

**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 No:

CA/HCC/0046/18

The Director General,

The Commission to Investigate Bribery and
Corruption

No. 36, Malalasekara Mawatha

Colombo 07.

COMPLAINANT

Vs.

High Court of Colombo

Case No: HCB/2099/2015

Kaluarachchige Dayawathi

Pasal Mawatha

Aluviharaya, Matale.

ACCUSED

AND NOW BETWEEN

Kaluarachchige Dayawathi

Pasal Mawatha

Aluviharaya, Matale.

ACCUSED-APPELLANT

Vs.

The Director General,

The Commission to Investigate Bribery and
Corruption

No. 36, Malalasekara Mawatha

Colombo 07.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Prasantha Lal De Alwis, P.C. with Mohan

Sellapperuma and L.A.D. Samith Kalhara for the
Accused Appellant

: Subashini Siriwardena, Assistant Director General
for the Respondent

Argued on : 26-07-2022

Written Submissions : 27-11-2018 and 16-08-2022 (By the Accused-
Appellant)

: 05-03-2019 and 09-08-2022 (By the Respondent)

Decided on : 30-09-2022

Sampath B Abayakoon, J.

The accused-appellant (hereinafter referred to as the appellant) preferred this appeal on being aggrieved by her conviction and the sentence by the learned High Court Judge of Colombo.

The appellant was indicted before the High Court of Colombo in terms of the Bribery Act on the following counts.

1. That on or about 8th February 2014, the appellant being a government servant and the principal of Matale Vijaya College, solicited a sum of Rs. 200000/- from one Udagekankanamge Prageeth Ranga as a gratification to facilitate the school admission of his son and thereby committed an offence punishable in terms of section 19 (b) of the Bribery Act.
2. At the same time and at the same place, and in the same transaction, the appellant being a government servant solicited a sum of Rs. 200000/- from the above mentioned Prageeth Ranga and thereby committed an offence punishable in terms of section 19 (c) of the Bribery Act.
3. That on or about 24th of February 2014, the appellant being a government servant and the principal of Matale Vijaya College accepted a sum of Rs. 150000/- from Shermila Thushari Sampath through Harsha Suresh Kumara Yapa Wijeratne as a gratification to facilitate the school admission of the son of the earlier mentioned Prageeth Ranga, and thereby committed an offence punishable in terms of section 19 (b) of the Bribery Act.
4. At the same time and at the same place, and in the course of the same transaction as described above, the appellant being a government servant accepted a sum of Rs. 150000/- from the earlier mentioned Shermila Thushari Sampath through the earlier mentioned Yapa

Wijeratne and thereby committed an offence punishable in terms of section 19 (c) of the Bribery Act.

After trial, the appellant was found guilty as charged, and was sentenced in the following manner.

1. On count one, she was sentenced to 5 years rigorous imprisonment and a fine of Rs. 5000/-, in default one-year rigorous imprisonment.
2. On count two, she was sentenced to 5 years rigorous imprisonment and a fine of Rs. 5000/-, in default one-year rigorous imprisonment.
3. On count three, she was sentenced to 5 years rigorous imprisonment and a fine of Rs. 5000/-, in default one-year rigorous imprisonment.
4. On count four, she was sentenced to 5 years rigorous imprisonment and a fine of Rs. 5000/-, in default one-year rigorous imprisonment.

In addition to the above sentence, she was ordered to pay Rs. 150,000/- in terms of section 26 of the Bribery Act and in default it was ordered to recover the said sum as a fine and a default sentence of one-year rigorous imprisonment was imposed.

The jail sentences imposed on all four counts were ordered to run concurrently.

The facts briefly, are as follows.

At the time relevant to this indictment, the appellant was functioning as the principal of the Matale Vijaya College. PW-01 who was an old boy of the college has returned to the country after being employed overseas. He could not get his son admitted to grade 01 of Vijaya College in the year 2013, and the child was studying in a primary school at that time. After returning to the country, PW-01 was making attempts to admit his child to grade 02 of the school. Towards this, he has gone several times to the school to meet the principal and when he finally met her at the school office and explained his intention to admit his son to the school, the appellant had accepted an application in that regard on 21-01-2014. (The document marked P-01). Along with that, PW-01 had handed over a letter

as well. (The document marked P2). The appellant had taken down the telephone number of the PW-01, informing that she will contact him later. In the document marked P-02, the mobile phone number of PW-01 has been written as 071-4631846 while his home land phone number has been written as 066-5710013.

