RATNAPURA VIJITHA NANDA THERA
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL
JAYASURIYA, J.,
DE SILVA, J.
C.A. NO. 183/95
H.C. COLOMBO CASE NO. B924/94
JUNE 30 & JULY 01, 1998.

Criminal Law – Illegal gratification – Section 19 (c) of amended Bribery Act – Evidence of disposition, propensities and tendencies – Evidence of similar transactions: Res inter alios actae non nocet – Sections 11 (b), 14, 15 and 52, 54 of the Evidence Ordinance.

The witness Mangalika offered a sum of Rs. 5,000.00 as illegal gratification to the accused to secure the release of her husband from the Pelawatte Detention Camp. The Bribery officers recovered the money from the accused. The accused did not dispute that the money was so recovered but the accused in a dock statement stated he received the money as expenses for religious rituals and a talisman to invoke God's blessings to obtain the release of Mangalika's husband.

He relied heavily on the contents of a statement of S. K. Jayasena, Senior Asst. Secretary attached to the Jayalath Committee in regard to an interview the accused had with officers of the Jayalath Committee in regard to the release of the Sumanawathie's brother Weerasinghe also detained at Pelawatte. The evidence of witness Jinasena and the contents of P3 related to a similar transaction and not to the transaction relating to the release of Mangalika's husband.

Held:

1. Evidence of similar facts would be inadmissible in law because of the Rule of exclusion – *res inter alios actae non nocet* – unless such evidence is admissible in terms of sections 14 and 15 of the Evidence Ordinance. Unlike in English law, since our law relating to admissibility of similar fact evidence is statutory we must not extend the operation of the statutory provision to other cases where the question of guilt or innocence depends upon actual facts and not upon the state of a man's mind and feeling.

2. The offences specified in the indictment which relate to solicitation and acceptance of an illegal gratification do not require the proof of intention knowledge or a state of mind on the part of the accused as an ingredient to constitute the offences by the prosecution.

3. In view of the diverse assertions of Mangalika and the accused the trial judge had to try that issue directly. He cannot adjudicate on that issue by relying on earlier transactions to which the accused had become a party because they would only disclose a certain disposition, propensity or a tendency on the part of the accused person – *res inter alios actae non nocet.*

4. A decision in regard to each transaction should be ascertained by its own circumstances and not by general character, propensity, inclination or tendency towards certain conduct of the parties.

5. A party litigant's general character should be usually of no probative value in a contentious dispute.

6. Section 11 of the evidence is not applicable. Before a fact can be relevant, it must be shown to be admissible. The oral evidence of the member of the Jayalath Committee and P3 which related to a similar transaction unconnected with the fact in issue, the bad character of the accused and evidence included by the principle *res inter alios actae non nocet* cannot be rendered admissible under section 11 (*b*) of the Evidence Ordinance.

Cases referred to :

1. *R. v. Vyapoory Modeliar* 6 – Calcutta 655, 659.
2. *King v. Wijesinghe* – 21 NLR 230.
3. *Thompson v. Church* – 1 Root Reports 312.
4. *Makin v. Attorney-General for New South Wales* – (1894) AC 57.
5. *K. Martin Singho v. V. Kularatne and Others* – CA 249/95, AGS/C/9, AGS/C/10 at Kegalle 16/A/2/3 C.A.M. 18.12.96.
6. *Kanapathipillai v. Queen* – 56 NLR 397.
7. *Sevugan Chettiar and others v. Raja Srimathu Doresingham* – AIR 1940 Madras 273, 278.
8. *Munna Lal v. Kameshari Datt* – AIR 1929 Oudh 113, 115.
9. *Ambika Charan Kundu v. Kumud Mohun Chaudhury* – AIR 1928 Calcutta 893.

APPEAL from judgment of the High Court.

Ranjit Abeysuriya, PC with *Ms. Priyadharshini Dias* and *Ms. M. Thalgodapitiya* for accused appellant.

Buvaneka Aluwihare SSC, for Attorney-General.

Cur. adv. vult.

June 30, 1998.

JAYASURIYA, J.

The accused-appellant who is a Buddhist priest and who functioned and was employed as a trainee teacher at the Bopatha Maha Vidyalaya (government school) was indicted in the High Court on two counts of soliciting on the 17th of April, 1992 and of accepting on the 22nd of April, 1992, of an illegal gratification of Rs. 5,000 from Sinharaweerage Mangalika which were offences punishable under section 19 (*c*) of the amended Bribery Act. After trial, the learned High Court Judge (Hon. Leslie Abeysekera) convicted the accused on the aforesaid two counts and sentenced the accused to a term of two years, imprisonment on count one and another term of two years, imprisonment on count two to run concurrently but suspended the term of imprisonment for an operational period of five years. Further, he imposed on counts 1 and 2 fines of Rs. 2,500 and Rs. 5,000 and a penalty of Rs. 5,000. The learned High Court Judge also imposed a default term of 12 months' imprisonment for non-payment of the fine of Rs. 2,500 and a default term of two years, imprisonment in respect of the non-payment of the fine of Rs. 5,000 and a default term of two years, imprisonment in respect of the non-payment of the penalty of Rs. 5,000 imposed by him. The accused-appellant has appealed against the findings, convictions and sentences imposed by the learned High Court Judge.

The virtual complainant, Sinharaweerage Mangalika, in her evidence, has stated that after engaging in a conversation with another prosecution witness named Manannalage Sumanawathie, that she had

discovered that the accused was helping the aforesaid Sumanawathie with a view to obtaining the release of Sumanawathie's brother, Manannalage Weerasinghe, from a detention camp in which the said Weerasinghe was being detained. Thereafter, the witness Sinharaweerage Mangalika had proceeded to the temple at which the accused resided to obtain the services of the accused for obtaining the release of her husband who was also being detained at the detention camp at Pelawatte. According to the aforesaid Mangalika, the accused had, during his conversation with her on the 17th of April, 1992, at the temple, solicited from her a sum of Rs. 5,000 to obtain the release of her husband from the said detention camp after enlisting the assistance and help of the Police Officer attached to the Avissawella Police station. Thereafter, the witness Mangalika had proceeded to the Bribery Department, lodged a complaint at the Bribery Department, and a trap was arranged to detect the accused when he accepted the illegal gratification from witness Mangalika. Thereafter, witness Mangalika had proceeded to the temple on the 22nd of April, 1992, in the company of certain officers of the Bribery Department and it is asserted by the prosecution witnesses that Mangalika offered a sum of Rs. 5,000 as illegal gratification to the accused and that the accused accepted the sum of Rs. 5,000 from Mangalika as an illegal gratification to secure the release of Mangalika's husband from the Pelawatte detention camp. The sum of Rs. 5,000 which was recovered by the Bribery officers from the possession of the accused was produced in Court marked P2. The accused accepted the detection carried out on the 22nd of April, 1992 and that the marked notes amounting to Rs. 5,000 were recovered from his possession by the officers attached to the Bribery Department. On that score there was no issue between the parties.

The learned High Court Judge had to decide and determine the truth as regards the diverse assertions made by the witness Mangalika and the accused in his Dock statement, as regards the purpose for which the said sum of Rs. 5,000 was accepted by the

accused. As already observed, it was the assertion of the witness Mangalika that this sum was solicited and accepted as an illegal gratification by the accused to obtain the release of her husband from the detention camp after enlisting the help and assistance of the officers attached to the Avissawella Police station. On the contrary, the accused in his Dock statement vehemently asserted that he had merely intimated to Mangalika that certain sums of money would have to be expended to perform religious rituals, take certain vows, prepare talismans and proceed to certain Vihares to carry out certain exercises in blessing the said talismans and that he had not ever specified the exact amount of expenses that would be incurred and when she handed him the money subsequently that he had accepted the said sum as necessary expenditure to perform the said religious rituals and religious practices with a view to invoking the blessings of the Gods in order to obtain the release of Mangalika's husband who was being detained at the detention camp.

In his Dock statement the accused has strenuously asserted that he had never solicited a sum of Rs. 4,000 to Rs. 5,000 to be handed over as a gratification to the police officers at the Avissawella Police station and that he had never accepted such a sum for such a specific purpose.

The High Court Judge had to decide whether the assertion made by Mangalika was true or whether the assertion made by the accused in his Dock statement represented the truth. In determining this issue, the learned High Court Judge has relied heavily on the contents of Document P3 and the evidence given by Sadiris Kankanamage Jinasena, a Senior Assistant Secretary attached to the Ministry of National Security who functioned as the Secretary to the Jayalath Committee in regard to the issue of P3 and the handing over of P3 to the accused. The evidence of the said witness Jinasena and the document P3 related to an entirely different transaction when the accused interviewed officers of the Jayalath Committee, including Justice Jayalath with regard to the expediting of the release of

Sumanawathie's brother, Manannalage Weerasinghe, who was detained at a detention camp. Though the Jayalath Committee had issued certain statutory forms similar to P3 to the respective Police stations, these forms had not been filled up and sent back by the Officers of the Police station to the Jayalath Committee and, therefore, at the instance of the accused this form P3 was sent up with the insertion of Manannalage Weerasinghe's name and it was handed over to the accused by the officers of the Jayalath Committee to be transmitted by the accused to the Police station so that the form would be expeditiously filled up and posted back to the Jayalath Committee. The learned High Court Judge has held that he accepts in toto the evidence given by witness Jinasena in respect to the issue of this form P3 to the accused which related to the attempt to obtain the release of Manannalage Weerasinghe from the detention camp. This form P3 was found in the possession of the accused when the Bribery officers searched the temple premises. The evidence of witness Jinasena and the contents of P3 related to a separate transaction which involved Manannalage Sumanawathie and Manannalage Weerasinghe. Though Manannalage Somawathie introduced the virtual complainant to the accused at the temple, it must be borne in mind that the evidence of Jinasena and the contents of document P3 related to a similar transaction and not to the transaction relating to the release of the virtual complainant's husband from the Pelawatte Detention Camp. The principle in law being *Res inter alios actae non nocet.* Transactions other than the transaction in queston, do not prejudice or harm the particular party who is involved in the particular transaction. Evidence of similar facts would be inadmissible in law because of the Rule of exclusion – *Res inter alios actae non nocet* unless such evidence is admissible in terms of sections 14 and 15 of the Evidence Ordinance. Unlike in English law, since our law relating to admissibility of similar fact evidence is statutory, we must not extend the operation of the statutory provision to other cases where the question of guilt or innocence depends upon *actual facts* and not upon the state of a man's mind and feeling – *R v. Vyapoory Modeliar*[1] at 655-659 *King v. Wijesinghe*[2]. The offences specified in the indictment which

relate to solicitation and acceptance of an illegal gratification do not require the proof of a mental state on the part of the accused as an ingredient to consitute the offences by the prosecution. Thus, the prosecution is not required to prove knowledge or intention or a particular state of mind as part of the ingredient of the offences which are specified in the indictment. In these circumstances, it was a grave misdirection on the part of the learned High Court Judge when he referred to the evidence of witness Jinasena and the contents of P3 and stated thus as the reason for rejecting the assertion of the accused and accepting the evidence of the virtual complainant Mangalika - -

