

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

In the matter of an Appeal under and in terms of the provisions contained in the Constitution of the Democratic Socialist Republic of Sri Lanka and section 33 of the Code of Criminal Procedure Act No.15 of 1979.

Democratic Socialist Republic of
Sri Lanka

Complainant

Court of Appeal
Case No. **CA HCC 0320/2018**

Vs.

High Court of Kandy
Case No. **HC 22/2009**

Majeed Thajudeen Mohmad Fahim,
No.22,
Godapola Road,
Matale.

Accused

AND NOW BETWEEN

Majeed Thajudeen Mohmad Fahim,
No.22,
Godapola Road,
Matale.

Accused-Appellant

Vs.

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

Respondent

Before: **B. Sasi Mahendran, J.**
 Amal Ranaraja, J.

Counsel: Ranil Samarasooriya with Isuru Somadasa and Nalaka
 Samarakoon for the Accused-Appellant.

Wasantha Perera, DSG for the Respondent.

Argued on: 27.02.2025

Decided on: 17.03.2025

JUDGMENT

AMAL RANARAJA, J.

1. The accused-appellant (hereinafter referred to as the “appellant”) has been indicted in the *High Court of Kandy* in High Court case no. 22/09.
2. The charge in the indictment is as follows;

That on or about 02.11.2007, at *Matale*, within the jurisdiction of this Court, the appellant has committed the offence of cheating on a total sum of Rs. 5,175,000.00 on PW1, by promising him that he would sell a Toyota Allion motor vehicle, and accepting a sum of Rs. 3,175,000.00 as

an advance and thereby committing an offence punishable under and in terms of section 403 of the Penal Code.

3. Upon the appellant pleading not guilty to the charge in the indictment, the trial has commenced and at the conclusion of the same the Learned High Court Judge has found the appellant guilty of the charge, convicted and sentenced him to one-year rigorous imprisonment. Further, has also imposed a fine of Rs.5000/- with a term of three months' simple imprisonment, in default of the payment of the fine.
4. Aggrieved by the conviction and the sentence imposed, the appellant has preferred the instant appeal to this Court.

The grounds of appeal

5. When the matter was taken up for argument, the learned counsel for the appellant urged the following grounds of appeal:
 - i. The ingredients of the charge of cheating have not been proved.
 - ii. The evidence of PW1 and PW2 have not been properly analysed by the Learned High Court Judge.

iii. No proper reasoning has been given in terms of section 283 of the Code of Criminal Procedure Act No. 15 of 1979 by the Learned High Court Judge when delivering the disputed judgment.

6. Before considering the submissions made by the Learned Counsel for the appellant in support of the above mentioned grounds of appeal and also the submissions made by the Learned Deputy Solicitor General who represented the complainant-respondent, this Court finds it relevant to consider the facts that had come to light in the trial Court.

Facts in brief

7. PW1, the person who had been purportedly cheated, has come back to *Sri Lanka* after being employed overseas for several years. Back in *Sri Lanka*, PW1 has been looking for an investment opportunity. Though his initial plan had been to invest in an immovable property PW1 had been informed by PW2, i.e. a middle-man, who was engaged in finding buyers for vehicles, that there was a Toyota Allion motor car for sale at a discounted price.

8. Upon receiving such information PW1 has concluded that it would be better for him to purchase the particular car and rent it to generate an income. Thereafter, he has gone to the relevant vehicle sales centre owned by the appellant with PW2. PW1, PW2 and the appellant have been relatives, and known to each other. At the vehicle sales centre, the appellant has shown the particular car to PW1 and informed the latter that the sale price of the particular car after a discount was Rs. 5,500,000.00. Offering a further discount, the appellant has agreed to sell the particular car for a sum of Rs. 5,175,000.00. Since PW1 has been informed that there were several others also interested in purchasing the particular car, PW1 has handed over a sum of Rs. 3,175,000.00 in cash to the appellant on 02.11.2007 while agreeing to pay the balance sum within two weeks' time and take possession of the particular car at that time.
9. When PW1 went back to the relevant vehicle sales centre he has found such business premises deserted and the car he intended to purchase also missing. Though PW1 had tried to contact the appellant thereafter, he has failed in his endeavour. Sometime later PW1 has been able to track down the appellant. In that instance, though the appellant had promised to hand over the particular car to PW1, he has failed to do so.
10. Thereafter, the appellant has issued a cheque for a value of the sum made as a part payment and obtained from PW1 in lieu of the particular

car, but the cheque has been dishonoured by the relevant bank. Upon realising that he has been cheated PW1 has made a complaint to the *Criminal Investigation Department*.

11. The appellant has suggested to PW1 in cross-examination that he never agreed to sell a car nor did he receive any money from PW1. It has been further suggested that the transaction referred to in the charge had taken place between PW1 and PW2, and the appellant issued the cheque which was subsequently dishonoured, as security in respect of the transaction that took place between the former.

12. At the conclusion of the prosecutions' case, the Learned High Court Judge has decided to call for a defence on the basis that there were grounds for proceeding with the trial.

13. The appellant has not given evidence or made a dock statement but has remained silent. Further, though he had informed the Learned High Court Judge initially that he did not intend to call witnesses on his behalf, he has subsequently proceeded to adduce evidence of an officer from a bank on his behalf.

14. At the hearing of this appeal, the Learned Counsel for the appellant agreed that though the evidence led through by such officer refers to a

sum similar to that stated in the charge, that the witness he has failed to establish a connection of the sum referred to, to the sum stated in the charge preferred against the appellant.

Consideration of the grounds of appeal

15. It was the contention of the Learned Counsel for the appellant that the prosecution had failed to prove a material ingredient in the offence stated in the charge i.e. the deception of PW1 by the appellant. If at all it was PW2 who deceived PW1 into making part payment to the appellant in order to purchase the car in question. Also, that the Learned High Court Judge has failed to analyse the evidence in the correct perspective.

16. It was the position of the Counsel for the appellant that although the Learned High Court Judge had determined that there were no contradictions or omissions in the evidence of PW1 and PW2, it was not a correct determination.

17. PW1 has stated that he had discussions with regard to the sale of the particular car at his house in *Mattale*, but subsequently contradicted himself when he stated that such discussion took place over the phone with PW2. The evidence of PW2 had been that he went to the car sales

centre only on the day the money was paid by PW1 to the appellant. However, the evidence of PW1 had been that he together with PW2 went to the car sales centre on several occasions.

18. This Court has been appraised that the discrepancies in evidence referred to above were material and they should have been considered in favour of the appellant by the Learned High Court Judge instead of determining that there were no contradictions or omissions in the evidence of those witnesses.

19. The submission of the Learned Deputy Solicitor General was that the evidence must be evaluated in an overall context and not in a piecemeal basis. The Learned Deputy Solicitor General has drawn the attention of this Court to the relationship that existed between the parties, which in turn had led PW1 to believe that he could purchase the particular car from the appellant at a discounted price. It was also pointed out that the actual deception was not the information provided by PW2 to PW1 but the statement made by the appellant to PW1, which caused the latter make a part payment to the appellant believing that the particular car could be purchased from the appellant. The Learned Deputy Solicitor General also referred to the evidence of PW1 which appears at page 84 of the appeal brief where it has been stated that when PW1 met the appellant, the former was shown the particular car and stated that several persons were interested in purchasing the same but since the

appellant and PW1 were relatives, the particular car could be sold to PW1 at a discounted price if the consideration was paid in cash. The Learned Deputy Solicitor General has also contended that the alleged discrepancies do not go into the core of the issue and are matters that do not affect the credibility of the prosecution case. He was also of the view that the Learned High Court Judge had imposed a lenient sentence on the appellant upon conviction. The Learned Deputy Solicitor General has moved that the appeal be dismissed for want of merit.

20. The offence of cheating punishable in terms of section 403 of the Penal Code Act No. 50 of 1980 has been delineated in section 398 of the same which reads as follows;

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".

21. Although it was argued that the deception that needed to be proved in a case of cheating had not been established by the prosecution, I find no basis to agree with such contention. It is very clear that PW2 who was the middle-man had only facilitated a deal between the appellant and PW1 by directing/introducing PW1 to the appellant. It is also clear that it was the appellant who have had the particular car in his car sales centre and informed PW1 that the particular car was for sale. It has been clearly established that PW1 had been deceived to pay a sum of Rs. 3,175,000.00 to the appellant due to the utterance of the latter to the effect that there were several other persons interested in purchasing the particular car and that it would be sold to PW1 at a discounted price since he was a relative of the appellant and the payment was to be made in cash by PW1.

22. It is the view of this Court that as pointed out by the Learned Deputy Solicitor General, the appellant has deceived PW1 to hand over the money to the former believing what the appellant had stated to him. Hence, this Court find no rationale in the first ground of appeal urged by the appellant.

23. As regards to the second and third grounds of appeal, it is the view of this Court that any contradiction or omission in evidence need to be material to effect the case of a particular party to a trial. A trivial

contradiction or omission which does not go into the root of a case cannot be considered a reason to reject the evidence of a witness. This Court is of the view that the discrepancies in the evidence referred to by the appellant are so trivial that they do not create a doubt as regards to the evidence led on behalf of the prosecution. When, such evidence is taken into consideration in its totality, it is clear that PW1 had made a part payment to the appellant in the belief that he could purchase the particular car which the appellant had offered to sell to him at a discounted price.

24. Although the Learned High Court Judge may not have dealt with the evidence in much detail, this Court finds that the Learned High Court judge has considered the evidence that is material in the correct perspective.

25. This Court is unable to find a misdirection of the Learned High Court in regard to the evaluation of evidence and the law that needs to be considered when determining a matter of the nature of the charge stated in the indictment.

26. Though it was submitted that the evidence of PW1 and PW2 were not cogent, it needs to be noted that PW2 has corroborated the narrative of

PW1. Further, PW2 has not been cross-examined, which connote that the evidence of PW2 has not been disputed by the appellant.

27. Even though the Learned Counsel for the appellant had contended that PW2's evidence has not been disputed because the latter's evidence does not corroborate the evidence of PW1, this Court finds such a claim to be an excuse for the failure of the appellant to dispute the evidence of PW2 at a material instance.

28. Another matter to which the attention of this Court is drawn to is the failure by the appellant to create a reasonable doubt as to the evidence placed before the trial court or at a minimum failure to offer a reasonable explanation in that regard.

29. It is settled law that an accused person need not prove anything and it is the duty of the prosecution to prove the charge against an accused beyond a reasonable doubt. However, once the prosecution adduces cogent incriminating evidence, an accused in those circumstances was required by law to offer an explanation of such cogent and incriminating evidence led against him.

30. It has been suggested to PW1 in cross examination that the sum referred to in the charge contained in the indictment was given by PW1 to PW2 and not to the appellant. This Court finds that the evidence led in the case does not support such a proposition under any circumstance. This Court finds such proposition to be a concocted story of the appellant in his endeavour to absolve himself of the charge.

31. For reasons as considered above, I am not inclined to interfere with the disputed judgment together with the sentence.

32. Accordingly, the appeal is dismissed for want of merit. I make no order regarding cost

33. The Registrar of this Court is requested to communicate this judgment to the *High Court of Kandy* for compliance.

Appeal dismissed.

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree.

Judge of the Court of Appeal