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

In the matter of an Application for revision under and in terms of Section 11 (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 reads with Article 138 of the Constitution.

Court of Appeal Application
No; CPA/77/2022

High Court of Colombo
No; HCB-115/~~2022~~
2021

Commission to Investigate Bribery or Corruption,
No. 36, Malalasekera Mawatha,
Colombo 07.

Plaintiff

Vs.

1. Maldeniyage Don Upali Gunarathne Perera,
   No.372, Upper Karagahamuna,
   Kadawatha.

2. Hewa Rajage Wasantha Wimalaweera,
   No.59, Wilabada Road,
   Gampaha

3. Upali Senarath Wickramasinghe,
   No.300 G, Godagama Road,
   Athurugiriya

4. Sudeera Parakrama Jinadasa,
   No. 65, Model Town,
   Ratmalana

Accused

AND NOW

Maldeniyage Don Upali Gunaratne Perera,
No. 372, Upper Karagahamuna,
Kadawatha.

1st Accused-Petitioner

Sudeera Parakrama Jinadasa,
No. 65, Model Town,
Ratmalana

4th Accused- Petitioner

Vs.

Commission to Investigate Bribery or Corruption,
No. 36, Malalasekera Mawatha,
Colombo 07.

Plaintiff- Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Maithri Gunaratne PC with Ashan Nanayakkara and Migara Gunaratne for the Petitioners.
A. Navavi DSG with S. M. Sabry, ADL for the Respondent

Argued on	:	09.01.2023
Written Submissions on	:	06.02.2023 (Accused-Petitioners) 02.03.2023 (Respondent)
Decided on	:	04.04.2023

Iddawala – J

This is a revisionary application made on 18.08.2022 to expunge the proceedings and stay the proceedings of the High Court of Colombo case No. HCB/115/2022 where the learned High Court judge of Colombo has dismissed the preliminary objections of the 1st accused-petitioner and 4th accused-petitioner (*hereinafter referred to as the petitioners)* by the order delivered on 21.02.2022.

The facts of the case are briefly as follows. The petitioners along with two others have been firstly indicted on 28.09.2017 under 14 charges by the Commission to Investigate Allegations of Bribery or Corruption (*hereinafter referred to as the Commission).* Upon some accused being acquitted and the original lower court case pertaining to the 1st indictment being withdrawn by the respondent the 2nd indictment was filed against the petitioners and 2 other accused on 29.06.2021 on the same charges by the Commission. The charges include soliciting gratifications of 150,000,000 LKR and 125,000,000 LKR on different occasions. The instant application is pertaining to the case filed under the 2nd indictment and the preliminary objections filed against it. Herein the petitioners challenge the authority and capacity of the Attorney General to represent and prosecute on behalf of the Commission. This Court is pursuing to entertain each argument submitted by the petitioners and respondent in buttressing their case.

1. <u>Legislatively mandated proper forum</u>

It is firstly submitted by the petitioners that under Section 13 and 17 of the CIABOC Act of No. 19 of 1994 *(hereinafter referred to as the Act)* the Commission is barred from seeking assistance of the Attorney General. Section 13 (1) states that,

> *(1) An officer of the Commission authorized by the Commission or any other Attorney-at-Law specially authorized by the Commission shall be entitled to conduct the prosecution at a trial of an offence held in a High Court on an indictment signed by the Director-General, notwithstanding anything to the contrary in any written law.*

The CIABOC is a Commission which is instituted with 'independence' as a high priority. Looking at its composition, it consists of three members, two of whom shall be retired Judges of the Supreme Court or of the Court of Appeal and one of whom shall be a person with wide experience relating to the investigation of crime and law enforcement (See Section 2 (a) of the Act). The Commission as an institution is mandated to take all decisions collectively. The fact that the commissioners hold the position for 5 years and cannot be reappointed further exemplifies the measures taken to ensure the independence of this body. Under the Constitution of the country although the President appoints the members to the Commission it cannot be done according to her/his whims and fancies and is required to seek recommendations from the Constitutional Council. (Constitutional Council when the matter took place, later on Parliamentary Council and currently Constitutional Council after the 21st Amendment to the Constitution- *No person shall be appointed by President as the Chairman or a member of any Commissions specified in the Schedule to the Article 40B except on a recommendation of the Constitutional Council* – vide Article 40B of the Constitution.)

The Commission being an independent body is allowed to decide who to be obtained for prosecutions and the decisions of the Commission cannot be

questioned by any entity except by the proper action at the proper forum. Such proper action is indicated in Section 24 (1) of the Act which states that *"the jurisdiction vested in the Court of Appeal by Article 140 of the Constitution shall, in respect of applications in which relief is sought against the Commission be exercised by the Supreme Court and not by the Court of Appeal.* In multiple cases, such as **Director General of Commission to Investigate Allegations of Bribery or Corruption vs Lalith Kumara** LTA 06 of 2016 dated 23.02.2022**, B.A. Ranjan Somasinghe vs Director General of Commission to Investigate Allegations of Bribery or Corruption** CPA 02/2022 dated 11.01.2022 and **D.M. Rohini Ekanayake vs Director General of Commission to Investigate Allegations of Bribery or Corruption** CA PHC APN 76/21 dated 05.04.2022 and the **Director General Commission to Investigate Allegations of Bribery vs Amarawansha Abeysiri Munasinghe** CA HCC 308/2019 dated 31.01.2023**,** this Court has repeatedly established that an act of the Commission has to be challenged by way of writ application to the Supreme Court as mandated in Section 24(1) of CIABOC Act. This stance was reaffirmed in the recent Supreme Court case decided by a Bench comprising of five Justices of the Supreme Court presided by His Lordship Justice Malalgoda P.C. in **Indiketiya Hewage Kusumdasa Mahanama v Commission to Investigate Allegations of Bribery or Corruption** SC TAB 1A and 1B/2020 decided on 11.01.2023 which held that *"Any party who intends to challenge an indictment forwarded by the Director General of CIABOC on the basis that the CIABOC had failed to comply with Section 11 of the CIABOC Act, the said challenge could only be raised in an appropriate action filed before an appropriate forum.*" (At Page 44) (Emphasis added)

Challenging decisions of the Commission by way of a writ application at the Supreme Court is now solidified precedent. Thus, if the petitioner in challenging the decision of the Commission directing the Attorney General to prosecute should follow legislatively mandated process and file the petition in the appropriate forum.

2. <u>Interpretation of Section 13 of the CIABOC Act.</u>

Section 13 of the CIABOC Act stipulates the discretionary power vested within the Commission to determine whether to obtain the service of an officer authorized by the commission or an attorney-at-law authorized by the commission in order to conduct the prosecution on behalf of the Commission. Section 13 delineates two categories of persons who could be authorized by the Commission to conduct a prosecution on behalf of the Commission, namely: An Officer of the Commission authorized by the Commission; An attorney-at-law specially authorized by the Commission.

An officer of the Attorney General's Department retained for the purpose of prosecuting a case by the Commission would fall under the second category, i.e., an attorney-at-law specially authorized by the Commission. This reinforces the above discussed concept of discretion vested with the Commission to enlist an appropriate prosecutor to for the case at hand in furtherance of justice. In such a situation, the said counsel is proceeding on the directions and instruction of the Commission as opposed to that of the Attorney General. This is most clear in the event that an indictment is withdrawn during the proceedings of a bribery case. In such an instance, the officer of the Attorney General's Department appearing on behalf of the Commission cannot unilaterally initiate such a withdrawal. Such withdrawal must be sanctioned by the Commission. Moreover, in the event of a conflict of interest, the AG or any other party cannot appear on behalf of the Commission related to that particular matter and when such an event transpires, the AG or any other Officer appearing on behalf of the Commission is required to inform of such a conflict of interest to the Commission and abstain from participating in that matter.

As such, the Commission may decide to opt for an officer outside of the Commission if, *inter alia:*

- The Commission deems its own officers as ill-equipped to handle certain cases given their complexity and want of highly specialized expertise
- The Commission deems certain cases requires the expertise of another field related to the matter

- The unavailability of the officers of the Commission to entrust the matter at hand due to their engagement in another matter.

In the aforementioned instances or any other reason, the Commission deems fit, the Commission has the discretion to authorize any officer outside the Commission to prosecute on behalf of the Commission. This is in no way a derogation of the independence of the Commission but an exercise of the Commission's discretion. Although, the above-mentioned instances are not exhaustive, it sheds light on the practical realities, the Commission encounters when dealing with bribery and corruption.

Therefore, it is within the discretion of the Commission to decide whether to entrust the task to an officer of the Commission or to an outsider depending on the requirement at the time. If this Court were to hold that the retention of an officer of the Attorney General's Department by the Commission for the purpose of prosecution is illegal or otherwise irregular, it would amount to a restriction of the Commission's independence. In any event, as discussed previously, the instant forum of revisionary jurisdiction of the Court of Appeal is ill-equipped to pass judgment on the exercise of the Commission's discretion.

3. Application of the maxim *cursus curiae est lex curiae*

The learned DSG has iterated in his written submissions that it is *cursus curiae* for the Attorney General to prosecute behalf of the Commission. The maxim *cursus curiae* est lex curiae is defined by Broom's' Legal Maxims 10th Edition at page 82 *as "Every court is the guardian of its own records and master of its own practice and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it; for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience."* Prosecution by Attorney General under the sanction of the Commission is unquestionably convenient to the Commission due to the long-standing practice and this Court does not foresee it to be prejudicial or inconsistent with the law. In Halsbury's Laws of England 4th Edition Vol 10 at para 703, it is stated *that "A*

court exercising judicial functions has an inherent power to regulate its own procedure, save in so far as its procedure has been laid down by the enacted law, and it by cannot adopt a practice or procedure contrary to or inconsistent with rules laid down statute or adopted by ancient usage". In the Sri Lankan case of **Boyagoda v Mendis** 30 NLR 321 it was stated that *"where an enactment concerning procedure has received a certain interpretation – which has been recognized by the Courts for a very long period of years, the practice based upon such interpretation should be followed".* (In **SC Appeal No. 06/2012** S-C. minute dated 2012.06.15 is also stated similar view). As the Attorney General is acting under the directives of the Commission at all times in her/his role in prosecution the maxim is well applicable for the instant matter and hence, this Court is inclined to accept and buttress this view.

4. <u>The 'task of prosecution'</u>

Although this Court has established that this application has to be calibrated, in the benefit of judicial efficiency, this Court would like to express its views on some arguments petitioners have elaborated. The petitioners submit that as per the Hansard Report of the debate conducted on 04.10.1994 in the Parliament of Sri Lanka when the Bill was presented, then Justice Minister Prof. G. L. Pieris had stated that,

> "සමූහාණ්ඩුවේ උසාවිවලට තමයි ඒ නඩුකරය ඉදිරිපත් කිරීමට පුළුවන් වන්නේ. ඒ අවස්ථාවේදී ඒ නඩුකරය අධිකරණය හමුවේ ඉදිරිපත් කිරීමට කොමිශන් සභාවට සිදුවෙනවා - the task of prosecution. නීතිපති දෙපාර්තමේන්තුව ඒ සම්බන්ධයෙන් කිසිම ක්‍රියාවක් කරන්නේ නැහැ..." (Page No. 284 – Document marked <u>Q8</u> in the brief)

Upon perusing the full text of the said Hansard, it is plainly clear that the legislative intent does not resort to impose stern obstructions to the Attorney General's Department in being involved with CIABOC matters, but it has rather mandated the CIABOC to take the initiative and direct. Further, in comparison to the previous Bribery legislations which endowed more powers to the Attorney

General who originally had the power to conduct all investigations and institute proceedings, the present legislation has clearly transferred such powers to the Commission and has empowered it to conduct investigations and prosecutions to ensure its independence. However, it does not downright bar the Commission from resorting to the Attorney General's Department for prosecutions or assistance. The Act has rather placed the Attorney General if assistance is sought by her/him under the purview of the Commission and has mandated to act under the directives of the Commission.

5. Section 24B of the Commissions of Inquiry (Amendment) Act, No. 3 of 2019.

The learned President's Counsel for the petitioners further relies on the Commissions of Inquiry (Amendment) Act, No. 3 of 2019 Section 24D which states that "*the Commission to Investigate Allegations of Bribery or Corruption may solicit, receive and consider the advice or opinion of the Attorney-General or any officer representing the Attorney-General in giving effect to the provisions of sections 24A, 24B, or 24C."* The petitioners' contention is that the amendment has only mandated the Attorney General to advise but not to prosecute. However this Court would like to emphasize Section 24B of the same legislation which mentions that, "*notwithstanding anything to the contrary in the Commission to Investigate Allegations of Bribery or Corruption Act or any other written law, the Commission to Investigate Allegations of Bribery or Corruption may, if it deems appropriate, forward the material collected and received under section 24A to the Attorney-General or to any other authority to take any appropriate action under any other written law.*"

Therefore, it is farfetched for the petitioner to rely on implications of Section 24D when 24B clearly depicts the role of Attorney General in taking appropriate actions for matters forwarded by the Commission.

6. <u>The precedent set by Land Reform Commission v. Grand Central Limited</u>

In the landmark judgment of **Land Reform Commission v. Grand Central Limited** [1981] 2 Sri. L.R. 147 (CA), [1981] 1 Sri. L.R. 250 (SC) it was established that the Attorney General cannot appear in his private capacity *viz* appearing as a private counsel and can only appear in his official capacity as Attorney General. At the Supreme Court, it was iterated by His Lordship Chief Justice Samarakoon Q.C. that,

"……. the Attorney-General of his Country is the leader of the Bar and the highest Legal Officer of the State. As Attorney-General he has a duty to Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. It is for that reason that all Courts in this Island request the appearance of the Attorney- General as amicus curiae when the Court requires assistance, which assistance has in the past been readily given. That image will certainly be tarnished if he takes part in private litigation arising out of private disputes. I cannot but agree with the judgment of the Court of Appeal that there are constraints on the Attorney-General engaging in private practice in the civil law as well as the criminal law. It is regrettable that the State has sought to act counter to tradition, (prudence and propriety) in granting the Attorney-General and his law officers the right of private practice. Justice is the loser thereby. No man can serve two masters. For either he will hate the one and love the other: or he will hold to one and despise the other. No Attorney-General can serve both State and private litigant".

This Court believes that the instant matter can be clearly distinguished with the circumstances of the Land Reform Commission matter. In the above case when the then Attorney General S. Pasupathi was inquired as to in which capacity he appeared, he stated that he appeared in his private capacity of an Attorney-at-Law. The petitioners have mistaken the ratio of these lines of judgment which barred the Attorney General from appearing in his personal capacity. It is unambiguously well settled law that the Attorney General cannot appear for private parties; however, the persistent matter discussed at above cases was

whether the Attorney General can appear in his "personal capacity" for the matters of government bodies or agencies. As quoted above the Court has maintained the line of precedent that the Attorney General cannot appear in personal capacity. However, it is unclear in the instant matter whether the petitioners are contending that the Attorney General appeared in his personal capacity as an Attorney-at-Law disregarding his official status or whether he prosecuted in his official capacity as the Attorney General.

Nevertheless, the petitioners contend in the written submissions that under Section 12 of the CIABOC Act it is only the Director General of the Commission that can institute proceedings under the Act. This is well settled law and has no necessity to be discussed in the instant application as the Commission has properly directed to institute proceedings through the Director General as evident from submissions made in the present matter. Instead, it is the prosecution by the Attorney General that is at issue here.

7. <u>Conclusion.</u>

Given the range of powers and independence cast upon the Commission, this Court decides that the Commission has the discretion to obtain services of the Attorney General solely for the purpose of 'prosecution', when the need arises under Section 13 (1) of the CIABOC Act. At certain instances Attorney General may have better capacity to prosecute on certain bribery matters, and at such instances Commission as an independent body should not be deprived of the opportunity to resort to the Attorney General. Restricting such instances are not provided for by the law or precedent and imposing such restrictions would undermine the Commission's independence and autonomy. Furthermore, offences related to bribery and corruption are not mere private disputes but ones with greater impact on the State and the public at large. In such cases, the courts have a vital role to play, in ensuring justice is served while also maintaining a balance between the rights of the accused and the rights of the general public. The judiciary must ensure that the accused's rights to a fair trial are protected, while also ensuring that the interests of the society are not compromised. The Attorney General, more than any other Attorney-at-Law, is mandated to act in

public interest. Thereby there is no reason to bar the Attorney General from prosecuting on behalf of the Commission where at all times the Attorney General is required to act under the directions of the Commission without making any autonomous decisions when prosecuting. The verbiage does not insinuate any kind of hierarchical superiority between the two offices; instead, it underscores the fact that both institutions are autonomous in their own right and thus, it is imperative for them to uphold their independence and integrity with utmost sincerity.

Based on the aforementioned conclusions, I find no justification for intervening with the order made by the learned High Court Judge.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL