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

In the matter of an application for leave to the Supreme Court from an order of the provincial High Court under and in terms of Section 31DD of the Industrial Disputes Act as amended

SC Appeal No. 209/12

SC No. SC (HC) LA 56/2011

WP/HCCA/KA/05/2010 (LT)

L.T. Case No. 18/KT/2669/2002

Lanka Banku Sevaka Sangamaya,

(On behalf of L.D. Dayananda),

No. 20, Temple Road, Maradana,

Colombo 10.

Applicant

Vs.

People's Bank

Head Office,

Sir Chittampalam A Gardiner Mawatha,

Colombo 2.

Respondent

AND BETWEEN

People's Bank

Head Office,

Sir Chittampalam A Gardiner Mawatha,

Colombo 2.

Respondent- Appellant

Vs.

Lanka Banku Sevaka Sangamaya,

(On behalf of L.D. Dayananda),

No. 20, Temple Road, Maradana,

Colombo 10.

Applicant- Respondent

AND NOW BETWEEN

People's Bank Head Office,

Sir Chittampalam A Gardiner Mawatha,

Colombo 2.

Respondent- Appellant- Petitioner

Vs.

Lanka Banku Sevaka Sangamaya,

(On behalf of L.D. Dayananda),

No. 20, Temple Road, Maradana,

Colombo 10.

Applicant- Respondent- Respondent

BEFORE: - Priyasath Dep P.C.J

Rohini Marasinghe J

Buwaneka Aluwihare P.C J J

COUNSEL:- Minoli Jinadasa with Malaka Wimalagunerathne for the Respondent -Petitioner- Appellant

Ronald Perera P.C, with Nalin Amarajeewa for the Applicant-Respondent-Respondent

ARGUED: - 28-04-2014

WRITTEN SUBMISSIONS: - 27-05-2014

DECIDED ON: 16-11-2015

Buwaneka Aluwihare P.C J

This is an appeal against the judgement of the Provincial High Court of Kalutara dated 11.05.2011 wherein the High Court, affirmed the Order of the learned President of the Labour Tribunal. At the conclusion of the inquiry before the Labour Tribunal, the learned President held in favour of the Applicant-Respondent-Respondent, a trade union, which filed action on behalf of the workman L.D Dayananda, whose services had been terminated by the Respondent- Appellant -Petitioner (hereinafter referred to as the 'Appellant- Bank').

This Court on 29.11.2012, granted leave to appeal on the following questions of law contained in paragraph 16 of the Petition of the Appellant dated 21-06-2011:-

a) Whether the Provincial High Court and the Labour Tribunal erred in the evaluation of evidence and has made an order without considering the totality of the evidence?
b) Whether the granting of relief to a workman, who had committed gross misconduct, by relying on the fact that another employee embroiled in the said transaction had escaped punishment is justified?

c) Whether the orders of the Labour Tribunal and the Provincial High Court for reinstatement is erroneous in law considering the facts and circumstances which leads to a loss of confidence of a bank employee?
d) Whether the workman is entitled to pension rights, which is not a relief prayed for in the application to the Labour Tribunal and no evidence has been led to establish the right?

Briefly the facts of this case are as follows:-

The Applicant-Respondent-Respondent (hereinafter referred to as "the Respondent") filed an application in the Labour Tribunal of Kalutara complaining that the services of the workman, L.D Dayananda (hereinafter referred to as 'the workman') had been unjustly and inequitably terminated by the Appellant Bank with effect from 02.06.2000 by the letter dated 04.04.2004.

It would be necessary in my view, to consider the background facts that led to the termination of the Workman for the reason that the first question of law on which leave was granted, is based on the failure on the part of both the Labour Tribunal as well as the High Court to consider the totality of the facts, relevant to the incident, in arriving at the decisions.

A customer of the bank named Thamara Dayani Kannangara had opened a savings account at the Baduraliya Branch of the Appellant Bank on or about 19.07.1981 (A/C No. 10046). Sometime in the year 1991 this account had been updated and thereafter no transactions have been carried out in respect of this savings account. According to the evidence led before the Labour Tribunal, if no activity relating to an account is recorded for a period of two years, such accounts are treated as dormant accounts. Accordingly the account of Thamara Kannangara had also been treated as a dormant account since 20.02.1992. A feature peculiar to a dormant account is that to make the account active again, certain specific steps need to be taken, including keying in the password of the manager.

The aforesaid account holder visited the Bank on 09-08-1999 in order to withdraw money for an emergency and to her dismay, she found that her account balance of Rs.20, 648/-lying to her credit on 04.05.1992 had only a credit balance of Rs.2000/-. Consequently the account holder had complained to the bank of the discrepancy in her bank balance as she had not withdrawn any money. Thus an internal investigation was carried out by the Regional Office of the Appellant Bank in the course of which it transpired that in four instances money had been withdrawn from the bank account of the account holder Kannangara, although it was a dormant account at the time the four withdrawals were carried out.

One of the issues that this court is called upon to consider is whether the Learned President as well as the learned High Court Judge failed to evaluate the evidence regarding the disbursement of money from the bank account in issue on three of the four withdrawals referred to above, that is on 26.04.1998, 15.05.1998 and 02.07.1998 and the complicity of the workman concerned. The Appellant asserts that it was the Workman, who as the cashier, had carried out the three impugned transactions on the dates referred to above. It was the contention of the learned Counsel for the Appellant Bank that, both the learned President of the Labour Tribunal and the Learned High Court Judge had neither considered the cogent and credible evidence led at the inquiry nor, had evaluated the evidence led at the inquiry in its proper context. It was further argued, had that been done the only reasonable conclusion that could have been arrived at is that the termination of the services of the workman is just and equitable under the circumstances.

At the outset, I wish to refer to the decision of this court in the case of the *Associated Battery Manufacturers Ceylon Ltd vs. United Engineering Workers Union, 77 NLR page 541,* wherein the court held,

> "*where in an enquiry before a Labour Tribunal it was alleged that the reason for the termination of employment was that the workman was guilty of criminal act involving moral turpitude, the allegation need not*

be established by proof beyond reasonable doubt as in a criminal case.Such an allegation has to be decided on a balance of probability, the very elements of the gravity of the charge becoming part of the whole range of circumstances which are weighed in the balance, as in every other civil proceedings.

Subsequently, in the case of *Sithamparanathan vs.Peoples Bank ,(1986) 1 SLR 411,* it was held that,

"allegations involving misconduct or moral turpitude in prceedings before a Labour Tribunal must be proved by a balance of probabilities. It is not necessary to call for proof beyond reasonable doubt"

This principle with regard to burden of proof referred to above had been followed by our courts over the years and now has virtually hardened in to a rule of law.

It is in this backdrop that I wish to consider the material placed before the inquiry in this case.

Mr. Nimal Weerasinghe who had investigated the disputed withdrawals from the savings account of Dayani Kannangara, is a computer analyst attached to the Peoples Bank. Giving evidence on behalf of the Appellant Bank at the inquiry , witness Weerasinghe had explained, that in order to reactivate a dormant account, the cashier who operates the computer terminal must feed the Withdrawal Form to the computer terminal and when this is done, the Form comes out with the endorsement 'WDL isa/ dormant osa' and the terminal generates a 'P' number. (i.e. the Form marked and produced as "R4"). In fact the three withdrawal forms relating to dormant accounts of some other customers produced on behalf of the Workman also carry the computer endorsement referred to above, (documents produced as V1, V2 and V3). Thereafter the withdrawal slip has to be signed by the manager and two other officials of the Bank authorising the transfer of the dormant account to an active account. After the authorization the Withdrawal Form is fed to the

computer for the second time and the earlier 'P' number generated by the computer has to be keyed in. Then the computer permits carrying out transactions of a dormant account. It is in evidence that the Workman had operated the computer terminal and has acted as the cashier in respect of the three impugned withdrawals from the savings account on the three dates referred to above, which the Workman in his evidence, has admitted. The Workman has also admitted that the savings account at issue was a "dormant account" when he carried out the impugned transactions.

Witness Weerasinghe in his testimony had placed a crucial piece of evidence which remains unassailed. That is, all operations relating to bank accounts at the Badureliya branch of the Bank hitherto that were carried out manually was computerised in June 1995, that is 11 years after Thamara Kannangara opened the Savings Account.

What is significant is that after computerisation, the bank had issued new "Pass Books" which are compatible with the new system that was put in place, replacing the old ones where entries were entered manually. Hence it appears that the bank had issued new Pass Books to customers as and when they produced the old one to carry out a transaction. The evidence is that, upon cancellation of the old Pass book, a new Pass book compatible with the system was issued.

Witness Newton, who testified on behalf the Appellant Bank has stated in his evidence that he recorded a statement from the customer concerned and collected the pass book which was issued to her when the bank was making entries manually.

None of the entries relating to the impugned transactions were recorded in the pass book (R2). He had added that according to the computer entries, on each of the days, the impugned transactions were carried out, a new passbook had been issued. According to the statement of the customer which is marked R 10, she had not withdrawn any money from her savings account on the dates referred to in documents (withdrawal slips) R5, R7 and R9. According to

witness Newton when he commenced the investigation, neither the signature card nor the mandate relating to the bank account concerned were available at the branch of the bank. Testifying further, he has said that none of the withdrawals from this dormant account had been authorised by the manager of the bank nor authorised by other bank officials, which is a requirement before a payment is made from a dormant account. Although it is a common ground that the account concerned was dormant at the point withdrawal slips R5, R7 and R9 were fed into the computer none of the withdrawal slips carry the usual endorsement that they ought to carry, that is 'WDL isa/ dormant osa'. In explaining the absence of this endorsement witness Newton had stated that if another slip of paper had been inserted into the computer instead of feeding the withdrawal slip at the first instance, one cannot expect to see the dormant account endorsement on the withdrawal slip. The Workman concerned had admitted in the course of his evidence before the Labour Tribunal, that it was he who carried out the transactions depicted in withdrawal slips R5, R7 and R9. This witness has stated that the Workman had no right to make any of the payments on R5, R7 and R9.

It was the contention of the Workman concerned that it was savings accounts officer Gunerathne who authorised the payment on R5 and it was he who issued a fresh Pass Book and he only updated it and gave it to the customer. However Gunerathne had been permitted to retire from the Bank when this fraud came to light ostensibly, by grace of the Bank in view of the complicity on the part of Gunerathne in these transactions. In fact the Workman stated that Gunerathne issued two new Pass Books when transactions on R7 and R9 took place. What is puzzling here is assuming that the transaction on R5 was a payment made on a mistaken identity, why then was the old Pass Book not cancelled. Even if the maximum benefit is accorded to the Workman that due to a lapse on his part he failed to do so, this could have been done on any of the subsequent alleged withdrawals on R7 which was about two weeks later or when the alleged withdrawal on R9, which was subsequent to transactions R5 and R7 took place. The fact remains that when the customer complained to

the Bank in 1999, she still had the original Pass Book issued to her without any cancellation. One other factor that is worth making reference to, the customer concerned had stated in her statement made to witness Newton that due to an anomaly in her name she obtained a new National Identity Card (NIC) in 1995 and a copy of it was produced as part of the case of the Appellant Bank. The new NIC bore the same number, but the date of issue is 18-03-1995 and her position is that she surrendered the old NIC to the Grama Seveka. However, on the reverse of the withdrawal slips R5, R7 and R9 the NIC number and the date of issue is recorded. The date of issue that has been written down is 22-08-1973, which is the date of issue of the customer's old NIC. The Workman admitted in his evidence it is he who recorded the NIC number and the date of issue on the reverse of R5, R7 and R9. Considering the above evidence it would in my view reasonable to infer that none of the withdrawal slips R5, R7 and R9 were presented by the Customer.

I wish to advert to the evidence given by the Workman before the Labour Tribunal. He admitted that he made payments in respect of the withdrawal slips R5, R7 and R9 and admitted recording the NIC number and the date of issue. He also admitted the Savings Account in question was a dormant account. As to R5 he did not obtain the authorisation of the manager, but only of Gunerathne the savings account officer. He also admitted that new Pass Books were issued on all three occasions on the dates the alleged transactions on R5, R7 and R9 said to have taken place and it is he who requested for new Pass Books from Gunerathne. In fact the learned Labour Tribunal President has questioned the Workman as to why three Pass Books were issued. His explanation was the system does not indicate that a fresh Pass Book has been issued. Even if it is so, the system shows the details of the last withdrawal and if the customer produces an old pass Book which is not compatible with the system, naturally the question arises as to how the previous transaction was carried out. According to the Workman, on all three occasions the old Pass Book he says was produced before him by the customer. In answering the question whether the account holder presented the Pass Book herself, he had

said he cannot say whether the account holder was present or not, as he cannot identify a customer when documents are passed over the counter. In the statement, the workman made to the Bank Officials (R11) he had said that he knows the customer concerned well as he has seen her on numerous occasions.

The three Pass Books have been issued by the Workman within a span of 2 1/2 months, the first one on the 26th April 1998, the second one a little more than two weeks thereafter, on the 15th of May and the third one, another six weeks later on the 2nd July, which the Workman admitted as wrong in answering the learned President of the Labour Tribunal.

All the payments have been made with a single signatory approving the payment instead of two signatures as required under the bank regulations and the position of the Workman was, at the relevant time, practice was to make payments on a single authorisation.

It would be pertinent to consider the statement made by Leela Edirisinghe which was produced by the Appellant at the inquiry and which the learned President of the Labour Tribunal has considered. It was Leela Edirisinghe who made the other disputed payment of Rupees 12,000 from the same savings account. She had stated that the National Identity Card number of the customer written on the reverse of the withdrawal slip had been written by the savings account officer, Gunarathne and not by her. She had also stated that she has no clear recollection as to whether the withdrawal slip was presented to her by the customer over the counter or not, implying that the customer may not have been present.

It is common ground that the account in issue was dormant at the time the impugned transactions were carried out. The Workman in his evidence had admitted that fact (Page 444 of the Labour Tribunal proceedings). However, the learned President of the Labour Tribunal has misdirected himself by concluding that "at no time it is asserted that the impugned account was a dormant account" and for that reason he concludes that the absence of the

"dormant endorsement" on the withdrawal slips is not a conclusive factor. In my view, this finding is not supported by evidence. As evidenced by the demonstration withdrawal slip produced as R4, when a withdrawal slip of a dormant account is fed into the terminal, the endorsement (WDL isa/ dormant osa)' gets printed on the withdrawal slip. None of the impugned withdrawal slips R 5, R 7, and R 9 carries that endorsement. As the Workman himself has admitted the account is a dormant account. The only conclusion one can come to is that, initially some other piece of paper was inserted into the computer instead of a withdrawal slip, as explained by witness Nimal Weerasinghe.

At this point I wish to refer to some of the matters taken into consideration by the learned President of the Labour Tribunal in concluding that the termination was unjust.

The learned President of the Labour Tribunal has stated in his order that at no point was it asserted that the savings account in issue was treated as a dormant account in the computer system or that the account was activated. This self same conclusion, in turn, had been used to justify the absence of the dormant account endorsement (WDL isa/ dormant osa)' on the withdrawal slips R 5, R 7 and R 9. This conclusion appears to be incorrect as the Workman himself has admitted that at the time the new passbooks were issued the impugned account was dormant. (Proceedings of 18 June 2009 page 444 of the Labour Tribunal proceedings). In any event the savings account in issue had to be dormant as for a period of nearly 15 years the account holder had not carried out any transactions. According to the evidence if for a period of two years there are no transactions automatically the account gets converted it into a dormant account. Hence the learned President of the Labour Tribunal has drawn a wrong conclusion.

In considering an allegation of unfair dismissal, the concerns of a Labour Tribunal should be;

(a) Were the alleged grounds of misconduct sufficiently established by evidence? What was the quality and nature of the misconduct.

(b) Are there proved reasons or legitimate inferences from the evidence available as regards how and why the business of the employer was, or might be reasonably expected to be adversely affected directly or indirectly by the act in question?

The above view was expressed by Amarasinghe J in the case of *Premadasa Rodrigo vs. Ceylon Petroleum Cooperation (1991) 2 SLR 182.*

In the instant case the learned President of the Labour Tribunal had held that, as regard to charges 1 to 12, of the charge sheet served on the workman, the Workman (Dayananada), Leela Edirisinghe, K.A. Gunerathne, Vijitha Kumarasinghe, W.A.B. Kumaraguru have actively colluded towards the commission of the alleged irregularities. The learned President of the Labour Tribunal doubted the evidence was sufficient to pin the irregularities on the Workman. In addition, the learned President of the Labour Tribunal had considered in his order, as to whether each of the charges on the charge sheet that was served on the workman at the domestic inquiry, had been established by the Appellant Bank. It is my view that the Labour Tribunal fell into error in approaching the issue in the manner referred to above.

As his lordship Justice Vythiylingam said in the case of the *Associated Battery Manufacturers (Ceylon) LTD vs. United Engineering Workers Union* 77 NLR 541,

"The employers position in this case was that the termination of the services of the Workman was justified for the reason that at the domestic inquiry had been on the theft of property belonging to the company. In other words, the reason for the termination was connected with the conduct of the Workman. The issue before the Tribunal in this case was whether having regard to all the facts and circumstances of the case the termination of the employment of the workman was justified or not, and **not simply whether the workman was**

guilty of theft of the boots or not." His Lordship further held "in the instant case the Tribunal had to find as a fact whether the workman did commit theft of the boots or not, but this was only incidental to the decision as to whether the termination of the employment was justified or not an not for the purpose of punishing him for a criminal offence. It has been emphasised in a number of cases that the proceedings before a Labour Tribunal are not criminal in nature and therefore the standards of proof require to establish a criminal charge are wholly inappropriate where the Tribunal has merely to ascertain the facts and make an order which in all the circumstances of the case is just and equitable. In doing so the Tribunal is not bound by the rules of evidence contained in the Evidence Ordinance and made base its decisions on evidence which would be shut out from the ordinary courts of law".

The learned President of the Labour Tribunal has concluded that, when one considers the irregularities alleged in charges 1 to 12, if in fact they had taken place, then the workman has actually contributed towards the commission of these irregularities. The relevant portion of the order is reproduced below.

"මෙම නඩුවේ ඉහත සම්පිණ්ඩනය කර ඇති අයුරින් පළමු චෝදනා 12 සැළකිල්ලට ගත් කළ, එවැනි අක්‍රමිකතාවයක් සිදු වී ඇති නම් එයට මෙම නඩුවේ ඉල්ලුම්කරුවන දයානන්ද ද, නීලා එදිරිසිංහ ද, කේ. ඒ. කේ. ගුණරත්න ද, විජිත කුමාරසිංහ ද, බී. ඒ. ඩබ්ලිව්. කුමාරගුරු ද යන අය සක්‍රීයව දායක වී ඇත. මෙම පස් දෙනාගෙන් ඉල්ලුම්කරු පමණක් මෙම ක්‍රියාවලියේ දී විශේෂත්ව කොට දැක්වීමට හැකි ආකාරයට නඩුව ඔප්පු කළා ද යන ප්‍රශ්නය පැන නගී."

Having concluded so, instead of giving his mind as to whether, having regard to all the facts and circumstances of the case the termination of employment of the workman was justified or not, the learned President had considered whether the workman is guilty of each of the charges on the charge sheet that was served on the workman at the domestic inquiry.

I am of the view that, had the learned President of the Labour Tribunal considered the totality of the facts in its correct perspective, he would have come to the conclusion, that the Workman had actively contributed towards

the irregularities committed and they are of serious enough to justify termination of employment.

I do not think there is any need to stress the significance of preserving the good name and the integrity of a financial institution such as a bank. As much as the services offered by the institution, the trust and the confidence reposed on such financial institutions by the public is equally important in attracting business. On the other hand, the Bank as an employer, undoubtedly expects its officers to justify, the trust and confidence reposed in them. As held in the case of *Bank of Ceylon vs. Manivasagasivam (1995) 2 SLR 79,* "utmost confidence is expected from any officer employed in the bank. There is a duty, both to the bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the bank"

Thambaiah J in the case of *Sithamparanathan vs. Peoples Bank (1989) 1 SLR 124,* stated that "where an officer employed in a bank, though not directly guilty of fraud or fraudulent transaction has been found to have dishonestly participated in withdrawals of money from the bank, his conduct not being absolutely above board, he is not a fit and a proper person to be employed by a bank".

The evidence that had been led in the instant case before the Labour Tribunal clearly establishes that the Workman had dishonestly participated in withdrawals of money from a bank account and this conduct is certainly not above board.

Allegations involving misconduct or moral turpitude in proceedings before a Labour Tribunal must be proved by a balance of probabilities. It is not necessary to call for proof beyond reasonable doubt. As such, in order to hold in favour of the Appellant Bank the misconduct on the part of the Workman must be proved on a balance of probabilities. *Prima facie* it can be seen that as a cashier and the operator of the computer, the Workman has played a major role in these fraudulent withdrawals though complicity of other officials cannot be ruled out. Moreover, after evaluating all the evidence discussed

above, I am of the firm view that the fault on the part of the Workman has been established on a balance of probability.

In the case of *Bristol Myera Squibbs (Phils) Inc. vs. Baban G.R. No. 167449, December 17,2008, 574 SCRA 198* , it was decided that,

> "As a general rule, employers are allowed a wider latitude of discretion in terminating the services of employees who perform functions by which their nature requires the employer's full trust and confidence. The mere existence of basis for believing that the employee has breached the trust and confidence is sufficient and does not require proof beyond reasonable doubt. Thus, when an employee has been guilty of breach of trust or his employer has ample reason to distrust him; a labour tribunal cannot deny the employer, the authority to dismiss him."

The learned High Court Judge had affirmed the order of the Labour Tribunal. On consideration of the order of the learned High Court Judge, it appears to me that the Judge of the High Court had lost sight of one of the basic principles of evidence that has not only has guided our courts but also guided the English courts for centuries.

The best evidence rule though now whittled down to some extent demands, the evidence, in order to be receivable, must come through proper instruments; thus a judge must not import his personal knowledge, except in the case of judicial notice. Simply put the facts must be established by legal evidence or by legitimate inferences.

The learned High Court Judge had concluded that the Appellant Bank after a domestic inquiry had recovered the amount so withdrawn from the impugned account from an employee, Leela Edirisinghe.

There is no evidence led before the Labour Tribunal to establish such a fact. Of the four impugned withdrawals, Leela Edirisinghe had acted as cashier on one occasion and a witness had said, according to his knowledge the amount

alleged to have been paid by Leela Edirisinghe (Rs.12, 000) was deducted from her salary in installments of Rs.1000/-. Thus, it appears that the Appellant has taken steps against the cashier Edirisinghe as well.

The Learned High Court Judge has also held that the Appellant has totally and willfully failed to call the customer Thamara Kannangara and her sister who happened to be a Grama Seva Niladhari. The learned High Court Judge had gone on to state that the said Grama Seva Niladari had played a major role in obtaining an additional National Identity Card for the customer. She had further stated that this leads to a serious suspicion that the customer obtained a second National Identity Card with the aid of the Grama Seva Niladhari with the intention of committing the fraud. There is absolutely no evidence to this effect, nor is there even a suggestion that either the customer or the Grama Seva Niladhari had defrauded the bank

A court no doubt is entitled to draw inferences, but such inferences must be drawn on the evidence placed before the court and if facts fall within the threshold laid down in section 114 of the Evidence Ordinance.

The learned High Court Judge had stated that the customer could not have received a Pass Book unless she visited the bank. There is no evidence that the customer had in her possession any of the three new Pass Books the Workman admitted that he issued. The day she complained to the bank about the discrepancy in her bank account, what she produced was the Pass Book that had been issued to her when she opened the bank account in 1981.

The learned High Court Judge had further stated that the Bank must ensure the cancellation of the previous Pass Book, prior to handing over the new Pass Book. According to his own admission it was the Workman, who obtained the new Pass Books and updated it and the interaction was between the customer and the Workman. When the learned High Court Judge states, that the 'bank must ensure the cancellation' it has to be done by an employee of the bank. As it was the Workman, who interacted with the customer, Thamara Kannangara, the Workman ought to have checked whether the old Pass Book

was cancelled before handing over the new Pass Book.This apperantly had not happened and it's another clear indication that the impugned transactions were not genuine. Going by the reasoning of the learned High Court Judge the Workman had, on no less than three occasions carried out the task him himself admitted and that it was he who had requested that new Pass Books be issued on three occasions.

There is another aspect emanating from the order of the learned High Court Judge I wish to address. She had stated that,

> "I observed that there is no justification in the termination of services of the Applicant whilst permitting the other respondents at the domestic inquiry inclusive of senior officers who have sanctioned the related payments to continue in services with lesser punishments or otherwise"

It is clear from the view expressed by the learned High Court Judge that one reason for her to hold that the termination of services is unjust is that other employees who have had connived in the impugned transaction had been dealt with leniently.

This approach is totally erroneous in my view. There is no material placed either before the Labour Tribunal or before the High Court to draw such a conclusion, particularly regarding cashier Leela Edirisinghe.

As far as the Workman is concerned, according to witness Fernando, over a shortage of Rs. 10,000 at Borella Branch the Workman has been warned to be more diligent and had been ordered to pay Rs.5000/-. Then in 1981 due absence from work without leave, he was deemed to have vacated his post and his services had been terminated. Thirteen years later in 1994, he had rejoined the bank as a new recruit.

The employer in my view must be permitted to exercise his discretion, with regard to errant employees taking into account facts and circumstances of the mischief committed, the extent of culpability and previous antecedents. There is no known principle in our law that the same punishment must be imposed when the same charge is laid against more than one and when all are found guilty.

In the case of *Gunarathne vs. People's Bank and Others, (2001) 1 SLR 381,* it was held that,

"Although charges laid against two persons are the same where there is discretion in imposing punishments, the degree of culpability in each person should be considered and different punishments may be imposed. This is a permissible and valid differentiation being in no way consistent with the equal protection of law guaranteed by Article 12 (1)."

It is to be noted that in as much as the Labour Tribunal exercises just and equitable jurisdiction so does the Supreme Court in determining infringements of fundamental rights.

This position was affirmed in the case of *W.M. Mendis and Co. Ltd. Vs. Sunil Liyanage, S.C Appeal 132/2004 (S.C Minutes 10.01.2006),* wherein the court observed thus, as per Justice Jayasinghe;

"It is my view that the Labour Tribunal fell into an error in coming to a finding that the Petitioner was entitled to compensation for the reason, that there are other employees who were similarly circumstanced and not dealt with by the company and that such indifference of the Appellant-Company amounted to discrimination."

The Workman did hold a position of trust and he himself is responsible for breaching that trust and I wish to quote the following passage with approval from the case of *Democratic Workers' Congress vs. De Mel and Wanigasekara (CGG 12, 432 19th May 1961)*

"The contractual relationship as between employer and employee as so far it concerns a position of responsibility is founded essentially on the confidence one has in the other and in the event of any incident which adversely affects that confidence the very foundation on which that contractual relationship is built should necessarily collapse…..once this link in the chain of the contractual relationship snaps it would be illogical or unreasonable to bind one party to fulfil his obligations towards the other. Otherwise it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter."

Considering the attendant facts, circumstances and the applicable law, I hold that the termination of services of the Workman by the Appellant-Bank is not unjust and hence the order of the Labour Tribunal is not one that is just and equitable.

Upon evaluation of the totality of material placed before the Labour Tribunal and the orders made by the Learned President of the Labour Tribunal and the learned Judge of the High Court respectively, in answering the questions of law on which leave was granted , I hold thus;

The labour Tribunal as well as the High Court have-

(a) arrived at the findings without proper evaluation of the totality of the evidence.

(b) erred in holding that the termination of the services of the Workman was unjust on the basis that other employees who were involved in the impugned transactions were treated more leniently.

(c) erred in directing the Appellant to have the Workman reinstated in service, when clearly the Appellant, the employer, has lost confidence in the Workman.

Accordingly, I set aside the order of the Labour Tribunal dated 05.03.2010 and the order of the Learned High Court Judge dated 11.05.2011.

However the workmen should be entitled to all the statutory dues.

The Appeal is allowed. I make no order as to costs.

Judge of the Supreme Court

Justice Priyasath Dep P.C

I agree

Judge of the Supreme Court

Justice Rohini Marasinghe

I agree

Judge of the Supreme Court