

**KESARA SENANAYAKE V.
ATTORNEY GENERAL AND ANOTHER**

SUPREME COURT

DR. SHIRANI BANDARANAYAKE, J.,

SRIPAVAN J. AND

IMAM, J.

S. C. APPEAL NO. 134/2009

S. C. (SPL.) L. A. NO. 218/2009

H. C. APPEAL NO. HCMCA 260.08

M. C. COLOMBO CASE NO. 9283/01/07

MARCH 17TH, 2010

Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994 – Section 3 – Institution of proceedings against such person for such offence in the appropriate Court – Section 11 – Director General to institute criminal proceedings – Supreme Court Rules 4 and 28 – failure to comply with – consequences – Code of Criminal Procedure Act – institution of proceedings – the person making the complaint or written report would become the complainant.

The Accused – Appellant – Appellant (Appellant) preferred an appeal to the Supreme Court against the order of the High Court whereby the High Court had affirmed the conviction and sentence imposed by the Magistrate. When this matter was taken up for hearing in the Supreme Court, a preliminary objection as to the maintainability of the appeal was raised by the Respondent.

The contention of the Respondent was that the Appellant had failed to name the Director-General of the Bribery Commission, who is the complainant, as a party Respondent in the appeal to the Supreme Court. It was further contended that the Appellant had not complied with Rules 4, 28 (1) and 28 (5) of the Supreme Court Rules of 1990. The learned President's Counsel for the Appellant submitted that the Commission itself was the proper party to have been made a party and there was no necessity to make the Director-General a party.

Held:

- (1) If the aggrieved person or persons desire to be the 'complainant', the Code of Criminal Procedure Act would give him the right to make a 'complaint' making himself the 'complainant'. However if the aggrieved person or persons, without exercising their right to make a complaint in terms of the Code of Criminal Procedure Act, state their grievances to the police, who after inquiry decides to institute proceedings on a report filed by the police, in such situation, the police officer who instituted the proceedings would become the complainant.

In terms of the provisions contained in Sections 2 and 136 (1) of the Code of Criminal Procedure Act and the ratio of decisions referred to, it is evident that a person, who makes such a complaint to the Magistrate would be regarded as a complainant.

- (2) The provisions of the Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994, reveal that the functions of the Commission are restricted to investigating allegations and directing the institution of proceedings.
- (3) In terms of the provisions contained in sections 11 and 12 of the Act No. 19 of 1994, where in the course of an investigation of an allegation of bribery or corruption, if it discloses the commission of an offence, the Commission to Investigate Allegations of Bribery and Corruption shall direct the Director General to institute criminal proceedings against such person in the appropriate Court. When such a direction is given by the Commission, it is mandatory for the Director – General to institute proceedings.
- (4) The totality of Rules 4, 28(1) and 28(5) of the Supreme Court Rules 1990 indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the appeal.

Held further per Dr. Shirani Bandaranayake, J.,

“In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be

adversely affected by the result of the appeal should be made parties.”

AN APPEAL from the judgment of the High Court Colombo.

Cases referred to:

1. *The Attorney-General v. Herath Singho* – (1948) 49 NLR 108
2. *Nonis v. Appuhamy* – (1926) 27 NLR 430
3. *Babi Nona v. Wijesinghe* – (1926) 29 NLR 43
4. *Ibrahim v. Nadarajah* – (1991) 1 Sri L. R. 131

C. R. de Silva, P. C., with *R. J. de Silva* and *Dulan Weerawardena* for the Accused- Appellant – Appellant.

Gihan Kulatunga, SSC with *Asitha Anthony* for the Respondents- Respondents.

Cur.adv.vult.

December 06th 2010

DR. SHIRANI A. BANDARANAYAKE, J.

This is an appeal from the order of the High Court dated 28.08.2009. By that order, the High Court had affirmed the conviction and sentence imposed by the learned Magistrate in M. C. Colombo Case No. 9283/01/07. The accused-appellant –appellant (hereinafter referred to as the appellant) preferred an appeal before this Court on which special leave to appeal was granted.

At the stage this matter was supported for special leave to appeal, learned Senior State Counsel for the respondents-respondents (hereinafter referred to as respondents) had raised a preliminary objection as to the maintainability of this appeal. After granting leave, this Court had stated that the said objection would be considered at the stage of hearing.

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant, who was the Mayor of the Kandy Municipal Council, was prosecuted by the 2nd respondent, in the Magistrate's Court of Colombo in respect of two counts under Section 70 of the Bribery Act, No. 20 of 1994. It was alleged in Count No. 1 of the charge sheet that the appellant, whilst being the Mayor of the Kandy Municipal Council, had obtained funds for the purpose of attending a workshop organized by the International Union of Local Authorities – Asian and Pacific section and scheduled to be held between 13th to 15th April 2004 in Taipei, Taiwan had not attended the said workshop, but had toured Singapore with his wife and thereby caused a loss of Rs. 185,185/56 to the Government.

The second count was also in respect of the same amount and it was alleged therein that he was guilty of obtaining an illegal benefit to the same value.

The appellant stated that he could not get a visa from Sri Lanka to Taiwan since there was no diplomatic relationship between Sri Lanka and Taiwan. He had met with an accident in Singapore on 12.04.2004, while he was on his way to Taiwan Consulate to obtain his visa to proceed to Taiwan. The appellant accordingly had submitted that in the circumstances he did not have the requisite *mens rea* to commit the alleged offences and that he had not acted intentionally.

After trial the appellant was convicted on both counts by the learned Magistrate on 18.09.2008, and sentenced to one year's imprisonment suspended for 5 years and a fine of Rs. 100,000/- with a default term of 3 months simple imprisonment for the first Count and a fine of Rs. 100,000/-

with a default term of 3 months simple imprisonment for the second count.

When this matter came up for hearing it was agreed that the preliminary objection would be taken up for consideration first. Both parties were accordingly heard only on the preliminary issue raised by the learned Senior State Counsel for respondents.

The contention of the learned Senior State Counsel for the respondents was that the appellant had failed to name the Director-General of the Bribery Commission, who is the complainant, as a party respondent in the appeal to the Supreme Court. In the circumstances, it was contended that the appellant had not complied with Rules 4, 28(1) and 28(5) of the Supreme Court Rules of 1990. Accordingly learned Senior State Counsel for the respondents moved that this appeal be dismissed *in limine*.

Learned President's Counsel for the appellant conceded that the question of identifying the proper party is an essential question in any type of litigation and that the purpose of having the proper party named is to ensure that any decree of Court or a finding of a Court is properly enforceable once such decree is entered or such finding has been made.

Accordingly it was contended that in order to ascertain as to whether it is necessary to make the Director-General of the Bribery Commission a party to this appeal, it would be necessary to consider the provisions of the Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994.

Learned President's Counsel for the appellant referred to Sections 2, 3, 4, 5, 6, 7, 8 and 11 of the said Act, No. 19 of

1994 and contended that the said provisions clearly show that the Director-General has to act on the directions given by the Commission and it is the Commission, which has the responsibility of investigation and the institution of proceedings. Accordingly, the learned President's Counsel for the appellant submitted that the Commission itself was the proper party to have been made a party and there was no necessity to make the Director-General a party to this appeal.

The word 'complainant' is not defined by the Code of Criminal Procedure Act. However, the meaning of the word 'complaint' is defined in Section 2 of the Code of Criminal Procedure Act and is stated as follows:

"Complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence."

Chapter XIV of the Code of Criminal Procedure Act deals with the commencement of proceedings before the Magistrate's Courts and Section 136(1) refers to the fact that proceedings in a Magistrate's Court shall be instituted on a complaint being made orally or in writing to a Magistrate of such Court that an offence has been committed, which such Court has jurisdiction either to inquire into or try such complaint.

Referring to the provisions in the Code of Criminal Procedure Act, which deals with the complaints, Dias, J. in *The Attorney-General v. Herath Singho*⁽¹⁾ had stated that the 'complainant' must mean the person, who makes the 'complaint'. In *Herath Singho (supra)* Dias, J., had to consider the applicability of the word 'complaint'

defined in Section 2 of the Code of Criminal Procedure Act in relation to other relevant sections in the Code. Considering the question, Dias, J., was of the view that the 'aggrieved person or persons' or the police, who have been induced by the aggrieved person or persons, could take up the grievance before Court. In such instances, if the aggrieved person or persons desire to be the 'complainant', the Code of Criminal Procedure Act would give him the right to make a 'complaint' making himself the 'complainant'. If, on the other hand, the aggrieved person or persons, without exercising their right to make a complaint in terms of the Code of Criminal Procedure Act, state their grievances to the police, who after inquiry decides to take up the case and institute proceedings on their own, the said police would file their 'complaint' and the aggrieved person or persons would cease to be 'complainants'. In such situations, it is clear that the police officers, who 'instituted the proceedings' would become the complainant.

Dias, J., in *The Attorney-General v. Herath Singho* (*supra*) referring to Dalton, J.'s decision in *Nonis v. Appuhamy* ⁽²⁾ had stated that,

“ . . . for the institution of proceedings by complaint or written report, the person making the complaint or written report is regarded as the party instituting the proceedings against the accused person.”

This position was further affirmed by Dalton, J., in *Babi Nona v. Wijesinghe* ⁽³⁾, where the Court had considered the right of appeal of an aggrieved party in a matter in which the proceedings were instituted on a written report by a police officer.

As stated earlier in terms of Section 136(1) of the Code of Criminal Procedure Act, the proceedings before the

Magistrate's Court would commence after the institution of a complaint being made to the Magistrate. Considering the provisions contained in Section 2 and 136 (1) of the Code of Criminal Procedure Act and the ratio of decisions referred to earlier, it is evident that a person, who makes such a complaint to the Magistrate would be regarded as a 'complainant'.

The powers and functions of the Commission to investigate Allegations of Bribery or Corruption are stipulated in Act, No. 19 of 1994. The Commission consists of a Chairman and two (2) other members and has the power to investigate into allegations of bribery or corruption. A Director-General is appointed to the Commission in terms of Section 16 of the Act, No. 19 of 1994, to assist the Commission in the discharge of the functions assigned to the Commission. Section 3 of the Act, No. 19 of 1994 states that, based on the communication made to the Commission, where there is disclosure of the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the Commission shall **direct the institution of proceedings** against such person for such offence in the appropriate Court. The said Section 3 of the Act, No. 19 of 1994 is as follows:

*"The Commission shall subject to the other provisions of this Act, investigate allegations, contained in communications made to it under Section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, **direct the institution of proceedings against such person for such offence in the appropriate Court**" (emphasis added).*

Section 4 of the Act, No. 19 of 1994 refers to communications received by the Commission and the conduct of investigations that would be carried out, if it is satisfied that such communication is genuine and discloses material upon which an investigation ought to be conducted. Section 11 of the said Act, No. 19 of 1994, specifies the steps that should be taken by the Commission, where in the course of an investigation conducted by the Commission under Act, No. 19 of 1994, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975. The said Section 11, which is reproduced below, clearly states that the Commission shall direct the Director-General to institute criminal proceedings against such persons.

*“Where the material received by the Commission in the course of an investigation conducted by it under this Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the **Commission shall direct the Director-General to institute criminal proceedings against such person in the appropriate court and the Director-General shall institute proceedings accordingly.***

Provided, however, that where the material received by the Commission in the course of an investigation conducted by it discloses an offence under Part II of the Bribery Act and consisting of soliciting, accepting or offering, by any person, of a gratification which or the value of which does not exceed two thousand rupees, the Commission shall direct the institution of proceedings against such person before the Magistrate’s Court and where such material discloses an offence under that part and

consisting of soliciting, accepting or offering, by any person of any gratification which or the value of which exceeds two thousand rupees, the Commission shall direct the institution of proceedings against such person in the High Court by indictment” (emphasis added).

An examination of the aforementioned provisions of the Act, No. 19 of 1994, reveals that, the functions of the Commission are restricted to investigating allegations and directing the institution of proceedings. It is also evident that on the material received by the Commission in the course of an investigation conducted by the Commission there is disclosure of the commission of an offence, thereafter the role of the Commission is only to direct the Director-General to institute criminal proceedings and the indictment would be signed by the Director-General. The said procedure is clearly laid down in Section 12(1) of Act, No. 19 of 1994, where it is stated thus:

“Where proceedings are instituted in a High Court in pursuance of a direction made by the Commission under Section 11 by an indictment signed by the Director-General, such High Court shall receive such indictment and shall have jurisdiction to try the offence described in such indictment in all respects as if such indictment were an indictment presented by the Attorney-General to such Court”

Considering the provisions contained in Sections 11 and 12 of the Act, No. 19 of 1994 it is quite obvious that where the material received by the Commission to investigate Allegations of Bribery or Corruption, in the course of an investigation conducted under and in terms of the Act, No. 19 of 1994,

discloses the commission of an offence, the said Commission shall direct the Director - General to institute criminal proceedings against such person in the appropriate Court. The said provisions also indicate, quite clearly that when such a direction is given by the Commission that it is mandatory for the Director-General to institute proceedings. Furthermore in terms of Section 12 of the Act, No. 19 of 1994, the indictment under the hand of the Director-General is receivable in the High Court.

It is therefore evident that the Director-General has to be regarded as the complainant, as the authority to institute criminal proceedings on the offences under Act No. 19 of 1994, is exclusively vested with the Director-General of the Commission.

The provisions contained in Section 3 of the Act, No. 19 of 1994, further clarified this position. The said Section 3 of the Act referred to earlier, deals with the functions of the Commission and clearly states that the functions of the Commission are limited to investigate allegations and to direct the institution of proceeding against such person.

A careful examination of the provisions in Section 3 and 11, thus clearly indicates that, whilst the Commission has the authority to investigate, and on the basis of the findings of such investigation, the Commission has the authority to direct the institution of proceedings, such institution of proceedings shall be carried out in effect by the Director-General of the Commission.

It is common ground that the Director-General has not been made a party to the application before the Supreme Court.

Learned Senior State Counsel for the respondents contended that since the Director-General of the Bribery Commission, who is a necessary party to this application, had not been named as a respondent, that the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules 1990 and therefore the appeal should be dismissed *in limine*.

Rule 4 of the Supreme Court Rules 1990, which deals with the applications for Special Leave to Appeal refers to the necessity in naming as the respondents the necessary and relevant parties. The said Rule reads as follows:

“In every such application, there shall be named as respondent, the party or parties (whether complainant or accused, in a criminal cause or matter, or whether plaintiff, petitioner, defendant, respondent, intervenient or otherwise, in a civil cause or matter), in whose favour the judgment or order complained against was delivered, or adversely to whom such application is preferred, or whose interest may be adversely affected by the success of the appeal, and the names and present addresses of all such respondents shall be set out in full.”

Rule 28 deals with other appeals, which come before the Supreme Court and the said Rule reads as follows:

“28 (1) Save as otherwise specifically provided by or under any laws passed by Parliament, the provisions of this Rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal.

....

28 (5) In every such petition of appeal and notice of appeal, there shall be named as respondents, all parties in whose favour the judgment or order complained against was delivered, or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal, and the names and present addresses of the appellant and the respondents shall be set out in full.”

The totality of the aforementioned Rules indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the appeal.

This position was considered by the Supreme Court in *Ibrahim v. Nadarajah*⁽⁴⁾, where the Court had to consider whether there was a violation of Rules 4 and 28 of the Supreme Court Rules.

In that case learned Counsel for the appellant submitted that the party who was not added was, the minor daughter of the respondent, who was named and that no prejudice would be caused because the same counsel might have appeared for the daughter had she been made a party to the appeal and that in any event the decision against the daughter will be the same as that against her mother.

Considering the applicability of the Supreme Court Rules and taking the view that a failure to comply with the requirements of Rules 4 and 28 is necessarily fatal, Dr. Amerasinghe, J., held that,

“It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal

should be made parties and, unless they are, the petition of appeal should be rejected.”

As stated earlier it is common ground that the Director-General of the Commission to Investigate Allegations of Bribery and Corruption was not made a party to this appeal. On the basis of the examination of the provisions of the Act, No. 19 of 1994 it is evident that the Director-General, has to be regarded as the complainant in such an application and therefore is a necessary party to this appeal. **In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be adversely affected by the result of the appeal should be made parties.**

It is thus apparent that the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules of 1990.

For the reasons aforesaid, I uphold the preliminary objection raised by the learned Senior State Counsel for the respondents and dismiss this appeal for non compliance with Supreme Court Rules.

I make no order as to costs.

SRIPAVAN, J. – I agree.

IMAM, J. – I agree.

Preliminary objection upheld Appeal dismissed.