

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal in terms
Section 331(4) of the Code of Criminal
Procedure Act No.15 of 1979 and Section
13(2) of the Commission to Investigate
Allegations of Bribery or Corruption Act
No.19 of 1994.

C.A.No. HCC No. 260/2007

H.C. Colombo No. HC 1172/1996

Imbulana Liyanage Dharmawardana

Accused-Appellant

Vs.

Director General,
Commission to Investigate Allegations of
Bribery or Corruption,
No.36, Malalasekera Mawatha,
Colombo 07.

Complainant- Respondent

BEFORE : **ACHALA WENGAPPULI, J.**
K. PRIYANTHA FERNANDO, J.

COUNSEL : Prasantha Lal De Alwis P.C, with H. Mohan
Sellapperuma and Samith Kalhara for the Accused-
Appellant.

Dilan Ratnayake D.S.G for the respondent

ARGUED ON : 10th July, 2020

DECIDED ON : 18th September, 2020

ACHALA WENGAPPULI, J.

The accused-appellant (hereinafter referred to as the Appellant) was indicted by the Director General of Commission to Investigate Allegations of Bribery and Corruption for committing an offence under Section 23(A)(3) of the Bribery Act.

Trial against the Appellant commenced in March 1998 and after four applications for trial *de novo*, with each succession of trial Judges interspersed with his repeated applications to postpone the trial, it had finally reached conclusion with the pronouncement of the impugned judgment in March 2007.

The Appellant was convicted by the judgment of the High Court and sentenced to a four-year term of imprisonment. He was imposed a fine of Rs.2500.00, in addition to the fine of Rs. 1,200,000.00 imposed under Section 26A

of the Bribery Act. In default of the said fine a five-year term of imprisonment, was imposed by the trial Court and made operative consecutive to the four-year term of imprisonment.

Being aggrieved by the said conviction and sentence, the Appellant appealed to this Court, invoking its appellate jurisdiction, to have them set aside.

At the hearing of his appeal, learned President's Counsel for the Appellant submitted that the trial Court had unfairly entered a conviction as it rejected the defence position on the basis that his wife's income was not acceptable to it since it had no documentary support. It was his contention that the trial Court reached the said conclusion on its failure to note that this was primarily due to the failure of the Commission to properly investigate that aspect of the known income of the Appellant. In addition, learned President's Counsel also relied on instances where the trial Court allegedly made errors in relation to the prosecution evidence, in arriving at a finding to the detriment of the Appellant.

The Appellant was employed as a Customs officer and it is alleged in the indictment that the properties that are listed out could not have been properly acquired during the period 31.03.1990 to 31.07.1992, with any part of his known income.

During the trial, the prosecution primarily relied on the evidence of *David Singho*, the officer who was tasked to carry out an investigation on the income and expenditure of the Appellant.

At the commencement of the trial *de novo* for the fourth time, the prosecution and the Appellant marked several admissions before the trial Court under Section 420 of the Code of Criminal Procedure Act No. 15 of 1979, by

which the parties considered that certain acquisitions of property of the Appellant were admitted as proved. A brief description of these admissions are as follows:-

- a. acquisition of property (*Gonahena Estate*) for Rs. 207,000.00
- b. acquisition of property (*Gonahena*) for Rs.77,250.00
- c. acquisition of property (*Galabada Estate*) for Rs.51,500.00
- d. construction of a dwelling house in *Galabada Estate* at the cost of Rs. 200,000.00
- e. acquisition of paddy land for Rs. 41,200.00
- f. acquisition of land for Rs. 498,200.00
- g. acquisition of land for Rs.248,600.00
- h. acquisition of land (*Puwakwatta*) for Rs. 51,500.00
- i. repair cost of *Weliveriya* house at Rs.40,000.00
- j. balance in the Sampath Bank *Kiribathgoda* account at Rs.316,528.89
- k. balance in the Sampath Bank *Kiribathgoda* another account at Rs.140,211.30
- l. balance in the Rural Bank *Weliveriya* of Rs.163,114.26
- m. acquisition of four plots of land for Rs. 414,348.80
- n. acquisition of a motor cycle for Rs.36,000.00
- o. acquisition of a motor car for Rs.230,000.00
- p. investment of Rs. 5000.00 on Singhe Enterprises
- q. loan of Rs. 500,000.00
- r. income from Coconut Estate Rs. 28,000.00

The Appellant gave evidence before the trial Court and sought to explain that the investigators have failed to allow certain other income in his favour

before instituting the instant prosecution for the excess amount of Rs.620,000.00 in excess of his known income.

One such instance is the income of his wife derived from her self-employment. He quantifies her income from plant sales, Cake baking and money lending at Rs. 150,000.00 for the relevant period.

According to the Appellant's evidence before the trial Court, he had received an income of Rs. 324,000.00 for the nine- month period from his coconut Estate since its acquisition, an amount which had not been included into his known income, although he opted to declare only Rs. 28,000.00 to the Commission as his income from the said Estate. His explanation for making an understatement to the Commission in Form 5, as to his actual income from the Estate, was, in order to avoid having problems with the Inland Revenue.

It is also alleged by the Appellant that the total payments he had received from the Customs as rewards are not included to his known income.

The trial Court, in its judgment had determined the total expenses of the Appellant during the relevant period (including the expenses that are incurred in acquisitions of properties) at Rs. 2,632,533.54, upon his admissions and on documentary proof and his known income at Rs. 2,013,108.62. In the impugned judgment, the trial Court had concluded that the Appellant had therefore overspent Rs. 619,425.00, during the relevant period above his known income.

Turning to the primary ground of appeal that there were no investigations conducted as to the veracity of the Appellant's claim of income from his wife's self-employment, the trial Court in its impugned judgment had considered this aspect in detail. It refers to the statement recorded from the Appellant's wife

where she had stated that she earns an income about Rs.4000.00 a month from her self-employment. The Court also considered the Appellant's position that had been suggested to the investigating officer *David Singho*, where the Appellant took up the position that she received about Rs. 2000.00 a month. In order to assess the truthfulness of these conflicting claims, the trial Court had considered the declaration of assets and liabilities of the Appellant for the year 1990, where he had stated that she had Rs. 75,000.00 in her possession which he himself had given to her for safe keeping. No mention of her income from cakes or any of her earning was made. The Appellant had accounted for that amount of money in her possession consisting of his rewards, in addition to her unspecified earnings.

The basis on which the trial Court had rejected the Appellant's claim that his wife earned about Rs. 150,000.00 from her self-employment is based on application of tests of consistency and probability. It had noted that no such claim was made in the said declaration of his assets and liabilities and there was no documentary proof to substantiate such a claim made before the trial Court.

During cross-examination, the Appellant admitted that it is his wife who knows the income from her self-employment and he is unable to recollect that it was suggested by him to the prosecution witness that she received Rs. 400,000.00 annually from her self -employment. The Appellant conceded that his wife paid income tax for her share in Singhe Enterprises and she had not declared her self-employment to the Inland Revenue Department. He also stated that since he was not involved with her self-employment, he is not in a position to elaborate on her income and unable to recollect the amount she stated as her income in her statement. He denied that he ever accused the prosecution of not including his

wife's income to his known income and confines his complaint that there was no proper investigation. He had no answer to offer when questioned as to the exact amount she had earned. Neither he nor his wife did ever maintain any accounts on her self-employment.

Thus, this Court is of the view that the conclusion reached by the trial Court over the claim of self-employment is based on the proper appreciation and assessment of the evidence that had been presented before it by the prosecution and the Appellant.

Learned President's Counsel, during his submissions had referred to the evidence in relation to the cash rewards of the Appellant and invited attention of this Court that the prosecution witness admitted that some of these amounts are not included in the document P20 the Customs had issued to the investigators.

The Chief Accountant of Sri Lanka Customs was called by the prosecution to produce document P20, which included the total amount the Appellant had received including cash rewards as per the records maintained at his office. It is stated that the said amounts have calculated on the available documents. When cross examined by the Appellant, the witness claimed he is unaware of any cash reward that had not been included in the document P20. The witness denied any knowledge when it was suggested to him that all rewards received by the Appellant are not included in P20. He conceded that P20 had no reference to payment of an incentive but clarified the non inclusion of the said allowance on the basis that, to his knowledge, such incentives were paid only from 1994.

It is interesting to note that the Appellant claimed that he received over Rs. 2 Million as rewards, but P20 refers only to Rs.493,521.40 and no suggestion was

put to the Chief Accountant that he received incentive allowance over Rs. 1.5 Million during the relevant period.

The trial Court had considered all these aspects in relation to the evaluation of the truthfulness of his assertion and arrived at the conclusion that such a claim is unfounded.

It is appropriate at this stage of the judgment, to consider the burden of proof of the prosecution as well as the Appellant, in view of the deeming provision contained in Section 23A of the Bribery Act, since the prosecution was based on the said Section.

In *Fernando v Republic of Sri Lanka* 79 II NLR 313, the then Supreme Court considered the applicable provisions in relation to prosecutions under Section 23A of the Bribery Act and related statutory provisions in relation to what is generally known as 'asset inquiries'. It is stated that;

"The law which creates the offence is subsection 3 to section 23A. A person who owns property which is deemed to be property, (a) which he has acquired by bribery or (b) to which he has converted property acquired by bribery is guilty of an offence. Section 90 defines what bribery is. The prosecution then has to prove, beyond reasonable doubt, that the appellant owned such property. Subsection 1 to section 23A states what is deemed to be property acquired by bribery. Where it is shown that a person to whom the section applies has acquired property, within the requisite period, movable or immovable and it is shown that he could not have

acquired such property from his known income or known receipts or it is shown that it is not property to which any part of his known receipts has been converted that property is deemed to be property (a) acquired from bribery or (b) to which he has converted property acquired from bribery and that person who owns such property is guilty of an offence under section 23A(3) of the Act. The offence then depends on the legal presumption. But that legal presumption will apply to the property and will only last " until the contrary is proved by him." The legislature has clearly stated by whom "the contrary" is to be proved. It is not by the prosecution. It is by "him", that is the person who owns or has acquired such property. He knows best how he acquired it. It is within his special knowledge. Consequently, he is in a position to show that it was not acquired from bribery. What is it that " he" has to prove or, as the learned trial Judge stated, contrary of what ? Contrary of " that such property is property acquired by him by bribery." He has to prove that the property was not acquired from income or receipts from bribery, i.e., the property was not acquired from any gratification accepted in contravention of Part II of the Bribery Act."

When the parties made admissions and the prosecution presented documentary proof of income and expenditure it had disclosed its burden sufficiently.

It appears that the primary ground of appeal of the Appellant that there was no proper investigation carried out by the Commission in relation to his known income was made based on the reasoning of the judgment of

Kekulandara v Director General, Commission to Investigate Allegations of Bribery and Corruption(2006) 3 Sri L.R. 90, where this Court stated;

"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 Service 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."

In relation to the instant appeal, this reasoning could not be adopted since the factual situation is quite different. In this instant appeal, the investigators have verified all verifiable claims of the Appellant. In relation to his claim of self-employment, the Appellant himself concedes that no records were available. The fact that his wife baked cakes and sold flower plants and received over Rs. 150,000.00 when the Appellant had received only Rs.63,169.05 as his salary for the same period, if accepted as credible, indicate the scale of her industry and therefore it is reasonable to expect some documentation at least to

confirm the purchases of raw material. But neither the Appellant nor his wife provided any details where the Commission could focus its attention in verifying this claim.

This is clearly not a situation where *"the prosecution admitted that they were aware of some unascertained income"* which could have been easily verified. The Appellant's as well as his wife's claim of income from self-employment remained a mere verbal assertion, and in the absence of any proof, its acceptance depends on the credibility of the witness who asserts of such a claim.

In relation to claim that the incentives were not added to the known income, the Appellant did not counter the accountant's position that such an allowance was in fact paid during the relevant period.

At the most, the Appellant's position of income from self-employment might suffice to raise a doubt as to whether these claims could have been acceptable. But that is not what is expected from the Appellant, in a prosecution under Section 23A of the Bribery Act. In *Fernando v Republic of Sri Lanka* (supra) the Supreme Court had endorsed the approach taken by the trial Court as it states;

"... it is evident that what the trial Judge meant was that the appellant must prove that from the sources he did not receive gratifications. He stated immediately afterwards. The quantum of proof in discharging that presumption is no doubt on a balance of probability. There is a duty cast on the Court not merely to examine the sources of income but also to examine the character of each

payment, and it is not enough for the accused to leave a doubt in the mind of the Court, because leaving a doubt alone will not be sufficient. Here there is no doubt that the trial Judge had the case of Jayasena, 72 N.L.R. 313, in mind. This is, with respect, a correct statement of the burden that lay on the appellant and that is the yardstick applied by the trial Judge in determining whether the presumption has been rebutted. When the learned trial Judge said in the second instance that the appellant 'has to prove these transactions are free from taint and that the character of these payments are above suspicion' he meant nothing other than to say that 'leaving a doubt alone will not be sufficient' as in the first passage."

The complaint of factual error committed by the trial Court is limited to P20 when the trial Court stated that several documents including P20 were "admitted" by the parties. The document, indicating the total income received from Sri Lanka Customs by the Appellant, was marked through *David Singho* and Accountant, *Suriya Kumara*. The position of the Appellant in relation to P20 is that it did not include the incentives. But the witness *Suriya Kumara* refuted that position. The other allowance that had been received by the Appellant (බැරිසර පරීක්ෂණ ගාස්තු) was taken into consideration by the trial Court as it noted that he had received Rs. 8632.00 as that allowance. The trial Court noted that on 05.03.1998, the Appellant admitted the contents of P20, referred to as item 20 in page 8 of the impugned judgment. P20 was not among the documents that are admitted by the Appellant.

Even if there is an error of fact in relation to admission of P20 it had not resulted any prejudice since what the Appellant contended was that it should have indicated a higher value. The trial Court was mindful of this issue, which it had considered and rejected. Clearly this ground of appeal is bereft of any merit.

Therefore, this Court is of the view that there is no merit in the appeal of the Appellant. The conviction of the Appellant is accordingly affirmed by this Court.

However, this Court notes that the Appellant was imposed a four-year term of imprisonment and a default term of five years of imprisonment, if he fails to pay the Rs. 1,200,000.00 fine. The Court further ordered that the default term of imprisonment be consecutive to the four-year term of imprisonment.

The Appellant was accused of committing the offence in 1990-1992, almost four decades ago. As noted by this Court at the very commencement of this judgment, the extraordinary delay was mostly due to the Appellant's own contributions by seeking postponements. The Appellant had accumulated wealth by resorting to bribery and being a Customs officer, he would have deprived the Government of its due revenue by helping out the bribe givers in his official capacity. This is clearly an aggravating circumstance that warranted imposition of a custodial sentence and the trial Court was correct to impose such a sentence.

Nonetheless, in consideration of the Appellant's age as being 67 years at present, this Court is of the view that the deterrent effect of the sentence of imprisonment had reduced over time and therefore would not serve its purpose anymore. This Court therefore reduces the said sentence by substituting the same with a two-year term of imprisonment, suspended for a period of ten years.

The imposition of the fine of Rs. 1,200,000.00 by the trial Court is affirmed by this Court. But the default term of five years imposed by the trial Court was in conflict with the statutory provisions contained in Section 291(1)(d) of the Code of Criminal Procedure Act No 15 of 1979 and therefore is reduced to 18 months of imprisonment.

Subject to the above variations in the sentence, the Appeal of the Appellant is dismissed.

The High Court is directed to comply with the provisions of Section 303(4).

JUDGE OF THE COURT OF APPEAL

K.PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL