

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

*In the matter of an Application for Revision
in terms of Article 138 of the Constitution of
The Democratic Socialist Republic of Sri
Lanka read with Section 364 of the Criminal
Procedure Act No. 15 of 1979.*

Court of Appeal Case No.

CPA/0135/2022

The Director General,

Commission to Investigate Allegations of

Bribery or Corruption,

No. 36, Malalasekara Mawatha,

Colombo 07.

High Court Colombo

HCB/42/2020

COMPLAINANT

Vs.

Hikgoda Gamage Niroshan Dhananjaya,

No. 177/2, 22 Post, Pothuvil Road,

Monaragala.

ACCUSED

AND NOW BETWEEN

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

COMPLAINANT-PETITIONER

Vs.

Hikgoda Gamage Niroshan Dhananjaya,
No. 177/2, 22 Post, Pothuvil Road,
Monaragala.

ACCUSED-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anusha Sammandapperuma, Assistant Director
(Legal) of the Commission to Investigate allegations of
Bribery or Corruption for the Complainant-Petitioner

: Kasun Liyanage for the Accused-Respondent

Argued on : 07-09-2023

Written Submissions : 06-09-2023 (By the Complainant-Petitioner)

: 28-08-2023 (By the Accused-Respondent)

Decided on : 11-01-2024

Sampath B. Abayakoon, J.

This is an application by the complainant-petitioner, namely, The Director General of the Commission to Investigate Allegations of Bribery or Corruption invoking the revisionary jurisdiction granted to this Court in terms of Article 138 of The Constitution of The Democratic Socialist Republic of Sri Lanka.

When this matter was supported for notice, after having considered the petition and other relevant documents, and the submission of the learned Counsel for the complainant-petitioner (hereinafter referred to as the petitioner), this Court decided to grant notice in relation to this application.

The accused-respondent (hereinafter referred to as the respondent) filed objections to the application and at the hearing of this application, both parties agreed that the Case No. CPA-0133-22, which is also an application filed invoking the revisionary jurisdiction of this Court by the petitioner challenging an order very much similar to the order challenged in this application before the Court. As such, both parties agreed that both these applications can be considered together and the respective judgements can be pronounced accordingly. Hence the application by this Court in this matter as well in Case No. CPA-0133-22 was considered together and concluded.

At the conclusion of the oral arguments, both sides were allowed to file written submissions as well, and both the learned Counsel filed comprehensive written submissions for the consideration of the Court.

This is a matter where the petitioner has instituted an action before the High Court of Colombo against the respondent in the High Court of Colombo Case No. HCB/42/2020 for solicitation of a sum of Rs. 10000/= and accepting a sum of Rs. 2000/= as a gratification from a person in relation to recommending of issuing of a permit to cut down a Jak tree, which are offences punishable in terms of section 19 (b) and 19 (c) of the Bribery Act.

Upon the receipt of the indictment, the respondent had been noticed to appear before the High Court and the indictment had been served and read over to the respondent. However, without pleading to the indictment, the learned Counsel for the respondent has raised a preliminary objection as to the maintainability of the indictment before the High Court.

The objection raised had been on the basis that in terms of section 3 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (hereinafter referred to as the Act.), to conduct an investigation into a complaint received by the Commission, there shall be a directive signed by all three members of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as the Commission).

It was on the basis that all three Commissioners had not given a directive to commence an investigation in this action, and therefore, any indictment filed on the basis of an investigation carried out by a directive given by one Commissioner would vitiate any proceeding or institution of an indictment, this objection has been raised.

The learned High Court Judge of Colombo having considered the above preliminary objection, had agreed with the said objection and, accordingly, of his order dated 16-09-2022 has discharged the respondent from the charges preferred against him.

He has determined that the failure by all three Commissioners to sign and give a directive to commence investigations in relation to this offence was a defect that goes to the root of the action, which has the effect of vitiating the indictment.

It is against this order the petitioner has come before this Court by way of this revision application.

At the hearing of this application, the learned Counsel for the petitioner admitted that all three Commissioners had not signed the order to investigate the complaint against the respondent, but only one Commissioner. However, it was her submission that there is no such requirement for all three Commissioners to sign such a directive to commence an investigation.

It was also her view that in any way, since the Director General of the Commission has filed this indictment based on the directive given to him by the Commission in terms of section 11 of the Act. The High Court has no power to question the validity of the indictment, and it is only before the Supreme Court, in terms of section 24 of the Act, any such challenge can be made.

The learned Counsel for the petitioner relied on several judgements and orders pronounced by this Court on the above basis, and argued that **Anoma S. Polwatte Vs. The Director General of the Commission to Investigate Allegations of Bribery or Corruption and Others, SC Writ Application No. 1/2011 decided on 26-07-2018**, the judgement relied on heavily by the learned High Court Judge to hold with the arguments presented on behalf of the respondent, has no application to the preliminary objection raised and the issues considered by the learned High Court Judge.

Citing several sections of the Act, it was her view that commencing of an investigation is a power granted to the Commission in terms of the Act, and such power can be delegated to the officers of the Commission by any member of the Commission sitting together or separately.

It was her contention that the learned High Court Judge was misdirected when it was determined based on the *ratio decidendi* of **Anoma Polwatte Case (Supra)**, the consent of all three Commissioners to file action, as well as to commence investigation, comes within the functions of the Commission in terms of section 3 of the Act and for such a function to be legally binding, all three Commissioners' directive must be available.

The learned Counsel for the petitioner relied on the judgement pronounced by the Supreme Court in the case of **Indikatiya Hewage Kusumadasa Mahanama And Another Vs. The Commission To Investigate Allegations of Bribery or Corruption And Another SC, TAB-1A & 1B/2020, decided on 11-01-2023**, where it has been determined that once the Director General of the Commission forwards an indictment under section 12 (1) and (2) of the Act, and if the Director General is directed under section 11 of the Act by the Commission to forward an indictment, in the absence of any complaint that the Director General has failed to comply with section 12 (1) and (2) of the Act when forwarding the indictment before the High Court, it is correct in refusing any jurisdictional objection raised in that regard, as any such challenge could only be raised in an appropriate action filed before an appropriate forum.

The learned Counsel for the respondent was of the view that any indictment filed in a High Court should be in accordance with the relevant law, and by following the due process. He strenuously argued that the process of investigations, including commencement of an investigation in terms of the Act shall deem to be a function of the Commission in terms of section 3 of the Act.

Citing the provisions of section 5 of the Act, he was of the view that section 2 (8) of the Act relied on by the learned Counsel for the petitioner to argue that the powers of the Commission can be exercised by the Commissioners sitting together or separately, shall be applicable only in relation to the situations mentioned in section 5 of the Act and for nothing else.

He was of the view that under the above context, the judgement in **Anoma Polwatte (Supra)** becomes relevant as it has been determined that institution of proceedings which falls under the ambit of section 3 shall be with the directive of all three Commissioners, therefore, investigations as to the allegations of bribery or corruption which is also a function in terms of section 3, shall also be

by the directive of all three Commissioners and not by a single Commissioner acting alone.

He defended the order of the learned High Court Judge on the basis that it has been reached after considering the relevant provisions of the law, and was of the view that it need not be disturbed.

Both the Counsels cited several judgements decided by our Superior Courts, as well as the Courts in similar jurisdictions, and also the Hansard of the Parliament in support of their respective arguments.

It needs to be noted that this Court is highly appreciative of the valuable contributions made by both the learned Counsel in assisting the Court to reach the final determination in relation to this application.

I will now proceed to consider the contention of the petitioner that an objection of this nature in relation to an indictment filed before the High Court by the Director General of the Commission having followed the provisions of section 12 (1) and (2) cannot be challenged before the High Court itself.

As pointed out by the learned Counsel for the petitioner, another division of this Court in **CA Application No 85/2022 decided on 04-04-2023** has determined that such an objection has to be raised only in terms of section 24 of the Act, and the Court of Appeal or the High Court is not the forum to challenge an indictment filed before the High Court.

The Court of Appeal has taken guidance from the five-Judge bench judgement in the case of **Indikatiya Hewage Kusumadasa Mahanama and Another Vs. The Commission To Investigate Allegations of Bribery or Corruption (supra)**, where, after having considered a similar objection, their Lordships of the Supreme Court observed thus;

“When considering the submission referred to above, it is clear that the said grounds of appeal raised on behalf of the 2nd accused-appellant were based on a misrepresentation given to the decision of this Court in the case of

Anoma S. Polwatte Vs. The Director General of the Commission to Investigate Allegations of Bribery or Corruption and Others (supra).

As already observed by us, when deciding the above case, this Court had never intended to impose an additional requirement of submitting a written directive given by the commission when forwarding an indictment by the Director General CIABOC to High Court other than following the provision already identified under section 12 (1) and (2) of the CIABOC Act. If the Director General is directed under section 11 of the CIABOC Act by the CIABOC to forward an indictment, he is only bound to follow the provisions of section 12 (1) and (2) of the CIABOC Act. In the absence of any complaint that the Director General CIABOC had failed to comply with sections 12 (1) and (2) of the CIABOC Act when forwarding the indictment before the High Court at Bar, it is correct in refusing the jurisdictional objection raised on behalf of the 2nd accused before the High Court at Bar. The trial Judge before whom the indictment is filed is therefore bound to accept the indictment and take up the trial unless there is material to establish that Director General CIABOC had failed to comply with the provisions of section 12 (1) and (2) of the CIABOC Act. Any party who intends to challenge an indictment forwarded by the Director General CIABOC on the basis that the CIABOC had failed to comply with section 11 of the CIABOC Act, the said challenge would only be raised in an appropriate action filed before an appropriate forum.”

The appropriate action mentioned in the above observation refers to filing of an application in terms of section 24 of the Act invoking the Writ jurisdiction of the Supreme Court in order to quash any directive given in terms of section 11 of the Act to institute criminal proceedings, and the appropriate forum mentioned is the Supreme Court as section 24 of the Act has taken away the jurisdiction vested in Court of Appeal by Article 140 of The Constitution in relation to issuing of Writs in relation to the matters under the Act.

However, it needs to be noted that the learned High Court Judge did not have the benefit of considering the above-mentioned judgement as the Supreme Court judgement was pronounced only on 11-01-2023, whereas, the order pronounced by the learned High Court Judge in relation to the preliminary objection was on 16-09-2022.

Be that as it may, it clearly appears that the learned High Court Judge has been guided by the judgement in **Anoma Polwatte (Supra)** where it was determined that the institution of proceedings under the Bribery Act or The Declaration of Assets and Liabilities Law No. 1 of 1975 is a function of the Commission, and such a function shall be exercised by all three members of the Commission.

Having considered the relevant law in that regard, the learned High Court Judge has determined that investigating allegations contained in communications made to the Commission should also come within the interpretation of a function in terms of section 3 of the Act, and the indictment should be dismissed as all three Commissioners had not ordered the investigation in relation to the offences mentioned in the indictment.

Although **Anoma Polwatte Case (Supra)** was a matter decided on the basis that directing the institution of proceedings in terms of the Bribery Act or The Declaration of Assets and Liabilities Law No. 1 of 1975 is a function of the Commission and, therefore, the directive of all three Commissioners must be an essential prerequisite to file an action, it appears that the learned High Court Judge has gone further by relying on the judgement of **Anoma S. Polwatte (Supra)** to interpret the commencement of an investigation in terms of the Act shall also be by a directive of all three Commissioners, and any investigation carried out without such a directive should have a vitiating effect on an indictment filed based on such an investigation.

For matters of clarity, I will now reproduce the relevant section 3 of the Act which refers to the function of the Commission relied on by the learned High Court Judge in his determination.

3. The commission shall subject to the other provisions of this Act, investigate allegations, contained in the communications made to it under section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or The Declaration of Assets and Liabilities Law No. 1 of 1975, direct the institution of proceedings against such person for such offence in the appropriate Court.

Anoma Polwatte Case (Supra) was a Writ application filed before the Supreme Court seeking Writs in the nature of Certiorari, Prohibition, and Mandamus in terms of section 24 (1) of the Act challenging the institution of proceedings against Anoma S. Polwatte in the Magistrate's Court under the provisions of 78(1) of the Bribery Act.

It was held by the Supreme Court that there are functions and powers granted to the Commission by the Act and only the powers can be exercised by the members of the Commission sitting together or separately. However, the function of instituting proceedings shall be exercised only by all the members of the Commission.

Their Lordships of the Supreme Court having considered section 2 (8), section 3 and section 5, of the Act has observed as follows;

“When looking at the provisions of the above 3 provisions of the act, it is clear that by the above provisions, a clear distinction had been between the powers of the Commission and functions of the Commission. As identified in section 3 referred to above, when an offence is disclosed after an investigation, Commission shall direct the institution of proceedings and the said conduct of the Commission had been identified within the functions of the Commission. The powers of the Commission have been identified under

section 5 of the Act and under section 2 (8), such powers of the Commission may be exercised by its members either sitting together or separately.

Thus, it is clear that the members of the Commission can exercise ancillary powers on his own though the full complement of the Commission is not available at one give time, but for the exercise of functions such as the direction to be given to the Director General, it is crystal clear that the act has not provided for one member alone to give such direction.”

The above observations of their Lordships of the Supreme Court, clearly shows that the focus had been on the function of instituting of proceedings before a Court of law, and that it should be exercised by all three members of the Commission.

Since the **Anoma Polwatte (Supra)** judgement has not provided clear directions as to the commencement of an investigation by the Commission should also by way of a directive of all three members of the Commission, it becomes necessary for this Court to consider whether the learned High Court Judge was correct in extending the principles laid out by the Supreme Court in the **Anoma Polwatte (Supra)** judgement to dismiss the indictment.

If one takes the face value of section 3 of the Act, it may be argued that, investigate allegations and institution of proceedings are the two functions granted to the Bribery Commission and both the functions shall need the approval of all three Commissioners.

However, it is my considered view that if one goes through the other relevant sections of the Act, the intention of the legislature in formulating the provisions of the Commission to Investigate Allegations of Bribery or Corruption Act had not been that.

Section 3 of the Act begins by stating that **‘The commission shall, subject to the other provisions of this Act.’**, in other words, section 3 needs to be

interpreted in relation to the other provisions contained in the Act as to the investigation of allegations and institution of proceedings.

As the function of the institution of proceedings had been interpreted and determined by the Supreme Court, my focus in this judgement is on the investigating allegations of bribery and corruption aspect in relation to the provisions of the Act.

It is my considered view that the powers of the Commission cannot be confined to powers specifically granted to it in terms of section 5 of the Act, which relates to the powers granted to it in discharging the functions assigned to it by this Act.

The provisions of the Act are very much clear that the powers mentioned under section 5 are not the only powers granted to the Commission in terms of the Act.

Section 4 (3) of the Act reads as follows;

4.(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 to the appointed date and not withstanding anything to the contrary in any other law. (the emphasis is mine)

Section 16 (3) of the Act reads as follows;

16.(3) The Commission may delegate to the Director General or any other officer appointed to assist the Commission any of its powers [other than the powers referred to in paragraphs (i), (j), (k) and (l) of subsection (1) of section 5, section 11, and this section] and the person to whom such powers are delegated may exercise those powers subject to the direction of the Commission. (the emphasis is mine)

It is my view that the above considered sections provide that powers of the Commission shall not be confined to the areas mentioned in section 5 of the Act, but investigating allegations of bribery or corruption made to the Commission is

also a power vested in the Commission, although that has been mentioned under the functions of the Commission as well.

In that regard, it is abundantly clear that the legislature by its wisdom has provided for the members of the Commission to exercise its powers sitting together or separately.

The relevant section 2 (8) of the Act reads as follows;

2. (8) The members of the Commission may exercise the powers conferred on the Commission either sitting together or separately and where a member of the Commission exercises any such power sitting separately, his acts shall be deemed to be the act of the Commission.

It is trite law that statutes should be construed as far as possible to avoid absurdity or futility.

I would like to quote from the judgement of **Sharvananda, J.** (as he was then) in the case of **Nandasena Vs. Senanayake And Another (1981) 1 SLR 238** at page 245.

“Statutes should be construed, as far as possible, to avoid absurdity or futility. A statute should be construed in a manner to give it validity rather than invalidity- ut res magis valeat quam pereat. As Lord Dunedin stated in Whitney Vs. Inland Revenue Commissioner (1925) AC 27, 52, “A statute is designed to be workable, and the interpretation thereof should be to secure that object, unless crucial omission or clear direction makes that end unattainable.” A similar view was expressed by Lord Simon L.C. in Noles Vs. Don Caster Amalgamated Collieries Ltd (1940) AC 1014, 1023 in the words: “If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislature to futility and should rather accept the bolder construction based on the view that

parliament would legislate only for the purpose of bringing about an effective result.” Lord Reid enunciated the same view in Luke Vs. Inland Revenue Commissioner (1963) 1 ALL ER 655, 664 “How then are we to resolve this difficulty? To apply the word literally is to defeat the obvious intention of the legislature and to produce a wholly unreasonable result. To achieve the obvious intention and produce a reasonable result, we should do some violence to the words. This is not a new problem ... The general principle is well settled. It is only where the words are absolutely incapable of construction which will accord with the apparent intention of the provision and avoid a wholly unreasonable result that the words of the enactment must prevail.”

It is thus legitimate and proper to read and rely upon such a principle as this: “Where the language of a statute in its ordinary meaning and grammatical construction leads to manifest contradiction of the apparent purpose of the enactment, or to cause inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence.” (Maxwell ‘Interpretation of Statutes, 10th Ed. at p. 229) A purposive approach to the construction of relevant section of the law avoids the futility apprehended by Counsel and enables the statutory objective to be achieved.”

If this Court is to accept the argument that the powers vested with the Commission shall be limited to what is stated in section 5 of the Act, and investigating allegations of bribery and corruption shall be a function where all three Commissioners must perform the said function, and ordering of a commencement of an investigation must also be by all three Commissioners as determined by the learned High Court Judge, I am of the view that the purpose of enacting the Commission to Investigate Allegations of Bribery or Corruption Act. No. 19 of 1994 and also the Bribery Act would not be serving its purpose.

An allegation of bribery or corruption against a person can come at any moment which require prompt investigations without any delay whatsoever. There may be situations where not initiating prompt investigations would result in the failure to apprehend the culprit or culprits.

Under such circumstances, if the intention of the legislature was to obtain the sanction of all three Commissioners to commence an investigation, in a situation where all three Commissioners are not available at a given time to allow investigations as to a complaint received by the Commission, there is no need to say that such a requirement would be futile and an absurdity.

Article 156A enacted by the 19th Amendment to The Constitution where the enabling provisions for the establishment of a Commission to Investigate Allegations of Bribery or Corruption has been introduced, clearly provides that the intention of the legislature had been to provide powers for the Commission to investigate allegations of bribery or corruption.

The relevant Article 156A (1) (b) reads as follows.

156A (1) (b). The powers of the Commission including the power to direct the holding of a preliminary inquiry or the making of an investigation into an allegation of bribery or corruption whether of its own motion or on a complaint made to it and the power to institute prosecutions for offences under the law in force relating to bribery or corruption.

The corresponding Article 156A (1) (b) of the 21st Amendment to the Constitution which is the provision now in effect reads as follows.

156A (1) (b). The powers of the Commission including the power to direct the holding of a preliminary inquiry or the making of an investigation into an allegation of bribery or corruption whether of its own motion or on a complaint made to it, and the power to

institute prosecutions for offences under the law in force relating to bribery or corruption.

I am of the view that was the very reason why the legislature in its wisdom has enacted section 4 (3), 16 (3) as well as section 2 (8) as sections where the powers of the Commission to investigate have been referred to, other than the ancillary powers granted to the Commission in terms of section 5 of the Act.

I am of the view that the other grounds argued by the learned Counsel for the petitioner and countered by the learned Counsel for the respondent need not be considered, as the determination of the learned High Court Judge to discharge the respondent from the proceedings before the High Court cannot be allowed to stand for the reasons considered as above.

The application before this Court being an application invoking the revisionary jurisdiction of the Court of Appeal, which is a discretionary remedy, it becomes necessary for this Court to consider the conditions upon which the discretionary remedy of revision can be granted.

In the case of **Hotel Galaxy (Pvt) Ltd Vs. Mercantile Hotels Management Ltd (1987) 1 SLR 5**, it was held;

“It is settled law that the exercise of revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention.”

I find that the petitioner has established sufficient exceptional grounds before this Court. I am of the view that this is a fit and proper case where this Court should intervene exercising the discretionary remedy of revision vested in this Court to interfere with the order of the learned High Court Judge for the reasons as considered.

Accordingly, the order dated 16-09-2022 of the learned High Court Judge of Colombo is set aside as it cannot be allowed to stand.

The learned High Court Judge is directed to revert the case back to the case role of the Court and issue notice on the respondent, read over the indictment to him, and proceed therefrom to hear evidence if necessary, and conclude the matter.

The Registrar of the Court is directed to communicate this judgement to the High Court of Colombo for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal