IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of proceedings after granting of Leave to Appeal by the Provincial High Court of Western Province Colombo Under provisions of Article 128 of the Constitution and S.9 of the High Court of Western Province Act No. 9 of 1990

SC Appeal 70/2010
Provincial High Court /Application No. H.C.M.C.A. 1108/2006
Magistrates Court of Colombo
Case No 19993/3

Subramaniam Sivapalanathan
No. 115 Kotahene Road,
Colombo 13.
Currently of No. 285 Mahawatte Road
Colombo 14.

Accused-Appellant-Appellant

Vs.

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

2. The Officer-in-Charge
   Police Station
   Kotahena

Respondent-Respondent-Respondents

Before : Tilakawardane, J.
Marsoof, PC, J.
Dep, PC, J.

Counsel : M.A.Q.M. Ghazzali with Laksiri Silva and Mallika Somasundaram for the Appellant

Ms. P. Munasinghe, SC for AG

Argued on : 13.10.2011

Decided on : 26.03.2014

Priyasath Dep, PC, J.

This is an appeal against the judgment of the Provincial High Court of Western Province held in Colombo dated 24.06.2010 affirming the conviction and sentence imposed by Magistrate's Court of Colombo in Case No. 19993/3 . The High Court granted leave to Appeal to the Accused-Appellant – Appellant (hereinafter referred to as the "Accused").

The Officer in charge of Kotahena Police filed two charges against the Accused in the Magistrates Court of Colombo under section 400 and section 386 of the Penal Code. The contents of the charges are briefly given as follows:

1. The Accused did tender a cheque for Rs. 42500/- being the balance due to the Complainant (tenant) out of the one year's rent paid in advance by the Complainant and thereby fraudulently or dishonestly induced the Complainant to vacate the premises which she would not have done, if she was not so deceived as a result of the cheque being dishonored due to lack of funds and thereby committed an offence of cheating under section 400 of the Penal Code.

   In the alternative

2. The accused did misappropriate Rs 42500/- which is the balance some due to the Complainant in respect of the advance payment of rent for one year and thereby committed an offence of misappropriation punishable under 386 of the Penal Code.

At the trial Complainant Selvadorai Sellamma, Sub-Inspector Kaluarachchi ((Investigating Officer), L. Karunarathne, Deputy Manager of Bank of Ceylon, Kotahena gave evidence for the prosecution. The Learned Magistrate call upon the accused for the defence and the Accused gave evidence on his behalf and he was examined and cross examined at length. After the conclusion of the case the learned Magistrate convicted the accused on both counts and imposed a sentence of one year's rigorous imprisonment.

The facts of the case are briefly as follows:

The Complainant Selladorai Sellamma entered into an agreement with the Accused and rented out a room belonging to the Accused at No. 115, Kotahena, Colombo 13 for a period of one year and paid sum of Rs. 72,000/- being the total sum of monthly rentals of Rs. 6000/-. The agreement was marked as P1. According to the agreement, if the tenant intends to leave the premises before the expiry of one year she is required to give one month's notice. The Complainant came into occupation on or about 19th August 1998 and resided in the premises for a period of 3 months and she vacated the premises due to various problems she encountered with the Accused (the landlord). She states that she gave a letter to the landlord (accused) indicating her intention of vacating the premises. Thereafter, she vacated the premises and requested the accused to return the balance sum of Rs. 54000/-. She met the accused on several occasions and in November the accused gave a cheque drawn on Bank of Ceylon bearing No.285991-7010-663 for a sum of Rs. 42500/-. It was a post dated cheque bearing

the date 10.01.99. The cheque was marked as P2. The Complainant tendered the cheque to the bank on 12.1.99 and the cheque was returned with the endorsement 'account closed'. In the course of the investigations, police obtained details of the bank account maintained by the wife of the accused. According to the statement given by the bank, the account was closed on 30.12.98. This statement was marked as P3.

The Accused gave evidence and admitted that he received Rs. 72,000/- being a rent for one year from the Complainant. He admitted that he entered into an agreement with the complainant which was marked P1. He had stated that in terms of the agreement the tenant is required to give one month's written notice to him. Hence as the tenant failed to give one month's written notice as agreed upon he is not required to return the balance amount and thereby the money belongs to him. He stated that the Complainant came to his house with three unknown persons armed with weapons and threatened him and his wife and obtained Rs. 11,000/- in cash and forced his wife to issue a cheque for Rs. 42,000/-. (This position was not suggested to the Complainant when she gave evidence)He stated that almost two years after the incident the complainant made a complaint to the Kotahena Police against him and thereafter he was arrested and produced in Court as he did not agree to return the money to the Complainant.

After the conclusion of the case the learned Magistrate convicted the Accused on both counts and sentenced him to one year's rigorous imprisonment. The learned Magistrate had refused bail and he was in remand prison for nearly six months pending granting of Bail by the High Court.

The accused appealed to the High Court and his appeal was dismissed. The learned High Court Judge in his judgment had stated that the prosecution had proved the charges made against the accused beyond reasonable doubt and that he has no reason to disturb the findings of the learned Magistrate.

The learned High Court Judge granted leave on following questions of law submitted by the Counsel for the Appellant.

Questions of Law:

1. Is the conviction of the Accused by the trial Judge in the above case, the result of serious misreading of the evidence before Court.

2. Did the trial Court make serious error of law by failing and or neglecting to identify the ownership and entitlement of the parties in the above case to the involved sum of Rs. 42,500/-, before proceeding to convict the Accused for the charges of 'Cheating'(s.398 of the Penal Code) and 'misappropriation' (s.386 of Penal Code).

3. Is the contention of the trial court in the above case, that the contesting claims of the Accused and the virtual complainant to the said sum of Rs. 42500/-, a matter for the Civil Court.

   a) erroneous in law;

   b) has led to wrongful and unlawful conviction of the Accused.

4. Is the finding of the trial judge that the Accused in the above case had issued cheque No. 285591 for a sum of Rs. 42,500/- to Sellamma, the Complainant, on account No. 37024, with knowledge of the closure of the said Account contrary to evidence led in this case.

5. Was the misreading of evidence as aforesaid, a serious error that had led to the Conviction of the Accused in the above case unlawfully and wrongfully on the charges against him.

6. 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 totally.

When examining the facts and circumstances of this case, I find that the most important question of law is whether the established facts are sufficient to prove the essential elements of charges of cheating and misappropriation.

The learned Magistrate and the High Court Judge both accepted the evidence of the Complainant as reliable and trustworthy. The learned High Court Judge held that there is no reason to disturb the findings of facts. Therefore, we are left with the main issue to decide whether or not the established facts are sufficient to prove the necessary ingredients of the charges preferred against the accused. As far as the 1st charge is concerned it is necessary to examine whether 'deception' the essential ingredient of the charge of cheating was established. The main question is whether the accused by tendering the cheque deceived the complainant and induced her to vacate the premises. The evidence is that the Complainant on her own vacated the premises after three months in occupation as she found it difficult to live in that premises due to the prevailing situation. The cheque was issued by the accused after she left the premises and when she demanded the repayment of the money. Therefore, by issuing a cheque without funds the Accused did not deceive the Complainant and induced the Complainant to vacate the premises. I am of the view that the cheating charge was not established and therefore I set aside the conviction on cheating count and acquit the accused on count one. If there was a charge under section 25 of the Debt Recovery Act for issuing a cheque without funds, on the available evidence there is a possibility of convicting the Accused for that offence.

The next question is whether the misappropriation charge in count two could be maintained or not. It is an established fact that the accused accepted Rs. 72,000/- as advance rent. The complainant was in occupation of the premises for a period of three months. The Complainant after vacating the premises demanded the balance money from the Accused and a cheque was issued for Rs. 42500/- which was subsequently dishonoured due to the fact that the Account was closed. The position of the Accused is that he did not return the money due to the reason that the Complainant did not give one month's written notice in terms of the agreement marked P1. But the Complainant stated that she gave written notice to the Accused. In any event the complainant vacated the premises after three months and that fact is known to the accused as the accused was living in the same premises and also from the fact that after vacating the premises the Complainant demanded from the Accused to return the balance sum. Even assuming that the complainant did not give one months notice, if at all the accused can retain one month's rent only and required to return the balance sum. Therefore he had misappropriated the balance sum due to the Complainant which was part of the advance rent. Therefore I affirm the conviction on count two.

The next question is what is the appropriate sentence that should be imposed on the accused. The learned Magistrate had given a custodial sentence due to the fact that there was a previous conviction against the accused for a similar offence committed in 2005. The learned Counsel had submitted to the High court that this conviction was for an offence committed long after the offence which is the subject matter of this appeal. Therefore, the learned Magistrate should not have considered that fact as a bar for the imposition of a suspended sentence.

This offence was committed in 1998 and the accused was 54 years old at the time of giving evidence in 2004. Considering the above facts, I am of the view that a custodial sentence will not be appropriate in the circumstances of this case. Therefore, sentence of one year's rigorous imprisonment imposed by the learned Magistrate on Count 2 (misappropriation) which was affirmed by the High Court is suspended for 5 years. Subject to the above variations the Appeal is dismissed.

This Order to be dispatched by the Registrar to the Magistrate Court for the imposition of the suspended sentence. High Court record along with this order to be dispatched to the High Court without delay.

Judge of the Supreme Court.

Shiranee Tilakawardena, J.
I agree.

Judge of the Supreme Court

Saleem Marsoof PC.,J.
I agree.

Judge of the Supreme Court