colombo, dated 29.10.2009, by which, the accused-appellant, was convicted and sentenced to 2 years of rigorous imprisonment, which was suspended for 5 years and fined Rs. 95,000/.

The accused-appellant was indicted in the High Court of Colombo on following counts by indictment dated 05.01.1999:

- i. Committing an offence punishable under section 386 of the Penal Code, read with section 5 (l) of the Public Property Act No. 12 of 1982, for dishonestly misappropriating a sum of Rs. 60,000/= payable to the Government of Sri Lanka as stamp duty during the period of 15.02.1991 to 30.03.1991, in Colombo.
- ii. Committing an offence punishable under section 196 read with section 190 of the Penal Code for making a false declaration in the monthly list as a Notary Public that Deed No. 734 dated 15.02.1991 was a Last Will.
- iii. Committing an offence punishable under section 196 read with section 190 of the Penal Code for making a false statement that stamps to the value of Rs. 60,000/= were affixed to the duplicate of the said Deed No. 734 dated 15.02.1991.
- iv. Committing an offence punishable under section 400 of the Penal Code read with section 5(1) of the Public Property Act No. 12 of 1982 for misleading the Clerk and the Additional Registrar of the Land Registry of Ratnapura, by making a false statement that stamps to the value of Rs. 60,000/= were affixed to the duplicate of the said Deed No. 734 dated 15.02.1991.

The trial commenced on the 13.11.2006. The prosecution led the evidence of the following witnesses;

- i. Upananda Piyasena on behalf of Hansawawthie Wanigasekara Perera, the Land Registrar of Ratnapura (PW1);
- ii. Kumarasinghe Somasiri Jayamanne, Land Registrar, Colombo (PW2);
- iii. B. H. Anura Pieris (PW3);
- iv. Ugath Meevitage Wijeratne (PW5);
- v. Pethiyalage Piyasena Saman Kumara (PW7);
- vi. Inspector of Police Wimalasena (PW8).

The prosecution marked documents X 1 to X 6 and closed the prosecution case. The marked documents were as follows;

- X 1 - The relevant page in the Day Book kept at the Land Registry in Ratnapura (the entry regarding Deed No. 734 is marked as X 1 (aa));
- X 2 - The extract from the said Day Book;
- X 3 - The Original of the said Deed No. 734;
- X 4 - Duplicate of the said Deed No. 734;
- X 5 - Amended monthly list sent by the accused-appellant;
- X 6 - Notaries Book (The entry regarding Deed No. 734 is marked X 6(a)).

Thereafter, an application under section 200 of the Criminal Procedure Code was made on behalf of the accused-appellant. The learned Trial Judge rejected the said application and called for the defence and the accused-appellant gave evidence from the witness box and marked documents Y 1, Y 2, and V 1.

The learned High Court Judge delivered the judgement on 29.10.2009, and acquitted the accused person from the charges under the Public Property Act No. 12 of 1982, but convicted her on the other 4 charges, and imposed sentences as follows;

- (i) Imprisonment for 6 months and a fine of Rs. 20,000/= for the first charge;
- (ii) Imprisonment for 9 months and a fine of Rs. 25,000/= for the second charge;
- (iii) Imprisonment for 9 months and a fine of Rs. 25,000/= for the third charge;
- (iv) A fine of Rs. 25,000/= for the fourth charge.

The total imprisonment period for 24 months was suspended for 5 years. The present appeal was preferred against the said conviction and the sentence.

The accused-appellant raised the following grounds of appeal;

- (i) The learned Trial Judge had failed to consider that the prosecution had not proved the charges against the accused-appellant beyond reasonable doubt.
- (ii) The learned Trial Judge had failed to consider that the only evidence against the accused-appellant is hearsay evidence which is inadmissible.
- (iii) Convictions in relation to charges 1 and 4 are erroneous.

Learned counsel for the respondent submits that it is proved beyond reasonable doubt that Deed No. 734, which is the subject matter of this case, is a Mortgage Bond attested by the accused-appellant on 15.02.1991, when she was an employee of John Keells PLC. The value of the Mortgage Bond was Rs. 6,000,000/=. The stamp duty payable was Rs. 60,000/=.

The learned counsel further says that the land related to the present dispute was owned by one Anura Pieris and the mortgage was in connection to a land in Ratnapura. It was proved that the accused-appellant had submitted the original of the said Mortgage Bond with a stamp of Rs.1/- affixed for registration in the Land Registry at Ratnapura.

The documents produced and marked as X 1, X 2 and X 3 which are material documents in this case clearly indicates that the said Deed No.734 is a Mortgage Bond and that it have been duly registered in the Land Registry of Ratnapura. The prosecution witness Upananda Piyasena (PW 1) who gave evidence on behalf of the Land Registrar of Ratnapura, Hansawathi Perera, in his evidence had categorically stated that the Deed No. 734 is a Mortgage Bond and that the due amount of stamp duty had been affixed to that.

PW 1 had clearly admitted that when the said deed was accepted for registration, they were satisfied that the stamps to the amount of Rs. 60,000/= had been duly affixed.

Page 122 of the appeal brief is as follows;

- ප්‍ර : රජයට ගෙවපු මුදල ගෙවල තිබෙනවාද කියලා බලන්න?
- උ : මුද්දර ගාස්තුවල වටිනාකම සඳහන් කරනවා .
- ප්‍ර : X 3 මුල් පිටපතේ මුද්දර ගාස්තු ගත් බව සඳහන් කර තිබෙනවාද?
- උ : ඔව්.
- ප්‍ර : කීයද එය?
- උ : රු 60,000/- ක් කියලා තිබෙනවා .
- ප්‍ර : එම රු 60,000/- මුදල් බස්නාහිර පළාතට තේද?
- උ : ඔව්
- ප්‍ර : රු 60,000/- ක මුද්දර අලවා තිබෙනවාද?
- උ : ඔව්
- ප්‍ර : අවසානයේ තිබෙන රු 60,000/- ක මුදල 2 වන පිටපතේ අලවා තිබෙන බවට තමා සෑහීමකට පත්වෙනවාද?
- උ : ඔව්
- ප්‍ර : වෙනත් කරුණු යටතේ මොනවාද තිබෙන්නේ කියන්න?
- උ : ඊසිටිපත අලවා තිබෙනවා.

Witness Pethiyalage Piyasena Saman Kumara (PW 7) who was the Clerk at the Land Registry in Ratnapura had admitted that the stamp duty was duly paid for the said deed.

Page 137 and 138 of the appeal brief is as follows;

- ප්‍ර : ඉන් පස්සේ ඔබ මොකක්ද කළේ ?
- උ : ඔප්පුව ලියාපදිංචි කළා.

- ප්‍ර : රු 60,000/- ක මුද්දර ඔප්පුවේ දෙවෙනි පිටපතට නිසියාකාරව අලවා තිබෙනවා කියා සැහීමකට පත් වුනාද ?
- උ : ඔව්
- ප්‍ර : ඒ මුද්දර ඔක්කොම ඇලවුයේ නැතිනම් ඔප්පුව ලියා පදිංචි කරනවාද ?
- උ : නැහැ.
- ප්‍ර : දැන් ඔය දෙවැනි පිටපතට රු 60,000/- ක මුද්දර අලවා තිබෙනවාද කියන එක ගැන සැකයක් හිතූනා නම් ඒ සම්බන්ධයෙන් වෙනත් ක්‍රියා මාර්ගයක් ගන්නවාද?
- උ : අදාළ ඉඩම් රෙජිස්ට්‍රාර් ගෙන විමසනවා මේකට මුද්දර කොච්චර ගහලා තිබෙනවාද කියලා.
- ප්‍ර : එවැනි විමසීමක් X 3 සම්බන්ධයෙන් කරන්න අවශ්‍ය වුනාද ?
- උ : නැහැ.
- ප්‍ර : ඇයි ඒ ?
- උ : නියම විදිහට බැලූ බැල්මට අවශ්‍ය දේවල් කරලා තිබුන නිසා.
- ප්‍ර : මොකක්ද ඒකෙන් අදහස් කළේ ?
- උ : ඔප්පුවේ වටිනාකමට මුද්දර අලවා සහතික කරලා තිබෙනවා. ඒ නිසා විමසන්න අවශ්‍ය වුනේ නැහැ.

The Day Book of the Ratnapura Land Registry was marked X 1 and the relevant extract from the said Day Book was marked X 2. The original of the said Mortgage Bond was marked X 3, bear testimony to the fact of registration of the said Mortgage Bond. The duplicate of the said Mortgage Bond, Deed No. 734 was marked and produced as X 4.

The original monthly list of the Notary could not be found and was not available. Therefore, it could not be produced in evidence. The accused-appellant also did not produce a copy of the original monthly list. The amended monthly list submitted by the accused-appellant was marked as X 5, together with the belated duplicate of the said Deed marked X 4. The said duplicate was submitted more than one year after the original deed was registered.

The duplicate of the said Deed No.734 which is the crucial document in issue, was registered in the Land Registry of Colombo as the Notary, the accused-appellant in the present case is from Colombo. The Additional Land Registrar, who was at the Colombo Land Registry who was the witness PW 5, Ugath Meevitage Wijeratne, in his evidence had admitted that the said duplicate which was marked as X 4 was handed over to the Colombo Land Registry by one Jayantha Pieris, an Executive Officer of John Keells PLC.

Police witness, Inspector Wimalasena (PW 8), who conducted the investigation had testified that the stamps were duly affixed to the duplicate of Deed No. 734 and cancelled when he took the said deed into custody.

- ප්‍ර : ඒ 734 ඔප්පුව සම්බන්ධයෙන් මොනවද ඔබ බාරයට ගත් ලේඛණ?

- උ : නීතිඥ සහ නොතාරිස් ඒ.එස්.ජේ. රොඩ්රිගෝ ලියා සහතික කර ඇති අංක 734 ණය උකස්කරයේ දෙවන පිටපත
- ප්‍ර : ඒක කවදාද ලබා ගත්තේ ?
- උ : 1993.01.18 වෙනිදා.
- ප්‍ර : ඒ දෙවෙනි පිටපත කියා ඔබ සඳහන් කරපු එක මොන ආකාරයේ ඔප්පුවක්ද ? මොන වර්ගයේ ඔප්පුවක්ද ?
- උ : ඇප උගස්කරයක්.
- ප්‍ර : එතකොට ඒ ඇප උගස්කරයට අවශ්‍ය මුද්දර ගසා තිබුණාද ඒ ඔප්පුවේ?
- උ : මම බාර ගන්නා අවස්ථාවේදී මට මතක හැටියට ගසා තිබුණා.

Page 308 of the appeal brief is as follows;

- ප්‍ර : මම තමාට පෙන්නනවා X 4 වශයෙන් ලකුණු කර ඇති අංක 734 දරණ ඔප්පුව හරිද?
- උ : හරි
- ප්‍ර : ඔය ඔප්පුව කවදාද ලියලා තියෙන්නේ , ඕකේ තියෙන සටහන් අනුව කවදා සහතික කරපු ඔප්පුවක්ද?
- උ : දිනය තියෙන්නේ 1991 පෙබරවාරි 15
- ප්‍ර : ඔය X 4 කියන ලේඛනයේ රු 60,000/- ක වලංගු මුද්දර ගහලා තියෙනවාද?
- උ : එහෙමයි.
- ප්‍ර : ඒ මුද්දර අවලංගු කරලා තියෙනවා. එතකොට ඒ මුද්දර මත ඉරි කැලී ගහලා අවලංගු කරලා තියෙනවා නේද බලන්න?
- උ : අත්සන් වගයක් තියෙනවා.
- ප්‍ර : ඒ අත්සන්වල දිනය කවදාද?
- උ : 91.2.15

The Notaries Book which was marked as X 6, and more specifically X 6 (a) indicates that in the original monthly list, Deed No. 734 was entered as a Last Will, and not as a Mortgage Bond. It is evident that the duplicate of the original deed was not submitted to the Land Registry with the necessary stamps to the value of Rs. 60,000/=. The learned counsel for the respondent submits that the accused-appellant had submitted a false declaration through her monthly list, by concealing the attestation of a Mortgage Bond, and instead declaring a Last Will in its place and thereby further failing to submit the duly stamped duplicate affixing stamps to the value of Rs. 60,000/= on the due date, and delaying over a year.

It is the contention of the learned counsel for the respondent that this action not only deprived the government of revenue, but also cheated the Registrar of Lands of a sum of Rs. 60,000/= as he was deceived into registering the said deed on the belief that the stamp duty was paid when in fact it was not so, and misappropriated funds to the value of Rs. 60,000/ =.

The prosecution evidence and the documents marked does not prove that the accused-appellant had acted with a dishonest intention in order to misappropriate a sum of Rs. 60,000/= which is due as stamp duty. The learned Trial Judge have failed to consider that the charges against the accused-appellant are not proved beyond reasonable doubt.

Section 386 of the Penal code reads as follows;

“Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for a term which may extend to two years, or with a fine, or with both.”

The accused-appellant was cross-examined at length at the trial and it is important to note that the prosecution had failed to establish that the appellant had acted dishonestly to convert the said stamp duty to her own use.

In Dissanayake vs. Attorney-General II Sri. L.R 150 (CA/SC/279/78-MC Kuliwapitiya/92043) it was held that "the onus is on the prosecution to prove that the misappropriation was committed with a dishonest intention. Mere deficiency in the quantity of goods entrusted to a servant is not sufficient to maintain the charge. Even though the deficiency in quantity is proved and accepted by the person responsible for the goods, intention to misappropriate cannot be presumed."

I am of the view that in a charge of criminal misappropriation the onus of proving the important ingredient of the charge, namely that the misappropriation was with a dishonest intention was on the prosecution. There could have been very many explanations for deficiency. Thus the 1<sup>st</sup> charge against the accused-appellant have not been established and the learned Trial Judge had failed to consider that in his judgment.

Another argument raised by the learned counsel for the accused-appellant was that the Trial Judge had failed to consider that the only evidence against the accused-appellant is hearsay evidence which is inadmissible.

Witness Ugath Meevitage Wijeratne (PW 5) in his evidence had stated that the duplicate of the said Deed 734 was handed over to the Land Registry with an "amended" monthly list which was marked as X-5 by one Jayantha Pieris. In the said monthly list marked X 5 the Deed No. 734 is entered as a Mortgage Bond.

Evidence at pages 188 & 189 of the appeal brief is as follows;

- ප්‍ර : X 5 මාසික ලැයිස්තුව අනුව අංක 734 දරණ ඔප්පුව සඳහන් කර තිබෙනවාද?  
උ : ඔව්.  
ප්‍ර : මොකක් වශයෙන්ද තියෙන්නේ ?  
උ : උකස් ඔප්පුවක් වශයෙන්  
ප්‍ර : එහි දිනය ?  
උ : 1991 පෙබරවාරි 15

ප්‍ර : ලක්ෂ හැටක උකස් ඔප්පුව වශයෙන් කියෙනවා ද?

උ : ඔව්

ප්‍ර : හැට දහසක් රු 60,000/ වශයෙන් මුද්දර ගාස්තු කියෙනවාද?

උ : ඔව්.

He had further stated that the Record Keeper Premaratne informed him that in the original monthly list which was at the Registry at the time this amended list was submitted, the Deed No. 734 was entered as a Last Will.

Evidence at page 190-191 appeal brief is as follows;

ප්‍ර : X 5 මාසික ලැයිස්තුව නැවත පෙන්වයි. දිනය 91 මාර්තු 13 ලෙස කියෙනවා කිව්වාද?

උ : ඔව්.

ප්‍ර : මෙම ලේඛනය භාර ගන්න කොට දින මුද්‍රාව තිබුණාද?

උ : ඔව්.

ප්‍ර : දිනය වශයෙන් කවදාද?

උ : 1991 මාර්තු 15 කියෙනවා.

ප්‍ර : නොතාරිස්වරියගේ දින මුද්‍රාව කියෙනවාද?

උ : ඔව්.

ප්‍ර : 1991 මාර්තු 15 ට පසු ඔබට ලැබුණා කිව්වා නේද?

උ : ඔව්.

ප්‍ර : එහෙම ලැබුණු මාසික ලැයිස්තුව ඊට පෙර දින වශයෙන් දින මුද්‍රාව තිබුණේ කොහොමද?

උ : ප්‍රේමරත්න මහත්මයා ලියන්නට ඇති. වැරදීමකින් නිසා ආදේශ කළයුතු නිසා තවත් මාසික ලැයිස්තුවක් නියමිත දිනට අරගත්තා. කලින් දීලා තිබුණේ මාසික ලැයිස්තුව ඒ දිනය යොදන්නට ඕන නිසා ලේඛණයේ තිබුණු අතපසු දිනය දැමීමා ඒ ලේඛණ දෙක සමග භාර ගත්තා.

The said original monthly list was never produced before the court. The said Record Keeper Premaratne was also deceased at the time of the trial and his evidence was never lead in court. Thus, the evidence given by PW 5 referring to a mistake done by said Premaratne can be considered as hearsay evidence. Therefore, the accused-appellant was denied an opportunity to challenge the veracity of the evidence of witness Wijeratne (PW 5).

The Notaries Book which was marked as X 6 at the trial carried an entry that the said Deed No. 734 was a Last Will. At the cross-examination witness Wijeratne (PW 5) admitted that entries in the Notaries Book is made by the clerk at the Land Registry.

Page 207 appeal brief is as follows;



- ප්‍ර : මේ X 6 කියන ලේඛනය කවුරුන් විසින් සකස් කරනු ලබන ලේඛනයක්ද ?
- උ : නොකාරිස් ලිපිකරු විසින් තමයි මෙහි ඇතුළත් කිරීම් කරන්නේ.
- ප්‍ර : මෙම ලේඛනය පවත්වාගෙන යන්නේ කොහේද ?
- උ : ඉඩම් රෙජිස්ට්‍රාර් කාර්යාලයේ.

Witness Kumarasinghe Somasiri Jayamanne (PW 2), the Registrar of Colombo Land Registry when questioned at cross-examination admits that the officers at the Registry are responsible for the errors made in the Notaries book.

Page 207 of the appeal brief is as follows;

- ප්‍ර : එන්.බී.සී පොත කවුද පවත්වාගෙන යන්නේ?
- උ : 2 වන ඉඩම් රෙජිස්ට්‍රාර යූ. විජේරත්න මහතා
- ප්‍ර : පුද්ගලිකව පිටස්තර අයට මේ ලේඛනයේ විස්තර ඇතුළත් කරන්න පුළුවන්ද ?
- උ : කරන්න බැහැ.
- ප්‍ර : එහෙම නම් මේ එන්.බී.සී පොතේ තිබෙන සටහන් හරි හෝ වැරදි හෝ තමාගේ නිලධාරියෙක් ඇතුළු කළ සටහන් වෙන්න ඕන ?
- උ : එහෙමයි.

Evidence given by Witness Kumarasinghe Somasiri Jayamanne (PW 2) suggests irregular procedure in the part of the staff at the Land Registry in registration of the deeds and documents.

Page 237 & 238 of the appeal brief is as follows;

- ප්‍ර : ඒ අනුව අංක 734 අන්තිම කැමති පත්‍රය ලකුණු කළා?
- උ : ඔව්.
- ප්‍ර : ඔබ ඒ පිළිබඳව විජේරත්නගෙන් ප්‍රශ්න කළාද ?
- උ : ඔව්.
- ප්‍ර : තමා එහිදී මොන වගේ ප්‍රශ්න කිරීමක්ද කළේ ?
- උ : මම බාර්ගුම් එකට ගිහින් එනවිට විජේරත්න එළියේ සිටියා. ආරච්චිත් සිටියා මම ඇහුවා මොකටද ඉන්නේ කියලා. ඊට පසු ඔහු කිව්වා මේ ගැන ක්‍රියා මාර්ගයක් ගන්න එපා අන්තිම කැමති පත්‍රය ලිව්වේ මමයි කියලා.

In considering the totality of the said evidence the accused-appellant cannot be held responsible for the irregularities committed by the officers at the Land Registry. The appellant has no way of establishing this, as this evidence is mainly hearsay. The contention of the accused-appellant was that the deceased officer Jayantha Pieris mainly handled the deed work at John Keells PLC. Jayantha Pieris who was initially made a suspect in this case died under tragic circumstances before the commencement of the High Court Trial. Hence his

evidence was not at any time led at the High Court. Thus, the veracity of the evidence referred to by witness PW 5 is not established.

The learned Trial Judge should have completely acquitted the accused-appellant on charges 1, 2, 3 and 4.

In The King vs. Cassim 48 NLR 116 it was held that "where hearsay evidence formed part of the evidence upon which the Jury were invited to decide a vitally important question which arose in the case" held that it was likely that the Jury were influenced by the reference to the hearsay evidence."

The accused-appellant admitted attesting Deed No. 734, and admitted X 3, X 4, and the amended monthly list X 5. At the time of the trial, her Law Clerk Jayantha Pieris was dead. The accused-appellant stated in evidence that it was Jayantha Pieris who was involved in the preparation of the monthly list, and the submission of deeds for registration to the Land Registry, and that it was Jayantha Pieris who affixed the necessary stamps on duplicates, and submitted the same. The accused-appellant further stated that she was pre-occupied with her job and entrusted Jayantha Pieris with all matters connected to the registration of deeds. It is evident that Jayantha Pieris was initially a suspect in this case, but died before the trial commenced.

The accused-appellant stated that she cannot remember whether she had checked the monthly list, and that she was shocked to learn that the monthly list had contained a Last Will instead of the Mortgage Bond. She denied guilty and indirectly apportioned criminal liability on Jayantha Pieris.

The evidence of the accused-appellant is creating a reasonable doubt as she had signed the monthly list and also is required to cancel the stamps at the time of affixation on the duplicate. Therefore, it is her responsibility to affix the necessary stamps on the duplicate of the deed and submit it on the due date to the Land Registry. It is true that as a Notary Public she has specific responsibilities under the Notaries Ordinance and cannot legally take up the position that her duties and responsibilities were performed by an Office Clerk of a department.

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 Mudiyanseelage 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".

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 fair trial against an accused on the basis of presumption of innocence as set out in Article 13(5). Evidence for defence in our 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. 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.

The learned Trial Judge had not given reason why she rejected the explanation given by the accused-appellant.

When the Trial Judge had 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 that there is no reasoning to effect proof beyond reasonable doubt attached to findings of the learned Trial Judge.

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 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 findings 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 accused-appellant.

I, therefore, decide to set aside the conviction and sentence dated 29.10.2009.

The accused-appellant is acquitted and discharged from all 4 counts in the indictment.

The Appeal of the accused-appellant is allowed.

**Judge of the Court of Appeal**

**R. Gurusinghe J.**

**I agree.**

**Judge of the Court of Appeal**