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

In the matter of an Appeal in terms of Section 331(1) of the code of Criminal Procedure Act, No. 15 of 1979 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Case No:
HCC 210/18

HC Colombo
Case No: B1774/2018

The Director General,
Commission to Investigate Allegation of Bribery or Corruption,
No.36, Malalasekara Mawatha,
Colombo 07.

Complainant

Vs.

Rajapaksha Gedara Mahindaratne,
No.1, Government House,
School lane, Anuradhapura.

Accused

And Now

Rajapaksha Gedara Mahindaratne
No.2434/A, SirimewanUyana,
3rd Stage, Anuradhapura.

Accused-Appellant

Vs.

1. The Director General,
Commission to Investigate Allegation of Bribery or Corruption,
No.36,
Malalasekara Mawatha, Colombo 07.

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

Complainant-Respondents

Before : **Devika Abeyratne,J**

P.Kumararatnam,J

Counsel : Anil Silva PC with Isuru Jayawardena for the Accused-Appellant
Subashini Siriwardhena, Assistant Director General for the Complainant-Respondent

Written Submissions On: 29.08.2019 (by the Accused-Appellant)
09.10.2019 (by the Complainant- Respondent)

Argued On : 10.02.2021

Decided On : 18.03.2021

****

Devika Abeyratne,J

The Accused Appellant was indicted in the High Court of Colombo under the following six counts.

I. On or about 14.05.2007 at *Thalawa* within the jurisdiction of this Court you being a public servant to wit the Divisional Secretary of the *Thalawa* Divisional Secretaries office did solicit a gratification in a sum of Rs. 20,000/- from *Diwakara Punchi Ralage Ashoka Chandana* as an inducement or reward to do an official act to wit grant approval for the issue of a

timber permit applied in the name of *T.M.Saman Manoj* and thereby committed an offence punishable under Section 19(b) of the Bribery Act.

II. At the time place and in the course of the transaction referred to in Charge 1 you being a public servant to wit the Divisional Secretary of the *Thalawa* Divisional Secretaries office did solicit a gratification of Rs. 20,000/- from *Diwakara Punchi Ralage Ashoka Chandana* and thereby committed an offence punishable under Section 19(c) of the Bribery Act as amended.

III. At the time place and in the course of the transaction referred to in Charge 1 you being a public servant to wit the Divisional Secretary of the *Thalawa* Divisional Secretaries office did accept a gratification of a sum of Rs. 10,000/- from *Diwakara Punchi Ralage Ashoka Chandana* as an inducement or reward to do an official act to wit grant approval for the issue of a timber permit applied in the name of *T.M. Saman Manoj* and thereby committed an offence punishable under section 19(b) of the Bribery Act.

IV. At the time place and in the course of the transaction referred to in Charge 3 you being a public servant to wit the Divisional Secretary of the *Thalawa* Divisional Secretaries office did accept a gratification of Rs. 10,000/- from *Diwakara Punchi Ralage Ashoka Chandana* and thereby committed an offence punishable under section 19(C) of the Bribery Act as amended.

V. On or about 16.05.2007 at *Anuradhapura*within the jurisdiction of this Court you being a public servant to wit the Divisional Secretary of the *Thalawa* Divisional Secretaries office did accept a gratification in a sum of Rs. 10,000/- from *Diwakara Punchi Ralage Ashoka Chandana* as an inducement or reward to do an official act to wit grant approval for the issue of a timber permit applied in the name of *T.M. Saman Manoj* and thereby committed an offence punishable under Section 19(b) of the Bribery Act.

VI. At the time place and in the course of the transaction referred to in Charge 5 you being a public servant to wit the Divisional Secretary of the *Thalawaa* Divisional Secretaries office did accept a gratification of Rs. 10,000/- from *Diwakara Punchi Ralage Ashoka Chandana* and thereby committed an offence punishable under section 199 (c) of the Bribery Act as amended.

After trial the learned High Court Judge convicted the accused appellant (hereinafter sometimes referred to as the appellant) on all 6 counts and sentenced to 3 months rigorous imprisonment in respect of each count to be suspended for 7 years and a fine of Rs. Five thousand each for all counts with a default term of 4 months each of simple imprisonment.

Being aggrieved by the said conviction and sentence, the appellant appealed to this court.

At the trial, the prosecution led the evidence of the complainant *Ashoka Chandana, (sometimes referred to as Ashoka Ranjith) T.B Dissanayaka, Saman Manoj,* P.C.24221 *Herath*, and IP *Chandrapala Abeywickrama* (whose name is not included in the indictment).

It is pertinent to document the following facts to understand the delay for the pronouncement of the judgment, when after the conclusion of the trial the first date of judgment was fixed for 9.01.2015 and finally judgment had been delivered three years later on 28.03.2018.

The evidence of the prosecution witnesses, the dock statement of the accused and the evidence of the two witnesses called on behalf of the defense have been concluded and the correction of proceedings on behalf of the accused concluded on 05.09.2014 (it has been informed that there are no corrections on behalf of the prosecution) and the judgment has been fixed for 09.01.2015.However, the judgment was not delivered on that day by the learned High Court Judge before whom the trial was concluded.

On 31.03.2015 an application has been made by both parties to adopt the evidence and deliver judgment by the successor High Court Judge and accordingly, judgement has been fixed for 03.07. 2015.On this day it had been informed by the Honorable judge that the proceedings dated 08.03.2015 of PW 2 was not filed of record.The legal officer of the Bribery Commission has been informed to submit a photo copy of the evidence of PW 2 on 28.10.2015. Thereafter, as per the proceedings dated 22.01.2016 another application has been made

before another High Court Judge to adopt the evidence and pronounce the judgment and accordingly, again the judgment has been fixed for 30.03.2016.

However, on 19.05.2016 once again an application had been made before the High Court Judge who delivered the impugned judgment to adopt the evidence and deliver the judgment. After the adoption of evidence, judgment has been fixed for 15.06.2016 on which date court has made order under section 439 of the Criminal Procedure Code to recall PW 01 *Asoka Chandana* whose evidence was subsequently recorded on 30.11.2016 and the judgement was finally delivered on 28.03.2018 convicting the accused-appellant on all charges.

Briefly the facts of this case are as follows; according to *Ashoka Chandana* the complainant, he had made an application for a permit to transport some timber on behalf of one *Manoj Kumara* who is a supplier of timber to a place in *Moratuwa.* The permit had to be issued by the Divisional Secretary of *Mahawa* who is the appellant. *Ashoka Chandana* has stated that the Divisional Secretary at his office solicited a bribe of 20,000/- to issue the permit. Initially a sum of Rs. 10,000/- was given and accepted and then the Bribery Commission was informed by telephone and the following day when the balance Rs 10,000/- was paid in the presence of the Bribery Officers, the Divisional Secretary was arrested.

The appellant denied that he solicited and accepted any such gratification and states that it is a fabricated charge. The motive being

the appellant admonishing and reprimanding the complainant about not supplying timber or returning the money taken from the Accountant *Kumara* who works in the AGA's office. The accountant has complained about *Asoka Chandana* (who comes regularly to the AGA's office to obtain permits) to the Divisional Secretary who is his superior.

It is interesting to note that the complainant in his examination in chief could not remember any specific date about the alleged transaction or the date of the raid. However, in cross examination the following dates were fixed. The date the appellant solicited Rs. 20,000/- to be on the 13.05.2007. Rs 10,000/- given on 14.05.2007 and the raid was on 16.05.2007 when the balance Rs 10,000/- was given.

It was submitted by the learned President's Counsel that the Divisional Secretary was on leave on the 13th, the day he is alleged to have solicited the money, and that the prosecution has failed to establish its case beyond reasonable doubt.

It appears that the 13th of May is a Sunday. Therefore, when the complainant in cross examination, has been specific about the days in relation to the alleged transaction, it is the duty of the prosecution to establish the case beyond reasonable doubt.There is no obligation on the appellant to fill in the blanks of the prosecution case.

The learned counsel for the accused at the trial stage has stated that on the 13th the accused was on leave and according to the

calendar it is a Sunday. As such, as far as the charge of soliciting a gratification is concerned there is no evidence coming forth from the complainant in proof of this charge, let alone any corroboration from any witness.

On a perusal of the evidence, it was apparent that as a whole, there were many contradictions and discrepancies in the evidence of the prosecution witnesses, which will be addressed subsequently in this judgment.

PW 01 had in evidence in chief portrayed as if it was he who paid the initial Rs 10,000/- to the Divisional Secretary. (appellant) However after his evidence was postponed for another day for cross examination, the prosecuting counsel sought permission from Court to examine PW 01 further and some **leading questions** were asked, where the name of one *Dissanayake* as the person who gave the appellant the initial Rs. 10,000/- was elicited. It is very clear that up to the point the leading questions were asked as to who gave the appellant money, there was no evidence of *Dissanayake* paying any money. The previous evidence was presented as if it was PW 01 who paid the money to the appellant.

What is more surprising is *Dissanayake* (PW 2) in his evidence never testifying that any money was given to the Appellant by him. The prosecution case is dependent on the issue that money was solicited then paid to the appellant. But *Dissanayake* merely stated that the Divisional Secretary asked for a payment Rs 10,000/- to issue a permit, which message he conveyed to *Ashoka Chandana* PW 01.

When considering the evidence of *Ashoka Chandana* at one time stating that he paid Rs 10,000/- through *Dissanayake*, and if in fact *Dissanayake* gave that money to the Divisional Secretary, why *Dissanayake* did not testify to that fact is unclear. It is not probable for a person like *Dissanayake* who is said to be a farmer, to forget a fact like paying money to the highest government officer in the region.

This position leads to another discrepancy in the evidence of *Asoka Chandana*. He was heard to say that after the initial payment of Rs 10,000/-, the appellant gave his telephone number and wanted him (PW 1) to contact the appellant with the balance Rs 10,000/. (page 62 of the brief in evidence in chief)

ප්‍ර : මම අහන්නේ සාක්ෂිකරු තමා රු 20000/- ක මුදලක් ඉල්ලුවා කියලා කිවුවානේ, ඒ දවසේ ඉදල කවදාද මේ දුරකථන අංකය තමාට ලබා දුන්නේ ?

උ : ඉතිරි මුදල් දෙන්න ඉල්ලූ දවසේ තමා මට දුරකථන අංකය ලබා දුන්නේ.

Then the question arises, if it was *Dissanayake* who gave Rs 10,000/- to the appellant, PW 1 could not have been given the telephone number by the appellant on that occasion.

What is most significant is that although PW 1 gave evidence for the second time before the learned judge who pronounced the impugned judgment, he has not testified either about him giving Rs 10,000/-to the appellant or sending that money though *Dissanayake* or the Appellant accepting such money.

PW 1 has on 15.5.2009 and 30.11.2016 given evidence. Therefore, some discrepancies in his evidence can be expected with

the passage of time. However, it is safe to assume that payment of money in an unlawful manner to a person of the caliber of a Divisional Secretary, which is not an every day occurrence, has to be etched in PW 1's memory. His failure to testify to that fact creates a doubt about his testimonial trustworthiness.

Further, PW 1 has categorically stated that he travelled to the place of raid in the vehicle of the Bribery Officers, whereas in his earlier evidence and the evidence of officer *Herath* (PW 4) was that they went in a three wheeler, with which evidence the whole scenario of the raid changes. This is clearly contradictory evidence.The contradictory evidence of PW 1 cannot be considered as due to faulty memory.

These vital infirmities in the evidence of PW 1, the learned trial judge has failed to consider.

In *K. Padmathilake Alias Sergeant Elpitiya VS. The Director General of Commission to Investigate Allegations of Bribery and Corruption [2010] BLR 67 it was held;*

(a) Credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the judge.

(b) When witnesses makes inconsistent statements in their evidence either at one stage or at two stages, the testimony of such witnesses is unreliable and in the absence of special circumstances, no conviction can be based on the testimony of such witnesses. On the other hand one cannot be unmindful of the

proposition that Court cannot mechanically reject the evidence of any witness.

(c) It is the paramount duty of the Court to consider entire evidence of a witness brought on record in the examination-in-chief, cross-examination and re-examination.

(d) It is a cardinal principle that unreliable and unacceptable evidence cannot be rendered credible, simply because there is some corroborative material."

The evidence of PW 1, when considered in its totality,contains discrepancies and material contradictions which has created a doubt about the credibility of his evidence.

Furthermore, there is another confusing fact elicited from the proceedings at the trial. Both, PW 1 and PW 4 Officer *Herath* refer to an Inspector *Gunawardena* as the main officer involved in the raid. He was the person who had given instructions and the marked money to PW 1 and the officer who arrested the appellant.

Although the name SI *Gunawardena* of the Bribery Commission is named as a witness, it is IP *Chandrapala Abeywickrama* who had given evidence at the trial. From pages 156 and 179 of the brief, IP *Abeywickrama* has given evidence of how the raid was conducted and regarding the arrest of the appellant. The questions posed by Counsel as well as in the answers of the witnesses including the evidence of PW 4 refer to an officer named *Gunawardena.*

The prosecution has failed to explain this very relevant issue. The Counsel for the appellant in his written submissions in the High Court in page 351 of the brief has submitted that inadvertently the name of the officer is stated as *Gunawardena* and the correct name is *Abeywickrama.* But it is unclear on what basis the counsel for the accused-appellant has stated that fact when the prosecution who called the officer has not given any such clarification. Further, even at the hearing of the appeal that aspect was not adverted to by any party.

Therefore, the current position before this court seems to be that there is a gaping and unexplained mystery about the prosecution witness who has conducted the raid and arrested the appellant.

It is also apparent that the learned trial judge has failed to consider the credit worthiness of the evidence of PW 1 and officer *Herath* PW 4, with regard to the acceptance of money at *Dahaiyagama* junction in his evaluation and analysis as there are material contradictions in their evidence.

There is also no analysis or evaluation of the evidence of PW 2 *Dissanayake* by the learned trial judge in the judgment. The Counsel for the respondent conceding that fact was heard to say that the judgment states that there were six prosecution witnesses. Merely because the number of the prosecution witnesses are referred to in a judgment that does not mean that the evidence of one of the most important witnesses was considered by the learned judge when there is no reference to that fact.

It is well established that findings of primary facts by a trial judge who hears and observes the witnesses are not to be lightly disturbed on appeal. (*Alwis vs Piyasoma Fernando 1993 1 SLR 122, Wickramasooriya vs Dedoleena 1996 2 SLR 95, Fradd vs Brown 20 NLR 282*)

It is noted that in the instant case the learned judge who delivered the judgment had the benefit of witnessing only PW 1.

It is trite law that a court of appeal should "attach the greatest weight to the opinion of the judge who saw the witnesses and heard their evidence," and, consequently, should not disturb a judgment of fact unless it is unsound. The principle embodied has been stated succinctly in the following cases.

King v. Gunaratne14 Ceylon Law Recorder 174 Macdonell, C.J. stated:

> *"This is an appeal mainly on the facts from a Court which saw and heard the witnesses, to a Court which has not seen or heard them, and in dealing with this judgment I have to apply the three tests, as they seem to be, which a Court of Appeal must apply to an appeal coming to it on questions of fact:*

(1) Was the verdict of the Judge unreasonably against the weight of evidence,

(2) Was there a misdirection either on the law or on the evidence,

(3) Has the Court of trial drawn the wrong inferences from matters in evidence."

In *Martin Fernando v. The Inspector of Police, Minuwangoda, 45 NLR 210 Wijeyewardene, J. held that:*

> *"An Appellate Court is not absolved from the duty of testing the evidence extrinsically as well as intrinsically" although "the decision of a Magistrate on questions of fact based on the demeanour and credibility of witnesses carries great weight." Where "a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt.*

On a perusal of the judgment of the learned trial judge it appears that the dock statement and the evidence of the two defence witnesses have not been given due consideration according to law. The evidence of the witnesses has been rejected on the basis that they are partisan witnesses, without giving any acceptable reason how that conclusion was reached.

In *Jayathunga V A.G and another 2002 1 SLR 197 at 202 Hector Yapa J***,** stated as follows.

> *"….. The other submission that was made by Learned President's Counsel was the failure of the Learned High Court Judge to consider the defence evidence, specially the evidence given by the Accused Appellant, before he decided to sustain the conviction of the Accused Appellant. Counsel contended that there was complete failure by the High Court Judge to*

consider the evidence given by the defence. In support of this submission, Learned counsel cited the cases The King V Tholis Silva (30 NLR 267), where it has been held that it is the duty of a Court to scrutinize the defence put forward in a case and if it is rejected, to give reasons therefore. Counsel also referred to the case of Chandrasena and others V. Munaweewa (1998(3) SLR 94), where the need for a judge to analyse and evaluate the evidence of both the Prosecution and the defence with reasons has been highlighted and commented upon".

On consideration of the totality of the evidence adduced at the trial and the above mentioned facts and the judicial authorities cited, it is my considered view that it is unsafe to allow the conviction to stand.

Accordingly, the conviction and the sentence are set aside. The appeal is allowed. The appellant is acquitted of all the charges.

The registrar is directed to send a copy of the judgment together with the original case record to the High Court of *Colombo.*

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL