

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

In the matter of an application for Leave to Appeal in terms of Section 15 of the Judicature Act read with Section 331 of the Code of Criminal Procedure Act No. 15 of 1979, Section 13 (2) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994.

Court of Appeal No:

CA/LTA/0006/16

The Director General,

Commission to Investigate Allegation of
Bribery or Corruption.

COMPLAINANT

Vs.

High Court of Colombo

Case No: B/1392/02

Weerasekara Aarachchilage Lalith Kumara

21/185, Araliya Uyana,

Depaanama, Pannipitiya.

ACCUSED

AND NOW BETWEEN

The Director General,
Commission to Investigate Allegation of
Bribery or Corruption.

COMPLAINANT-APPELLANT

Vs.

Weerasekara Aarachchilage Lalith Kumara
21/185, Araliya Uyana,
Depaanama, Pannipitiya.

ACCUSED-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Anusha Sammandapperuma, Assistant Director
Legal for the Complainant-Appellant
: Rienzie Arsecularatne, P.C. with Chenelle Fernando
for the Accused-Respondent

Supported on : 11-05-2023

Written Submissions : 10-02-2022 (By the Complainant-Appellant)
: 10-02-2022 (By the Accused-Respondent)

Order on : 13-06-2023

Sampath B. Abayakoon, J.

This is an application by the Director General of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as the complainant) seeking leave to appeal in terms of Article 138 and 139 of The Constitution read with section 15 of the Judicature Act, section 331 of the Code of Criminal Act No. 15 of 1979 and section 13 (2) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994.

This application emanates from the judgement of the learned High Court Judge of Colombo pronounced on 07-09-2016, where the accused-respondent (hereinafter referred to as the accused) was acquitted by the learned High Court Judge.

The complainant indicted the accused on 8 counts in terms of the Bribery Act. The allegation against the accused was that, he being a police officer, demanded a gratification of Rs. 10000/= from two persons on 2nd February 1997, and accepted Rs. 2000/= and a gold chain worth Rs. 7500/= in that process. Accordingly, he was charged for having committed offences punishable in terms of section 16 (b) and section 19 (c) of the Bribery Act.

After trial, the learned High Court Judge found that the prosecution has failed to prove the charges against the accused beyond reasonable doubt and acquitted the accused accordingly.

It is against the said acquittal; the complainant is now seeking leave to appeal.

This Court heard the submissions of the learned Counsel for the complainant in support of the application for leave to appeal, and had the opportunity of listening to the learned President's Counsel who represented the accused at the trial in opposing the application of the complainant.

In the petition before this Court, the complainant has urged the following grounds as reasons for seeking leave to appeal against the judgement amongst

other grounds of law and facts and of mixed questions of fact and law, which may be urged by the Counsel at the hearing of this application.

1. The learned High Court Judge erred in that the amended indictment had not been read out to the respondent thereby, violating the respondent's rights.
2. The learned High Court Judge erred by concluding that the investigation conducted by the Bribery Commission did not warrant the Director General to file an action.
3. The learned High Court Judge erred in concluding that the source of the complaint, viz V5 had not been investigated.
4. The learned High Court Judge erred in not considering the provisions of section 24 of the Bribery Act.

In her submission before the Court, apart from the above grounds, the learned Counsel for the complainant urged that the learned High Court Judge failed to consider the provisions of section 24 of Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 as well.

It was her contention that the learned High Court Judge was misdirected as to the relevant law, as well as facts, in this matter when it was decided to acquit the accused.

It was her position that the indictment was filed based on an investigation carried out by the Bribery Commission based on an open inquiry, based on a petition received by the Commission. In other words, this was not a raid carried out by the Bribery Commission upon receiving a complaint of demanding a bribe or a solicitation, but an inquiry carried out after receiving a petition that such a bribe or a gratification was demanded and obtained on a previous instance.

It was also the position of the learned Counsel that there were no contradictions or omissions of the evidence of PW-01 and 02 who are the persons alleged to have been the victims of the alleged offences of bribery, and the learned High

Court Judge had failed to draw his attention in that regard, and had misdirected himself in not accepting their evidence as reliable and truthful.

Pointing to the judgement where the learned High Court Judge had commented on the investigations that had been carried out by the Bribery Commission officials, it was her position that since this was an open inquiry, rather than a raid carried out by the Bribery Commission, the officials who investigated the matter are not essential witnesses to prove the case against the accused.

It was her position that the view expressed by the learned High Court Judge, that the alleged promise by the accused in granting bail to a suspect was not within the purview of the accused and therefore, there was no basis for a charge on that basis against the accused was also a misdirection considering section 24 of the Bribery Act.

It was stressed that Section 24 of the Bribery Act stipulates that the acceptor of gratification to be guilty notwithstanding that purpose not carried out or he did not actually have the power, right or opportunity to so to do.

For the above reasons urged, it was the view of the learned Counsel for the complainant that the application for leave to appeal should be granted.

It was the view of the learned President's Counsel that there exists no basis to grant leave to appeal against the impugned judgement. He pointed out that apart from considering the legal aspects, the learned High Court Judge has well considered the evidence made available to the Court and had come to a correct finding to acquit the accused appellant as the prosecution has failed to prove the charges beyond reasonable doubt against him.

Having considered the submissions made by the learned Counsel on behalf of the complainant as well as the accused, and the facts and the circumstances relating to this case, it is the view of this Court, that facts as well as the law needs to be considered in order to determine whether there is a basis to grant leave to appeal from the impugned judgement of the learned High Court Judge.

In the case of **Attorney General Vs Baranage (2003) 1 SLR 340**, it was stated by **Amarathunga, J.**,

“In an appeal against an acquittal on a question of fact the prosecution has a heavy burden to discharge. Such an appeal could only be justified if there had been a palpable misdirection by the judge when considering the facts of the case which would be demonstrated to the wrong on the very face of the record and which had in effect resulted in a miscarriage of justice.”

Although this application to leave for appeal from the judgement is based on facts as well as the questions of law raised by the learned Counsel for the complainant, it is the view of this Court that the underlying principle would be the same.

It is the considered view of this Court that even though there may be misdirection's as to the law or facts for that matter, such misdirection's has to be material misdirections and there should be a basis to conclude on the face of it that if such misdirections did not occur, there would have been a strong possibility of securing a conviction against the accused.

This is an offence alleged to have been committed on 2nd February 1997. According to the prosecution evidence, it appears that a petition has been sent to the Bribery Commission one month after the alleged incident, alleging that the accused who was the Officer-in-Charge of the Laggala police station has taken money and jewellery and some other items as a gratification.

It appears that the Bribery Commission had conducted an inquiry based on that petition, and indicted the accused on eight counts for offences allegedly committed under the Bribery act.

The evidence adduced in the Court shows that the officials of the Bribery Commission have commenced recording statements from the witnesses some seven months after the alleged incident. In the indictment, the prosecution has listed 8 witnesses and 4 items of evidence. The indictment has been tendered to

the Court on 26th July 2002, and the trial against the accused has commenced on 22nd July 2004. However, after the conclusion of PW-01's evidence, it appears that the trial has commenced de novo before the succeeding Judge on 26-08-2008 and PW-01 has been recalled.

The facts relating to the action can be summarized, in brief, in the following manner.

According to the evidence of PW-01 and 02, they were serving army soldiers during the time relevant to this incident and were carrying some wooden furniture and wooden planks in a lorry driven by another person. There had been a lorry assistant as well, when the officers of Laggala police stopped this vehicle in front of the police station and detained it for transporting timber without a valid permit.

According to PW-01 and 02, they were detained near the police station until the Officer-in-Charge who is the accused in this case arrived, but later one police officer came to the lorry and told them to go. However, they had been detained at another police roadblock, arrested, and taken to the Laggala police where the accused had allegedly demanded a bribe of Rs. 10000/= to release them on bail. It is alleged that PW-01 and 02, gave money and a gold necklace in order to obtain favours in relation to the charge against them. They had been produced before the Magistrate and released on bail as the police had informed the Court that they are not objecting to bail.

It appears that subsequently, PW-01 and 02 along with the driver and the lorry assistant had been charged before the Magistrate Court for illegal transportation of timber, and on a later date, the lorry assistant had pleaded guilty to the charge and other 3 accused including PW-01 and 02 had been discharged. When this happened, the accused was not the Officer-in-Charge of the police station.

It also reveals that although PW-01 and 02 had portrayed that they were taking some furniture and wooden planks for their domestic use, they were wearing uniforms similar to that are being used by army soldiers when the arrest was

made. The position taken up by PW-01 and 02 were that when they asked the police to release them, the police officers of Laggala police asked them to go, however, they were arrested at another police roadblock and brought back to Laggala police.

In their evidence, PW-01 and 02 had admitted that the accused had informed their relevant army units that they were apprehended while transporting timber without a permit. PW-01 had admitted that as a result, he was subjected to a disciplinary inquiry and his seniority was downgraded as a punishment. Both of them had claimed that they were unaware as to who sent the petition against the accused. However, it had been transpired at the trial that the investigators had traced the person as a police officer called Priyantha, and in fact, a statement had also been recorded from him.

It is therefore clear that the two witnesses namely PW-01 and 02 who were the alleged victims of this Bribery were not innocent victims. They had been apprehended by police while committing a crime. It is undisputed that they were arrested and produced in Court and charged accordingly. The evidence also establishes that the accused was instrumental in reporting them to their relevant army units. Therefore, it is the view of this Court that any evidence given by them has to be carefully scrutinized by a trial Court to determine whether their version of events are probable, credible and trustworthy to rely solely on their evidence and convict a person.

In the judgement, the learned High Court Judge has considered the facts of the matter as well as the weaknesses of the prosecuting authority in conducting investigations in this regard. The learned High Court Judge has well considered the probability factor of the story of the two witnesses and had come to a conclusion that there is a question mark whether this was an incident actually occurred or an attempt to implicate the accused because of the difficulties PW-01 and 02 had to face due to the accused's action of reporting the offences committed by them to their higher officials in the Army.

He has well considered the initial B-report tendered to the Court in this regard, where the prosecution had relied to show that the B report had been intentionally changed to say that rather than objecting to bail, sought the Court to decide on the matter. It was the view of the learned High Court Judge that there is no direct evidence to establish that it was a deliberate act of the accused as he was not the person who has produced the suspects in Court.

In this matter, the investigating officers have not given evidence to substantiate their investigations. The learned High Court Judge has found that it was not acceptable and has determined that the investigations regarding the charges had not been satisfactory.

I am unable to agree with the contention of the learned Counsel for the complainant that it was not necessary for investigating officials to give evidence in a prosecution on an open inquiry conducted by the Bribery Commission. I am of the view that not giving evidence and explaining the investigations conducted was a major drawback for the prosecution's case against the accused, as viewed by the learned High Court Judge. It had prevented getting any doubts cleared as to the evidence presented to the Court.

It is trite law that suspicious circumstances do not establish guilt against an accused and any reasonable doubt should be held in favour of an accused.

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”

Although it was the contention of the learned Counsel for the Complainant that the learned High Court Judge was misdirected when it was determined that the allegation against the accused was for obtaining a gratification for something he

cannot do and it would not warrant a charge against the accused, I am in no position to agree.

As correctly pointed out by the learned Counsel for the complainant, acceptor of gratification can be found guilty even if the intended purpose were not carried out or achieved.

However, careful scrutiny of the reasoning of the learned High Court Judge demonstrates that it was not his view as contended by the learned Counsel for the complainant. It is clear that the learned High Court Judge has analyzed the evidence in such a manner to consider the probability of the story of the prosecution witnesses and not any other view in mind.

I am of the view that the complainant has failed to establish a *prima facie* basis to this Court that an appeal against the judgement of the learned High Court Judge would be successful for the reasons considered above.

Accordingly, leave to appeal against the judgment is refused.

The Registrar of the Court is directed to communicate this order to the relevant High Court for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal