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 CPC read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Commission to Investigate Allegations of Bribery or Corruption

No. 36, Malalasekara Mawatha,

Colombo 07.

CA Appeal No: CA/HCC/419/18 **Complainant**

Colombo High Court Case No: HCB 1971/13 **Vs.**

Senarath Bandara Kulatunge

Accused

And Now

Senarath Bandara Kulatunge

Accused-Appellant

Prabha Nilushika Sarojini Ranaweera

2nd Defence Witness-Appellant

Vs.

Commission to Investigate Allegations of Bribery or Corruption

No. 36, Malalasekara Mawatha,

Colombo 07.

Complainant-Respondent

The Hon Attorney General,

Attorney General's Department,

Colombo 12

Respondent

Before: **N. Bandula Karunarathna J.**

&

R. Gurusinghe J.

Counsel: Dimuth Senarath Bandara AAL with Malindu Peiris AAL and Keheliya Alahakoon AAL for the 02nd Defence Witness-Appellant

Sudharshana de Silva DSG for the Complainant-Respondent

Written Submissions: By the 02nd Defense Witness-Appellant on 10.02.2020

By the Complainant-Respondent on 04.03.2020

Argued on : 06.10.2021

Decided on : 07.12.2021.

N. Bandula Karunarathna J.

This appeal is preferred against the Order, delivered by the learned Judge of the High Court of Colombo, dated 07.12.2018, by which, the 02nd defence witness-appellant, was convicted and sentenced for 12 months Rigorous Imprisonment for 2 counts, to run concurrently. The learned High Court Judge acting under Section 449 (1) of the Code of Criminal Procedure Act, sentenced the 02nd defence witness-appellant for perjury.

When I consider the background story, it is evident that the accused-appellant above named was indicted in the High Court of Colombo in Case No. HCB 1971/13 on four separate Counts under sections 16(b) and 16(c) of the Bribery Act for soliciting and accepting a bribe of Rs. 2,500/- from one Wijesiri Buddhakoralage Mahinda Lal Gunawardene to refrain from taking legal action against him for a traffic offence which he had committed, on 10.09.2008.

The said trial commenced on 17.09.2014 and evidence of PW 01, PW 02, PW 03, PW 04, PW 05 and another official witness was led by the prosecution, marking its documents from P 1 to P 8 (6). Upon the defence being called, the accused-appellant himself gave evidence and thereafter called the 02nd defence witness-appellant as a witness for the defence. After the trial, the learned High Court Judge by his judgement dated 16.11.2018 convicted the accused-appellant for all 04 counts and imposed a sentence of 05 years Rigorous Imprisonment for each count to run concurrently, and a fine of Rs. 5,000 for each count with a default term of one year's Rigorous Imprisonment.

Having concluded the said order to the effect that the 02nd defence witness-appellant had given false evidence in her testimony, the learned Judge of the High Court proceeded to act under section 449(1) of the Code of Criminal Procedure Act, against her for perjury. The Registrar of the High Court containing the following allegations of perjury was served on the 02nd defence witness-appellant on 30.11.2019, who was directed to show cause against imposing punishment under section 449(1).

> Allegation 1; that the evidence she had given at the trial to the effect that she was present at the occasion of the arrest of the accused and that the accused did not ask for any money from the person who had come there, was in the opinion of the court, false evidence as interpreted by section 188 of the Penal Code.

Allegation 2; that her evidence to the effect that she was unaware of the telephone number of the accused and she has not conversed or exchanged SMS messages with him over the telephone, was in the opinion of the court, false evidence as interpreted by section 188 of the Penal Code.

Pursuant to the inquiry under the Section 449 (1) held on 07.12.2018, the learned Judge of the High Court found the 02nd defence witness-appellant guilty for both allegations levelled against her and imposed rigorous imprisonment of 01 year, to run concurrently.

Being aggrieved by the said order dated 07.12.2018, the 02nd defence witness has preferred this Appeal to this Court. The Appeal of the accused of the said High Court trial against his conviction and sentence in the main case is also considered together with this appeal, having a separate number before this Court.

Grounds of Appeal of the 02nd defence witness - appellant are as follows;

(i) The finding of the learned trial Judge to the effect that the 02nd defence witness has deliberately given false evidence is against the weight of the evidence placed before the court.
(ii) The learned trial Judge has erred in law in neglecting the need for a glaring case of perjury to proceed under section 449(1) of the Code of Criminal Procedure Act.
(iii) The punishment imposed by the learned Trial Judge on the 02nd defence witness - appellant is excessive.

The main conclusion of the learned trial Judge in his judgement dated 16.11.2018 against the 02nd defence witness appellant was that "she has given bias evidence in order to save the accused from this bribery matter and it was done after discussion with the accused and upon his instructions"

The learned trial Judge has based his finding on several grounds as below;

(i) Telephone calls and SMS between mobile number 0755971047 admitted to having been used by the 02nd defence witness appellant and mobile number 0770624787 of the accused was “closer to the time she was giving evidence".

(ii) She has "vehemently tried to conceal" the mobile number 0757971047.

(iii) After 10 years from the incident, she could not have a good memory as to the details such as dates, times, court dates, instructions received on that day.

(iv) Failure of the 02nd defence witness appellant to enter any notes regarding the bribery incident.

(v) Failure of the 02nd defence witness appellant to protest against the arrest or to complain to superiors.

The learned Trial Judge has said in his judgement of the main case, that he has "already found to be false", in the following evidence of the 02nd defence witness appellant;

(i) "that she was present when the accused was arrested"
(ii) "that she was unaware of the telephone number of the accused, and that she has not conversed or exchanged SMS with him over the phone"

In the judgement dated 16.11.2018 of the learned trial judge in the main case, nowhere has he concluded that the said witness has given false evidence as to her presence at the time of the arrest of the accused. The wordings of the 1st allegation levelled against the 02nd defence witness appellant in the inquiry under Section 449(1) also indicated that her evidence on her presence at the time of arrest was a major part of the allegation. A part of the evidence alleged to be false at the said inquiry is not based on a determination or finding of the main case, and thus it invalidates the inquiry under section 449(1) as such determination or finding is an essential prerequisite to an inquiry under section 449(1) of the Code of Criminal Procedure Act.

The grounds to form the conclusion against the 02nd defence witness appellant, the learned trial judge has ignored the weightage of the evidence which is adverse such a conclusion. Telephone calls and SMS While conceding that the defence has admitted the 32 items of calls and SMS between the said mobile phone numbers of the accused and the witness as depicted in a report marked as X4 by the prosecution, the finding of the learned trial judge that the said items related to the "time closer to that of giving evidence by the witness" are wrong. The period of the relevant telephone records marked X4 and tendered by the prosecution as evidence in rebuttal is only relevant to the period from 20.02.2017 to 22.11.2017. The period of such items listed separately and considered by the learned trial Judge is 05-09-2017 to 18-10-2017.

It is important to note that none of these items relates to the date of the evidence of the 02nd defence witness appellant who commenced and concluded her evidence on 02-03-2018. Therefore, the above records are insufficient to conclude that the witness was "coached by the accused" before giving evidence.

The Counsel for the prosecution had initially cross-examined the witness on her telephone connections. Without asking whether the witness has any other telephone numbers, the Counsel has straightaway proceeded to question the number used by the husband of the witness. It is natural for a witness to mention the most frequently used number when asked "What is the telephone used by you"? While conceding that the witness has failed to explain why the other number was not mentioned in her answer to the very first question put to her, according to the sequence of questions and answers in the said pages it is not fair to conclude that the witness has deliberately tried to conceal the telephone number in question.

The learned trial judge has ignored the evidence in which the witness has explained how certain items happened to be in her memory.

The learned counsel for the 02nd defence witness appellant says that she remembered the exact date of the incident because she had checked it up in a RIB at the police station after receiving summons from court, and keeping in mind the court date of the traffic offence. Not only that she remembered having lunch at 1.00 pm as she has her lunch at that time every day. She has explained on several occasions that since this incident was the very first experience to her, she remembered certain things even after 10 years.

It is evident that reason for not protesting, complaining and entering notes the witness has very clearly stated that being in her low rank, she was not in a position to protest or complain against the arrest of the accused and the only thing she could do was to leave the formalities to her superiors. She also maintains that she would have commented if a statement was recorded from her. The witness has clearly explained that after taking notes at the desk of the accused she moved to another desk in front of him and was engaged in pasting the notes when she sensed a struggle

and noticed the accused being held by several people with one handcuffed. She immediately ran out of the room to the OIC and informed him and never returned to the previous room.

The learned counsel for the 02nd defence witness appellant submitted that she got to know the identity of the officers only when one of them said to the OIC that "they are from bribery". She was only in the corridor when she saw through the glass panel of the room that one officer lifting something from the waste paper box announcing aloud that they found "it". Though she heard that through the wire mesh on top of the glass panel, the other conversations which were not so loud were inaudible to her. It was argued that according to this clear explanation of what exactly the witness saw and heard during the incident, it is difficult to presume that she could during that time, ascertain to which incident this arrest related to, and should not be expected to protest, complain or even make a note, without knowing the exact incident.

What the witness right throughout has maintained was that she did not see or hear the accused receiving money or discussing the same with the complainant. She explains that she was engaged in work at her table and was not paying attention to who was at the desk of the accused or to what they were discussing and therefore did not hear anything or see anything until the movements of the steel table of the accused caught her attention, which caused her to look up to see the accused being partly handcuffed.

The learned counsel for the 02nd defence witness appellant says that there is no reason to accuse that this type of evidence of the witness amounts to evidence "falsely given to show that the accused did not solicit or accept money". It is unreasonable for the witness to have been accused as in allegation 1, based on a few selected questions and answers, having ignored other plausible explanations in her lengthy evidence.

It is my view that the evidence of the 02nd defence witness appellant concerning the incident, though disbelieved by the learned trial judge, does not amount to deliberately giving false evidence and such finding of the learned trial judge is against the weight of evidence adduced in this matter. Therefore, allegation 1 upon which the witness was punished does not hold firm ground. Allegation number 2 is not about a material point of the main case but relates only as to the denying of the witness of any telephone conversation and SMS with the accused. This factor should not be allowed to overshadow or prejudice the other evidence of the witness.

The learned trial Judge has erred in law in neglecting the need for a glaring case of perjury to proceed under section 449(1) of the Code of Criminal Procedure Act. The proceedings and punishment under section 449(1) for perjury requires a high degree of proof that the witness has deliberately given false evidence to mislead the court and should not be applied to instances where the court should only disregard her evidence as untrue.

AG Vs. Silvan Silva (1981) 1 SLR 364 it was observed; "A witness should not be dealt with under s. 161(2) of the Administration of Justice Law (substantially same as sec. 440 (1) of Criminal Procedure code of 1898 and sec. 449 (1) of the present Code of Criminal Procedure Act) unless the evidence is inherently or palpably false. The question of perjury must be determined on certainties."

The following decisions cited in "A Commentary on the Ceylon Criminal Procedure Code" by Reginald F. Dias on page 1251 of Volume II, is important to decide this appeal;

It was decided in Sinnetamby Vs. Fernando 1913 - 1 B.N.C. 25; "Section 440 (of Ordinance No. 15 of 1898) applies only to glaring cases of perjury. The aid of the provisions of Sec. 440 should not be invoked for the punishment of every witness whose evidence in the course of a criminal trial is not accepted as true. There must be a glaring case of perjury".

In Duraya vs. Tissera 1914 - 3 B.N.C. 60, it was held; "Section 440 should not be invoked except in a manifest case of an attempt to mislead the Court by deliberately giving false evidence in support of the side for which the witness is called."

Bandara Vs. Ukkuwa 1914 - 4 B.N.C. 18 "Section 440 is intended to meet cases where perjury on the part of a witness is apparent and palpable on the record. It is not applicable in cases where it is possible on a balance of the evidence to find that a witness has given false evidence."

It is my view that in the light of the above authorities and the circumstances, even though the trial Judge has disbelieved the evidence of the 02nd defence witness appellant, her evidence does not meet the higher degree of deliberate falsehood amounting to perjury and warranting punishment under section 449(1) of the Code of Criminal Procedure Act.

The inquiry under section 449(1) was held on 07.12.2018 at which the counsel for the 02nd defence witness appellant mitigated the sentence praying for leniency of the court.

In mitigation of the sentence, the learned counsel of the 02nd defence witness appellant has placed several reasons before the learned Judge of the High Court.

> “The Witness was 41 years old and joined as a reserve constable in 1996, she was promoted to the rank of Police Sergeant. She has served in various stations on the island for 22 years. She is married and her husband who works as a driver is not permanently employed. Her 17-year-old son was a student sitting for GCE Ordinary Level Examination. Her parents are without the care of anybody else. Also, an 11-year-old daughter and 18-year-old son of her husband's brother is under her care after their mother has left them. Not only that 68-year-old mother of her husband, who is suffering from diabetes and heart ailments, is also under her care at her house. She has obtained a housing loan of Rs. 500,000/- from the People's Bank of which the monthly instalment was Rs. 28,500/-. Her husband was working as the driver of a lorry. She has obtained two more loans to gain an extra income which is essential to run the family. Her salary was Rs. 45,000/- but after loan deductions, she has only a sum of Rs. 19,000/-with which and the additional income from the lorry they have to manage everything. She has an unblemished service record. She repents and begs the pardon of court for the inconvenience caused by her mistakes.”

The learned counsel of the 02nd defence witness appellant submitted that the trial Judge has failed to duly evaluate the above circumstances of the 02nd defence witness appellant and should have imposed a more lenient punishment.

On the same day that is on 07.12.2018 the learned Judge of the High Court delivered his order finding the 02nd defence witness appellant guilty for both allegations levelled against her and imposed a Rigorous Imprisonment of 1 year for each allegation, to run concurrently.

The learned counsel for the complainant-respondent submitted that the learned High Court Judge has correctly scrutinized and analysed the evidence given by the prosecution witnesses, defence

witnesses and the evidence given by the appellant in coming to the conclusion, that the prosecution has proved their case "beyond reasonable doubt". In reply to the contention of the 02nd defence witness appellant, the complainant-respondent argued that the learned High Court Judge had the opportunity to observe the demeanour and deportment of the witnesses.

The Attorney General vs Sandanam Pitchi Mary Theresa S.C. Appeal 79/2008 decided on 06.05.2010 at Page 11 of the said judgement it was held that;

> "Appellate Courts are generally slow to interfere with the decisions of inferior courts question of fact or oral testimony. The Privy Council has stated that appellate court should not ordinarily interfere with the trial court's opinion as to the credibility of a witness as the trial judge alone know the demeanour of witness; he alone can appreciate how the questions are answered, whether with honest candour or with doubtful plausibility and whether after careful thought or with reckless glibness; and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross-examination."

The learned counsel for the complainant-respondent says that the Learned Trial Judge accurately noted in his judgement that during cross-examination, she firmly held the position that she had not had any telephone conversation or any other connection whatsoever with the accused-appellant after his arrest. She also maintained that she did not know the mobile number of the Accused-Appellant and she had further failed to disclose her mobile number on being questioned about the number that she is using.

The prosecution calling evidence in rebuttal brought cogent evidence to the fact that there was telephone correspondence between 0755971047, the mobile number used by the 02nd defence witness appellant and 0770624787, the mobile number used by the accused-appellant more than 32 instances from this evidence, it is clear that she even communicated with the accused-appellant a short while before giving evidence in Court and while the trial was ongoing. Accordingly, the learned counsel for the complainant-respondent argued that it is apparent that the witness had given false evidence and that she tried to conceal the telephone communications with the accused-appellant. Hence, it was submitted that there was a glaring case of perjury warranting the learned High Court Judge to proceed under Section 449 (1) of the Code of Criminal Procedure Act.

I am unable to agree with the said argument of the learned counsel for the complainant-respondent. The reason is that it was not revealed in evidence what was discussed by the 02nd defence witness appellant and the accused in the main case.

The only way to determine what kind of communication took place during a telephone conversation between two people is to record the telephone conversation and play it back in court. It is not fair for a Judge to come to a biased conclusion or inference at his discretion, presuming what the two discussed when it is only confirmed by telephone records that there was a telephone conversation between the two. According to Article **14** of the Constitution, everyone has the right to freedom of speech. The Constitution protects the right to freedom of speech at will, because of the importance of the concept.

What was discussed between the two has not been confirmed by the evidence before the High Court in the present case? In such a case, it is wrong for the learned High Court Judge to conclude that "the defence witness had testified in favour of the accused on the accused's instructions," as

it had not been proved in the evidence that the accused and the accused's witness, in this case, had "discussed the facts relevant to the bribery case."

The telephone records marked as "X 1" to "X 4" reflects that there were communications between those 2 numbers for several occasions. It does not mean or prove that both of them were talking with each other. There is a possibility that someone else can use the telephone and talk during that period mentioned in reports "X 1" to "X 4". The prosecution has not proved beyond reasonable doubt that the same accused was talking with the same defence witness. There should be voice recordings to prove that the accused and the defence witnesses were talking with each other, regarding their case. But in the present case, the prosecution failed to produce the voice recordings before the trial Judge, to confirm the conversations that took place were only between the accused and the defence witness and not anyone else.

In the light of the above authorities and the circumstances, even though the trial Judge has disbelieved the evidence of the 02nd defence witness appellant, her evidence does not meet the higher degree of deliberate falsehood amounting to perjury and warranting punishment under section 449(1) of the Code of Criminal Procedure Act.

For the reasons enumerated by me, on the facts and the law, in the foregoing paragraphs of this judgment, I set aside the conviction and sentence of the learned High Court Judge of Colombo dated 07.12.2018 and acquit the 02nd defence witness appellant.

Appeal allowed.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal