

Number of Members
of the Commission

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

In the matter of an application in revision

Court of Appeal No. C.A. (PHC) APN
385/2004

High Court of Colombo No. B 1318/1997

Vithanage Gunawardene

Accused-Petitioner

Vs.

Nelum Gamage,
Director-General,
Commission to Investigate Allegations of
Bribery and Corruption

Complainant-Respondent

Before: D.J.De S. Balapatabendi J (P/C.A.)
Eric Basnayake J.

Counsel: Mohan Peiris P.C. for the Petitioner
Mallika Liyanage, Deputy Director General of the Commission

Written Submissions Tendered: 20.1.2006, 28.2.2006

Decided on: 12.6.2006



Eric Basnayake J

The accused-petitioner (hereinafter referred to as the accused) was indicted in the High Court of Colombo for having solicited and accepted a sum of Rs.50,000 on 7.10.1996 to grant relief on an income tax matter. The offences are punishable under section 19 'b' and 'c' of the Bribery Act as amended. The accused was convicted and sentenced on 21.3.2002. The accused appealed against the conviction in C.A. Application No. 22/2002. The Court of Appeal ordered a retrial on the ground that the indictment was not read over to the accused at the commencement of the trial. When this case was taken up for trial for the second time on 28.10.2004, an objection was raised on behalf of the accused challenging the validity of the indictment. This objection was overruled after inquiry by the learned High Court Judge on 30.11.2004. The accused is seeking to revise the said order of the learned High Court Judge, Colombo.

The objection

In terms of section 2 (2) (a) of the Commission to Investigate Allegations of Bribery or Corruption Act No.19 of 1994 (herein after referred to as the Act) the Commission shall consist of three members. The objection is that on the date of the indictment, namely, on 6.6.1997, there were only two members. A member of the Commission was deceased. Therefore, the argument went, the indictment against the accused is null and void and of no force or avail in law and thereby illegal.

In terms of sub section (8) of section 2 of the Act the members of the Commission may either sit together or separately and where a member exercises any power sitting separately his acts shall be deemed to be the act of the Commission. The learned counsel for the accused submitted that in order for the members to exercise powers under section 2 (8) of the Act either together or individually the Commission should have been necessarily constituted from the beginning. He rests his argument on the Judgment of Paskaralingam Vs P.R.P. Perera and Others¹ where non participation of one member rendered the interim report one made without jurisdiction. The

¹ (1998) 2 S.L.R.169

learned counsel further submitted that the powers could not be exercised unless the quorum is constituted.

The learned counsel further submitted that unlike in other Commissions of inquiry (referring to Public Service Commission and the Police Commission) the Act does not contain an enabling clause to allow the commission to function notwithstanding a vacancy. He submitted that the intention of the Legislature was to discontinue the functions of the Commission and render it funtus when a vacancy occurs until such vacancy is filled.

Another argument that finds favour with the petitioner is with regard to the required qualifications of the members to be appointed to the Commission. Of the three members, two shall be retired Judges of the Supreme Court or Court of Appeal. One of whom shall be a person with wide experience relating to the investigation of crime and law enforcement. One of the Judges shall be made the chairman. It may be argued that the Legislature intended to have a strong body to fight against corruption.

Does the Commission come to an end with the death of a member?

To consider this question one must look in to the history of the Commission. Originally the Attorney-General² or any officer authorized in that behalf by and acting under the control of the Attorney-General was empowered to direct and conduct investigations of all allegations of bribery and to institute proceedings. Act No.11 of 1954 also made provision to appoint Commissions of Inquiries to inquire in to the allegations against Cabinet Ministers etc. and to create Boards of Inquiries to inquire in to charges of bribery against public servants³. The Commissions of Inquiry and the Boards of Inquiry had the power to inquire in to allegations of bribery and to impose punishments. The Board of Inquiries was abolished by Act No.2 of 1965. The power of the Attorney-General was confined to the conducting of investigations and instituting proceedings. The Attorney-General was not empowered to hold inquiries and to impose punishment.

² Section 3 (1) of Act 11 of 1954 and 17 of 1956

³ Sections 40 to 69 of the 1954 Act repealed by Act 2 of 1965

Bribery Commissioner

The office of the Bribery Commissioner was created by Act 40 of 1958⁴. He was entrusted with the power of investigation which was done earlier by the Attorney-General, and if satisfied that there is a prima facie case of the commission of an offence specified in part II of the Bribery Act to transmit a copy of the record to the Attorney-General to indict such person before the High Court⁵. Proceedings were instituted in the Magistrate Courts by the Bribery Commissioner⁶ where the value did not exceed Rs.200.

The newly established Commission by Act 19 of 1994

The functions of the Commissioner and the Attorney-General have now been transferred to the newly established Commission⁷. The Commission consists of three members. The Commission has taken over the conduct of investigations as well as the prosecution; tasks previously performed by the former Bribery Commissioner and the Attorney-General. With the establishment of this commission the entire machinery has now been brought under one roof. All this time investigation and prosecution was done without abeyance although it was carried out in collaboration by two institutions. Although the Commission has to be appointed every five years, it has the features of a permanent body. The long title of the Act states thus; "An Act to provide for the **establishment of a permanent Commission** to investigate allegations of bribery or corruption and to direct the institution of prosecutions for offences under the Bribery Act and The Declaration of Assets and Liabilities Law, No. 1 of 1975; And for matters connected therewith or incidental thereto" (emphasis added).

⁴ Section 2A

⁵ Section 5 of the Bribery (Amendment) Act No. 9 of 1980

⁶ Proviso to section 5 (Act No.9 of 1980)

⁷ By Act 20 of 1994

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The establishment of the office of the Director-General indicates the continuity of the institution. A Director General and other officers and servants have been appointed to assist the Commission in the discharge of the functions assigned to the Commission. The Commission could delegate any of its powers other than the powers referred to in paragraphs (i), (j), (k), (l) of sub section 1 of section 5 and section 11 of the Act to the Director-General or any other officer appointed to assist the Commission⁸. All these provisions direct at the intention of the Legislature, that is to have a permanent body. New members are appointed every five years in order to maintain the independence of the Body. Provision is made to appoint a new member to fill a vacancy. Such new member could be appointed only for the remaining period. This also indicates that the body must continue with the remaining members. The members are empowered to act collectively as well as individually⁹.

The Supreme Court Judgment of Paskaralingam Vs. P.R.P.Perera

This case involved a Special Presidential Commission of Inquiry 1995 established in terms of section 2 of the Special Presidential Commissions of Inquiry Law No. 7 of 1978. A Commission appointed under this law basically has two functions to perform, namely;

1. To hold an inquiry and find the person against whom the inquiry is held guilty or not guilty of political victimization, misuse or abuse of power, corruption or any fraudulent act etc.
2. To make a recommendation to the President to deprive him of civic disability.

In contrast the Bribery Commission has power only to investigate, to institute action and to prosecute before a court of law. The Commission has no power to hold inquiries and to punish offenders. To that extent this case is of no relevance.

The other bodies like the Public Service Commission, the Judicial Service commission are entrusted with the authority of appointments, promotions, transfers, disciplinary control and

⁸ Section 16 of the Act.

⁹ Section 2 (8) of the Act

dismissals¹⁰. The Constitution has specified a quorum¹¹ in respect of those bodies without which meetings cannot be held. The Bribery Commission is different. It has no quorum. The members could sit individually, and when decisions are taken those decisions are treated as taken collectively. The meaning that may be derived from this is that individual members are given the powers of the Commission. The authority of a member to take action individually in this manner has enabled members to deal with more cases of bribery which is rampant in society.

The only power the Commission has is to investigate and to prosecute after having instituted proceedings before a court of law. The case is heard by a Judge in court. The Commission does not hold inquiries. The presence of all three members is not necessary to authorize an investigation or to hold an investigation.

Further it may be pointed out that the three member constitution of the Commission is purely for the purpose of its strength. The Commission is a very powerful one taken as whole or individually. It has two retired Judges. They are retired either from the Supreme Court or the Court of Appeal. One of them should be possessed with wide experience in investigation of crime and law enforcement. All these qualifications would make the Commission strong. The Commission holds investigations. Investigations are done to institute proceedings. Even a single member could conduct these investigations. The entire body will only make it stronger.

The Public Service Commission shall have the power to act notwithstanding any vacancy in its membership, and no act or proceeding or decision of the Commission shall be or be deemed to be invalid by reason only of such vacancy or any defect in the appointment of a member.¹² The Judicial Service commission too has a similar provision¹³

The learned counsel for the accused submitted that there is no such provision with regard to the Bribery Commission and therefore in the event of a member ceasing to function the Commission comes to a standstill. Due to the reasons already given this argument cannot be accepted as correct.

In this particular case it was found that a member of the Commission was deceased on the day the indictment was signed by the Director General. I am of the view that it does not affect the validity of the

¹⁰ Article 55 (1) and Article 111 H (1) of the Constitution

¹¹ Article 61 (1) and Article 111E (1) of the Constitution

¹² Article 54 (9)

¹³ Article 111 E (4)



indictment. Once the Commission is constituted, the absence of a member does not affect the functions of the Commission. Unlike the other Commissions, the Bribery Commission is not one that holds inquires and passes judgment. Three members are appointed for the purpose of making it a strong body. Although the presence of all three members therefore is an important factor, the absence therefore cannot be said to bring the Commission to a complete standstill. After the Commission is appointed the Commission could function even with one member. When vacancies are filled the Commission may be able to function in full strength and discharge their duties more effectively. The absence of a member does not make the Commission "functus". That is not clearly the intention of the Legislature. I am of the view that the learned High Court Judge is correct in overruling the objection. Hence the application of the petitioner is dismissed.



Judge of the Court of Appeal


D.J.De S. Balapatabendi J (P. C/A)

I agree.



President of the Court of Appeal

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