

KARUNARATNE
v.
ATTORNEY-GENERAL

COURT OF APPEAL
GUNASEKERA, J., (P/CA)
DE SILVA, J.
C.A. NO. 167/94
H.C.COLOMBO NO. B 785/92
MARCH 20TH, 25TH, 27TH, 1997
MAY 14TH, 1997

Bribery Act – S. 19, 19 (c), S. 89 (a) – Proof beyond reasonable doubt – Solicitation on dates specified in the Indictment – Evidence Ordinance – S. 154.

Held:

Even if one can say on the evidence that there was a willingness to accept an amount on the evidence led there is no positive evidence in regard to the date when that willingness had been expressed.

APPEAL from the High Court of Colombo.

D. S. Wijesinghe PC with *P. H. Manatunge* for accused-appellant.

Palitha Fernando SSC for the Attorney-General.

Cur. adv. vult.

May 14, 1997.

GUNASEKERA, J. (P/CA)

In this case the accused-appellant Mahara Lekamlage Kularatne was indicted on 4 counts of Bribery.

- (1) that on or about 15.03.1991 at Anuradhapura being a public servant to wit a School Building Inspector did solicit a gratification of a sum of Rs. 11,050 from D. W. Athulathmudali as a commission of 5% of Rs. 221,000 as a reward for performing an official act to wit the approval of the payment on account of the work performed in respect of the buildings erected in the Galenbindunuwewa educational circuit punishable under section 19 of the Bribery Act.

- (2) at the time and place set out in count (1) and in the course of the same transaction being a public servant to wit a School Building Inspector that he did solicit a sum of Rs. 11,050 being a 5% commission of Rs. 221,000 which was paid as an advance on the contract punishable under section 19 (c) of the Bribery Act.
- (3) that on or about 02.04.1991 at Anuradhapura that the accused appellant did accept a sum of Rs.10,000 from D. W. Athulathmudali in order to perform an official act to wit to approve the payment in respect of a building erected in the Galenbindunuwewa Educational Circuit punishable under section 19 of the Bribery Act.
- (4) at the time and place set out in count 3 that he did accept Rs. 10,000 from the aforesaid D. W. Athulathmudali punishable under sec. 19 (c) of the Bribery Act.

After trial he was convicted on all 4 counts of the indictment on 07.06.1994 and sentenced to a term of 2 years, rigorous imprisonment in respect of each count which sentence was suspended for a period of 7 years. In addition a fine of Rs. 10,000 in respect of each count was imposed together with a penalty of Rs. 10,000 and in default of the payment of fine an additional term of 2-year rigorous imprisonment was imposed.

The evidence led for the prosecution was that of the virtual complainant D. W. Athulathmudali and P. H. Sunil Bandara, Buildings Engineer L. Herath and H. K. Senaratne the officials of the Bribery Department.

According to the evidence of Athulathmudali he had been a government buildings contractor for about 15 years. He had tendered for building projects in the Galenbindunuwewa educational circuit in the year 1990 estimated at Rs. 562,000. The payment for the said contract which was awarded to him was to be made in three stages on a measure and pay basis. Having completed the building he had received the 1st instalment of about one lakh and thereafter 2nd instalment of Rs.120,000. Before payment, it had to be approved by two officers attached to the education office, Nandadeva and Kularatne, the accused-appellant. Kularatne had been acting at the relevant time for the engineer and Nandadeva the subordinate officer working as buildings inspector. As there had been a delay in the payment of the 3rd instalment, he had met the accused in his official quarters in

March, 1991. When he requested the accused-appellant to make the 3rd payment having submitted the bill he had requested the complainant to meet the buildings inspector, Nandadeva and speak to him. When he met Nandadeva, he in turn had requested the complainant to meet the accused-appellant. According to his evidence, he had got the impression that the accused-appellant was expecting a commission of 5% of the payment made in order to approve the final payment. In the entirety of his evidence the complainant did not give any evidence of a direct solicitation by the accused-appellant but made out that the accused-appellant had solicited through Nandadeva as the intermediary.

It was submitted by learned President's Counsel that after the evidence of the complainant was given that an application was made by prosecuting state counsel in terms of section 154 of the Evidence Ordinance to treat him as an adverse witness and certain portions of the statement made by the witness to the officers of the Bribery Commission was put to him. It was contended by learned President's Counsel that during the course of his evidence, the complainant had stated that there was a tacit solicitation made by the appellant on the 1st April which was the second visit that the complainant had made and that after the application made under section 154 of the Evidence Ordinance the witness when confronted with the statements had referred to a direct solicitation by the appellant. At page 52 of his evidence he has admitted that in the statement made to the Bribery Officer that he had stated thus "*this Mr. Kularatne told me that in respect of a contract like this that he usually charges a commission of 10%*". When it was suggested that the earlier evidence that he gave was false the witness had stated that he had forgotten to say what he had told the Bribery Officers in his statement. In his evidence at the trial, in respect of the final payment, it was his evidence (at page 55) that when he met the accused-appellant, the accused-appellant had told him "Athulathmudali you have not made the payment in respect of an earlier instalment you should at least make payment in respect of the final instalment and that I have informed Nandadeva about it". This evidence of his relates to the final payment which had been made in April, 1991.

It was contended by learned President's Counsel that this evidence even if it is accepted and is considered to be a tacit solicitation does not relate to the dates specified in counts 1 and 2 of the indictment and therefore the learned trial Judge erred in reaching conclusion that counts 1 and 2 had been established beyond reasonable doubt. Learned counsel further contended that in the evidence, the virtual

complainant took up a 3rd position that he admitted that in his statement made to the Bribery Commissioner, he has stated that the appellant was expecting a 5% commission in respect of the payment that he had been made. Learned President's Counsel submitted that in view of the three different positions taken by the virtual complainant that it was not safe to have acted upon his evidence which was not corroborated. Learned counsel further contended that the only witness who could have corroborated this solicitation was Nandadeva through whom the appellant is alleged to have solicited the gratification. Nandadeva has not been called as a witness, nor has even a statement been recorded from him by the bribery officers.

Learned senior state counsel submitted that on the evidence it appears that the appellant had indicated a willingness to receive the amount that was solicited and submitted that it would be covered by section 89 (a) of the Bribery Act. However even if one can say on the evidence that there was a willingness to accept an amount on the evidence led there is no positive evidence in regard to the date when that willingness had been expressed. Learned senior state counsel rightly in our view conceded that on the evidence led that although one could say that there was a tacit solicitation that the date on which that solicitation had been made cannot be referable to the 15th March, 1991, which is the material date stated in counts 1 and 2 of the indictment. That being so we are of the view that the benefit of that doubt must ensue to the appellant. Thus we uphold the contention of learned President's Counsel and take the view that the prosecution has failed to prove beyond reasonable doubt that there was a solicitation by the appellant on the dates specified in the indictment. Therefore we set aside the conviction and sentence of the appellant in respect of counts 1 and 2 of the indictment.

In regard to counts 3 and 4 namely in regard to the acceptance of a sum of Rs.10,000 on 02.04.1991. It is to be observed that the evidence of the virtual complainant Athulathmudali has been contradicted in material particulars by the evidence of police sergeant Herath who acted as the decoy and Sub Inspector Senaratne who has gone in charge the detection. In view of this contradiction learned senior state counsel did not seek to support the conviction of the accused-appellant on counts 3 and 4. We set aside this conviction and sentence on those counts as well and we allow the appeal and acquit the accused-appellant.

DE SILVA, J. – I agree.

Appeal allowed.