මේ අනුව චිත්තිකරු මනන්තලාගේ වීරසිංහ මෙන්ම මංගලිකාගේ සැමියාවද රැඳවුම් කඳවුරෙන් නිදහස් කර ගැනීමට හැකි බව පෙන්වා සිටියේ ජයලත් කොමිටියේ සහ පොලීසියේ නිළධාරීන්ගේ සහාය ලබාගැනීමෙන් විනා ආගමික වතාවත් කිරීමෙන් නොවන බව සක්සුදක්සේ පැහැදිලි වන කරුණකි. චිත්තිවාචිකය මම සම්පූර්ණයෙන්ම ප්‍රතික්ෂේප කරමි. ජයලත් කොමිටියේ සහ පොලිස් නිළධාරීන්ගේ සහාය ලබාගැනීමට හැකි බව චිත්තිකරු මංගලිකාට පෙන්වා සිටි බව මම විශ්වාස කරමි. මෙවැනි ක්‍රියාමාර්ගයක් සඳහා ඔහු රු. 5000 ක මුදලක් ඇයගෙන් අයැද සිටි බව මම විශ්වාස කරමි. එසේ අයැද සිටි මුදල 1992 අප්‍රේල් මස 22 වැනි දින පැමිණිල්ලේ සාක්ෂියෙන් අනාවරණය වූ වැටලීමේදී චිත්තිකරු භාරගත් බවද මම විශ්වාස කරමි.

The learned High Court Judge has erred and grievously misdirected himself in arriving at this finding for the reason adduced by him and he has exactly done what was very correctly deprecated and frowned upon by a Court in the American case of *Thompson v. Church*[3] where the judge succinctly remarked:

> "The business of the Court is to try the case and not the man for very bad men (prone to certain dispositions, propensities and tendencies) may very well have righteous causes."

It was no business of the learned High Court Judge to avoid trying the issue that directly arose before him. In view of the diverse assertions of Mangalika and the accused, he had to try that issue directly. He cannot adjudicate on that issue by relying on earlier

transactions to which the accused had become a party because they would only disclose a certain disposition, propensity or a tendency on the part of the accused person – *Res inter alios actae non nocet.* The learned High Court Judge has overlooked this fundamental principle in the law of evidence and has acted on earlier transactions in which the accused was involved which manifest bad character of the accused person which was wholly inadmissible in law, as the accused has not put his character in issue at the particular trial – vide observations of Justice Ennis in *King v. Wijesinghe* (*supra*) to the effect that :

> "there was no question of accident or intention and that there was nothing suggested to call for any evidence in rebuttal . . . They are merely evidence of bad character of the accused which is highly prejudicial to his defence."

The controverted issue before him was whether the acceptance of money was for the performance of religious rituals and vows or whether it was an acceptance of an illegal gratification for the release of the virtual complainant's husband from detention by interviewing the police officers and the officers attached to the Jayalath Committee in the Ministry of National Security. The Judge was called upon to decide and adjudicate on this issue on the merits of the cases presented. It was his business to try these contentious issues which arose in the case and not to decide that issue by trying the man by having regard to his propensities, inclinations and tendencies disclosed upon an entirely unrelated transaction. He has grievously erred in not trying the case but trying the man as was remarked by the American Judge in *Thompson v. Church* (*supra*). In what is described as the *locus classicus* this principle was enunciated. Lord Herschel in *Makin v. Attorney-General for New South Wales*[4] remarked succinctly thus: "It is undoubtedly not competent for the prosecution to adduce evidence to show that the accused has been guilty of criminal acts other than those covered by the indictment for the *purpose* of leading to the conclusion that the accused is a person

likely from his criminal conduct or character to have commited the offence for which he is being tried". The prosecution in this case had to establish that in this particular transaction the accused accepted the money as an illegal gratification to influence the authorities concerned and thereby secure the release of the virtual complainant's husband. It is not competent for the prosecution to merely establish that in another unconnected transaction he had accepted a payment of money to obtain the release of a detenue by interviewing police officers and members of the Jayalath Committee. If the prosecution seeks to pursue the latter course of action, it is illegally relying on the accused's general propensity, inclination and tendency to commit similar acts for the express purpose of inferring that he committed the particular unlawful act, which is the subject-matter of the charge.

Section 54 of the Evidence Ordinance states that in criminal proceedings, the fact that the accused person has a bad character is irrelevant unless there has been evidence given that he has a good character. Section 52 of the Evidence Ordinance in relation to civil cases sets out the corollary rule that the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is irrelevant. Thus, the rule of exclusion – *Res inter alios actae non nocet* and the aforesaid rules exclude character evidence emphasizing that a learned trial judge ought not to have resorted to the impugned reasoning to arrive at an adverse finding against an accused. In regard to the particular issue that came up for adjudication before the trial judge, the two sections of the Evidence Ordinance to which I have adverted to, exemplify the principle that evidence of a party litigant to commit another collateral act is wholly inadmissible before any Court or tribunal. The rationale behind this legal principle is that a decision in regard to each transaction should be ascertained *by its own circumstances* and not by general character, propensity, inclination or tendency towards certain conduct of the parties. Thus, a party litigant's general character should not have been put in issue before a Court. It is for this reason that the

striking pronouncement was echoed in the leading American decision in *Thompson v. Church (supra)* where the Court emphasized that –

> "the business of the court is to try the case and not the man for very bad men (prone to certain dispositions, propensities and tendencies) may very well have righteous causes."

Vide K. Martin Singho v. V. Kularatne and others[5] per Justice F. N. D. Jayasuriya); Vide also the judgment in High Court Labour Tribunal Appeal decision in *H. F. A. de Zosa v. Ramada Renaissance Hotel and Trans Asia Hotel Ltd.,**

The rationale behind the two sections of the Evidence Ordinance to which I have adverted to, is that a party litigant's general character is usually of no probative value in a contentious dispute. The facts in issue, particularly in regard to a civil dispute, is in regard to an accusation which involves no moral quality or at any rate the moral quality that may have been present is ignored by the law. In the result, moral character can throw no light on the probability of doing or not doing an act. Besides, the supporting policy of the law is equally cogent and effective, to shut out evidence of propensity, tendency and general character. Adduction of such evidence generates *undue prejudice,* unfair surprise and *widespread confusion of side issues* and the main contentious controversy and the fact in issue would be clouded and overlooked in a trial of a great multitude of minor and trivial side issues. Vide Wigmore on Evidence, section 64.

It is with regret that I hold that the learned trial judge has indulged in this case in such faulty and erroneous reasoning in arriving at a decision adverse to the accused in regard to the highly controverted fact in issue which arose on the divergent assertions of

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**HC LT appeal No. 664/95 LT 1/48/92 HCM 4.10.94 per F.N.D. Jayasuriya.*

the virtual complainant and the accused. In view of this grievous error and grave misdirection on the part of the trial judge and the faulty reasoning adopted by him, his findings, convictions and sentences have necessarily to be set aside. Learned state counsel has referred this Court to the evidence given by Ranjani Jayaratne and has contended that the interest of justice would demand a rehearing of this case. In the circumstances, we set aside the findings, convictions and sentences imposed by the trial judge and direct that a retrial be held before the High Court Judge of Colombo on an indictment which would be carefully drawn up and drafted by the Attorney-General's Department.

Learned State Counsel argued that the oral evidence given by witness Sadiris Kankanage Jinasena who was the Secretary of the Jayalath Committee and the contents of the documents marked P3 would alternatively be relevant and admissible in terms of section 11 of the Evidence Ordinance, in that such evidence by themselves or in connection with other facts, make the existence or non-existence of any fact in issue or relevant fact highly probable. In *Kanapathipillai v. Queen*[6] Justice Gratiaen, having concluded that the oral evidence of a tracker-trainer, in regard to the behaviour of a police tracker dog trained in the detection of crime would not come within the definition of a science" and expert opinion evidence under section 45 of the Evidence Ordinance, nevertheless, proceeded to consider whether such evidence would be rendered admissible and relevant under section 11 (*b*) of the Evidence Ordinance on a similar contention made by the Crown Counsel in that case. We hold that the submission of learned senior state counsel upon this appeal and the submissions of the Crown Counsel in the appeal which came up before Justice Gratiaen are both misconceived and untenable in law. For Sir James Fritzgerald Stephen, who is the author of the Evidence Ordinance, in his speech introducing the Evidence Ordinance before the Indian legislature (which speech has also been published as "The Introduction to the Evidence Ordinance and as Judicial Principles relating to the Law of Evidence")

has explained that section 11 has been expressed in very wide language but that it was not intended to mean that any and every fact which by a chain of reasoning may be shown to have a bearing, however remote, on any fact in issue or relevant fact is relevant; such a view would do away with the theory of relevancy as propounded in the earlier sections and bring in a mass of collateral facts creating confusion, embarrassment and prejudice. Hence, Stephen comments that though the terms of section 11 are wide, they are controlled by the provisions regarding relevancy contained in the other sections of the Ordinance and the fact relied on must be proved according to the provisions of the Evidence Ordinance. Thus, according to Stephen, before a fact can be relevant under section 11, it must be shown that it is admissible. In fact, Stephen states though he enacted section 11 in this wide form, he *intended* the section to be read subject to a proviso postulating and manifesting admissibility though he failed to specifically state so in this statute. A proviso to the following effect – "No statement shall be regarded as rendering the matter stated highly probable within the meaning of the section *unless* it is declared to be a relevant fact under some other section of the Act" – Stephen – Introduction – Pages 160-161.

The views expressed by Stephen in his booklet were followed in the decision in *Sevugan Chettiar and others v. Raja Srimathu Doresingham*[7] Justice Varadachariya remarked in this context. "It seems to us that section 11 must be read subject to the other provisions of the Act and that statement not satisfying the conditions laid down in section 32 cannot be admitted merely on the ground that, if admitted, it may probablise or improbablise a fact in issue or relevant fact." In the decision in *Munna Lal v. Kameshari Datt*[8] at 113, 115 two judges of the Indian Court (Misra, J. and Pullen, J.) stressed and emphasized that before a fact can be considered to be relevant, under section 11 of the Evidence Act, It must be shown that it is admissible; it would be absurd to hold that every fact which even if it is inadmissible and irrelevant, would be admissible under section 11. If a particular disposition could not be admitted under section 32

it could not be held to be admissible under section 11." Again, in *Ambika Charan Kundu v. Kumud Mohun Chaudhury*[9] at 893 Justice Mukherjee at page 895 remarked: "As a general rule section 11 is controlled by section 32 of the Evidence Ordinance when the evidence consists of statements of persons who are dead". These decisions have followed the views expressed by Stephen the framer of the Ordinance when the author remarked thus: "It may possibly be argued that the effect of the second paragraph of section 11 would be to admit proof of such facts as these (viz statements as to facts by persons not called as witnesses; *Transactions similar to but unconnected with the fact in issue*: Opinions formed by persons as to facts in issue or relevant facts) . . . This was not the intention of the section as is shown by the elaborate provisions in the following part of chapter 2, sections 32-39 . . . The meaning of the section would have been more fully expressed if words to the following effect had been added to it : "No statement shall be regarded as rendering the matter stated highly probable within the meaning of the section *unless* it is declared to be a relevant fact under some other section of this Act". Vide Stephen's Introduction to the Evidence Act pages 160 to 161.

Thus, the evidence which was sought to be admitted on the alternative ground before Justice Gratiaen was evidence which was clearly irrelevant and inadmissible in terms of section 45 of the Evidence Ordinance. Therefore, such evidence cannot be admitted under section 11 (*b*) of the Evidence Ordinance. Likewise, rejecting the learned senior state counsel's submission, we hold that the oral evidence of the said member of the Jayalath Committee and the adduction in evidence of P3 which related to a similar transaction unconnected with and which manifested fact in issue, the bad character of the accused and which evidence was excluded by the principle *Res inter alios actae non nocet,* cannot be rendered relevant and admissible under section 11 (*b*) of the Evidence Ordinance for the multitude of reasons spelt out in this judgment and having regard to the principles laid down by Stephen which

have been followed in the aforesaid Indian cases. Therefore, we hold that the aforesaid evidence is not relevant under section 11 (*b*) and its admission prejudiced the case of the accused-appellant. In the result, we affirm our order upon this appeal which has been already set out in the preceding part of this judgment. The appeal is allowed. The findings, convictions and sentences imposed by the High Court Judge are set aside but a retrial is ordered.

DE SILVA, J. – I agree.

Appeal allowed.

Retrial ordered.