

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

In the matter of an application for Leave to Appeal in terms of Section 15 of the Judicature Act read with Section 331 of the Criminal Procedure Act No. 15 of 1979 and Section 13(2) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994.

Director General,
Commission to Investigate Allegations of
Bribery or Corruption,
36, Malalasekera Mawatha,
Colombo 07.

Complainant – Petitioner

Vs.

Court of Appeal Application
No: **LTA/06/16**

High Court of Colombo
No: **B/1392/02**

Weerasekera Arachchilage Lalith Kumara,
21/185,
Araliya Uyana, Depanama,
Pannipitiya.

Accused – Respondent

BEFORE

: Menaka Wijesundera J
Neil Iddawala J

COUNSEL

: Sunethra Jayasinghe ADG for the
Complainant Bribery Commission

Rienzie Arsecularatna PC with C.
Arsecularatna for the Respondent

Supported on

: 11.01.2022

Written Submissions on

: 10.02.2022

Decided on : 23.02.2022

Iddawala – J

This is a Leave to Appeal application filed on 26.09.2016 by the Director General of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter the Bribery Commission) against the acquittal of the respondent in Case No B 1392/02 by Order dated 07.09.2016 pronounced by the High Court of Colombo.

The application has come before several benches of this Court since 2016. However, when the matter was taken up for support on 11.01.2022 the learned President's Counsel for the respondent raised a preliminary objection contending that the institution of proceedings in Case No B 1392/02 above, is bad in law and accordingly, the Court of Appeal may not be able to grant the ultimate reliefs claimed in the instant application. Hence, the order on the said preliminary objection was reserved and both parties were directed to file written submissions.

The preliminary objection raised is as follows. That the institution of proceedings in High Court Case no B 139/02 is bad in law as a valid direction in terms of Section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (hereinafter the CIABOC-Act) has not been given to the Director General of the Bribery Commission, i.e., all 3 Commissioners have not signed the direction. The respondent in his written submission refers to the Supreme Court case of **Anoma Polwatte v Jayawickrama Director General, Bribery Commission and Others** SC (writ) 01/2011 SC Minute dated 26.07.2018 in submitting that the direction given by one of the Commissioners in terms of Section 11 of the said Act to institute criminal proceedings against an accused is patently illegal.

The counsel for the petitioner, while conceding that the impugned direction was not signed by all Commissioners, maintained that the same was legally valid. In the written submissions, the petitioner contends that

Anoma Polwatte (supra) was delivered *per incuriam* submitting that the preliminary objection raised by the respondent should be dismissed.

As such the instant matter involves a challenge to the validity of the direction given by the Bribery Commission to institute criminal action against the respondent. Hence, the respondent, by way of a preliminary objection is canvassing an act of the Bribery Commission which falls within the ambit of Section 11 of the CIABOC Act. The said provision stipulates the institution of criminal proceedings in certain cases:

“Where the material received by the Commission in the course of an investigation conducted by it under this Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the Commission shall direct the Director-General to institute criminal proceedings against such person in the appropriate court and the Director-General shall institute proceedings accordingly:

Provided however that where the material received by the Commission in the course of an investigation conducted by it discloses an offence under Part II of the Bribery Act and consisting of soliciting, accepting or offering, by any person, of a gratification which or the value of which does not exceed two thousand rupees, the Commission shall direct the institution of proceedings against such person before the Magistrate’s Court and where such material discloses an offence under that Part and consisting of soliciting, accepting, or offering, by any person of any gratification which or the value of which exceeds two thousand rupees, the Commission shall direct the institution of proceedings against such person in the High Court by indictment.”

Therefore, the crux of the preliminary objection raised by the respondent is impugning an act of the Bribery Commission. Prior to examining the merit of the said objection, it is pertinent to examine whether the Court of Appeal has power in appeal to take cognizance of this matter.

A careful reading of Section 11 of the CIABOC Act reveals that, in order to institute criminal action under the Act, a precondition in the form of a ‘direction’ by the Bribery Commission is required by law. Any challenge to such a ‘direction’ is a challenge to a public duty fulfilled by the Bribery Commission, arising out of statutory law. The framers of the Commission Act provide for such a relief in Section 24 of the Commission Act.

Section 24 of the CIABOC Act delineates that the writ jurisdiction in relation to the Bribery Commission is to be exercised by the Supreme Court:

- (1) *“The jurisdiction vested in the Court of Appeal by Article 140 of the Constitution shall, in respect of applications in which relief is sought against the Commission be exercised by the Supreme Court and not by the Court of Appeal.*
- (2) *Subject to the provisions of subsection (1), no injunction or enjoining order shall be granted by any Court restraining or staying, or having the effect of restraining or staying, the Commission, from commencing, or continuing, the conduct of an investigation under this Act or from exercising any of the powers conferred on it by this Act or from giving any direction under this Act.”*

As such, any person aggrieved by the decision of the Bribery Commission to institute criminal action must prefer such grievances to the Supreme Court by way of a writ application. The unequivocal recognition of the Supreme Court’s writ jurisdiction in the Commission Act is in line with the Proviso to Article 140 of the Constitution which provides that *“Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal”*

The instant matter deals with a ‘rare combination of the core of both Criminal law and Public law’ as on the one hand, it impugns the validity

of the institution of criminal proceedings and on the other, impugns an act of an institution which is dispensing a public duty. This unique situation was addressed by a Divisional Bench of the Court of Appeal in **Ajahn Gardiye Punchihewa v Officer in Charge Financial Investigation Unit III** CA (Writ) Application No. WRT 311/2019 CA Minute 18.06.2020 where the petitioner primarily sought to quash the institution of proceedings before the Permanent High Court at Bar by issuance of a Writ of Certiorari and stay the said prosecution by issuance of a Writ of Prohibition. The petitioner in *Ajahn Punchihewa* (Supra) argued that the decision by the Attorney General to institute criminal proceedings against him was taken arbitrarily, capriciously, unreasonably, irrationally and in haste, without due consideration to the applicable legal provisions as stipulated in the Judicature Act and the Code of Criminal Procedure Act No. 15 of 1979. Thus, the petitioner in *Ajahn Punchihewa* (Supra) relied on the writ jurisdiction of the Court of Appeal to challenge the validity of institution of criminal proceedings against him. The following excerpt from the judgment of the Court of Appeal in *Ajahn Punchihewa* (Supra) clearly delineates that in the event a similar challenge is made to the institution of criminal proceedings under the CIABOC Act, the party must canvass the same before the Supreme Court and not the Court of Appeal:

“.....It is to be noted that these provisions (Section 12A(1)(a) of the Judicature Act) are similarly applicable to the Director General for the Prevention of Bribery and Corruption, who could institute criminal proceedings before the Permanent High Court at Bar, on the direction of the Commission to Investigate Allegations of Bribery or Corruption as well. Section 24(1) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, had invested the Supreme Court with the jurisdiction conferred upon this Court under Article

140 of the Constitution in respect of the said Commission and therefore, the prosecutions instituted by the said Commission are outside the preview of this Court.”

(At Page 12, emphasis added)

Even *Anoma Polwatte* (Supra), the judgment upon which the respondent has based his preliminary objection, was a writ application before the Supreme Court, filed in terms of article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with the provisions of section 24 (1) of the Commission Act. The caption of the instant application reads ‘In the matter of an application for Leave to Appeal in terms of Section 15 of the Judicature Act read with Section 331 of the Criminal Procedure Act No. 15 of 1979 and Section 13(2) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994.’

As such, it is the considered view of this Court that the preliminary objection raised by the respondent deals with a subject matter that cannot be canvassed before the Court of Appeal.

Accordingly, the substantive matter is re-fixed for support.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL