

RUPASINGHE
v.
REPUBLIC OF SRI LANKA

COURT OF APPEAL.
ATUKORALE, J. (P/CA),
SIVA SELLIAH, J. AND
MOONEMALLE, J.
C.A. NO. 75/82.
H.C. COLOMBO B624.
MAY 31, JUNE 1 AND 2, 1983.

Bribery – Ingredients to be proved – Burden of proof – Bribery Act, sections 16, 19(c), 90.

The burden of proof that the accused, a public officer, accepted a gratification as an inducement or reward for interfering with the due administration of justice was on the prosecution. It was for the prosecution to establish each ingredient of the offence under section 16 of the Bribery Act beyond reasonable doubt. There was no burden for the accused to discharge.

In regard to the charge under section 19(c) the burden was first on the prosecution to prove beyond reasonable doubt that the accused was a State Officer and secondly that he accepted a gratification. Once these two ingredients are proved beyond reasonable doubt, the burden shifts to the accused to prove on a balance of probability that he was authorised by law or by the terms of his employment to receive the money.

The meaning of the word "gratification" under section 90 of the Bribery Act includes "money".

APPEAL from conviction and sentence passed by the High Court of Colombo.

E. R. S. R. Coomaraswamy with *Lakshman de Alwis* for accused-appellant.

G. L. M. de Silva, Senior State Counsel for the State.

(Note by Editor: The judgment of the Supreme Court in appeal from this Judgment is reported in (1986) 2 Sri L.R. 329)

Cur. adv. vult.

July 11, 1983.

MOONEMALLE, J.

The accused-appellant was indicted on the following two counts:

(1) That on or about 2nd day of December 1975, at Homagama, the accused-appellant being an Officer of Court to wit: Interpreter Mudaliyar, Magistrate's Court Homagama, did accept a gratification of a sum of Rs. 50/- from one A. A. Avis Singho, as an inducement or a reward for his interfering with the due administration of justice in Magistrate's Court, Homagama Case No. 22929 and that he is guilty of an offence punishable under Section 16 of the Bribery Act.

(2) That at the same time and place aforesaid and in the course of the same transaction, the accused appellant being a State Officer to wit; Interpreter Mudaliyar, Magistrate's Court Homagama, did accept a gratification of a sum of Rs. 50/- from the said A. A. Avis Singho and he is thereby guilty of an offence punishable under section 19(c) of the Bribery Act as amended by section 8 of the Bribery (Amendment) Law, No. 38 of 1974.

After trial in the High Court of Colombo, the accused-appellant was found guilty of both counts and was sentenced to (A) one year's rigorous imprisonment on each count, the sentence to run concurrently, (B) To a fine of Rs. 1000/- in default 6 weeks rigorous imprisonment on each count. If the accused-appellant pays the Rs. 1000/- on count (1) he need not pay the Rs. 1000/- on Count (2), (C) to a penalty of Rs. 100/-. This Appeal is against these convictions and sentences.

The prosecution case was that the complainant A. A. Avis Singho and one Somapala were charged in M.C. Homagama in case No. 22929 for the offence of theft. Then on 11th November, 1975 both appeared in Court and pleaded guilty to the charge. Thereafter, they were ordered to give their fingerprints and were warned to appear for sentence on 25th November, 1975.

Thereafter, Avis Singho had filed a petition of Appeal in the Supreme Court alleging that he had been forced to plead guilty in the case. He was unable to appear in Court on the 25th November, 1975 for sentence as he had been noticed to appear in the Court of Appeal that day. Sentence had been put off for 2nd December, 1975. Then on 26th November, 1975, Avis Singho had met the accused - appellant at the Magistrate's Court Homagama, and asked him to get him some relief in the sentence. The accused appellant had then asked Avis Singho to give him Rs. 50/- in order to get him a minor punishment. Avis Singho had then promised to meet the accused-appellant on 2nd December, 1975 which was the next date fixed for the sentence. Then on 27th November, 1975, Avis Singho lodged a complaint at the Bribery Commissioner's Department, and he was asked to come there again on the 2nd December.

Avis Singho went to the Bribery Commissioner's Department on the 2nd December about 6.30 a.m. and there he had met Inspector Dharmapala who had instructed him to meet the accused-appellant along with P.C. Bissomenika of the Bribery Commissioner's Department who was to pose as his sister. I. P. Dharmapala had given Avis Singho four Rs. 10/- notes and two Rs. 5/- notes after noting the numbers of the notes.

Avis Singho was further instructed by the Inspector to proceed to the Magistrate's Court Homagama along with P.C. Bissomenika and to meet the accused-appellant and to introduce Bissomenika to him as his sister. He was also instructed by the Inspector to inform the accused-appellant so that Bissomenika could hear that he had brought the Rs. 50/- and to get him redress in the case, and thereafter to hand over the Rs. 50/- to him.

I. P. Dharmapala had also instructed P.C. Bissomenika to pose as the sister of Avis Singho, to listen to the conversation carefully between Avis Singho and the accused-appellant and thereafter to give a signal with the hand. He had also instructed her not to allow Avis Singho to give the money to the accused-appellant by force.

Thereafter, Avis Singho and P.C. Bissomenika proceeded to the Magistrate's Court Homagama and had met the accused-appellant who was seated on a chair. Avis Singho had told him that he had brought the money he had promised on the 26th and to get him relief in the case. The accused-appellant had taken the Rs. 50/-, handed over to him by Avis Singho and had put the money into his purse which he put into his trouser hip pocket. Bissomenika had then asked him whether her elder brother would go to jail and he had replied that he would not be sent to jail and that he would save him with a fine. Thereafter, Bissomenika had given a pre-arranged signal and I. P. Dharmapala had come there and had recovered the Rs. 50/- from the possession of the accused-appellant.

The defence was that the accused-appellant was authorised to recover money for translations and that the Rs. 50/- he received from Avis Singho was an advance payment for the translations of an appeal brief into English which was to be prepared in triplicate. He denied that he accepted the Rs. 50/- as a bribe.

The burden of proof in respect of Count (1) was on the prosecution to establish each ingredient of that offence beyond reasonable doubt. There was no burden for the accused-appellant to discharge.

In respect of Count (2) the burden was **first** on the prosecution to prove beyond reasonable doubt that the **accused-appellant was a State Officer**, and **secondly** that **he accepted a gratification of Rs. 50/- from Avis Singho**. The meaning of the word "gratification" under section 90 of the Bribery Act included "money". Once those two ingredients are proved beyond reasonable doubt, **the burden shifts to the accused-appellant to prove as a balance of probability that he was authorised by Law or the terms of his employment to receive the Rs. 50/-**. The burden of proof shifts to the accused-appellant by reason of the proviso stated in section 8 subsection 3 of the Bribery (Amendment) Law No. 38 of 1974 which reads as follows:

"Provided, however, that it shall not be an offence for a State Officer to solicit or accept any gratification which he is authorised by Law or the terms of his employment to receive."

In respect of Count (1) it is common ground that the accused-appellant being an officer of Court to wit... Interpreter Mudaliyar Magistrate's Court, Homagama accepted a sum of Rs. 50/- from the complainant A. A. Avis Singho on 2nd December, 1975. Thus the only question that arose in respect of Count (1) was whether the prosecution had proved beyond reasonable doubt that the accused-appellant had accepted this Rs. 50/- as an inducement or a reward for his interfering with the due administration of justice in Magistrate's Court Homagama, Case No. 22929.

Learned Counsel for the accused-appellant submitted that there were material misdirections in the Learned Trial Judge's findings which led to wrong conclusions. He particularly referred to that part of the judgment where the Learned Trial Judge had stated that the evidence of Bissomenika corroborated the evidence of the complainant in all material particulars. This submission certainly carries weight because Bissomenika contradicted Avis Singho, the complainant on a very important factor in the case.

I. P. Dharmapala had specifically instructed Avis Singho to speak to the accused-appellant about the bribe that he solicited the

previous day, in the presence of Bissomenika so that it could be heard by her. He was also instructed to inquire from the accused-appellant before the money was given, the nature of the relief he would get; Bissomenika was present for the purpose of being a witness to corroborate Avis Singho.

Avis Singho stated in his evidence that he spoke to the accused-appellant to be heard by Bissomenika. Bissomenika, on the contrary stated that Avis Singho got close to the accused-appellant and spoke softly to him and she did not hear what was spoken. The Learned Trial Judge has accepted the evidence of Bissomenika in preference to that of Avis Singho. Further, the Learned Judge categorically came to a finding that the complainant Avis Singho had not spoken the truth when he stated in evidence that he discussed about the bribe with the accused-appellant in a tone loud enough to be heard by Bissomenika. He also came to a clear finding that the complainant Avis Singho was not speaking the truth when he denied making the statements D1 and D3 to I.P. Dharmapala after the raid. In D1, Avis Singho had stated that **"I bent down and spoke to the suspect in a low tone"**. In D3, Avis Singho had stated **"I thought if I discuss about the bribe in a loud voice, that the suspect would suspect me and not accept the bribe from me. Hence, I spoke to him softly."** Having arrived at these findings the Learned Trial Judge unaccountably proceeded to draw wrong inferences as to why Avis Singho should have spoken softly. **The Judgment reads,**

"In all probability the complainant genuinely felt that if he spoke about the bribe loud enough to be heard by anyone, the accused would not accept the Rs. 50/- he had solicited and the raid would have been a failure. This explains, why in spite of instructions given to him he spoke softly to the accused and what he told the accused would not be heard by Bissomenika".

According to the evidence led, the only persons in the Court House at the time Avis Singho spoke to the accused-appellant were Avis Singho, the accused-appellant and Bissomenika. So that there was no question of anyone else hearing what Avis Singho spoke, if he spoke loud enough for Bissomenika to hear. Further, according to the evidence of Avis Singho, Bissomenika was at the time near him to his left. So that there would not have been any necessity for Avis Singho to speak so loud as to rouse any suspicion in the accused-appellant's mind. He had only to speak in his normal tone for Bissomenika to hear.

The Learned Trial Judge also referred to the possibility of the Inspector having reprimanded Avis Singho. Then he went on to state that may be a reason why he told a lie in Court that he spoke to the accused loud enough to be heard by Bissomenika. There is no evidence that the Inspector reprimanded the complainant. This is merely an inference the Learned Trial Judge has drawn.

The Learned Trial Judge also stated that the acceptance by the accused-appellant of the Rs. 50/- in order to obtain relief for the complaint in connection with case No. 22929 M.C. Homagama was corroborated by the evidence of Bissomenika. This is not so. Bissomenika supported Avis Singho only in that she had seen him speaking to the accused appellant and that she had seen the accused appellant receiving the money from Avis Singho. Bissomenika did not know the the purpose for which the Rs. 50/- was accepted on that occasion by the accused appellant. She did not hear what Avis Singho told the accused appellant before he handed over the money to him.

Avis Singho, besides, not speaking loud enough for Bissomenika to hear, had failed to introduce her to the accused appellant as his sister. Here again, he failed to comply with the instructions given to him.

According to Bissomenika she had asked the accused-appellant whether her elder brother would go to jail and he had replied that he would not be sent to jail and that he would save him with a fine. The accused-appellant, on the other hand, denied this and said that he had told her as follows: **“He will go to jail in today’s case. Then it struck me that there was an earlier case. Then I told her he will escape with a fine”**. Whichever version on this matter is accepted, the reply of the accused-appellant to Bissomenika gives the impression that he knew before hand the nature of the sentence that would be passed. This gives **consistency** to the prosecution case that he had asked Avis Singho for Rs. 50/- in order to get him a minor sentence.

Further, the accused-appellant’s conduct in making no attempt to issue a receipt in Form 172 to Avis Singho after he accepted the Rs. 50/- and the failure on his part to state his defence to I. P. Dharmapala at the first opportunity or even to the District Judge who remanded him tend to militate against his defence.

The Learned Trial Judge had rejected as false the accused-appellant's version that Avis Singho had paid him Rs. 50/- as an advance for a translation. However, that factor did not establish the prosecution case against the accused-appellant on Count (1) beyond reasonable doubt. The burden still remained on the prosecution to establish the charge against the accused-appellant beyond reasonable doubt.

I have given my most anxious consideration to this question whether the prosecution has proved beyond reasonable doubt that the accused-appellant accepted the Rs. 50/- for a sinister purpose, namely, as an inducement or reward for his interfering with the due administration of justice in M. C. Homagama Case No. 22929.

However strong the inferences may be that could be drawn against the accused-appellant from his reply to P. C. Bissomenika and from his conduct, still, the failure on the part of Avis Singho to comply with the important instructions given to him by I. P. Dharmapala for the purpose of the raid which was initiated by his own complaint, and the finding of the Learned Trial Judge that he had not spoken the truth, and by his being contradicted by Bissomenika, creates a reasonable doubt in the prosecution case as to whether the accused-appellant accepted the Rs. 50/- from Avis Singho as a bribe in order to get him a minor sentence in M. C. Homagama Case No. 22929. The accused-appellant is entitled to the benefit of the doubt, and is therefore entitled to an acquittal on Count (1).

In respect of Count (2), it was conceded by Learned Counsel for the accused-appellant that the prosecution had proved beyond reasonable doubt that the accused-appellant was a State Officer and that he had accepted the gratification of Rs. 50/- and that the burden was on the accused-appellant to prove on a balance of probability that he accepted this gratification which he was authorised by law or the terms of his employment to receive.

Learned Counsel for the accused-appellant submitted that the Learned Trial Judge should have considered the evidence in respect of the charge separately, instead of considering both charges as an omnibus charge, and thereby overlooking the differences of the scope and operation of the standard of proof in respect of both charges.

I disagree with that submission as the two charges are not distinct and separate charges but are similar charges having a common factual origin. The fact that the Learned Trial Judge had rejected without hesitation the accused-appellant's defence – it was not necessary for him to arrive at a separate finding that in regard to charge 2 he was not satisfied with the accused-appellant's version on a balance of probability. The Learned Trial Judge has also come to a finding that the accused-appellant's version was obviously false. In the light of these findings it cannot be said that the Learned Trial Judge has disregarded the evidence of the accused-appellant as regards Count 2.

Learned Counsel for the accused-appellant also submitted that as there were material misdirections in the Trial Judge's findings in respect of Count (1) and that he had come to wrong conclusions, then this Court could not safely say that his consideration if any, of the evidence regarding Count (2) was correct. In such circumstances, this Court could review the evidence to see whether Count (2) is proved.

The accused-appellant has made an unsworn statement from the dock. That was the only evidence called on behalf of the defence. This Court is in an equally disadvantageous position as the Trial Judge in a case where an accused person has not given sworn evidence and has not been subject to cross examination, and in circumstances where his demeanour could not be observed. Thus, what is left for this Court in the present case, is merely to draw inferences from the accused-appellant's unsworn statement.

The accused-appellant in his unsworn statement has stated that on the 14th November 1975, Avis Singho the complainant came with one Adin who was an employee of Mr. Samarajeeva Attorney-at-Law, Homagama, and gave him a copy of an appeal and requested him to translate the same into English in triplicate. Then, as the translation would take some time, the accused-appellant had asked Adin to bring it later with an advance. Then he said that on the 2nd December Avis Singho the complainant had come up to his table and had bent down and said in a soft tone that he had brought the advance, to keep it, otherwise that he might spend it. Then he said that he took the money into his hand. Then a female who had come

with the complainant asked him whether her elder brother would go to jail and he replied **“He will go to jail in today’s case. Then it struck me that there was an earlier case. Thereafter, I told her that I would save him with a fine.”** He said that he did not tell her that he would save her elder brother with a fine.

Learned Senior State Counsel pointed out that though the accused-appellant stated that Avis Singho and Adin met him on the 14th November and discussed with him the translation into English of the Appeal and the payment of the advance for it, that when Avis Singho was cross-examined, it was suggested to him that it was about 4 or 5 days before the judgment was delivered that this discussion with the accused-appellant took place – sentence in the case was to be passed on the 2nd December. It is clear that the accused-appellant’s version of the date of this discussion is inconsistent with this suggestion. This suggestion is more consistent with Avis Singho’s version that the discussion of the bribe took place on the 26th November.

The accused-appellant’s version that Avis Singho bent down and spoke softly to him is consistent with P. C. Bissomenika’s evidence that Avis Singho got close to the accused-appellant and had spoken softly to him and she did not hear what was spoken.

The accused-appellant’s version relating to the discussion with Avis Singho concerning the advance for translating the Appeal into English was disbelieved by the Learned Trial Judge who commented that no evidence was led by the accused-appellant, to support his version. It was open to him to have called Adin, Mr. Samarajeeva’s employee as a witness to support his version, but he had not done so.

Regarding the question put by Bissomenika to the accused-appellant and the reply she received, I have already referred to earlier in this judgment. However, I would repeat my view on it as it is necessary to do so in considering the unsworn statement made by the accused-appellant.

Learned Counsel for the Defence, submitted that there were two cases pending against Avis Singho on 2nd December and that would

give support to his evidence relating to the reply he gave Bissomenika.

Whether the accused-appellant's version on that matter is accepted or whether Bissomenika's version is accepted, there is no escape from the fact that the accused-appellant has given the impression that he would influence the sentence. It would be relevant at this stage to refer to a very pertinent comment made by the Learned Trial Judge on this matter.

“It is strange how the accused knew in what way the Judge would pass sentence on those who had pleaded guilty.”

The accused-appellant stated that after he was taken into custody, I. P. Dharmapala produced him before the District Judge and that he was remanded. He stated that by his experience he thought it was not proper to tell the Inspector that he had accepted the money as an advance fee for translations, because he was connected with the raid. This conduct of the accused-appellant is strange. He is a senior experienced officer of Court and being the Interpreter Mudaliyar of a Magistrate's Court he would have known that it was important for him to tell his version, if the translation was an innocent and lawful one, at the earliest opportunity, to a person in authority. If he did not want to mention this to Inspector Dharmapala, he had every opportunity to do so to the District Judge who remanded him. If he could have told the Judge as follows: **“He paid off a grudge against Court,”** he could then surely have told him that he accepted Rs. 50/- as an advance for the translation of the appeal into English. Then, he had every opportunity of informing the Bribery Commissioner of his version, but he had not done so. Though he stated that he wanted to tell his version of this transaction to a Police Officer superior to I. P. Dharmapala, he had taken no steps to do so. It is very strange that it took him almost four and a half years after the incident, to divulge his version for the first time in Court.

The Learned Trial Judge also referred to the attempt made by the accused-appellant to show that the complainant Avis Singho had a grudge against the presiding Judge by stating that he told the Judge that the complainant had paid off a grudge against Court. The District Judge was not called as a witness to support this allegation. This was

referred to by the Learned Trial Judge who had made his comments on it.

Learned Counsel for the defence submitted that there was proof in the evidence of witness Amarasekera of the Ministry of Justice that the accused-appellant was entitled to charge copying fees and that this was not referred to by the Trial Judge.

The entitlement to charge copying fees and Translation fees does not establish to any degree of proof that the accused-appellant accepted the Rs. 50/- from Avis Singho as an advance fee for translations. The evidence of Amarasekera established the fact that the accused-appellant should have issued a receipt in form, 172 when he accepted the Rs. 50/- from Avis Singho, if the payment was for translations. He made no attempt whatsoever to issue a receipt to Avis Singho.

On a consideration of the evidence led in this case, I am of the view that the Learned Trial Judge has correctly rejected the version of the accused-appellant. The accused-appellant has failed to discharge his burden of proving on a balance of probability that his acceptance of the Rs. 50/- was authorised by law or the terms of his employment.

For these reasons, I affirm his conviction and sentence on Count 2 of the indictment, subject to the penalty of Rs. 100/- being reduced to Rs. 50/-.

I allow the appeal of the accused-appellant against the conviction and sentence on Count (1) of the indictment, and I acquit him on Count (1), and I dismiss his appeal against the conviction and sentence on Count (2) of the Indictment subject to the penalty of Rs. 100/- being reduced to Rs. 50/-.

ATUKORALE, J. – I agree.

SIVA SELLIAH – I agree.

Conviction and sentence on Count 1 set aside.

Conviction and sentence on Count 2 affirmed but penalty reduced.