

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

In the matter of an Application for Special Leave
to Appeal from an order of the Court of Appeal in
terms of Article 128 of the Constitution

The Director General,
Commission to Investigate Allegations of
Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

Complainant

SC Appeal 103/ 2012

SC/SPL/LA/ 210/2011

CA 260/2007

HC Colombo case No. 1172/1996

Vs,

Imbulana Liyanage Dharmawardana,
No. 145/53, Walawuwatta,
Waliweriya.

Accused

And

Imbulana Liyanage Dharmawardana,
No. 145/53, Walawuwatta,
Waliweriya.

Accused- Appellant

Vs,

The Director General,
Commission to Investigate Allegations of
Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

Complainant-Respondent

And now between

The Director General,
Commission to Investigate Allegations of
Bribery or Corruption,
No. 36, Malalasekara Mawatha,
Colombo 07.

Complainant-Respondent-Appellant

Vs,

Imbulana Liyanage Dharmawardana,
No. 145/53, Walawuwatta,
Waliweriya.

Accused- Appellant-Respondent

Before: **Priyantha Jayawardena PC J**
 Vijith K. Malalgoda PC J
 Murdu N.B. Fernando PC J

Counsel: Dilan Ratnayake DSG, for the Complainant-Respondent-Appellant
 Shanaka Ranasinghe PC, with Niroshan Mihindukulasuriya for the Accused-
 Appellant-Respondent

Argued on **31.05.2018**

Decided on **14.12.2018**

Vijith K. Malalgoda PC J

The Director General, Commission to Investigate Allegations of Bribery or Corruption had filed a special leave to appeal application challenging the decision by the Court of Appeal in CA 260/2007 delivered on 17.10.2011.

As revealed before us, the said Commission to Investigate Allegations of Bribery or Corruption had forwarded an indictment against one Imbulana Liyanage Dharmawardana under section 23 A (3) of the Bribery Act (as amended)

The trial against the said accused Imbulana Liyanage Dharmawardana was taken up before the High Court of Colombo and at the conclusion of the said trial, the learned High Court Judge of Colombo had found the said accused guilty of the indictment against him and sentenced him as follows;

- 1) Four years Rigorous Imprisonment
- 2) Fine of Rs. 2500/- with a default term of six months
- 3) Further fine of Rs. 12, 000, 00/- under section 26 (a) of the Bribery Act (as amended) with a default term of 5 years Rigorous Imprisonment.

(Jail terms to run consecutively)

Being aggrieved by the said conviction and sentence, the accused preferred an appeal to the Court of Appeal and the said appeal was taken up for argument on 16th June 2011. During the said appeal it was revealed that the documents relied upon by the prosecution in the High Court Trial and was marked and produced during the trial as P-1 to P-23 were not available to be examined both by the counsel and court since the said documents had been misplaced from the High Court Registry. During the argument before the Court of Appeal, the counsel for the accused-appellant took up a preliminary objection, that he was unable to effectively prosecute the appeal due to the absence of the marked documents.

In this regard the learned counsel for the Accused-Appellant-Respondent had taken up the position before the Court of Appeal that they would not object if the prosecution, in the very least, tendered

photocopies of the documents that are missing, but the prosecution failed to submit even photocopies of the lost documents before Court of Appeal.

The Court of Appeal by its order dated 17.10.2011 held that the trial court's failure to send all the documents to Court of Appeal has violated the undeniable rights of the appellant including his right of appeal and allowed the appeal by acquitting and discharging the Accused-Appellant.

Aggrieved by the said judgment the Complainant-Respondent-Appellant sought special leave to appeal from the said judgment and when it was supported before the Supreme Court on 08.01.2012, court granted special leave on the questions of law identified in paragraph 18 (a) to (e) along with a further question identified during the support stage.

The questions of law on which the special leave was granted can be summarized as follows;

- a) Did the Court of Appeal err in law by holding that, the failure of the trial court to send all documents to the Court of Appeal violated the applicant's right of appeal in the circumstances of the present case?
- b) Did the Honourable Court of Appeal err in law holding that productions referred to in the decision of ***Leelananda vs. Ernest de. Silva 1990 (2) Sri LR 237*** referred to real evidence and not to documents?
- c) Did the Court of Appeal err in law by holding that the Court of Appeal does not have the power to dispense with the examination of all or any of the documents those that are not admitted by the contending parties?
- d) Did the Honourable Court of Appeal fail to consider the learned High Court Judge's judgment and the proceedings to ascertain, as to what documents and contents thereof were admitted in the course of the trial?

- e) Did the Honourable Court of Appeal err in law by holding that, the appellant had disputed documents P-17 to P-22 and that, there are certain deliberate false statements in the written submission of the state especially where the state has taken up the position that all the lost documents were admitted by the defence at the trial?
- f) In the circumstances of the case, did the learned Judges of the Court of Appeal err in upholding the preliminary objection raised by the learned President's Counsel for the Respondent?

As submitted on behalf of the Complainant-Respondent-Appellant, the decision to acquit and discharge the Accused-Appellant-Respondent by the Court of Appeal by its order dated 17.10.2011 was arrived by only considering the preliminary objection raised on behalf of the Accused-Appellant-Respondent without going into the merits of the case and therefore it is premature for the Court of Appeal to reach the said decision. In support of the above contention the learned Deputy Solicitor General who appeared for the Complainant-Respondent-Appellant submitted that;

- a) During the trial before the High Court, prosecution led the evidence of two witnesses namely G.A. David Singho Authorized Officer from the Commission to Investigate Bribery and Corruption and N. Sooriyakumara Director Finance of Sri Lanka Customs.
- b) During their evidence documents from P-1 to P-23 were marked by the prosecution.
- c) Out of the said documents, documents P-1 to P-16 and P-23 were admitted by the defence and therefore no additional witnesses were summoned to prove those documents.
- d) At the conclusion of the prosecution case, an application was made on behalf of the accused under section 200 of the Code of Criminal Procedure Act to discharge the accused.

- e) The said application made under section 200 of the Code of Criminal Procedure Act was rejected by the Learned High Court Judge and defence was called from the Accused above named.
- f) The Accused elected to give evidence from the witness box and was subject to cross examination by the prosecution counsel.
- g) At the end of both the prosecution and defence cases, both parties moved to make oral submissions as well as to produce written submission.
- h) On 22.02.2007 both counsel made oral submissions. The prosecuting counsel had produced the marked document namely P-1 to P-23 in open court once he conclude his oral submissions.
- i) The learned Trial Judge delivered his order on 23.03.2007 convicting the Accused-Appellant. In the said order the learned Trial Judge had considered all the documents produced at the trial by making reference to the documents and producing the contents of the said documents in his judgment.

and argued that the non-availability of the marked documents at the appeal stage is not per-se an impediment to consider the appeal unless it involves interpretation of the said documents. It was further argued by the learned Deputy Solicitor General that the function of the Appellate Court is not to engage in an examination of the productions but to consider whether the trial judge applied the correct standard and drawn correct inferences on the facts as found by the trial judge.

When considering the material placed before this court it is observed that the Accused-Appellant-Respondent had faced charges under section 23A (3) of the Bribery Act for acquiring assets in excess

of his known income. When establishing the said charge the prosecution had mainly relied on number of documents to establish the accused's known income as well as acquired assets.

Unlike in any other trial before a trial court, an Indictment forwarded under section 23(A) (3) of the Bribery Act depend largely on documentary evidence, to establish the known income as well as the known assets and liabilities of the accused.

As revealed from the evidence placed before the trial court as well as from the judgment of the trial judge, it appears that there was no challenge by the accused with regard to the known assets and/or the known expenditure of the accused for the relevant period, and infact the documentation with regard to known assets and liabilities were admitted and produced before the trial court. The said admitted documents namely P-1 to P-16 had been referred to by the trial judge in his judgment at page 4 to 8.

In addition to the above admissions, with regard to the known assets and/or known expenditure, a further admission was recorded with regard to P-19 which indicted the salaries, overtime and traveling money received by the accused during the period relevant to the indictment.

Rest of the documents produced at the trial was not admitted by the accused and the said documents are as follows;

- P- 17 Affidavit of the accused made on form 5 of the Bribery Act
- P-18 Declaration of assets and liabilities of the accused made under the Declaration of Assets and Liabilities Act
- P-20 Rewards received by the accused from Sri Lanka Custom
- P-21 Show cause notice issued to the accused
- P-22 Show cause affidavit by the accused

During the arguments before this court the learned President's Counsel who represented the Accused-Appellant-Respondent whilst stressing the importance of the availability of documents at the appeal stage and submitted that the prosecution had relied on the said documents when securing a conviction before the High Court and the failure to produce them or any one of them in appeal would seriously prejudice the appellants rights during the argument before Appellate Court since the documents referred to above go to the very root of the conviction of the Accused-Appellant-Respondent.

I do agree with the learned President's Counsel's above submission that the documents referred to above had played a major role in the trial before the High Court and would be relevant to the appeal but reluctant to agree when the learned Counsel submitted that the appellant would be seriously prejudiced for non-availability of productions at the appeal stage.

As referred to above in this judgment, the decision to allow the appeal by the Court of Appeal was reached on a preliminary objection raised by the learned Counsel for the Accused-Appellant on the non-availability of documents marked during the High Court trial without considering the main appeal before the said court. However when reaching the said decision their lordships of the Court of Appeal had considered the importance of one such document namely document produced marked P-20 in the following manner,

“Counsel for the Appellant contended that, out of the said documents P-20 is of utmost significance as it is clear from the evidence that the document did not set out the full particulars of the rewards the accused had obtained during the relevant period. At page 325 of the brief the Customs official who gave evidence had stated in evidence that there could have been other rewards granted to the Appellant other than those contained in the document. He has stated in his evidence that P-20 is not comprehensive and did not contain

particulars of all the rewards granted to the Appellant. The particular piece of evidence was corroborative of the evidence of the Appellant. The Appellant in his evidence had stated that the said document contained only a part of the rewards that were granted to him by the Sri Lanka Customs. According to the evidence of the customs officer (at page 325) it is apparent that P-20 does not reflect all the rewards granted to the Appellant hence failure on the part of the prosecution to produce an exhaustive and comprehensive list of rewards casts a serious doubt as to the correctness of the amount contained in the indictment. In this background P-20 is of paramount importance to this court in arriving at a fair decision.”

I cannot understand as to how their lordships of the Court of Appeal made the said observation without going through the merits of the main appeal before the Court of Appeal since the Learned Trial Judge had considered each and every document produced at the trial in his judgment. As further observed by this Court, their lordships of the Court of Appeal had misdirected themselves when they come to the said conclusion without giving due consideration to the Judgment pronounced by the trial judge.

Section 331 of the Code of Criminal Procedure Act No 15 of 1979 had provided an accused person to lodge a leave to appeal application before the High Court, and subsection (f) of the section 331 (4) provides to contain in the said appeal “a plain and concise statement of the grounds of Appeal”.

As further observed by this court, right to appeal is guaranteed in a fair trial and Sri Lanka being a state party to the International Covenant on Civil and Political Rights (ICCPR) had recognized the provisions of the said covenant by introducing the said provisions into our legislation. Section 4 (2) of the ICCPR Act No 56 of 2007 had guaranteed the right of appeal as follows;

- 4 (2)** Every person convicted of criminal offence under any written law, shall have the right to appeal to a higher court against such conviction and any sentence imposed.

However when considering the preliminary objection raised before the Court of Appeal, their lordships whilst drawing their lordships attention to the case of ***Wijerathne V. Republic of Sri Lanka*** **78 NLR 49** had discussed the principle of a fair trial.

As submitted by both parties before this court, the Accused-Appellant before the Court of Appeal had not raised any complaint of depriving his rights before the trial court, either guaranteed under the provisions of the Code of Criminal Procedure Act No. 15 of 1979 or guaranteed under section 4 (1) of the ICCPR act No 56 of 2007.

In the said circumstances, I see no relevance of the said decision to the appeal before the Court of Appeal.

Their lordships of the Court of Appeal had further considered the decision reported in 1990 2 Sri LR 237 relied on behalf of the state and observed the difference between a “productions” and a “document” but failed to consider the principle laid down in the said decision to the effect that, “In appeals this court has to consider whether the trial judge applied the correct standard and drew the correct inferences on the facts as found by him.”

As observed by me, the said principle identified in the case of ***Leelananda V. Earnest de. Silva reported in 1990 (2) Sri LR 237*** had clearly identified the role of an Appellate Judge in Appeal and for the Appellate Court to consider the above, they should hear the main appeal. When taking up the main appeal, the Appellate Court should always consider the relevancy of the documents to the case in hand. If the trial judge had failed to draw the correct inference on facts before him, the

documents before the trial court plays a major role in the appeal before the Appellate Court. However for the Appellate Court to consider whether the trial judge had failed to draw the correct inference on the facts before him, the Appellate Court should hear the main appeal and then only the Appellate Court can consider the importance of the documents which are not before court at the Appeal stage.

In the said circumstances, it is not correct for the Appellate Court to conclude that an accused person is deprived of a fair trial, when the documents relied at the trial stage are missing without considering the importance of the said document for the appeal before them.

In the said circumstances, I answer the questions of Law raised in this appeal in favour of the Complainant-Respondent-Appellant and conclude that their lordships of the Court of Appeal had erred in law when they upheld the preliminary objection raised on behalf of the Accused-Appellant-Respondent.

I therefore set aside the judgment of the Court of Appeal dated 17.10.2011 and direct the Court of Appeal to hear the main appeal in this case.

Appeal allowed.

Judge of the Supreme Court

Priyantha Jayawardena PC J

I agree,

Judge of the Supreme Court

Murdu N.B. Fernando PC J

I agree,

Judge of the Supreme Court

