

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

An Appeal under Section 320 of the
Code of Criminal Procedure Act
No.15/1979 against the judgment
and sentence pronounced in the
High Court of Colombo in case No.
B1432/03.

C.A.No.329/2012

H.C. Colombo No.B1432/2003

K. Piyadasa De Silva

Accused-Appellant

Vs.

Director General of the Commission
to Investigate Allegations of Bribery
or Corruption

Complainant-Respondent

BEFORE : DEEPALI WIJESUNDERA, J.
ACHALA WENGAPPULI J.

COUNSEL : Dulindra Weerasuriya P.C. with Kanishka Gunawardena for the Accused-Appellant.
Wasantha Perera S.S.C. for the respondent

ARGUED ON : 05th October 2018

DECIDED ON : 11th January, 2019

ACHALA WENGAPPULI J.

The Accused Appellant (hereinafter referred to as the "Appellant") was indicted under Section 23A(3) of the Bribery Act for being the owner of the properties and money that are described in the two schedules to the indictment which are deemed under subsection (1) of the said Section to be property and money which he has or had acquired by bribery or to which he has or had converted any property acquired by him upon bribery".

The case presented by the prosecution was that the Appellant's total known income during the time period specified in the indictment including his salary was Rs.781,619.22 whereas his acquisition of several properties and cost of construction during the same period amounted to Rs.1,114,923.50 and therefore he had exceeded his known income in

acquiring property to the value of Rs. 333,304.28, which deemed to have acquired through bribery.

The Appellant was a technical officer attached to Paddy Marketing Board during the time period specified in the indictment i.e. 11th January 1991 and 31st December 1992.

The schedule A refers to following five instances of acquisitions of property and incurring expenses;

- a. acquisition of a land in *Weligampitiya* for the value of Rs.77,250.00 on 12th August 1992,
- b. acquisition of a land in *Delduwa, Kalutara* for the value of Rs.51,500.00 on 12th August 1992,
- c. acquisition of a land in *Waththalpola, Panadura* for the value of Rs.20,600.00 on 3rd December 1992,
- d. cost of construction at premises bearing No. 135/3, Galle Road, *Walana, Panadura* to the value of Rs. 70,000.00 during the time specified in the indictment,
- e. acquisition of the vehicle bearing registration No. 32 Sri 3589 for the value of Rs. 445,000.00 on 18th October 1991.

Schedule B of the indictment refers to the amounts of money lying in credit of the several bank accounts maintained by the Appellant including a fixed deposit account, the amounts that had been paid to banks as interest and overseas travel expenses totalling Rs. 450,573.50.

After trial, the Appellant was convicted by the High Court as charged. He was thereafter imposed a term of imprisonment of one year, suspended for a period of five years. He was imposed a fine of Rs.5000.00 and in addition a further sum of Rs. 300,000.00 was also imposed as a fine under Section 26A of the Bribery Act.

Being aggrieved by the said conviction and sentence, learned President's Counsel for the Appellant sought to challenge its validity on the basis that the trial Court has fallen into error when it shifted the burden of proof on the Appellant when in fact the prosecution had failed to establish "basic facts" of value of property that had been acquired during the period and his known income beyond reasonable doubt.

Learned President's Counsel contended that this failure to establish the basic facts was a result of the failure of the prosecuting authorities to conduct proper investigation on the claim of the Appellant that the amount he had spent over and above his known income was in fact adequately explained in his show cause to the Commission. It is submitted by the Appellant that in his show cause to the Commission he had declared the receipt of Rs. 350, 000.00 by way of "gift" and a "loan" received from his younger sister who was employed overseas as a medical practitioner.

Learned President's Counsel invited our attention to the segment of the evidence of the investigating officer where he had admitted in cross examination that the Appellant may have received this payment from his sister as he claimed. In support of the ground of appeal, learned President's Counsel further contended that there was an affidavit by the sister of the Appellant confirming the giving of Rs. 350,000.00 and she offered evidence during trial confirming this fact.

In spite of this evidence, the trial Court in its judgement observed that “ එකී කරුණ අධිකරණය ඉදිරියේ පිලිගත හැකි සාක්ෂියක් ලෙස ඔරු කිරීම විනිශ්චය කළ කාර්ය තායක ” and had thereby shifted the burden on the Appellant to prove the reception of additional funding whereas the law envisages the prosecution to prove its case beyond reasonable doubt. It is contended by the learned Counsel that only when the prosecution has proved its case beyond reasonable doubt, the Appellant is expected to satisfy Court on a balance of probability of his explanation on the acquisition of property over his known income. Learned President's Counsel has placed heavy reliance on the reasoning of the judgment of this Court in *Kakulandara v Director General of the Commission to investigate allegations of Bribery and Corruption* (2006) 3 Sri L.R. 90 in support of his contention.

In his reply, learned Senior State Counsel for the Respondent submitted that there is no dispute by the Appellant to the value of the acquired property but he contests the total value of known income. He further contended that there were two opportunities that were made

available to the Appellant to explain the acquisition of properties over his known income and the source of that extra funding. In his statement to the Commission he gave no specific time period during which this additional amount was received from his sister. In his show cause, the Appellant has only disclosed the period which he failed to do in his statement.

In view of the ground of appeal as raised by the Appellant, it is clear that his grievance was founded upon the rejection of his and sister's evidence by the trial Court in relation to reception of Rs. 350,000.00 during the relevant time. If that evidence is accepted by the trial Court, then he had sufficiently explained the overspending and thereby effectively negating the allegation of bribery. The contention of the Appellant is that the failure of the prosecution to establish this "basic fact" made them disqualify for the advantage of the deeming provision contained in Section 23A.

Therefore, it is incumbent upon this Court to consider the evidence presented before the trial Court on this limited aspect, in order to fully appreciate the ground of appeal relied upon by the Appellant.

Competent Officer *David Singho* in his cross examination stated that after the Appellant's declaration of his source of funding a request for information was sent to Appellant's sister who was residing in the United Kingdom at the time regarding certain payments and in her reply, it was admitted that she had given a "loan" of Rs. 200,000.00 and another Rs. 150,000 as a "gift" for the construction of his house. She had tendered an affidavit affirming this position at a subsequent stage of the investigation.

Then the witness admitted in further cross examination that the Appellant's sister may or may not have given that amount of money to the Appellant. When the witness was confronted with the position that the Commission had no material to discredit this assertion, the witness, having admitted there was no such evidence, replied that it is the Commission that evaluates the acceptance of such claims and not him.

In re-examination the witness clarified that the Appellant in his affidavit to the Commission asserted that he had received a "loan" of Rs. 200,000.00 from his sister during 1989 and 1992.

The Appellant in his examination in chief claimed that his acquisitions had exceeded his income by Rs. 361,434.16 and further asserted that his sister's admission of giving Rs. 350,000.00 to him had not been investigated into by the Commission. She had given Rs. 150,000.00 as a gift and another Rs. 200,000.00 as a loan. This was due to his brotherly act of supporting his sister during her student days financially and otherwise.

During the cross examination the Appellant admitted that he only contests that the exclusions of Rs. 350,000.00 received from his sister, Rs 75,000.00 from one *Dharshanee Gunawardena* and reassessment of income tax of his wife by the Inland Revenue Department.

He claimed in his evidence that he had received Rs. 200,000.00 loan in the latter part of 1991. He stated in his affidavit to the Commission that he received only Rs. 250,000.00 from his sister although he now claims that

she gave Rs. 350,000.00 in total. The Appellant admitted that the said loan of Rs. 200,000.00 was received at their residence and was utilised by his wife as an investment in her business of building materials and also in the construction of their house. He then said that it was his wife who requested this amount from his sister.

He further claimed that a "gift" of Rs. 150,000.00 was also received by his wife from his sister just prior to the latter's departure to United Kingdom in mid 1992.

Appellant's sister *Shyamalie Merlin* in her evidence however limited her brother's assistance to her during her student days only to find her a boarding place. She claimed that she was awarded a scholarship and had obtained a bank loan to support her studies and therefore did not depend on anyone for financial assistance. According to her, the Appellant informed her that he needed some money to construct his house on 6th October 1991. After two weeks she handed him over Rs. 200,000.00 and indicated that it is a "loan". After a period of six months she gifted him Rs. 150,000.00 on account of her inability to be present for the house warming of her brother since she was about to leave the island for her postgraduate studies.

It was elicited during her cross examination that she has no records of her bank accounts. In addition, she claimed it was her husband who

attended to all her banking requirements and only through him that she obtained cash to be handed over to the Appellant. She denied when it was suggested to her that she makes this false claim to save her brother.

The ground of appeal of the Appellant raised before this Court should be considered against this evidentiary background for assessment of its merits.

A three-member bench of the then Supreme Court, in its judgment in *Wanigasekera v Republic of Sri Lanka* 79 (I) NLR 241 has held that;

"... the 'basic fact' required to be proved in a prosecution under section 23A of the Bribery Act is that the accused acquired property which cannot or could not have been acquired with any part of his sources of income or receipts known to the prosecution after investigation..."

The requirement of conducting a proper investigation by the prosecuting authorities in order to ascertain known income of the Appellant was reiterated by this Court in *Kakulandara v Director General, CIABOC* (2006) 3 Sri L.R. 90 as it is stated that:-

"The burden lies with the prosecution to prove that the charges were filed only after a thorough investigation of the known income of the accused. If this was challenged the prosecution should satisfy

court that such an investigation was done. If persons are brought before court without such investigation, the prosecution would in effect be expecting the defence to prove the innocence of the accused. The prosecution must prove its case without leaving part of the evidence to be provided by the accused."

Their Lordships have further observed that;

"When the Commission became aware that the accused had received some payments from another source during the relevant period, there arose a duty on the part of the Commission to find out those amounts before concluding that the accused had taken bribes."

It is already noted that the Appellant's contention is that there was no investigation into his claim of the funds received from his sister by the prosecuting authorities.

The trial Court, in dealing with this contention in the impugned judgment, has held that there was no investigation carried out by the Commission on this aspect whilst observing that there is no factor that supports the Appellant's claim of his sister's monetary contribution either. The trial Court was mindful of the investigating officer's evidence that the sister may or may not have provided some financial assistance.

Since the Appellant conceded the evidence placed before the trial Court by the prosecution as to his acquisitions and spending as per the schedules annexed to the indictment by narrowing down the factual contest only to three instances of monetary transaction which should have been included in his "known income", the trial Court had focused its attention to primarily on the claim of the Appellant that he received Rs. 350,000.00 from his sister.

It is evident from the material available before the trial Court that the Appellant, when he was under investigation, claimed that he did receive financial assistance from his sister. The Commission had then verified this claim of the Appellant from his sister. They contacted witness *Shyamalie Merlin* in her overseas address and sought her confirmation of the transactions the Appellant claimed to have taken place between them. She replied to the Commission confirming the claim of the Appellant and had further tendered an affidavit supplementing the contents of her reply to the Commission.

As noted by this Court; in relation to her evidence before the trial Court, the two instances where she parted with some money firstly as a loan and secondly as a gift, was by handing them personally over to the recipient. There is a serious inconsistency among the evidence of the Appellant and his sister as to who in fact received money on those two occasions. Appellant claims that it was his wife who sought financial assistance and it was she who did receive the money from his sister.

Witness *Shyamalie* of course asserts that it was the Appellant who sought her assistance and she handed over the loan and gift money to her brother.

The same position is evident from the answers given by the Appellant and his sister to the questionnaire presented to them by the Commission during investigations. They only provided some sketchy details of these transactions bereft of any vital information to the Commission to satisfy itself as to its grievances and obviously it was not impressed with the claim of the Appellant as evident for the fact that he was indicted before the High Court.

Thus, it is clear that these two money transactions concerning were made on person to person basis and therefore had taken place without a traceable trail. It is only their verbal claims that asserts such a handing over of cash on those two occasions.

In this type of a situation, could one fault the Commission for "not" investigating the said claim by the Appellant beyond the point it did ?

Our considered opinion is that in this particular instance, the Commission had in fact investigated the Appellant's claim and traced the transactions up to the two individuals who are concerned with it and thereby reached the probable end of that inquiry. The transaction that had taken place, as claimed by the Appellant, had left no traceable trail. The said transaction is confined to the verbal assertions of the two parties who claim to have participated in. Therefore, in this backdrop of circumstances, we hold that it is unreasonable to expect the Commission to conduct further investigations to find material so as to disprove the verbal assertion of the Appellant, that such a transaction never did take place, under the

guise that it failed to investigate the claim by the Appellant. Hence, the answer of the investigating officer that she may have given money to the Appellant, though a truthful answer to the question posed to him, does not raise a reasonable doubt about this "basic fact".

The Appellant relied on the judgment of *Kakulandara v Director General, CIABOC* (supra) in support of the contention that when the Appellant said that he did receive funds from his sister, the Commission had failed to investigate it, then he is entitled to be acquitted of the charge.

In the said judgment the failure of the Commission to conduct investigations was considered again the following factual background as per their Lordships observation that:-

"In this case the prosecution admitted that they were aware of some unascertained income received by the accused. The Commission got this information from the Department of Agrarian Services where the accused was employed. The Agrarian Service Department informed the Commission that the information with regard to this income has to be obtained by the Bank which made payments to the accused. The Commission never made inquiries from the Bank with regard to these payments. The Commission did not inquire from the accused either particularly with regard to these receipts. Then can one say that the charges were brought after a thorough investigation? The

prosecution is not expected to conduct an incomplete investigation and get the accused to prove his innocence."

In the situation that arose for consideration by this Court in *Kakulandara v Director General, CIABOC*, the payments relied on by the Appellant before their Lordships Court were in fact made by a bank, which undoubtedly had the relevant entries confirming the details of them. No attempt was made by the Commission to ascertain details at least from the Appellant who claimed that he did receive payments through the bank. It is in consideration of these circumstances that their Lordships have held that:-

"The Commission should refrain from bringing persons to court unless they are able to show that charges have been brought after a thorough investigation. I am of the view that no attempt has been made to ascertain the receipts of the accused on account of the investigations done to the bank during the relevant period. Therefore, the prosecution has failed in its duty to bring a fair prosecution. The accused should succeed as there is no case to answer."

The circumstances that were highlighted in the appeal before us are quite different from that of *Kakulandara v Director General, CIABOC* (supra) and therefore its reasoning would not be relevant in the

determination of the ground of appeal that had been raised in the instant appeal.

In view of the reasoning contained in the preceding paragraphs, we are unable to accede to the view formed by the trial Court that the Commission had failed to conduct investigations into the claim of the Appellant that he received funding from his sister. However, the trial Court had nonetheless held that the prosecution had proved its case beyond reasonable doubt and therefore the presumption as per the deeming provision of Section 23A is drawn against the Appellant. This is a correct conclusion that had been reached by the trial Court considering the evidence presented by the prosecution.

Therefore, the part of the ground of appeal of the Appellant in relation to the failure of the prosecution to establish basic facts, fails. The second part of the said ground of appeal concerns a claim of wrongfully shifting of burden on the Appellant.

What is expected of an accused in a prosecution under Section 23A of the Bribery Act once the basic facts have been proved, had already been dealt in the judgment of *Wanigasekera v Republic of Sri Lanka* (supra).

Their Lordships have quoted with approval of the following views expressed by *Samerawickrema, J.* in an unreported judgment of *Attorney*

General v Karunaratne (S. C. 16/74 D. C. Colombo B/75 - SC. Minutes of 17.6.77);

"What a person (accused) has to prove is that a property was not acquired by bribery or was not property to which he had converted any property acquired by bribery. The ordinary and usual method by which a person may prove this is by showing the source from which he acquired the property and demonstrating that it was not by bribery. As this is a matter in which the onus is on the accused person, it will be sufficient if he establishes it on a balance of probabilities." ".

In *Director General, CIOBC v Dissanayake* (2005) 2 Sri L.R. 258, this Court reiterated this principle in relation to a prosecution under Section 23A of the Bribery Act as it was held that;

"It is obvious that the abovementioned section required to prove by the prosecution, that the accused acquired property which cannot or could not have been acquired with any part of his income or receipts known to the prosecution after thorough investigation; the prosecution is not required to prove that the acquisitions were made with income or receipts from

bribery. Once the above 'basic fact' fact is proved by the prosecution, a rebuttable presumption could be drawn against the accused and it shall be deemed until the contrary is proved by the accused; that such property is or was property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery."

Having laid down the manner in which the presumption that had been drawn against a person accused under Section 23A of the Bribery Act, their Lordships have in *Wanigasekera v Republic of Sri Lanka* (supra) dealt the manner in which such a presumption could be rebutted in following terms;

"Dealing with the degree of cogency which evidence must reach in order that it may discharge the burden in a civil case, Denning, J. said in *Miller v. Minister of Pensions* (1947) 2 A.E.R. 372 at 374: "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: 'we think it more probable than not', the burden is discharged, but if the probabilities are equal, it is not". If the tribunal is reasonably satisfied, that is, satisfied to the extent that it can say " we think it is more probable than not that the accused acquired the

"property by proceeds other than income or receipts from bribery" then the accused is entitled to an acquittal."

The trial Court, having drawn the presumption, thereafter proceeded to examine the evidence of the Appellant in order to determine whether he had successfully rebutted it. In the judgment of the trial Court this aspect had been stated in this manner;

"නමුත් එකී කරුණ අධිකරණය ඉදිරියේ පිළිගත හැකි සාක්ෂියක් ලෙස ඔරුපු කිරීම විෂයිය සහ කාර්ය භාරයක්".

Learned President's Counsel contended that this statement clearly indicates a shift of burden on the Appellant. If one were to consider the context in which this statement is made by the trial Court, it is not possible to impute any illegality to it. In effect what the trial Court observed is that the Appellant should rebut the presumption with evidence that could be "acceptable" to a Court of law.

The trial Court had dealt with the evidence of the Appellant and his sister and observed that the testimonial trustworthiness of their evidence is tainted due to the significant inconsistencies that exist in it. We have carefully perused the evidence presented before the trial Court by the Appellant and his sister. It is our view that the evidence presented by the Appellant and his sister are not worthy of credit due to its inherent inconsistencies and improbabilities.

The reasons for the said determination are as follows;

The evidence of witness *Shyamalie* reveals that she handed over a sum of Rs. 200,000.00 to the Appellant on 6th October 1991 as a loan since he was in need of financial assistance due to an ongoing construction project. However, the Accused in his declaration to the Commission stated that he had spent only Rs. 70,000.00 for this construction over the period 11.01.1991 to 31.12.1992 but could not recall its details. Schedule A indicated that the Appellant had brought himself a jeep for Rs. 445,000.00 on 18.10.1991 i.e. after only 12 days he received Rs. 200,000.00 as a "loan" on account of his construction work. On 12.08.1992 he had acquired ownership of two properties with a combined value of Rs. 128,750.00. It is strange that in spite of several acquisitions of property during the relevant period for Rs. 594,350.00, the Appellant had spent only Rs. 70,000.00 for construction having received an additional housewarming "gift" of Rs. 150,000.00 from his sister in April 1992.

The Appellant denied requesting financial assistance from his sister and implicates his wife for seeking funds from his sister. He further accuses his wife of investing part of that money in her business and thereby completely contradicting his sister's evidence that it was the Appellant who made the request to her.

It is stated by the Appellant that the reason for the benevolence of his sister in making these monetary contributions was that it was he who provided monetary and other support during her student days until her

graduation from the medical school after their father's untimely death. Therefore, it was her obligation towards the Appellant that made her repay this moral debt back to her brother. His sister however, flatly denies the Appellant's claim of financial dependency on him and she asserts that she was a recipient of a scholarship which supported her school education and thereafter she had obtained a loan to support her tertiary education. She effectively limited the Appellants contribution during her student days only to secure her a boarding place.

It is also revealed that *Shyamalie* had first claimed that she gave Rs. 400,000.00 in total to the Appellant in her correspondence with the Commission and an inconsistency was highlighted during the trial over this fact.

Their evidence, apart from these inconsistencies, reveals an improbable version of events. Witness *Shyamalie*'s claim of lending Rs. 200,000.00 to support the construction work seemed an improbable version since the Appellant had made a substantial investment in making a purchase of a vehicle at the same time. If he was in a dire need of funding to finance the construction of his house, it is illogical for him to invest in a vehicle that had cost him Rs. 445,000.00 whilst pleading for assistance from his sister to grant him a loan of Rs. 200,000.00. Besides this improbability the Appellant claimed in his declaration and evidence that he spent Rs.70,000.00 for unspecified construction work which had in effect spread over a period of 23 months as specified in the indictment. That shows there

was no urgent need for additional funding at the time he claimed to have requested this "loan".

Adding to this improbability is the fact that in spite of the "loan" yet to be repaid, *Shyamalie* then "gifts" another Rs. 150,000.00 to the Appellant just after six months after her "loan". The reason for this "gift" is her inability to attend the house warming of her brother. She did not think of converting his already assisting "loan" to a "gift" but opted to make available this extra funding to her brother as a "gift" just before her departure to undertake overseas postgraduate studies in medicine. There is no evidence that she was on a scholarship that had financed her post graduate studies or she had substantial amounts of funds and therefore parting with Rs. 350,000.00 is well within her means at that juncture. She had graduated only in 1982 and had only 10 years of post qualifying professional practice. In addition, it is improbable for her to part with substantial amount of money when she is also in need of funding for her postgraduate studies in medicine.

Therefore, the Appellant's case does not satisfy the claim that he did receive a total of Rs. 350,000.00 from his sister on a balance of probability and the trial Court had rightly rejected his evidence in this regard.

We hold that the trial Court had correctly applied the required level of burden of proof, as laid down in the judgment of *Wanigasekera v Republic of Sri Lanka* (supra) on the case presented by the Appellant before rejecting it.

Accordingly we hold that the appeal of the Appellant is devoid of merit.

Appeal of the Appellant is therefore dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPA LI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL