CHANDRAPALA PERERA
v.
THE ATTORNEY-GENERAL

SUPREME COURT
G. P. S. DE SILVA, CJ.,
PERERA, J. AND
BANDARANAYAKE, J.
S.C. APPEAL NO. 169/96
C.A. NO. 157/91
H.C. COLOMBO NO. B243/84
27 FEBRUARY, 1998

Bribery Act – Sections 19 (b) and 19 (c) of the Act – Acquittal on one count- Conviction on the other count on the evidence of same witness – Rejection of evidence by implication – Order required to be made at the conclusion of trial – S. 203 of the Code of Criminal Procedure Act.

The appellant was a labour officer. He was charged that he being a public servant solicited a gratification of Rs. 3,000.00 from the complainant on 17. 1. 83 to assist the complainant to avoid payment of EPF dues and accepted Rs. 1,500.00 out of that sum on 22. 1. 83, offences punishable under sections 19 (*b*) and 19 (*c*) of the Bribery Act. On 22. 1. 83 the appellant visited the complainant's work place to collect the gratification where the complainant was present with a decoy Police Officer from the Bribery Department who posed off as the complainant's son and gave the appellant Rs. 1,500.00 which he put into his trouser pocket. The money was recovered from his pocket. He, however, denied the charges and said that the money might have been introduced into his pocket when he met the complainant and the police decoy. The Magistrate believed the complainant's version; but convicted the appellant only on the charge of solicitation, in view of the fact that the charges specifically alleged that the appellant accepted the gratification from the complainant. The Magistrate "discharged" the appellant on the charge of acceptance.

Held:

1. The evidence of solicitation was in respect of 17. 1. 83 and that solicitation of the gratification had been established beyond reasonable doubt.

2. In terms of the provisions of section 203 of the Code of Criminal Procedure Act at the conclusion of the trial the Judge has to record a verdict of conviction; hence the appellant was entitled to an acquittal instead of a "discharge" on the charge of acceptance.

3. Having regard to the fact that the Magistrate had accepted the complainant's version and in the light of all the facts and circumstances and the ground on which the Magistrate declined to convict the appellant on the charge of accepting the gratification, it cannot be said that this was a case in which the conviction on the solicitation charge was based on evidence which had by implication been rejected by the acquittal on the other count.

Cases referred to :

1. *Nalliah v. Herat* 54 NLR 473, at 475.
2. *Sambasivam v. Public Prosecutor, Federation of Malaya* (1950) AC 479.
3. *Raphael v. The State* 78 NLR 29.

APPEAL from the judgment of the Court of Appeal.

Ranjith Abeysuriya P.C with *Ms. Priyadharshini Dias* for accused-appellant.

B. Aluvihare S.S.C for Attorney-General.

Cur. adv. vult.

May 21, 1998

PERERA, J.

The accused-appellant (hereinafter referred to as the appellant) was charged in the High Court of Colombo upon an Indictment on the following charges –

(1) That on 17. 1. 1983 at Kandy being a public servant, to wit, a labour officer did solicit a gratification of Rs. 3,000.00 from Don Wilfred Jayasinghe to avoid the payment of EPF dues, an offence punishable under section 19 (*b*) of the Bribery Act.

(2) That on 22. 1. 1983, he did accept the sum of Rs. 1,500.00 for the said purpose, an offence punishable under section 19 (*b*) of the Bribery Act.

(3) That on 17. 1. 1983, he being a public servant as aforesaid, did solicit the sum of Rs. 3,000.00 from the said Jayasinghe, an offence punishable under section 19 (*c*) of the Bribery Act.

(4) That on 22. 1. 1983, he being a public servant, did accept the sum of Rs. 1,500.00 from the said Jayasinghe, an offence punishable under section 19 (*c*) of the Bribery Act.

At the conclusion of the trial in the High Court, the learned High Court Judge found the accused-appellant guilty on counts 1 and 3 and imposed on him a sentence of 4 years rigorous imprisonment on each count, the sentences to run concurrently.

In respect of counts 2 and 4 of the Indictment, the learned Trial Judge refrained from making an order in terms of section 203 of the Criminal Procedure Code acquitting the appellant – instead the learned Trial Judge has stated thus:

> "Having regard to the facts that counts 2 and 4 of the Indictment are not in accord with the evidence placed at the trial, without arriving at an adjudication on the merits on counts 2 and 4 in regard to the innocence of the accused without entering an order of acquittal, I discharge the accused on these two counts."

The precise word used by the Trial Judge in his judgment is "UTTHARANAYA" which means 'discharged'. (Vide-Paribhasika Sabda Malawa – dated 1968. 1. 31 – Published by the Educational Publications Dept.).

Section 203 of the Criminal Procedure Code, however, mandates that on the conclusion of the case for the prosecution and defence, "the Judge shall forthwith or within ten days of the conclusion of the trial record a verdict of acquittal or conviction . . ." This the Trial Judge has failed to do in the instant case.

The Court of Appeal has, however, in its judgment rightly made order in terms of section 203 of the Criminal Procedure Code acquitting the appellant on the aforesaid counts in the Indictment.

This court has granted the appellant leave to appeal on the following question –

> "Having regard to the acquittal of the appellant on charges 2 and 4 of the Indictment, is it safe to permit the convictions on counts 1 and 3 to stand?"

It was the primary complaint of Mr. Abeysuriya, counsel for the appellant that the learned Trial Judge having convicted the accused-petitioner only on counts 1 and 3 which related to solicitation, refrained

from making an order of acquittal on counts 2 and 4 of the Indictment which related to the alleged acceptance of the gratification, due to the wholly contradictory and totally unsatisfactory evidence of the main witness for the prosecution, D. W. Jayasinghe. Counsel submitted further that this was a "trap case" organised by officials of the Bribery Commissioner's Department and at the time the alleged payment of Rs. 1,500.00 was made on the 22nd of January, 1983, the virtual complainant Jayasinghe was accompanied by a police decoy by the name of Seneviratne who was a witness to the alleged acceptance. The prosecution failed to call Seneviratne as a witness at the trial. It was Mr. Abeysuriya's submission that had the prosecution called Mr. Seneviratne to testify, the falsity of the testimony of Jayasinghe would have been established beyond doubt.

Admittedly, the sole witness who testified in regard to the solicitation and acceptance of the illegal gratification at the trial was D. W. Jayasinghe who was running a motor garage in Kandy. According to Jayasinghe, the appellant visited his garage on 13. 1. 1983 and informed him that there was a sum of Rs. 87,000.00 due to be paid by him to the Labour Department as EPF payments. He had requested Jayasinghe to call over at his office on the following day. When Jayasinghe called on the appellant at his office as requested, the appellant is alleged to have taken him to the canteen and solicited a sum of Rs. 10,000.00 for the purpose of helping him to avoid payment of EPF dues. Jayasinghe had declined to make this payment and the appellant had requested Jayasinghe to suggest an amount which he could pay. Jayasinghe had then suggested a sum of Rs. 3,000.00 and offered to pay this sum in two instalments. The appellant had then stated that he would come to the garage on Friday, 21. 1. 1983 to collect this gratification.

Jayasinghe had then informed the Bribery Commissioner's Department and a few days later on 21. 1. 1983, Jayasinghe had been questioned in Kandy by officials of the Bribery Commissioner's Department. Therefore, when the appellant called at the garage on Friday the 21st of January, 1983, Jayasinghe had put him off and informed him that he would have the money ready on the next day.

On the 22nd of January, 1983, Bribery decoy Seneviratne who was to pose off as Jayasinghe's son awaited the arrival of the appellant at the garage. Jayasinghe was also at the garage at the time. The

appellant on his arrival at the garage on that day had questioned Jayasinghe whether the money was ready and Jayasinghe had replied that his son had brought the money. Thereupon the appellant had called both of them (Jayasinghe and his son) to go up to the office of the garage and as suggested all three of them had gone up to the garage.

Thereafter, they had left the garage and all three of them had proceeded to a hotel to have tea. Decoy Seneviratne who posed off as Jayasinghe's son offered Rs. 1,500.00 to the appellant who accepted the payment and put the money into his trouser pocket. At about that time, four persons came and apprehended the appellant and somebody shouted, 'pocket karayo'.

The appellant was called upon for his defence by the Trial Judge and he opted to make an unsworn statement from the dock. According to the appellant, he was duly performing his duty as a labour officer when he visited this garage and gave instructions to witness Jayasinghe regarding the keeping of proper books. He denied the solicitation or acceptance of any money and he suggested that the Rs. 1,500.00 that was recovered from his trouser pocket might well have been inserted into his pocket on the occasion when he along with Jayasinghe and the Bribery decoy had gone to the hotel to have a cup of tea.

Mr. Ranjith Abeysuriya on behalf of the appellant contended that the prosecution relied only on one solitary witness, namely, D. W. Jayasinghe in order to establish the charges of solicitation and acceptance of an illegal gratification by the appellant. Counsel submitted that the evidence of this witness on every single aspect of this transaction had been contradicted at the trial – vide **DI** to **D17**. Of these, at least ten were on extremely crucial matters and those have been marked **D1** to **D7, D10, D11** and **D12.** A true copy of the entirety of the evidence given by Jayasinghe at the trial has been marked as **P3**.

It was counsel's contention that in the light of the testimony of Jayasinghe at the trial, it was impossible for the Trial Judge to have convicted the accused for the reason that the only evidence adduced at the trial relating to the solicitation and acceptance was that of Jayasinghe and that his testimony was highly unacceptable having regard to the contradictory nature of his evidence.

Counsel argued strenuously that in this case the evidence of Jayasinghe was demonstrably contradictory on several crucial aspects, hence it was not possible to act on the rest of his evidence, particularly because the prosecution refrained from calling police decoy Seneviratne who could have supported Jayasinghe if his testimony was truthful.

Counsel contended further that the remaining two charges relating to the alleged solicitation on 17. 1. 1983 stand or fall entirely upon the claim of D. W. Jayasinghe alone. In these circumstances, he argued that it was wholly unsafe to regard the evidence of Jayasinghe as being worthy of credit in regard to the remaining part of his evidence and in the circumstances invited this court to quash the convictions and the sentences imposed on the appellant on counts 1 and 3 of the Indictment.

Counsel also submitted that upon a proper evaluation of the dock statement made by the accused-petitioner, it is manifestly clear that the appellant had given a credible explanation of his conduct and suggested that Rs. 1,500.00 could possibly have been put into his pocket without his knowledge.

The main contention of appellant's counsel was that where an accused is tried on two connected but different charges in the same proceedings, a conviction on one count cannot be based on evidence which has by implication been rejected by an order of acquittal on the other count. Counsel adverted to the Judgment of Gratiaen, J. in *Nalliah v. Herat*[(1)] where he followed the enunciation of this fundamental principle by the Privy Council in *Sambasivam v. Public Prosecutor, Federation of Malaya*[(2)]. In that case, Gratiaen, J. observed thus: "The rule is of general application and has equal force when one considers the effect which an order of acquittal on one charge could have on a connected charge in the same proceedings. A verdict on one count cannot be based on evidence which has by implication been rejected in disposing of another count at the trial" at 475.

Counsel also relied on the case of *Raphael v. The State*[(3)] where Tennekoon, CJ. adopted the same principle and expressly held that where the accused was acquitted by the Trial Judge on one count, he should have been acquitted on the remaining count which was based on evidence which has by implication been rejected by an acquittal on the other count.

Counsel strenuously urged that the acquittal on two charges relating to acceptance was entirely due to the rejection of the evidence of Jayasinghe who deposed to an alleged acceptance by the accused-appellant in circumstances totally different to the version stated by him in his statement to the Bribery Department on 22. 1. 1983. Thus his evidence was unequivocally rejected in regard to the allegation of acceptance. His evidence could have been supported by the evidence of police decoy Seneviratne who was however not called by the prosecution to testify at the trial.

Senior state counsel however contended that in the present case, the acquittal of the appellant on counts 1 and 3 was not based upon the rejection of the evidence of witness Jayasinghe, but was due to failure on the part of the prosecution to establish the specific allegation that the appellant accepted the gratification from D. W. Jayasinghe. In this connection, state counsel invited the attention of this Court to the careful analysis by the Trial Judge of the evidence of witness Jayasinghe where he has taken into consideration the following matters:

(1) That the witness was 76 years of age at the time he testified at the trial.

(2) That the witness had testified at the trial in regard to the alleged incident which had occurred approximately 8 1/2 years before the date on which he testified.

(3) The fact that the witness did not have the benefit of higher education.

Having regard to the above circumstances, the Trial Judge has come to a firm finding that the discrepancies in the testimony of witness Jayasinghe could well be due to loss of memory in regard to the transaction which had taken place about 8 1/2 years earlier.

Senior state counsel also submitted that the evidence of Jayasinghe did not relate to an event which took place on a single occasion, but to several events that had taken place on a number of date's namely, **13th, 17th, 21st and 22nd of January, 1983**. Counsel also contended that the acquittal of the appellant on the two charges relating to acceptance was not for the reason that his evidence was

unequivocally rejected by the Trial Judge. On the contrary, counsel submitted that the Trial Judge has accepted the evidence of this witness and has given specific reasons as to why he did not proceed to find the appellant guilty on the two charges relating to acceptance.

In this connection senior state counsel invited the attention of this Court to the observations of the learned Trial Judge who in evaluating the evidence of witness Jayasinghe had concluded that even the acceptance charge had been proved by the prosecution beyond reasonable doubt – vide an extract from the judgment marked **P1** (a). The learned Trial Judge has observed that he refrained from finding the accused guilty on counts 2 and 4 for the reason that the said two charges specifically alleged that the appellant accepted the gratification from witness Jayasinghe at the trial. State counsel contended that in evaluating the evidence of witness Jayasinghe, the Trial Judge has stated thus: "From the detached position occupied by me as a Judge without involving myself in the controversy in this case (as opposed to counsel on both sides), I hold from the witness's conduct, deportment, bearing, inflexion and delivery, both in the examination-in-chief and under cross-examination, that the witness has given frank, honest, truthful and *bona fide* evidence, though due to his faulty memory, the witness may at times have made certain mistakes on rather trivial and less important aspects of this case".

In the context of the observations made by the learned Trial Judge as regards the testimony of witness Jayasinghe who was the sole witness called by the prosecution in this case, I have given careful consideration to the submission of counsel for the appellant based on the judgment in *Nalliah v. Herat & Raphael v. The State (supra)* on which counsel strongly relied to support his submission that where an accused is tried on two connected but different charges in the same proceedings, a conviction on one count cannot be based on evidence which has by implication been rejected by an order of acquittal on the other count.

While I am in respectful agreement with the view expressed by Gratiaen, J. in *Nalliah v. Herat (supra)* which has also been followed in *Raphael v. The State (supra)*, I am of the view that these two decided cases are clearly distinguishable from the facts of the case that is presently before us.

As has been rightly pointed out by senior state counsel in the present case, the learned Trial Judge has not by implication or otherwise rejected the evidence of D. W. Jayasinghe. He has on the other hand commended this witness as "a frank, honest and truthful witness who has given evidence in good faith, but due to his faulty memory has made at times certain mistakes on rather trivial and less important aspects of this case". I, therefore, regret that I am unable to accept the submission of Counsel for the appellant that the acquittal of the appellant on counts 1 and 3 was for the reason that the evidence of witness Jayasinghe has been rejected by the Trial Judge by implication. In my view, both decisions cited by counsel have no application to the facts of this case. This submission of counsel for the appellant must in my view therefore necessarily fail.

I shall now proceed to consider the question whether there was sufficient evidence adduced by the prosecution in this case to justify affirming the conviction of the appellant on the charges relating to solicitation – namely, counts 1 and 3.

Admittedly, the charges relating to solicitation refer to the 17th of January, 1983, a date anterior to the date on which the gratification is alleged to have been accepted – to wit, 21. 1. 1983. Therefore the criticism of appellant's counsel on the failure of the prosecution to lead the evidence of the Bribery decoy Seneviratne to support Jayasinghe's evidence would not arise in respect of counts 1 and 3. It is indeed the uncontradicted evidence of witness Jayasinghe that it was only after 17. 1. 1983 that he had complained to the Bribery Commissioner regarding this matter.

Further, it must be observed that on a consideration of the evidence adduced by the prosecution, there are certain items of evidence which tend to support the proposition that the appellant had taken an unusual interest in coming to the aid of a person who had acted in violation of the law. The appellant himself in his dock statement has admitted that Jayasinghe was indeed a defaulter who had failed to make payments in respect of his employees to the Employees Provident Fund. In point of fact, the appellant has admitted that he went to the garage of the complainant Jayasinghe on the 13th of January, 1983, and that at his request, Jayasinghe had seen him at his office on the 17th of January, 1983. The appellant has also admitted that he went to Jayasinghe's garage on the 22nd of January, 1983, which was the date on which the detection was made. The question arises

as to why the appellant without complying with the relevant provisions of the EPF Act and initiating a prosecution against Jayasinghe for his default, adopted the course of action he did to help Jayasinghe, without any plausible reason for doing so. This conduct on the part of the appellant to my mind is, to say the least, highly suspicious, and must therefore be considered in the context of the other items of evidence which relate to the charge of solicitation.

Senior state counsel has adverted to the fact that the appellant's field notebook which has been produced marked P4 contained no entry whatsoever relating to the alleged three visits by the appellant to the complainant's garage on the 13, 17th and 22nd of January, 1983. It is significant to note that the appellant had admitted these visits in his statement from the dock. It was the submission of state counsel that the absence of entries in the field notebook P4 relating to the visits of the appellant to the complainant's garage supports the position that such visits were not official acts done in good faith. This item of evidence would also in my view tend to support the allegations set out in counts 1 and 3. It has also transpired in evidence that the appellant had in this notebook P4 made many entries relating to official work he had performed during this period. The items of evidence set out above in my view corroborate the evidence of Jayasinghe on the charges relating to solicitation set out in counts 1 and 3.

I have also given careful consideration to the statement the appellant has made from the dock when he was called upon for his defence and I am in entire agreement with the submission of state counsel that some of the facts narrated by the appellant in his statement from the dock were palpably false and must necessarily be rejected. Counsel adverted to that part of the dock statement wherein the appellant had stated that his visit to the garage of the complainant on Saturday the 22nd of January, 1983, was a chance visit and that when he came to the garage, the Bribery decoy Seneviratne was present. He did not know at that time the real identity of the decoy. If this position set out by the appellant is correct that his visit was a chance visit, then how could one explain Jayasinghe's conduct in awaiting the arrival of the appellant in the company of the Bribery decoy Seneviratne ready for the alleged detection. This circumstance necessarily suggests that Jayasinghe was awaiting the arrival of the appellant on the said date having made arrangements with the Bribery Department

to conduct a detection based on a complaint made by him against the appellant.

Yet another aspect of the statement made by the appellant from the dock relates to his explanation as to how a bundle of fifteen currency notes of the denomination of Rs. 100 was found in his pocket, which sum of money was handed over by him to the Bribery decoy on demand. In his dock statement, the appellant has stated that he does not know as to how the currency notes came into his trouser pocket. This explanation on the part of the appellant is most unacceptable and bears no scrutiny. Is it reasonably possible to introduce a bundle of fifteen Rs. 100 notes into the trouser pocket of a person without his being aware of it?

Upon a consideration of the totality of the evidence adduced in this case despite the contradictions that have been proved in the evidence of Jayasinghe, I hold that the charges relating to the solicitation of a gratification set out in counts 1 and 3 of the Indictment have been established beyond reasonable doubt, I therefore affirm the conviction of the appellant on counts 1 and 3 of the Indictment. The appeal against the said conviction is therefore dismissed.

Having regard to the particular facts of this case, however, I am of the opinion that the sentence imposed on the appellant is somewhat excessive. In a case such as this, it would be relevant to take into consideration the long period of time has lapsed between the date of the commission of the offence and the date of punishment – a period of over fifteen years. I have also taken into account the fact that the appellant who held office as public servant would now be dismissed from service consequent upon this conviction. I, accordingly, set aside the sentence of four years rigorous imprisonment on each of the counts 1 and 3 imposed on the appellant by the Trial Judge and affirmed by the Court of Appeal and substitute therefor a sentence of two years rigorous imprisonment on each of the aforesaid counts, which in my view, would meet the ends of justice. The sentences are to run concurrently.

G. P. S. DE SILVA, CJ. – I agree.

BANDARANAYAKE, J.– I agree.

Appeal dismissed.

Sentence varied.