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

In the matter of an appeal to the Supreme Court in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC Appeal No. 61/2024
SC Spl L/A No. 88/2024
CA/LTA/0002/2023
HC Colombo No. HC B 70/2020

Director General,
Commission to Investigate Allegations of Bribery or Corruption,
No. 36, Malalasekera Mawatha,
Colombo 7.

COMPLAINANT

-Vs-

1. Sandresh Ravindra Karunanayake,
   No. 1291/6/1,
   Rajamalwatte Road,
   Battaramulla.

2. Arjun Joseph Aloysius,
   No. 52/1, Flower Road,
   Colombo 7.

ACCUSED

And between

Sandresh Ravindra Karunanayake,
No. 1291/6/1,
Rajamalwatte Road,
Battaramulla.

1ST ACCUSED – PETITIONER

-Vs –

Commission to Investigate Allegations of Bribery or Corruption,
No. 36, Malalasekera Mawatha, Colombo 7.

COMPLAINANT – RESPONDENT

Arjun Joseph Aloysius,
No. 52/1, Flower Road,
Colombo 7.

2ND ACCUSED – RESPONDENT

And now between

Director General,
Commission to Investigate Allegations of Bribery or Corruption,
No. 36, Malalasekera Mawatha,
Colombo 7.

COMPLAINANT – APPELLANT

- Vs –

Sandresh Ravindra Karunanayake,
No. 1291/6/1,
Rajamalwatte Road,
Battaramulla.

1ST ACCUSED – PETITIONER – RESPONDENT

Arjun Joseph Aloysius,
No. 52/1, Flower Road,
Colombo 7.

2ND ACCUSED – RESPONDENT – RESPONDENT

Before: **E.A.G.R. Amarasekara, J**
A.H.M.D. Nawaz, J
Arjuna Obeyesekere, J

Counsel: Harippriya Jayasundera, PC, Additional Solicitor General with Udara Karunathilake, Senior State Counsel, Disna Gurusinghe, Assistant Director General, Commission to Investigate Allegations of Bribery or Corruption and Chathuri Jayakody, Assistant Director General, Commission to Investigate Allegations of Bribery or Corruption for the Complainant – Appellant

Faisz Musthapha, PC with Razik Zarook, PC, Shavindra Fernando, PC, Faisza Musthapha Markar, PC, Zainab Markar and Bishran Iqbal for the 1st Accused – Petitioner – Respondent

Razik Zarook, PC with Rohana Deshapriya and Chanakya Liyanage for the 2nd Accused – Respondent – Respondent

Argued on: 6th November 2024 and 2nd December 2024

Written Submissions: Tendered on behalf of the Complainant – Appellant on 14th June 2024 and 6th December 2024

Tendered on behalf of the 1st Accused – Petitioner – Respondent on 26th July 2024 and 13th December 2024

Decided on: 30th May 2025

Obeyesekere, J

This judgment consists of three parts.

The first part deals with the indictment filed in the Provincial High Court of the Western Province holden in Colombo [the High Court] by the Director General of the Commission to Investigate Allegations of Bribery or Corruption [the Complainant – Appellant / the Appellant] against the 1st Accused – Petitioner – Respondent [the 1st Accused] and the 2nd Accused – Respondent – Respondent [the 2nd Accused], the preliminary objection raised

by the 2nd Accused with regard to the maintainability of the said indictment based on the definition of public servant and public officer, and the order made by the High Court.

The second part deals with the two separate applications filed in the Court of Appeal by the Accused against such order of the High Court seeking leave to appeal of the Court of Appeal, the two preliminary objections taken on behalf of the Commission to Investigate Allegations of Bribery or Corruption [CIABOC] with regard to the maintainability of such applications, and the order made by the Court of Appeal.

The third and final part of this judgment deals with the petition filed in this Court by the Appellant seeking special leave to appeal against such order of the Court of Appeal, the questions of law on which leave has been granted, an analysis of the issues relating to the aforementioned preliminary objections raised by the CIABOC before the Court of Appeal, and the determination of this Court with regard to the said objections and the questions of law.

Indictment against the 1st and 2nd Accused

The 1st Accused is a Member of Parliament. He was at all times relevant to this appeal, the Minister of Finance of the Republic and a member of the Cabinet of Ministers. The 2nd Accused was *inter alia* a director of Perpetual Capital (Private) Limited and Walt & Row Associates (Private) Limited.

On 21st September 2020, the Appellant instituted proceedings in the High Court by way of an indictment containing the following charges against the 1st Accused:

1. That, between 12th February 2016 and 30th September 2016 the 1st Accused, being a **public servant**, i.e., as the Minister of Finance, solicited or accepted a gratification from the 2nd Accused by residing at an apartment at Monarch Housing Complex for which the 2nd Accused paid a sum of Rs. 11.68 million using cheques from Walt and Row Associates (Private) Limited and Perpetual Capital (Private) Limited of which the 2nd Accused was a director and thereby committed an offense punishable under Section 19(c) of the Bribery Act, No. 11 of 1954 as amended;

2. That, between 18th March 2016 and 21st March 2016 the 1st Accused, being a **public servant**, i.e., as the Minister of Finance, solicited or accepted a gratification from the 2nd Accused by allowing the 2nd Accused to pay a sum of Rs. 15,346.52 to the Condominium Management Council of the Monarch Housing Complex using cheques from Perpetual Capital (Private) Limited of which the 2nd Accused was a director and thereby committed an offense punishable under Section 19(c) of the Bribery Act, No. 11 of 1954 as amended;

3. That, between 6th April 2016 and 27th April 2016 the 1st Accused, being a **public servant**, i.e., as the Minister of Finance, solicited or accepted a gratification from the 2nd Accused by allowing the 2nd Accused to pay Rs. 68,048.95 as lease rental for apartment No. 5PH2 to the Condominium Management Council of the Monarch Housing Complex using cheques from Perpetual Capital (Private) Limited of which the 2nd Accused was a director and thereby committed an offense punishable under Section 19(c) of the Bribery Act, No. 11 of 1954 as amended.

The 2nd Accused stood indicted of aiding and abetting the 1st Accused in committing the above offences under and in terms of Section 19(c) read with Section 25(2) of the Bribery Act.

Definition of Public Servant under the Bribery Act and the amendment in 1994

It is clear from the above three charges that the 1st Accused has been charged for acts committed while he was a Minister of the Cabinet of Ministers. In order to give context to the issue that arose before the High Court and eventually culminated in this appeal, I shall at the outset refer to the definition of 'public servant' and 'public officer' as found in the Bribery Act and the Constitution, respectively.

At the time the Bribery Act was introduced in 1954, the phrase, 'public servant' [රජයේ සේවකයෙක්] was defined in Section 90 thereof to include, "*every officer, servant or employee of the Crown, or of any local authority, or of any scheduled institution, every juror, and every arbitrator or other person to whom any cause or matter has been referred for a decision or report by any court or by any other competent public authority*".

While Sections 16, 17, 18 and 19 of the Bribery Act dealt with the offering to or the soliciting and/or accepting of any gratification by a police officer, peace officer or public servant, the above definition of a 'public servant' did not include a Member of Parliament probably due to Sections 14 and 15 of the Bribery Act containing specific provisions relating to bribery by members of the Senate or the House of Representatives. It must however be noted that Sections 14 and 15 are narrower in scope than Section 19. This may have prompted the following amendment to the definition of 'public servant' by the Bribery (Amendment) Act, No. 20 of 1994:

> "*A public servant includes* ***a Minister of the Cabinet of Ministers****, a Minister appointed under Article 45 of the Constitution, Speaker, Deputy Speaker, Deputy Chairman of Committees, a Deputy Minister, the Governor of a Province, a Minister of the Board of Ministers of a Province, a Member of Parliament, every officer, or employee of the State or any Chairman, director, Governor, member, officer or employee, whether in receipt of remuneration or not, of a Provincial Council, local authority or of a scheduled institution, or of a company incorporated under the Companies Act, No. 17 of 1982, in which over fifty per centum of the shares are held by the Government, a member of a Provincial Public Service, every juror, every licensed surveyor and every arbitrator or other person to whom any cause or matter has been referred for decision or report by any court or any other competent public authority*: …"

The intention of the legislature to make a Member of Parliament liable under the Bribery Act to its fullest extent has thus been made clearer by the above definition. Perhaps, as a matter of interest, I must refer to the following extracts from the speech made by the then Minister of Justice at the time he moved the amendment to the Bribery Act in 1994, which is found in the Hansard of 4th October 1994 submitted to this Court by the learned Additional Solicitor General:

> "පළමුවැන්න තමයි මේ වරදට භාජනය වන්නේ කවුද කියන එක' who are the persons who are liable for this offence? මේකට භාජනය වන්නේ කවුද කියන ප්‍රශ්නය 'රාජ්‍ය නිලධාරීන් - Public servants - කියන පුද්ගලයින් තමයි' අද පවතින නීතිය අනුව මේ අපරාධයට භාජනය වන්නේ රාජය නිලධාරියෙක් ය කියා කියන්නේ කව් ද? දැන් තිබෙන ආඥා පනත යටතේ එයට නිර්වචනයක්- definition-තිබෙනවා' "official employee or servant of the State" මේ නිර්වචනය කිරීම සම්බන්ධයෙන් අන්න ඒ වචන තමයි භාවිතා කර තිබෙන්නේ'' දැන් ඒ නිර්වචනය අනුව යම්කිසි අපහැදිලි තැනක්

තියනවා' අමාත්‍යවරයෙක්, නියෝජ්‍ය අමාත්‍යවරයෙක්, පාර්ලිමේන්තු මන්ත්‍රීවරයෙක්, පළාත් සභා සභිකයෙක් ඒ නිර්වචනයේ රුහුන ඇතුළට වැටෙනවාද නැද්ද කියන ප්‍රශ්නය පිළිබඳව අපහැදිලිභාවයක් වත්මන් නීතියේ අඩංගු වී තිබෙනවා' අපි මේ අවස්ථාවේ දී ක්‍රියා කරන්නේ අන්න ඒ සැකය දුරු කිරීමට පමණයි' දැන් ඒ සඳහා අලුත් නිර්වචනයක් ඉදිරිපත් කරනවා' එයින් ප්‍රකාශිතව සඳහන් වෙනවා මේ පුද්ගලයන් ඒ නිර්වචනයේ රුහුන ඇතුළට වැටෙනවාය කියා' එහි කිසිම වරදක් නැහැ' මගේ අමාත්‍යාංශයේ නිලධාරියෙක් අල්ලස් ගන්නවා නම් ඒ පුද්ගලයාට විරුද්ධව දඬුවම් පැමිණීමට පුළුවන් නම් අමාත්‍යවරයා හැටියට මම අල්ලස් ගත්තොත් මගේ නිලධාරියා හා මා හා අතර විභේදනයක් දැක්වීම අවැරදිය කියා කවුරුවත් ප්‍රකාශ කරන්නේ නැහැ." [page 285]

"*But even with regard to bribery, there are certain deficiencies in the existing law which the government is endeavouring to correct. There are two limitations in that field which we think require legislative action for the purpose of correction of the existing anomalies.*

One of these deficiencies relates to the definition of public servant which is part and parcel of the present law. The definition refers to officers, servants and employees of the State. There is some element of doubt as to whether ministers, deputy ministers, members of parliament, members of provincial councils and other persons fall within the ambit of this definition. It is purely for the purpose of clarifying a doubt which exists at present that the new section has been put in and in that area we think it is totally proper that the change should apply with retroactive effect because it cannot be contended with any degree of validity that distinction should be drawn between a politician and a bureaucrat with regard to the application of that offense. So that particular definition will be given effect retroactively." [Page 413]

Thus, the 1st Accused, by virtue of being a Member of Parliament and a Minister of the Cabinet of Ministers was a public servant for the purposes of the Bribery Act and was therefore liable to be charged in terms of the provisions of the Bribery Act, which was the law applicable to bribery and corruption at the time the aforementioned offences referred to in the indictment were committed.

United Nations Convention against Corruption

Article 2 of the United Nations Convention against Corruption [the Convention], introduced in 2003 and to which Sri Lanka and another 195 countries are signatories, provides that:

"*For the purposes of this Convention:*

(a) "Public official" shall mean:

(i) ***any person holding a legislative, executive****, administrative or judicial* ***office*** *of a State Party, whether appointed or elected, whether permanent or temporary, whether paid or unpaid, irrespective of that person's seniority;*

(ii) any other person who performs a public function, including for a public agency or public enterprise, or provides a public service, as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;

(iii) any other person defined as a "public official" in the domestic law of a State Party.

However, for the purpose of some specific measures contained in Chapter II of this Convention, "public official" may mean any person who performs a public function or provides a public service as defined in the domestic law of the State Party and as applied in the pertinent area of law of that State Party;"

Thus, members of the legislature as well as of the executive are considered a 'public official' for the purposes of the Convention.

Constitutional Determination – 2023

The Anti-Corruption Bill was published in the Government Gazette of 3rd April 2023 and was placed on the Order Paper of Parliament of 27th April 2023. Its preamble provided *inter alia* that it was an Act to give effect to certain provisions of the United Nations Convention against Corruption and repeal the Bribery Act. In its Determination under Article 123(1) of the Constitution [SC SD Nos. 16-21/2023], this Court, whilst noting that corruption is a transnational phenomenon that affects all societies and economies and undermines the institutions and values of democracy, highlighted the importance of the leadership of a country being honest, and the ripple effect that it will have on the rest of the Country, when it stated as follows:

"*Bribery and corruption appear to have been in existence from time immemorial. The proof is found in ancient religious scriptures which deal with the subject. Adhamma Sutta of Aṅguttara Nikāya discusses how corrupt leadership has adverse consequences not only on the entire social order but also on nature and the physical environment:*

> *"Monks, at a time the kings are unethical, the royal servicemen become unethical. When the royal servicemen become unethical, the Brahmin householders become unethical. When the Brahmin householders become unethical, those in the townships and provinces become unethical. When the townships and provinces become unethical, the moon and sun move unevenly. When the moon and sun move unevenly, the stars and the constellations move unevenly. When the stars and constellations move unevenly, then the night and day occur unevenly. When the night and day occur unevenly, the fortnights and months become uneven. When the fortnights and months become uneven, winds blow unevenly and in the wrong direction. When winds blow unevenly and in the wrong directions, deities become disturbed. When the deities become disturbed, the sky does not bring proper rainfall. When there is no proper rainfall, the grains ripen unevenly. When humans eat unevenly ripened grains, their life span is shortened, and they lose their beauty and power and are struck by many ailments.*
>
> *Monks, at a time the kings are ethical the opposite to the above happens.*
>
> *When cattle are crossing a (water way), if the leading bull goes crooked, all of them go crooked as the leading one has gone crooked.*
>
> *Even so, among humans, if one considered the chief behaves unethically, the rest will follow suit.*
>
> *If the king is unethical, the whole country rests unhappily.*
>
> *When cattle are crossing a (water way), if the leading bull goes straight, all of them go straight as the leading one has gone straight.* ***Even so, among humans, if one considered the chief, indeed conducts oneself ethically all the rest follow suit. If the king is ethical, the whole country rests happily****."* [emphasis added]

[cited by Prof. P. D. Premasiri, Buddhist Principles of Good Governance, pages. 64-65,Nagananda International Vesak Festival]"

Similarly, in the Holy Bible, Chapter 18, Verse 21 of the book of Exodus explicitly highlights that when choosing leaders, they must be capable men who fear God and trustworthy men who reject dishonest gain as trustworthiness and rejection of corruption are essential qualities of a good leader. The verse states that, *"But in addition, you should choose some capable men and appoint them as leaders of the people: leaders of thousands, hundreds, fifties, and tens. They must be God-fearing men who can be trusted and who cannot be bribed." [Exodus 18:21]*

Definition of Public Official – the Anti-Corruption Act, No. 9 of 2023

The Anti-Corruption Act, No. 9 of 2023 was certified by the Speaker on 8th August 2023. While specifically providing in Sections 93 and 94 that it shall be an offence for a Member of Parliament to solicit or accept any gratification, Section 96 and several sections thereafter provide that it shall be an offence for a 'public official' to solicit or accept any gratification.

Section 162(2) of the Act has defined a 'public official' for the purposes of the Anti-Corruption Act to include the following:

> "*the President, the Prime Minister, **a Minister of the Cabinet of Ministers**, a Minister appointed under Article 45 of the Constitution, Speaker, Deputy Speaker, Chairman of a Committee, Deputy Chairman of a Committee, a Deputy Minister, the Governor of a Province, a Minister of the Board of Ministers of a Provincial Council, a Member of Parliament, …*"

Thus, whether it be under the Bribery Act or under the Anti-Corruption Act, Members of Parliament and Ministers of the Cabinet of Ministers are liable to be charged for bribery and corruption.

Definition of Public Officer – the Constitution

While the Bribery Act referred to a 'public servant' and the Anti-Corruption Act to a 'public official', Article 170 of the Constitution contains a definition of a 'public officer'. The definition found in the Constitution at the time it was enacted in 1978 was repealed by the 19th Amendment to the Constitution and replaced with the following:

" '*public officer*' *means a person who holds any paid office under the Republic, other than a judicial officer but* ***does not include*** –

(a) the President;

(b) the Prime Minister;

(c) the Speaker;

(d) a Minister;

(e) a Deputy Minister;

(f) a Member of Parliament;

(g) – (v) …;"

Although the said definition has been amended subsequent to the date of the commission of the offences specified in the indictment, a Minister of the Cabinet of Ministers continues to be excluded from the definition of 'public officer' **for the purposes of the Constitution**.

Objection before the High Court and its Order

Both Accused had pleaded not guilty when indictment was served on them on 5th February 2021. When the case was taken up for trial before the High Court on 14th March 2022, the learned President's Counsel appearing for the 2nd Accused at that time had submitted that even though a Minister of the Cabinet of Ministers is a 'public servant' for the purposes of the Bribery Act, the 1st Accused was not a 'public officer' within the meaning of the phrase 'public officer' contained in Article 170 of the Constitution. He had therefore submitted that there is an inconsistency between the provisions of the Constitution and the Bribery Act and that in such a situation, the provisions of the Constitution must prevail. It was therefore the position of the learned President's Counsel for the 2nd Accused that the 1st Accused cannot be indicted in terms of the Bribery Act. The consequential argument was that since charges cannot be maintained against the 1st Accused, no charges can be maintained against the 2nd Accused, as well, and therefore

both Accused must be discharged. The learned President's Counsel for the 1st Accused had associated himself with the said objection.

Having heard the submissions of all parties, the High Court, by its Order delivered on 24th January 2023, overruled the said objection and fixed the matter for further trial. I am in agreement with the conclusion reached by the High Court for the simple reason that the definition of 'public officer' contained in the Constitution is for the purposes of the Constitution, as clearly specified at the commencement of Article 170. The definition of 'public servant' as found in the Bribery Act, as amended, would apply where proceedings are instituted under the Bribery Act. I must reiterate that there can be no doubt that a Minister of the Cabinet of Ministers and everyone else referred to in the definition of 'public servant' found in the Bribery Act, as amended is a 'public servant' for the purposes of the Bribery Act, and that proceedings can be instituted against all such persons including a Minister of the Cabinet of Ministers for an offence committed under the Bribery Act. The position is the same under the Anti-Corruption Act, as well.

Leave to Appeal application to the Court of Appeal

This brings me to the second part of this judgment.

Aggrieved by the said Order of the High Court, the 1st Accused made an '*application for leave to appeal under and in terms of Section 331 read with Section 340 of the Code of Criminal Procedure Act, No. 15 of 1979*', seeking *inter alia* the following relief:

(a) Leave to appeal against the order of the High Court;

(b) Uphold the preliminary objection raised by the 2nd Accused and set aside the order of the High Court;

(c) Make order discharging and acquitting the Accused from all charges filed against them in the High Court.

According to the journal entries of the Court of Appeal tendered to this Court together with the petition of appeal, the 2nd Accused too had made an application for leave to appeal against the said order of the High Court and sought the identical relief. The learned Additional Solicitor General submitted during the course of her submissions before this

Court that that application, which is identical in nature, is pending before the Court of Appeal awaiting the outcome of this appeal.

I shall now address the two preliminary objections raised by the learned Additional Solicitor General relating to the maintainability of the above applications filed in the Court of Appeal.

First preliminary objection – failure to name necessary parties

In its application to the Court of Appeal, the 1st Accused had named the Commission to Investigate Allegations of Bribery or Corruption [CIABOC] as a Respondent but not its Director General.

In terms of Section 3 of the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994, the CIABOC shall investigate allegations contained in communications made to it under Section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the CIABOC shall direct the institution of proceedings against such person for such offence in the appropriate Court. Section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994 provides 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;* ***…***"

Section 12(1) of Act No. 19 of 1994 provides further that, "*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*"

In **Kesara Senanayake v Attorney General and another** [(2010) 1 Sri LR 149; at page 162] the appellant had named the CIABOC as a party to the appeal but not its Director General. On an objection raised that proceedings have been instituted by the Director General and therefore the Director General is a necessary party to the appeal and should have been named as a respondent, Shirani Bandaranayake, J (as she was then) considered *inter alia* the above provisions of Act No. 19 of 1994 and held that institution of proceedings are carried out by the Director General of CIABOC on the directive of CIABOC, and thus, "*it is evident that the Director-General has to be regarded as the complainant in such an application and therefore is a necessary party to this appeal*."

When the above leave to appeal application was supported before the Court of Appeal on 19th July 2023, the learned Additional Solicitor General had quite rightly raised a preliminary objection relating to the maintainability of the said application on the basis that a necessary party, that being the Director General of the CIABOC has not been named as a respondent, and that the said application is therefore misconceived and liable to be dismissed *in limine*. I am in agreement with the aforementioned reasoning of this Court in **Kesara Senanayake**, and I am therefore of the view that the learned Additional Solicitor General was entitled to succeed with the said objection.

Second preliminary objection – the Accused does not have a right of appeal

The learned Additional Solicitor General had raised a further preliminary objection before the Court of Appeal that the application made by the 1st Accused is misconceived in law in that the 1st Accused does not have a right of appeal against the impugned interim order of the High Court and therefore he cannot come before the Court of Appeal by way of a leave to appeal application. This is the core issue in this appeal and will be discussed in detail in the final part of this judgment.

Order of the Court of Appeal

It is clear that both objections raised by the learned Additional Solicitor General relate to the maintainability of the two applications of the Accused before the Court of Appeal and go to the root of the matter. Having afforded all parties an opportunity of making oral submissions supplemented by written submissions, the Court of Appeal had overruled the

said preliminary objections with its aforementioned Order delivered on 9th February 2024. This appeal stems from that Order.

Having carefully examined the said Order of the Court of Appeal, I regret to state that the Court of Appeal has not considered at all the preliminary objection that the Director General of CIABOC was a necessary party and that the failure to name him as a party respondent is fatal to the maintainability of the application before the Court of Appeal. With regard to the other preliminary objection that an accused does not have a right of appeal against an interim order of the High Court, the Court of Appeal has not considered the provisions of the Judicature Act but has instead proceeded on the basis that the impugned order of the High Court was a final order, applied the reasoning of this Court in **Dona Padma Priyanthi Senanayake v Chamika Jayantha and others** [SC Appeal No. 41/2015; SC minutes of 4th August 2017] which had considered the provisions of the Civil Procedure Code and which therefore had no relevance, and overruled the objection that the accused had no right of appeal.

Questions of Law

I shall now deal with the final part of this judgment.

Leave to appeal has been granted by this Court on 30th May 2024 on the following questions of law:

1. Did the Court of Appeal err in law in overruling the preliminary objections of the appellant founded upon sound and valid legal principles?

2. Did the Court of Appeal err in law in interpreting and applying existing law governing the leave to appeal procedure?

3. Did the Court of Appeal err in recognizing the concept of finality of proceedings?

4. Did the Court of Appeal err in interpreting the concept of a final order?

5. Did the Court of Appeal err in law in recognizing as a final order an order of overruling a preliminary objection raised to an indictment even prior to a trial proper having commenced and prior to a finality of proceedings being reached?

6. Did the Court of Appeal err in law in failing to recognise the principle of necessity of naming the necessary parties to the application?

During the course of the hearing before this Court, the learned Additional Solicitor General distilled the core question of law to be determined in this appeal as being whether an accused who stands indicted before the High Court has a right of appeal against an interim order made by the High Court.

This question brings into play three important laws relating to appeals. The first is the Constitution which sets out the forum jurisdiction of the Court of Appeal. The second is the Judicature Act, No. 2 of 1978, as amended which confers the right of appeal. The third is the Code of Criminal Procedure Act, No. 15 of 1979, as amended which sets out the procedure that should be followed in putting into motion such right of appeal conferred by the Judicature Act in the forum provided for by the Constitution.

There are two matters that I wish to advert to, prior to considering the above question and the statutory provisions relating thereto.

Failure by the Appellant to name necessary parties

I have already stated that proceedings have been instituted in the High Court by the Director General of CIABOC and that the Director General should have been named as a party to the applications made by the Accused to the Court of Appeal. Although the Director General of CIABOC had not been made a party in the said applications to the Court of Appeal, the appeal to this Court has been made by the Director General. Admittedly, neither the CIABOC nor its members have been made a party to this appeal.

During the hearing, the learned President's Counsel for the 1st Accused submitted that this appeal is misconceived in law since the CIABOC who was the party before the Court of Appeal should have invoked the jurisdiction of this Court since the rights of CIABOC cannot be decided in its absence. Not having made the Director General a party before the Court of Appeal, it is indeed ironic for the 1st Accused to now claim that CIABOC is a necessary party. While this is a matter that should have been raised at the time leave was granted, the necessity for me to consider this submission does not arise since it has been

admitted in the post argument written submissions filed on behalf of the 1st Accused on 13th December 2024 that it is only the Director General who has the right to present an appeal.

I must in any event state that (a) the failure to name the CIABOC or its members as a party to this appeal is not fatal since the proper party who can invoke the jurisdiction of this Court is the Director General, and not CIABOC, and (b) to have presented this appeal in the name of CIABOC would have been contrary to the first preliminary objection raised by the learned Additional Solicitor General in the Court of Appeal.

Thennakoonwela v Director General, CIABOC

The second matter that I wish to advert to is that, after special leave to appeal was granted, this Court delivered its judgment in **Thennakoonwela v Director General, Commission to Investigate Allegations of Bribery or Corruption** [SC TAB No. 4/2023; SC minutes of 7th October 2024]. The impugned order in that case, interlocutory in nature, had been made by the Permanent High Court-at-Bar pursuant to an application under Section 200 of the Code of Criminal Procedure Act to acquit the accused without calling for the defence.

The Permanent High Court-at-Bar has been established in terms of Section 12A of the Judicature Act introduced by the Judicature (Amendment) Act, No. 9 of 2018. It is a High Court of the Province established by Article 154P of the Constitution, similar to the High Court that delivered the order in this case.

Section 12B(1) and (2) of the Judicature Act provides as follows:

> "(1) *An appeal from any judgment, sentence or **order** pronounced at a trial held by a Permanent High Court at Bar under section 12A, shall be made within twenty eight days from the pronouncement of such judgment, sentence or **order** to the Supreme Court and shall be heard by a Bench of not less than five Judges of that Court nominated by the Chief Justice*.
>
> (2) *The provisions of the Code of Criminal Procedure Act, No. 15 of 1979 and the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of*

1994, or of any other written law governing appeals to the Court of Appeal from judgments, sentences or orders of the High Court in cases tried without a Jury shall, mutatis mutandis, apply to the appeals to the Supreme Court under subsection (1) from judgments, sentences or orders pronounced at a trial held before the Permanent High Court at Bar under section 12A."

Since Sections 12A and 12B seem to suggest that an appeal is available against any judgment, sentence or **order** pronounced by the Permanent High Court at Bar, this Court had proceeded to consider as a threshold issue whether an appellant could file an appeal against an interlocutory order of the Permanent High Court at Bar. Having considered the applicable statutory provisions, Samayawardhena, J stated that:

"*Although section 12B(1) of the Judicature Act appears to confer a right of appeal from any judgment, sentence or order pronounced by a Permanent High Court at Bar to the Supreme Court, it is important to emphasize that, as section 12B(2) states, such a right must be understood in light of other written laws governing appeals to the Court of Appeal from judgments, sentences or orders of the High Court in cases tried without a Jury. This includes the provisions of the Judicature Act, the Commission to Investigate Allegations of Bribery or Corruption Act, the Code of Criminal Procedure Act and the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. When so considered, it is the view of this Court, unless there is an amendment to explicitly reflect the intention of the legislature, the term* ***"order"*** *in section 12B(1) shall be understood, insofar as an accused is concerned, as referring to a final order having the effect of a final judgment, but* ***does not include an interlocutory order***." [emphasis added]

Thus, a divisional bench of this Court has already held that an accused indicted before the Permanent High Court-at-Bar does not have a right of appeal against an interlocutory order made by such High Court. Although the issue before Court in **Thennakoonwela** related to the analysis and interpretation of Section 12B of the Judicature Act, this Court had also analysed the scope and width of Sections 14, 15 and 16 of the Judicature Act, which are the three Sections of the Judicature Act which arise for consideration in this appeal, and concluded that an accused does not have a right of appeal against any interim order of a High Court in terms of those sections, as well. While I shall refer to the specific

findings in that regard in the latter part of this judgment, I must state that I am in respectful agreement with the said analysis of this Court with regard to the ambit of Sections 14, 15 and 16, for the reasons explained below.

Forum jurisdiction and the right of appeal

Article 138 of the Constitution reads as follows:

> "(1) *The Court of Appeal shall have and exercise subject to the provisions of the Constitution or* ***of any law****, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the* ***High Court, in the exercise of its*** *appellate or* ***original jurisdiction*** *or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:*
>
> *Provided that no judgement, decree or order of any court shall be reversed 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*.
>
> (2) *The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain*."

Thus, the forum to which any person who is dissatisfied with a decision made by the High Court in the exercise of its original jurisdiction must prefer an appeal is the Court of Appeal.

However, it is trite law that even though the Court of Appeal is the appropriate forum to which an appeal must be preferred, the right of appeal to the Court of Appeal must be specifically conferred by statute. This issue has been exhaustively dealt with by this Court in **Martin v Wijewardena** [(1989) 2 Sri LR 409]. That was a case arising under the Agrarian Services Act, No. 58 of 1979 and the question to be decided was whether Article 138 of the Constitution confers a right on an aggrieved person to appeal to the Court of Appeal from any order made by the Assistant Commissioner of Agrarian Services in terms of

Section 18(1) of Act No. 58 of 1979, when such a right has not been specifically conferred by statute.

It was sought to be argued on behalf of the appellant in that case that "*Article 138 not only spells out the appellate jurisdiction of the Court of Appeal but that it also grants, impliedly, a right of appeal to all parties who came before the Court of First Instance, Tribunal or Other Institution concerned*." It had been contended further that this right is a full and unfettered right granted to a litigant, and that it is only '*provisions of the Constitution, if any or any other law*' referred to in Article 138(1) that can curtail such full and unfettered right.

Jameel, J rejected the above argument and held [at page 414] that the words, " *'Subject to the provisions of the Constitution or of any Law' are a limitation on the powers of the Court of Appeal. They do not constitute a limitation on the Rights of an Appellant. One such limitation placed on the powers of the Court of Appeal is to be seen in the proviso to this very Article*."

It was further held as follows:

> "***Article 138 is an enabling provision*** *which creates and grants jurisdiction to the Court of Appeal to hear appeals from Courts of First Instance, Tribunals and Other Institutions. It defines and delineates the jurisdiction of the Court of Appeal.* ***It does not, nor indeed does it seek to, create or grant rights to individuals viz-a-viz appeals.*** *It only deals with the jurisdiction of the Court of Appeal and its limits and its limitations and nothing more. It does not expressly nor by implication create or grant any rights in respect of individuals*." [emphasis added; page 413]
>
> "***An Appeal is a Statutory Right and must be expressly created and granted by statute****. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments*." [emphasis added; page 419]

This issue was exhaustively dealt with in **Thennakoonwela v Director General, Commission to Investigate Allegations of Bribery or Corruption** [supra] where Samayawardhena, J held as follows:

> "*It was held in the landmark case of Martin v. Wijewardena [1989] 2 Sri LR 409 that Article 138(1) only defines the jurisdiction of the Court of Appeal and does not create or confer new rights of appeal to persons.* ***It is now well-settled law across jurisdictions that the right of appeal is a creature of statute, not an inherent or common law right.*** *Such a right must be explicitly and expressly conferred by statute, not implied or inferred. As observed in The People's Bank v. Camillus Perera [2003] 2 Sri LR 358 at 360,* ***if there is no right of appeal, unless expressly provided for, there is no right to make an application for leave to appeal****, as the granting of such leave would effectively make the application a final appeal. What cannot be achieved directly, cannot be achieved indirectly*." [emphasis added]

Thus, the mere fact that the Court of Appeal has forum jurisdiction does not enable it to entertain an appeal unless the person invoking such jurisdiction has been statutorily conferred a right of appeal to invoke such forum jurisdiction.

Provisions of the Judicature Act and the right of appeal

In **Martin v Wijewardena** [supra; at page 413], this Court, having concluded that the right of appeal must be conferred by statute, went on to state as follows:

> "***In the case of the Courts of First instance, referred to above, it is the Judicature Act which creates and institutes them****. (Vide Section 5 of the Judicature Act No. 2 of 1978).* ***Sections 13(3), 14, 15 and 16 of this Act designated the persons who are entitled to appeal from orders and judgments of the High Courts****, in its several jurisdictions.* ***These sections contain the general limitations on those rights of appeal.*** *…*
>
> ***These several sections of the Judicature Act expressly create the rights of appeal in each case and invest those rights in the several persons respectively designated in those sections****.* ***These sections enable those designated persons to lodge appeals while Article 138 enables the Court of Appeal to receive and entertain them****. This*

differentiation is made explicit in the terms of Section 13 of the Judicature Act itself." [emphasis added]

With this being the position, I shall now consider the provisions of the Judicature Act in order to determine whether an accused has been conferred a right of appeal against an interlocutory order made by the High Court.

A criminal case has three parties, namely the accused, the prosecution and the person aggrieved by the commission of the impugned offence by the accused. Accordingly, the Judicature Act seeks to confer the accused, the Attorney General and an aggrieved party a distinct right of appeal in accordance with the provisions of Sections 14, 15 and 16, respectively.

Section 14(a) of the Judicature Act reads as follows:

> "*Any person who stands **convicted of any offence** by the High Court of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution may appeal therefrom to the Court of Appeal-*
>
> *(a) in a case tried **with a jury** -*
>
> *(i) against his conviction on any ground which involves a question of law alone; or*
>
> *(ii) against his conviction on any ground which involves a question of fact alone, or a question of mixed law and fact; or*
>
> *(iii) with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law*;"

It is admitted that in this case, the trial before the High Court was before a Judge without a jury. Section 14(a) therefore has no application in this instance. It must however be noted that a right of appeal has been conferred only against a conviction and where an appeal is with regard to the sentence, the leave of the Court of Appeal must be obtained.

With regard to cases heard by a Judge without a jury as in this appeal, Section 14(b) provides as follows:

> *"Any person who stands **convicted of any offence** by the High Court of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution may appeal therefrom to the Court of Appeal –*
>
> *(b) in a case tried without a jury, **as of right**, from any **conviction** or sentence except in the case where –*
>
> *(i) the accused has pleaded guilty; or*
>
> *(ii) the sentence is for a period of imprisonment of one month of whatsoever nature or a fine not exceeding one hundred rupees*;
>
> *Provided that in every such case there shall be an appeal on a question of law or where the accused has pleaded guilty on the question of sentence only*."

Where a trial is held before a Judge without a jury and **the accused is convicted**, the accused has a **right of appeal against any conviction** or sentence on a question of law. Where the accused has pleaded guilty, he has a right of appeal on the question of sentence only. Thus, the right of appeal conferred on an accused by Section 14(b) is circumscribed by law and is contingent upon and becomes operative only once such accused is convicted by the High Court. In other words, Section 14(b) does not confer a right of appeal on an accused unless there is a conviction, which means there must be a judgment of the High Court convicting the accused for the right of appeal to be triggered in terms of the law. Anything short of a judgment convicting an accused will not give rise to a right of appeal on the part of such accused. The resultant position is that with the order of the High Court in this case being an interim order, the 1st and 2nd Accused did not have a right of appeal against such order and their applications to the Court of Appeal were therefore misconceived in law.

In the above circumstances, I am in agreement with the submission of the learned Additional Solicitor General that:

(a) In the absence of a conviction of either the 1st or the 2nd Accused, none of them have a right of appeal in terms of Section 14(b) of the Judicature Act against the said Order of the High Court;

(b) The leave to appeal application of the 1st Accused is therefore misconceived in law; and

(c) The Court of Appeal erred when it failed to uphold the objection raised by the learned Additional Solicitor General.

In view of the above conclusion, the necessity for me to refer to the provisions of the Code of Criminal Procedure Act does not arise.

Abuse of process

The rationale for not granting an accused a right of appeal against each and every order delivered by the High Court prior to conviction is to ensure that proceedings are concluded expeditiously, effectively and efficiently. Furthermore, in terms of Section 333(1) of the Code of Criminal Procedure Act, the case record must be submitted to the Court of Appeal no sooner an appeal is filed. Thus, if an appeal is available against each and every order, it would effectively stay all proceedings before the High Court.

Quite apart from the frivolous nature of the objection raised before the High Court that the 1st Accused is not a public servant for the purposes of the Bribery Act, the raising of the said objection and the subsequent application to the Court of Appeal have clearly resulted in the trial that was scheduled to start in March 2022 being delayed by over three years. To my mind, the actions of the 1st and 2nd Accused are a clear abuse of process.

A similar situation as in this appeal arose in **Ravi Karunanayake v Attorney General** [CA (PHC) Application No. 66/2010; CA minutes of 26th May 2010] where an objection was taken to the jurisdiction of the High Court to proceed with the indictment. Pursuant to the objection being overruled by the High Court, the accused had filed a petition of appeal to

the Court of Appeal and thereafter made an application to the High Court to stay proceedings since an appeal had been filed. The said application had been rejected by the High Court. It was contended before the Court of Appeal that since a petition of appeal had been filed in the Court of Appeal, it was imperative that proceedings before the High Court be stayed pending the outcome of the appeal.

Sisira De Abrew, J held that:

> " *If this argument is correct, whenever a party dissatisfied with an order of the trial court whether it is a final order or not files a petition of appeal, the proceedings of the trial court must be stayed. If this procedure is adopted by trial courts, can the trial court conclude cases expeditiously? I say no. If the said procedure is adopted it will lead to an absurd situation and the public faith in the judicial system of this country will start eroding. Adoption of the said procedure will undoubtedly frustrate the smooth functioning of the trial Court.* ***Therefore if a party dissatisfied with an order of the High Court files a petition of appeal, the order appealed against, in my view, must be a final order****. This contention is strengthened by the provisions of section 331(2) of the Code of Criminal Procedure which contemplates of a final order.*" [emphasis added]

As pointed out in **Thennakoonwela v Director General, Commission to Investigate Allegations of Bribery or Corruption** [supra], "*If there is a right of appeal against each and every order made by the Permanent High Court at Bar to the Supreme Court, this is not practically possible. Such an interpretation could also lead to abuse of the process of the Court, because in terms of Section 333(1) of the Code of Criminal Procedure Act, once an appeal is accepted, all further proceedings in such case shall be stayed and the appeal together with the case record and eight copies thereof shall be forwarded to the Court of Appeal as quickly as possible.*"

I may also add that raising frivolous objections and thereafter invoking the appellate jurisdiction of either this Court or the Court of Appeal with a view of delaying the wheels of justice from turning is a phenomenon that has emerged within the criminal justice system in the recent past, and very unfortunately, is fast becoming a regular practice.

Section 15 of the Judicature Act

For the sake of completeness, I must contrast the above provision of the right of an accused with Section 15(a) which reads as follows:

> "*The Attorney General may appeal to the Court of Appeal in the following cases:-*
>
> *(a) from **an order of acquittal** by a High Court of the Republic of Sri Lanka or a High Court for the Province established by Article 154P of the Constitution-*
>
> *(i) on a question of law alone in a trial with or without a jury;"*
>
> *(ii) on a question of fact alone or on a question of mixed law and fact with **leave of the Court of Appeal first had and obtained** in a trial without a jury;*

Thus, the Attorney General has a right of appeal from **an order of acquittal** on a question of law. However, where an order of acquittal is sought to be challenged on a mixed question of fact and law, he shall do so only with the **leave of the Court of Appeal** first had and obtained.

Section 15(b) provides further that:

> "*The Attorney General may appeal to the Court of Appeal in the following cases :-*
>
> *(b) in all cases on the ground of inadequacy or illegality of the sentence imposed or illegality of any other order of the High Court of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution*."

Thus, the Attorney General has been conferred with a statutory right of appeal not only with regard to the inadequacy or illegality of the sentence imposed but also with regard to the illegality of **any other order** of the High Court.

The position of the 1st and 2nd Accused

The learned President's Counsel for the 1st and the 2nd Accused did not claim that Section 14 confers on the accused a right of appeal. Instead, they relied on the provisions of Section 16 of the Judicature Act in support of their position that the Accused could well have come before the Court of Appeal by way of a leave to appeal application.

Section 16 (1) and (2) of the Judicature Act reads as follows:

> "(1) *A **person aggrieved** by **a judgment**, **order** or sentence of the High Court of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution in criminal cases **may appeal** to the Court of Appeal with **the leave of such court** first had and obtained in all cases in which the Attorney-General has a right of appeal under this Chapter*.
>
> (2) *In this section "a person aggrieved" shall mean any person **whose person or property has been the subject of the alleged offence** in respect of which the Attorney-General might have appealed under this Chapter and shall, if such person be dead, include his next of kin namely his surviving spouse, children, parents or further descendants or brothers or sisters*."

The position of the learned President's Counsel for the 1st and 2nd Accused was that '*the Bribery Act defines a gratification to include an interest in property*' and '*as the accused was charged with having received a gratification in terms of Section 19(c) by receiving a lease of an apartment, the property [of the 2nd accused] is clearly the subject of the offence*.' It was therefore submitted that the 1st and 2nd Accused are in fact aggrieved by the order of the High Court and that they can thus come by way of a leave to appeal application to the Court of Appeal. Simply put, the submission of the learned President's Counsel was that the Accused are aggrieved parties as provided in Section 16.

I am unable to agree with this submission. Quite apart from the fact that the definition of a 'person aggrieved' as found in Section 16(2) being clear and it not extending to an accused by any yardstick, commonsense and logic does not permit me to accept the submission that an accused is a person aggrieved for the purposes of Section 16 of the Judicature Act.

Sections 14, 15 and 16 of the Judicature Act

I have already stated that the scope and width of Sections 14, 15 and 16 of the Judicature Act was considered in **Thennakoonwela v Director General, Commission to Investigate Allegations of Bribery or Corruption** [supra], and that I am in respectful agreement with the views expressed with regard to the said sections. I shall now refer to the specific findings made in that case.

Samayawardhena, J having observed that the Judicature Act, as per its long title, is an "*Act to provide for the establishment and constitution of a system of Courts of First Instance in terms of Article 105(1) of the Constitution, to define the jurisdiction of and to regulate the procedure in and before such courts*", stated as follows:

> "*Sections 14, 15, and 16 of the Judicature Act create and confer the right of appeal from the judgments and orders of the High Court to the Court of Appeal by the accused, the Attorney General, and an aggrieved party. These provisions delineate the scope of appellate jurisdiction, ensuring that specific parties have a defined avenue to challenge the decisions of the High Court.*
>
> *Section 14 confers on a convicted person the right of appeal / the right to file a leave to appeal application against a conviction or sentence. Section 15 confers on the Attorney General the right of appeal/the right to file a leave to appeal application against an acquittal, sentence or illegality of any other order of the High Court. Section 16 confers on an aggrieved party the right to file a leave to appeal application in all cases in which the Attorney General has the right of appeal.* ***A proper interpretation of section 16(2) reveals that the term "a person aggrieved" does not extend to include an accused or convicted person****.*
>
> ***Sections 14, 15 and 16 of the Judicature Act do not provide for a right of appeal to an accused****, whether by direct appeal or by leave of the Court of Appeal first had and obtained,* ***against orders made by the High Court prior to conviction***." [emphasis added]

Conclusion

In the above circumstances, I am of the view that the Court of Appeal erred when it overruled the two preliminary objections raised by the Appellant. The questions of law are therefore answered in the affirmative, the Order of the Court of Appeal is set aside and the leave to appeal application filed by the 1st Accused in the Court of Appeal is dismissed. This appeal is accordingly allowed.

The Appellant shall be entitled to costs in a sum of Rs. 100,000 payable by the 1st Accused.

JUDGE OF THE SUPREME COURT

E.A.G.R. Amarasekara, J

I agree

JUDGE OF THE SUPREME COURT

A.H.M.D. Nawaz, J

I agree

JUDGE OF THE SUPREME COURT