

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

Copy : P/O . 23*
Assets

In the matter of an application under Section 331
of the Criminal Procedure Act No.05 of 1979.

Jayasinghege Gamini Jayasinghe

Waduwardeniya,

Hiriwardunna

Accused-appellant

vs.

C.A. No. HC. 136/99

H.C.Colombo No. 1266/96

Director General

Prevention of Bribery and Corruption

Colombo 07.

Respondent



BEFORE

C. NANAYAKKAR, J. &
GAMINI A. L. ABEYRATNE, J.

COUNSEL

Dr. Ranjith Fernando with Harshini Gunawardane, Himali Kularatne and Ramini de Silva for the Accused-Appellant.
A. K. Chandrakantha, Deputy Director General, Bribery Commission for the respondent.

ARGUED ON

: 09.02.2004

WRITTEN SUBMISSIONS

TENDERED ON

: 15.03.2004 & 28.04.2004

DECIDED ON

: 06th August, 2004

NANAYAKKARA, J.

The Accused-Appellant in this case has been convicted and sentenced under section 23(A)(3) of the Bribery Act for having acquired a sum of money which could not have been acquired with any part of his known income. The judgment is predicated on two grounds. Firstly the Accused-Appellant had failed to explain on a balance of probability the sum of Rs.182,292.33 held by his wife in her Bank Account was not acquired by bribery. Secondly disbelief of the accused-appellant's testimony that the monies deposited in a daughter-in-law's Bank Account by the mother-in-law could be so deposited in a situation when both mother and daughter-in-law had a joint account.

The facts are briefly as follows. the accused-Appellant was a member of the minor staff of the Customs Department. His wife maintained a savings account with the Bank of Ceylon, Rambukkana and there was deposit of Rs.182,292.33 in that account after set off on hypothetical basis of the living expenses of the Accused-Appellant. In deducing this amount all earned income including allowances of the Accused-Appellant had been taken into account.

The deposits are not disputed and have been formally led in evidence in a manner which could be accepted as proof of the fact.

The relevant formal evidence which consisted of the Bank Officer and the Investigating Officer of the Bribery Department was led before the Accused-appellant testified on oath as to how his wife's account was credited with the said sum of money and in a manner totally independent of his intervention -

Section 23(A) deals with moveable or immovable property acquisition independent of known income or receipts and in the alternative absence of any proof of



conversion of known income into acquired property - the section proceeds to state that 'until the contrary be proved' such property would be deemed to be the product of bribery subsection (5) deals with the position of a spouse or child under 18 years of a person having acquired such property - after a stipulated date - as not being the real owners but the front for the suspected person - and that suspected person would be deemed to be the owner of the assets in question.

There is no dispute with regard to the money which is the subject matter of the charge in this case lying to the credit of the wife of the Accused in her savings account bearing No.5206 in the Bank of Ceylon branch in Rambukkana. Therefore this would narrow down the area of determination, to whether the question to be determined, that is accrual of the said sum of money in the savings account of his wife could be explained on any other hypothesis other than his guilt.

In considering this aspect of the matter, it is important to ascertain the credibility of the Investigating officer - It appears from examination of his evidence that not only has he faltered in his testimony but he has also taken up contradictory positions - thus quite apart from the fact that he has in all candour expressed the fact that he has not fully investigated certain items of evidence but has contented himself with hearsay utterances and acted on the strength of the same incorporating the same in his reports to the Department. One cannot ignore the fact that in the Accumulation of assets matters under section 23A(1) of the Bribery Act - strict compliance with subsection (4) is obligatory. For due compliance with this subsection the Bribery Commissioner has to issue show cause notice as to why prosecution should not be withheld and this notice is issued on the report of the investigation officer - If the investigation is flawed and the credibility of the investigator could be assailed even where the explanation submitted by the Accused-Appellant is unsatisfactory. The repercussion could be disastrous as the result could be an error in indicting and the perpetuation of an error in consequent conviction.



It is proposed to consider the testimony of the Investigating Officer in order to correctly determine this matter. For this purpose this Court is inclined to illustrate by way of relevant excerpts of the evidence of the Investigating Officer Hewapathirana Abeysickrama- page 48 of the brief disclose the fact that

ප්‍ර: ඒ වගේම යම් සොයා ගැනීමක් සිද්ධකලාව පස්සේ ඒ ලැබී සහ වයදම් සම්බන්ධයෙන් අල්ලස් නීතිය අනුව විත්තිකරුගෙන් ඒ සම්බන්ධයෙන් නිදහසට කරුණු විමසා සිටිය යුතුයි?
C: එසේය.

