

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

In the matter of an Appeal made under
Section 331 of the Code of Criminal
Procedure Act No.15 of 1979.

Court of Appeal Case No:
CA/HCC/ 0248/2020
High Court of Colombo
Case No. 9356/1998

Moditha Tikiri Bandara Ekanayake

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Anil Silva, PC with Isuru Jayawardena**
and Amaan Bandara for the Appellant.
Rohantha Abeysuriya, ASG, PC for the
Respondent.

ARGUED ON : **31/07/2024**

DECIDED ON : **29/11/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted by the Attorney General in the High Court of Colombo for committing Criminal Breach of Trust of five gemstones worth approximately Rs.24,85,400/- obtained from Millapitiya Arachchige Karadana on 07.06.1994 thereby committing an offence punishable under Section 389 of the Penal Code.

As the Appellant was not present before Court and absconded several times after summons were issued, steps were taken under Section 241 of the Code of Criminal Procedure Act No.15 of 1979 and the case was fixed to be heard in absentia of the Appellant. The Appellant was arrested on 11.08.2004 by the Criminal Investigation Department and produced before the High Court on 19.08.2004.

After the closure of the cross examination of PW1, before he was re-examined, the prosecution with the leave of the Court amended the indictment and brought in an additional charge punishable under Section 403 of the Penal Code. The Appellant was afforded an opportunity to continue the cross examination of PW1 in view of the amendment to the indictment. As no cross examination continued after the amendment, the prosecution re-examined the complainant and closed his evidence. After leading evidence of PW3, PW5, PW6, PW07, PW10, PW11, PW12 and PW14

and marking productions P1-3 and R1 and R1(x) the prosecution had closed their case.

The learned High Court Judge had called for the defence and the Appellant had made a dock statement and closed his case.

After the trial, the learned High Court Judge has found the Appellant guilty for the second count only, and sentenced him to two years rigorous imprisonment which was suspended for a period of ten years. A fine of Rs.25000/= and a compensation of Rs.1000,000/- were ordered to be paid, in default of which, six months simple imprisonment was imposed.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Appellant was present in Court when the matter was argued.

Background of the case *albeit* briefly is as follows:

In this case, PW01 is a businessman from Ehaliyagoda engaging in gem trade. When he was unable to pay back his bank loan, a bank manager had given him some information about the Appellant so that he may sell some of his gems in order to pay back the said bank loan. As per the information, PW1 had met the Appellant at the Galadari Hotel and PW1 had handed over five (05) gem stone for sale through the Appellant. In the meantime, both parties had entered into an agreement which had been marked as P2. As per the agreement, the Appellant should handover the gems if he is unable to sell them.

The Appellant had failed to return the money or the gems to PW1. Instead, he had handed over a cheque to PW1. As the cheque given to PW1 had been dishonoured by the bank, he had tried his best to contact the Appellant but had failed.

PW10 had corroborated the evidence of PW1 and had witnessed the alleged gem transaction happening between the Complainant and the Appellant and the parties signing an agreement.

PW3 a gem merchant had bought a gem from the Appellant for Rs.65,000/- on 08.06.1994. After the said transaction the Appellant had not met PW3.

The Appellant in his dock statement admitted that he received gems from PW1 and took up the position that he had settled all the dues by a cheque.

The following grounds have been raised by the learned President's Counsel on behalf of the Appellant.

1. The prosecution has not proved its case beyond reasonable doubt.
2. The learned High Court Judge has not taken into consideration matters favourable to the Appellant.

As the appeal grounds raised by the Appellant are interconnected, both grounds will be considered together hereinafter.

In this case the learned High Court Judge has considered and accurately analysed all evidence oral as well as documentary which were placed before the Court by both parties to arrive at her conclusion. Also, she has given plausible reasons as to the acceptance and rejection of evidence in her judgment.

In this case the Appellant in his dock statement admitted that the agreement which had been marked as P2 was entered between himself and PW1. This clearly adds more weight to the prosecution case. The belatedness of the complaint is justified on the basis that PW1 was anticipating that the Appellant will hand over either the gems or the money in return. As soon as PW1 became aware that the cheque was dishonoured, he had proceeded to lodge the complaint in the police.

Through PW1 the prosecution had marked a foreign bank cheque as P1. Although PW1 had given the original to the Criminal Investigation

Department, the CID had not produced the original of P1 to the Court. As such, the Court allowed to mark the same subject to proof. The learned President's Counsel highlighting non production of the original cheque to Court contends that the failure to produce P1 is a clear testament that the Appellant had settled the money to the Complainant.

In this case the Appellant had entered into an agreement marked P2 with PW1. The Appellant in his dock statement admitted that he issued P2 after receiving gems from PW1. Hence, non-production of the original P1, the cheque has not caused any prejudice to the Appellant as he had admitted that he received gems from PW1.

Further, PW3 a gem merchant had bought a gem from the Appellant for Rs.65,000/- on 08.06.1994. The Appellant had not met PW3 after the said transaction. This evidence further strengthens the prosecution case.

In **Dharmasiri v Republic of Sri Lanka** [2010] 2 SLR 241 the Court held that:

“Credibility of a witness is mainly a matter for the trial Judge. Court of Appeal will not lightly disturb the findings of the trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong”.

In this case, the learned High Court Judge had applied the legal principles in a proper manner, pertaining to the test of belatedness, test of consistency, test of corroboration and test of probability in her judgment. Further she had accurately considered the Appellant's conduct in assessing the evidence.

Further no vital contradiction or omission were marked from the material witnesses of the prosecution.

Hence it is wrong to say that the learned High Court Judge was predetermined and failed to evaluate the prosecution witnesses in a correct perspective.

Considering all the evidence presented during the trial, I conclude that the prosecution has proved the case beyond reasonable doubt. Hence, I further conclude that this is not an appropriate case in which to interfere with the decision rendered by the learned High Court Judge of Colombo dated 20/10/2020. Hence, I dismiss this appeal.

Appeal is dismissed.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree

JUDGE OF THE COURT OF APPEAL