IN THE MATTER OF PROCEEDINGS BEFORE THE ANTI-CORRUPTION TRIBUNAL ESTABLISHED UNDER THE ICC ANTI-CORRUPTION CODE

BETWEEN:

INTERNATIONAL CRICKET COUNCIL ("ICC")

-and-

MR SANATH JAYASUNDARA ("SJ")

Award[1] - Liability

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1. Introduction

1.1 The ICC is the international federation responsible for the global governance of the game of cricket. As part of its continuing efforts to maintain the public image, popularity and integrity of cricket, and in particular to take the strongest possible stand against the scourge of match-fixing and related corruption in the sport, the ICC has adopted and implements the ICC Anti-Corruption Code for Participants (the "Code"). The Code sets out details of the conduct that, if committed by a Participant in relation to International Matches, will be an offence under the Code. The Code sets out the disciplinary procedures to be followed where an offence is alleged and provides a range of sanctions to be imposed.

[1] DB = Documents bundle utilized for the proceedings.

1.2 SJ is a Sri Lankan citizen who has been employed full-time by Sri Lanka Cricket ("SLC") from 2003, having been promoted to the role of performance analyst in June 2010. In that role, Mr Jayasundara was required to analyse the performance of players in Sri Lankan national teams, i.e. the teams representing Sri Lanka who participated in International Matches.

2. The Charges

2.1 The ICC has charged SJ with the following offences contrary to the Code:

Charge No.1: a breach of Code Article 2.1.3 ("*Seeking, accepting, offering or agreeing to accept any bribe or other Reward to: (a) fix or to contrive in any way or otherwise to influence improperly the result, progress, conduct or any other aspect of any International Match; or (b) ensure for Betting or other corrupt purposes the occurrence of a particular incident in an International Match*");

Charge No.2 (alternative to Charge No.1): a breach of Code Article 2.1.1 ("*Fixing or contriving in any way or otherwise influencing improperly, or being a party to any agreement or effort to fix or contrive in any way or otherwise influence improperly, the result, progress, conduct or any other aspect of any International Match, including (without limitation) by deliberately underperforming therein*; and

Charge No.3: a breach of Code Article 2.4.7 ("*obstructing or delaying any investigation that may be carried out by the ACU in relation to possible Corrupt Conduct under the Anti-Corruption Code (by any Participant), including (without limitation) concealing, tampering with or destroying any documentation or other information that may be relevant to that investigation and/or that may be evidence of or may lead to the discovery of evidence of Corrupt Conduct under the Anti-Corruption Code"*).

2.2 SJ denies all the charges on the basis that the ICC had no jurisdiction over him in relation to the alleged offences and that, in any event, he did not commit them. He has also recently raised a preliminary challenge to the jurisdiction of the Tribunal in its present composition which it must first address.

3. The Preliminary Challenge

3.1 In an email dated 13 March 2021, the Preliminary Challenge was articulated thus:

> *"…our client has expressed the following concerns, which we would like to place on record without prejudice to his legal rights for a preliminary determination by the Tribunal prior to proceeding with the hearing.*
>
> *We have noted that by an email dated 1st February 2021, both Mr Beloff QC and Justice Anderson had recused themselves in the previously scheduled hearings of ECB vs Gunawardene, ECB vs Zoysa and ECB vs Lokuhettige, in order to "ensure the appearance of impartiality and fairness to all parties", which we understand was due to a previous split decision involving the said Tribunal Members and Mr Simon Copleston in the matter of ICC vs Lokuhettige; where the Tribunal could not agree that the ICC held jurisdiction over DL under his contract with SLC.*
>
> *We note that except for Mr Simon Copleston the above two members of the Tribunal namely Mr Beloff QC and Justice Anderson are continuing to hear this matter, which also has the same underlying issues of jurisdiction being traversed which we are of the considered opinion leads to a possible pre determination of those questions and therefore a reasonable likelihood of bias.*
>
> *Our client therefore, instructs us to question as to why the above considerations employed by Mr Beloff QC and Justice Anderson do not apply to this matter as well, and the fairness in you continuing to adjudicate on the same question of jurisdiction in the absence of Mr Copleston who dissented with you, in the previous matter..."*

3.2 The Tribunal observes that the Preliminary Challenge is based on two misconceptions. The first is that the recusal of the Tribunal ("the Recusal"), including Mr Copleston's, from the ECB cases was "*due to*" the division of view between them on a jurisdictional issue. It was not. It was due to their unanimous view on the merits in the cases of both ICC v Lokuhettige and ICC v Zoysa including the lack of credibility of the two cricketers which they concluded could give rise to a claim of apparent bias were they to sit on the ECB cases raising associated factual questions. The second misconception is that Mr Copleston's dissent in the case of ICC v Lokuhettige was on an issue which recurs in the present case. It was not. Mr Copleston did not accept that when Mr Lokuhettige played in a domestic match in Sri

Lanka, organised by SLC rather than by ICC and subject to SLC's anti-corruption regime, Mr Lokuhettige could be deemed to have acknowledged objectively the jurisdiction of the ICC. This conclusion by Mr Copleston was based in part on the fact that SLC became a party to the Code only after Mr Lokuhettige had been a participant. Apart from the matter mentioned in paragraphs 3.3-3.5 below, SJ's denial of ICC jurisdiction is founded on a different basis as appears below.

3.3 The Tribunal accepts that there is one underlying issue common to the case of ICC v Lokuhettige and the present case, namely the submission that Sri Lanka (said to reflect its dualist approach under International Law) does not permit its citizens to be subject to international jurisdiction in any fora without express agreement by the State or the individual concerned (which was said to be absent) itself means that the ICC lacks jurisdiction. The Tribunal in ICC v Lokuhettige (and ICC v Zoysa) were unanimous in ICC's favour on this issue. This award concludes that there was an express agreement in this case, with the result that this issue to does not arise.

3.4 It is well established in English law[2] that the mere fact that a Judge or Arbitrator has expressed himself on a point of law in one case cannot be a basis for his recusal or disqualification in a later case. Judges and arbitrators are assumed to have the capacity to change their minds, especially if confronted with fresh arguments or previous arguments freshly presented. It is a capacity "*possessed by anyone prepared and able to engage with the issue on a reasonable and intelligent basis. It is surely a commonplace of the professions, indeed of the experience of all thinking men and women*" Sengupta v Holmes 2002 EWCA Civ 1104 per Laws LJ at para 36. Principle apart, any alternative conclusion would cause grave problems for the operation of the Courts and arbitral bodies by continually decreasing the number of those able to sit in cases where the same point arose for decision.

3.5 The only exception is where a judge or arbitrator had previously expressed a view in terms so extreme and unbalanced as to cast doubt on his or her ability to try the issue with an objective judicial mind - the Tribunal's paraphrasing of Locabail UK Ltd v Bayfield

[2] Which governs the Code Article 11.5.

Properties Ltd 2000 QB 451 ("Locabail") at p480F para 25. It is not suggested by SJ that this exception could be engaged in his case.

3.6 In any event, even apart from the preceding, the preliminary challenge has been made too late. The composition of the present Tribunal was known to SJ on 5 December 2019. The decision in ICC v Lokuhettige was published on 28 January 2021. On 1 February 2021, the lawyers for Mr Lokuhettige and Mr Zoysa, who also represent SJ, were notified of the Recusal. SJ later participated in these proceedings by sundry communications to ICC without the objection now raised. By reason of this participation SJ must be taken to have waived any such objection. To allow him to raise it so much later than when he would have first become aware of the facts material to it, "*would be unjust to the other party and undermine both the reality and appearance of justice*" Locabail at para 26 p481A-C.

4. Jurisdiction

4.1 The Code applies to all Participants. Code Article 1.4.2.1 provides that the following persons constitute *Player Support Personnel"* and thus Participants bound by the Code:

> "*any coach, trainer, manager, selector, team owner or official, doctor, physiotherapist or any other person who:*
>
> *1.4.2.1 is employed by, represents or is otherwise affiliated to (or who has been employed by, has represented or has been otherwise affiliated to in the preceding twenty four (24) months) a team that participates in International Matches and/or a playing or touring club, team or squad that participates in Domestic Matches and is a member of, affiliated to, or otherwise falls within the jurisdiction of, a National Cricket Federation.*"

4.2 Code Article 1.5 provides that each Participant is "*automatically*" bound by the Code and, among other things, is "*deemed to have agreed*:"

> "*1.5.1 not to engage in Corrupt Conduct in respect of any International Match, wherever it is held and whether or not he/she is personally participating or involved in any way in it;*
>
> *that it is his/her personal responsibility to familiarize him/herself with all of the requirements of the Anti-Corruption Code, and to comply with those requirements (where applicable);*

to submit to the jurisdiction of the ICC to investigate apparent or suspected Corrupt Conduct that would amount to a violation of the Anti-Corruption Code;

to submit to the jurisdiction of any Anti-Corruption tribunal convened under the Anti-Corruption Code to hear and determine (a) any allegation by the ICC[3] that the Participant has committed Corrupt Conduct under the Anti-Corruption Code; and (b) any related issue (e.g. any challenge to the validity of the charges or to the jurisdiction of the ICC[4] or the

Anti-Corruption Tribunal, as applicable) …"

4.3 The ICC's case is that on the plain language of the definition, SJ was a Player Support Person, and therefore a Participant, for the purposes of the Code since at the time of his alleged offence as a performance analyst for one or more of the Sri Lankan national teams, employed by Sri Lanka Cricket ("SLC") he was '*a person who is employed by, represents or is otherwise affiliated to … a team that participates in International Matches'*.

4.4 As against this SJ advances a number of points which the Tribunal will consider seriatim. SJ reprises the argument based on Sri Lanka's dualist system rejected in previous cases but without further elaboration. His principal submission is that "*since Sri Lanka as a Republic follows a dualist policy in International Law for any international body or institution (such as the ICC) to exercise jurisdiction over citizens of this Republic in matters affecting their rights and privileges, it must strictly fall within an express agreement that the individual has entered into with such international body (like an arbitration agreement) and even then, it must conform to the laws of this Republic; which the facts and circumstances of this instant matter clearly places outside of the jurisdiction of the ICC Code*".

4.5 The short answer is that this case is not concerned with public international law, but contract. No question as to the incorporation of a treaty into the law of Sri Lanka is engaged. The Tribunal is content to adopt the reasoning of the Chair (sitting as Chair of the ICC Code

[3] As above.
[4] As above.

of Conduct Commission) at paragraphs 14 to 17 of his decision dated 31 October 2019[5] rejecting an application to lift SJ's provisional suspension.

"*14. Insofar as reliance is placed on the law of Sri Lanka, it has previously been held by the ICC Code of Conduct Commission (sitting as members of Anti-Corruption Tribunals under the Code) that national laws (other than those that govern the Codes) cannot be deployed to trump or frustrate enforcement of the Codes which confer upon the ICC prima facie jurisdiction. See ICC v Ikope, award of the ICC Anti-Corruption Tribunal, dated 5 March 2019, para 6.16 et seq. Analogous rulings, designed to ensure a level playing field for those who participate in a global and globally regulated sport can be found in the case law of the Court of Arbitration for Sport ("CAS") and the IAAF Disciplinary Tribunal.*

15. Article 11.4 of the Code specifies that it 'is governed by and shall be construed in accordance with English law'. As the CAS has recently explained, the purpose of such a governing law clause in an international federation's rules 'is to ensure the uniform interpretation of the standards of the [sport] worldwide'.

16. If a Participant were allowed to avoid his obligations under those rules on the basis that they conflict with laws of the state of which he is a citizen, that would destroy the level playing field, as well as the protection of ethical standards, and the equality of treatment, on which the sport depends.

17. *Even assuming, without finding, that Mr Jayasundara's alleged conduct would constitute a breach of Sri Lankan national law: the fact that the same conduct might be a breach of the Code and national law is expressly contemplated by Article 1.11 of the Code, which states that the Code is intended to 'supplement' other laws and regulations. It follows that the Code envisages that investigations/proceedings relating to the same or similar facts might take place in more than one context. This duality of jurisdiction is also envisaged by Article 4.1 of the Code, which gives the ICC Anti-Corruption Unit discretion to stay its* own *investigation pending the outcome of investigations by 'other relevant authorities'. This is unsurprising given that the interests of public authorities in enforcement of national law and of sports governing bodies in enforcement of their regulations are inherently distinct.*"

[5] DB tab 2 (footnotes omitted).

4.6 That analysis has been fortified by the decision in ICC v Zoysa, paras 2.2-2.3 and indeed by the majority decision in ICC v Lokuhettige.

4.7 Even on its own terms SJ's argument must fail since he has expressly agreed to ICC's jurisdiction by reason of his employment contract with SLC in which he accepted that he will be '*subject to the Board's [i.e., SLC's] rules, regulations, standing instructions and orders, made from time to time and subject to modifications*'.[6] At the time of his alleged offence, the rules & regulations of SLC included the SLC Anti-Corruption Code (effective as from 1 November 2016)[7] which itself provides, at Article 1.6, that: '*[A] Participant shall also be bound by the anti-corruption rules of the ICC and all other National Cricket Federations … not to commit Corrupt Conduct as set out under those rules; and … to submit to the jurisdiction of the first instance and appeal hearing panels convened under those rules to hear and determine allegations of breach of such rules and related issues*'. Accordingly, as a direct result of expressly agreeing to be bound by the SLC rules and regulations, SJ expressly agreed to be bound by the Code. That alone gives the Tribunal jurisdiction in this case. SJ's submissions do not address this Article or its implications.

4.8 SJ further argues that he "*is not a "participant" under the ICC AC as SJ is an office employee of SLC who has nothing whatsoever to do with national cricket or selections and in any event there is no "international match" that underlies the allegations, simply vague references*".

4.9 It is, in the Tribunals view, irrelevant that SJ was an 'office employee'. The definition of Player Support Personnel does not exclude office employees from those who otherwise satisfy its definition.[8] The concept of "any other person" cannot be read down in the way contended for. The persons previously listed in the definition are not limited to those concerned with on field performance.

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[6] DB tab 11 (paragraph 16.d).
[7] DB tab 41.
[8] As noted by the Chairman of the Tribunal in his decision dated 31 October 2019, DB tab 2 (at paragraph 22), '… *I can find nothing in in the language of Code to suggest that any distinction is made as to the seniority of a Participant. Moreover viewing the issue from the perspective of purpose, I can find nothing to dislodge the plain meaning of the definition. The Code is to be interpreted and applied by reference to the fundamental sporting imperatives described in its Article 1.1 of the Code which are as much capable as being undermined by junior members of National Cricket Federation staff or players as they are by their senior equivalents …*'.

4.10 It is also irrelevant that the nature and terms of his employment by SLC differed in some way from those of players. This distinction is not recognised in the definition of 'participant'. Indeed, it is fundamentally his employment by the SLC which brings him within the definition. The fact that SJ is a permanent employee[9] of SLC not a contracted player or coach and subject to the ordinary labour laws of Sri Lanka; does not mean that he cannot at the same time be subject to the ICC's jurisdiction. Sri Lankan labour law and the Code co-exist. They are not in conflict.

4.11 SJ further submits that to be a "*Player Support Personnel*" he must be "*a person who is … employed by … a team … and is a member of, affiliated to or under the jurisdiction of, a National Cricket Federation*".

4.12 In the Tribunal's view this submission is based on a misreading of Article 1.4.2.1. It is the team which employs SJ, not SJ himself, that must be a member of, affiliated to or under the jurisdiction of, a National Cricket Federation. The Tribunal reminds itself that the interpretation and application of the Code by reference to its fundamental sporting imperatives means such interpretation and application "*takes precedence over any strict legal or technical interpretation that may otherwise be proposed*".[10] It cannot have been envisaged, if and in so far as it is alleged, that only employment by a team itself under the jurisdiction of the National Cricket Federation would satisfy the definition, whereas employment by the National Cricket organisation to which the team is affiliated would not. On any basis, SJ through his employment by the SLC was affiliated to all the teams because his role as a performance analyst involved the analysis of performance of all teams.

4.13 The Tribunal would add that there is no requirement under the Code for a Participant expressly to agree (whether in writing or otherwise) to be bound by it. Under English law, which is the law that governs the Code, a Participant's agreement to be bound by a contract can be implied from his/her conduct. SJ accepts this, citing his reply submission "*….it appears evident to the Sole Arbitrator that the term ''participation in sport" within the above*

[9] DB Tab 10.
[10] DB Tab 11.
[10] See Articles 1.5 and 1.9 of the Code.

meaning refers to entering into the "sphere of control of the sports organization" CAS 2016/ A/4697 Elena Dorofeyeva v. International Tennis Federation refer para 86.

4.14 It is, however, submitted by SJ that, even if this were so in the case of a cricketer it would not be so in the case of a performance analyst, who would have no reason to be aware of the Code.[11] Without being taken to accept this submission[12] the Tribunal will not pronounce further on the general issue in the present case not least because in what circumstances such implied contract can be identified in the context of the Code may be the subject of a decision of CAS in an appeal brought by Mr Lokuhettige (on different facts) against the Tribunal's liability award in his case. The Tribunal need not identify an implied contract where it can, as in the present case, identify an express one.

4.15 SJ also submits that by reason of Article 1.7 of the Code it is the SLC, if anyone, which has jurisdiction over its breaches.

4.16 Article 1.7.1 provides "*Where a Participant's alleged Corrupt Conduct would amount solely to a violation of this Anti-Corruption Code (whether such Corrupt Conduct actually relates to an International Match or not), the ICC will have the exclusive right to take action against the Participant under this Anti-Corruption Code for such Corrupt Conduct.*"

4.17 Article 1.7.2 of the Code provides "*Where a Participant's alleged Corrupt Conduct would amount solely to a violation of the anti-corruption rules of a National Cricket Federation (whether such Corrupt Conduct actually relates to a Domestic Match or not), the relevant National Cricket Federation will have the exclusive right to take action against the Participant under its own anti-corruption rules.*"

4.18 The relevant allegations against SJ concern an alleged approach he made to [the Sports Minister], with the view to having a player selected for the Sri Lankan "A" team, which is a team that (by definition) plays in International Matches. Moreover, SJ's approach specifically identified a match against Ireland's 'A' team ('For ongoing A- team ODI (SL A

[11] See further the discussion by Sullivan The World Anti-Doping Code and Contract law in Doping in Sport and the Law at p.68.
[12] If SJ were otherwise bound by the Code, ignorance of its provisions and lack of training in them would not avail him. Ignorance of the law is never an excuse.

Vs Ireland A)).[13] Accordingly, even if SLC had any jurisdiction over the breaches it did not have jurisdiction "*solely*". Where there is Corrupt Conduct relating to an International Match or Matches, the Code gives the ICC jurisdiction over it.[14] Where there is Corrupt Conduct relating to Domestic Matches under the jurisdiction of SLC, SLC's Code will apply.[15] A Participant's domestic National Cricket Federation is therefore irrelevant for the purposes of determining which Code has jurisdiction over alleged Corrupt Conduct. The factor that is relevant, and is indeed the determining factor, is the status of the Match or Matches to which the Corrupt Conduct relates. If it is proved that he sought corruptly to persuade [the Sports Minister] to exercise his influence to procure [Player A's] selection for a national team and indeed an international match, SJ would, in the Tribunal's view, have exposed himself to the ICC's jurisdiction. The sections quoted by SJ concern themselves with conduct that falls exclusively within either the national or the international domain. The conduct complained of here cannot by any stretch of the imagination be said to fall within the national arena alone.

4.19 SJ argues finally "*The only evidence which the ICC ACC is relying on is given by [the Sports Minister], even if there was some merit (which is not conceded at all) the ICC does not have jurisdiction to interfere with a criminal proceeding in Sri Lanka*".

4.20 In his reply SJ notes that he has proceedings before the Court of Appeal[16], an inquiry pending before the Ministry of Sports[17], and has also made a complaint to the Special Investigations Unit established by the Prevention of Offences Relating to Sports Act[18]

[13] See paragraph 3.3 of the ICC's Opening Brief and Exhibit HR1 at DB tab 3 (the WhatsApp message timed at 5.38pm).

[14] See Article 1.7 of the Code. The jurisdictional provisions of the ICC Code and National Cricket Federation Anti-Corruption Codes are clear. Where there is Corrupt Conduct relating to an International Match or Matches, the ICC Code applies. Where there is Corrupt Conduct relating to Domestic Matches under the jurisdiction of a National Cricket Federation, the National Cricket Federation's Code will apply. A Participant's home National Cricket Federation is therefore irrelevant for the purposes of determining which Code has jurisdiction over alleged Corrupt Conduct. The factor that is relevant, and is the determining factor, is the status of the Match or Matches to which the Corrupt Conduct relates.

[15] The note to Article 1.4 provides "*NOTE: For the avoidance of doubt, the ICC's jurisdiction to take action against a Participant under this Anti-Corruption Code is limited, subject to the provisions of Article 1.7 below, to Corrupt Conduct taking place in, or in relation to, International Matches.*"

[16] DB Tab 22.

[17] DB Tab 23.

[18] DB Tab 10.

against, inter alios, [ICC1] and [the Sports Minister]. The Code Article 1.11 provides *''This Anti-Corruption Code and the … rules of the National Cricket Federations are not criminal laws but rather disciplinary rules … However, Corrupt Conduct may also be a criminal offence and/or a breach of other applicable laws … The Code is intended to* ***supplement*** *such laws … It is not intended, and should not be interpreted, construed or* ***applied, to prejudice or undermine in any way the application of such laws and regulations."*** **(our emphasis)**

4.21 Far from subordinating the ICC's jurisdiction over the Code to the national laws of member states which provide penalties for corrupt conduct, Article 1.11 makes clear that it can co-exist with these national laws and their enforcement. The Code supplements but does not supersede them.

4.22 The ICC does not purport to prejudice or undermine any procedure or proceeding would be a matter brought in Sri Lanka as listed in paragraph 4.20 which, it accepts, are matters for the relevant Sri Lankan authorities. That there are domestic proceedings dealing with the same issues does not, however, detract from ICC's jurisdiction. The Sri Lankan proceedings and the ICC proceedings can proceed at the same time.

5. Merits

5.1 The ICC's case in essence is that SJ sought corruptly to persuade [the Sports Minister] who in [redacted], was appointed by the Sri Lankan Government as Cabinet Minister for Telecommunication, Foreign Employment and Sports ("Sports Minister"),[19] to influence SLC to select [Player A] for an international match.

5.2 The key evidence in support of that case is to be found in a series of WhatsApp Messages sent by SJ to [the Sports Minister] after a meeting between them on 14 January 2019[20] the

[19] A position he held until 17 November 2019.

[20] Three messages were deleted from SJ's phone by SJ, the one at 09h10 "hi sir , any possibilitie?"; 09h13 "1M ok – tom" and 09h35 reading "R u mad bro ". The significance of the deletions is discussed below.

screenshots of which[21] the Tribunal has seen and which are, in its view, accurately summarised in the Table below.

The Table:

Date	Time	Mr Jayasundara	[the Sports Minister]
14 January 2019	5.27pm	[Redacted] [Screenshot with information about Player A]	
	5.30pm	[Website link to information about Player A]	
	5.38pm	For on going A- team ODI (SL A Vs Ireland A)	
15 January 2019	9.10am	hi sir , any possibilitie?	
	9.13am	1M ok – tom	
	9.28am		R u mad bro
	10.05am	donating to charity	
	10.11am	in the future too	
	10.18am	that's his dream , this one spending lot for the club players too	
	10.26am	his not going behind politicians or SLC top people [OK emoticon] Jus let me kno if u want any help from me anytime sir, thank you sir	

[21] Taken from the Minister's phone from which they were not deleted.

	10.38am	[Screenshot of league table]	
	10.39am	On going tournament his name no [redacted] ([Player A]) as off spin bowler other all left arm spinners [praying emoticon]	
[…]			
18 January 2019	09.27am	good morning sir – how are you sir	
	10.57am	Dear Sir , I really don't know whether u have misunderstood me .. [Player A] [redacted] he performs very well since last three years as u aware about it .. we didn't have anyone else talk about it .. since I was close to u , u were a humble person that's why I approached u .. not because of anything else .. [Player A]'s father wanted to him be on the scod or in the team .. he was willing to help as a charity work because he knew y were such a good person .. sir, if u want to know anything about me u can always check regarding me from the cricket board .. or else can check about me from Kumar sanga, chaminda vass, prasanna jayawardena , shean etc.. if u want know about my family back ground u can I says refer to kithsiri jayasrkera.. it's a humble	

		request aiya please don't misunderstand me .. thank u	
	10.59am		I have nothing to do with this ! I would have helped but disgusting for u to offer me any thing like that ! U also don't know me
	11.15am	I never offered u anything bad Sir his father wanted to help you regarding charity work because of his son. thank you	

5.3 It was [the Sports Minister]'s understanding that SJ's message was an attempt to bribe him, through offering him one million Sri Lankan rupees in exchange for him arranging for [Player A] to be selected for the 'A' team.[22] That is why he responded: "*R u mad bro*".[23]

5.4 The Tribunal shares [the Sports Minister]'s understanding which is entirely consistent with the ordinary and natural meaning of the messages that SJ undoubtedly sent, read together and in sequence. The phrase '1M ok-tom' may, if read in isolation, be opaque. However, if it is read in the context of the message sent only 3 minutes earlier reading "*any possibilitie*" the position becomes clearer, a fortiori, if both messages are read in the light of SJ's suggestion of [Player A's] suitability for selection for an international match. So read, they are clearly an offer of a quid pro quo for [the Sports Minister] as Minister to use his

[22] For context, as at 16 January 2019, the GBP:LKR exchange rate (according to XE.com) was 0.004, so 1 million Sri Lankan rupees was worth approximately GBP 4,000.

[23] Which the Tribunal construes to mean "*Are you mad brother*?".

perceived influence.[24] This conclusion fortified rather than undermined by the modified offer, after [the Sports Minister]'s immediate and vehement refusal, that the million would be paid to charity rather than to [the Sports Minister], which is an obvious backtrack, apparently intended to be clever, once SJ had appreciated that his initial offer was met with a response which was not only unhelpful but might put SJ himself in jeopardy - as in indeed it did on the very next day, 16 January 2019: when attending an official lunch at which Alex Marshall, ICC ACU General Manager, was coincidentally present, [the Sports Minister] reported SJ's approach to Mr Marshall.

5.5 If there were any doubt that the modified offer was intended to absolve him from any wrongdoing necessary implied by the first offer it is eliminated by the message sent by SJ on 18 January 2019 at 10.57am.

5.6 SJ has given two entirely inconsistent explanations for those messages which discourage in themselves any belief in the correctness of either.

SJ's first version

5.7 Following [the Sports Minister's] report to Mr Marshall, SJ was interviewed by the ACU on 18 January 2019, an interview which was audio recorded and transcribed.[25] During this interview, SJ admitted or accepted the following facts:

(i) He had recommended [Player A] to [the Sports Minister] for selection for the Sri Lankan "A" team.[26]

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[24] As Sports Minister, his role was in fact to regulate and control individual participants or teams representing Sri Lanka. This included the approval of the appointment of the SLC selectors and approval of final team selections made by the official SLC selectors. This did not, however, require him to get personally involved in team selection decisions as that was a matter for the official selectors.

[25] A transcript of this interview (which comprises two parts) is attached at Exhibit [redacted] 1 to [ICC 1]'s witness statement, at DB tab 4, and the audio recording is attached at Exhibit [redacted] 2.

[26] See transcript of ACU interview with Mr Jayasundara on 18 January 2019 (part 2), at Exhibit [redacted] 1, at DB tab 4, at page 2: "***SANATH JAYASUNDARA****: … and I said sir, this player very innocent and performing … if you can, if you can even put this guy into squad on a team*" and at pages 21-22 of part 1 of the interview: "***[ICC 1]****: You, you wanted - … the player … to play in the side? … for the A team ODI series Sri Lankan A versus Ireland A which is coming up very soon isn't it?* ***SANATH JAYASUNDARA:*** *Yeah, yeah, yeah.* ***[ICC 1]:*** *eah. Hi, sir, any possibility? I don't think there's any misunderstanding there, is there?* ***SANATH JAYASUNDARA:*** *No, I was asking because we were talking to each other no at that day and he said, I was asking very clearly … I told him very clearly, sir, look here – now even this player didn't get any chance. I mean from any ither [...] scout. …so he got wickets, sir, even* ***[ICC 1]:*** *And you said hi, sir, any possibility? Did you send that message? Hi, sire, any possibility?*

(ii) He had sent the WhatsApp messages in the Table to [the Sports Minister].[27]

(iii) The reference to "*1M ok – tom*" was a reference to one million Sri Lankan Rupees and that "*tom*" meant being paid tomorrow[28], although he said, in support of modified offer that the payment was to be made to charity.[29]

(iv) It was not appropriate for him to offer money to [the Sports Minister] in the circumstances.[30]

(v) He had deleted some of the messages he had had with [the Sports Minister] from his phone, including the offer to pay [the Sports Minister] 1 million rupees because he knew that the messages were not "*good*" for him and that they might be misunderstood.[31]

5.8 SJ consented to the ACU downloading and examining the contents of his mobile phone. During this examination, [ICC1], the ACU's [redacted], stated in his witness statement,[32] and repeated in his oral evidence, that the ACU confirmed that the relevant WhatsApp

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SANATH JAYASUNDARA: *Yeah, I was asking him. …**[ICC 1]:** Just, so you did send that message? **SANATH JAYASUNDARA:** Yeah."*

[27] As above.

[28] See transcript of ACU interview with Mr Jayasundara on 18 January 2019, at Exhibit [redacted] 1 at DB tab 4, at page 19 (of part 1):"***[ICC 1]:*** *so you send, you sent a message – **SANATH JAYASUNDARA:** Yeah. **[ICC 1]:** One M. **SANATH JAYASUNDARA:** Yeah. **[ICC 1]:** That's million, is it? **[ICC 1]:** Yeah. **SANATH JAYASUNDARA:** Yeah. **[ICC 1]:** Okay, tom. T-O-M. What does tome mean, T-O-M? … is that tomorrow? **SANATH JAYASUNDARA:** Yeah, yeah. Even for tomorrow. Yes."*

[29] See transcript of ACU interview with Mr Jayasundara on 18 January 2019, at Exhibit [redacted] 1 at DB tab 4, at page 19 (of part 1):"***[ICC 1]:*** *So you've offered the minister one million – **SANATH JAYASUNDARA:** For charity. **[ICC 1]:** Sri Lankan rupees. **SANATH JAYASUNDARA:** Yeah. **[ICC 1]:** For tomorrow. **SANATH JAYASUNDARA:** For charity work."*

[30] See transcript of ACU interview with Mr Jayasundara on 18 January 2019, at Exhibit [redacted] 1 at DB tab 4, at page 24 (of part 1):"***[ICC 1]:*** *Do you think it is appropriate to offer money to the sports minister for a player to play in a Sri Lankan A side? **SANATH JAYASUNDARA:** No, not, that is not the way*" and also page 3 (of part 2): "***[ICC 1]:*** *Do you think it's good for Sri Lankan cricket if people can pay, even if it's to charity, to get – **SANATH JAYASUNDARA:** No, no, no. **[ICC 1]:** into a team? **SANATH JAYASUNDARA:** Bad. **[ICC 1]:** Do you think that's appropriate? **SANATH JAYASUNDARA?** No, no, no. That is – **[ICC 1]:** Do you think that's a good thing – **SANATH JAYASUNDARA:** No, no."*

[31] See transcript of ACU interview with Mr Jayasundara on 18 January 2019, at Exhibit [redacted] 1 at DB tab 4, at page 21 (of part 1):"***[ICC 1]:*** *Deleted it? **SANATH JAYASUNDARA:** Oh, I have deleted it because if I, anyone sees, its not good for me*" and at page 22 (of part 1) "***[ICC 1]:*** *where are those messages? **SANATH JAYASUNDARA:** I mean, I think I have deleted it. **[ICC 1]:** why have you deleted them? **SANATH JAYASUNDARA:** no, because I just deleted it. It's not – I didn't, because I thought my wife or my parents will use my mobile and then they will think, misunderstand about me*" and at page 31 (of part 1) "***[ICC 1]:*** *why have you deleted the messages? **SANATH JAYASUNDARA:** because I was scared he was thinking in a different way about me. That's what I deleted."*

[32] AT DB tab 4.

messages between SJ and [the Sports Minister] which appeared on [the Sports Minister's] device did not appear on SJ's device. Thus, in accordance with SJ's explanation in this interview, [ICC1] confirmed what SJ had himself said in his interview about deleting these messages.[33]

5.9 The Tribunal accepts that SJ had no interpreter to assist him at the first interview. It, however, has the benefit of the recording of the interview both audio and visual. SJ claims that he, in the modern vernacular "misspoke" through nervousness in being questioned, that his statements were somehow misunderstood and that they were extracted by oppression. The Tribunal rejects those or any other associated explanations aimed at denying that he made the statement knowingly and voluntarily. His command of the English language, albeit not his native tongue, seemed to the Tribunal on the basis of the interview recordings to be more than adequate; and there is no basis for any suggestion of unfairness in the way the interview was conducted. In the Tribunal's view SJ deleted the WhatsApp messages precisely because he knew exactly what they mean and the damage they might cause him. He knew what he was saying at the interview; and it was because it was highly incriminating that he had to come up with the modified comparatively benign version at his second interview.

SJ's second version

5.10 On 29 January 2019, SJ was interviewed by the ACU for a second time in order to allow the ACU to put to him the results of the telephone download, an interview which was audio and video recorded and transcribed.[34] In this interview, SJ maintained his position that he had not tried to bribe [the Sports Minister] to get [Player A] into the "A" team. However, he changed his story about the key message, namely the message referencing "*1M ok – tom*". While the Tribunal has already noted that in his first interview SJ had accepted that he had sent the message to [the Sports Minster] and followed it up when [the Sports Minister]

[33] See in particular Exhibit [redacted] 9 to [ICC 1]'s witness statement (at DB tab 4) which includes a comparison of the messages found on Mr Jayasundara's phone against the messages found on [the Sports Minister]'s phone.

[34] A transcript of this interview is attached at Exhibit [redacted] 5 at DB tab 4.

appeared to misunderstand what he had said by saying that the 1 million would be paid to charity in his second interview. SJ instead now said:

> the message "*1M ok – tom*" was not meant for [the Sports Minister], but had been meant for SJ's business partner [redacted] whom he had been talking to about a business loan they both had applied for. The message had been sent to [the Sports Minister] by mistake[35] instead of to its intended recipient, [redacted].
>
> The message was a reference to a pending business loan from the Sarvodaya Bank.[36]
>
> He had deleted the message because it had been sent to the wrong person.[37]

5.11 SJ was predictably unable in his second interview to explain (i) why he had not provided this explanation, namely that the message "*1M ok – tom*" was actually meant for his business partner, during his first interview and instead had accepted that he had sent this message to [the Sports Minister] and had done so to advise him that [Player A's] father would pay 1 million to charity in exchange for [the Sports Minister] arranging for [Player A] to be selected for the Sri Lankan "A" team[38], (ii) why, when he had realised that he had sent the message to the wrong [redacted], that he had not followed up with a message to [the Sports Minister] saying that the message was meant for someone else[39] but instead sent a further

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[35] See transcript of ACU interview with Mr Jayasundara on 29 January 2019, at Exhibit [redacted] 5 at DB tab 4, at page 11: "***[ICC 1]:*** *Did you send a message to the minister about the player and offering him money?* ***SANATH JAYASUNDARA:*** *No.* ***[ICC 1]:*** *Who did you send that message to you then? …* ***SANATH JAYASUNDARA:*** *I sent it to [redacted]. She's my business partner.*" And at page 10: "***[ICC 1]:*** *You offered the minister four and a half thousand US dollars equivalent.* ***SANATH JAYASUNDARA:*** *No, no, never.* ***[ICC 1]:*** *It's on a WhatsApp that you deleted.* ***[ICC 1]:*** *that is, that's what deleted, yes. That is went to wrong person.*"

[36] See transcript of ACU interview with Mr Jayasundara on 29 January 2019, at Exhibit [redacted] 5 at DB tab 4 at page 28; "***SANATH JAYSUNDARA:*** *… at that time I think around nine o'clock I talked to that, I was sending him in message to minister, sir, any possibility? Like that. At the same time I was keep calling with [redacted], so I tried to send [redacted] one million, ok tomorrow. That is truth because you can see her SMS. This is on next day morning. She was asking is that money ready because we applied for a loan from the bank. Right? We applied a loan from the Sarvodaya bank because we have to pay for the people. So at the time I deleted … Because it suddenly went to [the Sports Minister] at that time I click on that and then I delete it.*"

[37] See footnote 19 above.

[38] See transcript of ACU interview with Mr Jayasundara on 29 January 2019, at Exhibit [redacted] 5 at DB tab 4, at page 29: "***[ICC 1]:*** *Yeah, but you didn't say that did you last time. You said that the minister is mistaken, he's taken it the wrong way and what you means was that money would go to charity, not go to him. That's what you said. You said nothing whatsoever about your business partner.* ***SANATH JAYASUNDARA:*** *we didn't, that player, he's a innocent guy even, that father also innocent.*"

[39] See transcript of ACU interview with Mr Jayasundara on 29 January 2019, at Exhibit [redacted] 5 at DB tab 4, at page 28: "***[ICC 1]:*** *weird. How you're in the middle of a conversation with the minister about a player and any possibility, one million to you tomorrow sir, he then says are you mad bro? and you say donating to charity. You*

message "donating to charity" which could not have been intended for his business partner and (iii) deleted the message from his phone.

5.12 SJ provided no convincing explanation in his oral testimony or his written submissions for the first or second of those three matters. The Tribunal cannot identify any plausible explanation. As to SJ's third explanation that the message would not look good for him, was something of a two-edged sword and, even if accepted, could not eradicate the insurmountable difficulty posed by the absence of any explanation for the two.

5.13 SJ provided the ACU with various documents claimed by him to support his second version[40] (on which he relied for the purpose of the proceedings).

5.14 However, these documents, did not support the second version. They show, amongst other things, that:

- SJ communicated with [redacted] through the 'Viber' app in the period from 13 to 15 January 2019 ("the critical period"), not WhatsApp, the messenger application he used to contact [the Sports Minister] in the same period. Even if, as SJ claims, he used a variety of methods to contact [redacted], he has produced no evidence of any other method over the period concerned. The ICC submits that "*Given the way in which WhatsApp operates, it is quite difficult to inadvertently message the wrong person within WhatsApp itself (it is not necessary to type in the name of a recipient in order to send messages to them*)". In the event the ICC mercifully abstained from a promised demonstration of the technology and the Tribunal does not need to pronounce on this issue.

- SJ sought to buttress his modified version by evidence that there was a payment into his account from Sarvodaya Bank on 18 January 2019, which totalled 685,782 Sri Lankan Rupees, i.e., not one million Sri Lankan Rupees (the latter might have been consistent with the message "*1M ok – tom*", sent on 15 January 2019). While SJ claimed that the bank in

don't say oh sorry that was supposed to go to someone else. ***SANATH JAYASUNDARA:*** *because I thought it was deleted from my phone.*"

[40] Attached at Exhibit [redacted] 8 of [ICC 1]'s witness statement, at DB tab 4.

question would not as a matter of practice produce documents to explain why a lesser sum only had been paid, it was for SJ to prove a link between the sum sought and the sum disbursed, and by the conclusion of the hearing he had failed to do so.

5.15 From the Tribunal's perspective, the key absent witness was [redacted] said to be his partner in his landscaping business. She would, if SJ's version of the true meaning of "*1M ok-tom*" and its intended recipient were correct, have been the best person to provide corroboration. There was no satisfactory explanation why she was not called save – weakly - that SJ's evidence was sufficient without her!

5.16 In his closing submissions, SJ tendered an affidavit sworn to by [redacted] on the date of the closing submission which sought to fill the gap. She said that she used multiple methods of communication with SJ between the 4th and 19th January 2019, but did not focus on the critical period or produce corroborating evidence.

5.17 [Redacted] also said that SJ had to apply to the Sarvodhaya Bank for a loan of LKR[41] 1 million on 26th December 2018 in connection with the landscaping business in which they were partners and had corresponded with him thereafter on the status of the application. Again, there was no documentary corroboration.

5.18 Admitting it *de bene esse* the Tribunal cannot give real weight to this affidavit given that neither the ICC nor the Tribunal could put questions to her about it. It appreciates why [redacted] wishes to assist her business partner so that her testimony could not be described as truly objective.

5.19 SJ also produced a copy of a letter given by the Sarvodaya Bank at SJ's request dated 25th March 2021 which appears to state that RS700,000 only is the settlement amount given by way of loan to Mr Jayasundara personally. This does not, in the Tribunal's view, establish any link between the 1M sum referred to in the message of 15th January 2019 and the loan made. There is still no evidence as to when the request for a loan was made and in what

[41] Sri Lankan rupees.

sum (other than [redacted]'s bare assertion) and, why the loan actually made was less than 1 million. In any event, according to SJ's first version the sum of 1 million rupees was to be paid not by him but by his uncle.

5.20 On 2nd April 2021, SJ sought belatedly to add to the file affidavits by the guarantors, presumably of the loan, who are said to have signed with the Bank, and who, it is alleged, would confirm that the initial amount requested from the bank by SJ was LKR 1million. Even assuming, without sight thereof, that the affidavits would indeed purport to provide confirmation, the Tribunal cannot give credence to it when the ICC (and indeed the Tribunal) is unable to put questions to the deponents. The Tribunal cannot but note that SJ has had the benefit of legal representation in these proceedings and is forced to wonder why, when the meaning of the 1M sum lay at the heart of the charges evidence said to support SJ's case if credible, could not have been provided before rather than after the hearing.

5.21 SJ finally claimed that there were WhatsApp documents deleted from his mobile phone by [ICC1] which would have supported his second version.

5.22 In response to the questions from the Tribunal, SJ claimed that [ICC1] was acting on [the Sports Minister]'s instructions. Both are serious allegations which lacked any evidential foundation and were not even put to [the Sports Minister]. The inherent flaw in this unfounded accusation is that the "business partner defence" became known only after the cellphone had been returned to SJ; at the second interview on the 29th of January 2019. It follows that, [ICC1] would never had known of SJ's intention to later produce a modified defence at the time when he is alleged to have deleted the messages.

5.23 In the Tribunal's view the reason why SJ had to switch from his first to his second version was that, if the message "*1M ok-tom*" had been intended for [the Sports Minister] it was clearly damning and unsolicited. Suppose, as was put to [the Sports Minister], he harboured a grudge against SJ resulting from some unprofitable and unexplored earlier venture in rice, one would have expected [the Sports Minister], not SJ, to have generated the inculpatory

message; but this was obviously not what happened.[42] It was suggested that [the Sports Minister] reported SJ's approach to him to Alex Marshall (which the Tribunal finds he did) and repeated publicly what the ICC had told him about Sri Lanka being the most corrupt cricketing nation, in order to align himself with one group of candidates in the elections to SLC. None of this, even if there was any evidence, as distinct from a bare assertion, to that effect, could cast doubt by itself on the fact or provenance of the message.

5.24 The Tribunal finds that the [the Sports Minister]'s motives in passing information about the message to Mr Marshall were honourable. As the moving force behind the introduction of legislation proscribing corruption in sport in Sri Lanka, he wished to be seen to be acting consistently. The Tribunal accepts that he made no formal complaint thereafter until provision of his witness statement in these proceedings, but cannot see how this undermines his credibility as to his understanding of SJ's approach.

5.25 SJ submits that if there was any sort of merit to the complaint made by [the Sports Minister], he ought and would have made the complaint to either the local police or to the SLC, as there are established procedures and laws to deal with the offences of trying to bribe a Member of Parliament.[43] The Tribunal is not concerned with what [the Sports Minister] might otherwise have done in respect of SJ's approach. It was, in its view, entirely proper for him to have mentioned it to Mr Marshall. It repeats that his omission to complain either to the Sri Lankan police or to the SLC could cast no doubt on the fact or provenance of the message from SJ.

5.26 SJ also had to overcome the obstacle presented by his WhatsApp message "*hi sir , any possibilitie*", which prima facie was a follow up to his previous praise of [Player A]'s qualities to [the Sports Minister] and was an inquiry as to whether [the Sports Minister] could influence [Player A]'s selection for the national team. SJ did not dispute that this message was properly directed to [the Sports Minister]. However, he said that it referred to an approach by a person located in England who had offered to donate cricket equipment.

[42] SJ's own evidence was that averred that he made the initial contact with the Minister in 2018 because he was told by his friend...that the Minister no longer harboured any grudge against him.
[43] https://www.lawnet.gov.lk/bribery-3/ S14 of Bribery Act.

There was simply no corroboration that any donor had made an offer the previous day, or that SJ had mentioned this to [the Sports Minister]. Standing back, SJ's case has to be that within a short space of time he was dealing with three separate issues; [Player A]'s cricketing future; a possible donation of cricket equipment for SLC; and a bank loan for his landscaping business. This was not of itself impossible; but the sequence of the key WhatsApps read together presents, in the Tribunal's view, a quite different story. In addition, the second version offers no explanation as to why this WhatsApp was also deleted.

5.27 SJ submits that the deletion of the critical message from his iPhone must have been innocent since he was unaware that he might face charges until the press statement of 18th January 2019 i.e., 3 days after the message was sent and that his deletion simply reflected his awareness that it had been sent to the wrong [redacted]. There is no evidence except SJ's say-so that the message was in fact deleted on the 15th of January 2019 and not on the morning of the 18th of January 2019 when he received his suspension letter. Neither is there any explanation for the fact that the three messages sent on the 15th of January 2019 were deleted: JS "*any possibilite*"; "*1M ok – tom*" and [the Sports Minister] "*are u mad bro?*", nor the "business partner defence" to reply only to the deletion of one message. The Tribunal prefers what SJ said in his first version as opposed to the second version, i.e., that he was aware that, if disclosed, it would "*look bad*" but would add that such was not only a matter of appearance but of actuality. It was only after the press statement by the [Sports Minister] exposing SJ's conduct that he sought to contact [the Sports Minister] to mitigate his misconduct and, even then, he did not suggest that the message had been misdirected but only that, in sending it, he had been motivated by a wish to help a friend. It is in any event inconceivable that if the message was truly intended for his business partner and that he had deleted the message on that account why he forgot about this during the first interview on 18th January 2019 and remembered it only 11 days later.

6. The Charges

6.1 Under Code Article 3.1, the burden is on the ICC to establish each of the elements of the charges against Mr Jayasundara to the comfortable satisfaction of the Anti-Corruption Tribunal, bearing in mind the seriousness of the allegation.[44] This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.

6.2 SJ submits that the standard and burden of proof in these proceedings must conform to Sri Lankan domestic standards. According to the submission, this is because the allegation of "*attempting to bribe a public officer*" being that of a criminal nature prosecuted under the Bribery Act read with the Penal Code [7] should be investigated by local law enforcement. It is also submitted that the allegations should, in the alternative, be referred to the SLC to be inquired into under their ACC, as this is an alleged attempt to bribe a public official in Sri Lanka. In sum, his rights must be determined under and/or at least with due deference to Sri Lankan law and there is ample precedent to support this position from previous ICC Rulings.[8]

6.3 The Tribunal repeats that the ICC Code is clear that the standard of proof is comfortable satisfaction[45] - a recognised sports law standard in disciplinary proceedings. Were SJ to be prosecuted under Sri Lankan Criminal Law it accepts that a higher standard would apply. The Tribunal considers that SJ's submission runs contrary to a long line of Tribunal cases; including ICC v Lokuhettige and ICC v Zoysa. As to Bangladesh CB vs Chowdhury and others the provisions there under analysis were different.[46]

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[44] Code Article 3.1 states: "*Unless otherwise stated elsewhere in this Anti-Corruption Code, the burden of proof shall be on the ICC in all cases brought under the Anti-Corruption Code and the standard of proof shall be whether the Anti-Corruption Tribunal is comfortably satisfied that the alleged offence has been committed, bearing in mind the seriousness of the allegation that is being made. The standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*"

[45] Article...3.1. cit sup.

[46] The High Court Judge seized of the appeal wrote

"39 The question of proof has agitated and confused everyone so vigorously, I feel to keep the entire provisions of standard of proof and evidence under article 3 of the Code in focus, which is,

***"3.1** Unless otherwise described herein, the burden of proof shall be on the Designated Anti-Corruption Official (or his/her designee) and the standard of proof in all cases brought under this Anti-Corruption Code shall be whether the Anti-Corruption Tribunal is comfortably satisfied, bearing in mind the seriousness of the allegation that is being made, that the alleged offence has been committed. This standard*

(i) Charge No. 1 – Breach of Code Article 2.1.3, in that Mr Jayasundara offered a bribe or other Reward to contrive in any way or otherwise to influence improperly an aspect of an International Match."

6.4 Based on the evidence summarised and analysed above, the Tribunal is comfortably satisfied that SJ breached Code Article 2.1.3 in that by offering one million Sri Lankan Rupees to [the Sports Minister] in respect of [Player A] and his selection for the Sri Lankan "A" team, SJ offered a bribe or other reward to [the Sports Minister] to contrive or otherwise influence improperly an aspect of International Matches, namely the selection of players for the Sri Lankan "A" team which participates in International Matches.[47] The initial approach to the Minister lauding [Player A], while possibly inappropriate, was not of itself a breach but once coupled with the offer of a sum either to be paid to the Minister i.e. a "*bribe*" or to charity i.e. "*other reward*" became so.

(ii) Charge No. 2 – in the alternative, breach of Code Article 2.1.1, in that Mr Jayasundara contrived or otherwise influenced improperly an aspect of an International Match."

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of proof in all cases shall be determined on a sliding scale from, at a minimum, a mere balance of probability (for the least serious offences) up to proof beyond a reasonable doubt (for the most serious offences).

40Article 11.5 has provided that "the Code is governed by and shall be construed in accordance with the Laws of Bangladesh. Strictly without prejudice to the arbitration provisions of Articles 5 and 7 of this Anti-Corruption Code, disputes relating to this Anti-Corruption Code shall be subject to the exclusive jurisdiction of the Bangladesh Courts."

41. Close reading of the above provisions in the context of the entire Code makes it clear that the burden of proof shall be on the Designated Anti-Corruption Official i.e. the prosecution and the standard of proof in all cases shall ultimately rest on the comfortable satisfaction of the Tribunal only subject to bearing in mind the seriousness of the offence. The presumption of innocence would always operate in favour of the 'Participant' until discharged its burden by DAO.

42. The standard of proof in all cases shall be determined on a sliding scale from, at a minimum, a mere balance of probability (for the least serious offences) up to proof beyond a reasonable doubt (for the most serious offences). The standard of proof required of the federation is high: less than the criminal standard, but more than the ordinary civil standard.7 To adopt a criminal standard (at any rate, where the disciplinary 8charge is not a criminal offence) is to confuse the public law of the state with the private law of an association.8

[47] For completeness, an attempt is sufficient for this charge to be made out. See Code Article 2.5.1 ("*Any attempt by a Participant, or any agreement by a Participant with any other person, to act in a manner that would culminate in the commission of an offence under the Anti-Corruption Code, shall be treated as if an offence had been committed, whether or not such attempt or agreement in fact resulted in such offence.*")

6.5 It was in the Tribunal's view proper, even if in the circumstances unnecessary, to file alternative charges. SJ could on the facts be found in breach of the Code under either - but not, of course, both of the Articles relied on by the ICC. He knew the case which he had to meet which depended upon proof of the facts relied on by the ICC more than upon their classification. However, in the Tribunal's view there is no need to investigate the alternative charge in the light of the findings in the main charge.

(iii) Charge No. 3 – breach of Code Article 2.4.7, in that Mr Jayasundara (i) concealed, tampered with or destroyed information relevant to the ACU investigation when he deleted messages with [the Sports Minister], and/or (ii) deliberately provided the ACU with information he knew to be false or misleading.

6.6 Based on the evidence summarised and analysed above, and in particular SJ's own admissions of the deletion of messages the Tribunal is comfortably satisfied that SJ has breached Code Article 2.4.7 in that he concealed, tampered with or destroyed information relevant to the ACU investigation when he deleted messages he had had with [the Sports Minister]. His deletion of the three crucial messages is explicable only on the basis that he was - as he said in his first interview - aware of their inculpatory nature. Moreover, even if this (which is not the case here) destruction of information may be accidental and not deliberate in the context of the Article, it clearly bears the latter meaning when construed in association with the words 'concealing' and 'tampering' which carry the connotation of intentional action. The rule of construction noscitur a sociis is germane.

6.7 The Tribunal is also comfortably satisfied that SJ deliberately provided the ACU with information he knew to be false or misleading when he changed his story about the "1M ok – tom" message he sent to [the Sports Minister] between his first and second interview. He also breached Code Article 2.4.7 when he deleted the WhatsApp messages which were evidence of his inculpatory communications with [the Sports Minister].

7. Conclusion

7.1 The overriding thrust of SJ's submission is that "*these purported "charges" are trumped up and not quite what they appear to be ex facie, that [ICC1] whose conduct we have questioned, did not*

suddenly "discover" an attempted violation of the ICC ACC (as they would in a ICC sponsored international game); but they were part of a more concerted and collusive attempt involving Sri Lanka Cricket (SLC) and the domestic politics that (unfortunately) operates in it, that these contrived "investigations" resulted in making scapegoats of simple, unassuming innocents to cover-up the actual culprits and the faults of SLC and the political administration, also facilitating a more lucrative (and surreptitious) activity for these ICC ACU Officials for their own personal benefit leaving aside the actual mandate of the ICC and the more noble cause of protecting this "game of gentlemen" that some of us may have had the pleasure of playing (at some level), or simply enjoying its glorious uncertainties watching others battle it out on the green."

7.2 In the light of its analysis the Tribunal finds that this submission is not only bombastic and repetitious but meritless. SJ is no scapegoat but author of his own misfortune. Neither [the Sports Minister] nor [ICC1] was responsible for the inculpatory messages. The suggestion in the Answer that [the Sports Minister] "*saw this as an ideal opportunity to collude with the ICC in order justify his initial public statement*[48] *and make a baseless allegation on SJ based on just a WhatsApp message, but did so in order to further enhance his own political image, by using his relationship with the ICC*" must have as its premise that the message was not intended for [the Sports Minister] at all - a proposition that the Tribunal roundly rejects. Nor does it accept any imputation of bad faith against [the Sports Minister] who, when he mentioned the WhatsApp message to Mr Marshall had and could have had no idea that it had not been intended for him, even had that, in fact, been the case.

8. Sanction

8.1 The Tribunal invites from the Parties submissions on sanction under Article 6 of the Code to be provided in writing within 14 days of receipt of this Award with a right of reply to be provided in writing within 7 days thereafter..

Michael J Beloff QC Chair

Justice Winston Anderson

[48] DB Tab 16.

Justice Zak Yacoob

11 May 2021

Appendix Procedural History

The ICC issued a Notice of Charge to Mr Jayasundara on 11 May 2019.[49] Mr Jayasundara was charged with the following, and was provisionally suspended pending resolution of the charges:

- Charge No.1: a breach of Code Article 2.1.3 ("*Seeking, accepting, offering or agreeing to accept any bribe or other Reward to: (a) fix or to contrive in any way or otherwise to influence improperly the result, progress, conduct or any other aspect of any International Match; or (b) ensure for Betting or other corrupt purposes the occurrence of a particular incident in an International Match*") in that by offering one million Sri Lankan Rupees to [the Sports Minister] in exchange for the selection of [Player A] in the Sri Lankan "A" team, he offered a bribe or other Reward to [the Sports Minister] to contrive or otherwise influence improperly an aspect of an International Match, being the selection of players for an International Match;
- Charge No.2 (alternative to Charge No.1): a breach of Code Article 2.1.1 ("*Fixing or contriving in any way or otherwise influencing improperly, or being a party to any agreement or effort to fix or contrive in any way or otherwise influence improperly, the result, progress, conduct or any other aspect of any International Match, including (without limitation) by deliberately underperforming therein*") in that by offering one million Sri Lankan Rupees to [the Sports Minister] in respect of [Player A] and his selection for the Sri Lankan "A" team, he contrived or otherwise influenced improperly an aspect of an International Match, being the selection of players for an International Match;
- Charge No.3: a breach of Code Article 2.4.7 ("*obstructing or delaying any investigation that may be carried out by the ACU in relation to possible Corrupt Conduct under the Anti- Corruption Code (by any Participant), including (without limitation) concealing, tampering with or destroying any documentation or other information that may be relevant to that investigation and/or that may be evidence of or may lead to the discovery of evidence of Corrupt Conduct under the Anti-Corruption Code"*) in that Mr Jayasundara (i) concealed, tampered with or destroyed information relevant to the ACU investigation when he deleted his messages with [the Sports Minister], and/or (ii) deliberately provided the ACU with information he knew to be false and misleading (with regards to the two different versions he provided for the "1M ok – tom" message across his two interviews).

[49] At DB tab 5 (incorrectly dated 11 May 2018).

On 24 May 2019, Mr Jayasundara responded to the Notice of Charge through his lawyers.[50] In his response, he denied all of the charges save that, in the case of Charge No. 3, he admitted deleting certain WhatsApp messages but contended that his actions did not fall within the conduct prohibited by Code Article 2.4.7. In his response, Mr Jayasundara also sought to contest a number of preliminary issues and to contest the Provisional Suspension that was imposed on him.

On 7 August 2019 (supplemented on 20 September 2019), the Chairman of the Anti-Corruption Tribunal, sitting in his capacity as Chairman of the Code of Conduct Commission, issued directions pertaining to the filing of written submissions on behalf of the respective parties addressing the issues of jurisdiction and provisional suspension.

On 31 October 2019, having considered the written submissions filed by the parties, the Chairman of the Anti-Corruption Tribunal, in his capacity as Chairman of the Code of Conduct Commission, ruled as follows (the "31 October Order"[51]):

- The ICC has jurisdiction over Mr Jayasundara in respect of the charges brought against him under the Code;
- Mr Jayasundara's application to lift his provisional suspension was denied; and
- an Anti-Corruption Tribunal would be convened to hear and determine the charges on the merits, and that a hearing be held to fix directions for the progress of the charges to such hearing.

A significant period of delay in the progress of these proceedings then occurred, attributable principally to Mr Jayasundara's appeal of the 31 October Order to CAS. On 18 December 2019, the parties agreed to stay the underlying proceedings pending the outcome of Mr Jayasundara's CAS appeal.

On 6 August 2020, the ICC informed the Tribunal that CAS had advised the parties that Mr Jayasundara had failed to pay his advance of costs and failed to provide proof that he had made

[50] At DB tab 6.
[51] At DB tab 2.

such payment. The ICC noted its presumption that the CAS proceedings would shortly be terminated, and stated that it wished for the proceedings to move forward in any event.

On 13 August 2020, having considered the written representations of the parties, the Chairman of the Anti-Corruption Tribunal issued directions with regards to the timetable for the exchange of written submissions.[52] This Opening Brief is served and filed by the ICC in accordance with those directions.

On 27 August 2020, the parties received formal confirmation from CAS that the appeal was withdrawn, and the CAS proceedings terminated because of the failure of Mr Jayasundara to pay the necessary advance of costs for the procedure.[53] Accordingly, CAS made no determination as to the merits of Mr Jayasundara's appeal.

On 17 March 2021 the hearing book place by video conference.

[The Sports Minister] has provided a witness statement for the purpose of these proceedings.[54] In his statement, [the Sports Minister] says as follows:

He was first introduced to Mr Jayasundara in 2015 by a mutual musician friend, [redacted], at an election event. He also met Mr Jayasundara at the wedding of [redacted], and at other election events that year.

He was appointed as Sports Minister on [redacated]. On that same day, Mr Jayasundara contacted him by WhatsApp message. In this message, Mr Jayasundara congratulated him on his new appointment and said he wanted to speak urgently. He could not recall any contact with Mr Jayasundara since 2015.

The two then engaged in a WhatsApp conversation in which Mr Jayasundara sought to provide various pieces of information to [the Sports Minister], for example in relation to the inner workings of SLC, his thoughts on Sri Lanka's cricketing performance, and so on.

In these messages, on several occasions Mr Jayasundara told him that he wanted to meet. Eventually, on 14 January 2019, he met Mr Jayasundara at his ([the Sports Minister's]) office. This

[52] At DB tab 7.
[53] At DB tab 8, with the Termination Order issued on 1 September 2020.
[54] Witness statement of [the Sports Minister], DB tab 3.

meeting only lasted a short while. Mr Jayasundara told him that the reason he had wanted to meet was to ask him whether he could speak to the Sri Lankan 'A' team coach in order to try and get a cricketer that Mr Jayasundara knew into the 'A' team. He initially thought that Mr Jayasundara was not being serious in saying that but, as there were several people around them, brought the meeting to a swift close telling Mr Jayasundara that he was busy but would speak to him later. As the meeting was wrapping up, Mr Jayasundara told him that the father of the player he was talking about was very rich and therefore would be able to "*help*" [the Sports Minister].

Very shortly after the meeting ended, Mr Jayasundara sent him several further WhatsApp messages in which Mr Jayasundara gave him more information about the player he had mentioned. These messages stated:

[redacted]

IN THE MATTER OF PROCEEDINGS BEFORE THE ANTI-CORRUPTION TRIBUNAL ESTABLISHED UNDER THE ICC ANTI-CORRUPTION CODE

BETWEEN:

INTERNATIONAL CRICKET COUNCIL ("ICC")

-and-

MR SANATH JAYASUNDARA ("SJ")

AWARD ON SANCTIONS

INTRODUCTION

1. In its Liability Award dated 11 May 2021, the Tribunal concluded that SJ was guilty of two offences under the Code:

   Code Article 2.1.3(a): '*Seeking, accepting, offering or agreeing to accept any bribe or other Reward to: (a) fix or to contrive in any way or otherwise to influence improperly the result, progress, conduct or any other aspect of any International Match; or (b) …'* in that "*by offering one million Sri Lankan Rupees to [the Sports Minister] in respect of [Player A] and his selection for the Sri Lankan "A" team, SJ offered a bribe or other reward to [the Sports Minister] to contrive or otherwise influence improperly an aspect of International Matches, namely the selection of players for the Sri Lankan "A" team which participates in International Matches.*

   Code Article 2.4.7: '*Obstructing or delaying any investigation that may be carried out by the ACU in relation to possible Corrupt Conduct under the Anti-Corruption Code (by any Participant), including (without limitation) concealing, tampering with or destroying any*

documentation or other information that may be relevant to that investigation and/or that may be evidence of or may lead to the discovery of evidence of Corrupt Conduct under the Anti-Corruption Code'.

2. The Tribunal has carefully considered the submissions on sanction made by the ICC on 26 May 2021, and on 1 June 2021; and by SJ on 26 May 2021. On 1 June 2021, SJ expressly renounced an opportunity to add to those submissions and stood by what he had earlier written.

3. The Tribunal notes at the outset that it must, for the purposes of its determination on sanction, proceed based on the facts in relation to the two offences found proven by it in the Liability Award. SJ has the right to appeal those findings but, unless and until they are successfully appealed, they stand.

FACTORS RELEVANT TO THE TRIBUNAL'S DETERMINATION OF SANCTION

4. In accordance with Code Article 6.1, where a breach of the Code is upheld by a Tribunal, it is necessary for the Tribunal to impose an appropriate sanction upon the Participant from the range of permissible sanctions set out in Code Article 6.2. The range of ineligibility for the offences found proven against SJ is prescribed by Code Article 6.2. For offences under Code Article 2.1.3 the minimum period of ineligibility is five (5) years and a maximum of a lifetime, and for offences under Code Article 2.4.7 the minimum period of ineligibility is six (6) months and a maximum of five (5) years. Additionally, for each offence, the Tribunal has the discretion to impose a fine of such amount as it deems appropriate.

5. It is common ground that, in determining the appropriate sanction in an anti-corruption case, a Tribunal must undertake a qualitative assessment of the weight to give to each element prescribed by the Code (i.e., Code Articles 6.1.1 and 6.1.2). The Tribunal in the recent cases of ICC v Zoysa[55] and ICC v Lokuhettige[56] considered the application of those provisions[57] noting that the purpose of any sanction is both to deter and to maintain public confidence in the sport.

[55] Decision of the Tribunal dated 7 April 2021.
[56] Decision of the Tribunal dated 7 April 2021.
[57] See paragraph 33 in the Zoysa decision and paragraph 21 in the Lokuhettige decision.

Seriousness of the offence

6. The ICC argues that the Article 2.1 corruption offences (including Article 2.1.3) are the most serious contemplated by the Code, going to the very core of the fundamental sporting imperatives that underpin it.[58] A breach of Article 2.4.7 the 'failure to cooperate' offence is also at odds with such imperatives underpinning the Code (at Code Article 1.1.4): '*It is the nature of this type of misconduct [i.e., corruption] that it is carried out under cover and in secret, thereby creating significant challenges for the ICC in the enforcement of rules of conduct. As a consequence, the ICC needs to be empowered … to require Participants to cooperate fully with all investigations and requests for information*'.[59] Moreover, where the CAS has had occasion to consider 'failure to cooperate' offences, it is made clear that such offences are to be considered to be of a serious nature due to the otherwise extremely limited investigative powers that sport governing bodies have.[60]

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[58] See Code Articles 1.1.1 to 1.1.5: ('The ICC has adopted this Anti-Corruption Code in recognition of the following fundamental sporting imperatives: 1.1.1 All cricket matches are to be contested on a level playing-field, with the outcome to be determined solely by the respective merits of the competing teams and to remain uncertain until the cricket match is completed. This is the essential characteristic that gives sport its unique appeal. 1.1.2 Public confidence in the authenticity and integrity of the sporting contest is therefore vital. If that confidence is undermined, then the very essence of cricket will be shaken to the core. 1.1.3 Advancing technology and increasing popularity have led to a substantial increase in the amount, and the sophistication, of betting on cricket matches. The development of new betting products, including spread-betting and betting exchanges, as well as internet and phone accounts that allow people to place a bet at any time and from any place, even after a cricket match has started, have all increased the potential for the development of corrupt betting practices. That, in turn, increases the risk that attempts will be made to involve Participants in such practices. This can create a perception that the integrity of the sport is under threat. 1.1.4 Furthermore, it is of the nature of this type of misconduct that it is carried out under cover and in secret, thereby creating significant challenges for the ICC in the enforcement of rules of conduct. As a consequence, the ICC needs to be empowered to seek information from and share information with competent authorities and other relevant third parties, and to require Participants to cooperate fully with all investigations and requests for information. 1.1.5 The ICC is committed to taking every step in its power (a) to prevent corrupt practices undermining the integrity of the sport of cricket, including any efforts to influence improperly the outcome or any other aspect of any Match; and (b) to preserve public confidence in the readiness, willingness and ability of the ICC and its National Cricket Federations to protect the sport from such corrupt practices').

[59] See ICC v Ansari, Award dated 19 February 2019, at paragraph 7.15.2.

[60] *Ibid*, para 7.21. See, e.g., Mong Joon Chung v FIFA CAS 2017/A/5086, at paragraph 189 ('Preliminarily, the Panel recognizes the importance that sports governing bodies establish rules in their respective ethical and disciplinary codes requiring witnesses and parties to cooperate in investigations and proceedings and subjecting them to sanctions for failing to do so. Sports governing bodies, in

7. In light of what it asserts therefore to be the inherent seriousness of the offence, the ICC submits that in determining the appropriate sanction the Tribunal should weigh very heavily those imperatives – including in particular (1) deterring others from similar wrongdoing (i.e., preventing corrupt practices from undermining the sport), [61] (2) maintaining public confidence in the sport,[62] and (3) preserving public confidence in the readiness, willingness and ability of the ICC and its National Cricket Federations to protect the sport from such corrupt practices.[63]

8. The Tribunal accepts the proposition that both offences are inherently serious in the sense that neither is trivial but observes that there are many degrees of seriousness. This is illustrated by a number of factors: (i) the range of sanctions provided for is extremely wide, (ii) although the same range of sanctions is prescribed for the offences described in Code

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contrast to public authorities, have extremely limited investigative powers and must rely on such cooperation rules for fact-finding and to expose parties that are violating the ethical standards of said bodies. Such rules are essential to maintain the image, integrity and stability of sport') and Valcke v FIFA, CAS 2017/A/5003 at para 266 ('The cooperation of the individuals subject to the ethics or disciplinary rules of a sports association is necessary if the integrity of sport is to be protected …').

[61] See, e.g., ICC v Butt, Asif and Amir, Tribunal decision dated 5 February 2011), para 217, ('We must take account of the greater interests of cricket which the Code itself is designed to preserve and protect. There must, we consider, be a deterrent aspect to our sanction'); ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 7 ('the Tribunal accepts that in determining the appropriate sanction against each of the Respondents it should weigh very heavily these fundamental sporting imperatives, including, in particular, the need (i) to deter others from similar wrongdoing (i.e., preventing corrupt practices from undermining the sport), and (ii) to maintain public confidence in the sport'); ICC v Ikope, Award dated 5 March 2019, at para 8.20 ('[I]n light of the inherent seriousness of the offences, the ICC submits that the Tribunal should weigh heavily the fundamental sporting imperatives undermining (*sic*) the Code (Code Article 1.1) in determining the appropriate sanction – including in particular (i) deterring others from similar wrongdoing (i.e., preventing corrupt practices from undermining the sport, and (ii) maintaining public confidence in the sport. The Tribunal would accept that submission too').

[62] See e.g., in relation to the point of principle, Bolton v Law Society [1993] EWCA Civ 32, para 15 ('To maintain this reputation and sustain public confidence in the integrity of the profession it is often necessary that those guilty of serious lapses are not only expelled but denied readmission … A profession's most valuable asset is its collective reputation and the confidence which that inspires'). Also, in the sporting context, Bradley v Jockey Club [2005] EWCA Civ 1056, at para 24, ('Where an individual takes up a profession or occupation that depends critically upon the observance of certain rules, and then deliberately breaks those rules, he cannot be heard to contend that he has a vested right to continue to earn his living in his chosen profession or occupation. But a penalty which deprives him of that right may well be the only appropriate response to his offending'). See also ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 7 and ICC v Ikope, Award dated 5 March 2019, at para 8.20 (both as quoted in the footnote immediately above).

[63] See Code Article 1.1.5.

Articles 2.1.1, 2.1.2 and 2.1.3(a) and (b), the offences listed in Code Article 2.1 and 2.2 are inherently more serious than the corruption offence described in Code Article 2.3, and the offence described in Code Article 2.1.3(b) is more serious than the offence described in Code Article 2.1.3(a); and (iii) the offence described in Code Article 2.1.3(a) itself embraces a wide variety of conduct. Against that background the Tribunal notes: (i) SJ has not been found guilty of subparagraph (b), betting or other corrupt purposes, only paragraph (a), which is a limited form of the offence;[64] (ii) SJ has not been found guilty of influencing the result, progress or conduct of any international match, but only an "other aspect'' thereof which may embrace, *inter alia*, player selection; and (iii) SJ did not accept a reward. He offered one on behalf of the father of [Player A] in an attempt, apparently as a favour to a family friend, to promote the interest of the latter's son who was not blatantly ill-equipped to play for the national team. In the Tribunal's view, SJ's conduct, albeit involving an attempted bribe, was by any measure less reprehensible than the classic effort to spot fix or match fix in aid of some betting coup and although obviously serious, entailed a relatively low level of seriousness.

9. Without specifically addressing the ICC's general points about the purpose of the Code, SJ challenges the ICC's assertion that either of the offences found were, in the circumstances, serious.

10. SJ correctly submits that what he did had no effect on any international match. On that basis he argues, with reference to English criminal case law, that sentences for attempts should be much less than sentences where the completed offence has been committed, saying:

> '*[The Sports Minister] in his previous capacity as Minister of Sports, did not in any manner, have power to interfere in team selections as admitted by him during the hearing and further in his witness statement as well, even if SJ had attempted to bribe [the Sports Minister],* ***then it would have been for an impossible outcome, we have relied on this argument in our previous submissions and we are yet to see any sort of response from the Tribunal nor from the ICC on this perspective***'.

[64] Paragraph 6.4 of the Liability Award,

11. The Tribunal considers, however, that whether [the Sports Minister] was able to bring about SJ's desired result cannot be decisive. The offence does not lie in [the Sports Minister] being able to bring about such desired result. The offence is in the *making* of the offer by SJ. This is clear from the language of the relevant Article which underpins the charge under Article 2.1.3(a) and describes it as '*offering … any bribe or other Reward to fix or to contrive in any way or otherwise to influence improperly the result, progress, conduct or any other aspect of any International Match*'.

12. Since the Tribunal is not concerned with an attempted offence given that SJ completed the Article 2.1.3(a) offence when he made the corrupt approach to [the Sports Minister] English criminal law authority to the effect that sentences for attempts are much less than sentences where the completed offence has been committed is not directly applicable. In any event, the effect of Code Article 2.5 ('*Any attempt by a Participant, or any agreement by a Participant with any other person, to act in a manner that would culminate in the commission of an offence under the Anti-Corruption Code, shall be treated as if an offence had been committed, whether or not such attempt or agreement in fact resulted in such offence*') is that attempted offences are to be treated as though they had been committed.

13. However, while the Tribunal acknowledges CAS jurisprudence which suggests that whether a corrupt approach is successful in terms of bringing about the desired result is irrelevant - see Savic v PTIOs CAS 2011/A/2621 (referencing Kollerer v ATP, WTA, ITF & GSC CAS 2011/A/2490 at paragraph 43), it observes that that those cases related to a Code Article 2.1.1 offence, namely match fixing, where it is clear that the attempt to fix a match is itself so serious that its success or otherwise would ordinarily be irrelevant. There can be no automatic read across- to a case which involves only a truncated commission of the broad offence contained in Code Article 2.1.3(a).

14. In the Tribunal's view, the difference between a successful and unsuccessful attempt to corrupt cannot be wholly ignored when the period of ineligibility must be calculated, particularly in the light of the nature of the conduct with which the Tribunal is here concerned, see paragraph 9 above.

15. SJ submits for the purposes of Article 2.4.7 that although he did delete the purported WhatsApp messages, he did so before he was aware that an investigation had been commenced against him by the ICC. On that basis he argues that the Tribunal must accept that SJ did not have the gift of foresight, that would have enabled him to anticipate an ICC investigation into his WhatsApp message, especially one which, according to him had been sent to the wrong recipient.

16. As to this the Tribunal repeats its finding in the Liability Award at para 5.27 namely,

> *"SJ submits that the deletion of the critical message from his iPhone must have been innocent since he was unaware that he might face charges until the press statement of 18th January 2019 i.e., 3 days after the message was sent and that his deletion simply reflected his awareness that it had been sent to the wrong [redacted]. There is no evidence except SJ's say-so that the message was in fact deleted on the 15th of January 2019 and not on the morning of the 18th of January 2019 when he received his suspension letter. Neither is there any explanation for the fact that the three messages sent on the 15th of January 2019 were deleted: JS "any possibilite"; "1M ok – tom" and [the Sports Minister] "are u mad bro?", nor the "business partner defence" to reply only to the deletion of one message. The Tribunal prefers what SJ said in his first version as opposed to the second version, i.e., that he was aware that, if disclosed, it would "look bad" but would add that such was not only a matter of appearance but of actuality. It was only after the press statement by the [the Sports Minister] exposing SJ's conduct that he sought to contact [the Sports Minister] to mitigate his misconduct and, even then, he did not suggest that the message had been misdirected but only that, in sending it, he had been motivated by a wish to help a friend. It is in any event inconceivable that if the message was truly intended for his business partner and that he had deleted the message on that account why he forgot about this during the first interview on 18th January 2019 and remembered it only 11 days later.''*

17. It follows that in his argument as set out at para 15 above, SJ ignores a finding already made. The Tribunal did not accept SJ's version of the timing and purpose of the deletion. It considered that the deletions were made after, not before, SJ became aware that he was to be the subject of an ICC investigation, and aware of the inculpatory nature of the messages of 15th January 2019. It asks, and not merely rhetorically, who else other than the ICC would be likely to have any interest in messages which "*look(ed) bad*" and whose scrutiny SJ would by deletion wish to avoid.

18. Furthermore, in so far as his argument depends upon the fact that his WhatsApp message was not intended for [the Sports Minister] but for his business partner, that too ignores the finding of the Tribunal to the contrary effect i.e., that it was SJ's first, not his second version, which represented the truth, see para 16 above. His conclusion might follow if his premise were sound, but as his premise is false his conclusion cannot follow.

19. SJ's last point is that, even if SJ did delete the WhatsApp messages, SJ asks how it could "obstruct" or "delay an investigation", as the ICC had screenshots of the messages given by [the Sports Minister], unless the ICC did not trust [the Sports Minister] to take him for his word and wanted to check SJ's mobile phone as well to confirm it. He submits that in any event there was no evidence of any delay or obstruction caused. The Tribunal repeats that it did not find SJ's version of the sequence of the relevant events credible. In any event, SJ cannot sensibly rely upon the adventitious circumstance that the ICC would have access to [the Sports Minister]'s device with its screenshots.

20. The Tribunal notes that Code Article 2.4.7 expressly includes *'concealing, tampering with or destroying any documentation or other information that may be relevant to that investigation…'* SJ's deletion of the messages falls fairly and squarely within that definition. That the ICC was still able to complete its investigation is immaterial. The ineffectiveness of SJ's deletion is *nihil ad rem*. His intention both in deleting his messages and later concocting a false account to explain the deletion was obviously to delay and/or obstruct the investigation.

21. The Tribunal adheres to its conclusion in the Liability Award at para 6.6: "*Based on the evidence summarised and analysed above, and in particular SJ's own admissions of the deletion of messages the Tribunal is comfortably satisfied that SJ has breached Code Article 2.4.7 in that he concealed, tampered with or destroyed information relevant to the ACU investigation when he deleted messages he had had with [the Sports Minister]. His deletion of the three crucial messages is explicable only on the basis that he was - as he said in his first interview - aware of their inculpatory nature. Moreover, even if this (which is not the case here) destruction of information may be accidental and not deliberate in the context of the Article, it clearly bears the latter meaning when construed in association with the words 'concealing' and 'tampering' which carry the connotation of intentional action. The rule of construction noscitur a sociis is germane*."

22. The Tribunal also adheres to its conclusion in the Liability Award at para 6.7: "*The Tribunal is also comfortably satisfied that SJ deliberately provided the ACU with information he knew to be false or misleading when he changed his story about the "1M ok – tom" message he sent to [the Sports Minister] between his first and second interview. He also breached Code Article 2.4.7 when he deleted the WhatsApp messages which were evidence of his inculpatory communications with [the Sports Minister].*"

23. SJ expands on his general argument in addressing and seeking to defuse the allegedly aggravating factors and emphasising the importance of mitigating factors. On true analysis, SJ's arguments, as summarised above, go, if at all, to mitigation, to which the Tribunal turns shortly.

24. Code Articles 6.1.1 and 6.1.2 set out lists of factors that may, respectively, aggravate or mitigate the severity of the sanction under the Code. The Tribunal sets out and then analyses the parties' submissions under each head.

Aggravating factors

Code Article 6.1.1.1 "*a lack of remorse on the part of the Participant*"

25. This aggravating factor applies equally to both the Article 2.1.3(a) and 2.4.7 offences. Indeed, the commission of the Code Article 2.4.7 offence is a companion to his plea of not guilty and his lack of remorse. There is an inter-relationship between SJ's lack of remorse and his commission of a Code Article 2.4.7 offence so that each cannot be seen as entirely separate.

26. The Tribunal accepts that SJ has shown no remorse and he does not indeed claim otherwise. Further, his lack of remorse has been compounded by the manner in which his defence has been conducted, which involved a litany of allegations of bad faith, and which the Tribunal ultimately found to be '*not only bombastic and repetitious but meritless*'.[65], Code Article 6.1.1.8 (other relevant factors).

27. As to the Article 2.1.3(a) offence, the Tribunal accepts that the attempted corruption of a public official, of the rank of the national sports Minister is a particularly egregious example

[65] Liability Award, paragraph 7.2.

of the attempted corruption of a third party which had the potential to seriously damage the image or reputation of the sport, particularly in Sri Lanka. SJ has not disputed this point.

28. As to the Article 2.4.7 offence, the Tribunal accepts that there was a significant degree of premeditation in preparing his untrue account between his first and second interviews. SJ has not disputed this point.

29. SJ's submission under the heading Aggravating Factors is relied on in relation to both the Article 2.1.3(a) and Article 2.4.7 offence. However, it is designed for the most part to establish that certain aggravating factors are absent from his case rather than to rebut the factors upon which ICC actually relies and, as such, does not advance his case in so far as absence of aggravation does not *per se* equate to presence of mitigation. It is therefore, in so far as appropriate, better considered as if deployed under the heading of mitigating factors where it has the capacity to do so and will, accordingly, *mutatis mutandis*, be treated as such.

Mitigating Factors

Code Article 6.1.2.2 "*the Participant's* ***good previous disciplinary record***."

30. The Tribunal accepts that SJ has a flawless disciplinary record during his employment with Sri Lanka Cricket, until the events of the alleged WhatsApp message and that he has not been found guilty before any Tribunal, before the ICC nor before any Courts of Law in Sri Lanka and the ICC rightly accepts this to be a mitigating factor.

Code Article 6.1.2.3 "*lack of experience*"

31. The ICC acknowledges that in his role as performance analyst for SLC, SJ will have received limited, if any, anti-corruption education albeit it was obvious - as is often the case, that the nature of his conduct was wrongful. The Tribunal is prepared to accept the ICC's concession that there is some mitigation to be found in this context, although given that SJ was warned about the consequences of failing to cooperate with the ACU's investigation, this concession has greater resonance *vis-a-vis* the Article 2.1.3(a) than to the Article 2.4.7 offence.

32. The Tribunal notes that SJ's lack of experience is demonstrated by his naivety in thinking both that he could bribe [the Sports Minister] and that his obvious inventions designed to

deny this might be believed by the Tribunal. His objectionable conduct was as much the product of stupidity as of calculation.

> Code Articles 6.1.2.6 (*where the offence did not substantially damage (or have the potential to substantially damage) the commercial value, integrity of results and/or the public interest in the relevant International Match(es)*) and 6.1.2.7 (*where the offence did not affect (or have the potential to affect) the result of the relevant International Match(es))*

33. In the Tribunal's view these Articles are best considered in tandem. They are potentially germane only to the Article 2.1.3(a) offence. Furthermore, Article 6.1.2.6 would be engaged only if Article 6.1.2.7 were so. The critical question therefore is whether the attempted corruption of [the Sports Minister] had the potential to affect the result of relevant international matches.

34. SJ argues, "*There is absolutely no evidence before this Tribunal stating that there was an International Match that SJ attempted to "FIX", how could he when he was just a minor employee at Sri Lanka Cricket, thus there was obviously no damage to any sort of International Match, as a result of SJ's alleged WhatsApp message. The message just said "1M Tom ok", and did not refer to any sort of cricket match, Domestic nor International whatsoever*."

> "*Furthermore, it's well established before this Tribunal, that [the Sports Minister] in his previous capacity as Minister of Sports, did not in any manner, have power to interfere in team selections as admitted by him during the hearing and further in his witness statement as well, even if SJ had attempted to bribe [the Sports Minister], then it would have been for an impossible outcome*[66]*, SJ contends that he has seen no rebuttal of this point from the Tribunal or from the ICC.*"

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66 As per sentencing criminal cases in English law. For example, see Attorney General's Reference No 24 of 2002 (R v Everett) [2004] EWCA Crim 844, in which an application was made by the Crown for leave to refer as unduly lenient a sentence of 8 years' imprisonment for conspiracy to import between 6 and 10 tonnes of cannabis, with a value of £8-11m, into the UK. The maximum sentence was 14 years. Kay L.J. said (at para. 5) "*… despite the persistence of the conspirators, there was in fact no evidence at all of any successful importation. This resulted from a number of unforeseen events thwarting their plans...*"

Having reviewed the aggravating and mitigating features of the case (at para. 41) the court observed that nowhere in the Attorney General's reference was any comment made on the fact that none of the drugs actually reached the UK. Nor did any of the sentencing authorities referred to deal with a situation where there was no successful importation at all. Kay L.J. said (at para. 42): "It seems to us that is an important factor in a case of this kind. It is a clearly established principle that sentences for attempt are much less than sentences where the completed offence has been committed. This of course was a conspiracy, but it was not a successful

35. The Tribunal finds this argument skates too lightly over the surface of the evidence. The Tribunal has already found in the Liability Award that SJ's corrupt approach to [the Sports Minister] was designed to secure a place in the Sri Lankan "A" team for [Player A] and hence the player selection of an international match, and predicated on the basis that [the Sports Minister] might still have had influence, even if no official role, on team selection.

36. The ICC rightly concedes that: (1) if the corrupt approach had succeeded, any effect on the result of any relevant match would have been theoretical and/or very indirect (essentially, the difference between selecting [Player A] and the cricketer who he would have replaced); and (2) SJ's conduct did not in any way affect, the result of, or a single event within, any international match, since [Player A] was not in fact selected.

Code Article 6.1.2.10 "*any other relevant factors*"

37. The Tribunal finds (consistently with the ICC) on the evidence before it that: (i) SJ received no profit or award as a result of his conduct., he did not benefit personally in any way from his approach to [the Sports Minister], and would not have done so whether his bribe was accepted or refused; (ii) there was no danger to the welfare of any such person as a result of the offences; and (iii) neither offence involved more than one participant, i.e. there is a total absence of aggravating factors mentioned in Code Articles 6.1.1.3, 6.1.1.6 and 6.1.1.7 which in the particular circumstances of this case the Tribunal is prepared to treat as a form of mitigation.

38. The ICC notes that the outcome of these proceedings will inevitably have a very significant personal effect on SJ given his role as a cricket analyst in that it is likely to cost him his livelihood and potentially any prospect of working again in professional cricket.

39. SJ heavily emphasises this point saying, uncontroversially, that:

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conspiracy; it was an unsuccessful one, and it seems to us there is no reason why similar principles should not apply. That, it seems to us, was an important factor that ought to have been recognised, and we anticipate, was recognised by the learned judge."

(i) the impact of these alleged offences on SJ's life, by reason of the suspension which he has already suffered, is considerable. SJ was suspended by SLC on 18 January 2019 and was provisionally suspended by the ICC on 11 May 2019;

(ii) SJ, the sole breadwinner, has had since those dates no source of income to attend to his family which include his wife and three school-going children and his elderly and retired parents, all of whom face severe hardships;

(iii) the suspension has already caused irreparable damage to SJ's public image and profile; and

(iv) he is in severe financial difficulty as he has been placed on compulsory leave by his employer, SLC, his salary has been halved, his monthly income amounts to only $225, not even sufficient to meet the daily bare essentials.

40. The Tribunal will take this into account as mitigating factors while bearing in mind that such consequences are all but inevitable consequence of such offences and must not be permitted to dilute unduly the deterrent effect of the sanctioning process by imposing over lenient sentences. This would not be in the public interest or promote 'clean cricket'. It must repeat that the purpose of any sanction is to deter and to maintain public confidence in the sport.

APPLICATION OF CODE ARTICLE 6.3.2

41. SJ has been found by the Tribunal to have committed two separate offences under the Code. In such circumstances, Code Article 6.3.2 is engaged, which provides that '*where a Participant is found guilty of committing two offences under the Anti-Corruption Code in relation to the same incident or set of facts, then (save where ordered otherwise by the Tribunal for good cause shown) any multiple periods of ineligibility imposed should run concurrently (and not cumulatively)*'.

42. Previous Tribunals have noted that:

(i) Code Article 6.3.2 does not define the degree of proximity for the requisite relationship to subsist between the offence and the relevant incident or set of facts;

(ii) under English law, which is the governing law of the Code,[67] proximity is dictated by context,[68] and the relevant context here is of the exception to the general rule that would allow the Tribunal freedom to determine whether periods of ineligibility should run cumulatively or concurrently,

(iii) in principle therefore the phrase '*in relation to*' should be construed narrowly rather than broadly in the context of Code Article 6.3.2.[69] The Tribunal in ICC v Ansari took into account whether offences were 'intrinsically distinct'.

43. The ICC submits that the periods of ineligibility to be imposed on SJ should run cumulatively and not concurrently, for the following reasons:

(i) The Code Article 2.1.3(a) offence concerns SJ's corrupt approach to [the Sports Minister].

(ii) The Code Article 2.4.7 offence concerns SJ's efforts to avoid the consequences of him committing the Code Article 2.1.3(a) offence, by (1) deleting relevant, inculpatory WhatsApp messages, and (2) providing information to the ACU that he knew to be false or misleading when changing his story between his first and second interviews. In particular, the provision of false and misleading information in his second interview must be considered as 'intrinsically distinct' from the Code Article 2.1.3 offence. The Code Article 2.1.3(a) offence was committed on 14 January 2019, SJ was first interviewed on 18 January 2019, and his second interview took place on 29 January 2019 – so, SJ provided false or misleading information just over two weeks after he had committed the Article 2.1.3(a) offence, and 11 days after he had first been interviewed by the ACU.

(iii) The imposition of cumulative periods of ineligibility in these circumstances would be entirely consistent with the decision in ICC v Ansari,[70] where consecutive periods of ineligibility were imposed in respect of (1) Mr Ansari's corrupt approach to Sarfraz

[67] Code Article 11.5.
[68] See, for example, Svenska Petroleum Exploration AB v Lithuania [2006] EWCA Civ. 1529, at para 137.
[69] See ICC v Ansari, Award dated 19 February 2019, at paragraph 7.6 *et seq*.; ICC v Ahmed, Ahmed and Amjad, Award dated 26 August 2019, para 16).
[70] See ICC v Ansari, Award dated 19 February 2019, at paragraph 7.12.

Ahmed (under Code Article 2.3.3), and (2) Mr Ansari's subsequent failures and/or refusals to cooperate with the ACU's investigation (under Code Article 2.4.6).

44. SJ has chosen not to address this specific point. In the Tribunal's view, the exercise of judgment as to whether periods of ineligibility in a case such as the present should be cumulative or concurrent is necessarily conditioned by its circumstances. An important consideration is whether the final sentence would be proportionate to the offences considered together. The Tribunal considers that justice would be served by treating the two offences in play as two sides of a single coin.

THE PARTIES' PRAYERS FOR RELIEF

45. The ICC proposes that the Tribunal determines to impose such period(s) of ineligibility on SJ as it sees fit; without itself suggesting a period. It accepts that in accordance with Code Article 6.4, SJ's provisional suspension is to be credited against any period of ineligibility to be served[71], and if it considers it appropriate to meet the justice of the case, having imposed a period (or periods) of ineligibility, to also impose a fine in such amount on SJ as the Tribunal sees fit.

46. SJ proposes that considering both the relative lack of seriousness of the purported offences and the mitigating factors that the Tribunal should not impose any further sanctions on SJ as his provisional suspension, which he has served, has been in place for over two years, and that the imposition of any further sanctions will result in immediate termination of his employment. SJ submits that this would have a severe detriment on his financial security and his ability to cater to the needs of his family, especially, as he puts it "*during these challenging times of the Pandemic which is still running rampant in Sri Lanka*."

THE TRIBUNAL'S CONCLUSION

47. The Tribunal notes that, for offences under Code Article 2.1.3 the minimum period of ineligibility is five (5) years and a maximum of a lifetime, and for offences under Code Article 2.4.7 the minimum period of ineligibility is six (6) months and a maximum of five (5) years (see Code Article 6.2). Therefore, as SJ has been found guilty of an offence under Code Article 2.1.3(a), the minimum period of ineligibility that he can serve for this offence is five

[71] SJ was provisionally suspended on 11 May 2019.

(5) years. As such, it is not open to the Tribunal to impose a sanction of less than this minimum.

48. It is a peculiar feature of this case that the Article 2.1.3(a) offence is less serious than the Article 2.4.7 offence. But in sport, as in politics, the cover up is often worse than the offences sought to be concealed. Nonetheless, the Tribunal cannot lose sight of the fact that the attempted cover-up was ill-advised and, utterly unlikely to succeed, the product in part as it has already held of SJ's naivete and inexperience.

49. The Tribunal has to balance in particular on the one hand the gravity of SJ's attempt to bribe a Cabinet Minister, the dishonesty with which SJ sought to cover up his tracks and his lack of any display of remorse; on the other hand the fact that he appears to have been motivated by a wish to help a friend, not by the prospect of personal gain; that his recommendation of [Player A] was not itself wholly unreasonable; that his attempt was entirely unsuccessful and led to no untoward result.

50. Weighing up all the factors alluded to in this Award and bearing in mind the underlying purpose of the Code, the Tribunal concludes that the appropriate period of ineligibility is to be 7 years, subject to crediting the period of provisional suspension imposed by the ICC already served (as required by Article 6.4 of the Code) and factoring in, as it is entitled if not obliged to do, the earlier suspension by the SLC.

51. The Tribunal, however, declines to impose a fine or make an adverse costs order not because either would in principle be inappropriate but for pragmatic considerations reflecting SJ's financial prospects.

ORDER

52. SJ is to serve a total period of 7 years of ineligibility from the date of issue of this award, subject to the crediting the period of the provisional suspension already served.

Michael J Beloff QC Chair
Justice Winston Anderson
Justice Zak Yacoob

21 June 2021