

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

In the matter of an appeal in terms of
Section 331 of the Code of Criminal
Procedure Act No. 15 of 1979.

Court of Appeal cases No:
CA/HCC/48/2021 and
CA/HCC/49/2021

Democratic Socialist Republic of Sri Lanka
Complainant

High Court of Colombo
Case No: HC/1537/2003

Vs.

1. Wellawatte Arachchige Kalyanasiri,
No. 43, Model Village West, Thunkama.
2. Wellawatte Arachchige Vipula Ajith
Kumara,
No.854, Kendaliyadda Paluwa,
Ragama.

Accused

AND NOW BETWEEN

Wellawatte Arachchige Kalyanasiri,
No. 43, Model Village West, Thunkama.

1st Accused – Appellant

Wellawatte Arachchige Vipula Ajith Kumara,
No. 854, Kendaliyadda Paluwa, Ragama.

2nd Accused-Appellant

Vs.

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

Complainant-Respondent

Before : Menaka Wijesundera J.
Wickum A. Kaluarachchi J.

Counsel : Sarath Jaymanne P.C with Ms. Vineshka Mendis,
Prashan Wickramaratne, Sujeewa Meegahawatte,
Dakshin Abeykoon and D. Ratnayake for the Accused-
Appellant.
Anoopa De Silva, DSG for the Respondent.

Argued on : 06.08.2024

Decided on : 24.09.2024

MENAKA WIJESUNDERA J.

The instant appeal has been filed to set aside the judgment dated 29th March 2021 of the High Court of Colombo.

The accused appellants were indicted for two individual charges of aiding and abetting to commit forgery along with persons unknown to the prosecution.

The accused-appellants had been convicted by the learned trial judge for the charges in the indictment and sentenced accordingly.

The accused-appellants aggrieved by the said conviction and sentence had filed the instant appeal.

The grounds of appeal raised by the learned President's Counsel for the appellants were as below,

1. The trial judge had not been mindful of the fact that the two witnesses who attested the alleged document had failed to discharge their duty of ascertaining the identity of the attesting vendor.
2. The trial judge had failed to consider the inadequacies in the evidence of PW-06.
3. The trial judge has failed to consider the defense case in its proper perspective.
4. Charges being defective.

The instant case revolves around a land situated at Maharagama Panninpitaya.

PW-01 and PW-02 has been the real owners of the said land. But they had been orphaned children and had been growing up in an orphanage and PW-02, who has been elder to PW-01, had left the Orphanage before and when PW-01 had left the orphanage, he had been living in the house of the 1st accused, who had been married to the eldest girl in the family.

The 1st accused had been familiar with the wealth pertaining to the family and PW-01 had remembered the subject matter of the instant case because he had visited the place when he had been small with the father.

According to the evidence of PW-01 he had been looked after by the 1st accused and the eldest sister but he had wanted the 1st accused to sell the land in question and had signed on empty A4 papers and had handed over to the 1st accused along with his identity card.

PW-02 also had not objected to and she also had consented to the agreement of PW-01 with the 1st accused because they had all trusted their elder brother in law.

But one fine day, PW-01 had been informed by the 1st accused wife that the alleged land is being developed and going to be sold.

At that point, PW-01 and PW-02 with the 1st accused had gone to the land where PW-01 had met PW-03 and learnt that PW-01 and PW-02 had been impersonated and an agreement to sell had been attested and signed by PW-03 and his wife PW-04 had been the beneficiary. The said agreement had been registered under the number of 1753.

At that time, the 1st accused and PW-01 and PW-02 had reacted very adversely and had lodged a complaint in the police.

In the evidence of PW-01, it has been very clearly said that he has no intention of implicating the 1st accused but to find out who impersonated him and PW-02.

PW-01 had further said that there was a case filed against him in the Magistrates Court of Mount Lavinia and PW-01 and PW-02 had been the accused and PW-03 had been the complainant and the case has been settled and the land was transferred in the name of PW-04.

PW-01 had been cross examined at length but he had stood the test of cross-examination quite well.

Evidence of PW-02 had also been led and she had corroborated PW-01.

Thereafter, the evidence of PW-06, the attesting witness number 1 to the sales agreement had been led.

According to him PW-03 had been their company notary and one day the 1st accused had come with the second attesting witness with the deed to the instant land.

PW-06 had got PW-03 to do a search and PW-03 had told him that the land is being sold for a very minimum amount and that he will give the money personally.

Thereafter, the 1st accused had brought the 2nd accused and had introduced him as one of the owners.

Thereafter, the sales agreement had been drawn and, on that day, the 1st accused had not come but the 2nd accused had come with another person impersonating PW-02.

Thereafter, PW-03 had paid the 2nd accused and PW-06 and the second attesting witness had signed as witnesses and PW-03 had acted as the notary.

But PW-06 as one of the attesting witnesses had not tried to verify the identity of the owners to the land which was his duty.

Thereafter, he had started to clear the property along with PW-03 at that point the 1st accused and PW-01 and PW-02 had intervened.

PW-06 had been lengthily cross-examined and it had been brought to the notice of Court that PW-06 has not told the CID that the 1st accused brought the 2nd accused as the owner and the handing over of money to the 2nd accused.

Therefore, the most important aspect of the evidence of PW-06 has been subject to a very important omission.

PW-06 has further high-lighted the fact that for the money transaction the 1st accused had not participated and that was intentional, but this too he has not told the CID.

Thereafter, the prosecution has led the evidence PW-03, who had been the notary in alleged sales agreement, according to whom he had not known PW-01 and PW-02 but the impersonated owners had been introduced to him by PW-06 and the deceased second witness namely Sooriayarachchi.

He says that he checked the IDs of the fictitious owners and he attested the sales agreement and the beneficiary had been his wife and he had given PW-06 to develop the land. When the land was being developed, the real owners had intervened and the investigations had begun.

He says that he paid money to the fictitious owners as well and when the real came along he and his wife filed a case in the Mt. Lavinia Courts and paid the real owners and got the land written in the name of his wife. The credibility of this witness had been attacked by the defense by bringing to the notice of the Court that he had been accused of various violations of the law as a Notary.

Nevertheless, it has to be stated that PW-03 has clearly shirked his responsibilities as a Notary.

Therefore, according to the story of the prosecution, PW-01 and PW-02 has had absolute faith in the 1st accused and PW-01, and PW-02 had given the duty of disposing the subject matter and the 1st accused had approached PW-06.

PW-06 had said that the 1st accused came to meet him with the 2nd accused and the second witness and the 2nd accused had been introduced as the owner of the land and PW-03, who had been their company lawyer, had wanted to buy this land and an agreement of sale had been drawn in which the 2nd accused and another fictitious person had pretended to be the owners and they had received money. The 1st accused had not been present at this attestation.

Hence, the 2nd accused has been implicated by PW-06 but his evidence has been subject to a very vital omission, where he had not mentioned at all the involvement of the 2nd accused to the CID and the fact that the 1st accused introduced the 2nd accused to him.

Hence, although the prosecution has heavily relied on the evidence of PW-06 to implicate the 1st accused and the 2nd accused, he had not been a very reliable witness.

Furthermore, from the evidence of the prosecution PW-01 and PW-02 had received money for the value of the land from PW-03 and what PW-01 had stressed is that he and PW-02 do not want to go against the 1st accused but to ascertain the real culprits who had impersonated them.

The culpability of the 1st accused and the 2nd accused had been challenged very seriously by the defense in cross-examination but the trial judge had failed to consider the same.

The Examiner of Questioned documents had certified that the signatures of the owners are not the real signatures of PW-01 and PW-02.

Upon the conclusion of the case for the prosecution the defense had been called and the 1st accused had given evidence on oath and had said that he had been married to the sister of PW-01 and PW-02 and they had lived with him after they left the orphanage.

According to his evidence, he had made a valiant effort to locate the land in question and finally when he did, he had found that the aunt of PW-01 and PW-02 had given the house on the land in question on rent. Then he had befriended them and had made PW-01 and PW-02 contact them and thereafter they also had agreed that PW-01 and PW-02 had owned the land but the sister also has had an undivided right to a portion of the land. As such, another deed had been executed, dividing the land among PW-01, PW-02 and Mahendra Welikala. This deed had been executed by notary Jagath Wimalasuriya, who had been a junior to PW-03.

Thereafter, PW-01 had wanted to sell the portions of land owned by PW-01 and PW-02 and they had given all the necessary documents to the 1st accused and the 1st accused had advertised the said land, when a broker by the name Sooriarachchi had approached him and with the said broker, the 1st accused had gone to meet PW-03 and he had taken over the documents and later the 1st accused had been told that the land had been put on sale.

At this point only they had found the alleged sales agreement and they had found that the beneficiary had been PW-03's wife, PW-04.

Thereafter the matter had been reported to police.

The 1st accused had said in evidence that the 2nd accused was his brother and he had denied all charges.

The 1st accused had been cross-examined but his evidence had stood the test of cross-examination well and in favour of him Mahendra Welikala also had given evidence and the 2nd accused had made a statement from the dock.

The learned trial judge had very carefully analyzed the evidence of both parties but has failed to take into account the infirmities in the evidence of PW-06, who had been a broker and who also had been an attesting witness to the alleged sales agreement.

According to his evidence, the 1st accused had approached him with the 2nd accused and Sooriyaarachchi and had produced the documents pertaining to the land and thereafter, PW-03 the notary had been introduced and he says that the 2nd accused had pretended to be PW-01 and that he received money from PW-03.

But the evidence of PW-06 had been subjected to very important omissions and contradictions because he has failed to mention the presence of the 2nd accused to the CID and according to the evidence of PW-06, at the time the monies had transacted, the 1st accused had not been present but the evidence PW-03 reveals that PW-01 and PW-02 had not been the persons who signed as

the owners and that it was PW-06, who introduced him to the land on the deed brought to him by the 1st accused.

But the 1st accused had said that he advertised and for this advertisement Sooriyaarachchi responded and took him to PW-03 and he handed over the documents to him.

But the evidence of the 1st accused had not been contradicted but the evidence of PW-06 who had been the link between the 1st accused and the notary had given contradictory evidence.

The presence of the 2nd accused comes out only in the evidence PW-06 which cannot be relied upon because it has been contradicted which the trial judge had heavily relied on.

The involvement of the 1st accused is that PW-01 and PW-02 had heavily relied on him and they had handed him over the alleged documents for the sale of the land and the 1st accused had advertised the land and Sooriyarachchi a land broker had approached him and had introduced to PW-03.

But according to the prosecution version the 1st accused had approached PW-06 and PW-03 with Sooriyarachchi but the evidence of PW-03 is that at the time the impersonation took place and the sales agreement was drawn the 1st accused had not been there.

Therefore, the evidence against the 1st accused for conspiracy is that he had got PW-01 and PW-02 to sign on empty papers but there is no evidence to say that those papers were used to commit the impersonation because at the time the impersonation took place, the 1st accused had not been at the scene.

The 1st accused involvement had been only with regard to the agreement of the sale of the land which had been done with the utmost trust of PW-01 and PW-02 and even when giving evidence they do not level any allegation towards the 1st accused.

The learned trial judge had found the 1st accused also guilty, relying heavily on the evidence of PW-06, which had subjected to very important infirmities, which makes him an unreliable witness.

Therefore, having considered the evidence of both parties, it is the opinion of this Court that the trial judge had failed to appreciate the fact that the attesting witness PW-06, had misled all parties by vouching for the identity of the fake owners, and that the notary also had failed in his duty to ascertain whether the persons who came to sign the sales agreement are the true owners of the land, unless he had an ulterior motive, because he had been the beneficiary of the transaction, which the trial judge had failed to appreciate.

The trial judge had also heavily relied on the evidence of PW-06, which had been subjected to some serious infirmities.

Therefore, it is the well-considered view of this Court that the prosecution had not proved the charges in the indictment beyond a reasonable doubt, hence, the instant appeal is allowed and the first and the second appellants are hereby acquitted of the charges in the indictment.

Judge of the Court of Appeal

Hon. Justice Wickum A. Kaluarachchi

I agree.

Judge of the Court of Appeal