

IN THE PROVINCIAL HIGH COURT OF THE WESTERN PROVINCE

HOLDEN IN COLOMBO

Rannaidege Dharmasiri

Ekanayake.

No.05, Ahangama,

Thirappane.

Accused-Appellant

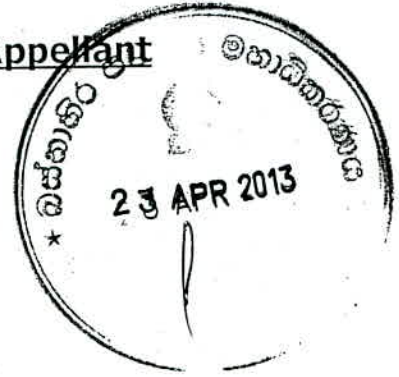
High Court Revision

HC. MCA No. 113/2012

Magistrates' Court

Colombo No. 58913/10/01

Vs.



Director General,

Commission to investigate in
to allegations of Bribery and
Corruption.

Malalasekara Mawatha,

Colombo 07.

Complainant-Respondent.

Decided on : 2013.03.05

Counsel : Mr. Ravindra C de Silva for the Accused appellant.
Ms. Thanuja Bandara, for the Complainant
Respondent.



JUDGMENT

Accused appellant has been charged in the Magistrate's Court of Colombo under 04 Counts. They are as follows.

- (1) that he solicited a gratification of Rs. 1500/- on 04.07.2009, from Mohamed Raushan Nazeer, an offence punishable under section 16 (b) of the Bribery Act.
- (2) that in the course of the same transaction, he solicited a gratification of Rs. 1500/- , an offence punishable under section 19 (c) of the Bribery Act.
- (3) that he accepted a gratification of Rs. 1000/- on 09.07.2009 , an offence punishable under section 16 (b) of the Bribery Act.

(4) that in the course of the same transaction he accepted a gratification of Rs. 1000/-, an offence punishable under section 19(c) of the Bribery Act.

As the Accused appellant had pleaded not guilty, the trial had proceeded against him. He has thereafter been convicted for the 1st and 3rd counts by the learned Magistrate and has been acquitted from the 2nd and 4th counts. Learned Magistrate has imposed a sentence on him thereafter. This appeal is against the said conviction.

When this appeal was taken up for argument learned Counsel for both parties stated to Court that they have filed written submissions and that they will not make oral submissions in addition, and requested this Court to pronounce its Judgement after considering the contents of their written submissions. Thus this judgment will be based on material contained in the written submissions of the parties.



The Accused appellant has stated in his written submissions that the prosecution has failed to prove that these incidents occurred on 2009.07.04. However, perusal of the evidence adduced on behalf of the prosecution does not support such a stance. Defence has cross examined the prosecution witness and the instances under this adjudication were quite clear to the parties.

Witness No.01, Mohamed Raushan Nazeer has adequately described the incident.

Although the learned Counsel for the accused appellant has stated in his written submissions that the conclusion arrived at by the learned Magistrate is perverse, he has failed to substantiate it in a manner acceptable to this Court.

It is the position of the learned Counsel for the Accused appellant that the currency note of Rs. 1000/- was never given to witness No. 01 by witness Kumarasiri.



Learned Counsel for the Accused appellant has also submitted in his written submissions that,

- (i) Witness No. 01 Mohamed Raushan Nazeer has stated that he has received the money from the Bribery officers , and that he handed over the money to the Accused appellant.
- (ii) that the decoy Mohamed Mohaideen Mohamad Hazen, witness No. 02 has stated that he was given Money by witness No.03 Kumarasiri and that this Money was never given to witness No. 01 at any stage.
- (iii) that the Officer In charge of the raid , Premalal Kumarsiri , Witness No.03 has stated that it was witness No. 01 who retained this money.

In view of these it was the submission by the Accused appellant that the evidence adduced for the prosecution is contradictory.



However, perusal of the virtual complainant's evidence along with the evidence of the decoy and the evidence of Kumarasiri does not show that these witnesses have contradicted each other in their evidence in the way set out above by the learned Counsel for the Accused appellant.

Therefore, the above argument put forward by the learned Counsel for the Accused appellant must be rejected.

Learned Counsel for the accused appellant has extracted several pieces of evidence in isolation and has attempted to argue that they have cut across the prosecution's case.

However it is the duty of the Court of law to consider all the evidence adduced in a case in its totality in arriving at the final conclusion.

Perusal of the Judgement dated 2012.06.14 pronounced by the learned Magistrate , show that he has considered the evidence adduced by the prosecution and by the defence , before deciding to convict the Accused appellant on 1st and 3rd counts.



Learned Counsel for the Accused appellant has not stated in his written submissions any cogent reason as to why the learned Magistrate's Judgment is flawed. As such this Court is of the opinion that there is no basis for this Court to interfere at this stage in the findings arrived at by the learned Magistrate. Witnesses have testified before the learned Magistrate and it is settled law that it is best to leave the credibility of the witnesses in the hands of the trial Judge who has had the opportunity to observe them testifying..

In these circumstances, I affirm the conviction entered in to and the sentence imposed on the Accused appellant by the learned Magistrate and proceed to dismiss this appeal.

Appeal is dismissed.

Surasena

(P. Padman Surasena)

High Court Judge

Colombo.

(Court No. 04)

2013.03.05



NW/-

IN THE PROVINCIAL HIGH COURT OF WESTERN PROVINCE
OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

(HOLDEN AT COLOMBO)

High Court Colombo

HCRA 103/2011

Narasinghe Buwelikada Deeshika

Malkanthi,

No.345/1, Uduwila, Delgoda,

Meegahawatta.

Accused-Petitioner

Vs.

Magistrates' Court

Colombo

Case No. 55724/1/10

1. The Commission to Investigate

Allegations of Bribery or

Corruption,

No.36. Malalasekara Mawatha,

Colombo 07.

2. The Director General for the

Commission to Investigate -

Allegation and Bribery or Corruption,

No.36, Malalasekara Mawatha,

Colombo 07.

Complainant - Respondents



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

3rd Respondent

Decided on : 2013.08.06

Counsel : Mr. V.P.A. Hettiarachchi with Mr. Vijaya Hettiarachchi
for the Petitioner.
Ms. Ruwani Wickramasinghe for the 1st and 2nd
Respondents.

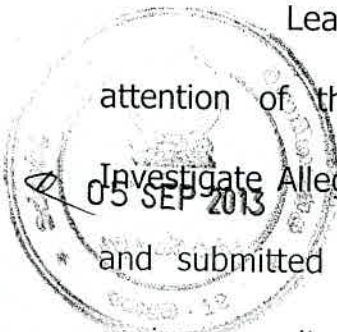


JUDGMENT

Accused Petitioner has been charged in the Magistrate's Court under Section 70 of the Bribery Act as amended by Act No. 20 of 1994 for an offence of corruption.

In the Magistrate's court, at the inception a preliminary objection has been raised on behalf of the Accused - Petitioner that this case cannot be maintained against the Accused - Petitioner,

since there had been no proper complaint made as required under section 41 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994. Learned Magistrate for the reasons stated in his order dated 2011.06.02 has overruled this objection and has fixed the case for trial. It is this order that is sought to be revised by the Accused - Petitioner in this revision application.



Learned Counsel for the Accused - Petitioner drew the attention of this court to Section 21 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 and submitted to this court that the provisions in section 21 envisages a situation where the person who makes the allegation in any communication made by him to the Commission under section 4, becomes responsible for the veracity of its contents. It is the submission of the learned counsel for the Accused - Petitioner that Section 21 becomes redundant if section 4 (1) is interpreted to include anonymous petitions also. In view of these submission this court needs to examine the provision in section 21 of the Act No.19 of 1994. It is as follows,

:hhi



" Every person who makes an allegation in any communication made by him to the Commission under section 4 knowing such allegation to be false or having reason to believe that such allegation is not true shall be guilty of an offence and shall on conviction after summary trial before a Magistrate be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding two hundred thousand rupees or to both such imprisonment and fine and shall in addition, be liable to the payment to the person in respect of whom the communication was made, of compensation of such sum as the Court may think fit."




The Preliminary objection that the Accused - Petitioner has raised in the Magistrates' Court is that since there is no proper complaint by a specific person the Commission to Investigate Allegations of Bribery or Corruption which is hereinafter referred to as the "Commission" has no legal power under Section 4 (1) of the Act No. 19 of 1994, to conduct the investigation pertaining to this

matter against the Accused - Petitioner and that therefore the Commission could not have preferred these charges against the Accused - Petitioner. It is therefore necessary at this stage to examine the section 4 of the Act. It is as follows,

" 4 (1) An allegation of bribery or corruption may be made against a person (whether or not such person is holding on the date on which the communication is received by the commission, the office or employment by virtue of holding which he is alleged to have committed the act constituting bribery or corruption) by a communication to the Commission, or a person may by a communication to the Commission , draw the attention of the Commission to any recent acquisitions of wealth or property or to any recent financial or business dealings or to any recent expenditures by a person (whether or not such person is holding any office or employment on the date on which such communication is received by the Commission) which acquisitions, dealings or expenditures are to the knowledge of the person making such communication not commensurate with the known sources of wealth or income of such person.



(2) Upon receipt of a communication under subsection (1) the Commission, if it is satisfied that such communication is genuine and that the communication discloses material upon which an investigation ought to be conducted, shall conduct such investigation as may be necessary for the purpose of deciding upon all or any of the following matters:-

- 
- (a) Prosecution or other suitable action under the provisions of the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975; or
 - (b) Prosecution under any other law,

and where the Commission decides, whether before or after the conduct of an investigation, that a -communication received by it should be dealt with by any other authority, it may forward such communication to such other authority.

(3) The Commission shall have the power to investigate any matters disclosed by a communication received by it under subsection (1) whether or not such matters relate to a period prior to the appointed date and notwithstanding anything to the contrary in any other law....."




It is also useful at the same time to have in mind that the word used for the term "Communication" in Sinhala Act is "සන්නිවේදනය".

Learned Counsel for the Accused - Petitioner heavily relied on the case of **Mahinda Rajapaksha Vs. Attorney General and others** Supreme Court FR application No. 387/2005 decided on 27.03.2006 by the Supreme Court. In this case the Supreme Court has cited the following commentary from Sohoni's Code of Criminal Procedure 1973-Vol.II, page 1416 has which reads as follows:



"The information on which the Police Officer is expected to act must be authentic; in other words, the information must be capable of being traced to a specific individual who would take the responsibility for the same so that should the information subsequently turn out to be false, the informant may be proceeded against....."



The issue before the Supreme Court in that case was whether it was justifiable for Police to have proceeded with an investigation on the given set of facts in that case without a complaint being recorded by the virtual complainant who had wanted police to commence an investigation. The decision in that case was centered around section 109 of the Code of Criminal Procedure Act.

Further in that case the Supreme Court has considered the facts which are intrinsic in nature in that case, when arriving at that conclusion.

Respondent on the other hand distinguishes this case from the application to this case and insist that it is legal for the

e
e
n
d
Commission to proceed to investigate into this matter even on an
anonymous petition.

As pointed out by the learned counsel for the
Complainant - Respondents in her written submissions Act No. 19 of
1994 has not given an interpretation to the word "Communication".

s
r
a
d
t
It is clear that the commencement of investigation
pertaining to this case has been done according to section 4 of the
Act No. 19 of 1994. Therefore Section 109 of the Code of Criminal
Procedure Act has no direct relevance to this case.

il
d
t
According to section 4 (1) it is even open for the
person who provides the communication just to draw the attention
of the commission to any recent acquisitions of wealth , property or
any recent financial or business dealings or to any recent
expenditures by a person. This means that pre- requisites for
commencement of an investigation by the commission by virtue of
this section are not the same as described in the quotation cited by
the Supreme Court in that case, cited above. Therefore it is the



10
view of this Court that the case relied upon by the learned counsel for the Accused - Petitioner has no direct relevance to this case.

Further there is another distinguishable feature which is found in section 4 (2). According to section 4 (2) an investigation is commenced by the commission only if it is satisfied that a communication referred to in section 4 (1) is genuine and that it discloses material upon which an investigation ought to be conducted. This should be considered as a sufficient safe guard against incoming false complaints referred to in the Supreme Court judgment relied upon by the learned counsel for the Accused - Petitioner.

According to the petition a Commission to Investigate Bribery or Corruption has taken steps to charge the Accused - Petitioner in the Magistrate's Court in Colombo and a copy of the charge sheet has been handed over to her by the learned Magistrate. Learned Magistrate having overruled the impugned preliminary objection has fixed this case for trial.


Upon receipt of a communication under section 4(1) the Commission is empowered to authorize the conduct of an investigation for which variety of powers have been conferred on the commission by the provisions of the Act. Where the material collected in the course of such investigation conducted by it discloses the commission of an offence by any person, then the commission has the power to direct its Director General to institute criminal proceedings against such person in an appropriate court in terms of section 11 of the Act No.19 of 1994. Since the charge sheet in this case has been filed by the Commission in the Magistrate's Court it could be presumed that the material collected during this investigation has disclosed that the offences described in the charge sheet are alleged to have been committed by the Accused - Petitioner.

However, except presenting an argument that the Commission has no power to prefer charges against the Accused - Petitioner on an anonymous communication, the Accused - Petitioner has not adduced any reason what so ever either before the Magistrate's Court or before this court to satisfy this court that the Commission on the material collected could not have been

05 SEP 2013



satisfied that the allegations against the Accused - Petitioner are well founded.



The Supreme Court case relied upon by the Accused - Petitioner is a Fundamental Rights application against violation of Fundamental Rights guaranteed by Article 12 (1) of the constitution. The Supreme Court has held that the Petitioner in that case has been denied equal protection of law. The Supreme Court has given specific reasons as to why it came to that finding in that case. However as I have mentioned before there are no facts produced before this court by either party which would have been of some assistance to this court to ascertain whether there is at least a semblance of truth in the submissions made on behalf of the Accused - petitioner that the allegations against the Accused - Petitioner are baseless.

It is appropriate at this stage to turn to the reasons given by the learned Magistrate when he overruled this preliminary objection. Learned Magistrate in his order has stated that the Supreme Court judgment cited above relied upon by the Accused - Petitioner has no application to this case as investigation and

preferring charges in respect of this case has been done by the Commission in terms of Provisions of some other law namely, under Section 4 (1) of the Act No. 19 of 1994.

It must be remembered that unlike the institution of proceedings by the police under the Provisions of Criminal Procedure Code which was the subject matter under review in the Supreme Court case cited above by the learned Counsel for the Accused - Petitioner, the legislature has established a Commission by the name of "Commission to Investigate Allegations of Bribery or Corruption " which consists of two retired Judges of Superior Courts. According to Section 4 (2) an investigation could be conducted only if the Commission is satisfied that such communication referred to in Section 4 (1) is genuine and that the communication discloses material upon which investigation should be conducted. Therefore it could be clearly seen that there is a filtering process in place which is not seen in the other cases instituted under the Provisions of Code of Criminal Procedure Act. This suggests that the procedure of institution of proceedings by the Commission is different from that done by the police as in the Supreme Court case relied upon by the Accused - Petitioner.





Learned Counsel for the Accused - Petitioner at no stage pointed out a basis on which this court could come to a conclusion that the charges have been falsely framed against the Accused - Petitioner.

In view of this, I see no reason or no basis to interfere with the order of the learned Magistrate overruling the preliminary objection. Hence I proceed to dismiss this application.

PP Surasena

(P. Padman Surasena)
High Court Judge
Colombo.
(Court No. 04)
2013.08.06

NW/-

ඉහත සඳහන් වනුයේ පිටු අංක 01200 14 දක්වා
කොළඹ මහාධිකරණයේ අංක H.C.P. 103/11 දරණ නඩුවේ
විචාරණ මහතින් විනිසුරුතුමාගේ ප්‍රචාරණ පත් රාජකාරී
කටයුතුකම සඳහා ශාස්තුවෙන් තොරව නොමිලේ නිකුත් කර
මෙහිින් ප්‍රකාශ කරමි.
දිනය : 2013/08/06
රෙජිස්ට්‍රාර්
මහාධිකරණය කොළඹ 12
පරීක්ෂා කළා

copy to officials
of the Legal Staff.

