DIRECTOR GENERAL, COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY AND CORRUPTION

VS

S. B. DISSANAYAKE

COURT OF APPEAL,
BALAPATABENDI, J
BASNAYAKE, J.
CALA 299/2005
HIGH COURT OF COLOMBO
B/ 1516/2004
NOVEMBER 9, 28, 2005

Commission to investigate Allegation of Bribery and Corruption Act, No. 19 of 1954 - Sections 4, 13(2), 23A(1), 23(A)3- indicated - After closure of case for the Prosecution accused was acquitted - Code of Criminal Procedure No. 15 of 1979 Sections 200(1), 340 - proving of Basic fact Burden - Unknown income - Evidence Ordinance - Section 114- Presumption - Burden of proof - Citizenship Act - Judicature Act - 9 - 13

The accused respondent was indicted on a charge of committing an offence under section 23A (1) of the Bribery Act and thereby being guilty of an offence punishable under section 23A(3).

After the evidence of the Chief Investigating Officer of the Bribery Commission was led, the High Court Judge acquitted the accused without calling for a defence. The Bribery Commission sought leave to appeal against the said order.

Held :

(i) The burden is on the prosecution to prove the 'basic fact' that the known income of the Accused Respondent was less than that of his known expenditure during the alleged period, that the accused respondent accquired property which cannot or could not have been acquired with any part of his income during the said period.

(ii) The case for the prosecution was starved of evidence to prove the basic fact contemplated by section 23 (A) (1), hence no presumption could have been drawn against the accused respondent to call for his defence

(iii) There was infact no evidence presented to court by the investigations. It had also been revealed that certain legitimately earned income of the accused - respondent which were included in Document VI prepared by the witness, were not included in the document "X" prepared by the Bribery Commission.

(iv) There is a difference between a presumption airising under section 114 Evidence Orinance and the presumption arising under section 4 of the Prevention of Corruption Act.

APPLICATION for leave to appeal under section 15 Judicature Act read with section 340 of the Code of Criminal Procedure Act, No. 15 of 1979 and section 13(2) of the Commission to Investigate Allegation of Bribery or Corruption Act, No. 19 of 1994.

Cases referred to :

1. *Attorney - General vs. R. M. Karunaratne, SC 16/74, DC Colombo No. B/ 75, SCM, 17. 06.77*
2. *Wanigaskera vs. Republic of Sri Lanka, 79 NLR 241 at 251*
3. *State of Madras vs. Naidyanthan, 1958 AiR SC 61*
4. *Attorney - General vs. Ratwatte, 72 CLW 93*
5. *Attorney - General vs. Baranage, 2003 Spl. Sri. L. R. LR 340*

Dr. Ranjith Fernando with Ms. Deshani Jayatilake and Amila Udayanganie and Asita Anthony for the applicant - appellant.

D.S. Wijesinhe, P. C. with Kolitha Dharmawardena and Chandana Perera for trhe accused - respondent.

Cur. adv. vult

JAGATH BALAPATABENDI, J.

This is an application for leave to appeal under section 15 of the Judicature Act read with the provisions of section 340 of the Code of Criminial Procedure Act, No. 15 of 1979 and section 13 (2) of the Commission to Investigate allegations of Bribery or Corruption Act No. 19 of 1994.

The Accused - Respondent was indicted in the High Court of Colombo on a charge of committing an offence under section 23A(1) of the Bribery Act and thereby being guilty of an offence punishable under section 23A(3) of the Bribery Act giving details of the offence committed in the schedules marked as 'A' and 'B' annexed to the indictment.

At the close of the case for the prosecution on an application by the counsel for the accused respondent under section 200(1) of the Code of Criminal Procedure Act, the learned High Court Judge having heard both counsel, acquitted the accused respondent without calling for a defence on 19th July 2005.

This application for leave to appeal is preferred by the Director General of the Commission to Investigate Allegations of Bribery or Corruption against the Judgment of the learned High Court Judge dated 19th July 2005.

Counsel for both parties invited Court to make an order on the written submissions filed on the question of leave to appeal. Hence having gone through the written submissions filed by both parties the Court arrives at a conclusion on the following findings.

Provisons of the section 23A(1) of the Bribery Act reads as follows:-

Where a person has or had acquired any property on or after March 1, 1954, and such property-

(a) Being money, cannot be or could not have been-

(i) part of his known income or receipts; or

(ii) money to which any part of his known receipts has or had been converted ; or

(b) Being property other than money, cannot be or could not have been-

(i) property acquired with any part of his known income ; or

(ii) property which is or was part of his known receipts; or

(iii) property to which any part of his known receipts has or had been converted,

Then, for the purposes of any prosecution under this section, it shall be deemed, until the contrary is proved by him, that such property is or was property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery.

It is obvious that the above mentioned section required to prove by the prosecution, that the accused acquired property which cannot or could not have been acquired with any part of his income or receipts known to the prosecution after thorough investigation; the prosecution is not required to prove that the acquisitions were made with income or receipts from bribery. Once the above 'basic fact' fact is proved by the prosecution, a rebuttable presumption could be drawn against the accused and it shall be deemed until the contrary is proved by the accused; that such property is or was property which he has or had acquired by bribery or to which he has or had converted any property acquired by him by bribery.

In the case of *Attorney- General Vs. R. M. Karunaratne*[1] Samarawickrema, J. observed as follows:- "to require proof that such an individual has infact received a reward would be to defeat the purpose of section 23(A) which is designed against a person in respect of whom there is no proof of the actual receipt of a gratification, but there is presumptive evidence of bribery."

In the case of *Wanigasekera Vs Republic of Sri Lanka* [2] it is stated as follows" The Supreme Court of India has taken the view that a presumption of law cannot be successfully rebutted by merely raising a probability, however reasonable, that the actual fact is the reverse of the fact which is presumed. Something more than a reasonable probability is required for rebutting a presumption of law. The bare word of the accused is not sufficient and it is necessary for him to show that his explanation is so probable that a prudent man ought, in the circumstances, to have accepted it. This view is based on the difference between a presumption arising under section 114 of the Evidence Ordinance, and the presumption arising under section 4 of the Prevention of Corruption Act. In the former case it is not obligatory upon the court to draw a presumption as to the existence of one fact from the proof of another fact, where as in the latter case, the Court has no alternative but to draw the presumption". "See *State of Madras Vs. Naidyanathan Iyer,*[3].

In Karunaratne' s case (supra) Samarawickrema, J expressed a view, although an obiter. "What a person (accused) has to prove is that a property was not acqired by bribery or was not property to which he had converted any property acquired by bribery. The ordinary and usual method by which a person (accused) may prove this is by showing the source with which he acquired the property and demonstrating that it was not by bribery. As

this is a matter in which the onus is on the accused person, it will be sufficient if he establishes it on the balance of probabilities."

"If the Court is reasonably satisfied, that is, satisfied to the extent that it can say 'we think it more probable than not that the accused acquired the property by proceeds other than income or receipts from bribery'; then the accused is entitled to an acquittal."

In the instant case, after the prosecution case was closed, on the application made by the counsel for the accused respondent the learned Trial Judge acting under the provisons of section 200 (1) of the Code of Criminal Procedure Act, has acquitted the accused - respondent without calling for his defence, for the reasons given in her Judgement.

Section 200(1) of the Code of Criminal Procedure Act is as follows:- "when the case for the prosecution is closed, if the Judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused or of any other offence of which he might be convicted on such indictment he shall record a verdict of acquittal; if however the Judge, considers that there are grounds for proceeding with the trial he shall call upon the accused for his defence."

The words used in the above mentioned section 200(1) signify the scope of the function, giving a wide discretion and power to the judge. In the case of Attorney - General Vs. Ratwatte[4] provides an example of a situation where the judge has wholly discredited the evidence for the prosecution. The first accused in that case, at the time of the alleged offence was the Private Secretary of the Prime Minister of Ceylon. He was indicted for accepting a bride of Rs. 5000/- (given in two instalments) as an in ducement for obtaining a grant of citizenship in terms of the Citizenship Act to a Malaysian National. According to the evidence of the prosecution witness, on the first occasion a sum of Rs. 1000/- was openly given to the 1st accused in his house and the latter, in the presence of other unknown persons who had come with the person who gave the bribe, has put the money into his shirt pocket. Again two days later the same person has given Rs. 4000/- to the first accused at the latter's ancestral house and even on that occasion the accused has openly accepted the money in the presence of persons unknown to him. At the end of the prosecution case

the trial Judge, acting under section 210(1) of the Criminal Procedure Code of 1898, (which is similar to section 200(1) of the present Code) has acquitted the first accused without calling for his defence.

In his reasons the trial Judge has stated as follows "On both occasions the 1st accused does not appear to have been in any way hesitant about accepting the money. He does not appear to have been anxious to conceal the acceptance from any person who may have seen it. He does not take the precaution even of accepting the money without being seen by the unknown persons. It can not be said he is unaware of the seriousness of the offence he is committing. He does not seem to care as to whether he is led into a trap or not. I do not think any ordinary person would accept a bribe in such a manner, least of all a person in the position of 1st accused who holds such a responsible post under the Government." The Learned trial Judge has therefore concluded that "no reasonable Court can accept the oral testimony of papuraj that this gratification was given to the 1st accused." In appeal the Supreme Court accepted the correctness of this reasoning and dismissed the appeal filed against the acquittal of the 1st accused.

In the case of Attorney - *General Vs Baranage*[5] Amaratunga, J observed as follows:-

"In a trial by a Judge without a jury the Judge is the trier of facts and as such at the end of the prosecution case in order to decide whether he should call upon the accused for his defence he is entitled to consider such matters as the credibility of the witnesses, the probability of the prosecution case, the weight of evidence and the reasonable inferences to be drawn from the proven facts. Having considered those matters, if the Judge comes to the conclusion that he cannot place any reliance on the prosecution evidence, then the resulting position is that the judge has wholly discredited the evidence for the prosecution. In such a situation the Judge shall enter a verdict of acquittal".

Even if the judge has not wholly discredited the prosecution evidence, the words in the section that the "Judge is of opinion that such evidence fails to establish the commission of the offence charged against the accused or any other offence of which he might be convicted on such indictment", give him the power to enter a verdict of acquital without calling for the defence.

Now I would like to examine the Judgment in the instant case to see whether the learned Trial Judge had erred on questions of law and/or misdirected herself in relation to the matters of facts, as alleged by the applicant - appellant.

At the outset, I would like to reiterate the very words used by the Learned High Court Judge in her Judgdment for her conclusion, *viz* "It is my view that according to the findings which I have made both of law and fact the Commission had failed to establish a *prima facie* case against the accused that there were unknown income and receipts not from legitimate sources constituting under section 23A of the Act. If there has not been any proof as to the existence of any sources of income unknown to the prosecution after investigation then the accused cannot be asked to submit a defence on his behalf for there is no case against him to defend. I therefore do not call for the defence, and I order the acquittal of the accused from all the charges."

Hence, It is apparent that the finding of the learned High Court Judge on the evidence led, was that the prosecution (Applicant - appellant) after investigation had failed to establish or put in issue that there had been in existence any sources of income of the Accused respondent, unknown to the prosecution (applicant - appellant) to call for a defence from the accused respondent. Thus no presumption could have been drawn against the accused respondent as envisaged by the provisions of the section 23A of the Act.

As aforsaid learned High Court Judge had expressed her opinion to this effect in her Judgement. The Judges employ varying language to express their opinion.

In the instant case the only witness called by the prosecution (the applicant appellant) was the chief Investigating Officer of the Bribery Commission Epa Kankanange Don Chandrapala. He had commenced an investigation against the accused - respondent on a letter received by the Bribery Commission from one Dharmadasa of Veyangoda. On inquiries into the said letter the witness had found that there was no such person and their was no such address as stated in the said letter.

The burden is on the prosecution (applicant appellant) to prove the *'basic fact'* that the known income of the accused - respondent was less

than his known expenditure during the period between 31.3.1995 to 30.09.2001 (as per indictment) *i.e,* that the accused - respondent acquired property which cannot or could not have been acquired with any part of his known income during the said period.

The learned High Court Judge having considered the evidence led, had correctly come to a finding that the contents of the documents p1 to P13 (Marked by the prosecution. as to the income of the accused respondent could be classified as "known income", since admitted by the witness Chandrapala. The contents of the docements P 14 to P22 (marked by the prosecution) are also found to be true on investigation carried out by the witness Chandrapala.

The contensts of the document marked as "X" prepared and relied on by the Bribery Commission (Applicant - appellant) shows the total income as Rs. 19, 736,11.84 and total expenditure as Rs. 48,333123.52 ; Therefore the expenditure over income of the accused - respondent was Rs. 28,597,003.68. However the only witness Chandrapala, had stated that he was unaware of the preparation of it, and had no knowledge of its contents.

In cross examination of the witness Chandrapala, the documents VI and V2 were marked by the accused - respondent which were in the custody of the Bribery Commission. The documents VI and V2 had been prepared by the invetigating officers Chandrapala and Nandasena respectively in connection with this case and had been submitted to the Bribery Commission and VI shows the total known income of Rs. 54, 667, 685.87 and known expenditure of Rs. 30,203,915.03 therefore known income over expenditure of the accused - respondent was Rs. 24,463,770.84. The document 'X' shows a contrasting position of the total expenditure over the total income of the accused - respondent as being Rs. 28,597,003.68 as against the document VI. It had been revealed that certain legitimately earned income of the accused respondent which were included in the document VI prepared by the witness were not included in the document 'X' prepared by the Bribery Commission.

On analysis of the evidence of the prosecution case, the learned High Court Judge had correctly come to a finding and stated in the judegment as follows:- "Therefore in the present case, I find that there was cogent and compelling evidence to establish that the income which the accused had received was within the statutory concept of "known income" which

did not constitute an offence under the Act. This was a finding made by the investigators employed by the Commission. There was in fact no evidence presented to the court of a finding of any "unknown income ". by the investigators. Moreover, in his evidence, the principal investigator Chandrapala, admitted to Court that he found no evidence to establish that the accused had any 'unknown income'. Further Chandrapala, who was the only witness for the Commission informed Court that he had made a Report to the Bribery Commissioner that there was no evidence of any 'Unknown income'.

Further, the learned High Court Judge had come to a conclusion, as follows - "It was clearly evidenced by the sole witness for the commission that all moneys and acquistions of the accused were from the sources of income claimed by the accused. When the witness for the Commission concluded his evidence by establishing that there was no money or property acquired by this accused which were from unknown sources, and not by legitimate means there is no obligation upon the accused to prove that the property or money he had received and acquired were not by bribery."

It is pertinent to note that case for the prosecution was starved of evidence to prove the 'basic fact' contemplated by the provisions of the section 23A (1) of the Bribery Act, hence no presumption could have been drawn against the accused respondent to call for his defence.

As mentioned above, I cannot see any other conclusion that the learned High Court Judge could have arrived at than the one set out in her judgment for the reasons mentioned therein.

The ultimate conclusion of the learned High Court judge was correct in law and on the facts. I am of the view that the learned Hight Court Judge's decision to acquit the accused appellant without calling for his defence was correct.

Thus, the application for leave to appeal is of no merit.

BASNAYAKE, J. — I agree

Leave to appeal refused. The application is dismissed.