

**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.

C A 277/2007

Dingiri Bandage Sugath  
Gnasiri, Kohelanwala,  
Madawela,  
Ulpatha,  
Mathale.

**APPELLANT**

-Vs-

Director General,  
Commission to  
Investigate Allegations  
of Bribery or  
Corruption,  
Malalasekara Mawatha,  
Colombo 07.

**RESPONDENT**

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

**Madawala J**

**P. Padman Surasena J**

Counsel : R A F Arasacularatne PC for the Petitioner

Thusith Mudalige DSG for the Respondents

Argued on: 2016-12-07 & 2017-02-06.

Decided on: 2017 - 05 - 05

**JUDGMENT**

**P Padman Surasena J**

The Accused Appellant in this case was indicted by the Respondent in the High Court of Colombo under 8 counts which are as follows;

1. That on 1998-01-06 at Polonnaruwa, he being a public servant namely a Grama Niladhari solicited a gratification of sum of Rs. 5,000/= from Keerakotuwe Gedera Rohan Wijenayake for giving a recommendation report to an application for registration of a

business name, an offence punishable under section 19(b) of the Bribery Act.

2. That at the same time, place and in the course of the same transaction, , he being a public servant namely a Grama Niladhari solicited a gratification of sum of Rs. 5,000/= from Keerakotuwe Gedera Rohan Wijenayake, an offence punishable under section 19(c) of the Bribery Act.
3. That at the same time, place and in the course of the same transaction, he being a public servant namely a Grama Niladhari accepted a gratification of sum of Rs. 3,000/= from Keerakotuwe Gedera Rohan Wijenayake for giving a recommendation report to an application for registration of a business name, an offence punishable under section 19(b) of the Bribery Act.
4. That at the same time, place and in the course of the same transaction, he being a public servant namely a Grama Niladhari accepted a gratification of sum of Rs. 3,000/= from Keerakotuwe Gedera Rohan Wijenayake, an offence punishable under section 19(c) of the Bribery Act.

5. That during the period 1998-01-06 and 1998-02-18 at Polonnaruwa, he being a public servant namely a Grama Niladhari accepted a gratification of sum of Rs. 1,000/= from Keerakotuwe Gedera Rohan Wijenayake for giving a recommendation report to an application for registration of a business name, an offence punishable under section 19(b) of the Bribery Act.
6. That during the same period referred to in the 5<sup>th</sup> count, at Polonnaruwa, he being a public servant namely a Grama Niladhari accepted a gratification of sum of Rs. 1,000/= from Keerakotuwe Gedera Rohan Wijenayake, an offence punishable under section 19(c) of the Bribery Act.
7. That on 1998-02-18 at Polonnaruwa, he being a public servant namely a Grama Niladhari accepted a gratification of sum of Rs. 1,000/= from Keerakotuwe Gedera Rohan Wijenayake for giving a recommendation report to an application for registration of a business name, an offence punishable under section 19(b) of the Bribery Act.
8. That during the same period referred to in the 7<sup>th</sup> count, at Polonnaruwa, he being a public servant namely a Grama Niladhari

accepted a gratification of sum of Rs. 1,000/= from Keerakotuwe Gedera Rohan Wijenayake, an offence punishable under section 19(c) of the Bribery Act.

Learned High Court Judge has commenced, conducted and concluded the trial against the Accused Appellant as he had pleaded not guilty to the charges when the same was read over to him. At the end of the trial learned High Court Judge by his judgment dated 2007-09-12 had convicted the Accused Appellant on counts 1, 3, 5 and 7 of the Indictment and had decided not to convict the Accused Appellant on other counts namely counts 2, 4, 6 and 8 on the basis that they relate to the same incident referred to in the other counts. Upon conviction learned High Court Judge has sentenced the Accused Appellant to a term of 04 years RI and to a fine of Rs. 2500/= with a default sentence of 01 year RI in respect of each count (Counts 1,3,5 and 7). Learned High Court Judge has also directed that the amount accepted as a bribe Rs. 5000/= be recovered as a fine for which a further default sentence of 06 Months RI was also imposed.

Being aggrieved by the said judgment the Accused Appellant has preferred this appeal to this Court.

Although learned President's Counsel appearing for the Accused Appellant raised several issues in the course of his submissions before this Court, it could be seen that this Court is in a position to dispose this appeal by sufficiently focusing on the main argument advanced on behalf of the Accused Appellant.

The said main argument advanced by the learned President's Counsel appearing for the Accused Appellant is that the learned High Court Judge has failed to evaluate or take into consideration, the infirmities of the case for the prosecution. It is the submission of the learned President's Counsel that there exists a major contradiction between the evidence of the virtual complainant and that of the evidence of officers of the Bribery Commission who participated in the raid.

In order to evaluate this argument it is necessary for this Court to consider the effect of the evidence on the relevant points adduced by the above mentioned two segments of the prosecution witnesses.

The position taken up in his evidence by the virtual complainant namely Keerakotuwe Gedera Rohan Wijenayake is that all the officers (three officers) of the Bribery Commission who participated in the raid were inside

his house when the accused Appellant accepted the gratification of Rs. 1000/= from him on 1998-02-18. He has made this position clear in no uncertain terms in his evidence, both in the course of his evidence in chief<sup>1</sup> and his cross examination<sup>2</sup>. It is his testimony that he waited with PC 24221 Herath (who acted as the decoy in the raid) in the main sitting area of the house while two other officers stayed separately in two different rooms in the same house. Thus it is his position that a total number of three officers took positions inside his house.

However the prosecution witness No. 02 - PC 24221 Herath (the decoy) has clearly stated in his evidence that only he as a Bribery Officer stayed with the virtual complainant Rohan Wijenayake in the house<sup>3</sup>. On being asked by the learned counsel for the defence this witness, (PC Herath) has categorically excluded the presence of any other Bribery Officer inside the house at this moment of the raid. This witness (PC Herath), on being asked by the learned counsel for the defence to do so, has verified and confirmed this position after refreshing his memory by going through the notes he

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<sup>1</sup> Page 56 (evidence in chief), of the brief.

<sup>2</sup> Page 81 (cross examination), of the brief.

<sup>3</sup> Page 109 of the brief.

had made in relation to this raid<sup>4</sup>. It is his position that the other Bribery Officers took up positions outside and at places around the house<sup>5</sup>.

The position taken up by Bribery Officer Liyanarachchi who was called by the prosecution to corroborate the evidence of PC Herath (decoy) is also the same. He stated in his evidence that it is only PC Herath who stayed with the virtual Complainant at his residence. Thus that becomes the concrete position of the official witnesses who participated and conducted the raid. It is his position that he along with the other officers went to the house of the virtual complainant after PC Herath gave a signal indicating that the bribe was handed over<sup>6</sup>.

Analysis of the above evidence clearly show that it has been positively established in the trial, in unequivocal terms, that there exists a clear contradictory position between the positions taken up by the virtual complainant on one hand and the raiding Bribery officers on the other with regard to the above point.

The next question that arises for consideration before this Court is to find out the course of action that has been adopted by the learned High Court

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<sup>4</sup> Page 120 of the brief

<sup>5</sup> Page 113 of the brief.

<sup>6</sup> Page 148 of the brief.



Judge in this regard. Learned High Court Judge in his judgment inter alia has stated<sup>7</sup> that;

- i. the defence failed to challenge the evidence of the prosecution with regard to the soliciting and accepting the bribe.
- ii. no negative impact has been caused to the roots of the prosecution case by the minor discrepancies elicited from the evidence of the prosecution witnesses.
- iii. the dock statement of the accused has failed to create a reasonable doubt in the prosecution case.

It is significant to note that other than the penultimate paragraph which contained a solitary reference set out above in most general terms, there is no other reference made by the learned High Court Judge with regard to the discrepancy highlighted by the defence.

It is the evidence of Bribery Officer Liyanarachchi that three Police Officers namely PC 19596 Senevirathne, PC 24221 Herath, PC 17354 Fonseka participated along with him in this raid. PC 24221 Herath acted as the decoy in this instance while IP Liyanarachchi had come to arrest the accused Appellant after he accepted the bribe. The prosecution has

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<sup>7</sup> The penultimate paragraph of the last page of the judgment at page 196 of the brief.

maintained a deafening silence on the whereabouts of the two other bribery officers namely PC 19596 Senevirathne and PC 17354 Fonseka who formed part of the team, at the time of the events leading to the arrest of the Accused Appellant. Thus the only evidence available before the Court on this aspect is the evidence of the virtual Complainant that they took position inside the house in two separate rooms. This fact is denied by the decoy PC Herath. It is important to note that this is only a bare denial. Having regard to the fact that the evidence of the main witness of the prosecution has been cut across by the other witnesses called by the prosecution to corroborate the main witness, it is the view of this Court;

- i. That there exists a major contradiction between the evidence of the virtual complainant and that of the evidence of officers of the Bribery Commission,
- ii. That the said contradiction cannot be termed as a minor contradiction,
- iii. That this contradiction is material in the light of the facts of this case as it throws a considerable amount of light on the question of credibility of the evidence of the prosecution witnesses,

- iv. That this contradiction therefore is a contradiction which shakes the very foundation of the prosecution case as it raises questions as to the way the said raid has been conducted.
- v. That in the light of that it becomes imperative for the learned trial judge to have addressed his mind on the effect of this contradiction (which he has failed to do),
- vi. That a mere passing general remark on the effect of such contradiction without adducing any reason as to why it cannot be considered as material, cannot, in the light of the facts of this case, amount to any valid consideration of such contradiction.
- vii. Presence of such a statement in the judgment of the trial judge which cannot be substantiated from available evidence would amount to an indication that the learned trial Judge had not taken any interest to consider the submission by the defence on this point.

It is relevant to note at this stage that the learned trial Judge has not considered at least most of the other issues complained by the learned Counsel for the Accused Appellant as no mention could be found in the judgment with regard to those issues as well.

Further it is the view of this Court that in the light of the above facts the assertion by the learned trial Judge that the prosecution has proved its case beyond reasonable doubt becomes an assertion which cannot be substantiated by evidence available in the case. Thus it cannot be permitted to stand and must be struck down.

The question this court will have to address next is whether this Court should order a retrial. The burden to prove the charges framed against the accused beyond reasonable doubt lies fairly and squarely on the prosecution. The version of the raiding police officers as to how the raid was conducted is clear and has already been recorded in their notes. That position cannot be changed. The virtual Complainant's position in this regard is also unequivocal as has been mentioned before.

The prosecution has neither attempted to explain this contradiction nor has adduced any plausible reason as to how or why such contradiction may have come into existence. The burden to prove the charges beyond reasonable doubt being on the prosecution, this Court is compelled to conclude that the prosecution did not have any explanation to offer in this regard.

In these circumstances this Court cannot think of any basis upon which the Accused Appellant could have been convicted.

For these reasons this Court decides to set aside the judgment dated 2007-09-12, the conviction entered into consequent to it and the subsequent sentence passed on the Accused Appellant by the learned High Court Judge.

This Court further directs that the Accused Appellant be acquitted and discharged from all the charges levelled against him.

We make no order for costs.

Appeal is allowed.

**JUDGE OF THE COURT OF APPEAL**

**Vijith K. Malalgoda PC J**

I agree,

**PRESIDENT OF THE COURT OF APPEAL**

**C Madawala J**

I agree,

**JUDGE OF THE COURT OF APPEAL**