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

In the matter of an application for revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Director General,
Commission to Investigate Allegations of Bribery or Corruptions

Vs.

1. Sarath Kulathunga
   03rd Post, Ambakolawewa,
   Medamulana
   Via Tangalle

2. Mahadurage Nimal
   02/A, Kawanthissapura,
   Thissamaharamaya

Accused

CA Revision Application :
CA/CPA/52/2020

High Court Colombo :
B 1609/2006

AND NOW BETWEEN

Sarath Kulathunga
03rd Post, Ambakolawewa,
Medamulana
Via Tangalle

Accused- Petitioner

Vs.

The Director General,
Commission to Investigate allegations of Bribery or Corruptions

Respondent

BEFORE : Menaka Wijesundera J.

Neil Iddawala J.

COUNSEL : Senarath Jayasundara with
C.Waduge and S.Milinda for the Petitioner

Ganga Heiyanthuduwa,
Additional Director General,
Bribery Commission for the Respondent

Argued on	:	10.03.2021
Written Submissions		15.03.2021
Decided on	:	28.04.2021

Iddawala J.

The Accused-Petitioner (hereinafter referred as the Petitioner) has invoked revisionary jurisdiction of this Court conferred under Article 138 of the Constitution seeking to revise the judgment of the High Court of Colombo dated 06.03.2020 in the Case No H.C. B 1609/2006.

The Petitioner, a Police Sergeant, attached to the Police Station of Thissamaharamaya had been charged under Section 16 (b) and Section 19 (c) of the Bribery Act, for soliciting and accepting a gratification of Rupee 6000 from one Weerasinghe Pathiranage Pushpakumara as an inducement or a reward to allow and continue his liquor business during the period between 01st May 2005 and 28th June 2005. The Petitioner was named as the first accused in the indictment.

The second accused of the case, another Police Sergeant, attached to the same Police Station had also been initially charged in the same indictment, under the same provisions of the Bribery Act for soliciting and accepting a gratification of Rupees 5000 as an inducement or a reward to not institute legal action against one Weerasinghe Pathiranage Pushpakumara in relation to illicit liquor on or about 26th June 2005 and 28th June 2005 respectively. He has also sought the revisionary jurisdiction of this Court against the said judgement under the case CA/CPA/53/2020.

The Counsel for the Accused has made preliminary objections on the basis that two distinct offences against two separate persons have been amalgamated and therefore the two accused have not been properly indicted in terms of the Section173 and Section 180 of the Code of Criminal Procedure Act No.15 of 1979. Thereafter, the indictment had been amended to replace the name 'Weerasinghe Pathiranage Pushpakumara' with that of 'Kulasisuge alias Kodithuwakku Pushpakumara' in the counts against the 2nd accused (count no. 05, 06 and 07) and to include "for possessing illicit liquor for sale" to the count.

A full trial had been conducted where the prosecution witnesses were heard and the accused had made a dock statement. Thereafter, the learned High Court Judge, by his Judgment dated 06.03.2020 has ***discharged*** the accused on the basis that there was no enough evidence to establish that the soliciting and acceptance of the money by the two accused has been done in one singular process and the indictment has wrongly joined the offences and the accused. Therefore, the indictment is not legally valid.

The Petitioner seeks to set aside the said Judgment and pleads this Court to make order to acquit him from the charges. Counsel for the petitioner argued in this instant case that both the prosecution and the defense concluded their cases and therefore the learned High Court Judge should have recorded a verdict of acquittal or conviction and the provisions of the Code of Criminal Procedure Act, No. 15 of 1979 do not make any room to discharge an accused person. Counsel appearing for the 1st Respondent informed the court that the Bribery Commission does not intend to file a case against the petitioner again.

Section 203 of the Code of Criminal Procedure says**:**

> *"When the cases for the prosecution and defense are concluded, the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction giving his reasons therefor and if the verdict is one of conviction pass sentence on the accused according to law"*

In the interpretation clause of the Code of Criminal Procedure, the term of **"discharge** " is interpreted thus,

> *"with its grammatical variations and cognate expressions means the discontinuance of criminal proceedings against an accused but* ***does not include an acquittal****".*

Learned Counsel for the petitioner urged that depending on the circumstances the trial Judge had arrived at a wrong conclusion contrary to the law. At the conclusion of the proceedings there was nothing to discontinue the proceedings and henceforth an acquittal should have been pronounced.

In the case of **Solicitor General vs Aradiel** 1948 50NLR 233, **Basnayake J**. (as he was then) took the view that*:*

> *"where at the close of the case for the prosecution the accused called no defense but took objection to the validity of the summons and magistrate discharged the accused, the order amounted in reality to an acquittal."*

In **Dyson v Khan** 1929 31NLR 136**,** it was held that:

> *"Where in summary trial the Magistrate at the close of the case for the prosecution made order discharging the accused, as the evidence failed to establish the charge, Held that the order was tantamount to an acquittal under section 190 of the Criminal Procedure Code."*

Chandrapala Perera v Attorney General 1998 2 SLR 85

In this case, the Appellant was charged for soliciting and accepting a gratification under the Bribery Act. He was convicted on the charge of soliciting and discharged on the charge of acceptance by the Magistrate Court. The Supreme Court held that :

> *"In terms of the provisions of section 203 of the Code of Criminal Procedure Act at the conclusion of the trial the Judge has to record a verdict of conviction; hence the appellant was entitled to an acquittal instead of a "discharge" on the charge of acceptance."*

In this instant case, both prosecution and defense concluded their cases and all relevant materials were presented before the High Court. Therefore, the learned High Court Judge should have recorded a verdict of acquittal based on the evidence before the court and there was no reason to discharge the accused. The learned High Judge discharged the accused by this impugned Judgment on the basis that there was no sufficient evidence to establish that the soliciting and acceptance of the money by the two accused has been done in one singular process and the indictment has wrongly joined the offences and the accused.

These identical points were raised as an objection by the defense, right at the beginning of the trial. The trial judge should have considered this objection at that stage of the trial and made an appropriate order rather than calling for prosecution and defense witnesses. In these circumstances this court is compelled to consider the impugned Judgment of discharging the accused as being tantamount to an acquittal.

Therefore, in the light of above contention, I incline to revise the Judgment of the learned High Court Judge dated 06.03.2020 and order to acquit the petitioner from all charges. I make no order as to the costs.

Judge of the Court of Appeal

Menaka Wijesundera J.

I agree.

Judge of the Court of Appeal