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

In the matter of an Appeal in terms of Section 331of the Criminal Procedure Code

**C.A.No.227/2005**
**H.C. Colombo No.H.C.B.1359/2001**

01. Lalith Kumara Weerasekara
02. Ajith Indralal

**Accused-Appellants**

**Vs.**

Hon. Attorney General
Attorney General's Department

Colombo 12.

**Respondent**

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**BEFORE** : **DEEPALI WIJESUNDERA, J.**

**ACHALA WENGAPPULI J.**

**COUNSEL** : Saliya Peiris P.C. with Rukshan Nanayakkara for the 1st Accused-Appellant.

Priyantha Deniyaya for the 2nd Accused-Appellant

A. Navavi S.S.C. for the respondent

**ARGUED ON** : 02.08. 2018

**DECIDED ON** : 05th October, 2018

**ACHALA WENGAPPULI, J.**

The 1st and 2nd Accused-Appellants (hereinafter referred to as the "1st and 2nd Appellants") have preferred this appeal seeking intervention of this Court to set aside their conviction and sentence imposed by the High Court of Colombo. The 1st Appellant was indicted for committing offences punishable under Sections 16(b) and (c) of the Bribery Act by soliciting and accepting a bribe of Rs. 5000.00, while the 2nd Appellant was indicted for aiding and abetting the 1st Appellant for the commission of the said offences.

After trial, both Appellants were found guilty as charged and were sentenced to 2 years of imprisonment suspended for a period of 5 years.

Being aggrieved by the said conviction and sentence, the 1st Appellant sought to challenge its validity on the following grounds;

i. there is a failure by the trial Court to adequately consider discrepancies that exists in the prosecution evidence in concluding that its case was proved beyond reasonable doubt,

ii. the trial Court failed to properly assess the credibility of prosecution witnesses,

iii. the trial Court failed to adequately consider his dock statement,

iv. the trial Court failed to follow accepted principles in writing its judgment.

The 2nd Appellant's ground of appeal is the impugned judgment is contrary to law and is against the weight of the evidence led in the case.

In view of these several grounds of appeal, as raised by the Appellants, it is imperative for this Court to refer to the evidence presented before the trial Court *albeit* briefly.

The virtual complainant, *Prdeep Ekanayaka* was engaged in gem mining business and the 1st Appellant, being the Officer-in-Charge of *Laggala* Police at that time, solicited Rs. 5000.00 from him through the 2nd Appellant, another officer attached to the same station. One day, a Police party raided his mining pit and had arrested the miners who were later produced before the Magistrate's Court. At the time of arrest, when the complainant tried to intervene by showing his permit for gem mining, the 1st Appellant remarked that the complainant did not want to help him and hence the raid on his gem pit.

After the arrest of his men, the complainant went to the Police to bail them out and the 1st Appellant reminded him of the earlier solicitation. Then the complainant agreed. He had then conveyed this to one *Pallegama Aiya* who in turn contacted officers of the Commission to Investigate Bribery and Corruption. He made a statement to them and agreed to participate in the detection planned by them.

The complainant indicated that he is prepared to give the bribe on the day his men are produced before Court. He met the 2nd Appellant in the Court premises who enquired from him whether he brought money. When answered in the negative, he was directed to meet the 1st Appellant at the Police, which the complainant did with the decoy provided by the Commission. The complainant met the 1st Appellant in his office and verified from him whether the bribe was ready for collection on that day. When he agreed, the 1st Appellant had said that if he had given it earlier it would have been over by now. Then the 1st Appellant undertook to have the bribe collected at the complainant's house by sending someone.

Later that day, the 2nd Appellant visited the complainant at his house and wanted the money meant for the 1st Appellant. The complainant then took the marked bank notes from the decoy and had given it to 2nd Appellant who accepted it. Thereafter, the 2nd Appellant and the 1st Appellants were arrested.

In addition to the complainant, the decoy and the detecting officer gave evidence for the prosecution while the two Appellants made statements from the dock, denying the charges levelled against them.

The 1st Appellant stated in his evidence that once the miners were charged in Court and fined it is not probable to solicit a bribe.

In his statement, the 2nd Appellant stated that he had visited the complainant's house on his invitation, as he knew him well from childhood and it was the complainant who handed him over some cash to be given to the 1st Appellant.

Since both Appellants complained about the evaluation of the prosecution evidence by the trial Court for its credibility and the erroneous conclusion it had reached, it is appropriate at this stage to consider their submissions in support of this common ground of appeal.

It is the contention of the 1st Appellant that the prosecution evidence had following infirmities;

i. the 1st informant *Pallegama Aiya* is not a witness for the prosecution and what he conveyed to the bribery officers was tendered marked as 1V2, which is inconsistent with the prosecution case,

ii. complainant could not remember details of initial solicitation as admitted during his cross examination,

iii. the evidence of the complainant and the decoy are at variance as to where the decoy was at the time the complainant went to see the 1st Appellant at the Police Station, as according to the complainant the decoy remained at the doorway, and the decoy said that the room had a swinging half door, fitted with dark glasses and as a result a person who remains outside could not hear or see what happens inside,

iv. PW 2 and 3 gave instructions to the complainant to handover the marked notes when they meet the 1st Appellant, but contrary to the instructions, the cash were handed over to the 2nd Appellant later at his residence thereby making the

prosecution version improbable by not explaining the deviation and delay,

v. If the complainant met the 2nd Appellant at the Court premises, then they could have gone to see 1st Appellant with him, instead of meeting him alone at the Station,

vi. There was no irregularity in the performance of his official duties by the 1st Appellant who had taken prompt action to produce the arrested miners to Court where they have pleaded guilty and were fined.

The 2nd Appellant, in his submissions, relied on the following infirmities of the prosecution case;

i. the 1st informant *Pallegama Aiya* is not a witness for the prosecution during the trial and no nexus between the 1st information and the complainant was established by the prosecution,

ii. allegation in the indictment is not to prosecute the complainant in his illegal mining activities, but Commission's officers have acted rather late, as when the detection was carried out, the miners were already prosecuted for illegal

mining activities, and this fact would make the prosecution version improbable.

In view of the submissions of the two appellants, it is evident that they seek to challenge the credibility of the prosecution witnesses and the trial Court's evaluation of evidence on that aspect.

It is held that *"credibility is a question of fact and not of law"* as per the judgment of the Supreme Court in ***The Attorney General v Theresa*** (2011) 2 Sri L.R. 292). Therefore, we must consider the scope of the jurisdiction of an appellate Court, in reconsidering a determination of a question of fact by the original Court.

In ***King v Gunaratne and Another*** 14 C.L.W. 144, Mc Donnell CJ has formulated the following three tests in re-determining a question of fact by an appellate Court;

a. was the verdict of the Judge unreasonably against the weight of evidence.

b. was there a misdirection either on law or on evidence.

c. has the Court of trial drawn the wrong inferences from matter in evidence.

A more recent pronouncement on this matter could be found in the judgment of ***De Silva & Others v Seneviratne & Another*** (1981) 2 Sri L.R. 7

where Ranasinghe J, as he was then, having considered a series of judicial precedents, held as follows;

> *"On an examination of the principles laid down by the authorities referred to above, it seems to me; that, where the trial Judge's findings on questions of fact are based upon the credibility of the witnesses, on the footing of the trial Judge's perception of such evidence, then such findings are entitled great weight and the utmost consideration, and will be reversed only if it appears to the appellate Court that the trial Judge has failed to make full use of the "priceless advantage" given to him of seeing and listening to the witnesses giving viva voce evidence, and the appellate Court is convinced by the plainest consideration that it would be justified in doing so; that, where the findings of fact are based upon the trial Judge's evaluation of facts, the appellate Court is then in as good a position as a trial Judge to evaluate such facts, and no sanctity attaches to such findings of fact of the trial Judge; that, if on either of these grounds, it appears to the appellate Court that such findings of fact should be reversed then the appellate Court "ought not to shrink from that task."*

In ***The Attorney General v Theresa*** (supra) the following passage was cited with approval by Tilakawardane J that;

> *"There is simply no jurisdiction in an appellate Court to upset trial findings of fact that have evidentiary support. A Court of Appeal improperly substitutes its own view of the facts of a case when it seeks for whatever reason to replace those made by the trial Judge. It is also to be noted that the State is not obliged to*

*disprove every speculative scenario consistent with the innocence of an accused."*

Thus, the appellate jurisdiction of this Court is clearly demarcated by the principles enunciated in respect of determinations by the trial Court on questions of fact by the collective reasoning of these judgments.

In the light of these judgments, we now turn to consider the several grounds of appeal and the submissions of Counsel.

The Appellants have made lengthy submissions over the "mysterious" 1st informant who remained elusive throughout the trial. His complaint received by an officer at the Commission was tendered marked 1V2. The legal basis of placing reliance of its contents during the trial is questionable in the absence of proper proof. Be that as it may, the main thrust by the Appellants against the prosecution case is that the evidence is inconsistent with the 1st information and there was no nexus established between the 1st information and the sequence of events as narrated by the complainant.

The 1st information was provided over telephone by one *Kitsiri Ekanayaka* of *Laggala Pallegama* to an officer identified as "B 86" on 14.07.1997. The complainant who gave evidence before the trial Court was *Chaminda Pradeep Ekanayaka* of *Hattota Amuna* whose statement was recorded by the Commission on 16.07.1997 while the detection was made on the following day at *Laggala.*

It is his evidence, that the statement of the complainant was recorded for the first time at the residence of one *Seneviratne* and after the

detection another statement was recorded at his own residence at *Hattota Amuna.* The complainant said in evidence after the act of solicitation and his gem pit was raided by the 1st Appellant he discussed the situation with one *Pallegama Aiya* who undertook to inform the Commission. Then the officers from the Commission came to meet him and recorded a statement.

IP *Liyanage* (PW3), in his evidence admitted that they could not proceed to *Laggala* on 15.07.1997, the day on which the 1st informant claimed the money was to be given to 1st Appellant due to a logistical issue at the Commission and upon instructions, they proceeded to *Laggala* only on the following day. He further admitted that no statement was recorded from the 1st informant and his information about the solicitation of a bribe from his grandfather is erroneous. However, the witness explained that it was usual on such raids to have such problems, and they were given instructions to act appropriately as the situation demanded. He said in evidence that a statement was recorded from the father of the complainant.

When these items of evidence are considered in the proper perspective, it becomes clear as to the "nexus" between the 1st informant and the detection. The evidence is clear that the solicitation was made from the complainant and not from his father or grandfather as the 1st informant claimed. This inconsistency is natural as the complainant narrated his ordeal to *Pallegama Aiya* who in turn conveyed it to the Commission by telephone. It was recorded by an officer in summery form. These obvious distortions, which could well be due to gaps in communications, are therefore adequately explainable. PW3 was cross examined at length over this issue and his evidence clearly explained the approach of the officers of the Commission and the complainant. The inconsistency between the 1st

information and the complainant is therefore due to an instance of miscommunication between them.

However, the fact remains that there was direct evidence provided by the complainant and the officers of the Commission before the trial Court in relation to the alleged acts of solicitation and acceptance of a bribe. Both the Appellants challenge the credibility of that direct evidence. The submissions of the 1st Appellant that the complainant's evidence in relation to the initial solicitation that he could not remember it properly should be considered next.

In order to consider the 1st Appellant's contention, it is necessary to consider the sequence of questioning of the complainant, during cross examination. The complainant was cross examined by the 1st Appellant on his statement to the Commission where it is stated the 1st Appellant himself solicited the bribe. He was questioned by the 1st Appellant only on his statement by quoting few sentences. He was not reminded of the evidence he has given on the point. When he was suggested that he uttered total falsehood in Court, the complainant said that since it was 6 years ago he cannot remember.

It is relevant to note that there was no suggestion that the 1st Appellant did not solicit a bribe at that time. But only a blanket suggestion that the complainant uttered falsehood in Court. Then another suggestion was put to him on his evidence that it was the 2nd Appellant who solicited a bribe, is a lie. The complainant had repeatedly denied the suggestions that it is a lie and sought to explain that he could not remember. When suggested that he had concocted this story after 6 years, the complainant

denied it. His evidence before the trial Court that it was the 2nd Appellant who came alone to meet him and solicited a bribe on behalf of the 1st Appellant.

When this segment of cross examination is considered it is apparent that it is his memory power that is being tested and not necessarily the consistency of his version of events.

As and when the complainant was confronted with quotations from his statement, he has candidly admitted that he made such statements. Only one inconsistency was marked off his evidence (1V1).

In relation to the allegation of solicitation, even if the complainant could not remember the circumstances under which the 2nd Appellant solicited a bribe on behalf of the 1st Appellant, the 2nd repeated act of solicitation in the presence of PW2 clearly supports a consistent solicitation since the evidence clearly indicate the 2nd act of solicitation is a continuation of the 1st act of solicitation. Even if there is a reliability issue, not a credibility issue, the supportive evidence of PW2 as to the solicitation and acceptance supplements that deficiency.

The 1st Appellant, in challenging the prosecution evidence that the decoy could hear and see what is going on inside the office of the Officer-in-Charge when they returned from the Court upon the direction of the 2nd Appellant.

It appears that this submission is made under the impression that the complainant and decoy were at different places and therefore the decoy could not be privy to the dialog between the complainant and the 1st

Appellant. The relevant parts of the evidence that were presented before the trial Court however points otherwise.

The evidence is that the decoy was standing at the doorway to the OIC's office when the two of them talked. The decoy saw them and could hear their dialog. He says the 2nd Appellant was also there in the office. The complainant does not confirm this fact. It is not the evidence of the complainant that they spoke in subdued tone to prevent others from hearing what they talked. The 1st Appellant was making his demand in the presence of 2nd Appellant and reminded of him what could be the repercussions if his request is not considered favourably. Therefore, there was no need for the 1st Appellant to talk to the complainant in a subdued voice posing a difficulty to PW2 to hear it properly.

The presence of the 2nd Appellant was also relied upon by the Appellants to challenge the prosecution evidence on the ground of probability.

During the cross examination of the complainant as well as PW2, it was put to them that having had the instructions and opportunity to give money to the Appellants, why they waited until the 2nd Appellant turns up at his residence. At the hearing of their appeal, this factor was highlighted by the Appellants, claiming that it is an improbable version of events.

PW2, when he was cross examined on this point offered a reason for such a deviation. He explained that he needed to hear from each of the Appellants that in fact a prior solicitation was made, and that the impending acceptance is a result of that prior solicitation. This position is confirmed by PW3. PW2, in his evidence added another reason as to why

they shifted the location of acceptance to the residence of the complainant. They were under instructions to shift the place of acceptance to the residence of the complainant as there could be a problem of the recovery of marked notes from the Appellants if the money was given in the Police Station itself. This is a justifiable apprehension since the 1st Appellant was the serving OIC while the 2nd Appellant was his subordinate. It is also clear that another police officer called *Matara Ralahamy* was also knew that the 1st Appellant had already solicited a bribe from the complainant and he was reluctant to yield to the request.

Other complaint by the Appellants that the indictment specified the allegation against them is that they solicited and accepted a bribe not to prosecute the complainant in his illegal mining activities, but since the miners have already been produced before Court, the prosecution has failed to prove that part of the charge.

It is correct that the indictment refers to the allegation as the bribe is solicited and accepted not to prosecute the complainant in his illegal mining activities. The Appellants contention is that the event had already taken place and the officers have acted after the miners were produced in Court and therefore the promised relief in exchange of the bribe had not materialised. It was submitted that there was no irregularity in the performance of his official duties by the 1st Appellant who had taken prompt action to produce the arrested miners to Court where they have pleaded guilty and were fined.

The wording used in the indictment in describing the offending conduct is slightly different to the submissions by the Appellant. The

description of the act done by the Appellants as in the indictment is as follows;

> " එකනායක මුදියන්සෙලාගේ වමින්ද ප්‍රදීප් එකනායකගේ මැණික් ව්‍යාපාර කටයුතු වලදී වන වැරදි සම්බන්ධයෙන් නීත්‍යානුකූලව ක්‍රියා නොකර සිටීම සඳහා පෙළඹවීමක් හෝ තෘප්තියක් වශයෙන් රුපියල් 5000/= ක්වූ මුදලක තුටු පඩුරක් එකී එතනායක මුදියන්සෙලාගේ වමින්ද ප්‍රදීප් එකනායක යන අයගෙන් අයැදීමෙන්" (emphasis added)

If one were to attribute the general meaning of the words reproduced above, it is obvious that the offending conduct is not in respect of a particular incident but meant to be an insurance for all future illegal activities. The words used are "මැණික් ව්‍යාපාර කටයුතු වලදී වන වැරදි". The prosecution presented its case also on this basis. The evidence on the point is supportive of that line of thinking.

It is the evidence of the complainant, that the 1st Appellant, having solicited a bribe, raided his gem pit and arrested his men when he showed his reluctance to comply. At the time of the raid, the 1st Appellant indicated that since the complainant did not help him, the miners were arrested. When the complainant met him in the same evening seeking to bail out his men, the 1st Appellant had said "you mine pits for gems but cannot [afford to] give Rs. 5000.00".

Thereafter, when the complainant went to meet the 1st Appellant upon the direction of the 2nd Appellant, after attending Courts, he said in the presence of PW2 that if the money was given earlier nothing would have happened and further sanctioned the complainant to dig mines where ever he pleased.

Learned Senior State Counsel invited our attention to the evidence of PW2, who supports the complainant in his evidence as he stated that the 2nd Appellant had assured the complainant of no further trouble by him even if the complainant digs up the main road.

All these items of evidence clearly support the allegation in the indictment that the bribe is solicited and accepted to ensure no further intervention by the 1st Appellant in any illegal mining activity by the complainant. The fact the miners employed by the complainant were arrested and produced before Court would not cause a dent in the acceptability of the prosecution version of events as it was apparently meant to be a "lesson" for the failure of the complainant to yield to the "request" by the 1st Appellant and also to serve as an "inducement" to comply to the demand of the bribe, if he wanted to continue in gem mining trade in the area.

In view of the ground of appeal raised by the Appellants the all-important question whether the evidence, particularly of the complainant, placed before the trial Court by the prosecution is truthful and reliable or not had to be decided by this Court.

The 1st and 2nd Appellants contention is that the evidence of the complainant is false, unreliable and could not be acted upon owing to the infirmities elicited under cross examination. They relied upon the instances where there were inconsistencies of the evidence of the complainant and what he had stated in his statement to the Commission. The complainant, when the relevant part of his statement was quoted by the 1st Appellant admitted having made such a claim as revealed by that portion, which

sometimes is inconsistent with his evidence in the examination in chief. It had to be noted that in most instances, the complainant was not given an opportunity to focus his attention to the inconsistent part of his evidence and to offer any explanation as he was only confronted with the highlighted portion of his statement that was read out by the learned Counsel who defended the 1st Appellant before the trial Court.

These inconsistencies were not in relation to the solicitation and acceptance of a bribe and thereby does not have the capacity to shake the basic version of the prosecution evidence, but only on the circumstances which led to the situation in which a bribe was solicited. In relation to this type of inconsistencies, it is cited with approval by the apex Court of an Indian authority in ***The Attorney General v Theresa*** (supra) which in turn has held thus;

> *" ... while appreciating the evidence of a witness, the approach must be whether the evidence ... read as a whole appears to have a ring of truth ... minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentence torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole."*

This Court, in relation to assessment of contradictions, pronounced in the judgment of ***Sunil v Attorney General*** (1999) 3 Sri L.R. 191, as follows;

> *"... the Court must not be unmindful of the fact that they are human witnesses and it is a hall mark of human testimony that*

*such evidence is replete with mistakes, inaccuracies and misstatements. Though one has to be careful in the assessment of evidence given by the bribery officers, the Court has to be equally mindful of the fact that the evidence tendered by human testimony will suffer from certain deficiencies and defects. It is in this light that Justice Cannon in Attorney-General v. Visuvalingam 47 NLR 286, emphasised that no prudent and wise Judge would disregard testimony for the mere proof of a contradiction but that a wise Judge should critically assess and evaluate the contradiction. He emphasised "the Judge must give his mind to the issues what contradictions are material in discrediting the testimony of a witness. The Judge should pointedly direct his attention to this fundamental issue and also consider whether the witness has been given an opportunity of explaining those statements which are marked as contradictions."*

It must be noted that the learned trial Judge who convicted the Appellants has presided over the trial at a very late stage of the proceedings. She only recorded the two statements made by the Appellants from the dock. It is clear that, in the circumstances, the trial Court did not have the advantage of observing the demeanour and deportment of the prosecution witnesses during their evidence and more particularly during their cross examination. The learned trial Judge only had the transcript of the proceedings before her to evaluate the credibility of the prosecution witnesses and therefore this Court is also equally placed in the assessment of credibility of the witnesses with the trial Court.

The trial Court opted to accept the complainant's and other Police witnesses evidence as truthful and reliable account of the facts in issue. The trial Court, in believing his evidence, particularly considered his limited opportunity to have a formal education on his admission that he only studied up to grade 8. The complainant has admitted that due to lapse of time certain incidents have faded from his memory and this is the first time he had given evidence in a Court of Law. He seemed a disinterested witness, and had not realised the tactical approach of the bribery officers in not giving the bribe at the Police Station itself when they met the 1st Appellant after Court case was over. His understandable perplexity over the questioning as to his failure to give the bribe to the 1st Appellant at that first opportunity as instructed, had resulted in the attack on his evidence on probability.

When the above quoted principles are applied to the infirmities that are highlighted by the Appellants, it is our considered view that the complainant's evidence could not be rejected as false or he had lied under oath to fabricate a story to implicate the Appellants.

Having considered his evidence in its totality, we concur with the view of the trial Court that the complainant is a truthful and reliable witness. There is no valid basis to reject the evidence of PW 2 and PW3 as well and the delay in action by their part on the 1st information is adequately explained.

It is time to refer to the other grounds of appeal by the Appellants. The Appellants made statements from the dock. The trial Court, having reminded itself as to the applicable legal principles ventured to consider

them in relation to the facts in issue. The trial Court had considered the most relevant part of the dock statement of the 1st Appellant as it noted that the miners were already produced before Court and therefore he has no reason to take a bribe not to act legally. Credibility of this assertion *vis a vis* the prosecution version of events was considered by the trial Court and it had rightly concluded that it did not create a reasonable doubt in the prosecution case. In relation to the statement of the 2nd Appellant also the trial Court arrived at the same conclusion. It is noted that the 2nd Appellant claimed that he knew the complainant from his childhood when he resided at *Pilimatalaw*. This claim is to justify his visit to the complainant's house that afternoon. Strangely the 2nd Appellant did not put his prior acquaintance with the complainant in cross examination. Thus, the rejection of his dock statement by trial Court is justified.

Lastly the complaint by the 1st Appellant that the trial Court failed to follow accepted principles in writing its judgment should be considered. The basis of this complaint is, according to the 1st Appellant, the trial Court even before it considered the evidence of the prosecution for its credibility, concluded that the case for the prosecution had been proved beyond reasonable doubt in violation of the accepted norms of writing a judgment.

This submission is based on a misreading of the relevant sentence, whereby the trial Court states that the prosecution has proved its case beyond reasonable doubt for "below mentioned reasons" and thereafter proceeded to consider the prosecution evidence for its credibility and sufficiency to justify its already stated conclusion. It is the way the trial Court thought it is best to state its reasons for conviction entered against the Appellants.

In view of the considerations mentioned in the preceding paragraphs, we are of the considered opinion that the there is no valid reason to *"upset trial findings of fact that have evidentiary support"* and for that reason the appeal of the 1st and 2nd Appellants are dismissed by affirming the conviction and sentence imposed on them.

The relevant High Court is directed to comply with the provisions of Section 303(4) of the Code of Criminal Procedure Act No. 15 of 1979.

JUDGE OF THE COURT OF APPEAL

**DEEPALI WIJESUNDERA, J.**

I agree.

JUDGE OF THE COURT OF APPEAL