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

In the matter of an Appeal
Under section 331 of the Code of
Criminal Procedure Act No. 15 of
1979

Director-General

Commission to Investigate,

Allegations of Bribery,
or Corruption

Vs

Mohamed Hanifa Mahamed Refai
Accused

C. A. Case No. : 196/2008

H. C. Colombo Case No. : B/1405/2002

And now

Mohamed Hanifa Mahamed Refai

Accused Appellant
Vs

Director – General,
Commission to Invesitigate,
Allegations of Bribery
or Corruption,
Complainant Respondent

The Hon. Attorney General
Attorney General's Department,
Colombo 12.

Respondent

BEFORE : **P.R.Walgama, J &**

K. K. Wickramasinghe, J

COUNSEL : R. Arsecularathne,PC. for the Accused Appellant

Dilan Rathnayake, DSG for the Respondent

ARGUED ON : 20/06/ 2016

DECIDED ON : 17 /03 /2017

K. K. WICKRAMASINGHE, J.

The Accused Appellant (herein after referred to as the Appellant) was indicted in the High Court of Colombo by the Director-General of the Commission to Investigate Allegations of Bribery or Corruption, on the direction of the said Commission for committing the following offences.

1. That between 01.07.2000 and 31.12.2001., at Warakapola, the Accused Appellant, who was a Works Superintendent attached to the Warakapola Divisional Secretariat, solicited a sum of Rs. 6000/= from one Weerakkody Arachchilage Ajith Rohana Werakkody in order to recommend the last payment pertaining to agreement bearing No: 0809/05/2000/01 between the Warakapola Divisional Secretary and Algama Samurdhi Authority, for the construction of a side wall joining Mawathkanda and Panihela Road and thereby committed an offence punishable under Section 19 (b) of the Bribery Act.

2. At the aforesaid time, place and during the course of the same transaction, the Accused Appellant being a public servant solicited a sum of Rs. 6000/= from the said Weerakkody Arachchilage Ajith Rohana Weerakkody and thereby committed an offence punishable under Section 19 (c) of the Bribery Act.

3. On 26.12.2001. at Warakapola, the Accused Appellant being a Works Superintendent attached to the Warakapla Divisional Secretariat, accepted a sum of Rs.1000/= from the said Weerakkody Arachchilage Ajith Rohana Weerakkody for the purpose of recommending the last payment due, under agreement bearing No: 0809/05/2000/1 between the Warakapola Divisional Secretary and Algama Samurdhi Authority, for the purpose of construction of a side wall joining Mawathakanda and Panihela Road and thereby committed an offence punishable under Section 19 (b) of the Bribery Act.

4. At the aforesaid time, place and during the course of the transaction set out in count 3 above, the Accused –Appellant being a public servant, accepted a sum of Rs. 1000/= from the said Weerakkody Arachchilage Ajith Rohana Weerakkody and thereby committed an offence punishable under Section 19 (c) of the Bribery Act.

5. The trial in this case commenced on 25.02,2003. At the trial, following witnesses were called by the prosecution in order to prove the above mentioned charges.

    1. Weerakkody Arachchilage Ajith Rohana Weerakkody – the complainant (PW1) (pages 36- 127 of the brief)
    2. H.M. Lalith Herath PC 34221 – the decoy (PW 2) (pages 129-154 of the brief)
    3. PS 10205 Kumarasiri (PW3) (pages 155-163 of the brief)
    4. IPK Wasantha – OIC (PW 4) (pages 165-193 of the brief)
    5. Ananda Wimalasena – Divisional Secretary (PW 5) (pages 194-214 of the brief)

The prosecution closed the case after leading the evidence of the above witnesses and marked documents P1-P8. Learned High Court Judge called for the defence. Then the Accused-Appellant opted to give evidence by himself. (Vide pages 215-245 of the brief). After submissions of both parties, the Learned High Court Judge delivered the judgement on 25.01.2008.

Grounds of Appeal

(1.) The Judgement bears no date.

In terms of section 283 of the Code of Criminal Procedure Act No. 15 of 1979, judge who heard the case is required to sign and date the judgement in open court at the time of pronouncing it.

It is submitted by the Counsel for the Appellant that the only date that is set out in the judgement is 25.01.2008. Which is the date appearing at the beginning of the judgement and there is no date found at the place where the judge's signature appears. (Vide judgement at 247- 255 of the brief).

It is further submitted by the counsel that if the requirement of the law is to sign and date the judgement in open court, the law expects the date to appear in ink or in carbon at the place where the judge's signature appears. In the aforesaid purported judgement there is no date at the place where the judge's signature appears either in ink or carbon or even in printed form.

(2.) The Learned Trial Judge has used his discretion not to re-summon witnesses but to act on evidence partly and substantially recorded by his predecessor.

"As the evidence pertaining to the solicitation and acceptance has been led before the Learned Trial Judge's predecessor, by choosing this course of action the Learned Trial Judge who wrote the judgement has been rendered bereft of the advantage of watching the demeanour of the witnesses who testified with regard to the solicitation and the acceptance.

Demeanour is also one of the most important yard sticks used by Courts of Law and Learned Trial Judges to ascertain whether the witness was trustworthy or not, and therefore the Learned Trial Judge has wrongly used his discretion to render himself bereft of the observations pertaining to the demeanour of witnesses PW 1, 2, 3, and 4".

In the circumstances, it is submitted by the Counsel that the Learned Trial Judge has not properly used his discretion provided to him in terms of section 48 of the Judicature Act No. 02 of 1978, and as thereby violated section 283(1) of the Code of Criminal Procedure Act No. 15 of 1979.

Thereby the Counsel submitted that the Accused-Appellant has not been afforded a fair trial and this is a ground upon which a judgement should be vitiated or set aside.

(3.) "The indictment in this case was defective as the contract referred to in charges 1 and 3 in the indictment was not the relevant contract on which Payment was due". His submission was that all payments to be made under the first contract had been made to the Virtual complaint in this case when the alleged solicitation and acceptance took place. Therefore the Appellant argues that counts 1, 2, and 3 in the indictment cannot be made.

The Respondent's position in this regard is that under section 166 of the Code of Criminal Procedure Act No. 15 of 1979, any error in stating the offence or any ingredient as to the offence would be material only if the accused was misled by such error or omission. The statutory illustration (b) to the section shows that when an accused defends him and gives his account of the transaction the court may infer that the omission to refer to the particular way in which the offence was committed cannot be considered a material error.

After perusing the evidence of the Accused-Appellant it is evident that the availability of evidence does not reveal that the Accused-appellant was misled. Therefore the objection cannot be considered as a misled fact.

The counsel for the Appellant argued that the Learned Trial Judge has failed to sign the Judgement on the date of its pronouncement and this was a mandatory requirement in law in terms of section 283 (1) of the Code of Criminal Procedure Act.

By perusing the Judgement in this case depicts the date of Judgement very clearly typed at the beginning of the Judgement (at page 247 of the brief) and the journal entry made by the Trial Judge (Vide page 29) in the minute dated 25.01. 2008, clearly states that the judgement was delivered on the 25.01.2008. The fact that soon after the judge has immediately proceeded to sentence the Appellant also show that there was no doubt that the Judgement was pronounced on the said date and was signed in open court.

Therefore it is amply demonstrated that the judgement was pronounced on the 25.01.2008.

(It is noted by Court that the written submissions filed by the Counsel for the Appellant has cited a wrong date as 25.10. 2008 (Vide paragraph 04, of page 02)

Therefore the mere fact that the judgement was not dated soon after the signature was placed does not make this judgement invalid by that omission alone.

Section 114 (d) of the Evidence Ordinance also provides that courts may presume that all official and judicial acts are duly performed. Although the above is a rebuttable presumption a mere statement from the bar is insufficient to prove that the judgement was not in fact pronounced on that day. The Appellant has failed to show any such evidence that the judgement was not delivered on the date signified at the commencement of the judgement.

In the case of ***Punchibanda Vs Seelawathie 1986 2 SLLR 414,*** It was held that *"the fact that the journal entry stated the date of the order is sufficient compliance with the requirements of sections 279 and 283 of the code of Criminal Procedure Act No. 15 of 1979. Therefor the mere fact that the order has not been dated does not constitute an irregularity"*. Thus the Trial Judge failure to date the judgement, soon after signing it as in the instant case cannot be considered an irregularity. Further, the appellant has failed to show how the non-placement of the date, after signing the judgement has prejudiced him. Therefore under these circumstances it is very clear that submission of the counsel has no merit.

The perusal of the Prosecution Evidence in this case reveals that there were no marked contradictions or vital omissions for the trial judge to consider discrediting the prosecution witness. In this situation the court having considered all the evidence before it has concluded (Vide page 251, paragraphs 2 and 3 of the brief) reveals that there was ample corroboration on the acceptance charge. Court has also stated that on the charges of solicitation there is no corroboration whatsoever where the sole witness's evidence is without blemish by way of contradictions and omissions and therefor court could act even on the single witness's testimony. In this regard The learned trial judge has followed the leading authority ***,AG Vs Sunil 1999 3 SLLR 191*** where gone on to point out that *"where there were no marked contradictions or omissions in the Prosecution Evidence there is no basis to discredit the prosecution witness. Therefore the prosecution evidence has on its own established a case beyond a reasonable doubt against the appellant "*

Furthermore, as in the case of ***Bharwada Bhuginbbai Hirjibhai Vs State of Gujarat 1983 AIR 753 SC 755-766*** it *was held that,"Over much importance cannot be given to minor discrepancies. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be annexed with undue importance. More so, when all important "probabilities-factor" echoes in favour of the version narrated by the witnesses"*

Further in **State of Uttar Pradesh Vs. M.K. Anthony AIR 1985 SC 48** it was held that *" while appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring truth. Once that impression is formed, it is*

undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here and there from evidence, attaching importance to some technical error committed by the investigating officer going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the Appellate Court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matters of trivial details. Even honest and truthful witnesses may differ in some detail unrelated to the main incident because power of observation, retention and reproduction differ with individuals".

The learned Trial Judge in his judgment has gone on to evaluate the defense case. (Vide page 2552 second paragraph to page 254 of the brief).Thereafter at paragraph 2 of page 254 has rejected the defense on the basis of the defense version not passing the test of probability. The defense evidence in its entirety was taken up before the Trial Judge who wrote this judgment and therefore, he had the opportunity to observe the demeanor and deportment of the Appellant. Hence the Court's finding that the defense cannot be given any credence cannot be found fault with.

In the case of ***Dharmadasa Vs Director General, Commission to Investigate Allegations of Bribery or Corruption 2003 1 SLR*** 64 it was held that even though the learned trial judge has failed in his duty to consider the dock statement adequately and impartially, if no credence can be given to the evidence of the accused, the conviction of the Accused should be affirmed.

The learned President's Counsel on behalf of the Appellant further criticizing the charges on the indictment submitted finally, that since the 1st to 3rd count speaks of a transaction which flows from the first contract and as all payments due on the first contract had been met by the time the acceptance was made, these charges cannot be maintained in law.

Sec 436 of the Criminal Procedure Code states that any irregularity in the charges would not be considered material if such irregularity has not occasioned a failure of Justice.

In ***Lionel Vs. OIC Meetiyagoda 1987 1 SLLR 210*** *it was held that "a misjoinder of charges is curable under provisions of the Code of Criminal Procedure if there has been no actual or possible failure of justice. It was also held that as the misjoinder has not prejudiced the*

appellants and occasioned a failure of justice, it amounts to an irregularity that is curable under Section 436 of the Code of Criminal Procedure Act No. 15 of 1979, and the Appeal therefore fails"

Thus in the instant case where the Appellant has opted to give evidence on oath there is nothing to show that the appellant misunderstood the charges against him and was in any way prejudiced in presenting his defense. Therefore that such irregularity if at all is curable.

Having made extensive submissions on the evidence led, the Learned President's Counsel on behalf of the Appellant did not complain with regard to the 4th charge on the indictment of the acceptance of Rs 1000/- by the Appellant. As observed by the Trial Judge (Vide page 251 of the brief) this charge was proved by corroborative evidence. In the absence of any reason to doubt the credibility of the prosecution witnesses there is no legal basis to intervene this conviction.

It is pertinent to note that the Appellant at the time that he was giving evidence had a good understanding of the charges framed against him. Furthermore, in his own evidence he admitted that he was working as a technical officer attached to Warakapola Divisional Secretariat (Vide page 216 of the brief). Therefor he has admitted that he was a public servant during that time.Considering the above facts it is undoubtedly clear that the 04th charge on the indictment is also proved beyond reasonable doubt by the prosecution.

It is noted that the sentences given on each charges are legal and not excessive. Therefore, there is no reason to interfere with the findings of the Learned High Court Judge.

Considering above, we affirm the convictions and the sentences imposed by the Learned High Court Judge.

Hereby, the Appeal is dismissed.

Judge of the Court of Appeal

P.R. Walgama, J.

I agree

Judge of the Court of Appeal

Cases referred to:-

- *Punchibanda Vs Seelawathie 1986 2 SLLR 414*
- *AG Vs Sunil 1999 3 SLLR 191*
- *Bharwada Bhuginbbai Hirjibhai Vs State of Gujarat 1983 AIR 753 SC 755-766*
- *State of Uttar Pradesh Vs. M.K. Anthony AIR 1985 SC 48*
- *Dharmadasa Vs Director General, Commission to Investigate Allegations of Bribery or Corruption 2003 1 SLR 64*
- *Chandradasa VS Queen 72 NLR 160 at 162*
- *Jagathsena and others Vs GD.D. Perera,Inspector,Criminal Investigations and Mrs.Sirimavo Bandaranayake (1992) 1SLLR 371 at 379*
- *Lionel Vs OIC Meetiyagoda 1987 1 SLLR 210*