

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

In the matter of a Revision in terms of Article
138 of the Constitution read with the High
Court of the Provinces (Special Provisions)
Act, No 19 of 1990 (as amended).

The Commission to Investigate Allegations
of Bribery or Corruption,

No. 36, Malalasekera Mawatha,

Colombo 07, Sri Lanka.

Court of Appeal Case No:

CA – CA/PHC/APN

CPA – 0037-20

HC Colombo Case No:

HCB 25/2017

Complainant

Vs.

1. Palitha Piyasiri Fernanado
6/6, Suramya Mawatha, Maharagama

2. Yapa Hetti Pathirananahalage
Nissanka Yapa Senadhipathi
No. 160/60. Ekamuthu Mawatha,
Thalawathugoda.

Accused

AND NOW BETWEEN

1. Palitha Piyasiri Fernanado
6/6, Suramya Mawatha, Maharagama
2. Yapa Hetti Pathirananahalage
Nissanka Yapa Senadhipathi
No. 160/60. Ekamuthu Mawatha,
Thalawathugoda.

Accused-Petitioners

Vs.

1. Mr. Kanishka Wijeratne
Director General of the Commission
to Investigate Allegations of Bribery
or Corruption
No.36, Malalsekera Mawatha,
Colombo 07
2. Mr. Sarath Jayamanne PC
Attorney General's Department
Hulftsdorp St
Colombo 12
3. Justice T.B.Weerasooriya
Chairman
Commission to Investigate
Allegations of Bribery or Corruption
No.36, Malalsekera Mawatha,
Colombo 07

4. Justice Ranjith Silva
Member
Commission to Investigate
Allegations of Bribery or Corruption
No.36, Malalsekera Mawatha,
Colombo 07
5. Mr. Neville Guruge
Member
Commission to Investigate
Allegations of Bribery or Corruption
No.36, Malalsekera Mawatha,
Colombo 07
6. The Attorney General
Attorney General's Department
Colombo 12.

Complainant - Respondents

BEFORE : K. K. Wickremasinghe, J.
Devika Abeyratne J.

COUNSEL : Eraj de Silva, AAL with Manjula Fernandopulle,
AAL, Niran Ankitell, AAL and Harith
Hettiarachchi, AAL for the Accused – Petitioners

Thusith Mudalige DSG with Thushari Dayaratne,
SC for Respondents

SUBMISSIONS MADE ON : 08.07.2020 and 17.07.2020

DECIDED ON : 31.07.2020

K.K.WICKREMASINGHE, J.

The Learned Counsel for the Accused – Petitioners (hereinafter referred as the ‘Petitioners’) made submissions in order to issue formal notice to the Respondents purely on a question of Law, on an order dated 11.03. 2020 made by the Provincial High Court of the Western Province, Holden in Colombo dated 11.03.2020. Having heard the submissions of the Learned Counsel for the Petitioners and Learned Deputy Solicitor General for the Respondents, the analysis is made as follows;

The 2nd Respondent, the former Director General of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred as the “Respondent”), has instituted proceedings before the High Court of Colombo by way of an indictment, alleging commission of several offences by the 1st and the 2nd Accused Petitioners under the Bribery Act (as amended). The indictment consisted of 47 charges against the said Accused Petitioners including the charges of soliciting and accepting gratification. The Learned Counsel for the Petitioners submitted to Court that the 1st Petitioner was holding the office as the Millitary Liason Officer to the Ministry of Defence of Sri Lanka and the 2nd Accused Petitioner was holding the officer as the Chairman of the Avant Garde Maritime Services (Pvt) Ltd.

Upon service of notice by the High Court of Colombo, both Petitioners appeared before the Learned High Court Judge and the indictment was read over to the Petitioners to which the Petitioners pleaded not guilty to each and every charge separately and the matter was fixed for the trial by the Learned High Court Judge.

On or about 14.11.2019, the Counsel for the Petitioner raised a preliminary objection in open Court that the purported indictment was not based on a valid direction by the Commissioners to institute

proceedings in the High Court, where the Learned High Court Judge has rejected the preliminary objection by his order dated 11.03.2020. Being aggrieved by the aforesaid order, the Petitioners filed the instant revision application to set aside the impugned order.

I. Grounds of the Application

The Petitioners sought to issue formal notice to the Respondents where the Petitioners have stated 19 exceptional grounds in their Revision Application. However in order to issue notice, this Court wishes to consider the most vital grounds listed as follows;

- a. The said order of the Learned High Court Judge has not considered the objection raised by the defence.
- b. The High Court of Colombo has no jurisdiction to try and determine this case.
- c. The said order of the Learned High Court Judge has failed to apply *ratio decidendi* of the ***Anoma Polwatta v Jayawickrema*** case, **SC Writ Application No.01/2011**.
- d. The said order of the Learned High Court Judge is a nullity. Hence it depends on an illegal indictment without a valid direction from the Commission to Investigate Allegations of Bribery or Corruption.
- e. The position that criminal proceedings cannot be instituted or continued against a person based on strength of a nullity.

II. Legal Analysis

- a. The Counsel for the Petitioner argued that the Learned High Court Judge of Colombo has failed to address the objection raised as to the Jurisdiction of the Court to determine the case.

Having considered the submissions of the parties in support of their respective positions, this court would first analyse the primary contention which is the Jurisdiction of the Court. In order to consider above, I wish to draw my attention to the Section 11 and Section 12 of the CIABOC Act No. 19 of 1994. Section 11 which is the basis for the above objection reads as follows;

"Where the material received by the Commission in the course of an investigation conducted by it under this Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the Commission shall direct the Director-General to institute criminal proceedings against such person in the appropriate court and the Director-General shall institute proceedings accordingly:

Provided however that where the material received by the Commission in the course of an investigation conducted by it discloses an offence under Part II of the Bribery Act and consisting of soliciting, accepting or offering, by any person, of a gratification which or the value of which does not exceed two thousand rupees, the Commission shall direct the institution of proceedings against such person before the Magistrate's Court and where such material discloses an offence under that Part and consisting of soliciting, accepting, or offering, by any person of any gratification which or the value of which exceeds two thousand rupees, the Commission shall direct the institution of proceedings against such person in the High Court by indictment".

Section 11 of the Act clearly stipulates that, upon investigation and finding of evidence, the commission shall direct the Director General of the Bribery Commission to institute proceedings in the appropriate Court depending on the monetary limitations as provided in the Act.

Section 12 of the Act vests the power to file indictment by the Director General of the Bribery Commission. Section 12(1) of the CIABOC Act reads as follows;

*“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 such indictment in all respects as if such indictment were an indictment presented by the Attorney-General to such court.”*

Section 12 makes it mandatory for the Director General to act upon the direction of the Commission when proceedings are being instituted in a High Court. In the instant case the Counsel for the Accused-Petitioners stated that, the decision of the Learned High Court Judge of Colombo has overruled the objection without considering the legal requirement in the Act.

- b. The Learned Counsel for the Petitioners contended that the said order of the Learned High Court Judge has failed to apply the *ratio decidendi* of the **Anoma Polwatta v Jayawickrema** case (SC Writ Application No.01/2011) and the High Court of Colombo has no jurisdiction to try and determine the case hence it depends on an illegal indictment which is based on an invalid direction from the Commission.

The Supreme Court of Sri Lanka in exercising its highest and final judicial instance decided the **Anoma Polwatta v Jayawickrema** case (*supra*) and established a legal principle associating with Section 11 of the Act. The Supreme Court in its analysis made it clear that, nevertheless the Act does not make an express provision as to how the directive should be made but it is a mandatory requirement on the part of the Commission to direct the Director General to institute proceedings.

Moreover in the Supreme Court case of **Kesara Senanayake V. Attorney General and Another**, [2010] 1 S.L.R 149, held that even if the material facts of the case was different to the case in hand, Hon. Shirani Bandaranayake, J made it crystal clear that a valid direction from the Commission is mandatory in order to initiate proceedings by the Director General of the Bribery Commission.

In light of the above discussed position, my attention is drawn to two important submissions made by the Learned State Counsel for the Prosecution. At the stage of the trial the Learned State Counsel in his submissions at Pg. 484 of the brief has referred to “උපදෙස්” and not “විධානය”.

In addition to the above mentioned grounds we have considered the following grounds which was placed before this Court. They are;

1. That there was no transparency.
2. That Counsel for the Respondents had misused the word advice instead of using directive at the submissions made to the High Court.
3. The Learned High Court Judge had misapplied the provisions of Section 114 of the Evidence Ordinance.
4. The Learned High Court Judge was erred in Law by holding that direction in terms of Section 11 of the Act is a mere administrative rule.
5. No certificate was submitted along with the indictment like in other cases.

Further, it is observed by this Court that the documents pertaining to the direction was shown only to the Learned High Court Judge and not the Petitioners. I don't think it is necessary to discuss the aforesaid five grounds in detail at this preliminary stage of issuing notice.

In light of the above analysis, I am of the opinion that the Petitioners have established a prima facie exceptional circumstances for this Court to issue notice.

Accordingly this Court issue notice to Respondents and stay further proceedings of the above mentioned case No. HCB 25/2017 as prayed for in prayer (a) and (b) of the prayer of the petition.

JUDGE OF THE COURT OF APPEAL

Devika Abeyratne J.

I agree,

JUDGE OF THE COURT OF APPEAL