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

In the matter of an Appeal under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 331(1) of the Code of Criminal Procedure Act No. 15 of 1979.

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

Complainant

Court of Appeal Case No. HCC/277/2016

High Court of Colombo Case No. HC 4360/2008

Vs.

Kodikara Aarachchige Ranjith Kodikara,

Accused

AND NOW BETWEEN

Kodikara Aarachchige Ranjith Kodikara,

Accused-Appellant

Vs.

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

Complainant-Respondent

BEFORE : MENAKA WIJESUNDERA, J
WICKUM A. KALUARACHCHI, J

COUNSEL : Dr. Ranjith Fernando with Champika Monarawila and Michelle Fernando for the Accused-Appellant
Disna Warnakula D.S.G. for the State.

ARGUED ON : 29.01.2024

DECIDED ON : 28.02.2024

WICKUM A. KALUARACHCHI, J.

The accused-appellant was convicted for dishonestly misappropriating Rs.2,200,000/- belonging to Damith Nandalal Sahabandu (PW-1), and thereby committing an offence under Section 386 of the Penal Code. Prior to the hearing of the appeal, written submissions were filed on behalf of both parties. At the hearing, the learned counsel for the appellant and the learned Deputy Solicitor General for the respondent made oral submissions.

Briefly, the prosecution case is as follows:

The complainant (PW-1) had entered into a tenancy agreement with the accused-appellant in October 1999 for 2 years. This tenancy agreement

has been extended for a further period of 2 years. With the expiry of the tenancy agreement in 2003, there had been a discussion to purchase the property by the complainant and he agreed to purchase the property for a sum of Rs. 2,700,000/-. Both parties had signed an agreement to sell. This agreement has been marked as P-1. Admittedly, an advance payment of Rs.1,000,000/- was paid by the complainant. The agreement was to pay the balance of Rs.1,700,000/- within one year and upon payment of the balance, the property was to be transferred to the complainant.

The complainant has admitted in his evidence that since October 2004 up to date, he continued to occupy the premises without paying rent. The appellant had filed a case in the District Court to eject the complainant from the premises.

The learned High Court Judge has convicted the accused-appellant for misappropriating Rs.2,200,000/- by her judgment dated 30.08.2016.

The grounds of appeal urged in the written submissions of the appellant are as follows:

I. The learned trial judge failed to address and attach any significance to items of uncontroverted evidence led at the trial that militated against and negatived any “dishonest intention” allegedly entertained by the accused at that time.

II. The learned trial judge had erred in fact and in law by concluding that the accused “dishonestly” misappropriated/converted to his own use thereby intentionally causing wrongful gain to himself and/or “wrongful loss” to the complainant by unlawful means.

In addition, in his brief oral submission at the hearing, the learned counsel for the appellant raised another ground that the learned trial judge failed to observe that the transaction subject to this case is only a civil transaction.

According to clause 8 of the agreement to sell, if the vendor (the appellant) neglects and fails to execute the deed of transfer after the purchaser (the complainant) paid the due amount on or before the relevant date as specified in the agreement, the purchaser is entitled to enforce specific performance of the vendor's covenant to sell and convey the property to the purchaser or his nominee. In addition, the purchaser is entitled to claim liquidated damages.

According to clause 8 of the agreement, if the vendor performs the terms and conditions outlined in the agreement and the purchaser neglects and fails to complete the purchase on or before October 31, 2004, the vendor is entitled to forfeit Rs.100,000/- from the advance payment.

A similar clause such as clause 8 of this agreement is usually set out in most of the agreements to sell. The purpose of this clause is to allow either party to go before the District Court and secure the fulfillment of the terms of the contract if the other party breaches the terms and conditions of the contract. Failing to perform the terms and conditions of a sales agreement gives rise to only civil liability and not criminal liability.

However, the learned high court judge in this case convicted the accused-appellant on the ground that the appellant had misappropriated a sum of Rs. 2,200,000/- given by the complainant in order to purchase the property relating to this sales agreement. In deciding so, the learned judge accepted the complainant's evidence that he had given another Rs.1,200,000/- to the appellant apart from the initial payment of Rs.1,000,000/-.

The prosecution proved by producing cheques bearing the numbers 775612, 775618, and 775605 that the complainant gave the appellant Rs. 2 lakhs, Rs. 3 lakhs, and Rs. 2.5 lakhs on three separate occasions.

With that Rs.750,000/- given by three cheques, it is proved that the complainant had given Rs.1,750,000/- to the appellant. The complainant (PW-1) stated in his evidence that he paid Rs.12 lakhs in six occasions (page 99 of the Appeal Brief) to the appellant in addition to the initial payment of Rs.10 lakhs. According to the complainant, Rs.50,000/-, Rs.100,000/- and Rs. 300,000/- had been paid in three occasions in cash, apart from the payments made by the aforesaid three checks. However, there are no receipts or any other documentation to prove the aforesaid three cash payments. In addition, the complainant could not remember when these cash payments were made. Since the complainant stated in his evidence that he gave this money to the appellant, the learned high court judge decided that the complainant had altogether paid 22 lakhs to the appellant.

In the District Court case bearing No. 20695 L, the learned additional district judge decided by answering issue No.5 that the payment of Rs.22 lakhs is not proved. The said portion of the District Court Judgment has been marked as “V-8a”. However, the learned High Court Judge stated in the impugned judgment that although the learned additional district judge decided so, I decide that the complainant has paid Rs. 22 lakhs to the appellant because complainant’s testimony can be believed than the statement made by the accused-appellant from the dock. Accordingly, the learned high court judge has come to the conclusion that apart from the proved amount of Rs. 1,750,000/-, the sum of Rs. 4 and a half lakhs that the complainant claims to have paid to the appellant, which he cannot prove, has also been paid by the complainant to the appellant.

Although, there was no proof regarding the aforesaid cash payments, a settlement entered in the District Court has been marked as V-1 (page 132 of the Appeal Brief) in cross-examining PW-1 in the High Court. According to the said settlement, the appellant had agreed to pay and the

complainant had agreed to receive the balance amount from the Rs. 22 lakhs, after deducting the rent relating to the period during which the complainant occupied the premises of the appellant without paying rent. Since both parties had come to an agreement in the district court on the basis that an amount of twenty-two lakhs has been paid by the complainant, it will not be necessary to consider further in this appeal, the proof regarding the payment of the sum of Rs. 22 lakhs.

The vital issue to be considered in this appeal is how the learned high court judge came to the conclusion that the appellant had misappropriated the said Rs. 22 lakhs. As to the issue of how the offence of criminal misappropriation is proved, the finding of the learned trial judge and the contention of the learned DSG are the same. When the court posed the question as to the criminal element in this transaction, the learned DSG responded that the sales agreement in question had been executed in contravention with Section 2 of the Prevention of Frauds Ordinance. Her contention was that the sales agreement was not executed by a notary, was not registered and that it is evident that the spouse of the accused who is a lawyer and a notary public signed as a witness thereby being privy to this improperly formulated transaction. Further, the learned DSG contended that the dishonest intention of the appellant is clear from the beginning of the series of events that have transpired by executing this invalid agreement. Also, she contended that it is clear that the intention of the appellant was to evade from transferring the property to the complainant as per the agreement and to evict the complainant from the property. In perusing the impugned judgment, it is apparent that the learned high court judge has also taken the same views in determining this action.

It is important to realize that occupying the premises on a tenancy/lease agreement and the transactions pertaining to the said tenancy/lease

agreement are different from the transactions pertaining to the sales agreement. In this case, the complainant who came to the occupation of the premises on a tenancy/lease agreement wanted to purchase the property. The complainant, PW-1, in his evidence admitted that he had not paid rent since October 2004. Therefore, acting in accordance with the law, the appellant sent a notice to quit and then filed an ejectment action in the District Court. It is apparent that the appellant filed the District Court action to eject the complainant because he occupied the premises owned by the appellant without any legal authority. It is unfair and wrong to decide that the appellant intended to misappropriate the complainant's money and eject him from the property for the reason of filing an ejection action for which he is legally entitled. The complainant has admitted clearly in the following manner that he continued the occupation of the premises without paying anything to the appellant.

ප්‍ර: මහත්තයා පිළිගන්නවාද මේ 2004 ඉඳන් කිසිදු බදු මුදලක් ගෙවන්නේ නැතුව මේ ගෙදර ඉඳලා තිබෙන්නේ කියලා ?

උ: ඔව් මම කිසිම මුදලක් ගෙව්වේ නැහැ.

ප්‍ර: අවුරුදු 09කට අධික කාලයක්?

උ: ඔව්.

When the complainant continued in occupation of the appellant's property without any legal authority and without paying any rent, the appellant has all the rights to file an action to eject him. Exercising the appellant's legal right has also been used as a ground for assigning criminal liability to the appellant by the learned trial judge.

Now, I proceed to consider whether the appellant had misappropriated Rs.22 lakhs with dishonest intention. Undisputedly, the agreed amount to transfer the property is Rs. 27 lakhs. The complainant paid Rs. 22 lakhs to the appellant. He had to pay another Rs. 5 lakhs. The complainant stated in his evidence that he attempted to pay the balance Rs. 5 lakhs to

the appellant but he avoided taking the same and the appellant wanted to increase the agreed amount. The appellant's position was that he took all endeavours to meet the complainant to obtain the balance Rs. 5 lakhs but the complainant evaded because he had no money at that time to pay the balance amount. In this case, the accused-appellant has made a statement from the dock and three witnesses were called on his behalf. In his dock statement and while cross-examining PW-1, the appellant has proposed to pay back to him the money that the complainant gave to him. In the said circumstances, it has to be considered whether it is proved beyond a reasonable doubt that the appellant had misappropriated the complainant's money.

The only reason stated by the learned DSG for assigning criminal liability to the appellant is executing the sales agreement in contravention with Section 2 of the Prevention of Frauds Ordinance with dishonest intention. The learned trial judge found guilty of the accused for criminal misappropriation on the ground that the appellant dishonestly executed the said invalid sales agreement in order to misappropriate the money given by the complainant. In addition, the learned judge stated in her judgment that as a lawyer, the wife of the appellant should have taken steps to execute the sales agreement by a notary and to register the agreement. The learned trial judge was of the opinion that it appears from the evidence presented to the court that the accused-appellant's wife, as a lawyer knowing that such property should be registered, deliberately did not register it in this way and received an amount of Rs. 22 lakhs from the complainant. The said finding contained in her judgment appears as follows:

"එසේ වුවද විත්තිකරුගේ බිරිඳ නීතීඥවරියක් ලෙස මෙවැනි දේපලක් ලියාපදිංචි විය යුතු බව දැන දැනම, හිතාමතාම මේ ආකාරයට ලියාපදිංචි නොකර අදාළ ගිවිසුම අනුව පැමිණිලිකරුගෙන් ලක්ෂ 22 ක මුදලක් ලබා ගත් බව මෙම අධිකරණයට ඉදිරිපත් වූ සාක්ෂි අනුව පෙනී යයි." (Page 421 of the Appeal Brief)

According to this finding of the learned judge, not the accused-appellant, but his wife had received Rs.22 lakhs from the complainant. According to the said finding, the accused-appellant could not be convicted of criminal misappropriation.

However, again in her judgment, the learned high court judge stated as follows: "තවද මෙම ගිවිසුම වංචා වැළක්වීමේ ආඥා පනත යටතේ ලියාපදිංචි වී නැති බවත්, එසේ ලියාපදිංචි නොවී ඇත්තේ විත්තිකරුගේ වුවමනාවට බවත්, විත්තිකරුගේ බිරිඳ නොතාරිස්වරියක ලෙස හිතාමතාම නීතීඥවරයාට ලබා දුන් උපදෙස් පරිදි මෙම ඔප්පුව ලියාපදිංචි කර නැති බව සඳහන් කරමි. විත්තිකරුගේ බිරිඳ මෙම ඔප්පුවේ සාක්ෂිකාරියක් ලෙස අත්සන් කරන අවස්ථාවේදී ද මෙම ඔප්පුව ලියාපදිංචි කිරීමේ අවශ්‍යතාවය ඇති බව ඇය දැන සිටිය යුතුය. එබැවින් හිතාමතාම පැමිණිලිකරුට විත්තිකරු වංචාවක් සිදු කර ඇති බව සඳහන් කරමි." (Page 425 of the Appeal Brief)

I regret that I am unable to agree with that finding also because according to her own observation, the sales agreement had not been registered not only for the need of the appellant but for the need of both the appellant and the complainant. (එම ඔප්පුව ලියාපදිංචි වී නැත්තේ විත්තිකරුගේද පැමිණිලිකරුගේ එකඟත්වය මත බව පෙනී යයි. – Page 37 of the Judgment) According to the evidence of the case, the said observation of the learned judge is correct. Therefore, her finding that the agreement had not been registered because the appellant did not want to register it and thereby the appellant had defrauded the complainant is completely wrong. The said finding is contrary to the evidence presented in the High Court. On the agreement and understanding of both the appellant as well as the complainant, the agreement was not registered.

It is to be noted that entering into an agreement which is not attested by a notary is not illegal or legally prohibited. On the consent of both parties to the agreement, they can enter into a written agreement between them like an oral agreement for the future sale or purchase of any land without

notarial execution. However, such a document has no legal enforceability. When both parties who entered into the sales agreement did not want to execute the same by a notary, there was no basis for the learned judge to state that the wife of the appellant should know as a lawyer that this agreement must be registered and that the appellant's wife should have arranged for the notary public who prepared the agreement to attest the same. It is correct that as a lawyer the wife of the appellant should have known that any contract or agreement for the future sale or purchase of any land or other immovable property to be legally enforceable, it must be attested by a notary and then registered. However, when the appellant as well as the complainant informed that they wanted to sign an agreement without notarial execution, the appellant's wife could not force the notary to execute the same and register. The learned judge is wrong in coming to a conclusion that the accused-appellant had intentionally defrauded the complainant because the wife of the appellant should have known the necessity of registering this agreement ("විත්තිකරුගේ බිරිඳ මෙම ඔප්පුවේ සාක්ෂිකාරියක් ලෙස අත්සන් කරන අවස්ථාවේදී ද මෙම ඔප්පුව ලියාපදිංචි කිරීමේ අවශ්‍යතාවය ඇති බව ඇය දැන සිටිය යුතුය. එබැවින් හිතාමතාම පැමිණිලිකරුට විත්තිකරු වංචාවක් සිදු කර ඇති බව සඳහන් කරමි.")

Fraudulent or dishonest intention of the appellant would be reflected if the appellant fraudulently obtained the complainant's signature implying that the sale agreement would be executed by a notary public and it would be registered. However, in the case at hand, the learned trial judge herself observed, as stated previously, that the agreement was not registered with the consent of both the appellant as well as the complainant. In addition, the complainant admitted in his evidence that he has general knowledge of reading the English language (page 92 of the appeal brief). Furthermore, the complainant stated that he received a copy of the agreement signed by both parties (page 108 of the appeal brief). So, in entering into the sales

agreement, no fraudulent or dishonest intention of the appellant has been established from the evidence.

According to the appellant, the property could not be transferred to the complainant because he did not pay the balance of Rs.5 lakhs on or before the date specified in the agreement. According to the complainant, he attempted to pay the balance amount in time but the appellant avoided accepting the balance payment asserting him to increase the agreed value of the property. According to my view, there was no evidence in this case to decide which version is correct. However, the learned trial judge accepted the complainant's version stating that he is a truthful witness and his testimony could be reliable than the appellant's dock statement. Even if the learned judge acted on the said decision, the conclusion that could be arrived at was that the appellant failed to transfer the property as per the terms of the agreement to sell. It assigns only civil liability for non-compliance with the agreement. No criminal liability could be assigned to the appellant for the reasons explained above. The contention that money was fraudulently taken from the complainant by preparing an agreement which was not attested by a notary public has no validity because entering into an agreement that is unenforceable in the eyes of the law had been done with the consent of not only the appellant but also the complainant. Therefore, I hold that the finding of the learned high court that the appellant's fraudulent or dishonest intention has been established in this transaction is an erroneous finding.

The offence of criminal misappropriation under Section 386 of the Penal Code reads as follows:

"*Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both*"

The accused-appellant in this case was always ready to return the money that the complainant gave to him. Even at the stage of cross-examining PW-1 (the complainant), the counsel who appeared in the high court for the accused-appellant suggested to PW-1 to give him back the Rs. 22 lakhs but PW-1 refused to accept (pages 137 and 138 of the appeal brief). Thus, there is no evidence that the appellant had dishonestly misappropriated the Rs. 22 lakhs that he obtained from the complainant. Hence, I hold that it has not been proved beyond a reasonable doubt that the accused-appellant had dishonestly misappropriated Rs.22 lakhs. I hold further that convicting the appellant for the charge of misappropriation is bad in law.

Accordingly, I set aside the Judgment dated 30.08.2016, the conviction, and the sentence imposed on the accused-appellant.

The appeal is allowed. The accused-appellant is acquitted of the charge of misappropriation.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J

I agree.

JUDGE OF THE COURT OF APPEAL