

**DIRECTOR GENERAL, COMMISSION TO INVESTIGATE  
ALLEGATIONS OF BRIBERY OR CORRUPTION  
V. GENERAL ANURUDDHA RATWATTE**

COURT OF APPEAL

SILVA, J. AND

D. S. C. LECAMWASAM, J.

CA 325/07

H. C. (COLOMBO) B 1579/15

FEBRUARY 26<sup>TH</sup>, 2010

*Judicature Act – Section 39 – Objection to jurisdiction of any Court of first instance when? – Bribery Act – Section 23A(4) – Opportunity to show cause before instituting proceedings-No action can be instituted without giving such opportunity to show cause – Legal maxim expressio unius est exclusion alterius - Patent - Latent lack of Jurisdiction?*

The Director General of the Bribery Commission filed action against the Accused under Section 23A(3) of the Bribery Act. At the end of the prosecution case, the defence took up an objection that the prosecution had failed to comply with the pre-conditions found in Section 23A (4) of the Bribery Act. The learned High Court Judge upheld the objection and discharged the Accused.

In the appeal, the defence raised two preliminary objections, namely, the Bribery Commission should give a person an opportunity to show cause as to why he should not be prosecuted for such offence and there must be a certificate stating either the person has failed to show cause or the cause shown by the persons is unsatisfactory in the opinion of the Bribery Commission.

**Held:**

- (1) The salient ingredient of Section 23A (4) of the Bribery Act is the 'affording of an opportunity' to 'show cause' before instituting an action. If the opportunity is not given, then it can tantamount to a patent lack of jurisdiction as no prosecution is possible without affording such opportunity before institution of action.

- (2) There is no requirement that a certificate or a document should be annexed to the indictment that the Bribery Commission is not satisfied with the explanation given by the Accused in terms of Section 23A (4). A certificate of dissatisfaction is not a requirement under Section 23A (4) of the Bribery Act.

Held further –

Per Lecamwasam, J., -

“ . . . once an opportunity is given and if the Commission is not satisfied with the explanation given in reply on such occasion, I hold that the Commission is not bound to issue a certificate or letter of dissatisfaction. Mere fact of institution of action is ample proof of such dissatisfaction.”

**Cases referred to:**

1. *Kanagarajah v. Queen* – 74 N.L.R. 378

**APPEAL** from an order made by the High Court of Colombo.

*Jayantha Jayasuriya, D.S.G.* for the Complainant – Appellant  
*Rienze Arsecularatne, P.C.*, with *Wasantha Batugoda* for the Accused-Respondent.

*Cur.adv.vult.*

June 17<sup>th</sup> 2010

**D. S. C. LECAMWASAM, J.**

In this case the Director General of the Bribery Commission filed action against the accused under Section 23 A (3) of the Bribery Act. At the end of the prosecution case the defence took up an objection to the effect that the prosecution failed to satisfy two pre conditions embodied in section 23 A (4) of the Bribery Act and therefore moved court to acquit the accused.

On a perusal of the proceedings it is evident that the parties have made lengthy submissions and on 30<sup>th</sup> November

2007 the learned High Court Judge upheld the objection and discharged the accused. Being aggrieved by the aforementioned order the complainant has filed the instant appeal and a revision application bearing No. 168/2007.

In his written submissions learned Presidents Counsel has raised two preliminary objections, to wit; The Bribery Commission should give a person an opportunity to show cause why he should not be prosecuted for such offence and there must be a certificate stating either the person has failed to show cause or the cause shown by the person is unsatisfactory in the opinion of the Bribery Commission.

Although the learned Presidents Counsel has urged two pre conditions before this court by way of written submissions, before the High Court he had confined his objections merely to the second point and the order dated 30<sup>th</sup> November 2007 of the learned high court judge too reflects only the second point, as the learned defence counsel had not raised any objections based on the first point. Quite contrary to the position taken up by the defence counsel in this court, before the High court at page 1033 on 26<sup>th</sup> October 2007 the learned Presidents Counsel had admitted that the commission has fulfilled the requirements in relation to the first precondition. Therefore now he is estopped from taking up this particular objection and the defence cannot be allowed to blow hot and cold. Hence I will only deal with the second precondition to which the learned counsel has drawn the attention of this court.

The learned Deputy Solicitor General in his written submissions has stated that under section 39 of the Judicature Act the defence is precluded from raising an objection to the Jurisdiction of the High Court at this late stage of the proceedings. Section 39 of the Judicature Act provides thus;

*“Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any court of first instance neither party shall afterwards be entitled to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter. . .”*

It is common ground that in the instant application defence had raised the preliminary objection after the prosecution closed its case. Defence’s contention is that although there was no certificate from the commission to the effect that it was not satisfied with explanation given, yet they anticipated some oral evidence to that effect in the course of the trial.

Defence further argued by relying on previous judicial pronouncements that an objection to the patent lack of jurisdiction can be taken up at any stage of the case. As defence has argued that in the instant case the absence of a certificate by the commission amounts to a patent lack of jurisdiction it is pertinent to look into the provisions of Section 23A (4) of the Bribery Act.

Section 23 A (4) provides that;

*“No prosecution for an offence under this section shall be instituted against any person unless the Bribery Commission has given such person an opportunity to show cause why he should not be prosecuted for such offence and he has failed to show cause or the cause shown by him is unsatisfactory in the opinion of such commission”*

A plain reading of section 23 A (4) reveals clearly that giving “an opportunity” to show cause is of paramount importance and no action can be instituted without giving

such an opportunity to show cause. It is also clear that the intention of the legislature was to protect the subjects from arbitrary prosecution. A careful scrutiny of the section makes it evident that the salient ingredient of this section is the 'affording of an opportunity' before institution of action. If the opportunity is not given, then it can tantamount to a patent lack of jurisdiction as no prosecution is possible without affording an opportunity. However once an opportunity is given, and on such occasion no cause is shown or if the commission is not satisfied with the explanation, then legal action will follow. According to section 23 A (4) it is the commission who should be dissatisfied with explanation and no one else. Nowhere in the section is it stipulated that a certificate or a document should be annexed to the indictment. Under section 23 A (4), if at all, a patent lack of jurisdiction can only arise if an opportunity is not afforded. Assuming but without conceding that the existence of a certificate of dissatisfaction is a requisite, still it cannot be a patent lack of jurisdiction.

Section 12 (2) of Act No. 19 of 1994 stipulates that there shall be annexed to every such indictment, in addition to the documents which are required by the Code of Criminal Procedure Act No. 15 of 1979 to be annexed there to, a copy of the statements, if any, made before the commission by the accused and by every person intended to be called as a witness by the prosecution. The section is unambiguous and does not disclose any other requirement. The law makers never intended to include a certificate of dissatisfaction or any analogous document as a requisite in an indictment under the Bribery Act.

In my opinion this is eminently a suitable situation wherein the maxim '***expressio unius est exclusio alterius***' should apply. Conceding that this rule of interpretation must be applied with great caution, nevertheless in the situation at hand out of necessity it is relevant.

The application of this maxim results in the exclusion of all other provisions save the expressly mentioned provisions. As a letter or certificate of dissatisfaction is not mentioned as a requisite under section 12(2) the irresistible conclusion is that such a letter or certificate is not a pre condition. Hence once the Commission is not satisfied with the explanation, Commission can direct the Director-General to institute proceedings under section 11 of Act No. 15 of 1994. Although the defence has attempted to make a mountain out of a molehill, in view of the above reasoning I hold that the certificate of dissatisfaction is not a requirement under section 23 A (4).

Though the learned presidents counsel submitted that no evidence whatsoever has been led with regard to the existence of the precondition, I think the learned presidents counsel has not adverted his attention correctly to the evidence of Ranatunga at page 899 on 09<sup>th</sup> July 2007 when the witness said "සමහරක් කරුණු ප්‍රතික්ෂේප කිරීමක් කර තිබෙනවා." Therefore the defence position of "no evidence whatsoever has been led with regard to the existence of the pre condition" is incorrect. On a comparison of V 35 (show cause notice) and the indictment it is manifestly clear, out of the twenty five (25) items included in V 35, items 1, 2, 3, 4, 5, 6, 11, 22, 23, 24 and 25 totalling to the value of nearly 10.6 Million have not been included in the indictment. Therefore it is irrefutable that the explanation given in respect of those items has been accepted and explanation with regard to the other items has been rejected.

Adverting back to the submission made by the learned Deputy Solicitor General under section 39 of the Judicature Act, as I have already opined that there cannot be a patent lack of jurisdiction under section 23 A (4) otherwise than on the question of affording an opportunity to show cause,

any other objection should fall under latent lack of jurisdiction and hence, should have been taken before the accused pleaded to the indictment. As the defence could not have been unaware of the non-availability of a certificate of dissatisfaction, defence should not have lingered till closure of the prosecution case. On that ground alone the objection must fail.

Learned Presidents Counsel for the defence cited the decision in *Kanagarajah v. Queen*<sup>(1)</sup>. But as pointed out by the learned Deputy Solicitor General the circumstances in that case was different from the instant case. Especially in view of the sequence of events, their lordships had taken a sympathetic view in favour of the accused. In *Herman Fernando* (B 1173/96) the issue was whether the notice given under section 23 (4) was sufficient or not. But in the instant case that particular question never arose. All other judicial pronouncements cited by the defence are decisions of the high court and hence is not binding on this court.

Finally I must emphasize that once an opportunity is given and if the Commission is not satisfied with the explanation given in reply on such occasion, I hold that the Commission is not bound to issue a certificate or letter of dissatisfaction. Mere fact of institution of action is ample proof of such dissatisfaction. Dictates of common sense too justifies such a conclusion.

For the aforementioned reasons the appeal is allowed and the order made by the High Court of Colombo dated 30<sup>th</sup> November 2007 is set aside. The matter is referred back to the High Court for further trial.

**RANJIT SILVA J** – I agree.

*Appeal allowed.*