

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

In the matter of an application for
revision under Article 138 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka, read with section
364 of the Code of Criminal Procedure
Act No. 15 of 1979.

C A (PHC) APN / 55 / 2018

High Court of Colombo

Case No. H C B 2052 / 2015

Senanayaka Ganepi Mudiyansele
Palitha Mohanlal Senanayaka
Medilanda Walawwa,
Narangoda,
Pitagaldeniya Junction,
Kegalle.

-Vs-

ACCUSED - PETITIONER

Director General

Commission to Investigate Allegations of

Bribery or Corruption,

No. 36,

Malalasekara Mawatha,

Colombo 07.

COMPLAINANT - RESPONDENT

Before: P. Padman Surasena J (P / C A)

Arjuna Obeyesekere J

Counsel : Rienzie Arasacularatne PC for the Accused - Petitioner.

M L Y K Udawela for the Complainant - Respondent.

Supported on: 2018 – 06 - 14.

Decided on : 2016 - 07 - 04.

ORDER

P Padman Surasena J

The Accused Petitioner in this case has been indicted by the Director General of the Commission to Investigate Allegations of Bribery or Corruption in the High Court of Colombo under four counts. He is alleged to have committed offences punishable under section 19 (b) and 19 (c) of the Bribery Act.

On the date of the trial, the Accused Petitioner had raised a preliminary objection against the maintainability of the case on the basis that he is not a public servant within the meaning of the Bribery Act.

Letter of appointment of the Accused Petitioner shows that the Sri Lanka Insurance Corporation Ltd. (Hereinafter sometimes referred to as SLICL) has enrolled him to the panel of 'Loss Adjusters'. Terms of employment set out in the said appointment letter specifies inter alia;

- i. that he is not an employee of SLICL,

- ii. that he is an independent contractor,
- iii. that the said enrollment shall not preclude him from carrying out the work of a Loss Adjuster for any other insurance company,
- iv. that the assignment of work to him shall be at the sole discretion of SLICL.

It is on the above terms of service that the Accused Petitioner takes up the position that he is not an employee of the Sri Lanka Insurance Corporation Ltd. (SLICL).

In the instant case the charge relates to an incident of soliciting and accepting a bribe of Rs. 50,000/= from one Kaluarachchige Premaratne for the performance of an official Act (i.e. to furnish the report pertaining to the claim submitted by said Premaratne to the SLICL).

It must be observed that the charges framed against the Accused Petitioner under section 19 (c) (i.e. the 2nd and 4th counts in the Indictment) do not allege the Accused Petitioner to be an employee of SLICL.

The charges framed under section 19(b) of the Bribery Act (i.e. the 1st and 3rd counts in the Indictment) also do not allege the Accused Petitioner to be an employee of SLICL.

Therefore, the question whether or not the Accused – Petitioner is an employee of the SLICL, simply does not arise for determination in the instant case.

It would be prudent at this stage to turn to the relevant provisions under which the charges have been framed against the Accused - Petitioner. It is under section 19 that the charges have been framed. It is as follows;

A person -

(a). who offers any gratification to a public servant as an inducement or a reward for that public servant's performing or abstaining from performing any official act, or expediting, hindering or preventing the performance of any official act whether by that public servant or by any other public servant, or assisting, favouring, hindering or delaying any person in the transaction of any business with the Government, or

(b). who, being a public servant, solicits or accepts any gratification as an inducement or a reward for his performing or abstaining from performing

any official act or for such expediting, delaying, hindering, preventing, assisting or favouring as is referred to in paragraph (a) of this section, or (c). who, being a public servant, solicits or accepts any gratification, shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding five thousand rupees;

When one examines the above section it becomes clear that the offences described in that section could be committed by a 'public servant' the meaning of which has been defined in the Act.

What arises for determination in this case by the High Court is the question whether or not the Accused Petitioner falls under the category of a "Public Servant" within the meaning of the Bribery Act and not the question whether or not the Accused - Petitioner is an employee of SLICL.

Thus, one of the ingredients that the prosecution has to prove is the fact that the accused Petitioner is a public servant within the meaning of Bribery Act.

Section 90 of the Bribery Act has defined the term 'public servant' as follows.

" public servant" includes every officer, servant or employee of the Crown, or of any local authority, or of any scheduled institution, every juror, and every arbitrator or other person to whom any cause or matter has been referred for decision or report by any court or by any other competent public authority;

According to the above section any other person to whom any cause or matter has been referred for decision or report by any court or by any other competent public authority has been categorized as falling under the category of public servant for the purposes of the Bribery Act.

The Insurance Corporation has engaged the services of the Accused Petitioner as a loss adjustment officer whose duty is to submit reports to SLICL.

It is to be noted that a "scheduled institution " means any such board, institution, corporation or other body as is for the time being specified in the Schedule to this Act.

There is no dispute that the Insurance Corporation is a scheduled institution in terms of the Bribery Act.

In these circumstances, this Court is of the view that section 90 has encompassed the persons who are entrusted by public authority to decide and or report matters referred to such persons by the relevant Public authority for decisions or for reports. It stands to reason that such persons should fall under section 90 of the Bribery Act. Further, the wordings in section 90 is clear enough to infer that position.

This Court is also of the opinion that since this is really a question of fact the best course of action would be for the trial Judge to decide this issue at the appropriate time after the evidence in that regard is led before Court.

This Court takes the view that it is the raising of the instant preliminary objection by the Accused Petitioner, which had prompted the learned High Court Judge to rule on the matter at the very commencement of the case even before the trial could be commenced.

This Court observes that what the prosecution is obliged to prove in the instant case is not really whether the accused Petitioner is an employee of SLICL or not, but the fact that the Accused Petitioner falls under the

definition of the term 'public servant' as has been defined in section 90 of the Bribery Act.

The burden to prove the charges beyond reasonable doubt would be fairly and squarely upon the Prosecution. Until that is done, the accused must be presumed to be not guilty of the charges. This pre-supposes that the prosecution must prove all ingredients of the offence with which the Accused - Petitioner has been charged.

In these circumstances, this Court is of the view that the trial Judge should have refused to entertain the Preliminary objection raised on behalf of the Accused - Petitioner as that is not the occasion to decide that issue.

This Court observes that the prayer of the Accused - Petitioner is to set aside the order of the learned High Court Judge dated 2017-12-15 and for this Court to hold that the Accused Petitioner is not a public servant within the meaning of the Bribery Act and discharge the Accused Petitioner from further proceedings from this case.

For the foregoing reasons, this Court has no legal basis to grant the relief prayed for by the Petitioner.

Thus, this Court decides to refuse to issue notice on the Respondent. This application should stand dismissed.

We make no order for costs.

Application is dismissed.

PRESIDENT OF THE COURT OF APPEAL

Arjuna Obeyesekere J

I agree,

JUDGE OF THE COURT OF APPEAL