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

In the matter of an appeal under and in terms of Section 331 of the Criminal Procedure Code Act No. 15 of 1979.

The Attorney General of the Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal
Case No. CA 230-231/2007

Vs,

1. Lalith Kumara Amarasiri Silva
2. Mohomad Sahir Rasak

Accused

And Now Between

1. Lalith Kumara Amarasiri Silva
2. Mohomad Sahir Rasak

Accused-Appellant

High Court of Colombo
Case No. HC B/ 1354/2001

Vs,

The Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant-Respondent

Before : **S. Devika de L. Tennekoon, J &**
S. Thurairaja PC, J

Counsel : Saliya Pieris PC with Rukshan Nanayakkara for the Accused-Appellant
Thusith Mudalige DSG for the Complainant- Respondent

Judgment on : **15th November 2017**

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Judgment

S. Thurairaja PC J

The accused appellants were indicted at the High Court of Colombo on following charges;

1. On or about 24.02.1997 the 1st accused being a Police Officer did solicit a gratification of Rs. 5000/= from Ratnasiri Jayasena (the complainant), an offence punishable under Section 19(c) of the Bribery Act (as amended).
2. At the same time and place and in the course of the same transaction the 1st accused did accept a gratification of Rs. 5000/= from the complainant, an offence punishable under Section 19(c) of the Bribery Act (as amended).
3. At the same time and place in the course of the same transaction the 2nd accused aided and abetted the 1st accused to commit the offence in count [1], an offence punishable under Section 25(2) read with Section 19(c) of the Bribery Act (as amended).
4. At the same time and place in the course of the same transaction the 2nd accused aided and abetted the 1st accused to commit the offence in count[2], an offence punishable under Section 25(2) read with Section 19(c) of the Bribery Act (as amended).

Both accused were convicted after trial and were sentenced as follows;

Count [1] – Four years rigorous imprisonment (R.I)

Rs. 5000 fine with a default term of 1 year R.I

Rs. 5000 fine under Section 26 of the Bribery Act with a default term of 1 year R.I

Count [2] – Same as the fine and sentence in count [1]

Both sentences were ordered to run concurrently.

Count [3] – Four years R.I

Rs. 5000 fine with a default term of 1 year R.I

Count [4] – Four years R.I

Rs. 5000 fine with a default term of 1 year R.I

Both sentences were ordered to run concurrently.

Being aggrieved with the said conviction accused appellants had preferred an appeal on the following grounds:

i. The High Court Judge has not complied with Section 283(1) of the Code of Criminal Procedure Act No.15 of 1979 (as amended).
ii. The defence of the accused appellants were not considered.
iii. Identification of the 1st accused was in doubt.
iv. There was no evidence against that the 2nd accused appellant.

As per the available materials, the prosecution's case is as follows:

On the 24th February 1997, the complainant P.W. Ratnasiri Jayasena and G. Premadasa Samson returned from Singapore after a business trip. The complainant brought some electronic items and Mr. Samson brought some spare parts for his vehicle. Both came in the same vehicle from the airport to Dehiwala. At the Peliyagoda Japan Friendship Bridge (commonly known as the Victoria Bridge or Kelaniya Bridge) they were stopped by the police at the checkpoint, it is of common knowledge that during that period the roads were blocked due to security threats and police check points were set up in many places including the above mentioned place. They were stopped at the checkpoint by the 1st accused who was a Police Sergeant and the vehicle was subject to search. After the search they found that the items in the vehicle should be subject to customs duty. The complainant had informed the accused that he had paid Rs. 1450 as duty, but the accused was of the view that amount was insufficient. 1st accused was seen talking to his superior the 2nd accused, who was a Sub Inspector and in charge of that checkpoint. After a delay they were asked to pay another Rs. 5000, the complainant took the money from his relative who was in the van and gave it to the 1st accused, who kept the money in the cap and wore it.

At the time they were detained, the complainant had clearly taken note of the 1st accused and his number tag (not written). Thereafter he had complained to the Police Head Quarters even though he says he complained to the CID, it appears the complaint was made to the Special Investigation Unit. The 1st accused had a number tag in his uniform and he was identified with that number. The second accused was an officer who didn't carry a number therefore he was subject to an identification parade and he was identified by the witness.

The 1st, 2nd and 4th grounds of appeal can be considered together. Therefore, I wish to consider the 3rd ground of appeal primarily which was said that the identification of the 1st accused was not established.

At the very outset it should be noted that there is no motive established or suggested to the witness that he made a malicious allegation against these two Police Officers. Considering the facts before the court I do not see that these witnesses will benefit in any way in making an allegation against the two accused. It is an established fact that the two Police Officers were attached to the Grandpas Police Station and it was well documented that they were assigned to man the check point on the said date and time. The defence counsel was trying to establish that the Army also participated in the checkpoint but it was categorically denied by the official witnesses.

It is an established fact the complainant and other witnesses returned from Singapore on the said night, but the checkpoint vehicle register does not contain an entry of this vehicle on which the witnesses travelled was subject to search. Three witnesses who gave evidence were not contradicted on the fact that their vehicle was stopped at the said checkpoint.

The witnesses say that the vehicle was stopped for a considerable period. It is noted that the prosecution witness Ratnasiri Jayasena says it was nearly an hour but the other witness S.A. Chandrasena says about 15 minutes and witness G.P Samson says they were kept until they paid the money. The fact remains that the vehicle was

stopped and subjected to a search. Now the question is why the accused have not entered the registration number of the vehicle. It may be 15 minutes or 1 hour but in the late hours of the night there are minimum number of vehicles on the road; even though it was dark the spot light in the check point makes a clear vision on any person who stays for a short period. The witness had told the 1st accused that he knows the DIG but the 1st accused after consulting with the 2nd acclaimed had told them that they will be taken to the Police Station and they can sort the issue there.

It is on evidence that the complaint was made to the Police Head Quarters and inquiry was held by the CID/ SIU. There after the matter was referred to the Bribery Commission. Since the identification of the 2nd accused was not clear the investigators of the CID and Bribery Commission held an identification parade to identify the 2nd accused. There is no challenge thrown at the identification parade. The 2nd accused was duly identified at the said parade.

The prosecution witness Jayasena had clearly identified 1st and 2nd accused in the open court while giving evidence. The counsel for the accused appellants submits that this is a dock identification and it cannot be accepted.

Dock identification is normally described as a witness identifying the accused for the 1st time in open court at the time of the trial. In this case there was a complaint to the Police Head Quarters and an investigation was conducted, after gathering sufficient materials and evidence they referred it to the relevant authority namely the Bribery Commission to take the necessary course of action. The Bribery Commission after satisfying themselves preferred an indictment.

Considering the evidence, the identification of the 1st accused was not a passing glimpse, it appears genuine, a Police Officer in the midnight taking money from a person, keeping it under his cap invites any person to observe it carefully and make a mental note. In this case the witness made 2 statements to the CID as well as the Bribery Commission and those were with the defence. It was not questioned about whether the identification number was mentioned or not to the investigators.

Author E.R.S.R. Coomaraswamy gave his idea on the topic of Dock Identification in his **Law of Evidence Volume (1),** where he stated the following:

> *"If a witness knew the accused earlier and he recognised him, the identification is more satisfactory than if he did not know him earlier, in which case an identification parade is almost a* ***sine qua non****. If this is not carried out, the identification becomes a "first time" identification in court or a dock identification. This practice is undesirable and unsafe and should be avoided, if possible. If the accused had refused to take part in an identification parade, he runs the risk of dock identification."*
> [Emphasis Added]

The concept of dock identification was broadly discussed in **Kokmaduwa Mudalige Premachandra and Two Others Vs Attorney General (CA 39-41/1997)** where Justice F.N.D Jayasuriya held that:

> "Justice Wijesundara in Gunarathna Banda's case (an unreported decision) but which is referred to the author E.R.S.R Coomaraswamy, Law of Evidence Volume (1), has referred to a series of English and foreign judgments where the view has been expressed that it is against prudence and wisdom to proceed against an Accused person in a criminal case on mere dock identification. Justice Wijesundara has followed this development of the law in foreign jurisdictions and recommended to the trial judges that they should adopt this rule which prevails in foreign jurisdiction. In the circumstances we set aside the findings conviction and sentence, imposed on third accused appellant and acquit the third accused."

In **O.W Wasantha and three others Vs A.G (CA 179/2006)**, Justice Ranjith Silva held that:

> "On the issue of identification evidence, the judge must give accurate directions regarding the identification evidence and direct the jury that

they must be satisfied beyond reasonable doubt to the accuse. *If no identification parade was held and the accused was a stranger, the judge must caution the jury that the identification may become a mere dock identification and must direct the jury that the omission to hold and identification parade may be an important omission for the purpose."*
[Emphasis Added]

Considering the above facts and the case laws I find that the 1st accused appellant was clearly identified by the witnesses. Therefore, this ground of appeal fails on its own merits.

The other grounds of appeal are amalgamated and considered together. Perusing the judgment of the learned trial judge; I find that it comes within the meaning of Section 283(1) of CCPA. The judge had considered the charge, ingredients of the charge, evidence submitted by the prosecution and the defence's version was considered. The judgment is dated and signed by the trial judge, there after it was pronounced in open court. The counsel for the 1st and 2nd accused made submissions in mitigation. After considering the submission the Learned Trial Judge imposed the sentence and fine. It is noted that the learned High Court Judge had not imposed the maximum sentence provided by the law. He had given a lenient sentence on the accused appellants. I do not see any illegality or impropriety in the sentence.

Considering the contents of the judgment, I find that the trial judge had considered the ingredients of the charge and analysed the evidence submitted by prosecution. At the same time, he had considered the defence put forward by the accused through the prosecution. The 1st accused remained silent; the 2nd accused made a dock statement and denied the allegation against him. The learned Trial Judge had not drawn any adverse inference against these two accused persons. He had considered all the evidence in a holistic approach and come to a conclusion that the charges are proved against the respective accused beyond reasonable doubt.

We perused the entire evidence available before us and find that the judgment of the learned trial judge is based on the evidence before him. One cannot expect the trial judge to write a thesis on a case before him, the judicially trained minded judge will spell out what he recognises as important in a case which does not mean that he had not considered all relevant facts and laws. This court is mindful of the workings of the original courts.

Considering all the available materials, I find that the involvement of the 2nd accused appellant had been proved beyond reasonable doubt. He had been identified at an identification parade, he was the Officer-in-Charge, he had been seen instructing /ordering the 1st accused appellant in this wrongful act. Hence, I do not see any reason to interfere with the finding of the Learned Trial Judge.

All grounds of appeal fail on its own merits. The counsels for the accused appellants pleaded with the court to show leniency by imposing state cost on the accused appellants.

We are possessed of the submission made by the counsels. The offence committed is serious in nature. The two accused appellants are Police Officers and the period in which this incident occurred was the peak of civil war, where the Colombo city was under severe threats from terrorist. The Police Officers who were entrusted with the duty of protecting civilians had a big responsibility placed upon their shoulders, as there have been many terrorists' attacks within the city, even with all the heavy checkpoints. Therefore, the accused appellants cannot be shown any leniency for the offence they have committed. Anyhow we are mindful that the offence was committed on the 24th February 1997 which is more than 20 years ago.

The court duly observes the delay caused by the accused appellant's in the trial but these delays are inherent to the system. Therefore, giving the benefit to the accused appellants this court decides to impose the following sentence:

a) 1st accused appellant's conviction was affirmed on the 1st and 2nd charge and we impose 1-year rigorous imprisonment to run concurrently and suspend the said sentence for a period of 7 years. In addition, we impose a fine of Rs. 5000 on each count in default 3 months simple imprisonment (Default sentence will operate concurrently).

b) 2nd accused appellant's conviction is affirmed on the 3rd and 4th counts and we impose 1-year rigorous imprisonment to run concurrently and suspend the sentence for a period of 7 years. In addition, we impose a fine of Rs. 5000 on each count in default 3 months simple imprisonment (Default sentence will operate concurrently).

Subject to variation in the sentence appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J

I agree,

JUDGE OF THE COURT OF APPEAL