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

Kurusuththu Arokyanadar
Accused – Appellant

Vs.

CA Appeal No: 292/2009
HC Colombo B 1580/2005

Commission to Investigate Allegations of Bribery and Corruption.

Respondent

Before : Sisira de Abrew J &
DSC Lecamwasam J

Counsel : CR De Silva PC for the accused appellant.
Thusith Mudalige SSC for the Respondent.

Argued on : 16th, 17th, and 18th of November 2011

Decided on : 30.11.2011

Sisira de Abrew J.

The accused appellant (hereinafter referred to as the appellant) in this case was indicted under Section 19 (b) and 19(c) of the Bribery Act for soliciting Rs.3000/- from Sabhapathi Kulendran and under Section 19(b) and 19(c) of the Bribery Act for accepting Rs.3000/- from said Sabhapathi

Kulendran. The 1st and 2nd counts were under 19(b) and 19(c) of Bribery Act for solicitation of Rs.3000/- The 3rd and 4th counts were under 19(b) and 19(c) of the Bribery Act for acceptance of Rs.3000/-.

The learned trial Judge, after trial, convicted the accused appellant on all four counts but sentenced only on 2nd and 4th counts. On the 2nd count he was sentenced to a term of two years rigorous imprisonment (RI) and to pay a fine of Rs.5000/- carrying a default sentence of twelve months RI. Same sentence was imposed in respect of count No.4. In addition to the above sentence learned trial Judge, acting under section 26 of the Bribery Act, ordered the accused appellant to pay Rs.3000/- carrying a default sentence of twelve months RI. Being aggrieved by the said conviction and the sentence, the accused appellant has appealed to this court.

Facts of this case may be summarized as follows: PC Kulendran who was a Police officer attached to the Bribery and Corruption Commission (hereinafter referred to as the BC Commission) on 3.5.2005 met the accused appellant who was a Grama Sevaka and requested a certificate certifying that he was an unmarried person be issued. He who was one of the investigating officers in this case made this request after receiving instructions from his superior officer. The accused appellant requested a sum of Rs.3000/- to fulfill the request. On 25.5.2005 PC Kulendran, PC Ajith and IP Liyanage went to Kotahena area where the accused appellant's office is located. Kulendran gave relevant documents and Rs.3000/- to the accused appellant and PC Ajith gave a signal to IP Liyanage who came and arrested the accused appellant with Rs.3000/- given by PC Kulendran. The accused appellant in his evidence denied the incident. According to him Kulendran

came on several occasions and requested a certificate certifying that he was an unmarried person. On first two occasions he refused. On 3rd of May when he came for the 3rd time he cried and asked for the certificate. Accused appellant requested him to bring the relevant documents. On 25th of May Kulendran came with relevant documents. He kept some of the documents with him and gave the rest to Kulendran who thereafter left the place. He (the accused appellant) thereafter went near his cupboard to keep his documents. When he came back to his table Kulendran and five others came and asked for money. When he questioned about it he saw a thousand rupee note fallen on the ground near his chair. When he refused the request by witness Liyanage to pick up the note and give, Liyanage came to assault him. Then he was taken into custody. This was the summery of the evidence of the accuse appellant.

Rangasamy was called by the accused appellant. According to him on 25.5.2005 he came to the communication centre which was two feet away from the accused appellant's table to take a call. At this time a person who was talking to the accused went away. When the accused appellant went inside his room, the said person came back, kept a thousand rupee note on the accused appellant's table and went away. Just then said person came back with three others and the accused appellant too came back to his table. They requested the people in the communication centre to leave the place. Later he saw the accused appellant being taken away by them. This was the summery of Rangasamy's evidence. From this evidence it is clear that Rangasamy had not seen the end of the incident that took place at the accused appellant's table.

Evidence of Rangasamy is that he saw somebody placing a thousand rupee note on the table of the accused appellant. He does not say that he saw a thousand rupee note fallen on the ground. But the evidence of the accused appellant was that he saw the thousand rupee note fallen on the ground. The learned trial Judge on the said contradiction rejected the defence evidence. It is to be noted that Rangasamy could not have seen the end of the incident that took place at the accused appellant's table as he and the others were asked to leave the place by the BC Commission officers. Isn't it possible for the thousand rupee note to fall from the table? No one can say it is impossible. For these reasons I hold that it was incorrect for the learned trial Judge to reject the defence evidence on the said ground. Even if one assumes that Rangasamy cannot be believed, was it correct for the learned trial Judge to reject the evidence of the accused appellant? I now advert to this question. It has to be noted that the accused appellant made his statement to Bribery officers whilst he was in their custody and therefore it has to be a prompt statement. Accused gave lengthy evidence but the prosecution could not mark any contradictions or omissions with his statement. This shows that his evidence satisfies the test of consistency. In my view if evidence of an accused person who makes a prompt statement whilst in the custody of investigators satisfies the test of consistency, it is something that must be considered in his favour when evaluating his evidence. The learned trial Judge has failed to consider these matters. However it has to be stated that accused cannot be confronted with confessional parts of his statement made to the investigating officer. Although the learned trial Judge rejected the evidence of the accused appellant on the said contradiction what is the evidence of the Bribery officers with regard to the taking of Rs.3000/- from the accused appellant.

Liyanage, at 136 of the brief, says that when he questioned the accused appellant about the money, he (the accused appellant) took the money from his trouser pocket and gave. But he contradicts this evidence at page 150 of the brief and says that the accused appellant took money from the shirt pocket and gave. Learned trial Judge failed to consider this vital contradiction. IP Liyanage is a Police Officer. When police officers come to give evidence they do so after reading their notes. Police Officers when giving evidence cannot make contradictions of this nature. Such a contradiction therefore becomes a vital contradiction which can shake the truth of the prosecution case. Benefit of such contradictions must be given to the accused.

Kulendra who is a Police Officer says, at page 59 of the brief, that when he gave Rs.3000/- to the accused appellant he kept the currency notes in his trouser pocket. But PC Ajith, at page 111 of the brief, says that the accused appellant took Rs.3000/- from his shirt pocket and gave them to IP Liyanage. Here again one Police Officer contradicts the other Police Officer. As I pointed out earlier Police officers, before giving evidence, read their notes. Therefore when this kind of contradiction is marked it becomes a vital contradiction which is capable of creating a reasonable doubt in the prosecution case. Learned trial Judge failed to consider these matters. When these contradictions are considered very serious doubts are created in the truth of the prosecution case and the evidence of the accused that thousand rupee currency note was on the ground becomes believable. When I consider all these matters I hold the view that the rejection of the evidence of the accused was wrong. Further these contradictions in my view create reasonable doubts in the prosecution case relating to the acceptance of

Rs.3000/- by the accused appellant and also shake the credibility of the three Police Officers (PC Kulendran, PC Ajith and IP Liyanage). Learned SSC upholding the best traditions of the Attorney General's Department submitted that in view of the said contradictions he would not support the convictions on acceptance charges (3rd and 4th charges). For the above reasons I hold the view that convictions on 3rd and 4th counts cannot be permitted to stand. I therefore set aside the convictions on 3rd and 4th counts and acquit the accused appellant of 3rd and 4th counts. But learned SSC submitted that he would support the convictions on solicitation charges (1st and 2nd counts). He submitted that the accused appellant in document marked P7 had made a false recommendation to his superior officer. He contended that no Grama Sevaka would make this kind of false recommendation except for money. I now advert to this contention. The evidence of the accused appellant must be considered when considering this contention. According to the accused appellant on 3.5.2005 Kulendran came and cried asking for the certificate and requested him to consider the case as one of his children's cases. He therefore decided to help Kulendran. It is true that no Grama Sevaka would make a recommendation risking his employment. But different people act in different ways. Therefore it is difficult to make a sweeping statement that no Grama Sevaka would make this kind of recommendation except for money.

What is the other evidence to affirm the conviction on solicitation? Prosecution has only the evidence of Kulendran to support the convictions on solicitation counts. Learned SSC contended that the accused appellant had not denied the charge of solicitation in his evidence. The

accused appellant at 191 of the brief denied the charge of solicitation. Therefore I am unable to agree with the said contention.

I have earlier set aside the conviction on the 3rd and the 4th counts. In view of the contradiction in IP Liyanage's evidence and the contradictions between PC Kulendran and PC Ajith, their evidence on the acceptance of Rs.3000/- will have to be rejected. Further in view of the said contradictions it is doubtful whether IP Liyanage took Rs.3000/- from the possession of the accused appellant and there is a very serious doubt whether currency notes were taken from the possession of the accused appellant. The evidence of the accused appellant is that he saw a thousand rupee note on the ground. Rangasamy's evidence is that he saw a person placing a thousand rupee note on the accused appellant's table. I have earlier held that the rejection of the accused appellant's evidence by the trial Judge was wrong. When I consider all these matters reliance can be placed on the defence evidence. The evidence of the accused appellant was that the thousand rupee note was on the ground. If he had solicited money from Kulendran why should he allow it to fall on the ground? He should have, without hesitation, accepted it. Therefore the accused appellant's evidence creates a reasonable doubt in the entire evidence of the three Police Officers including the evidence relating to the solicitation. Then the accused appellant should be acquitted of solicitation charges.

PC Kulendran is the only witness who speaks about the solicitation. Learned SSC contended that although PC Kulendran's evidence on the acceptance of Rs.3000/- was rejected, his evidence on the solicitation charge can be accepted. Can the court reject evidence of one witness on one

charge and accept the evidence on the other charge. To answer this question I would like to consider a judicial decision. In Samaraweera Vs Attorney General [1990] 1 SLR 256 Court of Appeal observed following facts.

"Four accused were indicted for murder on charges under sections 296, 315, 314 of the Penal Code. At the end of the prosecution case the 1st and 4th accused were acquitted on the directions of the judge to the jury. At the conclusion of the trial the 2nd accused was acquitted by the unanimous verdict of the jury while the 3rd accused appellant was found guilty of culpable homicide not amounting to murder on the basis of grave and sudden provocation on the count of murder and acquitted on the other counts. The main challenge to the verdict was on the ground that it was unreasonable having regard to the fact that the same witness who testified against the 3rd accused had testified against the 2nd accused who was acquitted. Having disbelieved the two witnesses as against the 2nd accused, the jury should not have accepted their evidence against the 3rd accused appellant. The maxim *falsus in uno falsus in ominibus* should have been applied."

Held :

"The verdict was supportable in that the acquittal of the 2nd accused could be attributable to the fact that vicarious liability on the basis of common intention could be imputed to him on the evidence even if the two witnesses were believed. The maxim *falsus in uno falsus in ominibus* could not be applied in such circumstances. Further all falsehood is not deliberate. Errors of memory faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between

different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the truth."

Applying the principles laid down in the above judicial decision, I hold that Court can reject the evidence of a witness on one charge and accept his evidence on another charge if there are compelling reasons to de so. In the instant case PC Kulendran's evidence on the charge of acceptance of Rs.3000/- has been rejected by me. Are there compelling reasons for me to accept his evidence on the charge of solicitation? I have earlier held that reliance could be placed on the accused appellant's evidence. The evidence of the accused appellant is to the effect that the thousand rupee note was on the ground. If reliance could be placed on the evidence of the accused appellant then court has to conclude that currency notes were foisted upon him by the investigators of this case. Then can the court accept the entire evidence? I say no. If they could introduce Rs.3000/- to the accused, what is the difficulty for them to level an allegation of solicitation? I therefore hold that there are no compelling reasons to accept part of Kulendran's evidence when the other part has been rejected. For these reasons I hold the view that I am unable to accept the evidence of PC Kulendran on the solicitation

count. If his evidence cannot be accepted on the charge of solicitation, the accused appellant should be acquitted of the solicitation charges.

There is another matter that should be considered. According to the indictment charge of solicitation was on 18.5.2005. But according to the evidence of PC Kulendran the alleged solicitation was on 2nd of May 2005. Learned PC therefore contended that the accused appellant had been misled by this error. Learned SSC contended that solicitation of Rs.3000/- was the only amount solicited by the accused appellant and as such accused appellant could not say that he was misled. Section 166 of the Criminal Procedure Code reads as follows: "Any error in stating either the offence or the particulars required to be stated in the charge and any omission to state the offence or these particulars shall not be regarded at any stage of the case as material, unless the accused was misled by such error or omission."

The most important question that must be decided is whether the accused appellant was misled by the said error. That is to say that the evidence reveals the solicitation was on the 3rd of May 2005 but the indictment alleges that the solicitation was on the 18th of May 2005. The accused appellant in his evidence stated that PC Kulendran came to meet him on four occasions. According to the evidence led at the trial there was no meeting between the accused appellant and PC Kulendran on 18th of May 2005. Which is the allegation that the accused should answer? Is it the allegation on the 3rd or the 18th ? When these matters are considered it can be said that the said error in the charge a material error and that the accused was misled at the trial. Learned SSC contended that since the indictment alleges the commission of the offence was on or about 18th of May 2005

period of fifteen days could be considered within the meaning of the term'on or about'. He cited PandithaKoralage Vs Selvanayagam 56 NLR 143 wherein Swan J observed the following facts: "The date given in the plaint of an alleged offence was stated to be 'on or about March 28, 1954.'
Held, that a mistaken date in an indictment is not a material error unless the date is of the essence of the offence or the accused is prejudiced." It has to be noted here that the error in the charge of the said case was only one day. This judicial decision is not an authority for the contention that is being debated in this case since the error in the charge of this case is fifteen days.

Learned PC cited Attorney General Vs Dheen 61 CLW 74 where the charge against the accused was to the effect that he on 18th of December 1951 committed criminal breach of trust on Rs.340.09. But there was no evidence to prove the commission of an offence on that day. The accused was discharged by the Magistrate. The Attorney General appealed. In appeal it was contended that the averments in the charge, taken together, was reasonably sufficient to give the accused notice of the matter with which he was charged. Gunasekara J held thus: "the charge meant that the offence was committed on 18th of December 1951, and that the prosecution had failed to prove this charge. All what the accused had to do was to show that there was no evidence that he misappropriated any money on the day in question." I have to note in the said case the charge did not allege the accused committed the offence on or about 18th of December but alleged that it was on 18th of December.

In the instant case the indictment alleged that the offence was committed on or about 18th of May 2005. But the prosecution did not lead

evidence to prove this charge and as such it has to be concluded that the charge has not been proved. When I consider all these matters I am unable to conclude that term 'on or about' covers a period of fifteen days. If the evidence reveals that the offence was committed around midnight then difference of one day is permissible. But there is no justification to permit a difference of fifteen days. If the offence was committed during a period then the prosecution has a right to state the period. For the above reasons I hold that the charges of solicitation have not been proved by the prosecution. I do not intend to direct a re trial on the solicitation charges as I have else where of this judgment held that I was unable to accept PC Kulendran's evidence on solicitation charges. I have earlier decided that the accused appellant should be acquitted on solicitation charges,

For these reasons I set aside the convictions ant the sentences of the accused appellant on all four counts and acquit him of all the counts.
Appeal allowed.

Judge of the Court of Appeal.

DSC Lecamwasam J
I agree.

Judge of the Court of Appeal.