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. of 1979.

Court of Appeal Case No:
HCC 236/2018

Commission to Investigate Allegations of Bribery Corruption.

HC of Colombo Case No:
B 1983/13

Complainant

Vs.

1. Mohomed Hanifa Mohomed Niyas,
   Ikbal Road,
   Muthur 06.

2. Mohomed Ameen Asmir Ali,
   168/B,
   Dunuwila Road,
   Akurana.

Accused

And Between

Mohomed Hanifa Mohomad Niyas,
Ikbal Road,
Muthur 06.
(Presently in Welikada Prison)

Accused-Appellant

VS.

1. Commission to Investigate Allegations of Bribery or Corruption,
   No.36,
   Malalasekara Mawatha,Colombo 07.

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

Respondents

Before	**:**	**Devika Abeyratne,J** **P.Kumararatnam,J**
Counsel	**:**	Palitha Fernando PC with Ruwan Udawela, Mahendra Dias and Kishan Perera for the Accused-Appellant Dilan Rathnayake DSG for the Respondents
Written Submissions On	**:**	30.07.2019 (by the Accused-Appellant) 06.09.2019(by the Respondent)
Argued On	**:**	25.03.2021
Decided On	**:**	04.05.2021

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Devika Abeyratne.J

The Accused Appellant (hereinafter referred to as the appellant) in this case was indicted on counts 1 to 4 of the indictment which are as follows;

1. Between 11th May 2012 and 16th May 2012 while serving as the Divisional Secretary *Akurana*, for solicitation of Rs. 50,000/- as gratification from *Asanaka Ranawana* for the purpose of granting approval of a license to a metal quarry, an offence punishable under Section 19 (b) of the Bribery Act.

2. At the time, place and in the course of the same transaction being a public servant for soliciting 50,000/- as gratification from *Asanka Ranawana* an offence punishable under Section 19 (c) of the Bribery Act.

3. On 16.05.2012 in the course of the same transaction as the Divisional Secretary *Akurana* accepting a gratification of Rs. 50,000/- through the 2nd accused from *Asanka Ranawana* for the purpose of granting approval of a license to a metal quarry, an offence punishable under Section 19 (b) of the Bribery Act.

4. At the time, place and in the course of the same transaction being a public servant for accepting a gratification of Rs. 50,000/- from *Asanka Ranawana* an offence punishable under Section 19 (c) of the Bribery Act.

The 2nd accused was indicted for the 5th and 6th counts for aiding and abetting the appellant to commit the offences specified in counts 3 and 4. He admitted liability to both charges and was imposed a sentence of one year rigorous imprisonment for each charge separately, suspended for 7 years and a fine of Rs,5000/- each with a default sentence of one year.

The learned trial judge after trial, convicted the appellant on counts 2 and 4. He was acquitted from counts 1 and 3 on the basis that the official act set out in counts 1 and 3 had already been performed by the appellant by the time the solicitation for the illegal gratification was made.

For the 2nd and 4th counts which is for soliciting an illegal gratification of Rs. 50,000/- while serving as a public servant he was sentenced as follows,

Count [2] – 5 years Rigorous Imprisonment
Rs.5000/- fine [one year Rigorous imprisonment in default]
Count [4] – 5 years Rigorous Imprisonment
Rs. 5000/- fine [one year Rigorous imprisonment in default]

Both sentences to run concurrently.

A Further fine of 50,000/- was imposed under Section 26 of the Bribery Act with a default Sentence of 1 year Rigorous Imprisonment.

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

The facts of the case can be summarized as follows; PW 01 the complainant is a businessman who owns a metal quarry at *Akurana* situated close to his residence. Previously, his now deceased father had carried on the business. On 01.02.2012, the complainant has applied for his annual license for the year 2012 which was received by the Divisional Secretary on 03.02.2012 and on 10.02.2012 the license had been recommended. It was submitted that approval from the other authorities is based on this recommendation.

According to PW 1, when he responded to a missed telephone call on his mobile phone it had been answered by one *Hashima* (PW 05) an employee from the Divisional Secretariat of *Akurana.*

Hashima (PW 05) is known to the complainant as an employee of the Divisional Secretariat who used to handle the file pertaining to the Quarry. She has informed that the newly appointed Divisional Secretary wants to speak to him and given the phone to the person who identified himself as the Divisional Secretary.

Thereafter, the person who identified himself as the Divisional Secretary, on the telephone has solicited a sum of Rs. 50,000/- and had indicated that his assistance will be required to the complainant in future too to carry on his business and had requested for the money before Thursday. PW 01 who had indicated he would be able to settle a sum of about Rs 30,000/-, had informed the Bribery Commission and a trap had been arranged on 16.05.2012.

As arranged with the officials of the Bribery Commission, the complainant together with officer *Pathiraja* who acted as *Manju,* (the employee of PW 01 who attended to matters in the Divisional Secretariat, who is also alleged to have been informed to convey a message to PW 01 to meet with the Divisional Secretary by the officer who handled the file.) had visited the Secretariat.

At the office of the Divisional Secretary, PW 01 had been asked whether he brought Rs. 50,000/- by the Divisional Secretary, who was identified in the Dock as the accused. Thereafter, PW 01 and officer *Patrhiraja* were directed to the Quarters of the Divisional Secretary which was situated on the upper floor of the Secretariat. They were taken there by a peon named *Cader*. After a while, they were again asked to come to

the office of the Divisional Secretary and was told by him to proceed to the house of the complainant and that the money would be collected there. When PW 01 and the officer were waiting at his residence (the Quarry is also in the same premises 150 meters away) *Hashima* has contacted him over the phone to inform that 'Sir will be coming around 4 pm'.

PW 2, Officer *Pathirajah* has been stationed near the 'crusher'. The Divisional Secretary has come with some others. He and another fair complexioned person with the complainant had been walking towards the 'crusher' when the appellant asked whether the Rs.50,000/- was there and instructed him to give it to the fair complexioned person who was with them. The money had been given to that person who was instructed by the appellant to take the money.

After the money was given as instructed the signal was given and officer *Seneviratne,* of the Bribery commission with the other officers have come and arrested the appellant and the other person who was with him. The person who was given the money on the instruction of the Divisional Secretary was identified as Ali the 2nd accused who admitted liability at the trial.

PW 02 *Pathirajah* has corroborated the evidence of PW 01 (page 213/214). He has testified that when the person who was in a sarong was arrested he had stated that the money was taken on the instructions of the Divisional Secretary.

In Page 321 of the brief;

ප්‍ර : සරමක් ඇඳ ගත්ත තැනැත්තා මොකද කිවුවේ?

උ : ඔහු කිවුවා ස්වාමිනි සර් ගන්න කියලා කිවුව නිසා ගත්තේ කියලා කිවුව ස්වාමිනී. එම මුදල් ගුලි කරලා තිබුනේ ගුලි කරලා තිබුන මුදල් සෙනෙවිරත්න මහත්තයා අතට දුන්නා ස්වාමිනි.

This statement was corroborated by PW 03 *Senaviratne* the Officer-In-Charge of the raid. He also testified that the money was recovered from the person who was subsequently named and identified as the 2nd accused who admitted liability to the charge, before the commencement of the trial.

There were several other prosecution witnesses including PW 05 *Hashima*. On perusal of the evidence of *Hashima* it is noted that neither party has elicited any important evidence from this witness. It appears that as the learned judge has commented in his judgment , considering the relationship between PW 05 and the appellant , prosecution may have had good reason not to pose too many questions to PW 05.

PW 08 *Abdul Cader* has testified that he accompanied the complainant and another person to the private quarters of the Divisional Secretary and later brought them back to the office. This had been at the request of the appellant.

PW 09 *Ismail Lebbe Mohomed*, is a *Grama Sevaka* who was present when the Divisional Secretary was arrested. He had been seated at the back seat of the cab with the 2nd accused, when the officers of the Bribery Commission arrested the 2nd accused and the Divisional Secretary. His evidence that he was not watching what was taking place as he was disturbed by the turn of events is hard to believe specially coming from a *Grama Sevaka*, which indicated he was an uncooperative witness.

The appellant has made a lengthy statement from the Dock and denied the charges levelled against him.

The following grounds of appeal were urged on behalf of the appellant.

1. A Large volume of evidence incriminating the Accused Appellant was based on a conversation between an employee of the Office Divisional Secretary, named *Hashima* and Complainant. The Learned Trial Judge failed to consider is impact on the evidence against the accused appellant when the prosecution did not lead the evidence of the said *Hashima* regarding the said conversations, though she was called as a witness for the prosecution.

2. The Learned Trial Judge misdirected himself when referring to the fact that there was no cross examination of the said witness *Hashima* by the defence regarding the conversations between the complainant and the witness.

3. The Learned Trial Judge failed to consider the impact on the case for the prosecution when the prosecution purposely declined to lead the evidence of witness *Hashima* on the items of evidence already elicited from the Complainant regarding the conversations with her.

4. The learned Trial Judge failed to analyze the evidence of the decoy, Police Sergeant *Pathiraja* and the Chief Investigating Officer Police Inspector *Seneviratne,* in view of the discrepancies between the evidence of the Complainant and the officers of the Bribery Commission.

5. The Learned Trial Judge failed to pay attention to the evidence of witness *Hashima* that there were complainants against the Quarry of the Complainant that were investigated by the Divisional Secretariat as a cause for false implication.

6. Due to one or more of the reasons set out above the Accused Appellant was denied fair trial.

The first to three grounds of appeal above focuses on the failure of the learned judge to consider that there is no evidence elicited from *Hashima* by the prosecution regarding her alleged introduction of the appellant to the complainant and her direct involvement which culminated in this action.

The learned President's Counsel appearing for the appellant contended that as the prosecution failed to lead the evidence of witness *Hashima* (PW 5) to elicit evidence on the conversation she is alleged to have had with the complainant, it is hearsay evidence and not admissible.

It was contended on behalf of the appellant that the evidence pertaining to *Hashima' s* alleged conversation with the complainant was allowed by the learned trial judge after it was informed that she was a witness. Thereafter a large volume of evidence that would not have been admissible if *Hashima* was not a witness had been led. However PW 5 has not been questioned on the conversation she was alleged to have had with the complainant and as a result prejudice was caused to the appellant and that the learned trial Judge failed to consider that issue.

The evidence elicited from PW 1 transpires that PW 5 has played an important role in the entire transaction. Even on the date of the raid she is said to have been in contact with PW 1 passing on messages about the arrival of the appellant and with regard to the payment of money.

For whatever reason this evidence was not elicited from PW 5 to corroborate the evidence of PW 1. It stands to reason therefore, as the learned DSG has admitted, that the evidence of PW 1, on what was communicated by PW 5 was hearsay evidence. Nevertheless, it appears that PW 1 on what he perceived from the said communication had taken action to inform the Bribery Commission and pursued with the information he gathered, which evidence is admissible.

It is also to be considered that the appellant if he so wished could have elicited evidence enuring to his benefit from PW 5 as she was available for cross examination.

The learned trial judge has quite correctly analyzed the evidence and had concluded as follows;

In Page 511 of the brief ;

"..... පොදුවේ සලකා බැලීමේදී පැ. සා 5 1 වන විත්තිකරු සමග ඇති කිට්ටු සම්බන්ධතාධවය පිළිගෙන ඇත. එම හේතුව ප්‍රධාන කොට ගෙන සලකා බැලීමේ දී මෙම සාක්ෂිකාරිය පක්ෂග්‍රාහී සාක්ෂිකාරියක් බවට දැඩි අනුමැතියක් පවතී. ඒ අනුව ඇය විශ්වාසය තැබිය හැකි සාක්ෂිකාරියක් ලෙස සැලකීමට අපහසුතාවයක් මතුවන අතර, ඇය එක්තරා මට්ටමකට විත්තිකරුට පක්ෂග්‍රාහී සාක්ෂිකාරියක් බවට පොදුවේ ඉහත කරුණු සලකා බැලීමේදී හෙළිදරවු වේ. ඒ අනුව ඇයගේ සාක්ෂිය විත්තිකරුට එරෙහිව සලකා බලන්නේ නැත. කිසියම් හෝ ආකාරයකට විත්තිකරුගේ වාසියට ඇයගේ සාක්ෂිය සලකා බැලිය හැකි නම් එය පමණක් සිදු කිරීමට කටයුතු කරමි."

Considering the above, the ground of appeal that the appellant was denied a fair trial has no merit.

The 5th ground of appeal is that the learned trial judge failed to pay attention to the evidence of *Hashima* that there were complaints against the Quarry and they were being considered by the appellant. Upon perusal of the evidence clearly indicate that some general questions have been asked about complaints regarding the Quarry. But has not elicited information about any serious complaints. There were no specific incidents or complaints referred to. Anyhow, by the time the site was visited the license had already been issued and there was no necessity or reason whatsoever to visit the site for an inspection. Accordingly, that grounds of appeal also has no merit.

The learned President's Counsel had contended that the prosecution was under a duty to call the 2nd accused as a witness, who has admitted liability to the charges against him. It is for the prosecution to decide to call witnesses as the burden is on the

prosecution to prove its case beyond reasonable doubt. Therefore, it cannot be considered as a valid ground of appeal.

In the instant case the main witness was PW 01.

In *Sunil Vs AG* 1999 (3) SLR page 191 it was held;

1. *It is trite law that the trial Judge who hears a bribery trial is entitled to convict on the sole testimony of a prosecution witness without any corroboration provided he is impressed with the cogency, convincing character of the evidence and the testimonial trustworthiness of the sole witness.*

2. *It is an incorrect statement of the law to hold that a reasonable doubt arises on the mere fact that the prosecution case rested on the uncorroborated evidence of a solitary prosecution witness.*

In *Walimunige John and Another vs State 76 NLR 488* held;

> *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the ' prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."*

King vs Chalo Singho 42 NLR Page 269 has held;

> *Prosecuting Counsel is not bound to call all the witnesses named on the back of the indictment or tender them for cross-examination. In exceptional circumstances the presiding Judge may ask the prosecuting Counsel to call such a witness or may call him as a witness of the Court.*

In the light of the above authorities it is apparent that the prosecution had no compelling reason to call the second accused as a prosecution witness.

The fourth ground of appeal is that the learned trial judge has failed to consider the omissions and the discrepancies in the evidence of the prosecution witnesses.

The learned President's Counsel has referred to the discrepancies such as the colour of the vehicle, the signal that was given to the officers and has submitted that the learned judge, should have been cautious when the bare testimony of the decoy and complainant was considered.

On perusal of the judgement it is apparent that the learned trial judge has carefully and extensively analysed and evaluated the omissions and contradictions and considered meticulously the acceptable evidence which in my view cannot be faulted.

The trial judge has considered the Dock Statement very carefully and rejected same giving established legal basis for the rejection.

It is admitted that the visit to the Divisional Secretariat by the complainant was after the recommendation was obtained. According to the complainant the reason to visit the Secretariat was the Divisional Secretary's request for him to come with the solicited money. The evidence is that the complainant and the decoy was sent to the private quarters of the Divisional Secretary on his request which was corroborated by the evidence of *Cade*r the peon of the Divisional Secretary. If the request for the

complainant was to come for an official inquiry, there was no reason for him to be sent to the official quarters of the appellant.

The argument that the reason for the appellant to visit the Quarry was to inspect it cannot stand as the license was already issued by that time and there was no cogent reason for the appellant to inspect the Quarry. There is no plausible explanation why the appellant visited the Quarry on that day.

As the learned Trial Judge has considered all the evidence properly, we see no reason to interfere with the finding and conclusion of the trial judge.

Accordingly, we dismiss the appeal and affirm the conviction and the sentence imposed by the learned High Court Judge.

JUDGE OF THE COURT OF APPEAL

P.Kumararatnam,J

I Agree

JUDGE OF THE COURT OF APPEAL