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

In the matter of an Application for Revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with Section 364 and 365 of the Criminal Procedure Act No. 15 of 1979.

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

Complainant

Court of Appeal Revision Application

No. CPA/0108/2023

Vs.

High Court of Colombo
Case No. HCB 156/2022

Sajin de Vaas Gunawardena,
No. 12/6/A,
Hill Street,
Rathnayaka Mawatha,
Pelawatta.

Accused

AND NOW BETWEEN

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

Complainant-Petitioner

Vs.

Sajin de Vaas Gunawardena,
No. 12/6/A,
Hill Street,
Rathnayaka Mawatha,
Pelawatta.

Accused-Respondent

Before: B. Sasi Mahendran, J.
Amal Ranaraja, J.

Counsel: Anusha Sammandapperuma, Assistant Director Legal for the Petitioner.

Jeewantha Jayathilake with Ralith Amarasena instructed by Ace Legal Service for the Respondent.

Supported on: 20.05.2025

Decided on: 25.06.2025

ORDER

AMAL RANARAJA, J.

1. This is an application by the Complainant-Petitioner namely the Director-General of the Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as the "Petitioner") invoking the revisionary jurisdiction granted to this Court in terms of Article 138 of the Constitution.

2. The petitioner is seeking to set aside an order made by the Learned High Court Judge of Colombo on March 29, 2023 in High Court of Colombo case no. HCB/ 156/2022, where the indictment forwarded by the petitioner has been rejected and the accused discharged on a preliminary objection raised on behalf of the accused-respondent named in the instant application.

3. When the instant matter was supported for notice, this Court after having satisfied itself with regard to the submissions made on behalf of the petitioner has decided to issue notice on the accused-respondent. Accordingly, the accused-respondent was represented in Court and was permitted to file objections.

4. Filing objections the accused-respondent has moved that the matter be dismissed on the basis that the application of the petitioner had no merit.

<u>High Court case no. HCB/156/2022</u>

5. The accused-respondent has been indicted in the High Court of Colombo on two counts of corruption, offences punishable in terms of section 70 of the Bribery Act No, 11 of 1954 (as amended). The aforementioned counts are alleged to have been committed by the accused-respondent while he was serving as the CEO of an airline named, *Mihin Lanka Ltd*, between the period of June 27, 2007 and May 29,2008.

6. On November 18,2022, the matter has come up before the *High Court*. During those proceedings, the accused respondent has raised an objection, contending that the case instituted in the *Magistrate Court* has been withdrawn by the petitioner. The objection has further stated that the indictment submitted to the *High Court* was based on the same

facts and counts as those outlined in the charge sheet related to the withdrawn *Magistrates Court* matter. Further given that the indictment was forwarded only at the expiration of one year since the withdrawal, the accused-respondent has argued that he cannot be indicted under those circumstances and therefore must be acquitted.

7. However, it appears from the *High Court* case record that the original objection raised on behalf of the accused-respondent in that Court has been altered based on the fact that since the accused-respondent has been discharged from a previous proceeding in accordance with the provisions of the Code of Criminal Procedure Act No.15 of 1979 and no proceedings have been instituted again within a period of one year, such discharge would amount to an acquittal. Furthermore, the provisions in section 314 of the Code of Criminal Procedure Act No.15 of 1979 would come into play and the indictment could not be sustained on that ground.

8. Accordingly, the Learned High Court Judge has allowed the parties to file written submissions after considering the submissions made on behalf of the accused-respondents as well as those made by the petitioner. The Learned High Court Judge pronouncing the order on March 29, 2023 has agreed with the submissions regarding the applicability of section 314 of the Code of Criminal Procedure Act No. 15 of 1979 in favour of the accused-respondent. It has been determined that the indictment cannot be sustained due to the stated objection.

9. Accordingly, the accused-respondent, has been discharged by the *High Court*.

Factual Background

10. Before considering the legality of the disputed order (i.e. order discharging the accused-respondent from the High Court case no. HCB/156/2022), I would now proceed to examine the factual background which led to the accused-respondent being indicted in the *High Court of Colombo*.

11. The Commission to Investigate Allegations of Bribery or Corruption (hereinafter referred to as the "Commission") upon receipt of a communication regarding an allegation of bribery and corruption has investigated such allegation and thereafter directed the *Director-General* to institute criminal proceedings against the accused-respondent on August 16, 2016, before the *Magistrates Court of Colombo* by case no. 58311/01/16. The counts, the accused-respondent has been charged of have been the same as those stated in the indictment forwarded to the *High Court of Colombo* subsequently. When the matter was taken up for trial in the *Magistrates Court* and PW01 was giving evidence, the Learned Counsel of the accused-respondent has raised an objection regarding the maintainability of the matter on the basis that the *Commission* had not collectively directed the *Director-General* to institute proceedings against the accused-respondent. The objection has been based on the judgement pronounced by their Lordships of the Supreme Court in the case of *Anoma Polwatta vs. The Commission to Investigate Allegations of Bribery or Corruption*, SC/Writ Application No. 01/2011.

12. The Learned Magistrate has overruled the objection. The accused-respondent thereafter has preferred an application in revision to the *Provincial High Court of Western Province holden in Colombo* seeking to revise the order of the Learned Magistrate.

13. However, during the pendency of the revision application, the *Director-General* after having considered the implications of the Supreme Court

judgement referred to above has decided to withdraw the matter in the *Magistrates Court.*

14. The Learned Magistrate has permitted the withdrawal of the case in the *Magistrates Court* and has further determined that such application for withdrawal has been made in terms of section 189 of the Code of Criminal Procedure Act No. 15 of 1979. Therewith, proceeded to acquit the accused-respondent. The said order acquitting the accused-respondent has been pronounced on March 15, 2021.

15. The *Director-General* has thereafter forwarded the indictment in question to the *High Court of Colombo* on March 24,2022. There is no dispute that the said indictment contains the same counts that have been outlined in the charge sheet handed over to the accused-respondent in the *Magistrates Court*.

Legal analysis

16. Section 188(2) of the Code of Criminal Procedure Act No.15 of 1979 is as follows;

> "*If the summons has been issued on a complainant under section 136(1(b) or (c) as the case may be, and on the day fixed for trial the prosecution is not ready the Court may discharge the accused unless for some reason the Court thinks proper to adjourn the hearing of the case to some other hour or day."*

17. In accordance with section 188(3) of the Code of Criminal Procedure Act, a discharge of an accused by a Magistrate shall operate as an acquittal under the following circumstances;

(a) It is not set aside and the case against the accused is not re-opened within a period of one year from the date of such order; or,

(b) The case has been re-opened and order of discharge is made for the second time.

Provided that where an application to set aside the order to discharge is pending before a Magistrate or any other Court in revision, the order of discharge shall not operate as an acquittal at the end of period of 1 year until the Magistate or such Court makes order refusing the application to set it aside.

18. The accused-respondent has not been acquitted in the *Magistrate Court* in terms of the provisions in section 188(3) of the Code of Criminal Procedure Act. Therefore, presenting an argument based on those provisions in the *High Court* would be irrelevant. Further, upon examining the disputed order, it is clear that the Learned High Court Judge has determined that the accused-respondent has been acquitted based on the provisions of section 189 of the Code of Criminal Procedure Act.

19. The Learned High Court Judge has also determined that;

i. Since the accused-respondent has been acquitted under the provisions of section 189 of the Code of Criminal Procedure Act, such acquittal serves as a bar to forwarding an indictment with the same counts as those listed in the charge sheet handed over to the accused-respondent.

ii. As the accused-respondent has been acquitted in accordance with section 189 of the Code of Criminal Procedure Act, the word "tried" as referred to as section 314 of the Code of Criminal Procedure Act does not apply to the matter concerning the accused-respondent.

20. The maxim "*nemo debet bis vexari pro una et eadem causa"* expresses a great fundamental rule of criminal law, which forbids that a man should be put in jeopardy twice for one and the same offence. It is the foundation of the special pleas of *autrefois* acquit and *autrefois* convict. This rule of law has been enshrined in our legal system through the provisions outlined in section 314 of the Code of Criminal Procedure Act.

21. Section 314 of the Code of Criminal Procedure Act reads as follows;

> "*(1) A person who has once been tried by a Court of competent Jurisdiction for an offence and convicted or acquitted of such offence shall while such conviction or acquittal remain in force not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 176 or for which he might have been convicted under section 177."*

22. When the instant application was taken up for argument, the Learned Counsel for the petitioner has cited several legal interpretations as to the word "tried" referred to in section 314 of the Code of Criminal Procedure Act. She has also argued that the Learned High Court Judge erred in properly considering the provisions in section 314 of the Code of Criminal Procedure Act and has drawn the attention of this Court to the judgment

in the case of SC Appeal 12A/2009 decided on May 05,2011 to support her argument.

23. It has been her position that although the Learned Magistrate has acquitted the accused-respondent from the Magistrates Court's case, that itself would not be a bar to the petitioner to indict the accused-respondent and section 314 of the Code of Criminal Procedure Act was not applicable.

24. The Learned Counsel for the accused-respondent argued that the order pronounced by the Learned Magistrate constituted an acquittal that has not been overturned by a competent Court. Consequently, this acquittal remains a final verdict. He further argued that the provisions laid out in section 314 of the Code of Criminal Procedure Act precluded the petitioner from presenting an indictment against the accused-respondent as long as the acquittal is still in effect. In addition, the Learned Counsel emphasise that the accused-respondent was acquitted in the Magistrate Court following the provisions in section 189 of the Code of Criminal Procedure Act, he has also pointed out that the petitioner has relied on case law pertinent to section 186 of the same legislation which is not applicable to this circumstance. Furthermore, the Learned Counsel has clarified that the term "tried" as used in the Code of Criminal Procedure Act does not imply that a trial must reach a definitive conclusion.

25. *E. R. S. R. Coomaraswamy* in his book, "*The Law of Evidence*" [*Volume-I*] at page 543 cites Spencer Bower and Turner, op. cit., section 317, pp. 268-269, states as follows,

"The plea of auterfois acquit is expressed in the maxim, nemo debet bis vexari pro una et eadem causa it is a species of estoppel by which one party is precluded as against the other from asserting the contrary of what has been determined in previous proceedings between them. But the plea of auterfois convict depends on nemo debet bis puniri pro uno delicto it is strictly not a manifestation of the doctrine of estoppel but is akin to merger. The rights of the successful party having become merged in the judgment, the same facts cannot be re-asserted in fresh proceedings".

26. In the case of *SC Appeal No.12 A/2009* decided on 05.05.2011, her ladyship, Shiranee Thilakawardena, J, in considering the meaning of term "tried" in the provisions in section 314 in the Code of Criminal Procedure Act has stated as follows;

"*The word 'tried', the operative word in this section, finds meaning in section 5 and section 184 of the Code of Criminal Procedure Act referred to above. Section 5 provides that all offences (under the Penal Code or any other law) are to be (i) investigated (ii) inquired into and (iii) tried and otherwise dealt in accordance with the provisions of the Code of Criminal Procedure Act referred to above. The nature of these three phases of an allegation of an offence in the context of a summary procedure is found in section 184 which stipulates that if a Magistrate proceeds to try the accused, there is a mandatory obligation to take all such evidence as is produced by the prosecution or defence the effect, then, of the operative language of section 314(1) as informed by the above mentioned sections is to make clear that if a person is to have been considered tried for purposes of section 314, the opportunity for both sides to produce some evidence to support their respective stances has to have been available.*

Given the earlier determination that acquittal under the proviso require some level of evidentiary proceeding to have taken place, and that an opportunity for leading evidence is inherent to section 314 (1) definition "tried", it necessarily follows that an acquittal under the proviso of section 186 does not fall within the ambit of section 314."

27. As stated earlier, during the proceedings in the *Magistrates Court*, an objection has been raised against the accused-respondent regarding the maintainability of the case. The objection has asserted that the *Commission* has not collectively directed the institution of such proceedings. In response to this objection, the *Director-General* has decided to withdraw a case from the *Magistrates Court*. He has thereafter on the direction of the *Commission* instituted proceedings against the accused-respondent by forwarding an indictment based on the same counts outlined in the charge sheet that had been presented to the accused-respondent in the *Magistrates Court*.

28. The matters discussed above indicate that there has not been an opportunity for either party involved in the *Magistrates Court* case to present in full evidence that could support their respective positions. In the situation referred to such an opportunity was evidently absent. Furthermore, the ability to present evidence is inherently tied to the definition of "tried" outlined in section 314 of the Code of Criminal Procedure Act. Consequently, it logically follows that an acquittal such as the one being considered does not fall within the scope of section 314 of the Code of Criminal Procedure Act.

29. As articulated in section 314(1) of the Code of Criminal Procedure Code Act, the framework allows for the introduction of evidence as a crucial component of the trial. The absence of such an opportunity implies that the acquittal cannot be categorised within the provisions of such section as it inherently lacks the necessary evidential foundation that section 314 of the Code of Criminal Procedure Act presupposes.

30. Therefore, it is my considered view that the Learned High Court Judge was misdirected when he discharged the accused-respondent based on the matters discussed in the disputed order.

31. Accordingly, I set aside the order dated March 29,2023 of the *High Court of Colombo* and dismiss the objection raised on behalf of the accused-respondent as to the sustainability of the indictment/case before the *High Court of Colombo.*

32. I direct the Learned High Court Judge of Colombo to restore the case back to the Court's case roll and proceed with the case to its conclusion.

33. The Registrar of this Court is directed to communicate this order to the *High Court of Colombo* for necessary compliance.

Judge of the Court of Appeal

B. SASI MAHENDRAN, J.

I agree,

Judge of the Court of Appeal