X_1

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

In the matter of an Appeal under and in terms of Section 331 (1) of the Criminal Procedure Code No. 15 of 1979.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Court of Appeal Case No:
CA 413 - 414/2017

Complainant

High Court Colombo Case No:
HC 8026/2015

Vs.

1. Vithana Palpita Koralalage Anusha Palpita.
   No. D2/1/1, Torrington Flats,
   Step 3, Malalasekara Mawatha,
   Colombo 07
   Presently; No.67, Dewala Road
   Pagoda, Nugegoda.

2. Lalith Chandrakumar Weeratunga.
No.A-19-02, Royal Park Housing Complex, Lake Drive, Rajagiriya.
Presently ; No.25/9, 3rd Lane, Dolalanda Gardens, Thalawathugoda.

Accused

AND NOW BETWEEN

Vithana Palpita Koralalage Anusha Palpita.
No. D2/1/1, Torrington Flats, Step 3, Malalasekara Mawatha, Colombo 07
Presently; No.67, Dewala Road Pagoda, Nugegoda.

1st Accused – Appellant

Lalith Chandrakumar Weeratunga.
No.A-19-02, Royal Park Housing Complex, Lake Drive, Rajagiriya.
Presently; No.25/9, 3rd Lane, Dolalanda Gardens, Thalawathugoda

2nd Accused – Appellant

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

BEFORE : Hon. K. K. Wickremasinghe, J.
Hon. Devika Abeyratne, J.

COUNSEL : Mr. Kanchana Ratwatte, AAL with Mr. Janaka Ranatunge, AAL, Ms. Thushara Samanpali Amarasiri, AAL and Ms. Amani Pilapitiya , AAL for the 1st Accused Appellant.

Mr. Faisz Musthapha, PC with Shavindra Fernando, PC, Mr. Faiszer Musthapha, PC, Ms. Faisza Marker, AAL, Mr. Shantha Jayawardhana, AAL and Mr. Keerthi Thilakaratne, AAL for the 2nd Accused Appellant.

Mr. Thusith Mudalige, DSG with Ms. Chathuri Wijesuriya, SC for the Hon. Attorney – General.

ARGUED ON	:	23/07/2020, 29/07/2020, 24/08/2020, 02/09/2020, 04/09/2020, 10/09/2020, 16/09/2020, 24/09/2020, 30/09/2020 and 06/10/2020.
WRITTEN SUBMISSIONS	:	1st Accused Appellant – 03/01/2019 2nd Accused Appellant – 03/01/2019 Respondent – 06/02/2019 Further Written Submissions on -27.10.2020 (By both parties via email)
DECIDED ON	:	19.11.2020

K.K.WICKREMASINGHE, J.

Both Parties agreed to have one consolidated judgement for both Appeals.

The 1st and 2nd Accused-Appellants (hereinafter sometimes referred to as the Appellants or the 1st and 2nd Accused respectively) were originally indicted in the High Court of Colombo for the following offences:-

1) That during the period between 30th October 2014 and 5th January 2015 the Accused with others unknown to the prosecution, acting contrary to the provisions of the Sri Lanka Telecommunication Regulatory Commission Act No. 25 of 1991 (as amended by the Act No. 27 of 1996), by transferring a sum of Rs. 600,000,000/= belonging to the Sri Lanka Telecommunication Regulatory Commission, to the account bearing No. 7040016 maintained at Taprobane Branch of Bank of Ceylon in the name of Secretary to the President or by causing the same, for a programme distributing "*sil redi*" aided or acted with the common object or by agreeing to act with a common object or conspiring to aid the commission of the offence of criminal misappropriation as described in Section 386 of the Penal Code, and in consequence committed the offence of criminal misappropriation punishable in terms of Section

113(b) and 102 of the Penal Code read with Section 5 (1) of the Offences Against Public Property Act No 12 of 1982;

2) That at the same time, place and transaction referred to in Count No. 1 above, the 1st Accused by dishonestly misappropriating a sum of Rs. 600,000,000/= belonging to the Sri Lanka Telecommunication Regulatory Commission in that acting contrary to the provisions of the Sri Lanka Telecommunication Regulatory Commission Act No. 25 of 1991 (as amended by the Act No. 27 of 1996), by transferring a sum of Rs. 600,000,000/= belonging to the Sri Lanka Telecommunication Regulatory Commission, to the account bearing No. 7040016 maintained at the Taprobane Branch of Bank of Ceylon in the name of Secretary to the President or by causing the same, for a programme distributing "*sil redi*", committed the offence of criminal misappropriation punishable under Section 386 of the Penal Code, punishable under Section 5 (1) of the Offences Against Public Property Act No 12 of 1982.

3) That at the same time, place and transaction referred to in Count No.1 above, the 2nd Accused aided the 1st Accused to commit the offence under Count No. 2, and in consequence, committed an offence punishable under Section 5 (1) of the Offences Against Public Property Act read with Section 102 of the Penal Code.

It was initially on this indictment to which both Accused had pleaded not guilty on 07.10.2015 the case went to trial. At the trial before the Learned High Court Judge of Colombo (Court No 3), the evidence of the following witnesses was led.

PW1 Jayalathage Sumathipala Hettiarachchi (a Textile Supplier) 25/05/2016

PW2 Mohamed Feroz Hadji Anwer (A Textile Supplier) - 03/08/2016

PW3 Aboobucker Adwani Mohamed Yousuf (a Textile Supplier) - 25/08/2016

PW5 Amarasinghe Lekamge Don Guneratne (Former Chief Accountant of the Presidential Secretariat) - 20/09/2016

PW15 Rev. Watinpaha Somananda Thero (A Coordinating Secretary of the then President of the Republic) - 15/12/2016

PW16 W. Mahinda Deshapriya (Commissioner of Elections) - 23/11/2016

PW13 Alwis Hewage Chamil Priyantha (Former Deputy Director General of TRC) - 04/11/2016

PW18 Hewage Anura Siriwardena(Former Secretary to the Ministry of Trade and Commerce) - 04/11/2016

PW20 Ruwini Saumya Guneratne (Deputy Director, Legal and Acting Secretary of TRC) - 08/12/2016

The testimony of **PW1, PW2, PW3, PW5, PW18, PW13, PW16, PW20** and the evidence in chief of **PW15** was adduced before the Learned High Court Judge of Colombo (Court No 03). It is pertinent to observe that after the Learned Judge in High Court No 3 was transferred, the case came up before Learned High Court Judge in Court No 6. Thereafter, from the cross examination onwards of **PW15,** the evidence of **PW 14** and **PW17** was led before the Learned High Court Judge in High Court No 6. The prosecution closed its case on 10.01.2017 reading in evidence documents marked **X1 to X35, M1 to M11** and **Y1 to Y8**.

When the defence case began on 14.02.2017, the 1st Accused made a dock statement and thereafter the 2nd Accused testified on his behalf from the witness box. In the course of the evidence of the 2nd Accused on 06.03.2017, on a suggestion made by the High Court, the prosecution amended the indictment, deleting the references in the original indictment to the offences under the Offence Against Public Property Act No 12 of 1982. Thus, the amended indictment on Penal Code offences with which the trial proceeded to a conclusion goes as follows:

(1) That during the period between 30th October 2014 and 5th January 2015 the Accused with others unknown to the prosecution, acting contrary to the provisions of the Sri Lanka Telecommunication Regulatory Commission Act No. 25 of 1991 (as amended by the Act No. 27 of 1996), by transferring a

sum of Rs. 600,000,000/= belonging to the Sri Lanka Telecommunication Regulatory Commission, to the account bearing No. 7040016 maintained at Taprobane Branch of Bank of Ceylon in the name of Secretary to the President or by causing the same, for a programme distributing "*sil redi*" aided or acted with the common object or by agreeing to act with a common object or conspiring to aid the commission of the offence of criminal misappropriation as described in section 386 of the Penal Code, and in consequence committed the offence of criminal misappropriation punishable in terms of Section 113(b) and 102 of the Penal Code.

(2) That at the same time, place and transaction referred to in Count No. 1 above, the 1st Accused by dishonestly misappropriating a sum of Rs. 600,000,000/= belonging to the Sri Lanka Telecommunication Regulatory Commission in that acting contrary to the provisions of the Sri Lanka Telecommunication Regulatory Commission Act No. 25 of 1991 (as amended by the Act No. 27 of 1996), by transferring a sum of Rs. 600,000,000/= belonging to the Sri Lanka Telecommunication Regulatory Commission, to the account bearing No. 7040016 maintained at the Taprobane Branch of Bank of Ceylon in the name of Secretary to the President or by causing the same, for a programme distributing "*sil redi*",

committed the offence of criminal misappropriation punishable under Section 386 of the Penal Code.

(3) That at the same time, place and transaction referred to in Count No.1 above, the 2nd Accused aided the 1st Accused to commit the offence under Count No. 2, and in consequence, committed an offence punishable under Section 386 of the Penal Code read with Section 102 of the Penal Code.

The evidence of the 2nd Accused concluded on 10.07.2017 and after addresses of both counsel for the prosecution and defence, the Learned High Court Judge found both accused guilty of the charges levelled against them and convicted them of the same.

The Learned High Court Judge imposed the following sentences against the accused appellants as follows.

Charge 1 :- One and a half years' rigorous imprisonment on both accused-appellants and a fine of LKR 10 Lakhs each and in default of the fine, a sentence of 6 months rigorous imprisonment against both accused appellants.

Charge 2 :-In respect of the 1st Accused, One and a half years' rigorous imprisonment and a fine of LKR 10 Lakhs, and a default sentence of 6 months' rigorous imprisonment.

Charge 3 :- In respect of the 2nd Accused, One and a half years' rigorous imprisonment and a fine of LKR 10 Lakhs, and a default sentence of 6 months rigorous imprisonment against the 2nd accused appellant.

Further a sum of LKR 50,000,000 was imposed on each accused-appellants to be paid as compensation to TRC. In default a sentence of 2 years' rigorous imprisonment would come into operation.

The case presented against both the accused-appellants was that they were acting in concert with others unknown, conspiring to misappropriate a sum of LKR 600,000, 000 out of the Telecommunication Regulation Commission Fund contrary to the provisions of the TRC Act for a project specified in the indictment. The 2nd count in the indictment charges the 1st accused-appellant with criminal misappropriation whilst the 2nd accused-appellant is charged with aiding and abetting the commission of the offence of criminal misappropriation by the 1st accused appellant.

At the outset of the argument, the following facts were admitted by both parties.

1. Designation of both accused appellants in the Telecommunication Regulatory Commission of Sri Lanka (hereinafter referred to as the TRC).

   i. 1st accused appellant – Director-General

ii. 2nd accused appellant – Dual role as the Secretary to the then President and the Chairman of TRC.

2. The 2nd accused made a written request to the 1st accused requesting the release of Rs 600, 000, 000 to the bank account of the Secretary to the President (**Y3**)

3. A remittance of Rs 600, 000, 000 from the TRC to the aforesaid account by the 1st accused (**Y4**)

4. The entire sum of LKR 600, 000, 000 (599, 999, 445.00 LKR as at **D2**) was spent for the project.

5. The evidence of witnesses 1-3 went unchallenged since they were only suppliers of the material and received payment from the Presidential Secretariat.

6. It was admitted by both parties that neither the 1st nor the 2nd accused appellant has utilized any part of the aforesaid sum of LKR 600, 000, 000 for their personal use.

7. The evidence revealed that no such item of "*sil redi*" was found in their possession.

Since the offence of criminal misappropriation pervades the pith and substance of the charges levelled against both the accused appellants, this Court would venture to consider whether these offences have been established against both the accused

appellants beyond reasonable doubt. The offence of criminal misappropriation is defined in Section 386 of the Penal Code which reads as follows:

> *"Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."*

It is thus clear that misappropriation or conversion of movable property to one's use is the physical element (*actus reus*) of the offence, whilst the fault element (*mens rea*) is connoted by the adverb *dishonestly*. It goes without saying that the question before this Court is whether these constituent elements of the offence have been established by the prosecution in terms of Section 386 of the Penal Code. It is basic to the commission of this offence that there should be concurrence or coincidence between the two elements and if either element is absent, the offence would not be constituted. In other words the onus is on the prosecution to establish the two elements beyond reasonable doubt namely whether the accused misappropriated or converted to their own use the sum of Rs 600 million belonging to the TRC, with dishonest intention-see ***The law of Evidence Volume II (book 1)*** by ***E.R.S.R.Coomaraswamy*** at page 299 alluding to the case of ***Woolmington v D.P.P*** **(1935) 104 L.J.K.B 433** on the general rule of overall burden that the prosecution must prove both *mens rea* and *actus reus* of an offence beyond

reasonable doubt. I would presently deal with the evidence pertaining to both elements in order to ascertain whether the evidence adduced satisfies the requirement of proof beyond reasonable doubt. Before undertaking that task let me set out the salient points of the respective cases of both the prosecution and the appellants in a nutshell.

I must observe at this stage that the Learned Deputy Solicitor General argued that the documents referred to above as **Y3** and **Y4** afford sufficient evidence of misappropriation. By way of **Y3** dated 30th October 2014 the 1st accused appellant wrote to the 2nd accused appellant explaining the nature of the national project undertaken by the then President and requested a grant of Rs 600 million for the purpose. **Y4** constitutes the transmission of the money.

The main plank of submission by the Learned Deputy Solicitor General was that the steps taken by both the accused are contrary to **Sections 22 F (2) and (3)** of the Sri Lanka Telecommunications Act, No 25 of 1991 as amended by Sri Lanka Telecommunications (Amendment) Act, No 27 of 1996 (TRC Act as hereinafter referred to) and would amount to criminal misappropriation for purposes of attracting the liability under Section 386 of the Penal Code.

Since it is also the contention of the accused appellants that the transference of the money from the TRC to the national initiative of the *Sil Redi* program undertaken

by the then President falls well within the law, let me set out Section 22F in its entirety.

Section 22F

(1) The Commission shall have its own Fund.

(2) "There shall be paid into the Fund;

(a) all such sums of money as may be voted upon from time to time by Parliament for the use of the Commission;

(b) All sums of money as may be paid as fees under sections 17, 21 and 22 of this Act.

(c) The proceeds of cess imposed under section 22G: and

(d) All such sums of money as may be received by the Commission by way of donations, gifts or grants from any source whatsoever, whether in or outside Sri Lanka.

Section 22 F (3) of the TRC Act states as follows;

"There shall be paid out of the Fund of the Commission all such sums of money as may be required to defray any expenditure incurred by the commission in the exercise and performance of its powers and duties".

Section 22 F (3) makes it crystal clear that the Commission is empowered to pay out any expenditure which it incurs in the exercise and performance of its powers

and duties. It was contended before this Court by the Learned counsel for the State that the transfer of Rs 600 million is not authorized by Section 22 F (3) and thus the transfer of the money from the TRC to the '*Sil Redi*' project in such circumstances as was effected would attach criminal liability to the 1st and 2nd accused who were the Director General and Chairman of the TRC respectively. It was the argument of the prosecution that a grant of Rs 600 million cannot fall within the powers and duties of the TRC but both counsel for the accused appellants argued to the contrary.

It is pertinent at this stage to bring to the fore the defence version as to how they contended the transfer of money from the TRC to the "*Sil Redi*" project constituted a permissible expenditure within the ambit of the TRC Act and it was strenuously contended that there was no misappropriation on the part of the 1st and 2nd accused appellants as they were authorized by the board of the TRC to transfer the money as was effected. The concept of **corporate social responsibility** (CSR) that pervades the business world of corporate entities in the modern world was invoked by the Learned Counsel for the 2nd accused appellant to drive home his argument that the course of conduct indulged in if at all was that of the TRC board in effecting the transfer and when such an authorization exists, the 1st and 2nd appellants cannot be selectively prosecuted and found guilty of the offences that were launched against them. I must also state that the Learned Deputy Solicitor

General also impugned the validity of the authorization of the Board dated 15th December 2014 that was put forward by the appellants.

The Learned Deputy Solicitor General sought to argue that there existed dishonest intention on the part of the accused appellants whilst the absence of such a dishonest intention predominated in the arguments of both the Counsel for the 1st accused-appellants and the counsel for the 2nd accused appellant. The Learned Counsel for the state pinned his submissions of dishonesty on what he called the unauthorized purpose for which the money was used. So long as the money used was not authorized by the express words of the TRC Act, *mens rea* flowed from such an apportionment of funds for a project unspecified in the law-this was the nub of the argument of the Learned Counsel for the State.

In fact the State placed reliance on the Indian case of ***Sohan Lal v Emperor*** **31 Indian Cases 651** in order to bring out the meaning of misappropriation. Piggot J stated in a judgment delivered on 12 November, 1915 in relation to the corresponding section 403 of the Penal Code:

> *"The charge is therefore based on the words "whoever dishonestly misappropriates". The verb "to appropriate" in this connection means setting apart for, or assigning to, a particular person or use; and "to misappropriate," no doubt means to set apart for or assign to the wrong person or a wrong use, and this act must be done dishonestly."*

The setting apart or the wrong use must be a legal wrong which is prohibited by law and certainly the question that arises in this case is whether the grant or appropriation facilitated from the TRC for the distribution of "*Sil Redi*" for devotees could expose the 1st and 2nd accused who sourced the funds to criminal prosecutions and sanctions. No doubt the 2nd accused wrote **Y3** to the 1st accused requesting funds for the project and the 1st accused directed the transfer of the funds. Could these two items of evidence alone constitute a manifestation of a dishonest intention to misappropriate? One cannot take items of evidence piecemeal and hold that *mens rea* and *actus reus* have been established. Evidence has to be holistically looked at in order to ascertain *mens rea* and in my view the antecedent items of evidence preceding **Y3** (the letter written by the 2nd accused to the 1st accused) also become relevant in order to arrive at a decision whether the two accused in the case entertained dishonest intention to misappropriate the funds of the TRC.

Antecedent items of evidence prior to the writing of Y3

The TRC fell within the purview and portfolio of the then President and since the 2nd accused was the Secretary to the President, *ipso facto* he became the chairman of the TRC as Section 3 (1) of the Sri Lanka Telecommunications (Amendment) Act No 27 of 1996 mandates such an eventuality. Section 3 (1) sets out the Constitution of the Commission thus:

"The Commission shall consist of-

(a) the Secretary to the Ministry of the Minister, who shall be the Chairman of the Commission ;

(b) the person for the time being holding office as the Director-General; and

(c) three members appointed by the Minister from among persons who possess any recognized qualifications and have distinguished themselves in the field of law, finance and management respectively (hereinafter referred to as "appointed members") ".

The evidence shows that whilst holding the *ex-officio* position of the Chairman of this corporate body known as the Telecommunications Regulatory Commission of Sri Lanka which was indeed created by the Sri Lanka Telecommunications Act, No 27 of 1996, the occasion on which the 2nd accused became acquainted with the "*Sil Redi*" project happens to be somewhere in March 2014 when he was told about it by the President on 20/03/2014-see the evidence of the 2nd Accused at page 720 of the proceedings in the High Court. While reiterating this stance at page 826 of the proceedings, the 2nd accused also states that His Excellency the President reminded him of the project in May 2014-see **2V2.** This evidence is in consonance with the testimony of PW15 Rev. Watinapaha Somananda Thero the coordinating Secretary to the then President on religious affairs. The *Sil Redi* was to be distributed to the needy people who would be observing *sil* in temples around

the island. It cannot be gainsaid that anything done with a view to advancing religion is regarded as charitable in law. The defence evidence is that the 2nd Accused Appellant made a note about the instructions of the President. (marked as **2V1**). Again in May 2014, Ven. Watinapaha Somanada Thero, coordinating Secretary to the then President on religious affairs (**PW 15**) reminded the 2nd Accused Appellant about the project and further the President also reminded him of the necessity to complete the above mentioned project.

The President directed the 2nd Accused Appellant to carry out the project and the statistics were provided by the Ven. Watinapaha Somananda Thero. (The reminder is marked as **2V2**). The requisite number of recipients had been obtained by the Ven. Watinapaha Somanada Thero collecting data from various temples island wide- (Vide evidence at Page 546-567).. This evidence clearly shows that the 2nd accused was not the initiator or originator of the *Sil Redi* project. Neither is there evidence to show that he had anything to do with the choice of the project. It would appear that the projects were determined by the *Special Presidential Initiatives* of the President. Thus the evidence placed before the High Court is that when the "*Sil Redi*" project was initiated on 20.03.2014, the Presidential Election that was held on 8.01.2015 had not been in sight. The presidential election itself had been called for on 20.11.2014 and it is notable that the evidence establishes that the "*Sil Redi*" project had been initiated long before the Presidential Election was called for and

as the evidence unfolded, it is worth noting that even when the 2nd accused wrote the letter **Y3** to the 1st Accused on 30th October 2014 requesting funds for the project, the election had not been yet called for. .

But it would appear that the Learned High Court Judge has not properly appreciated nor has the assessed the evidentiary value of these items of evidence because at page 1220 of the brief which is indeed page 9 of the judgement (1st paragraph, 4th line from the bottom of the judgement) the Learned High Court Judge arrives at the erroneous finding that the decision to distribute the "*Sil Redi*" was taken by the President after consulting the 2nd accused. There is a culpable omission to take cognizance of the testimony of Ven. Watinapaha Somanada Thero **(PW 15)** wherein he stated that the decision to carry out the sender program was taken by the then President after having considered the requests made by venerable thero monks around the country in early 2014.

In my view this appears to be a vital misdirection on the part of the learned High Court Judge.

The effect of these antecedent items of evidence which I have discussed unequivocally shows that the 2nd accused was not prosecuting an agenda to confer a wrongful benefit or gain to another person. These antecedent items of evidence only show that the 2nd accused acquired knowledge of the *Sil Redi* project in March 2014.

Having discussed the antecedent items of evidence which preceded the writing of the letter **Y3** by the 2nd Accused to the 1st Accused, I think it is appropriate to allude to the circumstances in which the 2nd Accused came to write **Y3**-the letter which sought to source the funds for the project from the TRC. It may be recalled that **Y3** is relied upon by the prosecution to adduce *mens rea* of the offence of criminal appropriation on the part of the 2nd accused.

It is in evidence that the former chief accountant of the Presidential Secretariat Amarasinghe Lekamge Don Guneratne (**PW 5**) brought to the notice of the 2nd Accused Appellant that out of the sum of Rs 1000,000,000 allocated for *Special Presidential Initiatives,* a sum of Rs. 400 Million had already been spent for the General Sir John Kotelawala Defence University and approximately Rs, 800 Million would be necessary for the *sil redi* distribution project. This was by way of a minute dated 14/10/2014 marked as X 34. It was also intimated to the 2nd accused that it was difficult to obtain imprest (**අත්‌මුදල්**) from the treasury.

Consequent to a discussion with the then President and by way of a Minute dated 15/10/2014 marked as X34 (ඇ), the 2nd Accused informed the chief accountant of the Presidential Secretariat that the steps can be taken to obtain an advance in a sum of Rs. 600 Million from the TRC but the 2nd accused made it quite clear that this grant is subject *to reimbursement.* It is thereafter that the2nd Accused Appellant formally wrote a letter (marked as **Y3**) to the 1st Accused Appellant

making a request for the sum of Rs. 600 Million in order for it to be used for the above mentioned *Sil Redi* project. Thereafter, 2nd Accused Appellant wrote another letter (marked **Y1**) to the Secretary, Ministry of Trade and Commerce requesting to procure the necessary clothing material.

The import of the direction made by the 2nd accused appellant that TRC must be reimbursed is further reinforced by document marked "**X33**" dated 29.12.2014.

By a note in writing (a yellow coloured sticky note marked as **X33)** the 2nd Accused Appellant, directed the chief accountant of the Presidential Secretariat to reimburse the sum of Rs, 600 Million to TRC as soon as budgetary allocations for 2015 are received by the Presidential Secretariat. There is evidence that Parliament allots money for *Special Presidential Initiatives*. These items of evidence show the dutiful conduct of an exemplary public officer. When he received orders from the President in March 2014 that this project must be undertaken for the benefit of devotees, it was a legal direction that had to be carried out by any one in the office of the 2nd Accused. The project itself was initiated by the then President because there was a widespread request from venerable monks that those who observed *Sil* had to be furnished with clothes. It is axiomatic that clothing is one of the fundamental necessities just like water is an elixir.

I have already observed that by virtue of the fact that the project was meant to promote the welfare of devotees, it was a charitable project. The evidence discloses

that by the time the coordinating Secretary on religious affairs brought it to the attention of the 2nd Accused the number of devotees from several parts of the island who needed to be succored and the amount of money that was needed to fund the project, the kitty of the *Special Presidential Initiatives* did not have sufficient funds.

It is in such circumstances that just as anyone in his shoes would do, the 2nd accused decided to source the funds from the TRC. As the Chairman of the TRC, it was no secret that TRC engaged in social responsibility projects. It had assisted the *Kotalawella Defence Academy.* It had offered its succor from its vast funds even to the treasury. In such a background when the 2nd Accused took the step to source the funds from the TRC to promote the welfare of *Sil* observing devotees, in no way can this conduct be condemned as blameworthy. There was a consistent practice that TRC engaged in socially beneficial projects and there were several instances as the record reveals that TRC had made donations for public causes and social welfare.

It was in such circumstances that the writing of **Y3** has to be understood. There was nothing blameworthy in requesting funds from an institution which is known for its involvement in charitable activities. This was an institution that had a separate budget for corporate social responsibility. But the 2nd accused makes it

clear in the first instance to the Chief Accountant of the Presidential Secretariat that whatever funds are obtained from the TRC have to be reimbursed in the end.

In December 2014 when vouchers were being submitted for payments to be made to the suppliers of the clothes, the 2nd Accused repeated his consistent stance that TRC must be paid back what it had granted. The 2nd Accused reminded the Chief Accountant by a *post it note* pasted on the voucher that at least a part payment of Rs 200 million had to be made to the TRC in the first quarter of 2015 when budgetary allocations are received by the Presidential Secretariat.

Thus there is this inescapable conclusion to which this Court is irresistibly drawn and it is evident that when it considers the action of the 2nd Accused, laudable as it is. One could see the efforts of the 2nd Accused to ensure that TRC got back its money though the board of the TRC had made a donation to it.

There is uncontradicted evidence that the 2nd Accused had at all times the intention to ensure that TRC was recouped. He attempted to ensure that there was no wrongful loss to the TRC. His conduct was consistent with an attempt to ensure there was no wrongful gain to anyone, leave alone the fact not a dime ever went to him.

Can this conduct be characterized as dishonest? In my view it would be a figment of the widest imagination to ever suggest that the 2nd accused entertained a dishonest intention. His conduct is anything but dishonest. I observed at an anterior

part of the judgement that the prosecution bears the responsibility to establish dishonest intention beyond reasonable doubt.

The keenness displayed to source the funds for a social cause and the alacrity to pay back the money that are vital to a finding of absence of a dishonest intention have gone unnoticed by the Learned High Court Judge and the social spirit shown as a public servant is manifestly clear. How can a man who sticks to his last that money obtained from the TRC must be a loan be characterized as dishonest? A vital ingredient "dishonestly" inherent in the charge has received a manifestly wrong interpretation and I am of the firm view that having regard to the law as well, there is a misappreciation of the facts on the part of the Learned High Court Judge.

On the question of *mens rea* on which there is a misdirection, let me state the following.

The word *dishonestly* is defined in Section 22 of the Penal Code:

> *"Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing "dishonestly."*

Section 386 of the Penal Code contains as its constituent element *dishonestly* as *mens rea* of the offence of criminal misappropriation and the onus is on the

prosecution to establish dishonest intention on the part of the 2nd accused to drive home his conviction.

In fact Fernando J in the case of ***Walgamage v Attorney-General*** (2000) 3 Sri.LR 1 adverted to this all important element of the offence of criminal misappropriation and observed that a dishonest intention must exist at the time of misappropriation or conversion. Viewed in that conspectus, a trier of an indictment for criminal misappropriation must pose the question:

- Was the conduct of the accused dishonest according to the standards of reasonable and honest people?

Oftentimes the question arises in criminal cases as to what are the standards by which dishonesty must be assessed.

What are these standards of reasonable and honest people?

Views on dishonesty may very much depend on an individual's age, socio-economic position, religious beliefs, and business judgements adopted in the context of a corporate entity. For instance in regard to the objective test in the context of the plea of grave and sudden provocation, our Courts have read the ordinary person test into the wording of Exception 1 to Section 294 of the Penal Code by ruling that the judge must tell the jury that the test for deciding on whether the provocation was adequate is an objective test, namely, the test whether

a reasonable man of ***the class of society to which the accused belonged*** would have been provoked and it therefore follows that the objective test of a reasonable man in the context of criminal misappropriation requires proof that the 2nd accused was dishonest. In order to establish dishonest intention, the prosecution must establish that the accused's conduct dropped below the standards expected of a reasonable person in *his position*. The transfer of money took place in the context of a corporate body in the business world. The 2nd accused was the Chairman of the corporation and when he sourced the funds subject to reimbursement would the reasonable man in his position (namely a director of a company in the business world) ever consider it to be dishonest?

Could a man who journalized a definitive minute that the funds could be sourced from TRC subject to reimbursement be considered to have acted dishonestly by men in similar position of the business world? Would the class of society to which he belonged namely Chairmen and Directors of a Corporation or a Company condemn the act of the Chairman of this Corporation as dishonest when he so eloquently minuted that the money should be recouped? This is the *mens rea* question before this Court and it is crystal clear that when the intention is to recoupment and restitution it is inconsistent with a guilty mind and would definitely be consistent with an innocent state of mind.

When a court has received evidence as to the consistent practices of corporate social responsibility in the context of a public corporation and its socially oriented projects adopted in the past, the question whether the particular conduct of an accused in a corporation in fact is dishonest has to be assessed according to the standards of business practices in the Corporation, for in our diverse society there are no generally accepted standards of dishonesty. What is or is not honest may vary in different contexts. So I reach a firm conclusion on evidence that there is no dishonest intention.

Having thus disposed of the question of *mens rea* in that manner namely whether one adopts a subjective or objective standard, there is an absence of *mens rea,* one arrives at the next stage where the decision to transmit the money in favor of the *"Sil Redi"* project took place. That discussion would take me to the board approvals that figured prominently in the case. In fact it was the argument of the state that there was no formal approval before the funds were transmitted from the TRC to the Presidential Secretariat.

Question of Approvals

The circulation of a commission paper bearing No 2026 and dated 30th October 2014 establishes the assertion of witnesses that the transmission of money was approved verbally. The board paper which bears the marking M2 (ඵ) also goes to

corroborate the assertion of the defence that a verbal approval spoken to by the witnesses had been granted. The verbal approval was the bone of contention between the Learned Counsel for the State and both the Learned Counsel who appeared for the 1st and 2nd Accused Appellants. Though a formal approval for transmission of money was insisted upon by the Learned Counsel for the State and the Learned High Court Judge concurs with the contention of the prosecution, the evidentiary value and weight of the evidence of some crucial witnesses have gone unnoticed and unassessed. Apart from the fact that Don Gunarathne (**PW 15**) -the then Chief Accountant of the Presidential Secretariat has corroborated the consistent stance of the 2nd accused appellant that money was transferred subject to reimbursement by the Presidential Secretariat, there is evidence from Mallika Jayaratne -the Director Finance of the TRC that the TRC board had verbally approved the said transference of Rs 600 million to the Presidential Secretariat. It has to be noted that the Learned High Court Judge has failed to take into account the testimony of these two witnesses. The evidence reveals that it was subsequent to the verbal approval that a sum of Rs. 600 Million was transferred from the account of TRC maintained at People's Bank, Narahenpita to the Official Account of the Secretary of the President (2nd Accused Appellant) bearing 7040016 Bank of Ceylon Tabrobane Branch. The transmission took place on 05.12. 2014. It was the consistent position of the accused appellants that there was a verbal approval

by the board prior to the said date of the transfer. It was never the position of the defence that there was a written board approval before 05.12. 2014. Even the board paper dated 30.10.2014 remains uncontradicted and uncontested. The witness Chamli Priyantha **(PW 13)** Deputy Director General, TRC testified that he knew that a board paper had been prepared on 30th October 2014 and submitted to the board.

This board paper is also spoken to in the dock statement of the 1st accused appellant. It has to be noted that no presidential election had been declared by 30th October 2014 by which time the verbal approval had taken place. The board paper dated 30th October 2014 introduces the project and sets out the reasoning and justification for the funds to be given as follows:

> *This project's objectives are to protect social and religious activities and to encourage people to make a contribution to society. For this purpose the Presidential Secretariat has implemented this project and the estimated cost would be Rupees 600 million. I would like to suggest* ***a donation of Rupees 600 million*** *for this purpose.*
>
> *The funds could be used from the budgetary allocation for* ***"Corporate Social Responsibility" of the TRCSL.***

It is crystal clear that what was uppermost in the mind of the 2nd accused was a loan. There is also evidence that verbal approval was given for the transfer. Despite this evidence, the learned High Court Judge arrives at an erroneous finding that there was no approval for the transfer of money that took place on 05.12.2014. Between 30th October 2014 and 05th December 2014 there is no evidence that was led by the prosecution as to any objection that emanated from any member of the board, to the transfer of money. The fact that the prosecution did not lead any evidence to the contrary shows that they did not have adverse evidence that would have rebutted the assertion of a verbal approval. If at all the burden is on the defence to establish verbal approval, the proof has come about through the testimony of prosecution witnesses and, the evidence of the 1st and 2nd accused appellants is supported by the weight of prosecution evidence. If it is argued that the verbal approval is a fact specially within the knowledge of any person, I take the view that burden has been discharged on a balance of probabilities as required under section 106 of the Evidence Ordinance-see ***The King v James Chandrasekera*** **44 N.L.R 97** (per Soertsz J).

In the modern day transactions of the corporate world it is unthinkable to insist that decisions should at all times be taken by all members of the board coming together physically and TRC Act does not place a statutory prohibition against a verbal decision of the board. In any event there is the device of subsequent ratification

that validates verbal decisions. In the face of uncontradicted evidence of prosecution witnesses as aforesaid and in the absence of contrary evidence emanating from any other directors to rebut and impugn the verbal approval, in my view the proof that is contemplated in section 3 of the Evidence Ordinance has been established within the quantum of proof adumbrated in sections 101, 103 and 106 of the Evidence Ordinance. Prosecution witnesses themselves have spoken of the verbal approval. There is no contrary evidence emanating from any other witness contradicting the verbal approval and in such a situation there is no inconsistency *inter se* among prosecution witnesses. In fact the versions of the accused appellants have been enhanced and bolstered by the prosecution witnesses who knew the internal management of the corporation. The attention of Court was drawn by the Learned Counsel for the 1st Accused-Appellant to the following:

a) Even though a meeting of the TRC was generally expected to be held at once a month, it would not be done in most instances in view of the busy schedule of the 2nd accused

b) Hence, approval for most decisions of the TRC were obtained through circulation by the use of iPads which had been provided to all the members of the board of the TRC,

c) The request for funds sent by the 2nd accused by letter dated 30th October 2014 in his capacity as Secretary to the President was circulated through iPad among the members of the board of the TRC;

d) The above matter was to be discussed at the November meeting of the TRC scheduled for 13/11/2014,

e) The 2nd Accused could not attend that meeting due to his work schedule

f) In any event all members of the board of the TRC were aware and consented orally and thereafter approve the decision to make the above contribution at the meeting held on 15/12/2014.

Both accused stated the above in the dock statement and testimony respectively and this cumulative evidence remains uncontradicted. As I said before, there is no evidence to the contrary and the presumption under Section 114 (f) of the Evidence Ordinance has to be drawn.

According to the evidence of Ruwini Saumya Guneratne (**PW20**), the Deputy Director - Legal TRC, there prevailed a practice of obtaining the approval of the Commission before the sittings of the Commission and thereafter validating it with a formal approval from the Commissioners when they assembled. In fact as far as the written approval of the "*sil redi*" project was concerned the board took a decision to make a donation of Rs 600 million on 15/12/2014. Before I move to

the meeting of 15/12/2014, I must observe that there are other items of evidence that shed light on the verbal approval that preceded the transfer of the money.

I must highlight that in the course of her evidence Ruwini Saumya Guneratne **(PW20)**, the Deputy Director - Legal TRC, also revealed that the Commission had in the past approved the release of a sum of Rs. 35 million for a film in order to improve ethnic harmony as well as a sum of Rs. 6.5 Million for a tele drama. There was also a tranche of a sum of Rs. 100 Million being given for Buddhist Affairs. (බෞද්ධ පුනර්ජීවන). Engagement in social responsibility projects was not something new to TRC. It was one of the duties and obligations that the body corporate had been involved in and nobody had questioned the validity or legality of these projects. The budgetary allocation for corporate social responsibility has not been questioned by the auditor general who audited the accounts of this body corporate. It has to be remembered that the projects engaged in by the TRC to promote corporate social responsibility were all voluntary and the disbursements had been donations. It is to be highlighted that despite the presence of voluntary undertakings and donations that could be engaged in or given by the TRC, the 2nd accused had the objective of making this grant a loan subject to the obligation of the office of the President to reimburse this amount. He was thus motivated by laudable objectives which were however sought to be argued by the prosecution as dishonest practice. It defies logic and common sense that a chairman of a

corporate body who attempted to ensure the recoupment of money belonging to the corporation should have faced an ordeal of a sardonic prosecution despite his responsible and prudent decision as the chairman of the corporate body.

If the entire board has converted the suggested loan into a donation under its Corporate Social Responsibility allocations, it is unthinkable that what is permissible should be sought to be characterized as impermissible. I will presently return to corporate social responsibility after dealing with some other items of evidence.

The evidence of Mallika Kankanmalage Jayantha (**PW 14**) reveals that under Section 22 F (2) of the TRC Act, donations are permissible. In fact it was the 1st Accused Appellant who informed him that he had obtained the approval of the Commission verbally and that he would be obtaining the formal approval in writing at the next meeting. Accordingly he transferred a sum of Rs. 600 Million to the Bank of Ceylon, Tabrobane Branch in order to fulfil the "*Saradharma*" Project ("*Sil Redi*") (Vide Page 607 of Vol I containing the proceedings).

The witness further mentioned that there had been a consistent practice to act on such verbal approvals and thereafter to obtain covering approval. In regard to such practices the 1st Accused Appellant had always kept his word and was never found to be wanting in credibility. Therefore the witness acted on his advice to transmit the money. The witness also stated that the Director General (the 1st Accused) had

obtained verbal approval from all the commissioners to credit the sum of Rs. 600 Million to the Official Account of the Secretary to the President and not to his personal account.

The witness also testified that in 2013 a sum of Rs. 498 Million was donated ("පූජණය") on verbal approval to CHOGAM and the covering approval was given later. He also stated that the Establishment Code is not applicable to the transactions of the TRC. All this shows that no dishonest intention could be attributed to the 1st accused appellant either. It has to be recalled that the evidence of Chamli Priyantha (**PW 13**) to which I have already alluded is corroborated by the testimony of the prosecution witness Mallika Jayantha (**PW 14**)-the Director Finance. The latter categorically stated that he personally knew that the board had given the verbal approval before the money was transmitted on 5th December 2014 (Vide pages 642, 644 and 649 of the proceedings). It is pertinent to recall that the witness Chamili Priyantha stated that the 1st accused had never lied about covering approvals on the earlier occasions. In light of these telling items of evidence, the Learned High Court Judge fell into a grievous error when he came to the finding that there was no evidence or not even a suggestion put to any of the witnesses that there was a verbal approval by the TRC Board or the Board paper was circulated among the board members prior to the remittance.

When one thus holistically analyses the steps taken by the 1st accused-appellant in regard to the request for funds made by the Chairman of the TRC, one does not see anything clandestine. He put up a board paper dated 30th October 2014 (**M2 (ඇ)**) giving an introduction and a rationale for the grant. He suggested a donation of Rs 600 million for this purpose. He also stated that the funds could be sourced from the budgetary allocation for corporate social responsibility of the TRC.

There is uncontradicted evidence that the verbal approval was given for the transmission of the money. Donations had been given in the past and corporate social responsibility grants are all payments made gratuitously for public weal. According to the witnesses, the 1st accused-appellant had never lied about verbal approvals. The steps taken by the 1st accused appellant do not partake of the characteristics of dishonesty in Section 386 of the Penal Code. Despite these tell tale items of evidence the Learned Counsel for the state advanced the argument of transmission of money for an unauthorized purpose. Let me test that argument having regard to the specific provision of the TRC law.

Section 22 F (3) of the TRC Act states

> *"There shall be paid out of the Fund of the Commission all such sums of money as may be required to defray any expenditure incurred by the commission* ***in the exercise and performance of its powers and duties."***

Powers and Duties as wide as they are prescribed in Section 22 F (3) would encompass obligations such as corporate social responsibility endeavors. Nowhere does the Act restrict the Commission or impose a fetter on its engagement in corporate social responsibility programs. Even the budgetary allocation maintained for corporate social responsibility projects has not been questioned by the auditor general. It has remained a **permissible activity** over the years and in the circumstances in no wildest dream can it be alleged that it is dishonest to appropriate funds for corporate social responsibility projects such as promotion of religion and religious practices. Such appropriations as was done in this case for a **charitable objective** of providing *"Sil Redi"* cannot be classified as misappropriations when donations for charitable causes and disbursements have continued to be authorized by the Board as permissible activities. Even in the corporate world, corporate social responsibility or CSR as is called has never been condemned as ***ultra vires.***

Any citizen of this country can be prosecuted and penalized only for legal wrongs and not for permissible activities which are authorized by the Commission itself. No chairman of a corporation and a director in the position of the 1st and 2nd accused would ever characterize the apportionment of funds for providing needy devotees with clothes as criminally dishonest. Nowhere in any company are corporate social responsibility projects considered illegal even though neither the

Companies Act nor the constitution of any Company in this country may be silent on corporate social responsibility. I have to observe that if directors of companies or corporate entities are to be visited with prosecutions and sanctions under the Penal Code for ***making validly authorized donations***, no one would ever wish to serve as a Director of a company or for that matter as a Director of a corporate body such as TRC.

Upon a careful consideration of all evidence adduced in the case I conclude that it was a collective decision of the board to appropriate this money for this project. It was not the individual decision of the 1st accused or 2nd accused. Appropriations for a corporate social responsibility project falls within the permissible parameters of the powers and duties stipulated in Section 22 F (3) of the TRC law and no criminal liability could visit any member of the board if the board had authorized such activity. One cannot cherry pick individual directors and launch a prosecution when the whole board had engaged in the decision making process. Evidence is so glaring that the 2nd accused only tried to source the funds subject to reimbursement long before the Presidential election was called for. The 1st accused put up board papers and suggested a donation in light of previous engagements of the corporation in such activities. The board assented to the recommendation of a donation and as evidence shows it was a ratification of what was done before-

namely ratification of the oral approval and the transmission of the money in consequence of the verbal approval.

Let me now turn to the meeting of the Board that took place on 15.12.2014. The meeting of the Board held on 15.12.2014 is a telling example of ratification of the verbal approval and all other steps that preceded. An extract of the draft minutes of the meeting of the Commission held on 15 December 2014 has been marked as **M - 2 (ඇ)** which sets out in the main the following decisions.

M 2 (ඇ) of 15/12/2014 makes reference to the first board paper M2 (ඈ) of 30/10/2014

M 2 (ඇ) of 15/12/2014

Approval was granted for the following-

1. *To approve a sum of Rs 600 Million as an extra budgetary allocation to CSR budget.*
2. *To make a payment of Rs 600, 000,000 (Rs 600 Million) as a donation for project- to encourage public to protect social values & religious activities/traditions initiated by the Presidential Secretariat.*
3. *Such payment to be made out of the Corporate Social Responsibility (CSR) budget allocation of the TRCSL.*

Action by Director General.

The first board paper **M2 (ಪ)** bearing No 2026 and dated 30th October 2014 which was tabled but not approved because of the absence of the 2nd accused from the meeting owing to his work schedule had its oral approval according to uncontradicted evidence. The aforesaid **M - 2 (ಫ)** is the minute of the meeting of the board that validated or ratified the previous oral approval. The order approval followed the first board paper **M2 (ಪ)**.which was not acted upon. The previously prepared board paper **M2 (ಪ) dated 30th October 2014 and the subsequent board paper M - 2 (ಫ)** of 15th December 2014 bear some striking similarities. The second board paper **M - 2 (ಫ)** of 15th December 2014 makes reference to the previous board paper **M2 (ಪ) by reference to its number 2026. The language of M - 2 (ಫ)** of 15th December 2014 is identical to the language of the first board paper **M2 (ಪ) of 30th October 2014. What lie between the two board papers in chronological order are the oral approval based on the previous board paper (M2 (ಪ)) and the transmission of the money on 05.12.2014.**

Since the second board paper of 15.12.2014 (**M - 2 (ಫ)**) whose language I have reproduced above is couched in the same terms as the 1st board paper of 30.10.2014 makes a specific reference to the number of the first board paper (**M2 (ಪ)**) namely 2026, it automatically follows that the second board paper of 15.12.2014 (**M - 2 (ಫ)**) has ratified all that has preceded namely the oral approval

and the transmission of the money. It is patently clear that it has ratified the oral approval and the transmission money.

One cannot just look at the language of the second board paper (**M - 2 (ह)**) and argue, as the Deputy Solicitor General has sought to do, that it is a prospective authorization to transfer money in the future. This argument was made because the minute begins with an infinitive **To** such as "*To approve a sum of Rs 600 Million as an extra budgetary allocation to CSR budget..*"

Why should the ratification that took place on 15.12.2014 appropriate money for the future when the request for funds was in the past and all other events that preceded the meeting of 15.12.2014 were all in the past namely the inchoate board paper of 30/10/2014, oral approval and the transmission of money which all took place previously to the said ratification on 15.12.2014?

No doubt the second board paper of 15.12.2014 (**M - 2 (ह)**) which I have reproduced above is inelegantly drafted. It could have been couched better. Confronted with a commercial document, this Court has to gather its intent taking into account all that has preceded before it and the surrounding circumstances. One cannot look at that document piecemeal and interpret it in isolation. There was no present and existing request for funds so as to treat the meeting on 15.12.2014 as having approved a prospective allocation and transfer of funds. The ratification is retrospective in effect. On a synoptic interpretation of the document **M - 2 (ह)** of

15th December 2014, it is an *ex post facto* ratification of the verbal approval and transmission of money. Out of the 5 members, 4 members were present at the meeting and it was a unanimous decision of all 4 members, where the quorum was only 3 members. (Chairman - 2nd Accused Appellant, Director General – 1st Accused Appellant, Member – Prasanna de Silva, Member – Dr. Sampath Amarathunga were present). (Vide Page 522 of Volume 1).

This shows that the ratification of the donation which was suggested in the board paper of 30.10.2014 and verbally approved took place with the participation of all these members. On 15.12.2014, the decision to give formal approval to the oral approval and the transmission of money was all taken by all these 4 members. It must be taken that they were all aware of the facts and circumstances of the request, the 1st board paper, verbal approval and the transmission of money and with this knowledge they ratified all these steps. There was nothing done in secrecy and the prosecution witnesses as well as the evidence given from the witness box and the dock statement all establish the inescapable inferences of absence of dishonest intention. Other than the 1st and 2nd accused there were two other members who participated at the meeting which authorized the donation but they were not called as witnesses either to contradict or impugn these facts. When the money allotted thus became the authorized activity of the corporation, this Court finds that only the 1st and 2nd accused have been cherry picked and

selectively prosecuted. One is reminded of the all or nothing rule in this instance and as the facts clearly show these two accused should not have chased after in the way they were pursued.

A board decision was taken to make a donation but only two members of the board faced a long drawn out prosecution for a donation which was lawfully authorized at the meeting of 15 December 2014. There is no adverse evidence before Court of any complaint that this meeting did not authorize the donation. This evidence if at all could have been given by the other directors. In such circumstances this Court is irresistibly drawn to the presumption in Section 114 (f) of the Evidence Ordinance that the prosecution did not call those two directors for fear they would have furnished evidence consistent with the version of the 1st and 2nd accused. In this backdrop the authorized donation became a lawful activity of the Commission and the 1st and 2nd accused could not be said to have intended a wrongful gain or a wrongful loss because if at all a donation was a voluntary disbursement which cannot be classified as wrongful. In such a situation since the appropriation of the money was authorized it cannot become a misappropriation. Thus there is not only an absence of *mens rea* but also a lack of *actus reus* necessary to constitute the offence of criminal misappropriation. Only when a person causes wrongful gain or wrongful loss by an unlawful means, he acts dishonestly within the meaning of sections 21 and 22 of the of the Penal Code. There are no unlawful means that have

been employed and an act done in accordance with the consensus of the board and the provisions of the Act cannot be considered to be a dishonest act, and would not justify the conclusion of the offence of criminal misappropriation.

There was no concert or complicity between the 1st and 2nd accused and they could not be said to have acted in concert or conspiracy. It has to be noted that even though the funds were transferred on 05. 12.2014, they were not disbursed or paid to the suppliers of *Sil Redi* until after the board meeting of 15.12.2014. Money could have been recalled between the two dates if there was anything unlawful in the transfer. The funds were not dispersed until ratification took place. All this shows a *bona fide* exercise of powers by the directors and none of the 1st and 2nd accused had anything to do with the distribution of *Sil Redi*. It was the coordinating Secretary of the Presidential Secretariat who oversaw the execution of the project. Every step including from the request for funds, the board paper of 30.10.2014 and verbal approval all took place before a Presidential Election was declared to be held in the future. The accused appellants had no control over the fixing of the Presidential election and there is no evidence that compels this Court to hold otherwise. In such circumstances in view of the finding of this Court that, there is neither *mens rea* of dishonest intention nor the *actus reus* of misappropriation, I hold that the prosecution did not establish its case beyond reasonable doubt and in the circumstances I conclude that the conviction and sentence of both the accused

appellants must be set aside and they should be acquitted. Accordingly the judgment dated 07.09.2017 is hereby set aside and both the accused are acquitted.

Apart from the above, the Learned President's Counsel for the 2nd accused also invoked Section 70 of the TRC Act which bars a suit or prosecution against any officer, servant or agent of the Commission for any act which in good faith is done or purported to be done by him under the Act or any regulation or rule made there under or on the direction of the Commission. I would conclude that based on the evidence that demonstrates the good faith of the two accused appellants, Section 70 would preclude a prosecution against them. As submitted by the learned President's Counsel for the 2nd accused, if there is an established precedent for engaging in corporate social responsibility, an appropriation of funds for *Sil Redi* in pursuance of such a practice cannot be anything but a bona fide exercise of an act that would be entitled to the protection under Section 70 of the TRC Act. I also take the view that corporate social responsibility can well be accommodated within Section 70 of the TRC Act and it is for these reasons that the provision based on good faith has been enacted in Section 70.

If directors of a corporation are going to be in peril of a prospective prosecution for a business, judgement or a *bona fide* engagement in a consistent practice of corporate social responsibility for which there is a separate budgetary allowance is to entail prosecution and humiliation, no recognized public servant or anyone

distinguished in a profession such as law or accountancy would ever like to run the risk of an appointment on a board of a Corporation such as TRC. Therefore, I conclude that there is a gross misdirection on the part of the Learned High Court Judge both in fact and law, which amounts to a non-direction. Necessarily the judgment dated 07.09.2017 has to be set aside.

There are other grounds of appeal that both the accused appellants have advanced before this Court and I would now turn towards them.

Demeanor of Witnesses

The Learned High Court Judge was of the view that witnesses PW 4, PW 13, PW 14, PW 15 and PW 20 were working together with the 2nd Accused Appellant with regard to the *sil redi* project. They were also involved in the transaction. The Learned High Court Judge observed that they were partial witnesses. (When they were giving evidence in their examination in chief). Further he has also mentioned as follows;

> "ඔවුන්ට එරෙහිව ප්‍රකාශ කල හැකි අවමය ප්‍රකාශ කර යම් අවස්ථා වලදී ලේඛන මත හෙළිදරව් වන කරුණු නැවත ප්‍රශ්න කිරීමේදී හෙළිදරව් කිරීම සිදු කර ඇත."
> (Vide Page 1221 of Volume I)

"පැ ස 15 වටිනාපහ සෝමානන්ද හිමි ද මා ඉදිරිපිට සාක්ෂි දුන් අතර ඔහුද මෙම ගනුදෙනුව සධාරනීකරණය කිරීමට විත්තිකරුවන්ට යම් ආකාරයක ලැදියාවක් ඇතිව සාක්ෂි දුන් බව නිරීක්ෂණය කරමි."

Though the Learned High Court Judge has stated as above, it is evident upon a perusal that none of the aforesaid witnesses have given evidence before him. When the learned High Court Judge states that "සෝමානන්ද හිමිද මා ඉදිරිපිට සාක්ෂි දුන් අතර", the impression one is driven to is that all the witnesses cited above have given evidence before him. Further he adds a rider "මේ ආකාරයට සාක්ෂි දුන් බවට නිරීක්ෂනය කරමි". Th Learned High Court Judge cannot come to a conclusion on demeanour of witnesses unless he could recall the deportment and demeanour when they gave evidence before him. In any instance when he had not seen and heard the witnesses, the statement that some of the prosecution witnesses cannot be believed and they are partial would be grossly unfair and merely because of this erroneous conclusion, the Learned High Court Judge cannot seek to rehabilitate the case of the prosecution by reference to the evidence of the second accused appellant.

In ***Yuill v. Yuil,*** **(1944) 29 CLW 97 at 102** it was observed that;

"A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more

favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked as everyone who had experience of these matters knows that the demeanour of witness is apt to vary when he is being questioned by the Judge particularly when the Judge's examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue".

Importation of Personal Knowledge

The Learned High Court Judge has stated that there was a prevailing political culture during the last regime "එවකට පවතී දේශාපලන සංස්කෘතිය". This is found at page 1259 of the brief, Volume I. There is no evidence to support this observation. The Learned Judge has perhaps imported this knowledge from the commission of which he was a member or even from an unknown source. The importation of this personal knowledge into his conclusions has coloured his judgment and lends credence to the submission made by the Learned Counsel for the 2nd accused that the accused did not have a fair trial.

In the case of ***The King v Sussex Justices*** **[1924] 1 KB 256, [1923] All ER Rep 233),** it was held that;

> *"The conviction must be quashed as it was improper for the acting clerk, having regard to his firm's relation to the case, to be present with the justices when they were considering their decision".*

It was further held that; *"Not only must Justice be done; it must also be seen to be done."*

A Judge should not import his personal knowledge into the matter in evidence, which may favour either party. It is an important matter for a trial Judge to adopt strict impartiality in the hearing of cases. The role of the Judge as an unbiased umpire is well demonstrated in the judgment of a Court of Appeal in England, in ***Yuill vs. Yuill***-see **29 C.L.W. at page 102.**

Guarantees of a fair trial are embodied in Article 13 (3) of the Constitution and a judgement would be vitiated when an adjudication is based on personal views and conceptions unsupported by evidence. I take the view that on this misdirection of importation of personal knowledge of an alleged political culture, the judgement dated 07.09.2017 stands liable to be quashed and set aside.

Comments on a TV interview

The Learned High Court Judge has also indulged in questions on a TV interview where the 2nd Accused Appellant had participated. The above mentioned question was put unexpectedly and it would not appear that the 2nd accused was ever confronted with questions on the TV interview during the investigation. No date of the interview was ever suggested and it was an *ad hoc* question put to the witness by the Learned High Court Judge which was of his personal knowledge. The Prosecution did not call any witnesses to prove the authenticity of the CD produced by the Prosecution and no evidence was led when the interview was held, whether it was before or after the election. There was no proof that the particular interview was held prior to the distribution of *sil redi*. Further the 2nd Accused Appellant was questioned about a leaflet which was inside each of the clothing material packet containing 5 Meters of *sil redi*. But the 2nd Accused Appellant was unaware of its content since he was not physically involved in the distribution process. As is evident, he only sourced the allocation of funds as the Secretary to the then President long before the election was announced. This was corroborated and confirmed by the evidence of Rev. Watinpaha Somananda Thero. (**PW15**).

The Learned High Court Judge has stated as follows at page 1260 of Volume I, Page 48 of the Judgment:

> "තවද 2 වන විත්තිකරු එවකට සිටි ජනාධිපතිතුමා තුන්වන වරටත් ජනාධිපති වීමද සාකච්චා කරන ලද රූපවාහිනී වැඩසටහනකට සහභාගී වී ඇති බවට එය 2014 දෙසැම්බර් හෝ මැතිවරණය අසන්නයේ විකාශය යූ බවක් සාක්ෂි තුලින් ගම්‍ය වී ඇත. ඒ අනුව 2 වන විත්තිකරු හිටපු ජනාධිපති වූ එක අපේෂක්යෙක් සමග තිබූ කිට්ටු සබඳතාව හා පවතී දේශපාලන හා රාජ්‍ය සේවයේ සංස්කෘතිය හේතු කොට ගෙන මෙසේ ක්‍රියා කිරීමට යම් පෙර චේතනාවක් තිබූ බවටද සාක්ෂි හෙළිදරව් වී ඇත."

This is a misdirection which is based on inadmissible evidence. Since there is no reference to the date of the above-mentioned interview the interview would have no relevance to the Sil Redi project and its funding. The evidence has already emerged that both the accused appellants did not source the funds for the purpose of an election campaign. In any event this evidence is inadmissible for non-compliance with Evidence (Special Provisions) Act No 14 of 1995.

Interventions and Interjections by the Learned High Court Judge

The Learned President's Counsel for the 2nd Accused Appellants submitted that the Learned High Court Judge was engaged in questioning the witnesses, specially the

2nd Accused Appellant in an inappropriate manner biased towards the prosecution case.

While the widest powers in regard to examination of witnesses are undoubtedly conferred on the Court by section 165 of the Evidence Ordinance, these powers are not without certain inherent limitations. The fact that such limitations exist is well settled both in Sri Lanka and abroad-See ***The Queen vs. David Perera*** **(1962) 66 N.L.R. 553.** One of the well-recognized limitations of the powers of the Court under this section is that the Court "must not question the witness in the spirit of beating him down or encouraging him to give an answer."[1] ***Sunil Chandra Roy vs. The State*** **(1954) A.I.R. Calcutta 305**

In the case of ***Sunil Chandra Roy And Anr. vs The State*** **AIR (supra)** the Court analyzed the powers and functions of a judge as follows;

> *"The right of a Judge to put questions to witnesses is given to him by Section 165, Evidence Act…… The history of the section shows that it was enacted in that wide form, because in 1872 it was thought that in many of the courts of the country where lawyers of the lower ranks practised, neither were cases properly prepared, nor witnesses properly examined, so that it was necessary to vest the Judge with an over-all power to get at the truth by asking any*

[1] Monir, *Evidence, 4th ed., Vol. II, p. 949.*

questions he liked. But although a great deal of time has since passed, the section has remained on the statute-book and its provisions are in substantial agreement with the English law on the subject. The powers conferred by the section can therefore still be claimed and exercised. It is obvious that the Judge contemplated by the section is not a mere umpire at a wit-combat between the lawyers for the parties whose only duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected, and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which the lawyers for the parties have either overlooked or left obscure or wilfully avoided. It has been said that it is particularly necessary that the Judge should exercise this power in a jury trial, because it is his duty to aid the jury in obtaining a proper comprehension of the facts which they, as laymen, can do only if the facts are laid bare, with the implications not left as such but fully brought out and with the false suggestions eliminated. If therefore the Judge finds that the examination of a witness is not being conducted in such a way as to unfold the truth, it is not only his right but his duty to intervene with his own questions, particularly at a jury trial. ***But while theoretically the powers of the Judges are limitless and unfettered, certain principles have come to be recognised which he must follow as to the***

manner in which he exercises the power. *It need hardly be pointed out that* ***he must not take side; but he must not also "descend into the arena" and forsake the judicial calm for the zeal of a combatant. If he does so and questions witnesses in the spirit of beating them down or encouraging them to give an answer, his action may have an intimidating or inflatory effect upon them and their evidence may not be the evidence they would have given, if not so intimidated or encouraged".***

In the case of The ***Queen v G.M.A Abeyratne,*** **(1962) 64 CLW 68**, it was held that,

> *"that the words in order to discover or to obtain proper proof or relevant facts in section 165 of the Evidence Ordinance place a limitation on the powers of a Judge to ask any question he pleases in any form of any witness or of the parties to a case."*

In the case of ***Sabapathy v Huntley***, **(1935) 38 NLR 171**, it was held that, though the Court can refuse cross examination on answers to such questions, leave ought to be given where the questions are adverse to either party. In the case of **Sabapathy** it was further held that;

> *"The principle laid down by the House of Lords in the case of* ***Powell v. The Streatham Manor Nursing Home (1935) A.C 243****, viz., " Where the*

question at issue is the proper inference to be drawn from facts, which are not in doubt, the Appellate Court is in as good a position to decide the question as the Judge at the trial is " , applied."

In ***Rex v. Wijedasa Perera,*** **(1950) 52 NLR 29**, it was held that where an accused, after he had been examined in-chief, cross - examined and re-examined, was put a series of questions by the trial Judge, the procedure adopted by the Judge was lawful under section 165 of the Evidence Ordinance if it caused no prejudice to the accused.

In ***Senanayake v. De Silva,*** **(1972) 75 NLR 409** at 432 it was held that *"While the widest powers in regard to examination of witnesses are undoubtedly conferred on the Court by section 165 of the Evidence Ordinance, these powers are not without certain limitations."*

In ***Sisilinona v. Balasuriya,*** **[2002] 1 Sri LR 404** is a civil case where the Judge after inquiry refused to vacate the ex parte Judgment entered against the defendant. After evidence-in-chief, cross examination and re-examination, the Judge had questioned the defendant not with the apparent intention of ascertaining the truth but to obtain contradictions, which he did. The Court of Appeal took the view that the line of questioning by the Judge had been in the spirit of beating the witness down or encouraging the witness to accept the position advanced by the Judge.

In the case of ***Captain Nawarathna v Major General Sarath Fonseka and 6 others*, (2009) 1 SLR 190**, the dicta of ***Seneviratne, J in Mohideen Hassan v Peris,* [1982] 1 SLR 195** was reproduced by P. A. Ratnayake, J as follows;

> *"A "real likelihood of bias" means at least a* ***substantial possibility of bias****. The Court, it has been said, will judge of the matter as a reasonable man would judge of any matter in the conduct of his own business." The test of real likelihood of bias ,..... is based on the reasonable apprehensions of a reasonable man fully apprised of the facts..... However, the pendulum has now swung towards a test of reasonable suspicion, founded on the apprehensions of a reasonable man who had taken reasonable steps to inform himself of the material facts. "Reasonable suspicion" tests look mainly to outward appearances "Real likelihood" tests focus on the court's own evaluation of the probabilities; but in practice the tests have much in common with one another, and in the vast majority of cases they will lead to the same result."*

Accordingly, by going through the proceedings and the judgement very carefully this Court observes that the incessant questioning by the judge unconsciously dragged him into an uncontrollable stage where he has lost his control over the **examination of evidence of the witnesses.**

It was submitted that the Learned High Court Judge had only heard the evidence of the last prosecution witnesses and had intervened on 11 occasions and had 91 interjections during the evidence of Mallika Jayantha **(PW14).**

It is observed that even whilst the 2nd accused was giving evidence the learned High Court Judge intervened continuously on 66 occasions and had 287 interjections. The submission was also made that the interjections by the Learned High Court Judge exponentially increased when the 2nd accused gave evidence. By such lengthy interrogations the submission was made that the second accused was denied a fair trial and he should be acquitted of all charges.

It is not fair for a Judge to render the cross-examination of witnesses ineffective by himself questioning them at length before the cross-examination is over. ***Naga Saw*, 2 Bal. Rep. up. 12.**

Looking at the incessant questioning despite the inherent limitations of the powers entrusted to trial judge to question witnesses, I take the view there was an indiscriminate use of the powers of questioning a witness and the complaint made before this Court that the 2nd accused appellant was denied a fair trial is well founded.

How the case followed the learned High Court Judge to Court No 6

Another complaint as regards deprivation of a fair trial stemmed from the fact that the case suddenly surfaced in Court No 6 where the Learned High Court Judge had

begun to sit after his transfer. Prior to this the evidence of nine witnesses and the evidence in chief of PW 15 had been led before the High Court Judge of Colombo High Court No 3.

On being informed that the said High Court Judge was on transfer, both parties had made a joint application that the matter should be heard and concluded before the said High Court Judge as he had heard the majority of witnesses. Accordingly he had made order that he would seek a direction from his Lordship the Chief Justice and the matter was just postponed to 4th January 2017 to intimate to the parties the position on their application.

The submission was made that when 4th January 2017 came about, the matter was called in Court No 6 and despite the application made that since the majority of the witnesses had given evidence before the previous Judge the matter be listed before him for trial, the newly transferred Judge made order deciding to take up this matter for trial in Court No 6-vide page 567 of the brief.

Both the Learned Counsel for the appellants submitted before this Court that the manner in which the case was transferred cannot be justified. The procedure followed was in violation of the practices followed in High Court and there is no minute or journal entry assigning this case from Court No 3 to Court No 6. In other words the circumstances in which the presiding judge came to hear the case created

a serious doubt on the impartiality and validity of the proceedings adopted in the case- so submitted that the Learned Counsel for both the appellants.

While I wish to state that there should not be room for such complaints to be made before this Court, a trial judge will bear in mind that circumspection in adhering to principles of fair trials would enhance the quality of justice and create confidence in the litigants who seek the citadel of justice, whether in the capacity of a prosecutor, an aggrieved party or an accused seeking to defend a criminal charge against him.

On the whole, having carefully perused the evidence led in the case and the submissions made on behalf of both the Attorney General and the accused appellants I take the view that the prosecution has failed to establish the ingredients of the offences laid in the indictment. There is no dishonest intention with which both accused appellants have acted. They were not actuated by *men rea or actus reus*. There has been a bona fide exercise of their powers and duties. Neither accused was enriched. Whilst the board authorized a transaction which is protected by law and corporate social responsibility, it is a travesty of justice that only two members of the TRC had to endure the traumatic experience of a selective prosecution at a prolonged trial, causing a senior public servant of long years of meritorious public service humiliation and anguish. The 1st accused who only

followed the request of his Chairman for assistance also underwent the infamy of a long drawn out trial.

While I record these observations after careful consideration and scrutiny of all evidence led in this case, I cannot reach any other conclusion except that of innocence of the two accused appellants fully vindicated on oral and documentary evidence.

Accordingly this Court sets aside the conviction and the sentences imposed against both accused appellants by the Learned High Court Judge with regard to all three charges in the indictment.

Both the accused appellants are acquitted from all three charges.

The appeals of both the accused appellants are allowed.

Judge of the Court of Appeal

Devika Abeyratne, J.

I have had the benefit of perusing the draft judgment prepared by my sister Justice *Kumudini Wickramasinghe* and agree with the conclusion reached by her to allow the appeal and acquit the appellants. As the grounds of appeal that are required to be examined by this Court and the factual background of the case is set out and dealt with in depth in the judgment, there is no need to repeat same. However, I find it necessary to express my views, *albeit* briefly, on the following issues that were debated in this appeal.

(a) Whether the prosecution has proved the case beyond reasonable doubt?

(b) Whether there was bias on the part of the learned trial judge?

It was the contention of the Counsel for the respondent that although in the indictment which is based on section 386 of the Penal Code where misappropriation or conversion to one's own use is one of the ingredients of the offence, it was not applicable in the instant case. However, relying on the dicta in *Sohan Lal vs Emperor* 31 Indian Cases 651 which was a situation where appropriation of movable property is done for a wrong purpose, the argument of the learned Counsel was that in the instant matter, the 600 million rupees that was appropriated from the TRC fund was for a wrong use, which establishes misappropriation. Therefore, one of the main arguments for the prosecution was the wrongful loss to the TRC when the money is remitted out of its fund , as appropriating funds of the TRC for a project of this nature which is outside of the scope

of section 22 F (3) of the Act (which is the only provision in the Act which specifies the expenditure out of the fund of the Commission) confirms the dishonest intention of both the accused.

The dishonest intention of the two accused is alleged to be based on the motive to ensure support to the head of State at that time for the Presidential Election that was held on 08.01.2015. Is this position supported by cogent evidence and has the prosecution established that position beyond reasonable doubt?

Section 22 of the Penal Code defines dishonesty as follows; '*whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing dishonestly.*'

It is established as per the evidence, that the *Sil Redi* project was initiated by the President. Commencing from the year 2012, a 'Special Presidential Initiatives' project has been initiated with an allocation made by Parliament for special projects identified by the President, where no further Parliamentary approval is necessary.

According to *Ven Watinapaha Somananda* PW 15 who was the co ordinating Buddhist Priest for Religious Affairs to the President appointed since 2005, in page 546

of the brief (when reference is made to the pages in the Brief it refers to Volume 1) has testified that in the early part of the year 2014 requests were made from various *viharasthana* to the President to provide *Sil Redi* for children and poor people who observe *sil* at those *temples,* which has been communicated to the Secretary to the President the 2nd accused. Thereafter, the necessary statistics were called for with consultation with the Secretary to the Ministry of Economic Development and the process has commenced. On the information obtained with regard to the statistics, written requests have been made from various Districts in October 2014.

Page 553 of the brief

ප්‍ර: ඔබ වහන්සේ සඳහන් කලා ආර්ථික සංවර්ධන අමාත්‍යාංශයෙන් සංඛ්‍යා ලේඛණ ලබා ගැනීමට හේතුවක් කියලා කඩිනමින් මේ ව්‍යාපෘතිය කරන්න අවශ්‍යයි කියලා? ඒ කඩිනමින් කරන්න අවශ්‍යයි කියලා අදහස් කලේ ඇයි?

උ: අපි තොරතුරු ලබා ගෙන විහාරස්ථානවලට ලිඛිතව දැනුම් දීලා මේ තොරතුරු ලබා ගැනීමේදී අපට මේ පිලිබඳව පැහැදිලිතාවයක් නැහැ. මොකද සිල් සමාදන් වන පිරිස එක එකද පෝය දිනවල වෙනස් වෙනවා. මට කල්පනා වුනා අමාත්‍යාංශය තුල එකම දවසක මේ නිළධාරීන් දැනුවත් කරලා එකම පෝය දිනයක මේ සංඛ්‍යාව ලබා ගැනීමට කඩිනමින් ලබා ගත්තොත් අපිට මේ වර්ෂය තුල මේ කර්යය කරන්න පුළුවන් කියන විශ්වාසය මත

තමයි අමාත්‍යාංශය සමග මේ කාර්යය කලේ.

ප්‍ර : ඒ කියන්නේ 2014 වර්ෂයේ අවසානය වන විට මේ කාර්ය සිද්ද කරන්න ඕන කියලා හිතුවා.

උ :මුල ඉදලාම මේ ඉල්ලීම තිබුනට අපිට ක්‍රියාත්මක කරන්න පුලුවන් නේ 2014.05 වෙනි මාසේ 6 වෙනි මාසේ වගේ. අපි ඒ කාර්යයට උනන්දු වුනා. නමුත් අපිට මේ වර්ෂය තුල යම් කාර්යයක් සිදු කරන්න ඕන කියලා විශ්වාසයක් තිබුනා. හැම වර්ෂයකම අපි යමක් කරනවා. මේ වර්ෂයේ සිල් රෙදි බෙදා දීම තමයි ප්‍රමුඛස්ථානය දීලා කටයුතු කලේ.

According to PW1 *Sumathipala Hettiarachchi*, in early 2014 (page 208 of the brief) quotations have been called from his company by the Ministry of Textiles regarding supplying of *Sil Redi* and there have also been communications with PW 15 *Ven Watinapaha Somananda.* Although the actual order for supplies has been communicated in November 2014, before November, PW 1 had been aware of the intended order as he has already taken part in at least two other meetings with the officials of the Ministry concerned. (vide page 271).

In the evidence in chief in page 277 of PW 2, *Haji Anwar* has testified that on 3.11.2014 a request was made and on 20th November the order was placed in which the

amount of *Sil Redi* to be supplied to various districts was informed. However, it appeared that although PW 2 has stated the first communication was on November 3rd by the Presidential Secretariat, that statement was incorrect and that communication has been from the Ministry of Textiles. Further, it transpired that before November 3rd there has been another communication from PW 15 dated 30.10.2014 with regard to an order of *Sil Redi*.

It is apparent from the evidence of PW 1 and PW 2, that with regard to the placing of orders to manufacture the *Sil Redi*, inserting labels to the packets or with regard to the distribution of these items, there has been no active involvement of the two accused. It is PW 15 who has been the active participant and the distribution has been done through his coordination.

The Second accused in his evidence has testified that PW 15 had informed him of the need of funds for the project. The time period stated vide page 368 of the brief is although it was documented in October, it could have been earlier in the months of June, July or September.

The second accused in answer to a question by Court has stated in page 826, that on 20th March 2014 the President has instructed him on the project and a reminder has been given in May 2014 to expedite it.

අධිකරණයෙන්

ප්‍ර: මෙම නඩුවට අදාලව මොකද්ද ඔබතුමාට ලැබුණ නියෝගය ජනාධිපතිතුමාගෙන්?

උ : 2014 මාර්තු 23 වන දින තමයි මුල් නියෝගය ලැබුනේ උතුමාණෙනි. තව වෙනත් කරුණු කිහිපයක් අතර, පොහෝදා සිල් ගන්න උදව්යට ද්‍රව්‍යමය දෙවල් ලබා දීම කියන ඒ නියෝගය. ඉන් පසුව 2014 මැයි මාසයේ මගේ මතකයේ හැටියට එතුමා නැවත වරක් මට මතක් කළා, මේ පිලිබඳව හැකි ඉක්මනින් ක්‍රියා කරන ලෙසට. නමුත් ඒ ක්‍රියා කිරීමට කරන්නට ඕන යම්කිසි පසුබාන කටයුතු ප්‍රමාණයක් තිබුණා. ඒ අවස්ථාවේදී තමයි මට එතුමා නියෝග කලේ.

According to PW5, the Chief Accountant of the Presidential Secretariat he has become aware of this project in the months of June, July of 2014. He has informed the 2nd accused in October that there were not sufficient funds in the allocated Special Presidential Initiatives fund for this project and thereafter, the accountant has been instructed to take steps to obtain the necessary funds subject to reimbursement from the TRC by the 2nd accused. Vide page 371 of the evidence of PW 5 has specifically stated as follows,

ප්‍ර :එතකොට මහත්මයා බලන්න මේ x34 ආ කියන 02 වන චිත්තිකරු ඔබට එවලා තියෙන පිළිතුරේ මොන වගේ දෙයක්ද සඳහන් කරලා තියෙන්නේ?

උ : එහි අංක 1 වශයෙන් සඳහන් වෙන්නේ මා මුලින්ම ජනාධිපති ලේකම් තුමා වෙත යොමු කරලා

තියෙන සටහනේ සඳහන් කොතලාවල ආරක්ෂක විශ්ව විද්‍යාලයේ රුපියල් මිලියන 200ක් වැය වීම සම්බන්ධයෙන් සටහනක්. ඒ කියන්නේ ආරක්ෂක ව්‍යාපෘතියට දැනට මුදල් නිකුත් කරන්න සිල් රෙදි බෙදා දීමේ ව්‍යාපෘතියට මුදල් ලබා ගැනීමේ විකල්ප මාර්ගයක් ගැන සිතිය යුතුයි. ප්‍රතිපූර්ණය කිරීමේ පදනම මත මේ සඳහා පී. ආර්. සි විසින් පී. ආර්. සී කියන්නේ විදුලි සංදේශන නියාමන කොමිෂන් සභාවෙන් ලබා ගැනීමට කටයුතු කරමි කියලා තමයි තියෙන්නේ.

ප්‍ර :ඒ කියන්නේ ප්‍රතිපූර්ණය කිරීමේ පදනම මත සිල් රෙදි ව්‍යාපෘතියට විදුලි සංදේශන කොමිශන් සභාවෙන් මුදල් ලබා ගැනීමට කටයුතු කරමි කියලා තියෙන සටහන තමයි තියෙන්නේ?

උ :එහෙමයි ස්වාමීනි

In pages 804, 805 the second accused has answered Court as follows;

ප්‍ර : ඔබතුමාට කිවුවාද මේකට ප්‍රතිපාදන නැහැ කියලා ජනාධිපතිතුමාට?

උ : එතුමාට මම සඳහන් කලා ප්‍රතිපාදන වල ප්‍රශ්නයක් තිබුනොත් භාණ්ඩාගරයට මැදිහත් වෙන්න වෙයි කියන එක විතරක් මම යෝජනා කළා. ඒ ඇරෙන්න වෙන ප්‍රකාශයක් කලේ නැහැ.

ප්‍ර : TRC එකෙන් මේ මුදල ලබා ගන්න කවුද තීරණය කලේ?

උ : මේ ගැන මා සාකච්ඡා කලා. සුදුසු පරිදි ක්‍රියා කරන්න කියලා තමයි මා හට දුන්න උපදෙස්.

ප්‍ර : හිටපු ජනාධිපතිතුමා කොයි වෙලාවකවත් මේ සල්ලි TRC එකෙන් ගන්න කියලා කිවුවාද? ඔබතුමාට කිවුවාද ජනාධිපතිතුමා?

උ : ඒ සඳහා එතුමා එකඟත්වයක් පල කලා.

ප්‍ර : කවුද යෝජනා කලේ?

උ : මම යෝජනා කලේ උතුමාණෙනි.

ප්‍ර : ඔබතුමා ඒ ආයතන දෙකේම ඉන්න නිලධාරියෙක් නේද?

උ : එහෙමයි.

ප්‍ර : එතකොට මේ TRC එකෙන් මුදල් ලබා ගැනීමේ යෝජනාව කලේ කාටද ඔබතුමා?

උ විකල්ප ක්‍රියාමාර්ගයක් සොයා ගන්න ඕන නිසා මා යෝජනා කලා.

When there is no evidence to the contrary, it is apparent from the above and the fact that the project being an initiative by the President of the country, as his Secretary, the second accused was duty bound to execute the directions given by the President.

The Presidential elections of 2015 was gazetted on the 22nd of November 2014. The incumbent President's term of office officially extended up to the year 2016. The evidence elicited is that the *Sil Redi* project has commenced in the early part of March in 2014. The notification of the election is in November.

When there is evidence that the *Sil Redi* project had taken off the ground in the early part of 2014, in such circumstances, it is not established beyond reasonable doubt

that the *Sil Redi* project was implemented to get undue advantage for the Presidential candidate. Therefore, the proposition by the prosecution that the *Sil Redi* project was intended to confer a benefit on the incumbent President's candidature fails and thus, not established.

The learned Deputy Solicitor General also contended that the payment of Rs 600 million out of the TRC money was not a purpose specified in section 22 F (3) of the TRC Act, which provides for what purpose TRC can spend its funds. *".... There shall be paid out of the fund of the Commission all such sums of money as may be required to defray any expenditure incurred by the Commission in the exercise and performance of its powers and duties."*

The argument for the respondent is that obtaining money from the fund for this project offends section 22 F (3) and taking money out on the basis of reimbursement confirms the illegality.

The **wrong purpose** alluded to is that the money was appropriated for the advantage of the Presidential Candidate, which is the basis for the misappropriation. Therefore, when the money was remitted out of the TRC funds to the official account of the Secretary to the President, TRC suffered a wrongful loss.

In the above background the evidence elicited for the prosecution and the defense have to be considered.

The argument of the prosecution was that the entrustment of the fund is to the Board and not individually to the Director General, the first accused and the Chairman, the second accused who also had a dual role as the Secretary to the President. It is submitted that the first and second accused conspired to remit the money and transferred it from the TRC funds on 5.12.2014 and that the offence was committed by that act.

It is the argument of the State that as the Board decision was followed 10 days later on 15.12.2014, criminal liability cannot be imputed to the other members of the Board, who had no involvement in the conspiracy. According to the prosecution the basis for the conspiracy is the request for funds by the 2nd accused and the remittance of the money by the 1st accused.

In page 124 of the brief, it is in evidence that the request by the 2nd accused has been made on 30.10.2014 (X5), and the matter could not be tabled in the month of November as the second accused did not attend the meeting with the TRC that month.

The position of the defense is that the decision to utilize the funds from the Commission was not an individual decision of the appellants but a decision of the Board of Directors of the TRC and that on 15.12.2014 the decision to transfer 600 million was unanimously approved by the members of the TRC.

It was also contended by the appellants that before 5.12.2014 and 15.12.2014, verbal approval was obtained from the other members of the Board and as the second accused did not participate in the meeting that was held in November ,the Board Paper was presented on 15.12.2014 and in the presence of the two appellants and two other members, without any objection, it was formally approved.

The Counsel for the appellants explained to Courts the various methods that are followed when there are practical difficulties to have a Board meeting because of the busy schedules of the individuals. In certain instances that Board Papers are circulated in advance of a Board Meeting, and sometimes by electronic method by use of an *ipad method* as examples and then later, approval is obtained at a subsequent Board meeting. And that in the instant matter, the prior verbal approval was formally ratified by the Board on 15.12.2014.

The Prosecution has failed to contradict this position although sufficient opportunity was available to rebut this evidence, when the position of the accused from the very start was that the decision to remit the money was a decision of all the directors of the TRC and not only of the two accused. By merely stating that giving oral approval for any decision is unknown to TRC or for any Corporate entity, should not suffice, when there is evidence before Court that the Board approved the paper on 15.12.2014.

PW 14, the Director Finance who testified regarding the procedures adopted when payments are made from the fund of the TRC has stated that he was informed by the first accused that all the Directors have given their oral consent for the remittance and pending written confirmation the money has been remitted on 5.12.2014. There is uncontradicted evidence that the 600 million rupees was not dealt with until the approval of the Board Paper on 15.12. 2014 and until the end of December.

If the remittance of the 600 million was authorized by the TRC which is the position of the defense, can the prosecution maintain the charge under section 386 of the Penal Code?

The prosecution witnesses PW 20 *Ruwini Gunaratne,* PW 13 *Chamli Priyantha*, PW 14 *M.K. Jayantha* have all testified that on 15.12.2014 the Board ratified the decision

unanimously. The evidence of the appellants was that before 15.12.2014 and before the money was remitted on 5.12.2014, the approval of the other members of the Commission was obtained. The prosecution failed to establish that the first accused has not obtained the approval of the other directors prior to 5.12.2014.

The best evidence would have been to call for evidence from the other members of the Commission, rather than assume and proceed on the basis that there was no necessity to rebut the evidence of the 2nd accused and the position of the first accused on his Dock statement. Therefore, the prosecution has failed to establish that the appellants have not obtained approval for the remittance from the other members of the Commission, and that the decision to remit the 600 million rupees was not a decision of the Commission.

The Counsel for the prosecution stressed on the dual role of the second accused in that when as the Secretary to the President he referred to the money as a loan and as Chairman of TRC he refers to it as a donation.

There is no provision in the TRC Act which provides to advance loans. However, it was brought to the notice of Court, that there have been earlier occasions, as well as by the succeeding Government, of instances where TRC money has been utilized for various projects with the blessings of the Government in Power. This position although not

proved on documentary evidence, PW 13 *Chamli Priyantha* in pages 454 to 456 and PW 14, *M.K. Jayantha* in pages 637,643, 646 and 648 of the brief (among other pages) under oath, have testified of certain instances, for example the expenses involved in the Commonwealth Heads of States Meeting (CHOGM), the project *Api wenuwen api*, for a launch of a book, to facilitate a teledrama and a production of a Film, and for Buddhist and Muslim religious functions, money has been utilized from the fund of the TRC.

The evidence elicited with regard to the money given to CHOGM, Cabinet approval has been granted after the money was remitted. The witness has referred to the instances where certain decisions are taken on the basis of 'covering approvals'. The above-mentioned facts and the position have not been contradicted by the prosecution.

Furthermore, evidence has been elicited that the TRC has been remitting money to the Treasury on request every year, which does not directly fall within the scope of Section 22 F (3) of the TRC Act. PW 13 and PW 14 also have testified that TRC had a CSR budget allocation (for Corporate Social Responsibility), from which, with approval from the Board of the TRC the money concerned was allocated.

In the document marked as M2A, the Board Paper, approval has been sought to approve a sum of rupees 600 million as an extra budgetary allocation to the CSR Budget

and the payment to be made out of the Corporate Social Responsibility Budget allocation. This evidence is uncontradicted.

All the above evidence, together with the uncontradicted evidence of how the TRC money is utilized and also according to Section 70 of the TRC Act which provides that no prosecution shall lie in respect of actions done in ***good faith***, when the above evidence is considered in conjunction with each other, it is my considered view that the prosecution has failed to prove the element of "misappropriation" in the instant case.

The burden is on the prosecution to prove the case beyond reasonable doubt. The evidence established is that the *Sil Redi* project commenced long before the Presidential Election was declared. Therefore, the prosecution has failed to establish that the project was implemented to confer a benefit on the Candidate the appellants were supporting. Accordingly, the dishonest intention of the offence is also not proved beyond reasonable doubt.

The contention raised on the basis of bias of the learned judge is an important issue in this appeal. Both the learned President's Counsel Mr. *Faiz Mustafa* and Counsel Mr. *Kanchana Ratwatte* for the 1st and 2nd second appellants respectively have

commented about the constant interjections by the learned High Court Judge which demonstrated the bias with which he proceeded to hear the case. The contention was that '*the patent bias has the fundamental vice of striking at the root of the Constitutional guarantee of a fair trial'.*

The Counsel have referred to the many interjections by the learned Judge. That contention is correct. On a perusal of the interjections it was apparent that some questions (not all) were intrusive and not relevant. Some interjections were for clarification of the evidence which may have been helpful and necessary for the judge to formulate the judgment at the end of the case. I concede that excessive questioning by a judge may create a wrong impression. However, merely because of the **number** of questions that have been asked by the learned judge it cannot be said that a miscarriage of justice has resulted, to either of the appellants.

However, there is a very disturbing factor where I am perturbed by the comments in the judgment where the learned judge has concluded in pages 1259 and 1260 of the judgment as follows.

".....1 හා 2 විත්තිකරුවන් එකී ජනාධිපති අපේක්ෂකයා යටතේ කටයුතු කර ඇති අතර, දීර්ඝ කලක් එසේ කටයුතු කිරීමත් එවකට පැවති දේශපාලන සංස්කෘතිය යටතේ රජයේ සේවකයන් තම දේශපාලන පත්වීමේ බලධාරියගේ ඉල්ලීම මත නීත්‍යානුකූල නොවන ආකාරයට කටයුතු කිරීමට යොමු වීමක් සිදු වී ඇති බව මෙම නඩුවේ සාක්ෂි තුලින්ද හෙලිදරව් වී ඇත....."

"..... ඒ අනුව 02 වන විත්තිකරු හිටපු ජනාධිපති වූ එක් අපේක්ෂකයෙකු සමග තිබූ කිට්ටු සබඳතාව හා පැවති දේශපාලන හා රාජ්‍ය සේවයේ සංස්කෘතිය හේතු කොට ගෙන මෙසේ ක්‍රියා කිරීමට යම් පෙර චේතනාවක් තිබූ බවටද සාක්ෂි හෙලිදරව් වී ඇත....."

It is unclear how the learned judge came to such a conclusion when no evidence was elicited from any witness '.... *that there was a political culture prevailing at the time.....*' among government servants. The judgment has to be on the evidence before Court and that evidence should justify the conclusions and the remarks. Judges' cannot and are not expected to act on presumptions.

It was held in *Anil Chandra vs Indra* 1964 Cut. LT 206; *Percy Geral Papali vs Abraham* 1963 Ker LT 312, that in the *administration of Justice, it is accepted that Judges should have the freedom and independence to perform their functions freely and fearlessly. However, that it is equally necessary that in expressing their opinions, Judges must be guided by considerations of justice, fair play and restraint. Sweeping generalisations defeat the very purpose for which they are made.* This is the accepted norm in any jurisdiction, where impartiality of the judge is of cardinal importance.

The Counsel for the appellants have submitted in their written submissions and has stated in open Court at the hearing of the appeal, that the learned judge who

delivered the judgment has been a member of a Presidential Commission that inquired in to allegations against the previous regime and that the learned judges' assessment and or adjudication is based on his personal perception and prejudice of the previous regime.

This is a serious contention. The Counsel for the Respondent informed Court he was unaware of the learned judge being a member of such a Commission. It is correct that these are only submissions of Counsel without any documentary proof. But they have appraised Court of this situation with responsibility, which the Court has to take cognizance of.

This is a disturbing situation and two questions come to my mind. Firstly, the reason why the learned Judge did not recuse himself from hearing the case if he was a member of a Presidential Commission, where it is safe to infer that evidence may have transpired prejudicial to any office bearer of the previous regime. It is also safe to assume in such a backdrop, the second accused who was the Secretary to the President of that regime, would necessarily be a person of interest.

Secondly, the failure of the Counsel for the accused to make Court aware of the situation and to make an application to the proper forum for a transfer of the case

considering this fact, especially if the Special Presidential Commission of Inquiry was proceeding concurrently.

Be that as it may, the words used by the learned judge referring to '.....*due to the political culture prevailing during the last regime*.....' and also the words of similar import being used at the time of passing the sentence. "..... දෙවනි විත්තිකරු වසර 10 ක වැඩි කාලයක් මේ පත්කිරීමේ බලධාරියා යටතේ සේවය කර ඇති අතර පළවෙනි විත්තිකරුද මෙම ආයතනයේ ඒ ආකාරයෙන් කාලයක් සේවය කර ඇත. එවක පැවති දේශපාලන සංස්කෘතිය යටතේ රජයේ සේවකයන් සහ විධායක නිලධාරීන් මෙවැනි තීන්දු තීරණ ගැනීම් වලට යොමු වීමේ ස්වාභාවයක් තිබී ඇත....." is inappropriate.

It is difficult to comprehend the tenor of the judgment when there is no evidence whatsoever from which the learned judge could have possibly drawn such an inference against the appellants. It seems to be an unfounded generalization of the perceived behaviour of government servants. It is my view that it is not possible, fair or reasonable to arrive at a finding on mere suspicion or conjecture which cannot be substituted for evidence.

It has also to be stated that Courts expect experienced judicial officers to be more dignified and restrained in the expression of their opinion as stated in In *Re Adiraju*

Somanna Vs Unknown on 17 December, 1937 Equivalent Citations; (1938) 2 MLJ 100. Where *Abdul Rahman* J went on to state "*....They should try and avoid expressions which may attract a comment that the Judge had either made up his mind even before he had initiated proceedings or had identified himself with a case to an extent that he was unable to appreciate the case or weigh the evidence before him impartially and without any bias . It is usually unnecessary and, in any case, unsafe to indulge in generalisations.*"

By the remarks of the learned trial judge which are not only unjustified but unnecessary, a doubt has been created in my mind that the learned Judge was biased in his considerations. The words used are objectionable as there was no evidence whatsoever to arrive at that conclusion.

Further, without giving any acceptable reason, the learned Judge has stated that certain witnesses had shown allegiance towards the accused. These statements are unsupported by evidence.

Therefore, it is safe to infer from the learned judge's unsubstantiated sentiments, that he may have even unconsciously, allowed extraneous matters to cloud his judgment and therefore, the contention of the Counsel for the appellants about the judge bringing in his personal perceptions in to this case whether independently or after being a member

of a Presidential Commission inquiring in to allegations of the previous regime is more probable.

Considering all of the above, I am of the view that it will be unsafe to let the judgment of the learned judge stand.

For the reasons set out above, I conclude that the prosecution has failed to prove the charges beyond reasonable doubt and that there was bias on the part of the learned trial judge who has come to conclusions not based on evidence and thus denied a fair trial to the accused as guaranteed and protected by the Constitution. Accordingly, as my sister *Kumuduni Wickremasinghe, J* has held, the appeal should be allowed.

Judge of the Court of Appeal