

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

Singharam Thiyagarajah

**ACCUSED-APPELLANT**

C.A. 216/2010

H.C. Colombo B 1645/2006

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

**COMPLAINANT-RESPONDENT**

**BEFORE:** Anil Gooneratne J. &  
P. R. Walgama J.

**COUNSEL:** Thilak Marapana P.C., with Y.D. Jayasekera, A.K. Chandrakantha  
and Chamith Marapana for the Accused-Appellant

Shamil Kularatne S.S.C. for the Complainant-Respondent

**ARGUED ON:** 10.10.2014

**WRITTEN SUBMISSIONS****TENDERED ON:** 12.11.2014**DECIDED ON:** 27.11.2014**GOONERATNE J.**

The Accused-Appellant was a Grama Sevaka and he was indicted under two counts, as per the Bribery Act as Amended, for soliciting and accepting a bribe of Rs. 10,000/- from one Mahendran in terms of Section 19(c) of the said Act during the period 1<sup>st</sup> August to 31<sup>st</sup> August 2003. He was convicted after trial on or about 19.01.2010 and sentenced to 2 years rigorous imprisonment, with a fine of Rs. 5000/- which carries a default sentence of 12 months rigorous imprisonment. On count No. (1) and on count No. (2) Trial Court imposed the same sentence. Further a sum of Rs. 10,000/= was also imposed in terms of Section 26 of the Bribery Act, which carries a default sentence of 6 months rigorous imprisonment. Pending appeal the Accused-Appellant was granted bail on 11.10.2010. (about 9 months after conviction and sentence).

The case of the prosecution very briefly was that the complainant named in the indictment had obtained a loan facility from the People's Bank by way of an over draft in a sum of Rs. 100000/- and a loan for Rs. 300000/-. The bank had moved the provision of the People's Bank Act, to proceed to auction the house and property of the complaint which had been kept as security for the above facility. The Accused-Appellant who was known to the complainant, had solicited a bribe of Rs. 10,000/-, promising the complainant that he would provide some relief to him by preventing or withholding the alleged auction of the house and property. However no such promise had been fulfilled by the Accused and as such the complainant had to obtain a loan from another party with the assistance of his brother-in-law who was a witness, and ultimately settle the loan with the bank. There is also material provided by the prosecution that the amount of Rs. 10,000/- was obtained and paid to the Accused from certain sums of money given by the complainant's mother who broke a till to collect and pay the sum solicited.

The learned President's Counsel who appeared for the Accused-Appellant relied on the test of probability, and invited this court to several items of evidence. He referred to the evidence that transpired at pgs. 35, 37, 38, 39 & 42 of the brief. It refers to a conversation between the complainant

and the Accused regarding the house and property kept as security and that it is to be auctioned. Complainant having told the Accused-Appellant to help him in this connection, Accused had requested for Rs. 10,000/- (ten thousand mentioned in the English language – 35) to get the property released in 21 days. Then at pg. 37 it is stated that having given Rs. 10,000/- the complainant took steps to get the property released. මම තිදහස් කර ගැනීමක් කලා. The method used to get the property released transpired in evidence (37). It is stated that a sum of Rupees Three Hundred Thousand was borrowed by his brother-in-law (Rada Krishnan) from one 'Wasantha', and having obtained this sum (Rs. 300,000/-) deposited the money on the same day. Having deposited the said sum a question was posed to the complainant as to whether they (තමන්ලා) went to the Nuwara Eliya People's Bank. The answer was as follows:

උ: ආර් ඕ මහත්තයා මා සමග නොදැයි. ඔහුට ගෙස් කිව්වා මම සියළු මුදල් තැන්පත් කලා පොලිය අඩු කරලා දෙන්න. මම මෙව්වර කල් ගනුදෙනු කලා ග්‍රාම සේවක කෙනෙකුට රු. 10,000/- ක් ලබා දිලා තමයි ඉඩම ලබා ගත්තේ කියලා කිව්වා. ඉන් පසු ඔහු ඇහැව්වා මොන ග්‍රාමසේවකටද කියලා. ග්‍රාමසේවකට ඇයි මුදල් දුන්නේ කියලා ඇහැව්වා.

I would in a gist advert to the following matters since much emphasis had been placed by learned President's Counsel on the question of improbability of the prosecution version.

- (a) The complaint was made aware of an auction by the Accused party. Accused-Appellant made no effort to find out about the intended auction sale and as to how the Accused-Appellant could stop the sale or help the complainant
- (b) No steps taken by complainant to verify from the Bank about their liability or the auction procedure.
- (c) Having parted with the sum solicited, no attempt made by the complainant to ascertain the settlement process or its progress from Accused.
- (d) The unintelligible version recorded at pg. 39 of the brief about the version given by complainant to the Nuwara Eliya Regional Office.
- (e) Further, Radhakrishna, the brother-in-law who had signed as a guarantor to the People's Bank loan and who helped the complainant to raise the loan from Wasantha malli to settle the bank loan states that the complainant Mahendran had informed him that it was from the Grama Seveka Accused that he came to know that the house and property was to be sold by the Bank but he does not say that Mahendran had informed him of having given Rs. 10,0000 to the Accused.

My attention has also been drawn to the misapplication of the Ratio in 'Hirijibhai case, and the proceedings not being adopted by the trial Judge who wrote the Judgment. I have considered all those matters contained in the written submissions submitted on behalf of the Accused-Appellant and the submissions of learned Senior State Counsel, and his written submissions.

I would for the purpose of the record make a note of the gist of the submissions of learned Senior State Counsel who had taken the trouble to prepare and present a comprehensive set of written submissions for the benefit of this court. It was his position inter alia that the Accused party has failed to exercise his right under Section 48 of the Judicature Act. The said section reads thus:

Section 48 of the Judicature Act, in the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any judge before whom any action, prosecution proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or if he thinks fit, to re-summon the witness and commence the proceedings afresh:

Provided that where any criminal prosecution, or matter except on any inquiry preliminary to committal for trial is continued before the successor of any such judge, the accused may demand that the witnesses be re-summoned and re-heard.”

Learned State Counsel emphasis that it is the Accused party who should make an application to re-summon witnesses or demand for trial de nova. In this case the Accused party did not do so and as such there is no obligation for the trial Judge to re-summon witnesses or make order for trial de nova. He also states that the proceedings indicate that the Accused party merely moved for postponements without exercising his right under Section 48 as aforesaid to file written submissions and as such the trial Judge is well within the law to proceed from the point where his predecessor stopped. In other words the Accused party has acquiesced in the continuation of the proceedings and there is no necessity even to adopt the proceedings and the succeeding trial Judge could proceed to enter judgment. The new Judge has the following choice, according to the learned Senior State Counsel.

- (1) To act on the evidence already recorded by his predecessor.
- (2) To re-summon witnesses and commence proceedings.

Our attention was drawn by learned Senior State Counsel to the test of probability, and according to him the test of probability would necessarily fail due to the evidence led at the trial and the initial complaints P1 & P2, where criminal investigation were moved by Government officials and not the complainant. It was also submitted inter alia that based on evidence it was the Accused that informed that the property in question would be mortgaged and that the Accused would be in a position to differ the auction. In this regard several items of evidence of witnesses were highlighted. We were also cautioned about the following tests and aspects which no doubt are useful to decide on the culpability of the Accused person.

- (a) Witnesses means of knowledge – the bribe was directly handed over to the Accused-Appellant by the victim.
- (b) Test of consistency – Internal consistency of a witness, consistency inter se and per-se
- (c) Test of inconsistency – contradictions and omissions
- (d) Test of spontaneity - Victim has informed the Regional Manager of People's Bank at the first available opportunity
- (e) Test of interest – 1<sup>st</sup> information and the entire criminal justice process has commenced on the information provided by the Divisional Secretary of Nuwara-Eliya



(f) Test of falsehood – Whether there was a reason for the victim or a material witness had a reason to falsely implicate the Accused-Appellant?

(A) All lending institutions and Banks whether Government/Semi Government or private institutions require security to be provided for any loan facility. Thereby compel parties to enter into agreements. Parties are made known orally and in writing of their respective obligations. Complainant no doubt is a businessman. Although the Accused-Appellant a Grama Sevaka had nothing to do with the Bank, some busy bodies in this country fraudulently or otherwise attempt and demonstrate to layman, that they are capable of interfering even with public institutions. Sometimes they may be in a position, if they work, hand in glove with corrupt officials to show some results. The complainant came to know that his house and property would be eventually auctioned, by the Bank, and it was the Accused party who gave him the first information. The testimony of the complainant and his mother confirm above. It is also evident from the testimony of witnesses that transpired in court that:

(a) Complainant nor his mother never made an effort to ascertain how the Accused got information of auctioning the property.

(b) Nor has the complainant tried to ascertain whether (a) above is correct.

- (c) Complainant nor his mother never inquired from the Accused party as to how auction sale would be suspended or stopped.
- (d) The complainant did not take the trouble to verify from bank officials about above as the complainant was known to bank officials.
- (e) Within a very short space of time ten thousand rupees paid to the Accused having collected money by breaking a till.
- (f) Having paid Rs. 10,000/-, complainant never inquired about the progress of settling the issue, with bank, from the Accused-Appellant.
- (g) Accused solicited Rs. 10,000/- to get the property released within 21 days. Almost immediately or before the said expiry of 21 days as told by the Accused-Appellant the complainant initiated steps to repay or settle the bank having obtained a loan from one 'Wasantha Malli', who was introduced by his brother-in-law Radakrishnan.
- (h) Radakrishnan not made known about the dealings the complainant had with the Accused party as regards the solicitation of Rs. 10,000/-

It is the view of this court that (a) to (h) above demonstrate and establish the deficiencies and improbability of the prosecution version. The failure to ascertain the progress of the Accused-Appellant dealings if any with

the bank and the other immediate steps to settle the bank, independently of any intervention by the Accused-Appellant, creates a reasonable doubt in the prosecution version. A complainant who applied for a loan facility and obtained same from a bank, cannot be so ignorant of the steps that would follow or the consequences that flow on his failure to settle the facility. If he depends on a Grama Sevaka to negotiate and settle the issue, one cannot contemplate as to why no inquiry was made about the progress made by the relevant Grama Sevaka, having parted with ten thousand rupees. The probabilities echoes in favour of the Accused party, which is a question of fact. In Wickremasinghe Vs. Dedoleena and others 1996 (2) SLR at 96 – per Jayasooriya J. “A Judge, in applying the test of probabilities and improbability relies heavily on his knowledge of men and matters and the pattern of conduct observed by human beings both ingenious as well as those who are less talented and fortunate”.

I wish to observe that the realities of life and the testimony of a witness cannot always be co-related. Nothing is perfect in life and the truth does not surface so easily as a man so bias could attempt to hide the truth or distort it. The test of probability need to be applied and recognized to

grapple with normal human behavior and problems and pave the way for likelihood of occurrence.

**(B)** During the course of the argument another question arose, that the judgment was delivered by not the Judge who heard and saw the witnesses. The trial Judge must carefully follow the evidence led and he would always have the advantage of the impressions created by the witnesses whom he saw and heard. When he sit down to write the Judgment it is natural to recollect the finer points in the case. If the trials in the original court are heard and taken up on a day to day basis, it may not be necessary to resort to the provisions contained in Section 48 of the Judicature Act. Over the years the ever increasing litigation has resulted in Judges granting postponements to ensure that good part of the cases in the role could be taken up for hearing. On the other hand the law permits jury option to be ascertained, from the Accused party and the majority of criminal cases are now heard as a non-jury trial. The several instances where the presiding trial Judge is unable to continue with the trial are referred to in Section 48 of the Judicature Act. This section no doubt enable the succeeding Judge to continue the case from the point it was stopped. The discretion is vested in the trial Judge to re-summon

the witnesses and commence proceedings afresh. The proviso to Section 48 permits the Accused party to make an application and demand for a fresh trial or to recall witnesses.

The way above section is drafted and introduced by the legislature no doubt casts an obligation on the trial Judges to use his discretion in a reasonable manner and decide for himself and to select the options available under Section 48 of the said Act. If and when the succeeding trial Judge decides to re-hear witnesses or hear the case afresh or continue from the stage it was stopped the law envisages the trial Judge to make up his mind and do what is necessary for the case and do justice to the case. There is no automatic continuation of the trial, vested in the succeeding Judge. The succeeding Judge is under in any circumstances bound to give a fair hearing to the Accused party or to the parties in a case as recognized by article 13 of the Constitution. In the instance case I agree with learned Senior State Counsel that the Accused party made no such application as required by the Provisions of Section 48 of the Judicature Act. But a continuation by the trial Judge without formally adopting the proceedings would be unacceptable and it is essential to record that fact of adopting proceedings, which would be on one hand the usual practical approach. On the other hand an integral part of a fair

trial, to adopt the proceedings and go ahead with the case. If not, just like the case in hand justice is never seen to be done. It is imperative to do so and a practice to ascertain from the parties whether to adopt the proceedings has developed in our jurisdiction which equates with a right to a fair hearing.

As regards absence of formal adoption of proceedings the case of *Ratnayake Vs. A.G* is relevant 2004(1) SLR 390.

Held:

The trial judge who finally concluded the trial had failed to formally adopt the proceedings held before his predecessor. This is a violation of a fundamental procedural requirements which justifies a re-trial in the interests of justice

Per Nanayakkara J.,

“Ordering a re-trial against the accused-appellant who had be under the strain of a criminal charge poised over his head for such a long period of time 15 years – would be resulting in causing irremediably detrimental consequences and disorganization to his family”

The question of a trial Judge who never had the opportunity to hear evidence of witnesses or Judgment founded on evidence led before another Judge had not been approved in our legal system from ancient times (1900). As at present one could argue that times are different. Whatever the difference the basic rules should be followed not for the benefit of the court, but for the litigants. *In Samaraweera Vs. Jayawardena* 4 NLR 106..

An allegation of misconduct, in an action for divorce ought to specify the date and place of the act complained of

Though The Courts Ordinance, section 89, provides that in the case of a removal of a judge, while the suit is pending, another judge may take up the case and act on the evidence already recorded, yet such a course should not be followed except where such evidence is of a merely formal character.

In a case where the decision depends altogether upon the credit to be given to the plaintiff and his witnesses, it is not proper for a judge who has not heard the plaintiff and his witnesses to decide on their veracity and trustworthiness, when he has the means in his power of judging for himself by calling and examining them.

In all the above facts and circumstances and particularly for the reasons in **(A) & (B)** above, we are not inclined to favour the prosecution version. Nor do we wish to send the case back to the original court for trial de nova. As such we proceed to set aside the conviction and sentence, and allow this appeal.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

P. R. Walgama

I agree.

JUDGE OF THE COURT OF APPEAL