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

Court of Appeal No. CA.(PHC) APN 231/2004

Karunaratne Kakulandara

Accused-petitioner

Vs.

Director-General,
Prevention of Bribery or Corruption.

Complainant-Respondent

Before: **Jagath Balapatabendi J (P/C.A)**
Eric Basnayake J

Counsel: Dulindra Weerasuriya with Janak Amerasinghe
for the Accused Petitioner

M/s. Mallika Liyanage Deputy Director-General,
Prevention of the Bribery or Corruption, for the Complainant
Respondent

Argued on: 24.10.2005.

Written Submissions Tendered On: 5.12.2005 & 19.1.2006

Decided on: 16.11.2006.

Eric Basnayake J



The accused petitioner (hereinafter referred to as the accused) in this case was an Assistant Commissioner of Agrarian Services. He was charged under section 23 A (3) of the Bribery Act to wit that for the period 17.10 1988 and 31.8.1989 the accused could not account for the value of properties he gained as per the details given in the attachment with his known income, an offence punishable with seven years imprisonment and a fine. After the closing of the prosecution case an application was made by the defence under section 200 of the Code of Criminal Procedure Act to acquit the accused. The learned

High Court Judge after hearing both parties refused the application and called for the defence. The accused is seeking to have the order of the learned High Court Judge set aside.

Submission of the learned counsel for the accused

This action was filed on the basis that the accused could not account for his expenditure from his known income. As per the income and the expenditure in the document marked P2 (P17 at the trial) the difference is Rs. 122772 . 74. The learned counsel submitted that the income the accused had received from the Bank of Ceylon for inquiries conducted regarding non payment of agricultural loans of the debtors had not been accounted for. Hence, he argued, the document P2 cannot be considered as a correct statement of account. He submitted that the prosecution is aware of these payments. The learned counsel submitted that in terms of section 23 A the burden lies with the prosecution to show that the expenditure is more than the known income of the accused for the relevant period. As the prosecution had not done so the prosecution cannot rely on the presumption referred to in the section.

Section 23 A (1) is as follows:- Where a person has or had acquired any property on or after March 1st 1954 and such property –

(a)

(b) being property, other than money, cannot be or could not have been-

(i) property acquired with any part of his **known Income** or

(ii) property which is or was part of his known receipts,

(iii) property to which any part of his known Receipts has or had been converted,



then , for the purposes of any prosecution under this section, it shall be deemed, until the contrary is proved by him, that such property is or was property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery.

(3) a person who is or had been the owner of any property which is deemed under sub section (1) to be property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding five thousand rupees:

The complaint of the learned counsel is that the summary of the Income and expenditure (marked P17 at the trial and as P2 to the petition) showing the difference between the income and the expenditure as Rs.122172.74 is wrong as the prosecution had failed to prove all the known income of the accused after a thorough investigation. Two witnesses for the prosecution, namely, Cyril Wickum Ariyaratne and Tennakoon Mudiyanseelage Seneviratne admitted in evidence that some receipts of the accused during the relevant period had not been accounted for in preparing the summary marked P17. Two of these receipts were marked V 10 and V 11 at the trial (P4a and P4b). It is evident from documents marked P3 and P4 at the trial (P5a and P5b) that the Bribery Commission was aware prior to the date the accused was charged that the accused was receiving payments from the Bank of Ceylon on account of the investigations done by him. The amounts would have been found out had a thorough investigation been done.

The learned High Court Judge stated that "it is revealed from cross examination that the prosecution came to know a source of income of the accused, that is, payments made to the accused by the Bank for the investigations and inquiries done by the accused. The position of the prosecution is that they have made every endeavour to ascertain the income which he had received from this source of income but the prosecution failed in its attempt to obtain the same. The prosecution was unable to obtain this information from the accused even though the prosecution had requested the accused to declare all the



known income. Under these circumstances even though the prosecution was aware of a source of income from which the accused would have received some income but the prosecution was not aware the amount of money received from this source and as this information is not forthcoming the prosecution has thought it fit to proceed with the known income of the accused”.

Admittedly, the Bribery Commission has been aware of some payments received by the accused although they did not know the exact amount. If a thorough investigation was done there would have been no difficulty in finding out these amounts. There is no evidence that such a thorough investigation was done. There is no evidence that inquiries were made from the Bank with regard to these payments. The Commission has not made any specific inquiries from the accused either, with regard to the payments received from the bank on account of his performing the services to the bank. The summary has been prepared without considering these payments. Therefore the summary of the income and the expenditure cannot be considered as something that was prepared after a thorough investigation. To that extent the learned High court Judge has erred in coming to the conclusion that:-

1. The prosecution made every endeavour to ascertain the income which he had received but failed.
2. The prosecution was unable to obtain this information.

I am of the view that no endeavour has been made to ascertain the amount the accused had received on account of the investigations done for the Bank of Ceylon. The prosecution could have obtained this information from the accused if such information was called for. There is no such evidence. When the Commission became aware that the accused had received some payments from another source during the relevant period, there arose a duty on the part of the Commission to find out those amounts before concluding that the accused had taken bribes.



Wimalaratne J in Wanigasekera Vs. Republic of Sri Lanka 79 I NLR 240 at 248 quoted Sinha J in C.S.D. Swami vs. The State (1969) AIR (SC) pg 7 that "the known source of income" must have reference to sources known to the prosecution on a thorough investigation. Wimalaratne J held at pg 250 that "the basic fact required to be proved in a prosecution under section 23A of the Bribery Act is that the accused acquired property which cannot or could not have been acquired with any part of his sources of income or receipts known to the prosecution after investigation".

The burden lies with the prosecution to prove that the charges were filed only after a thorough investigation of the known income of the accused. If this was challenged the prosecution should satisfy court that such an investigation was done. If persons are brought before court without such investigation, the prosecution would in effect be expecting the defence to prove the innocence of the accused. The prosecution must prove its case without leaving part of the evidence to be provided by the accused.

In this case the prosecution admitted that they were aware of some unascertained income received by the accused. The Commission got this information from the Department of Agrarian Services where the accused was employed. The Agrarian Services Department informed the Commission that the information with regard to this income has to be obtained by the Bank which made payments to the accused. The Commission never made inquiries from the Bank with regard to these payments. The Commission did not inquire from the accused either particularly with regard to these receipts. Then can one say that the charges were brought after a thorough investigation? The prosecution is not expected to conduct an incomplete investigation and get the accused to prove his innocence. There is no evidence in this case that the accused did not cooperate with regard to the investigation.

The Commission had written to the accused requesting him to the income received by the accused with regard to the relevant period. There is no evidence that the commission ever inquired from the accused about these payments not accounted for. "It shall be deemed...that such property is....acquired by bribery...". The statute has a presumption



under the section. Admittedly it is a rebuttable presumption. However one must also remember that these are cases involving criminal law and the burden lies with the prosecution. This presumption should be made applicable at the completion of a thorough investigation by the prosecution, at which point there still remain amounts unaccounted for. What was the investigation conducted to ascertain the amounts received by the accused from the Bank on account of investigations the accused did to the Bank?

The Commission should refrain from bringing persons to court unless they are able to show that charges have been brought after a thorough investigation. I am of the view that no attempt has been made to ascertain the receipts of the accused on account of the investigations done to the bank during the relevant period. Therefore the prosecution has failed in its duty to bring a fair prosecution. The accused should succeed as there is no case to answer. Hence this application is allowed and the accused is acquitted.



Judge of the Court of Appeal

Jagath Balapatabendi J

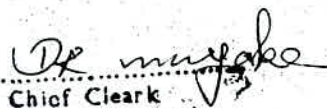
I agree.



President of the Court of Appeal



TRUE COPY



Chief Clerk

COURT OF APPEAL
COLOMBO