IN THE SUPREME COURT

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

– –

In the matter of an Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Kapila Nishshanka Kumarage
No. 102/03,
Gnananlankara Mawatha,
Ratnapura.

Accused - Appellant -Appellant

SC Appeal No. 51/18
High Court Ratnapura
Appeal No. HCR/APL 42/14
Magistrate's Court Ratnapura
Case No. 68675

Vs.

1. **Officer-in-Charge,**
Special Crimes Investigation Bureau,
Police Station,
Ratnapura.

Complainant - Respondent - Respondent

2. **Hon. Attorney General**
Attorney General's
Department,

Colombo. 12.

Respondent - Respondent

Before: **Priyantha Jayawardena, PC, J.**
L.T.B. Dehideniya, J.
Yasantha Kodagoda, PC, J.

Appearance: Chathura Galhena for the Accused - Appellant - Appellant.
Ganga Wakishta Arachchi, Senior State Counsel with Ruchindra Fernando, State Counsel for the Respondent - Respondent.

Argued on: 4th August, 2020

Written Submissions: Written submissions for the Accused - Appellant - Appellant filed on 21st September 2018 and 7th December 2020.
Written submissions for the Complainant - Respondent - Respondent tendered on 4th December 2020.

Judgment delivered on: 4th May, 2021

Yasantha Kodagoda, PC, J.

Background

On 18th July 2008, the Officer-in-Charge of the Special Crimes Investigation Bureau of the Ratnapura Police Station (Complainant - Respondent - Respondent) instituted criminal proceedings against the Accused - Appellant - Appellant (hereinafter referred to as the "Appellant") in the Magistrate's Court of Ratnapura by filing a Complaint (commonly referred to as a 'Plaint') in terms of section 136(1)(b) of the Code of Criminal Procedure Act. (Number 68675 had been assinged to this case.) The *charge sheet* attached to the Complaint contained three charges, namely 'Cheating', 'Criminal Breach of Trust' and 'Criminal Misappropriation of Property'. The Appellant pleaded *'not guilty'* and a trial was held. Following the conclusion of the trial, on 29th August 2014 the learned Magistrate found the Appellant *'guilty'* and accordingly he was convicted of all three charges. On 12th December 2014, the Appellant was sentenced to a term of 1-year rigorous imprisonment and a fine of Rs. 1,500/=, per each charge. The Appellant appealed against the said conviction and sentence to the High Court of the Sabaragamuwa Province, holden in Ratnapura. (No. HCR/APL 42/14 had been assigned to that Appeal.) Following the hearing of the Appeal, the High Court acquitted the Appellant with regard to the second and third charges, and hence quashed the corresponding sentences. The conviction and sentence pertaining to the first charge of 'cheating', was affirmed. Subject thereto, the Appeal was dismissed. This Appeal is against the said judgment of the High Court of the Provinces.

Following a consideration of an Application seeking Leave to Appeal against the afore-stated judgment of the High Court, this Court on 16th March 2018 granted Leave to Appeal, on the following questions of law:

(i) *"Did the Provincial High Court fail to analyze the lack of mens rea on the part of the Petitioner to constitute an act of cheating?"*

(ii) *"Did the Provincial High Court fail to analyze that the virtual complainant had not been deceived by the act of the Petitioner, which is a necessary ingredient to constitute a charge of cheating?"*

[The reference to the 'Petitioner' in these questions, is a reference to the present 'Appellant'.]

Offence

According to the charge sheet, the offence in respect of which the Appellant stands convicted and sentenced, is as follows:

"That on or about the 25th September 2007, by asserting that money was required for a business purpose, having obtained Rs. 8,00,000/= from Kalawitigoda Pathirannalage Chandralatha, residing at No. 74, Polhengoda, Ratnapura, and in respect thereof having got her to repose confidence by tendering to her a cheque drawn for Rs. 8,00,000/= bearing No. 908494 drawn against Account No. 013001001397 maintained at National Development Bank, Ratnapura, and having told her that she could on the date contained in the cheque deposit the said cheque and obtain money, and thereafter by not having either deposited money in the relevant account on the date stated in the cheque or returned the money to her, dishonestly or fraudulently cheated her, and thereby committed an offence punishable in terms of section 403 of the Penal Code."

Evidence

The virtual complainant Kalawitigoda Pathirannalage Chandralatha Athukorala (hereinafter sometimes referred to as the 'virtual complainant') is a married lady with grown up children. The Appellant had been known to her for approximately five to six years. He was a friend of one of her sons. He had been preparing accounts on behalf of her son, for tax purposes. The Appellant used to frequent her house. She knew that the Appellant was running a shop at the supermarket in a building of the Ratnapura Municipality. On 12th September 2007, the Appellant sought a 'favour' from the virtual complainant; he solicited eight hundred thousand rupees on the premise that money was required for some business activity that he had commenced. She told the Appellant that she would think about it (the request for a loan) and respond. She had with her, four hundred thousand rupees. She collected another four hundred thousand rupees through several ways. Accordingly, on 25th September 2007, the virtual complainant gave a loan of eight hundred thousand rupees (in cash) to the Appellant. The Appellant offered to the virtual complainant a cheque. In response, the virtual complainant told the Appellant that she knew that there wasn't money in the Appellant's bank account and hence the cheque was not necessary. The Appellant responded and said *"its OK aunty, keep the cheque with you for the purpose of having confidence"*. Consequently, the Appellant had drawn and given the virtual complainant a *cash cheque* bearing No. 908494 issued by the NDB Bank drawn against account No. 013001001397, with a face value of eight hundred thousand rupees. The date on the cheque was 20th December 2007 (i.e. the cheque was post-dated). The virtual complainant's position is that she gave the loan to the Appellant because she had *'confidence / trust'* that the Appellant would return the money to her. According to her, the money was given to the Appellant as a loan and in a lump sum. The virtual complainant told the Appellant that she required

the money to be returned by December that year, as she would have to spend money for an eye operation.

In December 2007, she contacted the Appellant and asked him to return the money. He originally undertook to do so. However, he failed to return the money. Later, when she called the Appellant, he did not even pick-up the phone. Thus, the Appellant informed one of her sons, Madhuka Nishantha Athukorala. On 27th December 2007, they deposited the cheque in the account of her son, Madhuka. The cheque was dishonoured by the bank. She has produced to Court the 'Notice of Dishonour' issued by the Bank, marked "P1". Attached to the notice of dishonour issued by the bank, had been a photo-copy of the cheque that was dishonoured. After the cheque was dishonoured, the virtual complainant had informed the Appellant. However, he has not come to meet the Appellant. Up to the time at which the virtual complainant gave evidence in Court, the Appellant had not returned the money.

However, the case record reveals that after the case for the prosecution was closed and the learned Magistrate called upon the Appellant to present defence evidence, the Appellant had returned a portion of the money to the virtual complainant and again defaulted.

Under cross-examination, the virtual complainant testified that, she had '*utmost confidence*' in the Appellant. No document was exchanged between the parties at the time the loan was given. She has denied a suggestion put to her that she declined to accept the cheque due to the reason that she knew that there wasn't money in the Appellant's bank account. However, she has admitted that she told the Appellant that she did not require the cheque, and that what was required was for him to return the money, as she wanted the

money for her eye operation. She has also admitted the suggestion made by the learned counsel for the Appellant, that the cheque was accepted by her as a form of 'security'. The appellant had told the virtual complainant that he "*will definitely return the money in December*". The witness has responded positively to the position taken up by the defence counsel that the money was given to the Appellant as a *loan.* She has also responded positively to the position put to her that the Appellant gave a promise to her and he was unable to return the money to her. Under cross-examination, the witness has also said that the Appellant requested her to even mortgage her jewelry and give him the money he solicited. Thus, she had collected the money from multiple sources and given eight hundred thousand rupees to the Appellant. The virtual complainant has denied the suggestion put to her under cross-examination, that she gave the money to the Appellant in three instalments. She has been emphatic that she gave the eight hundred thousand rupees to the appellant in a lump sum. She has also denied the suggestion put to her that the *loan* was given to the Appellant at an interest rate of eight percent.

The second witness to testify on behalf of the prosecution had been Jinendra Asanga Dawulgama, an Assistant Manager of the Ratnapura Branch of the National Development Bank. According to his testimony, Kapila Nishshanka Kumarage (the Appellant) had an account bearing No. 013001001397, maintained at the Ratnapura branch of the National Development Bank. Cheque No. 908494 had been drawn against that account. This account had been '*closed*' with effect from 11th January 2007. The account had been closed by the Bank, following three cheques issued against the account having got dishonoured. A letter had been sent to the Appellant notifying him that the bank had closed the account. At the time cheque No. 908494 had been issued, the account remained closed. The witness has produced to Court a statement

of accounts relating to the relevant bank account, which was marked "P2". According to the witness, that statement reflects *inter alia* to the dishonouring of the cheque in issue.

The third and the final witness to testify for the prosecution was Police Sergeant Kulatunga Mudiyanselage Jayanath, of the Special Crimes Investigations Unit of the Ratnapura Police Station. His evidence was formal in nature. The virtual complainant had lodged a complaint regarding this matter on 24th January 2008, and he had conducted the investigation into that complaint.

Following the closure of the case for the prosecution, the learned Magistrate had called upon the Appellant to present the defence case. On 15th November 2015, learned defence counsel has informed court that no evidence will be presented to Court on behalf of the Appellant. Thus, the trial had been concluded.

Submissions of counsel

Learned counsel for the Appellant submitted that, "*a charge of cheating requires the complainant to handover to the offender an article or property* ***as a result of being deceived***". (emphasis added.) In the instant case, "*the complainant should have been deceived by receiving of the cheque drawn by the Appellant*". He further submitted that, "*it is essential that the lending of money occurred due to the act of deceit committed by the Accused, which induced the act of lending money to the Appellant*". "*If the lending of money had not been induced by giving the cheque to the complainant, the charge of cheating framed against the Appellant would not be proved*". He submitted further, that the gravamen of the charge relates to the

"inducement caused by the deceit of giving a cheque without funds, and not to the promise to re-pay the sum borrowed by the Appellant".

Learned counsel cited illustration "(f)" of section 398 of the Penal Code, which provides as follows:

"A, intentionally deceives Z into a belief that A means to repay any money that Z may lend to him, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats."

Counsel for the Appellant also submitted that, the facts of this matter are distinguishable with the facts of illustration "(f)" of section 398 of the Penal Code, since the Appellant did not dishonestly induce the virtual complainant to lend him money, and hence the said illustration is inapplicable to this case.

Learned counsel for the Appellant also drew the attention of the Court to illustration "(d)" of section 398, which provides as follows:

"A, by tendering in payment for an article, a cheque on a bank with which A keeps no money, and by which A expects that the cheque will be dishonoured, intentionally deceives Z, and thereby dishonestly induces Z to deliver the article, intending not to pay for it. A cheats."

Learned counsel submitted that though it appears that the facts of the instant matter come within the scope of illustration "(d)", it is necessary to examine whether it was the tendering of the cheque that induced the virtual complainant to lend money to the Appellant. He submitted that for some conduct to amount to deception, a false impression must be intentionally given or a false statement should be made, to induce someone to act upon the said representation. His position was that, as the evidence suggests, the lending of the money was not induced by giving the cheque, and was occasioned by the trust placed on the Appellant by the virtual complainant. He submitted that

the cheque was not even given as a mode of repayment. He further submitted that, according to the evidence, when the money was due, the virtual complainant originally tried to contact the Appellant to ask for the money to be returned, and it was only when her attempts to contact the Appellant failed, that she gave the cheque to her son to deposit it. Thus, learned counsel summed up his submission on the footing that "*the lending of the money was not induced by the tendering of the cheque*". Therefore, he submitted that the prosecution has failed to establish the element of '*deception by tendering the cheque*', and hence the Appellant's conviction for '*cheating*' was unlawful. Accordingly, he urged that the Appeal be allowed and the conviction and sentenced imposed on the Appellant be quashed.

On behalf of the Respondent, learned Senior State Counsel in her written submissions, referring to the evidence of the virtual complainant, submitted the following: "*… it is also evident that the virtual complainant had initially given it much thought and she was initially reluctant to give the Petitioner (sic) the said sum of money … However, the Petitioner (sic) had then provided the virtual complainant with a cheque as an assurance that the said sum of money would be returned by the Petitioner (sic) … In fact, the virtual complainant has also stated that the Petitioner (sic) had insisted on her taking the cheque … As a result of the said assurance, the virtual complainant had finally decided that the Petitioner (sic) could be trusted to return the said amount. The money had therefore been given to the Petitioner (sic) on 25th September 2007 …*"

Learned Senior State Counsel also drew the attention of this Court to illustration "(d)" of section 398 of the Penal Code, and submitted that, "*the aforesaid illustration matches the exact circumstances of the present case, as the Petitioner (sic) had essentially forced the cheque in issue on the virtual complainant as*

an instrument of inducement (knowing that the said cheque could not be encashed) to deliver the sum of money to him."

Learned Senior State Counsel submitted that the tendering of a cheque from an account which had already been closed several months prior, is reflective of the dishonest intention on the part of the Appellant. It was further submitted that the Appellant had no intention of repaying the virtual complainant. The Appellant intended to cause loss to the virtual complainant and thereby the *mens rea* of the offence of 'cheating' is satisfied.

Learned Senior State Counsel citing *Arvindbhai Ravjibhai Patel v. State of Gujarat* (1998 Cr.L.J. 463) submitted that it has been held that, "*if after taking a loan, for a considerable period the same is not paid till the date the complaint is filed, then from that point of time it can be prima facie said that he had the dishonest intention of not to pay right from the beginning. If the law is not interpreted in this manner, dishonest persons would screamingly skip the law and defeat the justice*".

The position of the learned Senior State Counsel is that the tendering of the cheque would have '*undoubtedly reassured the virtual complainant into providing the petitioner (sic) the loan*'. Thus, by tendering the cheque, the Appellant had 'deceived' the virtual complainant. The presentation of the cheque induced the virtual complainant to deliver to the Appellant the property, namely the loan of Rs. 800,000/=.

The written submissions filed on behalf of the Respondent also contained the following paragraph:

"*Further, it is pertinent to note that the Petitioner (sic) has had multiple connected matters pertaining to similar offences which were pending at the time (Case Nos,*

68674, 68676 & B 354/2008 - at page 40, High Court Appeal Brief marked 'X'), as well as a previous conviction from the Magistrate's Court of Ratnapura in Case No. 68673 (at page 82, High Court Appeal Brief marked 'X'). These facts indubitably go towards the Petitioner's character, that he is a repeat offender who has engaged in cheating persons in a manner similar to that in which he cheated the virtual complainant in this matter."

In the light of these submissions, learned Senior State Counsel submitted that the charge of 'cheating' has been clearly proven by the prosecution, and therefore submitted that the conviction of the Appellant for having committed *cheating* was lawful, and hence the Appeal be dismissed.

Consideration of the law, evidence, submissions and conclusions

Offence of 'Cheating'

Section 398 of the Penal Codes defines the offence of *Cheating* in the following manner:

"***Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person****, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government, is said to 'cheat'."* (Emphasis added.)

From this definition, it is evident that the offence of '*cheating*' can be committed in several ways. The focus here is not on the *modus operandi* that may be adopted by the perpetrator of the offence, but on technical ways recognized by

the Penal Code, as amounting to *'cheating'*. Those multiple ways in which the offence of *'cheating'* may be committed, are as follows:

1. **By deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person.**
2. By deceiving any person, fraudulently or dishonestly induces the person so deceived to consent that any person shall retain any property.
3. By deceiving any person, intentionally induces the person so deceived to do anything which he would not do if he were not so deceived, and which act causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government.
4. By deceiving any person, intentionally induces the person so deceived to omit to do anything which he would do if he were not so deceived, and which omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government.

In view of the evidence presented by the prosecution at the trial and the submissions made before this Court by both learned counsel, the manner in which the offence of *'cheating'* may be committed cited in "1" above is of particular significance to the adjudication of this Appeal.

That the offence of *'cheating'* can be committed in these four ways is reflected clearly in Dr. Sir Hari Singh Gour's *'The Penal Law of India'* (Diamond Jubilee - 10th Edition, Volume IV, page 3636), which provides as follows:

"To constitute 'cheating' under this section, there must be -

(1) deception of any person and thereby,

(2) (a) fraudulently or dishonestly inducing that person -

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property,

or

(2) (b) intentionally inducing that person to do or omit to do anything which if he were not so deceived, and which act or omission causes or is likely to cause harm to that person in body, mind, reputation or property."

Thus, it is Dr. Gour's view as well, that to constitute the offence of *'cheating'* ingredients "(1)" and "(2)(a)" or "(2)(b)" should be satisfied.

It would therefore be seen that ***deception*** is the core ingredient of the offence of 'cheating', and it is common to all four ways in which the offence may be committed. In comparison thereof, ***fraudulence*** and ***dishonesty***, which operate as alternate ingredients of the offence, are expressly provided ingredients only to the first and second ways in which the offence of 'cheating' may be committed, wherein the offender induces the victim to either (a) deliver any property to any person, or (b) to consent that any person shall retain any property. The third and fourth ways in which the offence of 'cheating' may be committed, do not contain *'fraudulence'* or *'dishonesty'* as constituent ingredients. Nevertheless, it is important to note that *'dishonesty'* is embedded in the ingredient of *'deception'*, and hence *'dishonesty'* is actually a requirement for all four ways in which the offence of *cheating* could be committed. This aspect will be discussed in further detail in due course.

Furthermore, with regard to the first and second ways in which the offence of *cheating* may be committed, it would not be necessary for the prosecution to prove that the victim suffered any loss or was likely to suffer any loss as a result of being subject to the offence, though pecuniary loss or loss of property would in most instances be a consequential result. However, with regard to the third

and fourth ways in which the offence may be committed, it would be necessary for the prosecution to prove a particular consequential loss or a likelihood of such a consequential loss as a result of being subject to the offence of '*cheating*'. Such consequential loss should be in the nature of either (i) actual damage or harm to such person in body, mind, reputation, or property, or damage or loss to the government, or (ii) the likelihood of causing such damage or harm to such person in body, mind, reputation, or property, or damage of loss to the government.

The term *'deception'* has not been defined in the Penal Code. *Black's Law Dictionary* (11th Edition) provides two definitions to the term *'deception'*. Those are *(i) the act of deliberately causing someone to believe that something is true when the actor knows it to be false,* and *(ii) a trick intended to make a person believe something untrue*. Generally, *deception* is carried out through making some verbal assertion or through conduct or by a combination of both. In *deception*, the verbal assertion contains falsehood which the perpetrator knows to be false. It has the effect of misleading the victim. However, a verbal assertion of falsehood is not absolutely essential. As the *explanation* to section 398 provides, "*a* ***dishonest concealment*** *of facts is a deception within the meaning of this section*". (Emphasis added.) Thus, not a mere omission to tell the truth or concealment of the truth, but an omission or concealment with the intention of dishonestly concealing the truth, would amount to *deception*. As Dr. Gour has pointed out, *deception* has in it the element of misleading, or making a person believe something that is not real. It implies causing a person to believe as true, something that is false. (page 3637) In *deception,* the motive for uttering falsehood or a false representation through other means, or the concealment of the truth, is *dishonesty*. The term "*dishonestly*" has been defined in section 22 of the Penal Code in the following manner:

"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." Section 21(1) provides that, "'*wrongful gain' is gain by unlawful means of property to which the person gaining is not legally entitled*", and section 21(2) provides that, "'*wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled'*. Thus, *dishonesty* connotes an intention to cause wrongful gain or wrongful loss contrary to law.

It would thus be seen that *deception* is distinct from the utterance of mere falsehood or failure to reveal the truth. It is not a mere misrepresentation as well. *Deception* is the inducement that is provided by the perpetrator of the offence of *cheating* to the victim, which should have been practiced with a *dishonest* intention. Thus, '*dishonesty*' is the *mens rea* of the offence of *cheating* common to all four ways in which the offence may be committed.

From the structuring of the charge of '*cheating*' preferred against the Appellant (i.e. the first charge on the charge sheet), it would be seen that the prosecution had premised the charge on the first out of the four ways in which I have described above, the offence of '*cheating*' may be committed. Thus, it is necessary to consider whether, the prosecution has proven that the Appellant practiced *deception* in respect of the virtual complainant in the manner alleged in the charge. Whether he entertained a dishonest intention when he solicited a loan from the virtual complainant is of critical importance. Furthermore, it is necessary to consider whether through such *deception,* the Appellant had *fraudulently* or *dishonestly* induced the virtual complainant to deliver property to the Appellant. From the perspective of the virtual complainant, it is necessary to consider whether it was the alleged act of *deception* (if any) practiced by the Appellant, which caused the virtual complainant to deliver

property to the Appellant. Even if the alleged offender had practiced *deception*, and nonetheless quite independent of the deceptive assertion made by the offender, the alleged victim had due to some auxiliary reason departed with property, the offence of '*cheating*' would not be made out. This is because, the prosecution under such circumstances has failed to establish **a causal relationship between the *deception* practiced by the alleged offender and the conduct of the victim**.

It would be seen that section 398 contains only the definition of the offence of 'cheating'. The punishment for 'cheating' is contained in sections 400, 401, 402 and 403 of the Penal Code. The punishment for committing '*cheating*' is conditioned upon the satisfaction of certain associated circumstances stipulated in these sections. In the instant matter, the Appellant was charged with having committed the offence of '*cheating*', punishable in terms of section 403 of the Penal Code. Section 403 provides as follows:

"***Whoever cheats and <u>thereby</u> dishonestly induces the person deceived to deliver any property to any person****, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security,* ***shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.***" (Emphasis added.)

Therefore, to be punishable in terms of section 403 of the Penal Code, it is necessary to consider whether the prosecution has proven that **as a result of being cheated**, the virtual complainant had **delivered property** to the Appellant.

Analysis of the evidence and application of the law

Offence of Cheating

It is now necessary to re-visit the evidence, while applying the afore-stated applicable legal principles. According to the virtual complainant, the Appellant was known to the virtual complainant for some time. It is evident that, well before the Appellant solicited a 'loan' from her, she had confidence or trust in the Appellant. According to her, due to the several reasons she has described in her testimony, she had *'utmost trust'* in the Appellant. On 12th September 2007, the Appellant solicited a *'loan'* from the virtual complainant. The prosecution did not place any evidence before Court that at the time the loan was solicited the Appellant had undertaken to tender to the virtual complainant a cheque, either as security or as the means by which the loan would be repaid. When the loan was solicited by the Appellant, the virtual complainant did not immediately indicate to the Appellant whether or not she will accede to the request. She contemplated on the matter for some time and at some point-of-time after the 12th of September, she seems to have decided to grant the loan to the Appellant. The date on which she took that decision has not been elicited from the virtual complainant. Having decided to grant the loan to the Appellant, the virtual complainant took certain steps to collect the required amount of money. That is because, she had only four hundred thousand rupees with her and the amount required was eight hundred thousand rupees. It was on the 25th September 2007 that she handed over to the Appellant the loan amounting to eight hundred thousand rupees. It is on that day that the Appellant drew the cheque in issue in the presence of the virtual complainant, and handed it over to her. The prosecution has not presented specific evidence on whether the cheque was tendered to the virtual complainant before or after the money was given by the virtual complainant to the Appellant. However, what is evident is that the cheque was handed over

to the virtual complainant by the Appellant some-time after the virtual complainant decided to lend the money to the Appellant. When the cheque was offered, the virtual complainant told the Appellant that it (the cheque) was not necessary, as in any event she knew that the Appellant did not have money in the account. However, the Appellant insisted on giving the cheque, and the virtual complainant accepted it as *'security'*. On being specifically questioned under cross-examination by learned counsel for the accused, the virtual complainant has testified that she gave the loan to the Appellant because she had 'confidence' in him. She has at no stage stated that she gave the loan on the belief that she considered the cheque to be *valuable security* and hence she will be able to encash the cheque when she required money. Thus, it would be seen that there is no specific evidence that the tendering of the cheque caused the virtual complainant to decide to grant the loan to the Appellant. In the circumstances, I am not inclined to agree with the submission of the learned Senior State Counsel that it was as a result of tendering the cheque as an assurance, that the virtual complainant decided to give the money to the Appellant. Further, even if this Court were to infer that the cheque had been given to the virtual complainant by the Appellant before the money was given to him, that the tendering of the cheque was the governing reason which resulted in the virtual complainant having decided to give the loan amounting to eight hundred thousand rupees to the Appellant, remains an unresolved issue.

At page 3641 (supra), Dr. Gour has pointed out that, *'to constitute the offence of cheating, there must be a deception which must precede and induce, under the first part of this section, the delivery or retention of property, or the act or omission referred to in the second part'*.

Views identical to Dr. Gour's have been expressed by Justice Hearne in *The King v. Wijerama* [2 CLJ 211], wherein it has been stated as follows:
"*Cheating is defined in section 398 C.P.C. The indictment in the present case refers to the first part of section 398. Under this part, in order to constitute 'cheating' there must be deception which must precede and induce the delivery or retention of property.*"

It is necessary to observe that in the matter under examination by me, **the prosecution has not proved that the impugned deceptive act of the Appellant preceded and induced the virtual complainant to lend him money**.

Indeed, in *The King v. Chandrasekera* (23 NLR 286) it has been held by Justice Shaw that the inducement to deliver the property need not have been wholly due to the deceit practiced by the perpetrator of cheating, independent of other auxiliary causes. However, the key issue to be determined is whether the tendering of the cheque by the Appellant to the virtual complainant was perceived by the virtual complainant as the means of recovery of the loan or as valuable security, and hence she was **thereby** persuaded to grant the loan of rupees eight hundred thousand to the Appellant because the cheque was tendered to her. For the tendering of the cheque to have played a decisive role on the virtual complainant having decided to give the money to the Appellant as a loan, the cheque should have been given to the virtual complainant at or before the time she decided to give the loan to the Appellant, or the Appellant should have given a promise to the virtual complainant that a cheque will be given to her if she were to give the money to him. As pointed out earlier, no evidence has been placed before this Court to that effect.

According to the testimony provided by the Assistant Manager of the Ratnapura Branch of the National Development Bank, the cheque in issue bearing No. 908494 had been drawn against the Appellant's bank account bearing No. 01300100139. This account had been *closed* by the bank on 11th January 2007, upon detecting that three cheques issued by the Appellant against this account had been dishonoured due to want of necessary funds. The fact that the account was being *closed*, had been communicated to the Appellant. The Appellant took no steps to re-activate the account. Thus, when the appellant drew cheque No. 908494, he knew that the corresponding account against which the cheque was being drawn had been *closed*. After the tendering of the cheque to the virtual complainant, the Appellant made no attempt to re-activate the account and deposit sufficient funds into that account so that there will be funds in the account to honour the cheque when the cheque is deposited by the virtual complainant. It is under such circumstances that in December 2007 when the virtual complainant's son deposited the cheque, it was dishonoured by the bank.

When the Appellant handed over the cheque to the virtual complainant and asked her to keep it as *'security'*, he made no reference to the fact that the relevant account had been *closed* by the bank. It can under these circumstances be argued that the Appellant's conduct of drawing and tendering the cheque was illegal as it amounted to an offence. When tendering the cheque to the virtual complainant, the Appellant had deliberately given the impression that the cheque was to be kept as *'security'*, when in fact, it was not a *'valuable security'* as at that point of time. Nor did he take any steps afterwards to convert the cheque in to a *'valuable security'* by re-activating the bank account and depositing sufficient money in it, facilitating the realization of the cheque when it is tendered to the bank. Consequent to the receipt of loan, when he was

obliged to return the money to the virtual complainant, the Appellant defaulted, and also started to avoid the virtual complainant. These items of subsequent conduct can be taken into consideration when arriving at an inferential finding regarding the state of mind of the Appellant at the time he accepted the money and handed over the cheque to the virtual complainant.

In my view, these circumstances by themselves are insufficient to arrive at an inference that at the time the Appellant solicited the loan and subsequently tendered the cheque, he entertained a dishonest intention. That is in view of the reasonable possibility that at the time the cheque was tendered the Appellant may have in *good faith* intended to repay the loan when the loan money was due, either by tendering cash or by depositing sufficient money in the bank account so that the cheque when tendered would be honoured. Thus, in my view, it cannot be unequivocally concluded that the Appellant had by the tendering of the cheque to the virtual complainant, engaged in *deception* of the virtual complainant by the dishonest concealment of certain relevant facts pertaining to the cheque and by asserting facts that gave the virtual complainant a false impression.

In any event, it is important to note that, even if this Court were to arrive at a finding that the tendering of the cheque and assertions made associated with the tendering of the cheque amounts to *deception*, that by itself does not convert the character of the Appellant's conduct to the offence of '*cheating*'. As pointed out earlier, the prosecution has failed to prove that it was the *deception* if any practiced by the Appellant that thereby caused the virtual complainant to give the solicited sum of money to the Appellant.

As the virtual complainant herself has admitted, the transaction between herself and the Appellant was one relating to a *loan*. From the perspective of the law of contracts, there has certainly been a breach of contract by the Appellant. According to Dr. Gour, *"a mere breach of contract cannot give rise to a criminal prosecution. The distinction between a case of mere breach of contract and one of cheating, depends upon the intention of the accused at the time of the alleged inducement, which must be judged by his subsequent act but of which the subsequent act is not the sole criterion"*. (page 3634, supra) Dr. Gour has also pointed out that, *"if the terms of the agreement are not carried out, it may attract civil as well as criminal consequences. The vital factor to be considered is whether at the time of the agreement, there was an intention to carry out the terms of the agreement or not. If at its inception there was no intention to carry out the terms, it would constitute the offence of 'cheating'. Not otherwise"*. (page 3635, supra) In view of the attendant facts and circumstances of this case, it cannot be concluded beyond a reasonable doubt that at the time of the making the request to the virtual complainant and when receiving the eight hundred thousand rupees, the Appellant entertained the intention of not re-paying the amount as per the undertaking he gave to the virtual complainant.

Charge against the Appellant

Section 165(3) of the Code of Criminal Procedure Act, No. 15 of 1979 provides that, *"when the nature of the case is such that the particulars mentioned in section 164 and the preceding sub-sections of this section do not give the accused sufficient notice of the matter with which he is charged, the charge shall also contain such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose"*. Particularly in offences such as '*cheating*' which has multiple technical ways in which the offence may be committed, the manner in which the offence had been committed should be specified. Illustration "(b)" of section 165

provides as follows: *'A is accused of cheating B at a given time and place. The charge must set out the manner in which A cheated B."* In compliance with this requirement, the charge against the Appellant contained the following averment: *"… by tendering to her a cheque drawn for Rs. 8,00,000/= bearing No. 908494 drawn against Account No. 013001001397 maintained at National Development Bank, Ratnapura, and having told her that* ***she could on the date contained in the cheque deposit the said cheque and obtain money*** *…"* (Emphasis added.) However, no evidence has been presented at the trial that the Appellant made such an utterance to the virtual complainant. Therefore, the prosecution has failed in establishing that the Appellant committed the offence of *cheating* in the manner in which the prosecution has alleged in the charge that the offence was committed. Thus, the evidence in the case is not compatible with the charge. That is another ground on which I conclude that the prosecution has failed to prove the charge of '*cheating*' against the Appellant.

I am of the view that, in the circumstances of this case, the answers to the following questions would point towards the absence of culpability of the Appellant for the offence of '*cheating*'.

(a) *Did the Appellant entertain a dishonest intention when he solicited the loan?*

(b) *Based on a dishonest intention, did the Appellant practice deception by concealing from the virtual complainant the fact that the bank account was closed and that there was no money in the account to honour the cheque?*

(c) *Did the Appellant solicit the loan and thereafter borrow the money from the virtual complainant with the intention of not repaying it?*

(d) *At the time the loan was solicited, did the Appellant know that he would not be in a position to settle the loan?*

(e) *While entertaining grounds to believe that he will not be in a position to settle the loan, did the Appellant conceal from the virtual complainant the fact that he will not be able to repay the money that was being borrowed?*

(f) *Did the tendering of the cheque by the Appellant to the virtual complainant result in the virtual complainant being deceived and thereby did the virtual complainant decide to give the money to the Appellant?*

In my view, the evidence presented at the trial is insufficient to conclusively answer any of the above questions in the affirmative. Thus, the conviction of the Appellant cannot be affirmed.

Arvindbhai Ravjibhai Patel v. State of Gujarat

I must now deal with the citing of the judgment in *Arvindbhai Ravjibhai Patel v. State of Gujarat*, by the learned Senior State Counsel in support of her submission, that the Appellant was culpable for having committed the offence of '*cheating*'.

The first matter I wish to observe is that, the said judgment of the High Court of Gujarat, India, has been decided by Judge K. Vaidya sitting alone, in respect of an application by which Arvindbhai Ravijibhai Patel sought the quashing of an order made by the Chief Judicial Magistrate of Surat. Following a consideration of a complaint filed in the Magistrate's Court of Surat by one Dhirubhai Shambhubai Kakadia against Patel that the latter had cheated him to give a loan of Rs. 90,000/=, the Magistrate had made an order directing the Police to inquire into the complaint and report. Thus, the impugned order made by the Magistrate challenged in the High Court was not a judgment in respect of a conviction and sentence imposed against Patel by a Magistrate. In the said case, what the High Court had been called upon to consider was whether there was sufficient material before the Magistrate that would in

terms of the applicable law warrant the Magistrate to require the police to inquire into the complaint and report back to the Magistrate. Thus, the matter that required adjudication by the High Court of Gujarat was not whether the evidence disclosed proof beyond reasonable doubt as to whether the accused (Patel) had committed the offence of '*cheating*'. It should be noted that there is a significant difference in the threshold of evidence an appellate court is required to consider between the two scenarios. In the matter before Judge Vaidya, all what he was required to consider was whether the material before the learned Magistrate disclosed well-founded information that Patel had committed the offence of '*cheating*', which would warrant the conduct of an inquiry into the complaint by the police. That question had been answered in the affirmative by Judge Vaidya. Thus, the judgment cited by learned Senior State Counsel has been decided on a totally different context and therefore notwithstanding the above being a judgment pronounced by a foreign court of law, I am constrained to conclude that it is not a *'relevant'* judgment from the context of this matter.

The second matter that needs to be dealt with by this Court, relates to the citing of this particular judgment of a foreign court of law. I am conscious that, learned Senior State Counsel when citing this judgment did not invite this Court to invoke the doctrine of judicial precedent (*stare decisis*) and thereby did not invite this Court to feel legally bound by or even obliged to follow the *ratio decidendi* of the cited judgment. In fact, the doctrine of judicial precedent does not require a Court of a sovereign and independent country to be bound by a judgment of a foreign country, notwithstanding the foreign judgment having been pronounced by a relatively superior Court in the comparative judicial hierarchies of the two countries. In fact, being legally bound to follow a judgment of a Court of another country would be inconsistent with the

sovereignty of the Democratic Socialist Republic of Sri Lanka and Article 3 read with Article 4 of the Constitution. Applying the doctrine of judicial precedent in respect of a judgment of a foreign Court, even though it may be in respect of a judgment of a relatively superior Court, would in my view also be inconsistent with the concept of *sovereignty of nation states* and contrary to Article 2 of the Charter of the United Nations which recognizes the principle of *sovereign equality*. However, an exception to this is found during the pre-republican era of Sri Lanka, when Sri Lankan courts were required to be bound by judgments of the Privy Council of the United Kingdom, pronounced in appeals to that Court from judgments of Courts of Ceylon (as Sri Lanka was called then). That is because, the law of the country (at that time) recognized the Privy Council to be the court of final resort.

Nevertheless, I wish to observe that the views of judges of superior courts can considerably be enriched by considering foreign judgments and appreciating the interpretation and application of the law by the justices who decided the relevant judgments and the judicial wisdom contained therein. Indeed, particularly during the embryological stage of the development of the fundamental rights jurisdiction, the Supreme Court of Sri Lanka gained much from judgments pronounced by the Supreme Court of India. A careful comparison of related judgments of the two national jurisdictions reveal how *'judicial borrowings'* if I may use that terminology, has contributed towards the development of the law in Sri Lanka. Furthermore, Public and Administrative Law of this country has gained significantly and exponentially from judgments of the Privy Council and the House of Lords of the United Kingdom.

However, in view of the sheer number and the multiplicity of views contained in judgments of foreign courts of comparable jurisdictions, unless a judge is

extremely careful and meticulously rigorous in examining the cited judgment in the backdrop of judgments of the same foreign jurisdiction not cited by counsel, it is probable that such judge may succumb to the consequences of possible *cherry-picking* of foreign judgments by counsel.

Be that as it may, it appears to me that the judgment in issue was cited by learned Senior State Counsel on the assumption that this Court should consider itself to be persuaded to follow the views expressed by Judge K. Vaidya and thereby be guided by his views. As observed earlier, the cited judgment is one of the High Court of the State of Gujarat, India. Based on the hierarchy of Courts in India, the High Court of the State of India cannot be equated to the Supreme Court of the Democratic Socialist Republic of Sri Lanka. Justice Thamotheram in *Walker Sons & Co. (U.K.) Ltd. v. Gunatilake and Others* [(1978-79-80) 1 Sri L.R. 231 at page 243] has expressed the view that it is the judgments of the highest Courts of a particular country which should be recognized as a judgment declaratory of the law of that country. I am in respectful agreement of that view. Therefore, the judgment of Judge K. Vaidya referred to by the learned Senior State Counsel cannot be considered as the law on the matter in terms of the law of India.

Subject to the absence of the term *'or damage or loss to the government'*, the offence of *'cheating'* is defined in section 415 of the Indian Penal Code of 1860 in the identical manner in which it has been defined in the Penal Code of this country. Further, in criminal matters, the applicable legal principles pertaining to relevancy and admissibility of evidence, burden of proof, and judicial practices relating to assessment of credibility and testimonial trustworthiness of evidence of Sri Lanka and India are comparable. However, a Judgment of a High Court of a State of India would certainly not even attract persuasive

influence on the Supreme Court of Sri Lanka. Therefore, even if the facts were identical, and the cited judgment also related to a consideration of an Appeal arising out of a conviction and sentence imposed by a trial court relating to the committing of the offence of '*cheating*', I see no useful purpose having been served by citing the judgment referred to above.

If at all, what may serve as helpful guidance to the Supreme Court of Sri Lanka would be judgments of the Supreme Court of India, in instances where the jurisdictions of the two courts and the applicable laws are comparable.

In any event, I must place on record that Courts must exercise great caution and apply extreme diligence when considering a judgment of a Court of a foreign jurisdiction, as a judgment must be necessarily viewed and appreciated in the backdrop of the applicable law, sources of law, evolution of the law, jurisdiction of the relevant court, comparable binding judicial precedents, subsequent developments of judicial precedents, natural and inherent conduct of the people of that country, and the socio-cultural and other conditions and circumstances which prevailed in such country at the time the particular judgment was pronounced. All such relevant factors may not be apparent *ex-facie* in the cited judgment and would not be within the domain of knowledge of judges invited to consider such judgment of the relevant foreign Court.

Former Chief Justice of India Justice K. G. Balakrishnan in "*The Role of Foreign Precedents in a country's Legal System*" [National Law School of India Review, Volume 22 (No. 1) 2010] has expressed the view that, "*… judges should be cautious against giving undue weightage to precedents decided in entirely different socio-political settings. … reliance on foreign precedents should also be shaped by the*

discipline expected of a common law judge in weighing the credibility and persuasive value of precedents from different legal systems".

From that perspective too, the judgment cited by learned Senior State Counsel provides hardly any assistance for the determination of this Appeal, and must be classified as being *'irrelevant'*. In the circumstances, it would be necessary to call upon counsel to refrain from citing judgments of foreign jurisdictions that do not have any relevance to the case at hand required to be decided by a Sri Lankan Court.

Antecedents and the character of the Appellant

As referred to earlier, learned Senior State Counsel citing certain journal entries and proceedings of the case, submitted that the Appellant had several connected cases relating to several similar offences and that he had been once convicted of having committed an offence. Her submission was that these facts *'indubitably go toward the Petitioner's* [sic] *character, that he is a repeat offender who has engaged in cheating persons in a manner similar to that in which he cheated the virtual complainant in this matter".* It appears from the said submission that the Respondent's position is that, the said antecedents amounting to bad character of the Appellant should be taken into account for the purpose of considering the lawfulness or otherwise of the conviction that is impugned by the Appellant in this Appeal.

Section 54 of the Evidence Ordinance provides as follows:

In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant." Explanations 1 and 2 of section 54 provide that this section does not apply to cases in which the bad character of any person is itself a fact

in issue and that in such cases a previous conviction is relevant notwithstanding such evidence amounting to evidence of bad character. E.R.S.R. Coomaraswamy in "*The Law of Evidence*" (Volume I, page 684) has aptly summarized the position of the law in this regard in the following manner: "*Section 54 lays down the general rule that in criminal proceedings, the fact that the accused has a bad character is irrelevant, except in exceptional cases mentioned therein. Evidence may not be given of the accused's previous convictions and misconduct on other occasions for the purpose of supporting an argument that he is the kind of person who would commit the crime charged. As Wigmore puts it, "the rule, then, firmly and universally established in policy and tradition is that the prosecution may not initially attack the defendant's character".*" Lord Sumner in *Thompson v. Rex* [(1918) A.C. 232] has held that, "*no one doubts that it does not tend to prove a man guilty of a particular crime to show that he is the kind of man who would commit a crime or that he is generally disposed to crime and even to a particular crime'*. In *Makin v. Attorney General for New South Wales* [(1894) A.C. 57] it has been held by Lord Herschell that, it is not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that he is likely, from his criminal conduct or character to have committed the offence, for which he is being tried.

This is not a case where the character of the accused was a fact in issue. Indeed, in such cases, evidence relating to the bad character of the accused can be presented by the prosecution. Nor had the accused acting in terms of section 52 of the Evidence Ordinance presented to court evidence of his good character. In such instances, evidence amounting to the bad character of the accused can be presented to rebut the evidence presented on behalf of the accused. Thus, neither of these two situations are applicable.

The third situation whether the presentation of evidence which may amount to evidence of bad character may be relevant, would be instances where the prosecution seeks to present evidence in terms of sections 14 or 15 of the Evidence Ordinance for the purpose of establishing the existence of a particular state of mind of the accused at the time of committing of the offence which would constitute the *means rea* of the offence, or for the purpose of establishing a state of body or bodily feeling. Towards this objective evidence which may amount to bad character of the accused may be led, as well as evidence of similar occurrences involving the accused, commonly referred to as *system evidence*. Illustrations "*(a)*", "*(b)*" and "*(c)*" of section 14 and illustration "*(c)*" of section 15 provide ample illustration of this principle of evidence. However, in such situations too, evidence which amounts to bad character of the accused would be permitted by court only in exceptional circumstances if the prosecution can show a high degree of probative force in such evidence, the principle being that the court should protect the accused against the consequential prejudicial impact arising out of such evidence of bad character.

The fourth and the final circumstances under which evidence which may amount to bad character of the accused may be relevant, would be for the purpose of establishing the 'cause' and the 'motive' for the committing of an offence, which would be relevant in terms of sections 7 and 8(1) of the Evidence Ordinance, respectively. Illustration "*(a)*" of section 8 which provides that, "*when 'A' is tried for the murder of 'B', the facts that 'A' murdered 'C', that 'B' knew that 'A' had murdered 'C', and that 'B' had tried to extort money from 'A' by threatening to make his knowledge public, are relevant*", amply exemplifies the position of the law in this regard. However, even when evidence which may amount to bad character of the accused is sought to be presented by the

prosecution as means of establishing the 'cause' and or the 'motive' for committing the offence, the trial Court must exercise great caution in ensuring that the probative value of such evidence outweighs its prejudicial effect.

It would be seen that the circumstances cited above by the learned Senior State Counsel which in any event has not been presented as 'evidence' before the learned Magistrate, do not come within any of the four situations described above, which make evidence of bad character relevant and admissible. Therefore, consideration of such factors submitted by the learned Senior State Counsel would be obnoxious to the law and hence this court refrains from doing so.

Impugned judgments of the High Court and the Magistrate's Court

It is a matter of regret that the learned Magistrate who found the Appellant *guilty* as charged in respect of all three offences, has not considered the evidence led by the prosecution from the perspective of the ingredients of the offences the Appellant had been charged with. After arriving at determinations regarding the credibility and testimonial trustworthiness of the witnesses who testified at the trial, a trial judge must necessarily consider the evidence from the perspective of the constituent ingredients of the offence the accused has been charged with. Having identified witnesses who are credible, the trial judge must conclude whether their testimony is trustworthy. He must thereafter apply the evidence emanating from such credible and trustworthy witnesses, to the ingredients of the offence, and consider and arrive at a conclusion on whether the available evidence would be sufficient to prove the ingredients of the offence. If following a consideration of the evidence for the prosecution, the learned trial judge arrives at an affirmative finding, he must thereafter consider the totality of the evidence presented by both the

prosecution and the defence and determine whether the prosecution has proved its case against the accused beyond reasonable doubt.

The learned High Court judge has proceeded on the footing that, the Appellant had by tendering the cheque and giving an undertaking to the virtual complainant that the amount obtained as a loan would be returned as promised, had thereby created a belief in the mind of the virtual complainant that the money would be returned, and had therefore committed the offence of *cheating.* The learned High Court judge has also not considered the impact arising out of the pre-existing confidence / trust the virtual complainant had towards the Appellant. Nor has the learned High Court Judge considered whether the conduct of the Appellant amounted to *deception,* whether it was such deceptive conduct which resulted in the virtual complainant giving the money to the Appellant, and whether the Appellant entertained a *dishonest* intention.

In view of the foregoing, I answer the questions of law presented to this Court in the following manner:

(i) The Provincial High Court had failed to analyse whether the evidence led at the trial justifies the conclusion that the Appellant entertained the requisite *mens rea* of the offence of *cheating*, which in view of the manner in which the charge had been framed and the evidence presented by the prosecution was a *dishonest intention.*

(ii) The Provincial High Court had failed to analyze and conclude that the virtual complainant had not been deceived by the impugned conduct of the Appellant, which is a necessary ingredient to constitute a charge of *cheating*.

In view of the above, I conclude that both the judgments of the High Court and the Magistrate's Court are against the weight of the evidence and are not lawful.

In the circumstances, I allow this Appeal. Accordingly, I acquit the Appellant of the charge of *cheating*.

Judge of the Supreme Court

Priyantha Jayawardena, PC, J.

I agree.

Judge of the Supreme Court

L.T.B. Dehideniya, J.

I agree.

Judge of the Supreme Court