

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

**In the matter of an appeal under and
in terms of Section 331 of the
Criminal Procedure Code Act No.
15 of 1979.**

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

Complainant

**Court of Appeal
Case No. CA 187/2010**

Vs,

Karanayaka Kankanamge Don Diyonis

Accused

And Now Between

Karanayaka Kankanamge Don Diyonis

Accused-Appellant

**High Court of Colombo
Case No. B 1789/2008**

Vs,

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

Complainant-Respondent

Before : S. Devika de L. Tennekoon, J &
S. Thurairaja PC, J

Counsel : Rienzie Arsecularatne PC with Thilina Punchihewa for the
Accused-Appellant
Parinda Ranasinghe SDSG for the Complainant-Respondent

Judgment on : 12th January 2018

Judgment

S. Thurairaja PC J

The accused appellant, (Sometimes referred to as appellant hereinafter) who was the Officer in Charge (OIC) of the Police Station of Urubokka was convicted and Sentenced for Soliciting and accepting a Bribe, being aggrieved with the said findings preferred an appeal to the Court of Appeal.

The Accused appellant was indicted by the Director- General of the Commission to investigate allegations of Bribery or Corruption (Here in after referred as Bribery Commission) under section 16 (b), 19 (c) of the Bribery Act. There were four counts in the Indictment, after the trial the appellant was found guilty and sentenced to 1-year rigorous imprisonment each for the first and third counts and imposed a fine of Rupees 5000/- on each count in default 3 months simple imprisonment.

The appellant had submitted following grounds of appeal;

- a) Decoy was not testified
- b) Trial Judge had not considered documents marked V1 to V8
- c) High Court Judge had failed to consider the motive for Sirisena who is the virtual complainant to complaint.

It will be appropriate to narrate the facts of the case briefly as revealed at the trial. The prosecution version is that Sirisena who is an illicit liquor seller from Urubokka area had called the Bribery Commission and informed that the OIC of the Police Station of Urubokka, the appellant is demanding money for not to file action against him and for him to sell illicit liquor. The Commission laid trap and arrested the appellant on accepting Rupees 5000/- The appellant's version is that one of the Commissioner Mr. Neville Guruge had a grudge against him and he presented a fabricated case.

Prosecution called five witnesses to prove the case, that including the Virtual complainant Ranavithanthrige Sirisena, his son Ranavithanthrige Wasantha, Investigating officers Cl. Liyanage, PS. 29243 Kahatadeniya and SP. Palitha Bandara. The Accused appellant gave evidence and called two witnesses namely SSP Gamini Wijetunga and OIC Chandrasena.

Witness Sirisena who is also known as Kottawa Siri, gave evidence in court and said that he is involved in selling illicit liquor (seeni karingjang) for about 17 years. He was arrested by the Police on many occasions and been convicted more than 10 times. In the recent times (period relevant to the indictment) he was approached by the appellant and demanded money from him, and told him that if it is not paid he cannot do his business. He submitted that he paid earlier to the appellant and felt he can't pay any more hence he decided to complain to the authorities. Since he doesn't use a phone he asked his son R. Wasantha to call the Bribery Commission, he called and the officers came to him and laid the raid. On the day in question 13th June 2007 he was given 5 marked Rupees 1000/- currency notes by the bribery official Liyanage. He took it and went to the Police Station of Urubokka with an official Kulendran attached to the Bribery Commission, in the pretext of employing him at his work place. They discussed about the clearance letter to Kulendran and at the office room of the appellant, there the appellant had asked what happened to that message (අර පනිවිඩය කොතොමුද) Then the witness replied saying I can't give Rs. 15000/- I will give Rs. 5000/- and gave Rs. 5000/- to the appellant. (මම රුපියල් 15000 ක් තරම් නම් දෙන නැත, මම

5000 ක දෙනම කියල රුපියල් 5000 ක දුන්නා) The appellant took it in his hand and put it, in the table drawer. At that time Kulendran left the room and signalled the others to come, they entered the office room of the appellant, after identifying CI Liyanage took the money from the drawer. This witness admitted that he had many cases in the court and he was convicted on many occasions. 10 days prior to this incident he was raided by the Police officers attached to Urubokka Police Station for possession of about 25 litres of illicit liquor. His son Wasantha was arrested for another offence previously.

Chief Inspector Liyanage who was the team leader in the raid testified before the court and submitted that Kulendran was a Police officer attached to the Bribery Commission. He was a member in the team which was involved in this investigation. He was detailed to accompany the virtual complainant and he took part and made relevant notes, subsequently he had left the department and presently residing overseas.

The first ground of appeal is that the decoy didn't give evidence hence the conviction could not stand.

It is appropriate to see who is a decoy. According to the definition by **Merriam-Webster**;

lure, entice, inveigle, decoy, tempt, seduce mean to lead astray from one's true course. lure implies a drawing into danger, evil, or difficulty through attracting and deceiving. (lured naive investors with get-rich-quick schemes) entice suggests drawing by artful or adroit means. (advertising designed to entice new customers) inveigle implies enticing by cajoling or flattering. (fund-raisers inveigling wealthy alumni) decoy implies a luring into entrapment by artifice. (attempting to decoy the enemy into an ambush) tempt implies the presenting of an attraction so strong that it overcomes the restraints of conscience or better judgment. (tempted by the offer of money) seduce implies a leading astray by persuasion or false promises. (seduced by assurances of assistance)

Decoy is also defined at another place as;

"a person who entices or lures another person or thing, as into danger, a trap, or the like"

Chambers Thesaurus, New Edition 1988, Defines as follows;

Decoy – (n) attraction, bait, ensnarement, enticement, inducement, lure, pretence, roper(-in), skill, trap. Inveigle, lead, lure, seduce, tempt.

(V) allure, attract, bait, beguile, deceive, draw, ensnare, entice, entrap. entice

Macmillan English Dictionary for advanced learners (New edition, second edition 2007) Defines as follows;

"a person or thing that you use to trick someone into going somewhere or doing something."

The word decoy is common for both animals and human beings whenever the purpose of their employment is to trap someone else. Hence, a decoy witness is a person who is employed by investigating agencies to bring culprits into trap. It is an easy and efficacious manner resorted to in a number of jurisdictions to bring to justice such criminals who are otherwise successfully evading process of law.

It is important to differentiate a decoy from accompanying witness. Decoy is a person who is involved in the transaction, accompanying witness is a person who goes with the decoy or person in concern to witness the transaction.

In this case, as per the evidence, persons involved are, the appellant and the virtual complainant R. Sirisena, Kulendran was there in the pretext of getting clearance for employment. The alleged transaction was related to the illicit liquor business, nothing related to the employment clearance of Kulendran. Considering the available evidence submitted before the High Court and the submissions of Counsels before the Trial

court and appellate court we conclude that Kulendran is not a decoy as defined in the dictionary and decided case laws.

Considering the available materials, we conclude he is not an accomplice, he is a person sent by Bribery investigators to observe and corroborate the virtual complainant.

The available evidence reveals that the virtual complainant Sirisena had gone with Kulendran into the office room of the appellant. As we concluded earlier that Kulendran is not a Decoy, hence there are two witnesses apart from the appellant to speak what happened in the office room. This will bring us to a point of acceptability of the evidence of Sirisena. The evidence Ordinance and other case laws will govern and guide the Judge. In this case the trial judge had found the evidence of the witness Sirisena can be relied upon. Further this witness was independently corroborated by many other factors such as recovery of money from the drawer of the appellant's table which was occupied by the appellant.

Credibility of the virtual complainant R. Sirisena is challenged by the appellant in the original court. It is the content of the appellant that this witness is involved in selling illicit liquor and he has previous convictions therefore, he is unreliable.

Then the next question arise can a Judge depend on a single witness to convict an accused. Time and again this was discussed by Courts, Legislators and other forums. Section 134 of the Evidence Ordinance clearly provides answer to this question.

134. *No particular number of witnesses shall in any case be required for the proof of any fact.*

In **Sunil vs Attorney General** 1999 (3) Sri LR191, F.N.D. Jayasuriya J held,

"There appears to be a misgiving among trial Judges in bribery court that the testimony of a witness in bribery prosecution is required to be corroborated before it could be acted upon; such a proposition is a manifest error of law."

[Emphasis added]

Earlier days, in rape cases, character of the victim was a material fact, but now it had changed and the law has developed to the extent to protect animals, fauna and flora even things without life. Courts held, that prostitutes also can be subject to rape. Recognition of human values and rights, made the courts to decide the incident (offence) not the persons involved. It is immaterial on whom by whom it is committed.

In this case the test is whether the witness is reliable to accept his evidence. Therefore, the court cannot be told to reject because he was involved in illicit liquor trade nor he has previous convictions.

Considering the reasons given by the trial judge and the evidence before the court, we find that the witness was not contradicted or found fault on material points. Therefore, we agree with the trial judge in accepting the evidence of Sirisena.

The appellant submits that the trial judge has not considered defence documents marked V1 to V8. It will be appropriate to list down all those documents for easy reference.

- a) **V1** – Charge Sheet against R. Sirisena, in Morawaka MC case 86500 (Page 87 of the brief) Marked through Sirisena and produced on 9/9/2009)
- b) **V2** – B Report against Wasantha at MC Morawaka case number 95641 (at page 10 Marked through Sirisena and produced on 11/5/2010)
- c) **V3**- First B report of this case filed by CI Liyanage at MC Morawaka number B 98026/2007 (at page 136, marked through CI. Liyanage on 11/05/2010)
- d) **V4**- Entry made by Nelie Guruge on the Bribery office file dated 11/06/2007, (Page 136, produced through CI Liyanage on 11/05/2010)

- e) **V5**- Contradiction marked on ASP Palitha Bandara (Page 187 date 14/05/2010)
- f) **V6** – Sirisena Pleaded guilty on a charge and fined Rs. 51000/-9Page 197, Marked through the Appellant on28/06/2010)
- g) **V7** – Entry dated 09/03/2007 made by appellant regarding Nevile Guruge’s phone call (Page 200, marked and produced through the appellant on 28/06/2010)
- h) **V8** – Certified copy MC Morawaka case number 95641 assault regarding a land dispute of Gamini wasantha (page 207 marked and produced by the appellant on 28/06/2010).

The above list shows the documents and its details, we perused the said documents, evidence and the reasons given by the trial judge and we conclude, that the learned High Court Judge has considered these documents and concluded that there is no reasonable doubt was created, we have no reason to interfere with his findings.

The final grounds of appeal of the appellant is the High Court Judge failed to consider the motive, for Sirisena make this complaint.

It is a proven fact that the virtual complainant Sirisena was involved in the trade of illicit liquor for more than 17 years. He had been arrested on many occasions and convicted more than 10 times. So, arrest by the appellant is not a new thing. On one hand, the witness may have had the reason or even vengeance to complain against the appellant. On the other hand, as he claims in his evidence, it had become unbearable to give money to the appellant, for him to make the complaint to the bribery commission.

Anyhow the witness when this was suggested to him he categorically denied it and said it had become unbearable to make “*payment*” and to run his “*business*”, made him to make the complaint to the Bribery Commission. The learned trial judge after evaluating all the evidence and the circumstances accepted the evidence of the virtual complainant Sirisena.

The appellant also submitted, that the commissioner in charge of investigations Mr. Nevile Guruge, had a grudge on the appellant was the cause of this investigation. This matter had extensively dealt by the trial judge, we also perused the evidence and documents before the court. After careful consideration, we have no reason to interfere with findings of the trial judge.

Considering all the submissions, evidence, documents and the judgement we find that there is no merit in the grounds of appeal hence we conclude that the conviction is acceptable and we have no reasons to interfere with the same. Hence we affirm the conviction.

We draw our attention to the sentence imposed, considering the gravity of the offence we find the sentence is very lenient.

It is disheartening to note, that time and again the law makers, Courts and the public had expressed serious concern on bribery cases. As it claimed it is cancer to the society. All of us talk about it but when it comes to implementation we take the side of the convict and not the society at large.

In this case mitigatory circumstances submitted by the accused were; he has no previous convictions, his wife is sick, children are studying. The appellant is a Police officer serving the government, he cannot have any previous conviction, it is mandatory so, this cannot be a mitigatory circumstance. Informing court that Wife is not well, children are studying are mere submissions, there is no evidence before the court. Hence this cannot be considered as a mitigating factor.

The learned trial Judge had invited his attention to the guidance given by the Supreme Court in reference number 3 of 2008 and imposed 1-year Rigorous Imprisonment on the 1st and 3rd count and suspended the same for a period of 10 years, and a fine of Rs. 5000/- in default 3 months simple imprisonment. In laymen's view other than losing the job the appellant is not getting a substantial punishment. One of the purpose for sentencing is deterrent, which is not present here.

Anyhow the sentence was imposed on 22/11/2010 and the Respondent state agency had not appealed or moved in revision against the sentence. Further the counsel for the respondent did not make any application to enhance the sentence. Therefore, we are not revising the sentence at this juncture, anyhow we place on record of our concern for the trial judges and the Respondent to be mindful in the future.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

S. Devika de L. Tennekoon, J
I agree,

JUDGE OF THE COURT OF APPEAL