
**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

Court of Appeal Case No.

CA/HCC/ 0312/2018

Thammita Arachchige Wasantha
Sarath Siriwardene

High Court of Colombo

Case No. HCB/1816/2009

Accused-Appellant

vs.

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

2. 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 : **Anil Silva, P.C. with Amman Bandara**
for the Appellant.
Mr. Asitha Anthony,
Assistant Director General of Bribery
Commission for the Respondent.

ARGUED ON : **28/03/2022**

DECIDED ON : **09/05/2022**

JUDGMENT

P. Kumararatnam, J.

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

1. On or about the 18th of June 2008 at Kosgama the Appellant being a public servant to wit PC 27868 attached to the Police Station of Kosgama did solicit a gratification in the sum of Rs.15,000/- from Mullela Dewage Wickrama Gunasena alias Disco as an inducement or reward to stay away from instituting

action and executing the warrant issued on Mullela Dewage Wickrama Gunasena alias Disco an offender to wit a person arrested while transporting illicit liquor and thereby committed an offence punishable under Section 16(b) of the Bribery Act.

2. At the same time and place and in the same transaction referred to in the first charge the Appellant being a public servant to wit PC 27868 attached to the Police Station in Kosgama did solicit a gratification in the sum of Rs.15,000/- from Mullela Dewage Wickrama Gunasena alias Disco and thereby committed an offence punishable under Section 19(c) of the Bribery Act.
3. On or about the 10th of June 2008 at Kosgama the Appellant being a public servant to wit PC 27868 attached to the Police Station in Kosgama did solicit a gratification in a sum of Rs.15,000/- from Mullela Dewage Wickrama Gunasena alias Disco as an inducement or reward to stay away from instituting action and executing the warrant issued on Mullela Dewage Wickrama Gunasena alias Disco an offender to wit a person arrested while transporting illicit liquor and thereby committed an offence punishable under Section 16(b) of the Bribery Act.
4. At the time place and in the same transaction referred to in the first charge the Appellant being a public servant to wit PC 27868 attached to the Police Station Kosgama did solicit a gratification in a sum of Rs.15,000/- from Mullela Dewage Wickrama Gunasena alias Disco and thereby committed an offence punishable under Section 19(c) of the Bribery Act.

After the trial, the Appellant was found guilty for all the counts and the Learned Judge of the High Court of Colombo has imposed the following sentences on the Appellant by his judgment dated 29/08/2018:

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 (a total of 16 months rigorous imprisonment) imposed 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. At the hearing, the Appellant was waiting outside the court due to Covid 19 restrictions.

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

1. The Learned Trial Judge has not taken in to consideration matters favourable to the Accused- Appellant and therefore has there been a miscarriage of justice?
2. The Learned Trial Judge misdirected himself in applying the law relating to the defence of alibi?
3. Has the Learned Trial Judge misdirected himself when he failed to consider that the prosecution has failed to prove the case beyond reasonable doubt?

Before the commencement of the argument, the Counsel appearing for the Respondent raised a preliminary objection based on his written submissions. The preliminary objection being that in the Petition of Appeal the Appellant has named the Commission to Investigate Allegations of Bribery or

Corruption as the Respondent whereas he should have named the Director General of the Commission to Investigate Allegations of Bribery or Corruption as the Respondent. He relied on several judgments mentioned in his written submissions to substantiate his preliminary objection.

In reply the Learned President's Counsel moved this court that he be allowed to amend the Petition of Appeal as the hearing of this appeal has not yet commenced. He further elaborated that such amendment will not cause any prejudice to the Respondent since the Respondent has been properly represented and written submissions have also been filed.

After considering the submissions of both parties, the court is of the view that since it is clear that, the mistake committed by the Counsel who filed the Petition of Appeal has not caused any prejudice to either party, allowing the Appellant to amend the caption of the Petition of Appeal is in the interest of justice rather than dismissing an appeal of a person without giving him a fair hearing, this court allowed the amendment of the caption of the Petition of Appeal by adding the Director General of the Commission to Investigate Allegations of Bribery or Corruption as the 2nd Complainant-Respondent. Hence, the preliminary objection raised by the Respondent was rejected and the argument was taken up.

Background of the case.

The complainant is a three-wheeler driver by profession and is also engaged in business related to illicit liquor as well. On 18/06/2008 while he was driving his three-wheeler with 3 cans of illicit liquor, a gas cooker and a gas cylinder at Koswatta, in the Kosgama Police area, two police officers had stopped his three-wheeler. One of the police officers who stopped the three-wheeler is said to be the Appellant. A person called Rasika was also in the three-wheeler. As the Appellant directed the complainant to take his vehicle to the police station for the purpose of filing an action, the complainant had pleaded that he be excused, as the complainant's father had passed away

only three months ago. At that time the Appellant had demanded Rs.50000/- to refrain from filing an action against him. Following a discussion, the amount was reduced to Rs.15000/. According to the complainant, the Appellant had given several phone calls to claim this amount. In the meantime, the complainant had lodged a complaint at the Bribery Commission and a raid was organized. The Appellant was arrested on 20/06/2008 upon receiving the money from the complainant in the presence of the Bribery officials.

The defence denied the charge and adduced evidence to show that he was arrested on fabricated evidence due to a personal enmity that existed against a police officer namely PC Wasantha who was attached to Kosgama Police Station earlier and was transferred to the Bribery Commission thereafter. At the time of alleged raid, he was said to be a member of the Bribery Team but was not called to give evidence for the prosecution.

As all three grounds of appeal involve the standard of proof in a criminal trial, I decided to consider all these appeal grounds together in the judgment.

In a criminal trial, it is incumbent on the prosecution to prove the case beyond reasonable doubt. There is no burden on the Appellant to prove his innocence. This is the “Golden Thread” as discussed in **Woolmington v. DPP** [1935] A.C.462. In this case Viscount Sankey J held that:

“Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt..... If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner.....the prosecution has not made out the case and the prisoner is entitled to an acquittal.”

According to the complainant when he was driving the three-wheeler, he was accompanied by a person called Rasika (P2). But he was not called to give evidence to corroborate the evidence of the complainant. Further the police

officer who was allegedly with the Appellant when the three-wheeler was stopped was also not called by the prosecution. Further, he was not even named in the indictment. The complainant's position was that he was released by the Appellant after detecting three cans of illicit liquor and a gas cooker with a cylinder in the three-wheeler. The reason was that the Appellant had demanded money. The Appellant's position was that at the relevant time he was at the police station. PW7, the Officer-in Charge of the Kosgama Police Station, under cross examination endorsed the fact that the Appellant was at the Kosgama Police Station as per the police record, which had not been contradicted by the prosecution.

Under these circumstances not calling the above-mentioned witnesses by the prosecution creates a doubt as to whether the event actually took place on 18/06/2008 as stated by the complainant.

It is a well-established rule of 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 witnesses, it is incumbent on the prosecution to corroborate the evidence as stated in **Sunil v. AG** [1999] 3 SLR 191 where it was held:

“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.

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.”

It is incomprehensible why the prosecution did not call, at least one of the persons who were present when the Appellant solicited the gratification. This also makes the story of the complainant open to doubt.

In **Walimunige John and Another v. The State** 76 NLR 488 the court 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 a 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.”

In **Beddewithana v. The Attorney General** [1990] 1 SLR 275 the court 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.

..... 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.”

When documentary evidence confirms that the Appellant was at the police station when he solicited the said gratification from the complainant, I consider it very important to call corroborative evidence to confirm the evidence of the complainant as his evidence stands in isolation. In the light of the failure to call corroborative evidence in this case, when there were several witnesses present, there is a reasonable doubt that there was solicitation by the appellant on the date specified in the indictment. The benefit of that doubt must accrue to the Appellant.

The Appellant’s position was that at the time the solicitation took place he was at the Kosgama Police Station. This has been confirmed by PW7 with documentary evidence. When this position was put forward by the defence, the prosecution has not raised any objection under Section 126A (1) of the Code of Criminal Procedure Act No. 15 of 1979.

