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

In the matter of an Appeal under and in terms of section 331 of the Code of Criminal Procedure Act No.15 of 1979 as amended.

Court of Appeal No:

CA/HCC/84-85/2018

Director-General,

Commission to Investigate Allegations of Bribery or Corruption,

No. 36, Malalasekara Mawatha,

Colombo 07.

COMPLAINANT

Vs.

High Court of Colombo

Case No: HC/1929/2012

01. Imihami Mudiyanselage Ranil Priyantha,

Minuwanwewa, Welimada Road,

3rd Mile Post,

Bandarawela.

02. Kankanamge Thilakarathne,

Panakaduwa, Rotaba,

Matara.

ACCUSED

AND NOW

01. Imihami Mudiyanselage Ranil
    Priyantha,
    Minuwanwewa, Welimada Road,
    3rd Mile Post,
    Bandarawela.
02. Kankanamge Thilakarathne,
    Panakaduwa, Rotaba,
    Matara.

ACCUSED-APPELLANT

Vs.

Director-General,
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 : U.R. de Silva, P.C. with Pradeepa Kaluarachchi for the 1st Accused-Appellant

: Darshana Kuruppu with Tharushi Gamage for the 2nd Accused-Appellant

: Azard Navavi, S.D.S.G. for the Complainant-Respondent

Argued on : 16-02-2024

Written Submissions : 10-11-2021 (By the Complainant-Respondent)

: 29-03-2019 (By the 2nd Accused-Appellant)

: 26-03-2019 (By the 1st Accused-Appellant)

Decided on : 28-05-2024

Sampath B. Abayakoon, J.

The accused-appellants (hereinafter sometimes referred to as the 1st appellant or 2nd appellant) were indicted before the High Court of Colombo based on 8 counts in terms of the Bribery Act.

The 1st and the 2nd counts had been against the 1st appellant on the basis that, being a government servant, he solicited a bribe of Rs.10,000/- to perform an

official act from one Eranga de Silva, between the period of 30-04-2009 to 18-05-2009 in Galle, and thereby committing an offence punishable in terms of section 19(b) and also in terms of section 19(c) of the Bribery Act.

The 3rd and the 4th counts were on the basis that, acting in the same capacity as earlier mentioned, he accepted a sum of Rs.10, 000/- from the earlier mentioned person on 18-05-2009, and thereby committed offences punishable in terms of section 19(b) and section 19(c) of the Bribery Act.

The 5th to 8th counts had been against the 2nd appellant on the basis that he aided and abetted the 1st appellant to solicit and accept the earlier mentioned bribe, and thereby committed offences punishable in terms of sections 19(b) and 19(c) of the Bribery Act.

After trial, of the judgment dated 17-01-2018, the learned High Court Judge of Colombo found the appellants guilty as charged. Accordingly, after having considered the mitigatory as well as the aggravating circumstances, the learned High Court Judge of Colombo sentenced the two appellants in the following manner.

The 1st appellant had been sentenced to 4 years simple imprisonment for each of the 1st, 2nd, 3rd, and the 4th counts for which he was found guilty. He has been ordered to a pay a fine of Rs.4000/- each and in default, a default sentence of 8-month simple imprisonment had been ordered.

The 2nd appellant who was found guilty for the 5th ,6th ,7th and 8th counts had also been sentenced for 4 years simple imprisonment in relation to each count and had been ordered Rs.4000/- each fine. In default, he had been ordered to serve 8 months each simple imprisonment.

It has also been ordered that the sentence imposed upon the 1st appellant in relation to the 1st and 2nd count shall be concurrent to each other, while the sentence imposed upon the 3rd and the 4th count shall also be concurrent to each other, which means a total period of 8 years simple imprisonment.

In relation to the jail terms imposed upon the 2nd appellant, it had been ordered that the sentences ordered on the 5th and the 6th counts shall be concurrent to each other, while the sentences imposed upon the 7th and the 8th count shall also be concurrent to each other, which means the total period of imprisonment would be 8 years for the 2nd appellant as well.

In addition to the above, both the appellants had been ordered to pay Rs.10,000/- each in terms of section 26 of the Bribery Act, and in default, it had been ordered that the said sum should be recovered as a fine and in default, 10 months each simple imprisonment should be served.

Being aggrieved by the said conviction and the sentences, the appellants preferred this appeal.

The Facts in Brief

PW-01 has been in the business of funeral undertaking and had a business establishment in front of the Mahamodara hospital in Galle. The business had been in the name of his father, but he was the person who was running the business.

As part of his business activities, he has responded to a tender to remove body parts from the laboratory of the Mahamodara hospital. The tender had been to remove the body parts when informed, and to dispose the body parts and properly destroy the other material. He has received this tender for the year 2008 and has applied for the tender again for the year 2009, and had been awarded the tender for the year 2009. By the letter dated 30-04-2009, the director of the hospital has written to him informing that he should come and remove the relevant parts from the laboratory. When inquired, he has come to know that he has to remove 650 such parts and he was to receive Rs.100/- per each container, and Rs.65,000/- in total.

Accordingly, in the 1st week of the month of May, he has gone to the hospital laboratory to remove the body parts, where he has met the two appellants who

were the laborers attached to the laboratory whose assistance he needed to obtain the material that should be removed. The two appellants had demanded Rs.10,000/- from him, if they are to give him all the samples that needs to be removed without any delay. He has identified the two persons who demanded the money as Ranil and Thilakaratne; Ranil being the 1st appellant and Thilakarathne being the 2nd appellant.

It had been his evidence that both of them demanded the money stating that, it will have to be shared among them. When the money was demanded, the PW-01 has agreed to pay the sum demanded once he received the cheque for the claim he will be made to the hospital director. Thereafter, PW-01 has been allowed to remove the body samples and he has submitted his claim for Rs.65,000/- to the hospital director.

The PW-01 has lodged the complaint to the Bribery Commission after he was allowed to remove the body parts on the said promise.

Responding to his complaint, the officers of the Bribery Commission have come and met him on 18-05-2009. After recording his statement, the relevant raid has been organized. PW-01 has selected one of the officers whom he came to know as Jayaweera to accompany him in the raid as a worker in his shop. Rs.10,000/- had been given to the mentioned decoy to be used in the raid.

Accordingly, both of them had gone to the laboratory of the hospital where they have met the 1st appellant Ranil. When he met the 1st appellant, the PW-01 has attempted to negotiate a reduction which has been refused, but the 1st appellant has told him to discuss that with Tillakaratne. When he informed the 1st appellant that he brought the money, the 1st appellant has allegedly told him, since there are other people around, give the money to the 2nd appellant Tillakaratne, who was outside of the of the hospital by that time..

Accordingly, PW-01 has given a call to the 2nd appellant, but he has been informed to give the money to the 1st appellant. Thereafter, they have met the 1st appellant outside of the hospital for the 2nd time and PW-01 has given

Rs.10,000/- to the 1st appellant, at which point the officials from the Bribery Commission had come and arrested him.

According to PW-01, the officials have recovered the money from one of the 1st appellants trouser pockets. After the arrest of the 1st appellant, he has been instructed to go and meet the 2nd appellant and give the same Rs.10,000/- as well.

PW-01 and the decoy had met the 2nd appellant outside of the laboratory. And according to PW-01, he has given the money to the 2nd appellant, wherein the Bribery Department officials have come and arrested the 2nd appellant. When he was arrested the 2nd appellant has fainted.

Under cross-examination, PW-01 has stated that on a previous occasion also, he was forced to give Rs.3000/- to the 2nd appellant for the same purpose and he made a complaint to the Bribery Commission as he could not keep on paying bribes to the appellants. To the suggestion that he was trying to mislead the Court, PW-01 has stated that it was not so. He has admitted that although his claim was for Rs.65,000/- he did not get a cheque for Rs.65,000/-.

It had been suggested to the witness that the two appellants, were the persons instrumental in not paying the claim made by him, and that was the reason for a false complaint against them, which the witness has denied.

Under further cross-examination, PW-01 has stated that although he said in his evidence-in-chief that Rs.10,000/- was given to the 2nd appellant as well, that was wrong, and due to the passage of time he could not remember very well that fact. He has maintained the position that the money was given only to the 1st appellant.

The prosecution has called official witnesses to show that in fact such a tender was awarded to PW-01 and he has made a claim for removing 650 body parts as per the tender at a rate of Rs.100/- per part. However, the evidence led at the trial shows that, since the director of the hospital did not agree to pay on the

basis of 650 parts had been removed at the rate of Rs.100/-, but only to pay the PW-01 Rs.10,000/- for his work, the actual amount paid to the PW-01 was Rs.10,000/. The said sum had been paid to PW-01 on 03-11-2009.

The prosecution has also led evidence to show that the two appellants were government servants and had been working in their respective capacities at the hospital laboratory during the relevant period.

The decoy who accompanied the PW-01 has given evidence as PW-02 and has substantiated the version of events as narrated by PW-01. It had been his evidence that before the 2nd appellant was arrested, there was only a discussion between the PW-01 and the 2nd appellant, where PW-01 informed him that the money was given to the 1st appellant. He too has confirmed that when arrested the 2nd appellant fainted and was admitted to the hospital for treatment before he was taken to the Galle police station.

The officer who led the raiding party, (PW-03) has given evidence confirming that the raid was conducted, and the appellants were arrested as stated by the other witnesses.

When the two appellants were called upon for their defence by the learned trial Judge at the conclusion of the prosecution case, both of them had made statements from the dock.

The 1st appellant had stated that he worked as a sanitary laborer at the Mahamodara hospital for nearly 5 years by the time he was arrested, and was attached to the hospital laboratory for a period of two years. He has claimed that he had no power to increase the number of samples and he performed his duties to the perfection. He has stated that PW-01, after obtaining the samples, used forged documents in order to obtain more money in his claim for the services tendered, and because he failed in his attempt, PW-01 framed him in order to take revenge on him.

The 1st appellant has denied any wrongdoing and has claimed innocence of the charges.

The 2nd appellant in his dock statement has also admitted that he was working as a laborer attached to the laboratory of the hospital during the time relevant to the incident and has explained the procedure adopted to remove the samples taken for analysis to the laboratory. He has stated that, he was arrested on 18-05 -2009, alleging that he obtained a bribe from PW-01 and has claimed that he never obtained any bribe from PW-01.

The Grounds of Appeal

The learned President's Counsel on behalf of the 1st appellant formulated the following grounds of appeal,

1. The learned High Court Judge, after analyzing the prosecution case has come to a finding that the prosecution has proved the case beyond reasonable doubt, and only thereafter, had looked at the defence evidence.
2. The learned High Court Judge has failed to properly evaluate the evidence of the whole case.
3. The credibility of the complainant has not been properly analyzed.

The learned Counsel for the 2nd appellant urged the following grounds of appeal for the consideration of the court.

1. The learned High Court Judge has failed to consider that the prosecution has not established the ingredients of the charges against the 2nd appellant beyond reasonable doubt.
2. The learned High Court Judge has failed to take into consideration and evaluate the *inter se* and *per se* contradictions of the prosecution witnesses.
3. The learned High Court Judge has failed to consider that the failure of the prosecution to call the phone details of the 2nd accused appellant

from the relevant service providers warrants the application of section 114(f) of the Evidence Ordinance.

4. The learned High Court Judge was misdirected himself on the law by seeking corroboration even after having come to a finding that the complainant was not a credible witness.

Consideration of the grounds of appeal

Although separate grounds of appeal were urged on behalf of the appellants, I will now proceed to consider them together, as they are interrelated.

One of the main grounds of appeal submitted by the learned President's Counsel on behalf of the 1st appellant was that the learned High Court Judge has predetermined that the charges against the appellants have been proved beyond reasonable doubt even before the learned trial judge considered the case of the defence, and hence the conviction was bad in law.

At this juncture, it needs to be emphasized that there is no accepted form for writing a judgment as each judge has his or her own way of writing. What matters is whether the judge has considered the relevant legal principles that should be applicable to a given fact and the circumstances, and whether the evidence placed before the Court has been correctly analyzed in its correct perspective.

I am of the view that if a learned trial judge has done so, and if it can be concluded that the determinations reached have been reached after the correct application of the law, such a judgment need not be disturbed based on the words used by the trial judge taken in its isolation.

It is true that in the process of analyzing evidence of the prosecution, the learned High Court Judge has used words that the said evidence can be accepted beyond reasonable doubt before he proceeded to analyze the defence put forward by the appellants.

As pointed out correctly by the learned Senior Deputy Solicitor General (SDSG) the analysis of the evidence by the learned trial Judge has to be considered in

its totality to find out whether a misdirection has occasioned in the way claimed on behalf of the appellants.

At page 12 of the judgment (page 317 of the appeal brief) under paragraph 19.0, after considering the evidence of PW-01 and PW-02, the learned High Court Judge has concluded that the defence has failed to create a doubt in relation to their evidence. Hence, it can be concluded beyond reasonable doubt that an incident as described by the witnesses has taken place.

At page 15 of the judgment (page 320 of the appeal brief) under paragraph 25.0, after analyzing the evidence as to who has accepted the money from PW-01, it has been stated that the fact that it was the 1st appellant who has accepted the bribe has been proven beyond reasonable doubt.

At page 19 of the judgment (page 324 of the appeal brief) under paragraph 30.1, after considering whether there can be a basis for the appellants' stand that they were fixed for this offence because they blocked the cheque payment for the PW-01, it has been determined that such a claim has no basis and the trustworthiness of the prosecution witnesses cannot be doubted, and can be believed beyond reasonable doubt.

Although the learned High Court Judge may have used the wrong word (සාධාරණ සැකයෙන් තොරව) in his analysis of the prosecution evidence, that does not mean he has been misdirected to come to a finding that the prosecution has proved its case beyond reasonable doubt before he considered the defence put forward by the appellants. It is amply clear what has been meant was that the mentioned facts have been established before the Court up to the necessary standard of proof.

In my view, it can be stated that the learned High Court Judge has determined that the prosecution has proved the case beyond reasonable doubt after considering the prosecution evidence only, if it can be so concluded by going through the judgment in its entirety and not taking segments of the judgment in isolation.

It is clear from the judgment that after considering and analyzing the prosecution evidence, the learned High Court Judge has considered the stand the appellants put forward as their defence, in order to find whether it has created a reasonable doubt on the prosecution case, or it has provided a reasonable explanation as to the evidence against the appellants.

It is obvious that the learned trial Judge has looked at the defence case with the understanding that if the defence creates a reasonable doubt on the prosecution case, the benefit of that doubt should be in favour of the appellants and they should stand acquitted of the charges.

As observed correctly by the learned High Court Judge, the appellants have not denied that such a raid took place and they were arrested on the day of the incident. Other than suggesting to the PW-01 that he is lying in Court, the cross examination of the witnesses has not created any material doubt as to the evidence placed before the Court in that regard.

The only discrepancy in relation to the evidence of the PW-01 had been his evidence where he has stated that after the arrest of the 1st appellant, the same money was again given to the 2nd appellant as well, before he was also arrested. However, later in his evidence he has explained this discrepancy stating that the money was given only to the 1st appellant and what he stated previously was a mistake as he could not exactly remember the events due to the passage of time.

As considered rightly by the learned High Court Judge, I do not find a basis to believe that the PW-01 has concocted a false allegation of bribery against the two appellants because of his attempt of making a fraudulent claim was prevented by them.

The evidence led in this action clearly establishes that the PW-01 has not made a false money claim from the hospital authorities. He has duly won a tender to dispose lab discards on the basis of Rs.100/- per container. The evidence of PW-06, who was the then Deputy Director (Finance) of Mahamodara hospital establishes the fact that the PW-01 has been given 650 containers to be disposed

in the transaction relevant to this incident, and he has duly put forward a claim voucher for Rs.65000/- in that regard. However, the evidence of PW-06 discloses that the Director of the hospital has refused to pay the amount due to the PW-01 on a basis different to the agreed terms of the tender, and has allowed only a sum of Rs. 10000/- to be paid.

The said sum has been paid some five months after the arrest of the appellants, which shows that the appellants cannot have any hand in blocking the payment that was due to the PW-01.

It clearly appears that the appellants have developed this stand based on what happened after the raid in relation to the payment due to the PW-01 in an attempt to show that it was because of them the payment was withheld. I find no basis for such a claim.

Another matter raised by the learned Counsel for the appellant was that there are *inter se* contradictions in the evidence of PW-01 as to who solicited the bribe from him in contrary to the charges where it was alleged that it was the 1st appellant. It was pointed out that the PW-01's position had been that it was the 2nd appellant who initially demanded the bribe.

Although PW-01, at one stage of his evidence has stated that it was the 2nd appellant who demanded the bribe, when taken as a whole, his evidence has been to the effect that it was both the appellants acting in connivance who demanded money from him. It is quite probable that both of them being labours attached to the laboratory of the hospital have demanded the money on the basis that it has to be shared among them. I find no reasons to doubt the evidence of the PW-01 on account of that discrepancy in his evidence, or a reason to accept that as a major contradiction in the evidence in that regard.

I am of the view that there is nothing wrong in formulating chargers based on the solicitation and acceptance of the bribe against the 1st appellant and initiating the charges on the basis that the 2nd appellant aided and abated in the

process, as it had been the 1st appellant who has accepted the money from the PW-01 on the day of the incident.

In the case of **State of U.P. Vs. M. K. Anthony, AIR 1985 SC 48**, it was held:

> *"While appreciating the evidence of a witness the approach must be whether the evidence of a witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to tender it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole."*

The learned Counsel for the 2nd appellant contended that the PW-01 has not been consistent in relation to the phone conversations he had with the appellants and therefore, the call details between the PW-01 and the appellants should have been produced as evidence. It was his position that the non-production of such evidence by the prosecution should have been held in favour of the appellants by the learned High Court Judge and the presumption in terms of section 114(f) of the Evidence Ordinance should have been considered.

I am of the view that providing call details was up to the prosecution if the prosecution considered them necessary for their case. The PW-01 has clearly stated under cross-examination that although he had phone conversations with the appellants, he cannot exactly remember with whom he had phone contact on the day of the incident, which is probable, which makes it irrelevant to the prosecution case. Hence, I am unable to agree that the presumption in terms of

section 114(f) should be applicable to the facts and the circumstances of the matter.

The learned Counsel for the 2nd appellant argued that the learned High Court Judge has doubted the evidence of PW-01, but without giving that benefit to the appellants, has proceeded to look for corroboration of the evidence of PW-01. It was argued that this was a clear misdirection on the relevant law.

The above contention of the learned Counsel is based on what was stated at page 17, in paragraph 27.4 of the judgment (page 322 of the appeal brief), where the learned High Court Judge has stated that if only evidence in relation to the raid was that of the PW-01, it would have been unsafe to convict the appellants, but since his evidence has been corroborated by the evidence of other witnesses he finds the evidence as to the raid believable beyond reasonable doubt.

I am unable to agree with the argument of the learned Counsel in this regard. This clearly shows that the learned High Court Judge has not doubted the evidence of the PW-01, but has looked for other evidence, as he should have, in order to determine whether the evidence of PW-01 has been strengthened by other corroborative evidence .

It is trite law that evidence of a case has to be considered in its totality, be it by the prosecution and the defence and come to a finding whether the prosecution has proven the case beyond reasonable doubt, without compartmentalizing the evidence.

In the Privy Council judgement in **Jayasena Vs. Queen 72 NLR 313** it was held:

> *"A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty."*

I do not find merit in the argument that the offence of abatement has not been considered by the learned High Court Judge in the judgment. On the contrary, it is my view that the offence of abatement needs to be considered together with the charges against the 1st appellant and not in its isolation. I find that the learned High Court Judge has considered the abatement in that perspective and has come to a correct finding in that regard.

At this juncture, I would like to cite the judgment in the Indian Supreme Court case of **State of Punjab Vs. Karnail Singh (2003) 11 SCC 271**, as I find it relevant under the facts and the circumstances of the appeal under consideration.

It was held:

> "*Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let hundred guilty escape, than punish an innocent. Letting guilty escape is not doing justice according to law. Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish. Vague hunches cannot take place of judicial evaluation. 'A Judge does not preside over a criminal trial, merely to see that no innocent man is punished. A Judge also presides to see that a guilty man does not escape. Both are public duties.' (Per Viscount Simon in Stirland Vs. Director of Public Prosecution (1944 AC(PC) 315) quoted in State of U.P. Vs. Anil Singh (AIR*

1988 SC 1998). Doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favorite other than truth."

I am of the view that even though there may be mis-statements in the manner the evidence has been evaluated, the learned High Court Judge has evaluated the evidence in accordance with the law, and has come to a correct finding that the prosecution has proven the charges beyond reasonable doubt against the appellants.

It is under the terms of Article 138 of the Constitution; this Court has been granted appellate jurisdiction to hear and determine appeals against judgments and orders of the Courts of first instance. The proviso of Article 138 reads as follows;

> **"Provided that no judgment decree or order of any court shall be reveres or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."**

I find that no prejudice has occurred to the substantial rights of the parties or a failure of justice has occasioned to the appellants due to the alleged defects in the judgment, which needs no disturbance from this Court.

Accordingly, the appeal against the conviction is dismissed for want of merit.

However, I do not find justification in the manner in which the rigorous imprisonment periods of four years each, on each of the four counts under which the appellants were found guilty were ordered to be served.

I am of the view that the imposing a total period of eight years rigorous imprisonment each, on the appellants would not be warranted having considered the facts and the circumstances of the case.

Hence, I set aside that part of the sentence where it has been stated that the sentence of four years each imprisonment imposed on the 1st and the 2nd counts shall be served concurrently to each other, and the sentence on 3rd and the 4th counts shall also be concurrently each other, which means a total period of eight years in relation to the 1st appellant.

Accordingly, I replace the said part of the sentence with an order that the four years each rigorous imprisonment ordered in relation to 1st, 2nd, 3rd, and 4th counts shall be served concurrently to each other. This means the total period of sentence of the 1st appellant should be four years.

Similarly, I set aside the period of sentence that was ordered to be served by the 2nd appellant and order that the rigorous imprisonment period of four years each, ordered in relation to the 5th, 6th, 7th, and 8th counts shall be served concurrently to each other. This means the total period of sentence of the 2nd appellant should be four years.

The fines imposed on the appellants and the default sentences, as well as the amount ordered to be paid in terms of section 26 of the Bribery Act, and the default sentence shall remain the same.

The appeal against the sentence is varied to the above extent.

Since the appellants are on bail pending appeal, I direct that the varied sentences should take effect from the date this judgment is communicated to the appellants by the learned High Court Judge of Colombo.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal