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

In the matter of an Appeal against the judgment/order of the High Court of Colombo under Section 331 of the Code of Criminal Procedure Act No.15/1979 read with Section 138 of the Constitution.

C.A.No.209-210/2006

H.C. Colombo No.B1457/2004

1. Visinchi Baduge Palitha Jayaratne.
2. Mapa Musiyanselage Nalaka Mihira Bandara.

Accused-Appellants

Vs.

Commission to investigate
Allegations of Bribery or Corruption,
No.36, Malalasekera Mawatha,
Colombo 07

Respondent

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BEFORE : **DEEPALI WIJESUNDERA, J.**
ACHALA WENGAPPULI, J.

COUNSEL : Anil Silva P.C. for the 1st Accused-Appellant.
Tenny Fernando for the 2nd Accused-Appellant.
Thusith Mudalige D.S.G. for the respondent.

ARGUED ON : 12th March, 2019

DECIDED ON : 23rd July, 2019

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ACHALA WENGAPPULI, J.

The 1st and 2nd accused-appellants (hereinafter referred to as the "1st and 2nd appellants"), by lodging individual petitions of appeal to this Court, seek to set aside their convictions on certain offences committed under the Bribery Act, that had been entered by the High Court of Colombo on 03.05.2006 and the consequent imposition of terms of imprisonment.

In the indictment presented by the Director General of the Commission to Investigate Allegations of Bribery and Corruption, it is alleged that the 1st appellant committed offences under Sections 19 (b), (c) and 11 of the Bribery Act in four counts, when he solicited Rs. 5000.00 from

one *Dissawe Mudiyanselage Amila Prasanga Bandara* to abstain from prosecuting him under Forest Ordinance for transporting timber and accepting Rs. 2000.00 on 13.01.2003. The 2nd appellant was charged under Sections 19 (b) and 25 (2) in four counts for aiding and abetting the 1st appellant.

Being aggrieved by the said conviction and sentence, the 1st appellant sought to challenge its validity on the basis that;

a. the trial Court has erroneously accepted confessionary evidence contrary to Section 25 of the Evidence Ordinance,
b. the trial Court had failed to consider the evidence of the Bribery Officers with caution,
c. the trial Court had erroneously rejected the 1st appellant's evidence,
d. the sentence imposed on the 1st appellant is excessive in view of the long duration of time since the date of offence to his conviction.

The 2nd appellant relied on the following grounds of appeal in support of his appeal;

a. the trial Court has erroneously rejected the defence of alibi which was supported by independent evidence,
b. the trial Court had failed to consider the unreliability of the evidence of the virtual complainant.

The prosecution presented its case based primarily on the evidence of the virtual complainant *Amila Prasanga Bandara,* his friend *Seneviratne Bandara* (PW3) and PC 19901 *Ajith Kumara* (PW4) who acted on the complaint against the Appellants.

It was revealed from the evidence of the prosecution that *Amila* who was employed as a Home Guard attached to *Uhana* Police in *Ampara* at that time. In the evening of 13.01.2003 he had taken few logs of *Pulun* wood to a nearby sawmill to have them sawn into planks. He had then loaded the sawn planks into a two wheeled tractor that had been borrowed from one of his uncles. It was already dark and *Amila* and PW3 proceeded towards *Manda Oluwa* Junction in order to reach his partly constructed home. As they drove along the highway, a motor cyclist (later identified as the 1st appellant) who was with a pillion rider (the 2nd appellant), motioned them to stop. The 1st appellant asked *Amila* whether he had a permit to transport timber. When *Amila* answered that he had none, the 1st appellant told him to follow his motorcycle and they were led to a house at *Bogas Handiya. Amila* later realised that it was the house of one *Priyantha,* a *Samurdhi* officer of the area.

The appellants then indicated *Amila* that the stand of timber he had transported without any permit had to be produced before Court. *Amila* pleaded with the appellants which made them to have a brief discussion among themselves and also with *Priyantha* who arrived at that juncture in his motorcycle. Thereafter, the 2nd appellant informed *Amila* that they

could release the tractor and the stand of timber they transported, if he gives them Rs. 5000.00. The 1st appellant was also standing nearby when the 2nd appellant made this solicitation.

When *Amila* indicated he did not have Rs 5000.00 at that point of time, the 1st appellant had said if that is the case then they would have to produce the timber and tractor in Court. The appellants then directed *Amila* to talk to his companions and to indicate his position. *Amila* had only Rs. 1000.00 with him and after having borrowed another Rs. 1000.00 from his friend, a total of Rs. 2000.00 was given to and accepted by the 1st appellant. Having accepted the partial payment of Rs. 2000.00, the 1st appellant had let *Amila* to take the tractor along, with the instructions that he could take the timber only after settling the balance of Rs. 3000.00.

After returning home, *Amila* decided to lodge a formal complaint about this "අපරාධය" to the Commission to Investigate Allegations of Bribery and Corruption and did so, having travelled to Colombo in the following morning. He returned home after his statement was recorded and PW4 came to see him in *Ampara*. He was instructed to meet up with the appellants and also to introduce PW4 to them as the uncle who owns the two-wheel tractor in which the timber was transported.

At *Uhana* town, *Amila* and PW4 met the 1st appellant. *Amila* introduced PW4 as his uncle and told him that money is ready and to

release his timber. The 1st appellant then instructed *Amila* to follow him and had stopped his motorcycle at a certain point along *Weeragoda* Road, away from the town. The 1st appellant then told *Amila* that he (the virtual complainant) could have lost his employment due to this detection and cautioned him not to repeat this offensive conduct. *Amila* pleaded for clemency and repeated that " මහත්තයා ඉල්ලපු සල්ලි ගෙනාවා මගේ ලැලී ටික දෙන්න". PW4 kept Rs. 3000.00 with him but the 1st appellant replied " එදා සල්ලි දුන්නනේ, ලැලී ටික අරන් යන්න". *Amila* had thereafter removed the planks from the residence of *Priyantha* with the help of the officers from the Commission.

The 1st appellant's main contention is based on the words that are attributed to him by *Amila* in his evidence to the effect that "එදා සල්ලි දුන්නනේ, ලැලී ටික අරන් යන්න ".

Learned President's Counsel, on behalf of the 1st appellant, contended that the said portion of evidence should not have been admitted and relied upon by the trial Court as it clearly violates the statutory provisions contained in Section 25 of the Evidence Ordinance since those words were allegedly uttered by the 1st appellant to PW4, who is in fact a police officer, although attached to the Commission.

In countering the said contention, learned Deputy Solicitor General submitted that the 1st appellant made this confessionary statement only to

Amila and PW4 only a witness who heard that dialog and as such the prohibition imposed by Section 25 has no application to the instant appeal. Having referred to the authoritative text from the Law of Evidence by *E.R.S.R. Coomaraswamy,* in support of his submission, he also stated that the 1st appellant has had no knowledge that PW4 is a Police Officer at the time of making that confessionary statement and therefore it has no impact of the validity of the confession.

Learned DSG also addressed the issue whether *Amila's* employment as a Home Guard could be considered as a Police Officer or not and invited attention of Court to consider the said issue in the light of the statutory provisions contained in Section 52(1) of the Mobilization and Supplementary Forces Act No. 40 of 1985 and Government Gazette No. 1462 of 13.09.2006 by which the Home Guard Force was converted into Department of Civil Defence.

This particular ground of appeal thus presents an interesting question of law. It is evident from the submissions made by the parties the pivotal point of contest is whether a confessionary statement by an accused to another, made in the presence of a Police Officer, is admissible evidence against its maker in view of the prohibition contained in Section 25(1) of the Evidence Ordinance ?

Section 25(1) of the Evidence Ordinance reads as follows;

> *"No confession made to a police officer shall be proved as against a person accused of any offence."*

Plain reading of the said section indicates that the prohibition imposed by this section applies to confessionary statements which are "made to a police officer". This prohibition was considered by the Court as an absolute prohibition. In ***Seyadu v The King*** 53 N.L.R. 251, the Court of Criminal Appeal reiterated this position as its judgment states;

> *"In The King v. Kiriwasthu [(1930) 40 N. L. R. 289.] a Divisional Bench of the Supreme Court, dealing with a precisely similar objection, upheld the submission that, in the present state of the law of this country, the prohibition contained in Section 25 of the Evidence Ordinance is absolute. The unanimous opinion of the Court was that " a confession made to a Police Officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself.*

The question that had been placed before this Court concerns the admissibility of a confession made in the presence of a police officer. In

The King v Sudhamma26 N.L.R. 220, *Jayewardene* J considered a situation where,

> *"One of the statements objected to appears in the evidence of the witness Mr. Dassenaike, Chief Clerk of the Post Office Savings Bank, who stated that when Inspector Koelmeyer brought the accused to his counter he identified the accused. " Then the accused said he had handed the notice -(that is the notice ' F ' to withdraw a sum of Rs. 150) to me."*

and decided that;

> *"This statement amounts to a confession, it was made to or in the presence of a police officer, its admission is prohibited by section 25."*

This judgment apparently had added the phrase "... *in the presence ...*" a new condition, in addition to the original phrase "... *made to a police officer...* " as found in Section 25(1).

However, *E.R.S.R. Coomaraswamy* in his treatise on Law of Evidence (Vol. I, at p. 396), under the heading " Effect of presence of the police at the time of a confession: ", states thus;

> *"A confession made to a police officer is ruled out by Section 25. A confession while in the custody of the police is inadmissible under Section 26. But the mere*

presence of the police while a confession is made will not necessarily result in the confession being not a voluntary confession or being inadmissible. What would be material is the effect that the presence of the police had on the person making the confession."

Coomaraswamy had placed emphasis on the effect that the presence of the police had on the person making the confession in determining its admissibility under these two sections. The judiciary, in order to protect the rights of an individual, had sought to provide a reason of this prohibition in several of its judgments. The judgment of the apex Court in ***Rajapakse and Others v The State*** (2010) 2 Sri L.R. 113, revisited this issue when it considered the question of admissibility of confessions made to military officers and quoted *Viscount Radcliff* who delivered the following opinion of the Judicial Committee of the Privy Council on the policy behind the enactment of these two sections in ***Murugan v. Ramasamy*** 68 N.L.R. 265;

"There can be no doubt as to what is the general purpose of Sections 25 and 26. It is to recognize the dangers of giving credence to self - incriminating statements made to policemen or made while in police custody, not necessarily because of suspicion that improper pressure may have been brought to bear for the purpose of securing convictions. Police authority

itself, however carefully controlled, carries a menace to those brought suddenly under its shadow; and these two Sections recognize and provide against the danger of such persons making incriminating confessions with the intention of placating authority and without regard to the truth of what they are saying."

It is clear that the Privy Council had restricted the absolute prohibition under Section 25 and 26 to confessions *"made to policemen or made while in police custody"* and not to the ones which were made in the presence of a policeman. Then why in ***The King v Sudhamma*** (supra) *Jayawerdene* J expanded the scope of the section to include confessions *"made to or in the presence of a police officer"* ?

The answer could be found in the narration of facts that are peculiar to that matter. When the impugned confession was made by the appellant to the Chief Clerk of the Post Office Savings Bank, he was already in custody of the Police. It was the Police who brought him to the bank for investigations during which period the confession was made. Therefore, the appellant before *Jayawerdene* J was entitled to the protection of both section 25 and 26 of the Evidence Ordinance. It is in this peculiar setting only *Jayawerdene* J expressed the view that confessions *"made to or in the presence of a police officer"* are inadmissible. Therefore, the said pronouncement does not lay down a principle making any confession in the presence of a police officer inadmissible. Thus the quotation of

Coomaraswamy is not in conflict with the judgment of ***The King v Sudhamma*** (supra) delivered by *Jayawardene* J while sitting alone.

In relation to the instant appeal, the evidence is clear that the confessionary statement of the 1st appellant was made during his conversation with *Amila*. PW4 was a mere bystander, although was present there listening to this conversation. The 1st appellant was not under arrest at the time and was totally unaware that PW4 was a policeman since he was introduced to him by *Amila* as one of his uncles and also as the owner of the two-wheel tractor in which the timber was transported. Clearly the 1st appellant was not "in some sort of Police custody" as per the judgment of ***Iyer v. Galboda*** 44 NLR 94.

R.K.W. Goonesekere, in his book titled Bribery - A study in law making and of the Criminal Process, explains the purpose of the presence of the bribery officer at detections as follows (at p. 90);

> *"In the case of a trap the prosecution usually relies on the evidence of the complainant and of bribery officers who took part in the trap. These bribery officers either accompany the complainant to see the money being given or wait nearby for the signal to burst in and arrest the accused ... usually in the guise of a relative ('uncle' is a favourite)...".*

There was no indication that the circumstances that existed at the time when the 1st appellant made his confession, are similar to the circumstances as envisaged by ***Murugan v. Ramasamy*** (supra) and raises no significant issue demanding consideration of this Court as to "*the effect that the presence of the police had on the person making the confession*", as *Coomaraswamy* observes. PW4 remained there only as a neutral observer waiting for the completion of the offence and had no part to play either to entice or to discourage the 1st appellant from accepting the balance Rs. 3000.00 of what he solicited from *Amila* after the "detection of illegal transportation of timber". *Coomaraswamy* described these type of "traps" as "legitimate traps"(Vol.II Book 1 at page 395).

The other aspect that had been raised is *Amila's* official capacity as a Home Guard.

This Court inclines to agree with the submissions of the learned DSG that Home Guards do not have investigative powers and as such could not be equated to Police Officers, thus triggering the prohibition under Section 25 of the Evidence Ordinance. The statutory provisions contained in Section 52(1) of the Act No. 40 of 1985 is clear that Home Guards are considered as an auxiliary forces. Home Guards do not qualify under Section 25 of the Evidence Ordinance as per the test adopted in ***Rajapakse & others v. The State*** (Supra). The instant appeal does not cover a situation under Section 58(1) of the Act as envisaged in the said provision.

Therefore, it is the considered view of this Court, that the prohibition imposed by Section 25 or 26 of the Evidence Ordinance has no application to the situation that had been considered by the trial Court in relation to the instant appeal and therefore the said confession suffers no disqualification as an item of evidence against the 1st appellant.

Other grounds of appeals, as raised by learned Counsel for the appellants concerns that the trial Court's evaluation of the evidence presented by the prosecution in support of its case against them and also on behalf of the appellants.

Perusal of the judgment of the trial Court revealed that it had considered the evidence of the complainant *Amila* in great detail. It had applied the tests on evaluation of credibility on the testimony of *Amila* and *Bandara.* Then it decided to accept their evidence also on the demeanour and deportment. The conclusions reached by the trial Court in relation to credibility of witnesses are necessarily a questions of fact and an appellate Court would be very slow to interfere with such a determination unless some compelling reason to do so emerges. In relation to the evidence of PW4, the bribery officer, it is apparent that the trial Court had not placed any significance on it since there was no acceptance that took place in his presence. His evidence is confined to the above quoted confession by the 1st appellant and the subsequent recovery of the timber at *Priyantha's* residence. The conviction is founded upon the evidence of *Amila* who alleges that the appellants have solicited and accepted a part payment on

an earlier date in the absence of any bribery officer. The inconsistency highlighted by the 2nd appellant that *Amila* implicated him for solicitation but he was indicted only for aiding and abetting, had in fact been considered by the trial Court at length. This Court concurs with the conclusion reached by the trial Court on this issue since the evidence is clear that both appellants have conveyed to *Amila* that if they were to abstain from producing the tractor and timber in Court, a bribe of Rs. 5000.00 needed to be paid. Hence, these complaints by the appellants have no significant impact on the validity of the conviction.

In relation to the ground of appeal that the trial Court had erroneously rejected their evidence needed a more detailed consideration.

The 1st appellant admits having stopped the tractor in transporting timber not with the 2nd appellant, but with another officer called *Samantha.* The 1st appellant however claims that they let the complainant proceed with the timber and he only made a report to his senior officer about it. He attributes the initiative to make a payment on the complainant, in return of the favour of letting him go after the detection. The 2nd appellant took up an alibi and had called his senior officer *Arunasiri* in support.

In rejecting the appellants evidence, the trial Court had applied the tests of consistency and probability and concluded that the evidence of the appellants is not credible. This is a correct conclusion reached by the trial

Court on the evidence of the appellants since the involvement of *Samantha* in the detection was never put to the complainant or to his witness *Bandara* during their lengthy cross examinations by any of the appellants. It was brought up only during appellant's evidence. Clearly this is an afterthought on the part of the appellants. The 2nd appellant had merely suggested to the complainant and the other lay witness that he was not there on the 13th and *Amila* had re-emphasised his position that both the appellants were there on the 13th.

This Court, therefore is of the considered opinion that the appeals of the appellants are without any merit and accordingly affirms their convictions.

However, the 1st appellant raised the question of the propriety of sentence. The date of offence is 13.01.2003 and they were convicted on 03.05.2006. Their appeal was taken up only in March 2019. They were enlarged on bail pending appeal. In view of the totality of circumstances and the long gap between the date of offence and the determination of their appeal, this Court is of the view that it is appropriate that they do not serve a custodial term.

Therefore, the three year terms of imprisonment imposed on the 1st appellant in respect of the 1st and 2nd counts are reduced to a term of two years and suspended it for a period of ten years. Similarly, the three year

terms of imprisonment imposed on the 2nd appellant in respect of the 5th and 6th counts are reduced to a term of two years and suspend it for a period of ten years. Fines and default sentences are to remain unaltered. The altered sentences are to take effect from the date of this judgment.

Subject to the above variation of their sentences, the appeals of the appellants stands dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL