

**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 and 365 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal

Application No:

CA (PHC) APN 0069/23

The Director General

Commissioner to Investigate Allegations of
Bribery and Corruption,
Malalasekera Mawatha, Colombo-07.

High Court of Colombo

No.HCB/95/21

Complainant

Vs.

Sivapadham Sadhananthan
No. 198/A, Hospital Road,
Batticaloa.

Accused

AND NOW BETEEN

The Director General

Commissioner to Investigate Allegation of
Bribery and Corruption,

No. 36, Malalasekera Mawatha,

Colombo-07.

Complainant-Petitioner

Vs.

Sivapadham Sadhananthan

No. 198/A, Hospital Road,

Batticaloa.

Accused-Respondent

BEFORE : **Sampath B. Abayakoon, J.**

P. Kumararatnam, J.

COUNSEL : **Anusha Sammandapperuma, Assistant
Director Legal for the Petitioner.
Saliya Pieris, PC for the Respondent.**

ARGUED ON : **07/11/2023.**

DECIDED ON : **22/03/2024.**

JUDGMENT

P. Kumararatnam, J.

The Accused-Respondent (Hereinafter referred to as the Respondent) was indicted in the High Court of Colombo for solicitation and acceptance of money as a gratification at various occasions from a person called Nagalingam Thangamma the virtual complainant, to perform his duty which is an offence punishable under Section 19(b) 19 (c) of the Bribery Act No. 11 of 1954 as amended.

According to the Complainant-Petitioner (Hereinafter referred to as the Petitioner) the offences with which the Respondent was charged were framed sequel to a Criminal Investigation conducted by the Commission to Investigate Allegations of Bribery or Corruption (Hereinafter referred to as CIABOC). The Information which prompted an investigation was received on 03.04.2018 and the Commission approved an Authorized Investigation Officer to conduct a criminal investigation against the Respondent.

The Investigation Officer having satisfied the statement recorded from the complainant, conducted a raid on 05.04.2018 and arrested the Respondent while he was accepting a sum of Rs. 5,000/- from the complainant. Upon consideration of the investigation notes pertains to this raid, the Petitioner had been directed on 25.02.2021 to institute criminal proceedings against the Respondent in the High Court, in terms of Section 11 of the CIABOC Act. The indictment styled HCB 95/2021 in the High Court of Colombo contained 12 charges.

As the Counsel for the defence informed Court that they were going to take a preliminary objection, the Learned High Court Judge fixed the

matter to be called on 10.03.2022. The indictment was not served on the Respondent on 10.03.2022, the Learned High Court Judge directed the defence Counsel to file their preliminary objection in writing. Hence, the matter fixed to be called on 03.06.2022.

The defence, placed their preliminary objection on the premise that, the all Commissioners of the CIABOC had not given directive to the Director General to proceed with the criminal investigation which caused the institution of criminal proceedings in this matter.

The defence, having referred to **Anoma Polwatta v The Commission to Investigate Allegation of Bribery and Corruption SC/Writ Application No. 01/2011** contended that the indictment premised upon the said investigation is *void in abinitio* and urged the learned trial judge to dismiss the indictment.

In reply to the preliminary objection raised, the Petitioner submitted to Court that there is no single provision in the Bribery Act or CIABOC Act or any judicial pronouncement which made it mandatory for all three commissioners to give a directive to commence a criminal investigation.

Upholding the preliminary objection raised by the Respondent, the Learned High Court had dismissed the indictment discharging the Respondent.

The Petitioner had submitted following grounds and invoke the extraordinary jurisdiction of this Court.

- i. The order dated 21.10.2022 is contrary to law.
- ii. The said order is infested with illegality since learned High Court Judge has entailed sanctioning of criminal investigation by all three commissioners on a prerequisite to the institution of Criminal proceedings in the High Court which is not known to the Law.

- iii. The learned Trial Judge erred in law by failing to consider that in terms of Section 2(8) of the CIABOC Act No. 19 of 1994, 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.
- iv. The learned Trail Judge erred in law in failing to consider that the decided case of *Anoma Polwatte Vs. Jayawickrama and others* SC/Writ/1/2011 was a judgment of the Supreme Court pursuant to a writ application challenging the institution of an action under Section 78 (1) of the Bribery Act No. 11 of 1954 and that the Respondent was not entitled to challenge a decision of the Commission without resorting to the proper remedy granted in terms of Section 24 (1) of the CIABOC Act No. 19 of 1994.
- v. The learned Trail Judge erred in law by failing to consider that the investigation and the institution of proceedings constitutes a “Power” of the Commission in terms of Section 16 (3) of the CIABOC Act No. 19 of 1994.
- vi. The learned Trail Judge has misconceived in law in holding that “the directive” of the Commission is required under Sec. 3 of CIABOC Act, not only to institute the proceedings but also to investigate the allegations, contained in communication made under Sec. 4 of CIABOC Act.

- vii. The said order is clearly in error as the learned trial Judge misdirected himself in considering the ***ratio decidendi*** in ***Anoma Polwatta Vs the Commission to Investigate Allegation of Bribery and Corruption SC/Writ Application No. 1/2011*** applicable to institution of proceeding and the investigation.
- viii. The learned trial judge misconceived in law in holding that section 78 (1) of Bribery Act is applicable to institution of proceedings before the High Court.
- ix. The learned Trial Judge erred in law by failing to consider the judicial pronouncement of the Court of Appeal in *CA/PHC/APN/2/2021* decided on 01/11/2021 wherein the Court of Appeal recognized the distinction between a criminal proceeding instituted before High Court in terms of Section 11 and 12 of the CIABOC Act No. 19 of 1994 *vis a vis* a criminal proceeding instituted in terms of Section 78 (1) of Bribery Act No. 11 of 1954 in the Magistrates' Court and upheld the position that, the decided case of *Anoma Polwatte Vs. Jayawickrama and others SC/Writ/1/2011* has no application for institution of criminal proceedings before High Court.
- Criminal proceeding instituted before High Court in terms of Section 11 and 12 of the CIABOC Act No. 19 of 1994.
 - Criminal proceeding instituted before Magistrates Court in terms of Section 78 (1) of Bribery Act No. 11 of 1954.
- x. The Learned Trial judge has erroneously determined that, the Supreme Court Judgement *Anoma Polwatte Vs. Jayawickrama and others [SC/Writ/1/2011]* should be considered since it has been pronounced by the Supreme Court, and the Judgement *CA/PHC/APN/2/2021* should be disregarded just because it has been pronounced by the Court of Appeal.

- xi. The learned trial judge has erroneously determined that the criminal investigation conducted by the Commission in this matter is contrary to law.
- xii. The learned Trial judge has misconceived in law in holding that, that, the Supreme Court Case *Anoma Polwatte Vs. Jayawickrama and others [SC/Writ/1/2011]* was also decided regarding Section 78 (1) of Bribery Act and erred in law by failing to consider that, in the case of *Anoma Polwatte Vs. Jayawickrama and others [SC/Writ/1/2011]*, their Lordship had not made any observation on Section 78 of the Bribery Act.
- xiii. The Court of Appeal erred in Law in failing to consider and applicability of section 114 (D) of the Evidence Ordinance to the instant case.
- xiv. The Learned Trial Judge has errored in law in failing to give valid reasons of the order dated 21st October, 2022.
- xv. The said order is contrary to the legal maxim of *Ut res magis valeat quam pereat* as in invalidated the purpose of the existing laws on Bribery and Corruption rather than giving some effect.

The defence, in the High Court, placed their preliminary objection on the premise that, all the Commissioners of the CIABOC had not given directive to the Director General to proceed with the criminal investigation which caused the institution of criminal proceedings in this matter.

Section 2(8) of the CIABOC Act No. 19 of 1994 states:

“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.”

In this case, as admitted by the Counsel for the Petitioner, all three Commissioners had not signed the order to investigate the complaint against the Respondent. According to Section 2(8) CIABOC Act, no such expressed provision mentioned in the Act. Hence, the Counsel for the Petitioner argues that all three Commissioners need not be signed in order.

In this case since the Director General of the Commission has filed the indictment in the High Court of Colombo based in the directive given to him by the Commission in terms of Section 11 of the Act. The requirements that should be fulfilled by CIABOC when forwarding an indictment before the High Court is identified under Section 12(1) and (2) of the CIABOC Act which reads as follows:

Section 12(1):

Where proceedings are instituted in a High Court, in pursuance of a direction made by the Commission under Section 11 by an indictment signed by the Director General, such High Court shall receive such indictment and shall have jurisdiction to try the offence described in all respects as if such indictment were an indictment presented by the Attorney General to such Court.

Section 12(2):

There shall be annexed to every such indictment, in addition to the documents which are required by the Code of Criminal Procedure Act, No.15 of 1979, to be annexed thereto, a copy of the statements, if any, before the Commission, by the accused and by every person intended to be called as a witness by the prosecution.

Apart from questioning the requirements under Section 12(1) and (2) of the CIABOC Act, the High Court has no power to question the validity of the indictment. Any such challenge can be possible only before the Supreme Court, in terms of Section 24 of the Act.

In **Indikatiya Hewage Kusumadasa Mahanama and Another v. The Commission to Investigate Allegations of Bribery or Corruption and Another** SC TAB 1A and 1B/2000, decided on 11.01.2023, the Supreme Court held that:

*“ In the circumstances it is clear that, the Supreme Court when deciding **Anoma S.Polwatte v. Director General Commission to Investigate Allegation of Bribery and Corruption** (supra) had never intended to impose an additional requirement to submit a written directive when filing charges before Court, and therefore this Court is not inclined to impose an additional requirement other than the provisions already identified....”*

His Lordship further said that:

“As 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 provisions already identified under Sections 12(I) and (II) 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 in Section 12 (I) and (II) of the CIABOC Act. In the absence of any complaint, that the Director General CIABOC had failed to comply with Sections 12(I) and (II) 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 Sections 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 could only be raised in an appropriate action filed before an appropriate forum.”

Considering the Supreme Court Judgment cited above, and the Section 2(8) of the Bribery Act, written sanction requirement is unnecessary and only cause an additional requirement which certainly obstruct or delay the smooth function of the Bribery Act. This Court satisfies that the Bribery Commission had given required directions to institute proceeding in the High Court of Colombo against the Respondent.

As the Petitioner had established sufficient exceptional grounds before this court, this Court exercising the discretionary remedy of revision, set aside the order dated 21/10/2022 of the Learned High Court Judge of Colombo.

The Learned High Court Judge is hereby directed to revert the case back to the case role of the Court and issue notice to the Respondent, and commence the trial and conclude the same expeditiously.

Therefore, the revision is allowed.

The Registrar of this Court is directed to send this Judgment to the High Court of Colombo for necessary action forthwith.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL