

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

C.A. (PHC) 102/2013

WP HCRA 103/2011

M.C. Colombo Case No.
55724/10 Bribery

Director General,
Commission to investigate
Allegations of Bribery or Corruption
Complainant

V.

Narasinghe Buwelikada Deshika Malkanthi
Accused

AND

Narasinghe Buwelikada Deshika Malkanthi
Accused-Petitioner

V.

1. Commission to investigate
Allegations of Bribery or Corruption

2. Director General
Commission to investigate
Allegations of Bribery or Corruption

3. The Hon. Attorney General

Respondents

AND NOW

Narasinghe Buwelikada Deshika Malkanthi

Accused-Petitioner-Appellant

V.

1. Commission to investigate
Allegations of Bribery or Corruption
2. Director General
Commission to investigate
Allegations of Bribery or Corruption
3. The Hon. Attorney General

Complainant-Respondents
Respondents

BEFORE

: **K.K. WICKREMASINGHE, J**
K. PRIYANTHA FERNANDO, J

COUNSEL

: Wijaya Hettiarachchi with Thanushika
Hidigaspege for the Accused Petitioner
Appellant.

Dilan Ratnayake DSG for the A.G.

ARGUED ON

: 30.05.2019

WRITTEN SUBMISSIONS

FILED ON : 04.01.2019 by the Complainant Respondent Respondents.
08.10.2018 by the Accused Petitioner Appellant.

JUDGMENT ON : 09.08.2019

K. PRIYANTHA FERNANDO, J.

01. This is an appeal against the judgment of the learned High Court Judge dated 06.08.2013. In the above case, the Accused Appellant (Appellant) was charged in the Magistrate's Court of Colombo for committing an offence punishable under section 70 of the Bribery Act, as amended by Act No. 19 of 1994. A preliminary objection was raised by the Appellant, on the basis that, the Commission to Investigate Allegation of Bribery or Corruption (Commission) has no authority to initiate an investigation on an anonymous complaint. The learned Magistrate by his order dated 02.06.2011, for the reasons given, rejected the preliminary objection. The Appellant moved in revision against the learned Magistrate's order in the High Court. After hearing the said revision application, the learned High Court Judge delivering his judgment on 06.08.2013, for the given reasons, dismissed the application. The instant appeal is against the said judgment of the Learned High Court Judge, by the Appellant.

02. Counsel for the Appellant submitted that, in terms of section 4 (1) of the Act No. 19 of 1994, for the Commission to commence an investigation, there has to be a communication against a person to the Commission. For the communication to be received by the commission, there has to be a person who sends the communication. Further, it is submitted that, genuineness of the communication has to be investigated, and that the identity of the person who communicated is important for that purpose.
03. It is also the contention of the counsel for the Appellant that, section 4 (1) has to be read with section 21 of the Act No. 19 of 1994. If the allegation is found to be false, the person who communicated to the Commission could be punished in terms of section 21, and for that purpose, the person who sends the communication has to be an identifiable person, Counsel submitted.
04. Counsel for the Respondent submitted that, the word 'communication' is not defined in the Act, and therefore, the function and the objectives of the Act has to be taken into consideration when interpreting the same. In terms of section 4 (2), the Commission has to be satisfied that the Communication is genuine, before an investigation is conducted. Therefore, because of that filtering process, only genuine communications will be acted upon. It is submitted that, in no way that false communications would be acted upon.
05. Counsel for the Respondent further submitted that, to interpret the word 'communication', section 21 has no relevancy. Counsel further submitted

that, any informant is privileged and that more communications must be facilitated.

06. Learned counsel for the Appellant referred to the case of *Mahinda Rajapakse V. Chandra Fernando and Others S.C. (FR) 387/2005* and invited the attention of Court to a portion from *Sohoni's The Code of Criminal Procedure 1973-Vol.2*, that was referred to in the above judgment. It refers to section 154 of the Code of Criminal procedure in India, that relates to investigation of cognizable offences upon receiving information by a Police Officer. The similar section in our Code of Criminal Procedure Act is section 109, which says that, every information received by a Police officer has to be given orally or in writing and that if given orally, it has to be reduced to writing and shall be signed by the person who is giving such information.

07. As rightly concluded by the learned High Court Judge and also by the learned Magistrate, the issue that was in case of *Mahinda Rajapakse* (supra) was whether it was justifiable for the police to initiate an investigation without a complaint being recorded from a complainant, and that has no relevance to the instant case. The issue in this case is, whether the commission can initiate an investigation on an anonymous petition. Part 2 of the Act No 19 of 1994, provides for receiving communications on allegations of bribery or corruption. Procedure is also laid down on investigating into the communications received. Section 109 of the Code of Criminal Procedure Act provides for receiving information by a police officer, and the procedure is laid down on recording such information and

acting upon it. Therefore, *Mahinda Rajapakse V. Chandra Fernando* (supra) has no relevance to a 'communication' referred to in part 2 of the Act No. 19 of 1994.

08. The word 'communication' is not defined in the Act. The word used in the Sinhala text of the Act No. 19 of 1994 for communication is 'දැනුම්දීම'. The Act No 19 of 1994 does not mention whether such 'communication' should be anonymous or onymous, although the procedure to be followed by the Commission upon receiving the 'communication' is provided.

Section 4 (2) of the Act No. 19 of 1994 provides:

'Upon receipt of the communication under subsection (1) the Commission, if it is satisfied that such information is genuine and that the communication discloses material upon which an investigation ought to be conducted, shall conduct such investigation as may be necessary for the purpose of deciding upon all or any of the following matters: -

- (a) Prosecution or other suitable action under the provisions of the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975; or*
- (b) Prosecution under any other Law,*

And where the Commission decides, whether before or after the conduct of an investigation, that a communication received by it should be dealt with by any other authority, it may forward such communication to such other authority.'

09. Hence, the legislature has made clear provision to filter the 'communication' received by the Commission. For the Commission to initiate an investigation on a communication received by it, the Commission has to be satisfied that such communication is genuine. As rightly stated in his judgment by the learned High Court Judge, composition of the Commission also carries great weight in the above filtering process on the genuineness of the 'communication'. Therefore, the 'communication' being anonymous would not cause any prejudice to the person against whom the anonymous petition is sent.
10. Counsel for the Appellant contended that, it is mandatory to have an identifiable person to take action in terms of section 21, if the communication under section 4 (1) is found to be false or malicious. For the reasons stated above, I am of the view that it should not be a reason to shut out anonymous communications completely. Any communication whether anonymous or onymous will be acted upon only if found to be genuine, after the mandatory filtering process provided in section 4(2).
11. Under certain circumstances, there can be reticence on the part of the general public to come out openly against persons in high office or authority. In such situations, if the genuineness of the 'communication' can be independently verified, I see no reason to not to commence an investigation on such 'communication'. It would not cause any prejudice to the person against whom such 'communication' is made.

12. It is also important to note that Sri Lanka is a signatory to the United Nations Convention against Corruption (UNCAC). There is a specific provision in 'UNCAC', where protection should be given to whistle blowers. Unfortunately, such provision is not available in our legislature. In this context, I am of the view that, such 'communication' even if it is anonymous, should be acted upon, if it can be verified independently to be genuine to commence an investigation.
13. In the above premise, I am of the view that, an investigation can be commenced on an anonymous 'communication' in terms of section 04 of the Act No. 19 of 1994, subject to the verification of genuineness of such 'communication' in terms of section 4(2).
14. In the above premise, I see no reason to interfere with the judgment of the learned High Court Judge.

Hence the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

K.K. WICKREMASINGHE, J

I agree.

JUDGE OF THE COURT OF APPEAL