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

In the matter of an Appeal made under
Section 331 of the Code of Criminal
Procedure Act No.15 of 1979

CA 300/2016

HC/ COLOMBO/ 6852/2013

Hettinayake Mudiyansele Lilantheni
Dinesha Maliyedda

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Devika Abeyratne** J
P. Kumararatnam J

COUNSEL : **Mr. Ranil Samarasoorya AAL with Amila Nawalage AAL for the Appellant.**

Mr.Sudharsana De Silva DSG for the Respondent.

ARGUED ON : **02/02/2021**

18/03/2021

29/03/2021

DECIDED ON : **03/05/2021**

JUDGMENT

P. Kumararatnam J

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General with six charges in the High Court of Colombo. The first charge was Cheating Mahesh Jayantha Dias to give Rs.1800000/= to the Appellant to secure foreign employment. The second and third charges are for Misappropriation and Criminal Breach of Trust of the same amount. The fourth charge was Cheating Chandrika Sonali Mendis to give Rs.2000000/= to the Appellant to secure foreign employment. The fifth and sixth charges are for Misappropriation and Criminal Breach of Trust of the same amount.

After the trial the Learned High Court Judge has found the Appellant guilty for first, second, fourth and fifth charges and ordered to pay a fine of Rs.5000/= for each charge with a default sentence of three months simple imprisonment. For each count 06 months RI suspended for 10 years was imposed. Further the Appellant was ordered to pay Rs.2000000/= as compensation to PW01 with a default sentence of 03 months simple imprisonment and Rs. 1500000/= compensation to PW02 with a default sentence of 03 months simple imprisonment.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant is on bail and has given consent to argue this matter in her absence due to the Covid 19 pandemic. With the permission of this Court the Appellant was present during the final day of the argument.

At the very out set the Learned Deputy Solicitor General informed this court that he is not contesting the conviction and sentence imposed on second and fifth charges by the trial court. Hence the counsel for the Appellant restricted his argument on the second ground of Appeal.

In the second ground of Appeal the Appellant contends that on a proper correct and impartial reading of the evidence in this case has the prosecution fallen short of establishing the charges against the accused in all their ingredients and in total.

Back ground of the case

In this case PW01 and PW2 are wife and husband. PW01 is a beautician by profession and her husband PW02 was running an advertising firm during the period relevant to this case. As the couple were not successful in their respective businesses, both had decided to migrate to England for greener pasture. At this time the Appellant being a relative of PW01 had promised employment in England and PW01 had paid Rs.2000000/= to the

Appellant on 13/03/2009 in the presence of PW04 who is a Justice of Peace (JP). The Appellant acknowledged the said sum by placing her signature to an affidavit attested by the said JP which had been marked as P1 in the trial. The Appellant had promised to secure a job in England in two months' time.

Likewise, PW02 had paid the Appellant Rs.1800000/= on 04/04/2009 in the presence of the same JP. This occasion too the Appellant had placed her signature to an affidavit and acknowledged the receipt of the said money. The said affidavit was marked as P2 in the trial. After the payment the couple had handed over their passports and waited for the travel arrangement by the Appellant. After some time as the Appellant went incommunicado, PW01 and PW02 had lodged their complaints to Colombo Crime Division on 24/09/2009 as directed by their local police. As the Appellant absconded for some time, the police could only arrest her on 15/07/2010. The prosecution called three more witnesses with PW01 and PW02 and closed their case.

As there was a case to answer by the Appellant the Learned High Court Judge had called for the defence. The Appellant opted to make a dock statement and called two witnesses. In her defence she had completely denied the charges levelled against her.

The Counsel for the Appellant strenuously argued that both PW01 and PW02 had failed to provide cogent evidence with documents with regards to raising of funds allegedly to have been given to the Appellant.

PW01 in her evidence stated that she had sold her jewellery and obtained money from her mother to raise the money. To complete Rs.2000000/= her husband PW02 had given Rs. 500000/= to her. She further said that she had number of jewellery and sold everything to raise the money. Although the defence had marked 03 promissory notes as V4, V5 and V6 with PW01's National Identity Card No. 728180692V but she had denied placing

her signature on those documents. Answering to court PW01 has said that the Appellant would have obtained her identity card number from her passport. Further date of the documents of V4, V5 and V6 had been on 04/12/2006,08/01/2007 and 02/02/2007 respectively. But money had been given to the Appellant by PW01 and PW02 on 13/03/2009 and 04/04/2009 respectively. Further PW01 had denied that she knew a person called Dammika Samankanthi from whom the defence alleges that PW01 had obtained money after signing the promissory notes which had been marked as V4, V5 and V6. The defence witness Samankanthi in her cross-examination admitted that she had not made any complaint against PW01 till she gave evidence in the High Court. This lethargic attitude clearly demonstrates her malafide intention of favouring the Appellant.

During the cross-examination of PW02 the defence had shown V4, V5 and V6 to him. PW02 after examining the same informed the court that signatures appearing on V4, V5 and V6 were not signed by his wife as it differs in some characters. But answering to the court PW02 had admitted signature appearing on V6 as his wife's signature. Even though this evidence favours the defence case no plausible nexus has been elicited between V4, V5 and V6 with the money paid to the Appellant by PW01 and PW2. The Learned High Court Judge citing this reason has very correctly disregarded the documents V4, V5 and V6 which had been marked subject to proof by the defence.

Next the Counsel for the Appellant contended that Appellant's signatures had been forcibly obtained to P1 and P2 by PW02 who had allegedly abducted the Appellant and her daughter from Anuradhapura to Kadawatha and obtained her signature forcibly to blank papers and converted the same as affidavits. Hence the Appellant drew this court's attention about the page setting of P1 and P2 to substantiate her argument. On perusal of the originals of P1 and P2 no visible discrepancies

appear on P1 and P2 and they are in conformity with Section 02 of the Affidavits Act No. 23 of 1953.

Further in their evidence PW01 and PW02 stated that when they paid money to the Appellant at their residence in the presence of PW04 the JP, the Appellant had received the money and placed her signature on P1 and P2 respectively.

Although the Appellant takes up the position that her signatures had been forcibly obtained on P1 and P2 after she and her daughter had been abducted and forcibly held under detention, but no complaint had been lodged in any of the police stations in the island. The conduct of the Appellant in this regard clearly demonstrates her after thought to escape from this case.

The Counsel for the Appellant further argued that PW04 is not a reliable witness as per the contradiction marked as V8. It is the contention of the Appellant that she had never signed P1 and P2 at the residence of PW01 and PW02. According to PW04 the JP, on both occasions had obtained the signature of the Appellant at the residence of PW01 and PW02. He further added that on both occasions as instructed by complainants he had obtained Appellant's signature when the money had been paid to the Appellant. On both occasions P1 and P2 had been prepared by him as per the instructions given to him by PW01.

But PW04 in his statement to police had said that he obtained the signature of the Appellant over a Rs.50/= stamp to an affidavit which had been prepared by PW01. This contradiction had been marked as V8 by the defence. Further two more contradiction on the same point had been marked as V9 and V10.

Although the defence had marked V8, V9 and V10, the witness PW04 re-affirmed that the purported affidavits had been prepared by him and signed in his presence at the residence of PW01 and PW02.

The importance of an omission and a contradiction in criminal trials have been discussed in several judicial decisions by the Appellate Courts of our country. It is pertinent to discuss whether the above-mentioned contradictions V8, V9 and V10 have any adverse effect on the evidence given by PW04 in this case.

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa** (2011) 2 Sri L.R. 292 held that,

“Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgement on the nature of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.

Witnesses should not be disbelieved on account of trifling discrepancies and omissions. When contradictions are marked, the Judge should direct his attention to whether they are material or not and the witness should be given an opportunity of explaining the matter.”

Now I consider whether the aforementioned contradictions are material and affect the trustworthiness and creditworthiness of the evidence of PW04.

The incident happened in the year 2009 and the PW04 had given evidence before the High Court on 22/09/2014 after about 05 years of the incident. Considering the contradictions and the passage of time passed after the incident a reasonable court cannot expect hundred percent accurate evidence from a witness. The Appellate Courts have repeatedly endorsed this position in several decided cases.

In the case of **The Attorney General v. Sandanam Pitchi Mary Theresa (Supra)** the Court held that:

“The court observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies”.

Considering the above-mentioned judicial decision, the Learned High Court Judge has very correctly concluded that the contradiction marked as V8, V9 and V10 are not material contradictions which affect the root of the case.

Next the Counsel for the Appellant argued that the husband of the Appellant who is a relation of PW01 had been separated from the Appellant from the year 2007 and therefore, coming to PW01’s house with the Appellant’s husband is a blatant lie uttered to court by PW01. To substantiate her argument the defence had marked documents V1 (The motion filed along with the divorce plaint) and V2 (The plaint of the divorce case no. DDV/00177/09).

PW01 had reiterated that when the Appellant came to discuss about the foreign employment, she had come with her husband to her house. But when she came to collect money, on both occasions, the Appellant had come alone and collected the money. As stated earlier the Appellant had collected the money on 13/03/2009 and 04/04/2009 from PW01 and PW02 respectively.

It is possible that any married people can be separated for some time and file divorce action thereafter. In this case upon perusal of V1 and V2 the certified copies of the Colombo District Court, which had been admitted by the prosecution at the trial, revealed that the divorce action was filed after completing the corrections of pleadings on 22/07/2009. Hence the position taken by PW01 that the Appellant came with her husband to her house before she accepted money has not been contradicted by the defence. As this argument has no merit the Learned High Court Judge had very correctly rejected this position advanced by the Appellant during the High Court trial.

In the case of **Attorney General v. Viswulingam** 47 NLR 286 Justice Cannon stressed that:

“the judge should direct his mind specially to the issue what contradictions are material and what contradictions are not material before he proceeds to discredit the testimony of a witness”.

In **Jagathsena v. Bandaranaike** [1984] 2 Sri.L.R 39 Justice Collin Thome in considering the issue of contradictions inter se of the testimony of two witnesses, emphasized that:

“the trial judge should probe the issue whether the discrepancy is due to dishonesty or defective memory or whether the witness’s power of observation was limited”.

In this case the Learned High Court Judge has considered all evidence oral and documentary placed before the court by both parties to come to her conclusion. She had analysed all evidence very correctly to come to her conclusion. Also, she has given plausible reasons as to the acceptance and rejection of evidence in her judgment. She had observed the demeanour and deportment of the witnesses and mentioned about their behaviour whenever she thought it would be necessary in the proceedings.

Hence it is wrong to say that the Learned High Court Judge was predetermined and failed to evaluate the prosecution witnesses in a correct perspective.

Considering all the evidence presented during the trial, we conclude that the prosecution has proved the case beyond reasonable doubt. We further conclude that this is not an appropriate case in which to interfere with the decision of Learned High Court Judge of Colombo dated 16/12/2016. Hence, we dismiss this appeal.

Appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

DEVIKA ABEYRATNE, J

I agree

JUDGE OF THE COURT OF APPEAL