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.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No.
HCC/0003/20

Complainant

High Court of Puttalam
Case No. HC/100/2004

Vs.

Don Sydney Manikka Hettiarachchi.

Accused

AND NOW BETWEEN

Don Sydney Manikka Hettiarachchi.

Accused-Appellant

Vs.

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

Complainant- Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : U.R. De Silva, PC with Savithri Fernando, Thilini Athapaththu for the Accused-Appellant.
Harippriya Jayasundera, ASG for the Respondent.

ARGUED ON : 09.09.2024

DECIDED ON : 08.10.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was indicted in the High Court of Puttalam on 20 counts. The first count is committing Criminal Misappropriation of sum of Rs. 2,685,550/- belonging to the Kalpitiya Branch of the People's Bank during the period of 31st of January 2001 to 06th September 2001, an offence punishable under Section 5(1) of the Offences against Public Property Act No. 12 of 1982 as amended by Act No.76 of 1988. Further, the appellant was indicted on the 2nd to 20th counts for dishonestly or fraudulently inducing bank officers to pay money to certain individuals who acted on behalf of the appellant and pawned fake jewellery items, offences punishable under Section 5(1) of the same Act. As the prosecution witness No. 7 and 12 were abroad at the time of the trial, the 2nd to 20th counts were withdrawn by the prosecution and the trial proceeded against the accused-appellant on the first count only. After trial, the learned High Court Judge convicted the accused-appellant for the first count and imposed a sentence of 10

years simple imprisonment and a fine of Rs.8,056,650.00/- which carries a default sentence of 10 years simple imprisonment. This appeal is preferred against the said conviction and the sentence.

Prior to the hearing, written submissions had been filed on behalf of both parties. At the hearing of the appeal, the learned President's Counsel for the appellant and the learned Additional Solicitor General for the respondent made oral submissions. The learned Additional Solicitor General submitted further written submissions with a schedule outlining how the amount of Rs. 2,685,550/- contained in the first charge was determined.

Briefly, the prosecution case is as follows:

The accused-appellant served as the Officer in Charge of the Pawning Division in the People's Bank, Kalpitiya Branch during the period of 31st of January 2001 to 06th September 2001. PW-1, the Manager of the People's Bank, Kalpitiya Branch had initiated a preliminary investigation on 12.09.2021 after being informed by the Regional Office to conduct an audit of the bank's pawn stock. This was in response to a suspected fraud that was discovered in the People's Bank, Negombo Branch during the appellant's tenure in the Pawning Division of the said bank. According to the prosecution, the accused-appellant had repeatedly pawned 2 fake items of jewellery; a gold-plated chain and a bracelet (P-12 and P-13) to the bank through intermediaries and obtained money and thereby committing criminal misappropriation of sum of Rs. 2,685,550/-money belonging to the People's Bank.

In the written submissions tendered on behalf of the Accused-Appellant following grounds of appeal have been urged.

i. The Judgement of the learned High Court Judge is not a Judgment in terms of Section 283 of the Code of Criminal Procedure Act.

ii. The learned High Court Judge has misconceived in law and facts as he has failed to appreciate the evidence in the light of the principles applicable for evaluation of circumstantial evidence.

iii. The learned Trial Judge has improperly rejected the defence case.

However, at the hearing of the appeal, the learned President's Counsel for the appellant stressed the fact that as the two keys of the safe were not with the accused-appellant, he had no opportunity to take back the jewellery that had been pawned to the bank and pawned repeatedly through various persons as stated by the prosecution witnesses.

The learned Additional Solicitor General explained in her submission, the sequence of events which took place in respect of the offence described in the 1st Count and stated that the accused-appellant pawned the same jewellery repeatedly for 55 times through other people such as PW-3, PW-16, PW-17 and PW-20 and misappropriated Rs. 2,685,550/- while being the Officer in Charge of the Pawning Division of the People's Bank, Kalpitiya Branch. She also contended that it was found that there was a deficit of 55 items in the gold stock of the bank and that there were two fake jewelries as well.

In order to substantiate the prosecution version, 55 receipts and 2 receipts pertaining to fake jewellery items were produced. The learned ASG explained by submitting a schedule with further written submissions, how the total amount mentioned in the 1st charge has been computed. According to the said schedule, 18 receipts have been produced through witnesses PW-3, PW-16, PW-17, and PW-20 who could speak about those receipts and 38 receipts have been produced through the retired Credit Officer of the People's Bank. No connection of the accused-appellant to the offence has been established in respect of the other receipt.

The aforesaid 57 receipts have been produced to establish that the appellant has pawned jewellery to the bank through some other people and obtained money from the bank. However, there is no evidence that the appellant pawned the jewellery through some other persons and got money pertaining to the aforesaid 38 receipts produced through the retired Credit Officer of the People's Bank. In respect of the aforesaid 38 receipts, no witness stated that the appellant asked him or her to pawn the jewellery. In addition, no witness stated that the money given by the bank to him or her pertaining to the aforesaid 38 receipts had been handed over to the appellant. Therefore, any culpability of the accused-appellant with regard to the aforesaid 38 receipts has not been established. As it is not established that the accused-appellant had misappropriated the sum of money pertaining to the aforesaid 38 receipts, the decision of the learned High Court Judge that the entire amount mentioned in the 1st charge has been misappropriated by the accused-appellant is incorrect.

Now, this Court has to consider whether the accused-appellant could be convicted for the balance amount from the amount mentioned in the 1st charge excluding the aggregate amount of money pertaining to the aforesaid 38 receipts. In the case of ***M. E. A. Cooray v. The King- 53 N.L.R. 73,*** Court of Criminal Appeal held that the following direction given by the learned trial judge to the jury is in conformity with the law:

" If you can find after your examination of the whole of the evidence that he did commit criminal breach of trust or did dishonestly misappropriate, not the entire sum alleged by the Crown to have been misappropriated but some lesser sum, if that fact is proved to you beyond reasonable doubt, then even though you may not be able to answer with any degree of accuracy the precise sum, but having made every allowance to the accused you still are convinced that he had dishonestly misappropriated a portion of the sum alleged in the indictment, then he would be guilty"

or again:

"Once again I may say, it does not seem to me that it is very important to determine what is the precise figure which went into his hands, or if he did appropriate any money, what was appropriated by him "

Court also observed that *"In England, the proposition was laid down as early as 1858 in Regina v. Thomas Wright 1 [169 E. R. 1070] by no less than five Judges including Judges of the eminence of Lord Campbell C.J. and Coleridge J. that a verdict of the Jury that the prisoner " stole some money " but without specifying the amount was a good verdict."*

In the Bombay case of ***Emperor v Byramji Jamsetji Chevalla 3 [A.I.R. 1928 Bom. 148]*** Fawcett J. had stated that *"if the evidence is sufficient as to establish that at any rate some property such as money has been misappropriated, it seems to me that it is against reason and authority to say that because you cannot specify the exact amount that has been misappropriated the accused cannot be convicted."*

The Court of Criminal Appeal upheld the said position in the aforesaid case of ***M. E. A. Cooray v. The King*** in the following manner: *"We find ourselves in agreement with the view expressed in the Bombay case and we hold that a verdict which is specific and definite that the offence has been committed in respect of some sum of money, though that sum may not be ascertained with exactness, is a proper and valid verdict and is not open to the objection that it is vague and therefore bad. We are further of opinion that the Jury need not have returned a finding as to what the sum was which in their opinion had been committed criminal breach of trust of but a verdict that they found the prisoner guilty was all that was called for."*

According to the aforesaid judicial authorities, when it is found that the accused had misappropriated not the entire sum mentioned in the charge but some lesser sum, the accused can be convicted for dishonest misappropriation. In addition, an accused can be convicted although the exact amount that has been misappropriated has not been specified.

Therefore, the accused-appellant in this case could be convicted for the 1st charge of Criminal Misappropriation although the amount misappropriated by the appellant is less than the amount mentioned in the 1st charge. Also, the Judgment of the learned High Court Judge need not be set aside for the reason that he found the appellant guilty for misappropriating the entire amount mentioned in the 1st charge.

In the instant action, the prosecution has led the evidence regarding 2 fake jewellery items (P-12 and P-13) found in the safe. However, the prosecution failed to establish any link between the accused-appellant's involvement with the fake jewellery items. The witnesses who spoke about the jewellery given by the appellant to pawn have not identified these fake items as the jewellery given by the accused-appellant. In fact, PW-17 has stated in his evidence that it was not the item that was given by the appellant requesting him to pawn to the bank and get money. Therefore, no connection has been established with the 2 fake jewellery items found in the safe to the alleged offence committed by the appellant.

Hence, this Court proceed to see whether there is any other evidence to establish appellant's culpability. The learned Additional Solicitor General pointed out that the appellant did not follow the correct procedure in pawning these jewelries as the officer in charge of the pawning division of the bank. She stated that evidence has been led to the effect that appellant had not sent this jewellery for proper valuation and also the appellant had not referred these items of jewellery to the other relevant authorities in following the pawning procedure.

In giving evidence, PW-3 identified his signature in receipts marked P-1 and P-3. PW-17 identified the receipt marked P-6. PW-20 identified the receipts marked P7-A to P7-O. Although these witnesses have not identified the jewellery that they pawned, they stated in their testimony that the same item of jewellery was given by the accused- appellant

again and again to be pawned to the bank. They have also said that they pawned those jewellery to the bank on the request of the appellant, obtained money from the bank and handed over that money to the appellant. They have got a small amount of money from the accused-appellant.

Evidence has also been led that these pawned items have not been released by the persons who pawned these items by paying back the required payment. Therefore, it is apparent that the appellant had taken back the items of jewellery that was pawned to the bank and repeatedly pawned the same item to the bank by engaging various persons.

Whoever dishonestly misappropriates or converts to his own use any movable property commits the offence of dishonest misappropriation according to Section 386 of the Penal Code. It is to be noted that in the Penal Code 'dishonest misappropriation' has no other interpretation. According to Section 22 of the Penal Code, whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly".

In the case at hand, it is apparent that without paying the amount due to the bank to redeem the pawned jewellery items, those items of jewellery repeatedly came to the hands of the appellant and through various people, the appellant repeatedly pawned the same jewellery, fake or genuine, to the bank and obtained money from the bank. Therefore, it has been clearly established that it is a wrongful gain to the appellant from the funds of the bank. Hence, dishonest misappropriation of the funds of the bank has been established.

According to the evidence of PW-16, jewellery had not been given to her. However, the appellant had taken her signature to the documents and had got money from the bank according to her evidence. The relevant

receipt has been marked as P-8. That is also misappropriation of the funds of the bank.

The aforesaid sequence of events provides an answer to the argument of the learned President's Counsel for the appellant that the learned High Court Judge has failed to appreciate the evidence in the light of the principles applicable for evaluation of circumstantial evidence. It is correct that one of the keys was with PW-1 and the other key was with a person called "Seram" according to the evidence of PW-1. (Page 588 and 603 of the Appeal Brief) The accused-appellant did not possess any of the keys.

According to the prosecution evidence, PW-1 (Bank Manager) and the Second Officer had the keys to the safe and both the key which was with PW-1 and the key that was with the Second Officer should be used to open the safe. Neither PW-1 nor the Second Officer can open the safe using the one key they possessed. When the safe was opened in the presence of PW-1 and the Second Officer, the appellant was the one who took out and put the jewelries from the safe to a tray and confirmed whether all the jewelries that should have been in the safe are in fact there in the safe. (Page 602- 605 of the Appeal Brief) Although, PW-1 and the Second Officer have to exercise supervision over this act of handling jewellery, due to the limited space in the place where the safes were kept no one could actually see whether the appellant actually put the items in the tray and confirmed that the items are present. Nobody could see whether he took any item from the safe and put it in his pocket or kept it with him in any other manner.

It is clearly established from the prosecution evidence that the appellant is the one who puts the pawned jewellery in the safe and takes them out. Therefore, the appellant had access to the safe. The appellant had access to the safe in the presence of the officers who possessed with the keys. However, it has been revealed from the evidence that when the

appellant was placing the jewellery in the safe or taking back the jewellery from the safe, any other person could not see whether in fact, he has placed the jewellery in the safe or whether he has taken them out of the safe. (Page 643, 735 of the Appeal Brief) The other officers rely on what he says as to whether the items that should have been in the safe are actually there. In the circumstances, there is no dispute on the fact that the appellant also had ample opportunities to access the safes as the officer in charge of the pawning division of the bank.

As decided in a line of judicial authorities, when a fact is proved by circumstantial evidence, there should be no room for an involvement of any other person other than the accused and the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

Jewellery pertaining to 55 receipts have been missing. Witnesses of the prosecution stated as mentioned previously that the appellant gave same items of jewellery to pawn. Although, the witnesses have not identified the jewellery that they were given to pawn, they have clearly stated that the same items of jewellery were given by the appellant to pawn. The said evidence clearly demonstrates that the accused-appellant and no other person had taken back the jewellery that was pawned once from the bank and that the same jewellery were given to those witnesses to pawn them repeatedly. Hence, it is clear from the evidence that no other person but the appellant had taken the jewellery from the bank. There was no room for any other person's involvement because the same jewellery came to the hands of the appellant who placed the jewellery in the safe repeatedly. Therefore, I regret that the argument of the learned President's Counsel that the principles applicable for evaluation of circumstantial evidence has not been properly applied by the learned High Court Judge cannot be accepted.

The accused-appellant giving evidence denied any involvement to the offence described in the first charge. However, for the reasons stated above, his denial creates no reasonable doubt regarding the prosecution case. Hence, although the learned High Court Judge's reasoning is not so detailed, his conclusion to reject the defence version is correct.

As stated previously, it is established from the evidence of the case that the money pertaining to the receipts produced through the witnesses PW-3, PW-16, PW-17 and PW-20 have been misappropriated by the appellant. Accordingly, the total amount of money misappropriated was Rs.843,000/-. Therefore, I hold that the learned High Court Judge's decision to convict the appellant for dishonest misappropriation of public property (1st charge) is correct. However, the prosecution has proved only Rs.843,000/- misappropriated by the appellant. However, as this Court also finds that the dishonest misappropriation is established beyond a reasonable doubt, for the reasons stated above, I find no reason to interfere with the conviction entered by the learned High Court Judge. Accordingly, the conviction of the learned High Court Judge is affirmed. In his submissions, the learned President's Counsel for the appellant challenged only the conviction but not the sentence. As the sentence of 10 years imprisonment is lawful and reasonable, I hold that the said sentence of imprisonment should remain as it is.

According to Section 5(1) of the Offences Against Public Property Act, the fine should be three times the value of the property in respect of which such offence was committed. Therefore, the fine that could be imposed on the accused-appellant would be Rs.2,529,000/-. Accordingly, the fine imposed by the learned High Court Judge is reduced to Rs. 2,529,000/- as the proved amount of misappropriation is Rs.843,000/-. In default of paying the said fine, the appellant is sentenced to 6 years of simple imprisonment.

The conviction and the sentence of 10 years imprisonment imposed on the accused-appellant are affirmed. Subject to the aforesaid variation in respect of the fine and default sentence, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL