

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

Phalage Sudath Lakmal

Abegunawardana

ACCUSED – APPELLANT

C.A. 249/2013

HC Kalutara Case No: 612/13

Vs.

Hon. Attorney General,
Attorney General's Department;
Colombo 12.

RESPONDENT

Before : P.R. Walgama, J
: K.K. Wickremasinghe, J

**Counsel : Nagitha Wijesekara with V. Abeywickrema for
the Appellant.**

: Dilan Ratnayake DSG for A.G.

Argued on : 03.10.2016

Decided on : 21.02.2017

P.R. Walgama, J

The accused in this case was charged under Section 403 of the Penal Code, for deceiving and inducing the Complainant to debit certain money to the Accused

Account bearing No. 8400006939 in the Commercial Bank.

As per indictment the charges are as follows;

1. On or about 29th November 2011 the accused had deceived the complainant and made her to deposit a sum of US\$ 9400, in the said Account, stating that the said money to be utilised for the purpose of purchasing a Fishing Boat.
2. Between 01.12.2011 to 31.12.2011 the Accused had induced the complainant to deposit a sum of US\$ 26,200, in the said Account for the purpose of commencing a fisheries industry.

As the accused pleaded not guilty to the charges the trial judge proceeded to trial.

It is the contention of the Accused – Appellant, that the said money was sent to the accused by the complainant not for the purpose of purchasing a fishing boat to commence a fisheries industry, but for the purpose of building a house for the complainant, to stay when ever she comes to Sri Lanka.

It is a admitted fact that the complainant and the Accused – Appellant had a clandestine affair and they had been living together.

Further it is contended by the Counsel for the Accused – Appellant that the alleged money was a donation. In

deed it is said that in the evidence surfaced in the trial no material was establish to prove that value of the fishing boat and the amount of money needed for the fishing industry. Therefore it is the categorical position of the Accused – Appellant that there was no inducement or compulsion by him for the complainant to deposit a sum of US\$ 26,200, and US\$ 9400 in the said account of the Accused – Appellant.

In addition it is said the above money was sent as a donation. This position contradicts the earlier position of transfer of this money was to build a house for the complainant to stay whenever she comes to Sri Lanka.

The complainant in her testimony to court had stated that the Accused – Appellant had suggested of a business which is more lucrative and could earn 10,000 US\$ for a month, and more so the Accused also had spoken about the Fishing Industry. Further her evidence reveals that she was not familiar with the Fishing Industry , and it was at the behest of the Accused that she had invested this money in the said industry. In addition it is said that the Accused had taken her to the Beruwala Fishing Harbour, to convince her of the said business.

It is evident from her testimony that the entire transaction did revolve around the Fishing Industry, and when it was not materialising, the complainant

demanded the money from the Accused and it was at that point the accused had threatened to kill her.

In the course of cross examination it was suggested by the defence that as per documents marked X 3 and X 4 is clearly stated that the money has been sent as a donation, which position has been denied by the complainant.

It was the position of the defence that the said money was utilized to build a house for her. If that was the genuine intention of the Accused – Appellant should have written the house and property in her name. But it was the categorical position that she never sent the money for the purpose of building a house for her. Moreover she was never shown the house that was built for her. It is salient to note that there is absolutely no material to establish that the complainant has sent money to build a house for her. But the complainant's evidence in court was to the effect that the said money was sent to the Accused – Appellant has been established with cogent evidence. She has given a vivid description of the incidents which led her to believe that her money will be utilized for the purpose of purchasing a fishing boat for the Fishing Industry. Therefore this Court is of the view that the Learned High Court Judge was compelled to accept her evidence, as it is unassailable.

The above Section under which the Accused is indicted is reproduced herein below;

Section 403

“Whoever cheats by and thereby dishonestly induces a person deceived to deliver any property to any person or to make, alter, or destroy the whole or any part of a valuable security, or anything which is capable of being converted to a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

After the trial the Learned High Court Judge found the Accused – Appellant guilty and imposed the following sentences.

Had imposed a fine of Rs.20,000/ for each count, and carrying a default sentence of one year AND

For 7 years Rigorous Imprisonment for the 1st count
And

For 7 years Rigorous Imprisonment for the 2nd count

The counsel for the Accused – Appellant also stressed the fact the sentence imposed on the Accused – Appellant is too excessive.

But in considering the attended circumstances under which the Accused was charged and convicted this

Court see no reason to reduce the jail term imposed by the High Court Judge to a lesser period. Hence the contention of the counsel for the Accused – Appellant is devoid of merits and should stand rejected.

It is also contended by the Counsel for the Accused – Appellant that the charges in the indictment are defective as there are two counts for the same offence, but it is seen that the Accused – Appellant had accepted money on two occasions.

The Section 174 of the Criminal Procedure Code has explicitly stated thus and answer to the above is clearly sets out herein below;

“ when a person is accused of more offences than one of the same kind committed within the space of twelve months from first to the last of such offences he may be charged with and tried at one trial for any number of them not exceeding three, and in trials before the High Court such charges may be included in one and the same indictment”.

As a response to the above argument the counsel for the Respondent, in addition to the said section where the two offence charged under section 403 of the Penal Code and committed within one year. There is no basis to object to the joinder of the charges.

In answering the stance taken by the Accused – Appellant the counsel for the Respondent, in respect of the nature of the alleged transaction it is categorically stated that the transaction was not one of a donation but for the purpose of investing in the Fishing Industry. It is established that the afore said transaction is not a donation but in order to avoid any illegal transaction as to money laundering the bank has categorised the subject transaction as one of a donation.

Further it is abundantly clear the purported transaction was not a civil transaction as claimed by the counsel for the Accused – Appellant as there was a criminal intention on the part of the Accused – Appellant to induce the complainant to transfer money to his account. Therefore the criminal element on the part of the accused- appellant is well established by the attended circumstances as stated before.

As a comprehensive response to the final ground of appeal, viz a viz the failure on the part of the Learned Trial Judge to evaluate the evidence of the defence. The contention of the learned DSG was that, it was the Learned Trial Judge had the benefit of observing the demeanour and deportment of the witnesses namely the complainant and the Accused – Appellant, and it is trite law that such evaluation after observation shall not be lightly disturbed in appeal.

As per evidence of the complainant it is abundantly clear that the prosecution has established and proved beyond reasonable doubt that the Accused – Appellant has exorted the complainant's money by inducing her to invest in fishing industry, and made her to believe that the said industry is a lucrative and income generating one. There is no evidence except for the Accused – Appellant's version that the said money was sent to build a house, which house was never shown to the complainant. In fact there was no house in existence, and it was only an imagination of the Accused – Appellant.

It is seen from the sentence imposed by the Learned High Court Judge that the maximum punishment of 7 years of Rigorous imprisonment carrying a default sentence been given. It is the contention of the counsel for the Appellant that the said sentence is excessive and should be set aside. But for the reasons adduced herein before this court is of the view that the same do not warrant an interference of this court to vary the sentence imposed by the Learned High Court Judge.

It was also contended by the Counsel for the Appellant that documents marked X3 and X4 indicated that the alleged money has been sent as a donation. But it is intensely relevant to note that a foreigner cannot send money to invest in a business venture

without following the proper procedure. If the said money according to the Accused – Appellant was sent as a donation he need not take up the position that the money was sent for the purpose of building a house for the Complainant.

In the said back drop this court is of the view that the Learned High Court Judge has arrived at the correct determination by handing down the judgment for a conviction.

It is apposite to note that the prosecution has proved its case beyond reasonable doubt.

We thus, do not find merit in this appeal which is accordingly dismissed.

Accordingly appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J

I agree.

JUDGE OF THE COURT OF APPEAL