

**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/0024/22

COMPLAINANT

Vs.

High Court of Colombo

Hemantha Pushpa Kumara *alias*

Case No. HC 461/2001

Kurumbapitiyalage Hemantha Pushpalal

ACCUSED

AND NOW BETWEEN

Hemantha Pushpa Kumara *alias*

Kurumbapitiyalage Hemantha Pushpalal

ACCUSED-APPELLANT

Vs.

The Attorney General,
Attorney General's Department,
Colombo 12

RESPONDENT

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

Counsel : Kasun Liyanage for the Accused Appellant
: Anooa De Silva, DSG for the Respondent

Argued on : 02-05-2023

Written Submissions : 22-12-2022 (By the Accused-Appellant)
: 27-04-2023 (By the Respondent)

Decided on : 12-06-2023

Sampath B. Abayakoon, J.

The accused appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo on 8 counts of criminal breach of trust and criminal misappropriation for committing offences punishable in terms of sections 389 and 386 of the Penal Code.

Count number 5 and 6 of the indictment had been withdrawn by the prosecution at the trial. After the trial against the appellant, the learned High Court Judge of Colombo by his judgement dated 12th December 2019 found the appellant guilty only for the first count preferred against him. He was acquitted on the 2nd count on the basis that the said count should be a count alternative to the 1st count for which the appellant was found guilty. He was acquitted of 3rd, 4th, 7th and the

8th count on the basis that the prosecution has failed to prove the said counts against him.

Accordingly, by his sentencing order of the even date, the learned High Court Judge, after having considered the mitigatory circumstances pleaded on behalf of the appellant and the other relevant facts and the circumstances, has sentenced the appellant for 30 months rigorous imprisonment for the count he was found guilty, in addition to the fine and the default sentence imposed and the compensation ordered to be paid to Singer Sri Lanka Ltd who was the aggrieved party.

The count no. 1 for which the appellant was found guilty reads as follows.

1. The accused appellant on or about 3rd May 1999 in Colombo committed the offence of criminal breach of trust by using a pay order handed over to him by Singer Sri Lanka Ltd for a sum of Rs. 825,094/= by failing to get the goods as required from Sri Lanka Customs, and instead getting some other goods released contrary to the agreement entered by him with the said Singer Sri Lanka Ltd, and thereby committing an offence punishable in terms of section 389 of the Penal Code.

The facts that led to the conviction of the appellant to the above-mentioned count are briefly as follows.

The appellant functioned as the owner of a clearing agency called Janaranjana Enterprises, in assisting importers to clear goods from Sri Lanka Customs. In his capacity as a clearance agent, it was the appellant who handled the relevant paperwork and paid the relevant Customs levies on behalf of his clients and got the goods imported by them released.

According to the evidence of PW-01, who was the Items Manager of Singer Sri Lanka Ltd during the relevant period, the company has been dealing with the appellant since 1999 for the purposes of getting their goods cleared from the Customs. As of usual practice, when the company was informed of the relevant

sum that needs to be paid to the customs in relation to the goods imported by them relating to the 1st count preferred against the appellant, they have obtained the pay order no. 272748 marked P-01 from their bank for a sum of Rs. 825,094/= and handed over to the appellant for the relevant purpose. Along with the pay order marked P-01, the company has handed over another pay order for a sum of Rs. 946,417/= (documents marked P-02) for the same purpose, which is the amount in relation to the 3rd and the 4th counts preferred against the appellant.

Since the relevant goods were not cleared within the normal time period, PW-01 has contacted the appellant and the appellant has given various excuses for not getting the goods cleared from the Customs. He has informed that the relevant file has been lost and a new file has to be reconstructed and there are issues with the Customs. Lately, PW-01 has failed to even contact the appellant over the phone. Upon suspicion, when it was inquired from the relevant bank, the company has been informed that the relevant pay orders (P-01 and P-02) had been paid to the Commissioner General of Customs. It has been discovered that the relevant pay orders have been used to get some goods other than the goods belonging to Singer Sri Lanka Ltd cleared from the customs.

The subsequent attempts by the company to contact the appellant has failed, and the company has preferred a complaint in this regard to the Criminal Investigation Department. The Singer Sri Lanka Ltd has had to incur additional costs other than the sums mentioned in the pay orders to get the goods released subsequently.

PW-01 has admitted under cross-examination that it was one Yatawara who was a clerk at her institution who attended to these matters, and has stated that she was unaware of any personal difficulties faced by the appellant. It has been found that the relevant pay order P-01 has been used to get goods imported by one Sunimal Enterprises.

According to the bank officials who were called as witnesses at the trial, when a pay order of this kind is issued, it can be used to pay Customs duties in relation to any other goods imported by any other importer, as the pay orders are not issued for a specific consignment.

When called for a defence at the conclusion of the prosecution case, the appellant has made a dock statement and has admitted that he had a business called Janaranjana Enterprises where Customs clearance on behalf of his clients was conducted, and has admitted that he was doing such clearance for Singer Sri Lanka Ltd during the relevant period.

However, he has denied that he misappropriated or caused the criminal breach of trust of the sums mentioned in the charges against him. He has taken up the position that it was Kapila Yatawara who was a clerk at Singer Sri Lanka Ltd that may have committed this offence.

The Ground of Appeal

The learned Counsel for the appellant formulated the following ground of appeal for the consideration of the Court during the hearing of this appeal.

1. The learned Trial Judge has erred in law in applying principles relevant to the circumstantial evidence with regard to the entrustment being the threshold ingredient of section 389 of the Penal Code.

It was submitted by the learned Counsel for the appellant that since there was no direct evidence as to the entrustment by Singer Sri Lanka Ltd to the appellant, the learned High Court Judge has considered the circumstantial evidence to determine that there was such an entrustment. It was his view that the learned High Court Judge was misdirected in that regard, and there was no circumstantial evidence that points directly towards the appellant. He was of the view that the evidence led in this action points to another person who may have caused the criminal breach of trust, and that fact has not been considered in its correct perspective by the learned High Court Judge.

It was contended that the circumstantial evidence considered by the learned High Court Judge was not sufficient to prove the charge against him and the learned High Court Judge has acted on suspicious circumstances, which would not suffice to find an accused person guilty.

The submissions of the learned Deputy Solicitor General (DSG) was that the prosecution has sufficiently proved that the relevant pay orders were entrusted to the appellant for the purposes of clearing the goods imported by Singer Sri Lanka Ltd, and that the appellant has used the relevant pay orders to clear goods belonging to some other company, thereby committing the criminal breach of trust.

He pointed out that the appellant has failed to challenge any of the relevant evidence of PW-01, and the claim by the appellant in relation to another person was a concocted story.

Consideration of the Ground of Appeal

It is clear from the judgement of the learned High Court Judge that he was very much aware as to the relevant matters that need to be proved in a case of this nature, and the standard of proof.

The offence of criminal breach of trust has been defined in section 388 of the Penal Code in the following manner.

388. Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust”.

The fact that the Singer Sri Lanka Ltd had obtained two bank pay orders through Hatton National Bank in order to clear the goods imported by them from Sri Lanka Customs are proven and undisputed facts in this case. The fact that the appellant was in the business of running a clearing agency in the name of Janaranjana Enterprises and was providing services to Singer Sri Lanka Ltd and several other importers during the time relevant to the incident are also undisputed facts. The fact that the pay orders marked P-01 and P-02 had been used to pay Customs duties in relation to goods imported by another importer had been proved beyond reasonable doubt by way of the evidence led by the prosecution.

Under the circumstances, the learned High Court Judge has correctly held that the entrustment of the relevant pay orders to the appellant for the purposes of clearing goods imported by Singer Sri Lanka Ltd has to be proved before the trial Court. It has been decided to consider whether there is sufficient circumstantial evidence against the appellant to that fact in his judgement. This approach has become necessitated because of the fact that it was not the PW-01 who gave evidence in Court on behalf of the company who had physically handed over the relevant pay orders to the appellant.

It had been the evidence of PW-01 that after the relevant pay orders were handed over to the appellant, the goods were not released as the usual practice within 2 or 3 days of the handing over of the pay order. This has resulted in PW-01 inquiring about this matter from the appellant who was the designated clearing agent of her company. It was the evidence of PW-01 that the appellant provided various evasive answers and explanations for the delay and subsequently failed to answer the phone or he could not be found in his usual address of the business.

None of these pieces of evidence had been materially challenged or disputed at the trial. Subsequently, it had been discovered that the said pay orders had been used to clear some other goods imported by some other companies on whose

behalf the appellant had acted as the clearing agent. The relevant witnesses have given clear evidence in that regard at the trial.

Considering all these pieces of evidence together, and in its totality, the learned High Court Judge has decided that the prosecution has proved entrustment as required in section 388 of the Penal Code to determine that the appellant has acted in criminal breach of trust towards Singer Sri Lanka Ltd.

I do not find any reason to agree with the contention that the considered circumstantial evidence does not prove beyond reasonable doubt, the culpability of the appellant, but only creates a suspicion towards him.

On the contrary, I am of the view that as considered by the learned High Court Judge, the entrustment by Singer Sri Lanka Ltd to the appellant the relevant pay orders for the purposes of clearing the goods imported by the company from Sri Lanka Customs had been proved beyond reasonable doubt.

The evidence led in this action clearly establishes that the appellant after obtaining the relevant pay orders which can be used to clear any other goods as well, had used them to clear goods belonging to other companies and had acted in criminal breach of trust towards the Singer Sri Lanka Ltd.

It is clear from the evidence placed before the Court that the appellant has attempted to put the blame on one Yatawara without any basis to cover his misdeeds. The learned High Court Judge has well considered the defence put forward by the appellant and was correct in determining that there was no basis to conclude that the stand of the appellant had created any doubt on the prosecution evidence, and the appellant's claim was an afterthought.

The learned High Court Judge has also considered whether the actions of the appellant in clearing goods belonging to some other company can be a mistake and has found that no such mistake in relation to Customs transactions can take place.

For the above reasoning, I am of the view that the learned High Court Judge has found the appellant guilty of the 1st count preferred against him with a sound basis, and after analyzing the evidence placed before the Court in its correct perspective.

Hence, I find no reason to interfere with the conviction of the appellant for the 1st count preferred against him.

I find that there had been a misdirection as to the acquittal of the appellant on the 3rd count, which is also a count where the appellant has misappropriated the sum mentioned in the pay order marked P-02 on the wrong premise that the 3rd count relates to a company called Jayawansha Construction. However, since there is no appeal in that regard, I would make no order in relation to the said misdirection.

I find that the learned High Court Judge has well considered the mitigatory factors urged on behalf of the appellant in sentencing him for 30 months rigorous imprisonment, which is according to law and the facts and circumstances of the case.

The appeal is dismissed as I find no merit in the ground of appeal urged.

Accordingly, the conviction and the sentence dated 12th December 2019 by the learned High Court Judge of Colombo is affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal