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

In the matter of an Appeal under and in terms of S. 12B of the Judicature Act No.2 of 1978 as amended by the Judicature (Amendment) Act, No. 9 of 2018 read with the provisions of the Code of Criminal Procedure Act No. 15 of 1979 as amended

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

Complainant

SC TAB 1A and 1B/2020
High Court Trial-at-Bar Case No.
HC/PTB/01/04/2019

Vs,

Indiketiya Hewage Kusumdasa Mahanama,
Chief of Staff to the President,
Presidential Secretariat,
(Private Address)
No. 328/2, Betans Road, Dalugama, Kelaniya.

1st Accused

Piyadasa Dissanayake,
Chairman, State Timber Corporation,
(Private Address)
No. 55/23, Gemunu Mawatha,
Udumulla, Battaramulla.

2nd Accused

And now between

Indiketiya Hewage Kusumdasa Mahanama,
Chief of Staff to the President,
Presidential Secretariat,
(Private Address)
No. 328/2, Betans Road, Dalugama, Kelaniya.

Presently at- Welikada Prison, Colombo 10
(Pr. No. 23336X)

1st Accused-Appellant

Piyadasa Dissanayake,
Chairman, State Timber Corporation,
(Private Address)
No. 55/23, Gemunu Mawatha,
Udumulla, Battaramulla.

2nd Accused-Appellant

Vs,

1. **Commission to Investigate Allegations of Bribery or Corruption**,
   No. 36, Malalasekara Mawatha, Colombo 07.

Complainant- Respondent

2. **Hon Attorney General,**
   Attorney General's Department,
   Colombo 12.

Respondent

Before: Justice Vijith K. Malalgoda PC,
Justice L.T.B. Dehideniya,
Justice P. Padman Surasena,
Justice S. Thurairaja, PC,
Justice Yasantha Kodagoda, PC,

Counsel:

Anil Silva PC with Chandika Pieris, Nandana Perera, Dhanaraj Samarakoon and Isumi Jayawardena for the 1st Accused Appellant.

Gamini Marapana PC with Navin Marapana PC, Kaushalya Molligoda, Uchitha Wickremasinghe, Gimhana Wickramasurendra, Thanuja Meegahawatta and Saumya Hettiarachchi instructed by Sanath Wijewardena for the 2nd Accused Appellant.

Janaka Bandara DSG with Udara Karunathilleke SC, Kasun Sarathchandra SC and Subhashini Siriwardhena ADG, Anusha Samandapperuma ADL of CIABOC.

Argued on:

16-03-2021, 19-03-2021, 24-03-2021, 30-03-2021, 01-04-2021,13-07-2021,15-07-2021, 19-07-2021, 26-07-2021, 30-07-2021, 22-11-2021, 25-11-2021, 16-03-2022, 05-04-2022, 07-04-

2022, 08-04-2022, 13-05-2022, 01-06-2022, 03-06-2022, 15-06-2022, 05-09-2022, 06-09-2022, 09-09-2022.

Decided on: 11-01-2023

JUDGMENT

The two appellants before this Court namely Indiketiya Hewage Kusumdasa Mahanama and Piyadasa Dissanayake were indicted by the Director General of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as DG-CIABOC) before the High Court of the Western Province holden in Colombo on several charges under the Bribery Act No. 11 of 1954 (as amended- hereinafter referred to as the Act). Acting on the Directive made by the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as CIABOC) under section 12 A (4)a of the Judicature Act (as amended) reference was made by DG-CIABOC to His Lordship the Chief Justice, and His Lordship had nominated a bench of three Judges of the High Court to hear and determine this case before the Permanent High Court at Bar (hereinafter be referred to as High Court at Bar).

The First and Second Appellants stood indicted by the DG-CIABOC for conspiring to solicit a sum of USD Three Million in the first instance and later Rupees Hundred Million as gratification and acceptance of Rupees Twenty Million as a gratification as an inducement or a reward in order to facilitate the process of handing over the machinery of the sugar factory in Kanthale, from the Virtual Complainant, Kotagaralahalli Pedappiah Nagarajah, during the period between 11th August 2016 to 03rd May 2018.

The Indictment that was served on the two accused contained 24 charges and except for the 4th count all the other counts contained charges against either the 1st or the 2nd Accused-Appellant, 4th count was a count of conspiracy against both Accused-Appellants.

As revealed before us 1st, 2nd and 5th - 12 counts were solicitation counts under sections 19 (b) and 19 (c) of the Act, and counts 13 and 14 were counts of acceptance under sections 19 (b) and 19 (c) of the Act against the 1st Accused-Appellant. Count 3 was a count of solicitation under section 19 (c), counts 15-22 were abetment counts corresponding to counts 5-12, and counts 23 and 24 were abetment counts corresponding to counts 13 and 14 against the 2nd Accused-Appellant.

The said 24 counts against the two Accused are set out as follows:

1. That on or about 11th August of 2016, at Colombo, within the jurisdiction of this court, the 1st accused, being a Public Servant, had solicited US$ 03 million as a gratification (Rs. 450 million) from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward for his performing or abstaining from performing any official act, or expediting, delaying, hindering or preventing the performance of an official act namely to hand over a plot of land, buildings, and machinery for the functioning of the Sugar Factory in Kanthale without any obstacle, had thereby committed an offence punishable under Section 19(b) of Bribery Act No. 11 of 1954 as amended.

2. At the time, place, and in the course of the same transaction referred to in the 1st count, the 1st accused, being a Public Servant had solicited US$ 03 million (Rs. 450 million) as gratification from Kotagaralahalli Pedappiah Nagarajah, had thereby committed an offence punishable under Section 19(c) of the Bribery Act No.11 of 1954 as amended.

3. On or about 05th September of 2017, at the same place and in the course of the same transaction referred to in the 1st count, the 2nd accused, being a Public Servant, had solicited a sum of Rs.450 million as gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence punishable under Section 19(c) of Bribery Act No. 11 of 1954 as amended.

4. During the time period between 05th September 2017 and 03rd May 2018 at the same place and in the course of the same transaction referred to in the 1st count, the 1st and the 2nd accused, being Public Servants, had conspired to commit or abet or to act together with a common purpose or in committing or abetting, with or without any previous concert or deliberation, to solicit a sum of Rs. 100 million as a gratification from Kotagaralahalli Pedappiah Nagarajah and as a result of such conspiracy, had solicited a sum of Rs. 100 million as a gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence under Section 113(A) of the Penal Code, read with Section 25(3) and 19(C) of Bribery Act No. 11 of 1954 as amended.

5. On or about 27th February of 2018, at the same place and in the course of the same transaction referred to in the 4th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 100 million as a gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward, for his performing or abstaining from performing any official act, or expediting, delaying, hindering or preventing the

performance of an official act that is, to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale, and thereby committed an offence punishable under Section 19(b) of Bribery Act No.11 of 1954 as amended.

6. At the time, place, and in the course of the same transaction referred to in the 5th count, the 1st accused, being a Public Servant had solicited a sum of Rs.100 million as a gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence punishable under Section 19(c) of the Bribery Act No. 11 of 1954 as amended.

7. At the time, place, and in the course of the same transaction referred to in the 5th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward to expedite or to delay or to hinder performing an official act that is, to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale, and thereby committed an offence punishable under Section 19(b) of Bribery Act No. 11 of 1954 as amended.

8. At the time, place, and in the course of the same transaction referred to in the 5th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, had thereby committed an offence punishable under Section 19(c) of the Bribery Act No. 11 of 1954 as amended.

9. On or about 28th April 2018, at the same place and in the course of the same transaction referred to in the 1st count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale, and thereby committed an offence punishable under Section 20 (b) read with Section 20 (a) of Bribery Act No.11 of 1954 as amended.

10. At the time, place, and in the course of the same transaction referred to in the 9th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence punishable under Section 19(c) of the Bribery Act No. 11 of 1954 as amended.

11. On or about 3rd May of 2018, at the same place and in the course of the same transaction referred to in the 1st count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale, and thereby committed an offence punishable under Section 20(b) read with Section 20(a) of Bribery Act No. 11 of 1954 as amended.

12. At the time, place, and in the course of the same transaction referred to in the 11th count, the 1st accused, being a Public Servant, had solicited a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, and thereby committed an offence punishable under Section 19(c) of the Bribery Act No. 11 of 1954 as amended.

13. On or about 3rd May of 2018, at the same place and in the course of the same transaction referred to in the 1st count, the 1st accused, being a Public Servant, had accepted a sum of Rs. 20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, as an inducement or a reward to facilitate the process of handing over the machinery of the Sugar Factory in Kanthale committed an offence punishable under Section 20(b) read with Section 20(a) of Bribery Act by No. 11 of 1954 as amended.

14. At the time, place, and in the course of the same transaction referred to in the 13th count, the 1st accused, being a Public Servant, had accepted a sum of Rs.20 million as an advance of the gratification from Kotagaralahalli Pedappiah Nagarajah, had thereby committed an offence punishable under Section 19(c) of the Bribery Act No.11 of 1954 as amended.

15. At the time, place, and in the course of the same transaction referred to in the 5th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 5th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(b) of Bribery Act No.11 of 1954 as amended.

16. At the time, place, and in the course of the same transaction referred to in the 6th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 6th count and as a result of such abatement the 1st accused had committed the said

offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

17. At the time, place, and in the course of the same transaction referred to in the 7th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 7th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(b) of Bribery Act No.11 of 1954 as amended.

18. At the time, place, and in the course of the same transaction referred to in the 8th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 8th count and as a result of such abatement the 1st accused had committed the said offence, therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

19. At the time, place, and in the course of the same transaction referred to in the 9th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 9th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 20(b) of Bribery Act No.11 of 1954 as amended.

20. At the time, place, and in the course of the same transaction referred to in the 10th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 10th count and as a result of such abatement the 1st accused had committed the said offence, therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

21. At the time, place, and in the course of the same transaction referred to in the 11th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 11th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 20(b) of Bribery Act No.11 of 1954 as amended.

22. At the time, place, and in the course of the same transaction referred to in the 12th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 12th count and as a result of such abatement the 1st accused had committed the said offence, therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

23. At the time, place, and in the course of the same transaction referred to in the 13th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 13th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 20(b) of Bribery Act No.11 of 1954 as amended.

24. At the time, place, and in the course of the same transaction referred to in the 14th count, the 2nd accused had abetted the 1st accused to commit the offence described in the 14th count and as a result of such abatement the 1st accused had committed the said offence, and therefore the 2nd accused had committed an offence punishable under Section 25(2) read with Section 19(c) of Bribery Act No.11 of 1954 as amended.

Before the commencement of the trial before the High Court at Bar, two preliminary objections were raised with regard to the maintainability of the Indictment before the High Court at Bar, and subsequent to the ruling and/or decision by the High Court at Bar on those objections, the trial was commenced before the High Court at Bar.

During the trial before the High Court at Bar, the prosecution led the evidence of 22 witnesses including the evidence of K.P. Nagarajah the virtual complainant, ASP Ruwan Kumara the Chief Investigating Officer, and Sgt/ Karunarathne who acted as the decoy in the raid and closed the case for the prosecution marking as productions P-1 to P-116 A(a)-A(d) 1-5. The 1st Accused-Appellant made a dock statement and the 2nd Accused-Appellant gave evidence on oath and called one witness when the High Court at Bar called for their defence. At the conclusion of the trial before the High Court at Bar, the learned Judges of the High Court at Bar whilst acquitting the 2nd Accused-Appellant from count No. 3, convicted the 1st Accused-Appellant of all the charges against him, namely charges 1-2, 4, 5-14 and the 2nd Accused-Appellant of charges 4, and 15-24, and imposed sentences on them as follows;

<u>Against the 1st Accused-Appellant</u>;

Count 1	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 2	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 4	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 5	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 6	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 7	4 years Rigorous Imprisonment with a fine of Rs. 5000/-
Count 8	4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 9 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 10 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 11 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 12 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 13 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 14 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Out of the sentences imposed on the 1st, Accused-Appellant as referred to above, the sentences imposed on counts 1,4, 5, 9, and 13 were ordered to run consecutive to each other, and the sentence imposed on count 2 was ordered to run concurrent with the sentence imposed on count 1, sentences imposed on counts 6, 7 and 8 were ordered to run concurrent to sentence imposed on count 5, sentences imposed on counts 10, 11 and 12 to run concurrent with the sentence imposed on count 9 and the sentence imposed on count 14 was ordered to run concurrent with the sentence imposed on court 13 of the indictment.

Against the 2nd Accused-Appellant;

Count 4 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 15 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 16 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 17 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 18 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 19 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 20 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 21 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 22 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 23 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Count 24 4 years Rigorous Imprisonment with a fine of Rs. 5000/-

Out of the sentences imposed on the 2nd Accused-Appellant the sentences imposed on counts 4, 15, and 19, were ordered to run consecutive to each other, and the sentences imposed on counts 16, 17 and 19 were ordered to run concurrent with the sentence imposed on count 15, and the sentences imposed on counts 20, 21, 22, 23 and 24 were ordered to run concurrent with the sentence imposed on count 19 of the indictment

The aggregate sentence imposed on the two Accused-Appellants are as follows:

Aggregate sentence imposed on the 1st Accused-Appellant,

20 years of Rigorous Imprisonment with a fine of Rs. 65000 and compensation of Rs. 20 million in terms of section 26 of the Bribery Act.

Aggregate sentence imposed on the 2nd Accused-Appellant

12 years Rigorous Imprisonment with a fine of Rs. 55000

Being aggrieved by the said conviction and the sentence imposed on them by the High Court at Bar, both Accused Appellants had preferred two appeals to the Supreme Court under and in terms of section 12 B of the Judicature Act (as amended) read with the provisions of the Code of Criminal Procedure Act No. 15 of 1979 (as amended) His Lordship the Chief Justice had nominated the present bench in terms of section 12B of the Judicature Act (as amended) to hear and determine the said appeals and the two Accused-Appellants appeared through their counsel in the hearing of their appeals before this Court.

As already referred to above, the two Accused-Appellants were indicted before the High Court at Bar under the provisions of the Bribery Act for the solicitation and acceptance of bribes. As at the time of the offence, the 1st Accused-Appellant was the Chief of Staff at the Presidential Secretariat and the 2nd Accused-Appellant was the Chairman of State Timber Corporation. The Complainant K.P. Nagarajah an Indian National was involved in Sugar Industry and acted as a representative/ shareholder to a foreign investor who was interested in purchasing the state-owned Kanthale Sugar Factory. The evidence led before the High Court at Bar revealed (which I will consider when analyzing the evidence) that the Complainant had observed an inordinate delay in implementing the unsolicited proposal to purchase the Kanthale Sugar Factory when the matter had been approved by the Cabinet of Ministers. 1st Accused-Appellant being the Secretary to the Ministry of Lands, during the period in question was handling this matter by himself and the complainant had taken up the position that the 1st Accused-Appellant had solicited a bribe of US $ 3 million. Since the Complainant was not happy with the progress made, he brought it to the notice of an official in the Prime Minister's Officer and the matter had referred to the CIABOC by an Additional Secretary to the Prime Minister's Officer. The Complainant Nagarajah had appeared before the Investigation Unit of CIABOC on a telephone message received by the said division.

During the same period virtual complainant had a few meetings with the two accused and it was the position of the witness that the accused had solicited a sum of Rs. 20 million as an advance in order to finalize matters pending at that time and a successful raid had been carried out on the 3rd May

2018 at Hotel Taj Samudra – Colombo when the 1st Accused-Appellant accepted a bribe of Rs. 20 million from the complainant and the 2nd Accused-Appellant too was arrested on charges of abetment.

The indictment that was served on the two Accused-Appellant contained out charges into a series of events that took place in the process of the solicitation and acceptance of the bribe including the original solicitation of US $ 3 million and the subsequent events that took place at the office of the 2nd Accused-Appellant and at Bread Talk restaurant and finally the acceptance that took place at Taj Samudra Hotel Colombo.

During the arguments before us, the two Accused-Appellants raised several grounds of appeal, and the grounds that were raised before us can be summarized as follows,

***Was the investigation into the complaint received by the CIABOC against the Appellants, conducted by officers of the CIABOC in a lawful manner? (Was the investigation lawful?)**

***The Indictment was ex facia ultra vires the provisions of section 11 of the CIABOC ACT**

***Have the charges in the indictment (joinder of charges) been framed in a lawful manner? More particularly, is the amalgamation of charges 1 and 2 with the rest of the charges lawful, in that, has the prosecution established that the offences contained in charges 1 and 2 were committed in the course of the same transaction with the offences contained in the remaining charges?**

***Has the Prosecution proved "aliunde" that there were reasonable grounds to believe that two or more persons have conspired together to commit an offence? If not, was resorting to section 10 of the Evidence Ordinance lawful?**

***When the admissibility of voice recording was challenged at the time the prosecution sought to place such recordings before the Court as evidence, was it lawful for the trial judge to have differed taking a decision on the matter till the end of the trial? or in the alternative, Was it incumbent on the trial court to have conducted a voire dire inquiry into the matter and make a prompt ruling regarding the admissibility of the impugned voice recordings?**

***Was the procedure the trial judges had adopted by deferring the decision on the admissibility of the Voice recordings, Cause a miscarriage of Justice?**

***Did the Magistrate have power/Judicial Authority to give voice samples to the Government Analyst? Was the compulsion of the Appellants to give voice samples to the Government Analyst a breach of the rules against self-incrimination and did it cause a miscarriage of Justice?**

***Is "Voice Analysis" in the manner conducted by Witness Gunathilaka, Assistant Examiner of Questioned Documents of the Government Analyst Department a "Science"?**

***What amounts to "Safe Custody" as per Section 4 (1)(d) of the Evidence (Special provisions) Act? Were the Voice recordings in "Safe custody," when the recorded conversations were in a mobile phone, which was in the custody of the virtual Complainant? Has the fact that the voice recordings were in the custody of the Virtual Complainant, resulted in the recordings becoming inadmissible**

***Were the two Accused-Appellants entrapped to commit the offence they have been convicted of, and if so, have they been deprived of a fair trial?**

***In view of the alleged infirmities in the testimony given by the virtual Complainant, can credibility and testimonial trustworthiness be attached to his testimony?**

***Did the virtual Complainant have a motive to falsely implicate the Accused?**

*** Did the two Accused Appellants possess any motive to solicit and or accept a bribe as narrated by the virtual complainant?**

In considering the grounds that were raised on behalf of the Accused-Appellants before this Court, it is useful for this Court to first analyze the factual Matrix as revealed before Court during the arguments.

As already referred to above, the prosecution before the High Court at Bar, led the evidence of 22 witnesses including the evidence of witness Nagarajah, the virtual complainant in this case.

According to the testimony of witness Nagarajah, he has first come to Sri Lanka in 1994 seeking the prospects of investing in the apparel sector due to the GSP+ stimulus package that the Sri Lankan Government had been enjoying during that time. Thereafter, in 2011 he had decided to invest in the local sugar industry and had taken part in the international tender called for by the then Sri Lankan Government for Kanthale Sugar Factory. The tender process had been called off before its completion.

The second attempt of the witness to have the Kanthale Sugar Factory project comes to light in 2015, with the establishment of a new Government. According to the witness, he had submitted an unsolicited proposal to the then Minister in charge of Lands, under whose purview Kanthale Sugar

Factory project had been listed. The proposal came through Sri Prabhulingeshvar Sugars and Chemicals Company, which has its origins in India and is one of the largest in the global sugar industry. The project proposal is not only for manufacturing sugar but also to produce ethanol, electricity, and organic fertilizer on larger scales as by-products while empowering the farming community with financial assistance and improving their welfare. The proposal suggested a joint venture company to manage Kanthale Sugar Factory of which 51% of shares are owned by the Sri Lankan Government and 49% by the Investor Company. The total investment was estimated to be a Hundred million USD based on Build Operate and Transfer (BOT) as opposed to Build Operate and Owned (BOO). A cabinet memorandum dated 14.02.2015 had been submitted for approval in this regard by the then Minister of Lands the late Mr. M.K.D.S. Gunawardena.

A cabinet subcommittee comprised of three Cabinet Ministers who were appointed to evaluate the said proposal and to report back to the Cabinet of Ministers **(P20).** The said Cabinet Sub-Committee had referred the project proposal to the Board of Investment of Sri Lanka (hereinafter referred to as BOI) to evaluate the feasibility of the project. During this time, the BOI had been in receipt of another project proposal in respect of the same project from a company called Jupiter Sugars (PVT) Ltd., also from India. **(P23)**

Having considered the capability, capacity, and experience in the related area, the Cabinet of Ministers on 25.06.2015 approved the proposal submitted by the witness with the concurrence of the BOI. **(P24), (P25), (P26)**

Witness Nagarajah, on behalf of the Investor Company (at that point of time) MG Sugars Lanka (PVT) Ltd, had entered into an Agreement with BOI on 27th July 2015 as an initial step to commence with the Kanthale Sugar Factory project (**P5**).

The drafting and preparation of the Shareholders Agreement which was the next stage of this project had prolonged for 13 months. For the project to be carried out in Sri Lanka, a Sri Lankan Company named M.G. Sugars Private Limited was incorporated as a "Special purpose vehicle to undertake the business of revival/ restructuring of the sugar industry in Kanthale through the formation and set up a new sugar factory and associated enterprises and the involvement of the local farming community" The Sri Lankan Government was given shares in the aforesaid Sri Lankan Company as it was a party to this project in terms of the proposals. Further, the investment was channeled via a Company incorporated in Singapore named S.L.I. Development Private Limited which comprised Sri Prabhulingeshvar Sugars and Chemical Industries Ltd, Mendel Gluck, Nagarajah, and Moussa Salem **(P6)**. It was later observed that the said S.L.I. Development Private Limited had

also been brought into the Shareholders Agreement. As the initial proposal approved by the Cabinet of Ministers was for the project proposal by Sri Prabhu Lingeshwar Sugar and Chemical Company, it was decided to obtain the approval of the Cabinet of Ministers before signing the agreement by the Government of Sri Lanka and S.L.I. Development Private Limited. The Cabinet of Ministers granted the approval on 14th June 2016 and the Shareholders Agreement was signed on 11th November 2016.

After signing the Shareholders Agreement, in terms of Art. 7.9 of the said Agreement, the Government of Sri Lanka, which held 51% of the shares of MG Sugars Lanka (PVT) Ltd., was supposed to release the agreed existing infrastructure, machinery, and buildings of the existing Kanthale Sugar Factory along with surrounding 500 acres of land to the said MG Sugars Lanka (PVT) Ltd. in order to commence its operations. **(P6C)**

Witness Nagarajah claimed that a few days after the Shareholders Agreement was signed (11.08.2016), he had a meeting with the first Accused-Appellant in the capacity of the Secretary to the Ministry of Lands, under which the subject of the Kanthale Sugar Factory had been listed. It is at this meeting, according to the witness, the first Accused-Appellant solicited Three Million USD from him in order to facilitate the execution of the proposed project. The witness had neither refused, nor agreed to the said solicitation knowing the fact that the first Accused-Appellant, being the Secretary of the Ministry in charge of the Project can easily scuttle the whole process.

The witness had observed that even after several months of signing the Shareholders Agreement, the first Accused-Appellant failed to comply with the agreed requirements of the said Agreement, and that had gone to the extent of refraining from appointing his nominee.

A letter dated 25.10.2016 from the then Chairman of BOI to the first Accused-Appellant had solicited his assistance “to expedite the process to initially divest relevant lands for factory, nursery and staff residences as provided for in Article 7.1.1(a), 7.1.1 (b) and 7.1.1 (d) of the Shareholders Agreement to the said enterprise to facilitate preparation work of the project” to be implemented within the given timeline enabling “the investor to proceed with preliminary work on land clearance and clearance of old buildings as the implementation of the Agreement is time bound with the bank guarantee”

It is at that point the first Accused-Appellant wrote a letter dated 2.11.2016 addressed to the Secretary of the Ministry of Finance, with a copy to the Chairman of BOI seeking advice on the following matters in order to proceed with the Joint Venture

i. The conditions to be adopted on releasing lands as Article 09 of the Shareholders Agreement affirms that the Government has the authority of 51% of shares of the company.

ii. As part of the revival process, of the Kanthale Sugar Factory, the Ministry of Lands already obtained a sealed valuation from the Government Valuer for machinery and other available resources within the factory premise.

iii. As such, the procedures to be adopted on implementation of Article 7.9 of the Shareholders Agreement

It is in this process that the witness wrote a letter dated 5.12.2016 to the Secretary to the Treasury, with a copy to the first Accused-Appellant, requesting to make necessary arrangements for the leasing of land as per the Agreement in order to commence activities immediately, since 4 months have already passed after the signing of the Shareholders Agreements. (P67)

In the meantime, the Secretary to the then Prime minister, on behalf of the Cabinet Committee on Economic Management (hereinafter referred to as CCEM) had written to the first Accused-Appellant that "The Ministry of Lands has not yet handed over the Land of Kanthale Sugar Plant to the New Investor. The CCEM instructions were given to the Secretary, Ministry of Lands to hand over the land and report back at the Next CCEM Meeting." (P68).

The first Accused-Appellant had then written to the Hon Attorney General on 16/1/2017 with a copy of the Shareholders Agreement attached thereto, soliciting assistance to sort out two matters to proceed with the implementation of the said Agreement. **(P70)**

i. There is an issue in deciding the consideration of a Lease Agreement for the State Lands to be given to the company since the said Lands are to be given in lieu of the 51% shares of the Government.

ii. Even though the Shareholders Agreement affirms the investor to take possession of land, premises, infrastructure, and machinery, no instructions were given on transferring these resources, approximately valued at Rs.300Mn by the chief valuer.

Several letters had been exchanged thereafter between MG Sugar, CCEM, and the 1st Accused-Appellant about the lease of land as per the agreements already signed but once again the 1st Accused-Appellant wrote to the Hon. Attorney General on 16.03.2017 soliciting advice on:

i. the conditions to be adopted in releasing lands to the investor; and

ii. the procedures to be adopted in disposing the existing infrastructure, machinery, and other movable properties when implementing the Shareholders Agreement. **(P76)**

However, in a letter dated 20/3/2017 by the Hon. Attorney General to the 1st Accused-Appellant, in reply to P76, observed "……. that although the BOI Agreement was signed on 27/5/2015 and the Shareholders Agreement was executed on 11/8/2016, the said project has not commenced yet and there was inordinate delay". Accordingly, the first Appellant was advised by the Hon. Attorney General: (P77)

i. As regards the releasing of lands to the investor, the modalities are expressly provided in Article 7.1.1. of the Shareholders Agreement. There are no extraneous conditions to be complied with when releasing the said land, and it is incumbent upon the signatories to the said Agreement to strictly abide by the provisions of the said Article. In view of the concerns expressed at the CCEM about the long delay, this process should be completed expeditiously as possible.

ii. Regarding the disposal of existing infrastructure, machinery, and other movable properties, the open tender procedure should be followed within a stipulated time frame.

On or about 18th May 2017, the 1st Accused Appellant met the virtual complainant at the Royal Boat Restaurant in Wattala for a meeting over dinner (the 1st Accused Appellant denied such meeting). The 1st Accused-Appellant had then informed the virtual complainant that if he does not pay the solicited gratification, he would take steps to call for tenders to dispose of the existing machinery.

When the New paper advertisements were published inviting bids to demolish the buildings and sell the equipment as per the instructions of the Hon. Attorney General, the Legal consultants of MG Sugars (Pvt) Ltd wrote to the 1st Accused-Appellant that they have been instructed by their client to institute legal action against the 1st Accused-Appellant if the said invitation for bids is not publicly revoked with immediate effect. The said decision to sell the equipment was the subject matter in an arbitration proceeding commenced in Singapore by MG Sugars (Pvt) Ltd thereafter.

In reply to another letter sent by the 1st Accused-Appellant on 04.08.2017, Hon. Attorney General had observed the following (P83)

> "Upon consideration of the available documentation, it is quite clear that the Ministry of Lands and the BOI have not shared a common understanding or

> Agreement pertaining to a revival/restructuring of Kanthale Sugar Factory. As a result, there has been a plethora of letters forwarded to this Department seeking legal clarification on specific matters which are particularly relied upon or perceived by the respective institutions. This has led to five (05) opinions tendered by this Department."

Whilst the exchange of letters, discussions, and consultations take place amongst the stakeholders to the Shareholders Agreement from 11/8/2016 up until **P83** was issued by the Hon. Attorney General on 17/8/2017, witness Nagarajah says that he received a call on 05.09.2017 from the second Accused-Appellant, who was known to him previously, requesting him to come to Waters Edge Hotel at Battaramulla in the evening of the same day. Witness had gone to Waters Edge Hotel as agreed upon and during the conversation, the second Accused-Appellant had told the witness that the first Accused-Appellant is disappointed over the recent developments pertaining to the Kanthale Sugar Factory project, especially the adverse media publicity against him.

Witness had not specified whether he wished to pay the solicited amount of bribe indicated by the second Accused Appellant but has indicated that he will have to discuss this issue with the other directors of the company.

It was also claimed by the witness that he recorded this conversation with the second Accused-Appellant by using his mobile phone.

In the meantime, MG Sugars Lanka (PVT) Ltd., through its Attorneys, informed the first Accused-Appellant on 6/10/2017 as follows:

> "……Due to the failure and/or neglect of the Government of Sri Lanka to resolve the matter amicably, and despite the numerous *bonafide* efforts made by our client in this, the same was referred to the Singapore International Arbitration Centre (CIAC)
>
> As such, an Emergency Interim Relief Agreement (EIRA) was made in terms of Rule 30.2 and Schedule 1 of the CIAC Rules.
>
> Pursuant to the aforementioned application, a hearing was held via telephonic conference on the 29th of September 2017 at 11 a.m. Sri Lanka time. Subsequently, an award of Emergency Interim Relief was delivered in favour of our client……..
>
> Therefore, you are now compelled to maintain the status quo and are restrained from carrying out any demolition and/or removal exercise of any infrastructure, machinery, buildings and/or implements situated within the said lands." **(P84)**

Witness Nagarajah had testified before the High Court at Bar that he provided a Bank Guarantee of USD 10Mn in favour of the Government of Sri Lanka for several years by that time and has spent around USD 12Mn as consultancy fees and other expenditures in relation to the project. Considering the arbitration process, the Cabinet Sub Committee decision, and the huge amount that he had to spend during this time, he claims that he was frustrated and left with no option but to complain to the political hierarchy about what was going on in respect of the Kanthale Sugar Factory project.

It is against this backdrop that witness Nagarajah, had made a written complaint dated 7/2/2018 to the then Prime Minister. The witness was given an audience by a senior official of the Prime Minister's office on 9/2/2018 who had advised him that he should raise this issue with CIABOC if he claims that a bribe has been solicited by a Government Official.

ASP/Ruwan Kumara, PW 2, the then Deputy Director (Investigations) of CIABOC confirmed that he was advised by his Immediate Senior Officer, Director (Investigations) on 9/2/2018, that an Indian National is expecting to lodge a complaint with CIABOC and to take further steps in that regard. The mobile telephone number of the said Indian National had also been provided. Several attempts by ASP/Ruwan Kumara to contact the said complainant had not been successful, but he had returned a call to PW 2 on the same day. Thereafter Kotagarahalli Peddapaiya Nagarajah the said Indian National had gone to meet ASP/Ruwan Kumara, at his office at CIABOC around 3.30 p.m. on 9/2/2018 itself.

After listening to the narration of witness Nagarajah, PW 2 informed him that a written complaint should be submitted in order to commence the investigations over the allegations levelled.

In compliance with the directive of PW 2, the witness had handed over a written complaint to the CIABOC on 15/2/2018. Subsequently, witness Nagarajah's complaint had been reduced into writing on 22/2/2018 by IP/ Tennakoon (PW 5) of CIABOC.

After making the statement to CIABOC on 22.02.2018, the witness met the second Accused-Appellant at his office at Timber Corporation on 23/2/2018. During this meeting, the witness conveyed the message to the second Accused-Appellant, that he wants to proceed ahead with the Kanthale Sugar Factory project and therefore willing to pay a "bribe" as per the request of the first Accused-Appellant. It was the suggestion of the second Accused-Appellant at this meeting that the witness must pay Rs. 350Mn for the scrap metal in the factory premises and pay Rs. 100Mn to the first Accused-Appellant in addition. At the end of this meeting, it was agreed to have a further discussion with the first Appellant to iron out the issues that existed over the implementation of the

Shareholders Agreement. According to the witness, this conversation had been recorded with the use of his mobile phone.

The witness had met with the first and the second Accused Appellants once again at the office of the second Accused-Appellant at the Timber Corporation on 27/2/2018. According to the witness, the reactions of the first Accused-Appellant towards him at the very beginning was very rude. The first Accused-Appellant, according to the witness, had gone to the extent of saying that he will never trust the witness and does not know whether he is using any recording device even at that point.

The second Accused-Appellant had intervened at this point in time to mediate on the situation and the 1st Accused-Appellant had agreed to talk to the witness about the project. It was suggested by the first Accused-Appellant that the witness should in writing express his willingness to purchase the scrap metal as estimated and a bribe of Rs. 100Mn, out of which Rs. 20Mn is to be paid as an advance with immediate effect.

Witness has testified, before the High Court at Bar, that he tried to negotiate to bring down the bribe to Rs. 10Mn but failed. He says that the first Accused-Appellant was very specific that he would not allow the project to proceed as long as he occupies the office of the Secretary if the demanded amount of Rs. 100Mn is not paid. It was also stated by the witness that the second Accused-Appellant had actively participated throughout this discussion. This conversation on 27/2/2018 had also been recorded by the witness. After the said meeting the witness had to go to India for a short stay.

It was asserted by the witness that he contacted the second Accused-Appellant whilst he was in India and tried to negotiate the amount of bribe but the request was turned down by him saying that the first Accused-Appellant would not agree to such a move.

Upon arrival on 05.03.2018, the witness had met the 2nd Accused-Appellant on two occasions, once at Waters Edge and the other at the 2nd Accused-Appellant's office. Even though the witness had expected to arrange the transaction in early march, that did not materialize due to the retirement of the 1st Accused-Appellant as Secretary Ministry of Lands and his assumption of duties as the Chief of Staff to His Excellency the President.

However, witness Nagarajah had met the two Accused-Appellants at the Bread Talk Restaurant on 28/04/2018 around 11.30 a.m. after the 1st Accused-Appellant assumed duties as the Chief of staff to His Excellency the President. According to the witness, this meeting was arranged as promised by the 2nd Accused-Appellant. It is during this meeting the 1st Accused-Appellant had given his new visiting card (**P10**) as the chief of staff to His Excellency the President. Witness had stated that, upon

his agreement to pay the demanded gratification of Rs. 100 million and to pay Rs. 20 million in advance, the 1st Accused-Appellant agreed to provide his assistance to ensure the continuance of the proposed Kanthale Sugar Factory project. Further, according to the witness he had requested three days to organize things in order to meet the said advance of Rs. 20 million.

Two days after the above meeting, on 30/04/2018, the witness conveyed the message to the 2nd Accused-Appellant that he is ready with the agreed advance money of Rs. 20 million by the 02nd or 3rd of May. By this time the witness had close contact with the officers of the CIABOC and he had even provided a traveling bag to the investigators to bring the money. Sgt/ Karunarathne an officer from CIABOC was entrusted as the decoy and this officer was present at Bread Talk when the witness met the two Accused-Appellants on 28.04.2018. On the instructions of the investigators, it was decided to conduct the raid at the Residence of witness Nagarajah and to introduce the decoy as a domestic helper to the two Accused-Appellants when they visit his residence to accept the bribe.

On the 3rd around 10 o'clock witness received a call from the 2nd Accused-Appellant, that they should be able to meet him after 2 p.m. at Hotel Taj Samudra. Once again, the 2nd Accused-Appellant had called the witness around 11 o'clock and told that both should be able to meet him around 3.20 p.m. at Hotel Taj Samudra.

According to witness Nagarajah, he immediately contacted the officers from CIABOC and informed them of the change of venue and on the instructions, he received from the investigators, left for Hotel Taj Samudra accompanied by Sgt/ Karunarathne in his car driven by his Driver.

Whilst the witness had been waiting at the coffee shop in the lobby of Hotel Taj Samudra, it was the 2nd Accused-Appellant who joined him first. A few minutes later, the 1st Accused-Appellant had also come to the same place and had a conversation for about 50 minutes and had some beverages as well. According to him, the 1st Accused-Appellant had questioned about the money and it was informed to him that it is ready but kept with the personal assistant who is in the car at the car park. It was further told by the witness that the 1st Accused-Appellant wanted "another bag" and that was supplied with the assistance of a waiter at the coffee shop. Upon settling the bill, **(P16)** all three proceeded towards the car park through the rear passage of the Hotel. When they reached the driveway, the witness waved at his driver with the use of the bag collected from the coffee shop **(P17)** signaling him to come towards them. Sgt. Karunaratne having seen this signal got off from the car and walked towards the witness and the two Accused-Appellants carrying, the red colour

traveling bag which contained Rs. 20 million cash. By the time Sgt/Karunaratne reached the trio, the car also reached closer to them.

According to the virtual complainant, when he asked the 1st Accused-Appellant whether he can hand over the bag, he was told by the 1st Accused-Appellant that he wants to check the money and give the 2nd Accused-Appellant's portion. Thereafter the 1st Accused-Appellant got into the rear seat of the car from the driver's side.

The Prosecution claims that P12 was then handed over to the 1st Appellant who was seated in the back seat and told: "Doctor I did my part and I need your help to continue with the Kanthale Project". Since the 1st Accused-Appellant was struggling to open the bag, the witness had requested Sgt/ Karunarthne to assist the 1st Accused-Appellant to get it open. The decoy, Sgt/ Karunarathne had helped the 1st Accused-Appellant to check the cash bundles and thereafter put three bundles out of four, into the bag that was obtained from the coffee shop, by Sgt/ Karaunarathne on the request of the 1st Accused-Appellant. This paper bag which was produced marked P-17 was with the witness until the 1st Accused-Appellant wanted that bag to be given to Sgt/ Karunarathne to put the 3 cash bundles into the bag. The 2nd Accused-Appellant had been standing at the front passenger seat door during this time.

Witness saw the officers from the CIABOC approaching his car and arresting the two Accused-Appellants, whilst the money that was given to the 1st Accused-Appellant was in his custody.

According to witness Nagarajah, he made a statement to CIABOC on the following day regarding the raid which took place at Hotel Taj Samudra. The investigators had requested him to hand over the two mobile phones that he used to record the conversations with the 1st and 2nd Accused-Appellants, but he has declined to adhere to the said request on the basis that his personal mobile phone contained a lot of financial, personal and health details of him and his family.

The prosecution had relied on the evidence of several officers from CIABOC in establishing the case against the two Accused before the High Court at Bar and Sgt/ Karunarathne who acted as the decoy is one of the main witnesses the prosecution had relied upon.

According to the evidence of Sgt/ Karunarathne, he witnessed the meeting between Nagarajah and the two Accused-Appellants which took place at the Bread Talk Restaurant on 28.04.2018. Thereafter he was instructed to act as a domestic helper at the house of witness Nagarajah when it was arranged to hand over the bribe money to the Accused-Appellants. The said plan was suddenly changed and the witness was instructed to go to Hotel Taj Samudra with the bag containing Rs. 2000000/-. He went to Hotel Taj Samudra accompanied by witness Nagarajah in the car belonging to

the witness Nagarajah driven by Nagarajah's driver. He was instructed to be in the car park and to meet witness Nagarajah with the bag containing the money when the message was sent by witness Nagarajah who went inside the Hotel. According to the witness, both the witness and the Complainant Nagarajah were searched by CI/ Pushpakumara before they left the house of the complainant at Rosemond Place. After some time, the driver informed him that witness Nagarajah wanted him to come with the money. At that time, he saw Nagarajah coming towards the car park with two others and waving at them. He immediately got down from the car with the Red colour bag and walked towards them. The car too was moved towards them and stopped Infront of them. At that time, he heard the witness asking the others, whether he could give the money and the 1st Accused-Appellant saying that he wanted to get inside the car and check the money.

When the 1st Accused-Appellant got into the rear seat of the car, Nagarajah had given him the bag and the 1st Accused-Appellant tried to open the bag. At that stage he heard Complainant Nagarajah telling the 1st Accused-Appellant, "Dr. I have done my part, I wanted you to help me to start the sugar project" On the request of Nagarajah, the witness helped 1st Accused-Appellant to open the bag and on the request of the 1st Accused-Appellant witness put 3 bundles of money (out of four) into a bag which was given to him by Complainant Nagarajah (P-17)

After placing three bundles of cash in P17 upon the request of the 1st Accused-Appellant, Sgt/ Karunarathne signaled SI/ Weerathunge (PW06), who was close by, indicating the completion of the transaction.

With the said signal of Sgt/ Karunarathne, all the key members of the investigating team, CI/ Pushpakumara (PW03), IP/ Tennakoon (PW05), and SI/ Weerathunga (PW06), who were approaching the car, had rushed there. Witness then informed the Chief Investigating Officer and others that the person who is in the back seat is the 1st Accused-Appellant and the person who is standing near the front passenger seat is the 2nd Accused-Appellant. He had confirmed the completion of the transaction between the virtual complainant and the 1st Accused-Appellant. It is CI/ Pushpakumara's evidence that the 2nd Accused-Appellant at this point asked whether they are police Officers and the 1st Accused-Appellant had told he is the Chief of Staff to His Excellency the President. CI/ Pushpakumara, has informed him that he is aware of that and requested the 1st Accused Appellant to allow him to continue his duties.

Regarding the investigation carried out by the officers of CIABOC, witness Thushara Ruwan Kumara Superintendent of Police and IP Janaka Pushpakumara gave evidence before the High Court at Bar and witness Anura Tennakoon, Inspector of Police, S.K. Weerathunga, Sub-Inspector of Police and

IP/ Janaka Pushpakumara gave evidence about the raid conducted on 03.05.2013 at Hotel Taj Samudra.

As revealed from the evidence of the said witnesses, upon his return from India on 05.03.2018, the Virtual Complainant Nagarajah informed the investigators that there is a great possibility for the transaction to take place either on 8th or 9th March 2018.

Thereafter ASP/ Ruwan Kumara (PW 2) assigned the investigation to a team led by Chief Inspector Pushpakumara (PW 3). CI/ Pushpakumara had been instructed by ASP/ Ruwan Kumara to obtain Rs. 30Mn cash from the Central Bank with the assistance of the Accounts Division. ASP/Ruwan Kumara has stated in his evidence that he decided to obtain Rs. 30Mn, instead of the required amount of Rs. 20Mn simply to avoid any suspicion, had the request of CIABOC being leaked to the suspects.

The investigators had initially suspected that the transaction might take place at the office of the second Accused-Appellant in the Timber Corporation. They had in fact visited the said compound in order to get ready for the raid, in case it takes place in that compound. At the same time, the Investigating Officers had come to the residence of the virtual complainant at Rosemond Place and had been of the view that it is a better location to have the raid conducted, having been compared to the surroundings of the Timber Corporation.

The case for the Prosecution is that, even though the Investigators were ready to conduct the raid on 8th or 9th March 2018, it did not materialize due to Mr. Nagarajah being informed by the second Accused-Appellant that the first Accused-Appellant is to retire as Secretary, Ministry of Lands and to assume duties as the Chief of Staff to His Excellency the President. However, after the meeting with the two Accused-Appellants and the Complainant at Bread Talk Restaurant on 28.04.2018, Complainant Nagarajah informed the Investigators that the transaction might take place within two-three days.

The Investigating team comprised CI/Pushpakumara (PW03), IP/Tennakoon (PW05), SI/ Weerathunga (PW06), and Sgt/Karunaratne (PW07) had visited the residence of Nagarajah on 02/05/2018 and decided at that point that it would be practically convenient for them to conduct the raid if it takes place at his residence.

It was decided at this meeting to have Sgt/ Karunarathne as the decoy when the raid is conducted. The team of investigators had once again visited the residence on 03/05/2018, the following day, to conduct the raid according to the instructions and directions that they are going to receive from the 2nd Accused-Appellant simply because the via media between Complainant and the 1st Accused-Appellant was the 2nd Accused-Appellant. It was at this visit only CI/ Pushpakumara had brought Rs.

20 million out of the money obtained by the CIABOC in March in anticipation of this raid, to the residence of witness Nagarajah and showed the same to him, four bundles of Rs. 5000 notes (P14-a, b, c, d), a total sum of Rs. 20million.

It is also claimed both by the virtual complainant and the investigating officers that the virtual complainant was adequately cautioned that he should not at any point give the money to the suspects forcefully and must give it to the hand of the suspect only if he shows a willingness to accept the money, whilst stressing that the money is being given to him in order to facilitate the Kanthale Sugar Factory project. The decoy Sgt/ Karunarathne too was present when the said instructions were given to the Complainant.

On 03rd May a red colour traveling bag (**P 12)** had been obtained by the investigators from the Virtual Complainant in order to put the said four bundles of money. Before the bundles of money had been kept inside **P 12**, they were wrapped using a few pages of an English newspaper **(P 13).** The cash certificate in respect of the said amount of money had been submitted by the CIABOC at the time suspects were produced before the Magistrate upon arrest **(P 15).**

Once the venue had been informed by the 2nd Accused-Appellant, CI/ Pushpakumara had decided to send the supporting teams along with IP/Tennakoon (PW 05), SI/ Weerathunga and WSI/Weerasinghe to Hotel Taj Samudra for reconnaissance/or to gather useful information in the ground level to conduct the raid.

Upon receiving the 2nd call specifying the time and confirming the venue, the Investigators who remained at the Complainant's residence had advised him to leave for Hotel Taj Samudra and the Complainant had left for the Hotel, accompanied by Sgt/Karunarathne (PW 07) in his Chauffer driven car.

Complainant Nagarajah had once again been strictly advised not to coerce or not to forcefully get the money accepted. The presence of the decoy at the time of the transaction had also been stressed upon. The decoy and the complainant were both searched by CI/ Pushpakumara and got himself satisfied that there is nothing illegal in their possession.

CI/ Pushkumara had left Nagarajah's residence at the same time in his official car to Hotel Taj Samudra.

According to the evidence of CI/ Pushpakumara when he went to Hotel Taj Samudra, the other CIABOC officer including IP/ Tennakoon, SI/ Weerathunge and WSI/ Weerasinghe had already arrived at the Hotel. He had seen the car belonging to the Complaint parked at the car park and he

too has stayed in the car park area. After some time, he saw the Complainant coming towards the car park with two other persons and Sgt/ Karunarathne going towards them with the Red Bag. The car belonging to the Complainant had moved towards them. When he saw PS Karunarathne's signal, he rushed towards the car.

At that time CI/Pushpakumara had witnessed the red colour traveling bag (P12) on the back seat beside 1st Accused-Appellant, CI/ Pushpakumara had further noticed that the three sealed bundles of cash were inside the Taj Samudra paper bag, (P17) and the unsealed bundle of cash was inside the red colour traveling bag (P12). Thereafter CI/ Pushpakumara put three sealed bundles of cash and the Taj Samudra paper bag inside the red colour traveling bag and handed over the same to SI/Weerathunga (PW06).

The 1st Accused-Appellant had been arrested around 4.35 p.m. followed by the arrest of the 2nd Accused-Appellant and both were taken to CIABOC to record their statements.

During the investigation at Hotel Taj Samudra, it has also been revealed that the Toyota Allion car bearing number KF- 9502, which belongs to the presidential secretariat, which was used by the 1st Accused-Appellant on 03.05.2018 to come to Hotel Samudra had been parked at the car park in anticipation of the return of the 1st Accused-Appellant. PW 10, Pinsiri Dharmapriya Peiris, the driver of the said vehicle had been arrested soon after the arrest of the two Accused-Appellants whilst waiting at the hotel car park, but released soon afterward his statement was recorded. Peiris has testified before the High Court at Bar to the effect that he was advised by the 1st Accused-Appellant to wait at the car park of the hotel until his return.

In addition to the evidence of the virtual Complainant and the Police Witnesses, the evidence of the Government Analyst played an important role in the prosecution evidence before the High Court at Bar. The prosecution had placed a lot of reliance on the telephone conversations between the virtual Complainant and the Accused-Appellants. As already referred to above in this Judgment, the virtual Complainant in his evidence before the High Court at Bar referred to several instances where he has recorded the conversation he had with the two Accused-Appellants. In the said circumstances voice identification of the two Accused-Appellants and the recorded conversations between the virtual Complainant and the Accused-Appellants had a key role to play at the trial before the High Court at Bar, and in this regard, the prosecution heavily relied on the evidence of Ms. Dulani Lalithya Gunathilake, an Assistant Examiner of Questioned Documents attached to the Government Analyst Department (PW41)

Witness Gunathilake had been called by the prosecution in order to testify about 18 voice samples she had extracted from two telephones belonging to the virtual Complainant that was handed over to her on 17.05.2018. The two Accused-Appellants had been produced before the witness to obtain voice samples on 29.06.2018 by an order of the Chief Magistrate.

The two Accused-Appellants raised several objections regarding the admissibility of the said evidence during the trial before the High Court at Bar, and several legal issues were raised before us during their submissions. We will be separately analyzing the questions of law raised on behalf of the two Accused-Appellants and will be considering the evidence of witness Gunathilake when analyzing the above.

The contemporaneous recordings of CCTV footage at Bread Talk Restaurant and Hotel Taj Samudra were also another piece of evidence relied upon by the prosecution. The above footages were played before this Court as well as before the High Court at Bar by the prosecution.

Apart from the evidence of the above witnesses, the prosecution had relied on the evidence of a few formal witnesses in order to establish some legal requirements and their evidence was neither challenged nor discussed on behalf of the two Accused-Appellants before this Court. At the conclusion of the trial before the High Court at Bar, Court having considered the material placed before it had called upon the two Accused-Appellants to place their defence before Court.

The 1st Accused-Appellant had made a statement from the dock and the 2nd Accused-Appellant opted to give evidence from the witness box. Witness Neelakandan was called as a witness on behalf of the second Accused Appellant. In his dock statement, the 1st Accused-Appellant admitted that he was appointed the secretary to the Ministry of Lands in 2015 and continued to hold the office until 10.03.2018, since his retirement from the public service. He had then been appointed as the Chief of Staff to His Excellency the President with effect from 22.03.2018, though the letter of appointment received by him on 05.04.2018.

According to the 1st Accused-Appellant he had been in the public service for over 30 years at the time he was arrested in relation to this incident. He vehemently denied the allegation levelled against him and went on to say that he follows a very simple lifestyle that was never tainted with bribes or any improper/ immoral conduct. He claimed that he was trapped by the complainant and that the CIABOC offices may have simply resorted to their ordinary duties.

Nevertheless, the 1st Accused-Appellant admitted that he met the complainant somewhere in August 2016, soon after the Shareholders' Agreement was signed on 11.08.2016, at his office, on 27.02.2018 at the office of the 2nd Accused-Appellant in Timber Cooperation, on 28.04.2018 at

Bread Talk Restaurant and on 03.05.2018 at hotel Taj Samudra. He also admitted that the 2nd Accused-Appellant accompanied him during the last 3 meetings above mentioned, at Timber Cooperation, at Bread Talk Restaurant, and at hotel Taj Samudra.

The concern of the 1st Accused-Appellant regarding the project in issue seems to be his observation on the Complainant/ Investor that he is more interested in the scrap metal available in the compound of the factory than in commencing the substantive Sugar Cane project. The 1st Accused-Appellant has stated that he, during the meeting on 27.02.2018, advised the Complainant that he could pay Rs.350 million for the value of the infrastructure available in the premises and commence the Sugar Cane project.

The 1st Accused-Appellant admits the pending Arbitration process in Singapore and submitted to the court that he was supposed to be a witness on behalf of the Sri Lankan Government and the Attorney General's Department was getting ready by preparing his affidavit before he testified. The 1st Accused-Appellant had not been able to testify as scheduled due to the arrest of this case and he has revealed that the Sri Lankan Government had lost the said arbitration in November 2018.

Whilst claiming that the Complainant developed a rift with him during this period of the delays in implementing the Kanthale Sugar project, the 1st Accused-Appellant admits that he took part in the discussions and the meetings with the complainant because of the request by the 2nd Accused-Appellant, who is a long-standing friend of him.

Explaining the events which took place on 03.05.2018, the 1st Accused-Appellant says that he was thinking of getting a lift from the complainant to the Ministry of Postal Services, where his wife was the secretary, got into the complainant's car to the right-hand rear seat. He had then been thinking, according to the 1st Accused-Appellant, to call his driver who was waiting for him at the hotel car park, to go back to the office, but suddenly a few people claimed to be police officers from CIABOC, had approached him and arrested then and there.

He claims that he in fact was a victim of a very well-articulated and executed conspiracy to trap him due to the role he played as the secretary to the Ministry of Lands. He further claims that the voice recordings produced in court are fabricated.

As referred to above the 2nd Accused-Appellant had opted to give evidence from the witness box and he had been subjected to cross-examined by the prosecution.

The career of the 2nd Accused-Appellant in the public sector runs from 1978 to 2015. He himself had been the Chief of Staff to a former president when such a position was created for the first time.

Upon his retirement, in 2015, he had been appointed the Chairman of the State Timber Cooperation, which also falls within the ambit of a "public officer" in terms of the bribery act. He had been holding the said office until he was arrested on 03.05.2018 in relation to this matter. The 2nd Accused-Appellant claimed that he met the complainant at a public function well before the meeting at Waters Edge Restaurant on 09.05.2017. Whilst admitting the first meeting reflected in the indictment, at Waters Edge Restaurant on 09.05.2017, the 2nd Accused Appellant admits the next four meetings he was alleged to have taken part, on 23.02.2018 and 27.02.2018 at his office, 28.04.2018 at Bread Talk Restaurant and finally on 03.05.2018 at hotel Taj Samudra.

The assertion of the virtual Complainant that the first Accused-Appellant blamed him for trying to trap him is corroborated by the 2nd Accused-Appellant to a greater extent. He claims that after the initial exchange of words commenced by the 1st Accused Appellant, both of them had ironed out their differences and agreed to work together.

The 2nd Accused-Appellant speaks of a herbal toothpaste, requested to be brought from India when the complainant goes there. And also, he had stated that the complainant had indicated to him that he has brought a bottle of Brandy when returning from overseas and one of the expectations of the 2nd Accused-Appellant during the meeting at Bread Talk was to obtain the said two items. Apparently, he admits that he was given the said herbal toothpaste by the complainant when they met at the Bread Talk Restaurant, but not the bottle of Brandy.

Explaining the reasons for his presence at hotel Taj Samudra on 03.05.2018, the 2nd Accused-Appellant says that he had to participate in a meeting in the India-Sri Lanka summit in the same evening at the same venue and therefore he thought of accommodating the repeated requests of the Complainant to have a meeting with the presence of the 1st Accused-Appellant.

It is the version of the 2nd Accused-Appellant that after the three of them met at the lobby of Hotel Taj Samudra for a discussion for about 20 minutes, the virtual Complainant had informed them that the two bottles of Brandy brought for them are in the car. According to the 1st Accused Appellant, the reason for him and the 1st Accused-Appellant to proceed towards the car park of the hotel was to get the said bottles. He confirmed the virtual Complainant getting a bag from the waiter of the hotel restaurant and says that he thought it was meant for the bottles the virtual Complainant was to give them.

The 2nd Accused-Appellant confirmed that the car of the virtual Complainant approached three of them when they proceeded towards the car park and a person with a pink colored t-shirt put a red colored bag on the rear seat of the car after opening the back door. He has testified that either time

he realized that the said red bag did not contain the anticipated bottles of Brandy, the 1st Accused-Appellant had already got into the back seat of the car from the driver's side. He admits that he too had been leaning onto the car when the investigators surrounded the car.

The 2nd Accused-Appellant vehemently denied that he himself solicited or abetted the 1st Accused-Appellant to solicit and/or accept any bribe from the Complainant in relation to any of the official duties related to Kanthale Sugar Project. Further, at one point, he denied the presence of his voice in the produced audio recording in court and alleged that the said recordings are being tampered with by the Complainant.

It is on the strength of the above evidence placed before the High Court at Bar, Court proceeded to convict the two Accused-Appellants on charges levelled against them except for the 3rd Count framed against the 2nd Accused-Appellant. It is also important to note at this stage that the prosecution after leading evidence before the High Court at Bar had informed Court that the prosecution would not be proceeding against the 2nd Accused-Appellant with regard to the 3rd count framed against the 2nd Accused-Appellant.

In the light of the evidence placed before the High Court at Bar by the prosecution as well as by the two Accused-Appellants, this Court will now proceed to consider the questions of Law raised by the two Accused-Appellants before this Court.

Was the investigation into the complaint received by the CIABOC against the Appellants, conducted by officers of the CIABOC in a lawful manner? (Was the investigation lawful?)

The argument advanced by the Accused-Appellants is that the officers of the CIABOC had not carried out investigations into the complaint received by it against the two Accused-Appellants, in a lawful manner. It was the submission of the learned President's Counsel for the Accused Appellants that the first complaint regarding this incident was not lawfully recorded by the officers of the CIABOC. In order to evaluate this argument, let us first consider the process in which the virtual complainant Nagarajah, approached the CIABOC.

As already observed in this Judgment the virtual complainant had met ASP Ruwan Kumara of CIABOC following the phone call, he received in his office at CIABOC where ASP Ruwan Kumara had advised him to write a complaint regarding the matter. Thus, ASP Ruwan Kumara after listening to the oral account narrated by the virtual complaint, sent the virtual complainant back to submit a written complaint, without proceeding to record/reduce the statement into writing at that time

itself. It was the submission of the learned President's Counsel that this procedure is illegal as it is contrary to section 109 of the Code of Criminal Procedure Act No 15 of 1979.

Thereafter, the virtual complainant proceeded to lodge a complaint on 15th February 2018 acting upon which, CIABOC had proceeded to record a statement from him in the English language on 22 February 2018. The investigators then informed him that the available material is not sufficient to proceed with an arrest, to which the virtual complainant responded that he no longer had contact with either Appellant at that point in time. The Investigators had then instructed the virtual complainant to regenerate communication with the Appellants. It is this procedure that the learned Presidents' Counsel for the Accused Appellants complains as being unlawful.

Section 109 (1) of the Code of Criminal Procedure Act No 15 of 1979 on which the learned President's Counsel for the Accused Appellants have relied, states as follows;

> "*Every information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer"*

Section 109 (2) states-

> *"If such information is given orally to a police officer or to an inquirer, it shall be reduced to writing by him in the language in which it is given and be read over to the informant:*
>
> *Provided that if it is not possible for the officer or inquirer to record the information in the language in which it is given the officer or enquirer shall request that the information be given in writing. If the informant is unable to give it in writing, the officer or inquirer shall record the information in one of the national languages after recording the reasons for doing so and shall read over the record to the informant or interpret it in the language he understands."*

However, we observe that the procedure regarding the commencement of an investigation in relation to the offences under the Bribery Act by CIABOC is different. The Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (CIABOC Act) has specifically provided as to how CIABOC must commence an investigation. This can be clearly seen in sections 3, 4, and 5 of the Act. It is worthwhile reproducing the following parts from those sections.

CIABOC Act No. 19 of 1994

Section 3

The Commission shall subject to the other provisions of this Act, investigate allegations, contained in communications made to it under section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, direct the institution of proceedings against such person for such offence in the appropriate court.

Section 4

(1) An allegation of bribery or corruption may be made against a person (whether or not such person is holding on the date on which the communication is received by the Commission, the office, or employment by virtue of holding which he is alleged to have committed the act constituting bribery or corruption) by a communication to the Commission, or a person may by a communication on to the Commission, draw the attention of the Commission to any recent acquisitions of wealth or property or to any recent financial or business dealings or to any recent expenditures by a person (whether or not such person is holding any office or employment on the date on which such communication is received by the Commission) which acquisitions, dealings or expenditures are to the knowledge of the person making such communication not commensurate with the known sources of wealth or income of such person.

(2) Upon receipt of a communication under subsection (1) the Commission, if it is satisfied that such communication is genuine and that the communication discloses material upon which an investigation ought to be conducted, shall conduct such investigation as may be necessary for the purpose of deciding upon all or any of the following matters; -

(a) prosecution or other suitable action under the provisions of the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975; or

(b) prosecution under any other Law.

and where the Commission decides, whether before or after the conduct of an investigation, that a communication received by it should be dealt with by any other authority, it may forward such communication to such other authority.

(3) the Commission shall have the power to investigate any matters disclosed by a communication received by it under subsection (1) whether or not such matters relate

> *to a period prior to the appointed date and notwithstanding anything to the contrary in any other law.*

Thus, it is a legal obligation in the form of a prerequisite under the CIABOC Act that the Commission must be satisfied that any communication it receives, is genuine and that such communication discloses material upon which an investigation ought to be conducted. Therefore, it would not be lawful for the Commission to bypass this provision and straight away proceed to launch an investigation in respect of any communication it receives irrespective of its merits.

Let us also consider the applicability of the provisions of the Code of Criminal Procedure Act No 15 of 1979 to the investigations undertaken by CIABOC.

Section 2 (1) of the Bribery Act No. 11 of 1954 has clearly set out the scope of application of other written laws to the offences under the Bribery Act. It is as follows;

Section 2 (2) of the Bribery Act-

> *(2) Where the provisions of this Act are in conflict or are inconsistent with any other written law, this Act shall prevail.*

Further, Section 6(1) of the Bribery Act also has clearly specified the application of the Code of Criminal Procedure Act, No. 15 of 1979 to the offences under the Bribery Act in the following manner.

Section 6 (1) of the Bribery Act-

> *(1) Such of the provisions of the Code of Criminal Procedure Act, No. 15 of 1979, as are not excluded by subsection (2) or are not inconsistent with the provisions of this Act shall apply to proceedings instituted in a court for offences under this Act.*

In addition, the Prosecution's 2nd witness ASP Ruwan Kumara has provided the reasoning behind what impelled him not to record the virtual Complainant's statement at the very first instance, but to advise him to provide a written statement as CIABOC could treat it as a communication upon which it could act. Alongside other reasons, ASP Ruwan Kumara has stated in his evidence that as there was a complexity in the complaint and uncertainty in the alleged solicitation of a gratification at that point in time, he had wanted to establish whether the virtual Complainant was consistent in his version and ascertain whether there was merit in the allegations put forward by the virtual complainant.

In the evidence given by the virtual Complainant (PW 1), the learned counsel of the 2nd Appellant highlights that there was no evidence of contact between 2nd Appellant and the virtual Complainant after 5th September 2017, until the 23rd of February 2018, the day after Ruwan Kumara initiated the instigation on 22nd February 2018. Further, the learned counsel for the 2nd Appellant submitted that the entire process by CIABOC was to instigate, induce and inveigle PW 1 to hand over a bribe by providing PW 1 with the money to do so and that was a plan formulated by PW 2 Ruwan Kumara to entrap the Accused Appellants.

Learned Counsel for the Accused-Appellants persistently submitted that the Investigators of the CIABOC had an ulterior motive to entrap the Accused-Appellants, claiming that ASP Ruwan Kumara had made an unjustified phone call to the virtual Complainant instructing him to come to the CIABOC, without waiting for the virtual Complainant to come on his own. However, the evidence given by ASP Ruwan Kumara has clarified that the Director/Investigations of the CIABOC has informed him about the virtual Complainant and asked him to contact the said foreign national. The witness has further explained how they ordinarily receive complaints and has explained the situations where third parties contact the CIABOC on behalf of the Complainants [p.953 Vol 4A of Appeal Brief].

It is the submission of the appellants that the virtual Complainant had no intention of making a complaint to CIABOC. It is on that footing that the appellants further submitted that there cannot be a valid conviction without a legal and fair investigation.

We need to be mindful that the offences of bribery and corruption is generally committed by public officers. Thus, for an instance, in a circumstance where an allegation of bribery has to be made against the officer in charge of a police station, the mechanism provided for in the Code of Criminal Procedure Act for a complainant to make a complaint against the very police officer in the relevant police station appears to cause practical difficulties.

On the other hand, as a person can easily make an allegation of Bribery against any public officer, the legislature has set up a threshold in section 4 (2) of the CIABOC Act in that it has required CIABOC to be satisfied that the information received by it, is genuine and warrants further investigation. That would explain why investigations for the offences under the Bribery Act must proceed on a somewhat different path.

Thus, the legislature in its wisdom has vested the CIABOC with the power of commencing an investigation against any public officer when it receives any such communication only when the

Commission is satisfied that such communication is genuine and discloses material upon which an investigation ought to be conducted.

It must also be noted that the 19th amendment to the Constitution which was certified by the Parliament on 15th May 2015 brought in Chapter XIX A introducing a new Article, i.e., Article 156 A. According to Article 156A (1) (b), the powers of CIABOC includes '*the power to direct the holding of a preliminary inquiry or the making of an investigation into an allegation of bribery or corruption, whether of its own motion or on a complaint made to it, and the power to institute prosecutions for offences under the law in force relating to bribery or corruption.* (Emphasize is ours)

Accordingly, it is clear that the 19th amendment to the Constitution by Article 156 A had empowered the CIABOC to hold preliminary inquiries or investigations into allegations of bribery or corruption on its own motion also. This is in addition to its power to act when a complaint is made by any person.

We may mention here further that, the aforementioned Chapter (Chapter XIX A) containing Article 156 A was repealed by the 20th Amendment to the Constitution which came into effect on 29th October 2020. Although the said provision was subsequently repealed, the incidents relating to the instant case had taken place while the 19th amendment to the Constitution was in force i.e., the alleged incidents of solicitation of gratification had occurred during the time period between 11th August 2016–3rd May 2018. Thus, steps taken by ASP/Ruwan Kumara of CIABOC towards the commencement of around 22nd February 2018 would fall under Article 156 A making it lawful under the said article only.

Thus, it can be clearly seen that CIABOC had all the power, at the time in question, to commence and proceed with any investigation even on its own motion i.e., without a complaint. In this regard, section 5 of the CIABOC Act would also be relevant and its reproduction would further resolve the above issues. It is as follows;

Section 5 of the CIABOC Act:

> *(1) For the purpose of discharging the functions assigned to it by this Act, the Commission shall have the power-*
>
> *(a) to procure and receive all such evidence, written or oral, and to examine all such persons as the Commission may think necessary or desirable to procure, receive or examine;*

(b) to require any person to attend before the Commission for the purposes of being examined by the Commission and to answer, orally on oath or affirmation, any question put to him by the Commission relevant, in the opinion of the Commission, to the matters under investigation or require such person to state any facts relevant to the matters under investigation in the form of an affidavit;

(c) to summon any person to produce any document or other thing in his possession or control;

(d) to direct by notice in writing the manager of any back produce, within such time as may be specified in the notice, any book, document or cheque of the back containing entries relating to the account of any person in respect of whom a communication has been received under section 4 or of the spouse or a son or daughter of such person, or of a company of which such person is a director, or of a trust in which such person has a beneficial interest or of a firm of which such person is a partner, or to furnish as so specified, certified copies of such book, document, cheque or of any entry therein;

(e) to direct by notice in writing the Commissioner-General of Inland Revenue to furnish, as specified in the notice, all information available to such Commissioner-General relating to the affairs of any person in respect of whom a communication has been received under section 4 or of the spouse or a son or daughter of such person and to produce or furnish, as specified in the notice, any document or a certified copy of any document relating to such person, spouse, son or daughter which is in the possession or under the control of such Commissioner-General;

(f) to direct by notice in writing the person in charge of any department, office or establishment of the Government or the Mayor, Chairman, Governor or chief executive, howsoever designated, of a local authority, Provincial Council, scheduled institution or a company in which the Government owns more than fifty per centum of the shares, to produce or furnish, as specified in the notice, any book, register, record or document which is in his possession or under his control or certified copies thereof or of any entry therein;

(g) to direct any person in respect of whom communication has been received under section 4 to furnish a sworn statement in writing-

(i) setting out all movable or immovable property owned or possessed at any time, or at such time as may be specified by the Commission, by such person and by the

spouse, son, or daughter of such person and specifying the date on which each of the properties so set out was acquired, whether by way of purchase, gift, bequest, inheritance or otherwise;

(ii) containing particulars of such other matters which in the opinion of the Commission are relevant to the investigation;

(h) to direct any other person to furnish a sworn statement in writing-

(i) setting out all movable or immovable property owned or possessed at any time or at such time as may be specified by the Commission, by a such person where the Commission has reasonable grounds to believe that such information can assist an investigation conducted by the Commission;

(ii) containing particulars of such other matters which in the opinion of the Commission are relevant to the investigation;

(i) to prohibit, by written order, any person in respect of whom a communication has been received under Section 4, the spouse, a son or daughter of such person, or any other person holding any property in trust for such first-mentioned person, or a company of which he is a director or firm in which he is a partner from transferring the ownership of, or any interest in, any movable or immovable property specified in such order, until such time as such order is revoked by the Commission; and to cause a copy of such written order to be served on any such authority as the Commission may think fit, including in the case of immovable property, the Registrar of Lands, in the case of a motor vehicle, the Commissioner of Motor Traffic and in the case of shares, stocks of debentures of any company, the Registrar of Companies and the Secretary of such company;

(j) to require, by written order, any authority on whom a copy of a written order made under paragraph (i) has been served, to cause such copy to be registered or filed in any register or record maintained by such authority.

(k) to require, by written order the Controller of Immigration and Emigration to impound the passport and other travel documents of any person in respect of whom a communication has been received under section 4, for such period not exceeding three months as may be specified in such written order; and

(l) to require by written order, any police officer as shall be specified in that order, whether by name or by office, to take all such steps as may be necessary to prevent the departure from Sri Lanka of any person in respect of whom a communication has been received under section 4 for such period not exceeding three months, as may be specified in such order.

(2) the Commission may exercise any power conferred on it under subsection (1) and any person to whom the Commission issues any direction in the exercise of such power shall comply with such direction, notwithstanding anything to the contrary in any law.

The above section also clearly shows that the procedure of investigating offences under the Bribery Act takes a different form, from that of a normal crime investigation under the Code of Criminal Procedure Act. That is the law of the country.

In the above circumstances, the submission made on behalf of the Appellants that the virtual complainant had no intention of initiating an investigation by the officers of CIABOC becomes irrelevant.

Hence, we hold that the investigators of the CIABOC inclusive of ASP Ruwan Kumara have acted within the parameters of the law and have not acted in any manner which brings their conduct into question.

We need to highlight one other matter regarding the complaint that in the instant case. That is the argument that this case has been fabricated by the CIABOC against the Appellants. The Accused-Appellants were very senior Public Officers with long experience. They had held posts in the top echelons of the Government at the time of their arrest. However, it is noteworthy that at no time had they hitherto ever taken any step to make any complaint to any authority against any investigator for fabricating false evidence to implicate them in this crime. They also had failed to make any complaint against anyone in relation to any coercive act committed or unfair treatment meted out to them at any time during the investigation. Thus, we can conclude safely that no such fabrication had happened in the course of the raid and thereafter.

Hence, we hold that the position of the learned President's Counsel for the Accused-Appellants that the Accused-Appellants were subjected to an unfair, vindictive, prejudicial, and partisan investigation is completely unfounded.

In view of the threshold provision in section 4(2) of the CIABOC Act and also in view of the fact that any authorized officer of CIABOC is duty-bound to follow the procedure set out in the CIABOC Act,

the submissions made on behalf of the Accused-Appellants that the failure to record a statement from the virtual complainant on the very first day has led to an unfair investigation, also does not have merit. This is because the law requires that the CIABOC officer commencing the investigation must be satisfied of the genuineness of the complaint/allegation.

The learned President's Counsel for the 2nd Accused-Appellant advanced another argument to the effect that the prosecution had failed to make available to the accused, a copy of the first complaint. According to the learned President's Counsel, the first complaint of this case is the letter written by Nagarajah to the Prime Minister. He urged that we must apply the principles of fair trial enumerated in the case of ***Wijepala vs Attorney General.*** *[(2001) 1 Sri L.R. 46]*

It would be relevant at this stage to reproduce here, Section 444 of the Code of Criminal Procedure Act which is as follows;

Section 444 of the Code of Criminal Procedure Act No. 15 of 179

444. **Accused person entitled to copy of first information**

(1) Every inquirer or officer in charge of a police station shall issue to every accused person or his attorney-at-law who applies for it a duly certified copy of the first information relating to the commission of the offence with which he is charged and of any statement made by the person against whom or in respect of whom the accused is alleged to have committed an offence.

(2) In every proceeding under this Code the production of a certified copy of any information or statement obtained under subsection (1) shall be prima facie evidence of the fact that such information was given or that such statement was made to the inquirer or police officer by whom it was recorded; and notwithstanding the provisions of any other law, it shall not be necessary to call such inquirer or officer as a witness solely for the purpose of producing such certified copy.

(3) In the course of a trial in a Magistrate's Court, the Magistrate may, in the interests of justice, make available to the accused or his attorney-at-law for perusal in open court the statement recorded under Section 110 of any witness whose evidence is relied on by the prosecution in support of the charge against the accused.

What the learned President's Counsel for the Accused-Appellants complain as being not made available for them, is not the first information relating to the commission of the offence which an inquirer or officer in charge of a police station has had in their custody (as per the above section). What the above section makes every accused entitled to receive, is a duly certified copy of the first

information relating to the commission of the offence with which any inquirer or officer in charge of a police station is charged. Any letter written by either Nagarajah or anybody else to the President or to the Prime Minister of the country cannot be considered as the first information relating to the commission of the offence given to any inquirer or officer in charge of a police station under section 444 of the Code of Criminal Procedure Act.

The information which is treated as the first information as per our law is the first information relating to the commission of the offence given to any inquirer or officer in charge of a police station. Even in ***Wijepala vs Attorney General (2001) 1 Sri LR 46*** - Mark Fernando J treated witness named Senaratne's statement around 9.30 pm to hospital Police Post, as the first information.

On the other hand, Nagarajah's evidence on what he informed the President by that letter is the fact that the 1st appellant had called for tenders by way of a Newspaper advertisement, regarding the disposal of the factory building, machinery, and other infrastructure in the premises.

Moreover, the learned Presidents Counsel for the accused-appellants has also failed to show that there is evidence adduced in the trial, establishing the fact that any information/complaint (be it the first information or otherwise) pertaining to a solicitation of a gratification by either the appellants or any other public officer has been made to the President or the Prime Minister of the country.

This means that the appellants have not established the actual availability/actually making of such a complaint although they claim entitlement for it on the basis that it is the first information of the instant case.

There is also no mention of the fact whether the Appellants had taken any step to move court or the prosecution to give them a copy of this document if there was any such document available.

Therefore, this submission made by the learned President's Counsel for the Appellants has no merit.

The Indictment was ex facie ultra vires the provisions of section 11 of the CIABOC ACT

The next question of law raised on behalf of the 2nd Accused-Appellant was that the Indictment was *ex-facia ultra vires* the provisions of Section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (CIABOC Act) for the reason that the Indictment served on the Accused-Appellant was unaccompanied by the direction of the Commission to Investigate Allegations of Bribery or Corruption (the Commission) to institute proceedings against the Accused-Appellants. The above issue was first raised before the High Court at Bar as a preliminary objection by the Accused-Appellants and the High Court at Bar overruled the preliminary objection.

There is no doubt as to the nature of the indictment that was before the High Court at Bar. CIABOC had investigated a complaint of bribery and forwarded an Indictment against the two Accused under the provisions of the Bribery Act. The jurisdictional objection that was first raised before the High Court at Bar as well as before this Court on behalf of the 2nd Accused-Appellant was based on the provisions of Section 11 of the CIABOC ACT.

When raising the objection, it was contended;

a) Whether the CIABOC had considered the investigational findings and directed the Director General of CIABOC to institute Criminal proceedings against the Appellant before the High Court.
b) If such a directive had been issued, was it incumbent on the Director General of CIABOC to have attached to the indictment, the direction received by him by the Commissioners?

and the learned President's Counsel heavily relied on two Appellate Court decisions one by the Court of Appeal and the other by the Supreme Court.

Even though this Court is not bound by a decision of the Court of Appeal, their lordships of the Court of Appeal when deciding the case of ***Nandasena Gotabya Rajapakse V. Director General Commission to Investigate Allegations of Bribery and Corruption and Others CA (Rev) APN 29/2018*** *C.A. minute 12.09.2019* had considered a plethora of decisions both by the SC as well as Court of Appeal and therefore it appears to us that the said decision has a persuasive value before the Supreme Court.

The main complaint in the said case was the failure by CIABOC to act under Section 78(1) of the Bribery Act (as amended) by granting written sanction to institute the proceedings before the Magistrate's Court. The English Text of Section 78(1) of the Bribery Act (as amended) reads as follows;

> "No Magistrate's Court shall entertain any prosecution for an offence under this Act except by or with the written sanction of the Commission."

The Court of Appeal has referred to the Sinhala text of Section 78 (1) of the Bribery Act, (as amended) and also to the decision by the Supreme Court in ***Senanayake V. Attorney General (2010) 1 Sri LR 149*** and observed the following;

> "The prosecution 'by' the Commission is therefore clearly legislative residue from Section 78 (1) from the statutory provisions that existed before the amendment brought in by Act Nos. 19 and 20 of 1994, with no corresponding power conferred on the Commission to institute

proceedings. In the circumstances, the order of the Magistrate's Court and the Provincial High Court is tainted with illegality and thereby subjected to be interfered with this Court in exerting its power of revision"

The Court of Appeal has observed the above and had finally concluded that "If that Court is the Magistrate's Court, then the Commission must sanction the institution of such proceedings by written communication to that effect, addressed to that Court.

Even though section 78 (1) of the Bribery Act refers to a written sanction in order to entertain any prosecution before the Magistrate, neither Section 78 (1) nor any other provision in the Bribery Act had imposed a similar restriction when forwarding an indictment to the High Court. Since the decision by the Court of Appeal had only considered the question of sanction granted by the 'Commission' under Section 78 (1) of the Bribery Act (as amended) we see no relevance of the above judgment to the instant case.

The Petitioner in ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption and Others SC Writ 1/2011*** *SC minute dated 26.07.2018*, had challenged the decision to prosecute the Petitioner before the Magistrate's Court by way of a Writ Application.

In the said case Petitioner's main argument before the Supreme Court was the failure of the CIABOC to adhere to Section 11 of the CIABOC Act when forwarding charges before the Magistrate's Court.

Section 11 of the CIABOC Act which provides for a directive from CIABOC to the Director General, reads as follows;

Section 11 Where the material received by the Commission in the course of an investigation conducted by it under this Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law No. 01 of 1975, the Commission shall direct the Director General to institute criminal proceedings against such person in the appropriate Court and the Director General shall institute proceedings accordingly.

When raising the said objection to the charges that were presented before the Magistrate's Court, the Petitioner had also relied on Section 2 (a) of the CIABOC Act which reads as follows;

Section 2 (a) The Commission shall consist of three members, two of whom shall be retired Judges of the Supreme Court or the Court of Appeal and one of whom shall be a person with wide experience relating to the Investigation of Crime and Law Enforcement.

In the said case it was submitted before the Supreme Court, that during the period of which the investigation with regard to the Petitioner was carried out, CIABOC was not properly constituted since there were some unfilled positions or vacancies in the Commission and therefore the Commission could not have given a directive to the Director General to institute proceedings against the Petitioner before the Magistrate's Court under Section 11 of the CIABOC Act. While responding to the above position taken up by the Petitioner in the said case, the Director General of CIABOC had submitted the journal entry of the relevant file which carried the directive received by him before the Supreme Court along with the affidavit he tendered before the Court. The Supreme Court has considered several provisions of the CIABOC Act and the 'journal entry' that was produced marked R-1, had finally concluded that there was no valid directive made under Section 11 of the CIABOC Act and quashed the charge sheet issued to the Petitioner in the said case.

When raising the question of law, on behalf of the 2nd Accused-Appellant, it was submitted that the said decision had imposed a duty cast upon the Director General to file the directive he received by the Commission under Section 11 of the CIABOC Act along with the indictment filed before the High Court.

As already referred to above, the Petitioner in the case of ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption*** *(supra)* came before the Supreme Court seeking a Writ of *Certiorari* to quash the charges served on her since there was no valid directive given by the Commission under Section 11 of the CIABOC Act. The Petitioner in the said Case had not challenged the charges served on her under Section 78 (1) of the Bribery Act (as amended) even though the impugned charge sheet was filed before the Magistrate's Court under Section 78 (1) of the Bribery Act for the failure to submit the written sanction from the Commission, and the Supreme Court when deciding the said case had not considered the provision in Section 78 (1) of the Bribery Act (as amended). It is also important to note at this stage that the Supreme Court when deciding ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption*** *(supra)* had not pronounced a requirement by the CIABOC to submit a written directive when chargers are filed before the Magistrate's Court.

The requirements that should be fulfilled by CIABOC when forwarding an indictment before the High Court is identified under Section 12 (1) and (2) of the CIABOC Act which reads as follows;

Section 12 (1) Where proceedings are instituted in a High Court, in pursuance of a direction made by the Commission under Section 11 by an indictment signed by the Director General, such High Court shall receive such indictment and shall have

jurisdiction to try the offence described in such indictment in all respects as if such indictment were an indictment presented by the Attorney General to such Court.

(2) There shall be annexed to every such indictment, in addition to the documents which are required by the Code of Criminal Procedure Act, No. 15 of 1979, to be annexed thereto, a copy of the statements, if any, before the Commission, by the accused and by every person intended to be called as a witness by the prosecution.

The said provisions, in Section 12 (1) and (2) are silent on any requirement to annex a copy of the directive made under Section 11 of the CIABOC Act even though there is a specific reference to the directive made by the Commission under Section 11 of the CIABOC Act in subsection (1) referred to above.

In these circumstances it is clear that, the Supreme Court when deciding ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption*** *(supra)* had never intended to impose an additional requirement to submit a written directive when filing charges before Court, and therefore this Court is not inclined to impose an additional requirement other than the provisions already identified in Section 12 (I) and (II) of the CIABOC Act when forwarding an indictment before the High Court.

Whilst raising the above objection to the indictment before the Supreme Court, the learned President's Counsel who represented the 2nd Accused-Appellant drew the attention of this Court to the alleged 'fundamental errors' committed by the High Court at Bar when refusing the same jurisdictional objection at the commencement of the Trial at Bar proceeding.

In this regard it was submitted that the High Court at Bar erred;

a) In holding that this issue had to be 'canvassed in another forum by way of a separate judicial proceeding'
b) In deciding this issue by applying the presumption in Section 114, illustration (d) of the Evidence Ordinance, failing to apply the explicit provisions of the Evidence Ordinance, and totally disregarding the doctrine of 'stare Decisis', in not following the decision of the Supreme Court in the Polwatte case.
c) In its selective application of presumptions under the Evidence Ordinance to the detriment of the Accused,

When considering the submissions referred to above, it is clear that the said grounds of appeal raised on behalf of the 2nd Accused-Appellant were based on a misinterpretation given to the decision of this Court in the case of ***Anoma S. Polwatte V. Director General Commission to Investigate Allegations of Bribery and Corruption*** *(supra)*.

As already observed by us, when deciding the above case, this Court had never intended to impose an additional requirement of submitting a written directive given by the Commission when forwarding an indictment by the Director General CIABOC to High Court other than following the provisions already identified under Sections 12 (I) and (II) of the CIABOC Act. If the Director General is directed under Section 11 of the CIABOC Act by the CIABOC to forward an indictment, he is only bound to follow the provisions in Section 12 (I) and (II) of the CIABOC Act. In the absence of any complaint, that the Director General CIABOC had failed to comply with Sections 12(I) and (II) of the CIABOC Act when forwarding the indictment before the High Court at Bar it is correct in refusing the jurisdictional objection raised on behalf of the 2nd Accused before the High Court at Bar. The Trial Judge before whom the indictment is filed is therefore bound to accept the indictment and take up the trial unless there is material to establish that Director General CIABOC had failed to comply with the provisions of Sections 12 (1) and (2) of the CIABOC Act. Any party who intends to challenge an indictment forwarded by the Director General 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.

In the said circumstance, I see no merit in the argument placed before us.

Have the charges in the indictment (joinder of charges) been framed in a lawful manner? More particularly, is the amalgamation of charges 1 and 2 with the rest of the charges lawful, in that, has the prosecution established that the offences contained in charges 1 and 2 were committed in the course of the same transaction with the offences contained in the remaining charges?

The Accused-Appellants before the High Court at Bar had raised an objection to the amended indictment on the basis that the prosecution could not have lawfully joined the charges in counts 1, 2, and 3 with the rest of the charges as the incidents referred to in charges 1, 2 and 3 do not fall within the same course of the transaction as the rest of the charges.

When the objection was raised in the High Court at Bar, the learned judges had decided to address the said objection after the leading of evidence by the Prosecution. Accordingly, the learned judges in the judgment dated 19th December 2019 have reached the conclusion that the events relating to the charges are interconnected and do form part of the same transaction. The learned Judges of the High Court at Bar have rejected the aforesaid objection of the Appellants.

Let us now consider whether there is merit in this argument. The indictment against both Accused-Appellants contains 24 charges and we have already mentioned the charges and the sentence imposed by the High Court at Bar in this Judgment.

Out of the 24 counts in the indictment, counts 1, 2, 4, 5, 6, 7, 8 9, 10, 11, 12, 13, and 14 are against the 1st Accused Appellant; the counts 3, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 are against the 2nd Accused-Appellant. The charge in count 4 has been framed against both Accused-Appellants

Learned President's Counsel for the Accused-Appellants submitted that charges 1 and 2 are in respect of the alleged solicitation of a bribe of Rs. 450 million (USD 3 million) by the 1st Accused Appellant on or about 11th August 2016 whereas charges 4 - 24 are solicitation of Rs. 100 million as a bribe and acceptance of Rs. 20 million as an advance based on a conspiracy set out in charge 4 during the period between 05th September 2017 and 03rd May 2018 and the 3rd charge is for solicitation of a bribe of Rs 450 million by the 2nd Accused-Appellant on or about 05th September 2017. The learned President's Counsel therefore sought to argue that the purpose of soliciting Rs. 450 million in respect of charges 1 and 2 was to permit the virtual complainant to go ahead with the project whereas the purpose in relation to charge 4 which covers the charge of conspiracy between 1st and 2nd Accused-Appellants to solicit Rs. 100 million is different. It was on that footing that the learned President's Counsel for the Accused-Appellants submitted that while there is a common factor of soliciting a gratification, the element of community of purpose cannot be inferred by the same and the Prosecution lacks evidence to prove that there was continuity of action and community of purpose to enable them to lawfully join the charges on the basis that they had occurred in the course of the same transaction.

It is also to be noted that the learned President's Counsel for the 1st Accused-Appellant had submitted before the High Court at Bar that the test used to ascertain whether incidents fall within the same transaction is the test of Common Agreement (පොදු එකඟතාවය), which is not seen in the current instance. Accordingly, it was the position of the learned President's Counsel for the 1st Accused-Appellant that charges 1-2 and 3 cannot be joined with the rest of the charges. In other

words, the Accused-Appellants had claimed that charges 1 and 2, charges 3, and charges 4 - 24 do not fall within the course of the same transaction but fall under three separate transactions.

It is the contention of the 1st Accused-Appellant that although the objection was raised at the correct time in the Trial at Bar, the learned Judges had indicated that they would consider the same at the end of the trial, misdirecting themselves on the law. Thus, the learned President's Counsel complained that evidence which otherwise would have been inadmissible was permitted in by the trial Judges. It is therefore the contention of the 1st Accused-Appellant that the Accused-Appellants did not get a fair trial due to the above alleged lapse on the part of the learned Judges of the Permanent Trial at Bar.

Let us first reproduce below, the relevant sections from the Code of Criminal Procedure Act No. 15 of 1979.

Section 173 (Separate charge of separate offence)

> *For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately except in the cases mentioned in sections 174, 175, 176 and 180 which said sections may be applied either severally or in combination.*

Section 175 (1) (Trial for more than one offence)

> *If in one series of acts so connected together as to form the same transaction more offences than one are committed by the same person he may be charged with and tried at one trial for every such offence, and in trials before the High Court such charges may be included in one and the same indictment.*

Section 180 (All persons concerned in committing an offence may be charged together)

> *When more persons than one are accused of jointly committing the same offence or of different offences committed in the same transaction or when one person is accused of committing any offence and another of abetment of or attempt to commit such offence, they may be charged and tried together or separately as the court thinks fit; and the provisions contained in the former part of this Chapter shall apply to all such charges.*

The 1st count (under section 19(b) of the Bribery Act) alleges that on or about 11th August 2016 in Colombo, the 1st Accused-Appellant being a public servant, (Secretary to the Ministry of Land), solicited from K. P. Nagarajah (the virtual complainant) a gratification in a sum of USD 3 Million [SLR

450 Million], as an inducement or reward for - his expediting or delaying or hindering or preventing an official act - or for assisting or favouring or for hindering or delaying the transaction of any business with the Government - that is to say the act of giving unto him the machinery along with the entirety of the land and premises for the purpose of operating the Kanthale Sugar Factory. The 2nd count is for the same incident but framed under 19(c) of the Bribery Act and therefore the charge is silent about the purpose for which the alleged gratification was solicited.

The 3rd count (under s. 19(c) of the Bribery Act) alleges that on or about 5th September 2017 in Colombo, the 2nd Accused-Appellant being a public servant, (the Chairman of the State Timber Corporation), solicited from K. P. Nagarajah (the virtual Complainant), a gratification in a sum of USD 3 Mil [SLR 450 million].

According to the Respondent, the alleged solicitation has been made in respect of the same purpose, and the evidence led in the case too clearly shows that the alleged solicitation has been made in respect of the same purpose which is the act of giving the machinery along with the entirety of the land and premises for the purpose of operating the Kanthale Sugar Factory. This is evident from the fact that the 2nd Accused-Appellant had approached the virtual Complainant on 5th September 2017 to discuss at Water's Edge, the matter relating to the Kanthale Sugar Factory project and to inform the virtual complainant about the disappointment of the 1st Accused Appellant. They discussed the recent developments of the project. Although the only connection/standing that the 2nd Accused Appellant had in this event is his mere close friendship with the 1st Accused Appellant, evidence shows very clearly that it was the expectation of the 2nd Accused Appellant to persuade the virtual complainant that he should adhere to the solicitation of the gratification by the 1st Accused Appellant. The gratification solicited is for non-other than relating to affairs of the progress of operating the Kanthale Sugar Factory which falls within one and the same transaction.

The 4th count alleges between the 5th September 2017 and 3rd May 2018 in Colombo, the 1st Accused-Appellant being a public servant, (the Secretary to the Ministry of Land and the President's Chief of Staff) and the 2nd Accused Appellant, being a public servant, (the Chairman of the State Timber Corporation) agreed to act together with or without any previous concert or deliberation with the common intention for or in committing or abetting the offence of soliciting from K. P. Nagarajah, a gratification in a sum of SLR 100 million and the said offence was committed in consequence of the said conspiracy and they thereby committed the offence of 'Conspiracy'

punishable under section 25(3) of the Bribery Act read with section 19(c) of the Bribery Act. The incident in count 4 too was committed on the same day as charge 3 (5th of September 2017). Counts 4 - 24 are connected to the aforesaid conspiracy to solicit Rs. 100 million as a bribe and acceptance of Rs. 20 million as an advance based on the same. Indeed, according to the Prosecution, both the Accused-Appellants had been present when the advance of Rs. 20 million was handed over by the virtual Complainant at the car park of Taj Samudra Hotel.

While it is clear from the above facts that the charges in counts 4-24 can be joined along with the charges in counts 1-3 under section 175(1) and section 180 of the Criminal Procedure Code on the basis that they had occurred in the course of the same transaction, let us proceed to consider how our Courts have applied this principle in the past.

In ***Jonklaas vs Somadasa 43 NLR 284***, Wijeyewardene J took into consideration that the substantial test for determining whether several offences are committed in the course of the same transaction is to ascertain whether they are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. His Lordship then went on to hold as follows.

> *" …a community of purpose and a continuity of action which are regarded as essential elements necessary to link together different acts so as to form one and the same transaction."*

This was followed by Alles J in ***Don Wilbert vs Sub Inspector Chilaw 69 NLR 448*** where the accused was charged on two counts; the first count was for driving a vehicle in a negligent manner; the second count was for failure to report the said accident to the Officer-in-Charge of the nearest Police Station after driving the said vehicle on the said highway at the same time and place and after having met with an accident causing injury to another, an offence punishable under section 224 of the Motor Traffic Act.

In the case of ***The King V. Aman 21 NLR 375*** the Accused was prosecuted upon an indictment containing two counts, one for causing hurt to one Sena Abdul Cader, and the other for voluntarily causing hurt to one Cader Meera Saibo. The accused has had words with the man who is the subject of the second count (Cader Meera Saibo), pulled out a knife, and stabbed him. He then rushed along the street, which had several boutiques, and had seen Sena Abdul Cader at a place about thirty yards from the place where he committed the first offence. He had an altercation with him the previous day about some rice. The Accused reminded him of that occurrence and stabbed Sena Abdul Cader also. The two offences were committed in the same street, and the man who was

struck on the occasion of the second offence could see from where he was standing, the disturbance going on in which the first offence was committed. One of the two objections raised in the appeal was that these two offences could not be considered as a series of acts so connected together as to form the same transaction. In that case, Bertram C.J. holding that the acts were so connected together as to form the same transaction stated as follows;

> *"The real truth is that in all cases that question is a question of fact. The word " transaction," is defined in the Imperial Dictionary (which seems very closely to follow the definition in Webster) as " that which is done or takes place, an affair." Had the expression in our section been '' a series of acts so connected together as to form the same affair " there would have been no question as to the meaning. The word " transaction " does not necessarily mean something which takes place between parties. That is explained in the case of Drinecqbier v. Wood ([1899) 1Oh.Div.397.), where Byrne J., in interpreting a similar phrase under the English rules of procedure, instances the case of a traction engine proceeding along a highway and causing damage to a terrace of several houses. He says: " In the illustration suggested by the illegal use of a traction engine passing in front of them, each owner would have to prove his title to his house, but the other questions of fact and law would be common to all the owners, and I have no doubt that they could all sue in one action."*

In **Don Wilbert's** case the two offences that were joined, did not even take place between the same parties. The said incidents were joined on the premise that it was committed by the same person one after the other. The Court did not hesitate to treat them as a series of acts so connected together as part of the same transaction. In the instant case, not only are the incidents connected and interwoven together but have occurred in the same course of events following one other. Further, all those incidents had occurred between the same parties namely the Accused-Appellants and the virtual Complainant.

In regard to the instant matter, it is the view of this Court that there exists a common purpose that runs throughout the charges 1-2,3 up to 4-24 which purpose being the need to obtain a bribe and to scuttle and delay the process in order to apply pressure on the virtual complainant to pay the bribe. Further, it is evident that the 1st Accused Appellant has sought the assistance of the 2nd Accused Appellant to solicit the bribe from the virtual complainant. The Respondent has relied on the telephone records in establishing the same. The 1st Accused Appellant has made a call to the 2nd Accused Appellant even prior to the 2nd Accused Appellant contacting the complainant on 5th September 2017.

Following the incident on the 5th of September 2017, there had been three attempts to solicit a bribe i.e., on the 27th of February 2018, the 28th of April 2018, and the 03rd of May 2018. In all of the above three instances, the 2nd Accused-Appellant had been involved in facilitating the transactions. Further in all 5 attempts of solicitation (11/08/2016, 05/09/2017, 27/02/2018, 28/04/2018, and 03/05/2018) the purpose of the bribe was to expedite the process and/or grant clearance of handing over the land and machinery of Kanthale old Sugar Factory to the virtual Complainant and or to his company. Thus, the 2nd Accused-Appellant had throughout been involved in soliciting and aiding the 1st Accused-Appellant.

Further, it should be noted that although there was no telephone correspondence between the 1st Accused-Appellant and the virtual Complainant during the period August 2016 to September 2017, the subject file maintained at the 1st Accused-Appellant Ministry reveals the continuous correspondence between the 1st Accused-Appellant and the Complainant. The relevant correspondence has been submitted before court by Prosecution Witness No. 37.

Accordingly, by the letter dated 16th January 2017 produced marked P-70 it is evident that the 1st Accused-Appellant has sought the opinion of the Attorney General when the same was not required. According to the Prosecution, that was to delay the process. Further, letters produced marked P 67 dated 17th December 2016 and P 73 dated 10th February 2017 prove that the 1st Accused-Appellant had unduly delayed the handing over of the land. The letter produced marked P 75 dated 6th March 2017 further indicates that the 1st Accused-Appellant had once again sought instructions relating to the same issue; this too according to the Prosecution, was to willfully delay the progress of the process.

The Prosecution has also adduced the letters produced marked P-80A dated 8th June 2017, P 80 dated 9th June 2017, and P 83 dated 7th August 2017 to further indicate that the 1st Accused-Appellant had continued to delay the process.

On the other hand, the mere absence of telephone communications between the 1st Accused-Appellant and the virtual Complainant during the period August 2016 to September 2017 does not mean that the relevant parties terminated altogether, the solicitation process they had already started and commenced a fresh solicitation process. Such thinking is far-fetched. Moreover, even if it is so, it is by and large, for the same purpose. Therefore, the continuity of action and the community of purpose are remarkably present in the incidents described in the charges.

Accordingly, it is evident that while the process pertaining to soliciting the gratification had commenced on 11th August 2016 and ended only on 3rd May 2018 running through a time span little

over of 1 1/2 years, the 1st Accused Appellant has continued to pursue his aim of soliciting and accepting the gratification from the virtual Complainant throughout the said period with the involvement of the 2nd Accused Appellant also in the process, right through from 5th September 2017 onwards.

Therefore, there is lucid evidence to hold that the Accused-Appellants have acted with a community of purpose and continuity action linking counts 1-2 and count 3 with the rest of the counts (4-24), creating one series of acts so connected together as to form the same transaction. Therefore, we find the joinder of charges in the instant case to be lawful and there is no misjoinder as alleged by the Accused-Appellants.

Has the Prosecution proved "aliunde" that there were reasonable grounds to believe that two or more persons have conspired together to commit an offence? If not, was resorting to section 10 of the Evidence Ordinance lawful?

In count 04 of the indictment, the 1st and 2nd Accused-Appellants have been charged with the offence of conspiracy under section 25 (3) of the Bribery Act read with section 19 (c) of the Bribery Act as amended and section 113 A of the Penal Code. The said count is to the following effect,

> *"That on between the 5th September 2017 and 3rd May 2018 at Colombo, within the jurisdiction of this Court, in the course of the same transaction the* 1st Accused Appellant *being a public servant, i.e., the Secretary of the Ministry of Land and the President's Chief of Staff, and the 2nd* Accused Appellant *being a public servant, i.e., the Chairman of the State Timber Corporation agreed to act together with or without any previous concert or deliberation with the common intention for or in committing or abetting the offence of soliciting from K P Nagarajah, gratification in a sum of SLR 100 Million and the said offence was committed in consequence of the said conspiracy and they thereby committed the offence of "Conspiracy " punishable under s. 25(3) of the Bribery Act read with s.19(c) of the Bribery Act as amended by Acts No.2/1965, 38/1974, 9/1980 and s. 113A of the Penal Code".*

It is the contention of the 1st Accused-Appellant that the Prosecution has not placed before Court material *aliunde*, to prove that there were reasonable grounds to believe that the Accused-Appellants have conspired together to commit the offence described in count 4.

The 1st Accused-Appellant submits that the only evidence the Prosecution has submitted in this regard, are statements alleged to have been made by the 2nd Accused-Appellant to the investigating officers regarding discussions he is alleged to have had with the 1st Accused-Appellant. Accordingly,

the 1st Accused-Appellant submitted that these items of evidence are hearsay which would be made admissible only under section 10 of the Evidence Ordinance which is as follows.

Section 10 (Things said or done by conspirator in reference to common intention.)

> *Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was a party to it.*
>
> *illustrations*
>
> *Reasonable ground exists for believing that A has joined in a conspiracy to wage war against the Queen.*
>
> *The facts that B procured arms in Europe for the purpose of the conspiracy, C collected money in Colombo for a like object, D persuaded persons to join the conspiracy in Kandy, E published writings advocating the object in view at Galle, and F transmitted from Kalutara to G at Negombo the money which C had collected at Colombo, and the contents of a letter written by H giving an account of the conspiracy, are each relevant, both to prove the existence of the conspiracy and to prove A 's complicity in it, although he may have been ignorant of all of them, and although the persons by whom they were done were strangers to him, and although they may have taken place before he joined the conspiracy or after he left it.*

The 1st Accused-Appellant argues that prior to section 10 being applied, the Prosecution must prove *aliunde* that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence. It is the contention of the 1st Accused-Appellant that, in proving such reasonable grounds the statements to be relied on (under section 10 of the Evidence Ordinance) cannot themselves be taken as evidence for the existence of reasonable grounds; the said reasonable grounds should first be established in order to pave the way for the said statements to be admitted as evidence under section 10 of the Evidence Ordinance, and such evidence produced to establish the existence of reasonable grounds would also be considered as additional proof of conspiracy.

in this regard, the learned President's Counsel for the 1st Accused-Appellant has cited the case of ***Peiris V. Silva 17 NLR 139 at 141***. In that case, Perera J had observed as follows;

> *"It is manifest that these statements are no more than mere hearsay as against the first accused. They are by no means evidence against him. With reference to them the Solicitor-General cited section 10 of the Evidence Ordinance, but that section applies when it is first established aliunde that there are reasonable grounds to believe that two or more persons have conspired together to commit an offence. The statements relied on cannot themselves be taken as evidence of the existence of such reasonable grounds. Such grounds must first be established in order to pave the way for the admission of the statements as evidence, and when so admitted they may be additional proof of the conspiracy."*

This question was further considered in the case of ***King V. Attanayake (1931) 34 NLR 19*** where His Lordship Lyall-Grant J observed thus:

> *"Taylor on Evidence (section 590) states that before any act or declaration of one of a company of conspirators in regard to the common design as affecting his fellows is led, a foundation should first be laid by proof, sufficient, in the opinion of the Judge, to establish prima facie the fact of the conspiracy between the parties, or, at least, proper to be laid before a jury, as tending to establish such fact. The connection of the individuals in the unlawful enterprise being shown, every act or declaration of each member of the confederacy in furtherance of the original concerted plan and with reference to the common* object is, in contemplation of law an act and declaration of all and this is evidence against each other.
>
> ……
>
> *This statement of the English law has, I think, exactly the same effect as section 10 of our Code. Taylor proceeds: -"Sometimes for the sake of convenience the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the case."*

In King vs. Attanayake, Lyall-Grant, J. emphasized the followings:

> *(a) the judge should decide in every case whether or not reasonable grounds exist to believe that two or more persons have conspired together to commit an offence or an actionable wrong;*
>
> *(b) in order to do so, the judge can be guided:*

(i) by the evidence already led which gives an indication that a conspiracy already exists; and

(ii) by assurance of the prosecuting counsel that he would at a later stage lead further evidence.

(c) the existence of a conspiracy need not be conclusively proved in order to render evidence admissible under Section 10.

In the instant case, the Prosecution has clearly established the existence of reasonable grounds to believe that the two Accused-Appellants have conspired together to commit this offence. It would suffice in this regard, to mention here that the Prosecution has produced three main independent evidence for the said purpose. Firstly, the telephone call records between the Accused-Appellants and the virtual Complainant; secondly, the video footage in which both Accused-Appellants are shown acting in concert; thirdly, the conversations that took place amongst the three as admitted by the two Accused-Appellants.

Moreover, the Prosecution has produced before this Court, a telephone call log showcasing how the two Appellants have been in continuous communication while the 2nd Accused-Appellant had been having independent conversations with the virtual Complainant. The telephone records submitted, show that the 2nd Accused-Appellant had contacted the virtual Complainant via telephone call in twelve instances (during the time period 24th February 2018 – 3rd May 2018)/ The telephone log reveals how the two Accused-Appellants have been in contact with each other either immediately prior to or subsequent to the 2nd Accused-Appellant's telephone conversation with the virtual complainant. The said records have been established in the High Court at Bar by Prosecution Witnesses No. 28 and 29 (witness from Sri Lanka Mobitel Co. and Dialog Axiata Co.). In addition to the above, the 2nd Accused-Appellant has in fact admitted the identity of the voices in the audio recordings to be of his, the 1st Accused-Appellant's and the virtual Complainants. This indicates the existence of communion and agreement between the two.

Further, the video footage submitted, and the evidence led by the Prosecution confirms the presence of both Accused-Appellants along with the virtual complainant during the meetings that had taken place in the run up to the solicitation of the bribe i.e., the meeting at Bread Talk and the meeting at Taj Samudra Hotel. The presence of both Accused-Appellants and the conduct of both Accused-Appellants during the said meetings have displayed them acting in concert to infer the existence of conspiracy. In addition to the above, there is evidence that the 1st Accused-Appellant requesting for a separate bag from the hotel waiter at Taj Samudra once he got to know that the

virtual Complainant had brought the money. This when taken together with the other events, leads to the inference that such request was made to separate the share of the 2nd Accused-Appellant.

Thus, taking all of the above factors into consideration and while keeping in mind the degree of proof required by the Prosecution is merely to establish a *prima facie* case of conspiracy, where a prudent man would feel reasonably convinced that a conspiracy exists, we are of the view that the Prosecution has satisfied the aforesaid threshold requirement.

For the above reasons, we hold that the Prosecution has proved *aliunde*, that there are reasonable grounds to believe that the two Accused-Appellants have conspired together to commit the offence of conspiracy permitting further evidence in terms of section 10 of the Evidence Ordinance. Therefore, we hold that the learned Judges of the High Court at Bar have correctly applied section 10 of the Evidence Ordinance in relation to the charge of conspiracy against each of the Accused-Appellants.

When the admissibility of voice recording was challenged at the time the prosecution sought to place such recordings before the Court as evidence, was it lawful for the trial judge to have differed taking a decision on the matter till the end of the trial? or in the alternative, Was it incumbent on the trial court to have conducted a voire dire inquiry into the matter and make a prompt ruling regarding the admissibility of the impugned voice recordings?

Was the procedure the trial judges adopted by deferring the decision on the admissibility of the Voice recordings, cause a miscarriage of justice?

On 13/11/2019 the Counsel for the Prosecution who appeared before the High Court at Bar sought to place the recordings (converted into a transcript) before the Court as evidence. The Counsel appearing for the second Accused-Appellant opposed the same stating that the person who prepared the transcript (in accordance with the voice recordings) was not called before Court as a witness and that he/she did not sign the transcript, alleging that the authenticity of the transcript is questionable. Further he submitted to Court that the impugned voice recordings are not clear and hence the transcript which was made based on such recordings cannot be used as evidence. On the same day, Court made a prompt order stating that, Court will make an order considering the objections raised by the Defence at the end of the trial and Court allowed to raise questions based on the transcript (which made in accordance with the voice recordings). In this order, Court observed that though some parts of the voice recordings were not clear, the Court cannot neglect

the entire voice recording. Further it was emphasized in this order that the Court will consider the objections raised by the Counsel for the Defence when it would analyze the evidence.

This question of law suggests that, in the alternative, it was incumbent on the trial court to have conducted a voire dire inquiry into the matter and to have made a prompt ruling regarding the admissibility of the impugned voice recordings.

In answering the same this Court need to consider voire-dire inquiries and their application. Despite a judge not being normally required to determine questions of fact before the final judgment, in certain selected occasions the judge is called upon to do the same, particularly when a disputed question of fact must be determined in order to decide whether an item of evidence should be admitted. On these occasions the judge alone determines questions of fact and may generally tend to hear witnesses in order to do so. This procedure is called a "trial-within-a-trail" or "voire-dire."

The procedure at a voire-dire inquiry usually involves various steps including objection being made when the evidence is to be called, and the judge then hearing the evidence before ruling on admissibility, unless the circumstances are exceptional. If the Accused has opted for a jury trial, the jury is normally sent out and the evidence is heard in its absence. Usually, evidence for both prosecution and defence is called. Witnesses are sworn on the voire-dire, not on the oath taken when giving evidence before the jury. Prosecution witnesses may be cross-examined without affecting the right to cross-examination in the substantive trial. The Accused may give evidence himself and may call witnesses on his behalf. When deciding the question of admissibility, the judge should then act on admissible evidence presented at the voire-dire inquiry.

As is evident, a voire-dire inquiry is a protracted procedure which may involve many steps to be followed and generally this procedure may be adopted in a preliminary examination to determine competency of a witness available in Court to give evidence. This is done merely to save time as the Court may decide the competency of a witness at the outset of the trial. However, in the present case though the learned Counsel for the Accused Appellants contended that the learned Trial Judges ought to have conducted voire-dire inquiry to decide the admissibility at the outset of the trial itself, it is our position that holding a voire-dire inquiry is not a sine qua non to decide the admissibility of evidence.

In the case of ***Halawa V. Federation Against Copyright Theft ([1995] 1 Cr App Rep 21, DC)*** of the Divisional Court of UK, it was held that,

> *"The duty of trial judge, on an application under voire-dire,* ***is either to deal with it when it arises or to leave the decision until the end of the hearing, with the primary objective***

being to secure is fair and just trial for both parties. *Thus, in certain cases there will be a trial within a trial in which the accused is given the opportunity to exclude the evidence before he is required to give evidence on the main issues but* ***in most cases the better course will be for the whole of the prosecution case to be heard, including the disputed evidence, before any trial-within-a-trial held."***

(Emphasis Added)

There are other occasions when a trial-within-a-trial is appropriate i.e., to determine the admissibility of tape recordings as held in ***R v Robson v. Harris, R v Harris (1972) 56 Cr.App.R. 450***. However, a trial within a trial may be appropriate if the issues are limited but not if it is likely to be protracted and to raise issues which will need to be re-examined in the trial itself. Hence, it is our considered view that the voire-dire inquiry is a trial within a trial and should be used in the appropriate circumstances. It is not to be used as a means of protracting proceedings, which would in such case defeat the very purpose of having a trial before a High Court-at-Bar. In the instant case, there was sufficient material in the form of submissions of both parties before the Learned Judges to decide the admissibility of the audio recordings at the time they allowed the prosecution to lead such evidence. Hence we hold that it was lawful for the learned Trial Judges to have differed taking a decision on the matter till the end of the trial.

Further, in the impugned order Court made the decision to allow/place such recordings before the Court as evidence due to the fact that the 2nd Accused Appellant on many occasions accepted the voice recordings and its content. The excerpt of the order of the Trial Court is as follows:

"එසේම චිත්තිය විසින් මෙම හඬපටය ලක් කරන කාරණය ඒ සඳහා පදනමක් පවතින්නේද යන්න සම්බන්ධයෙන් නඩුවේ අවසානයේදී තීන්දු කරනු ලබන අතර, එකී කරුණු වලට යටත්ව මෙම ප්‍රශ්න ඇසීමට ඉඩ ලබා නොදීමට පදනමක් අධිකරණය නොදකී. ඊට හේතුව වන්නේ මේ වනවිටද සාක්ශිකරු විසින්ම මෙම හඬවල් බොහෝ දුරට පිළිගෙන තිබීමයි."

The above can simply be translated to the effect that the trial court decided to determine whether the Voice Recordings are admissible evidence for the purpose for which they are led by the prosecution, at the end of the trial. In the meantime, the Court stated that they did not see any basis to disallow questioning based on matters pertaining to the Recordings for the reason that, at such time, the Accused had already admitted matters in the recordings to a large extent during the trial.

It must be noted that this decision was made after consideration of the fact that the evidence was already almost admitted by the accused during the trial. This court observes that the opinion and impression created in the mind of laymen in being faced with evidence is drastically different to that of Judges who consider and evaluate these matters with a judicially trained mind and ample experience. The Judges who were at the Trial-at-Bar have proceeded to hear evidence as they have been capable of distinguishing the difference between admissibility of the evidence as a whole, as opposed to leading evidence for the limited purpose of identity towards the end. The High Court Judgment has dissected the admissibility of this evidence based on identity, content, safe custody and the implication of the evidence and considered each segment on its own merit. As such, this court does not find that this evidence has tainted the decision detrimentally to the accused.

Based on the above, the decision made by the judges to answer the issue regarding the admissibility of voice recordings at the end of the trial is acceptable as doing otherwise would merely have protracted proceedings, which defeats the very purpose of the trial. Therefore, this Court observes that the learned Trial Judges have not erred in allowing the prosecution to lead the audio recordings in evidence in the course of the trial and that the procedure adopted by the trial judges in deferring the decision on the admissibility of the voice recordings has not caused any miscarriage of Justice.

Did the Magistrate have power/Judicial Authority to give voice samples to the Government Analyst? Was the compulsion of the Accused Appellants to give voice samples to the Government Analyst a breach of the rule against self-incrimination and did it cause a miscarriage of Justice?

A prerequisite to the steps of voice identification, particularly for the purpose of Spectrographic and Automatic Analysis is the taking of voice samples from a conversation conducted with the concerned party as well as samples from reading a transcript based on recurring words in the recordings. In furtherance of this aim, the learned Magistrate had made an order dated 5th June 2018 under Section 124 of the Code of Criminal Procedure Act in relation to obtaining voice samples from the 1st and 2nd Accused Appellants as well as the Complainant. The Counsel appearing for the Accused Appellant had objected to the order on the basis that the Magistrate did not have the power under Section 124 of the Code of Criminal Procedure Act to make such order. Having considered the objection, the Magistrate had rejected the same.

The High Court appears to have relied on the cases of **Ritesh Sinha v Uttar Pradesh, R v Suppiah** and **King v Francis Perera** in coming to the conclusion that the Magistrate was acting within their powers with the said order. This court is faced with two Questions in this regard; firstly,

whether the Magistrate had power/judicial authority to give voice samples to the Government Analyst, and secondly, whether the compulsion of the Accused Appellants to give voice samples to the Government Analyst amounts to a breach of the rule against self-incrimination and thereby caused a miscarriage of Justice.

Section 124 based on which the Magistrate's order has been issued is as follows:

> *"Every Magistrate to whom application is made in that behalf shall assist the conduct of an investigation by making and issuing appropriate orders and processes of court, and may, in particular hold, or authorize the holding of, an identification parade for the purpose of ascertaining the identity of the offender, and may for such purpose require a suspect or any other person to participate in such parade, allow a witness to make his identification from a concealed position and make or cause to be made a record of the proceedings of such parade."*

In terms of the above, the Accused Appellants argue that the scope of this provision is restricted to the purposes of empowering the Magistrate to hold identification parades, as supported by the fact that the only amendment made to this section pertains to the conduct of such identification parades. Further, it is the position of the Accused that this is supported by Section 123 and the amendments thereof.

Section 123 as amended states,

> *"(1) Where any officer in charge of a police station is of opinion that it is necessary to do so for the purpose of an investigation, he may cause any finger, palm or foot impression or impression of any part of the body of any person suspected of the offence under investigation or any specimen of blood, saliva, urine, hair or finger nail or any scraping from a finger nail of such person to be taken with his consent.*
>
> *(2) Where the person referred to in subsection (1) does not consent to such impression, specimen or scraping being taken, such police officer may apply to the Magistrate's Court within whose jurisdiction the investigation is being made for an order authorizing a police officer to take such impression, specimen or scraping and such person shall comply with such order.*
>
> *(3) Any officer in charge of a police station may, where it is necessary for the purpose of the investigation to compare any handwriting, cause a specimen of the handwriting of any person to be taken with his consent.*

> *(4) Where such person refuses to give a specimen of his handwriting the officer in charge of the police station may apply to the Magistrate's Court within whose jurisdiction the investigation is being made for an order requiring such person to give a specimen of his handwriting, and such person shall comply with such order."*

The Accused Appellants claim that the entry of "blood" to sub section (1) above by Section 3 of the Code of Criminal Procedure (Amendment) Act No 14 of 2005 supports the position that should the Act empower the magistrate to order the taking of voice samples, the same would have been included in express terms as was done in 2005. As such, they argue that the lack of express authorization is an implication of intentional exclusion of this authority.

However, in interpreting the above provision it is rather apparent that all specimen, impression or scraping; finger, palm or foot impression, impression of any part of the body, specimen of blood, saliva, urine, hair, finger nail, any scraping from a finger nail, or handwriting of any suspect, all relate to identification of the suspect in the course of an investigation, by comparison of samples found in relation to the relevant offence at the scene. As such the purpose of the voice samples directly corresponds to such purpose.

Most importantly, Section 124 in essence provides for the Magistrate to "assist the conduct of an investigation by making and issuing appropriate orders and processes of court" while the portion allowing for the conduct of identification "...and may, in particular..." simply indicates that the Magistrate can also hold or authorize the holding of identification parades "for the purpose of ascertaining the identity of the offender."

Interpretation of this section at such face value does not provide any assistance to crime investigations . Firstly, it must be noted that the primary purpose is not only holding identification parades but rather to provide judicial assistance for the conduct of investigations using the powers vested in the Magistrate to issue processes of court, which is a power neither lightly granted, nor vested in the investigators themselves. As such, this provision allows providing such assistance not provided for under the preceding provisions, to assist identification of suspects. The provision for identification parades is therefore rather an extension of this same power rather than a restriction of it.

The High Court at bar has also considered Section 7 of the Act which states

> *As regards matters of criminal procedure for which special provisions may not have been made by this Code or by any other law for the time being in force such procedure*

> *as the justice of the case may require and as is not inconsistent with this Code may be followed.*

Considering the above, the taking of voice samples is indeed a procedure which the Code nor any other law expressly provides for, however as discussed above, it is in no way inconsistent with the Code and is aimed at achieving justice as is required in the instant case.

However, the Accused Appellants raise a secondary question whether the above order to provide evidence would potentially incriminate them on positive identification would amount to a violation of the rule against self-incrimination. The Evidence Ordinance Section 120(6) on Competency of witnesses provide that the accused shall be a competent witness in his own behalf, accordingly, the accused cannot be compelled to provide evidence against himself.

In Sri Lanka, this has been tested previously in ***Rex v Suppiah (1931) Cey. Law Recorder 31***, where the accused was compelled by an order of the Magistrate to provide impressions of fingerprints, which cited an observation made in a case before a Full bench of the High Court of Burma, ***King Emperor v Tun Hlaing (1923) I.L.R. 1 Ran. 759, F.B.*** wherein it was remarked that:

> *"The Court was not in effect compelling him to provide evidence against himself, since what really constituted the evidence, viz, the ridges of his thumb, are not provided by him any more than the features of his countenance"*

Further the case of **King v. Francis Perera 9 NLR 122** was cited, wherein a sample of handwriting was taken on an order of the Magistrate. In this instance, Middleton J was of the following view,

> *"It seems to me that the writing of these words and letter was merely the creation of facts, which standing alone were of no probative value, but which, when coupled or compared with some other facts in the case, might suggest an inference one way or the other, and until that comparison or conjunction was made, no inference arose."*

The above view was concurred by Wendt J who stated thus:

> *"They are not, the embodiment in language of any facts or opinions. The mere fact that they suggest an inference of guilt is not enough"*

In considering the instant case in light of the above, it is apparent that providing samples of his voice in conversation and via reading a transcript does not by itself amount to a confession and is merely a matter of providing a sample of the characteristics inherent to a person's voice, as opposed to posing questions in regard to the contents of the conversations at such stage of investigation. The

evidence of the recordings is of relevance at the comparison of the samples and on arriving at a conclusion as to identity of the suspect. It is primarily of relevance that certain communications, of whatever content, were constantly recurring between the parties at hand. The providing of voice samples to arrive at conclusions on scientific basis is a discovery of relevant fact and does not amount to a confession in the sense of violating rule against self-incrimination. To interpret it in such manner negates the functionality of Sections 123 and 124 as has been utilized since the enactment of these provisions. In the instant case this evidence is solely of corroborative value.

As neither of the above circumstances pertain to Voice Samples, the case of ***Ritesh Sinha v State of Uttar Pradesh (2013) 2 SCC 357*** cited cases including that of ***State of Bombay v Kathi Kalu Oghad (1961) AIR 1808*** in which the following observations were made by the then Chief Justice B.P Sinha:

> *"…Self-incrimination must mean conveying information based upon the personal knowledge of the person giving the information and cannot include merely the mechanical process of producing documents in court which may throw a light on any of the points in controversy, but which do not contain any statement of the accused based on his personal knowledge.*
>
> *In order that a testimony by an accused person may be said to have been self- incriminatory, the compulsion of which comes within the prohibition, of the constitutional provision, it must be of such a character that by itself it should have the tendency of incriminating the accused, if riot also of actually doing so. In other words, it should be a statement which makes the case against the accused person at least probable, considered by itself. A specimen handwriting or signature or finger impressions by themselves are no testimony at all, being wholly innocuous because they are unchangeable except in rare cases where the ridges of the fingers or the style of writing have been tampered with. They are only materials for comparison in order to lend assurance to the Court that its inference based on other pieces of evidence is reliable..."*

Applying the above to the instant case, the compelling of the accused to provide voice samples cannot be considered self-incriminatory as it does not make the case against the accused probable by itself, rather it is used upon positive identification only in conjunction with other reliable evidence against the accused. Accordingly, the provided voice samples do not amount to a confession and is not self-incriminatory in nature. It is simply the process whereby facts pertaining to the identity of the accused can be ascertained.

Additionally, the Accused Appellants in their submissions raised a question of the compulsion to provide voice samples being a violation of the rights of the Petitioner. However, as in the **Ritesh Singh** case, in the specific context of the instant case, the position in Sri Lanka is that the right to privacy cannot be construed as absolute. The suspect under investigation must bow down to compelling public interest and the Magistrate's power to order him to give a sample of his voice for the purpose of investigation of a crime. Such power has been conferred on a Magistrate in order to exercise his jurisdiction vested in him under the aforementioned provisions of the Code of Criminal Procedure Act.

Considering all above, it is the opinion of this court that the Magistrate had power to give voice samples to the Government Analyst and the compulsion of the Accused Appellants to give voice samples is not a breach of the rule against self-incrimination nor has it caused a miscarriage of Justice or violation of their rights.

Is "Voice Analysis" in the manner conducted by Witness Gunathilaka, Assistant Examiner of Questioned Documents of the Government Analyst Department a "Science"?

It must be noted that this question of law at hand is not solely whether Voice Identification itself is a science, but rather whether the Voice Identification in the manner conducted by Witness Gunathilaka qualifies it as a science.

Since the question whether witness Gunathilaka is an expert in Voice Identification has been dealt with, we may consider the circumstances under which the evidence of this witness becomes relevant to the instant matter. As per Section 45 of the Evidence Ordinance, opinions of experts are relevant in certain instances. It is as follows:

> *"When the Court has to form an opinion as to foreign law, or of science, or art, or as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, the opinions upon that point of persons specially skilled in such foreign law, science, or art, or in questions as to identity or genuineness of handwriting or finger impressions, palm impressions or foot impressions, are relevant.*
>
> *Such persons are called experts. "*

Accordingly, an expert is a "person specially skilled in such science." The Accused Appellants have stated in their Written submissions that by the exclusion of any reference to "voice" in the above provision, the legislature never intended to provide for matters of Voice Identification. As has

been observed in the Judgment of the High Court, it must be noted that this provision was enacted in 1895. It is rather apparent that the science of "Audio Forensics" was not developed at the time of enactment of the Evidence Ordinance. Despite a lack of substantial amendments, this provision is still operable on the basis that the provision does not restrict the interpretation of what may amount to a science or an art, thus leaving room for the evolution of the same based on available technology, modern developments with the passage of time. The approach of courts has been aptly demonstrated in ***Singho Appu v the King (1944) 46 NLR 49,*** which stated thus;

> *"… "Science" and "art" in section 45 of the Evidence Ordinance are to be construed widely"*

It must also be noted that all areas of expertise expressly provided for in this provision pertain to the ascertainment of identity through the use of science. This has been the basis for leading evidence on many other matters of which expert evidence is admissible in Sri Lankan Courts, that solely fall within the ambit of "science", despite lack of direct mention in Section 45.

Further, as per illustration c of Section 45,

> *"The question is, whether a certain document was written by A. Another document is produced which is proved or admitted to have been written by A. The opinion of experts on the question whether the two documents were written by the same person or by different persons, are relevant."*

In terms of the above illustration, it is apparent that Section 45 stands to provide for expert evidence on identification. In the instant case, the evidence of the Expert Witness has only been used by the High Court to establish that the speakers in the recorded conversations were in fact the Accused Appellants. It appears that the question whether the voices of the speakers in the recordings as stated by the Complainant were the same voices of the Accused Appellants as per the voice samples provided by them. It is rather similar to the question whether the handwriting is of the same or different persons as raised in the illustration above. Considering all, in the event Voice Identification is considered a science in the manner conducted by the Expert Witness, expert evidence of the same is admissible under Section 45 of the Evidence Ordinance.

In the matter of assessing whether Voice Identification in the manner conducted by the expert witness is a science, the factor of whether the procedure followed during analysis is 'scientific' is of relevance. The High Court considered the fact that Voice Identification has been a developing area of research in Forensic science which has been evolving since World War II. The understanding behind this area of research has drastically evolved since its early days leading to higher levels of accuracy and many more available reliable methods to achieve its objective. The Witness has

explained how technological advancements have brought format comparison on par with DNA and handwriting analysis.

As already discussed in this Judgment, prosecution in the instant case had heavily relied on the identification of the two Accused-Appellants through their voice, and as already referred to above, PW 41 Dulani Lalithya Gunathilake testified before the High Court at Bar regarding her expertise on the matter and her findings with regard to the examination conducted on the voice samples submitted before her.

The High court Judgment reproduces at length, the basis of such analysis as described by witness Gunathilake in her evidence and the process utilized to analyze the impugned recordings. Witness Gunathilake in her evidence states specific factors considered in Voice Identification.

The witness described the physiological process through which voice is produced and perceived by a human being. This has been done to explain how this field is being treated as a science. A voice is produced by a stream of air starting at the lungs and moving through the larynx vibrating the vocal cords in it. The vibrations are released as sound waves. The sound waves would differ on factors such as the thickness of the walls of the larynx, the length of the vocal cords, their shape, and the amount of air that flows through it. The sound waves that take different shapes on the above factors would be reflected as 'formants' in the analysis.

The witness also explained that there are four formants in the Human Voice (Named 1,2,3 and 4) Out of the above four formants, the human ear can only perceive the 1st and 2nd formants. The 3rd and 4th formants out of the above are unique to each individual just like handwriting and DNA and is not affected by imitation. The witness explained that the analysis of the above formants is therefore accepted as a science.

In terms of the steps involved in the scientific analysis as conducted by the witness, the steps as described were firstly that of "Critical Listening". Critical Listening is explained as a focused form of listening where small segments are listened to repeatedly. Qualities such as primary frequency, pitch, volume, duration of periods of silence of the speaker, speed of speech, dynamics, the stress put on words/ enunciation of words, accent, words frequently used by the speaker, geographical variations in speech, and stammering are perceived and analyzed at this stage. As explained a voice sample is listened to over one hundred times and Spectrogram Analysis is also conducted to identify the 'formants' in the voices at this stage.

The Second Step is the extraction of voice samples from the individuals in question. Having a normal conversation with the subjects is done first in this process. While basic aspects of the voice are

checked, the subjects are later given a transcript to read out. The transcripts are extractions from the recordings that are produced for analysis. The portions from the transcripts are compared with the same portions of the questioned recordings when doing the formant analysis.

The witness further opined that the next expected development in this field would be “automatic comparison.” Even though such a software is used nowadays during the course of analysis, it is said not to be accurate enough to express an opinion based on that alone, Therefore the comparison is not solely based on the automatic analysis giving a margin for errors. The final comparison results are also subjected to review. The witness also explained how her report, in this case, has been subjected to review and agreed upon.

In addition to the above, she has stated that she has taken care to observe any background noises that would affect the analysis. Other factors considered had included whether the voice provided for analysis is a computer-generated voice which is evaluated during the Critical listening stage and through observations done during this phase and she was satisfied that no editing has been done.

The witness has discussed the extraction process of the recordings and the obtaining of the voice samples from witness which will be considered in due course in the analysis of the relevant questions of law. In Cross examination, she was extensively questioned on the validity of the Spectrographic analysis, to which she provided substantial responses with an explanation to the effect that the Spectrographic approach is supplemented by Critical Listening, automatic analysis, and review.

In terms of Audio recorded Evidence and Identification of an accused by voice, such evidence has been admissible in Sri Lanka for well over half a century. The High Court cites and relies on the Case of ***Abu Bakr v The Queen (1953) 54 NLR 566***. In this case, the prosecution adduced evidence to the effect that the incriminating speech in question, which allegedly attempted to promote feelings of ill-will and hostility between different classes of the King's subjects, was electronically recorded, and subsequently reproduced, by means of an instrument and that when it was reproduced it was taken down in writing by an officer of the Criminal Investigation Department, named Wijesena, and that the document containing the text of the speech as taken down by him. The said Wijesena gave evidence, identified the document, and read it aloud to the jury. One of the grounds of appeal is that this document was inadmissible. In this case, an element of Voice Identification was discussed. Gunasekere J considered the evidence reproduced by electronic means to be admissible under S.11 of the evidence Ordinance under the below premise:

"There was evidence before the jury, about the working of the wire recorder, upon which it was open to them to hold that the instrument could accurately record a speech and reproduce it; ….

The police sergeant who had operated the instrument at the time of the speeches gave evidence to the effect that it was he who operated it later to reproduce the sounds recorded on P1 so that Wijesena might take down the appellant's speech as reproduced; ***and that he identified the appellant's voice on that occasion. Another police sergeant, too, gave evidence to the effect that he was present on both occasions and that he too identified the voice that was reproduced as the voice of the appellant.***

The speech that is alleged to have been reproduced in Wijesena's hearing by means of the wire recorder is a fact that, in connection with the other facts alleged by the prosecution witnesses regarding the making of a speech by the appellant and the recording and reproduction of it, makes it highly probable that the appellant made a speech in the same terms on the occasion in question. Therefore, if it is not a fact that is otherwise relevant, it is relevant under section 11 of the Evidence Ordinance; which provides that facts not otherwise relevant are relevant if by themselves or in connection with other facts they make the existence of any fact in issue or relevant fact highly probable. ….. Therefore, even if the document itself was inadmissible there was before the jury admissible oral evidence of what was heard by Wijesena, from which they could infer what was said by the appellant and was recorded on the spool of wire P1.

As such the use of voice recording for the purpose of identification of an individual is not entirely a foreign concept to Sri Lankan Courts. The above case was cited for further discussion of this matter in the case of ***Karunaratne V. The Queen (1966) 69 NLR 10*** concerning a wire recording of a telephone conversation in which the police accused a solicitation of a bribe as inducement for the performance of an official function. The evidence was to be led in the form of the transcript of this conversation, however, the original recording itself was played in court. Hon. Justice T. S. Fernando, J observed:

"It was next urged on behalf of the appellant that, before the tape- recorded evidence was acted upon, the trial judge should have considered the evidence of an expert the defence called at the trial to prove, inter alia, that (1) there are dangers in attempting to identify speakers by their voices as relayed through tape-recorders and (2) the dangers attendant upon such identification are greater in a case where what is relayed is a telephone

conversation, and that too a taped telephone conversation. I think the criticism made in this regard is just."

However, the omission of the same was not fatal in the above case owing to ample surrounding evidence to substantiate the charge, as the Judges believed the wire recorded evidence was relevant principally as corroborative evidence touching identity. As evidence was led extensively on the matter of the margin of error in voice identification as well as the actual risk of using the evidence, we find that the circumstances mentioned in **Karunaratne** case do not apply against the admissibility of the recorded evidence in the instant case.

However, both law and science have developed exponentially since the above decisions. The above cases referred to witnesses simply identifying a suspect by voice and did not delve into determining the admissibility of evidence as a science nor consider expert evidence based on the same. Accordingly, the evidence of Voice Identification has predominantly been used in the past where the witness is familiar with the voice of the perpetrator.

Thus, in discussing whether the methodology used in the instant case is recognized in courts of law as a "Science", we may turn to available research and determinations in other Jurisdictions.

In terms of available research, in delving into the development of this field of science visible speech as a quantitative and legible form of speech was propounded by Melville Bell, and continued by his son, Alexander Graham Bell, and was furthered by the efforts of Bell Telephone Laboratories. The development of this technology was initially for the benefit of the deaf community, but the use of the Spectrograph and related technology was later rated a war project given the military interests in this technology. The technology of "voiceprints", coined with obvious reference to fingerprints, for the purpose of Voice Identification was furthered during this time and was later controversially used in forensic applications by engineer Lawrence Kersta. Others soon discovered that context dependence is important to perform identification and an aural perspective was suggested to increase the accuracy of identification, which has been supported by research subsequently. Accordingly, the development of the methodology as it stands today predominantly focuses on the use of four general approaches including the Auditory Approach, the Spectrographic approach, the Acoustic-phonetic approach, and the Automatic Approach.

In determining whether the utilized procedure is scientific, the High Court has relied on that of ***Daubert v Merrell Dow Pharmaceuticals Inc. 509 U.S. 579***. This case was preceded by the case of ***Frye V. United States, 293 F. 1013 (D.C. Cir. 1923)***, which had set the standard of admissibility of

expert opinion based on a scientific technique. In determining the admissibility of novel scientific evidence, it was famously stated that:

> *"Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery,* ***the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs"***
>
> *(Emphasis added)*

This above "general acceptance test" was applied in determining the admissibility of expert evidence on spectrographic voice identification in many instances, including that of ***US v Smith 869 F.2d 348 (7th Circuit 1989)***. In this instance, the court was faced with a unique situation of identical twins who had committed financial fraud. The women were indicted and tried together for posing as bank employees and having telephoned banks authorizing them to make wire transfers of non-existent funds. Given that identity was a core dispute at the trial the government had led evidence provided by a Voice Identification Expert who utilized the Spectrographic approach to determine which of the twins had made certain phone calls. It was argued on behalf of the defence that Voice Identification did not pass this test of general acceptance. However, based on sufficient evidence of the reliability of this technique being adduced at trial by a description of the principles behind and the technique used to make spectrographs, as well as the technique being unlikely to mislead the jury, The evidence was held to be admissible.

However, in the case of ***Daubert V. Merrell Dow Pharmaceuticals Inc. 509 U.S. 579*****,** as has been relied on by the High Court, it was held that, faced with expert scientific testimony, the trial judge, must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and can be properly applied to the facts at hand. Many considerations will bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community. The inquiry is a flexible one, and its focus must be solely on principles and methodology, not on the conclusions that they generate. Throughout, the judge should also be mindful of other applicable rules.

While it is specified that this is not an exhaustive list, the considerations therein mentioned are sound in assessing whether the scientific method is sound, beyond simply the "General Acceptance" test of Frye.

In the instant case, the Witness has provided information as to the above. She has expounded on the acceptance of this science within the relevant scientific community of Forensic Audio Analysis, and the methods utilized are supported by current scientific findings in this field of science. Additionally, the software and devices used and their acceptance as suitable for the purposes used, and she has provided a clear answer as to the margin of error and potential risks, including the methods used to mitigate errors as far as possible through using a combination of multiple standard methods. As has been aptly noted, the inquiry is a flexible one wherein the methodology used in each science must be considered for its own merit as opposed to a strict checklist to be satisfied. The expert witness has conducted this examination with careful attention on the process and has not hesitated in indicating instances where she could not give conclusive answers, giving her reasoning for such instances. Additionally, her findings are not merely her own, but have been reviewed and approved by competent individuals in her department.

In terms of the error rate, a hundred percent infallibility or unanimity is not a precondition for general acceptance of scientific evidence under our law. Allowing for substantial technological advancement since the decision in the case of ***U.S. Vs. Smith (Supra)*** in terms of the Spectrograph analysis alone as it was in that time, the error rates as admitted and discussed in that case, prove that there is a certain margin of error as has been elaborated by numerous studies. However, it is also mentioned that many difficulties encountered in Voice identification using tapes not recorded under laboratory conditions will increase the error rate of false eliminations. As such, instead of results in more false identifications, these variations would result in more false eliminations, doing away with prejudice that may be caused to the accused by the conditions of the recording.

In the instant case this is assisted by the element of the accent and speech style of the two accused, in speaking in English which is not in fact their first language. The 2nd Accused has admitted that he is not particularly comfortable or well versed in speaking English, which amounts to his individual speaking style and accent being much more so pronounced as opposed to comparing the samples of persons whose style and manner of speaking would be easier to replicate. As in **Archbold** on **Criminal Pleading Evidence and Practice 14-72**, on Expert Evidence of Voice Identification by personal characteristics, the advantage of expert evidence is that the expert can draw up an overall profile of an individual's speech patterns, in which the significance of each parameter is assessed individually, and which will be backed up with instrumental analysis and reference research.

Additionally, admission of evidence of novel sciences for the purposes of identification is not a foreign experience for Sri Lankan Courts. For instance, the leading of evidence as to identification through DNA typing and fingerprints in the ***Sajeewa Alias Ukkuwa and Others V. The Attorney-General (Hokandara Case) (2004) 2 SLR 263*** as early as 1999 made history as the first case to consider DNA evidence in Sri Lanka. Thereafter, the use of DNA evidence as corroborative evidence in the case of ***The Attorney-General V. Potta Naufer and Others (Ambepitiya Murder Case) (2007) 2 SLR 144,*** with extensive elaboration of the methodology and science supporting the use of DNA typing, are both instances of leading expert evidence for the purposes of identification. Given the technological advancement, especially with the use of personal devices as smartphones and personal computers, the outlook on technological evidence must be altered significantly, making room for modern realities which could not have been contemplated by legislators at the time of the enactment of certain legislation effecting such evidence. It is evident that the evolution of technology has outpaced the parallel development of law, and oft it has been demonstrated in cases as the above, that practical necessity being demonstrated in cases, leads to the opinions of courts preceding and influencing eventual legislative amendments encompassing such opinions.

The identification of individuals, earlier being a selected few methods has undeniably advanced during the current millennia. For instance, the development of biometric technology for identification, including methods as facial and retinal recognition, have drastically increased in accuracy.

However, in terms of legal admissibility of evidence based on novel sciences, it is entirely dependent on factors that include those considered above and is undeniably subjective to each individual circumstance, the science concerned, the specific methodology used, and the error margin involved. In the instant case, applying all the above tests and taking the expert evidence into account, with due regard to the methodology used in this specific circumstance, we find that “Voice Analysis” in the manner conducted by Witness Gunathilake, is in fact a “Science” which falls under Section 45 of the Evidence Ordinance.

Was it correct for the trial court to have concluded that Witness Gunathilake of the Government Analyst Department was an “Expert” on “Voice Identification” for the purposes of S.45 of the Evidence Ordinance?

In considering the question of whether Witness Gunathilake is an expert in the field of Voice Identification, her credentials which have been admitted during the examination of the witness before the High court are noteworthy.

She has performed over sixty voice analysis and issued Analyst Reports for similar purposes albeit never having testified before court prior to this occasion. She was functioning in the capacity of Assistant Government Examiner of Questioned Documents and had listed her basic qualifications. In respect of qualifications in the area of Forensic Audio Analysis, she has specialized in this area during the training she received through a project conducted by KOICA Institute (Korea International Cooperation Agency) through which she has participated in a training conducted by four senior scientists at the National Forensic Service (NFS) situated in Wongju, South Korea. Thereafter, a further training was provided on her return to Sri Lanka. The witness explains that the equipment required for this form of testing was donated by KOICA and that she is the most senior officer in regard to Audio Forensic Analysis in her Department and has provided reports since 2017.

In terms of who may qualify as an expert, the High Court has relied on the definition provided by **Black's Law Dictionary** as

> *"Someone who, through education or experience, has developed skill of knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder"*

And "expert evidence" as provided by the same source is as follows:

> *"Evidence about a scientific, technical, professional or other specialized issue given by a person qualified to testify because of familiarity with the subject or special training in the field"*

In the case of ***Charles Perera V. Motha 65 NLR 294*** Hon. Basnayake, C. J. expressed his opinion on the expert witnesses to the effect that:

> *The standing of the expert, his skill and experience, the amount and nature of the materials available for comparison, the care and discrimination with which he has approached the question on which he is expressing his opinion, the extent to which he has called in aid the advances of modern science to demonstrate to the Court the soundness of his opinion, are all matters which will assist the Court in assessing the weight to be attached to the fact of his opinion. The cross-examination of the " expert " by the opposing side, where it is properly directed, would also assist the Court in determining what weight it should attach to the fact declared relevant by section 45.*

Additionally, in cases such as ***Solicitor General V. Fernando 1965 67 NLR 159*** it was considered that the precise character of the question upon which expert evidence is required has to be taken into account when deciding whether the qualifications of a person entitles him to be

regarded as a competent expert. In the situation at hand given that the witness is the expert on Audio Analysis in Sri Lanka and the character of the question pertains to Voice Identification, which is an area she has received special training in, she qualifies as an expert in the instant case on the questions directed to her.

Her credibility is in no way affected by the lack of previous appearances before a court of law. As considered in ***Mitharadasa Fernando V. S.I of Police, Kalubowila 1961 63 NLR 422*.** The fact that a person has provided evidence as an expert 250 instances prior, does not qualify him as an expert in the subject matter. Further, as per ***Stork I.P Vs. Perera (1948) 38 C.L.W 80*,** once the necessary degree of skill is conceded it does not matter how seldom that skill has been displayed in the witness box. Accordingly, the real expertise, training and methodology utilized by the witness is of more important than the number of times a person may or may not have testified before court. This was considered in the field of Voice Identification in the US 7th Circuit Court in ***US V. Smith 869 F,2d 348 (7th Cir.1989)***, in leading evidence of an expert who had not previously testified as a voice identification expert in a court of law.

The expert evidence of novel sciences is a question posed to Courts even during cases as ***Singho Appu V. The King (Supra)*** in which expert evidence was led regarding footprints, Hon Howard, C.J, considered that;

> *"Here again the testimony against the accused did not rest solely on the evidence of foot-prints… it would appear that the learned Judge in the present case was entitled to construe the words "science" or "art" so widely as to include within its ambit the testimony of a person who had studied foot-prints. If he was satisfied that such person was capable of distinguishing and identifying foot-prints, he was also entitled to rely on his testimony"*

In such cases, it was made apparent that in addition to the wider construction of Section 45, evidence of such science or art can be admitted if the Court is satisfied that the person testifying regarding the same is a person capable of distinguishing and identifying matters of such nature,

Applying the same to the instant case, in perusing the material before this court I find that the Witness has received requisite training and is competent in the field in which she professes to be an expert and she has continually practiced the same in previous instances albeit never having testified before court on the same. The witness has provided extensive and clear answers to the questions posed to her in her area of expertise in addition to a clear report of her investigation. She has expressed the basis of her having formed opinions with direct reference to the methodologies utilized by her in the conduct of her investigation. Further, she has not hesitated in answering with

clarity of the instances she could not deduce any matter with certainty. The witness has maintained a professional demeanor, standing firmly in cross examination and has presented her opinion with great confidence in an unwavering manner. The cross examination has not revealed any matters fatal to her findings nor refuted her position through other expert evidence.

For the reasons stated hereinbefore we hold that it is correct for the trial court to have concluded that witness Gunathilake of the Government Analyst Department is an "Expert" on "Voice Identification" for the purposes of S.45 of the Evidence Ordinance.

What amounts to "Safe Custody" as per Section 4 (1)(d) of the Evidence (Special provisions) Act? Were the Voice recordings in "Safe custody," when the recorded conversations were in a mobile phone, which was in the custody of the virtual Complainant? Has the fact that the voice recordings were in the custody of the Virtual Complainant, resulted in the recordings becoming inadmissible?

Information stored on digital devices can pose a number of evidential issues for the courts. This is largely given that rules of evidence contained in the Evidence Ordinance evolved long before the advent of modern electronic equipment and computers, and those rules have not always proved adaptable to evidence emanating from such modern devices. This has necessitated the introduction of legislation with a view of facilitating the proper use of such evidence. The Evidence (Special Provisions) Act No. 14 of 1995 has been enacted in Sri Lanka to provide for the admissibility of audio-visual recordings, and of information contained in statements produced by computers in civil and criminal proceedings.

Section 3 of the Evidence Ordinance has confined its definition of "evidence" to oral and documentary evidence. However, despite the non-inclusion of real evidence within the definition of "evidence" in Section 3, our courts have admitted real evidence also. The introduction of the Evidence (Special Provisions) Act No. 14 of 1995, has now enabled a party to produce in any proceeding where direct oral evidence of a fact would be admissible, any contemporaneous recording or reproduction thereof. (Section 4 (1) of the Act).

Section 4 (1)(d) of the Evidence (Special Provisions) Act reads as follows,

> *"In any proceeding where direct oral evidence of a fact would be admissible, any contemporaneous recording reproduction thereof, tending to establish that fact shall be admissible as evidence of that fact. If it is shown that-*

a) .....

b) .....

c) .....

d) the recording or reproduction was not altered or tampered with in any manner whatsoever during or after the making of such recording or reproduction, or that it was ***kept in safe custody at all material times, during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with, during the period in which It was in such custody."***

(Emphasis added)

There was no dispute that the voice recordings relevant to the instant case is a contemporaneous recording in terms of Section 4(1) of the Act. This is presumably because the said voice recording was recorded using a mobile phone.

The main thrust of the arguments put forward by the Accused Appellants is whether the voice recordings were in safe custody while in the possession of the Virtual Complainant. Section 4(1)(d) of the Act (above mentioned) is relevant in this regard.

Safe Custody is the safekeeping of important documents and valuables, in the instant case, the voice recordings. It is important to maintain the chain of custody to preserve the integrity of the evidence and prevent it from contamination, which can alter the state of the evidence. If not preserved, the evidence presented in Court might be challenged and ruled inadmissible. The chain of custody in digital forensics can also be referred to as the forensic link, the paper trail, or the chronological documentation of electronic evidence. It indicates the collection, sequence of control, transfer, and analysis. It also documents each person who handled the evidence, the date/time it was collected or transferred, and the purpose for the transfer.

In order to preserve digital evidence, the chain of custody should span from the first point of data collection, through examination, analysis, reporting, and the time of presentation to the Courts. This is necessary to avoid the possibility of any suggestion that the evidence has been altered or tampered with, in any manner. While it may have been handled correctly during the forensic process, if the evidence is then handed to the Court in a way that then leaves it open to alteration, perhaps by altering the timestamps or metadata associated, it may then be damaged. Hence it is important to establish that the recordings were in safe custody at all material times and that sufficient precautions were taken to prevent even a mere possibility of tampering in order to ensure

the authenticity of the recordings. In the instant case, the chain of custody pertaining to the persons in whose possession the evidence was kept, it can be observed that the chain of custody has not been broken as the recordings were constantly in possession of the Complainant until it was handed over to the Government Analyst and there have been no third-party interferences.

The Virtual Complainant has recorded multiple telephone conversations which had taken place between the 1st and 2nd Accused-Appellant and himself during the years 2017-2018 on his two mobile phones (iPhone 6 and iPhone 7). The issue raised by the Accused Appellants is that the alleged mobile phones used to record the conversations had not been tendered to the investigators and that the Complainant traveled to Bangalore, India with the mobile phones in his possession. Therefore, the Accused Appellants argue that they were not in safe custody when they were in the possession of the Virtual Complainant.

As per the Complainant's explanation, this was because he was a businessman and needed the use of the said mobile phones for his day-to-day activities. The Complainant admits that he did not hand over the said mobile phones to the investigators but had directly handed them over to the Government Analyst much later. In the meantime, he had traveled to India several times while possessing mobile phones in his custody and had copied all the recordings onto his computer in Bangalore. He further admits that he had retained custody of the phones for 5 days before the recordings made on 23/02/2018 were copied to the computers of the investigators and for over 5 months before the recordings made on 05/09/2017 were copied to the computers of the investigators.

As per the evidence submitted, the Accused Appellant argue that the said mobile phones had been handed over temporarily to the Government Analyst much later on 17/05/2018 and the same was not sealed. It is the contention of the Accused Appellant that the Complainant had ample opportunity to tamper with them prior to handing them over to the Government Analyst.

However, in the Indian case of ***S. Pratap Singh V. State of Punjab, AIR 1964 SC 72*****,** it was held that, tape recorded talks are admissible in evidence and the simple fact that such type of evidence can be easily tampered with certainly could not be a ground to reject such evidence as inadmissible or refuse to consider it, because there are few documents and possibly no piece of evidence, which could not be tampered with.

The Accused relying on Indian Law further argues that the fact that the recordings were not sealed "naturally gives rise to the argument that the recording medium might have been tampered with before it was replayed."

In the Court of Appeal case ***Abeyagunawardane V. Samoon and Others [2007] 1 Sri L.R*** the video cassette lay for two years in a dark room, which was not padlocked, nor the envelope that contained the video cassette sealed, as in the case of other productions, and accessible to many others. Hon. Imam J stated that,

> *"The evidence of P.S. Karunathilaka in my view clearly establishes that the requirements as set out in section 4(1)(d) of the aforesaid Evidence (Special Provisions) Act No. 14 of 1995 were not complied with. Section 4(2) of the aforesaid Act makes it clear that the video cassette could be admissible in evidence only if the conditions set out in section 4(1) are satisfied."*

In the above case, it was decided that the video cassette was not admissible as it did not satisfy the requirements set out in Section 4(1)(d) as it was easily accessible to anyone for two whole years and thus could have been tampered with. However, in the instant case, although the devices were not sealed when it was handed over to the Government Analyst, the recordings were on the personal mobile phones of the Complainant. As such, the circumstances of the instant case differ from that of the aforementioned case as it was always on his person even when he traveled to India and was never left unattended unlike in the case of **Abeyagunawardane**.

Furthermore, the Complainant had established the fact that the two mobile phones were secured with Personal Identification Numbers (PIN) only known to him and it was only he who had access to the phones. In mobile devices, the PIN acts as a password preventing persons from gaining unauthorized access to a personal device. This is a numeric code that must be entered each time the device is started. Unlike a video cassette, a mobile phone is much more advanced in technology and has many security features such as PIN codes or biometric scanners which prevents unauthorized access.

Due to the development of security countermeasures in personal devices, such as smartphones are no longer easily accessible to outsiders. As per Paul Bischoff, who is privacy advocate at Comparitech, iPhones are considered to have a highly secure operating system. Disk encryption is enabled by default, apps from the App Store go through a stricter vetting process, and Apple does not gather users' personal details for advertising purposes. Hence, third party access through hacking or malware is minimal in the devices used by the Complainant.

In the instant case, it is vital to establish that the recording or reproduction was not altered or tampered with in any manner whatsoever during or after the making of such recording or reproduction, or that it was kept in safe custody at all material times, during or after the making of

such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with, during the period in which it was in such custody.

As per the testimony of the expert witness Gunathilake, they have subjected the recordings to an initial investigation. She further pointed out that they did not subject the recordings to an authenticity analysis as they were not requested to do so. However, upon the initial investigation they were able to identify that they were not computer-generated voices thus, there was no need to go for an authenticity analysis.

However, they did subject the said recordings to a process of Critical Listening. This involves a thorough breakdown of both foreground and background sounds through repetitive listening. They had scanned the recordings to identify any viruses, then made a duplicate copy of it to work with, in order not to harm the original file. During the initial investigation of the copy, they first identify whether the voices on the recording are computer generated voices. Next, they pay attention to the background noises to see if there have been any changes to the background or if the flow of the conversation has changed. During this process they had listened to recordings repeatedly in order to identify if there has been any editing done to the recording, during which they had not identified any discrepancies. It is submitted that on a preliminary basis there were no indications of alteration shedding doubt on the authenticity of the recordings that would have indicated the need for an Authentication Analysis.

Upon being questioned on whether any mimicry of voices can be identified during the initial investigation, witness Gunathilake explained that only the tone we hear will be different. No matter how hard a person tries to change their voice only the basic pitch can be changed, and the person can still be identified through the process utilized for identification and on the above basis it was observed that the recordings have not been altered or tampered with.

On a secondary level, the Accused-Appellants argue that the presence of a “modified date” on the properties of the said recordings show that they have been modified by the Complainant. As per witness Gunathilake, what appears as the date modified means the last date the file has been modified or the content of the file has been changed. This can be changed or edited by anyone and therefore cannot be considered during a forensic investigation. As she further explained, the date modified can change due to saving the file after any small changes done to it or if the file is copied as a VCD – then both the modified date and created date will change to the date it was created. This can even change if one copies the file to a laptop, in which event the date of the file may change to

the date and time of the operating system on the laptop. Therefore, as per witness Gunathilake, the date modified cannot be relied on in identifying whether the file has been tampered with.

Thirdly, the Accused Appellants relying on the testimony of witness Gunathilake, argued that the voice recordings may have been tampered with even before they were handed over to the Government Analyst Department.

As witness Gunathilake explained, a more accurate and scientific form of investigating any tampering or alteration of the voice recordings is by analyzing the Hash Value of the recordings. Hash value is an algorithm which is unique to each file and is used to identify the files. Hash values can be thought of as fingerprints for files. The contents of a file are processed through a cryptographic algorithm, and a unique numerical value (the hash value) is produced that identifies the contents of the file. If the contents are modified in any way, the hash value will also change significantly. Of the many varieties of hash values available, the varieties used in the immediate investigation are MD.05 (Message Digest 5) and SHA 01 (Secure Hash Algorithm 1).

As every file on a computer is, ultimately, just data that can be represented in binary form, a hashing algorithm can take that data and run a complex calculation on it and output a fixed-length string as the result of the calculation. The result is the file's hash value or message digest. Since hashes cannot be reversed, simply knowing the result of a file's hash from a hashing algorithm does not allow a person to reconstruct the file's contents. However, it does allow to determine whether two files are identical or not without knowing anything about their contents.

As witness Gunathilake explained, she cannot confirm that the hash value of the original recording and the hash value of the recording given to her are the same. In the event the recording had been altered with before she received it, she would not have the original hash value. However, what she can confirm is that the hash value of the recording given to her, and the hash value of the recording played in Court are the same. Thus, it can be proved that the recordings have not been tampered with during that specific period of time, however, it is not a fact that can serve to establish genuineness nor tampering of any form.

Due to the above reasons explained, this Court believes that the mobile phones were in safe custody while they were in the custody of the Virtual Complainant.

Additionally, the Accused Appellants had raised objections with regard to the application of Section 7(1) of the Act. Section 7(1) reads as follows;

> *The following provisions shall apply where any party to a proceeding proposes to tender any evidence under section 4 or 5, in such proceeding-*

(a) the party proposing to tender such evidence shall, not later than forty-five days before the date fixed for inquiry or trial file, or cause to be filed, in court, after notice to the opposing party, a list of such evidence as is proposed to be tendered by that party, together with a copy of such evidence or such particulars thereof as is sufficient to enable the party to understand the nature of the evidence;

(b) any party to whom a notice has been given under the preceding provision may, within fifteen days of the receipt or such notice apply to the party giving such notice, to be permitted access to

At the time of the commencement of the trial, the accused had requested access to the two iPhones, which were used by the Complainant to record the conversations. With the commencement of the prosecution the Court has allowed both Accused Appellants to inspect the two mobile phones of the Complainant. (Both Accused have challenged the voice recordings on the ground that they were not kept in safe custody and that the Prosecution has not excluded the possibility of tampering. Therefore, they contended that it was dangerous to rely on such recordings).

However, as observed by the High Court, the said request for access to the mobile phones were made only on 09/09/2019, which was not within the stipulated period of 15 days. Though the opportunity was granted, the Accused Appellants did not inspect the devices and informed that the given time was not sufficient to employ the services of an expert. The Court had granted further time to have access to the phones on 18/09/2019 and on 20/09/2019. However, the 1st Accused Appellant particularly had failed to lead the evidence of his expert who inspected the two phones and the 2nd Accused Appellant did not even utilize the opportunity given to him by the Court to inspect the two phones. Therefore, the Accused Appellants cannot rely on non-compliance with Section 7 to question the integrity of the recordings.

Finally, in the question of whether the fact of the recordings being in the custody of the Virtual Complainant has resulted in them becoming inadmissible. In the instant case, when dealing with the question of admissibility, the High Court has stated that it used the voice recordings found in the mobile phones only to the limited extent of identifying the voices of the parties involved. However, as discussed above, as the recordings have been in safe custody while in possession of the Complainant, the recordings can be used as evidence to prove that the conversations actually took place and the incidents discussed happened in reality (further proved by the CCTV recordings submitted). Additionally, during cross examination and through independent evidence led to this

effect, it became an admitted/proved fact that the relevant conversations and incidents had indeed taken place. This is simply, corroborated by the scientific and technical evidence discussed above. Finally, as per Section 167 of the Evidence Ordinance,

> *The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.*

It is the opinion of this court that the conviction of the accused is based on sufficient evidence beyond the voice recordings. Indeed, the recordings serve as corroborative evidence supporting the conviction, however, exclusion of the same would not have amounted to any substantial variation of the decision.

Therefore, after carefully observing all the evidence at hand, this Court believes that the voice recordings which were in the mobile phones of the Virtual Complainant were in safe custody as per Section 4(1)(d) and are therefore admissible.

Were the two Accused-Appellants entrapped to commit the offence they have been convicted of, and if so, have they been deprived of a fair trial?

As has already been mentioned above, the virtual complainant had met ASP Ruwan Kumara of CIABOC after he had received a telephone call. Upon the virtual complainant's arrival in his office at CIABOC, ASP Ruwan Kumara had advised him to submit a written complaint regarding the matter. Thus, ASP Ruwan Kumara after listening to the oral account narrated by the virtual complainant, sent the virtual complainant back to submit a written complaint, without proceeding to record/reduce the statement into writing. Thereafter, the virtual complainant had lodged a complaint on 15th February 2018 and CIABOC had proceeded to record a statement from him on 22 February 2018. As has been mentioned before, the investigators then informed him that the available material is not sufficient to warrant an arrest. As the virtual complainant informed CIABOC that he no longer had contact with either Accused Appellant at that point in time, the Investigators had instructed the virtual complainant to renew his communication line with the Accused Appellants. It is the submission of the Accused Appellants that this procedure amounts entrapment of the Accused Appellants at the instance of the officers of CIABOC.

Learned President's Counsel for the 2nd Accused-Appellant vehemently relied on ***Sorrells V. United States*** 287 US 435 (1932). In that case the term entrapment has been defined as follows: *"… the conception and planning of an offence by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer …".* It can be seen from the above definition that any defence of entrapment would pre-suppose that the accused person who takes up such defence admits commission of the offending act. It is then only such accused person can assert that he/she would not have committed it in the absence of any trickery, persuasion or fraud of the officer. Let us see whether there was trickery, persuasion or fraud on the part of the CIABOC officers.

When the virtual complainant had received a telephone call from ASP Ruwan Kumara of CIABOC he went on his own volition. It was not his position that he was coerced by any officer of CIABOC to make a complaint against the Accused Appellants. When ASP Ruwan Kumara requested the virtual complainant to submit a written complaint, the virtual complainant could have waited without submitting such statement in writing. Thereafter, the virtual complainant could well have waited without proceeding to CIABOC which led to his statement being recorded on 22 February 2018. When the virtual complainant was informed by CIABOC to renew his communication line with the Accused Appellants the virtual complainant could have waited without implementing that advise. It was not his position that he was lured by any officer of CIABOC to make a complaint against the Accused Appellants. It is also not the position of the Accused Appellants that they would not have perpetrated this crime if not for the trickery, persuasion or fraud of the CIABOC officers. The defence of the Accused Appellants is that they did not commit this crime. Then whose position is this? It is only an argument put forward by the learned counsel for the Accused Appellants in the course the hearing of this appeal inviting Court to hold in this case that the officers of CIABOC have entrapped the Accused Appellants. We are unable to see any merit in this argument.

Moreover, if it is the position of the Accused Appellants that they would not have perpetrated this crime if not for the trickery, persuasion or fraud of the CIABOC officers, that would necessarily be within their exclusive knowledge. Thus, in such circumstances, section 106 of the Evidence Ordinance to wit: 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him' shall apply. Even if one is to argue that the above is a special circumstance (not provided by statutory law but as per some law), then too, section 105 of the Evidence Ordinance would apply and the burden of proving the existence of circumstances bringing the case within such special circumstance is upon the Accused Appellants. The Accused Appellants in the instant case have not even attempted to discharge such burden.

We need to be mindful that Police officers day in and day out, lay traps to detect criminals in action. This happens in cases involving possession and trafficking of dangerous drugs, bribery and corruption, gambling, prostitutions, raids carried out by authorized officers under Food Act and even price control cases. That is a long-standing practice happening from time immemorial not only in this country but in every part of the civilized world. While it is not an unlawful method of detecting crimes, the learned President's Counsel also did not seek to argue that those trap cases come under 'entrapment'. This can be clearly seen from the following quotation relied upon by the learned President's Counsel from the judgment of Justice Panchapakesa Ayyar in ***M.S. Mohiddin V. Unknown*** *[AIR 1952 Mad 561]:*

> *"… I have held in several cases already that there are two kinds of traps 'a legitimate trap', where the offence has already been born and is in its' course, and 'an illegitimate trap', where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not.* ***Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money but goes to the police and the magistrate and brings them to witness the payment, it will be 'a legitimate trap', wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man.*** *But, where a man has not demanded a bribe, and he is only suspected to be in the habit of taking bribes, and he is tempted with a bribe; just to see whether he would accept it or not and to trap him; if he accepts it, will be 'an illegitimate trap' and, unless authorized by an Act of Parliament, it will be an offence on the part of the persons taking part in the trap who -will all be "accomplices" whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of Court which has ripened almost to a rule of law. But, in the case of a legitimate trap, the officers taking part in the trap, like P.Ws 9 to 11, and the witnesses to the trap, like P.W. 8 would in no sense be "accomplices" and their evidence will not require under the law, to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinized carefully and accepted as true before a conviction can be had."* (Emphasize is ours).

In the instant case, what had happened is not anything more than the virtual complainant going out offering to bring the money after the Accused Appellants solicited the bribe from him but goes to the CIABOC and brings CIABOC officers to witness the payment. Thus, even in terms of the above case cited by the learned President's Counsel for the 2nd Accused Appellant, the trap in the instant

case would be 'a legitimate trap', which is 'wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man'. It is not an entrapment.

Moreover, Entrapment as a defence is not part of our criminal justice system. Even if one resorts to section 100 of the Evidence Ordinance, the position would be the same. Section 100 of the Evidence Ordinance is as follows:

> *"Whenever in a judicial proceeding a question of evidence arises not provided for by this Ordinance or by any other law in force in Sri Lanka, such question shall be determined in accordance with the English Law of Evidence for the time being."*

In ***R. Vs. Sang****, [(1980) AC 402],* the House of Lords held that Entrapment is not a defence in English Law. Thus, it would further confirm the earlier position we have already taken that even through the window provided for in section 100, Entrapment is not a defence in our criminal justice system.

Furthermore, in Rajapakse V Fernando (52 NLR 361), Mr. Chitty's first submission was that while Courts have to look to the Evidence Ordinance in regard to questions of evidence, nevertheless, it is incorrect to say that the principles of '' Public Policy '' do not form part of our law. Mr. Chitty contended in that case that the power is inherent in the Courts of Justice when it is faced with, what he called, conduct which is contrary to public morality or fair dealing. In such a scenario, Mr. Chitty contended that the Courts, despite the strict rules of evidence, must apply such principles of public policy, and hold that the admission of such evidence would cause greater harm than its rejection, and refuse to receive such evidence. However, Dias SPJ's views stated in that case, could be discernible from following excerpts taken from that judgment. They are as follows:

> *"… With this submission I am unable to agree. It will be observed that Mr. Chitty has been unable to quote a single authority in support of his proposition. What authority there is appears to be against him". …*
>
> *"…What Mr. Chitty is inviting us to do now is precisely what Wood Renton C J. pointed out a Court of Justice could not and must not do, namely, to expand the law of evidence by importing into it certain grounds of public policy to control or modify the statutory rules of evidence laid down by the Evidence Ordinance. This we cannot do as we possess no legislative powers. An examination of the provisions of the Evidence Ordinance shows that the Legislature when drafting the Evidence Ordinance had ". public policy " in mind, and legislated in order to give effect to the principles of " public policy " of the kind Mr. Chitty*

refers to in certain cases. Thus the admission of confessions against persons accused of crimes was confined within very strict limits. The rules of evidence relating to privilege and the admission of privileged communications is another example of the Legislature giving effect to certain principles of public policy. The prohibition that the prisoner's spouse should be called as a witness for the prosecution save in very exceptional cases furnishes another example. I am, therefore, unable to agree with Mr. Chitty that, over and above this, there exists a nebulous and undefined residual power in the Courts to admit or reject admissible evidence brought before it by legally competent and compellable witnesses on grounds of "public policy". Section 100 of the Evidence Ordinance provides that in the case of any casus omissus we are to have recourse, not to Scottish or American law, but to the principles of the English law alone. As I have pointed out, under English Law, relevant evidence which has been obtained improperly is not rendered inadmissible on that ground alone". …..

"..Mr. Chitty next argued that altogether apart from the question of public policy, there is another principle of law that an accused person should not be compelled to give or furnish evidence against himself. I agree that it would be immoral and undesirable that agents provocateur and others should tempt or abet persons to commit offences ; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge ' to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict". …..

The above excerpts are self-explanatory and hence we would not delve on any further discussion on this matter. Therefore, we reject the argument advanced by the Accused Appellants that they have been deprived of a fair trial as the officers of CIABOC have entrapped the Accused Appellants in this case.

In view of the alleged infirmities in the testimony given by the virtual Complainant, can credibility and testimonial trustworthiness be attached to his testimony?

Did the virtual Complainant have a motive to falsely implicate the Accused?

Did the two Accused Appellants possess any motive to solicit and or accept a bribe as narrated by the virtual complainant?

As already referred to above in this judgment, the instant case is based on an investigation commenced by the officers of CIABOC upon a complaint of alleged solicitation of a bribe by two senior Public Servants. The said complaint was investigated by a team of officers from CIABOC and the two Accused-Appellants were arrested at the point of accepting a bribe of Rupees twenty million. The fact that the two Accused-Appellants came to the Coffee-shop of Hotel Taj Samudra and met with the virtual Complainant as pre-arranged by them and the fact that they had some refreshments at the expense of the virtual Complainant is undisputed. The video footages obtained from the Hotel CCTV system confirms this fact. Subsequent to the meeting at the Coffee-shop, all three persons, including the virtual Complainant, the two Accused-Appellants, walked towards the car park. When the car belonging to the virtual Complainant reached them, the 1st Accused-Appellant had got into the rear seat of the said car from the Drivers side, and was seated inside the car with two bags, containing Rs. 20 million when the officers of the CIABOC came to the place. The 2nd Accused-Appellant who accompanied the 1st Accused-Appellant to the car park was watching the transaction when he was arrested by the CIABOC officers.

It is also admitted by the 2nd Accused-Appellant that he met the virtual Complainant on 05.09 2017 at the Waters' Edge Restaurant. The meeting between the two Accused-Appellants and the virtual Complainant on 27.02.2018 at the office of the 2nd Accused-Appellant and on 28.04.2018 at Bread talk Restaurant was admitted by all parties including the two Accused-Appellants. Even though the 1st Accused-Appellant denies his meeting with the virtual Complainant on 17.05.2017 at Royal Boat Restaurant, he too had admitted meeting the virtual Complainant at his office somewhere in August 2016 after signing the shareholders' agreement. It is also an admitted fact before the High Court at Bar, that the virtual Complainant representing Sri Prabhulingeshvar Sugars had submitted the unsolicited proposal for a joint venture between the Government of Sri Lanka and the said company to manage Kanthale Sugar Factory in early 2015 and in fact a cabinet paper was submitted by the late Minister of Lands seeking approval for the above proposal.

The virtual complainant complains of a long delay in giving effect to the unsolicited proposal he made and alleges that the 1st Accused-Appellant being the key person who is responsible for giving effect to the cabinet approval, had purposely delayed the implementation since the virtual complainant did not agree to pay him US $ 300000 as a bribe.

Since the case for the prosecution was solely dependent on the evidence of Nagarajah (the virtual complainant), it was submitted on behalf of the Accused-Appellants that it is unsafe to act on the

evidence of the sole witness who cannot be considered as an innocent person but was a dubious investor. In his evidence before the High Court at Bar, the virtual complainant took up the position that he recorded several conversations between him and the two Accused-Appellants and that he did not modify the recordings until the two phones were handed over to the Government Analyst for examination.

However, it was argued on behalf of the Accused-Appellants that the presence of a modified date on the properties that were examined by the Government Analyst creates a doubt on the evidence of the virtual Complainant and therefore his evidence cannot be acted upon or in other words, the virtual Complainant had lied before the High Court at Bar when he said that he did not interfere with the recorded evidence.

In those circumstances, on behalf of the 1st Accused-Appellant, it was submitted that the Court should advert to the principle of "indivisibility of credibility"

In this regard, the 1st Accused-Appellant relied on several appellate Court decisions including the case of ***Queen V. Vellasamy 63 NLR 265 at 270***.

As already referred to by us in this judgment, witness Gunathilake had explained her position with regard to "Modified data" as "the date modified can change due to saving the file after any small change done to it or if the file is copied as a VCD- then both the modified date and created date will change to the date it was created. This can even change if one copies the file to a laptop, in which event the date of the file may change to the date and time of the operating system on the laptop."

Based on the above, witness Gunathilake took the view that the date modified cannot be relied on, in identifying whether the file has been tampered with or not but she took the view that, the recordings before her were subject to Critical Listening which involves a thorough breakdown of both foreground and background sounds through repetitive listing and she could not identify any editing done to the voice samples. Furthermore, we have already held that the voice recordings which were in the mobile phones of the Virtual Complainant were in safe custody as per Section 4(1)(d) and are therefore admissible. we have already given extensive reasons in that regard.

In the light of the above conclusion and on the evidence of witness Gunathilake, it is not possible for this Court to conclude that witness Nagarajah had lied before the High Court at Bar when he denied making any modification to the recordings that were available in his two mobile phones.

When advancing the above argument, the Accused-Appellants further contended that the same principle of indivisibility of credibility applies when the prosecution decided to drop the 3rd charge in the Indictment against the 2nd Accused-Appellant.

As already referred to in this judgment, the 3rd count in the Indictment referred to a solicitation of a gratification of Rs. 540 million from the virtual complainant on or about 05.09.2017 by the 2nd Accused-Appellant. When establishing charges against an accused person, it is the duty of the prosecution to submit evidence to prove each and every charge. As submitted by the learned counsel for the Respondents, even though witness Nagarajah had referred to a meeting with the 2nd Accused-Appellant at Waters Edge Restaurant on 05.09.2017, he had not referred to a solicitation of Rs. 540 million from him on that day.

In the absence of any other evidence to that effect, the prosecution had decided to drop the said count but it cannot affect the credibility of the evidence of the virtual complainant.

As observed by this Court the above decision of the prosecution was solely on the non-availability of evidence to establish the said count, but there is no material before court to conclude that the virtual complainant had either lied or took up a different stand when giving evidence before the High Court at Bar.

Even though the learned Counsel for the Accused-Appellants relied heavily on the principle of indivisibility of credibility and submitted that “witness cannot be both not credible and credible with regard to the very same evidence” and submitted that it is unsafe to act on the evidence of the virtual Complainant, we see no reason to uphold such position for two reasons.

Firstly, the material already referred to above does not reveal that the evidence given by the virtual complainant with regard to the said matters are contradictory in nature compelling the Court to reject his evidence.

Secondly, our Courts have now adopted a more moderate view in following the principle of indivisibility of credibility which is evident from several cases decided in the recent past including the case of ***Sudu Aiya and Others V. The Attorney General 2005 1 Sri LR 358 at 377*** where the position of our Courts was discussed as follows;

> “Further, counsel’s submission that Ratnayake has given false evidence and by the application of the maxim “Falsus in uno, falsus in omnibus” his evidence should be rejected, is also without merit. Other than a few contradictions and omissions which were not very

material, defence did not succeed in showing that witness Ratnayake had given false evidence. In relation to this matter, errors of memory, faulty observations, and even exaggerations must be distinguished from deliberate falsehood. Besides, this maxim has not been applied as an absolute rule. It was observed in the case of ***Samaraweera vs. The Attorney General*** that divisibility of evidence test is preferred under certain conditions. In the case of ***Francis Appuhamy vs. The Queen*** T. S. Fernando J, in the course of his judgment stated as follows: "Certainly in this Country, it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

The virtual complainant is an Indian National who was engaged in business activities in Sri Lanka since 2003. In 2011 when the Government of Sri Lanka called for international bids to recommence the work in Kanthale Sugar Factory, he submitted a tender but he was not awarded the tender at that time. However, the said process was subsequently cancelled by the Government and in the year 2015 the virtual complainant had submitted an unsolicited offer for the same purpose through Prabhulingeshvar Sugar and Chemicals Company, a leading Sugar Manufacturer in India.

Subsequent to the signing of the shareholder's agreement in August 2016, the virtual complainant had met the 1st Accused-Appellant at his office and during the said meeting the 1st Accused-Appellant had solicited a gratification of 3 million USD to execute the project.

During this period 1st Accused-Appellant was directly involved in the implementation of the project as the Secretary to the Ministry of Lands. As revealed from the evidence of the virtual complainant, the 1st Accused-Appellant on another occasion had informed the virtual complainant that if he does not pay him the solicited gratification, steps would be taken to dispose of the existing machinery without giving it to the virtual complainant as per Article 7.9 of the Agreement. While the process for disposing of the machinery was in progress, the 2nd Accused-Appellant had met the virtual complainant and influenced him to resolve the dispute between the virtual complainant and the 1st Accused-Appellant with regard to the machinery lying in the Sugar Factory premises.

Even though the virtual complainant had ignored various steps taken by the 1st Accused-Appellant that delayed the implementation of the cabinet decision and the agreements signed between the parties, the seriousness of the conduct of the 1st Accused-Appellant was realized by the virtual

complainant when the 1st Accused-Appellant advertised the sale of machinery at Kanthale Sugar Factory.

As already revealed from the evidence of the virtual complainant, the investors had spent more than 20 million USD by this time and therefore, he had decided to bring it to the notice of the Prime Minister and met an officer of the Prime Minister's office and informed his grievance to the said officer. Since there was a reference to a solicitation of a bribe, he was advised by the said officer to lodge a complaint at the CIABOC.

However, the virtual complainant had not gone to CIABOC until he was requested to come by the CIABOC. When he was asked to lodge a complaint by ASP Ruwan Kumara, his first reaction was that he is not interested in taking legal action since he had come here to do business, but finally agreed to submit a written complaint.

The above is the path in a nutshell which ended up with a complaint by witness Nagarajah with CIABOC against the two Accused-Appellants. If he had the intention to falsely implicate the two Accused-Appellants, he would not have waited so long to lodge a complaint against them. As already referred to in this judgment, the Hon. Attorney General too had observed a long delay in implementing certain decisions by the 1st Accused-Appellant but still, the virtual complainant was following the routine procedure by making an appeal after appeal, until he realized that the things have been moving away from the interest of the investor.

Learned President's Counsel on behalf of the two Accused-Appellants argued that the two Accused-Appellants did not possess any motive to solicit and/or accept a bribe as narrated by the virtual complainant.

In support of the above argument the followings were submitted on behalf of the 2nd Accused-Appellant:

a) A copy of the shareholders agreement was not provided to him and he had to request for a copy from the Finance Ministry in order to implement the provisions in the said agreement.
b) Later he had observed that certain provisions in the agreement were contradictory to the advice given by the Hon. Attorney General.
c) In the said circumstances he had faced difficulties in implementing the provisions in the agreement and therefore he had to obtain advice from the Hon. Attorney General on several

> occasion, but he never delayed the process to scuttle the implementation of the shareholders agreement.

At this point, I would like to look at Black's Law Dictionary to ascertain the meaning of the term "motive". Black defines motive as, "something esp. willful desire that lead one to Act (Black's Law Dictionary 8th edition) In the above context the motive entertained by the virtual complainant should be for a wrongful purpose or in other words should have had malicious motive to falsely implicate the Accused-Appellant.

It is observed by this Court that the Cabinet Committee on Economic Management (CCEM) and the Hon. Attorney General, both had observed the long delay in implementing the shareholders agreement and the 1st Accused-Appellant had been repeatedly reminded by the said Cabinet Committee to handover the land and report back to the Committee.

Similarly, the Hon. Attorney General too had observed in his letter addressed to the 1st Accused-Appellant which was produced mark P-77 as follows:

> "As regards the releasing of lands to the investor, the modalities are expressly provided in Article 17.1.1. of the Shareholders Agreement. There are no extraneous conditions to be completed with when releasing the said land, and it is incumbent upon the signatories to the said agreement to strictly abide by the provisions of the said Articles. In view of the concerns expressed at the CCEM about the long delay, this process should be completed expeditiously as possible."

When the Hon. Attorney General had reached a specific and conclusive opinion about the issues raised by the 1st Accused-Appellant, as submitted by the learned Deputy Solicitor General before us, the 1st Accused-Appellant had without any justification, turned again towards the secretary to His Excellency the President writing the letter dated 07.08.2017 (P-82) seeking his intervention in the process.

The next notable incident after writing P-82 was the intervention by the 2nd Accused-Appellant, and the meeting the 2nd Accused-Appellant and Nagarajah had at Waters Edge Restaurant on 05.09.2017.

From the call record details produced before the High Court at Bar, it was the 2nd Accused-Appellant who had given the first call to Nagarajah on 05.09.2017 around 11.42.52.a.m.

Since then, the involvement of the 2nd Accused-Appellant is visible from the two CCTV footages produced before Court with regard to the meetings at Bread Talk Restaurant and Taj Samundra Hotel and the call records which show a similar pattern of calls taken between the virtual complainant and the two Accused-Appellants.

When evaluating the above evidence, the High Court at Bar had correctly observed that the 1st Accused-Appellant once retired from the office of the Secretary to the Ministry of Lands and assumed duties as the Chief of Staff of the Presidential Secretariat, where he has no role to play in Kanthale Sugar Factory Project, had still opted to continue the dealings with the virtual complainant and admittedly met with him at Bread Talk Restaurant and Hotel Taj Samudra in order to "discuss" and "assist" him in proceeding ahead with the project. If the 1st Accused-Appellant accompanied by the 2nd Accused-Appellant, wanted to assist the virtual complainant in the said project, being senior officers of the Government, they would obviously know that it is not the acceptable, prudent or transparent way in dealing with the matters of this nature.

When considering the totality of the above material we have no hesitation in concluding that both Accused-Appellants did possess the requisite motive for the solicitation and acceptance referred to in the Indictment filed before the High Court at Bar.

As already observed by this court the virtual complainant being a foreigner who had come to Sri Lanka to engage in business, and gone a considerable distance in the relevant investment by spending and/or investing over 20 million USD. He had not been left with any other option, but to seek some assistance from the higher authorities as he did. It was the version of the virtual complainant that he never wanted/planned to get entangled with anybody in this manner but simply wanted to focus on his business, but the circumstances had led for the final outcome of him becoming the virtual complainant in this case.

In the light of this backdrop, this court concludes that the virtual complainant had simply acted as an ordinary reasonable man who was confronted with a situation to which the solutions were beyond his reach.

We have carefully considered all the arguments put forward before us by both parties. For the foregoing reasons, we are unable to agree with the submissions of the learned Presidents' Counsel for the Accused Appellants that the High Court at Bar has wrongly/unlawfully/unfairly conducted the trial against their clients and wrongly convicted them. We hold that the High Court at Bar has lawfully convicted both the Accused Appellants for the respective charges. We see no necessity for

our intervention in this conviction. Therefore, we proceed to affirm the conviction of both the Accused Appellants for the respective charges as entered into by the High Court at Bar.

The learned Presidents' Counsel for the Accused Appellants also made submissions regarding the sentences imposed on them by the High Court at Bar.

We have already mentioned before that both the Accused Appellants at the time they solicited and accepted the bribes relevant to the instant case were holding very high posts in the highest echelons of the Public Service of this country. The magnitude of the bribes they have solicited are unimaginable. The purpose for which they were solicited no doubt shows that the Accused Appellants while holding high positions of the Government had only worked for their unlawful and immoral purposes while only helping the destruction of the country's economy. We are of the view that it would be difficult for this country to revive itself as long as high officers like the Accused Appellants would hold such high offices in the Government. We therefore think that it would be important to take into account the need to deter such public officers from being inclined to embark on such unlawful endeavours.

In the case of **The Attorney-General Vs. H. N. De Silva 57 NLR 121**, Basnayake, A.C.J. (as he then was) stated as follows:

"In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail. "

Sri Skanda Rajah J while citing with approval, the above passage from Basnayake, A.C.J.'s judgment, went ahead in the case of M**. Gomes (S. I. Police, Crimes) Vs. W. V. D. Leelaratna 66 NLR 233**, to add three more grounds which a trial judge should consider in the assessment of the sentence to be imposed on a convicted accused. Three of those additional grounds are firstly, the nature of the loss to the victim and secondly, the profit that may accrue to the culprit in the event of non-detection and thirdly, the use to which a stolen article could be put.

Perusal of the judgment of the High Court at Bar shows clearly, that it has been mindful of all the relevant matters before passing the sentence imposed by it on the Accused Appellants. The sentences imposed by the High Court at Bar are within the sentences the law has prescribed for the relevant offences. We have no basis to disagree with the said sentences. We affirm the sentences imposed on both the Accused Appellants by the High Court at Bar.

We proceed to dismiss the appeals of both the Accused Appellants.

Justice Vijith K. Malalgoda PC,
JUDGE OF THE SUPREME COURT

Justice L.T.B. Dehideniya,
JUDGE OF THE SUPREME COURT

Justice P. Padman Surasena,
JUDGE OF THE SUPREME COURT

Justice S. Thurairaja, PC,
JUDGE OF THE SUPREME COURT

Yasantha Kodagoda, PC, J

I have considered the draft judgment of my brother Judges Honourable Justice Vijith K. Malalgoda, PC, Honourable Justice L.T.B. Dehideniya, Hon. Justice P. Padman Surasena and Hon. Justice S. Thurairaja, PC. I am **in agreement** with their judgment, including their findings in respect of the several questions of law raised during the hearing of this Appeal, and the conclusion reached that this **Appeal should be dismissed** for the reasons contained in the said judgment. However, it is my considered opinion that the following question of law raised by the Appellants is unique, extremely important and therefore requires a detailed and an in-depth consideration. Therefore, I present this judgment which contains reasons, conclusions and findings of my own regarding the following question of law:

Were the two Appellants entrapped to commit the offences they have been convicted of, and if so, have they been denied a 'fair trial'?

Introduction

During the hearing of this Appeal, learned President's Counsel for both Appellants jointly raised a novel and innovative question of law. Albeit brief, their position was that (i) both Appellants (more particularly the 1st Appellant) had been 'entrapped' to commit the offences which they had been found *'guilty'* of having committed and convicted, (ii) the investigative technique referred to as 'entrapment' is obnoxious to law and hence illegal, (iii) presentation of evidence by the prosecution at the trial arising out of such entrapment was contrary to law, and thus, (iv) the two Appellants had been denied a 'fair trial'. Therefore, learned counsel for the Appellants submitted that convictions of both Appellants should be quashed and the Appeal should be allowed, as their Fundamental Right guaranteed under Article 13(3) of the Constitution (which guarantees an accused a *'fair trial'*) had been infringed. It was submitted on behalf of the 1st Appellant that the *'defence of entrapment'* was raised on his behalf at the end of the trial in the Permanent High Court at Bar, which rejected the said defence. They submitted that the rejection of the *'defence of entrapment'* was unlawful and hence this Court should set-aside the finding of guilt pronounced by the Permanent High Court at Bar. They urged that this ground of appeal was of such fundamental and critical importance, that should this Court were to hold with the Appellants on this point, the conviction of the Accused - Appellants should be set-aside and the Appellants should be acquitted while allowing this Appeal.

Both learned President's Counsel emphasized that their arguments pertaining to this question of law were being presented without prejudice to their other submissions which were based on the footing that (i) the institution of criminal proceedings by the Director General of the Commission to Investigate Allegations of Bribery or Corruption was unlawful, (ii) the joinder of charges was unlawful, in that there was a misjoinder, (iii) the testimony given by virtual complainant Nagarajah was false and untrustworthy, (iv) the deferment of the decision pertaining to the admissibility of the mobile telephone call recordings, till the end of the trial, was unlawful, (v) the Magistrate (during the investigation stage) having directed the Appellants to give voice samples to the Government Analyst was in violation of the rule against self-incrimination and was thus unlawful, and (vi) the prosecution had failed to prove the charges beyond reasonable doubt.

Both learned President's Counsel for the Appellants as well as the learned Deputy Solicitor General who appeared for the Commission to Investigate Allegations of Bribery or Corruption (CIABOC) submitted that this was the first instance where the *'defence of entrapment'* had been raised in a criminal appeal in Sri Lanka. Therefore, in my opinion, there exists a compelling need to consider this matter very carefully and at considerable length.

Submissions of learned Counsel

Submissions on behalf of the 1st Appellant

Citing the judgment of Justice Rehnquist in ***United States v. Russell*** *(411 US 423)*, learned President's Counsel for the 1st Appellant drew the attention of this Court to the following quotation:

> *"… that the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offence does not defeat the prosecution. … Nor will the mere fact of deceit defeat the prosecution. … For there are circumstances when the use of deceit is the only practicable law enforcement technique available.* ***It is only when the Government's deception actually implants the criminal design in the mind of the Defendant that the defence of entrapment come into play****."* [Emphasis added]

Citing certain principles contained in the judgment of the House of Lords in ***R v. Looseley****,* learned President's Counsel submitted that in English law, while entrapment is not a substantive defence to criminal liability, it has been held that nevertheless, it is unacceptable for the State, through its agents to lure and entrap its citizens into committing crimes and then prosecute them for their criminal conduct. To allow such prosecutions to take place would be to condone the abuse of its power by the Executive and compromise the integrity of the criminal justice system. Permitting

entrapment would result in an abuse of the process of court and possibly lead to a violation of Article 6 of the European Convention on Human Rights (ECHR). (Learned President's Counsel drew parallels between Article 6 of the ECHR and Article 13(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka, which guarantee *inter-alia* the right to a *'fair trial'*.) Therefore, prosecutions based on entrapment should be stayed as it would amount to an abuse of process. It is necessary to balance the competing requirements that those who commit crimes should be convicted and punished, and that there should not be an abuse of process which would constitute an affront to public conscience.

Learned counsel submitted that even though an accused receives a forensically fair trial, if it would be unfair to present certain evidence or subject the accused to a particular type of trial, he should not be tried in that manner. In appropriate circumstances, the doctrine of entrapment could be availed of by an accused to obtain relief against oppressive actions by the Police.

Turning towards Sri Lanka's law, learned President's Counsel submitted that in terms of Article 13(3) of the Constitution, every accused was entitled to receive a fair trial. He submitted that it was a very important Fundamental Right. A prosecution which is founded upon entrapment deprives an accused of a fair trial. Therefore, principles of law pertaining to entrapment should be applied when deciding Sri Lankan cases of the instant nature. Learned counsel submitted that if the investigation that resulted in the indictment of the accused was based on entrapment, following trial, the accused should not be convicted. In view of these principles of law, as the accused have been unlawfully convicted by the Permanent High Court at Bar, in Appeal, the conviction should be quashed and the Appeal should be allowed.

It is necessary to place on record, that though learned President's Counsel for the 1st Appellant initially attempted to portray that 'entrapment' was an exculpatory defence even under Sri Lankan law, he later abandoned that position, and sought to convince this Court (and I would think, advisedly) that entrapment is an unlawful investigative technique, and thus, the presentation of evidence emanating from an entrapment is unlawful. He submitted that in the instant case, the prosecution had presented evidence emanating from such an entrapment (which amounted to unlawfully gathered evidence), and hence the 1st Appellant (together with the 2nd Appellant) had been denied a fair trial.

Learned President's Counsel for the 1st Appellant further submitted that it was at the instance of CIABOC officers, that the virtual complainant had got in touch with the 2nd Appellant and accordingly on 05.09.2017 both of them had met at the *Waters Edge* restaurant. On the advice of CIABOC officers, through the 2nd Appellant, a meeting with the 1st Appellant had been arranged. That meeting took place on 27.02.2018 at the office of the 2nd Appellant. At this meeting, learned Counsel alleged that due to persistence by the virtual complainant the 1st Appellant solicited a bribe of Rs. 100 million, out of which the virtual complainant was asked by the 1st Appellant to pay a sum of Rs. 20 million, as an advance. It was submitted that the said solicitation of a bribe took place due to 'trickery' practiced on the 1st Appellant by officers of the CIABOC and the virtual complainant. After this meeting, CIABOC officers attempted to get down the 1st Appellant to the residence of the virtual complainant. Notwithstanding entreaties made by the virtual complainant, the 1st Appellant did not fall prey to that trap. Once again on 28.04.2018, at the instance of the virtual complainant, the 2nd Appellant persuaded the 1st Appellant to come to *Bread Talk* to meet the virtual complainant. This meeting took place on the same day at *Bread Talk* outlet, and it is alleged that the 1st Appellant repeated the solicitation of the bribe of Rs. 20 million. Thereafter, the virtual complainant proceeded to India and was there for a week, and returned. After he returned, the 1st Appellant was inveigled by the virtual complainant to come to the Taj Samudra Hotel, and that final meeting took place on 03.05.2018, where the learned President's Counsel submitted that a 'trap' had been laid. Learned counsel submitted that this sequence of events and the associated circumstances, clearly point towards 'entrapment' perpetrated by officers of the CIABOC together with the virtual complainant, to which the 1st Appellant fell victim to.

In view of the foregoing facts and circumstances, learned President's Counsel for the 1st Appellant submitted that this was 'a case of entrapment', and thus, the 1st Appellant has been denied a fair trial and hence the conviction of the 1st Appellant should be quashed in appeal.

Submissions on behalf of the 2nd Appellant

Augmenting the submissions made in this regard by learned President's Counsel for the 1st Appellant and successfully creating a synergy between the two submissions, the learned President's Counsel for the 2nd Appellant submitted that the Constitution ensures and guarantees unto the Accused in this case, as well as to all other accused, the fundamental right to a fair trial. However, the Accused – Appellants in this matter were deprived of a fair trial due to several reasons; the investigation carried out by CIABOC officers amounted to an entrapment was one, and the main ground. The other grounds urged by learned President's Counsel for the 2nd Appellant which he

alleged resulted in the Appellants being denied a fair trial have been dealt with by my brother judges as separate and substantive questions of law on their own standing. As I agree with the reasons, findings and conclusions reached in respect of those other grounds of Appeal, I do not propose to deal with those grounds raised by learned President's Counsel.

Learned President's Counsel for the 2nd Appellant submitted that investigation officers of CIABOC have not been vested with power to engage in an 'entrapment' in the nature of what they did in this case. He said that officers of CIABOC have induced and inveigled the virtual complainant who complained only of an instance of solicitation of a bribe, to participate in a scheme which had been designed to entrap the Appellants, so that they may be prosecuted. The entrapment perpetrated by officers of the CIABOC with the cooperation and assistance provided by the virtual complainant resulted in the Appellants committing offences, which they would not have otherwise committed. Entrapment was caused when the virtual complainant offered a bribe to the Appellants, afresh. Such offering was done with the view to luring the Appellants to commit the offence of accepting a bribe, and apprehending the Appellants in the act of acceptance.

Quoting certain observations of Justice Saleem Marsoof, PC in ***Namunukula Plantations Limited v. Minister of Lands and 6 Others***, *[(2012) 1 Sri L.R. 365]*, learned President's Counsel submitted that the conduct of officers of CIABOC was contrary to public policy and hence a prosecution launched based on such a scheme ought not be entertained by any Court, as it would be a pollution of the 'pure stream of justice'.

Citing the judgment of Justice Roberts in ***Sorrells v. United States****, [287 US 435 (1932]*, learned President's Counsel submitted that this Court should adopt the definition of 'entrapment' found in the said judgment. It defines entrapment as *"… the conception and planning of an offence by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer".* Learned President's Counsel submitted that in the same case, Justice Roberts has held that, *"… Proof of entrapment at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty. …".*

Referring to the powers and functions of the CIABOC in terms of the Commission to Investigate Allegations of Bribery or Corruption Act, No.19 of 1994 (CIABOC Act), learned President's Counsel submitted that the CIABOC and its officers did not have the power to 'trap' a person or 'to find out

whether he will commit an offence'. Citing Lord Goddard in ***Brannan v. Peek*** *[(1947) 2 All ER 572]*, he submitted that unless authorized by an Act of Parliament, no trap can be laid by the police to find out whether a man will commit an offence, and that persons trapping him like that would be accomplices, who are themselves liable for punishment. He submitted that the doctrine pertaining to the prohibition on entrapment contained in ***Brannan v. Peek*** should be adopted by Sri Lankan Courts under section 100 of the Evidence Ordinance and incorporated into Sri Lanka's Law of Evidence.

The position advanced by learned President's Counsel was that upon recording the complaint of the virtual complainant Nagarajah relating to the alleged solicitation of a bribe by the 1st Appellant, CIABOC officials should have proceeded to investigate that complaint. If the complaint revealed the commission of an offence or offences, the Commission should have directly taken action against those who have committed such offence(s). He submitted that without doing that, the investigators had engaged in a 'process of entrapment' which is unlawful. Officers of the CIABOC did so by directing Nagarajah to re-establish contact with the Appellants, record all communications he had with them, and luring the suspects to commit further offences. He submitted that doing so was in excess of the powers conferred on CIABOC by the CIABOC Act and was thus, illegal. Therefore, learned President's Counsel submitted that the trial Court (Permanent High Court at Bar) should have rejected the testimony presented by the prosecution relating to the series of events which are said to have occurred after Nagarajah's complaint was recorded by officers of the CIABOC.

Learned President's Counsel in his post-argument written submissions brought to the attention of this Court the following quotation from the judgment of Justice Panchapakesa Ayyar in ***M.S. Mohiddin v. Unknown*** *[AIR 1952 Mad 561]*:

> *"… I have held in several cases already that there are two kinds of traps 'a legitimate trap', where the offence has already been born and is in its' course, and 'an illegitimate trap', where the offence has not yet been born and a temptation is offered to see whether an offence would be committed, succumbing to it, or not. Thus, where the bribe has already been demanded from a man, and the man goes out offering to bring the money but goes to the police and the magistrate and brings them to witness the payment, it will be 'a legitimate trap', wholly laudable and admirable, and adopted in every civilized country without the least criticism by any honest man. But, where a man has not demanded a bribe, and he is only suspected to be in the habit of taking bribes, and he is tempted with a bribe just to see whether he would accept it or not and to trap him if he accepts it, will be 'an illegitimate trap'*

and, unless authorized by an Act of Parliament, it will be an offence on the part of the persons taking part in the trap who will all be "accomplices" whose evidence will have to be corroborated by untainted evidence to a smaller or larger extent as the case may be before a conviction can be had under a rule of Court which has ripened almost into a rule of law. But, in the case of a legitimate trap, the officers taking part in the trap, like P.Ws 9 to 11, and the witnesses to the trap, like P.W. 8 would in no sense be "accomplices" and their evidence will not require under the law, to be corroborated as a condition precedent for conviction though the usual rule of prudence will require the evidence to be scrutinized carefully and accepted as true before a conviction can be had."

Learned President's Counsel for the 2nd Appellant also drew the attention of this Court to the following quote from the judgment in ***Ramjanam Singh v. The State of Bihar*** *[AIR 1956 SC 643]*:

"Whatever the criminal tendencies of a man may be, he has a right to expect that he will not be deliberately tempted beyond the powers of his frail endurance and provoked into breaking the law; and more particularly by those who are the guardians and keepers of the law. However regrettable the necessity of employing agents provocateurs may be (and we realize to the full that this is unfortunately often inevitable if corruption is to be detected and bribery stamped out), it is one thing to tempt a suspected offender to overt action when he is doing all he can to commit a crime and has every intention of carrying through his nefarious purpose from start to finish, and quite another to egg him on to do that which it has been finally and firmly decided shall not be done."

Summing up his submissions on this point, learned President's Counsel for the 2nd Appellant submitted that there cannot be a valid conviction in the absence of a legal and fair investigation. He alleged that the evidence in this case in its entirety is the result of an *'entrapment'* which was illegal and conducted by officers of the CIABOC. Learned counsel alleged that the evidence in this case had not been procured by the investigators during a legally valid and fair investigation. Quoting from the judgment of Justice Mark Fernando in ***Victor Ivon v. Sarath N. Silva, Attorney General and Another*** *[(1998) 1 Sri L.R. 340]*, learned President's Counsel concluded his submission by stating that *"… a citizen is entitled to a proper investigation – one which is fair, competent, timely and appropriate …"*.

Submissions on behalf of the Respondent

Responding to the submissions made by learned President's Counsel for the Appellants, learned Deputy Solicitor General for the Respondent (CIABOC) made two key submissions. They were that (i)

'entrapment' is not a 'substantive defence in Sri Lankan jurisprudence', and (ii) assuming without conceding that the defence of entrapment can be taken by an accused in a criminal case in Sri Lanka either as an exculpatory defence or as a ground on which it could be alleged that the accused had been denied a fair trial, the facts of the instant case do not fall within the scope of 'entrapment' as recognized by other jurisdictions, and thus the question of legality of the evidence presented by the prosecution does not arise. He emphasized that the two Appellants had not been denied a fair trial.

For the purpose of determining whether a particular set of facts pertaining to an investigation reveal the existence of an 'entrapment' or not, learned Deputy Solicitor General presented the following quotation from the House of Lords judgment in ***R v. Loosely**, [(2001) UKHL 53]*:

> *"On this a useful guide is to consider whether the police did no more than present the defendant with **an unexceptional opportunity to commit a crime**. I emphasize the word "unexceptional". The yardstick for the purpose of this test is, in general, whether the police conduct preceding the commission of the offence was no more than might have been expected from others in the circumstances. Police conduct of this nature is not to be regarded as inciting or instigating crime, or luring a person into committing a crime. The police did no more than others could be expected to do. The police did not create crime artificially. McHugh J had this approach in mind in Ridgeway v. The Queen (1995) 184 CLR 19, 92, when he said:*
>
> > *'The State can justify the use of entrapment techniques to induce the commission of an offence only when the inducement is consistent with the ordinary temptations and stratagems that are likely to be encountered in the course of criminal activity. That may mean that some degree of deception, importunity and even threats on the part of authorities may be acceptable. But once the State goes beyond the ordinary, it is likely to increase the incidence of crime by artificial means.'"*

Learned Deputy Solicitor General submitted that though the 'defence of entrapment' was recognized in certain overseas jurisdictions, English Courts do not treat entrapment as a substantive defence. Citing ***R v. Sang**, [(1980) AC 402],* he submitted that the Court had held that the physical and mental elements of an offence are both constituted even when there is entrapment, and that in the circumstances, the value if any of the defence of entrapment is limited to mitigation of culpability. In support of his submission as regards the position in English law, learned DSG cited the following excerpt from the judgment of Lord Nicholls in ***R. v. Loosely**, [(2001) UKHL 53]:*

"In R v Sang [1980] AC 402 Your Lordships' House affirmed the Court of Appeal decisions of R v McEvilly (1973) 60 Cr App R 150 and R v Mealey (1974) 60 Cr App R 59. The House treated it as axiomatic that entrapment does not exist as a substantive defence in English law. Lord Diplock, at p 432, noted that many crimes are committed by one person at the instigation of others. The fact that the counsellor or procurer is a policeman or a police informer, although it may be of relevance in mitigation of penalty for the offence, cannot affect the guilt of the principal offender: 'both the physical element (actus reus) and the mental element (mens rea) of the offence with which he is charged are present in his case'. Likewise, Lord Fraser of Tullybelton observed, at p 446, that all the elements, factual and mental, of guilt are present and no finding other than guilty would be logically possible. The degree of guilt may be modified by the inducement and that can appropriately be reflected in the sentence. Lord Fraser famously added that when Eve, taxed with having eaten forbidden fruit, replied 'the serpent beguiled me', her excuse was at most a plea in mitigation and not a complete defence."

In view of the foregoing, learned DSG urged this Court to follow English law regarding this matter, and to not recognize entrapment as a substantive defence. He stressed that, if at all, 'entrapment' should be treated only as a mitigatory ground for reduction of the severity of the punishment.

Referring to ***R v. Loosely*** learned DSG conceded that, following the enactment of the Police and Criminal Evidence Act (1984) by the Parliament of the United Kingdom (the enactment of which pre-dates the decision in *R v. Loosely*), the concept of excluding from criminal trials evidence emanating from 'entrapment' has been recognized by English law, if such entrapment amounted to an abuse of power or if the conduct of the Police was illegal. He submitted that trial judges were permitted to exclude such evidence on the premise that permitting such evidence would affect fairness of the proceedings. He submitted that in the circumstances, exclusion of evidence emanating from entrapment in English law is an evidential principle as opposed to an exculpatory defence.

Learned DSG submitted further that in Sri Lankan law, trial judges were not empowered to exclude evidence that is relevant and admissible (in terms of the provisions of the Evidence Ordinance), on the premise that such evidence would affect fairness. Citing ***Rajapakse v. Fernando*** *[52 NLR 361],* he submitted that even evidence emanating from a search which was in the circumstances of the situation 'illegal' was admissible provided such evidence was relevant. In this regard, learned DSG cited the following excerpt from the judgment of Justice Dias:

"I agree that it would be immoral and undesirable that agents provocateur and others should tempt or abet persons to commit offences; but it is a question whether it is open to a Court to acquit such persons where the offence is proved, on the sole ground that the evidence was procured by unfair means. Such considerations may induce the trial Judge to disbelieve the evidence, but such evidence is not inadmissible, and, therefore, when the offence charged has been proved, it is the duty of the Judge to convict."

It is a point of considerable significance that learned DSG while emphasizing that admission of evidence during a trial should be screened only from the perspective of 'relevancy' and 'admissibility' (as per provisions of the Evidence Ordinance), did not venture to comment on whether the views of Justice Dias should be reconsidered in the present era, in view of the possible causal relationship between *'evidence gathered through unlawful means'* and depriving an accused of the fundamental right to a *'fair trial'*.

Based on an analysis of the judgment of the House of Lords in ***R v. Loosely***, learned Deputy Solicitor General pointed out that when determining whether a particular *modus operandi* adopted by law enforcement authorities in the conduct of an investigation amounts to 'entrapment' (which method he admitted should not be condoned), there are several features the Courts should consider. They are (a) the nature of the offence that was being investigated into, (b) reason for the investigators having adopted the particular investigative procedure, (c) the nature and extent of participation by the investigators, (d) intrusiveness of the investigative method adopted, (e) whether the investigators acted in *good-faith,* and (f) the antecedents of the suspect.

Turning towards the evidence, learned Deputy Solicitor General submitted that the following evidential aspects pertaining to the case, should be taken into consideration:

(i) The involvement of officers of the CIABOC commenced only after the 1st Appellant had in August 2016 made the initial solicitation of a bribe of USD 3 million from the virtual complainant.

(ii) Following the first instance when the solicitation was made, the 1st Appellant had on several other occasions solicited from the virtual complainant a bribe, and such events reveal a predisposition on the part of the 1st Appellant to accept a bribe from the virtual complainant.

(iii) On 5th September 2017 (well before the virtual complainant complained to the CIABOC), when the virtual complainant met the 2nd Appellant at the *Waters Edge*, the 2nd

Appellant had on his own motion solicited a bribe on behalf of the 1st Appellant. That was without the virtual complainant having induced the 2nd Appellant.

(iv) From that point onwards, it was the 2nd Appellant who had arranged meetings between the 1st Appellant and the virtual complainant. The virtual complainant did not initiate any of those meetings.

(v) At no stage did the officers of the CIABOC instigate or induce or lure either of the Appellants to solicit or accept a bribe. Nor did the virtual complainant do so.

(vi) The role of the decoy who was an officer of the CIABOC was passive, non-intrusive and was a mere 'pedestrian' like presence.

(vii) The decoy did not actively guide the virtual complainant, or manipulate the processes of the raid.

(viii) The virtual complainant on the strict advice of officers of the CIABOC refrained from enticing, luring or otherwise encouraging the 1st and the 2nd Appellants to commit any offence.

Learned DSG submitted that these items of evidence and circumstances support his contention that the instant case was not a case of 'entrapment'. Learned DSG using terminology found in ***R v. Loosely*** stressed that the role of CIABOC officers was limited to *'providing an unexceptional opportunity to commit a long-standing pre-planned crime which was already in the move'*. He submitted that in the circumstances, the evidence emanating from the prosecution's narrative from the time the virtual complainant complained to the CIABOC up to the arrest of the Appellants, should not be rejected and should be taken into consideration for the purpose of determining this Appeal. He concluded his submissions by stating that in view of the foregoing, the Appellants had not been denied a *'fair trial'*.

Finding of the Trial Court

An examination of the impugned judgment of the Permanent High Court at Bar reveals that learned Counsel who defended the two Appellants at the trial had raised 'the defence of entrapment' on the footing that the virtual complainant Nagarajah had acted as an *agent provocateur*, and that he had lured the accused to commit the offences in the indictment. In the circumstances, learned Counsel had pleaded that the evidence of the virtual complainant relating to events that are said to have occurred from the moment the complaint was made to the CIABOC, be excluded from the trial. Following a consideration of ***R. v. Sang,*** the trial Court had rejected the submission that English law recognizes the 'defence of entrapment'. Drawing a parallel, the view formed by the trial Court is

that Sri Lanka's law too does not recognize the 'defence of entrapment'. Thus, the Court has concluded that the evidence presented by the prosecution against the accused cannot be rejected. Such refusal to reject evidence presented by the prosecution has also been on the footing that virtual complainant's conduct cannot be treated as that of an *agent provocateur.*

Consideration, conclusions and findings

The fundamental right to a *'fair trial'*

The right of a person accused of committing an offence, to a *'fair trial'* against him, which is a fundamental right recognized by Article 13(3) of the Constitution, is of unparalleled importance. It is an important and crucial safeguard to ensure that only a person *'guilty'* of having committed an offence is *'convicted'* by a Court. Such conviction should be conditioned upon the prosecution having proved the charge against the accused beyond reasonable doubt. It is a *'fair trial'* that ultimately ensures that not a single innocent person is convicted of committing an offence for which he is not culpable of. Rightfully, the concept of a *'fair trial'* finds itself a foremost place even in the main objective of criminal justice, that in my opinion being, *'the prevention, detection and investigation of crime, and the prosecution and punishment of offenders founded upon a lawful and* ***fair trial****'.*

Particularly due to the prospect of a criminal trial resulting in the imposition of serious penal sanctions which have the potential of depriving the convict of his personal liberty, as well as affecting his financial and proprietary interests culminating in serious and far-reaching consequences, the conduct of criminal trials and related prosecutions must not only be procedurally lawful, they must be conducted in a fair manner as well.

It is primarily a *'fair trial'* that reflects the civility of any criminal justice system and ensures that the dignity of all persons who may be prosecuted by the state is protected and that criminal justice is administered according to law, equitably, and in a fair manner. It is the rule of law and a *'fair trial'* that separates a *'prosecution'* from a *'persecution'*. Persecution is a major afront to the rule of law and is unfair. Persecution is a sign of incivility. In the long-term, systematic and widespread persecution has the distinct potential of causing social unrest, resulting in the breakdown of an otherwise cohesive and law-abiding society and culminating in the destruction of the state. The insistence upon the conduct of criminal trials in a fair manner is a safeguard against such dangerous evils.

It is a *'fair trial'* that distinguishes a competent criminal trial court discharging justice according to law which is very much in national and public interest, from what is colloquially referred to as a *'kangaroo court'* of which the hallmarks are (i) illegitimacy, (ii) absence of independence, impartiality and neutrality, (iii) lack or absence of professionalism and fairness on the part of the judge and the prosecutor, and (iv) the existence of subjectivity, arbitrariness, unreasonableness, prejudice and unjustifiable haste.

'Fair trial' is consonant with the administration of justice, and serves as a protection against harassment and oppressive intrusion into the liberty of not only innocent persons, but even persons who may be culpable of committing offences.

Therefore, *'fair trial'* is necessarily a core feature to be expected from Sri Lanka's criminal justice system, which should permeate throughout the multiple phases of the criminal justice system, without being technically restricted to the trial stage. It is an imperative legal requirement that should prevail during pre-trial, trial and post-trail stages of criminal justice. It is of such importance that an accused deprived of a *'fair trial'* thereby gains the entitlement to have his conviction challenged in Appeal on that ground alone, particularly if grave and irreparable prejudice to the accused had resulted from such absence or lack of a *'fair trial'* culminating in a miscarriage of justice.

Article 13(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka provides as follows:

> *Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law,* ***at a fair trial*** *by a competent court.* [Emphasis added]

The importance the Constitution has placed on the fundamental right to a fair trial is manifest in the fact that Article 15 of the Constitution does not recognize any restrictions that may be lawfully imposed on the enjoyment of the right to a fair trial, save as to certain very limited restrictions that may be prescribed by law. The only restriction permitted by the Constitution are those that may be prescribed by law and made applicable only to trials against members of the armed forces, the police and other forces who may be charged with the maintenance of public order. Thus, there can be no derogation from the right to a fair trial even with regard to persons who may be indicted of having committed the most heinous type of offences such as those that may cause serious harm to national security or to the society as a whole.

In ***The Attorney-General v. Segulebbe Latheef and Another****, [(2008) 1 Sri L.R. 225]* and ***Attorney-General v. Aponso,*** *[(2008) B.L.R. 145]*, Justice J.A.N. De Silva (as His Lordship was then) has highlighted the importance of recognizing the right to a fair trial in the following words:

> *"The Constitution by Article 13(3) expressly guarantees the right of a person charged with an offence to be heard by person or by an Attorney-at-law at a "fair trial" by a competent court. This right is recognised obviously for the reason that a criminal trial (subject to an appeal) is the final stage of a proceeding at the end of which a person may have to suffer penalties of one sort or another, if found guilty. The right of an accused persons to a fair trial is recognized in all the criminal justice systems in the civilized world. Its denial is generally proof enough that justice has been denied."*

Justice J.A.N. De Silva has observed that the right of an accused person to a fair trial is recognized in all criminal justice systems in the civilized world. Its denial is generally proof enough that justice has been denied. Justice De Silva has further observed that like the concept of fairness, a fair trial is also not capable of a clear definition. However, there are certain aspects or qualities of a fair trial amongst other things which could be identified.

From a holistic perspective, it is in public interest that the following are ensured:

(i) That a person who has committed an offence and is therefore indicted, must be found *'guilty'* and **convicted** of committing the offence he has been charged with, and is appropriately punished in terms of the law. However, such outcome must be achieved by prosecuting the alleged offender before a competent court, through a procedurally lawful and fair trial at which evidence that is legally relevant is presented in terms of legally admissible means, through credible witnesses, whose testimonies are trustworthy.

(ii) That a person who has not committed an offence, who nevertheless may have been indicted, must be found *'not guilty'* and **acquitted** of the charges in terms of the law, following a procedurally lawful and fair trial.

Trial outcomes that are contrary to these two principles are inconsistent with the objectives of criminal justice and are not in public interest.

As pointed out by learned President's Counsel for the 1st Appellant, a trial should not only be forensically fair (which means compatibility with procedural and evidential rules), it must be fair in the true sense of the word.

In ***Zahira Habibullah Sheik and Another v. State of Gujarat and Others****, [Criminal Appeal No. 446-449 of 2004, decided in March 2006 by the Supreme Court of India],* Justice Arijith Pasayat has held the following:

> *"The principle of fair trial now informs and energizes many areas of the law. It is reflected in numerous rules and practices. It is a constant, ongoing development process continually adapted to new and changing circumstances, and exigencies of the situation – peculiar at times and related to the nature of crime, persons involved – directly or operating behind, social impart and societal needs and even so many powerful balancing factors which may come in the way of administration of the criminal justice system. … Denial of a fair trial is as much injustice to the accused as it is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and an atmosphere of judicial calm."*

In view of the foregoing, it is my view that judges of trial Courts of this country have an enormous and extraordinary legal responsibility of ensuring that criminal trials are conducted not only in a forensically accurate manner (in accordance with procedure prescribed by law and in compliance with the rules of evidence) but also in a fair manner as well. Similarly, there is an associated professional duty cast on the prosecutor (who in the conduct of criminal prosecutions has a quasi-judicial responsibility to perform, solely in public interest) to conduct the prosecution not only as provided for in the Code of Criminal Procedure Act and to present evidence in accordance with the law of Evidence, but also to discharge that pivotal professional responsibility towards the administration of justice in a fair manner as well. I cannot see a fair trial taking place, unless both the trial judge and the prosecutor discharge their responsibilities in a fair manner. That of course does not mean that all judicial orders and prosecutorial decisions should be favourable to the accused. What it means is that, while the trial judge should make lawful, judicious and fair decisions, the prosecutor must act in a quasi-judicial and fair manner, necessarily in public interest. The master and the guiding force of both the judge and the prosecutor should be the law and the law alone, and no individual or organization or self-interest.

There is one more point that requires, what I wish to refer to as a 'passing comment' . It is necessary to note that the concept of fairness at a criminal trial has been so far recognized as a fundamental

right only from the perspective of the accused. However, in my view, it is of paramount importance to recognize that victims of crime are also entitled to receive a fair trial. The right to a fair trial is one of the underlying legal concepts based upon which the Parliament has enacted numerous rights of victims of crime and made them justiciable in terms of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015. Thus, victims of crime are also entitled by law to receive a fair trial. Witnesses too, have an entitlement to testify at a fair trial. What is even more important to note is that when an offence has been committed, the public at large and the state also have the entitlement to have a lawful, fair and expeditious trial against the perpetrator of the offence. Such trial should be aimed at the conviction of the *guilty* or the acquittal of the *innocent*.

Relationship between the fundamental right to a *'fair trial'* and adjudication of a criminal appeal

It is natural for one to wonder why in the judicial adjudication of a criminal appeal, judicial consideration need be given to the examination and determination of whether in the impugned trial proceedings the accused – appellant had been deprived of the 'fundamental right' to a 'fair trial'. In this regard, it is pertinent to observe that in terms of the Constitution of the Democratic Socialist Republic of Sri Lanka, it is the duty of <u>all organs of the state</u> (the Executive, Legislature and the Judiciary) to respect, protect and promote the fundamental rights of all persons and <u>not to</u> act in a manner that would infringe fundamental rights. In fact, in my view, the spirit of Sri Lanka's Constitution demands that the three organs of the state undertake and carryout an 'activist role' towards the promotion and protection of fundamental rights. That is an overarching Constitutional duty cast on the state towards the public at large.

While Articles 17 read with 126 provide for a specific mechanism to impugn executive or administrative action on the footing that such action infringed one or more fundamental rights or that there exists an imminent likelihood of a fundamental right being infringed and to therefor obtain declarations from the Supreme Court to that effect and just and equitable relief, it remains the responsibility of all Courts to ensure that judicial proceedings (notwithstanding the nature of the jurisdiction invoked) are conducted in a manner in which fundamental rights are not infringed. It is important to note that as the mechanism contained in Articles 17 and 126 does not confer jurisdiction on the Supreme Court to adjudicate upon allegations that a particular judicial conduct or a judicial decision resulted in an infringement of a fundamental right, it is through appellate proceedings of this nature that the Supreme Court could examine such allegations. Thus, in appellate proceedings (such as in the instant appeal), when an allegation is made that the impugned criminal trial proceedings were conducted in a manner that infringed the fundamental rights of the

accused, the Supreme Court must give its anxious consideration to such allegation and arrive at a finding thereon. If it is found that a fundamental right the accused – appellant was entitled to enjoy had been infringed during trial proceedings and such infringement had resulted in a miscarriage of justice, the conviction of the accused – appellant must be set aside.

In this regard it would be pertinent to note that Justice Buwaneka Aluwihare in ***Hattuwan Pedige Sugath Karunarathne v. Attorney-General*** *[SC Appeal 32/2020, Supreme Court Minutes of 20th October 2020]* has observed that Courts must respect and give effect to Constitutional provisions in the conduct of Court proceedings, such as the fundamental rights contained in Chapter III of the Constitution. Justice Aluwihare has proceeded to observe that Article 13(3) recognizes the entitlement of a person charged with an offence to a *'fair trial'*, a right which the state has an obligation to accord to an accused through the Courts. It is important to note that these observations were made by Justice Aluwihare in the course of adjudicating upon a criminal Appeal.

Basis for the allegation that the Appellants had been denied a *'fair trial'*

Learned President's Counsel for the Appellants presented their arguments on the footing that the entire investigation conducted by the CIABOC was founded upon a process of investigation which they referred to as 'entrapment'. They submitted that the investigative process of entrapment is illegal (or to say the least unlawful), and that such illegality in the investigation resulted in the Appellants being deprived of a fair trial, since a lawful and fair investigation was a prerequisite for a fair trial. They submitted that the Appellants had been denied a fair trial, as the Prosecution's evidence was founded upon an entrapment which was illegal. Thus, from a generic perspective, the position advanced on behalf of the Appellants was that as the prosecution was founded upon an entrapment, the accused were deprived of a fair trial, and hence the convictions must be quashed.

Therefore, it is necessary to first consider and conclude whether a 'lawful investigation' is a prerequisite for a 'fair trial' or whether a lawful investigation is a component of a fair trial.

Nature and ingredients of the right to a *'fair trial'*

Though the Constitution recognizes the right to a fair trial as a Fundamental Right, the black letters of the Constitution remain conspicuous by their silence as to the exact meaning and the constituent ingredients of a fair trial.

The conceptual origins of a fair hearing (used synonymously with the term 'fair trial') being afforded to a person accused of committing a crime are found in the Magna Carta of 1215 AD. ["… *No freeman shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will we proceed against or prosecute him, except by the lawful judgment of his peers or by the law of the land … To no one will we sell, to no one will we deny or delay, right or justice*."]

The specific rules which regulate a fair trial have evolved from the rules of natural justice. It is widely accepted that the concept of a 'fair hearing' was developed by the judges of Courts of Equity in England and thereby entered the English common law. In contemporary English law, the concept of a fair hearing has found its way into both administrative law and the law relating to criminal justice. A 'fair hearing' as a Human Right was initially recognized by the Universal Declaration of Human Rights (UDHR) in 1948. Article 10 of the Declaration provides that, *"Everyone is entitled* ***in full equality to a fair and public hearing*** *by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."* [Emphasis added] Articles 11, 14 and 15 of the Declaration refer to certain ensuing rights of persons accused of committing offences, which seek to guarantee a fair trial.

The significance of Articles 10, 11, 14 and 15 of the UDHR fell outside the spotlight in 1966 by the right to a 'fair trial' being recognized as a Human Right under the International Covenant on Civil and Political Rights (ICCPR). With almost universal ratification of the Covenant, the ICCPR serves as the bedrock for contemporary International Human Rights Law.

Article 14 of the ICCPR reads as follows:

> *1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law,* ***everyone shall be entitled to a fair and public hearing*** *by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

> *7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.*

Supplementing the ICCPR, several regional Human Rights treaties have come into being, among which is the European Convention on Human Rights (ECHR) of 1950. Article 6 of the ECHR seeks to guarantee the human right to a fair trial. Article 6(1) provides as follows:

> ***In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing*** *within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.* [Emphasis added]

Judgments of the European Court of Human Rights which contain very important pronouncements on the right to a fair trial embodied in the ECHR (such as *Teixeira de Castro v. Portugal* cited by the House of Lords in *R. v. Looseley*, the case which was referred to frequently by learned Counsel during the hearing of this Appeal) have contributed immensely to the development of jurisprudence regarding the human right to a fair trial.

It is to be noted that Article 14 of the ICCPR while recognizing the right to a 'fair hearing' as a Human Right, contains both substantive and procedural safeguards to ensure that accused receive a fair trial. They are recognized under international human rights law only as minimum legal guarantees to be accorded to a person accused of committing an offence. A careful consideration of the schemes and provisions of the Code of Criminal Procedure Act (CCPA) and the Evidence Ordinance (EO) reveal that these two laws which are the two primary cornerstones of the criminal justice system of Sri Lanka, have been designed and structured to recognize many of the features contained in Article 14 of the ICCPR and generally the concept of a fair trial. Nevertheless, it is important to note that the CCPA and the EO do not contain ingredients of a fair trial, exhaustively. Those two laws, provide only the minimum features of a fair trial.

In 2007, the Parliament enacted the International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, as its preamble reads, to give effect to certain Articles of the ICCPR relating to Human Rights which have not been given domestic recognition through legislative measures. Section 4 of the Act confers on 'alleged offenders' the following 'entitlements':

> *(1) A person charged of a criminal offence under any written law, shall be entitled —*
>
> *(a) to be afforded an opportunity of being tried in his presence;*
>
> *(b) to defend himself in person or through legal assistance of his own choosing and where he does not have any such assistance, to be informed of that right;*
>
> *(c) to have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance:*
>
> *(d) to examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him;*
>
> *(e) to have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted; and*
>
> *(f) not to be compelled to testify against himself or to confess guilt.*
>
> *(2) Every person convicted of a criminal offence under any written law, shall have the right to appeal to a higher court against such conviction and any sentence imposed.*
>
> *(3) No person shall be tried or punished for any criminal offence for which such person has already been convicted or acquitted according to law.*

Whether these 'entitlements' have the force of law and unconditional justiciability (particularly as they have not been, surprisingly though, classified as 'rights') is a matter to be decided in an appropriate case. However, it is pertinent to note that substantial judicial recognition of these 'entitlements' is found in ***Attorney-General v. Aponso*** (cited above).

It is noteworthy that both Article 14 of the ICCPR and section 4 of the ICCPR Act make no mention regarding the need for a lawful investigation based upon which a criminal prosecution could be founded upon and for a lawful investigation to be a condition precedent for a fair trial.

Nevertheless, it is necessary to consider whether this lacuna in international treaty and domestic statutory law, needs to be filled by judicial pronouncements resulting in the development of the common law.

In ***Wijepala v. Attorney General*** *[(2001) 1 Sri L.R. 46]* Mark Fernando, J. observed that Article 13(3) *"not only entitles an accused to a right to legal representation at a trial before a competent court, but also to a fair trial, and that* ***includes anything and everything necessary for a fair trial****."* (Emphasis added.) Thus, it is seen that Justice Mark Fernando has by the use of the term *'anything and everything'* indicated the impossibility of defining the concept of a fair trial and exhaustively describing the constituent ingredients of a fair trial. He has observed the expansive nature of the concept of a fair trial. Indeed, what amounts to a fair trial would be extremely difficult to define. It is only a series of judgments on this matter that would give rise to a comprehensive description of the concept of a fair trial and illustrate a definitive list of the constituent ingredients of the concept. Whether or not an accused has been denied a fair trial must be determined upon a consideration of the attendant facts and circumstances of the case in comparison with the requirements of a fair trial.

Link between the right to a fair trial, a lawful investigation and the institution of criminal proceedings

It is noteworthy that both the institution of criminal proceedings and the conduct of criminal prosecutions are founded upon the conduct of criminal and forensic investigations. A criminal investigation can be described as **a legally regulated process**, which is required to be conducted by officials who possess the legal authority to conduct such a process. The primary objectives for which a criminal investigation is conducted, are as follows:

(a) To ascertain the truth pertaining to the information, complaint or allegation that an offence has been committed (i.e. whether in fact an offence has been committed).

(b) If the investigation reveals that in fact an offence has been committed, ascertaining the identity of the perpetrator.

(c) Apprehending the perpetrator.

(d) Collecting 'investigative material' that would have the potential of being admissible against such perpetrator in a court of law, by converting such material into 'judicial evidence' (oral, documentary and technical), so that criminal proceedings could be instituted against the perpetrator, and upon successful prosecution of the perpetrator, he could be convicted for committing the offence and be appropriately punished.

It must be noted that the function of the Attorney General with regard to the institution of criminal proceedings (following a consideration of investigative material) has been conferred on him by

statute (the written law). A decision on the institution of criminal proceedings has a direct bearing on the legal rights and interests of both the suspect / accused (alleged offender) and the relevant victim of crime. Therefore, this function of the Attorney General should be viewed from the perspectives of principles of public law. Subject to the exception provided by section 24 of the Commissions of Inquiry Act (as amended by Act No. 16 of 2008), the statutory function of instituting criminal proceedings against alleged offenders is regulated by section 393 of the Code of Criminal Procedure Act (CCPA). With regard to offences that are required to be investigated into by the police, the CCPA requires the decision of the Attorney General on the institution of criminal proceedings to be founded upon an investigation conducted by the police in terms of the law. Thus, with regard to an offence investigated into by the police, a decision on the institution of criminal proceedings by the Attorney General must be founded upon an *intra-vires*, independent, impartial, neutral, *good faith* and objective consideration of investigative material relating to an investigation conducted by the police **in a lawful manner**. The same principle applies to the function of the CIABOC pertaining to the institution of criminal proceedings by it. It needs hardly be mentioned that the institution of criminal proceedings by either the Attorney-General or the CIABOC for whatever collateral purposes of itself or any other person, would be unlawful and amount to an infringement of Article 12 of the Constitution.

If investigators are permitted to conduct investigations in a manner contrary to law, it would amount to a serious afront to the rule of law and will affect the legality of the institution of criminal proceedings. Similarly, it will affect the integrity of the criminal justice system and frustrate the achievement of objectives of criminal justice. It can result in persons suspected of committing offences being deprived of their fundamental rights, the truth being suppressed, and accused persons being unfairly prosecuted. It can give rise to innocent persons being investigated into and actual perpetrators of crime being shielded from criminal justice. In addition to the underlying rationale behind outlawing unlawful investigations, from a public law perspective, **using investigative material gathered through such an unlawfully conducted investigation to found a decision on the institution of criminal proceedings would be manifestly unlawful.**

In ***R.P. Wijesiri v. The Attorney General*** *[(1980) 2 Sri L.R. 317],* Justice Parinda Ranasinghe (as His Lordship was then) as a Judge of the Court of Appeal, considered the vexed question of (in the circumstances of the case examined by that Court), the legality of an indictment preferred by the Attorney General to the High Court. His Lordship considered whether, even if the Attorney General had the statutory power to prefer an indictment to the High Court, such indictment should have

been preceded by a 'lawful investigation'. While answering this question in the affirmative, Justice Ranasinghe observed the necessity for and the importance of a legally valid investigation being conducted by the Police into an offence, before criminal proceedings are instituted by the Attorney General. He observed that the importance of commencing proceedings before a Court in a lawful manner cannot be overstated (at page 339). In the circumstances of that case where the Attorney General had directly instituted criminal proceedings against the Petitioner for having committed an offence under section 480 of the Penal Code, Justice Ranasinghe observed (at pages 346-7) that the indictment should have been preceded by a lawful investigation, and that the absence of such a lawful investigation preceding the indictment rendered the indictment also unlawful. Justice Abdul Cader pronouncing a separate judgment, while expressing agreement with the views expressed by Justice Ranasinghe, held that in the circumstances of that case, the High Court was not empowered to try the case, as the Police had not conducted an investigation in a lawful manner in accordance with the provisions of the Code of Criminal Procedure Act. He therefore ruled that the indictment itself was unlawful.

Thus, the law is clear. The institution of criminal proceedings in the High Court by the Attorney-General and by the Director General of the CIAOBC (who is also conferred with the statutory power of instituting criminal proceedings before the High Court by forwarding indictment, on a direction to do so by the Commission) should be founded upon a consideration of investigative material collected in the course of a **lawful investigation** (which means an investigation conducted in terms of the applicable law) and should be preceded by the conduct of such a lawful investigation by competent law enforcement personnel. All criminal investigations must necessarily be conducted in terms of the law. As observed by the Court of Appeal in ***R. P. Wijesiri v. The Attorney General***, it is only investigative material emanating from a 'lawfully conducted investigation' that a prosecutorial authority such as the Attorney General should consider for the purpose of deciding on the institution of criminal proceedings. The same principle of law would apply to the CIABOC.

In terms of section 11 of the CIABOC Act, where the material received by the Commission in the course of an investigation conducted under the Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, the Commission shall direct the Director General to institute criminal proceedings in the appropriate Court. It is implicit in section 11, that such investigation should be lawful. Thus, this principle applies equally to both the Attorney-General and the Commission to Investigate Allegations of Bribery or Corruption. It logically flows from this principle of law, that, if upon a consideration of investigative material, an affirmative

decision is taken by either of these two prosecutorial authorities to institute criminal proceedings against an alleged offender, the corresponding prosecution can be conducted only based on material collected in the course of a lawful investigation, and not otherwise.

It is necessary to observe that basing prosecutorial decisions such as a decision on the institution of criminal proceedings and framing of charges, and the conduct of prosecutions relying upon material gathered in the course of an unlawful investigation, would be a violation of the doctrine of the rule of law, and be both unreliable and unfair. The resultant effect of an unlawful investigation may be grave prejudice being caused to the accused and depriving him of this fundamental right to a *'fair trial'*. Such a process would also amount to an infringement of Article 12(1) of the Constitution (which may be identified as the Constitutional guardian of the rule of law).

Fair investigations

Not only should a criminal investigation be lawful, it must be fair as well; fair from the perspective of both the victim of crime and the suspected perpetrator of the offence. From the perspective of the suspect, a fair investigation will include the investigator adhering to the following:

(i) Explaining to the suspect the allegation against him.

(ii) Affording the suspect, a full opportunity of presenting his position with regard to the allegation against him and regarding persons who have made incriminatory statements and items of incriminatory material gathered by investigators.

(iii) Conducting investigations based on exculpatory positions (if any) taken up by the suspect.

(iv) Treating the suspect in a humane manner, and in a manner that would not infringe his fundamental rights.

The investigator must always maintain an objective mind and not view or treat the suspect with any prejudice. Ascertainment of the truth in terms of the law should be the prime motive of the investigator, and not to 'develop a case against the suspect so that he could be somehow prosecuted'.

In ***Nirmal Singh Kahlon v. State of Punjab and Others****, [(2009) AIR SC 984]* the Supreme Court of India has held that *"… an accused is entitled to a fair investigation.* ***Fair investigation and fair trial are concomitant to the preservation of fundamental right*** *of an accused under Article 21 of the Constitution of India".* [Emphasis added] In ***Sidhartha Vashisht alias Manu Sharma v State (NCT of***

***Delhi)**, [(2010) 6 SCC 1]* the Supreme Court of India has observed that, *"… the alleged accused is entitled to fairness and true investigation and fair trial, and the prosecution is expected to play a balanced role in the trial of a crime... The investigation should be judicious, fair, transparent and expeditious to ensure compliance to the basic rule of law".*

If an investigation is conducted in an unfair manner, the accused (when indicted) may be able to claim that he had been deprived of his fundamental right to a fair trial. Further, by the conduct of an unfair investigation, there is every reason to believe that the truth will not surface, and in the circumstances, the public will lose confidence in criminal law enforcement and in the criminal justice system.

Unlawful investigations

There can be a strong causal nexus between on the one hand an unlawfully conducted investigation and on the other hand the conviction of the accused following a trial at which investigative material collected in the course of such unlawful investigation had been presented (as judicial evidence). Presentation of evidence founded upon investigative material (material which has the potential of being converted into judicial evidence at the trial) collected in the course of an unlawfully conducted investigation can pollute the findings of the trial court and its verdict, and thereby render such finding unlawful. That is primarily due to the possibility of highly prejudicial evidence emanating from an unlawfully conducted investigation. Therefore, if the prosecution had relied primarily on evidence collected in the course of an unlawfully conducted investigation, it is possible that such evidence resulted in causing substantial prejudice to the accused and therefore resulted in a miscarriage of justice. If in fact a miscarriage of justice had occurred, the conviction of the accused should be set aside on the premise that the accused has been denied a fair trial. That is a situation where the outcome of the case (conviction of the accused) has been inextricably interwoven with the evidence presented by the prosecution which had emanated from an unlawfully conducted investigation. Therefore, there has been a causal nexus between the unlawfully conducted investigation and the conviction of the accused.

However, there may be situations where the investigation as a whole had been conducted in a lawful manner, and only certain segments of it had been unlawfully conducted. An example would be a lawful investigation into an incident of murder, where a particular search had been conducted in an unlawful manner, and a highly incriminatory item of real (physical) evidence having been found during such unlawful search. In such instances, the Court would have to carefully examine

and rule on the impact of such unlawfully conducted portion(s) of the investigation. What was the impact of the search having been conducted in an unlawful manner, on the recovery of the relevant incriminatory item of real evidence? Was evidence presented against the accused based on such unlawfully conducted segments of the investigation? Was the testimonial narrative of the prosecution pertaining to the recovery of such item, credible and trustworthy? Has the presentation of material emanating from such unlawfully conducted segments of the investigation, cause grave and irreparable prejudice to the accused resulting in a miscarriage of justice? It is the answers to these questions, that will enable the Court to determine whether in such instances (where only a part of the investigation had been conducted unlawfully), the accused had been denied a fair trial, and if so, whether the conviction should be set-aside.

Conduct of the investigation by officers of the CIABOC

It is now necessary to consider whether the investigation into the complaint made to the CIABOC by the virtual complainant Nagarajah, had been conducted in a lawful manner. In this regard, consideration of section 5 of the Code of Criminal Procedure Act, No. 15 of 1979 would provide a useful starting point.

> *All **offences** –*
> *(a) under the Penal Code,*
> *(b) **under any other law unless otherwise specifically provided for in that law or any other law**,*
> *shall be **investigated**, inquired into, tried and otherwise dealt with **according to the provisions of this Code**.* [Emphasis added]

The offences for which the Appellants have been found *'guilty'* of committing, are offences under the Bribery Act. The Bribery Act presently does not contain specific provisions pertaining to the conduct of investigations into offences under the Act. [Prior to 1994, there were certain provisions, which were repealed by Act No. 20 of 1994.]

However, the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994, which established the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), has vide section 3 of the Act, entrusted such Commission the statutory functions of –

(i) investigating allegations contained in communications made to the Commission under section 4, and

(ii) where such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, directing the Director General for the Prevention of Bribery or Corruption to institute criminal proceedings against such person in the appropriate court.

It would be seen that by section 5 of the CIABOC Act, the CIABOC has been vested with certain powers of investigation. Therefore, the Commission in the exercise of its statutory function of investigating the alleged commission of certain offences (such as the offences the Appellants were subsequently indicted of having committed) is entitled to exercise such powers of investigation contained in section 5 of the CIABOC Act. However, vide section 5 of the Code of Criminal Procedure Act, unless specifically provided in a particular law, an investigation at large should be conducted in the manner provided for in such Code. To enable officers appointed to assist the Commission to exercise powers of investigation contained in the Code of Criminal Procedure Act, section 18(2) of the CIABOC Act provides that the Director General for the Prevention of Bribery or Corruption (referred to as the 'Director General of the Commission' during the hearing of this Appeal) and every officer appointed to assist the Commission shall be deemed to be 'peace officers' within the meaning of the Code of Criminal Procedure Act.

A careful consideration of the Code of Criminal Procedure Act reveals that the statutory regulation of the conduct of an investigation is primarily found in Chapter XI of the Act. As observed by Justice Parinda Ranasinghe in ***R.P. Wijesiri v. The Attorney-General,*** Chapter XI contains vital powers of investigation, provisions that are sacrosanct and are invaluable safeguards against oppressive and unlawful forms of investigations. However, it is important to note that there are several very important provisions pertaining to the conduct of criminal investigations outside Chapter XI of the Code as well. They are, the (i) power to conduct search operations (sections 24 to 31), (ii) powers of arrest of suspects (sections 23, 32, 33, 34, and 42), and (iii) power to hold an arrested person in custody (sections 37 and 43A). Additionally, when police officers conduct investigations, they are empowered under the provisions of the Police Ordinance as well. Therefore, restricting the powers of investigation to Chapter XI of the Code would not be correct.

A further examination of the provisions of the CIABOC Act and the Code of Criminal Procedure Act reveals that though the said laws suitably empower any Peace Officer or an Officer-in-Charge of Police Station (in the context of investigations into offences under the Penal Code and various other laws containing offences which may be investigated into by the Police) and the Commission (in the

context of offences under the Bribery Act and the Declaration of Assets and Liabilities Law), the two laws in conjunction do not exhaustively contain provisions of law that would regulate the conduct of investigations. Neither of these two laws stipulate the exact *modus operandi* that may be adopted when conducting an investigation. For valid reasons, determining the exact manner in which an investigation should be conducted has been left to the ingenuity of the relevant investigators based on circumstances relating to each investigation. The manner of conducting an investigation is to be determined keeping in mind a host of factors such as the nature of the offence, the circumstances pertaining to the commission of the offence that is required to be investigated into, and the need to collect sufficient investigative material that would enable the launching of a successful prosecution. Subject to the provisions of the afore-stated laws and circumscribed by such laws, investigation officers have been vested with considerable discretionary authority to determine the exact manner in which the investigation ought to be conducted and implement the conceptualized investigation strategy in a lawful manner. Particularly with regard to complex crimes such as premeditated murder, bribery and corruption, money laundering, and drug trafficking, law enforcement officers would need to adopt complex investigative methodology to detect crime and to gather evidence. Of course, when designing such investigation strategy and implementing it, investigation officers would have to abide specifically by the applicable provisions of the afore-stated two laws and generally by the rule of law, which would include recognizing and respecting the Fundamental Rights of suspects and the rights and entitlements of victims of crime and witnesses. Indeed, every investigation must be conducted in a lawful, impartial, fair, prompt and comprehensive manner, with the view to ascertaining the truth.

Laying of a 'trap' and 'entrapment' as investigative techniques and their legality

Throughout the hearing of this Appeal, there was considerable debate about the investigative technique adopted by CIABOC officials which resulted in the arrest of the appellants. While learned President's Counsel for the Appellants submitted that what took place at the instance of officers of the CIABOC was an 'entrapment', learned Deputy Solicitor General for the Respondents submitted that the investigative technique adopted by officers of the CIABOC did not amount to 'entrapment' and was not unlawful. Learned counsel also debated whether the *modus operandi* adopted by CIABOC officers was merely 'laying of a trap' or 'an entrapment'. Therefore, it is now necessary to consider (i) what a 'trap' is as opposed to an 'entrapment', (ii) whether the *modus operandi* of 'entrapment' as alleged to have been adopted by the investigation officers of the Commission in the instant case, amounted to an 'entrapment' (iii) whether such 'entrapment' is 'unlawful' or 'illegal',

and (iv) whether in the instant case, officers of the CIABOC engaged in an entrapment and thereby deprived the Appellants of a *'fair trial'*.

A search for answers to these questions should be viewed against the backdrop of a core submission made by learned President's Counsel for the Appellants, that when the virtual complainant Nagarajah lodged his complaint at the CIABOC, all what CIABOC officers were entitled to do in terms of the law, was to investigate that complaint containing multiple instances of solicitation of a bribe, and if such investigation revealed sufficient evidence against the perpetrators, take action against them. Learned counsel submitted that instead of doing that (which is the investigative procedure provided by law), the investigators engaged in entrapping the Appellants, which was illegal.

In my view, what was urged by learned President's Counsel for the Appellants as being the lawful entitlement of investigators, was a very conventional and routine investigation: What may be described as a 'simple, conventional and reactive investigation', as opposed to a 'proactive form of investigation aimed at detecting the commission of an offence and gathering cogent evidence relating to the commission of such offence'.

It would be seen that not only in complex crimes such as bribery, corruption, money laundering, terrorism, drug trafficking and online / cyber environment based criminal activities, even in somewhat simple offences such as offences under the Food Act and the Consumer Protection Authority Act, unless law enforcement authorities were to engage in the adoption of proactive and innovative measures of investigation, detecting the commission of the offences, promptly arresting the perpetrator and procuring credible and cogent evidence relating to commission of those offences, would be extremely difficult. Further, by the adoption of simple, conventional and reactive methods of investigation (in the nature of what was submitted by learned counsel for the Appellants as being what was permitted by law), it is highly unlikely that the investigators would be successful in securing sufficient investigative material that would enable the prosecutor to successfully prosecute the offender. Therefore, in my view, what was suggested by the learned President's Counsel for the Appellants as being the only method that is permissible by law, would not be in public interest or in the furtherance of objectives of law enforcement and criminal justice. In my opinion, what was suggested by learned Counsel for the Appellants would be a panacea for perpetrators of crime to avoid criminal justice sanctions, and certainly not in public interest.

Particularly in what may be referred to as 'consent crimes' where there is no direct and immediate victim and both parties had acted surreptitiously in a consensual manner, it is unlikely that law enforcement officers will receive complaints or information pertaining to the commission of such offences. Examples would be (i) a lay person voluntarily giving a bribe to a public officer to secure a benefit for himself and the corresponding acceptance of that bribe by the official for his personal gain, which results in the requested official act being successfully performed and a benefit accruing to both the giver and the receiver of the bribe, and (ii) the sale of narcotics by a large scale drug-trafficker to secure financial gain for himself and the corresponding purchase of such narcotics also by a drug-trafficker or by an addict for re-sale or personal use. Unless law enforcement authorities based on available information and crime intelligence, engage the suspected perpetrator in a proactive manner and devise a method of apprehending the perpetrator at the very moment the offence is committed while they themselves witness the commission of the offence, detection of such offences, arrest of suspects and successful prosecution of offenders would not be feasible. Contemporary law enforcement practices which include covert policing operations in the name and style of sting operations using decoys, other forms of crime detection using decoys, test purchases, controlled deliveries, automated detection of offences using advanced technology, and virtue testing of fidelity to legal values using online communication channels and other methods are adopted throughout the world. Particularly with the increase in the sophistication of commission of crime and the use of advanced technology by criminals, law enforcement authorities have been able to keep society relatively safe from unscrupulous criminals, mainly due to such proactive forms of crime detection and criminal investigation.

Particularly in the field of bribery and corruption, which has most dangerously invaded the officialdom of our country and caused (possibly continues to cause) significant damage to the integrity of governance and devastating economic consequences, the adoption of proactive forms of investigation (to the exclusion of what is illegal) is very much in public interest, and must be encouraged.

Trap

According to the Oxford Advanced Learns' Dictionary (10th Edition - 2020) to the extent it is contextually relevant, a 'trap' is a clever plan designed to trick somebody, either by capturing them or by making them to do or say something that they did not mean to do or say. (e.g. She had set up a trap for him and he had walked straight into it.) A trap is also a trick to get somebody into doing something. According to the Black's Law Dictionary (11th Edition) a trap is a devise for capturing

living creatures and that shuts suddenly. A trap has also be described as any devise or contrivance by which one may be caught unawares.

From a crime detection perspective, a 'trap' may be described as an innovative crime detection method which law enforcement authorities use to nab perpetrators at the very instant the offence is committed. It is an undercover method of criminal investigation by which 'a trap is laid' enabling the perpetrator to be apprehended in the 'act of committing the crime' while ensuring that the perpetrator has no room to extricate himself. Where investigators adopt the 'trap' technique, the suspected perpetrator is not apprehended (arrested) immediately following the receipt of information or the complaint that he has committed an offence. A crime detection method referred to as a 'trap' is laid providing the perpetrator an opportunity to commit the substantive offence or a further offence (if he decides to commit the substantive offence or such further offence, on his own volition). It is the commission of the substantive or further offence that is detected by law enforcement officers by the laying of a trap. Thus, what law enforcement officers do is to design and create circumstances that confer on the perpetrator the opportunity to commit an offence on his own free will. This investigative method is designed in such a manner that the suspect receives a free opportunity to commit an offence in the immediate presence of an undercover law enforcement officer, who is generally referred to as a 'decoy'. The decoy is a passive observer of the conduct of the offender and either does not engage with the offenders or engages only minimally. The decoy offers no inducement to the suspect to commit an offence, nor does he lure him to commit the offence. If the offender does commit an offence, the decoy either directly apprehends the offender or signals the rest of the law enforcement personnel, and they rush to apprehend the offender.

The laying of a trap is carried out for multiple reasons. They are, (i) to check the veracity of the complaint / information received, (ii) to directly take cognizance of the offence being committed (as the decoy witnesses the offence being committed), and (iii) to facilitate the perpetrator being arrested 'in the act of committing the offence' or immediately thereafter. This method has the advantage of securing cogent evidence against the perpetrator, obtain corroboration of the complainant's position, preventing the offender from destroying evidence which incriminates him, and also prevents the offender from evading arrest. Therefore, 'laying of traps' is a well-accepted method. Thus, it would be seen that, it will certainly not be in public interest to proscribe all forms and manifestations of 'laying of traps', which do not take the manifestation and aggravated form of 'entrapment' (defined below). I take judicial note of the fact that, the CIABOC presently adopts the

'laying of traps' as a routine method of detection of accepting bribes and its legality has not been challenged in judicial proceedings. During the hearing of this Appeal, learned Counsel for the Appellants were non-committal regarding their views on legality of 'laying of a trap using a decoy'.

In ***M.S. Mohiddin v. Unknown*** *[AIR 1952 Mad 561]* (cited by learned President's Counsel for the 2nd Appellant) Justice Panchapakesa Ayyar has referred to two kinds of traps, namely *'legitimate traps'* and *'illegitimate traps'*. The challenge in my view would be to draw the dividing line between traps simpliciter that are permissible as they are lawful, as opposed to what are impermissible and thus unlawful. However, it is important to note that basing the argument on what is lawful verses what is unlawful based on nomenclature alone to be assigned to the impugned investigative technique can be troublesome.

Entrapment

'Entrapment' as an investigative technique, which was at the epicenter of the argument in this Appeal, is a term which does not find a statutory definition in Sri Lankan law (both written and unwritten law). Learned Counsel did not bring to the attention of this Court a statutory definition of the term found in a statute of a comparable jurisdiction.

In the foregoing circumstances, it would be logical to commence the search for a definition of the term by ascertaining the literal meaning of the term 'entrapment'. According to the Oxford Advanced Learner's Dictionary (10th Edition - 2020) 'entrapment' means *the illegal act of tricking somebody into committing a crime so that he can be arrested for it*. Other language dictionaries offer similar literal meanings.

The logical next step would be to refer legal dictionaries. According to the Merriam–Webster's Dictionary of Law, entrapment is *the action or process of entrapping and the state or condition of being entrapped*. The term has also been defined as *the affirmative defence of having been entrapped by an agent of the government*. According to the Black's Law Dictionary (11th Edition), entrapment is *a law enforcement officer's or government agent's inducement of a person to commit a crime, by means of fraud or undue persuasion in an attempt to cause a criminal prosecution against that person*.

All counsel were unanimous in their position that judicial pronouncements of this country do not contain a definition of the term 'entrapment'. In the circumstances, it is necessary to consider

judicial interpretations found in judgments of comparable jurisdictions. As referred to above, learned President's Counsel for the 2nd Appellant brought to the attention of this Court a possible definition of the term, found in ***Sorrells v. United States*** *287 US 435 (1932),* which provides that entrapment is *"… the conception and planning of an offence by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion or fraud of the officer …".* Learned Deputy Solicitor General did not oppose this definition.

In the English case of ***R. v. Frank Alexander Birtles*** *[(1969) 53 Cr.A.R. 469]*, Lord Parker, CJ has, in an instance where the informer had created the commission of an offence by inciting the accused to commit an offence which he would not have otherwise committed, held that *"it is vitally important to ensure so far as possible that the informer does not create an offence, that is to say, incite others to commit an offence which those others would not otherwise have committed."* These words reflect Lord Chief Justice Parker's views on what entrapment means. In the South African case of ***S. v Malinga*** *[(1963) 1 S.A.L.R.692]* Justice Holmes has defined that a person may be referred to as a "trap" which such *"person who with a view to securing the conviction of another, proposes certain criminal conduct to him, and himself ostensibly takes part therein. In other words, he creates the occasion for someone else to commit the offence."* In the Canadian case of ***R. v. Haukness,*** *[(1976) 5 W.W.R. 420],* entrapment has been defined as *"… the act of an officer who induces a person to commit a crime, not contemplated by such person, for the purpose of prosecuting him …".*

Upon a consideration of the literal meaning of the English term 'entrapment', definitions found in legal dictionaries, and judicial pronouncements of comparable jurisdictions, without intending to provide an exhaustive definition, it is my view that ***'entrapment' is a process which is associated with the conduct of certain forms of criminal investigations, where one or more law enforcement officers in collaboration with or without the participation of a lay person, engages in the conduct of one or more activities not associated with routine and conventional criminal investigations, for the purpose of inducing or enticing another person to commit a crime. Such stratagem may take the form of instigation, enticement, inveigling, applying duress or luring. As a result of such stratagem, the offender commits an offence, which he did not originally intend to commit. The result of causing the offender to commit an offence is achieved by deception or fraud. As a result of such stratagem and upon being deceived, the offender commits the offence he was instigated, enticed, inveigled or lured into committing. Consequent to the commission of the offence, the offender is arrested forthwith.***

Thus, it would also be seen that 'entrapment' is an aggravated manifestation of 'laying of a trap'. In an entrapment, in addition to the routine features of 'laying a trap', investigators engage in certain measures by the application of stratagem, so as to induce or lure the offender to commit an offence which he would not have otherwise committed. In other words, investigators not only set in place circumstances that confer on the offender an opportunity to commit and offence, they 'create' the commission of the offence, as well.

Generally, entrapment is carried out by an *agent provocateur.* An *agent provocateur* is a person who entices another to commit an express breach of the law, which that person would not have otherwise committed, and then proceed to inform against him in respect of such offence to a law enforcement agency or to a Court. An *agent provocateur* could be a law enforcement officer or a lay person who acts in terms of advice or instructions given by a law enforcement officer. It is noteworthy that in entrapment, certain forms of interventions by law enforcement officers, are *per-se* criminal activities. Examples would be abetting the commission of an offence or conspiracy to commit an offence. Those are instances where the law enforcement officer concerned and or the *agent provocateur's* conduct forms the *actus reus* of an offence. However, in certain other entrapments, interventions by the *agent provocateur* do not constitute the *actus reus* of any offence. Notwithstanding the possible blameworthiness of the conduct of the *agent provocateur,* it is necessary to note that in entrapment, the motive of law enforcement officers is to detect and apprehend a person whom they believe has engaged in criminal activity. They do not entertain any criminal intent on their part.

It is thus seen that, in a case of entrapment, what led to the perpetrator to commit the ingredients of the offence, was a form of intervention necessarily associated with deception practiced upon him by law enforcement officers or by a lay person acting at the behest of law enforcement officers. As a result of the intervention, the perpetrator commits an offence which he would not have committed if not for such intervention. These features of 'entrapment' distinguish itself from a 'trap' simpliciter.

In ***Nottingham City Council v. Amin*** *[(2000) 1 WLR 1071],* it was held that the nature of the offence, the reason for the particular police operation, the nature and extent of police participation in the crime, and the character of the accused, are factors among others that may be taken into consideration in determining whether a particular conduct of the law enforcement officers is

acceptable or not. It was further held that this was not an exhaustive list of factors and that their relative weight and importance depends on the facts of each case.

Though in order to justify a particular *modus operandi* adopted by them to investigate a crime, law enforcement officers may advance the proposition that recourse was had to the impugned procedure for the purpose of detecting a person in the act of committing an offence and that they acted in *good faith,* the legality of such *modus operandi* needs to be carefully considered.

Legal implications arising out of entrapment

The legal implications arising out of entrapment has been discussed in the English case of ***R v Sang*** *[(1980) AC 402]*, which was referred to by all Counsel and by the trial court**.** In this case, while Sang had been a prisoner detained at the Brixton prison, he met a fellow prisoner called Scippo who unknown to Sang, was a police informant and served in this instance as an *agent provocateur*. Shortly before Sang was about to be released from prison, Scippo who seemed to think that Sang's business or part of it was to deal in forged banknotes, told Sang that he knew of a safe buyer of forged banknotes and that he would arrange for this buyer to get in touch with Sang by telephone. Soon after Sang left the prison, he was telephoned by a man who posed as a keen buyer of forged banknotes and enquired whether Sang would sell him some. Sang responded that he would, and at a subsequent meeting between the two, the deal was to be completed. Sang had no idea that the man with whom he had been speaking, was, in fact a sergeant of the police. Sang and some of his associates went to the meeting carrying with them a large number of forged USD banknotes and walked straight into a police trap. The forged notes were confiscated and Sang and his comrades in crime were arrested. Subsequently, Sang and another were charged with conspiracy to utter counterfeit banknotes and with unlawful possession of the same.

At the trial, the trial judge ruled that he had no discretion to exclude evidence obtained through an *agent provocateur* and after trial, convicted Sang. The Court of Appeal dismissed Sang's Appeal. However, the following question was certified as being fit for consideration by the House of Lords: *"Does a trial judge have a discretion to refuse to allow evidence-being other than evidence of admission-to be given in any circumstances in which such evidence is relevant and of more than minimal probative value?"*

The House of Lords affirmed the view of the Court of Appeal (Criminal Division). It was held that there was no justification for the exercise of the judge's discretion to exclude evidence, whether or not it had been obtained as a result of the activities of an *agent provocateur*. Accordingly, the appeal was dismissed. In the course of the judgment, the Court enunciated the following principles:

- There is no defence called 'entrapment' known to English Law. The fact that the procurer of the offence (*agent provocateur*) is a policeman or a police informer cannot affect the guilt of the principal offender, although it may be of relevance in mitigation of penalty for the offence. Both the physical element (*actus reus*) and the mental element (*mens rea*) of the offence with which the accused has been charged are present in this case.
- Incitement is no defence in law for the person incited to crime, even though the inciter is himself guilty of crime and may be far the more culpable. There are other more direct, less anomalous ways of controlling police and official activity than by introducing so dubious a defence into the law. The true relevance of official entrapment is upon the question of sentence where its mitigating value may be high.
- A trial judge in a criminal trial has always a discretion to refuse to admit evidence pertaining to entrapment, if in his opinion its prejudicial effect outweighs its probative value.
- Save with regard to admissions and confessions and generally with regard to evidence obtained from the accused after the commission of the offence, the trial judge has no discretion to refuse to admit relevant and admissible evidence on the ground that it was obtained by improper or unfair means. The court is not concerned with how it was obtained. It is no ground for the exercise of discretion to exclude that the evidence was obtained as the result of the activities of an *agent provocateur*.
- 'Fair' in this context relates to process of trial. No man is to be compelled to incriminate himself; No man is to be convicted save upon the probative effect of legally admissible evidence. No admission or confession is to be received in evidence unless such admission or confession was made voluntarily. If legally admissible evidence be tendered which endangers these principles, the judge may exercise his discretion to exclude it, thus ensuring that the accused has the benefit of principles which exist in the law to secure him a fair trial.

Lord Diplock answered the afore-stated question of law, in the following manner:

> A <u>trial judge may, at his discretion, exclude such evidence pertaining to an entrapment only where its prejudicial effect outweighs its probative value or where the evidence has been obtained from the accused after the commission of the offence</u>, as in cases of admissions and confessions.

Thus, it is evident that ***R v. Sang*** has been decided on the premise that procuring evidence through entrapment does not *per-se* make such evidence inadmissible against the accused. Nor is entrapment an exculpatory defence. If at all, it will have the effect of mitigating the sentence. The view of the Court was that admissibility of evidence procured through entrapment should be determined based on relevancy, admissibility and the probative value of such evidence, and should not be necessarily excluded.

In ***Regina v. Loosely*** and ***The Attorney General's Reference, No. 3 of 2000*** *[(2001) UKHL 53]* (which were two conjoined appeals), the House of Lords revisited the law regarding this matter. Much of the very interesting and argumentative debate during the hearing of the instant Appeal centered around the *ratio decidendi* of the judgment of the House of Lords and its applicability to the facts and circumstances of the instant case.

In ***R v Looseley****,* during the course of an authorized police operation relating to the trade in class-A controlled drugs, an undercover police officer who was at a public house, was given the defendant's (Looseley's) name and telephone number as a potential source of drugs. The officer telephoned Looseley who confirmed that he could obtain drugs. After they had agreed on a price for the supply of heroin, the defendant took the officer to an address where the defendant obtained a quantity of heroin and gave it to the officer in exchange for the agreed sum. On two further occasions, the officer contacted the defendant and bought two more quantities of heroin from him. The defendant was charged with supplying or being concerned in the supplying to another of a class-A controlled drug, contrary to section 4 of the Misuse of Drugs Act 1971. The trial judge declined to stay proceedings as an abuse of process of court or to exclude the evidence under section 78 of the Police and Criminal Evidence Act. The Court of Appeal upheld the judge's ruling and dismissed the defendant's appeal against conviction. The House of Lords held that there was no objection to the police posing as drug users to trap an active drug dealer.

In ***Attorney General's Reference (No. 3 of 2000)****,* two undercover police officers offered contraband cigarettes to a youth. The youth took the officers to the accused (who was introduced as a potential buyer), who paid for the cigarettes. The officers then asked the accused if he could supply them with some heroin. At first the accused said he could not get heroin at such short notice and that he was "not into heroin". But eventually he agreed to try and get them some. A few days later, he took the officers to meet the supplier, collected the heroin and gave it to the officers in exchange of 475

pounds. When he was subsequently arrested and interviewed, he said that because the officers were getting him cheap cigarettes, he thought that supplying heroin amounted to a 'favour for a favour'. He did not suggest that the officers exerted pressure of any kind. The accused was charged with supplying to another, a class-A controlled drug contrary to section 4 of the 971 Act. The trial judge stayed proceedings on the ground that the police officers had incited the commission of the offence and that based on jurisprudence of the European Court of Human Rights, held that permitting the evidence to be admitted would deprive the accused of the right to a fair hearing as guaranteed by Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms. When the stay was lifted and the prosecution offered no evidence, the accused was acquitted. On reference by the Attorney-General, the Court of Appeal ruled that the trial Judge had erred in staying proceedings. In the House of Lords, it was held that there was an abuse of process where the defendant, who had never dealt in drugs was induced to procure heroin for an undercover officer by the prospect of a profitable trade in smuggled cigarettes – the police had caused him to commit an offence which he would not otherwise have committed.

It is important to note that during the intervening period between the judgments in ***Sang*** and ***Loosely and AG's Reference 3 of 2000***, several significant developments occurred in the United Kingdom, which seems to have had an influence on the outcome of the two conjoined Appeals. They were, (i) the enactment of the Police and Criminal Evidence (PACE) Act of 1984, in which section 74 provides for the exclusion of otherwise admissible evidence on the footing that it would be unfair to adduce it, (ii) the pronouncements of the judgments of the European Court of Human Rights in ***Ludi v. Switzerland*** *[(1992) 15 E.H.R.R. 201]* and ***Texeira de Castro v. Portugal*** *[(1998) 28 E.H.R.R. 101]* where investigations conducted by the police amounting to entrapment were viewed from the context of Article 6 of the European Convention on Human Rights and determined by that Court as having deprived the accused of a fair trial, (iii) the decision of the House of Lords in ***R v. Latif and Shahzad*** *[(1996) 2 Cr.App.R. 92],* and (iv) the enactment of the Human Rights Act of 1998 of the United Kingdom, of which Article 6 guarantees the right to a fair trial.

In ***R v. Loosely*** and ***AG's Reference 3 of 2000***, the primary questions before the House of Lords were, (i) whether entrapment was illegal and thus whether evidence pertaining to an entrapment is inadmissible, and (ii) when an attempt is made by the prosecution to present evidence procured through entrapment, whether proceedings should be stayed or the impugned item of evidence should be excluded.

Particularly in view of the divergence of views expressed by learned Counsel during the hearing of this Appeal regarding the *ratio decidendi* to be deducted from the opinions of the several Lords who heard these two conjoined appeals, in my view, the following detailed reproduction of the principles of law (as contained below) found in the composite judgment of the House of Lords ***Loosely*** and ***AG's Reference 3 of 2000*** along with the corresponding observations and comments contained in the several opinions of their Lordships, is quite justified.

(1) It is not acceptable that the state through its agents should lure its citizens into committing acts forbidden by the law and then seek to prosecute them for doing so. Such conduct would amount to entrapment, which would be a misuse of state power and an abuse of process of court.

(2) By recourse to the principle that every court has an inherent power and duty to prevent abuse of its process, the courts can ensure that agents of the Executive of the state do not so misuse the coercive law enforcement functions of the courts and thereby oppress citizens.

(3) As to where the boundary lies in respect of acceptable police behaviour and what is unacceptable, each case must depend on its own facts. A useful guide to identifying the limits of the type of police conduct that is acceptable is to consider whether, in the particular circumstances, the police did no more than present the defendant with an unexceptional opportunity to commit a crime. The yardstick is, in general, whether the conduct of the police preceding the commission of the offence was no more than might have been expected from others in the circumstances; if not, then the police were not to be regarded as having instigated or incited the crime; if they did no more than others might be expected to do, they were not creating crime artificially. However, the investigatory technique of providing an opportunity to commit the crime should not be applied at random fashion or be used for wholesale virtue testing without good reason. The greater the degree of intrusiveness, the closer will the court scrutinize the reason for using it. The ultimate consideration is whether the conduct of the law enforcement agency is so seriously improper as to bring the administration of justice into disrepute. The use of proactive techniques is needed more, and is hence more appropriate, in some circumstances than others; the secrecy and difficulty of detection and the manner in which the particular criminal activity is carried on being relevant considerations.

(4) The difficulty lies in identifying conduct which is caught by such imprecise words as 'lure' or 'incite' or 'entice' or 'instigate'. If police officers acted only as detectives and passive observers, there would be little problem in identifying the boundary between permissible

and impermissible police conduct. But that would not be a satisfactory place for the boundary line.

(5) Moreover, and importantly, in some instances a degree of active involvement by the police in the commission of a crime is generally regarded as acceptable. Test purchases fall easily into this category.

(6) Thus, there are occasions when it is necessary for the police to resort to investigatory techniques in which the police themselves are the reporters and the witnesses of the commission of a crime. Sometimes, the particular technique adopted is acceptable. Sometimes it is not. For even when the use of these investigatory techniques is justified, there are limits to what is acceptable.

(7) The fact that the evidence was obtained by entrapment does not of itself require the judge to exclude it. But, in deciding whether to admit the evidence of an undercover police officer, the judge may take into account matters such as whether the officer was enticing the defendant to commit an offence he would not otherwise have committed, the nature of any entrapment, and how active or passive was the officer's role in obtaining the evidence.

(8) The judiciary should accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that 'threatens either basic human rights or the rule of law'.

(9) Entrapment, and the use of evidence obtained by entrapment ('as a result of police incitement'), may deprive an accused of the right to a fair trial. Although entrapment is not a substantive defence, English law has now developed remedies in respect of entrapment: the court may stay the relevant criminal proceedings, and the court may exclude evidence.

(10) Entrapment is not a matter going only to the blameworthiness or culpability of the defendant and, hence, to sentence as distinct from conviction. Entrapment goes to the propriety of there being a prosecution at all for the relevant offence, having regard to the state's involvement in the circumstance in which it was committed.

(11) Expressions such as ‘state-created crime’ and ‘lure’ and ‘incite’ focus attention on the role played by the police in the formation of the defendant’s intent to commit the crime in question. If the defendant already had the intent to commit a crime of the same or a similar kind, then the police did no more than give him the opportunity to fulfil his existing intent. This is unobjectionable. If the defendant was already presently disposed to commit such a crime, should opportunity arise, that is not entrapment. That is not state-created crime. The matter stands differently if the defendant lacked such a predisposition, and the police were responsible for implanting the necessary intent.

(12) The overall consideration is always whether the conduct of the police or other law enforcement agency was so seriously improper as to bring the administration of justice into disrepute.

(13) The use of pro-active techniques is more needed and, hence, more appropriate, in some circumstances than others. The secrecy and difficulty of detection, and the manner in which the particular criminal activity is carried on, are relevant considerations.

(14) It is necessary to consider the reason for the particular police operation. It goes without saying that the police must act in good faith and not, for example, as part of a malicious vendetta against an individual or group of individuals. Having reasonable grounds for suspicion is one-way good faith may be established, but having grounds for suspicion of a particular individual is not always essential. Sometimes suspicion may be centered on a particular place, such as a particular public house. Sometimes random testing may be the only practicable way of policing a particular trading activity.

(15) The greater the inducement held out by the police, and the more forceful or persistent the police overtures, the more readily may a court conclude that the police overstepped the boundary: their conduct might well have brought about commission of a crime by a person who would normally avoid crime of that kind. In assessing the weight to be attached to the police inducement, regard is to be had to the accused's circumstances, including his vulnerability. This is not because the standards of acceptable behaviour are variable. Rather, this is a recognition that what may be a significant inducement to one person may not be so to another. For the police to behave as would an ordinary customer of a trade, whether lawful or unlawful, being carried on by the defendant will not normally be regarded as objectionable.

(16) The fact that the accused was entrapped is not inconsistent with his having broken the law. The entrapment will usually have achieved its object in causing him to do the prohibited act with the necessary guilty intent.

(17) Many cases place emphasis upon the question of whether the policeman can be said to have caused the commission of the offence, rather than merely providing an opportunity for the accused to commit it with a policeman rather than in secrecy with someone else. There is no doubt that this will usually be a most important factor in deciding whether or not the police have overstepped the line between legitimate crime detection and unacceptable crime creation.

(18) The only proper purpose of police participation is to obtain evidence of criminal acts which they suspect someone is about to commit or in which he is already engaged. It is not to tempt people to commit crimes in order to expose their bad characters and punish them.

(19) Closely linked with the question of whether the police were creating or detecting crime is the supervision of their activities. To allow policemen or controlled informers to undertake entrapment activities unsupervised carries great danger, not merely that they will try to improve their performances in court, but of oppression, extortion and corruption.

(20) The remedy where entrapment has occurred is not a substantive defence. It had also been held that entrapment gives rise to a mitigatory plea in so far as the sentence is concerned. However, in view of section 78 of the PACE Act of 1984 and the Human Rights Act of 1998, this approach must be modified. The phrase 'fairness of proceedings' in section 78 of the PACE Act is directed primarily at matters going into the fairness of the actual conduct of proceedings. However, the scope of the wide and comprehensive discretion conferred on trial judges should not be strictly to procedural unfairness and can justify the exclusion of evidence pertaining to entrapment.

Present status of the English law on entrapment

In view of the foregoing, it is evident that the law relating to entrapment as laid down in ***R v. Sang*** has been reversed by the House of Lords by their judgment in the conjoined Appeals of ***R v. Loosely*** and ***AG's Reference (No. 3 of 2000)***. The House of Lords has held that entrapment amounts to an abuse of power conferred on law enforcement and investigation officers. Permitting entrapment to take place is an afront to the integrity of criminal justice and is contrary to public policy. It is inimical to the rule of law, and hence cannot be condoned. Entrapment causes the creation of an offence, that is, in entrapment the offender commits an offence which he would not have otherwise committed. (It should be noted that, 'creating crime' is different from 'creating circumstances that provides a mere opportunity to commit crime'.) In the circumstances, entrapment (the parameters of which have been laid down in the several opinions of the Lords, as being distinguishable from lawful proactive forms of investigation which would include the 'laying of traps' simpliciter) as a form of investigative technique is not lawful under English common law. Nevertheless, entrapment is not a substantive defence in English law. Evidence emanating from an entrapment would impinge on the right of an accused to a fair trial. Therefore, such evidence should not be permitted to be led in evidence.

During the hearing of this Appeal, learned counsel did not bring to the attention of this Court any subsequent judgment of the House of Lords or the Supreme Court of the United Kingdom which reflects that the English common law on this matter has changed since the judgment in ***R v. Loosely***. Nor did a scrutiny of the English law by me reveal such a development. I have considered the judgment of the Court of Appeal (UK) in ***Haroon Ali Syed v. Regina****, [(2018) EWCA Crim 2809],* and it is my view that English common law on this matter remains that which is contained in ***R v. Loosely*** and ***AG's Reference 3 of 2000****.*

Position of Sri Lanka's law regarding entrapment

I find myself in agreement with the afore-stated principles of law contained in ***R v. Loosely*** and ***AG's Reference (No. 3 of 2000)***. Adoption of these principles into Sri Lanka's law is wholly consistent with the law and procedure pertaining to criminal justice of this country and is in perfect consonance with the fundamental right to a *'fair trial'*. Thus, without any hesitation, I apply those principles in the adjudication of the instant Appeal.

In the present Appeal, the determination of the question of law referred to at the commencement of this judgment is not based only on the unlawfulness of the investigative method of entrapment. The related and more important issue in my opinion is whether permitting a prosecution to present evidence emanating from entrapment would be 'fair' and therefore, permissible.

In a situation where the offender had been entrapped, the intention on the part of the offender to commit the offence is not based on his free will and own volition and independent decision-making. The intention to commit the offence is the result of the stratagem applied on the offender by the *agent provocateur.* The offender did not on his own free will intend to commit the offence. He was influenced to commit an offence which if left alone to himself, he would not have committed. The offence is committed by the offender influenced by or due to the inducement, incitement or duress provided or as a result of being lured into committing the offence by the *agent provocateur*. The formation of the *mens rea* of the offence arises out of the intervention by the *agent provocateur*. Thus, though the requisite *mens rea* is entertained by the offender and the *actus reus* of the offence is completed by him, the *modus operandi* adopted by the *agent provocateur* and the investigators cannot be endorsed. In a case of entrapment, law enforcement personnel and or the *agent provocateur* are responsible for the 'creation' of the offence perpetrated by the offender. If not for their design and intervention aimed at the commission of the offence, the offender would not have committed the offence he has been subsequently charged with. Thus, in situations where

entrapment has taken place and such entrapment had resulted in the accused committing the offence, it would be manifestly unfair to prosecute him founded upon evidence arising out of the entrapment. That is because, presenting such evidence would be grossly unfair. In my view, that is the justification for the policy and rationale in outlawing evidence emanating from entrapment.

In view of the foregoing, **I hold that the investigative technique of 'entrapment' as defined in this judgment, is unlawful to the extent that, it is an abuse of the powers of investigation conferred on law enforcement officials, is an affront to the rule of law as it amounts to conspiracy or abetment to commit an offence or luring another to commit an offence. Doing so which results in 'creating the commission of an offence' which the offender would not have if not for being entrapped committed, is not in public interest, is against public conscience, has the potential of bringing the system of criminal justice into disrepute, and carries the distinct possibility of depriving an accused of a *'fair trial'*.**

However, following English law, I hold that **entrapment is not an exculpatory defence, as entrapment does not negative criminal responsibility**.

It is unlawful for investigators to engage in entrapment, and is thus an unlawful investigative technique. Therefore, adoption of entrapment as an investigative technique is a violation of the rule of law. An investigation which predominantly takes the form of an entrapment is an unlawful investigation. As a lawful investigation is a prerequisite for a fair trial, an entrapment gives rise to the distinct possibility of the accused being deprived of a 'fair trial'. If detected during the trial stage, the duty of the trial judge is to exclude evidence emanating from an entrapment. If alleged and proven during the appellate stage that evidence emanating from an entrapment had been led by the prosecution during the corresponding trial, the responsibility of the appellate judge is to consider the impact of the evidence that had emanated from such entrapment, and quash the conviction and acquit the accused, <u>if</u> the reception of such evidence at the trial had deprived the accused – appellant of a *'fair trial'* resulting in a miscarriage of justice.

Did the manner in which the investigation was carried out by officers of the CIABOC, amount to entrapment?

What is now left to be determined is whether, the conduct of CIABOC officials and the virtual complainant (at the instance of CIABOC officials) amounted to 'entrapment' which by its very nature and impact, in the circumstances of this case, would have deprived the Appellants of a fair trial.

In this regard, it is necessary to note that, the Accused – Appellants in their testimonies did not plead that they were entrapped to commit the offences they were accused of committing. Such a suggestion was not even made by the defence to prosecution witnesses. Nor did learned Counsel for the Appellants submit to this Court that the Appellants had committed the offences they were indicted of having committed, because they were entrapped. What was submitted on behalf of the Appellants was that CIABOC officers and the virtual complainant had engaged in entrapment which resulted in the Appellants being arrested and subsequently prosecuted. Thus, the Court is left with only the testimonial narrative of the prosecution to determine whether the Appellants had been entrapped and thereby deprived of a fair trial. In this regard, the following items of evidence, related circumstances and necessary inferences are of particular relevance:

(i) Well before the virtual complainant complained to the Prime Minister's office and thereafter met with and made a statement to the CIABOC, the 1st Appellant had on or about 11th August 2016, solicited a bribe of USD 3 million from the virtual complainant Nagarajah. The solicitation related to a matter that the virtual complainant was legitimately interested in getting attended to, namely facilitating the process of handing over to MG Sugars Lanka (Pvt.) Ltd (a company he was interested in) the plant and machinery of the Kantale Sugar Factory, which was a condition specified in the Shareholders' Agreement which the investor company entered into with the Government of Sri Lanka.

(ii) Thereafter, the 1st Appellant had on 27th February 2017 and 5th September 2017, repeatedly solicited bribes from the virtual complainant. On those occasions too, there was no enticement on the part of the virtual complainant which can be alleged by the Appellants as having resulted in the 1st Appellant soliciting such bribes.

(iii) The virtual complainant did not give the 1st Appellant the solicited bribe. In response thereof, the 1st Appellant did not concede to the legitimate entitlement of MG Sugars Lanka (Pvt.) Ltd to receive the ownership of the old plant and machinery of the Kantale Sugar factory. Thus, in February 2018, as at the time the virtual complainant got in touch with CIABOC officials, the matter the virtual complainant was interested in remained unresolved and pending. At no time between the solicitation and the virtual complainant having come into contact with CIABOC officials did the 1st Appellant withdraw the solicitation or state that he was no longer interested in receiving a bribe for the work the virtual complainant requested him to attend to. Thus, it is important to take note of the

fact that the 1st Appellant's predisposition to commit the offence of acceptance of a bribe remained active, notwithstanding the lapse of time between the last solicitation prior to the complaint being made to CIABOC and the time the virtual complainant got in touch with CIABOC officials in February 2018, when the virtual complainant lodged the complaint.

(iv) The 2nd Appellant's involvement in facilitating the 1st Appellant to receive the bribe commenced in September 2017, prior to the virtual complainant coming into contact with CIABOC officials. That was founded upon an initiative by the 2nd Appellant.

(v) The involvement of CIABOC officials commenced in February, 2018.

(vi) The virtual complainant was not under instructions by officers of the CIABOC to incite or lure the Appellants to commit any offence. Nor did he do so. However, on the advice of CIABOC officials, the virtual complainant contacted the 2nd Appellant by telephoning him. At the ensuing meeting, the virtual complainant told the 2nd Appellant that he was willing to pay a bribe to the 1st Appellant. In that regard, all what Nagaraja did was to inform the 2nd Appellant that he was willing to accede to the demand of the 1st Appellant. In response, the 2nd Appellant proposed that a bribe of Rs. 450 million be given to the 1st Appellant. At no stage did the 2nd Appellant indicate directly or otherwise that neither he nor the 1st Appellant were interested in receiving a bribe from the virtual complainant. Thus, the virtual complainant did not lure in the Appellants to accept a bribe. All what the virtual complainant did was to provide an opportunity to the Appellants to commit further offences. Further, these circumstances clearly point towards the continuation of the intent and pre-existing predisposition of the Appellants to commit the offence of acceptance of a bribe.

(vii) The initial use of a 'decoy' (an under-cover CIABOC officer) was limited to ascertaining the veracity of the complaint made by the virtual complainant to the CIABOC. Throughout the series of events that followed culminating in the acceptance of the bribe at the car park of the Taj Samudra Hotel, the decoy was a passive observer and did not instigate or lure either of the Appellants to commit an offence.

(viii) At meetings between the virtual complainant and the two Appellants, the bribe had been reduced to Rs. 100 million, and Rs. 20 million was to be initially paid as an advance. These changes took place at the instance of the Appellants.

(ix) On 3rd May 2018 when the Appellants met with the virtual complainant in the lobby of the Taj Samudra Hotel, neither by word nor deed, did the virtual complainant or the

decoy lure, encourage, entice or apply duress on either of the Appellants to accept a bribe.

(x) The acceptance of the bribe of Rs. 20 million by the 1st Appellant was a purely voluntary act on the part of the 1st Appellant. Such acceptance was the culmination of a series of events which commenced from the original solicitation of a bribe of USD 3 million.

(xi) When the Appellants were arrested the same day soon after they accepted the bribe from the virtual complainant (at the time when they were inside the car of the virtual complainant which was in the car park of the Taj Samudra Hotel), the role of CIABOC officers was purely law enforcement in nature. The CIABOC officers or the virtual complainant did not thrust the money upon either of the Appellants. The role of the decoy was passive, and to use terminology of the learned Deputy Solicitor General, 'pedestrian like'.

(xii) As at the time the virtual complainant complained to CIABOC, the only reason as to why the 1st Appellant had not committed the offence of accepting a bribe, was due to the fact that the virtual complainant was not willing to give the 1st Appellant the solicited bribe.

It is also seen from the above-mentioned sequence of events that at no time during the afore-stated events did any CIABOC officer entice, incite or lure either of the Appellants to solicit or accept a bribe. CIABOC officers did not advice the virtual complainant to do so either. Nor did the virtual complainant conduct himself in such a manner. What was done by CIABOC officers and the virtual complainant was to provide an opportunity to the Appellants to fulfil their intent. They did nothing to takeaway or limit the exercise of free will or discretion by the Appellants. The Appellants immediately took advantage of the opportunity that was given.

At the time the virtual complainant got in touch with the 2nd Appellant (sequel to the virtual complainant having met CIABOC officers following the complaint,), his utterance to the 2nd Appellant was limited to informing him that he (the virtual complainant) was willing to pay the bribe which the 1st Appellant had solicited from him. The 2nd Appellant immediately responded by suggesting that the virtual complainant pays a bribe of Rs. 450 million. If by that time, the 1st Appellant had given up his original intention of receiving a bribe from the virtual complainant and the 2nd Appellant was not interested in facilitating the 1st Appellant receiving a bribe from the virtual complainant, there was no reason for the 2nd Appellant to have made the afore-stated suggestion and for the 2nd Appellant to have arranged a meeting between the virtual complainant and the 1st Appellant. Further, unless the 1st Appellant remained interested in receiving a bribe from the virtual

complainant, the 1st Appellant would not have participated in the meeting arranged by the 2nd Appellant held on 27th February 2018. Furthermore, the conversation at that meeting had commenced seamlessly from where the parties concluded the last meeting before the virtual complainant complained to CIABOC. At that meeting, the virtual complainant did not have to persuade or encourage the 1st Appellant to accept a bribe. The 1st Appellant solicited a bribe of Rs. 100 million with Rs. 20 million to be paid as an advance.

Prosecution evidence relating to events that took place between 27th February and 3rd May 2018, clearly points towards the interest and keenness on the part of the 1st and 2nd Appellants to receive a bribe from the virtual complainant. The events of 3rd May 2018 show clearly the initiative taken by the 1st and 2nd Appellants to receive the bribe of Rs. 20 million from the virtual complainant. On that final occasion too, there was no inducement on the part of the virtual complainant. His conduct was limited to handing over to the 1st Appellant the solicited bribe of Rs. 20 million. The role of the 'decoy' was observatory in nature. He did not by any utterance or action on his part lure the Appellants to accept the bribe. The role of the other officers of the CIABOC was non-intrusive in nature. During the covert operation they took part in, their role was limited to observing the occurrences keenly and apprehending the Appellants no sooner the bribe was accepted.

Thus, it is beyond doubt that, the events which resulted in the 1st Appellant with the assistance of the 2nd Appellant having accepted a bribe of Rs. 20 million, was purely due to voluntary conduct on the part of the two Appellants, and CIABOC officers along with the virtual complainant had not participated in an entrapment as alleged on behalf of the Appellants. There had been neither illegality nor abuse of power in the manner the officers of the CIABOC conducted the investigation.

In view of the foregoing factual circumstances, neither the officers of the CIABOC who conducted the investigation nor the virtual complainant Nagarajah can be classified as *agents provocateurs*, as they did not create an offence by enticing or luring the Appellants to commit an offence. They merely provided an unexceptional opportunity to the Appellants to commit a further ensuing offence.

The *modus operandi* adopted by the officers of the CIABOC does not violate the scheme and provisions of the CIABOC Act and the applicable provisions of the Code of Criminal Procedure Act. As observed by me previously, provisions of those two laws do not lay down investigative techniques to be adopted when conducting an investigation. Apart from laying down certain vital provisions of law

pertaining to the conduct of investigations (which investigators are obliged to comply with) and powers of investigations, the law does not specify the practical manner in which an investigation ought to be conducted (*modus operandi* to be adopted when conducting an investigation). Based on the nature of the complaint received, the offence, the investigative material that can be gathered at that point of time, nature and degree of corroboration or the absence thereof of the complainant's narrative, and the propensity of the alleged perpetrator committing further offences, it is up to the investigator to determine whether the suspect should be interviewed and arrested forthwith or to delay the arrest pending further investigative steps being taken in *good-faith* and in a manner that would not infringe the law, while keeping in mind the ultimate objective of conducting a successful investigation in terms of the law. In the circumstances, the arrest of the alleged offender can be delayed up to a strategic moment when the suspect making use of an unexceptional opportunity provided by the investigator commits an ensuing further offence, enabling the commission of such offence being spontaneously detected and the suspect being arrested in the immediate aftermath of such subsequent offence being committed.

In this instance, the investigators of the CIABOC had decided to conduct further investigations with the view to ascertaining the veracity of the complaint, and should the occasion arise, to arrest the suspects at the time they commit the offence of acceptance of the solicited bribe. Their conduct was unexceptional, and was limited to providing an opportunity to the Appellants to commit an ensuing offence which they in any event intended to commit. The motive of the investigators was achieved, as subsequent investigative steps taken by them enabled them to conclude that the complainant's version of events was credible. Further, they were successful in apprehending the Appellants in the act of committing the ensuing offence, which in this instance was the acceptance of a bribe. Therefore, I am of the view that the investigative technique adopted by officers of the CIABOC was not in violation of the applicable statutory framework, did not amount to an entrapment and therefore was lawful. Further, I do not see CIABOC officers having abused their authority or by themselves having committed an offence or acted with a personal or malicious vendetta against the Appellants. There is nothing in the conduct of CIABOC officers or the virtual complainant Nagarajah that would shock the conscience of the public or bring the criminal justice system into disrepute. Their conduct is not contrary to the notions of fairness, particularly as the commission of an offence was not created by them. Nor were the Appellants deprived of their own free will.

In view of the foregoing, while expressing agreement with the submissions made by the learned Deputy Solicitor General, I conclude that the investigative technique adopted by the CIABOC does

not amount to an entrapment and that the Appellants have not been deprived of a fair trial. Therefore, I hold that the Appellants' fundamental right guaranteed under Article 13(3) of the Constitution has not been infringed, and hence there exists no basis in fact or in law to set aside the conviction of the Appellants.

I wish to acknowledge with appreciation the invaluable submissions made by learned President's Counsel for the Appellants and the learned Deputy Solicitor General, which significantly contributed towards the development of this judgment.

Justice Yasantha Kodagoda, PC

JUDGE OF THE SUPREME COURT