

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

**In the matter of an Application made under section
364 of the Code of Criminal Procedure Act No. 15 of
1979**

The Director General, Commission to Investigate
Allegation of Bribery or Corruption,
No. 36, Malalasekara Mw,
Colombo 07.

COMPLAINANT

Vs,
Siyambalage Don Nelson,
Nugawela Junction,
Walakumburumulla,
Weraligama,
Kuliyapitiya.

**CA (PHC) 118/2012
HC Colombo B 1522/2004**

ACCUSED

AND NOW BETWEEN,

The Director General,
Commission to Investigate Allegation of Bribery or
Corruption,
No. 36, Malalasekara Mw,
Colombo 07

COMPLAINANT-PETITIONER

Vs,
Siyambalage Don Nelson,
Nugawela Junction,
Walakumburumulla,
Weraligama,
Kuliyapitiya.

ACCUSED-RESPONDENT

Before : **Vijith K. Malalgoda PC J (P/CA) &**
H. C. J. Madawala

Counsel: Dilan Rathnayake SSC for the Complainant-Petitioner
Dulinda Weerasuriya PC with Darshana Edirisuriya for the Accused-Respondent

Argued On: 06.05.2015

Written Submissions on 13.08.2015

Order On: 12.10.2015

Order**Vijith K. Malalgoda PC J (P/CA)**

Director General, Commission to Investigate Allegations of Bribery or Corruption (here in after referred to as Complainant-Petitioner) has come before this court under section 364 of the Code of Criminal Procedure Act No 15 of 1979 in order to revise an order made by the Learned High Court Judge of Colombo on 09.05.2012, directing that the prosecution should submit “ the statement of the known income of the Accused”, certified by the Director General of the Commission to Investigate Allegations of Bribery and Corruption.

Being aggrieved by the said order the said Complainant–Petitioner has come before this court seeking inter alia “to set aside the order dated 09.05.2012 and accept the copy certified by the Investigating Officer.

I will now deal with the facts and circumstances under which the Complainant –Petitioner has come before this court. The Accused-Respondent was indicted before the High Court of Colombo under section 23A of the Bribery Act by the Complainant –Petitioner. The trial in the High Court was commenced on 25.01.2007 and in the course of the said trial on 29.09.2011 the Honorable Judge of the High Court made an order directing the prosecution to submit a statement of known income of the Accused to Court and accordingly a duly certified copy of the known income was submitted to court. The prosecution in the course of the trial on 09.05.2012 moved to mark the said statement of the known income of the accused. At this stage the defence objected to this document being marked on

the basis that it should be certified either by the Bribery Commission or by the Director General of the Bribery Commission.

In consequent to the said objection raised by the defence, the Learned High Court Judge had made the impugned order in this case.

At the commencement of the Argument before this court, Learned Counsel for the Accused-Respondent raised several objections to the maintainability of this application. At that stage the court decided to consider both issues, i.e the preliminary objection and the main argument together and accordingly both parties made submissions on both the above issues.

Since it is necessary to consider the preliminary objection prior to considering the arguments in the main matter, I will first deal with the Preliminary Objections raised before this court.

The Accused –Respondent had raised the following Preliminary Objections before us and moved that this application be dismissed in limine,

1. Section 364 of the Code of Criminal Procedure Act No. 15 of 1979 does not give the right to the Complainant -Petitioner to make an application for revision of this nature
2. Complainant –Petitioner has failed to comply with the Supreme Court rules by failing to submit an affidavit in support of the averments contained in the Petition.
3. Complainant –Petitioner has failed to annex the impugned order to his Petition which is also a violation of Supreme Court Rules
4. Complainant-Petitioner has further violated the Supreme Court rules by not submitting along with this Petition material facts for the proper adjudication and determination of this application
5. Petitioner is guilty of lashes

Under the provision of the Code of Criminal Procedure Act No 15 of 1979 the Attorney General is empowered to forward Indictment to the High Court. Until the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994 (here in after referred to as Bribery Commission Act) was enacted, it was the Attorney General who could forward indictment to the High Court including Indictments under the Bribery Act No 11 of 1955. However the said Bribery Commission Act made drastic changes to the above position by permitting the Director General of the Commission to Investigate Allegations of Bribery or Corruption to forward Indictment to the High Court. Section 12 (1) of the Bribery Commission Act which provides forwarding such Indictments reads as follows;

12 (1), 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 received such indictment and shall have jurisdiction to try the offence described in such indictment in all respects as if such indictment were an indictment presented by the Attorney General to such court.

Section 13(2) of the said Act provides for the Complainant –Petitioner to Appeal against a Judgment or Order of the High Court and the said section reads as follows;

13 (2), Where proceedings are instituted in a High Court by an indictment signed by the Director General, such Director- General shall have the right to appeal against a judgment, order or sentence of such High Court in all cases in which the Attorney General would have had the right to appeal against such judgment, order or sentence had an indictment for such offence been presented to such Court by the Attorney General, and the Director General or an officer appointed to assist the Commission shall be entitled to appear in any court in support of such appeal.

When going through the above provisions it is very much clear, that the legislature upon enacting the new Bribery Commission Act wanted the Commission to Investigate Allegations of Bribery or Corruption, to Act independent of the Attorney General who is empowered to forward Indictments to the High Court in all the other instances and thereby given the Commission and its Director General the sole, powers of forwarding Indictment and Appealing against the Orders of Court with regard to offences under the Bribery Act.

The Attorney General is empowered to invoke the powers of revisionary jurisdiction under section 364 of the Code of Criminal Procedure Act No 15 of 1979 and it is understood under the circumstances I have already discussed in this judgment, the Complainant-Petitioner being the Sole Authority in forwarding Indictment under the Bribery Commission Act has the same power of revision that the Attorney General has been given

In the case of *Attorney General Vs. Chandrasena 1991 (1) Sri LR 85* it was held that the absence of an affidavit by Attorney General did not violate the provisions of Rule 46 of the Supreme Court Rules, as the court was invited to decide only a question of Law, and the relevant matter for that decision, have been admitted by the Accused-Respondent.

However in the case where Attorney General is inviting the court to decide on a question of fact, he will be required to file affidavits through persons who have personal knowledge of the relevant facts.

When coming into the said conclusion the court was mindful of the role played by the Attorney General in a Revision Application which is based purely on a question of Law. The court in uncertain terms had said that the Attorney General will be required to file affidavit through persons who have personal knowledge of the relevant facts when he invokes the revisionary jurisdiction on question of facts.

When looking at the role played by the Director General, Commission to Investigate Allegations of the Bribery or Corruption, under provisions of the Bribery Commission Act, I see no reason to isolate him from the Attorney General, when he invokes the jurisdiction of this court on revisionary jurisdiction on a question of Law only as in the present case he should have the same privilege as enjoyed by the Attorney General. I therefore over rule the 1st and 2nd objections raised by the Accused-Respondent.

On perusal of the journal entries of the present case we observe the following journal entry dated 27.09.2012.

“Learned Senior State Counsel makes an application to support his application after filling the full certified copy of the High Court Record. Application is allowed Learned Senior State Counsel is at liberty to move court file a motion.”

Thereafter on 30th November 2012 a certified copy of the entire case record was filed before this court along with a motion and thereafter moved this court to support the present case for notices.

Therefore it is understood that at the time this Revision application was supported before this court the impugned order as well as all the proceedings and documents necessary for the proper adjudication and determination was before this court and therefore I see no merit in the 3rd and 4th objections raised by the counsel for the Accused-Respondent.

The impugned order in this case was made on 9th May 2012 and further trial was put off for the 4th September 2012. On the said date the Complainant-Petitioner was represented in court by a Senior State Counsel. However the said trial date was changed to 7th September when the matter came up in the High Court on 30/ 07/2012 on a motion filed by the Accused-Respondent. On 07/09/2012 an application was made by another Senior State Counsel who represented the Complainant-Petitioner

for an adjournment since the Complainant-Petitioner had decided to file Revision Application against the order made by the Learned High Court Judge on 09.05.2012 and also apologizing to court for the delay in reaching a decisions, for the reason that there were certain communication lapses between the Attorney General and the Complainant –Respondent since, the Senior State Counsel who handled this case had been appointed a Judicial Officer.

When the Counsel for the Accused-Respondent raised that the Complainant-Petitioner has taken 4 months to come before this court and therefore he is guilty of laches, the Complainant-Petitioner taking up the same issue in explaining the delay, had further submitted that the delay concerned is in no way proportionate to the prejudice that would be caused to the petitioner if this application is rejected.

In the case of *Carlo Perera Vs. Lakshman Perera 1990 (2) Sri L R 302* the question of delay in filing a revision application was discussed by S.N. Silva J as follows “it was submitted that the application should be dismissed in limine on this ground. As noted above, the order against which this application has been filed was made on 29.08.1984. The Defendant-Petitioners sought to explain the delay partly on the basis that they had to obtain a certified copy of the proceedings from the District Court. It is noted that the certified copy was obtained on 17.12.1984. This application was thereafter filed on 31.01.1985. Thus it is seen that the application has been filed within a period of five months of the order that is challenged. It had been filled within six weeks of the certified copy being obtained. Counsel for the Defendant-Petitioners has not cited any precedent in which an application has been dismissed because it was filed within a period of five months of the impugned order. To my mind there has been no undue delay in filing this application”.

In the case of *Gnanapandithen and Another Vs. Balanayagam and Another 1998 (1) Sri L R 391* Chief Justice G.P.S. de Silva concluded that, “the question whether delay is fatal to an application in revision depends on the facts and circumstances of the case. Having regard to the very special and exceptional circumstances of the case the appellants were entitled to the exercise of the revisionary powers of the Court of Appeal”.

Learned Senior State Counsel representing the Complainant-Petitioner explained the delay and submitted that the counsel who appeared in the High Court had apologized for the delay in informing the decision to High Court due to a communication laps between two institutions. As complained by the Accused-Respondent, the Complainant has taken 4 months to come before this court which is in my view cannot be considered as a long delay when considering the events explained by the Learned

Senior State Counsel before us as well as in the High Court. I therefore overrule the 5th and the last preliminary objection raised by the counsel for the Accused-Respondent.

I shall now deal with the submission made by both parties in the main argument.

Whilst making the impugned order the Learned High Court Judge had observed that such certification by the Commission or by the Director General would not cause prejudice to either party. Whilst challenging the said observation the Learned Senior State Counsel had submitted that the said order causes prejudice in two ways to the prosecution,

- I The Learned Trial Judge by demanding certification that is not required by the law have cast an additional burden on the prosecution which is prejudicial to the interest of the prosecution and has attempted to legislate a provision of law not found in the Bribery Act.
- II The Order directing that such certification be always issued in similar cases makes this a bad precedent which the prosecution would have to follow in other cases, which once more would be prejudicial to the prosecution.

Section 162 of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Amending Act No. 52 of 1980 refers to the contents of an Indictment as follows;

- 162 (1) Every Indictment for trial in the High Court whether with or without a jury shall contain a list of witnesses whom the prosecution intends to call and another list of documents and things intended to be produced at the trial which documents and things shall be called “ productions”.
- (2) To every indictment shall be attached the following documents
- a. Where there was a preliminary inquiry under this chapter a certified copy of the record of inquiry and of the documents and of the inquest proceedings if there had been an inquest,
 - b. Where there was a preliminary inquiry under this chapter ,copies of statements to the police, if any, of the accused and the witnesses listed in the indictment,
 - c. Copies of all reports and sketches listed in the indictment,

- d. Copies of the notes of any identification parades that may have been held during the investigation of the case,
- e. Copies of any statement made to the magistrate under section 127 by ,
 - i. The accused and
 - ii. Any witness listed in the indictment and
- f. Copies of such portion of notes, containing in the observations of the scene of offence, made during the investigation of the offence by a Police Officer

Section 12 (2) of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994 which refers to the annexure to an Indictment forwarded by the Director- General of Bribery reads as follows;

12 (2) There shall be annexed to every such indictment, in addition to the documents which are required by the Code of Criminal Procedure Act No. 15 of 1979, to be annexed there to, a copy of the statements, if any, made before the Commission, by the accused and by every person intended to be called as a witness by the prosecution.

The court observes that these are the remaining provisions of Law which provides for annexure and/or documents to be served on an accused person along with an indictment.

In addition to the above, section 164 and 165 of the Code of Criminal Procedure Act No. 15 of 1979 provides for certain information to be included to the charge itself and the sole object of these two sections is to “give the accused reasonably sufficient notice of the matters with which he is charged.”

In the present case the Accused-Respondent was indicted before the High Court of Colombo by the Director General Bribery under section 23A of the Bribery Act.

Section 23A of the Bribery Act reads as follows;

- 23A (1) where a person has or had acquired any property on or after March 1, 1954 and such property,
- a. Being money, cannot be or could not have been –
 - i. Part of his known income or receipts

- ii. Money to which any part of his known receipts has or had been converted or
- b. Being property other than money cannot be or could not have been-
 - i. Property acquired with any part of his known income or
 - ii. Property which is or was part of his known receipts or
 - iii. Property which is or was part of his known receipts has or had been converted,

Then for the purpose of any prosecution under this section, it shall be deemed, until the contrary is proved by him, 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.

- (3) A person who is or had been the owner of any property which is deemed under subsection (1) to be property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and fine not exceeding five thousand rupees.

As submitted by the counsel for the Accused Respondent, the most important ingredient the prosecution will have to establish in a charge under the section 23A is the "known income" if the person who is charged before court.

Subsection (4) of the said section 23A reads as follows;

- 23A (4) no prosecution for an offence under this section shall be instituted against any person unless the Bribery Commissioner 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 Commissioner.

Therefore it is clear that the Bribery Commissioner has to first give an opportunity to the person to offer an explanation as to why he should not be prosecuted for acquisition of any property in excess of his known income. In the said exercise the accused has to submit before the Commissioner proof of his known income and during their investigation the Officers of the Bribery Commission will probe in to the material submitted by the accused to conclude whether they are satisfied with the material placed before them or unsatisfied with the said material.

In the case of *C.S.D. Swami V. State AIR 1960 SC 7; (1960) 1 SCR 461; 1960 Cri L J 131* Bench comprising of *B.P. Sinha, P.B. Gajendragakar and K.N.Wanchoo (jj)* held, “the expression known sources of income” must have reference to sources known to the prosecution on a thorough investigation of the case. It was not and it could not be, contended that “known source of income” means sources known to the accused.

Wimalarathne (J) quoted the above interpretation in the case of *Wanigasekara V. Republic of Sri Lanka 79 NLR 240 at 248* and observed 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 be or could not have been acquired with any part of his sources of income or receipts known to the prosecution after investigation”.

After concluding the investigation, the investigator is possessed with the known income and the said income is used in deciding the fact whether an Indictment under section 23A is warranted or not,

Therefore I agree with the contention of the counsel for the Accused-Respondent, that the Accused - Respondent has a right to be informed of the known income which was considered by the prosecution in deciding the Indictment against the Accused under section 23A of the Bribery Act.

However, as the discussed by *Wimalarathne J* the said information is to be gathered by a thorough investigation conducted by the investigators and therefore it appear to me that the known income of the Accused which was taken in to consideration in forwarding the Indictment under section 23A of the Bribery Act is a part of the investigation carried out by the investigator of the Bribery Commission, and therefore it is the investigators who can take responsibility of the said investigation.

When this same issue was raised before the **Court of Appeal in the case of *Ray Ricardo Ramanayake V. Director General, Commission to Investigate Allegations of Bribery or Corruption CA (PHC) APN No 124/07*** Court of Appeal minutes dated 03.07.2008 the parties have agreed in court to include the known income of the Accused in a different schedule annexed to the Indictment.

In the said case the Accused –Petitioner has raised an objection before the High Court that the known income of the Petitioner as accepted by the Bribery Commissioner ought to have mentioned in the Indictment. The Learned High Court Judge had rejected the said objection and the Accused-Petitioner has gone before the Court of Appeal against the said Order.

As pointed out by me in this judgment when a person is charged under section 23A of the Bribery Act, he is entitled to be informed of the known income considered in forwarding the Indictment and it is the investigator who can take responsibility of the investigation carried out by him rather than the Director General of the Commission who will only take the decision based on the said information. Therefore I cannot agree with the Order of the High Court Judge when he conclude that no prejudice would caused by Director General signing the said schedule.

On this point I agree with the submissions made by the Learned Senior State Counsel that it imposes an additional burden on the prosecution and it is an attempt to legislate provisions of Law not found in the Bribery Act.

Therefore I make order to set aside the order by the High Court Judge Colombo made on 09.05.2012 directing the Commissioner General of the Commission to Investigate Allegations of Bribery or Corruption to certify the schedule which indicates the known income of the Accused-Respondent.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE CUORT OF APPEAL