IN THE MATTER OF PROCEEDINGS BROUGHT UNDER THE EMIRATES CRICKET BOARD ANTI-CORRUPTION CODE FOR THE T10 CRICKET LEAGUE

Between:

THE INTERNATIONAL CRICKET COUNCIL (ON BEHALF OF THE EMIRATES CRICKET BOARD)

and

(1) MR NUWAN ZOYSA

(2) MR AVISHKA GUNAWARDENE

Reasons of the Tribunal (for publication)

24 June 2021

Reasons of the Tribunal

After a four-day defended hearing in April and early May 2021, the Tribunal gave its decision on 10 May 2021. We found one charge proven against Mr Zoysa and dismissed the remaining three charges. We dismissed the charges against Mr Gunawardene. These reasons appear in a form, agreed between the parties and the Tribunal, that seeks to protect the identities of witnesses and third parties while still allowing the reader to understand the reason for the Tribunal's decision.

Introduction

1. Between 14 and 17 December 2017, the 2017 edition of the T10 Cricket League took place in the United Arab Emirates (a domestic T10 league involving domestic franchise teams and played under the sole control of the Emirates Cricket Board (ECB)).

2. The event was approved and sanctioned by the ECB, in accordance with the ICC's Sanctioning Regulations as in force at the relevant time. Jurisdiction issues arising are discussed further below.

3. A team from Colombo, Sri Lanka, called Team Sri Lanka (TSL) played in the T10 tournament. The team stayed at the Sheraton Grand Hotel in Dubai.

4. The Opening Ceremony for the tournament took place on the evening of 14 December 2017 with the first two matches being played after the ceremony.

5. On 15 December 2017 the tournament hosted four matches, two of which involved TSL. TSL lost both matches.

6. On 16 December 2017 TSL played two further matches, their final round robin match and then a fifth place play off. They lost those matches also.

7. Mr Nuwan Zoysa is a Sri Lankan national and an ex-international cricketer of considerable standing. He made his debut for Sri Lanka in 1997 and went on to play for Sri Lanka on 125 occasions (30 Test matches and 95 ODIs).

8. Mr Zoysa was employed by Sri Lanka Cricket (SLC), as a bowling coach, including as an assistant bowling coach for TSL for the T10 tournament.

9. Throughout his career, Mr Zoysa has attended at least three ICC anti-corruption education sessions, such sessions containing reminders of the obligations of participants under the ICC Anti-Corruption Code (ICC Code), which closely follow the provisions of the ECB Code.

10. Mr Avishka Gunawardene is a Sri Lankan national. He is also an ex-international cricketer. He made his debut for Sri Lanka in 1998 and went on to play for Sri Lanka on 67 occasions (six Test matches and 61 ODIs) as a left-hand batsman.

11. Mr Gunawardene was employed by SLC as Head Coach of TSL for the T10 tournament.

12. Throughout his career, Mr Gunawardene has attended at least two anti-corruption education sessions, such sessions containing reminders of the obligations on Participants under the ICC Code, and consequently the ECB Code.

Alleged fix

13. The ICC alleged that Mr Zoysa and Mr Gunawardene were part of a corrupt approach to two TSL players made on the evening of 14 December 2017 in one of the hotel rooms.

14. The essence of the allegations was that Mr Zoysa (supported by Mr Gunawardene) had suggested to two of the TSL players, [Player A] and [Player B], that they participate in a fix by deliberately under-performing in the first match on the next day (15 December).

15. In opening, the ICC alleged Mr Zoysa called [Player A]'s room and asked to speak to him. Mr Zoysa asked to meet [Player A] in the hotel room of [Player B].

16. When Mr [Player A] arrived at [Player B]'s hotel room, there were three people present: Mr Zoysa, Mr Gunawardene, and [Player B].

17. The ICC alleged that after some discussion about the players not getting their fair share of money, Mr Zoysa asked [Player A] and [Player B] whether they would like to make some money through fixing.

18. The ICC alleged Mr Gunawardene was seated in the corner of the room, relaxed and drinking a drink. Mr Gunawardene agreed with Mr Zoysa that the players were not getting their fair share, and said to [Player A] and [Player B] that because the team was not going to make the finals of the event, they might as well go along with the fix if they wanted to.

19. The ICC case was that [Player A] returned to his hotel room and told his wife what had happened. He said she immediately told him to ring his father, which he did. [Player A] said his father told him not to even think about it, telling him he did not need to make money like that, and that it would be a betrayal of his country.

