

Asitha Anthony

In the Supreme Court of the Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 35/2010
H.C. Colombo HCMCA 169/2007
M.C. Colombo 88222/1

*In the matter of an appeal with leave to
appeal granted by the Supreme Court*

*W.M.H.R.K. Wanasinghe,
39/A, Dandubendirippuwa,
Devahoowa.*

Accused-Appellant

Vs.

- 1 The Attorney General,*
- 2 The Director General,
The Commission to Investigate
Allegations of Bribery or
Corruption, Colombo 7.*

Respondents

Before: *Amaratunga J.
Marsoof J.
Ekanayake J.*

Counsel: *Ranjan Mendis with Ashoka Kandambi and
Ms. Sunimal Mendis for the accused appellant.
Thusith Mudalige, Senior State Counsel for respondents.
Asitha Anthony, Asst. Director (Legal), Commission to Investigate
Allegations of Bribery or Corruption for the 2nd respondent.*

Argued on: *08.09.2010*

Decided on: *21.07.2011*

Gamini Amaratunga J.

This is an appeal, with leave granted by this Court, against the conviction and the sentence of the accused appellant (the appellant) on charges framed under the provisions of the Bribery Act.

Before I set down the question of law on which leave to appeal was granted, it is pertinent to set out in brief the facts relevant to the case presented against the appellant. In the early hours of 01.11.2002 the Dambulla police detected the complainant Piyasoma driving a motor vehicle with a defective headlight. The police

warned him to replace the defective headlight within fourteen days and show the vehicle to the police. His driving licence was taken by the police and he was given a temporary licence valid for fourteen days.

The complainant failed to replace the defective headlight within the stipulated time period. On 18.11.2002 he visited the Dambulla Police Station to get his temporary licence extended. When he spoke to the Officer in Charge of the traffic branch, he was referred to another officer (the appellant) of the traffic branch, who was dressed in civilian clothes. That officer asked the complainant to wait outside. A little while later that officer came out and asked the complainant "How much money do you have?" When the complainant said that he had Rs.300/-, that officer told him that in the event of a case being filed against him, the fine would be around Rs.750/-. The appellant asked for Rs.300/- to return the complainant's driving license. When the complainant said that he needed Rs.100/- for his bus fare, the appellant asked for Rs.200/- to return the licence. The complainant who had a currency note of Rs.200/- denomination gave it to the appellant and got back his driving licence from the appellant. (It appears that at the time of this transaction currency notes of Rs 200/- denomination were in circulation but had been withdrawn later by the Central Bank.)

Having got his driving licence, the complainant walked into the A.S.P's Office which was in the premises adjoining the police station and complained to the A.S.P. that money was taken from him by a police officer to return his driving licence without filing a case against him. The A.S.P. then telephoned the Dambulla police station and ordered all officers of the traffic branch to come to his office. Thereafter several police officers, led by the O.I.C., Traffic, appeared before the A.S.P. and the latter then explained the reason for summoning those officers to his office and requested that if any officer had taken money from the complainant such officer should come forward and own it. None came forward. Then the O.I.C., Traffic, suggested to ask the complainant to point out the person who took money from him. The complainant then pointed out the appellant. It is pertinent to note, that according to the evidence led at the trial, there was no immediate protest of innocence by the appellant when he was pointed out by the complainant as the person who took money from him.

According to the evidence of I.P. Somatilaka, O.I.C., Traffic (against whom there was not even a suggestion at the trial that he was giving false evidence against the appellant) after the complainant pointed out the appellant, the A.S.P. told the appellant to hand over the money he had taken from the complainant and then, the appellant, in response to that request handed over a currency note of Rs.200/- denomination to the A.S.P. This is an item of evidence relating to the conduct of the appellant, relevant and admissible under section 8(2) of the Evidence Ordinance. After the appellant handed over the currency note, he was searched by the O.I.C. (on the orders of the A.S.P.) and the appellant had no money with him.

At the trial before the learned Magistrate, four years later, the complainant had stated that he pointed out to the A.S.P. the person who took money from him, but he could not say for sure, that it was the accused (the appellant), who was present before Court, was the person pointed out by him before the A.S.P.

Thus this case presented a situation where the witness remembered that on a previous occasion he had identified the relevant person, but could not remember at the time of the trial the exact person identified by him on that previous occasion. In such a situation other evidence is admissible to show that the witness identified a particular person. This legal position was recognized in Sri Lanka in King vs. Hendrick 48 NLR 396. Even in English Law the position is the same. Regina vs. Osborne and Virtue (1973) Q.B. 678.

I.P. Somathilaka who was present when the complainant pointed out the appellant in the presence of the A.S.P. testified that it was the appellant who was the person pointed out by the complainant. This evidence established the identity of the appellant as the person picked up by the complainant in the presence of the A.S.P.

At the trial the appellant had made a dock statement denying the allegation made against him. He was convicted by the Magistrate on the evidence I have briefly set out above. The conviction was affirmed by the High Court in appeal.

This Court had granted leave to appeal on the following question of law.

" Did the High Court err in its failure to appreciate that the learned Magistrate has admitted and acted upon the evidence of A.S.P. Lal Kumara and I.P. Somatilake in contravention of section 110(3) of the Criminal Procedure Code, particularly in relation to the identification of the accused?"

Section 110 of the Code of Criminal Procedure Act No.15 of 1979 makes provision relating to the recording of statements in the course of an investigation commenced under section 109 of the Code regarding the commission of an offence.

Section 110(3) of the Code provides that " A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in Court."

In the present case, according to the evidence of A.S.P. Lal Kumara, when the complainant informed him of the fact of taking Rs.200/- by a police officer, he did not commence an investigation into the commission of an offence under the Bribery Act. He merely wanted to ascertain the identity of the police officer to take disciplinary action against him. That was the sole object of his endeavour to ascertain the identity of the culprit. According to the A.S.P. after he ascertained the identity of the officer who had taken money from the complainant, he submitted a report to his superior officer to take disciplinary action against him and the superior officer had referred the matter to the Bribery Commission.

According to the A.S.P.'s evidence no statement was recorded by him in terms of section 110 from the complainant before the latter picked up the appellant as the person who took money from him. At the trial, the complainant's evidence was that he pointed out the person who took money from him to the A.S.P., but he could not say with certainty whether it was the appellant who was present at the trial as the accused. There was no question of corroboration arising from this evidence. The question that was

before the Court at that stage was whether the person pointed out by the complainant before the A.S.P. was the appellant who was present in Court as the accused. Evidence on this fact came from witness Somatilake who was present at the time the complainant pointed out the appellant. Somatilake had seen the complainant pointing out the appellant as the person who took money from him. This is direct evidence given by Somatilake as to what the complainant did in his presence. Section 3 of the Evidence Ordinance provides that a "Fact" means and includes "any thing capable of being perceived by senses." Somatilake had seen the complainant pointing out the appellant. This is evidence of a fact (the act of the complainant pointing out the accused) seen by Somatilake (perceived by his senses). This is direct evidence of Somatilake of an act done by the complainant in his presence and seen by him.

Section 110(3) of the Code of Criminal Procedure Act prohibits the use of the written record of a statement recorded under and in terms of section 110(1) in the course of an investigation. In this case there was no such statement in existence. Section 110(3) does not shut out direct evidence of a police officer of any thing done or said by a witness or an accused (except a confession of an accused) in his presence and seen or heard by such police officer.

For the reasons set out above, I answer the question of law on which leave to appeal was granted in the affirmative.

The learned counsel for the appellant, in his additional written submissions tendered after the hearing of the appeal has submitted that the evidence of identity alone was not sufficient to find the accused appellant guilty of the charges framed against him. He has submitted that the recovery of a Rs.200/- note from the appellant is not an item of evidence supporting the charges against him as it is not unusual for a person to have a Rs.200/- note in his possession as his own money. The substance of this submission is that the appellant's possession of a Rs.200/- note is a mere coincidence. If it was a rare coincidence, the appellant indeed is a very unfortunate man!

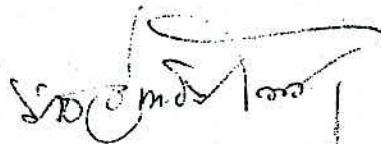
On the other hand, at no stage, either in the presence of the A.S.P. and I.P. Somatilake or at the trial before the learned Magistrate, the appellant had not taken up the position that the Rs.200/- note was his own money which he had in his possession. In his dock statement the appellant's position was that nothing was recovered from him! I therefore reject the submission made by the learned counsel. At the time the complainant first came before the A.S.P. the complainant had his driving licence with him which had been taken by the police two weeks prior to that date. There was no entry in the relevant books kept at the police station regarding the return of the licence to the complainant. The evidence of the O.I.C. traffic showed that the appellant had opportunity to have access to driving licences kept in the traffic branch. On the evidence led at the trial, the learned Magistrate had quite rightly convicted the appellant and the High Court was justified in dismissing the appeal. This appeal is accordingly dismissed.

In respect of charges 1 and 3 framed under section 16(b) of the Bribery Act, the appellant has been sentenced to eight months R.I in respect of each count making the total period of imprisonment sixteen months. In addition a fine of Rs.5000/ has been imposed in respect of each count. In respect of counts 2 and 4 framed under section 19(c) of the Bribery Act, a fine of Rs5000/- has been imposed for each count. The total amount of fines is Rs.20,000/-. A default term of one month R.I. for each fine was also imposed making the total period of default term four months.

In terms of section 26 of the Bribery Act, where a court convicts a person for an offence committed under Part II of the Bribery Act by accepting a sum of money as a gratification, in addition to any other punishment imposed by Court, a sum of money equal to the gratification accepted shall be imposed as a penalty. The stipulation in section 26 is mandatory. The learned trial Judge has not imposed the mandatory penalty. I therefore, in addition to the punishments imposed by the learned trial Judge, impose a penalty of Rs.200/- on the appellant and a default term of one month R.I. in respect of the penalty. Thus the total period of the default term is five months R.I.

The learned Chief Magistrate of Colombo is hereby directed to take steps to activate the sentence imposed on the accused appellant. This Court wishes to place on

record the Court's appreciation of the prompt action taken by A.S.P. Lal Kumara to deal with an errant police officer who has brought the police service into disrepute.



Judge of the Supreme Court

Marsoof J.


I agree.



Judge of the Supreme Court

Ekanayake J.

I agree.



Judge of the Supreme Court