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**KAKULANDARA  
VS.  
DIRECTOR GENERAL, PREVENTION OF  
BRIBERY AND CORRUPTION**

COURT OF APPEAL  
BALAPATABENDI, J(P/CA),  
ERIC BASNAYAKE, J.  
CA (PHC) APN 231/2004.  
OCTOBER 24, 2005.  
DECEMBER 5, 2005.  
JANUARY 19, 2006.

*Bribery Act-Section 23 (A) 3 - Criminal Procedure Code-section 200-  
Accused not able to account for value of properties gained with known  
income-Burden on whom? - Duty of the prosecution under Section 23(A).*

The accused-petitioner was charged under section 23 (A) as he could not account for the value of properties he gained with his known income. At the end of the case for the prosecution, an application was made by the defence under section 200 of the Criminal Procedure Code to acquit the accused, as it was contended that, the prosecution had not discharged its burden to show that the expenditure is more than the known income of the accused for the relevant period. The application was refused and the defence was called. The accused petitioner sought to have the order set aside.

**HELD :**

- (1) The burden lies with a prosecution to show that the expenditure is more than the known income of the accused for the relevant periods. The prosecution had not done so; the prosecution cannot rely on the presumption, referred to in the section—Section 23A
- (2) It is on the prosecution to prove that the charges were filed only after thorough investigation. If this was challenged the

prosecution should satisfy court that such an investigation was done. The prosecution must prove its case without leaving part of the evidence to be provided by the accused.

*Per Basnayake, J.*

"The Commission should refrain from bringing persons to Court unless they are able to show that charges have been brought after a thorough investigation. No attempt has been made to ascertain the receipts of the accused on account of the investigations, done to the bank during the relevant period.

**Cases referred to :**

- 1 *Wanigasekara vs Republic of Sri Lanka* 79 1NLR 240 at 248
- 2 *C. S. S. Swanii vs State* 1969 AIR SC 7

*Dulindra Weerasuriya, with Janaka Amerasinghe for accused-petitioner. Malika Liyanage Deputy Director General, Prevention of Bribery & Corruption.*

*Cur. adv. vult.*

November 16, 2006.

**ERIC BASNAYAKE, J.**

The accused petitioner (hereinafter referred to as the accused) in this case was an Assistant Commissioner of Agrarian Services. He was charged under Section 23 A (3) of the Bribery Act to wit that for the period 17.10.1988 and 31.8.1989 the accused could not account for the value of properties he gained as per the details given in the attachment with his known income, an offence punishable with seven years imprisonment and a fine. After the closing of the prosecution

case an application was made by the defence under Section 200 of the Code of Criminal Procedure Act to acquit the accused. The learned High Court Judge after hearing both parties refused the application and called for the defence. The accused is seeking to have the order of the learned High Court Judge set aside.

### **Submission of the learned counsel for the accused**

This action was filed on the basis that the accused could not account for his expenditure from his known income. As per the income and the expenditure in the document marked P2 (P17 at the trial) the difference is Rs. 122,772.74. The learned counsel submitted that the income the accused had received from the Bank of Ceylon for inquiries conducted regarding non payment of agricultural loans of the debtors had not been accounted for. Hence, he argued, the document P2 cannot be considered as a correct statement of account. He submitted that the prosecution is aware of these payments. The learned counsel submitted that in terms of Section 23A the burden lies with the prosecution to show that the expenditure is more than the known income of the accused for the relevant period. As the prosecution had not done so the prosecution cannot rely on the presumption referred to in the section.

*Section 23 A (1) is as follows :- Where a person has or had acquired any property on or after March 1st 1954 and such property -*

(a) .....

(b) *being property other than money, cannot be or could not have been-*

(i) *property acquired with any part of his **known Income** or*

(ii) *property which is or was part of his known receipts,*

(iii) *property to which any part of his known Receipts has or had been converted,*

*then, for the purposes of any prosecution under this section, it shall be deemed, until the contrary is proved by him, that such property is*

*or was property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery.*

*(3) a person who is or had been the owner of any property which is deemed under sub section (1) to be property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery shall be guilty of an offence punishable with rigorous imprisonment for a term of not more than seven years and a fine not exceeding five thousand rupees :·*

The complaint of the learned counsel is that the summary of the Income and expenditure (marked P17 at the trial and as P2 to the petition) showing the difference between the income and the expenditure as Rs. 122,172.74 is wrong as the prosecution had failed to prove all the known income of the accused after a thorough investigation. Two witnesses for the prosecution, namely, Cyril Wickum Ariyaratne and Tennakoon Mudiyansele Seneviratne admitted in evidence that some receipts of the accused during the relevant period had not been accounted for in preparing the summary marked P17. Two of these receipts were marked V 10 and V 11 at the trial (P4a and P4b). It is evident from documents marked P3 and P4 at the trial (P5a and P5b) that the Bribery Commission was aware prior to the date the accused was charged that the accused was receiving payments from the Bank of Ceylon on account of the investigations done by him. The amounts would have been found out had a thorough investigation been done.

The learned High Court Judge stated that "it is revealed from cross examination that the prosecution came to know a source of income of the accused, that is, payments made to the accused by the Bank for the investigations and inquiries done by the accused. The position of the prosecution is that they have made every endeavour to ascertain the income which he had received from this source of income but the prosecution failed in its attempt to obtain the same. The prosecution was unable to obtain this information from the accused even though the prosecution had requested the accused to declare all the known income. Under these circumstances even though the prosecution was aware of a source of income from which the accused would have

received some income but the prosecution was not aware of the amount of money received from this source and as this information is not forthcoming the prosecution has thought it fit to proceed with the known income of the accused”.

Admittedly, the Bribery Commission has been aware of some payments received by the accused although they did not know the exact amount. If a thorough investigation was done there would have been no difficulty in finding out these amounts. There is no evidence that such a thorough investigation was done. There is no evidence that inquiries were made from the Bank with regard to these payments. The Commission has not made any specific inquiries from the accused either, with regard to the payments received from the bank on account of his performing the services to the bank. The summary has been prepared without considering these payments. Therefore the summary of the income and the expenditure cannot be considered as something that was prepared after a thorough investigation. To that extent learned High Court Judge has erred in coming to the conclusion that :-

1. The prosecution made every endeavour to ascertain the income which he had received but failed.
2. The prosecution was unable to obtain this information.

I am of the view that no endeavour has been made to ascertain the amount the accused had received on account of the investigations done for the Bank of Ceylon. The prosecution could have obtained this information from the accused if such information was called for. There is no such evidence. When the Commission became aware that the accused had received some payments from another source during the relevant period, there arose a duty on the part of the Commission to find out those amounts before concluding that the accused had taken bribes.

Wimalaratne J in *Wanigasekera vs. Republic of Sri Lanka*<sup>(1)</sup> at 248 quoted Sinha J in *C. S. D. Swami vs. The State*<sup>(2)</sup> that “the known source of income” must have reference to sources known to the

prosecution on a thorough investigation. Wimalaratne J held at 250 that "the basic fact required to be proved in a prosecution under Section 23A of the Bribery Act is that the accused acquired property which cannot or could not have been acquired with any part of his sources of income or receipts known to the prosecution after investigation".

The burden lies with the prosecution to prove that the charges were filed only after a thorough investigation of the known income of the accused. If this was challenged the prosecution should satisfy court that such an investigation was done. If persons are brought before court without such investigation, the prosecution would in effect be expecting the defence to prove the innocence of the accused. The prosecution must prove its case without leaving part of the evidence to be provided by the accused.

In this case the prosecution admitted that they were aware of some unascertained income received by the accused. The Commission got this information from the Department of Agrarian Services where the accused was employed. The Agrarian Service Department informed the Commission that the information with regard to this income has to be obtained by the Bank which made payments to the accused. The Commission never made inquiries from the Bank with regard to these payments. The Commission did not inquire from the accused either particularly with regard to these receipts. Then can one say that the charges were brought after a thorough investigation? The prosecution is not expected to conduct an incomplete investigation and get the accused to prove his innocence. There is no evidence in this case that the accused did not cooperate with regard to the investigation.

The Commission had written to the accused requesting him for the income received by the accused with regard to the relevant period. There is no evidence that the Commission ever inquired from the accused about these payments not accounted for. "It shall be deemed ..... that such property is ..... acquired by bribery ....". The statute has a presumption under the section. Admittedly it is a rebuttable presumption. However one must also remember that these are cases involving criminal law and the burden lies with the prosecution. This

presumption should be made applicable at the completion of a thorough investigation by the prosecution, at which point there still remain amounts unaccounted for. What was the investigation conducted to ascertain the amounts received by the accused from the Bank on account of investigations the accused did to the Bank?

The Commission should refrain from bringing persons to court unless they are able to show that charges have been brought after a thorough investigation. I am of the view that no attempt has been made to ascertain the receipts of the accused on account of the investigations done to the bank during the relevant period. Therefore the prosecution has failed in its duty to bring a fair prosecution. The accused should succeed as there is no case to answer. Hence this application is allowed and the accused is acquitted.

**BALAPATABENDI, J. P/CA** — *I agree.*

*Application allowed.  
Accused acquitted.*

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