20. [Player A] said he saw Mr Zoysa on the team bus the next morning and told him he was not interested in the proposed fix.

Charges

21. Mr Zoysa faced four charges of breaching the ECB Code arising from the above allegations, namely:

    a. Charge No. 1 - Breach of ECB Code Article 2.1.1, in that he was a party to an agreement or effort to fix or contrive or otherwise influence improperly the result, progress, conduct, or other aspect(s) of a Domestic Match.

    b. Charge No. 2 - Breach of ECB Code Article 2.1.4, in that he directly solicited, induced, enticed or encouraged [Player A] and [Player B] to breach ECB Code Article 2.1.1.

    c. Charge No. 3 - Breach of ECB Code Article 2.4.4, in that he failed to disclose to the Designated Anti-Corruption Official (without unnecessary delay) full details of any approaches or invitations he received to engage in Corrupt Conduct under the ECB Code.

d. Charge No. 4 - Breach of ECB Code Article 2.4.6, in that he failed or refused to cooperate with an investigation carried out by the Designated Anti-Corruption Official in relation to possible Corrupt Conduct under the ECB Code. This charge resulted from the failure of Mr Zoysa to attend an interview requested by the ICC as part of the investigation.

22. Mr Gunawardene faced two charges of breaches of the ECB Code arising from the above allegations, namely:

a. Charge No. 1 - Breach of ECB Code Article 2.1.4, in that he directly or indirectly persuaded, encouraged or intentionally facilitated [Player A] and [Player B] to breach ECB Code Article 2.1.1.

b. Charge No. 2 - Breach of ECB Code Article 2.4.5, in that he failed to disclose to the Designated Anti-Corruption Official (without unnecessary delay) full details of any incident, fact or matter that came to your attention that may evidence Corrupt Conduct under the ECB Code by another Participant.

Jurisdiction

23. Mr Zoysa and Mr Gunawardene challenged the jurisdiction of this Tribunal over the charges. The Chair of the ICC Code of Conduct Commission heard and determined that challenge against the Respondents in a decision dated 20 September 2019. That challenge was renewed as part of this Tribunal's process.

24. At the request of the ICC shortly before the hearing, this Tribunal heard that challenge as a preliminary issue. We received written submissions and heard oral argument on the first day of hearing (19 April 2021). We deliberated and dismissed the Respondents challenge to jurisdiction and determined to proceed with the hearing (hearing an adjournment application referred to below). We advised our reasons would follow and these are recorded here.

The Issue

25. It was argued by Mr Bajwa QC on behalf of Mr Zoysa that the 2017 T10 League was not properly sanctioned. The submissions were supported by Mr Milliken-Smith QC on behalf of Mr Gunawardene.

26. The ICC on behalf of the Emirates Cricket Board argued that it was a sanctioned tournament and therefore we did have jurisdiction to hear the charges but also submitted that we had no jurisdiction to hear the Respondents' challenge. They stated that any challenge to the legality or sanctioning of this Tournament must be taken either according to the dispute resolution provisions of the National Cricket Federation's rules and regulations or by way of arbitration before the ICC Dispute Resolution Committee.

27. As we decided that this tournament was properly sanctioned or at least one that is subject to the jurisdiction of the ICC's Anti-Corruption Tribunal, we did not feel it necessary to rule on the point whether we could determine the matter of jurisdiction in the first place. Obviously if the reverse was the case, we would have had to determine the matter. It is therefore not necessary to set out full reasons on this point (as it is moot).

28. If required, we would say that we would be minded to reject the ICC's submission on this point as a general principle. The charges, if proved, would inevitably result in a penalty which would deprive the Respondents of their livelihoods and they were at the hearing subject to suspension. There may be cases of complexity where the Tribunal is unable or unwilling to determine and decide matters of invalidity or illegality and that they should be referred to the ICC Dispute Resolution Committee. We accept that our view on this narrow issue should not be taken as determinative or as a precedent.

Discussion

29. Para 1.4 of the ECB Anti-Corruption Code gives the ECB jurisdiction to take action against a participant under the Anti-Corruption Code limited to the corrupt conduct taking place in, or in relation to, domestic matches sanctioned or approved by the ECB.

30. Para 1.4.2 states a participant includes any coach who is employed by, represents or is otherwise affiliated to … a playing or touring, club, team or squad that participates in domestic matches and is a member of … or otherwise falls under the jurisdiction of the ECB or any other National Cricket Federation.

31. The Respondents were employed by Sri Lankan Cricket but released to act as coaches for Team Sri Lanka and released for this tournament. They are covered by the regulation.

32. A domestic match is defined in Appendix 1. It includes in addition to first class and list A matches, any other match organised or sanctioned by the ECB from time to time to which the ECB deems it appropriate that the Anti-Corruption Code should apply.

33. A match is a cricket match of any format and duration in length in which two teams compete against each other either at international level (i.e international match including tour match) or at national level (i.e a domestic match).

34. It was accepted by the Respondents that the ECB purported to sanction the 2017 T10 League. But they argue that it did not do so validly, appropriately and/ or lawfully. They argue that ICC was required to sanction the tournament.

35. Argument was presented by the Respondents that Team Sri Lanka was neither a national nor a provincial team, was not representative of Sri Lankan cricket nor under its jurisdiction but owned by an individual.

36. We find no evidence that the ECB acted or sanctioned the 2017 T10 tournament invalidly. The ECB sanctioned the matches and deemed it appropriate that their Anti-Corruption Code should apply to their tournament. We do not find merit in the Respondents' suggestion as to how the tournament was planned, run or played. Similarly there is nothing in the name of the team, its composition, its ownership or the way the players were paid or not paid.

37. We also accept by participating in the tournament the Respondents can be said to have waived any objection to the validity of sanctioning (whether or not there was an issue with that). If they had appeared in an invalid match it might have rendered them liable to a different allegation that they were participating in disapproved cricket.

38. If we were concerned about the legality of the sanctioning, then as set out above, we might have refused to rule on the validity and invited a reference to the ICC Dispute Resolution Committee.

Adjournment application

39. Following the jurisdiction argument heard on 19 April 2021 and our decision upholding jurisdiction, the Respondents sought an adjournment of the hearing to challenge jurisdiction before the ICC Dispute Resolution Committee. The application was advanced on the basis that there was a realistic prospect of the jurisdiction challenge succeeding before the DRC and the interests of justice favoured the granting of an adjournment.

40. The Tribunal heard argument from Mr Bajwa QC (for Mr Zoysa) on this point. That argument was supported by Mr Milliken-Smith QC (for Mr Gunawardene). The ICC opposed the adjournment.

41. The Tribunal adjourned to deliberate and returned to deliver an oral decision, declining the application for adjournment. In short, we did not consider the jurisdiction point had sufficient merit to allow an adjournment at this late stage. The prospect of further delay in the proceeding caused by an adjournment to pursue a challenge to jurisdiction was (to us) contrary to the interests of justice and contrary to natural justice (at least from the perspective of the ICC and its witnesses).

42. The Tribunal was concerned as to the delay already incurred in the conduct of the proceedings and the impact of this upon all involved. We did not consider the Respondents to be prejudiced by continuing with the hearing and that appears to have been borne out by the subsequent hearing and decision.

Substantive hearing and issue for determination

ICC Case

43. The ICC closed its case on this basis:

a. The fundamental questions remaining for the Anti-Corruption Tribunal to determine are:
    i. Did a meeting take place on the evening of 14 December 2017 involving Mr Zoysa, Mr Gunawardene, [Player A], and [Player B]?
    ii. If so, what was said (or not said) by each of Mr Zoysa and Mr Gunawardene?

44. The ICC submitted that the Tribunal can be comfortably satisfied that such a meeting involving discussion of match fixing did take place on the evening of 14 December 2017. It submitted in closing that there were no reasons to consider [Player A] was not telling the truth, there were good reasons to consider Mr Zoysa was not telling the truth and the evidence against Mr Gunawardene was not able to be distinguished from that against Mr Zoysa (and therefore he was equally liable).

45. The ICC noted the burden and standard of proof, that is that we needed to be comfortably satisfied that the evidence against each Respondent, considered separately for each of them, established each of the key elements alleged against them.

46. The standard of comfortable satisfaction was said to be:

> In relation to that standard, it is to be applied as set out at Article 3.1 of the ECB Code, i.e., 'This standard of proof is in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt'.

47. The authorities on that standard are summarised in Lewis & Taylor, 'Sport: Law and Practice'[1]. The standard should take into account the seriousness of the allegations made and the overall circumstances of the case, in particular that corruption such as match fixing is difficult to detect and hard to prove, given its surreptitious nature. The Tribunal must take care not to impose the criminal standard of beyond a reasonable doubt, as that is not the requirement of the relevant Code. Nor can the test be a simple balance of probabilities, with the more likely option being the result.

