

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

*In the matter of an Application for  
Special Leave to Appeal to the Supreme  
Court in terms of the High Court of the  
Provinces (Special Provision) Act No.  
19 of 1990.*

**SC APPEAL 85/2014.**

The Officer-in-Charge,  
Fraud Bureau –Unit 06,  
No. 05, Dharmarama Road,  
Colombo 06.

**HC COLOMBO CASE NO.  
HC MCA 215/2008.**

**COMPLAINANT**

**MC FORT CASE NO.  
66183.**

**Vs.**

Warnakulasuriya Michael Angelo Fernando  
'Eastern Spray', Ma-Eliya Watte,  
Ma-Eliya,  
Ja-Ela.

**ACCUSED**

**AND BETWEEN,**

Warnakulasuriya Michael Angelo Fernando  
'Eastern Spray', Ma-Eliya Watte,  
Ma-Eliya,  
Ja-Ela.

**ACCUSED -APPELLANT**

**Vs.**

The Officer-in-Charge,  
Fraud Bureau –Unit 06,  
No. 05, Dharmarama Road,  
Colombo 06.

**COMPLAINANT -RESPONDENT**

The Hon. Attorney General,  
Attorney General's Department,

Colombo 12.

**2<sup>nd</sup> RESPONDENT**

**AND NOW BETWEEN,**

Warnakulasuriya Michael Angelo Fernando  
'Eastern Spray', Ma-Eliya Watte,  
Ma-Eliya,  
Ja-Ela.

**ACCUSED –APPELLANT –APPELLANT**

**Vs.**

The Officer-in-Charge,  
Fraud Bureau –Unit 06,  
No. 05, Dharmarama Road,  
Colombo 06.

**COMPLAINANT –RESPONDENT –  
RESPONDENT**

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

**RESPONDENT –RESPONDENT**

**BEFORE** : **PRIYANTHA JAYAWARDENA, PC, J.**  
**MURDU N.B. FERNANDO, PC, J. and**  
**S. THURAIRAJA, PC, J.**

**COUNSEL** : Anil Silva, PC, for the Accused –Appellant –Appellant.  
Madhawa Tennakoon, SSC, for the Hon. Attorney General.

**ARGUED ON** : 20<sup>th</sup> February 2019.

**WRITTEN** : Accused –Appellant –Appellant on 6<sup>th</sup> January 2015.

**SUBMISSIONS** : Respondent –Respondent on 12<sup>th</sup> June 2019.

**DECIDED ON** : 13<sup>th</sup> November 2019.

**S. THURAIRAJA, PC, J.**

The Accused-Appellant-Appellant, Warnakulasuriya Michael Angelo Fernando (hereinafter referred to as the 'Accused-Appellant') had filed an Appeal against the order of the High Court of Colombo, through his Power of Attorney holder, Wanigasuriyaarachige Don Sharan Mary Dolita to the Supreme Court. Before proceeding to address the grounds of appeal, I find it essential to produce the material facts of the case.

The Accused-Appellant was employed as a General Cashier (Chief Cashier) at the Hilton Hotel, Colombo. He was entrusted with many responsibilities, including buying of Embarkation Tax Tickets from the Airport Aviation Sri Lanka Ltd. (hereinafter referred to as 'AASL') for their hotel customers. Once the tickets are obtained from AASL, the General Cashier distributes the tickets to other cashiers, namely the Front Office, Cafeteria, Pool Cashiers, etc. It is to be noted that any passenger who is departing through the Bandaranaike International Airport should pay an Embarkation Tax. Many tourist hotels, including the Hilton Hotel, pre-purchase the Embarkation Tax Tickets and provide them to their customers to have a smooth departure at the Airport.

As a practice, the General Cashier creates necessary vouchers, seeks permission from relevant authorities, makes the payment to AASL, obtains the ticket, sells the same and reimburses the money, which is obtained from the cashier's imprest.

In the present case, the Accused-Appellant who is the General Cashier had raised necessary documents and drawn two cheques for the value of Rs. 300,000/- each in favour of AASL and the same was sent through the travel desk of Ebert Silva Tours, who is permanently stationed at the hotel. The said cheques were sent in a

sealed envelope to the agents of the hotel, stationed at Bandaranaike International Airport. There, they open the envelope, make payments to AASL and obtain the Embarkation Tax Tickets. In this case, the agents have obtained three books which contained, one hundred tickets on the first occasion and similarly, on the second occasion as well, altogether amounting to six hundred tickets, which were sent to the Hotel in a covered parcel. There is no practice of sending these documents through delivery books.

It is the duty of the General Cashier i.e. the Accused-Appellant, to follow up on the purchase of the tickets, to obtain and to distribute the same to his cashiers and further, to collect the money and reimburse it to his petty cash. It is notable that, in 2006, the petty cash of the General Cashier was Rs. 3,000,000/-.

It was found, at the routine accounts verification that, the cashier had not accounted for the said money of Rs. 600,000/- and when they investigated, it was found that the cashier had not reimbursed Rs. 600,000/- (i.e. 300,000 x 2), which was used to purchase the Embarkation Tax Tickets. The Hotel held an independent enquiry and found the Accused-Appellant guilty. Thereafter, the matter was referred to the Colombo Fraud Investigations Bureau (hereinafter referred to as 'CFIB'). After formal investigation, a case was filed against the Accused-Appellant, at the Colombo-Fort Magistrate's Court on two counts under Section 391 of the Penal Code and two alternate counts under Section 386 of the Penal Code.

A trial was held and the Prosecution led the evidence of the following witnesses and concluded their case- 1) Sunil Chandrasiri Perera –Assistant Financial Controller, Hilton Hotel, Colombo, 2) Senerath Lal Perera –Payment Officer, Hilton Hotel 3) Anthony Ranjith Trevor Perera –Restaurant Cashier, Hilton Hotel 4) Senerath Mudalige Alexis Vineetha Jayathilake –Accounts Administrator, Hilton Hotel, 5) Sarath Premalal Perera –Staff Assistant, Department of Airport and Aviation Services Ltd., 6) Tuan Feral Ali –Executive, Hilton Hotel Counter at the Bandaranaike International Airport, 7) Jagath Udaya Kumara Mendis –Tourist Driver, Ebert Silva Tours, 8) Brian

Christopher Pieris –Manager, Transport, Ebert Silva Tours, 9) George Seneviratne – Manager, Ebert Silva Tours, 10) Salinka Dilshan Serasinghe –Accountant, Ernest and Young, 11) Ajith Naranjan Ranaweera, Banking Assistant, HSBC, 12) Police Sergeant 9255 Hewage Vijitha Kumara Ananda and 13) Anthony Jayasena –Partner, Chartered Accountant, Ernest and Young.

It is noted that, on the 14<sup>th</sup> of February 2006, the charges were explained by the Magistrate to the Accused-Appellant and he pleaded, not guilty. He was present throughout, till the 10<sup>th</sup> of October 2007, almost till the tail end of the case of the Prosecution. When the case was postponed to the 5<sup>th</sup> of December 2007, he absconded from Court. The learned Magistrate, after following necessary procedures under the Code of Criminal Procedure Act (CCPA), continued the trial and concluded the same. It is observed that the Attorney-at-Law continued to appear on behalf of the accused, on his instructions.

The learned Magistrate, after giving reasons, found the Accused-Appellant guilty on the first and the third counts and sentenced him to one year of rigorous imprisonment for each charge, in addition to a fine of Rs. 1,500 on each count. Further, the learned Magistrate discharged the Accused-Appellant on the second and fourth counts.

Being aggrieved with the said order, the Accused-Appellant preferred an appeal to the High Court. There, the learned High Court Judge, after hearing both counsels, delivered an order affirming the conviction and the sentence of the learned Magistrate.

Being dissatisfied with the said order of the High Court, the Accused-Appellant preferred an appeal to the Supreme Court and obtained leave to proceed on 10.06.2014. When the matter was taken up for argument, it was found that the grounds of appeal were not certain and clear. Hence, the court invited the Counsels to frame the grounds of appeal.

Accordingly, the following grounds of appeal were raised and are reproduced, as it is-

1. *Did the learned High Court Judge has misinterpreted the documents marked 'P1' and 'P2' and had considered them as receipts issued by the Petitioner in respect of the receipts of the embarkation tax tickets?*
2. *Did the learned High Court Judge err in law by basing his decision on the misconceive fact that the documents marked 'P1' and 'P2' are proof of embarkation tax tickets being entrusted to the Petitioner?*
3. *Did the learned High Court Judge misdirected himself by erroneously determining that the main ingredients in the charge of criminal breach of trust has been established by the Prosecution beyond reasonable doubt?*

***(Sic erat scriptum)***

Regrettably, although both counsels agreed to file further written submissions within 3 weeks from 20.02.2019 and a further two week period was given to respond to each other if necessary, until the preparation of this judgment, neither of the parties had filed their written submissions.

The learned President Counsel based his submission on the fact that there is no proper entrustment proved by the prosecution and hence, the conviction should fail.

In ***Walgamage v. The Attorney-General***, 2000 3 SLR 1 SC 828, it was observed-

*"Entrustment ... includes the delivery of property to another to be dealt with in accordance with an arrangement made either then or previously."*

The Accused-Appellant had worked as a cashier at the said hotel and the relationship between the employer and the employee is completely based on trust. Both parties cannot rely on documents and signatures for each and every dealing. The relationship shared between the employer and the employee is also reflected in the entrustment of Rs. 3,000,000/- as petty cash amount to the General Cashier. In comparison with Government Institutions, this is a large sum given to a cashier. This shows the extent of trust that is placed on the employee for the smooth operation of the hotel activities. Further, it is revealed that the staff was sufficiently and adequately remunerated. A person such as the Accused-Appellant, who holds the position of a General Cashier (Chief Cashier) should be more trustworthy and committed to his employer, in carrying out the entrusted functions.

In **Beuchanan v. Conrad**, 1 SCR 38 2 CL Rep. 135, while discussing the requirements in an offence of criminal breach of trust, it was observed-

*"There must be evidence of some specific sum having been misappropriated or converted to the defendant's use."*

In the present case, the misappropriation of the Accused-Appellant has been proved beyond reasonable doubt. Owing to the employer-employee relationship shared between the Complainant and the Accused-Appellant, the finding of the learned Magistrate that, the Accused-Appellant is guilty under Section 391 of the Penal code is well founded.

In consideration of the grounds of appeal, it is necessary for us to peruse the evidence led before the learned Magistrate and the arguments advanced before the learned High Court and this Court. I am of the view that, the learned Judge of the High Court had adequately considered the materials before him. I do not find there to be any inconsideration of the grounds of appeal. Hence, I find that, there is no merit in these grounds of appeal.

Considering the sentence, I find that, the learned magistrate has been very reasonable in imposing the legal sentence. Therefore, I am of the view that, there exists no reason to interfere with the findings of the learned Magistrate, regarding the conviction of the Accused-Appellant and the sentence imposed upon him.

For the stated reasons, I find that, the learned Judge of the High Court was correct in affirming the conviction and the sentence imposed upon the Accused-Appellant by the learned Magistrate.

Accordingly, I dismiss the Appeal and grant no order as to costs.

***Appeal dismissed.***

**JUDGE OF THE SUPREME COURT**

**PRIYANTHA JAYAWARDENA, PC, J.**

I agree.

**JUDGE OF THE SUPREME COURT**

**MURDU N.B. FERNANDO, PC, J.**

I agree.

**JUDGE OF THE SUPREME COURT**