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

In the matter of an Appeal made under Section 331 of the Code of Criminal Procedure Act No.15 of 1979

CA 113/2018
HC/ COLOMBO
No.HCB/1741/2007

Jayasinghe Arachchilage Karunathilaka Jayasinghe

Accused-Appellant

vs.

The Director General
Commission to Investigate Allegations of Bribery or Corruption
No.36, Malalasekera Mawatha,
Colomb0-07.

Complainant-Respondent

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Amila Palliyage with Duminda De Alwis for the Appellant.**
Asitha Anthony Assistant Director General of Bribery Commission for the Respondent.

ARGUED ON : **19/01/2022**

DECIDED ON : **02/03/2022**

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JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Appellant (hereinafter after referred to as the Appellant) was indicted by the Director General of Bribery Commission in the High Court of the Western Province holden in Colombo on the following charges:

1. On or about 1st of August 2006 the Appellant being the Principal of Wickramaseela Madya Maha Vidyalaya in Giriulla for soliciting a gratification in the sum of Rs.40,000/- from Moragoda Vithanage Deepthi Dammika in order to enrol her child Sachini Chamodya to Grade 01 of the said school which is an offence punishable under section 19(b) of the Bribery Act.

2. In the same transaction as the 1st count, the Appellant being a Public Servant employed as the Principal of the Wickramaseela Madya Maha Vidyalaya in Giriulla for was indicted for soliciting a gratification in the sum of Rs.40,000/- from Moragoda Vithanage Deepthi Dammika which is an offence punishable under section 19(c) of the Bribery Act.

3. On or about 18th of August 2006 in the course of the same transaction as the 1st count the Appellant being a Public Servant employed as the Principal of Wickramaseela Madya Maha Vidyalaya in Giriulla was indicted for accepting a gratification in the sum of Rs.40,000/- from Moragoda Vithanage Deepthi Dammika to enrol her child Sachini Chamodya to Grade 01 of the said school which is an offence punishable under section 19(b) of the Bribery Act.

4. In the course of the same transaction as the 3rd count the Appellant being a Public Servant employed as the Principal of Wickramaseela Madya Maha Vidyalaya in Giriulla was indicted for accepting a sum of Rs.40,000/- from Moragoda Vithanage Deepthi Dammika which is an offence punishable under section 19(c) of the Bribery Act.

After the trial the Appellant was found guilty under all counts and the Learned High Court Judge of Colombo on 07/03/2018 has imposed the following sentences:

1. For every count a fine of Rs.5,000/- with a default sentence of 3 months simple imprisonment.
2. For every count 4 months rigorous imprisonment (16 months rigorous imprisonment) and the same was suspended for 7 years.

Being aggrieved by the aforesaid conviction and sentence the Appellant preferred this appeal to this court.

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic.

On behalf of the Appellant the following Grounds of Appeal are raised.

1. The Learned High Court Judge has convicted the Appellant based on the prejudice of "Bad Character" unsupported by evidence.
2. The Learned High Court Judge has rejected the evidence given by the Appellant on an incorrect legal basis.
3. The Learned High Court Judge has failed to consider the evidence given by four defence witnesses.
4. The trial judge has failed to appreciate the defence position.
5. The Learned High Court Judge has failed to consider the "reasonable doubt" that has arisen in the prosecution case itself.

Background of the case.

In this case PW01 Deepthi Dammika, mother of the child in her evidence stated that as she wanted her daughter to be admitted to Wickramaseela Madya Maha Vidyalaya in Giriulla. Her husband PW04 Ajith Thewarapperuma, a Naval Officer, had gone to the said school and had a preliminary discussion with the Appellant regarding his daughter's school admission. As per the direction of her husband PW01 had gone to the Appellant's house on 01/08/2006 with a neighbour for further discussions so as to finalize the school admission. The Appellant during the discussion which took place at his residence had informed PW01 to bring Rs.40,000/- in order to procure her daughter's school admission. When she informed this to her husband (PW04) he had lodged a complaint with the Bribery Commission. After completing all formalities, the officials of the Bribery Commission had organized the detection which was executed on 18/08/2006 at the school premises. PW02 WPS Surangani acted as the decoy in this case.

The Bribery Officials had provided the requested funds of Rs.40,000/- to PW01 and PW01 had gone to the school with PW02 and handed over the money to the Appellant in his office. The Appellant after accepting the money put the same into the drawer of the table. At that time the officials of the Bribery Commission had gone into the Appellant's office and recovered the money from his table drawer.

All witnesses called by the prosecution had properly corroborated the evidence of PW01 and PW02.

PW07 Mohideen Salahaudeen Director of School Services of the Ministry of Education has confirmed that apart from facility fees, principals were not allowed to take money when new students are admitted to schools. To substantiate his position a circular dated 23/05/2006 issued by Ministry of Education was marked as P7 by the prosecution. During the cross examination he admitted that a circular marked as V5 was also issued by the Education Ministry but further said at the time pertaining to this case the marked circular V5 had been cancelled by the Ministry of Education. But the prosecution had failed to confirm this with documentary evidence.

After the conclusion of the prosecution case the defence was called. The Appellant elected to give evidence from the witness box and called 04 more witnesses to support his case.

Considering the first ground of appeal the Appellant contends that the trial judge had considered evidence pertaining to bad character which highly influenced the outcome of this case.

In the remaining grounds the Appellant contends that the defence evidence was not properly considered by the trial judge. As the remaining three appeal grounds are similar in nature as they are based on defence evidence being disregarded and standard of proof in a criminal trial, those three grounds will be considered together in this judgment if necessary.

The Appellant giving evidence stated his qualifications and work experiences in the field of education. Further he had said that he had rose to this position with much sacrifices and difficulties. He also said that he has two daughters who had had their education in Russia and that the elder daughter was working as a doctor in Sri Lanka.

The learned High Court judge in his judgment at page 771 of the brief has described the Appellant as a person who as a practice request and obtain money to admit students to the school he works at. He further stated that the defence evidence revealed that the Appellant had spent lots of money for his children's' costly education abroad and that there is heavy spending which goes over and above the earnings from a usual government salary. This adverse reference had totally been made by unsupported evidence and are assumptions of the trial judge. Now I will consider how this reference which amounts to bad character of the Appellant affects the fair trial and prejudice the defence case.

According to Section 53 of the Evidence Ordinance in criminal proceedings the fact that the person accused is of a good character is relevant.

According to Section 54 of the Evidence Ordinance in criminal proceedings the fact that the person accused is of a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

When the Character of the Appellant had not been put in issue during the trial, the adverse reference made against the Appellant by the trial judge in his judgement has caused a serious miscarriage of justice. Further the adverse reference had been made by the trial judge on the unsupported and uncorroborated evidence presented during the trial.

E.R.S.R.Coomarasawamy in his book "The Law of Evidence" Volume I at page 684 states that:

> "The principle underlying the rule is that hardship is possible, as evidence of bad character may lead the mind of the judge or jury away from the point to be decided, namely, the guilt or innocence of the accused person in regard to the particular offence with which he is charged. The main ground is prejudice".

In **Maxwell v. Director of Public Prosecution** (1935) A.C. 309, Lord Sankey, L.C. said:

> *"The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is, therefore irrelevant; it goes neither to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness. Such questions must therefore, be excluded on the principle which is fundamental in the law of evidence as conceived in this country, especially in criminal cases, because if allowed, they are likely to lead the minds of the jury astray into false issues; not merely do they trend to introduce suspicion as if it were evidence, but they trend to distract the jury from the true issue, namely whether the prisoner in fact committed the offence on which he is actually standing the trial".*

In **The King v. Pila** 15 NLR 453 held:

> *"that the evidence called to prove that the accused were by repute men of bad character and were generally feared by the villagers was inadmissible"*

The underlying principle in these cases are that no evidence regarding the bad character of an accused should directly or indirectly become part of the proceedings in a criminal case.

In a criminal trial when evidence of bad character of an accused has been led in evidence, it is the profound duty of the trial judge to stop such questioning immediately. He must ensure that no character evidence goes into the proceedings at any stage of the trial.

In **Moses v. Queen** 75 NLR 121 the court held:

> *"Conviction of the Appellant must be quashed on the ground that the evidence of the previous conviction, which was inadmissible according to section 54 of Evidence ordinance, had been taken into account in the trial judge's judgment and was in a high degree prejudicial to the Appellant. In such a case the substantial question is whether or not the accused has been deprived of a fair trial".*

In a criminal trial if inadmissible evidence is admitted by the trial judge at any stage not only does such evidence go into the proceedings but it will greatly prejudice the accused's interests and affect his right to a fair trial.

In this case the learned High Court judge adversely commented on the Appellant's character in his judgment. The comments the trial judge made fall completely outside of the evidence adduced by both parties. This clearly shows the highly prejudiced opinion formed against the Appellant by the learned trial judge at the time of writing the judgment. In my view the prejudicial mindset of the learned High Court judge has caused serious miscarriage of justice in this case.

As the first appeal ground has merit and greatly affect the judgment of the trial court, it is not necessary for this court to consider the remaining grounds of appeal raised by the Learned Counsel for the Appellant.

Now I consider whether this is an appropriate case to be sent for re-trial. The pros and cons of sending a case for re-trial have been discussed in several cases including the Court of Appeal and the Supreme Court.

In **Nandana v.The Attorney General** 2008 (1) SLR 51 held:

> *"The mis-statements of law by the trial judge would be tantamount to a denial of a fundamental right of any accused as enshrined in Art 13(5) of the Constitution…".*

The Court further held:

> *"(2)A discretion is vested in the Court whether or not to order a re-trial in a fit case, which discretion should be exercised judicially to satisfy the ends of justice taking into consideration the nature of the evidence available, the time duration. Since the date of appeal, the period of incarceration the accused had already suffered, the trauma and hazards an accused person would have to suffer in being subject to a second trial for no fault on his part and the resultant traumatic effect in his immediate family members who have no connection to the alleged crime, should be considered".*

In **The Attorney General v. Bimbirigodage Sujith Lal** SC Appeal 14/2016 decided on 20/02/2018 the Court considered the following paragraph from the Court of Appeal judgment.

> *"A long delay to finally conclude the matter is a relevant factor to be taken into consideration. The conviction and sentence may be so deserving. But court cannot forget the fact that when a fresh trial is ordered by the Appellate Court the accused is tried for the second time, and the process to be undertaken all over again. The second trial if at all would be after a long lapse of time of over 17 years."*

In this case the incident happened on 01/06/2006, almost 16 years ago. The date of judgment of this case was delivered on 07/03/2018. To conclude the first trial, it took about 12 years. One cannot expect perfect recollection of events from witnesses almost 16 years after an incident.

The Appellant in his evidence took up the position that he had powers to accept donations to the school upon the admission of new students. With regards to this incident PW01 had come to his house to discuss her child's school admission as the school was suddenly closed down due to a bomb explosion in Colombo. When she came to the school with another woman, following a short discussion with the principal, she had been requested to make a donation to the school under the past-pupil category. The Appellant had accepted Rs.40,000/- and when he was about to issue the receipt, the Bribery officials had arrested him at that time. The Appellant accepted the money as PW01 had told him that she was in a hurry and she unable to go to the bank to deposit the same in the school development account.

According to the Appellant as per the Education Ministry circular No.24 of 2001 and its subsequent amendment by circular number 23/2003 the acceptance of money for school development has not been prohibited. As such he had accepted the money given by PW01 and issued the receipt. According to defence witness 03 Malkanthi Hugo the money which had been accepted by the Appellant as a donation. A receipt will be issued when money is accepted and the same will be deposited in the bank account on the following day. The prosecution has not produced the circular which had been issued to cancel the circular No.2001 of 24.

The Appellant was in remand for about 02 months before he was granted bail initially.

In **Queen v. G. K. Jayasinghe** 69 NLR 314 the court held that:

> *"We have considered whether we should order a new trial in this case. We do not take that course, because there has been already a lapse of over three years since the commission of the offences,".*

In this case the learned High Court judge has added adverse character evidence of the Appellant in his judgment. The comments made by the trial

judge are completely outside of the evidence adduced by both parties which definitely affect the root of the case. Further, the prosecution has failed to mark the document which support the cancellation of the Education Ministry circular No.2001 of 24 in which the Appellant argued that he had the authority to accept donations for the development of the school. Now, nearly 16 years had passed following the commission of the offence.

Considering the above factors, this court has come to a conclusion that this is not a fit and proper case to order a re-trial.

For the reasons stated above, I allow the appeal and set aside the conviction and sentence imposed on the Appellant.

The Appellant is acquitted from all the charges.

The Registrar is directed to send a copy of this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J

I agree.

JUDGE OF THE COURT OF APPEAL