DHARMADASA
v.
DIRECTOR GENERAL, COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY OR CORRUPTION AND ANOTHER

SUPREME COURT
GUNASEKERA, J.
WIGNESWARAN, J., AND
WEERASEKERA, J.
SC APPEAL No.. 28/2002
H.C.M.C.A. (Colombo 60) 2000
M.C. COLOMBO CASE No. B/6552/1/96
17TH SEPTEMBER, 2002

Bribery Act – Conviction of a public servant for bribery – Section 19 of the Bribery Act – Accused's right to impartial and adequate consideration of his case – Consequence of the Magistrate's failutre to consider the accused's evidence in detail – Power of Appeal Court to consider such evidence in dismissing appeal.

The accused appellant ("the accused") was a clerk attached to the District Court of Matale. He was convicted of soliciting and accepting an illegal gratification of Rs.400/- as an inducement for obtaining the return of money furnished as bail on 4 counts alleging offences under section 19 of the Bribery Act. In addition to prosecution witnesses the accused himself gave evidence. His defence that the "illegal gratification" was forcibly introduced into his trouser pocket by the virtual complainant was rejected by the Magistrate. In appeal, the High Court affirmed the conviction but observed that the Magistrate should have given more consideration to the evidence of the accused. It was

submitted that the High Court should not have upheld the conviction in view of the "culpable" failure on the part of the trial judge to have adequately and impartially examined the evidence of the accused....."

Held:

On a careful analysis of the accused's evidence no credence whatever could have been given to the evidence of the accused. Accordingly the conviction of the accused should be affirmed.

APPEAL from the judgment of the High Court

Case referred to:

1. *Chandradasa v .Queen* 72 NLR 160 at 162
2. *Jagathsena and others v G.D.D. Perera, Inspector, Criminal Investigations and Mrs. Sirimavo Bandaranaike* (1992) 1 Sri LR 371 at 379

Ranjith Abeysuriya, PC. with *Lanka de Silva* for accused-appellant

Mallika Liyanage for 1st respondent

Riyaz Hamza, State Counsel for 2nd respondent

Cur.adv.vult

December 13, 2002

GUNASEKERA, J.

The Appellant Medagedera Dharmadasa has been charged and convicted in the Magistrate's Court of Colombo on four counts under the Bribery Act.

(i) that on or about the 16th of December 1996 at Matale, being a public servant to wit, a Clerk attached to the District Court of Matale did solicit a gratification of Rs. 400/- from Jayasunderage Samy Appuhamy as an inducement or reward for his performing an official act in assisting him in obtaining the return of money furnished as bail, an offence punishable under Section 19(b) of the Bribery Act.

(ii) that at the time and place aforesaid and in the course of the same transaction being a public servant as aforesaid, did solicit the said gratification, an offence under Section 19(c) of the Bribery Act.

(iii) that at the time and place aforesaid did accept the said gratification, an offence punishable under Section 19(b) of the Bribery Act.

(iv) that at the time and place aforesaid being a public servant did accept the said gratification, an offence under Section 19(c) of the Bribery Act.

Upon conviction after trial the Appellant had been sentenced to a term of one years' rigorous imprisonment on each count which had been suspended for a period of 10 years and a fine of Rs. 1500/- had been imposed in respect of each count.

The Appellant had preferred an appeal against the said conviction and sentence to the Provincial High Court of Colombo and after hearing the appeal the learned Judge of the High Court had affirmed the conviction and sentence imposed on the Appellant in respect of counts 1 and 3 and acquitted him on counts 2 and 4. Further the learned Judge of the High Court in addition had imposed a penalty of Rs. 400/- in respect of count 3 in terms of section 26 of the Bribery Act.

Upon a consideration of an application for special leave to this Court against the judgment of the learned Judge of the High Court on 28.5.2002 special leave to appeal was granted upon the question as to whether the learned High Court Judge erred in law in failing to set aside the Order of the learned Magistrate, in view of the latter's failure to consider the shortcomings in the prosecution case as well as the evidence of the Accused-Appellant. At the trial in the Magistrate's Court Jayasuderage Samy Appuhamy, Premaratne Jayasundera, A.M.W.M. Amarakoon, R.M. Premaratne and A. Liyanage testified as witnesses for the prosecution whilst the Accused Appellant gave evidence on his own behalf denying the allegations against him.

According to the evidence of the virtual complainant Samy Appuhamy he had stood as surety for one of his brothers

Premaratne Jayasundera, who had been charged in Case No. 23099 in the Magistrate's Court of Matale and had deposited a sum of Rs. 5000/- as bail on 13.10.1995 (the receipt issued for depositing bail has been produced as P1). After his brother was acquitted in the said case he had made an application for the release of the bail money and had met the Accused-Appellant who was a Clerk attached to the Matale Magistrate's Court in order to have the bail money released to him. He had asked him to come on a Friday. When he met the Accused-Appellant on Friday the Accused-Appellant informed him that the learned Magistrate had not yet signed the release Order. Thereafter he had met the Accused-Appellant for two months on every Friday but had been unsuccessful in getting the money released. On one occasion when he met the Accused-Appellant he had told the complainant "these matters cannot be done for nothing" and demanded a sum of Rs. 500/- to have the bail money released. Thereafter the virtual complainant had made a wirtten complaint to the Bribery Commissioner which complaint dated 28.11.1996 has been produced as 'P2'. Thereafter some officers from the Bribery Commissioner's Department had come and met him at his home and questioned him as to whether he had signed the letter 'P2' and after he identified 'P2' as being the complaint he made to the Bribery Commissioner, his statement had been recorded and he had proceeded with the Bribery Officers to the Matale Magistrate's Court. Inspector Liyanage who led the raiding party had given him instructions in regard to what he should do in implementing the trap and had been asked to accompany Police Constable Premaratne who was to be identified as his brother. Five hundred rupee notes, the serial numbers of which had been noted in the investigation note book had been handed over to the decoy P.C. Premaratne and the complainant had been asked to meet the Accused-Appellant and speak to him and further directed that should the Accused-Appellant ask for money that he was to collect it from the decoy Premaratne and hand it over to the Accused-Appellant. Although the complainant had gone to meet the Accused-Appellant on the 13th of December 1996 they had been informed that the Accused-Appellant was on leave and would return to work on Monday.

On 16.12.1996 the Bribery Officers had met the virtual complainant at Matale as directed. Inspector Liyanage had given him the same instructions that was given on the previous day and had requested him to accompany P.C. Premaratne to meet the Accused-Appellant and hand over the money if he asked for it. Accordingly on 16.12.1996 he had participated in the raid with the Bribery Officers. When he accompanied P.C. Premaratne the Accused-Appellant on seeing them had called the virtual complainant and asked him as to whether he had brought that, meaning money, in the presence of P.C. Premaratne, the decoy. The Accused-Appellant had informed him that the cheque had not been signed and for them to wait for a while stating that the Magistrate was still on the Bench and that he would get the cheque signed after he gets down from the Bench. When he and P.C. Premaratne were seated on a bench the Accused-Appellant had called them and asked them to go towards the canteen. When they went there the Accused-Appellant had come near them and asked them whether the money had been brought. When they replied in the affirmative the Accused-Appellant is alleged to have said "give it soon". Then the decoy Premaratne had asked the Accused-Appellant not to take Rs. 500/- but to take Rs. 400/- to which the Accused-Appellant had agreed. P.C. Premaratne had given the virtual complainant four one hundred rupee notes which money had been handed over to the Accused-Appellant. The Accused-Appellant had put that money in his shirt pocket and gone in to the latrine and closed the door. At this point of time P.C. Premaratne had signalled Inspector Liyanage and the other members of the raiding party who came near the latrine and waited there till the Accused-Appellant came out. As the Accused-Appellant came out Inspector Liyanage had identified himself and asked the Accused-Appellant for the money that had been taken from the complainant. He had denied taking any money. On a search made I.P. Liyanage had recovered the four marked hundred rupee notes together with some other money from the Accused-Appellant's possession and he had got the Accused-Appellant to compare the numbers of the notes recovered with the numbers noted in the investigation note book and the Accused-Appellant had been arrested.

P.C. Premaratne, the decoy, testified in regard to the instructions given and the conversation that took place between Accused-Appellant, the virtual complainant and himself and with regard to the acceptance of the money by the Accused-Appellant and the recovery of the money from the Accused-Appellant by Inspector Liyanage.

Inspector Liyanage testified before the Magistrate in regard to the instructions that were given and in regard to the manner in which the raid was conducted successfully. Apart from the aforesaid witnesses, the virtual complainant's brother Premaratne Jayasundera testified in regard to the fact that the virtual complainant had stood as surety for him in the criminal case that had been instituted against him and furnished bail in a sum of Rs. 5000/-. After he was acquitted his brother had informed him that the officers from the Bribery Department had arrested the Accused-Appellant when he took a sum of Rs. 400/- in order to release the bail money.

The Accused-Appellant in his evidence stated that he joined as a Clerk in the Judicial Service in 1984 and was first posted to the Dambulla Magistrate's Court and was transferred to the Matale District Court in January 1995. He further stated that the virtual complainant Samy Appuhamy first met him in the first month of 1996 when he came to see him in connection with the release of a sum of Rs. 5000/- which had been deposited as bail money in respect of a case where his brother Premaratne Jayasundera was charged. According to him on that day he had obtained a photostat copy of the bail deposit receipt, a five rupee stamp and a motion requesting the release of the bail money. He had then prepared a voucher and got the virtual complainant to sign it. He also noted the virtual complainant's National Identity Card number and informed him that he would post the cheque when it was ready. He went on to say that before the cheque was ready the virtual complainant came to see him in about three days' time thereafter and then he informed the virtual complainant that this could not be done in about two or three days' time and it may sometimes take even five to six months and again informed the complainant that he would notify when the cheque was ready. He further stated that the complainant came to see him on several occasions thereafter but was

unsuccessful in getting the bail deposit released. In answer to Court the Accused-Appellant stated that the complainant last came to see him on 15th February 1996 and questioned him as to whether the said money was not being released at the instance of the Accused-Appellant's brother who had a land case against the complainant's brother in law and went away stating "that he would see about it". It was the evidence of the Accused-Appellant that the virtual complainant came to see him next on the day he was arrested i.e. on 16.12.1996 and questioned him as to whether the cheque was ready even on that day. He then checked up the registers and found that the cheque had been written but the validity period of the cheque had expired and asked the virtual complainant to wait for sometime till the Magistrate adjourned for lunch so that he could get the Magistrate to have the validity period of the cheque extended. At about 1.30 in the afternoon he had instructed an office Peon to take the cheque that was on his table to the Magistrate when he adjourned for lunch and to get the signature of the Magistrate. Thereafter he had proceeded towards the canteen with his lunch packet in his hand and when he was climbing the steps leading to the canteen the virtual complainant followed by another had come along from behind and suddenly the virtual complainant had thrust something into his trouser pocket stating "keep this". According to the Accused-Appellant he had immediately examined what had been thrust into his pocket and had found that it was some money. He had immediately put the money on the ground. At that stage he stated that Inspector Liyanage identified himself as an officer of the Bribery Commissioner's Department and asked him for the money that was taken from the virtual complainant. He totally denied that he solicited and accepted a bribe from the virtual complainant. His position was that he had been falsely implicated due to a grievance the virtual complainant had owing to the land case between the virtual complainant's brother in law and his brother.

At the hearing of this appeal it was submitted by learned President's Counsel appearing for the Accused-Appellant that in the judgment of the learned Magistrate there had been a total failure to give any consideration to the sworn evidence of the Appellant and that the only reference thereto was an assertion in the penultimate sentence in the judgment that the defence evidence had

failed to demolish or to raise a reasonable doubt in the prosecution case, and contended that as observed by Samarawickrema J. in the case of *Chandradasa v. Queen* (1) that "an impartial and adequate consideration of his case by a judge of fact is the right of every accused". In the present case it was the submission of the learned President's Counsel that the Accused-Appellant had been deprived of that right secured to him by the total failure of the learned Magistrate to have considered his own evidence.

It was also submitted by learned President's Counsel that even the learned Judge of the High Court having expressly stated that the learned Magistrate should have examined the evidence of the Accused-Appellant erred in upholding the conviction of the Accused-Appellant in spite of the culpable failure on the part of the trial Judge to have adequately and impartially examined the evidence of the Accused-Appellant.

It was further submitted by the President's Counsel that despite the purported acceptance of the evidence of the prosecution witnesses by the trial Court the Appellate Courts are not relieved of the duty of testing that evidence both intrinsically and extrinsically as observed in *Jagathsena and others v. G.D.D. Perera Inspector, Criminal Investigations Department and Mrs. Sirimavo Bandaranaike* (2).

It was the contention of learned Counsel for the 1st respondent that the learned Magistrate who had the opportunity of seeing, hearing and observing the demeanour of the witnesses at the trial had quite correctly rejected the evidence of the Accused-Appellant although he had not set out in detail the reasons for doing so. It was submitted by learned Counsel that none of the positions taken up by the accused in his evidence relating to the reasons for his being falsely implicated, regarding the money being thrust into his pocket by the virtual complainant had even been suggested to any of the witnesses who testified for the prosecution at the trial. Learned Counsel for the 1st respondent further submitted that the learned Judge of the High Court had observed that the Magistrate should have given more consideration to the evidence of the accused before rejecting it. In his jugdement the learned High Court Judge had dealt with the evidence led and had considered the contradictions in the evidence of the virtual complainant and that of the

decoy P.C. Premaratne and had no hesitation in accepting the evidence of the prosecution witnesses and upholding the conviction of the Accused-Appellant in respect of counts 1 and 3.

Having regard to the submissions made, I am of view that it would be useful to examine the evidence of the Accused-Appellant in some detail to consider as to whether that evidence is credible. He commences the evidence by stating that the virtual complainant first met him in the first month of 1996 in order to get the bail money released. According to him about three days thereafter the complainant had come again and on several days and the last date that he came was on the 15th of February 1996 before he was arrested on 16.12.96. During the course of the trial the record in M.C. Matale 230/99 was produced marked P5. The journal entries of that case record reveals that the virtual complainant's brother had been acquitted only 20.3.1996. Thus in regard to the date on which the virtual complainant first met him and the answer given to Court that he met him last time on 15.2.1996 before he was arrested on 16.12.1996 does not bear scrutiny.

Although the Accused-Appellant in his evidence had taken up the position that he got the virtual complainant to give him a motion requesting the release of the money on the first day itself when he met him, according to the motion P5A produced in evidence which relates to the release of the bail deposit it is to be observed that it is dated 27.5.1996. Thus it appears that his evidence in regard to this question is unacceptable.

Although the Accused-Appellant had taken up the position that he has been falsely implicated owing to a land case that his brother had with the virtual complainant's brother in law, it is to be noted from document P2, that the written complaint made by the virtual complainant to the Bribery Commissioner is dated 28.11.1996 and the journal entries in Case No. D.C. Matale L5293 which were produced marked VI by the accused himself shows that the land case between the Accused-Appellant's brother and the brother in law of the virtual complainant had been instituted on the 24th of September 1998, nearly two years after the written complaint by the virtual complainant to the Bribery Commissioner. Another significant factor that is to be noted is that although in the evidence of the Accused-Appellant, he has testified that he would

notify the virtual complainant when the cheque was ready, it is to be observed that the application made by the virtual complainant on 27.5.1996 requesting the release of bail money has been journalised only on 25.10.1996 as evidence by P5B on which the learned Magistrate appears to have made Order on the same day to file the application and to release the bail money upon the surety being identified. It is to be further noted that the cheque for Rs. 5000/- in favour of the virtual complainant, P3, although had been written on 30.10.1996 had been kept with the Accused-Appellant without it being posted to the virtual complainant or without notifying him that the cheque was ready until 16th December 1996 (the date of the trap) on which date the period of validity had been extended by 30 days.

For the reasons stated I am of the view that no credence whatever could have been given to the evidence of the Accused-Appellant. Accordingly, I affirm the conviction of the Accused-Appellant on counts 1 and 3 and the sentence imposed by the learned Judge of the High Court but direct that the period of suspension of the term of imprisonment imposed in respect of the two counts on which he had been convicted be reduced to a period of five years from ten. Subject to the above variation the appeal is dismissed.

WIGNESWARAN, J – I agree.

WEERASURIYA, J. – I agree.

Appeal dismissed subject to variation of sentence.