

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

SC APPEAL 111/2018  
SC/SPL/LA/217/2017

HC GAMPAHA 64/2016  
MC GAMPAHA 13446/PC

In the case of an Appeal from the Judgement pronounced on 2017.08.31 by the High Court of the Western Province Holden in Gampaha in High Court Appeal No.64/16 in terms of section 9(a) of the High Court of the Provinces (Special Provisions) Act, No.19 of 1990 read with Article 154P of the Constitution and the Supreme Court Rules 1990

Officer In Charge,  
Special Crime Investigating Branch,  
Gampaha

Complainant

Vs.

Nishashanka Arachchige  
Mahesh Chaminda Priyantha  
Kumara,  
No.140/C, Megoda  
Thammita, Makewita.

Accused

**AND BETWEEN**

Nishashanka Arachchige  
Mahesh Chaminda  
Priyantha Kumara,  
No.140/C, Megoda Thammita, Makewita.

Accused- Appellant

Vs.

Officer In Charge,  
Special Crime Investigating Branch,  
Gampaha

Complainant- Respondent

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

Respondent

**AND NOW BETWEEN**

Nishashanka Arachchige Mahesh  
Chaminda Priyantha Kumara,  
No.140/C, Megoda Thammita,  
Makewita.

Accused- Appellant-Appellant

Vs.

Officer In Charge,  
Special Crime Investigating Branch,  
Gampaha

Complainant- Respondent- Respondent

Hon. Attorney General,  
Attorney General's Department,

Colombo 12.

Respondent- Respondent

**BEFORE: P. PADMAN SURASENA, J  
K. KUMUDINI WICKREMASINGHE, J  
MAHINDA SAMAYAWARDHENA, J**

**COUNSEL:** R .A. Priyantha Jayawardana for the Accused-  
Appellant- Appellant  
V. Hettige, SDSG for the Respondent

**WRITTEN SUBMISSIONS:**Written submissions for the Respondent  
Respondent on 21.09.2021

**ARGUED ON:** 06.06.2022

**DECIDED ON:** 05.06.2024

**K. KUMUDINI WICKREMASINGHE, J**

The application for special leave to appeal was preferred by the Accused Appellant Appellant (hereinafter referred to as the Appellant) against the judgment of the High Court dated 31.08.2017 affirming the judgment of the Learned Magistrate subject to the variations. Aggrieved by which the Accused Appellant Appellant appealed to the Supreme Court.

Accordingly, this court by order dated 25.07.2018 granted special leave to appeal on the following question of law:

1. Did the Learned High Court Judge err by failing to consider the basic elements to prove the charges of section 386 and 389 of the Penal Code.

The Accused Nishanka Arachchige Mahesh Chaminda Priyantha Kumara was charged in the Magistrate Court of Gampaha under sections 403, 386 and 389 of the Penal Code. The Accused once the charges were read over and explained to him, pleaded not guilty to all the charges. The trial commenced on 24.07.2014. The prosecution called 03 witnesses and closed its case marking a document P.01 as evidence. When defense was called, 03 witnesses gave evidence on behalf of the Accused and marked a document V.01. At the conclusion of the trial the Learned Magistrate convicted the Accused for all three charges. The Accused was sentenced to 6 months simple imprisonment and ordered Rs.100,000/- as compensation.

**The facts of the case briefly are as follows:**

The Accused Appellant Appellant namely Nishanka Arachchige Mahesh Chaminda Priyantha Kumara had been serving in the Sri Lanka Army with the Husband of the Complainant Jayasuriya Kuranage Priyanka Jayasuriya (PW1) both of them were members of the Sri Lanka Army Volleyball Team. They had been acquainted with the Husband of the Complainant for approximately 8 years. As per the Testimony of PW1, the Accused Appellant Appellant had needed to show “proof of funds” in order to send a relative of the Appellant abroad for which he needed to show he had Rs 2,000,000.00/- in his bank account and sought the assistance of the Complainant’s Husband in order to furnish the same. On 10.09.2012 the

Complainant (PW1) had handed over the said amount of Rs 2,000,000.00/- to the Accused Appellant Appellant at the Sampath Bank branch at Gampaha and the Accused Appellant Appellant had signed a document (P1) which stipulated that he had promised and agreed to repay the Complainant by 10.10.2012 in tranches. The Complainant had obtained this money from her husband who had received the same as a pension and other retirement benefits upon his retirement from the Sri Lanka Army. Thereafter, the Accused Appellant Appellant failed to return the money as agreed and on 13.12.2012 a complaint was lodged to the Police by PW1 informing that the Accused Appellant Appellant had failed to return the money as agreed on 10.10.2012, also to the fact that the Accused Appellant Appellant had been avoiding the Complainant. The Husband of the Complainant had informed his Superior Officers at the Sri Lanka Army regarding the incident and obtained a letter from the salary documentation division of the Sri Lanka Army and produced at the time the police complaint was made. PW1 states that after such a complaint was made to the superior officers the Accused Appellant Appellant was given a period of 14 days to return the money and the Accused Appellant Appellant signed another letter promising to do so. However, as the money had not been returned during the 14 day period agreed upon, the Accused Appellant Appellant was suspended from work.

As Per the evidence of PW2 the (Husband of the Complainant), had agreed to provide the money to the Accused Appellant Appellant on the condition that it would be repaid within one or two months in two tranches and

signed the document (P1) promising to do so. He stated that the money had been handed over to the Accused Appellant Appellant by PW1 at the Sampath Bank branch of Gampaha and that he too had been present. The witness stated that the money could not be given by him as he had plans to go abroad and due to such reason his wife (PW1) handed over the money to the Accused Appellant Appellant. The witness stated that after a year had passed and the Accused Appellant Appellant had not returned the money, PW2 proceeded to make a complaint to his Superior Officers in the Sri Lanka Army. Thereafter, since the Accused Appellant Appellant had not returned the money within 14 days as promised he proceeded to make a police complaint.

As per the evidence of PW4 who served as a police sergeant at the Special Crimes Investigations Division Gampaha who recorded the complaint made by PW1 that an amount of 2 million was given to the Accused Appellant Appellant on the agreement that it would be paid back in one months time and the amount had not been returned up to date. The witness stated that thereafter he proceeded to record the statement of PW2 and then submitted the relevant B report to the Gampaha Magistrates Court. The witness further stated that once it was ascertained by him that the Accused Appellant Appellant was serving as an Army Officer at the Panagoda Army Camp he informed the Accused Appellant Appellant who then came to the Special Investigations Division. Following which, he was arrested after being informed of the complaints against him. The witness stated that he then recorded the statement of the Accused Appellant Appellant. Following the testimony of

PW4 and marking P1 the prosecution concluded their case and called for the Defense.

The Defense thereafter led three witnesses, the Accused Appellant Appellant testified that he was serving in the capacity of an Army Officer in the Panagoda Army camp. He stated that on the day concerned (10.09.2012) he reported to work at the camp however, due to injuries he had suffered from a motor vehicle accident he was not dressed in uniform and due to such reasons he was excused from taking part in the parade. The Accused Appellant Appellant further stated that he had never met PW1 and never entered into any monetary transactions with PW1. He further stated that he was not present at the Sampath Bank branch in Gampaha on the date in concern as he was at the Panagoda Army Camp at the time. He stated that his wife operates a shoe business and borrowed some money for the aforesaid business from PW1. He stated that he only provided a letter in writing due to the constant trouble he had to undergo on part of PW1 and her husband PW2. he stated that he provided the letter instead of his wife because his wife was not employed. The Accused Appellant Appellant further stated that owing to this incident he lost his job at the Sri Lanka Army and the Higher officers within the Army too asked him to provide another letter regarding the aforementioned incident.

Defense witness 2 who is the wife of the Accused Appellant Appellant stated in her testimony that she met with PW1 on 2012.09.10 in order to borrow money which was necessary for her shoe business which was on the verge of bankruptcy. The witness stated that in order to salvage

her business she borrowed this amount of money from PW1. She further stated that her husband (Accused Appellant Appellant) had not been present at the time the transaction had taken place and that no letter had been provided to PW1 stipulating how the money will be paid back to PW1 on that day. The witness stated thereafter that PW1 constantly troubled them demanding repayment of the money borrowed. The witness stated that well after the date the transaction had taken place she visited the residence off PW1 with her brother and she handed over a signed undertaking to PW1 to return the money. The witness stated that this is the document which the prosecution has marked as P.01 which the prosecution states has been signed on the day the money was handed over to the Accused Appellant Appellant by PW1 at the Gampaha branch of Sampath Bank at the time the transaction took place. The witness stated that due to the constant demands of PW1 they decided to resort to even selling property in order to settle the money borrowed for which PW1 demanded that 20% interest be added to the borrowed amount. The witness stated that they had no means to repay such an amount. The witness stated that thereafter a complaint was made against her husband (The Accused Appellant Appellant) at the Panagoda Army camp following which he was let go from his duties, owing to this they were not able to repay the loan amount.

Defense witness 3 who testified on behalf of the Accused Appellant Appellant served as a clerk in charge of salaries at the Regiment Headquarters of the Sri Lanka Army. The witness stated that he had brought along with him a document regarding the Accused Appellant Appellant



reporting to work on 10.09.2012. The witness stated that every month army officers are required to send a letter to their divisional head regarding the number of days they had reported to work. The witness stated that he had brought along with him the true copy of such a letter reporting that the Accused Appellant Appellant had reported to work on 10.09.2012 and marked as V1 after which the defense concluded their case. The witness during cross examination stated that the Accused Appellant Appellant had not taken part in the morning parade on the day in question. However, during re-examination the witness testified that although the Accused Appellant Appellant had not taken part in the morning parade, if he reported to work thereafter it would be reflected on the Register as he had reported to work on that day.

Having considered the evidence at length led by both the prosecution and defense witnesses the learned Magistrate decided against the Accused Appellant Appellant.

The Learned Magistrate in her judgment stated that it is obvious that there had been no previous relationship between the Accused Appellant Appellant and the Complainant. During cross examination, the Accused Appellant Appellant has admitted to signing the document (P1). If the Accused Appellant Appellant had signed an empty paper as he had claimed in his original testimony then there was no hindrance for him to inform the police of doing so at the point at which he was arrested. However, based on the testimony of PW4 (Police Sergeant) the Accused Appellant Appellant had not done so at any point. The Learned Magistrate stated that it is quite apparent

that the Accused Appellant Appellant was well aware of the contents of the document P.01.

The Learned Magistrate noted that in the testimony of PW4 it was stated the Accused Appellant Appellant had been charged 10% interest by the Complainant for the borrowed amount however none of this was mentioned during the testimonies of PW1 or PW2. The Learned Magistrate noted that if the money had been obtained with interest payments this should have been raised during cross examination of PW1 and PW2 and the first mention of the interest payments was through the testimony of the Police Sergeant (PW4).

The Learned Magistrate observed that the position taken up by the Accused Appellant Appellant is that he was not present at the Sampath Bank branch on the day in question as he was at work at the Panagoda Army Camp. Defense witness 03 testified that the Accused Appellant Appellant had not taken part in the morning parade on 10.09.2009 and had not provided a medical certificate for not participating in the parade. The Accused Appellant Appellant had participated in the morning parades for two days before the day in question. The Accused Appellant Appellant testified that owing to an accident which occurred on 18.06.2009 and not being able to dress in uniform due to the injuries sustained from said accident the Accused Appellant Appellant was excused from the morning parades. As such, the Learned Magistrate observed that if it is true that he had been excused from the morning parades permanently then the document presented by the defense marked V1 shows only the dates reported to work by the Accused Appellant Appellant for

the month of September and that there is no reason for someone who has been excused permanently to be a part of the morning parade two days before the date of the incident. Therefore, the Learned Magistrate observed that the Accused Appellant Appellant had lied to the court in his testimony.

The Learned Magistrate held that based on the evidence and testimony provided in the trial, the Accused Appellant Appellant and the Husband of the Complainant (PW2) were acquainted by serving together in the Sri Lanka Army and as such the transaction had taken place based on the trust of that relationship. The Accused Appellant Appellant by not returning the amount borrowed as promised has thereby committed criminal misappropriation, criminal breach of trust and cheating as alleged by the prosecution and sentenced the Accused Appellant Appellant to 6 months rigorous imprisonment and compensation of Rupees 100,000/-, if compensation is not paid 06 months imprisonment.

Aggrieved by which the Accused Appellant Appellant appealed to the High Court of Gampaha. The Learned High Court Judge of Gamapa held that during the cross examination at trial the Accused Appellant Appellant admitted to signing the document marked P1 and that the Learned Magistrate has after considering the entirety of evidence led in the trial has correctly decided that the document marked P1 has been signed by the Accused Appellant Appellant. The Learned High Court Judge of Gampaha by judgment dated 31.08.2017 set aside the conviction based on section 403 of the Penal Code, stating that the elements of the charge had not been proved

beyond a reasonable doubt by the prosecution. However, the Learned High Court judge of Gampaha affirmed the conviction in respect of the remaining two charges based on sections 386 and 389 of the penal code.

Aggrieved by the decision of the High Court of Gampaha, the Accused Appellant Appellant by petition dated 20.09.2017 sought special leave to appeal from this court. Accordingly this court granted special leave to appeal from the aforementioned judgment of the High Court of Gampaha.

In the written submissions of the Respondent Respondent it was submitted that the money was misappropriated by the fact that it was not returned to the Complainant despite multiple attempts made by her and her husband to have the money returned to them. It was further submitted that this amounts to the Accused Appellant Appellant acting dishonestly and thus the actus reus and mens rea of both offenses have been established based on the evidence.

I will proceed to address the question of law on which special leave has been granted, namely that **“The Learned High Court Judge has erred by failing to consider the basic elements to prove charges of section 386 and 389 of the Penal Code.”**

In order to answer the question of law I will first focus on the definition of the offense of Criminal Misappropriation which is set out in section 386 of the Penal Code as follows:

*“Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with*

*imprisonment of either description for a term which may extend to two years, or with fine, or with both”.*

The Supreme Court held in the case of **Barber v Abdulla [1920] 7C.W. R 144** that; *“in order to maintain a charge of criminal misappropriation, the prosecution need show only that the property belonged to some person other than the accused. De Sampayo J “the offense of criminal misappropriation consists in the dishonest conversion to the uses of the party charged of the property of another. I do not think it is absolutely necessary that the actual owner should be disclosed in all cases. It may be sufficient if there is some person entitled to the possession of the goods misappropriated”.*

In the written submission of the Respondent Respondent it is contended as per **G.L Peiris, The Offences under the Penal Code of Sri Lanka 2nd Edition on page 453** *“The central idea involved in the concepts of ‘misappropriation’ and ‘conversion’ is the setting apart property for the wrong person or for the wrong purpose. The actus reus of the offense requires that the property should be used or exploited for the benefit of some person who is not legally entitled to the property.”*

In this case, the Prosecution has proved beyond a reasonable doubt that the 2 million rupees belonged to the PW2 and the Accused Appellant Appellant by failing to return the amount borrowed has deprived the PW1 and PW2 of the benefit that could be derived from that amount of money.

The mens rea of the offence requires the element of dishonest intention. Section 22 of the Penal Code defines dishonestly as follows:

***“Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing “dishonestly”.***

Section 21 of the Penal Code defines wrongful gain and wrongful loss as follows:

***“Wrongful gain is gain by unlawful means of property to which the person gaining is not legally entitled.***

***Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled.”***

It was the previous judicial position that an initial innocent taking of the property followed by a guilty state of mind at a later stage was required. This view was overturned in the case of **Attorney General Vs. Menthis [1960] 61 NLR 561** where Justice Sinnetamby Observed that *“The main provisions of Section 386 make dishonest misappropriation at any stage an offence; Explanation 2 only provides for a special case where the initial taking is honest and its intended to protect the finder of property not in the possession of anyone so long, and only so long, as his continued possession of that property is honest. If, of course, the property taken was in the possession of some person the resulting offence would be theft. In my opinion, therefore in order to constitute misappropriation under our law it is not necessary that there should be an innocent*

*initial taking. If the initial taking of the property not in the possession of anyone is dishonest then too the offence is made out. In regard to this, I agree with the view expressed by Justice Moseley in Salgado V. Mudali Pulle (supra).”*

Therefore, considering the evidence led at trial, the money was borrowed by the Accused Appellant Appellant in order to facilitate money for a relative who was going abroad. The undertaking of P1 was signed by the Accused Appellant Appellant at the point of borrowing, agreeing to repay the money in laches. I note that no evidence regarding the relative traveling abroad in respect of whom the money was borrowed has been led at trial. The Accused Appellant Appellant stated during his testimony that he did not sign P.01 at the point of borrowing, however he signed an empty paper at a later stage owing to the constant pressure by PW1 and PW2 for the repayment of the borrowed money. The Learned Magistrate in her judgment stated that if the position of the Accused Appellant Appellant is that he signed an empty paper at a later date, due to the pressure by PW1 and PW2 such should have been mentioned to the police at the point of his arrest.

According to the testimony of PW4 the officer who recorded the statement of the Accused Appellant Appellant, no mention of such was made and the Accused Appellant Appellant had admitted that he did in fact sign the document marked P1 in his statement to PW4. Therefore the Learned Magistrate correctly concluded that the Accused Appellant Appellant had clear knowledge of the contents of P1 at the point of signing and I am in agreement with this stance of the Learned Magistrate.

The position of the Accused Appellant Appellant is that on the date concerned 10.09.2012, he was not present at the Sampath Bank branch in Gampaha as he was at work at the Panagoda Army Camp and has produced a witness to prove this point. The evidence of the witness and the document marked V1 shows that the Accused Appellant Appellant had not taken part in the morning parade on the day in question and had not provided a medical certificate for not participating. However, the evidence of such a witness pointed out that the Accused Appellant Appellant had participated in the morning parade two days prior to the day in question. As such the Learned Magistrate has correctly observed that if it is true that he had been excused from the morning parades permanently, there is no reason for someone who has been excused permanently to be a part of the morning parade two days before the date of the incident. I am in agreement with the Learned Magistrate on this stance.

Further, the Accused Appellant Appellant has over a period of time since the borrowing of money up until the beginning of the trial on numerous occasions promised to pay back the money however no such repayment has been made up to date. According to the statement made to the police by PW1, the Accused Appellant Appellant had been avoiding PW1 in order to evade returning the money. I believe that this transaction has been entered into by the parties purely based on trust which PW1 and PW2 had with the Accused Appellant Appellant. The Accused Appellant Appellant has therefore misled the parties into



believing that the money will be repaid. In failing to repay the money the Accused Appellant Appellant has deprived the lawful owners of the money the benefits received from such money. Therefore considering all of the above, I believe that the prosecution has fulfilled the elements required for both the actus reus and mens rea of the criminal misappropriation as set out in section 386 of the Penal Code.

The definition of Criminal Breach of trust is set out in section 388 of the Penal Code 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”.*

As submitted in the written submissions of the Respondent Respondent that as per **G.L Peiris, The Offences under the Penal Code of Sri Lanka 2nd Edition on page 465** *“The definition of the offence of criminal breach of trust, embodied in the section 388 of the Penal Code requires proof of the following elements:*

- 1. The accused was in any manner entrusted with property or with any dominion over property;*
- 2. The accused committed one of the following acts;*

- a. *He misappropriated or converted to his own use that property; or*
  - b. *He used or disposed that property in violation of any direction of law prescribing the mode in which such trust is to be discharged; or*
  - c. *He used or disposed of that property in violation of any legal contract, expressed or implied, which he made touching the discharge of such trust; or*
  - d. *He suffered any other person to do so; and*
3. *The accused committed one of the first three acts dishonestly or the fourth act willfully.”*

In the case of **Basnayake v Officer in Charge, Special Crimes Detection Unit, Anuradhapura [1998] 2 SLR p 50** the inference of dishonesty was discussed and it was held that “*the inference of dishonest misappropriation or conversion is an essential ingredient of the offence under s. 391 of the Penal Code.*”

In the Indian case of **Jaswantrao Manilal Akhaney v The State of Bombay [1956] AIR 575,1956 SCR 483** it was held that “*section 405 which defines "criminal breach of trust" speaks of a person being in any manner entrusted with property, it does not contemplate the creation of a trust with all the technicalities of the law of trust. It contemplates the creation of a relationship whereby the owner of property makes it over to another person to be retained by him until a certain contingency arises or to be disposed of by him on the happening of a certain event. The person who transfers possession of the property to the second party still remains the legal owner of the property and the person in whose*

*favour possession is so transferred has only the custody of the property to be kept or disposed of by him for the benefit of the other party, the person so put in possession only obtaining a special interest by way of a claim for money advanced or spent upon the safe keeping of the thing or such other incidental expenses as may have been incurred by him”.*

The same view was followed in the case of **Walgamage v Attorney General 2000 3 SLR p 1** where it was held that “*entrustment does not contemplate the creation of a trust with all the technicalities of the law of trusts; it includes the delivery of property to another to be dealt with in accordance with an arrangement made either then or previously*”.

Based on the abovementioned judgments the distinguishing feature between criminal misappropriation and criminal breach of trust is the entrustment of property. The language used in section 388 is rather wide and states that entrustment of property “in any manner” is the necessary requirement.

Therefore, considering the facts and evidence led at the trial, it is quite evident that the Complainant has entered into this transaction with the Accused Appellant Appellant purely based on trust based on the relationship that existed between PW2 and the Accused Appellant Appellant. There had been no previous transactions between the parties prior to this occasion. The Accused Appellant Appellant borrowed the money from PW1 on the basis that he required the money in order to furnish the

same as proof of funds to send a relative abroad. As per the testimonies of both PW1 and PW2, they were both reluctant at first to provide the money however due to constant requests by the Accused Appellant Appellant agreed to provide the money on the promise that it would be returned in one month. Therefore, by agreement to provide the money to the Accused Appellant Appellant was based on the promise that it would be repaid in one month's time. On such promise the Complainant had been entrusted with 2 Million Rupees for the period of one month to be repaid in tranches. Numerous promises had been made thereafter to repay the amount however no payments had been made up to the date of trial. It is important to note that a period of one year had elapsed before PW1 and PW2 had proceeded to initiate any action against the Accused Appellant Appellant owing to the trust placed on the promises made by the Accused Appellant Appellant to repay the money. Therefore the element of entrustment as required by section 388 of the Penal Code has been satisfied. By the non repayment of the borrowed amount and by dishonestly converting the property to his own use and by depriving the owner of its benefits, the Accused Appellant Appellant has satisfied the elements of actus reus and mens rea required under section 388 of the Penal Code.

Having considered all above, I am of the view that the learned High Court Judge had come to a correct conclusion that the prosecution had proved all the elements required to maintain a charge under section 386 and 389 of the

Penal Code in the case against the Accused Appellant Appellant.

Accordingly, I answer the question of law on which special leave to appeal has been granted in the negative. For these reasons, the Judgment of the High Court of Gampaha is affirmed. The Appeal of the Accused Appellant Appellant is hereby dismissed.

**Judge of the Supreme Court**

**P. PADMAN SURASENA, J.**

**I agree.**

**Judge of the Supreme Court**

**MAHINDA SAMAYAWARDHENA, J.**

**I agree.**

**Judge of the Supreme Court**