48. Ultimately, this Tribunal must be clearly or comfortably satisfied that each of the allegations are proved against the particular Respondent (taking care to consider the evidence against each separately).

49. Mr Zoysa's closing submissions responded by focusing on the same issue. That is that [Player A]'s account could not comfortably satisfy the Tribunal, as it suffered from inconsistencies and [Player A]'s credibility was in doubt. Mr Zoysa submitted that the evidence offered from [Player B] (without him giving evidence) and [Player C] (see below) did not strengthen [Player A]'s account and indeed could be seen to weaken it further.

50. Mr Gunawardene submitted that the issue for the Tribunal was clear:

> "The parties agree that the issue for you in AG's case is clear: are you comfortably satisfied that between 10.18pm and 10.50pm on the evening of the 14th December 2017, AG was present at a meeting in [Player B]'s room, as [Player A] ultimately alleged."

51. The ICC case rested significantly on [Player A]'s evidence that a meeting did take place on the evening of 14 December in [Player B]'s room and that the discussion about match fixing took place.

52. The ICC submitted that his evidence was internally consistent on the key matters, such as the nature of the approach by Mr Zoysa and the details of the proposed fix. The ICC conceded that [Player A] was inconsistent about the date of the approach and the hotel room it occurred in, but submitted these were peripheral details which did not affect the key ingredients which were consistently maintained by him.

53. The ICC submitted that [Player A]'s evidence was supported by the evidence of [Player B] but acknowledged [Player B] has not given evidence to the Tribunal, and accepted there are question marks over [Player B]'s conduct generally.

54. The ICC case in closing was [Player B] changed his position in terms of cooperating with the ICC following his second interview but maintained that a meeting did take place between him, [Player A], Mr Zoysa and Mr Gunawardene (although he changed his account to say that it was a general conversation about corruption at the tournament).

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1 Bloomsbury Publishing, 2021, paragraphs C5.2-C5.3

55. The ICC submitted there was no evidence before the Tribunal that [Player A] and [Player B] colluded in their evidence or statements.

56. The ICC case in closing was that the evidence of [Player A]'s statement to [Player C], giving a similar account of the hotel room meeting, in September or October 2018, gave support to the likelihood that his evidence to the Tribunal was reliable and rebutted any suggestion that he had conspired with [Player B] later about the contents of his evidence.

57. The ICC relied upon a short exchange of WhatsApp messages between Mr Zoysa and Mr Gunawardene on the evening in question to support his evidence. The ICC submitted the WhatsApp messages show that Mr Zoysa and Mr Gunawardene were in communication by way of WhatsApp messages at 10.17pm - 10.18pm on 14 December 2017, which is consistent with when [Player A] says the meeting took place. The ICC submitted that the most natural reading of these WhatsApp messages is that Mr Gunawardene and Mr Zoysa were going somewhere together.

58. Those messages read as follows and were the subject of considerable debate and submission during the hearing:

> *AG: "Your ready?*
> *NZ: Going?*
> *NZ: Will go and see my friend now.*
> *AG: OK*

59. The ICC submitted these messages came at around 10.17 and 10.18pm on the evening of 14 December 2017 shortly before the meeting occurred with the corrupt discussion. The ICC suggested this exchange was referring to Mr Zoysa and Mr Gunawardene going to see [Player A] and [Player B] in [Player B]'s room.

60. The ICC submitted that one does not tend to ask someone the question 'Your ready?', i.e., 'are you ready?' unless you are about to go somewhere with that person.

61. The ICC submitted that Mr Zoysa's explanation of the messages was blatantly untrue, and the Tribunal should draw appropriate adverse inferences from this. There the ICC were referring to Mr Zoysa's explanation that he was going to meet a friend for dinner, this friend being a fellow pigeon fancier (who gave evidence before the Tribunal).

62. The ICC's case was that a further WhatsApp message from Mr Gunawardene to his wife (sent the next morning) showed the group were together late in the evening of 14 December (early morning 15 December).

63. The ICC stated its case was strengthened by Mr Zoysa's evidence which included an explanation of his Whatsapp message "Will go and see my friend now". Mr Zoysa gave evidence that this was his pigeon fancier friend [Mr P]. Mr Zoysa produced photos showing him together with [Mr P] and stated this was the evening in question. [Mr P] gave evidence to confirm that. The photos produced were not able to be dated or timed and when the ICC asked for that information [Mr P] refused to provide it. The ICC accepted that Mr Zoysa and [Mr P] were friends and had met at some stage in Dubai but said the purported timing of the evening of 14 December was a deliberate concoction which concealed the true position [Player A]'s version of events).

64. The ICC relied on the fact Mr Zoysa had already been found, and admitted, to having committed the sort of corrupt conduct alleged in these proceedings, and during a period that covers 14 December 2017. The ICC said that while it was argued on Mr Zoysa's behalf that if he were guilty of the corrupt approach alleged in these proceedings, he would surely have mentioned it when he confessed other approaches, there are any number of reasons as to why he might not have mentioned this specific approach, the most obvious being a desire not to implicate his friend, Mr Gunawardene.

65. The ICC's case was that if the Tribunal concludes that Mr Zoysa is lying about his whereabouts on 14 December 2017, then the Tribunal should make the obvious inference, that 'to tell the truth would be damning'.

66. Finally, on the key allegations, the ICC's case was that Mr Gunawardene's purported alibi (discussed below) was not in truth an alibi because there remained easily sufficient time for him to be involved in the discussion alleged by [Player A] after he had done the family errand (which it was agreed he had done on that evening). The ICC submitted the precise timing on the evening of 14December 2017 was not alleged or critical.

67. In relation to the charge of failing to attend the interview, the ICC stated that Mr Zoysa's excuse of being overborn by the will of his former counsel ([Mr X]) was not a sufficient or reasonable excuse. The argument for the ICC was:

    a. In general terms, if following legal advice were capable of amounting to compelling justification, it would obviously deprive Article2.4.6 (and similar cooperation rules) of any utility.

    b. The 'compelling justification' defence is, consistent with the purpose of Article 2.4.6, to be construed extremely narrowly. It has been held in the anti-doping context that 'If it remains "physically, hygienically and morally possible", for the sample to be provided, despite objections by the athlete, the refusal to submit to the test cannot be deemed to have been compellingly justified'.

    c. In this context, unless it was similarly not possible for Mr Zoysa to attend the interview,theArticle2.4.6 charge is made out. The reason that Mr Zoysa did not attend the interview might be relevant to the issue of sanction, but it is not relevant to liability.

    d. In any event, Mr Zoysa credibility and history means the Tribunal should take what he says about his counsel [Mr X] with extreme caution.

    e. The ICC accepted Mr Zoysa's former counsel was a strong personality but did not accept he was so extreme as to suggest any form of improper conduct absent cogent evidence of the same.

Case for Mr Zoysa

68. Mr Zoysa submitted the ICC's witnesses do not give anything close to satisfactory evidence to prove that the14 December 2017 corrupt approach took place and submitted:

a. [Player A]'s account suffered from material and critical inconsistencies and there were question marks over his credibility;

b. [Player B]'s account was similarly inconsistent, he lacked credibility and the failure on his part to give live evidence, thus to allow Mr Zoysa to test it, meant that it should be given no weight;

c. Any corroborative value of [Player B]'s account was lacking given:
   (i) the dissimilarities between [Player A] and [Player B]'s first accounts; and
   (ii) the opportunity for and inference of [Player A] and [Player B]'s collusion with each other before their first accounts and again between their first and second accounts.

d. [Player C]'s evidence, far from supporting [Player A]'s account, undermines it both because of the timing and manner of the report to him and the inconsistencies in what he was told.

69. Much was made of [Player A]'s inconsistencies in his original accounts to the ICC of the circumstances of the approach. In his first and subsequent accounts [Player A] was very clear that the corrupt approach occurred after they had lost two matches. He also changed his statement as to the whereabouts of the discussions (whose room they occurred in). [Player A]'s account of what happened after the discussion and his further discussions with [Player B] about match fixing, were also materially different in evidence than in his earlier statements.

70. Mr Zoysa's case was that [Player A] stated he reported the discussed immediately to his wife and then called his father to relay the same. But no statement or evidence was obtained by either. Given the timing of the discussion was specific (and material), this would have been a helpful piece of corroborative evidence.

71. Mr Zoysa submitted [Player A]'s account that many of the Sri Lankan players were talking about the corrupt approach sits uncomfortably with his failure to disclose it until almost a year later when he discussed it with [Player C].

72. Mr Zoysa's case was that [Player A] was possibly far more interested in what [Player B] might have done than just curiosity.

73. Mr Zoysa's case was that consistency between [Player A]'s latest version of events and an earlier account of [Player B] may have been due to collusion between them.

74. Mr Zoysa submitted that [Player B]'s evidence could not add anything to the case against him.

75. In respect to the evidence of [Player C], Mr Zoysa submitted:

a. The timing of [Player A]'s account to [Player C] coincides with the ICC's intervention and charges in relation to Mr Zoysa in October 2018.
b. Despite [Player A]'s claim that the alleged corrupt approach was treated by him as a laughing matter, [Player C] formed a very different view when he stated "He was panicked, clearly panicked."

c. Mr Zoysa submitted this was further evidence in support of an inference that [Player A] had some conduct of his own to worry about.

d. Mr Zoysa's case was that it was not a previous consistent statement, and there were material and significant inconsistencies between [Player A]'s account to the ICC and to the Tribunal when compared to his account to [Player C].

76. Mr Zoysa's case in respect to the WhatsApp messages (quoted above) was that on their plain meaning they did not support the ICC's case. In addition, the reference to the friend was to [Mr P] and the dinner which occurred, he said, on 14 December 2017. Evidence from a [Mr F] was that he was part of the dinner (and shown in the photograph) in December 2017 (but he was not specific as to the date).

77. Mr Zoysa submitted the ICC's case that [Mr P] and Mr Zoysa had concocted the timing of the dinner to create a false alibi was unlikely and not borne out by the evidence. The reluctance of [Mr P] to make available his computer to show the date of the photograph (he said the photograph had been deleted), was not proof of falsity of the date of the dinner.

78. Mr Zoysa was first subjected to an ICC intervention and interview on 2 October 2018. Before he had been shown any evidence or had any allegation put to him, he made a full confession and expressed remorse. Mr Zoysa was next interviewed on 9 October 2018, in which he reiterated his confession and remorse. He was charged and provisionally suspended from participating in cricket on 31 October 2018. Mr Zoysa's submission was that if he had made the corrupt approach described by [Player A], then he would have lost nothing by admitting it in these interviews.

79. Mr Zoysa submitted that had he told the ACU in his October 2018 interviews that he had made an unsuccessful corrupt approach to [Player A] and [Player B] at a T10 event in December 2017, it would have added next to nothing to the gravamen of his conduct, nor would it have altered the ICC's attitude towards him.

80. There is some force in that submission, although it is balanced by the ICC submission that there may have been another motive for concealing this occasion (for example to assist Mr Gunawardene).

Failure to attend the 6 March 2019 interview

81. Mr Zoysa accepts that he knew about the ACU's request to attend an interview on 6 March 2019 and that he failed to attend that interview. He acknowledged that legal advice to a client not to attend an ACU interview would not normally excuse his failure.

82. Mr Zoysa argued his then-lawyer, [Mr X] was no ordinary lawyer and this was no ordinary lawyer-client relationship. His defence was that [Mr X] did not advise Mr Zoysa not to attend the interview; he decided the matter for him and informed him of it that decision. Had Mr Zoysa overridden [Mr X]'s decision, he would no doubt have found himself unrepresented at the interview and very likely for the remainder of the proceedings against him.

83. Mr Zoysa submitted that even if this did not provide Mr Zoysa with a compelling justification for his failure to attend the 6 March interview, no inference adverse should be drawn in relation to the alleged corrupt approach part of the case.

84. Ultimately, Mr Zoysa submitted that the allegation against him was very specific in respect to the corrupt approach and the Tribunal could not be comfortably satisfied that it occurred in the way described on the date and time specified.

Case for Mr Gunawardene

85. Mr Gunawardene's case was also that the ICC case was specific and the issue was simple. In closing it was put as follows:

> *"The parties agree that the issue for you in AG's case is clear: are you comfortably satisfied that between 10.18pm and 10.50pm on the evening of the 14th December 2017, AG was present at a meeting* in [Player B]'s room*, as [Player A] ultimately alleged."*

86. The ICC and Mr Gunawardene agreed that he had gone out that evening with a [Mr K], but the ICC said this was at around 10.50pm and therefore there was plenty of time and opportunity for the conversation to have occurred in between the WhatsApp messages of 10.17 and 10.18pm.

87. Mr Gunawardene stressed in closing that whether the Tribunal could be comfortably satisfied depended fundamentally on whether the Tribunal accepted [Player A]'s evidence and that this in turn depended on his reliability and credibility.

88. Mr Gunawardene submitted that [Player A]'s evidence was so inconsistent, unreliable and at times not credible, that it could not satisfy the Tribunal to the requisite standard.

89. Mr Gunawardene raised a possible motive for [Player A] to falsely link him to corruption and this suggested meeting. In particular he said that [Player A] had a grudge against him as a coach because he did not support [Player A]'s selection because of his lack of fitness. He raised other motives, including that his evidence might deflect attention from his own suspicious behaviour.

90. Mr Gunawardene submitted that the reason [Player A] had told something to [Player C] was by then the ICC had announced its investigation into Sri Lankan cricketers and he was getting in first before attention might have turned to him.

91. A significant part of Mr Gunawardene's case was to produce and detail his WhatsApp messages over the tournament period. That showed his communications and by inference his movements over the time, including in particular on the evening of 14 December. Mr Gunawardene states this shows he was completing an errand to assist a family member and later in the evening going out with [Mr K]. Given the timing of the texts, he submits there is no reasonable possibility he was involved in a match fixing conversation in the window of time the ICC relies on.

92. In respect of [Player B]'s evidence, Mr Gunawardene says it is worthy of no weight at all given its inconsistency and that he did not give evidence in person. The key aspect, says Mr Gunawardene, is that his initial account to the ICC makes no mention of Gunawardene. It is only in his second interview that he does mention him, but says he was doing nothing. By that stage, it is submitted that [Player B] and [Player C] had the opportunity to calibrate their stories.

93. Mr Gunawardene gave two interviews to the ICC and in both denied any knowledge of the alleged meeting and the alleged discussion about match fixing.

94. His response to the specific WhatsApp messages relied on by the ICC was to say, similar to Mr Zoysa, that the plain meaning of these did not support the ICC. He was going out with his friend [Mr K] and Mr Zoysa was going to meet with his friend.

95. Mr Gunawardene submits that from the remaining WhatsApp messages submitted by him in complete form, there is a clear inference that at the relevant time (around 10.34pm) he was was telling his wife that, having got back to the hotel shortly before, he had just come back from leaving the delivery for family at the hotel reception.

96. That, he submitted, made it very difficult to conclude that he was in the middle of a discussion about corruption with the other team members. There was little, if any, room for the alleged participation in discussion in [Player B]'s room when those messages were properly considered.

97. Finally, Mr Gunawardene advanced significant evidence of good character, not only from his own record both as a player, coach and person, but also from four character witnesses, each highly respected figures in Sri Lankan cricket who vouched for the integrity and good character of Mr Gunawardene.

98. Mr Gunawardene submitted that his own conduct in interviews and in supplying his mobile phones and the response to this investigation all assisted to demonstrate these allegations were unfounded.

99. The submission ultimately made was that the evidence against him was such that even on the balance of probabilities he would not be guilty of the charges against him.

Further Analysis

100. The Tribunal is ultimately called to decide whether it is comfortably satisfied that [Player A] is correct when he alleges this meeting to discuss spot fixing took place in the hotel room on the evening of 14 December 2017 and was led by Mr Zoysa and supported by Mr Gunawardene.

101. As all counsel agree, this devolves to a consideration of whether we can clearly or comfortably be satisfied by [Player A]'s account.

102. For the reasons raised by counsel for Mr Zoysa and Mr Gunawardene, and outlined above, we are not able to be comfortably satisfied.

103. The primary reason for that is the marked inconsistencies in his account given to the ICC in response to the amnesty as opposed to given in evidence. These have been discussed above but in particular the earlier references to the conversation occurring after they had lost two matches.

104. We were troubled by his evidence of further discussions with [Player B] about match fixing when compared to his original witness statement as to his reaction to the alleged proposal.

105. His account as to how openly the matter was spoken of following the conversation did not sit easily with the circumstances of his raising it with [Player C] and his manner on that occasion.

[Player A]'s dealings and relationship with [Player B] also gave the Tribunal pause as to the reasons behind the changes in his account.

106. Ultimately, this is a matter which is determined by the standard of proof. We are not saying [Player A] was acting maliciously or the like. Rather, given the requirement to be comfortably satisfied, and given the inconsistencies and illogicalities in his account, we just cannot be satisfied to the standard which is required. The case for the ICC was that this conduct occurred on the evening of the 14th of December and yet [Player A]'s original statements suggest it could not have occurred then – they could not have lost any matches by that stage as they had not played any. It was a very clear feature of his earlier statements and one that cannot sit with his evidence before us.

107. The evidence from [Player B] does nothing to resolve that. His accounts are wildly variable, his conduct highly suspect and in the end he was not before us as a witness. We cannot take anything from his evidence, such that it was.

108. [Player C] was undoubtedly a credible witness but (no criticism of him) could not offer anything which would strengthen the evidence against either Respondent. At most, his evidence served to make it less likely that [Player A] was motivated by the amnesty. Yet, by the time of the conversation it would have been known that the ICC were investigating this sort of conduct and that Mr Zoysa at least may have been involved. [Player A]'s behaviour to [Player C] (being anxious or worried) seemed inconsistent with his other evidence that the approach was widely talked about.

109. The WhatsApp messages relied upon by the ICC do not add sufficiently to [Player A]'s evidence. They may have the meaning given to them by counsel for the ICC or that advanced for the Respondents, it is difficult to tell. It is certainly not a situation, as in other cases, where the messages can only have one reasonable interpretation.

110. The remainder of the WhatsApp messages give more support to the account of Mr Gunawardene and whilst not providing an alibi as such, do make his participation in this conversation less likely to have occurred at the precise time the ICC suggest.

111. Mr Zoysa's account of dinner with [Mr P] and [Mr F] may or may not have occurred on the evening of 14 December 2017. We certainly have our doubts about all of that evidence but in the end we are not convinced it can strengthen the case against Mr Zoysa.

112. For those reasons, and considering all of the evidence and submissions as summarised above, the Tribunal found all but one of the charges against Mr Zoysa not proven, and both of the charges against Mr Gunawardene not proven.

113. The charge of breaching ECB Code Article 2.4.6, against Mr Zoysa for failing to cooperate with an investigation carried out by the Designated Anti-Corruption Official in relation to possible Corrupt Conduct under the ECB Code. This charge resulted from the failure of Mr Zoysa to attend the March 2019 interview.

114. The reason for this request for interview was outlined in the evidence of Mr Richardson for the ICC. In summary, after Mr Zoysa's interview in February 2019, Mr Gunawardene was interviewed and provided his phone including the WhatsApp messages. The ICC rightly wished to interview him on those messages.

115. In correspondence with Mr Zoysa's then counsel, the ICC outlined the reason for its request for interview, the requirements to attend such an interview under the Code and the potential for a charge to follow if Mr Zoysa did not attend. In the course of the exchange of correspondence, Mr Zoysa's then counsel said Mr Zoysa was not willing to attend a further interview but would answer questions in writing.

116. Mr Bajwa QC for Mr Zoysa did not press strongly that Mr Zoysa had "compelling justification" for the failure to attend. Mr Zoysa accepted he was aware of the interview request and in those circumstances we do not consider it is a sufficient justification that counsel may have advised the player not to attend. The obligation is on the player or participant and counsel's conduct alone would rarely excuse. In this case, it does not. We accept and endorse the submissions of the ICC on this point and in particular accept that the compelling justification defence must be construed narrowly. We reinforce the importance of full compliance with the legitimate requests of ICC in this area.

117. Accordingly, we find that the charge against Mr Zoysa of failing to cooperate by failing to attend the 6 March 2019 interview proven.

Hearing

118. As earlier stated, we are very grateful to counsel for the streamlined way in which the case (before us) was prepared and presented. A four-day hearing with multiple applications, witnesses and opening and closing submissions, all conducted on-line across many jurisdictions and time zones, is a credit to the ICC, its counsel/solicitors and counsel/solicitors for the Respondents. We are very grateful to the witnesses and parties for their cooperation in achieving this.

Costs

119. The issue of costs was raised following the decision of the Tribunal dated 10 May 2021. Submissions were made but all counsel agreed that any consideration of costs could await these reasons and further submissions.

120. We now invite those further submissions, if costs are pursued. We observe the following to assist all parties in their submissions:

    i. We are unlikely to be assisted by a submission that any party has proceeded spuriously, frivolously or otherwise in bad faith (we do not consider that submission to be available on the evidence we have seen);
    ii. We have made limited comments on areas of possible evidence which might have assisted us but they apply both to the ICC and Mr Zoysa at least;
    iii. At present, we do not see the relevance of any contingent fee arrangement but invite submissions on that; and
    iv. Submissions should be no more than 5 pages and provided within 21 days of this decision (we would be very grateful for the provision of copies of any relevant authorities).

Michael Heron QC Chairman

His Honour Judge Nigel Peters QC
Imtiaz Ahmad Barrister

Auckland, New Zealand
24 June 2021