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

In the matter of an application for Special Leave to Appeal under and in terms of section 9(a) of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge,
Criminal Investigation Division,
Colombo

Complainant

SC Appeal No. 182/2017

SC SPL LA No. 201/16

High Court Case No. HCMCA 136/2014

Magistrate Court (Fort) Case No.

~Vs.~

Sangili Ramalingam
No. 19,
Wilferd Place,
Colombo 3.

Accused

AND BETWEEN

Mohhamed Hajji Anwar
No 50/19,
Sir James Pieris Mw,
Colombo 02

First Complainant-Appellant

~Vs.~

Sangili Ramalingam
No. 19,
Wilferd Place,
Colombo 3.

Accused~Respondent

AND

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

Respondent

AND NOW BETWEEN

Sangili Ramalingam
No. 19,
Wilferd Place,
Colombo 3.

Accused~Respondent~Appellant

~Vs.~

Mohhamed Hajji Anwar
No 50/19,
Sir James Pieris Mw,
Colombo 02

Virtual Complainant~
Appellant~Respondent

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

Respondent-Respondent

BEFORE	:	Buwaneka Aluwihare, PC, J L. T. B. Dehideniya, J. & P. Padman Surasena, J.
COUNSEL	:	Asthika Devendra with Kaneel Maddumage for the Accused-Respondent-Appellant. Shanaka Ranasinghe, PC. With Yasas Wijesinghe and Nisith Abeysooriya for the Virtual Complainant-Appellant-Respondent. Madhawa Tennakoon, SSC. With Thivanka Attygalle, SC. For the Respondent-Respondent.
ARGUED ON	:	08.06.2020
DECIDED ON	:	12.01.2023

JUDGEMENT

Aluwihare, PC, J.

(1) Accused Respondent Appellant (hereinafter referred to as the Accused) was charged before the magistrate's court on three counts punishable under section 25[1] of the Debt Recovery (Special Provisions) Act number 2 of 1990 and one count of Criminal Misappropriation punishable in terms of section 386 of the Penal Code.

(2) At the conclusion of the trial, the learned magistrate having concluded that the prosecution had failed to prove any of the charges preferred against the Accused, found him not guilty as charged and proceeded to acquit him.

(3) Aggrieved by the order of acquittal, the Virtual Complainant Respondent [hereinafter referred to as the Complainant] appealed against the said judgement of the learned magistrate, sanction having first obtained from the Honourable Attorney General, to the High Court.

(4) After hearing the appeal, the learned High Court judge in delivering the judgment, holding that the learned magistrate had erred in finding the Accused not guilty and acquitting him, set aside the said orders, and proceeded to convict the Accused on all four counts.

(5) Further, the learned High Court judge also held that the prosecution had proved the charges preferred against the Accused and that there was no impediment to convict the Accused for the charges preferred against him.

(6) The present appeal arises from the said judgement of the High Court, and when the matter was supported for special leave, the court granted special leave on the questions of law referred to in in sub- paragraphs (a) to (g) of paragraph 12 of the petition of the petitioner which are reproduced verbatim below.

(a) Did the learned High Court judge, err in holding that the Petitioner had failed to establish that he has repaid the money relating to the loan for which as guarantee the cheques in issue were given, whereas it was not the contention of the Petitioner that he has already repaid the said sums and/or which is not required to cast a doubt on the prosecution case?

(b) Did the learned High Court judge err in holding that the petitioner had failed to reveal specific details of the transaction relating to documents V1 to V6,

whereas there is no burden in law for the accused to prove the same other than to cast doubt on the prosecution case.

(c) Has the learned High Court judge failed to evaluate the evidence relating to each charge individually, which is prior to the petitioner's conviction for all four counts as required by law?

(d) Did the learned High Court judge fail to consider that the version of the prosecution would not satisfy the test of probability, whereas evidence of PW-1 in respect of selling apparels to the petitioner was not proved before the court and/or has not been corroborated?

(e) Did the learned High Court judge err in law by failing to consider that the petitioner could not be found guilty for count 2 and count 3 as the same were framed under section 25 (1) (a) of the Debt Recovery (special provisions) Act and/or the petitioner has stopped the payments of the two cheques relating the set counts?

(f) Did the learned High Court judge, in law by failing to consider that the petitioner could not be found guilty for Count 4 as the prosecution has failed to prove beyond reasonable doubt that the readymade garments had been taken/obtained by the petitioner?

(g) Did the learned High Court judge fail to consider that the contention of the petitioner is more probable than the version of the respondent.

The factual background

(7) According to the Virtual Complainant, he being a trader in textiles and finished garments, sold a stock of garments to the Accused in December 2011 to the value of Rs.2.5 million and had received cheques from the Accused as payment. An

invoice for the said amount [P5] and a 'Gate Pass' [P1] signed by the accused in proof of delivery, were produced in evidence.

(8) The invoice clearly indicates that the goods had been supplied to the Accused whom the Complainant knew of, having had business dealings with him previously and the Accused had signed at the foot of the invoice acknowledging the acceptance of the stock of garments.

(9) It appears that, what had been given by the Accused were post-dated cheques and the details are as follows;

[1] A cash Cheque no 196169 dated 30.03. 2012 drawn for Rs 850,000/-[P2]

[2] A cash Cheque no 196170 dated 30.04. 2012 drawn for Rs 850,000/-[P3]

[3] A cash Cheque no 196171 dated 15.05. 2012 drawn for Rs 800,000/-[P5]

(9) All three cheques were dishonoured in the following manner.

[i] The cheque No.196169, when presented to the bank, had bounced with the endorsement "refer to the drawer (01)". The code '(01)' is the standardised bank code used to denote that there were insufficient funds in the account of the drawer to meet the payment.

[ii] When cheque No. 169170 was presented it also had returned with the endorsement "payment stopped by the drawer (52)". The code "(52)" is the standardised bank code used to denote a directive from the drawer/ account holder countermanding the payment.

[iii] When the cheque No. 169171 was presented for payment, that too has bounced with the endorsement "Account closed (51)".

(10) A junior executive officer of the Commercial Bank, Lakshita Hewawasam in his testimony produced the details of the bank account maintained by the Accused

with the Kotahena branch of the Commercial Bank. According to the witness, of the three cheques in question, the cheque number 196169 drawn for Rs.850, 000/- was dishonoured due to insufficient funds in the accused's account to meet the payment. Cheque No. 169170 drawn for rupees 850000/- was dishonoured as the account holder [the Accused] countermanded the payment, while the third cheque for Rs. 800,000/- when presented for payment on 15.8.2012, the account had been closed by the accused Rasalingam on 8. 5. 2022.

(11) The accused giving evidence under oath stated that he borrowed Rs.2.4 million as a lump sum on interest from the virtual complainant and issued 3 cheques. His position was that he paid the Complainant Rs.125000/- a month, as interest. The Accused, however, conceded that there is no documentary proof of the monies that he alleged to have borrowed from the Complainant or any proof of interest payments made by him as alleged. The Accused, however, denied that he ever engaged in any transaction relating to garments and denied the signature on the 'Gate Pass' P1 as his.

(12) It appears from the evidence led at the trial, that prior to the impugned transaction relevant to these proceedings, there had been business dealings between the two parties which the Complainant admitted in his evidence. The documents V1 and V2 were produced in that regard, but both those documents are dated in 2011 whereas the impugned cheques had been dated in 2012. The virtual Complainant had said that documents V1 and V2 have no connection with the sale of garments. As such there does not appear to be a nexus between those two sets of documents and the impugned transaction.

Legal issues

(13) Having considered the evidence led at the trial, this court is of the view that the prosecution had failed to establish the offence of Criminal Misappropriation. Although the learned High Court Judge had concluded that all elements of the

said charge had been established, with due respect to the learned judge, I beg to disagree with the said conclusion.

(14) As far as the charge of Criminal Misappropriation is concerned, the allegation is that the accused dishonestly 'misappropriated' the garments he obtained from the virtual complainant. It is clear from the evidence that this was a pure and simple sale of goods and once the virtual complainant parted with the consignment of garments, the Accused was free to appropriate it in any manner he wished. Simply, there was no arrangement between the Virtual-Complainant and the Accused as to the manner in which the garments should be dealt with. Hence, one cannot say that the accused 'misappropriated' the garments.

(15) For the reasons set out above, I am of the opinion that the charge of Criminal Misappropriation is not made out and the conviction of the Accused for the said offence cannot be sustained. Accordingly, the conviction of the accused for the charge of Criminal Misappropriation [the 4th count] is hereby set aside and accordingly I make order acquitting the Accused on that count.

(16) For the reasons set out above I answer the question of law referred to in sub-paragraph (f) of paragraph 12 of the Petition in the affirmative.

(17) The remaining questions of law (a) to (e) and (g) relate to the conviction for the offences under the Debt Recovery (Special Provisions) Act.

(18) Before I deal with the liability of the Accused in terms of provision of the Act under which he was charged, I wish to consider the argument of the learned Counsel for the Accused where he argued that the learned High Court Judge had failed to evaluate the evidence led at the trial and in particular, to evaluate evidence relating to each charge before convicting the Accused. In this regard,

I wish to rely on the principle laid down in the case of **Mannar Mannan Vs. The Republic of Sri Lanka** 1990 1 SLR 280.

(19) It would be pertinent at this point to address our minds to the Constitutional provision embodied in Article 138 which sets down the criteria in granting relief in exercising Appellate jurisdiction. The proviso to the Article reads;

> *Provided that no judgement, decree, or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties* ***or occasioned a failure of justice***. [emphasis added]

Although the Article referred to above occurs in the Constitution under the heading "The Court of Appeal", the proviso referred to should be considered a guiding principle when a forum is exercising *'appellate jurisdiction'*

It is also to be noted that the proviso to Article 138 referred to above, is mirrored in Section; 334(1) of the Code of Criminal Procedure Act No.15 of1979 [hereinafter the CPC] the application of which was considered by a bench of five judges of this court in the case of **Mannar Mannan** *[supra].*

(20) The proviso to Section 334(1) of the CPC reads thus;

"Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred ".

In the case of **R v.Nicholas Webb Edwards** [1983] EWCA Crim J0228-2, the court considered some of the earlier English cases touching on the applicability of a proviso which is similar to that of our Constitution. This was a case where the appellant was convicted of rape and the sole ground of appeal was that there was a failure to direct the jury on the standard of proof. Goff L. J., in the course of his

judgment stated: "*It is plain that the failure of the Judge to direct the jury on the standard of proof was a serious defect in the summing up..... That being so, we have to consider whether we should exercise our powers under the proviso to section 2 (1) of the Criminal Appeal Act of 1968 to dismiss the appeal if we consider that no miscarriage of justice has actually occurred. From those cases it appears that in such a case, as in any other case, **the court must consider the operation of the proviso in the light of the particular facts of the case.*** [emphasis is mine].

(21) In answering the questions of law referred to above, all what this court has to consider is whether the prosecution has established, beyond reasonable doubt, the charges preferred against the accused under section 25 (1) of the Debt Recovery (special provisions) Act [Hereinafter the Act].

(22) Section 25(1) of the Act states thus;

(1) Any person who-

(a) knowingly draws a cheque which is dishonoured by a bank for want of funds;

(b) gives an order to a banker to pay a sum of money, which payment is not made by reason of there being no obligation on such banker to make payment or the order given being subsequently countermanded with a dishonest intention, or; and

(c) gives an authority to an institution to pay a sum of money to itself, in payment of a debt or loan or any part thereof owed to such institution, from, and out of an account maintained or funds deposited, by such person with such institution and such institution is unable to take such payment to itself by reason of such person not placing adequate funds in such account or by

reason of the funds deposited having been withdrawn by reason of such person countermanding the authority given or by reason of any one or more of such reasons ; or

(d) having accepted an inland bill refuses payment dishonestly;

5.

shall be guilty of an offence under this Act and shall on conviction by a Magistrate after summary trial be liable to punishment with imprisonment of either description for a term which may extend to one year or with fine of ten thousand rupees or ten per centum of the full value of the cheque, order, authority or inland bill in respect of which the offence is committed, whichever is higher, or with both such fine and imprisonment.

(23) At this juncture it would be pertinent to consider the liability under the penal provision referred to above. It is clear that the provision is not a strict liability provision and a mental element is part of the offence.
In an instance where a cheque is dishonoured due to lack of sufficient funds, the requisite mental element is *knowledge* on the part of the Accused, whereas when the reason for a cheque to be dishonoured is either the same being countermanded or closure of the account after the cheque was issued, then the mental element that has to be established is one of *dishonesty*.

(24) It is my view, that in a prosecution under Section 25 of the Act, the reason or the reasons as to the issuance of the cheque is not relevant, as the nature of the transaction is immaterial as far as the offence is concerned. In the instant case the liability of the Accused has to be considered in the following manner;
Regarding the cheque No. No 196169 dated 30.03. 2012, the liability has to be considered under paragraph (a) of Section 25 (1) of the Act whilst in relation to cheques bearing Nos. 196170 and 196171, what would be applicable is paragraph (b) of that Section.

(25) In relation to count No.1, which is based on the Cheque 196169 what the prosecution was required to prove, in order to satisfy the ingredients of the

offence was that the cheque that was drawn by the Accused was dishonoured due to insufficient funds and that the Accused had knowledge that the funds were insufficient to meet the cheque. It is common ground that the cheque was drawn by the Accused and the fact that it was dishonoured was not disputed by him either. It has also been established that the cause for dishonouring was due to lack of funds.

(26) The monthly bank statements of the Accused's business establishment for the months of January to May 2012 were marked and produced at the trial [P7]. In the normal course of events the account holder [Accused] ought to have received them at the end of each month. None of these statements reflect a sufficient credit balance to meet any of the cheques that the Accused issued to the Complainant.

(27) In any event there was no material placed before the court to show that the Accused did not have the knowledge that the credit balance was insufficient to meet the cheque. Regard being had to common course of natural events and human conduct plus the attended circumstances, it would be reasonable for the court to presume that the Accused was aware that the amount of money lying to his credit in the bank account in question was insufficient[to meet the cheques] at the time relevant to the impugned transaction.

(28) On the other hand, if any facts were especially within the knowledge of the Accused which was indicative of 'lack of knowledge' on his part as to the funds lying to the credit of the bank account, then it was incumbent on the Accused to prove that fact within the meaning of Section 106 of the Evidence Ordinance. The illustration to Section 106 reads thus;

> *"A person is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket on him"*

(29) Considering the above, I hold that the learned High Court Judge was correct in coming to the conclusion that the prosecution has established count No.1 beyond reasonable doubt.

(30) As far as count 3 is concerned, the conduct of the Accused in closing the bank account before the due date on which the cheque No. 196171 could have been presented for payment, appears to be a deliberate act on his part to deprive the Complainant of encashing the cheque in question. When the cheque was presented for payment by the Complainant, there was no obligation on the banker to make the payment, thus fulfilling the requisite elements of paragraph (b) of Section 25(1) of the Act.

(31) Here, again the attendant circumstances are indicative of dishonesty on the part of the Accused in the absence of any material to infer otherwise. As such the conviction of the Accused on count 3 also cannot be faulted.

The questions of law

(32) The question (a) raises the issue as to whether the learned High Court judge, erred in holding that the Petitioner [the Accused] had failed to establish that he has repaid the money relating to the loan for which as guarantee the checks in issue were given. Firstly, it must be said that what the learned High Court Judge had said was, that the Accused had argued that the cheques were given in respect of a loan obtained by the Accused but the Accused had failed to establish that the loan had been repaid. As referred to earlier, these matters are irrelevant as far as the requisite elements of the offence and as such the manner in which the learned High Court Judge dealt with this aspect has no bearing on the charges. As such I answer the question of law (a) above in the negative.

(33) The question of law referred to in paragraph (b) raises the issue as to whether the learned High Court judge erred in holding that the Accused had failed to reveal specific details of the transaction relating to documents V1 to V6, whereas

there is no burden in law for the accused to prove the same other than to cast doubt on the prosecution case. As referred to earlier, there does not appear to be any nexus between V1 to V6 and the impugned transactions relevant to this case. V1 refers to a cheque drawn on the Bank of Ceylon for Rs. 400,000/- V5 also refers to a cheque issued from the account the Accused maintained at the Bank of Ceylon, however, all the cheques relating to this case had been drawn on the Commercial Bank. It also refers to a cheque drawn for Rs.400, 000/-. None of the cheques relevant to the instant case had been drawn for Rs. 400,000/-. As such I am of the view that even if the learned High Court Judge had considered the documents V1 to V 6, he could not have arrived at a different decision. In the circumstances, I answer the question (b) referred to above also in the negative.

(34) The question of law referred to in paragraph (c) raises the issue as to whether the learned High Court judge failed to evaluate the evidence relating to each charge individually as required by law. As regard to the question of law raised, it is true that a court is required to consider each charge separately and decide as to whether the requisite *actus reus* and the *mens rea* have been established by the prosecution beyond reasonable doubt, before entering a conviction. The complaint in the instant case appears to be that the learned Judge had not done so. Upon perusal of the judgement, it appears that the contention on behalf of the Accused is correct in this regard. The question is whether the accused must be given the benefit of every non-direction or misdirection on the part of the learned judge. I do not think so. Even if there was a non-direction, if that non-direction had not caused any prejudice to the Accused or had not resulted in any failure of justice there is no reason then, to vary the judgement. Upon considering the entirety of the evidence led at the trial, I am of the view that if the learned High Court Judge had directed himself properly, he could not have come to a different conclusion other than finding the accused guilty. As such I answer the question of law referred to in paragraph (c) referred to above also in the negative.

(35) Question of law referred to in paragraph (d) raises the issue as to whether the learned High Court judge failed to consider that the version of the prosecution would not satisfy the test of probability whereas evidence of the Complainant in respect of selling apparels to the petitioner was not proved before the court and or has not been corroborated. This aspect again is not relevant in deciding the issues in this case as all what the learned High Court Judge was required to consider as to whether the requisite elements of the offence had been established or not and the probability of the version given by the Accused has no bearing on the charges as the Accused had not denied issuing the cheques. As such the question of law (d) too is answered in the negative.

(36) The question of law referred to in paragraph (e) raises the question as to whether the learned High Court judge erred in law by failing to consider that the petitioner could not be found guilty for count 2 and count 3 as the same were framed under section 25 (1) (a) of the Debt Recovery (special provisions) Act. In relation to count 2 and 3, the violations come under paragraph (b) of Section 25(1) and not under paragraph (a) of that section. The penal provision, however, is common to both limbs. Furthermore, in the body of the charges the specific reason as to the dishonouring of the cheques are referred to. In count 2 the actual reason for dishonouring of the cheque was due to the Accused countermanding the payment and not due to insufficient funds. However, the body of the charge states; '*knowing that the cheque would be dishonoured due to lack of funds to meet the cheque you issued it.*' As far as the said count was concerned what the prosecution had established through the bank official was that they did not honour the cheque as the Accused instructed the bank to stop payment and the issue of insufficiency funds was not raised. Hence, to my mind the finding of guilt on count No. 2 was erroneous. As such, as far as count 2 is concerned, I answer the question of law referred to in paragraph (e) in the affirmative and set aside the finding of guilt and the conviction of the Accused on the said count. The situation, however, is different in respect of count 3 which specifically says after issuing a cheque dated 15. 05.2012 the Accused closed the bank Account. It is a

known fact that in banking practices a cheque is valid for a period of six months from the date of its issuance. If a purposive construction is to be given to Section 25 of the Act, it would be reasonable to expect a reasonable man to make certain that all the cheques that had been issued by him had been presented for payment before taking the step of closing the bank Account. If a person acts with honesty, it would be reasonable to expect that person to inform any party to whom such person has issued cheques, his intention to close the bank account giving them a window to present any cheques for payment. In the instant case the Accused had not taken any such step which goes to indicate the dishonest intention on the part of the Accused. In the circumstance I hold that the finding of the Accused guilty on Count 3 is in accordance with the law and I answer the question of law referred to in paragraph (e) in the negative in respect of count 3.

(37) I have already dealt with the question of law referred to in paragraph (f) in paragraphs (13) to (16) of this judgement and answered the issue, as such I do not wish to repeat it here.

(38) The question of law referred to in paragraph (f) raises the question as to whether the learned High Court judge failed to consider that the contention of the petitioner [Accused] is more probable than the version of the respondent. I have expressed the view that the nature of the transaction is not material to decide the liability under Section 25(1) of the Act, unless it is relevant to establish or negate the requisite *mens rea*. The position taken up by the Accused was that the cheques were given as he borrowed money from the Complainant whereas the prosecution case is that it was given as payment for the stock of garments. When one considers the facts peculiar to the instant case in considering the culpability of the Accused, the non-consideration of probability of the Accused version has no bearing on the charge. As such I answer the question of law raised in paragraph (f) also in the negative.

Orders of the Court

The conviction of the Accused on counts 1 and 3 of the charge sheet dated 20th February 2013 are affirmed.

The conviction of the Accused on counts 2 and 4 of the said charge sheet are set aside and the accused is acquitted on the said counts.

As directed by the learned High Court judge, the magistrate is required to impose an appropriate sentence upon considering the aggravating and mitigatory factors.

The Registrar of this court is directed to return the original magistrate's court case record forthwith and to communicate the judgement of this court to the learned magistrate.

Appeal is partially allowed

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree

JUDGE OF THE SUPREME COURT

JUSTICE P. PADAMN SURASENA

I agree

JUDGE OF THE SUPREME COURT