This reflects the importance of the investigation vis-a-vis the strict compliance to section 23A(4) by the Bribery Commissioner.

The witness further testified to the fact that the mother of the Accused and his wife maintained a separate joint account where the pension of the mother was deposited. This account was numbered 13971.

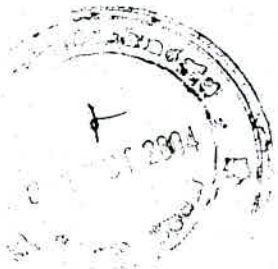
With regard to income from cultivation - p. 67 of the brief discloses.

ප්‍ර: විත්තිකරුගේ නමක් හෝ ඔහුගේ බිරිඳගේ නමක් අදාළ කාල පරිච්ඡේදය තුළ ආදායම් ලැබෙන බෝග ඉඩම් තිබෙනවාද?
C: ගෙදර ඉඩමෙන් ලැබෙන සාමාන්‍ය දෙයක් මග වතුණා මුදල් ගන්න දෙයක් පෙනී ගියේ නැහැ.
ප්‍ර: මෙම විමර්ශනයේදී විත්තිකරු හෝ බිරිඳ යම් යම් ආදායම් මාගී ගැන කරුණු ඉදිරිපත් කලාද?
C: ඔව්.
ප්‍ර: ඒ හැම දෙයක් සම්බන්ධයෙන් හමුත් විමර්ශනය කලාද?
C: ඔව්.

Vide page 70.

ප්‍ර: විත්තිකරු පදිංචි නිවසට ගියාද?
C: ගෙදරට ගියේ නැහැ.
ප්‍ර: හමුත් මේ ගැන තොරතුරු සොයා බැලුවාද?
C: ඔව්.

“ ගෙදරට ගියේ නැහැ” the answer to the latter question and answer to the former (earlier)question “ ගෙදරට ඉඩමෙන් ලැබෙන සාමාන්‍ය දෙයක් මග වතුණා මුදල් ගන්න දෙයක් පෙනී ගියේ නැහැ”



provide an interesting contrast, furthermore:-

Q : තමන් පදිංචි ස්ථානයට නොගොතින් කොතොමද සොයා ගන්නේ?

A : විමර්ශනයක් කරන විට අපි අදාළ පුද්ගලයන්ගේ නිවසට යන්නේ නැහැ. විමර්ශන කරන නිලධාරී වශයෙන් අවශ්‍ය තොරතුරු සොයා ගැනීමට පුළුවන් කියා මම විශ්වාස කරනවා.

To Court the witness has answered thus at page 11

Q : මොන වගේ නිවසක්ද හිඹුනේ?

A : මම විත්තිකරුගේ නිවසට ගියේ නැහැ.

Q : තමන් කියා සිටියා නේද විස්තර?

A : ඔව්.

Q : ඒවා කොතොමද තමන් දන්නේ?

A : ස්වාමිනි මම ගෙදරට ගියේ නැහැ - ආසන්න නිවෙස්වලින් සහ අවට සොයා බැලීම් මගින් නිවස තුළට නොගියාට සියළු විස්තර සොයා බලා ගත්තා.

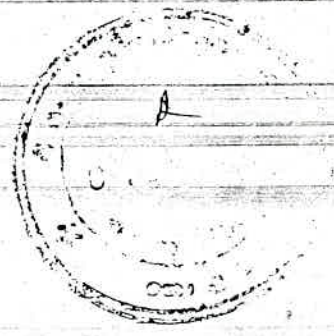
Evidence is of a speculative nature based on hearsay - with the witnesses admission of relying on the perhaps biased, prejudiced opinions of neighbours with the consequent reliance placed on such gossip to base his report to the Bribery Commissioner.

Q : එතකොට තමන් යම් යම් අයගෙන් විත්තිකරු ගැන විමසා බැලුවාද?

A : ඔව්.

Q : එතකොට තමන් විත්තිකරු සමඟ නොවේ තොරතුරු කවා කලේ ?

A : නැහැ.



විමර්ශනයේ ප්‍රගතිය ගැන මගේ ආයතනයට තොරතුරු ඉදිරිපත් කලා.

The witness has also provided a very significant answer to an important question - at p 73 of the brief -

Q : කොතොම වුනත් විත්තිකරුගේ පදිංචි නිවසට ගියේ නැහැ?

A : අපි එහෙම යන්නේ නැහැ විමර්ශනය සඳහා - පිටස්තර වශයෙන් දුරස්ථව දකිනවා

Q : තමා ඔය තොරතුරු විමසීමෙන් කලා කිරිවේ ජනසිගත තොරතුරු විමසීමක්?

A : එහෙමයි.

It was the claim of the Accused-Appellant that the interest from loans given by his father and received by the mother was deposited with his wife - in her Bank Account number 5206.

An answer by the witness is thought provoking - at p. 79

ප්‍ර : තමන්ට මග කරපු විමර්ශන කරපුතු වලින් දකුණත්ත ලැබුණද, මෙම මුද්‍රිත සහ බරිද පිටත්ව සිටියේ මුද්‍රිතයේ පියා සහ මව පිටත්ව සිටි නිවසේ කියලා?

උ : දෙමව්පියන් ඉඳලා තිබෙනවා.

Furthermore, In direct contrast to what the witness stated earlier, that he has never seen the house of the Accused-Appellant nor his garden which could not have had any cultivation he says thus at p. 80 of the brief.

ප්‍ර : තමා කිව්වා මෙම විත්තිකරු, පිටත්වුණු නිවස සහ වටා පිටාව දක්කා කියලා?

උ : එකෙමයි.

ප්‍ර : මොනවා හරි වගාවක් තිබුණද?

උ : ඉඩමේ සාමාන්‍ය මිශ්‍ර වගාවක් තිබුණා - නියරු ඉඩමක් නෙවෙයි. අක්කර 1/2 වගේ තිබෙන්න පුළුවන්.

According to the witness he was informed by the Accused about source of income - about owning property which was verified and found to be correct also the fact that the Accused had sold certain intended properties - to values of Rs.20,000/= and Rs.10,000/= in 1990 - that also, the sister-in-law of the Accused-Appellant had worked abroad and remitted sums of money to the wife of the Accused-Appellant - and deposited in her account bearing No.5206.

at p.88

ප්‍ර : ඇය විසින් ඊට සිට මුදල් ඒවා තිබුණා ?

උ : ඔව්.

ප්‍ර : ඇය ආවාට පස්සේ හෝ මුදල් ඇය විසින් ආපසු අරන් තිබෙනවාද?

උ : ඒ ගැන විමර්ශනය කලේ නැහැ -



The witness has also accepted the fact that the father of the Accused-Appellant had given money on interest and died in May 1993 - Two months after the investigation commenced.

In conclusion, with regard to the testimony of the Investigating Officer it is manifestly clear that he has chosen the path of least resistance, and conducted an investigation in a haphazard slipshod manner and in his own words relayed the progress

7


of his investigations to the Bribery Commission - who in turn predicated a show cause notice which was responded to by the Accused-appellant -

This Court is inclined to the view that no reliance could be placed on the investigations conducted by the witness Abeywickrama on the Anonymous petition he had received with regard to the Accused-Appellant.

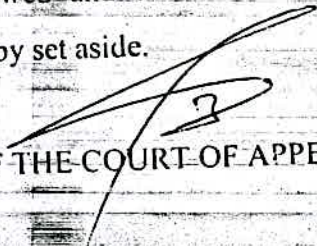
The Accused-appellant had testified on oath and detailed particulars of the manner in which his wife had credited her savings account with the monies that lay in deposit - He stated that his mother opened this savings account for the wife - It may well be that having worked for 22 years the investments from the savings from this long period of service could have filtered back to Account No.2206 during this one year period he testified that money was received from the sale of lands - interest from loans given by his father to debtors i.e. borrowers were in turn given by him to his wife and deposited in her account monies received from his sister-in-law from abroad and even the fact that his wife operated another joint account with his mother - which included deposits from her pension.

It is regrettable that the learned trial Judge has dismissed lightly, the evidence given by the Accused-Appellant without an adequate consideration as to its merits, although he was subjected to lengthy and thorough cross examination which has failed to bring forth any material contradiction tending to infirmities in his credibility.

Therefore in the context of the particular background of this case, this Court is inclined to the view that it would be unsafe to permit this conviction and sentence to be affirmed particularly because lack of proper investigation which has rendered the report unreliable and inaccurate - consequently, lack of due compliance with Section 23A(4) of the Bribery Act.



Accordingly, the Appeal is allowed and the conviction and sentence imposed by the learned High Court Judge is hereby set aside.


JUDGE OF THE COURT OF APPEAL

ABEYRATNE, J.

I agree.


JUDGE OF THE COURT OF APPEAL

Kwk/=



TRUE COPY

Chief Clerk
COURT OF APPEAL
COLOMBO-12.