As per this section one of three pre-requisite conditions should be fulfilled when the defence of alibi is raised. However, the proviso to the Section 126A (1) permits the court to exercise a discretion in allowing an alibi notwithstanding the fact that the accused was delayed in raising such alibi set out in the section.

The High Court Judge in his judgment considered the defence of alibi evidence adduced by the Appellant but placed the burden of proving the defence on the Appellant. It is trite law that when a defence of alibi is taken out there is no burden whatsoever on the Appellant to prove the same. This position is supported by several judicial decisions.

In **Banda and Others v. Attorney General** [1999] 3 SLR 168 the court held:

“...there is no burden whatsoever on an accused who puts forward a plea of alibi and the burden is always on the prosecution to establish

beyond reasonable doubt that the accused was not elsewhere but present at the time of the commission of the criminal offence.”

Although the prosecution witness No.7 stated in his evidence that the Appellant was at the Kosgama Police station on 18/06/2008 between 2.30 p.m. to 3.00 p.m. the Learned High Court judge speculated that the Appellant could have left the police station and gone to Eswatta. In the absence of any cogent evidence, the court cannot speculate anything against the Appellant. This clearly shows the prejudicial mind set of the Learned High Court judge who delivered the judgment.

The prosecution evidence further revealed the inclusion of a police officer namely, PC Wasantha in the Bribery Team. Police officer PC Wasantha had worked with the Appellant at the Kosgama Police Station before he was transferred to the Bribery Commission. PC Wasantha has had some animosity with the Appellant as he had purposefully avoided attending the courts to give evidence against the illicit liquor manufacturers and the sellers. On one such incident the complainant was discharged due to the absence of the police officer PC Wasantha. As the Appellant was the court officer of Kosgama Police Station, all such times the court had found fault with him and had taken steps to severely reprimand him.

PW6 in his evidence admitted the inclusion of police officer PC Wasantha who had worked in the Kosgama Police Station earlier. He is a resident of Awissawella area. According to the defence he is well acquainted with the complainant. The inclusion of police officer, PC Wasantha in the raiding team creates serious doubt as he went to arrest a former colleague of his. This is a very conflicting situation as the defence had raised the mala fide intention of the police officer PC Wasantha. Although this a very serious matter which affects the genuinity of the raiding team, this factor has not been adequately considered by the Learned High Court Judge in his judgment.

The Appellant in his dock statement stated that during his stay at the Kosgama Police Station he had conducted a number of raids to eradicate the illicit liquor problems from the area. In recognition of his service the Police Department had rewarded him with cash gifts up to about Rs.300,000/-. Further he had arrested the complainant on a warrant and remanded him. Also, he had arrested the complainant's wife, Complainant's brother-in-law and another person regarding illicit liquor business and produced them before court. Hence, the Appellant was a great obstacle to the complainant's smooth running of his illicit liquor business.

Professor G.L.Peiris in his book “ **Recent Trends in the Commonwealth Law of Evidence**” at page 311 states as follows:

“Where the evidence, viewed as whole, admits some degree of doubt, this doubt may be reinforced by evidence of good character which, to that extent, could facilitate an acquittal in marginal cases.”

The Professor further states at page 310 as follows:

“No distinction can be made convincingly between evidence of good character going to credibility and evidence of good character having a bearing on the issue of guilt or innocence, since these strands are incapable in practice of being disentangled. “If the trial judge directed the jury that the appellant was more credible by reason of his good character, it would have followed from that that he was less likely to commit the offence. (**R v. Bellis** [1966] 1 All E.R. 552; of **R v Richardson and Longman** [1969] 1 QB 299)”

Guided by the above cited judgments, when considering the totality of the evidence it is crystal clear that the prosecution has failed to prove beyond reasonable doubt that there was solicitation by the Appellant on the date specified in the indictment.

Also, the prosecution has failed to prove beyond reasonable doubt that the Appellant had accepted the gratification on the date specified in the indictment.

As the prosecution has failed to prove the charges beyond reasonable doubt against the Appellant, I allow the appeal and acquit him 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