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

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

Attorney General

Complainant

Court of Appeal Case No:
HCC-231-14
HC of Kandy Case No:
HC 31/1

Vs.

1. Ekanayake Mudiyanselage Priyanga Ekanayake
2. Muthukuda Wijesuriya Arachchige Jayantha Nishantha Wijesuriya

Accused

AND NOW BETWEEN

Muthukuda Wijesuriya Arachchige Jayantha Nishantha Wijesuriya

Accused-Appellant

Vs.

Attorney General

Complainant-Respondent

Before: **Menaka Wijesundera, J.**
B. Sasi Mahendran, J.

Counsel: Anil Silva PC with Amaan Bandara and Shaluka Neranga for the Accused-Appellant
Suharshi Herath, DSG for the State

Written Submissions: 13.05.2020(by the Accused-Appellant)
29.08.2017(by the Respondent)
On

Argued On: 18.07.2023

Decided On: 25.10.2023

Sasi Mahendran, J.

The 2nd Accused Appellant (hereinafter referred to as 'the 2nd Accused') along with Priyanga Ekanayaka (the 1st Accused) was indicted in the High Court of Kandy for the following charges:

> Count 1: For conspiring and aiding and abetting to commit forgery under Section 454 of the Penal Code read with Section 113(b) and 102 of the Penal Code and
> Count 2, Count 3 and Count 4: For committing forgery on three valuable securities namely deed nos. 2651, 3004,3012 and thereby committing Forgery under Section 456 of the Penal Code.

The case advanced by the prosecution contended that the two defendants had engaged in a conspiracy to fabricate deceptive legal instruments pertaining to a property known as Kadirane Estate, located on Airport Road in Katunayake. The alleged conspiracy involved the fraudulent introduction of two impersonators who purported to be Lilian Victoria De Silva Amarasekara Jayawardena—the ostensible donor of the land—and Nihal Dunstan Ranasinghe, who was presented as a witness to the deeds. As

a result of this collusive scheme, three counterfeit deeds were prepared through the agency of these impersonators.

The prosecution presented its case through the evidence of nineteen witnesses and submitted documentary evidence, designated as Exhibits A1 to A46, before resting its case. Conversely, the second defendant took the stand and offered evidence from the witness box, led the evidence of six additional witnesses, and marked documents as Exhibits V1 to V22 before closing the defense's case.

It is crucial to highlight that at the initiation of the trial proceedings, the first defendant entered a guilty plea to all the charges brought against him. He was subsequently sentenced to six months of rigorous imprisonment and imposed a fine of Rs. 10,000 for each respective count. The sentences meted out were suspended for a period of five years.

The second defendant was found guilty on all four charges levied against him and was sentenced as follows: For Charge 1, he received a term of five years of rigorous imprisonment. For Charges 2, 3, and 4, he was sentenced to fifteen years of rigorous imprisonment along with a financial penalty of Rs. 50,000. In the event of default in payment, a supplementary sentence of one year of rigorous imprisonment would be imposed.

Being aggrieved by the said convictions the 2nd Accused appealed to this court and tendered the following **grounds of appeal**:

A. Has the Learned High Court Judge failed to consider that the totality of the evidence led by the Prosecution does not prove the case against the accused-appellant beyond reasonable doubt?

B. Did the Learned High Court Judge misdirect himself by not considering whether the attesting of a signature to a document amount to a false document within the meaning of Section 453 of the Penal Code?

C. Did the Learned High Court Judge misdirect himself when he took into consideration the fact that of the 1st pleaded guilty to the charges as an item of evidence against the accused appellant who was a co-accused in the case?

D. Did the Learned High Court Judge by taking into consideration the admission of guilt made by the 1st accused against the accused appellant cause grave prejudice to the accused appellant and thereby deprived the accused appellant of a fair trial.

E. Did the Learned High Court Judge misdirect himself by not correctly evaluating the defense put forward by the accused appellant and thereby was there a miscarriage of justice.

F. Did the Learned High Court Judge fail to properly appreciate the items of evidence which tends to show that it could have been the 1st Accused who may have fraudulently got persons to sign as Lilian Victoria De Silva Amarasekara Jayawardena and Nihal Dunstan Ranasinghe unknown to the Accused appellant and therefore there was no criminality attached to the conduct of the accused appellant.

I now turn to a detailed examination of the evidence levied against the second accused in relation to the multiple charges arrayed against him.

As per the evidence of Prosecution Witness 10 (PW10), Colvin Kovinda, he acquired ownership of the subject land under Deed No. 529. Subsequent to this acquisition, the land was officially expropriated through a Gazette Notification bearing No. 320/05 dated June 5, 1978, which was marked as Exhibit A2 by the prosecution. However, the same tract of land was later restored to Colvin Kovinda's ownership through another Gazette Notification, numbered 831/20 and dated August 12, 1994. After regaining possession, he disposed of 299 perches from the entire property to Complainant Basnayake.

Corroborating this narrative, Prosecution Witness 1 (PW1), Sumedha Basnayake, also offered evidence in this case.

Turning to the evidence of Prosecution Witness 4 (PW4), Nihal Dunstan Ranasinghe, he indicated that he had first made the acquaintance of the first accused in the year 1997 through a professional relationship. He stated emphatically that he had never engaged in any discussion concerning land transactions with the first accused, although he did allude to a deed. On one particular evening, he received a telephonic communication from the first accused, who requested his National Identity Card number—653010869 V—and his residential address. The information was to be used for obtaining his signature as a witness at a future date. He conveyed his Identity Card number via text message and vocalized his address over the phone call. Ranasinghe further averred that his initial encounter with the second accused occurred when officers of the Criminal Investigation Department (C.I.D.) arrived at his residence.

On Page 381:

ප්‍ර : ඔහුව තමා කලින් දැකලා තියෙනවද?

උ : අපරාධ පරීක්ෂක දෙපාතර්මේන්තුවත් එක්ක අපේ ගෙදරට ආවාට පසුවද දැනගත්තේ?

A statement was duly recorded by the Criminal Investigation Department (C.I.D.) from Prosecution Witness 4 (PW4), and samples of his signature were taken for forensic scrutiny. PW4 categorically denied affixing his signature to any deeds bearing the numbers 2651, 2665, and 3012. When inquired about his acquaintance with PW5, he disavowed ever meeting him or travelling to Kandy for any related matters. He remained oblivious to any deed signing involving the first and second accused until the moment the C.I.D. appeared at his residence.

As for Prosecution Witness 5 (PW5), Chandima Wijesinghe, an Attorney-at-Law and Notary, he testified that the second accused was introduced to him by his clerk, PW6. PW5 stated that PW6 was responsible for preparing the pertinent documents and that he had been informed when Lilian—the alleged witness—and other parties had arrived at his office. Despite being physically constrained due to an accident, he asserted that he could hear their conversations and observe the proceedings from a distance of approximately 15 feet within his chamber. Notably, Lilian did not appear before him during the signing of the documents. Gift deeds numbered 2651, 3004, and 3012, transferring property from Lilan to the first accused, were signed and duly registered. Deed 2665 was also executed for the purpose of transferring ownership from the first accused to the second accused. Upon being interrogated by the C.I.D. on February 17, 2012, he discovered that the deeds were fabricated with spurious witnesses, as Lilian's

address did not correspond to the one recorded, namely No. 76 Kurunegala Rd, Minuwangoda. PW5 conceded that he had not been particularly vigilant in this matter, largely because he had relied on the information furnished by PW6, his clerk.

It can be deduced from PW5's evidence that he proceeded to notarize the deeds based on his trust in PW6, without having direct personal knowledge of the parties involved, as mandated by the Notaries Ordinance. This transgression was highlighted by the Learned Trial Judge in his judgment. While the judge did find fault in the notary's conduct, it is important to note that this particular finding does not necessarily bolster the prosecution's case.

According to the evidence of Prosecution Witness 6 (PW6), Peiris, the former clerk to PW5, he acknowledged having a personal relationship with the 2nd Accused dating back to 2006, when the latter served as a real estate broker. PW6 stated that he was the one who prepared the contentious deeds under scrutiny. He narrated that the 2nd Accused had introduced the 1st Accused, donor Lilian, and purported witness Nihal during the deed attestation process. PW6 prepared a series of deeds, namely 2651, 2665, 3004, and 3012, based on these introductions. Notably, only the I.D. number of the purported witness appeared on the deeds; no identification details for Lilian were provided beyond her address at No. 76 Kurunegala Rd, Minuwangoda. He admitted that he had proceeded with the deed preparations based on his trust in the 2nd Accused, only to later discover the problematic nature of these deeds during his questioning by the C.I.D.

During cross-examination, PW6 reiterated his long-standing relationship with the 2nd Accused and maintained that he had acted in good faith, predicated upon the trust he had in the 2nd Accused. However, he was unaware that the 2nd Accused was directly involved in the land transactions under scrutiny.

Inspector of Police (I.P.) Paduka of the C.I.D., designated as Prosecution Witness 11 (PW11), testified that he initiated an investigation following a complaint lodged by PW1 on February 9, 2012. During his investigation, he found that neither Lilian nor the purported witness Nihal were residents at the addresses specified in the deeds. Subsequent inquiries corroborated that the deeds were indeed fraudulent, prompting the summons of both accused parties for questioning. Forensic examination further revealed that the signature attributed to PW4 did not match, solidifying the conclusion that the documents were forged.

A pivotal query before this Court is whether Lilian Victoria De Silva Amarasekara Jayawardena, named in deeds 2651, 3004, and 3012, is a real or fictitious person and whether she holds any legitimate claim over the land in question. According to Prosecution Witness 26 (PW26), Newton Jayawardene, there is no family member bearing that name. Further, Prosecution Witness 2 (PW2), Grama Niladhari Pushpakumara Perera, confirmed that no records exist supporting Lilian's residence at the cited address, which in reality belongs to one Pathiranalage Harischandra, designated as PW3.

According to PW26, it becomes evident that a person named Lilian Mary Theresa existed, but there is no individual known as Lilian Victoria De Silva Amarasekara Jayawardena. If this is the case, what then is the legal impact on the deeds 2651, 3004, and 3012, which the so-called Lilian had bequeathed to the 1st Accused? The crux of the matter is the authenticity of this purported Lilian's ownership of the land in question.

It is a settled legal principle that a deed executed by a fictitious person is rendered void ab initio. Nonetheless, in the case at hand, the deeds are conspicuously silent on how this purported Lilian acquired her title to the property. This gap could have been filled if PW5 had conducted a due diligence check on the land registry to ascertain the previous owner of the property. The prosecution has not sufficiently proven whether the 2nd Accused impersonated the real owner for the execution of the deeds, or whether the name Lilian bears no connection to the title at all.

Generally, a legitimate owner would lodge a complaint with the police upon discovering that their property had been transferred without their consent, alleging that their signature was forged. Alternatively, the Attorney-at-Law who facilitated the deed may lodge a similar complaint. In the matter before us, neither has occurred.

Furthermore, while the police have stated that no individual named Lilian Victoria De Silva Amarasekara Jayawardena exists, the question remains as to the identity of this individual and, indeed, the true ownership of the property in question. No witness has provided answers to these pivotal queries. Concurrently, there exists evidence indicating that PW4's signature was fraudulently replicated; however, no conclusive evidence demonstrates that the 1st and 2nd Accused collaborated to forge PW4's signature on the deed.

Accused version

The 2nd Accused testified that he specialized in resolving unsettled land cases as a real estate broker. He met the 1st Accused initially in 1996, and later consulted on a property dispute in Katunayake connected to the 1st Accused's relative. The 2nd Accused acquired pertinent documents, including certified deed 969, confirming the 1st Accused's ownership, issued by the District Registrar of Negombo.

A land survey was conducted by Thilakaratne, who prepared plan 619A, in the presence of both Accused, their family members, and friends. The 1st Accused identified his grandmother, Lilian Victoria De Silva Jayawardena, as the property's owner, necessitating a change in ownership.

In July 2011, a deed was drafted in PW5's office; the donor Lilian and witness Nihal were introduced to the 2nd Accused by the 1st Accused. A series of deeds were executed, involving both Accused, their families, and purported witnesses. The 2nd Accused denied allegations of fraudulent intent when cross-examined. All relevant documents were seized by the C.I.D. post-arrest.

During cross-examination, the 2nd Accused affirmed his acquaintance with the 1st Accused, who had introduced Lilian as his grandmother. The 2nd Accused confirmed prior surveying that established the two properties as distinct, albeit adjacent. He reiterated that the 1st Accused should have been vigilant about the details on the gift deed. Upon inquiry, he stated the deeds were handed over to his legal representation.

Considering the totality of evidence, it emerges that both Accused were embroiled in a land dispute; the 2nd Accused even obtained a court order affirming his ownership of lot 18 via deed 2665. However, given that both the prosecution and defense have opted not to contest the land dispute in question, I shall refrain from delving into the title of the deed.

In assessing the case, due weight should be given to incontrovertibly proven facts, as well as those contested by the 2nd Accused. This will facilitate a thorough examination of the validity of the court's findings concerning the acceptance or rejection of these facts.

I reproduce the findings of the Learned High Court Judge pertaining to the adverse inferences taken against the 2nd Accused.

On page 1381;

'වන්දිම විජේතුංග නොතාරිස්වරයාගේ නොසැලකිලිමත්කමින් ප්‍රයෝජන ගෙන මෙම වංචනික ක්‍රියාදාමය සිදු කර ඇති බව ඔප්පුවන කරුණකි.

02 වන විත්තිකරුගේ විත්තිවාචකයේ ප්‍රකාශ කරන ආකාරයට අංක 76, කුරුණෑගල පාර, මිනුවන්ගොඩ ලිපිනයේ මෙම ඔප්පු වල විකුනුම්කාරිය හා දීමනාකාරිය වන ලිලියන් වික්ටෝරියා ද සිල්වා අමරසේකර ජයවධර්න යන අය 01 වන විත්තිකරු වන ප්‍රියංග ඒකනායකගේ ලිපිනයේ පදිංචිව ඇය එම ලිපිනයේ සිටිය යුතුව තිබුණි. කෙසේ නමුත් ඇගේ ලිපිනය සටහන් කර නැත. එයට හේතුව මෙම මන:කල්පිත තැනැත්තිය ව්‍යාජ ලෙස පෙනී සිටි තැනැත්තිය මෙම ඔප්පුවට අදාළ කදිරාන වත්ත ප්‍රදේශයට ආසන්න ප්‍රදේශයක පදිංචිව සිට ඇති බව ඉන් ගම්‍ය වන බවය.

On page 1385;

ඉන් එක පාශර්වයක් සුමේධ බස්නායක වන අතර අනෙක් පාශර්වය යශුනගා සමාගම වන අතර සාක්ෂිකරුවෙකු වශයෙන් මෙම අධිකරණයේ සිටින 02 වන විත්තිකරු කොල්වින් කොවිද මිලදී ගන්නා ලද ඒ, 1 අංක 529 දරණ ඔප්පුවේ සඳහන් සහ ඔවුන්ගේ පුවර්ගාමීන්ගේ අයිතිය කොල්වින් කොවිද විසින් සුමේධ බස්නායකට විකුණු ඉඩමේ අයිතිය සම්බන්ධයෙන් පෙළපතට අභියෝග කිරීමක් සහ තරග කිරීමක් සඳහා නව පෙළපතක් මීගමුව ඉඩම් කායර්ාලයේදී ලියාපදිංචි කර එකී පෙළපත සාධනය කිරීම සහ මෙම අධිවෝදනා පත්‍රයේ සඳහන් අංක 2651 දරණ ඔප්පුව, අංක 3004 දරණ ඔප්පුව, අංක 3012 දරණ ඔප්පුව සකස් කිරීමේ ක්‍රියාදාමයක් ඔහු විසින් සිදුකරන ලද බව සාක්ෂි වලින් පැහැදිලිවම අනාවරණය වී ඇත.

However, we find no evidence to indicate that the 2nd Accused was aware that Lilian Victoria de Silva Amarasekara Jayawardena and Nihal Dunstan Ranasinghe were not the genuine signatories of the contested deeds.

The primary argument presented by the Learned Counsel for the 2nd Accused centers on the allegation in Count 1 of the charge sheet: namely, whether the 2nd Accused colluded with the 1st Accused to acquire the property by means of introducing fictitious witnesses. The Learned Counsel for the 2nd Accused posits that these fabricated individuals were not known to the 2nd Accused, thereby negating the notion of criminal liability against him.

Upon analysis of the Learned High Court Judge's judgment, it is evident that the court has predicated its conclusion on the existence of a conspiracy. Nonetheless, as per Section 113(b), it is incumbent upon us to acknowledge that to be culpable for the offense outlined in Section 454, there must be mutual intent to commit the crime. The prosecution claims that the donor and the 2nd witness were fictitious and impersonated, respectively. However, the sole piece of evidence implicating the 2nd Accused is his introduction of these individuals to PW6 subsequent to the transfer of deed 2665 and the gifting of the

deed to the 1st Accused. In light of this, the Learned High Court Judge's conclusion concerning the 2nd Accused appears to be predicated more on suspicion than on substantiated evidence.

On page 1356;

නොතාරිස්වරයාට සහ විශේෂයෙන් පිරිස් වන නීතිඥ ලිපිකරුට අදාළ ලේඛණ සකස් කිරීමට සහ ව්‍යාජ දිමනාකරු සහ ව්‍යාජ විකුණුම්කරු ලිලියන් වික්ටෝරියා ද සිල්වා අමරසේකර ජයවර්ධන සම්බන්ධයෙන් තොරතුරු ලබා දී ඇත්තේද, එමෙන්ම සාක්ෂිකරු සම්බන්ධයෙන් තොරතුරු ලබා දුන්නේද තෑගි ලැබුම්කාර ප්‍රියංග ඒකනායක සම්බන්ධයෙන් තොරතුරු ලබා දී ඇත්තේද, ඔප්පු සකස් කිරීමට උපදෙස් ලබා දී ඇත්තේද 02 වන විත්තිකරු බව නොතාරිස්රවයාගේ සාක්ෂියෙන්ද , පිරිස්ගේ සාක්ෂියෙන්ද , බව පැමිණිල්ල ඔප්පු කර ඇත.

On page 1389 to 1390;

තවද මෙම ප්‍රශ්නගත කදිරානවත්ත නමැති ඉඩම පිහිටා තිබෙන්නේ මීගමුව ඉඩම් රෙජිස්ට්‍රාර් කාර්යාලයට අතර, මෙම සහ පැවරුම්කරු වශයෙන් ඉදිරිපත් වූ ලිලියන් වික්ටෝරියා ද සිල්වා අමරසේකර ජයවර්ධන 02 වන විත්තිකරු පැවසූ ආකාරයට ප්‍රියංග ඒකනායක කැලණියේ නිවසෙහි ඔප්පුවේ සඳහන් ලිපිනය වන අංක 76, කුරුණෑගල පාර, මිනුවන්ගොඩ හෝ වේවා ඔප්පුව ලියන තැනැත්තිය පදිංචිව සිටින්නේ එම ඉඩම ලබා ගත මීගමුව ප්‍රදේශයේය. එමෙන්ම මුල් ඔප්පුවේ පවරුම්ලාභියා තෑගි ලැබුම්කරු වන ප්‍රියංග ඒකනායක සිටින්නේ කැලණිය ප්‍රදේශයේය. ඩන්ස්ටන් රණසිංහ නැමැත්තා පදිංචිව සිටින්නේ වේයන්ගොඩ ප්‍රදේශයේය. එවැනි අවස්තාවක මෙම සියලුම ලේඛන මහනුවර අධිකරණ කලාපයේ නීතිඥවරයකු ලෙස, ප්‍රසිද්ධ නොතාරිස්වරයෙකු ලෙස සේවය කරන චන්දිම විජේතුංග වෙත ලියා සහතික කිරීමට භාරදුන්නේ ඇයි ?. චන්දිම විජේතුංග හදුනන්නේ මෙම විත්තිකරු වේ. නීතිඥ ලිපිකරු හදුනන්නේ මෙම 2 වන විත්තිකරුයි. එබැවින් මෙම කූට ලේඛන සකස් කිරීමට මුල් වූ තැනැත්තා අන් කිසිවෙකු නොව මෙම 2 වන විත්තිකරු බව පැමිණිල්ල සාධාරණ සැකයෙන් තොරව ඔප්පු කර ඇත.

Indeed, it is confirmed that the 2nd Accused introduced the 1st Accused and the ostensible parties to the transaction. According to the evidence of PW6, the 2nd Accused, a real estate broker, frequently brings clients to him and engages in property transactions. However, no evidence exists to substantiate who supplied the details pertaining to the Donor's address. Conversely, evidence does indicate that it was the 1st Accused who obtained information from PW4.

In scrutinizing the conclusions reached by the Learned High Court Judge, it becomes apparent that a comprehensive evaluation of the evidence presented by both the prosecution and the defense was not undertaken. This omission calls into question the

extent to which the totality of evidence supports the allegations against the 2nd Accused as outlined in the charge sheet. Consequently, the opinions expressed by the Learned High Court Judge may reasonably be considered as speculative.

Therefore, the question arises as to whether the 2nd Accused could be convicted for the offence of conspiracy defined under **Section 113(a) of the Penal Code.**

In **King vs. M.E.A. Cooray [1950], 51 NLR 433, His Lordship Gratian J** held that;

"If the offence of "criminal conspiracy " as defined by section 113A of the Penal Code be compared with the corresponding offence which has been either defined by statute in India or judicially interpreted as a common law offence in England, it emerges that the vital respect in which the Ceylon Legislature had departed from the existing models was by restricting the offence in this country to agreements designed to further the commission or the abetment of criminal acts-and that agreement to commit unlawful acts which are not offences, or to perform by illegal means acts which are themselves lawful, were not caught up in the new section."

On page 439;

"It seems to us that the words "with or without previous concert or deliberation" were advisedly introduced into the language of section 113A of the Penal Code so as to make it clear that, for the purpose of establishing the offence of criminal conspiracy, the only form of "agreement" which needs to be proved is an "agreement with a common design" as explained in the judgments to which I have referred.

Another argument which was addressed to us was that, if "agreement" be the vital ingredient of every form of conspiracy contemplated by section 113A, the words "agree to .... act together with a common purpose for or in committing or abetting an offence" would be redundant because they are in effect synonymous with the earlier words "agree to commit or abet an offence". We are not convinced that the meaning of these phrases is necessarily identical. One can conceive, for instance, of an agreement between A and B to commit acts (of preparation) which, though designed to further the commission of an offence by C, might possibly fall short of the actual abetment of a criminal act."

The King v Andree [1941], 42 NLR, 495, on page 500, His Lordship Soertsz J, held that:

"In regard to this contention, under our law the position appears to be, as I have pointed out, that it is not necessary to prove agreement, either directly or inferentially. It is sufficient to prove that the accused acted together *with a* ***common purpose*** **for or in committing an offence**."

(Emphasis added)

The above-said judgements were referred by Justice **Dep, P.C, J (as he was then),** in the case of **Mazur Ivegen and another v A.G, S.C App TAB/1/2015, decided on 08.12.2016.**

In **Tillakaratne and others v A.G [1989], 2 S.L.R, 54 on page 61, His Lordship Wijeratne J** held that;

"Conspiracy can ordinarily be proved only by a mere inference from the subsequent conduct of the parties in committing some overt acts which tend so obviously towards the alleged unlawful acts as to suggest that they must have arisen from an agreement to bring it about.

In **Ratanlal and Dhirajlal** proposed the following thesis in **The Indian Penal Code 30th Edition re-print 2009 on page 193;**

"It should, however, be remembered that where there is no direct evidence, for example through the evidence of an approver, and the case for the prosecution is dependent on circumstantial evidence alone, it is necessary for the prosecution to prove and establish such circumstances as would lead to the only conclusion of existence of a criminal conspiracy and rule out the theory of innocence."

Ratanlal and Dhirajlal(supra) followed the case of **Dadasaheb Bapusaheb Naik and Etc. vs State of Maharashtra [1981], 1982 Cr LJ 856**, it was held;

"Admittedly, this is a case wherein the prosecution rests entirely on circumstantial evidence for proving the alleged criminal conspiracy between accused Nos. 1, 2 and 4 to cheat the Zilla Parishad and/or the panchayat Samiti. Parner by preparing false accounts. It appears that the investigating agency thought that the circumstances referred to above were sufficient enough to establish a clinching case of conspiracy without any direct evidence. In cases of conspiracy, though it is true that direct evidence other than that

furnished by an approver is not generally available, it cannot be disputed that in those cases of conspiracy in which the prosecution relies only on circumstantial evidence to establish a criminal agreement between the accused persons to commit an alleged offence, it is necessary for the prosecution to prove and establish such circumstances as would lead to the only conclusion of existence of a criminal conspiracy. If there are circumstances compatible with innocence of the accused persons, the prosecution cannot succeed on the basis of such circumstantial evidence.

There are cases of criminal conspiracy in which evidence adduced by the prosecution for proving criminal conspiracy is the same as evidence for establishing the offence which is alleged to be the object of the criminal conspiracy. I feel that in such cases if the prosecution is not able to establish its case so far as the main offence constituting the object of criminal conspiracy is concerned, it will be extremely unsafe to find the accused persons guilty of abetment of the said offence with the aid of S. 120-B, I.P.C. unless by unimpeachable evidence, circumstances incompatible with the non-existence of criminal conspiracy are established by the prosecution."

This court observes that there is an absence of sufficient and credible evidence to conclude that the 2nd Accused entered into a conspiracy with the 1st Accused to produce the impugned forged documents, an act that would be punishable under Section 456 of the Penal Code. The extant evidence is inadequate to substantiate that the alleged conspiracy preceded the actions, such as knowing that the donor was fictitious or that the attesting witness was impersonated for the purpose of generating the questioned deeds. In other words, the acts were not committed in furtherance of any pre-existing conspiracy.

It is of utmost importance to ascertain whether there existed a prior agreement or mutual understanding between the 2nd Accused and the 1st Accused aimed at conspiring to commit the offense. To this end, the observations already made will be considered carefully.

In **Sudu Aiya and others v A.G[2004], 2005 1 S.L.R 358 on page 368 His Lordship Hector Yapa J** held that;

"Conspiracy can ordinarily be proved only by a mere inference from the **subsequent conduct** of the parties in committing some overt acts which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen from an agreement to

bring it about. Upon each of the isolated acts a conjectural interpretation is put, and from the aggregate of these interpretations an inference is drawn."

(emphasis added)

Indeed, while the 2nd Accused did introduce the donor, the 1st Accused, and the individual impersonating PW4 to PW6 during the preparation of the deeds, it was in fact the 1st Accused who brought forth the impersonator of PW4 and Lilian Victoria De Silva Amarasekara Jayawardena. This raises questions about the extent of the 2nd Accused's knowledge concerning the fictitious nature of these individuals. The additional point of contention is whether a prudent person, knowing that these documents were forged, would retain the property or dispose of it immediately. This issue has not been adequately addressed, as the Learned High Court Judge did not venture into this matter. Furthermore, it is apparent that the prosecution has failed to prove the essential elements of the charges brought against the 2nd Accused under Section 454 of the Penal Code.

The subsequent matter under scrutiny pertains to the authenticity of the impugned deeds. Given that the Donor was fictitious and the attesting witness was impersonated, there exists a question of whether the 2nd Accused could be legally convicted for this offense. To delve into this, it is pertinent to reference the relevant provisions concerning the making of a false document, as outlined in Section 453 of the Penal Code:

"A person is said to make a false document –

Firstly – Who dishonestly or fraudulently makes, signs, seals, or executes a document or part of a document or makes any mark denoting the execution of a document with the intention of causing it to be believed that such document or part of a document was made, signed, sealed, or executed, by or by the authority of a person by whom or by whose authority he knows that is was not made, signed, sealed, or executed, or at a time which he knows that it was not made, signed, sealed or executed; or

Secondly – Who, without lawful authority, dishonestly or fraudulently, by cancellation or otherwise, alters a document in any material part thereof, after it has been made or executed either by himself or by any other person, whether such person be living or dead at the time of such alteration; or

Thirdly – Who dishonestly or fraudulently causes any person to sign, seal, execute, or alter a document, knowing that such person by reason of unsoundness of mind or

intoxication cannot, or that by reason of deception practised upon him he does not, know the contents of the document or the nature of the alteration. “

Withers J in the case of **The Queen v Kapurala 2 NLR 330,** has described what are the elements to be proved in such a situation:

" A person is said to make a false document " who **dishonestly** or **fraudulently** makes, signs, seals, or executes " a document or part of a document, or makes any mark denoting the execution of a document, with the **intention** of causing it to be believed that such document or part of a document was made, signed, sealed, or executed by or by the authority of a person by whom or by whose " **authority he knows that it was not** made, **signed**, sealed, "or executed, or at a time at which he knows that it was "not made, signed, sealed, or executed."
(emphasis added).

In light of False documents being made **Ratanlal and Dhirajlal(supra)** followed the case of **Re: Riasat Ali, Alias Babu Miya v Unknown [1881], 1881 ILR 7 Cal 352, His Lordship Richard Garth, C.J** held that;

“I consider that the "making" of a document, or part of a document, does not mean "writing" or "printing" it, but signing or otherwise executing it; as in legal phrase we speak of "making an indenture" or "making a promissory note," by which is not meant the writing out of the form of the instrument, but the sealing or signing it as a deed or note. The fact that the word "makes" is used in the section in conjunction with the words "signs," "seals" or "executes," or makes any mark "denoting the execution, &c., "seems to me very clearly to denote that this is its true meaning. What constitutes a false document, or part of a document, is not the writing of any number of words which in themselves are innocent, but the affixing the seal or signature of some person to the document, or part of a document, knowing that the seal or signature is not his, and that he gave no authority to affix it. In other words, the falsity consists in the document, or part of a document, being signed or sealed with the name or seal of a person who did not in fact sign or seal it.”

According to section 453, there are three elements that should be established by the prosecution;

1. That the Accused knew that the person who executed had no authority to do that and,
2. It was not signed by him.
3. This act was done dishonestly and fraudulently.

Upon a thorough examination of the totality of the evidence presented, this court determines that the prosecution has been unsuccessful in establishing that the 2nd Accused had knowledge that persons who have signed as Lilan Victoria De Silva Amarasekara Jayawardena and Nihal Dunstan Ranasinghe were fictitious entities.

In light of the foregoing, this court concludes that there is neither sufficient nor credible evidence to substantiate the charges leveled against the 2nd Accused. Having carefully weighed all arguments and evidence brought before us, we are inclined to allow the appeal and, accordingly, set aside both the conviction and the sentence previously imposed.

This appeal is allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera, J.

I AGREE

JUDGE OF THE COURT OF APPEAL