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

In the matter of an appeal under 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.

The Commission to Investigate Allegations of bribery or Corruption,

No. 36, Malalasekara Mawatha,
Colombo 07.

C.A. Case No. HCC/206-208/2019 **Complainant**

High Court of Colombo **Vs.**

Case No. HCB/1696/2007

1. Wasala Mudiyanselage Gedara Gamini Senarath Bandara.
2. Nishshanka Arachchige Priyantha.
3. Kanagarathna Wijekoonlage Chandrasiri Kularathna Wijekoon.

Accused

AND NOW BETWEEN

1. Wasala Mudiyanselage Gedara Gamini Senarath Bandara.
2. Nishshanka Arachchige Priyantha
3. Kanagarathna Wijekoonlage Chandrasiri Kularathna Wijekoon

Accused –Appellants

Vs.

The commission to Investigate Allegations of bribery or Corruption,

Complainant-Respondent

BEFORE : K. PRIYANTHA FERNANDO, J (P/CA)

WICKUM A. KALUARACHCHI, J

COUNSEL : Nalin Ladduwahetti, PC with Hafeel Farisz, Kavithri Obeysekara and Rajith Samarasekara for the 1st Accused- Appellant.

Duminda De Alwis with Charuni De Alwis for the 2nd Accused-Appellant.

Shantha Perera, PC with Sweeni Suraweera and Mahanama Dissanayake for the 3rd Accused-Appellant.

Sudharshana De Silva, DSG with Thanuja Bandara and Gayan Madawage for the Respondent.

WRITTEN SUBMISSION

TENDERED ON : 28.07.2020 (On behalf of the 1st Accused-Appellant)
30.07.2020 (On behalf of the 2st Accused-Appellant)
26.06.2020 (On behalf of the 3rd Accused-Appellant)
21.08.2020 (On behalf of the Respondent)

ARGUED ON : 15.09.2022 and 16.09.2022

DECIDED ON : 20.10.2022

WICKUM A. KALUARACHCHI, J.

The three accused-appellants were police officers attached to Galenbindunuwewa Police Station at the time of the incident. The complainant, PW-1 was engaged in an illicit liquor business. In the High Court of Colombo, the three accused-appellants were indicted under the Bribery Act for soliciting and accepting bribes from Thennakoon Mudiyanselage Gnanadasage Chandana Kumara Dissanayake, (PW-1) to refrain from charging for all *goda* barrels taken into custody and to charge only for a few of those barrels.

The first accused-appellant was charged under sections 16(b) and 19(c) of the Act on counts one and two for soliciting a bribe of Rs.20,000/- from the said Thennakoon Mudiyanselage Gnanadasage Chandana Kumara Dissanayake. The first accused-appellant was also charged under sections 16(b) and 19(c) of the Act on counts four and five for accepting a bribe of Rs.10,000/- from the said Chandana Kumara Dissanayake.

The 2nd accused-appellant was charged on count three under section 19(c) of the Act for accepting a bribe of Rs.5,000/- from the said Chandana Kumara Dissanayake.

The 3rd accused-appellant was charged on counts six and seven under sections 16(b) and 19(c) read with section 25(2) of the Act for abetting the 1st accused to accept a bribe of Rs.10,000/- from the said Kumara Dissanayake.

After trial, all three accused-appellants were found guilty by the judgment dated 08.03.2019. The 1st accused was convicted and sentenced for counts 1, 2, 4, and 5, the 2nd accused was convicted and sentenced for count 3 and the 3rd accused was convicted and sentenced for counts 5 and 6. This appeal is preferred against the said convictions and sentences.

Prior to the hearing, written submissions were filed on behalf of all parties. At the hearing of the appeal, the learned President's Counsel for the 1st appellant, the learned Counsel for the 2nd appellant, the learned President's Counsel for the 3rd appellant, and the learned Deputy Solicitor General for the respondent made oral submissions.

The following is a summary of the facts relating to the prosecution case:

The three-accused appellants were police officers attached to Galenbindunuwewa Police Station, at the time of the alleged offences. The complainant, PW-1, was an illicit liquor dealer who had been doing this illegal business with one of his friends named Arunasiri (PW-2). According to the prosecution, on 24th July 2005, the Officer in Charge of the Police Station Galenbidunuwewa (PW-6) arranged a police team led by sergeant Bandara (1st accused) to raid the complainant's and his partner Anurasiri's illegal liquor business. The team of police officers had raided the place on that day. Five "*Goda*" barrels were taken into custody, and Udara Lakmal Bandara (PW-5), the brother-in-law of Anurasiri, was also arrested. On the same day, the 1st accused met the

complainant and Anurasiri on their way and told them that they had arrested some barrels of *goda* that belonged to the complainant and Arunasiri. According to the prosecution, the 1st accused demanded Rs.20,000/- not to charge for all those *goda* barrels found. In the afternoon of the same day, the complainant and Arunasiri had found Rs.5,000/- and the said Rs.5,000/- was given to the 2nd accused when they met the 2nd accused-appellant with Sergeant Senaka on the way.

Since PW-1 could not find the balance Rs.15,000/-, he called the Bribery Commission on 25.07.2005 and informed them about the matter. Accordingly, on 26.07.2005, around 5 p.m., a raid was organized. The raid was not successful on that day and was re-arranged for 27.07.2005. On the 27th also, PW-1 and PW-3 (decoy) made two attempts to give the balance money but were unsuccessful. Thereafter, when the 3rd appellant, PC Wijekoon, arrived near "T-Stores", PW-1 gave Rs.15,000/- to the 3rd appellant, stating that this was the money requested by the first accused and that the balance of Rs.5,000/- would be paid in four to five days. When the 3rd appellant accepted the money, he was arrested by officers of the Bribery Commission, according to the prosecution. Thereafter, on the instructions of the raiding officers, the complainant and the decoy were asked to go and meet the 1st accused at the police station. When the 1st appellant saw them, he proceeded to the boutique near the police station. Then, the 1st accused was also arrested.

After the prosecution case, the three accused-appellants made unsworn statements from the dock denying the charges leveled against them. Sergeant Senaka was also called in evidence on behalf of the 2nd accused-appellant.

Although a preliminary objection was taken on behalf of the 1st and 2nd appellants that the indictment has no force in law and is ultra vires on the basis that the said indictment has been signed by the Director General without any direction being issued by the three commissioners, the learned President's Counsel for the 1st appellant or the learned Counsel for the 2nd appellant did not pursue the said objection. They made submissions on the facts of the case, urging that the learned High Court Judge's judgment be set aside and the appellants be acquitted of all charges against them.

Furthermore, although several grounds of appeal were set out in the written submissions tendered on behalf of the appellants, all three learned counsel appeared for the three appellants centered their arguments on the main ground of not correctly evaluating the improbable prosecution version and probable defense version in coming to a conclusion by the learned High Court Judge.

The learned President's Counsel for the 1st appellant contended that there was no evidence against the 1st appellant with regard to soliciting and/or accepting any bribe from any person. He contended further that there was no nexus between the 1st and the 3rd appellants, although they were arrested and charged for accepting a bribe of Rs.10,000/-. While advancing his arguments to demonstrate that the prosecution version is improbable, the learned President's Counsel contended that there was absolute motivation to fabricate the charges against the 1st appellant, as he was standing in between corrupt police officials and an illicit liquor seller.

The learned counsel for the 2nd appellant contended that although PW-1 stated that he went with Police Sergeant Senaka on a motorcycle and gave Rs.5,000/- as a bribe to the 2nd appellant, the said police

officer gave evidence on behalf of the 2nd appellant and testified that he did not go anywhere with the 2nd appellant. Therefore, the learned Counsel for the 2nd appellant submitted that count three against the 2nd appellant has not been proved beyond a reasonable doubt.

The learned President's Counsel for the 3rd appellant contended that since the three attempts that were made to give money to the 3rd appellant failed, Rs.10,000/- was forcibly offered to the 3rd appellant, and PW-1 and Bribery Officers fabricated a false story against the 3rd appellant.

In response, the learned Deputy Solicitor General for the respondent stated that minor discrepancies in lay witnesses' testimony are to be expected, but PW-1's testimony is corroborated by PW-3's (decoy) testimony, and the prosecution has presented a plausible story. The Learned Deputy Solicitor General contended further that improbable dock statements of the appellants do not cast reasonable doubt on the prosecution case.

When making submissions, the learned President's Counsel for the 1st appellant pointed out certain contradictions *per se*, *inter se*, and other flaws in the prosecution case as well. However, I wish to consider first, the issue whether the prosecution case is improbable because if a reasonable doubt is cast on the issue of the probability of the prosecution case, the necessity does not arise to consider the other matters raised by the learned President's Counsel.

Solicitation of Rs.20,000/- (Counts 1 and 2)

In dealing with the first and second counts relating to the solicitation of Rs.20,000/- as a bribe, the manner in which the first charge was

framed is important. The following is the first charge in the indictment filed in the High Court:

> වර්ෂ 2005 ක්වූ ජූලි මස 24 වන දින හෝ ඊට ආසන්න දිනයකදී මෙම අධිකරණ බල සීමාව තුළ පිහිටි ගලෙන්බිදුණුවැව දී නිළ අංක 22835 යටතේ පොලිස් සැරයන්වරයෙකු ලෙස ගලෙන්බිදුණුවැව පොලිස් ස්ථානයේ සේවයේ යොදවා සිටි 01 වන චුදිත වන යුෂ්මතා වරද කරන්නෙකු එනම්, **නීති විරෝධී මත්පැන් නිෂ්පාදනයේ හා වෙළඳාමේ යෙදුනු ලැබූ තෙන්නකෝන් මුදියන්සේලාගේ ඥානදාසගේ චන්දන කුමාර දිසානායක යන අයගෙන් අත් අඩංගුවට ගන්නා ලද** ගෝඩා බැරල් සියල්ලටම නඩු නොදා කිහිපයකට පමණක් නඩු පැවරීම සඳහා පෙළඹවීමක් හෝ ත්‍යාගයක් වශයෙන් රු.20,000/- ක් වූ මුදලක තුටු පඬුරක් එකී තෙන්නකෝන් මුදියන්සේලාගේ ඥානදාසගේ චන්දන කුමාර දිසානායක යන අයගෙන් අයැදීමෙන් අල්ලස් පනතේ 16(ආ) වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් කළ බවය.

In perusing the first charge, it is apparent that the 1st accused-appellant was charged on the basis that the "*goda*" taken into custody was taken from Thennakoon Mudiyanselage Gnanadasage Chandana Kumara Dissanayaka's custody while he was involved in manufacturing and selling illegal liquor.

However, PW-1, the said Chandana Kumara, testifying on behalf of the prosecution, stated unequivocally that when the *goda* barrels were taken into custody, neither he nor his supporters were present there. PW-5, Udara Lakmal Bandara, testified that he was at home when he was taken by police to a place in the jungle where the *goda* barrels were, and that the police subsequently filed a case against him. The learned Deputy Solicitor General appearing for the respondent admitted that no one was present when the *goda* barrels were taken into custody. If this was the case, the first charge, which was brought on the basis that the *goda* was taken into custody from the possession of Chandana Kumara, who was engaged in manufacturing and selling illicit liquor, could not be maintained.

The learned Deputy Solicitor General contended that PW-1 had admitted that the *goda* belonged to him. Even if it is so, the first charge could not be brought on the basis that the *goda* was taken from Chandana Kumara, who was engaged in the manufacture and sale of illicit liquor, when the *goda* was found in the jungle and not in the possession of anybody. In any case, the prosecution has brought the first charge for soliciting a bribe of Rs.20,000/- from PW-1 to file a case only for a few barrels of *goda* instead of all the barrels of *goda* taken into custody.

Apart from the aforesaid incorrect manner of framing of the first charge, it is apparent that the evidence regarding the solicitation charge is also uncertain and doubtful. On page 203 of the appeal brief, PW-3, the decoy stated that Rs.20,000/- was demanded to file the case for only one barrel of *goda.* PW-1 stated on page 125 of the appeal brief that the first appellant told him that one case had been filed against Udara Lakmal and money was demanded not to file another case. Hence, it is apparent that the evidence of PW-1 and PW-3 regarding the purpose of soliciting the bribe is contradictory.

Apart from that, PW-1 has made contradictory statements on soliciting money on different occasions. PW-1 stated in one occasion "නීති විරෝධීව අත්අඩංගුවට ගත්ත මත්පැන් වලට නඩු දාන්නේ නැතෙයි කියලා සල්ලි ඉල්ලුවා" (Page 124 of the appeal brief). Another occasion, he stated "තමුන්ගේ බැරල් 5 ක් ඇල්ලුවා, එකකට අපි නඩු දානවා, අනෙක් හතරට නඩු නොදා ඉන්න රු.20,000/- ක් මට ගෙනත් දෙන්න කියලා....." (Page 139 of the appeal brief). Again, he stated "ඔව්. ආයේ නඩු දාන්නේ මොකුත් කරන්නේ නැහැ, බය වෙන්න එපා කිව්වා." (Page 154 of the appeal brief).

In light of the contradictory positions taken by PW-1 from time to time, it appears that there is some truth in the defence version that PW-1 had considered the raid carried out by the appellants as an obstacle for him

to run his illicit liquor business by giving regular bribes to the other police officers in the area, so a false story was fabricated against the appellants. As a result of the aforesaid contradictory prosecution evidence and the probable defence version, a reasonable doubt is cast about the solicitation of Rs.20,000/-. Hence, I hold that the learned High Court Judge's finding that the solicitation charges have been proved beyond a reasonable doubt is incorrect and that the first and second charges relating to the solicitation of Rs.20,000/- have not been proved beyond a reasonable doubt. Furthermore, it is to be noted that if there is doubt about soliciting the bribe, there would be doubt about the acceptance of the bribe as well, because there can be no acceptance without a solicitation.

Acceptance of Rs.5,000/- (Count 3)

The third count has been brought against the second appellant for accepting Rs.5,000/- as a bribe. The 1st appellant had no connection for accepting the said Rs.5,000/- according to the charge. So, the prosecution version is that the 1st appellant demanded Rs.20,000/- and the 2nd appellant accepted Rs.5,000/- from the said amount demanded. However, fourth and fifth counts have been brought against the 1st appellant in terms of Section 89(b) of the Bribery Act for the Rs.10,000/- purported to be accepted by the 3rd appellant, on the basis that the 3rd appellant accepted the same on behalf of the 1st appellant. Accordingly, the third appellant was charged under the sixth and seventh counts for abetting the first accused in accepting the said Rs.10,000/-.

According to the prosecution evidence, when PW-1 gave Rs.5,000/- to the 2nd appellant, the decoy was not there. So, the third count has to be proved only on the evidence of PW-1 and his helper (PW-2) in the illicit liquor business. According to the PW-1 and PW-2, when they met

the 2nd appellant on the day the *goda* raid was carried out, the PW-1 gave the 2nd appellant Rs.5,000/- near the petrol shed when he was with Police Sergeant Senaka.

Police Sergeant Senaka was a police officer attached to the Galenbindunuwewa Police Station at that time. He testified on behalf of the 2nd appellant and stated that he had never gone with the 2nd appellant on a motorcycle. In addition, the 2nd appellant also denied the acceptance of Rs.5,000/- in his dock statement.

Therefore, with regard to the acceptance of Rs.5,000/-, the evidence to be evaluated is PW-1 and PW-2's evidence against Police Sergeant Senaka's evidence and the 2nd appellant's dock statement. In his dock statement, the 2nd appellant denied the acceptance of Rs.5,000/-. In evaluating the evidence, I am of the view that there is no basis to reject 2nd appellant's dock statement, which was corroborated by Police Sergeant Senaka's evidence. In the circumstances, doubt arises on the prosecution version as to whether Rs.5,000/- was given to the 2nd appellant while PW-1 was accompanying police sergeant Senaka. Upon the said reasonable doubt, it should be concluded that the third count against the 2nd appellant has not been proved beyond a reasonable doubt.

Acceptance of Rs.10,000/- (Counts 4, 5, 6 and 7)

Now, I proceed to consider the acceptance of Rs.10,000/-. The fourth and fifth counts are against the 1st appellant for accepting the said Rs.10,000/- and the sixth and seventh counts are against the 3rd appellant for abetting the 1st appellant to accept the said Rs.10,000/-. Therefore, if the prosecution story about the acceptance of Rs.10,000/- could be accepted without reasonable doubt, the fourth and fifth counts

against the 1st appellant as well as the sixth and seventh counts against the 3rd appellant would be proved. Similarly, if the prosecution story about the acceptance of Rs.10,000/- could not be accepted without reasonable doubt, the two counts regarding acceptance would not be proved. Accordingly, sixth and seventh abetting charges would also fail.

Undisputedly, Rs.10,000/- has been given by PW-1 to the 3rd appellant. The 1st appellant was at least not in the vicinity of the place where the said money was handed over. The 1st appellant was arrested when he reached a boutique near the police station, according to the prosecution.

PW-6, the OIC confirms that all the items taken into custody during the raid and also Udara Lakmal, the boy who was arrested as the suspect in this raid were handed over to the police station by 4.00 p.m. on 24.07.2005. OIC also confirms that the plaint was filed against Udara Lakmal in the Anuradhapura Magistrate's Court on 28.07.2005. Those facts are also bolstered by the plaint filed in the Magistrate's Court, marked P-2. In addition, OIC, PW-6 clearly stated that notes were made and the pliant was filed only for one barrel of *goda*. He also testified that the notes were made on the same day of the raid. However, the notes have been pasted on 25.07.2005.

The contention of the learned President's Counsel for the 1st appellant was that everything was finalized by 27.07.2005 to file the case on 28.07.2005, and thus giving a bribe on the 27th is improbable because PW-1 could have known that there was no purpose in giving a bribe on the 27th because nothing could be changed in the case to be filed on the next date.

The learned Deputy Solicitor General replied that although all notes had been made by July 24th, 2005, PW-1 had no way of knowing what happened in the police station. There is merit in this contention.

However, PW-1 knew that a case would be filed in the Magistrate's Court on 28.07.2005. The reason that the PW-1 told the 3rd appellant for giving only Rs.10,000/- and promising to give the balance Rs.5,000/- within a few days was that the case was coming up on the 28th. Decoy, PW-3, has also stated the same reason for giving only Rs.10,000/-. The case that came up on 28.07.2005 was the case filed against Udara Lakmal for the *goda* taken into custody. PW-1 also knew that the case would be filed not against him but against Lakmal because he stated that on the date of the raid, Lakmal was arrested by the police and later released on bail.

Therefore, although PW-1 did not know when the notes were made and finalized in the police station, any person with common sense would understand that everything would be finalized by 27th if a case is filed on the 28th. Especially, a person like PW-1 who was engaged in the illicit liquor business would know these things very well.

Under these circumstances, PW-1 could easily understand that giving Rs.10,000/- as a bribe serves no purpose, even though the case was scheduled to be filed for one barrel of *goda* or five barrels of *goda*. If the case had been filed for one barrel of *goda*, there was no need to give a bribe. If the case had been filed for five barrels, there was no purpose of giving a bribe because it could not be changed. The prosecution witness, the OIC, confirms that no changes could be made under any circumstance after the productions were handed over to the police station and notes were made.

There could be an argument that this kind of changes are taking place in the police station. It can happen, but obviously, it should have happened with the knowledge of the OIC of the police station. In this instance, the OIC sent a special police team for this raid because he had received a petition that other police officers normally assigned to raiding duties take bribes. The 3rd appellant was attached to the traffic division of the police station. Hence, the OIC would not certainly assist the appellants in changing notes in this particular case. Therefore, it is apparent that the appellants had no opportunity to change notes.

This court also considered whether it was possible to file another case for the other four barrels of *goda* allegedly taken into custody, if the PW-1 had not given the balance Rs.15,000/-. It is evident that the appellants who went for this raid could not file another case apart from the case filed against Udara Lakmal because once the productions were handed over to the police and the case was filed, no other case could be filed based on the same raid. Therefore, when PW-1 could know very well that giving Rs.10,000/- on 27.07.2005 was pointless, the allegation of accepting Rs.10,000/- is improbable.

On the other hand, once the notes were made and the productions were handed over on 25.07.2005, the 1st appellant knew very well that they could not increase the quantity of *goda* and file a case. Even in those circumstances, the prosecution evidence was that on one occasion on 26.07.2005 and two occasions on 27.07.2005, the 3rd appellant refused to accept money even though the money was offered on those three occasions. When the money was offered on July 26th, PW-1 stated that the 3rd appellant went away in his vehicle saying he wanted to go to "Medawachchiya Courts". on July 27, 2005, when the money was offered again, PW-1 did not accept it and told them to come down the road. Yet again, on the second occasion, on July 27, 2005, PW-1 stated

that he gave money but the 3rd appellant did not accept. Therefore, it is apparent even though PW-1 and PW-3, the decoy, together attempted to give money to the 3rd appellant on those three occasions, he refused in accepting the money. Ultimately, PW-1 and PW-3, the decoy, say that on 27.07.2005, the 3rd appellant accepted Rs.10,000/- in a by-road of the Anuradhapura Road. The 3rd and 1st appellants both knew very well by 26.07.2005 that they couldn't do anything even though the bribe was not given because they had finalized everything to file a court case by that date. If the 1st and 3rd appellants wanted to accept a bribe in such a situation, they would accept the money whenever it was offered, and the 3rd appellant would certainly not refuse to accept the money in this manner.

Another important matter to be considered is that on all three occasions when PW-1 offered money to the 3rd appellant and he refused, the decoy was present. On the fourth occasion also, the decoy was present. They travelled by motorcycle from one place to another. The reason for his refusal to accept money would be that he may have some suspicion. A suspicion could arise, when there was an unknown person (decoy) with PW-1 at all times. So, if the 3rd appellant asked PW-1 to come alone without the other person, there was some basis for not accepting the bribe and asking him to come again. Without expressing any objection to PW-1 accompanying the said unknown person (decoy), the 3rd appellant's request for PW-1 to come to various places from time to time is implausible.

The position taken up by the 1st appellant in his dock statement that on the fourth occasion also, when PW-1 and PW-3 attempted to give him money, he refused, and thereafter they forcibly offered it to him, and then he was arrested.

Regarding the dock statement of the 1st appellant, the learned Deputy Solicitor General stated that if a bribe was offered and the 3rd appellant did not want to take it, what could be expected from him is to file a complaint for bribery. Since he has not done so on three occasions, the learned Deputy Solicitor General contended that his dock statement is improbable. It is my view that when bribes are offered, there may be instances where complaints are made. However, it cannot be assumed that all police officers who do not want to take bribes will necessarily complain whenever bribes are offered. Hence, I regret that I am unable to agree with the contention that the 1st appellant's dock statement is improbable.

In the aforesaid circumstances, I am of the view that not only this dock statement could not be rejected but also it raises a doubt as to whether PW-1 together with bribery officers, forcibly offered money and attempted to show that their raid was successful because they had experienced three unsuccessful attempts.

In a criminal case, if the dock statement casts reasonable doubt on the prosecution case, the accused is entitled to an acquittal. In the case at hand, the defence version not only casts a reasonable doubt on the prosecution case but is also more probable than the prosecution version for the reasons stated above. Therefore, I hold that the acceptance of Rs.10,000/- has not been proved beyond a reasonable doubt. Hence, charges 4, 5, 6, and 7 fail.

Since the charges of solicitation of a bribe and the charges of acceptance of bribes and abetting to accept the bribe have not been proved beyond a reasonable doubt for the aforementioned reasons, I hold that the 1st, 2nd, and 3rd appellants are entitled to be acquitted of all charges against them.

Accordingly, the judgment of the High Court dated 08.03.2019, the convictions and the sentences imposed on the 1st, 2nd, and 3rd accused-appellants are set aside.

The 1st, 2nd, and 3rd appellants are acquitted of all the charges against them.

The appeals of the 1st, 2nd, and 3rd appellants are allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J (P/CA)

I agree.

JUDGE OF THE COURT OF APPEAL