It has been his evidence that thereafter, on a Saturday morning at about 6 a.m., he received a call from the appellant of which the date he cannot exactly remember. It was his position that since the appellant wanted him to come to her house, he, along with his wife went and met the appellant at the house of the appellant. It was his evidence that the appellant, after agreeing to admit the child to the school, demanded Rs. 200,000/- in that regard, and when he informed her that he is unable to secure such an amount of money, the appellant demanded the said sum again. After agreeing to give the amount, he and his wife returned home was his evidence. PW-01 has further stated that before the discussion about the money took place, the appellant made sure that the battery of his mobile phone was removed.

About two weeks after the said incident, PW-01 has received another call from the appellant and he has been informed that the school admission is in progress. When PW-01 said that he can only afford Rs. 150,000/-, the appellant has agreed to accept the said sum. About three days afterwards, PW-01 has complained of this solicitation to the Bribery Commission.

Accordingly, a raid has been organized. On the 24th of February, officers from the Bribery Commission have come to Matale, and has met the PW-01 near Bernard Aluvihare playground. It appears from the evidence of PW-01 that, it was the officers of Bribery Commission that decided to use the wife of PW-01 (PW-02) for the raid on the basis that PW-01 has a speech deficiency. His evidence also reveals that after that decision, he has gone back to his home and returned with his wife and the child, and it was after that only the raid has been organized.

The Bribery Commission officers have instructed the PW-01 to be in hiding and accordingly, the PW-01, in his evidence has stated that he gave a call to the appellant and informed that it will be his wife who is coming to give the money as he is away from the area. It was the PW-02, the wife of PW-01 and Kanthi who was a female police sergeant (WPS) attached to the Commission has participated in the raid.

The cross-examination of the witness also reveals that in his desperation to admit his child to the school, has given Rs. 150,000/- to a priest which the witness has termed as a donation given by him to the temple, and the priest has also agreed to help him in the admission process.

It has also been revealed that PW-01 has discussed about a project report that could be implemented through a non-governmental organization (NGO) with the principal, and the principal has also shown interest in getting involved in the activities of the NGO.

The evidence of PW-02, Shermila Thushari Sampath was consistent with the evidence of PW-01 in relation to the solicitation of the bribe at the house of the appellant. Her evidence reveals that she was a reluctant participant of the raid and she has taken part in it only at the insistence of her husband and the Bribery Commission officials. She has given evidence stating that the money used for the raid was shown to her and kept with the female officer who accompanied her to the school.

According to the evidence of PW-02, she and the female police officer (PW-04) has gone to the office of Vijaya College and has met the appellant. Although the Principal has not recognized PW-02 initially, later has told the PW-02 to give the money to her husband Prasanna who is working at the Post Office. While these discussions taking place the appellant has received a phone call about a tuition class and was in a hurry to leave. When PW-02 and the decoy showed reluctance to give the money to an outsider, she was supposed to have said to come to her

home, but when they showed reluctance again, she had informed that she will be going near the post office and come there.

Later in her evidence, PW-02 has stated that she and the decoy PW-04, went near the post office to meet the appellant but she was not there. When contacted using the mobile phone of the decoy, the appellant informed her the money can be given to her husband Prasanna. After inquiring for Prasanna who was not there at the post office at that time, PW-02 has taken another call using the same phone of the decoy where the appellant was supposed to have told to give the money to a person called Wijeratne, who is a person working at the post office. Although she was reluctant to give the money to the person called Wijeratne, the money has been ultimately given to him after placing it in an envelope obtained from the post office. PW-02 has given evidence stating that to her recollection, the money was in 1000-rupee denominations. She has also stated in her evidence that when she and the decoy went and met the appellant at her office, she showed them a letter by the relevant Ministry approving the admission of their child to the school.

At the time of giving the money to Wijeratne, the officials from the Bribery Commission have come and arrested the said Wijeratne and subsequently, they have gone to the appellant's house and arrested her for accepting a bribe through the said Wijeratne.

The earlier mentioned Yapa Wijeratne (PW-03) has given evidence in this action, and has confirmed that he accepted the parcel because Prasanna, the husband of the appellant wanted him to accept that and keep it with him until he come and collect it. He also confirms that, before accepting the parcel, the two ladies who wanted to handover the parcel took a call to the appellant and she too informed him to accept the parcel. He has denied that he knew what was in the parcel, but has admitted that after the raid, the contents of the parcel were shown to him and that there were 5000-rupee notes inside.

The decoy Kanthi Indrani (PW-04) has given evidence and has stated that when she and the team of officers from the Bribery Commission went near the Matale Aluvihare Playground, the 1st complainant (PW-01), his wife (PW-02) and the son were there, and it was on the advice of Police Inspector Abeysinghe who led the team, PW-02 agreed to participate in the raid.

At the trial, Police Inspector Abeysinghe who organized and directed the witnesses to participate in the handing over of the bribe money, and several other witnesses also have given evidence.

When called for a defence, the appellant has made a lengthy statement from the dock, and has stated the steps taken by her to develop the school within a short span of becoming the principal and the obstacles she had to face in achieving a level of high standard in the school. She has admitted that PW-01 came and met her at the school and discussed an NGO project available from Korea, and since she too had the knowledge of working with NGOs, she discussed the project with him and gave her phone number with an endorsement in the project report produced by PW-01. It was her position that on a subsequent date, PW-01 informed her that he intends to admit his child to the school and he has already given Rs. 150,000/- to a third party towards this end. It was her position that since PW-01 has been an old boy, she accepted his application for the admission of his child to the school and following due procedure, she recommended the admission of the child and two other children to the Ministry, and she received the approval in writing from the Ministry on the 20th of February 2014.

She has admitted that PW-01 and his wife came to her home one day, but it was her position that she never solicited any bribe from him. It was her position that PW-01's wife and another female came to her office and informed her that they came to handover a letter from a government minister from the area, but it was not given to her. Later, since they insisted on handing over the letter, she told them to leave the letter with his husband, who is working in the post office. She has also admitted having received a call stating that her husband was not

available at the post office and informing them to handover it to Wijeratne, and informing him to accept it, but it was her position that she thought that it was a letter. She has denied that she ever solicited a bribe or accepted any bribe through the earlier mentioned Wijeratne as claimed by the prosecution.

The Grounds of Appeal

At the hearing of the appeal, the learned President's Counsel formulated the following grounds of appeal to be considered by the Court.

1. According to the indictment, the solicitation of the bribe has been on 8th February 2014 and the acceptance on 24th February 2014. The time gap of 16 days between solicitation and acceptance has created a reasonable doubt.
2. The solicitation was done on PW-01 Pradeep Ranga and the alleged acceptance was from the wife of said Pradeep Ranga which creates a reasonable doubt. The acceptance of the bribe was not by the appellant herself, but through an intermediary who was a peon at the workplace of the husband of the accused, and the place of acceptance creates a reasonable doubt.
3. The money solicited was Rs. 200,000/-, and what was accepted was Rs. 150,000/-, and the discrepancy by PW-02 and PW-04 as to the denominations of the money has created a reasonable doubt.

It was contended by the learned President's Counsel, if the solicitation was on the 8th of February, PW-01 has waited till 21st of February to make a complaint to the Bribery Commission and there was no acceptable explanation as to why he took so many days to make the complaint. It was the position of the learned President's Counsel, the reasons given by PW-01 and PW-05, the Officer who was in charge of the raid, to change the person who should handover the money to the appellant was contradictory and there was no reason for the change of persons which creates a doubt as to the story of the prosecution. He also points

out the differences in evidence as to the way the wife of PW-01 got involved in the raid and the fact that PW-02 was not a willing participant of this episode.

He argued further, that the project report mentioned by PW-01 has not been produced as evidence and the letter alleged to have been written by a politician with regard to the admission of the child to the school was not available in the file maintained at the school although it was the evidence of the deputy principal of the school, she saw a letter of that nature in the file and that too creates a doubt as to the genuineness of this alleged raid. PW-02 who participated in the handing over of money has stated that the money was in Rs. 1000 denominations while the other witnesses have stated that it was in Rs. 5000 notes were another issue raised.

Pointing to several other items of evidence which the learned President's Counsel claimed as inconsistencies of the evidence led by the prosecution, it was his view that the prosecution has failed to prove the charges against the appellant and the learned High Court Judge was misdirected in his conviction of the appellant for all the counts preferred against her.

It was the submission of the learned Counsel representing the Bribery Commission that there was no delay in making the complaint to the Bribery Commission. Bringing to the attention of the documents marked P-01 to P-05, it was her contention that the above-mentioned documents amply establish that knowing very well the child can be admitted to the school, the appellant has used devious methods to solicit and accept the bribe through a third party. It was her submission that there is no merit in the appeal.

After the conclusion of the submission by the Counsel, parties were allowed to file a further written submission if any, on some of the grounds of appeal which were not urged in the written submission of the appellant in order to provide both parties an opportunity to present matters before the Court.

Consideration of the Grounds of Appeal

Since the grounds of appeal are interrelated, I will now proceed to consider all the said grounds together.

It needs to be noted that the first two charges preferred against the appellant are charges in relation to the solicitation of the bribe, which has taken place on 8th February 2014, while the alleged acceptance of Rs.150000/- has been on 24th February.

I am of the view that since the solicitation and the acceptance are two separate events, although it relates to the same matter, the two events need to be considered separately in order to determine whether the prosecution has proved the said incidents beyond reasonable doubt.

It is an admitted fact that the PW-01 came and met the appellant and through his presentation to her of an NGO project, built a rapport with the appellant. It is also an admitted fact by the appellant that PW-01 informed her of his intention to admit the child to the school and the acceptance of an application and an appeal in that regard. (The documents marked P-01 and P-02).

It is clear from the evidence that after the acceptance of the application to admit the child, the appellant has taken steps to obtain the necessary approval from the higher authorities and she has received the approval by early February. It is also in evidence that the appellant had the contact phone numbers of the PW-01, and PW-01 had the appellant's phone number.

It is under these circumstances that one has to look at the evidences of PW-01 that he was asked to come to the house of the appellant, and a bribe of Rs. 200,000/- was solicited can be accepted as cogent and trustworthy evidence. According to the evidence of PW-01, he has received this call from the appellant somewhere in January, but it was his evidence that he cannot remember the date. However, he has been specific about the time and the day of the week he

received the call. He has stated that he received the call around 6 a.m. in the morning of a Saturday.

As correctly determined by the learned High Court Judge in his judgement, the prosecution has led the phone call details of the mobile phone of the appellant and that of the PW-01. PW-01 has stated in his evidence that he received a call from the appellant a week or two after he handed over the application on 21st January 2014. The mobile phone call details marked as P-15 of the mobile phone of the appellant show that at 6.02 am on 8th February 2014, a call has been received by the mobile phone used by PW-01. This was a Saturday as established by the evidence. It clearly appears that the prosecution has mentioned the date of the solicitation as 8th February 2014 based on these findings, which are findings that has not been shaken at the trial.

The appellant in her dock statement has admitted that PW-01 and his wife came and visited her at her house, but has claimed that she never entertained them. The evidence of PW-01 was that when he and his wife visited the appellant, she made sure that nothing is recorded by ensuring the removal of the battery of the PW-01's mobile phone. PW-01 has well explained what the appellant did in that regard and the evidence of PW-02 also confirms the actions of the appellant to make sure nothing is on record. I do not find any reason for PW-01 and PW-02 to concoct a story of this nature if it did not actually occur. It was the evidence of the wife of PW-01 that after the solicitation was done and when they were leaving, the appellant patted her and stated "*girl, do not put me into trouble.*"

It is clear from the evidence when taken in its totality that PW-01 and his wife were in desperate need of admitting their child to Vijaya College. It is also clear from the evidence that PW-01 being a recent returnee from overseas employment and also being a person involved in NGO activity, would have been a perfect target for this kind of solicitation.

I find that the evidence of PW-01 and PW-02, with regard to the solicitation of the bribe by the appellant and the documentary evidence in that regard are

cogent and trustworthy. The line of defence taken by the appellant to challenge the solicitation has not created any doubt in that regard.

The contention of the learned President's Counsel that the prosecution failed to produce the NGO project report which is alleged to have been endorsed by the appellant in order to cover-up what really happened has no merit. It is clear from the evidence that it was to the PW-01 the appellant had handed back the said project report with an assurance that she also can get involved in such a project. Therefore, if at all, the project report should be with PW-01 and not with the appellant. It is obvious as admitted by the PW-01, that since he has not divulged any of these facts in his statement, the investigating officials had no reasons to call for such a report. Similarly, the reasons behind the PW-01 waiting until the 21st of February to lodge a complaint has been well explained as no parent would rush to make a complaint of this nature.

It is my considered view that the prosecution has proved the first and the second count preferred against the appellant beyond reasonable doubt, namely, that she solicited a gratification of Rs. 200,000/- from PW-01 for the admission of his child to Matale Vijaya College on the date specified in the charge.

Therefore, I find no merit in the appeal in that regard, and any reasons to interfere with the conviction in relation to the first and the second count.

However, the same cannot be said about the conviction of the third and the fourth counts preferred against the appellant. The said counts have been on the basis that the appellant accepted a bribe of Rs. 150000/- through one Yapa Wijeratne on 24th February 2014.

No doubt that high degree of suspicion can be directed towards the appellant in view of her solicitation of a bribe as previously discussed. However, it is settled law that suspicion alone would not be sufficient to prove a case beyond reasonable doubt against an accused and it is the duty of the prosecution to prove its case beyond reasonable doubt.

In the case of **The Queen Vs. M.G. Sumanasena 66 NLR 350** it was held:

“In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence”

The evidence led in this action shows that it was with the PW-01 the appellant has built up the connection towards obtaining a bribe. It is clear that the appellant has trusted the PW-01 believing that he will agree to her demands because of his need to admit his child to the school. PW-02 who is the wife of PW-01, although she may have had the same need, has not gotten involved in this process other than going to the house of the appellant, until the 24th of February.

It was the evidence of PW-01 that when he met the officers of the Bribery Commission near Aluvihare Playground in Matale, the wife was not with him. It appears that it was not the intention of PW-01 to get the wife involved in this matter. According to him, it was the PW-05, who led the team of Bribery Commission officials suggested that they should use his wife to give the bribe. The reason given to him was that he has a speaking difficulty and it may hamper the operation.

In this action, PW-01 has given evidence and had been subjected to lengthy cross examination. There is no indication whatsoever that he had such a difficulty in giving evidence before the Court. Contrary to that, PW-05 in his evidence has stated that when he and his team met PW-01, his wife PW-02 was also there with him and he took steps to record a statement from her and decided that since the suspect is also a female, it is better to use the wife for the raid since she was also aware of the solicitation. Although he has stated that along with the decoy, PW-02 and her child was directed to go and meet the principal, he has not stated whether the child was with the couple when he and his team first met them. It was the evidence of PW-04, the decoy that, when they came near the playground

PW-01, his wife PW-02 and their son was there, and PW-02 agreed to participate in the raid.

The evidence of PW-02 had been that she was at home washing clothes when her husband came and wanted her to take part in the operation. It is clear that she had been a reluctant participant, but had accompanied her husband and child and met the bribery officials. I find that due to these contradictory evidence as to the way the whole operation was initiated on the 24th of February casts a shadow over the evidence of the prosecution as to what really happened on that day.

Admittedly, when the PW-02 and the decoy went and met the appellant at the school office, the appellant has initially failed to recognize the PW-02 as she has met her only once previously. In my view, it is not safe to conclude that a person like the appellant will openly discuss about the money she was expecting from PW-01 with someone not familiar to her who has come with another stranger, considering the behaviour of her when the solicitation of the gratification was made.

If the acceptance of the money was directly by the appellant the necessary considerations would have been different. But here is a situation where the allegation is that the appellant accepted the money through a third party who was not privy to it.

It is therefore necessary for the prosecution to eliminate all the reasonable doubts that can arise as to the giving of the bribe.

In the case of **Karunadasa Vs. Officer-in-Charge, Motor Traffic Division, Police Station Nittambuwa (1887) 1 SLR 155** it was stated by Perera, J. that;

“It is an imperative requirement in a criminal case that the prosecution must be convincing, no matter how weak the defence is, before the Court is entitled to convict on it. It is necessary to borne in mind that the general rule is that the burden is on the prosecution, to prove the guilt of the accused.

The prosecution must prove their case apart from any statement made by the accused or any evidence tendered by him. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The rule is based on the principle that every man is presumed to be innocent until the contrary is proved, and criminality is never to be presumed.”

In this matter the evidence of the PW-02 had been that when she and the decoy met the appellant, she told them to give the money to her husband who was working in the Post Office but later told them to come and meet her at her home. It was her evidence that when they showed reluctance to come, the appellant informed them to come near the Post Office and she will be waiting there. When they could not meet her at the Post Office, she called the appellant using the phone of the decoy and she was told to give the money to her husband, and when she called again and informed the appellant that the husband was not available, she was instructed to give the money to Wijeratne. It is not clear how the PW-02 knew the mobile phone number of the appellant as it was not she who was dealing with the appellant, unless her husband was also with her or he was contacted before making the calls to the appellant as this was an unexpected development. There is no evidence in that regard.

Contrary to this evidence the position of the decoy had been that when they went and met the appellant, she asked them whether the money was ready and later said come to her home in the evening and when they hesitated told them to come near the post office. It was her evidence that when they could not meet the appellant near the Post Office and called her it was informed that the money can be given to Wijeratne. She has failed to say anything about appellant telling them to give the money to her husband as stated by the PW-02 in her evidence.

I am of the view that given the contradictory nature of the evidence of the PW-02 and the decoy in this regard, the stand of the appellant as to what happened on that day cannot be excluded.

It was held in the case of **Alim Vs. Wijesinghe (S.I. Police, Batticaloa) 38 CLW 95** that;

“Where the same facts are capable of inference in favor of the accused and also of an inference against him, the inference consistent with is innocence should be preferred.”

In the case of **The Queen Vs. M.G. Sumanasena 66 NLR 350** it was held:

“In a criminal case suspicious circumstances do not establish guilt. Nor does the proof of any number of suspicious circumstances relieve the prosecution of its burden of proving the case against the accused beyond reasonable doubt and compel the accused to give or call evidence”

I am of the view that although there are strong suspicions directed at the appellant in this case as to the second and the third counts preferred against her, given the above infirmities in the evidence, it is not safe to let the conviction of her in the said counts to stand.

For the aforementioned reasons, I set aside the conviction and the sentence of the appellant on the third and the fourth counts preferred against her and acquit her of the said counts and allow the appeal up to that extent.

As I find no reasons to interfere with the conviction of her on the first and the second counts preferred against her as stated earlier, I affirm the conviction on those counts by the learned High Court Judge.

However, since the appellant is now stands convicted only for the solicitation of a bribe, given the fact that she has had no previous convictions and the fact that she will not be able to enjoy any benefit as a government servant, it is the view of this Court that incarcerating her is no longer warranted.

Therefore, the sentence imposed on her with regard to the first and the second counts are hereby set aside and replaced with the following sentence.

(1) On count one, period of one-year rigorous imprisonment and in addition Rs. 25000/- fine. In default she is sentenced to one-year rigorous imprisonment.

(2) On count two, period of one-year rigorous imprisonment and in addition Rs. 25000/- fine. In default, she is sentenced to one-year rigorous imprisonment.

The total period of two years rigorous imprisonment is suspended for a period of five years.

Since the appellant's conviction is based on the solicitation only, imposing her a fine in terms of section 26 of the Bribery Act would not arise. Hence, the fine of Rs. 150000/- ordered is also set aside.

Appeal partly allowed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal