DIRECTOR-GENERAL FOR THE PREVENTION OF BRIBERY AND CORRUPTION
v.
FERNANDO

COURT OF APPEAL.
JAYASURIYA, J.,
KULATILAKE, J.
C.A. NO. 55/97.
H.C. COLOMBO NO. B/1173/96.
JUNE 23, 1999.

Bribery Act – S. 23A (4) – Requirement of a legal and valid notice – Sufficient notice – The power of a High Court Judge to make an order of discharge – S. 203 Code of Criminal Procedure Act.

Held:

1. The notice under s. 23A (4) of the Bribery Act must give the accused sufficient notice in regard to the entire period which is sought to be relied upon.

2. If such a notice is not given, the accused has not been afforded the legal opportunity of preferring a full explanation in regard to the charges to be preferred – and where an accused is deprived of such an opportunity there is a legal bar to the institution of charges or preferring of an indictment against him.

per Jayasuriya, J.

> "A common fallacy and a misconception prevails among both the members of the official and unofficial Bar, that unlike in a Magistrate's Court or a District Court, the HIgh Court Judge is not legally entitled to make an order of discharge under any circumstances."

3. Although there is no express reference to an order of discharge in the Code, s. 203 postulates that after the High Court reaches a finding he has either to acquit or convict the accused giving reasons for such orders, but before he reaches such a finding the High Court Judge has inherent power to make an order discontinuing legal proceedings before him and discharging the accused in the exercise of his powers of control over the course of proceedings.

APPEAL from the High Court of Colombo.

Cases referred to:

1. *Chandrapala Perera v. A. G.* – [1998] 2 Sri. L.R 85 at 87 (SC).
2. *A. G. v. Piyasena* – 63 NLR 489.
3. *Fernando v. Excise Inspector,* Wennappuwa – 60 NLR 227.
4. *Premadasa v. Assen* – 60 NLR 451.
5. *Senaratne v. Lenohamy* – (DB) 1917 20 NLR 47.
6. *De Silva v. Jayatileka* – 67 NLR 169 (DB).
7. *Sumangala v. Piyatissa Thero* – 39 NLR 265.
8. *Fernando v. Rajasuriya* – 47 NLR 399.
9. *Kiri Banda v. A. G.* – 61 NLR 227.
10. *Kiri Banda v. William* – 44 NLR 74.
11. *Vidanagamatchi v. De Silva* – 80 CLW 94.
12. *Gabriel v. Soysa* – 31 NLR 315.
13. *Wanigasekara v. Simon* – 57 NLR 377.
14. *Weerasinghe v. Wijesinghe* – 29 NLR 208.
15. *A. G. v. Gunasekera* – 60 NLR 334.
16. *Edwin Singho v. Nanayakkara* – 61 NLR 22.
17. *Peter v. Cottelingam* – 66 NLR 468.

M. Liyanage, Deputy Director-General of the Bribery Commission for complainant-appellant.

Tilak Marapane, PC with *D. Jayanethi* for accused-respondent.

Cur. adv. vult.

June 23, 1999.

JAYASURIYA, J.

Mr. Tilak Marapana, PC, senior counsel for the accused-respondent is not present in Court.

We have heard Mrs. Liyanage, learned counsel for the complainant-appellant and learned junior counsel for the accused-respondent. She concedes that in the notice which the Director-General of the Bribery Commission has issued in terms of section 23A (4) of the Bribery

Act the period specified for the declaration of assets is the limited period from 1990-91 and there is no reference to a need of declaring of assets or funds acquired during the year 1954. The indictment drawn up against the accused-respondent charges the accused with certain events which have taken place in 1954. When she was confronted by this Court as to whether the notice is deficient or sufficient in regard to the period specified, her meek reply was that in the notice the Director-General has referred to the legal provision, that is to section 23A (4) of the Bribery Act. That was the solitary and the meek submission advanced by her in relation to the point raised by Court and in relation to the point which is highlighted in the order of the High Court Judge. We hold that the notice given under section 23A (4) of the said Act must give the accused sufficient notice in regard to the entire period which is sought to be relied upon subsequently in drawing an indictment and in the circumstances the instant notice given to the accused-respondent is deficient and defective. The issue of a legal and valid notice setting out the correct and complete factual matters on which his explanation is called for, is of paramount importance. If such a notice has not been given, the accused has not been afforded the legal opportunity of preferring a full explanation in regard to the charges that would ultimately be preferred against him in the indictment and where an accused person is deprived of such an opportunity, there is a legal bar to the institution of charges or preferring of an indictment against him. In the circumstances, we uphold that part of the order of the learned High Court Judge discontinuing legal proceedings and discharging the accused.

But, if the trial Judge intended to acquit the accused by the use of the word "නිදහස්", we hold that it is a wrong and incorrect order in law. A common fallacy and a misconception prevails among both the members of the official and unofficial bar, that unlike in a Magistrate's Court or a District Court (which tried criminal offences earlier) the High Court Judge is not legally entitled to make an order of discharge under any circumstances. Vide *Chandrapala Perera v. A. G.*[1] at 87 (SC). The provisions of the Code giving rise for such a misconception relating to High Court trials before a Judge refer to orders of *conviction*

and *acquittal.* Vide section 203 of the Code of Criminal Procedure. There is no express reference to an order of discharge in the Code. What the provisions of section 203 postulate is that after the High Court Judge *reaches a finding* he has either to acquit or convict the accused giving reasons for such orders. But, *before* he reaches such a *finding* the High Court Judge has inherent power to make an order discontinuing legal proceedings before him and discharging the accused in the exercise of his powers of control over the course of proceedings. The importance of reaching a *finding* before an order of acquittal or conviction is pronounced was stressed by a Divisional Bench in *A. G. v. Piyasena*[2] which overruled the contrary views taken by the Supreme Court in *Fernando v. Excise Inspector, Wennappuwa*[3] and by Justice H. N. G. Fernando in *Premadasa v. Assen*[4] that after the closure of the prosecution, no valid order of discharge could be pronounced under any circumstances.

In *Senaratne v. Lenohamy* (Divisional Bench)[5] Justice De Sampayo associated with other illustrious Judges of the Supreme Court referred to the *power of any Court* to discontinue and discharge proceedings before it. It is an inherent power which is vested in a Court automatically by the creation of the Court itself, to enable it to control the course of proceedings at the trial. It is an undoubted exercise of the inherent power and there is no need for an express specification and reservation of that power in the Code. In the Code of Criminal Procedure Act, there is an express provision specifying the *latest stage* at which a *Magistrate* could make an order of discharge. But, there is *no* specification of the earliest stage at which an order of discharge could be made by a *Magistrate.* In the circumstances, we hold that in the attendant circumstances of this case, the High Court Judge had the power to discontinue legal proceedings and to discharge the accused before arriving at an adjudication on the merits, on the ground that a mandatory provision requiring a proper and valid notice to be given to the accused-respondent in terms of section 23A (4) of the Bribery Act had not been complied with. It is manifest on a perusal of the instant proceedings that the stage of the *close of the prosecution* had not been reached. It is equally transparent that the learned Judge

has not reached *an adjudication on the merits* – vide *De Silva v. Jayatilleke*[6]. An order of acquittal can *only* be made *at the close of the prosecution* and *after an adjudication has been reached by the Judge on the merits.* The close of the prosecution could be reached *at the formal and technical end* of the prosecution (*Sumangala Thero v. Piyatisssa Thero*[7]; *Fernando v. Rajasuriya*[8]; *Kiribanda v. A. G.*[9]; *King v. William*[10]; (CCA) *or* at *the virtual end* of the prosecution. (*Vidanagamatchi v. De Silva*[11] Samarawickrema, J. *Gabriel v. Soysa*[12]; *Wanigasekera v. Simon*[13]; *Weerasinghe v. Wijesinghe*[14]; *A. G. v. Gunesekera*[15]; *Edwin Singho v. Nanayakkara*[16]; *Peter v. Cotelingam*[17]. Thus, the order which the trial Judge has pronounced is an order of discharge and not an order of acquittal. The complainant-appellant is, therefore, entitled to issue a legal and valid notice and thereafter prefer another indictment against the accused-respondent, if he or she is so advised.

The appeal is partly allowed.

KULATILAKE, J. – I agree.

Appeal partly allowed.

Order of the High Court Judge is an order of discharge and not an order of acquittal. Complainant entitled to issue a legal and valid notice.