**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 read with Article 138 of the constitution of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal Case No:**
**CA HCC 280/17**

**HC Colombo Case No:**
**B/1951/2013**

Bribery Commissioner
Commission to Investigate Allegations of Bribery or Corruption

**Complainant**

**VS.**

Thelge Nadeeka Kaumadi Peiris
No. 01 A
Walana Road,
Panadura

**Accused**

**AND NOW BETWEEN**

Thelge Nadeeka Kaumadi Peiris
No. 01 A
Walana road,
Panadura.

**Accused-Appellant**

**VS**

Bribery Commissioner
Commission to Investigate Allegations of Bribery or Corruption

**Respondent**

**Before** : **Devika Abeyratne,J**

**P.Kumararatnam,J**

**Counsel** : Eraj De Silva with Hafeel Fariz, Janagam Sundaramoorthy and Daminda Wijesuriya for the Accused-Appellant.

Subashini Siriwardena with Anusha Sammandapperuma for the Complainant-Respondent

**Argued On** : 23.11.2021 and 30.11.2021

**Decided On** : 17.12.2021

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**Devika Abeyratne,J**

In this case the Director General of the Commission to Investigate Allegations of Bribery or Corruption, on the directions of the Commission had indicted the accused appellant who was the school Principal of *Mahanama Navodya School* in *Panadura* in the High Court of *Colombo* on the following counts.

1. On or about 16th November 2008 in Panadura within the jurisdiction of this Court, you being a public servant to wit the principal of *Mahanama Navodya School Panadura* did solicit a gratification in a sum of Rs. 25000/- from *Sandanampichche Jenita Moreen Fernando* as an inducement or reward to do an official duty to wit to admit *Wellasamy Logeshwaran* to Grade 6 of *Mahanama Navodya School* for the year 2009 and thereby committed an offence punishable under Section 19(b) of the Bribery Act.

2. At the same date, place and in the course of the same transaction of Panadura area within the jurisdiction of this Court you being a public servant to wit the principal of *Mahanama Navodya School* Panadura did solicit a gratification in a sum of Rs. 25000/- from *Sansanampichche Jenita Moreen Fernando* and thereby committed an offence punishable under section 19(C) of the Bribery Act.

After trial she was convicted on both counts and sentenced to a term of four years rigorous imprisonment in respect of each count . In addition a fine of Rs 2500/- in respect of each count with a default sentence of 2 years rigorous imprisonment in default of payment of fine was imposed and it was ordered that the substantive jail sentence should run concurrently.

Aggrieved by the said conviction and the sentence the appellant has preferred this appeal to this Court challenging the said conviction and the sentence.

In the written submissions of the appellant the grounds of appeal are not clearly set out. However, Counsel for the appellant Mr.*Eraj de Silva* who

appeared for the appellant at the argument has submitted the following grounds of appeal on 25.11.2021.

1. The accused appellant was denied a right to Fair Trial, inter alia by material non-disclosure. Further and accordingly the adverse inferences drawn in the circumstance in particular, inter alia;
    a. Initial police statement
    b. Probation report;
    c. Initial statement/statements made to probation officers;
    d. Complaint to the HRC;
    e. HRC Report;
    f. Bank Account number written on a piece of paper (showing School Development Fund Account number)
    g. Father's Evidence
    h. Evidence of the Probation Officer;
    i. Evidence of Year Nine student of the school

2. Even the evidence given and produced (though selective) there is plenty of evidence to raise a reasonable doubt in favour of the Appellant;
3. The serious misdirection by the learned trial judge;
4. Burden of proof in criminal trials; the prosecution has not discharged its burden according to law.
5. No evidence of the Bribery Commission having given their mind inter alia to a direction to prosecute in this case which goes to the root of the court's jurisdiction.
6. The Sentencing process is wrong in law

According to the main prosecution witness PW 1, who is the mother of the school boy PW 3 *Logeshwaran* who has got through the Grade 5 scholarship exam , the appellant who was the school Principal of *Mahanama Navodya*

*Vidyalaya Panadura,* has solicited a sum of Rs 25000/- to admit PW 3 to Grade 6 of that school.

It was alleged that as the solicited money was not paid due to hardship the family was facing, the appellant has asked the child to be removed from school. It was also submitted that the child was humiliated in front of other children in the class for not paying the money. The child had been removed from school and had been admitted to *St Anthony's* College in Panadura thereafter. It is admitted that the child had attended *Mahanama* school from January to June in 2009.

A complaint had been made by the father of the child to the Bribery Commission, that the appellant has solicited money to keep the child in school. It transpired that the Human Rights Commission had been informed about this incident.

In the Dock Statement of the appellant she has denied the allegations made against her. She has stated that PW 1 had agreed to contribute to the School Development Fund where the parents were at liberty to contribute money for the welfare of the School and that she has given the number of the account of the School Development Fund to PW 1.

The appellant had stated that PW 3 had come with his mother PW 1 for the interview without the document described as (Student Progress Report)ශිෂ්‍ය කාර්ය දර්ශනය, which was a document necessary to admit the child to school. However, as the Principal in the previous school had made a comment why she was unable to submit that document, the appellant had admitted PW 3 to the school after informing that the document has to be submitted at the earliest opportunity. It was the position of the appellant that she never asked for any money or asked PW 3 to leave school but has continually reminded PW 3 to

bring the school leaving certificate as otherwise it is not legal to keep him in the school.

It was stated that the account number of the School Development Fund was given to PW 1 and to the other parents who came for the interview. PW 3 in his testimony at page 195 of the brief has admitted that PW 1 was given the account number of the Fund. The Account number of the Fund is listed under item No 6 in the list of productions in the indictment.

PW 3 had been admitted to the English Medium Stream. PW 1 in her evidence at page 143 of the brief has stated that the Probation Officer has conceded that if the child was studying in the English Medium, payment of Rs 25000/- was reasonable in the following manner.

In page 143

ප්‍ර : පරිවාසෙට පැමිණිලි කර අවස්ථාවේදී විභාග කරන්න එන්න කියලා දැනුම් දීමක් කලාද?

උ : මුලින් එහෙන් මිස් කෙනෙක් අපේ ගෙදරට ආවා. ඊටපසුව නැවත අපිට එහෙට එන්න කිව්වා.

ප්‍ර : විමශර්නයක් සිදු වුනා?

උ : ඔව්.

ප්‍ර : ඔබ තනිවද කලේ නැත්නම් පාශර්ව දෙකක් ගෙන්නලාද කලේ?

උ : ගෙදරටම ආවේ තනියම මාත් එක්ක කතා කළා විස්තර එහෙම අහලා ලියාගෙන ගියා. ඊටපස්සේ දිනයක් දුන්න අපිට ඒ ආයතනයට එන්න කියලා. ඊට පස්සේ නැවත ගිහින් ඇහුවා තාම ආවේ නැනේ විදුහල්පතිතුමිය මොකද කරන්නේ කියල. ඊටපස්සේ ඒගොල්ලන් කිව්වා එයාව ගෙන්නන්න අවශ්‍ය නැහැ. අපි කතා කර ගත්තා කියලා. ඉස්කෝලේ යවනවා නම් ඉන්ලිෂ් මීඩියම් කරනවා නම් 25000/- ක් දුන්නට කමක් නැහැ කියලා කිව්වා.

PW 10 who is a retired Additional Director of the Provincial Education Office at pages 230 and 231 of the brief has stated that contributions are made to the School Development Fund maintained by the School. Thus, it appears it was an accepted fact and nothing illegal was imputed to collecting funds in to that account.

The Counsel for the Appellant among the other grounds of appeal argued and, vehemently contended that the prosecution has failed to prove the case beyond reasonable doubt. He submitted that the date, place or time of solicitation has not been proved and that the learned trial judge has failed to consider these important points. Further, that the learned trial Judge has misdirected himself when he has concluded that apart from Rs 25000/- which was to be the contribution to the School Development Fund another Rs 25000/- was solicited when there was no evidence to that effect . At page 272 of the brief in the judgment it states as follows;

“……..පැමිණිල්ලේ සාක්ෂි සලකා බැලීමේදී පාසල් සංවධර්න අරමුදලේ ගිණුම් අංකයක් විත්තිකාරිය විසින් පැ.සා 01 ට දී ඇත. පැ.සා. 01 ද මුල් අවස්ථාවේ දී ස්වේච්ඡවෙන් යම් මුදල් දැරිමකට කැමැත්ත ප්‍රකාශ කර ඇත. මෙම අරමුදලට මුදල් බැංකුවට බැර කිරීමක් සිදු කල යුතු බව පෙනේ. එම මුදල් රැගෙන විත් විත්තිකාරියට භාර දීමක් සිදු විය යුතු බවට කරුණු හෙළි දරව් වී නැත. පැමිණිල්ලේ සාක්ෂි සලකා බැලීමේදී එම සංවධර්න සමිති ගිණුමට මුදල් බැර කිරීමේ ඉල්ලීමට ස්වාධීනව රු. 25,000/- මුදලක් විත්තිකාරිය ඉල්ලා සිට ඇති බව මෙම සාක්ෂි වලින් ඒකායන ලෙස ගම්‍ය වන එකම අනුමතය වේ…..”.

The learned judge who delivered judgment has not had the benefit of observing the evidence of the main witness PW 1 who alleges that the appellant solicited money from her. On perusal of her evidence it is apparent that PW1 has

been changing her stance and that her evidence is somewhat contradictory and confusing.

According to PW 1 on receipt of document P1 dated 6.11.2008 informing PW 3 to come for an interview on 14.11.2008, she with her small daughter, and a girl named *Hansani* who was a Year 9 student of the same school has gone to the school, but as there was no one in school they had gone back home. PW 1 has stated that PW 3 was at home that day with his father as he was not well.

At page 131 of the brief in her evidence in chief PW 01 has testified that when she went back to school a few days after the 14th of November, the principal had asked for Rs 25000/- to admit the child to the school. She had informed the Principal that she would try to find money. At the end of the month she has gone to the school once again and as the Principal was not in the school, after inquiring from the watcher she has gone to the Principal's house with Rs 10,000/- which was offered to the appellant who refused to take it and insisted the full amount of Rs 25000/-.That day also she has been with *Hansani* and her small daughter. At page 136, PW 1 has said the appellant wanted her to buy the books for the child with the Rs 10000/ - in the following manner.

In page 136 of the brief.

ප්‍ර : දැන් සාක්ෂිකාරිය ඔබ කිව්වා මේ විත්තිකාරිය ඉන්න පාසල ආසන්නයේ තියෙන නිවසට ගියාට පස්සේ තමයි 25000/- ක මුදල ඉල්ලුවේ කියලා?

උ : ඔව්.

ප්‍ර : දැන් එතකොට දරුවා පාසලට ඇතුලත් කර ගැනීම සම්බන්ධයෙන් යම් දෙයක් සිදු වුනාද?

උ : ඔව්.

ප්‍ර : ඒ මොකක්ද?

උ : රු. 25000/- මුදල දෙන්න බැහැ කිව්වට පස්සේ මම රු. 10000/- ක් ගෙනිච්චානේ.

මට රු.10000/- යි පුළුවන් කිව්වාම කොහොමහරි හදා ගන්න බලන්න මම දරුවාව ඇතුල් කර ගන්නවා පාසලට කියලා ගෙනිව්ව 10000/- න් කිව්වා ඔයා මේ මුදල අරන් ගෙනිහින් ඉස්කෝලෙම ලියන පොත් තියෙනවා කිව්වා. ඒවා පිටින් එපා පොත් මුකුත්. ඒ සල්ලි වලින් ඉස්කොලෙන්ම පොත් අරන් යන්න කිව්වා. කොහොමහරි ළමයට 25000/- හදලා දෙන්න කියලා තමයි කිව්වේ.

ප්‍ර : රු. 10000/- මුදල යොදවල පාසලට ළමයට ඉගෙන ගන්න අවශ්‍ය පොත් ටික ගන්න කිව්වා?

උ : ඔව්. ඒ කියන්නේ 25000/- මුදලම නැතුව ගන්න බැහැ කිව්වා.

At page 131 of the brief PW 1 has stated that the money was solicited when she met the Principal at the school. Thus, the evidence is unclear whether the appellant asked for Rs 25000/- at the school or at her residence. PW 1 speaks of having taken the Rs 10000/- to the residence of the appellant which was refused and the total amount of Rs 25000/= was demanded.

It is only the evidence of PW 1 that is before court with regard to solicitation. The most important issue to consider is whether there was solicitation? Is the evidence of PW 1 clear, cogent and established to consider there was solicitation?

In the indictment the date of solicitation is on or around the 16th of November 2008. This appears to be the date in P1 informing the date of interview. PW1 has been unable to fix the exact date when she met the Principal in school. What is stated is that it was a few day after the 14th of November, when for the first time Rs 25000/- was solicited. Even if one believes that the appellant solicited the payment even before seeing the student (according to PW 1's evidence), the evidence that when Rs 10000/ was offered could have been corroborated to some extent if *Hansani* was called as a witness.

There is no explanation why *Hansani* who is said to have been with PW 1 when she offered the money was not called to corroborate the evidence of PW 1.

It is trite law that it is not necessary to call a certain number of witnesses to prove a fact. However, if Court is not impressed with the cogency and the convincing character of the evidence of the sole testimony of the witness, it is incumbent on the prosecution to corroborate the evidence as stated in *Sunil Vs AG* 1999 (3) SLR page 191 where 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 King vs Chalo Singho 42 NLR* Page 269 it was 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.*

It is incomprehensible why *Hansani* was not called as a witness who according to PW 1 was with her when Rs 10,000/= was offered and refused and a demand for the full amount was made.

In *Walimunige John and Another vs State 76 NLR 488* it was 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."*

*Liyanage vs Attorney General (1978-79) 2 SLR 111 CA ),* also considered that in a trial under the Bribery Act on a charge of solicitation it is unsafe to allow a conviction to stand solely on the uncorroborated testimony of the complainant. It was held "…….. *In regard to count 1 however the evidence of Agnes Nona is uncorroborated. The learned District Judge does not seem to have addressed his mind to this fact. I do not think it is safe to allow the conviction on count 1 to stand solely on the uncorroborated testimony of the complainant Agnes Nona particularly in view of the fact that the learned District Judge himself appears to have been reluctant to act on her evidence alone. We therefore quash the conviction and sentence on count 1….."*

*Baddewithana v Attorney General* [1990] 1 SLR 275 CA

P.R.P.Perera J held '*I am however in agreement with the submission of Counsel for the appellant, that it would be unsafe to permit the conviction of the accused appellant in this case, to stand in the absence of any corroborative evidence to support the evidence of the virtual complainant Cader Ibrahim, in regard to the purpose for which the money was accepted as set out in the*

*Indictment. On an examination of the totality of the evidence of this case, it is clear, that there is no independent corroboration of the evidence of the virtual complainant, either in respect of the allegation that the accused-appellant accepted a sum of Rs. 5 as an inducement or a reward to perform an official act, or that he accepted a sum of Rs. 20 on 11.1.75 for the same purpose. There is no corroboration of the evidence of the virtual complainant Cader Ibrahim in respect of the charge set out in count (3) as well.*

*…….This lapse on the part of the prosecution has to be considered in the light of the evidence of Habeebu-Thamby a witness called by the defence who has testified to the effect that the conversation between Cader Ibrahim and the accused-appellant related to some money that was due to the accused-which according to the defence was rent payable by the virtual complainant to the accused-appellant's sister-in-law.*

*…….I am therefore of the opinion that in the absence of any corroborative evidence relating to the purpose for which the accused-appellant accepted this money it would be unsafe to permit a conviction of the accused appellant on charges under the Bribery Act to stand."*

*Loku Bogahawattage Gedera Justin Weeraratne v Director General, Bribery Commission* (CA105-106/98 decided on 28.10.2003)

*"…..A careful scrutiny of the proceedings shows, one Nishantha had been a witness to many of the events connected with the alleged transaction. Nishantha had been an attesting witness to the document marked P2 which described the whole transaction as a loan. It is also incomprehensible as to why he was not cited and called as a witness…… he could have thrown much light on the whole*

*transaction. The failure of the prosecution to call this person who had been present at the transaction, throws a serious doubt on the veracity of the prosecution story. The failure of the prosecution to call an important witness also gives rise to the presumption under s.114 of the Evidence Ordinance.*

*……. The receipts (P1-P2) issued in respect of the transaction also clearly show that the money was accepted as a loan.*

*……. Taking the totality of evidence into account it cannot be said that the prosecution has proved its case beyond reasonable doubt.''*

The above authorities stress the importance of corroboration in certain instances.

The learned trial judge has in most places in the judgment referred to the evidence of PW 2. ( which has to be PW 3 ) and commented on the probability and consistency factors of the evidence of PW 1 and PW 2. It is important to keep in mind that PW 3 was never a witness to the allegations made by PW 1 of the instances where Rs 25000/- was demanded from PW 1.

However, the trial judge has not given his mind to vital discrepancies in their evidence. For instance with regard to the application form, PW 1 has specifically stated that she is the one who filled it and that she recognized her handwriting when she saw the application form in the appellant's hands when the alleged solicitation had taken place. (page 133 of the brief)

Contrary to this evidence at page 170 of the brief PW 3 has stated he personally filled the application form.

Likewise, with regard to the interview of PW 3, PW 1 has specifically stated PW 3 was not interviewed. ( page 161) whereas PW 3 has stated he went for the interview with his mother PW 1 (page 174, 180, 181) and further stated , that there was a discussion about payment to the School Development Fund . These are vital discrepancies in the evidence of the main prosecution witnesses the learned trial judge should have considered. These contradictions in the testimony of PW 1 and PW 3 cannot be considered as minor discrepancies.

In this background, I am of the view when considering the serious charge against the appellant, especially when there is no acceptable reason given why *Hansani* was not called as a prosecution witness, it is dangerous to rely on the sole evidence of PW 1.

It is also to be considered that if the money that was demanded was for the personal use of the appellant, why the account details of the School Development Fund was given, which as stated earlier is listed in the indictment. There is uncontradicted evidence of PW 1 herself, that the Rs 10,000/- that was offered to the appellant was utilized to buy books for PW 3 on the directions of the appellant. Another question to consider here is would a person who had demanded a bribe, advise PW 1 to buy books with the Rs 10000/- without taking what was offered to her ?

*In K Padmathillake alias Sergeant Elpiytiya V. The Director General, Commission to Investigate Allegations of Bribery or Corruption, 2009 2 SLR 151 SC,*

*"…….It has to be stressed here that credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the*

*Judge. When witnesses makes inconsistent statements in their evidence either at one stage or at 2 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. With regard to appreciation of evidence in criminal cases it would be of importance to quote what Sir John Woodroffe & Amir Ali had to say in their work on - "Law of Evidence-18th Edition- Vol. 1 at pg. 471:-*

*" No hard and fast rule can be laid down about appreciation of evidence. It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case. Where a witness makes two inconsistent statements in his evidence with regard to a material fact and circumstance, the testimony of such a witness becomes unreliable and unworthy of credence."*

*Further 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. In other words Courts must take an overall view of the evidence of each witness....."*

I am of the view that it is not safe to allow the conviction solely on the uncorroborated testimony of PW 1.

In the light of the above authorities, when considering the totality of the evidence it is apparent that the prosecution has failed to prove beyond reasonable doubt that there was solicitation by the appellant on the date specified in the indictment. The benefit of that doubt must ensue to the appellant.

As the prosecution has failed to prove its case beyond reasonable doubt, there is no necessity to consider the other grounds of appeal argued by the counsel for the appellant.

Therefore, we allow the appeal and set aside the conviction and the sentence and acquit the appellant from both charges.

Appeal Allowed.

**JUDGE OF THE COURT OF APPEAL**

**P.Kumararatnam,J**

I Agree **JUDGE OF THE COURT OF APPEAL**