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

In the matter of an Appeal in terms of Article 138(1) 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 as amended.

The Attorney General
Attorney General's Department
Colombo 12.

Vs.

Court of Appeal Case No:
CA 244-246/2015

HC Nuwara Eliya Case No:
142/10

1. Wickramasinghe Mudiyanselage Kuda Banda
2. Dissanayake Mudiyanselage Meegaswatte
3. Kekulandara Mudiyanselage Pitiye Kumburegedara Abeykoon Kekulandara
4. Siriwardana Mudiyanselage Premaratne
5. Ihalagamaralalage Abeyratne (Now deceased)

Accused

AND NOW BETWEEN

1. Wickramasinghe Mudiyanselage Kuda Banda

2. Dissanayake Mudiyanselage Meegaswatte

3. Kekulandara Mudiyanselage Pitiye Kumburegedara Abeykoon Kekulandara

Accused-Appellants

Vs.

The Attorney General
Attorney General's Department
Colombo 12.

Respondent

BEFORE : K. K. Wickremasinghe, J.
K. Priyantha Fernando, J.

COUNSEL : G.S.Edirisinghe, AAL for the 1st Accused-Appellant.

Palitha Fernado, P.C. with Nikini Mapitigama, AAL for the 2nd and 3rd Accused-Appellants.

Dilan Ratnayake, DSG, for the Attorney General.

ARGUMENT CONCLUDED ON : 26.11.2019

WRITTEN SUBMISSIONS : The 1st Accused-Appellant – On 15.02.2018
The 2nd and 3rd Accused-Appellants – On 15.02.2018 and on 10.09.2019
The Respondent– On 28.10.2019

DECIDED ON : 30.07.2020

K.K.WICKREMASINGHE, J.

The Accused Appellants filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Nuwara Eliya dated 08.12.2015 in case No. HC/NE/142/2010.

Facts of the Case

The 1st Accused Appellant was the Chairman and the 2nd and 3rd Accused Appellants were the Directors of the Regional Rural Development Bank (RRDB) Nuwara Eliya, at all times pertaining to the transaction which had been the subject matter of this case.

The Regional Rural Development Banks are governed under the Central Bank of Sri Lanka by a Chairman and Board of Directors appointed by the Monetary Board where the initial capital for the Regional Rural Development Banks is provided by the Central Bank. The Board of Directors duly appointed are to administer any Regional Rural Development Bank as per the express guidelines given in the handbook which specifies the procedure to be followed by a Regional Rural Development Bank especially with regard to calling of tenders and authorizing investments.

When awarding a tender or authorizing an investment, the Board of Directors of a Regional Rural Development Bank is authorized to approve up to a value of Rs.500,000/= without the approval of the Central Bank. Any amount exceeding Rs.500,000/= is subjected to be approved by the Central Bank or the Cabinet of Ministers prior to calling for tenders or authorizing an investment in any project by the Board of a Regional Rural Development Bank.

The Accused Appellants in the instant case have granted Rs.21.04 million as an investment project to import seed potatoes without the due approval of the Central Bank or the Cabinet of Ministers where there is a direct violation of the stipulations of the Central Bank guidelines.

The three Accused Appellants with two others were indicted before the High Court of Nuwara Eliya punishable under Section 389 of the Penal Code read with Section 32 of the Penal Code and Section 5(1) of the Offences against Public Property Act No. 12 of 1982.

At the Conclusion of the Trial, the Learned High Court Judge of Nuwara Eliya convicted the 1st, 2nd and 3rd Accused Appellants and acquitted the 4th Accused. The 5th Accused had passed away before the conclusion of the Trial. Each of the Accused Appellant was imposed with a

punishment of 4 years simple imprisonment and Rs.30 million fine with a default sentence of 2 years.

Grounds of Appeal

As agreed by the parties of the case, the three petitions of appeal shall be considered together and there will be only one Judgement. The grounds of appeal of each Accused Appellant shall be listed as follows thus the analysis shall be made together.

Grounds of Appeal of 1st Accused Appellant

1. The decision by the Learned High Court Judge has not been arrived by analysing the evidence placed before him.
2. The Learned High Court Judge has solely depended on the document marked P16 and thereby wrongfully decided the amount subjected to Criminal Breach of Trust as 21.4 Million.
3. The Learned High Court Judge has failed to approach the fact that the accused had acted in bona fide.
4. The decision of the Learned High Court Judge is erroneous.
5. The decision of the Learned High Court Judge that the prosecution has proved the case beyond reasonable doubt has defeated the presumption of innocence.

Grounds of Appeal of 2nd Accused Appellant

1. The Learned High Court Judge has not considered the necessary ingredients that need to be proved for the charge under the Penal Code.
2. The decision by the Learned High Court Judge has not been arrived by analysing the evidence placed before him.
3. The Learned High Court Judge has failed to consider that the prosecution has failed to prove the common intention beyond reasonable doubt.
4. The Learned High Court Judge has not considered that the 2nd Accused Appellant has taken remedial steps in his capacity.

Grounds of Appeal of 3rd Accused Appellant

1. The Learned High Court Judge has misdirected himself on the facts and the law.
2. The decision by the Learned High Court Judge has not been arrived by considering the evidence placed before him.
3. The Learned High Court Judge has not considered the necessary ingredients that need to be proved for the charge under the Penal Code.
4. The judgment of the Learned High Court Judge is erroneous hence; no evidence has been placed before the court as to the Common intention.
5. The Learned High Court Judge has not considered the document marked as Pe15 in the proper perspective.
6. The judgment of the Learned High Court Judge is contrary to Law.
7. The Learned High Court Judge has not considered the document marked as Pe1 in the proper perspective.
8. The Learned High Court Judge has not considered that the 3rd Accused Appellant has taken remedial steps in his capacity.
9. The Learned High Court Judge has not given the benefit of the doubt to the 3rd Accused Appellant.
10. The Learned High Court Judge has failed to consider the defence case and has failed to analyse the evidence of 3rd Accused Appellant and the defence Witnesses.

At the stage of the argument both Counsel for the parties confined themselves to the following main three grounds as;

1. Proof of Entrustment and other ingredients of the offence
2. Proof of *Mens Rea*
3. Proof of Common Intention

Legal Analysis

I. **The argument that was brought on behalf of the 2nd and 3rd Accused – Appellants was that the Learned Trial Judge had totally misapprehended the ingredients of the offence of Criminal Breach of Trust as set out it out in the Penal Code, and thereby failed to decide the stage at which the offence of Criminal Breach of Trust had been committed. Further, the Counsel for the 1st Accused-Appellant also illustrated the fact that the prosecution had not established the ingredients necessary in proof of the charge under Section 388.**

The definition of the offence of Criminal Breach of Trust as embodied in section 388 of the Penal Code requires proof of its indispensible elements as follows:

> ***"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits "criminal breach of trust".***

The ingredients necessary to prove an allegation under this Section are:

a. Entrustment with property or dominion over property, and
b. either
    i. Dishonest misappropriation or conversion to his own use,
    Or
    ii. Dishonest user or disposal, or
    iii. Willfully suffering any other to do b (i) or b (ii).

It should be noted that the core element that distinguishes criminal misappropriation from criminal breach of trust is *Entrustment of Property*. In **Basnayake v Inspector of Police (1961) 66 N.L.R. 379,** it was held that;

> ***"In the absence of entrustment there can be no criminal breach of trust committed in respect of a sum of money received as security by an employer from an employee."***

Therefore, before moving in to the proof of other constituent elements of the offence, proof of entrustment is a fundamental. The proof of entrustment can be derived from the capacity and the power vested upon the each Accused Appellants in virtue of them being the Chairman and the Directors of the Director Board of Regional Rural Development Bank (RRDB) of Nuwara Eliya.

When analyzing the capacity and the power it is important to look in to the objectives of establishment of the said bank. The Regional Rural Development Banks are established under the Regional Rural Development Banks Act, No. 15 of 1985. The preamble to the said Act itself demonstrates the objectives of setting up a regional rural development bank.

> **"An act to enable the monetary board of the central bank to establish regional rural development banks with a view to developing the rural economy by providing, for the development of agriculture, cottage and small scale industry, fishing industry, commerce and other development activities in rural areas ; and for matters connected therewith or incidental thereto".**

The Chairman and the Board of Directors had granted Rs. 21.04 Million to an importation project of seed potatoes in virture of the agreement (P1) dated 1st October 1995. It was alleged that the Accused Appellants granted the said amount to the above mentioned project without the due approval of the Central Bank of Sri Lanka or the Cabinet of Ministers which lead to direct violation of the banking guidelines.

The testimony of Prosecution Witness 01 (PW01), in his examination in chief revealed the capacity vested to the board of directors of the Regional Rural Development Bank (RRDB) Nuwara Eliya when calling for tenders as follows;

> ප්‍ර : ඒ අනුව ටෙන්ඩර් මිල ගණන් ණය පිලිබඳව බලයක් අධ්‍යක්ෂක මණ්ඩලයට තියෙනවා ?
>
> උ : එහෙමයි ස්වාමීනි
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> .....
>
> උ: අධ්‍යක්ෂක මණ්ඩලය උපරිම රුපියල් ලක්ෂ 5ක් අනුමත කළ හැකිද?
>
> ප්‍ර : ඔව් ස්වාමීනි
>
> උ :මෙම සීමාව ඉක්මවා යාම සම්බන්ධයෙන් සභාපති සහ අධ්‍යක්ෂක මණ්ඩලයට උපදෙස් ලබා දී තිබෙනවද?

ප්‍ර : මහ බැංකුව උපදෙස් ලබා දී තිබෙනවා නීත්‍යානුකූලව ටෙන්ඩර් පටිපාටිය අනුව කටයුතු කල යුතුයි කියල *(At page 155 of the brief)*

Therefore, my view is that the Chairperson and the Board of Directors are vested with significant executive power and authority to take business decisions subjected to certain limitations

The case in hand refers to a sum of Rs. 21.04 Million invested in a seed potato project which is the property within the given meaning of the section 388. Section 388 of the penal code does not restrict the property as movables or immoveable. In my view 'property' will depend on the circumstances of each case. The vital fact is that whether that particular kind of property can be subject to the acts covered by the section which is Rs. 21.04 Million in the instant case.

The simplest meaning of entrustment is handing over something into someone's care or protection. At the trial, entrustment was elicited by the written submissions before the High Court of Nuwara Eliya as follows;

"සභාපති හැර අනෙක් අධ්‍යක්ෂක සාමාජිකයින්ට එදිනෙදා පරිපාලනයේ විධායක කටයුතු සඳහා ප්‍රවේශ වීමක් නොමැත. එමෙන්ම මසකට වරක් බැංකුවේ දැනුම් දීම පරිදි , රැස් වන ගරුබුර අධ්‍යක්ෂක වරුන්ට ලබා දී ඇත්තේ ප්‍රතිපත්ති තීන්දු ගැනීම පමණි. නමුත් මුදල් ගැනීමේ හා පරිහරණය කිරීමේ විධායක බලය 1 වන විත්තිකරුට පැවරේ".

Nevertheless, I am of the view that Bank directors are the guardians of financial stability, most importantly in the instant case they were trustees of public money. It is true that risk is an inseparable element attached to entrustment and a criminal prosecution should be limited to extreme cases where reasonable financial risk is exceeded. Thus, in this regard I conclude my stance that a director of a financial institution is entrusted with the property by the very fact of being a director himself. In the instant case, the Accused Appellants, being the Chairman and the Directors of the Director Board, had been entrusted with the funds of the bank.

At the juncture I wish to draw my attention to a decision by the Supreme Court of India which. As argued in the case of ***Jaswantrai Manilal Akhaney vs The State of Bombay,*** **(1956) AIR 575, 1956 SCR 483;**

"Although the offence of criminal breach of trust presupposes an entrustment, such entrustment need not conform to all the technicalities of the law of trust, and, consequently, in a case such as the present where the accused had the necessary power and exercised dominion over the securities and caused wrongful loss to the pledger and wrongful gain to the pledgee by dealing with the securities, he was guilty of the offence".

The same view was taken up in the Case of ***Walgamage V. The Attorney General*, (2000) 3 SLR 1, Per Fernando, J.**, it has been held that;

"Entrustment" does not contemplate the creation of a trust with all the technicalities of the law of trust: it includes the delivery of property to another to be dealt with in accordance with an arrangement made either then or previously."

In ***Shivnarayan v State of Maharashtra*, AIR 1980 SC 439** the courts accepted a similar view;

"Thus, this Court fully approved the law laid down by the cases mentioned above that a director was clearly in the position of a trustee and being a trustee of the assets which has come into his hand he had dominion and control over the same."

When considering the ingredients of the above mentioned charge, the second word proceeding entrustment is "Dominion over Property". For an offence to fall under this section the requisites of entrustment of property to the accused or dominion over it must be proved. In other words, the accused must be in such a position where he could exercise his control over the property. The evidence of prosecution witness 05 (PW05) distinguished the dominion that the directors had over the property as follows;

ප්‍ර : එතිදී ඔබ කීවා මෙම ග්‍රාමීය බැංකුවේ අධ්‍යක්ෂ මණ්ඩලයට මුදල් පිළිබඳව ආධිපත්‍ය යන්නේ නැ කියල

උ : එහෙමයි

ප්‍ර :ඒක සත්‍යද?

උ : මුදල් පිළිබඳව මුදල් පරිහරණය පිලිබඳව අයිතිය පිලිබඳව ආධිපත්‍ය නැහැ කියන එක මගේ විශ්වාසය

ප්‍ර :මුදල් පරිහරණයි, මුදල් ආධිපත්‍ය කියන එකෙයි් වෙනස මොකක්ද ඔබ කියන්නෙ?

උ : මුදල් ආධිපත්‍ය කියන එක ස්වාමිනි මුදල් පරිහරණය'කිරීමේ තීන්දු සම්බන්දයෙන් වෙන්න ඕනි. නමුත් මුදල් පරිහරණයේදී යම්කිසි තීරණයක් මත, යම්කිසි අවශ්‍යතාවයකට මුදල් ගනුදෙනු කිරීමක්. යම් තැනකින් අරගෙන තවත් තැනකට දීම එතනින් ඒවා ලබා ගැනීම කියා විශ්වාස කරනවා

ප්‍ර :එතකොට අධ්‍යක්ශ මණ්ඩලයට කාටද බලයක් තිබුනේ මුදල් පරිහරණය, මුදල් යෙදවීම, මුදල් යොදවල ටෙන්ඩර් පටිපාටියක් අනුගමනය කරලා යම් යම් කටයුතු වලට තීන්දු තීරණ ගැනීමට?

උ : අධ්‍යක්ශ මණ්ඩලය තීරණය කරලා ඒ වගේ දෙයක් යම් කිසි කෙනෙකුට පැවරීමට පුළුවන්

ප්‍ර : ඒක තමයි ඒ මුදල් පිලිබදව, මුදල් යොදවන්නේ මොකටද , මුදල් කොහොමද යොදවන්නේ, මුදල් යොදවන්නේ කොච්චරක්ද කියා තීන්දු තීරණ ගැනීමට අධ්‍යක්ශ මණ්ඩලයට ගත හැකිව තිබුණා ?

උ : තිබුණා එහෙම කරන්න පුළුවන්

ප්‍ර : එතකොට මුදල් පිලිබදව ආධිපත්‍ය තුබුන කියන එක පිළිගන්න පුලුවන්ද?

උ: ඒ වචනය හරිද කියන එක මම දන්නේ නැහැ. නමුත් ඔබ තුමා කියන එක පිලිගන්නවා. ***(At page 468 of the brief)***

The above testimony draws a distinction between the two concepts of; *Management of Money and Entrustment of Money.* I would emphasize repeatedly, as discussed previously as well, entrustment is it is *sine qua non* for the offence of criminal breach of trust. There is no criminal breach of trust where there is no entrustment. Thus this Court shall be miscarrying justice, if the words of Section 388 are construed by giving it a literal interpretation. The language of the section is very wide. The words used are ***"in any manner"*** entrusted with property. So it extends to entrustments of all kinds. Therefore Management of money amounts to entrustment when the words are given a meaning beyond textual interpretation. The board of directors who claim themselves as only managers of money cannot exonerate from their culpability by trying to draw a misleading and ambiguous distinction between the two concepts. In view of the evidence and circumstances, I will conclude that this court is satisfied that element of entrustment and dominion over the property is proved against all the three Accused Appellants.

Under Section 388 of the Penal Code, once the qualification of entrustment is proved, the *actus reus* of the offence has to be established by proving one of the following four ways:

1. **Misappropriation or conversion of the property to his own use by the accused**
2. **Use or disposal of the property in violation of any direction of law prescribing the mode in which the trust is to be discharged**
3. **Use or disposal of property in violation of any legal contract, express or implied**
4. **Suffering any other person to do any of these acts**

By referring myself to the above analysis, I would held that the Accused Appellants had committed "Dishonest user or disposal" of such property in violation of the directions prescribed by the law. To constitute the act of "Dishonest user or Disposal", there must be:

a. **A direction of law or a legal contract (express or implied) governing the discharge of the trust,**

b. **The accused must use or dispose of property in violation of the direction of law or the legal contract, as the case may be, and**

c. **Such use or disposal must be dishonest.**

In the instant case, the "direction of law or a legal contract (express or implied) governing the discharge of the trust" can be referred to as the handbook which specifies the procedure to be followed by Regional Rural Development Banks and the Accused Appellants had disposed the property which was entrusted on them in violation of the said direction of law. And the said "disposal" is dishonest as the Accused Appellants had failed to or ignored to comply with the procedure provided by the hand book, i.e. to obtain the approval of the Central Bank or the Cabinet of Ministers prior to calling for tenders or authorizing an investment in any project by the Board of the Regional Rural Development Bank. Therefore it is proven that the Accused Appellants had violated a direction of law which is governing the discharge of the trust.

II. The question whether the Accused Appellants was acting under good faith was raised on behalf of the 1st Accused Appellant.

The Offences stipulated under the Penal Code, considered including a mental element only where a reference is made to a state of mind in the definition of the offence. As read in Section 388 of the Penal Code, criminal breach of trust includes the term "***dishonestly***" which requires the proof of *mens rea* on the part of the accused in order to convict an accused for the said offence.

The testimony of the first witness for the prosecution (PW1) Hewa Atapattu Dharmabandu, a retired senior central bank officer provided ample of evidence on the regulation criteria for the Regional Rural Development Banks under the written guidelines of the hand book given by the Central Bank and how the Regional Rural Development Bank of Nuwara Eliya had breached them generating a dishonest intention

ප්‍ර : දැන් ඔබගේ රාජකාරී දිනයේදී ඔබට නියෝගයක් ලැබුනාද ග්‍රාමීය සංවර්ධන බැංකුවක් සම්හන්ධයෙන් පරීක්ෂණයක් පවත්වන්න?

උ : ලැබුනා ස්වාමිනි

ප්‍ර : මොකක්ද නියෝගය ?

උ : නියෝජ්‍ය අධිපති තුමා ගෙන් බැංකු අධ්‍යක්ෂකට ලිපියක් ලැබුනා

ප්‍ර : නියෝගය ලැබුනේ මහා බැංකුවේ කාහටද?

උ : ශ්‍රී ලංකා මහා බැංකුවේ ප්‍රාදේශීය කළමනාකරුට

ප්‍ර : එම ලිපිය ලිඛිතව ලැබුනද?

උ : ඔව් ස්වාමීනි

ප්‍ර : එම නියෝගය ප්‍රකාරව කටයුතු කලද?

උ :එහෙමයි ස්වාමිනි

ප්‍ර : එම නියෝගය ලබා දීමට හේතුව කුමක්ද ?

උ : නුවර එලිය ප්‍රාදේශීය ග්‍රාමීය බැංකුවේ බිජ ආනයන කර ශ්‍රී ලංකා මහා බැංකුවේ නියෝජ්‍යය අධිපති දී තිබෙන උපදෙස් වලට පටහැනිව අලෙවි කිරීම සහ ණය ලබා දීම ***(At page 152 of the brief)***

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ප්‍ර : ගරු අධිකරණයට කියන්න රු . 17950471/- ක මුදලක් මෙම ගිවිසුම අත්සන් කිරීමට ශ්‍රී ලංකා මහා බැංකුවෙන් හෝ ජනරජයේ ටෙන්ඩර් මණ්ඩලය විසින් අවසර ලබාගෙන තිබුනද?

උ: නැහැ ස්වාමීනි

ප්‍ර : එසේ අවසර ලබා නොගෙන මෙම නුවරඑළිය ග්‍රාමීය සංවර්ධන බැංකුවේ අධ්‍යක්ෂකට මෙම ගිවිසුම අත්සන් කිරීමට හැකියාවක් තිබෙනවද ?

උ: බලයක් නැහැ. ***(At page 176 of the brief)***

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ප්‍ර : දැන් මේ ගිවිසුම ප්‍රකාරව යම් යම් ගනුදෙනු සිදු වී තිබෙනවද කියා පරීක්ෂා කලාද ?

උ: එහෙමයි

ප්‍ර : මොනවද හෙලි වුනේ ?

උ: වෙක්පත් 11කින් සමරකෝන් බණ්ඩා යන අයට මුදල් ගෙවා තිබෙනවා. රුපියල් මිලියන 21.4ක්. ***(At page 177 of the brief)***

ප්‍ර : මෙම වෙක්පත් මගින් සමරකෝන් බණ්ඩාට ගෙවූ මුදල් නිසි පරිදි ගිණුම් ගත වී තිබුනද ?

උ: ලෙජර් වල නිසි පරිදි ගිණුම් ගත වී තිබුනේ නැහැ.

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ප්‍ර : ඇයි ඒ ?

උ: එය ගිණුම් ගත කර තිබුනේ නැහැ. සමහර ණය දීම සම්බන්ධයෙන් එක්සසයිස් පොත්වල ලියා තිබුනා.

ප්‍ර : එහෙම එක්සසයිස් පොත්වල සඳහන් කරන්න පුලුවන්ද ?

උ: බැහැ ස්වාමීනි. ***(At page 180, 181 of the brief)***

The said evidence provides as to how the Chairperson and the Director Board of Regional Rural Development Bank of Nuwara Eliya had been purposely avoided the due process that is ought to have followed by them and their dishonest motive is evident from their very act of not recording the accounts of the transaction in the prescribed manner.

In light of the above evidence, I would like to draw my attention to the submission dated 20/01/2014 made by the Learned Counsel for the 1st Accused Appellant.

> **"ඇත්ත වශයෙන්ම කියනවානම් වෙලා තියෙන්නේ ක්‍රයා පිළිවෙත විතරක්, ඒ අය කරපු වැඩ පිළිවෙල ඇමති මණ්ඩලයේ අනුමැතියක් ගෙන නැහැ. ටෙන්ඩර් ක්‍රමයක් නැතිවීම ආදී කටයුතු වරදක් වශයෙන් පෙන්වූවාට දඩුවම් කල හැකි වරදක් නොවන බව ඉතාම ගෞරවයෙන් ප්‍රකාශ කරනවා." *(At page 378 of the brief)***

His submission clearly admits that the Accused Appellants had entered in to the contract for importation of seed potatoes without following the due process. In my view it is clear violation of the procedure by the said Accused Appellants. Also, in the same submission cited above the Learned Counsel submitted that the main ingredient of 'dishonesty' against the accused had not been proved by the prosecution which is the intention to use the money for the own benefit or use, thereupon a conviction under Section 388 of the penal code cannot be entertained even if he may be guilty of professional negligence.

> "එකම පුද්ගලයෙක්වත් ඒ මුදල් වංචා සහගතව ඔවුන්ගේ ප්‍රයෝජනයට ගෙන නැහැ. එක්කෙනෙකුවත් ප්‍රයෝජනයට එම මුදල් පරිහරණය කරලා නැ. මෙයින් පෙනී යන්නේ ගරු උතුමාණෙනි පැමිණිල්ල ඉදිරිපත් කර ඇති සාක්ෂි වලින් මෙම චෝදනාව කිසි සේත්ම ඔප්පු කරල නැති බවයි." ***(At page 378 of the brief)***

I do agree to the fact that the dishonest intention is a basic thread and the gist running across this provision which is proved by the former analysis as well. However even if there is no lot of evidence in order to prove that the said appellants have used or converted the money for their personal usage, they have caused a wrongful loss to another would suffice to sustain a conviction. The case in hand is a serious loss to the government which includes public money wrongfully given to one party thereby caused a wrongful loss to the Republic.

Also, I would again prefer to quote how the Supreme Court of India held in the case of ***Krisnan Kumar v Union of India 1959 AIR 1390.1960 SCR (1) 452;***

> ***"It was not necessary in every case to prove in what precise manner the accused person had dealt with or appropriated the goods. The question is one of intention and not direct proof of misappropriation. It was held that the prosecution has established that the accused received the goods and removed it from the railway depot. That was sufficient enough to sustain a conviction under this section."***

Moreover, the fact that the 1st Accused Appellant was not acting in good faith, but was acting with the willful knowledge that the seed potato project had not received the required approval by the Central Bank or the Cabinet of Ministers is amply demonstrated from the evidence given by U.Geethananda, who was the then Secretary to the Director Board of Regional Rural Development Bank, Nuwara Eliya. Proceedings dated 31.10.2013 is reproduced hereby;

ප්‍ර : අධ්‍යක්ෂ මණ්ඩලයේ තීරණය ප්‍රකාරව බීජ අර්තාපල් ආනයනය කිරීමට කටයුතු කලා ද?

උ : එහෙමයි.

ප්‍ර : ඒ සඳහා මහ බැංකුවේ අනුමැතිය ලැබුණා ද?

උ : මහ බැංකුවේ අනුමැතිය ලැබුනේ නැති නිසා තමයි මේ විදිහට කටයුතු කලේ.

ප්‍ර : තමුන් මේ ආකාරයට බීජ අර්තාපල් ආනයනය කිරීමට කටයුතු කලා ?

උ : එහෙමයි.

ප්‍ර : ශ්‍රී ලංකා මහ බැංකුවෙන් මෙවැනි ආයෝජන කටයුත්තක් කරන්න එපා කියලා තමාට ලිඛිතව බැංකුව වෙත දැනුම් දීමක් කරලා තිබුණා ද?

උ : මම දැක්කේ නැහැ.

ප්‍ර : එතකොට තමුන් මුල් අවස්ථාවේ දී ප්‍රකාශ කලා මහා බැංකුවේ අනුමැතිය ලැබුනේ නැහැ කියලා ?

උ : ඒ අවස්ථාව වන විට සාකච්ජා වෙමින් තිබුනේ.

ප්‍ර : මහ බැංකුවේ අනුමැතිය නොමැති බවට සාකච්ජා වෙමින් තිබුණා ද?

උ : එහෙමයි. ***(Pg.348 and 349 of the Appeal Brief)***

In an Indian Judgement named **Jaikrishnadas** ***Manohardasdesai v The State Of Bombay, 1960 AIR 833, 1960 SCR (3) 329,*** it was held that ;

> " to establish a charge of criminal breach of trust, the ***prosecution was not bound to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he had dominion***. The ***principal ingredient of the offence of criminal breach of trust being dishonest misappropriation*** the mere failure of the accused to account for the property entrusted to him might not be the foundation of his conviction in all cases ***but where he was unable to account and rendered an explanation for his failure which was untrue, an inference of misappropriation with dishonest intent might readily be made***".

Therefore, I conclude that a conviction under section 388 of the Penal Code cannot be set aside even if it is a mere failure to follow the proper procedure or mere failure to account for the property which is entrusted. Even if it is a mere failure the judiciary must not construe in way so

that perpetrators can get away effortlessly from the criminal justice system. However in the instant case I do not observe that the transaction as a mere failure, thus I phrase it as an overt act where accused were unable to account and render an explanation for his failure. It shall unavoidably be an inference of misappropriation with dishonest intent.

III. The question whether the Accused Appellants can be indicted under Section 32 of the Penal Code as to establish joint liability on the basis of common intention was argued on behalf of the Accused-Appellants.

Section 32 of the Penal Code provides that;

> ***"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone".***

The said section expresses the meaning of common intention as participation of each person in furtherance of the shared intention. The landmark case of ***The Queen v Mahatun,* (1959) 61 N.L.R. 540** held that;

> ***"Under section 32 of the Penal Code, when a criminal act is committed by one of several persons in furtherance of the common intention of all, each of them is liable for that act in the same manner as if it were done by him alone. If each of several persons commits a different criminal act each Act being in furtherance of the common intention of all, each of them is liable for each such act as if it were done by him alone.***
>
> ***To establish the existence of a common intention it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre – arrangement".***

The *dicta* in the case of ***Regina v Somapala,* (1959)57 N.L.R. 350** emphasized that section 32 does not require imputation of the intention of knowledge of one *socius criminis* to another. In

other words it may be observed that as long as there is evidence of an *overt act* which is committed by an accused in furtherance of a common intention entertained by him with the other participants of the offence is criminally liable.

The 2nd and 3rd Accused-Appellants in the instant case were holding two honorary director posts in the Regional Rural Development Bank of Nuwara Eliya when this alleged offence was committed. 2nd Accused-Appellant in his testimony denied that fact that he participated in the alleged offence and his signature to the document marked P15 was taken without due consent.

ප්‍ර : මහත්මය ඔය පැ **15** කියන වාර්තාවට අත්සන් කලේ එම කරුණු සත්‍ය කරුණු කියල. ඒ වාර්තාවේ සඳහන් කරුණු සත්‍ය කියල ?

උ : නෑ

ප්‍ර : ඇයි එහෙනම් අත්සන් කලේ ?

උ : අපි එහිදී කිව්වා මේ බලන්න ලක්ෂ පනස් පහක් දෙන්න අනුමැතියක් ගත්තේ නෑ. මේ ටෙන්ඩර් දෙන්න අනුමැතියක් ගත්තේ නෑ. ඒ නිසා මේ මුදල, ලක්ෂ පනස් පහ අපහු යවන්න කිව්වා.

ප්‍ර මහත්මයා ඔය වාර්තාව අත්සන් කරන්න කලින් කියෙව්වද ?
උ : සංශෝදන හරි ගස්සන්න තියෙනවා කියල අත්සන් ගත්ත .

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ප්‍ර : ඒ කියන්නේ මහත්මයට සංශෝදිත වාර්තාවක් ඉදිරිපත් කරන්න බැහැ ?

උ : එහෙන් දුන්නේ මේ වාර්තාව ?

ප්‍ර : එතකොට මහත්මය පැ **15** කියන වාර්තාව ඉදිරිපත් කරන්නේ එහි තිබෙන කරුණු සියල්ලම සත්‍ය කියා?

උ : මම සත්‍ය කිව්වේ නැහැ

ප්‍ර : එහෙනම් ඇයි අසත්‍ය කරුණු තියෙන වාර්තාවකට අත්සන් කලේ?

උ: අපි හදන්න කියල දුන්න **(Pg.411 and 415 of the Brief)**

The said evidence of the 2nd Accused Appellant corroborates with the evidence of the 3rd Accused Appellant in his answers to the questions from the court during his examination.

ප්‍ර : ඒ වාර්තාවේ බීජ අර්තාපල් ගැන තියෙනවා ඒ සඳහා අධ්‍යක්ශ මණ්ඩලයේ අවසරය දෙනු ලැබුවා කියල තියෙනවා ඇයි එකට අත්සන් කලේ?

උ: සංශෝධනය කරන්න කියල අපි ඉල්ලා සිටිය ස්වාමිනි

ප්‍ර : තමන්ට මේකට අත්සන් නොකර ඉන්න තිබුනනේ ?

උ: සංශෝදනය කරනවා කියල කිව්වා

ප : නිවැරදි නැත්නම් ඇයි තමන් අත්සන් කලේ ?

උ: සංශෝදනය කරනවා කියල කිව්වා

ප :බැංකුවේත් එහෙමද වැඩ කලේ?

උ: නැත ස්වාමිනි

ප: සංශෝදනය ඉදිරිපත් කලාද කොයි වෙලාවක හරි

උ: නැත ස්වාමිනි

.....

ප : එහෙම ඉදිරිපත් නොකිරීම සම්බන්දයෙන් මොකද කලේ ? නැවත විමර්ශනය කලාද , ඒ සම්බන්දයෙන් පොලිස්සියට පැමිණිලක් කලාද මෙන්න මෙහෙම හිතුමනාපෙට සල්ලි දීල තිබුන කියල ?

උ: නැත ස්වාමිනි **(Pg.438 and 439 of the Brief)**

This undoubtedly demonstrates that the 2nd and the 3rd Accused Appellants were present at the board meeting dated 1995.10.31 and they had clear knowledge about the contents of the agreement. As decided in the case of ***The King v Asappu,*** **(1948) 50 N.L.R. 324,** the 3 ways to test shared/common intention is;

1. Prearrangement
2. Sharing of intention.
3. Declaration of the common intention

Thus as cited earlier in the case of ***The Queen v Mahatun*** **(Supra),** ***it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan.*** Therefore the 2nd and the 3rd Accused Appellants by virtue of the fact that they participated the meeting even without a prearranged plan had shared the guilty intention by signing an unedited illegal document on 1995. 10.31. Even if one argues that such act is mere presence which is not sufficient to prove the common intention, signing to the said illegal document knowing that it was illegal in that moment and not taking any steps to reverse such decision amounts to a participatory presence by criminal act or illegal omission and declaration of the common intention

Considering above, I am of the view that the Learned High Court Judge came to the correct conclusion after a careful consideration of all the evidence that was placed before him. Therefore, I do not wish to interfere with the conviction and the sentence imposed on the appellant, by the Learned High Court Judge and I affirm the same.

This appeal is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL