

**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.

Court of Appeal	The Director General
Application No:	Commissioner to Investigate Allegations of
CA /PHC/ APN 0133/23	Bribery and Corruption, Malalasekera Mawatha, Colombo-07.

High Court of Colombo
No.HCB/143/2022

Complainant

Vs.

1. Hewa Gunaratne Bashvara Senaka alias
Bashvara Senaka Gunaratne
No. 6/4, Vidyala Road, Templers Road,
Mount Lavinia.
2. Mohamed Jauffer Irshad Rummy alias Rummy
Jauffer
No. 37/2, Attidiya Road, Kawdana,
Dehiwala.

Accused

AND NOW BETEEN

Mohamed Jauffer Irshad Rummy alias Rummy
Jauffer

No. 37/2, Attidiya Road, Kawdana,
Dehiwala.

Presently at:

No.35, Dharmapala Mawatha,
Mount Lavinia.

Accused-Petitioner

Vs.

1. The Director General
Commissioner to Investigate Allegation of
Bribery and Corruption,
No. 36, Malalasekera Mawatha,
Colombo-07.
2. Hewa Gunaratne Bashvara Senaka alias
Bashvara Senaka Gunaratne
No. 6/4, Vidyala Road, Templers Road,
Mount Lavinia.

Respondents

BEFORE

: Sampath B. Abayakoon, J.

P. Kumararatnam, J.

COUNSEL : **Kalinga Indatissa, PC, with Neranjan Iriyagolla, Rashmini Indatissa, Razana Salih, Gardiniya Jayasundara and Ajith Wickramasingh for the Petitioner.**

Dilan Ratnayake, ASG, PC, with A. Jayasinghe, ADG, for the 1st Respondent.

Rienzie Arsekularatne, PC with Udara Muhandiramge, Thilina Punchihewa, Punsigamage and Himasha Silva for the 2nd Respondent.

ARGUED ON : **05/06/2024.**

DECIDED ON : **06/09/2024.**

JUDGMENT

P. Kumararatnam, J.

The Accused-Petitioner (Hereinafter referred to as the Petitioner) was indicted in the High Court of Colombo along with the 2nd Respondent for committing conspiracy and three counts of aiding and abetting the 2nd Respondent under Section 70 the Bribery Act No. 11 of 1954 as amended. The Petitioner was named as the 2nd Accused and the 2nd Respondent was named as the 1st Accused in High Court of Colombo case No. 143/2022.

According to the Petitioner, the offences with which he and the 2nd Respondent were framed sequel to a Criminal Investigation conducted by the Commission to Investigate Allegations of Bribery or Corruption (Hereinafter referred to as CIABOC).

When the indictment was served, the Petitioner pleaded not guilty to the charges. When the matter was taken up on 1st September 2023 the Petitioner and the 2nd Respondent had jointly raised a preliminary objection regarding the maintainability of the indictment.

The preliminary objections raised are as follows:

- i. That the provisions of Bribery (Amendment) Act No. 22 of 2018 do not have retrospective effect and that therefore, the CIABOC cannot commence a prosecution in the High Court for an offence under section 70 of the Bribery Act for an offence committed prior to enactment of the amendment as per section 6(3) of the Interpretation Ordinance,
- ii. That a plain reading of sections 3 and 4 of the CIABOC Act together with judicial reasoning demonstrate that conduction investigation is a function of the Commission and that therefore, such function can only be exercised by the full complement of the Commission requiring a valid directive/determination by all 3 members of the Commission and the absence of such a valid direction makes the investigation in the present case *ultra vires* and attracts the ground of illegality that goes to the root of the case,
- iii. That the Petitioner does not fall under the definition of a 'public servant' nor is the Sri Lanka Tourism Promotion Bureau a 'scheduled institution' as per the definitions in section 90 of the Bribery Act and therefore, the Petitioner does not fall within ambit of the Bribery Act and the 1st Respondent could not have filed the indictment against the Petitioner.

It is noteworthy to mention that the preliminary objections raised by the Petitioner and the 2nd Respondent in the High Court of Colombo were related to jurisdiction of the Court.

At the hearing of this application both the Learned President's Counsel for the Petitioner as well as the 2nd Respondent informed the Court that they will not peruse the 2nd preliminary objection raised by them.

Rejecting the preliminary objection raised by the Petitioner, the Learned High Court Judge delivered his order on 27.09.2023 on the following grounds:

- i. That the indictment once submitted to a High Court, is deemed to be a valid indictment notwithstanding any issue and all legal conditions are deemed to have been satisfied,
- ii. The validity of an indictment once presented to Court cannot be questioned,
- iii. That the High Court cannot reject an indictment in the 1st instance,
- iv. That the legal position would be the same even in respect of indictments forwarded by the Director General of Bribery consequent to a direction given by the CIABOC.

The Learned High Court Judge of Colombo without addressing the preliminary objections raised separately, stressing the importance of the prosecutorial discretion of the prosecution and the legality of the indictment forwarded to the High Court, dismissed the preliminary objections. At this juncture it is very important to note that neither the Petitioner nor the 2nd Respondent raised concerns regarding the validity of the indictment as one of their Preliminary Objections.

Section 39 of the Judicature Act states:

Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled to object to the

jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter:

Provided that where it shall appear in the course of the proceedings that the action, proceeding or matter was brought in a court having no jurisdiction intentionally and with previous knowledge of the want of jurisdiction of such court, the Judge shall be entitled at his discretion to refuse to proceed further with the same, and to declare the proceedings null and void.

The Petitioner submits that non consideration of the preliminary objections with regards to patent lack of jurisdiction raised by them, constitute “exceptional Circumstances” which warrant the exercise of revisionary jurisdiction of this Court under Article 138 of the Constitution the Democratic Socialist Republic of Sri Lanka.

The decision whether to or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interest of the affected party, the accused, and the community at large to ensure that the right decision is made. Both the President’s Counsels informed this Court that neither of them had ever raised question regarding the legality of the indictment as they are fully aware that the High Court is not the forum to raise concerns regarding the legality of the indictment.

Our Courts have repeatedly held that the revisionary power of Courts is an extraordinary power and that the Courts must exercise it only in exceptional circumstances. Exceptional circumstances are not defined in the statute. Hence, what is exceptional circumstances must be considered on its own facts and circumstances on a case by case.

In **Ramu Thamodarampillai v. The Attorney General [2004] 3 SLR 180** the court held that:

“the decision must in each case depend on its own peculiar facts and circumstances”.

In this case, as the Learned High Court Judge had failed to address the preliminary objections raised by the Petitioner and the 2nd Respondent in the High Court of Colombo. Therefore, this Court direct the Learned High Court Judge of Colombo to consider the 1st and 3rd preliminary objections raised by the Petitioner and the 2nd Respondent before the commencement of the main trial.

Both the Petitioner and the 2nd Respondent had withdrawn the 2nd ground of preliminary objection. As the Petitioner had established sufficient exceptional grounds before this court, the revision application is allowed.

The Learned High Court Judge is hereby directed to consider the 1st and 3rd grounds of preliminary objections expeditiously, and pronounce an order in that regard with clear reasoning.

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

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL