IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an appeal in terms of Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka and in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

CA Case No: CA/HCC/51-52/19
HC of Colombo Case No:
HCB 2008/14

Director General,
Commission to investigate Allegations of Bribery or Corruption, No. 36 Malalasekara Mawatha, Colombo 07.

Complainant

VS

1. Kahangama Mahanamage Haritha Sunil Kumara

2. Kakunawela Pathiranage Dhammika Nishantha

3. Hendric Peruma Gardhige Nandasena

4. Lagamuwa Thanne Viyannalage Janaka Ruwan Jayakodi

Accused

AND NOW BETWEEN

1. Kahangama Mahanamage Harith Sunil Kumara

2. Kakunawela Pathiranage Dhammika Nishantha.

Accused-Appellants

VS.

Director General,
Commission to investigate Allegations of Bribery or Corruption,
No 36 Malalasekara Mawatha, Colombo 07.

Complainant-Respondent

Before : **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel: Neranjan Jayasinghe with Randunu Heellage and Imangsi Senerath for the 1st Accused- Appellant
Saliya Peiris PC with Thanuka Nandasiri for the 2nd Accused-Appellant
Dushmanthie Rajapakse with Sharanya Jayarajah and Thilanka Kularathna for the Respondent

Written Submission : 14.01.2020 (by the 1st Accused Appellant)
On 13.10.2020 (by the 2nd Accused Appellant)
12.10.2021 and 23.09.2025 (by the Respondent)

Argued On: 12.09.2025

Judgment On: 28.10.2025

JUDGEMENT

B. Sasi Mahendran, J.

The Accused-Appellants (hereinafter referred to as the 1st and 2nd Accused), along with 3rd and the 4th Accused were indicted before the High Court of Colombo on 14 counts for the offence of soliciting and accepting a bribe from one Nishshanka Arachchige Sumathipala during the period of 01.05.2012 to 08.08.2012, punishable under Section 16 (b), 19(c) to be read section 25 (2) of the Bribery Act.

The Prosecution led evidence through seven witnesses and marked the productions P1 – P10 and closed its case. The Accused made dock statements separately in their defence.

Upon conclusion of the trial, the Learned Judge of the High Court, by judgment dated 22nd March 2019, convicted the 1st Accused on counts 1, 2, 9, and 10, and the 2nd Accused on counts 3, 4, 11, and 12. Accordingly, the 1st Accused was sentenced to six years of rigorous imprisonment on each of counts 1 and 2, to run concurrently and further sentenced to six years of rigorous imprisonment on each of counts 9 and 10, also to run concurrently. As a result, the total sentence imposed for all four counts amounted to twelve years of rigorous imprisonment. Additionally, a fine of Rs. 5,000 was imposed for each count, along with an extra fine of Rs. 30,000 for the 9th count. For the 2nd Accused, the 3rd and 4th counts were sentenced to 5 years of rigorous imprisonment, to run concurrently, and the 11th and 12th counts were also sentenced to run concurrently and, in total, 10 years of rigorous imprisonment for all four counts. Additionally, a fine of Rs. 5,000 was imposed for each count; furthermore, Rs. 100,000 as compensation to PW 01 from each Accused. The 3rd and 4th Accused were acquitted of all charges against them.
Being aggrieved by the afore-mentioned conviction and the sentence, both Accused have preferred this appeal to this Court on the premise that the Learned High Court Judge has influenced PW 1 by inducing him to give evidence.

The facts and circumstances of this case are as follows,

According to PW 1, Nishshanka Arachchilage Sumathipala, who lodged the complaint against the Accused, gave evidence to the effect that he had been engaged in sand mining since 2010. Initially, he operated under a valid permit issued for the location known as

'Periyaru Mankanda'. Upon expiry of that permit, the witness resumed mining activities at the same location without a valid permit and continued such operations for approximately six months.

In April 2012, while engaged in mining, 4 Wildlife officers from the Polonnaruwa Department arrived at the place, and they inquired whether the witness possessed a valid permit, to which he responded in the negative. According to the witness, after all 4 officers solicited money to avoid instituting any legal actions against him.

Page 179 of the brief,

ප්‍ර : මොනවද කිව්වේ?

උ : බලපත්‍ර නැතිව වැලි ගොඩ දාන්න බැහැ කිව්වා.

ප්‍ර : දැන් තමුන්ට කිව්ව බලපත්‍ර නැතිව කරන්න බැහැ කියල?

උ : එහෙමයි ස්වාමීනි.

ප්‍ර : ඒ අතරේ තව කවුරුහරි තව මොනවා හරි කිව්වද?

උ : උත්තරයක් නැත.

ප්‍ර: ඔතන හිටිය විත්තිකරුවන්ගෙන් තව කව්රුහරි මොනවා හරි කිව්වද?

උ : ඔව්. ස්වාමීනි.

ප්‍ර : මොකද්ද කිව්වේ?

උ : සල්ලි ඉල්ලුව ස්වාමීනි. බලපත්‍ර නැතිව වැලි ගොඩ දානවනම් සල්ලි ඉල්ලුව ස්වාමීනි.

ප්‍ර : කව්ද සල්ලි ඉල්ලුවේ?

උ : හතර දෙනාම ඉල්ලුව ස්වාමීනි.

After that, the Learned High Court judge made the following remarks.

අධිකරණයෙන්

(මේ අවස්ථාවේ මෙම සාක්ෂිකරු බයකින් සිටින බව මා දිගින් දිගට නිරීක්ෂනය කරමි. ඔහුට අවවාද කර සිටින්නේ ඔහුට යම් තර්ජනයක් බලපෑමක් ඇත්නම් අධිකරණයට හෙළිදරව් කරන ලෙසය.)

Then the prosecution led the following questions.

Page 180 of the brief;

ප්‍ර : දැන් තමුන්ට හරියට කියන්න පුලුවන්ද කව්ද ඉල්ලුවේ කියක් ද ඉල්ලුවේ කියලා?

උ : රු. 30,000/- ක් ඉල්ලුවේ ස්වාමීනි.

ප්‍ර : කව්ද ඉල්ලුවේ?

උ : ජයකොඩි මහත්මය.

Thereafter, the learned High Court Judge asked for a witness to identify the Accused.

<u>අධිකරණයෙන්</u>

ප්‍ර : තමා වැලි ගොඩ දානකොට ඔය 04 දෙනාම ආව කිව්වනේ ?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : ඔවුන්ගෙන් කව්ද ප්‍රධානියා?

උ : පොලොන්නරුව රවුම් පාර.

ප්‍ර : තමුන් කිව්වනේ අප්‍රේල් මාසේ විතර ආවේ කියලා?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : ඒ ආවේ කවදහ කියලා?

උ : දම්මික මහත්තයයි, ජයකොඩි මහත්තයයි, කුමාර මහත්මයයි, නන්දසේන මහත්මයයි.

ප්‍ර : මේ හතර දෙනාම කොහෙද වැඩ කලේ?

උ : වන ජීවී එකේ.

ප්‍ර : දැන් තමුන් කිව්වා දම්මික මහත්තයයි ජයකොඩි මහත්තයයි, කුමාර මහත්තයයි, නන්දසේන මහත්තමයයි ආවේ කියලා?

උ :එහෙමයි ස්වාමිනි.

ප්‍ර : ඒ හතරදෙන ආයේ දැක්කොත් හඳුනා ගන්න පුලුවන්ද?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : අද දින අධිකරණයේ ඉන්නවද ?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : කුමාර කියලා කෙනෙක් මෙම අධිකරණයේ ඉන්නවද ?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : කොතනද ඉන්නේ?

උ : විත්තිකුඩුවේ ඉන්නේ 01 වෙනියට. (01 වන විත්තිකරු පෙන්න හඳුනා ගනී)

ප්‍ර : දම්මික කියලා කෙනෙක් ඉන්නවද?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : කොතනද ඉන්නේ ?

උ : 02 වැනියාට ඉන්නේ. (02 වන විත්තිකරු පෙන්නා හඳුනා ගනී)

ප්‍ර : ඊළඟට කව්ද කිව්වේ?

උ : නන්දසේන.

ප්‍ර : නන්දසේන කියන කෙනා ඉන්නවද?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : කොහෙද ඉන්නේ ?

උ : 03 වෙනියට.

(03 වන විත්තිකරු පෙන්නා හඳුනා ගනී.)

ප්‍ර : අනිත් එක්කෙනා කව්ද?

උ : ජයකොඩි.

ප්‍ර : ජයකොඩි කියන කෙනා විත්තිකුඩුවේ ඉන්නවද?

උ : එහෙමයි ස්වාමිනි.

ප්‍ර : කොහෙද ඉන්නේ ?

උ : 4 වෙනියට.

(4 වන විත්තිකරු පෙන්නා හඳුනා ගනී.)

(01 සිට 04 දක්වා විත්තිකරුවන් සියලු දෙනා පැමිණිලිකරු පෙන්නා හඳුනා ගනී.)

ප්‍ර : දැන් තමුන් කිව්ව මේ විත්තිකරුවන් තමුන් ඉන්න තැනට ආවා කියලා ?

උ: ඔව්.

ප්‍ර : තමුන්ට මෙහෙම බලපත්‍ර නැතිව වැලිගොඩ දාන්න බැහැ කියලා කව්ද කිව්වේ මුලින්ම?

උ : කුමාර මහත්තයා.

ප්‍ර : තමාට මොකක් හරි තර්ජනයක් බලපෑමක් තියෙනවද සාක්ෂි දෙන්න ?

උ : උත්තරයක් නැත.

(සාක්ෂිකරු ඉතාමත් බයකින් බිම බලාගෙන සිටින ආකාරයක් නිරීක්ෂණය කරමි.)

ප්‍ර : තමුන්ට කාගෙන් හරි තර්ජනයක් බලපෑමක් තියෙනවද?

උ : නැහැ ස්වාමිනි.

Then, after the witness identified the 1st accused, Kumara, as the one who asked for the money. Suddenly, the learned high court judge asked the following questions.

(අධිකරණයෙන්)

ප්‍ර : කව්ද සල්ලි ඉල්ලුවේ?

උ : ජයකොඩි මහත්තය.

ප්‍ර : කියක් ද ඉල්ලුවේ?

උ : රු. 30,000 ක් ඉල්ලුවා.

ප්‍ර : එතකොට සල්ලි දෙන්නේ නැත්නම් නඩු දානවා කිව්වේ කව්ද ?

උ : කුමාර මහත්තයා.

ප්‍ර : දැන් ඔය සල්ලි ඉල්ලනකොට රු.30,000/ ඉල්ලනකොට කුමාර මහත්මයා මොකද කිව්වේ?

උ : එතන හිටිය ස්වාමිනි.

ප්‍ර : කුමාර මහත්මය මොනවද කිව්වේ?

උ : මුකුත් කිව්වේ නැහැ ස්වාමිනි.

When we analyse the evidence placed on that day, the witness stated that the 1st Accused was the lead officer, who told the witness that sand mining required a valid permit. Following a question posed by the Court, it emerged that the 4th Accused had solicited a

monthly payment of Rs. 30,000 to refrain from initiating legal proceedings against the witness, and the 1st Accused was also present at that time.

Thereafter, the court adjourned the case, and when the case was taken up later the counsel for the prosecution made application to adjourn to take the trial on another date. And the Learned High Court Judge made the following remarks.

Page 192 of the brief,

> 'දැනටමත් මා හට පෙනී ගිය ආකාරයට කුමක් හෝ හේතුවක් මත පැ.සා 01 සම්පූර්ණ සත්‍ය හෙළිදරව්ව කිරීමට මැලිකමක් දැනට මා හට හෙළිදරව් වී ඇත. මෙම අධිකරණයේ මේ හා සමාන නඩුවල පැමිණිලිකරුවන් විවිධ ස්ථාවරයන් ගෙන විවිධ ස්ථාවරයන් වෙනත් ස්ථාවරයන් ගන්නා අතර සාමාන්‍යයෙන් එම නඩු කටයුතු ආරම්භ කළායින් පසුව හැකිතාක් දිනෙන් දින විභාගයට ගන්නා අතර ප්‍රධාන සිවිල් සාක්ෂිකරු මෙහෙයවන තෙක් චිත්තිකරුවන් රක්ෂිත බන්ධනාගාරගත කිරීම අවස්ථානුකූලව සිදු ඇත. එසේ කරුණුයේ සාක්ෂිකරුවන්ට සිදු කරනු ලබන බලපෑම් අවම කිරීම සඳහා වේ. එසේ වුවද අද දින මෙම නඩුව කල් දමන්නේ පැමිණිල්ලේ ඉල්ලීම මත වේ. අවම වශයෙන් කල්යාම හේතු කොට ගෙන චිත්තිකරුවන් හතර දෙනාට තරයේ අවවාද කොට මුදවා හරිමි.
> එසේ වූවද රුපියල් ලක්ෂ පහක පුද්ගලික බැඳුම්කරයකට අත්සන් කිරීමට නියම කරමි.'

Thereafter, the Learned High Court Judge released PW 1, the complainant, on a personal bond and adjourned the trial to 01.02.2018 and 02.02.2018.

When this witness gave evidence on 1 February 2018, the witness stated that he could not give evidence as he was under duress. He made a complaint on 30 January 2018, informing the Bribery Commission by writing regarding this threat. He informed the court that he was threatened by the 1st and the second accused. When he gave evidence, he had changed his earlier position. This contradiction was not considered by the Learned High Court Judge.

Upon reviewing the judgment, it is evident that the Learned High Court Judge did not address a key contradiction in the evidence. Furthermore, the Judge failed to determine whether any threats were made by the first and second accused. It is imperative to note that the credibility of a witness must be assessed through the lens of probability, consistency, and contradiction. In my considered opinion, the Learned High Court Judge did not adequately evaluate the testimony of PW 01.

During the course of arguments, counsel for the appellant observed that the Learned High Court Judge, acting on their own accord, released PW 01 on a personal bond. Ordinarily, when a witness retracts or deviates from their earlier testimony, the prosecution may seek to have the witness declared adverse. In such circumstances, the court typically proceeds to release the witness by imposing a personal bond.

We are also mindful that there is no evidence on record to establish that Prosecution Witness 01 (PW 01) was under any threat. Nevertheless, the learned High Court Judge appears to have independently concluded that PW 01 was indeed under threat, without any evidentiary basis for such a finding. When we analyse the evidence placed on that day learned high court judge asked questions when PW 01 when back from his evidence.

It is pertinent to refer to Section 4 (1) of the International Covenant on Civil and Political Rights.

Section 4(1) provides as follows;

(1) A person charged of a criminal offence under any written law, shall be entitled-

(a) to be afforded an opportunity of being tried in his presence;

(b) to defend himself in person or through legal assistance of his own choosing and where he does not have any such assistance, to be informed of that right;

(c) to have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance.

(d) to examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him;

(e) to have the assistance of an interpreter where such a person cannot understand or speak the language in which the trial is being conducted; and

(f) not to be compelled to testify against himself or to confess guilt.

(emphasis added)

In this instance, it is observed that when the witness recanted his initial testimony, the Learned High Court Judge compelled his attendance by ordering him to enter into a bond, which did not conform to proper procedure. Furthermore, the Learned High Court Judge posed several questions that appeared intended to implicate the Accused.

I am mindful of the observation made by Justice A.R.P. Amasinghe in his book '*Judicial Conduct, Ethics and Responsibilities*', page 818,

> *A judge has the right and indeed the responsibility to prevent conduct which may well be or become an abuse of the process of the court. However, a judge must act with caution so as to leave unfettered the right of a party, through his or her counsel, to subject any witness's testimony to the test of cross-examination. It is not allowable, in advance, to place any length of time to be consumed by cross-examination.*
>
> *We have seen that judges must act within the norms of the adversary adjudicative process. Ludovic Kenndy was quoted as saying: Whereas in Britain the judge acts as a kind of referee in what is largely a test of debating skills between counsel, in France it is the presiding judge who does all the questioning.' Although in some civil law jurisdictions which have an inquisitorial system, it is the responsibility of the judge to develop the litigative facts, in common law countries like Sri Lanka, which as we have seen, have the adversarial system, judges are arbiters who must, in general, leave it to counsel to place the evidence before the court. and to deal with the case that is put before the court by counsel for the parties.*
>
> The role of a judge in an adversarial system was described by Bacon.
>
> > The parts of a judge in hearing are four:- to direct the evidence; to moderate length, repetition, or impertinency of speech; to recapitulate, select, and collate the material points of that which hath been said; and to give the rule or sentence. Whatsoever is above these is too much, and proceedeth either of glory and willingness to speak, or of impatience to hear, or of shortness of memory, or want of staid and equal attention.
>
> *Lord Denning, in Jones v National Coal Board said:*
>
> > *(The Judge] must keep his vision unclouded... Let the advocates one after the other put the weights into the scales - the nicely calculated less or more - but the judge at the end decides which way the balance tilts, be it ever so slightly. The judge's part in all this ... is to hearken to the evidence, only*

himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well... Such are our standards.

The basis of the judge's role was explained in Regina v Torbiak and Campbell.221 Kelly JA, delivering the judgment of the court, said:

The proper conduct of a trial is circumscribed by two considerations. On the one hand [the judge's] position is one of great power and prestige which gives his every word an especial significance. The position of established neutrality requires that the trial judge should confine himself as much as possible to his own responsibilities and leave to counsel and members of the jury their respective functions. On the other hand his responsibilities for the conduct of the trial may well require him to ask questions which ought to be asked and have not been asked on account of the failure of counsel, and so to compel him to interject himself into the examination of witnesses to a degree which he might not otherwise choose.

In the present matter, we find no justification for the learned trial judge's decision to release the witness on bond, particularly in the absence of any stated reasons.

Impact on remanding a witness was considered by Justice **Sisira de Abrew in Dinga Balithiyannalage Dayananda Sisira Kumara v. The Republic of Sri Lanka, CA Appeal No. 196/06, Decided on 29.09.2008**, held that;

"Remanding a witness for giving false evidence during the pendency of a trial can bring pressure on witnesses to be called by the prosecution or the defence, to stick to their versions in the police statement or the deposition in the Magistrate's Court. In such a situation Superior Court can conclude that the accused has been deprived of a fair trial."

We observed that after he was released on bail, he had changed his position and implicated the different accused.

Furthermore, we observe that the nature of the questions posed by the court was prejudicial to the accused. Such conduct, in our view, constitutes a breach of the fundamental principles of a fair trial.

Accordingly, I hereby set aside the convictions and sentences imposed by the learned High Court Judge on the first and second accused and order a fresh trial.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.
I AGREE.

JUDGE OF THE COURT OF APPEAL