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

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No. 15 of 1979 read with Article 138 of The Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/418/18

High Court of Colombo

Case No: HCB/1971/13

Commission to Investigate Allegations of Bribery or Corruption,

No.36, Malalasekara Mawatha,

Colombo 07.

COMPLAINANT

Vs.

Senerath Bandara Kulatunge

ACCUSED

AND NOW

Senerath Bandara Kulatunge

ACCUSED-APPELLANT

Vs.

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

COMPLAINANT-RESPONDENT

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT

Before	: Sampath B. Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Prasantha Lal De Alwis, P.C. with Chamara Wannisekara for the Accused-Appellant
	: Sudharshana De Silva, S.D.S.G for the Respondent
Argued on	: 26-03-2024
Written Submissions	: 10-02-2020 (By the Accused-Appellant)
	: 04-03-2020 (By the Respondent)
Decided on	: 24-06-2024

Sampath B. Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) was indicted before the High Court of Colombo by the Director General of the Commission to Investigate Bribery or Corruption (hereinafter referred to as the 'Bribery Commission' for easy reference) on the following counts.

1. That he, on or about 10-09-2008 at Mawanalla, solicited a gratification of Rs. 2500/- while engaging in duty as an inspector of police from Mahinda Lal Gunawardena for not to charge him for crossing the white center line of the road while driving, and to hand over his driving license back to him and thereby committed an offence punishable in terms of section 16(b) of the Bribery Act.
2. At the same time and at the same transaction, being a police officer and a government servant, solicited the same amount from the earlier mentioned Gunawardana and thereby committed an offence punishable in terms of section 19(c) of the Bribery Act.
3. That he, on or about 11-09-2208, accepted Rs. 2500/- as a gratification from the earlier mentioned Gunawardena for the aforementioned purpose at Mawanalla, and thereby committed an offence punishable in terms of section 16(b) of the Bribery Act.
4. At the same time and at the same transaction as mentioned in count 3 being a government servant and a police officer, accepted the said amount as a gratification, and thereby committed an offence punishable in terms of section 19(c) of the Bribery Act.

After trial, the learned High Court Judge of Colombo, of his judgment dated 16-11-2018 found the appellant guilty as charged.

After having considered the mitigatory as well as the aggravating circumstances, the learned High Court Judge imposed 5 years each rigorous imprisonment for the four counts preferred against the appellant.

In addition to the above, he was ordered to pay fines of Rs. 5000/- each in relation to the four counts, and in default, he was ordered to serve one year each rigorous imprisonment.

Having considered the mitigatory circumstances, the learned High Court Judge has ordered the said jail terms to be served concurrently to each other, which means a period of 5 years rigorous imprisonment in total.

On the basis of being aggrieved by the said conviction and the sentence, the appellant preferred this appeal.

The Grounds of Appeal

Although several grounds of appeal have been urged in the written submissions tendered on behalf of the appellant, the learned President's Counsel who represented the appellant submitted the following grounds of appeal for the consideration of the Court at the hearing of this appeal.

1. No fair trial was afforded to the appellant at the hearing of this matter before the High Court.
2. The evidence led at the trial creates a reasonable doubt as to the charges against the appellant and therefore, he should have been acquitted of the charges.

Before considering the grounds of appeal in detail, I find it appropriate to briefly summarize the evidence led at the trial in that regard.

Evidence in Brief

The PW-01 Lal Gunawardena was a hiring van driver by profession. He has been a driver since 1998. Since July 2008, he has operated the hiring van bearing number 62-3771 owned by one Nimal, who is a person from Bambalapitiya area. He has earned a salary of Rs. 6000/- per month and a commission of 10% out of the hires he managed to obtain.

On 06-09-2008, he has been driving the said van occupied by the owner of the van and eight others as passengers, and travelling to Matale to visit a church situated in that area. While driving along the Colombo-Kandy road and passing the new road situated in Mawanalla town, he has overtaken a lorry transporting gas cylinders by crossing the center white line of the road. As a result, he has been stopped by the traffic police for the said violation.

When he got down from the van, he has met the appellant who was an Inspector of Police whom he later came to know as the OIC of the Mawanella traffic police. After questioning him, the appellant has instructed the PW-01 to go to another officer who was a little distance away and to obtain a spot fine (දඩකොලය). Accordingly, he has gone towards the Sub-Inspector of Police pointed out by the appellant and had informed him that the appellant wanted him to meet him. The Sub-Inspector has informed the PW-01 to go back to the appellant and tell him what he wanted to say.

PW-01 has come back to the appellant and had informed him that he is a hiring van driver and to give him some relief. At that time, PW-01 has already had in his possession a temporary permit issued to him by the police relating to another violation (P-01). After taking the temporary permit to his custody, the appellant had informed the PW-01 to obtain a spot fine (දඩකොලයක්) from the Sub-Inspector. However, instead of giving the spot fine, the appellant then instructed the PW-01 to come to the police station to give a spot fine. Thereafter, the Sub-Inspector who accompanied the appellant has taken over the temporary licence of PW-01 and had given him another temporary licence. The said temporary licence had been identified at the trial as P-02. After the incident, the PW-01 had proceeded to Matale and had returned to Colombo.

On 10-09-2008, he has gone to the Mawanalla police station expecting a spot fine and to get his licence back. He has met the Sub-Inspector who took charge of his temporary licence and had inquired about his licence. However, the Sub-Inspector was unable to trace it. Subsequently, the appellant had come to the

station and has informed the PW-01 that the licence is with him. After informing him so, the appellant had gone inside a small room in the traffic division of the police station and had sat on a small table in the room. Thereafter, he has told the PW-01 to get Rs. 2500/- to give the licence back, or otherwise to go to the Court and pay Rs. 5000/-.

For matters of clarity, I will now reproduce the said utterance as narrated by the PW-01 in the Court.

> "උ: 2500/-ක් ගනින්, 2500/-ක් ගනින් කිව්වා. ලයිසන් එක දෙන්න 2500/-ක් ගනින් 2500/-ක් ගනින් කිව්වා. නැත්නම් උසාවි ගිහින් 5000/-ක් ගෙවපන් කියලා කිව්වා."

Although the PW-01 has pleaded with the appellant that he only has Rs. 1000/- with him and that he can give Rs.500/-, the appellant has insisted that he needs Rs. 2500/-.

Thereafter, he has told the PW-01 to come to the Courts on 17th and pay a fine of Rs. 5000/-. He has also placed his personal seal on the temporary permit the PW-01 had with him, making an endorsement to that effect. The witness has identified the said endorsement in the temporary permit previously marked as P-02 at the trial. He has also identified the appellant as the person who demanded the said sum of money.

Since he could not obtain the license or the spot fine as planned, PW-01 has informed this to the owner of the vehicle, and on his instructions, has returned to Colombo. He lodged a complaint with the Bribery Commission in this regard on the same day. Having agreed to assist in a raid, PW-01 has gone to the Bribery Commission on 11-09-2008 and accompanied by five officers of the Bribery Commission, has come to Mawanalla area. Upon their instructions, he has selected one of the officers named Sergeant Premathilaka to accompany him as a decoy. After receiving the necessary instructions, the Bribery Commission officials have given Rs. 2500/- to the decoy to be used in the raid. He has been instructed to introduce the decoy as his uncle, if necessary.

After getting off the van near the police station, the PW-01 and the decoy has gone to the Mawanalla police station around 1.45 in the afternoon. They have met the appellant and the PW-01 has informed him that the Rs. 2500/- which he wanted him to bring on the day before was brought .

At that point, the appellant has inquired about the decoy, and after being informed that he was the uncle of PW-01, he has instructed both of them to wait outside the office.

According to the version of events as narrated by the PW-01, the appellant has then instructed the few other police officers who were in the traffic division of the police station to have their lunch. Thereafter, he has asked the PW-01 to come and handover the money. After obtaining the money from the decoy, the PW-01 has given the money to the appellant who was seated in his office. He has put the money into his right-hand side trouser pocket. Thereafter, the appellant has opened the drawer of his table and has taken about 8 licences and had given the PW-01 a licence, which was not his licence, but one belonging to one A. R. Rajapakse. This license has been marked by the prosecution as P-03 during the trial. When he was informed that it was not his licence, the appellant had given about six licences he had in the drawer and had asked the PW-01 to select his one.

At that point, the officials of the Bribery Commission, including the Sub-Inspector who conducted the raid had come, and the PW-01 had informed them that the money was taken by the appellant. The officials have instructed the PW-01 to go to their van and wait.

PW-01 has stated that before he gave Rs. 2500/- to the appellant, he took the temporary licence which was marked as P-02 from him, and when the Bribery Commission officials came inside the office, the appellant took the said temporary licence and put it in his mouth.

The PW-01 has been cross-examined at length as to the incident that happened on that day, where the witness has maintained the same position throughout

the cross-examination. It has been his position that although he was informed that an action will be filed in Court on the 17th, he was informed by the appellant to come with Rs. 2500/- before that date to take the licence back.

The witness has also stated that subsequent to this incident, he received summons from Mawanalla Magistrate's Court and he was fined Rs. 1000/- for the traffic offence. He has denied the suggestion that he filmed the events which were unfolded at the police station.

The only suggestion made to the witness by way of a defence had been that because the appellant objected for his intention of paying a lesser fine without him having to go to Court, PW-01 instigated a false accusation against the appellant, of which the PW-01 has again denied, saying that he had no connection with the appellant.

PW-02 had been the officer of the Bribery Commission who accompanied PW-01 as the decoy. He has confirmed that he went along with PW-01 to the police station and met the appellant at the traffic division of the Mawanalla police. He has stated that when they met the appellant, he inquired about him from PW-01 and wanted both of them to wait outside. However, since he was the decoy, PW--02 had observed what was happening and had observed the appellant telling the other officers who were at the traffic division to leave. Thereafter, the appellant has inquired from the PW-01 whether he brought the money. After having obtained the money from him, PW-01 has given the money to the appellant. He has seen the appellant putting the money to his right-hand side pocket of the trouser. He has also seen the appellant handing over a document taken out from his table drawer to PW-01. At that point, the other members of the raiding party had come and entered the office of the appellant.

When inquired from the PW-01, he has informed the decoy and the raiding party that the money was given to the appellant and the temporary permit given to him by the appellant was not the one belonging to him.

When the officer who conducted the raid revealed his identity to the appellant and instructed him to hand over the money back, the appellant had stated that he does not have anyone's money with him and had resisted the arrest. Although the appellant had violently resisted the arrest, he has been subdued and arrested. The officer who conducted the raid has recovered the money given as a bribe on the floor, near the table of the appellant where he resisted the arrest.

This witness too has been subjected to a lengthy cross-examination, where it has been suggested to him that the money was recovered not near the appellant's table, but 6-7 feet away from where he was seated and there were several other tables in between. The witness has denied the suggestion and had stated that the money was recovered on the floor where the appellant resisted arrest.

According to the evidence of PW-03 who led the team of officers from the Bribery Commission in conducting this raid, once he went and confronted the appellant and asked for the money he obtained from PW-01, the appellant has stated that he did not take any money and had violently resisted the arrest. In the ensuing struggle with the appellant in order to arrest him, the witness has seen something being thrown away by the appellant.

After his arrest, the PW-03 has recovered the money used in the raid on the floor where the struggle with the appellant took place in order to arrest him. He has also recovered the temporary driving licence marked P-02 at the trial on the floor, but rather in a damaged state, which may be due to being trampled on by persons during the struggle.

After producing the appellant before the Chief Magistrate of Colombo, he has obtained the money certificate in terms of section 30A(3) of the Bribery Act from the Magistrate. The PW-03 has also taken steps to produce the appellant before the Judicial Medical Officer (JMO) of Kegalle hospital after his arrest. During his investigations, several documents in relation to the matter have been taken charge by him from the Mawanella police station.

During the cross-examination of PW-03, it needs to be noted that other than questioning him in detail as to the part played by him during the raid and suggesting that the appellant was arrested by him even without sufficient facts about the incident, and produced before the Court, no particular line of defence has been taken up by the appellant.

The fact that the appellant was a government servant and the Officer-in-Charge of the traffic division of the Mawanella police station on the days relevant to this incident was an admitted fact in terms of section 420 of the Code of Criminal Procedure Act.

The Sub-Inspector who was with the appellant when the PW-01 was stopped for the traffic violation and issued the temporary permit to him has given evidence to confirm that fact. However, he has not been in the police station when the raid took place.

The next witness of importance was the PW-05, who was the Officer-in-Charge of the police station at that time. He has confirmed the documents handed over by him to the investigating officers of the Bribery Commission marked as evidence in the case. He has also confirmed that the appellant was the Officer-in-Charge of the traffic division of the Mawanella Police on the day relevant to the raid.

Under cross-examination, he has stated that both he and the appellant were contemporaries of the same school and the appellant was a rugby player who represented both his school and the police rugby team. Describing the incident, he has stated that while he was in his office, a female officer rushed into his office and informed him that IP Kulatunga is struggling with some persons.

When he went to inquire, he has heard the appellant shouting with a loud voice asking to remove the handcuffs and find if he has it.

The officer who was in charge of the raid has told him not to enter, but he has entered the traffic division of the station after identifying him as the OIC of the

station. He has seen the appellant resisting the arrest. The officer who was in charge of the raid has informed him to order the appellant to cooperate, which he did.

Thereafter, he has returned to his office and had taken necessary steps to inform his higher officials about the raid. The officer who conducted the raid has also come to his office and made a call to the Director of the Bribery Commission.

It had been his evidence that while he was in the office, one of the other officers of the raiding team came to the office and informed the Officer-in-Charge of the raid that *"found in a dustbin*." However, he has stated that he did not know what was found, but believed it was something relevant to the raid.

At the conclusion of the cross-examination of PW-05, the prosecution has moved to treat him as a witness detrimental to the prosecution case in terms of section 154 of the Evidence Ordinance and had moved to cross-examine him on that basis. Accordingly, the learned trial Judge has allowed the application.

It appears from the line of cross-examination of the PW-05 by the prosecution, what he said while being cross-examined that one of the other officers came and said to the Officer-in-Charge of the raid that "*found in a dustbin"* had been the main reason that has prompted the application under section 154.

The prosecution has established that when the OIC made his statement to the officials of the Commission after the raid, he has not stated such a thing. It has been suggested to him that because of his connections to the appellant, he was attempting to help him. Admitting that he did not say such a thing in his statement, it had been his position that he said that in his evidence because it came to his mind while giving evidence, but not with the intention of helping the appellant in the case.

After leading the evidence of some of the other officers who assisted in the raid, the prosecution has closed the case.

Having considered the evidence placed before the Court, the learned High Court Judge has decided to call for a defence from the appellant. He has chosen to give evidence under oath and to call a witness on his behalf.

In his evidence, the appellant has admitted that he stopped the PW-01 for a traffic violation on 06-09-2008 as stated by him in his evidence, and had admitted that the PW-01 came to him and told him to shape it up (ෂේප් කරලා දෙන්න). It has been his evidence that he took it as a hint of attempting to give him a bribe, and he informed the Sub-Inspector Illangakoon who was with him to issue a temporary licence. He has testified that even after the issue of the temporary licence, the PW-01 came to him and uttered a name of a Deputy Inspector General, but he told him to come to the Court on the 17-09-2009.

It had been his position that on 10-09-2008, although he was not sure whether it was the same driver, PW-01 came to his office at the Mawanella police station and wanted him to issue a spot fine. Since the offence committed was an offence which cannot issue a spot fine, the appellant has instructed the person to come to the Court on 17-09-2009. He has admitted the endorsement made by him on the 10th in the temporary licence. He has further stated that on the 11-09-2008, the PW-01 came to his office again with another person around 2.15 p.m. and wanted him to issue a spot fine.

It had been his position that he refused that request and instructed one of the WPC's called Prabha, who was attending to office work at that time, to write the Court date and give them.

Thereafter, the appellant had his lunch and returned to his seat. The earlier mentioned person has come to him again, and at the same time, some persons have come and attempted to handcuff him, informing him that they are from the Bribery Commission. It had been his position that since he did not take any bribe, he resisted the arrest and the ensuing struggle lasted for about ten minutes. He has claimed that no money was taken from his possession, but those who arrested him recovered some money under a table which was three

tables away from the table where he was seated. He has admitted that after the arrest, the arresting officers produced him before the JMO of Kegalle and later he was remanded by the Magistrate.

The appellant too has been cross-examined at length by the prosecution where he has maintained the position that he did not accept the bribe as claimed by the witnesses. However, he has admitted that when PW-01 came and met him on the 11th, he questioned him as to who the other person was, and the PW-01 replied that it was his uncle. He has also admitted that he wanted them to go out of his office and wait. He has also claimed that the PW-01 video recorded his arrest. He has given evidence to the effect that some things were recovered from the dustbin under his table, which appears to be a reference to the temporary permit issued marked P-02 at the trial.

On behalf of the appellant, WPC5603 Prabha has given evidence. This is the officer whom the appellant claimed who was in his office when the arrest took place. According to her evidence, when this incident occurred, she was the only officer working in the office and the other officers attached to the unit were out on duty. While attending to her office work seated in front of the appellant's table, she has seen a person coming and requesting the appellant to give him a spot fine. She has observed the appellant informing the person that no spot fines can be issued for the offence. The appellant has then given the temporary permit to her informing her to write down the Court date as 17-09-2008. The witness has claimed that she looked at the temporary permit and informed the person that she will prepare the plaint to be presented to the Court, and told the person to come on the 17th as instructed. She has claimed that she was only about 2 to 3 meters away from the appellant when the said person came and talked to him and she did not hear anything about a money transaction, nor did she see the person giving any money to the appellant.

After a little while, she has seen some persons coming into the office and attempting to handcuff the appellant. While he was struggling with them, it has

prompted her to go and inform the OIC of the station of what was happening. After the arrival of the OIC and after the tense situation calmed down a bit, she has seen the officers who arrested the appellant looking for something inside the office and she has heard someone saying out loud that things were found (බඩු හොයාගත්තා). She has then seen someone lifting the cardboard box they were using as the dustbin and showing it to others. She has not heard anyone talking about payment of any money.

She has later come to know that the appellant was arrested by the officials of the Bribery Commission, but has stated that no statement was recorded from her in that regard.

Under cross-examination by the prosecution, she has maintained the position that she had no contact with the appellant after his arrest. She has denied the suggestion that she was giving false evidence influenced by the appellant. She has admitted that she has an Airtel mobile phone number, but has denied that she had any communication with the appellant.

After the closure of the defence case, as a result of the evidence given by the witness called on behalf of the appellant, the prosecution has sought the permission of the Court to call evidence in rebuttal, which has been granted.

Thereafter, the prosecution has called two representatives from the respective mobile service providers to establish that, in fact, the appellant and the said witness called on his behalf had communicated through their mobile phones by way of calls as well as SMS messages several times during the period where the said witness gave evidence in Court on behalf of the appellant.

Consideration of the Grounds of Appeal

The 1st Ground of Appeal:-

The 1st ground of appeal urged was on the basis that the appellant was not afforded a fair trial.

It was contended that the learned High Court Judge highly depended on the contents of the documents marked P-08(1) to P-08(6) in a manner detrimental to the appellant, and these are matters where the appellant did not have the opportunity of explaining.

The other matter put forward as a denial of a fair trial was the learned High Court Judge's decision to consider some parts of the evidence of PW-05 as relevant, despite him being treated as a hostile witness in terms of section 154 of the Evidence Ordinance.

It is clear from the judgment that the learned High Court Judge has carefully considered whether the position taken up by the appellant, that for an offence of crossing the center white line, he cannot issue a spot fine and it was the reason he refused the request made by PW-01 to him.

As correctly considered at page 20 of the judgment (page 716 of the appeal brief), it has been determined that it was the correct legal position. However, by meticulously studying the documents marked from P-08(1) to P-08(6), the learned High Court Judge has found that although the said position was legally correct, the practice followed has been to issue spot fines for the said offence as well. It has been found that even on the same day, a spot fine has been issued by the appellant to another motorist who committed the same offence.

Based on the said findings, it had been determined that the appellant's attempt to create a doubt as to the evidence of the PW-01 in that pretext has failed, and no doubt has been created on the evidence of the PW-01.

The above-mentioned documents as well as the documents marked P-06 and P-06(a) are documents marked and produced by the prosecution at the trial. I am of the view that after failing to study and cross-examine the relevant witnesses on those documentary evidence, the appellant cannot claim that he had no opportunity of questioning the witnesses on those matters.

If the argument is that since PW-05 was treated as a hostile witness for the prosecution in terms of section 154 of the Evidence Ordinance and the appellant had no reason to question him on his evidence, I find no basis for such a contention.

PW-05 who was the OIC of the Mawanella police station during the relevant period has been called by the prosecution not as an eyewitness to the incident. He has produced the relevant extracts from books under his custody and has spoken about the other matters relevant for the case. It is clear from the line of cross-examination of the said witness by the learned Counsel for the appellant that he has been a very accommodative witness for the defence.

It was only after the conclusion of the cross-examination of the witness by the appellant, the prosecution has moved to treat the PW-05 in terms of section 154 of the Evidence Ordinance.

I am of the view that the appellant cannot claim that he was denied of a fair trial on such a basis as it had been his own making.

The next matter to be considered is whether the learned High Court Judge was wrong in considering the evidence of PW-05 in determining the prosecution case.

The learned President's Counsel cited the judgment of **The Queen Vs. R. R. Abilinu Fernando (1967) 70 NLR 73** to stress his point.

It was held:

> *"If at a trial a prosecution witness voluntarily or in answer to defence counsel, gives evidence clearly inconsistent with the statement made by him in his deposition, the discretion of the trial Judge under S.154 of the Evidence Ordinance may well extend to permitting the prosecution to contradict the witness by proof of the former statement. But the case is different where there is no such inconsistent evidence, but merely such testimony generally unfavourable to the prosecution. In such a case, the prosecutor should not open the door to prove a former statement*

incriminatory of the accused by the device of first tempting and provoking the witness to deny the incriminatory matter. While such a course may be of some advantage in casting doubts on the general credibility of the witness, its more consequences is to cause grave prejudice to the accused."

It is my considered view that considering the above-mentioned observation in its isolation would be misleading as to the judgment pronounced by the Court of Criminal Appeal.

This was a case where the prosecution called the father of the accused and elicited from him only the fact of identification of the deceased at the post-mortem examination, knowing very well that he has spoken more about the incident in his deposition before the Magistrate.

Under cross-examination, the witness has given evidence to suggest that the other witness may not have been able to identify the assailant, there was no ill-feeling between the deceased women and the accused, who was the brother of her husband. He has also given answers to suggest that there was police interference with the witnesses.

This has prompted the trial Judge to allow the prosecution application to act under section 154 of the Evidence Ordinance, where the prosecuting State Counsel has proved several inconsistencies in the deposition made by the witness before the Magistrate, of which the Court has found no fault.

However, during this examination and due to certain remarks made by the State Counsel, the Court has found that the prosecuting State Counsel knew from the very outset of the case that the witness will not testify against his own son and was expecting to confront the witness in terms of section 154 of the Evidence Ordinance. It is clear from the judgment of the Court of Criminal Appeal, the above cited observation had been made in that context, and not in order to determine that the prosecution has failed to prove the case.

It was held further:

> *"There was however, ample evidence from the witness Premaratne and witness Jhon Fernando as to the stabbing of the deceased woman by the appellant and strong motive for the stabbing. Under the proviso to section 5(1) of the Court of Criminal Appeal Ordinance, we upheld the conviction and dismiss the appeal."*

The proviso of section 5(1) of the Court of Criminal Appeal Ordinance that was in operation then had a very much similar provision to the proviso of Article 138 of The Constitution under which the Court of Appeal derives its powers to determine appeals.

The relevant proviso of section 5(1) reads as follows;

> **"Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."**

I am of the view that the matter to be determined here is whether it was proper for the learned High Court Judge to consider parts of the evidence given by a witness who was treated by the prosecution as detrimental to the prosecution's case as relevant.

The learned High Court Judge has been guided by the observations of **Buwaneka Aluwihare, J.** in the case of **Galaboda Payagalage Sanath Wimalasiri Vs. Officer-in-Charge, Police Station, Maradana and Hon. Attorney General , SC Appeal No. 32/11 decided on 30-11-2016.**

This was a case where the decision to consider the evidence of a witness who was treated in terms of section 154 of the Evidence Ordinance as relevant for the prosecution case was considered.

It was observed:

> *"The question then is, what is the evidentiary value of such a witness. According to* ***E.R.S.R.Coomaraswamy (The Law of Evidence Vol II Book 2, 818)*** *there are two views on the question of the evidentiary value of the evidence of a witness who has been treated as hostile. According to one view, the evidence is of some value and is not to be disregarded altogether and the other view, the evidence is of no value and cannot be relied on for the party calling the witness and or the other party. It is doubtful whether the maxim, "Falsus in uno falsus in omnibus" could be applied to this class of cases. The underlying principle for allowing the party to the subject their own witness to virtual cross-examination, stems not so much because the witness is necessarily untruthful, more so because the witness shows hostility towards the party who called the witness.*
>
> *If the evidence given by a discredited witness in terms of section 154 is to be used it must be done with great caution and care and should not be acted upon unless parts of his testimony is corroborated by some independent evidence."*

In the case of **The King Vs. N. A. Fernando (1945) 46 NLR 254 at 255,** it was held:

> *"In regard to (a) we are in respectful agreement with the view taken by a full Bench of Calcutta High Court in* ***Profulla Kumar Saker Vs. King Emperor A.I.R. 1931 Calcutta 491*** *that the fact that a witness is dealt with as adverse and cross-examined to discredit, in no way warrants a direction to the jury that they are bound in law to place no reliance on his evidence. It is for the jury to examine the whole of the evidence of such a witness so far as it affects both parties favourably or unfavourably for what in their opinion it is worth."*

In the case under appeal, the PW-05 in his evidence-in-chief has stated nothing detrimental to the prosecution case. He has produced some of the documents

relevant to this case which were under his custody, and has spoken about the appellant's position at the police station and several other factors relating to the Mawanalla police station. It was only when he was cross-examined by the learned Counsel for the appellant, he has stated things which appears to be an attempt to help the appellant.

Although PW-05 has been treated as an adverse witness based on what he said, in my view, this was not a situation where the prosecution should have moved to act under section 154 of the Evidence Ordinance, as what was said by PW-05 had no evidential value. PW-05 has spoken about a thing supposed to have been said by another person which he overheard without even identifying who said that. This is clearly hearsay evidence which has no value. Besides that, there was no dispute that the money used in the raid was recovered by the raiding party on the floor where the incident of struggling with the appellant took place. The only difference being the prosecution evidence which says that the money was recovered on the floor near the table of the appellant, while the appellant's position was that it was recovered some 5-6 meters away.

The evidence considered by the learned High Court Judge in evaluating the prosecution case to find whether it has proved the evidence beyond reasonable doubt has only used the official documents produced by PW-05 which are also not disputed documents. Therefore, I am of the view that the learned High Court Judge was not misdirected when it was decided to consider the evidence of PW-05.

It is also noteworthy to mention that the learned High Court Judge has not only considered the evidence of PW-05 in relation to the prosecution case, but also has given equal weight to his evidence in deciding whether the appellant's version of events can be accepted in that regard. This shows that the learned High Court Judge has not looked at the evidence in a partial manner.

For the reasons as considered above, I am of the view that there exists no basis for this Court to consider that no fair trial was afforded to the appellant.

The 2nd ground of appeal:-

In the second ground of appeal, it was urged that the evidence creates a reasonable doubt as to the charges preferred against the appellant.

It was contended by the learned President's Counsel that when the PW-01 was stopped for the relevant traffic violation by the appellant, he has not solicited any bribe and it was the PW-01 who has asked for a spot fine from the appellant, which shows that the appellant never had the intention of soliciting a bribe.

It was submitted that although the owner of the vehicle was also present in his vehicle at that time, no statement had been recorded from him, which should have corroborated the version of events by the PW-01. It was submitted further that the appellant being a police officer has done his duty correctly, and has been purposely targeted for that and false charges had been initiated against him.

The learned President's Counsel also mentioned that although the learned High Court Judge has determined that there were no contradictions in the prosecution evidence, in fact, there were several contradictions and omissions. Referring to the evidence of PW-01 and that of the decoy (PW-02), he contended that the said discrepancies have not been considered by the learned High Court Judge.

It is trite law that discrepancies or omissions in evidence have to be material discrepancies and omissions that goes into the core of the prosecution case. The fact that there are discrepancies, in itself, is not a reason to doubt the evidence of the prosecution witnesses.

In the case of **Mahathun and Others Vs. The Attorney General (2015) 1 SLR 74** it was held:

(1) When faced with contradictions in a witness testimonial, the Court must bear in mind the nature and significance of the contradictions, viewed in light of the whole of the evidence given by the witness.
(2) Too great a significance cannot be attached to minor discrepancies, or contradictions.

(3) What is important is whether the witness is telling the truth on the material matters concerned with the event.

(4) Where evidence is generally reliable much importance should not be attached to the minor discrepancies and technical errors.

(5) The Court of Appeal will not lightly disturb the findings of a trial judge with regard to the acceptance or rejection of testimony of a witness unless it is manifestly wrong.

In the case of **State of Uttar Pradesh Vs. Anthony 1985 AIR SC 48,** the danger of disbelieving an otherwise truthful witness on account of trifling contradictions have been spotlighted. It has been stated that;

> *"The witness should not be disbelieved on account of trivial discrepancies, especially where it is established that there is a substantial reproduction in the testimony of the witness in relation to his evidence before the Magistrate or in the session court and that minor variation in language used by witness should not justify the total rejection of his evidence."*

In one of the contradictions pointed out, PW-01 has stated that when he went and met the appellant on the day of the raid, he informed the appellant that he brought the Rs. 2500/-, which the appellant wanted him to bring. What the decoy has stated in Court had been that, it was the appellant who asked the PW-01 whether he brought the money. It was also pointed out that under cross-examination, the PW-01 has stated that it was the appellant who questioned whether the money was brought, to point out that it was different to the earlier stand taken by him. It was also submitted that at one point, it has been stated that both of them were asked to go out by the appellant, but later it was the decoy who was asked to go out.

As I have considered before, in a case of this nature where the witnesses have been cross-examined at length, parts of the evidence cannot be considered in its isolation and argue that contradictions have been created. What needs to be looked at is the totality of the evidence. If one takes care to look at the evidence

of PW-01 and the decoy, as well as that of PW-03 who led the team of officers in conducting this raid, the said alleged contradictions would not become relevant or would not create any material doubt as to the prosecution evidence.

In the case of **Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753,** the Indian Supreme Court held as follows;

> *"By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.*
>
> *Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to attune to absorb the details.*
>
> *The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on."*

Another matter submitted by the learned President's Counsel to argue that there were contradictions in the evidence was what the PW-01 has stated about the temporary permit given by him to the appellant, and what he did to it when the raiding party came and confronted him. The PW-01 has stated that the appellant put it in his mouth. However, the decoy or the other witnesses have not stated anything of that nature.

There again, that omission needs to be considered in relation to the evidence in its totality. The evidence has been that the temporary permit marked PW-02 was also recovered while it was on the floor where the struggle took place with the

appellant. When P-02 was marked in Court, the prosecution has clearly shown the condition of the document to the Court.

Although it was submitted that there was high improbability of the version of events as narrated by the prosecution, and accordingly, the conviction should be set aside, I am in no position to agree.

As considered correctly by the learned High Court Judge, there are no material contradictions or omissions in the evidence of the relevant prosecution witnesses. I find that the learned High Court Judge has cautiously considered the evidence to determine whether the evidence was cogent and truthful enough to be acted upon. The learned High Court Judge has well considered the defence taken up by the appellant in order to find whether it has created a doubt as to the prosecution evidence or at least it has given a reasonable explanation as to the evidence against the appellant. It is in this process the learned High Court Judge has analyzed the evidence given by the appellant as well as the witness called on behalf of him to determine that the appellant and his witness was trying to create a false narrative which did not occur on the date of the incident. I find that it was a correct determination given the facts and the circumstances of the case.

For the reasons as considered above, I find no basis for the second ground of appeal urged on behalf of the appellant.

Accordingly, the appeal is dismissed for want of merit. The conviction and the sentence dated 16-11-2018 affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal