

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

In the matter of an appeal in terms of
Article 138 of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

C.A. No. 151-152/1997
H.C. Colombo Case No. B779/92

Alwa Pillai Ponniah

1st Accused-Appellant

Chandrawansa Rupasinghe
Abeysiriwardane,

2nd Accused-Appellant

Vs.

The Hon. Attorney General,

Respondent.

Before : Rohini Marasinghe, J and
Sarath De Abrew, J.

Counsel : No appearances for the 1st Accused-Appellant.

D.S Wijesinghe, P.C. with K. Molligoda
for the 2nd Accused-Appellant.

Kapila Waidyaratne, D.S.G., for the Respondent.

Argued on : 19.02.2008 and 01.03.2010.

Written Submission

Tendered on : 11.01.2008 for the 2nd Accused-Appellant.
15.10.2008 for the Respondent.

Decided on : 29.03.2012.

Sarath De Abrew, J.

The 1st Accused Appellant, who was a Superintendent of customs attached to the Free Trade Zone Customs office at Katunayake Export Promotion Zone, was indicted in the High Court of Colombo on 02 counts for having solicited a gratification of Rs. 25,000/= from one Russel Avery of El Steel Company on 08.01.91 at Katunayake as an inducement to expedite the approval of a sale in the local market of a consignment of steel imported duty free by the El Steel Company, punishable under Section 19 and 19(C) of the Bribery Act. (counts 1 and 2) The 1st accused appellant was also indicted for having accepted the said gratification of Rs. 25,000/= from L.K.W. Kumara Silva (the decoy) on 10.01.91 at Colombo,

punishable under section 19 and 19(c) of the Bribery Act. (counts 3 and 4). The 2nd accused appellant, an officer of the customs office at Katunayake, was charged on counts 05 and 06 of the indictment with having abetted the acceptance of the gratification by the 1st accused at Colombo, offences punishable under Sections 19 and 19(c) of the Bribery Act. After trial the learned High Court Judge of Colombo on 11.11.1997 convicted the 1st accused appellant on counts 1 – 4 and the 2nd accused appellant on counts 5 – 6 of the indictment and sentenced them to 07 years R.I. and a fine of Rs. 5000 on each of the counts with the prison terms to run concurrently.

Being aggrieved of the above conviction and sentences the 1st and 2nd accused appellants have tendered this Appeal to this court. The 1st accused appellant did not appear to support his appeal and was absent and unrepresented throughout the hearing. The 3rd surety of the 1st Accused Appellant has been dealt with, while warrants of arrest have been issued against the 1st Accused Appellant and his other sureties. However, the Appeal of the 1st Accused Appellant was considered under Section 349(3) of the Code of Criminal Procedure Act. The 2nd accused appellant appeared in Court

and supported his appeal and his Counsel tendered oral and written submissions on his behalf.

The trial had first commenced in 1993 before the Hon. Learned High Court Judge of Colombo upto 1995 and on his elevation to the court of Appeal, trial de novo had commenced before his successor and culminated with the conviction and sentence on 11.11.1997.

The prosecution case rested mainly on the virtual complainant, R.O. Avery, Shipping Manager of El Steel Company and that of sub-inspector Silva of the Bribery Commission, who acted as a decoy. Alexander Perera, then Chief executive of the relevant company, R.P. Joseph who conducted the raid had also given evidence for the prosecution followed by two former officers of the Customs Department to produce the appointment letters of the two accused persons. After the closure of the prosecution case the 1st Accused has given evidence from the witness box and called another witness, one Jayatilleke, a Director of Customs, who gave evidence for the 1st

Accused Appellant. The 2nd accused appellant has not given evidence or called evidence on his behalf.

The facts briefly are as follows. El Steel Limited was a Company located with Katunayake Free Trade Zone. The virtual complainant Avery was the Shipping Manager of this Company. The 1st Accused was a Superintendent of Customs attached to the Free Trade Zone Customs office. The 2nd Accused was an Assistant Superintendent of customs attached to the same office. According to the evidence on 08.01.91, witness Avery has met the 1st Accused at the Katunayake Customs office to obtain approval to remove a quantity of steel imported by the Company out of the GCEC area to be sold in the local market. The 1st Accused has then solicited a gratification of Rs. 25,000/=, given his visiting card with his home address to witness Avery and requested him to bring the money to his house the following day, while approving the removal of the steel. Avery had returned to his office and informed his Accountant of this demand whereupon the Financial controller of the Company, Alex Perera had complained to the Bribery Department.

On 10.01.91 officers of the Bribery Department had come to the office of witness Avery and recorded his statement . Thereafter these officers R.P. Joseph and S.I. Silva has gone with witness Avery to the customs office to ascertain whether the 1st Accused was there. Thereupon, according to witness Avery, the 2nd Accused on seeing witness Avery had called out to him "come come El Steel". The 1st Accused was not present and the 2nd Accused had told Avery that the 1st Accused had told him about the money and requested Avery to give the money to him. The 2nd Accused had inquired from Avery as to who S.I. Silva (decoy) was, and was told that he was the accounts clerk of the company. S.I. Silva had replied that he should give the money only to the 1st Accused as instructed. Witness Avery has stated that he heard the 2nd Accused saying that S.I. Silva may be a policeman. Thereafter they have informed I.P. Joseph waiting on the ground floor and proceeded to the Bribery Department to plan out the raid to be conducted that evening at the Bambalapitiya house of the 1st Accused.

On the evening of 10.01.91, witness Avery, I. P. Joseph and S.I. Silva (decoy) had conducted the raid and visited the 1st Accused Appellant at his residence at Bambalapitiya. According to the evidence of Avery, supported by that of S.I. Silva (decoy), the 1st Accused Appellant had offered them a seat and inquired as to who S.I. Silva was and was told he was the accounts clerk. Then the 1st Accused Appellant had inquired whether the money was brought and when answered in the affirmative, the 1st accused Appellant had taken them to an adjoining room where there was a table and requested the money to be kept on the table. When this was done, the 1st Accused Appellant had covered the money with a mat that was on the table. Whereupon, on proceeding towards the gate of the house, the decoy had signaled to I.P. Joseph who had rushed in and arrested the 1st Accused Appellant and recovered the money consisting of marked notes from where it was originally kept as instructed by the 1st Accused-Appellant. On the following day, on the instructions of the Bribery Department, Inspector Joseph had arrested the 2nd Accused Appellant at Katunayake.

The 1st Accused-Appellant was absent and unrepresented though the hearing of the Appeal, having tendered a petition of appeal dated 11.11.97. The learned Counsel for the 2nd Accused Appellant and the learned D.S.G. for the Respondent made oral submissions and have tendered written submissions. We have carefully perused the respective petitions of appeal, the entirety of the trial proceedings and the written submissions tendered to court.

In an appeal from the High court, Section 349(3) of the Code of Criminal Procedure Act provides that where the appellant does not appear to support the appeal the court shall consider the appeal and make such order thereon as it may deem fit. Accordingly we have considered the matters raised in the petition of appeal of the 1st Accused-Appellant in the light of the evidence led at the trial. The learned trial Judge has exhaustively analysed the evidence against the 01st Accused Appellant with regard to counts 1-4 of the indictment and given sound reasons for his conclusions. Therefore no sufficient grounds have been brought to our notice for interfering with the conviction and sentence against the 1st Accused Appellant. The 03rd surety of the 01st Accused Appellant has been dealt with and

according to the minute of 30.03.2004, he has informed court that the 1st Accused Appellant has left the country and is living abroad. The matters raised in the petition of appeal of the 1st Accused Appellant, especially the alleged contradictions in the evidence of Avery and the bribery officers, have been carefully considered and reconciled .by the learned trial Judge in his lengthy judgement with regard to the charges of soliciting (counts 1-2) and acceptance (counts 3-4). In view of the above, as the 1st Accused-Appellant has failed to urge material grounds which would vitiate the conviction and sentence on counts 01 – 04 of the indictment, we make order under section 349(3) of the Code of Criminal Procedure Act affirming the conviction and sentence of the 01st Accused Appellant on those charges.

During the course of the argument, and in the written submissions the following grounds of Appeal have been raised on behalf of the 02nd Accused Appellant.

- 01) The evidence pertaining to the counts of abatement (counts 5 and 6) is unsatisfactory and the same have not been considered properly by the learned trial Judge in his judgment.
- 2) Even if the available evidence is considered, it is insufficient to establish a charge of aiding and abetment against the 2nd Accused Appellant.
- 3) Even though charges of aiding and abetting in counts 05 and 06 of the indictment relates to the offence of acceptance contained in counts 03 and 04 committed in Colombo during the course of the same transaction, the evidence led in the case does not support this position.

On a perusal of the evidence led in the case and the judgment of the learned trial Judge, we are inclined to take the view that the above grounds of appeal should succeed for the following reasons.

The judgment of the learned trial Judge is contained in pages 1419 to 1461 of the original record. Consideration of the case against the 2nd Accused Appellant on abetment charges has been briefly confined to 04 paragraphs contained in pages 1448 to 1450 of the original record. The learned trial Judge has merely stated that the evidence of Avery and S.I. Silva was sufficient to substantiate abetment charges against the 2nd Accused and left it that, while commenting that the 2nd Accused has failed to adduce evidence. On a perusal of the evidence and the judgement, the following circumstances militate against the conviction of the 2nd Accused Appellant on charges of abetment of the 1st Accused Appellant with regard to the acceptance of the illegal gratification.

1) The learned trial Judge has misdirected himself in failing to attach a proper weightage to the two material contradictions elicited from the evidence of Avery and S.I. Silva when they met the 2nd Accused Appellant at the customs office. The evidence of Avery that the 2nd Accused called out "come come El Steel" and later commented about S.I. Silva "this fellow could be a police officer" is contradicted by S.I. Silva who denies having heard any of these

utterances. The learned trial Judge has sought to reconcile these material contradictions by citing Queen Vs Julis (65 NLR 585) and Samaraweera Vs The Attorney General (1990 (1) SLR 256) on the basis that error of memory or faulty observation could distinguish these utterances from being deliberate falsehoods. According to the evidence, the 2nd Accused Appellant had spoken to Avery when S.I. Silva has in close proximity. Further, S.I. Silva being a trained police officer who would have made notes to refresh his memory, it is quite inconceivable that he will fail to absorb what was told to Avery. If a proper weightage was given to these material contradictions, a reasonable doubt would have arisen in the evidence of Avery which would accrue to the benefit of the 2nd Accused Appellant.

2) The 1st Accused Appellant had requested Avery to come to his residence at Bambalapitiya. However on 10.01.91, without any plausible reason, the bribery officers have taken Avery to the Custom office at Katunayake much to the astonishment of Avery himself. In the light of the backdrop that the 2nd Accused Appellant too was involved in a customs inquiry against El Steel Company, in the

absence of an acceptable reason for the bribery officers to accompany Avery to the customs office in the absence of the 1st Accused Appellant, the learned trial Judge has misdirected himself in not affording a proper weightage to this aspect and scrutinized the evidence as to the involvement of the 2nd Accused more circumspectously.

3) The charges against the 2nd Accused Appellant entirely rests on his conduct conducive to abetment of the 1st Accused Appellant accepting the illegal gratification on a subsequent occasion. The learned trial Judge has totally failed to consider whether the ingredients with regard to abetment as laid down in Section 100 and 101 of the Penal Code have been proved beyond reasonable doubt. In order that the 2nd Accused Appellant abets the 1st Accused Appellant to accept the illegal gratification concerned, the prosecution must prove beyond reasonable doubt one or more of the following.

- a) The 2nd Accused instigated the 1st Accused to accept the bribe.

- b) The 2nd Accused engaged in a conspiracy with the 1st Accused for the latter to accept the bribe.
- c) The 2nd Accused intentionally aided the 1st Accused to accept the bribe.

While holding that there is sufficient evidence to substantiate the charges against the 2nd Accused, the learned trial Judge has gravely misdirected himself in failing to identify the ingredients that have to be proved in establishing a charge of abetment and applying and analysing the evidence judicially to conclude whether these ingredients are proved beyond reasonable doubt. There is no evidence on record that the 2nd Accused instigated, engaged in a conspiracy or intentionally aided the 1st Accused to accept the bribe. Even if the evidence of Avery and S.I. Silva against the 2nd Accused is admitted as credible, it would at most constitute that the 2nd Accused had knowledge of the soliciting by the 1st Accused and made an attempt obtain the money for himself. There is no conclusive evidence on record that the money requested by the 2nd Accused was an illegal gratification to permit El Steel Company to sell imported steel in the open market. The official

act concerned has by them already been performed by the 1st Accused. Therefore the conduct of the 2nd Accused does not conclusively establish that he committed the offence of abetment of the 1st Accused in accepting the bribe. Charges of abetment in counts 5 and 6 of the indictment relates to the offence of abetment being committed in Colombo in the same transaction pertaining to the charge of acceptance in counts 3 and 4. However the evidence is clear as crystal that the alleged conduct of abetment by the 2nd Accused took place not in Colombo but in Katunayake customs office as related to the offence of soliciting in counts 01. and 02. The learned trial Judge has failed to consider this aspect too in his judgment.

In view of the above, that court is inclined to uphold the above grounds of appeal in favour of the 2nd Accused Appellant.

For reasons stated in this judgment, we affirm the conviction and sentence imposed by the learned High Court Judge of Colombo on 11.11.1997 on the 1st Accused Appellant with regard to counts 01 – 04 of the indictment and make order under section 349 (3) of the Code of Criminal Procedure Act dismissing the Appeal of the 1st Accused Appellant. We further direct the learned High Court Judge of Colombo to take necessary steps against the 1st Accused Appellant to implement the sentence and to take necessary steps to deal with the 01st and 02nd sureties of the 01st accused Appellant according to law.

For the reasons stated above in this judgment, we set aside the conviction and sentence imposed on the 02nd Accused Appellant on 11.11.1997 with regard to counts 05 and 06 of the indictment and acquit the 02nd Accused Appellant. We therefore allow the Appeal of the 02nd Accused Appellant. The Registrar is directed to forward a copy of this judgment with the original case record to the High court of Colombo. The 02nd Accused Appellant is directed to appear before the High Court of Colombo when noticed.

Appeal dismissed with regard to the 01st Accused Appellant. Appeal allowed with regard to the 02nd Accused Appellant.

JUDGE OF THE COURT OF APPEAL

Rohini Marasinghe, J.

I agree.

JUDGE OF THE COURT OF APPEAL

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