

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

In the matter Appeal by the High Court of
Under provisions of Article 128 of the
Constitution.

Officer In Charge,
Police Station,
Kosgoda.

Complainant

Vs,

SC APPEAL NO. 42/2014
H.C. Balapitiya No. 116/2000
M.C. Balapitiya Case No.93704.

Meegastennage Prince Gunawardena,
"Starlight",
Warakamulla,
Maha- Induruwa.

Accused

AND

Meegastennage Prince Gunawardena,
"Starlight",
Warakamulla,
Maha- Induruwa.

Accused-Appellant

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

Complainant-Respondent

AND NOW BETWEEN

Meegastennage Prince Gunawardena,
"Starlight",
Warakamulla,
Maha- Induruwa.

Accused-Appellant-Appellant

Vs,

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

**Complainant-Respondent-
Respondent**

BEFORE : L.T.B. DEHIDENIYA, J.
S. THURAIRAJA, PC, J. and
E.A.G.R. AMARASEKARA, J.

COUNSEL : Amila Palliyage with Duminda De Alwis for Accused- Appellant-
Appellant.
Induni Punchihewa,SC for the Complainant-Respondent-
Respondent.

ARGUED ON : 01st October 2019.

WRITTEN SUBMISSIONS : not filed by both parties.

DECIDED ON : 07th November 2019.

S. THURAIRAJA, PC, J.

This is an appeal against the order of the Provincial High Court of Balapitiya. It will be appropriate to mention the particulars of the case. The Accused - Appellant-Appellant namely, Meegastennage Prince Gunawardena (hereinafter referred to as the "Accused- Appellant") was charged before the Magistrate Court on two counts punishable under Section 400 and 386 of the Penal Code respectively for committing the offences of cheating and misappropriation of sum of Rs. 80, 000/-.

On the 20/01/1999 the Learned Magistrate had taken up the case for trial. Prosecution led the evidence of Vendahandi Padmasiri, Vijemuni Lenton Terrance de Soysa, and Police Sergeant Yatagama Lokuge Leelawansa and closed the case for the prosecution. When, defence called the Accused-Appellant made a dock statement and stated that, the allegations made against him were false. The Learned Magistrate found the Accused- Appellant guilty on first and second counts and imposed Rs. 5000/- fine in-default 2 months Rigorous Imprisonment and 2 years Rigorous Imprisonment for the first count and 2 years rigorous imprisonment for the second count. Further, it was ordered to implement both sentences concurrently.

Being aggrieved by the said order Accused- Appellant appealed to the Provincial High Court (sitting in appeal) and raised the following questions of law.

“ (1) විත්තියේ උගත් නීතියද මහතා විසින් හරස් ප්‍රශ්න ඇසීමේදී ගන්නා ලද ස්ථාවරය විත්තිකරු සාක්ෂි දෙමින් වෙනස් නොකර වෙන ස්ථාවරයක් නැත්නම් උගත් නීතියද මහතාගේ යෝජනාවක් පිලිගැනීමක් ලෙස සලකා ඒ මත විත්තිකරු වරදකරු කල හැකිද?

(2) උගත් මහේස්ත්‍රාත් තුමා විත්තිකරු වරදකරු කිරීමට උපයෝගී කර නොගත් සාක්ෂිමය කරුණු උපයෝගී කර ගනිමින් අභියාචනය ප්‍රතික්ෂේප කිරීමට නීතිමය වශයෙන් බලයක් ඇත්ද?”

(Sic eret scriptum)

English translations of the above grounds of appeal are as follows:

" (1) when the accused does not suggest any defence, is it acceptable to convict the accused solely based on a suggestion made by the Counsel for the Prosecution to the Court?

(2) Is there any jurisdiction to dismiss the appeal based on evidence which was not utilised by the Magistrate Court to convict the Accused?"

The High Court Judges hearing the arguments found that, the Accused-Appellant not guilty on the 2nd count and acquitted him. Further, found the Accused-Appellant guilty on the first count and affirmed the sentence imposed by the Learned Magistrate (Rs. 5000/ fine in default 2 months Rigorous Imprisonment and 2 years Rigorous Imprisonment.)

Being dissatisfied with the order of the Learned High Court Judge the Accused-Appellant preferred this appeal to the Supreme Court and raised the following questions of law.

1. The Conviction solely based not on the evidence in the case, but on the suggestions made by the defence counsel in cross-examination of the main witness, where the accused-appellant did not take up such position.
2. The Learned High Court Judge has used the evidence which were not considered by the Learned Magistrate to dismiss the appeal.

(Sic eret scriptum)

When the matter was taken up for argument the counsel for the Accused-Appellant submitted that, there is no acceptable judgment by the Learned Magistrate. Therefore, anything proceeding further becomes illegal. State Counsel initially submitted

that, the judgment is proper and acceptable. After a while, she admitted that, the Learned Magistrate has not pronounced the judgment with reasons and sought to send the case for re-trial.

The facts of the case as per the submissions of the Counsels and the available evidence are as follows. It is alleged that, the Accused-Appellant had obtained Rs. 80,000/- from the First Prosecution Witness to send him to Malaysia to seek an employment as a driver. PW1 was sent to Malaysia and employed on casual basis to one "Upali". After about 8 months, the Accused- Appellant had made a forged visa with the help of Upali and entered to Singapore, where he was arrested and detained. After his deportation to Sri Lanka, he lodged a complaint at the Police Station of Kosgoda against the Accused-Appellant and he was charged under section 400 and 386 of the Penal Code for cheating and Criminal Misappropriation. After the trial, on the 17/11/1999 the Accused-Appellant was found guilty and on the 03/05/2000 and the Learned Magistrate imposed the sentences. The relevant Journal Entry is reproduced for clear reference.

"2000/05/03

චූචිත- එම් ප්‍රින්ස් ගුනවර්ධන.

චූචිතට 1 වන චෝදනාවට රුපියල් 5000 ක් මුදලින් දඩ නියම කරමි. නොගෙවන්නේ නම් මාස දෙකක් බ/වැ සිර දඬුවම් නියම කරමි. අමතරව අවු. 2ක් බ/වැ සිර දඬුවම් නියම කරමි.

අවුරුදු දෙකක්

2 වන චෝදනාවට අවු. 2ක් බ/වැ සිර දඬුවම් නියම කරමි. චෝදනා 2 සඳහා දඬුවම් එකවර ගෙවී යාමටද නියම කරමි."

(Emphasis by the Magistrate)

English translation of the above paragraph as follows:

"2000/05/03

Accused- M. Prince Gunawardena.

I impose a fine of Rs. 5000/- for the first count in default 2 months rigorous imprisonment. In addition, I impose 2 years rigorous imprisonment.

Two years

I impose 2 years rigorous imprisonment for the second count. I order that, both sentences run concurrently".

(Emphasis the Magistrate)

When the matter was taken up in the appeal before the High Court of Balapitiya the Learned High Court Judge almost re-written the Judgment and found the Accused-Appellant guilty for the first count and acquitted him on the second count. The Learned High Court Judge affirmed the sentence imposed by the Magistrate on the first count.

The first count is under Sec.400 of the Penal Code and it states as follows.

*"Punishment for cheating-Whoever cheats shall be punished with imprisonment of either description for a term which may extend to **one year**, or with fine, or with both."*

(Emphasis added)

Maximum sentence spelled out in the law is one year and the sentence imposed by the Learned Magistrate and the Learned High Court Judge is patently wrong because, the Court has no jurisdiction to impose the said sentence.

Further, under Section 14 of the Code of Criminal Procedure Act No. 15 of 1979 the Learned Magistrate has no jurisdiction to impose the said fine. Hence, the fine

imposed by the Learned Magistrate and affirming the sentence by Learned High Court Judge is bad in law.

Article 13(4) of the Constitution of the Republic states as follows: -

"No person shall be punished with death or imprisonment except by order of a competent Court, made in accordance with the procedure established by law."

For the purpose of completeness, I wish to consider the facts, order of the learned Magistrate and learned High Court Judge to determine the questions of law raised before this Court. It is alleged that the Accused- Appellant had obtained Rs. 80,000/- to get an employment to First Prosecution Witness in Malaysia. PW1 was sent to Malaysia. There, he worked with Upali for about 8 months, made a forged long term visa and entered Singapore. There he was arrested, detained and deported to Sri Lanka. On return he complained to the Police and they preferred charges against the Accused- Appellant under section 400 and 386 of the Penal Code for Cheating and Criminal Misappropriation respectively.

The Learned Magistrate found the Accused-Appellant guilty for both counts and imposed sentences as stated above. When the matter was appealed to the High Court, the High Court found the Accused- Appellant guilty for the first count and affirmed the sentence and acquitted him on the second count.

Order of the learned Magistrate was discussed by the learned High Court Judge and she had not accepted or denied the said order. Further, she had not given reasonable reasons for re-writing the judgment. Anyhow, I considered the available reasoning given by the learned High Court Judge, where she had found the Accused- Appellant guilty under section 400 of the Penal Code for cheating. But, the learned High Court Judge had not considered proof of ingredients of the charge of cheating. She had merely narrated selected portions of the evidence and decided that, the case is proved.

It is mandatory for the Judge to analyze the entire evidence before the Court and to find whether the ingredients are proved beyond reasonable doubt. But, in this case neither the Magistrate nor the High Court Judge had followed the basic evaluation of facts and standard of proof. It is also noted that the both the Magistrate and High Court Judge had not properly analysed the dock statement.

As stated above, I am of the view that, there is no case proved against the Accused-Appellant beyond reasonable doubt. Hence, finding of the Accused- Appellant guilty is unacceptable.

Considering all, I find that, the conviction is not supported by the Evidence before the Court therefore; I do not incline to uphold the conviction. For the reasons stated above I find that, the sentence is bad in law. Accordingly, I allow the appeal and find the Accused-Appellant not guilty and make an order to acquit him.

Appeal allowed.

JUDGE OF THE SUPREME COURT

L.T.B. DEHIDENIYA, J.

I agree.

JUDGE OF THE SUPREME COURT

E.A.G.R. AMARASEKARA, J.

I agree.

JUDGE OF THE SUPREME COURT