15

Learned Counsel for the accused-appellant quite legitimately pointed out that the most damaging and completely unwaranted inference drawn by the trial judge was stated in the penultimate part of the judgment as follows:

"It is clear that the delay in the 1st accused taking meaningful action concering the alleged illegal structure gives further credence to the prosecution version that the 1st accused was delaying taking steps in this manner so that he could seek a gratification from the complainant".

There was no evidence led at the trial that the accused had in any manner contributed to the delay in taking legal action against the complainant on account of the unauthorised construction of a building. There was no evidence that the 1st accused was taking steps to seek a gratification from the complainant. On the contrary the 1st accused has been prompt and has persevered in bringing to the notice of the authorities the need to take action in respect of this unauthorised building.

For these reasons I am of the view that the verdict of the trial judge is unreasonably against the weight of the evidence and that a close examination of the evidence raises a strong doubt as to the guilt of the 1st accused-appellant.

The conviction of the 1st accused-appellant on 1st, 2nd, 3rd and 4th charges is therefore quashed and the sentences imposed are set aside. The 1st accused-appellant is acquitted of all charges.

DE SILVA, J. – I agree.

Appeal allowed.

B a,b,c 25(1)

Gratification

KATHUBDEEN
v.
REPUBLIC OF SRI LANKA

COURT OF APPEAL
ISMAIL, J., (P/CA)
DE SILVA, J.,
C.A. NO. 44/94
H.C. COLOMBO B 839/93
MAY 21ST, 28TH, 1998

Bribery Act – S.19, 19(C), 25(1) – Soliciting and attempting to accept a gratification – Is sexual intercourse a gratification within the meaning of the Bribery Act – Dock Statement – credibility.

The accused appellant was indicted on four counts for soliciting and attempting to accept a gratification to wit sexual intercourse with the virtual complainant, as a reward or inducement for arranging a transfer. After trial the appellant was found guilty and convicted on all four counts.

Held:

1. It is settled law that an unsworn statement must be treated as evidence. It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt.

2. S.90 of the Bribery Act defines gratification to include among other things, "any other service favour or advantage or any descriptive whatsoever".

   "The word gratification is used in its larger sense as connoting anything which affords gratification or satisfaction or pleasure to the taste, appetite or the mind. The craving for an honorary distinction or for sexual intercourse is an example of mental and bodily desires, the satisfaction of which is gratification which is not estimable in money".

3. S.25 (1) of the Bribery Act makes 'attempts' to commit offences specified in the act punishable under the same provisions which make the principle offences punishable.

APPEAL from the judgment of High Court of Colombo.

Cases referred to:

1. *Q v. Kularatne* – 71 NLR 529.
2. *K v. Sittamparam* – 20 NLR 257.
3. *Q v. Buddarakkitha* – 63 NLR 443.
4. *Gunapala v. The Republic of Sri Lanka* – 1994 2 SLR 180.

Faiz Mustapha PC., with S. N. Senanayake for Accused-Appellant.

Jayantha Jayasuriya, S.S.C. for the Attorney-General.

Cur. adv. vult.

July 31, 1998

DE SILVA, J.

The Accused-Appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo on four counts under section 19, 19(C) and 25(1) of the Bribery Act for soliciting and attempting to accept a "gratification" to wit sexual intercourse with the virtual complainant Pallage Dona Damayanthi Monica de Silva, as a reward or inducement for arranging a transfer for her whilst the appellant was employed as the Security Manager of the National Housing Development Authority.

The first and third counts were for allegedly having solicited a gratification in the form of sexual intercourse with the said Monica de Silva, offences punishable under section 19 and 19(C) respectively of the Bribery Act.

According to count 2 the appellant on 16.07.1993 in the course of the same transaction as referred to in count 1 did attempt to have sexual intercourse with Monica de Silva an offence punishable under section 19 read with section 25(1) of the Bribery Act. Count 4 also refer to the attempt of the appellant to have sexual intercourse with Monica de Silva and thereby he committed an offence punishable under section 19(C) read with section 25(1) of the Bribery Act.

After trial the learned High Court Judge on 03.03.1994 found the appellant guilty and convicted him on all four counts. On counts 1 and 3 he was sentenced to a term of 5 years rigorous imprisonment on each count and in addition a fine of Rs. 5000 had been imposed

with a default sentence of 2 years rigorous imprisonment on each count.

On counts 2 and 4 the appellant was sentenced to a term of 7 years rigorous imprisonment with a fine of Rs. 5000 and a default sentence of 2 years rigorous imprisonment on each count.

The trial Judge had directed that all these sentences run concurrently. This appeal is against these convictions and sentences.

The case for the prosecution was that the accused-appellant was the Senior Security Manager of the National Housing Development Authority at the relevant time and in that capacity he was in charge of the Security Division of that Authority. Monica de Silva joined the National Housing Development Authority as a female security guard in December 1987 and came under the supervision and control of the accused who was her immediate superior. As she was a married lady and lived in Bandaragama she requested a transfer to Kalutara which the appellant refused. Instead the appellant suggested that she should spend time with him as husband and wife in order to help her to get a transfer and also offered to get a National Housing Development Authority house, in Colombo, for her, which offer Monica declined as she suspected his motives.

During this period she gave birth to a child and due to the difficulties encountered in feeding the baby and travelling to Colombo and back she re-applied for a transfer to Kalutara. On or about the 25th of November 1989 she was transferred to the Gramodaya Centre at Kollupitiya. One day the appellant visited the Gramodaya Centre ostensibly to inspect the changing room facilities but Monica was of the view that the reason of his visit was to explore the possibility of achieving his purpose and to see whether the place was suitable for him to commit the said act.

According to Monica the appellant was refusing to give her the transfer she had requested because of her unwillingness to accede to his demands. At one stage she verbally informed the Deputy General Manager (Administration) regarding the harassment she received at the hands of the appellant. However she was reluctant to make a complaint in writing as she had to continue to work in the same institution.

Investigations into the activities of the appellant commenced on a confidential letter sent to the Bribery Commissioner's Department by the General Manager of the National Housing Development Authority. On 10.07.1990 an officer from the Bribery Commissioner's Department came to see Monica at the said Gramodaya Centre and made inquires discreetly from her about the harassment she was receiving at the hand of the accused-appellant.

After the Bribery officers spoke to her she agreed to co-operate with them and on 13.07.1990 she received a telephone call asking her to come to the Bribery Commissioner's Department and on that day she made a statement to the Bribery officers.

The Bribery officers requested Monica to meet the appellant on the same day in the company of WPC Violet Senadheera who was to be introduced to the appellant as a married woman. whose husband had left her and was prepared to do "anything" in order to secure a job. Monica and Violet both visited the appellant in his office whereupon Monica spoke to him and presented to him an application for transfer which was produced by the prosecution as P(1) and introduced her friend to the appellant. She also "indicated" her willingness to sleep with him in return for the favour of getting the transfer. The appellant thereupon requested Monica to come with Violet to his apartment at Elivitigala Mawatha on 16.07.1990 and also requested her to bring her application P(1) and Violet's a application for a job. The appellant stated that he would be on leave that day and would be alone in the house as his wife would be away. He has further stated that he would be taking steps to remove the National Housing Development Authority security guards from the housing scheme where he lives.

On 16.07.1990 around 9.00 a.m. Monica with Violet went to the appellants flat at Elivitigala Mawatha. As they approached the front door the appellant opened the front door and took them in. The appellant was in a sarong but without a shirt and was drying his hair with a towel. They had been asked to sit in the hall. Having gone to the room the appellant had called Monica inside. The door to that room had a transparent curtain. According to Monica when she went inside the appellant removed his sarong and embraced her and requested her kiss his private parts which she refused to do.

Having observed Violet watching from the hall the appellant suggested that the door be closed to which Monica said that Violet is also like her and ready for "anything" therefore Violet being there was not a problem. Soon thereafter the officers of the Bribery Department walked in and arrested the accused. According to the Bribery officers the accused was naked at that time.

The learned counsel for the appellant submitted the following grounds of apeal.

(1) That there are material contradictions inter se and per se in the evidence of the chief prosecution witnesses and therefore the learned trial Judge could not have accepted them as truthful witnesses.

(2) The learned trial Judge had not given adequate consideration to the dock statement of the accused-appellant and the evidence led on his behalf.

(3) Counts 2 and 4 of the indictment do not have the elements known to law and for that reason they are unintelligible.

On the first ground the learned counsel for the appellant submitted that Monica is an untrustworthy and unreliable witness. He pointed out that it was the evidence of Monica that on the 13th when they met the appellant in the office the appellant questioned her in the presence of Violet whether she was willing to spend time with him as "husband and wife".

Mr. Mustapha pointed out that in cross-examination she changed her position and stated that what the appellant told was not to come and spend time as husband and wife but "උඹට අර වැඩේට එන්න පුළුවන්ද?" Counsel submitted that there is a vast difference between calling Monica to spend time as husband and wife and "උඹට අර වැඩේට එන්න පුළුවන්ද?" It was urged that apart from using the word "Umba" no immoral suggestions had been made by the appellant.

In this connection WPC Violet, The decoy, stated that at that time the appellant said "අර වැඩේට මාව හම්බවෙන්න වරෙන්කෝ."

It is to be noted that Monica's position was that the appellant had been demanding from her to have sexual relationship as husband and wife for a long time. She merely narrated this in the examination in chief. State Counsel who prosecuted has not bothered to clarify this position in examination in chief. However in cross examination when questioned by the defence as to the exact words uttered by the appellant witness came out with the words. It is appropriate at this stage to set out the evidence relating to this at page 117.

ප්‍ර : විත්තිකරු එක්ක කථාව ආරම්භකරන අවස්ථාවේ පිට අවසානය තෙක් ඇයත් තමන් සමඟ කමයි සිටියේ?

උ : අනේ දුරින් වාගේ සිටියා.

ප්‍ර : ඔය නිළධාරිනිය ඉදිරිපිටයි විත්තිකරු ඔබත් සමග අඹුසැමියන් වශයෙන් හැසිරෙන්න ආරාධනා කලේ?

උ : නැහැ මාරුවීම සම්බන්ධයෙන් කථාකලාට පසුවයි එහෙම දෙයක් ගැන කිව්වේ.

ප්‍ර : මාරුවීම ගැන කථාකලාට පස්සේ විත්තිකරු කථාකලේ මේ නිළධාරියා ඉදිරිපිටදීද?

උ : ඔව්.

ප්‍ර : මොන වාගේ වචන පාවිච්චි කරලද තමන්ට කථාකලේ?

උ : 'උඹට අර වැඩේට එන්ඩ පුළුවන්ද' කියලා.

ප්‍ර : 'අර වැඩේ' කිව්වහම සාමාන්‍යයෙන් තමන්ට තේරුනා?

උ : මටත් තේරුනා, ගිය නිළධාරිනියටත් තේරුනා.

ප්‍ර : 'අර වැඩේට එන්න පුළුවන්ද?' කියලයි කථා කලේ?

උ : ඔව්.

ප්‍ර : වෙනත් කැත වචන පාවිච්චි කලේ නැහැ?

උ : නැහැ.

From the above evidence it is clear that Monica's position was that not only her even Violet understood the meaning of the words uttered by the appellant. At this point it is pertinent to note that Violet's understanding of the words would have been in the context of the information supplied by Monica to the Bribery Commissioner's Department.

Thus in the circumstances of this case I do not think the contradiction referred to by the counsel is a material contradiction. Both versions given by Monica and Violet are substantially same.

The learned trial Judge has addressed his mind to this aspect of the evidence when he says that "It is indeed strange and therefore somewhat unbelievable that a man would arrange for a clandestine meeting with a woman in the presence and hearing of another woman, who in addition, was a total stranger to him. I have given careful thought to this situation of the plot arranged by the Bribery officials. The conduct of the accused as well as Violet who was presented as a woman of easy virtue desperately in need of a job. I am convinced beyond doubt that accused was prepared to throw caution to the winds in order to achieve his immoral purpose".

The learned counsel also submitted that the trial Judge misdirected himself when he treated Violet as a woman of easy virtue without any evidence to that effect.

It is to be noted that Violet was introduced as a person whose husband has left her and was in desperate circumstance to get a job. Monica has also indicated that violet too is willing to do "anything" with the appellant if she gets a job. In this situation the learned trial Judge has only commented that Violet was presented as a woman of easy virtue and not that Violet was infact a woman of easy virtue. I see no error in the Judge's comment in this regard.

The learned counsel has also complained that the trial Judge has erroneously treated Monica as a "disinterested" witness. He drew the attention of the court to the evidence given by her where she had admitted that she knew that there were no vacancies at Kalutara and the appellant too told her. Counsel submitted that in spite of this she persisted her quest for a transfer and she was angry with the appellant for not acceding to her request and was waiting for an opportunity to harm him.

It is to be noted that the trial Judge has considered this aspect on the basis that she never initiated a complaint to the Bribery officials. Till the Bribery officers contacted her she knew nothing about the complaint to the Bribery Department. It was the idea of the Bribery officials to send Violet with her to meet the appellant to the office. In the circumstances one cannot blame the Judge for describing Monica as a disinterested witness.

It was urged that witness Monica has deliberately given false evidence in this case. Counsel referred to P1 where according to the prosecution evidence the appellant had taken action on her application. He has informed the authority in writing that as there was no vacancy at Kalutara he cannot recommend the transfer. It was contended that if the appellant had acted on P1 there is no possibility that P1 could remain with Monica.

On an examination of her evidence at page (33) it is clear that she has forwarded several applications and on one occasion appellant refused to accept the application and on another occasion returned one to her and she identified P1 as that document. It is also relevant to note that when she went to meet the appellant on the 13th she had taken this application and appellant requested her to bring it on the 16th to his home. Bribery officers recovered this from Monica on the 16th after the said incident. In these circumstances I hold that there is no merit in the argument.

The next submission of the learned counsel for the appellant was that the trial Judge did not give adequate consideration to the defence evidence.

Apart from the dock statement, the defence called one Tuwan Raheem Jaya, a photographer, to produce certain photographs of the house of the appellant. The main purpose of this evidence was to show that there was a door from the bedroom to the hall. This was because Monica in her evidence has stated that there was no door to that room. Violet's evidence on this point was that she cannot remember whether there was a door or not.

These photographs have been taken long after the event and the trial Judge has correctly rejected his evidence and has stated "In any case these two witnesses spent only about 15 minutes at the flat and

that too under trying and tense circumstances. If they did not notice or did not remember the details of the apartment as much as the accused it is not a matter for surprise."

The appellant made an unsworn statement from the dock. He stated that he ceased to function as the Senior Security Manager of National Housing Development Authority since 15.03.1990 on which date he received a transfer to the Ministry of Plan Implementation and worked under one A. C. Lawrence a security consultant to the said Ministry. On the instructions of Lawrence he had conducted investigations into several important persons including the Deputy General Manager to whom Monica had made certain representations against the appellant. He admitted that Monica came to his office on the 13th of July with another woman (Violet) and had requested that that woman be given employment and that he asked for an application and then Monica said that the application could be given on Monday, and he told them that he was on leave on Monday and suggested that Monica could come with that woman to his house on Monday, 16th of July with an application, and, if she was coming, to bring some information regarding certain petitions he had received. He said even on prior occasions Monica had supplied him with necessary information. The appellant stated that he took leave for the 16th of July from Lawrence as he had to attend to a function in the school of his child. On the 16th morning whilst he was drying himself after a bath he heard his door bell ringing. He opened the door and saw Monica and Violet and invited them to come inside. As he was not wearing a shirt he went to the room to get a shirt and suddenly discovered Monica standing beside him. When he questioned her as to what she was doing there she laughed and sat on the bed. At that moment four persons entered the room and announced that they were from the Bribery Department. He denied that he kissed Monica or that he caused her any harm.

It is now settled law that an unsworn statement must be treated as evidence. (*Q v. Kularatne*[1], *K v. Sittamparam*[2], *Q v. Buddarakkitha*[3], *Gunapala v. The Republic*[3]). It has also been laid down that if the unsworn statement creates a reasonable doubt in the prosecution case or if it is believed, then the accused should be given the benefit of that doubt.

The learned trial Judge rejected the dock statement in the following terms: "I have endeavored to evaluate the dock statement with utmost concern for the accused. I have to conclude that it is a tissue of lies concocted by a desperate man situated in an inescapable predicament of his own creation. It has entirely failed to create any doubt whatever in the prosecution case. "I am inclined to agree with the learned trial Judge on this matter. The appellant admits that it was he who had invited the women to come to his house. It is also a fact that the wife of the appellant was not present in the house on the 16th when the two women went there. Furthermore, it is rather questionable that the appellant suggests that they meet at his house merely to hand over an application. Account must also be taken of the fact that the appellant has not denied Monica's evidence that when she questioned him about her leave he had said that he would look after it. So also, when she questioned regarding the security guards at the Elivitigala Flats, he had said that they would be removed. It is my view that the learned trial Judge has correctly rejected the dock statement of the appellant. The dock statement is not credible and nor does it create any reasonable doubt on the prosecution case.

With regard to the position taken up by the appellant that he was not an employee of the National Housing Development Authority the prosecution having obtained leave to lead evidence in rebuttal led the evidence of the Personnel Manager and succeeded in discrediting the accused. The evidence was led to establish that the appellant sat in tender Boards as Chairman representing the National Housing Development Authority during the relevant period. This position was not challenged by the defence.

The next question raised by the counsel for the defence was with regard to the validity of counts two and four of the indictment.

As mentioned earlier there are four counts on the indictment. 1st and 3rd counts refer to the solicitation of the gratification and allege that thereby the accused committed offenses punishable under section 19 and 19(C) of the Bribery Act respectively.

The gratification that is alleged to have solicited by the accused is "sexual intercourse". Section 90 of the Bribery Act defines

gratification to include among other things, "any other service, favour or advantage of any descriptive whatsoever".

Dr. Gour in the Penal Law of India Vol. 1 has made the following observations "The word gratification is thus used in it's larger sense as connoting anything which affords gratification or satisfaction or pleasure to the taste, appetite or the mind. Money is of course one source of affording pleasure, inasmuch as it implies command over things which afford gratification the satisfaction of ones desires, whether of body or mind, is a gratification in the true sense of the term. The craving for an honorary distinction or for sexual intercourse is an example of mental and bodily desires, the satisfaction of which is gratification which is not estimable in money".

The fact that the alleged act in counts 1 and 3, namely, "sexual intercourse" is a "gratification" within the meaning of the Bribery Act was not disputed by the appellant and therefore no objection was raised regarding counts one and three which deal with the solicitation of sexual intercourse.

According to count two the accused-appellant on 16.07.1993 in the course of the same transaction as referred to in count one, did attempt to have sexual intercourse with Monica de Silva and thereby committed an offence punishable under section 19 read with section 25(1) of the Bribery Act.

Count four also refer to the attempt of the accused to have sexual intercourse and allege that thereby he committed an offence punishable under section 19(C) read with section 25(1) of the Bribery Act.

Section 25(1) of the Bribery Act makes "attempts" to commit offences specified in the act punishable under the same provisions which make the principle offences punishable.

Counts two and four cannot be read in isolation but have to be read in conjunction with count one. Therefore it is clear that in the instant case reference to section 19 and 25(1) in counts two and

section 19(C) and 25(1) in count four deal with a situation where the accused had made an attempt to "accept" the gratification, which he solicited on 13.07.1990 as alleged in counts one and three in the indictment.

As pointed out by the Senior State Counsel who appeared for the Attorney General the evidence led at the trial clearly shows that the accused-appellant on 16.07.1990 did attempt to have sexual intercourse with the main witness. It is evident that the appellant in this attempt did several acts towards the commission of the offence of acceptance of the gratification i.e. invited the main witness to visit his house at a time when all other inmates were out, called her into his room, kissed her and removed the sarong he was wearing. The only and reasonable inference that could be drawn from these items of evidence is that the accused-appellant did attempt to accept the gratification he solicited as averred to in counts one and three.

In these circumstances I find that there is a legal and factual basis for these changes.

For the reasons set out above I affirm the convictions on all four counts. In regard to the sentence the counsel brought to the notice of court that after conviction the appellant was in custody for nearly two years until this court enlarged him on bail on 26.07.1996. In the circumstances I affirm the sentence of two years rigorous imprisonment imposed on counts one and three of the indictment. I set aside the sentence of seven years rigorous imprisonment imposed on counts two and four and in lieu of, I impose a sentence of three years rigorous imprisonment on each count. The sentences are to run concurrently. The fine and the default sentence imposed by the learned High Court Judge will remain. Subject to the above variation in the sentences as above, the appeal is dismissed.

ISMAIL. J, (P/CA) – I agree.

Appeal dismissed.

PERERA
v.
GOMES,
ATTORNEY-AT-LAW

SUPREME COURT
G. P. S. DE SILVA, CJ.,
RAMANATHAN, J.
SHIRANI BANDARANAYAKE, J.
S.C. RULE NO. 8/95 (D)
FEBRUARY 11, 1997, MARCH 11, 1997,
MAY 26, 1997, JUNE 11, 1997, JULY 22, 1997,
AND JULY 30, 1997

Professional misconduct of Attorney-at-law – Rule 61 of the Supreme Court (Code of Etiquette for Attorneys-at-law) Rules 1988.

Held:

It was not proper for the respondent (Attorney-at-law) to instill a belief in the complaint that the amount paid (Rs. 5,000) was sufficient for the case he had filed. It was also not proper for the respondents to accept a case against the very person who had introduced the client to him. It was also not at all proper for an Attorney-at-law, to have kept the money with him, after handing over the case to another lawyer. The respondent should have returned the money to the complainant. The respondent has thereby failed to discharge his professional obligations and acted in a manner unworthy of an Attorney-at-law and committed a breach of rule 61 of the Supreme Court (Code of Etiquette for Attorneys-at-law) rules 1988.

Two other charges of intentionally, wilfully and fraudulently cheating the client and of disgraceful and dishonourable conduct were held not proved.

Obiter:

It was not proper for the respondent to have acted as an Attorney-at-law or Notary Public in a transaction between the complainant and his daughter (ie daughter of the Attorney-at-laws/Notary Public).

In the matter of rule in terms of section 42 (2) of the Judicature Act, No. 2 of 1978.

Kolitha Dharmawardena, DSG with S. Rajaratnam, SC for the Attorney-General.