

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

Pothunaduge Winston Alfred Kanthilal  
Silva  
**Accused-Petitioner**

**CA (PHC) Apn. Application  
No. 105/06**

-Vs.-

**High Court of Colombo  
Case No: 1407/02**

The Attorney General  
Commission to Investigate Allegations of  
Bribery or corruption.  
**Complainant-Respondent**

**BEFORE** : Rohini Marasinghe, J. and  
Sarath de Abrew, J.

**COUNSEL** : D.S. Wijesinghe, PC., with Kaushalya Molligoda  
for the Accused-Petitioner.

Mallika Liyanage with A. Wickramasinghe  
for the Complainant-Respondent.

**ARGUED ON** : 25.06.2009

**WRITTEN SUBMISSIONS**

**TENDERED ON** : 27.08.2009

**DECIDED ON** : 15.05.2012

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**Sarath de Abrew, J.**

In this application the Accused-Petitioner has sought to revise the order (P-12) of the learned High Court Judge of Colombo dated 14.07.2006 overruling the preliminary objection raised by the Accused as to the validity of the indictment forwarded against the Accused by Complainant, the Director General of the Bribery Commission. This matter was argued before a Bench of Justice S.I. Imam and myself and on the elevation of Justice S.I. Imam to the Supreme Court before the delivery of the order, this matter was re-argued and written submissions filed before the present Bench of Justice Rohini Marasinghe and myself.

The facts briefly are as follows. The Complainant-Respondent, the Bribery Commission, commenced investigations in 1990 into the assets of the Accused-Petitioner. This inquiry into the assets included that of a house construction at Vajira Road, Bambalapitiya. The inquiry had commenced in 1990 based on petitions sent against the Accused-Petitioner. Form 05 (R-1) under the Bribery Act had been issued to the Petitioner on 27.12.1990 which had been duly perfected and tendered to the Bribery Commission on 18.01.1991. The inquiry had thereafter continued as evidenced by P2 - P3. The Petitioner had left the country in September 1994 and returned in January 1997 whereupon he has faced an inquiry by a Special Presidential Commission of Inquiry which proceedings had terminated without a finding (P4). Thereafter a show cause letter (P5)

has been issued to the Petitioner on 03.09.2001 by the Complainant Commission to submit a sworn statement which had been tendered on 04.01.2002 (P6) by the Petitioner. Thereafter the Complainant Commission had issued P7 on 10.06.2002 to the Petitioner calling for further clarifications on his sworn statement and directed to the Petitioner to appear before the Commission on 14.06.2002 (in 04 days time) with his identity card, bank account books, a copy of the tax return and copies of the bill payments with regard to the constructions of the house at Vajira Road, without specifying a specific time period. The Petitioner by P8 had requested one month extension of time to submit the information and documents requested, but the request had been refused by the Bribery Commission by P9A dated 14.06.2002 on the basis that the investigation had been badly delayed due to the Petitioner being abroad for a number of years.

Consequent to the refusal to grant extension of one month's time, the Complainant Bribery Commission had forwarded the indictment against the Petitioner (P9B) dated 18.08.2002, two months later, to the High Court of Colombo, without obtaining the clarifications sought by way of P7.

On 22.05.2006, before the indictment was read over to the Accused, the learned Counsel for the Accused had raised a preliminary objection assailing the validity of the indictment. After hearing oral

submissions from both parties, the learned High Court Judge had made order on 14.07.2006 (P12) rejecting this preliminary objection and fixing the case for trial. Being aggrieved of the aforesaid impugned order, the Accused-Petitioner has preferred this revision application to this Court on 31.07.2002.

The main contention of the Petitioner is that the purported indictment (P9B) is invalid and bad in law due to the non-compliance by the Complainant, Bribery Commission of the mandatory provisions in Section 23A (4) of the Bribery (Amendment) Act No. 10 of 1958 which stipulates as follows.

“No prosecution for an offence under this Section shall be instituted against any person unless the Bribery Commission has given such person an opportunity to show cause why he should not be prosecuted for such offence and he has failed to show cause or the cause shown by him is unsatisfactory in the opinion of such commission.”

It is clear ~~as~~ crystal that on a reasonable analysis of the <sup>§</sup> above mandatory provision, the Bribery Commission is required by law to comply with the following antecedent requirements in order to forward a valid indictment under Section 23 A of the Bribery Act in what is known as property or asset cases.

- a). A reasonable opportunity must be given to a person under investigation to show cause as to why he should not be prosecuted.
- b). Such person should fail to show cause after a reasonable opportunity has been given.
- c). Or, in cases where cause is shown consequent to being given a reasonable opportunity, such cause shown must be unsatisfactory in the opinion of the Commission.

The significance of this provision as a safe-guard and a sentinel to shut out haphazard indictments being forwarded, must be viewed in light of the stringent provision contained in Section 23 A (1) of the Bribery Act where the burden of proof shifts to an accused person to prove that the property and assets enumerated in such indictment have been acquired by legitimate means.

This is an exception to Article 13 (5) of the Constitution that every person shall be presumed innocent until he is proved guilty and comes within the ambit of its proviso in that the burden of proving particular facts may, by law, be placed on an accused person. Based on the above construction therefore, our Courts owe a duty to ensure strict compliance of

the mandatory provisions contained in Section 23A (4) of the Bribery Act as amended.

With the above legal construction of the above Section in mind, I now approach the problem.

In the instant case the Accused-Petitioner has shown cause (P1 - P2 and P6). By P7, the Commission has called for further clarifications and given only 04 days time. Therefore the Commission was still in the process of gathering information and assessing the material placed before them in order to decide whether or not to prosecute. Before the issue of P7, the Commission could not have formed the opinion that the cause shown by the Accused was unsatisfactory, in which event there was no purpose served in the Commission calling for further clarifications. The 04 days time given for the Accused to furnish the documents called for by P7 could hardly be interpreted to afford a reasonable opportunity to show cause further. The refusal of extension of time by one month is therefore arbitrary. The reason given for refusal of time in P9A that the investigation was badly delayed in view of the fact that the Accused-Petitioner was abroad for number of years is also unacceptable for the reason that the Accused going abroad during 1994 to 1997 has no application or relevance to the present situation in giving one month further time to enable the Accused-Petitioner to furnish the required documents and information called for as further

clarifications by the Commission itself. Where the Commission is undecided and seeks further clarifications within 04 days, and where a further one months time is sought to submit the documents, the extra delay of further 26 days do not empower the Commission to ignore the further clarifications already sought and come to an arbitrary and unfair decision to forward the indictment, in violation of the provisions of Section 23A (4). An indictment thus forwarded would be bad in law, has no force or avail and no legal consequences will flow thereupon.

In R.P. Wijesiri vs. The Attorney General (1980) 2 SLR 317)

it was held that a direct indictment forwarded by the Attorney General without an investigation, sanction and non-summary proceedings as required by law was invalid. Consequently the law was amended to empower the Attorney General to forward a direct indictment. Striking a personal note, I had the privilege of being a member of the State team, and coincidentally, the learned Counsel for the Petitioner in this Case was in the opposing team.

In Director General for the Prevention of Bribery and Corruption vs. Fernando ((1999) 3 SLR 104) F.N.D. Jayasuriya, J held that non-compliance of Section 23A (4) of the Bribery Act would invalidate the indictment and the learned High Court Judge had inherent power to discharge the Accused from further proceedings and entertain a subsequent

indictment after due compliance with Section 23A(4) of the Act.

Article 13(3) of the Constitution has promulgated that “Any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent Court. In this context it is most relevant and opportune to determine whether the application of Article 13 (3) would extend to include situations where there cannot be a fair trial by a competent Court based on a flawed indictment where mandatory provisions prescribed by law to initiate trial proceedings are blatantly infringed.

Refocusing on the impugned order dated 14.07.2006 by the learned High Court Judge of Colombo, the learned High Court Judge has totally failed to analyse the mandatory provisions contained in Section 23 A (4) of the Bribery Act as amended and totally failed to determine whether there was due compliance. Suffice it to say that the impugned order contains only a mere recital of the oral submissions of contending parties supplemented by two paragraphs at the tail-end of the order which does not have a semblance of reference to the requirements of Section 23 A (4).

Due to the foregoing reasons, I hold that the learned High Court Judge of Colombo has gravely misdirected herself on the law by rejecting the preliminary objection raised by the Accused-Petitioner. Acting



in revision, I therefore set aside the impugned order dated 14.07.2006 of the learned High Court Judge of Colombo and further direct that the said preliminary objection be upheld for non-compliance of Section 23 A (4) of the Bribery Act as amended and consequently direct that the Accused-Petitioner be discharged from further proceedings based on the invalid indictment dated 15.08.2002.

The Registrar is directed to send a copy of this order to the High Court of Colombo for compliance with the original case record.

Application is allowed with costs.

**JUDGE OF THE COURT OF APPEAL**

I agree.

Rohini Marasinghe, J.

**JUDGE OF THE COURT OF APPEAL**