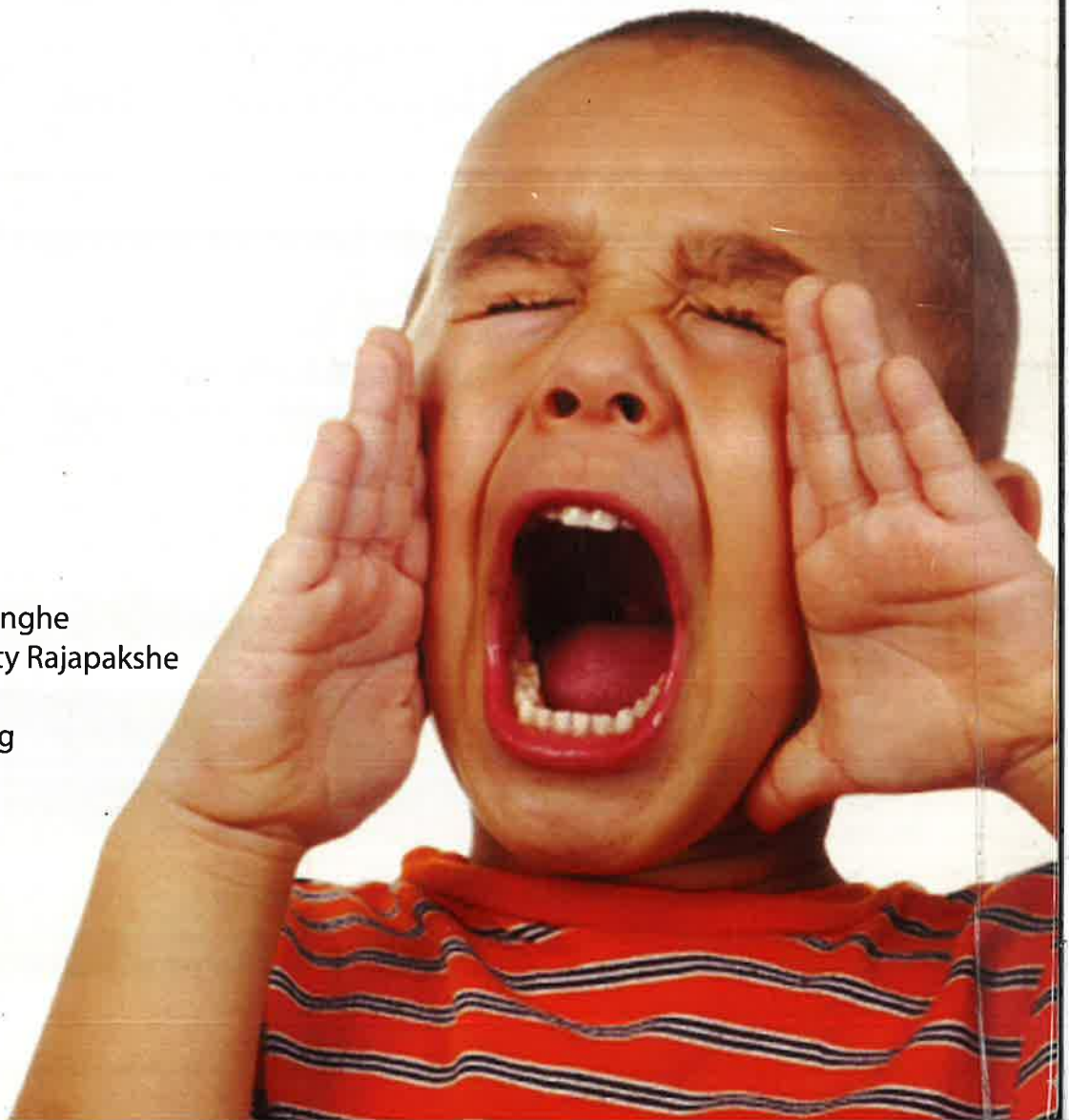
News Letter

THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA



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"I am the child.
All the world waits for my coming.
All the earth watches with interest to see what I shall become. Civilization hangs in the balance, for what I am, the world of tomorrow will be.
I am the child.
You hold in your hand my destiny.
You determine, largely, whether I shall succeed or fail,
Give me, I pray you, these things that make for happiness.
Train me, I beg you, that I may be a blessing to the world."

Justice B.L. Hansaria
(A judge of the Supreme Court of India)
M.C. Mehta Vs State Of Tamil Nadu And Others
AIR 1997 SC 699, (1996) 6 SCC 756

Editorial

The Article 03 of the United Nation Convention on the Rights of the Child speaks about the concept of Best Interest of the Child. The provisions of the aforesaid Article itself adopted to the International Covenant on Civil and Political Rights Act (ICCPR) Act No: 56 of 2007. According to the section 02 of the ICCPR Act Every person shall have the right to recognition as a person before the law. The section 05 of the ICCPR Act reads as follows;

" 5 (1) Every child has the right to:

(a) Have his or her birth registered and to have a name from his or her date of birth;

(b) Acquire nationality;

(c) Be protected from maltreatment, neglect, abuse or degradation and

(d) Have legal assistance provided by the State at its expenses in criminal proceedings affecting the child, if substantial injustice would otherwise result.

(2) In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interest of the child shall be paramount importance."

According to the aforesaid provisions, it is clear that the concept of the best interest of the child is well recognized principle in our legal regime. In Sri Lanka, there are several laws which are been enacted concerning the children related issues such as; Children and Young Persons Act, the Maintenance Act, National Child Protection Authority Act, The Adoption of Children Ordinance, the Tsunami (Special Provisions) Act, the Employment of Women, Young Persons and Children Act, the Factories Ordinance, the Shop and Office Employees Act, the Citizenship Act, the Prevention of Domestic Violence Act and the Penal Code.

Even though there are several special laws enacted for protecting rights of the children, special attention should be given to the prevailing laws in relation to the child victims and witnesses in criminal matters. The substantial law for the same is provided in section 3 and 7 of the Assistance to and Protection of Victims of Crime and Witnesses Act, No. 4 of 2015 which reads that;

Section 3-

A victim of crime shall have the right :—

(b) where the victim is a child victim, to be treated in a manner which ensures the best interests of such child ;

Section 7-

It shall be the duty of every public officer including the members of the armed forces and police officers and every judicial officer, to recognize, protect and promote rights and entitlements referred to in sections 3, 4, 5 and 6 of this Act.

Therefore it is clear that all judicial officers are expected to recognize, protect and promote rights of child victims and child witnesses. However the prompt question arises in this regard is whether our procedural laws are capable to facilitate the rights ensured in the substantial law.

Although the investigations are concluded, instituting actions in most of the matters relating to child victims are delayed due to various reasons and as a result of which, credibility of the evidence of child victims are frequently challenged at the trial stage. Therefore the Code of Criminal Procedure should be amended addressing the said issue and minimum time period should be given to relevant authorities to advice law enforcement machinery with regard to instituting actions. Day to day trials can be made compulsory in child victim matters. It is further suggested that the ultimate goal should be to expedite both the investigation and litigating mechanisms in order to conclude child victim matters as soon as possible.

Until the rights of those children are adequately recognized and respected, they may suffer additional hardships during the investigation process and in the justice process. Therefore a suitable mechanism should be introduced regarding matters of child victims and witnesses. In addition, since most of the laws that have mentioned aforesaid were enacted long time ago, necessary amendments should be considered having in mind the present economic, social and cultural situations.

Finally it is proposed that until the aforesaid amendments are made, it is our paramount duty to secure the best interest of the child by giving additional care and taking more responsibilities in child related matters as the judiciary serves as the most trusted pillar of democracy in the eyes and minds of the general public.

His Lordship Justice Jayantha Jayasuriya (PC), the 47th Chief Justice of the Democratic Socialist Republic of Sri Lanka

On the 29th April 2019 His Lordship Justice Jayantha Chandrasiri Jayasuriya took oaths before His Excellency the President as the 47th Chief Justice of the Democratic Socialist Republic of Sri Lanka.

He is an old boy of Maliyadeva College, Kurunagala. After successful completion of his Advance Level Examination, he joined the Sri Lanka Law College in the year 1979 and His Lordship Jayantha Jayasuriya was enrolled to the Bar in the year 1982. Thereafter on the 1st November 1983 he joined the Attorney General's Department as a State Counsel. In February 1996 he was promoted as a Senior State Counsel and in the years 2004, 2011, 2014, His Lordship was appointed as Deputy Solicitor General, Additional Solicitor General and, the Senior Additional Solicitor General respectively. In March 2012 His Lordship took silk as a President's Counsel. Further on 10th February 2016 His Lordship was appointed as the 45th Attorney General of the Democratic Socialist Republic of Sri Lanka.

In the year 1997, His Lordship obtained a Master of Philosophy from the University of Hong Kong and His Lordship completed the European Certificate on Cyber Crime and Electronic Evidence organized by Cybex in Florence, Italy. His Lordship Functioned as a trial Attorney in the International Criminal Tribunal appointed for Yugoslavia from 2001 to 2004. From 2000 to 2001 he functioned as a trial Attorney in the International Criminal Tribunal for Ruwanda. In the year 2012 he was awarded the "Best Prosecutor" award by the International Association of Prosecutors. Further he functioned as a board member of the National Child Protection Authority for 03 years.

The JSA wishes His Lordship, the Chief Justice all the success to safeguard the Independence of the Judiciary ensuring the best interest of all Sri Lankans.

About Former Chief Justice Honourable Nalin Perera, the 46th Chief Justice of the Democratic Socialist Republic of Sri Lanka

Honourable Chief Justice Nalin Jayalath Perera bade farewell to active judicial life with effect from 28th April 2019.

His Lordship was enrolled as an Attorney at Law on 25th August 1977 and joined the Judicial Service of Sri Lanka in the year 1980. He had performed as the Magistrate of Walasmulla, Mount Lavinia, Kalutara, and Fort. Furthermore His Lordship Served as a District Judge in Galle, Matara, Colombo, Kalutara and Awissawella.

In the year 2001, His Lordship was Promoted as a High Court Judge and served at High Courts of Rathnapura, Kandy and Nuwara Eliya. Moreover, His Lordship functioned as a High Court Judge at Civil Appellate High Courts holden at Kandy and Colombo.

In July 2011, His Lordship was appointed as a Judge of the Court of Appeal and he served as a Judge of the Court of Appeal for five years. On the 03rd March 2016, His Lordship took Oaths as a Supreme Court Judge before His Excellency the President. On the 12th October 2018, His Lordship reached the pinnacle of the judiciary as the 46th Chief Justice of the Democratic Socialist Republic of Sri Lanka. During his 39 years of service on the bench, His Lordship, Justice Nalin Perera rendered an yeoman service for the interest of Justice safeguarding the independence of the Judiciary.

JSA wishes Justice Nalin Perera a happy and a contended retirement and wishes him good health, peace of mind and long life.

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Judging hard cases: to uphold rights or to deny them? An analysis of the role of the judge in guaranteeing the best interest of the child

Rose Wijeyesekera*

The modern world recognizes that '[H]uman rights and fundamental freedoms are the birthright of all human beings; their protection and promotion is the first responsibility of Governments'[1] and that 'While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.'[2] The idea was promoted by scholars belonging to the natural law tradition such as Hugo Grotius, Thomas Hobbes, John Locke, Lon Fuller and John Finnis.The idea of human rights, according to natural law, is based on 'morality', which is believed to be the underlying basis of all laws. On the contrary, positivists assert that law and morality are separate, and refuse to appreciate the morality in law. For positivists, the pedigree of laws depend not on their morality or the justice they deliver, but their origin. Jeremy Bentham and John Austin were pioneers who believed that only the sovereign has the power to make law, and hence judges can only interpret the laws created by the sovereign.

In reality however, the law-making process is not so technical, as there are areas in law which such sovereign powers have kept open. These uncodified areas, identified by Hart and Dworkin as hard cases, are expected to be determined by the judge. Judges determining these cases are required to actually make law. Rights relating to children, in custody and guardianship issues in particular, are such areas where the judge is called upon to *make* law, as the applicable law remains unwritten. Though according to Dworkinthe Judge is expected to perform a Herculean task in hard cases, a determination could be influenced by various factors that constitute important facets in a legal system, i.e. the substance, culture and structure of the law. The impact such determinations could have on human rights of parties in legal regimes where the culture and structure is defined according to positivist thinking is immense, as protection of rights of all parties concerned would not be an objective of a positivist court. The impact of such positivist thinking on human rights of children who come before courts could be even worse.

The extent of judges' freedom in lawmaking in upholding the best interests of the child, whose custody and guardianship are at issue, has always been a subject of controversy. Analyzing a few selected cases, this article attempts to describe courts' intervention in restricting or upholding children's rights through the interpretation of the 'best interests of the child' using the concept of *parens patriae*. It argues that universality of human rights, as stated at the outset of this article, is subjective, and that courts which adopt natural law tradition, uphold the rights of children while courts which favour a positivist approach restrict their rights in law-making. It also attempts to make a case for adopting a natural law tradition in judicial law-making, especially where children's custody and adoption are at issue.

Children in the substance of the law

Children have historically been defined as a group of 'vulnerables' in many legal systems. Blackstone, a positivist, described children as 'legal disables' treating them as dependents with nominal recognition, if at all,rather than autonomous individuals. Blackstone went further describing their disabilities as 'privileges'. Blackstone's definition of 'privileges' however, has

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1 Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993, Art.1

2 Vienna Declaration and Programme of Action, Art. 5

a meaning of its own: i.e. these disabilities required others to decide for children and do things for them, rather than letting them decide and do things on their own. This definition has led Blackstone to conclude that children need to be "secure... from hurting themselves by their own improvident acts."[3] It carried a considerable weight in English law as well as other countries influenced by English law, particularly in respect of children's contractual obligations, their right to hold and control property, state and parental obligations when children separate from family settings, with reference to parental responsibility for the custody, upbringing and development of the child and in the context of the child's involvement with the police and the justice system.

Upholding this colonial heritage, the legislature of Ceylon has enacted many a statute that deal with children and affect their rights, containing archaic legal norms and principles. As Goonesekere notes, this 'protectionist value system had an important impact on domestic legal systems' and prevented children's interests being 'articulated as social, cultural and economic rights.'[4] Law reforms that took place in the independent Sri Lanka, though have adopted policies aligned with international standards to a certain extent, have generally been *ad hoc* and piecemeal rather than holistic and principled. Law reform neither takes place on a broad holistic basis of Constitutional standards; Sri Lanka's obligations as a state party to international conventions; and other standard-setting agreements and national policies including the Children's Charter, nor considering the contemporary social, medical and other important and relevant developments. Consequently, fundamental rights of children have been violated in a crippling attitude of protection.

The age threshold for the definition of a 'child' continues to be varied despite the very clear definition of a child in the Children's Charter[5] and several statutes including the Age of Majority Ordinance[6] and the ICCPR Act.[7] The Adoption Ordinancefor instance, which has not been reformed according to national standards, continues to define a child as a person below the age of fourteen years,[8] and necessitates to obtain the consent of an adoptee child only where the child is above the age of ten years.[9] This provision challenges a child's rights to autonomy, participation, expression and the right to be heard in an important decision, which has life-long and irreversible consequences.Furthermore, culture and religion often prevail over the definition of 'child' affecting their autonomy and rights. For example, the Muslim Marriage and Divorce Act[10] allows a girl child to be given in marriage at the age of twelve, and even at a prior age with the approval of *Quazi* of the area.[11]

However, many a reforms have been introduced to Sri Lankan statute law including the overarching provision in the International Covenant on Civil and Political Rights (ICCPR) Act,[12] which states "In all matters concerning children, whether undertaken by public or private social welfare institutions, courts, administrative authorities or legislative bodies, the best interest of the child shall be of paramount importance."[13]

The culture of the law

Law has traditionally been taught by paying more attention to the established legal norms and jurisprudence of English Law and Roman-Dutch Law and placing children in their 'protected' enclave, rather than treating them as autonomous human beings holding rights. The law schools, which in the main, have faithfully followed British positivism in teaching both substantive and procedural law

3 William Blackstone, Commentaries on the Laws of England, atp. 452 (1992)

4 GoonesekereSavitri, Children, Law and Justice, (SAGE 1998) p 77

5 The Government of Sri Lanka formulated the Children's Charter in 1992

6 Age of Majority (Amendment) Act (No. 17 of 1989) - Sect 3

7 International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007

8 Adoption Ordinance No. 24 of 1941

9 Adoption Ordinance No. 24 of 1941, s. 3(5)

10 No. 13 of 1951

11 Ibid, s 23

12 No. 56 of 2007

13 S 5(2). Emphasis is mine.

have, for decades, trained law men and women to define children in terms of this English law vision, disregarding the evolving capacity of a child. Thus, the relevance of the law in social change and vice versa are rarely addressed and the law's role in oppressing 'vulnerable groups' in the façade of protectionism has been reinforced. This remains so to date, despite the recognition of fundamental rights in the country's constitution; ratifying a number of international conventions obliging as a state party to uphold children's rights; and adopting a national charter on the rights of the child.

The doctrine *parens patriae* has its roots in English Common law, and referred to the Royal prerogative. The King exercised *parens patriae* in his role of father of the country.[14] The early English courts have interpreted 'welfare of the child' in a way that reinforces a father's rights. *In re Agar-Ellis*[15], per Cotton LJ's definition stands testimony: *'When by birth a child is subject to a father, it is for the general interest of families, and for the general interest of children, and really for the interests of the particular infant, that the court should not, except in very extreme cases, interfere with the discretion of the father but leave him the responsibility of exercising the power which nature has given him by birth of the child'.*

On the other hand, *parens patriae* in Latin, means 'parent of the country', and allows the state to step in and serve as a guardian for children where they are unable to care for themselves and act on their behalf.

The concept of *parens patriae* has gained statutory recognition in Sri Lanka during colonial times, and been recognized in the legal system since then.[16] This mandates the courts to hold custody and care of minors and wards resident within its judicial district. Even though Sri Lanka had the opportunity of drawing from both the English Common Law and Roman-Dutch Law, in giving meaning and effect to this doctrine, a long line of judicial determinations stand testimony for bias the Sri Lankan courts have had, towards the English Common Law standard. Consequently, using an authoritarian stand, especially what has been adopted in cases like *In re Agar-Ellis*, the Sri Lankan courts have used its *parens patriae* to uphold parents', especially a father's rights, rather than taking a child rights perspective in preserving the latter's best interests.[17]

There have been occasional exceptions like Justice Weeramantry's approach in *Fernando v. Fernando*,[18] which reflects a departure from the traditional thinking and change of focus from parents towards children. However, such attempts have not been able to transform the mindset of the courtin general to use its prerogative to uphold the best interest of children. Another attempt to uphold the *best interest of the child* could be seen in an unreported Court of Appeal judgment where Grero J. held that the best interest of the child is the most fundamental issue to be determined in a custody dispute. Yet, rather than looking through a lens of child rights, the court has focused on choosing between parents as custodians, in order to ensure the interests of the child.[19]

A marked departure from the traditional thinking can be seen in Justice Thilakawardene's progressive judgment in *Jeyarajan v. Jeyarajan*,[20] where the Court of Appeal opined in unequivocal terms that the best interest of the child prevails over parental rights.As Dworkin theorized in Taking Rights Seriously, the Court of Appeal's determination was clearly based on the 'principle'- rights of the child- rather than 'policy'. The idea that a child's rights take precedent over other factors established in *Jeyarajan* was later followed in *Krishanthi Perera v. M. R. Perera*[21], where Wimalachandra J. stated thus: *"In recent decisions the courts have expanded the concept of the welfare of*

14 https://legal-dictionary.thefreedictionary.com/jurisdiction

15 (1883) 24 Ch D 317, at p 334

16 Courts Ordinance No. 1 of 1889 (s 69); The Judicature Act No 2 of 1978 (s 3); and The Judicature (Amendment) Act No 71 of 1981.

17 See Scharenguivel S, Parental and State Responsibility for Children: The Development of South African and Sri Lankan Law, for a detailed discussion of these cases, though in comparison with South African Law.

18 (1968) 70 NLR 534

19 H.C. application No. 77/91 (decided on 14.02.1994)

20 1999 (1) Sri. L. R. 113

21 CALA 334/2004, (2006-08-30, Unreported)

the child with regard of minor children. It is in the child's interest the court plays a special role as the guardian of the child's welfare. The court as the upper guardian has every right to ensure the welfare of the child." Even though the court's effort in upholding the *'welfare'* should be appreciated, the use of terms in delivering the judgement reflects a favor for the common law approach: rather than an obligation. The doctrine *parens patriae* has apparently been used as a 'right of the court'; thus the courts have used *'welfare of the child'*, which means general *wellbeing* rather than the *'best interest of the child'*. The principle *'best interest of the child'* does not give a right to the court, but *compels* it to take a holistic look at each situation and assess what is the best for the particular child, for whose interests the court stand when in acts as *parens patriae*.

Such an approach was taken in the Civil Appellate High Court judgment (adoption) in *Sumanathissa Bandara v. Sajith Lakshitha de Silva.*[22] In interpreting the provisions of the Adoption Ordinance, the court has looked far and beyond the four corners of the statute. Citing global standards and recognizing the child as an autonomous human being holding rights, the court laid down guidelines to be adopted by courts in determining the *'best interest and welfare of the child'*.[23] Clearly, the main focus has been to ensure the *best interests of the child*, and the language adopted by the court reflect its obligation towards upholding the right of each child who comes before the court. Upholding *the child's best interest* was considered as the duty of the court, rather than a right.

However, the Supreme Court sprung back to its former position in a dispute relating to adoption of a child in *Jagath Priyantha Epa v. Ahingsa Sathsarani Epa.*[24] The court, depending mainly on the Report of the Probation Officer, continuously used the phrase *'welfare of the child'*, and stressed the importance of parental rights for the welfare of the child, and stated in very certain terms: *"The Petitioner-Respondents are the natural parents of the child. Thus, they have the legal right to keep the child in their custody. No argument can be brought forward to deprive the said legal right of the natural parents."*

Karunkalage Chandana Silva v. N Sudharshani[25] is another instance where the Court of Appeal, though referred to the *'welfare of the child'* did not delved into serving the girl's interests a reality. In this instance, the appellant claimed that he had a relationship with the respondent, who was married, and that he is the natural father of the child born to her. He also claimed that he maintained both the mother and the child, a girl, and that he and the child were very close to each other before he went abroad for employment. Further he claimed that he continued to support them financially even after he went overseas. In his petition to the court he claimed paternity of the girl and pleaded for access. The court had held that a third party cannot be allowed to challenge the paternity of a child born to a married woman during the subsistence of her marriage. In the process of analyzing preceding case law, the court had omitted to analyze the best interests of the seven year old girl, who was the main victim of this case. *'Corpus'* as the positivist legal nomenclature may call her, she is human, and by virtue of being human she is entitled to all the human rights. And at the age of seven she had the capacity to express her opinion, but apparently she was never consulted. She should not have been denied the right to express her opinion and to be heard and the right to participate in a most important decision of her life. The court would undoubtedly call her as a witness had she been an adult. Yet, age cannot be a rational ground to deny a person of her rights or to be discriminated against. She also has the right to know who her parents are. According to global standards, every child has a right to know and be cared for by his or her parents[26] and a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and

22 NWP/HCCA/KUR/Appeal/ 129 / 2014 (F)
23 Dr. SumuduPremachandra, HCJ. [HCCA]
24 S.C Appeal 12/2018, Decided on 03.04.2019
25 C.A.(HB) Application No. 03/2017, decided on June 2019 (Unreported)
26 United Nations Convention on the Rights of the Child, Art. 7(1)

procedures, that such separation is necessary for the best interests of the child.[27] The court has referred to the child's best interests, but apparently the structure of the law has prevented it from looking at the 'child' within the meaning of the *corpus*.

The structure of the law

The 19th century legal formalism focused on maintaining the *status quo* of the system rather than the people it is supposed to serve. The British system of administration of justice zealously guarded the hierarchical adversarial system, and the structure has not been able to be flexible according to the needs of the people. Instead, the people have been expected, sometimes forced, by the system to fit into the structure.

The present Sri Lankan court system and the structure, which was introduced in the 19th century by the Dutch and developed later by the British, is a replica of this formal system hailed by the British. It has been modelled on the assumption that in any 'dispute' there are two conflicting parties, who are free to bid according to their capacities as in the free market concept.[28] Notwithstanding their differences in actual society, the two conflicting parties are assumed to be on equal standing – economically, socially and otherwise, and the judge is required to deliver only in respect of the issues 'disputed' on and to grant only the relief 'pleaded'. This prevents a court from taking a holistic view of a situation. For example, in *Buddhadasa Kaluarachchi v. NilamaniWijewickrama and another*[29] the Court of Appeal stated *"The court considering the paramount importance of the welfare of the child could vary its own order..."* but *"The appellate court would not grant a relief which no party had prayed for. However wide the jurisdiction of the court of appeal may be it can only exercise it in a properly constituted appeal from judgment presented to it by an aggrieved party."* Clearly, the court has given meaning to the law in its strictest sense using rules of court procedure to restrict itself, rather than stretching its boundaries to deliver justice. Needless to say, it should have been the District Court which could have called for evidence in order to obtain a clearer and wider picture of the situation. It's obvious however, that the heavy workload prevents trial court judges from looking at family disputes through a progressive lens even where they want to have a closer look at the status of the challenged relationships. On the other hand, the doctrine *parens patriae* does not distinguish between trial courts and appellate courts. Nor the ICCPR Act does make a distinction between upper and lower courts in the hierarchy of system. Being the upper guardian of every child, it is *the court* which is duty bound to look into the best interests of the child even where the child's interests are not prayed for by any party to the suit.

Another crippling feature is the adversarial nature of the Family Court. The Sri Lankan court structure – both civil and criminal- is so adversarial that 'mutual agreement' on selected issues, though recognized in indigenous Sri Lanka, have been termed 'connivance' and 'collusion' and bar parties from obtaining redress in many law suits. The parties are expected to behave as 'disputants' and are represented by counsel who focus on wining the case rather than ascertaining the truth. The court-room rivalry between family members inherent in such a court distract the focus away from the best interest of their children and badly affect the children's lives. The proceedings in District Courts in custody cases are a far cry from Family Courts.

Furthermore, the essentially hierarchical nature of the courts system maintains its standards so high as to make an ordinary citizen feel an alien – where a different language is spoken that prevent one from speaking on her/his behalf. In this context where even an adult does not feel comfortable, a child's vulnerability, isolation, fear, anxiety and deprivation are beyond explanation. In other words, courts, which are larger than life even to adults, can be a nightmare for children. On the other hand, the courts leave little space for judges to deliver justice – these established

27 Ibid, Art. 9(1)
28 Roberto M Unger, The Critical Legal Studies Movement, p575-577
29 (1989) I Sri. L. R. 262

norms and structures create obstacles, which even an exceptional judge find hard to overcome.

Rather than using the doctrine for the courts to stand on behalf of the children and to uphold their interests, the Sri Lankan courts adopt the ordinary adversarial approach also in disputes where children are involved in. Every person, including a child depending on his/her capacity has a right to participate in matters affecting his/her life. It is upto the court as *parens patriae* to ensure that a child participate in such proceedings in a meaningful way. A notable concern of the courtin *Sumanathissa Bandarav . Sajith Lakshitha de Silva*[30] was its recognition of ascertaining 'the wishes and feelings of each child concerned'. Yet, this is more an exception than a rule. Even in situations of adoption, upholding the legislative intention as expressed in the statute, the adoptee child's views are generally sought only where the child is above the age of ten years. In J*agath Priyantha Epa v. Ahingsa Sathsarani Epa*[31] The child's wishes were not considered in determining the issue, nor was she independently represented in court.

Judicial law-making

Adding to this restricted court culture and structure, the *ad hoc* statutory reforms create anomalies challenging the parameters of judicial law-making and place mainly the primary courts in a quandary. Consequently, in keeping with what they learnt at law schools, both the bench and the bar use *parens patriae* as a cover to avoid going beyond the clear intention of the legislature, local statutes are interpreted so as to preserve their literal meaning, draw insights from jurisprudence from English and Roman-Dutch legal systems, and thus take great measures to prevent children being recognized as autonomous individuals, so as to 'protect' them and not to let them 'hurt themselves'.

Using a protectionist approach, cultures and religions also have contributed to add colour to this definition, identifying children and recognizing their capacities and abilities, according to cultural-specific parameters. These cultures have over shadowed some judgements, while influenced others from side-doors, without being mentioned or noticed.

Consequently, despite the global recognition that children are autonomous human beings holding rights and the extent of the protection and care required by a child depends on the physical and psychological capacity of an individual child, the structure of the law remain static, hardly providing ways and means to test the 'capacity' of an individual child within its purview. Moreover, the substance, culture and the structure of the law continue to be formulated and practiced on pre-conceived legal norms, socio-cultural standards, religious beliefs, gender assumptions and in some instances on the marital status or matrimonial guilt/innocence of their parents. Thus, notwithstanding the constitutional recognition that 'the fundamental rights which shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied'[32], children, as 'ineligible' and 'disabled' ones continue to be sidelined, discriminated and disadvantaged contrary to the right to equality and non-discrimination guaranteed as fundamental rights to 'all persons' and 'all citizens' of the country.[33] Moreover, even amidst statutory compulsion to uphold the best interest of the child in all matters concerning a child'[34] courts continue to be misled by statutory loopholes, legislative oversights and their own socio-cultural prejudices. Behind the façade of 'protection' courts continue to recognize children as a vulnerable group needing protection, sometimes to the extent of violating their own rights. Judicial decisions are routinely taken on individual adult assumptions, and court practicesare hardly based on child-centric value judgments, fail to explore all options and their possible outcomes, and children are rarely given a reasonable opportunity to participate in the decision-making process. Thus, children,who are ill-fitted in adversarial courts,continue to be

30 NWP/HCCA/KUR/Appeal/ 129 / 2014 (F)
31 S.C Appeal 12/2018, Decided on 03.04.2019
32 Constitution of Sri Lanka, 1978, Art. 4 (d)
33 Ibid, Art. 12
34 International Covenant on Civil and Political Rights (ICCPR) Act, No. 56 of 2007, s 5(2)

unrepresented, unheard and least importantin courts that work according to adult assumptions and standards.

Of recent however, Sri Lankan appellate courts have taken progressive steps towards interpreting children as autonomous individuals holding rights. In *Ishara Anjalie v. Waruni Bogahawatte,*[35] a Fundamental Rights application, the Supreme Court stressed the importance of upholding the best interest of the child in all matters. Citing Article3 (2) of Sri Lanka's Charter on the Rights on the Child, the court emphasized the importance of upholding the best interest of the child as a primary consideration in any matter concerning a child.[36]

Such progressiveness is yet to be witnessed from primary courts, especially the District Courts which function as Family Courts, where the bulk of child-centered cases are handled and where *parens patriae* is exercised on a daily basis. As the role of the court expands beyond mere adjudication, but should deliver justice, going beyond mere interpretation of statutes where necessary, it is pertinent to reassess how courts should use *parens patriae* in guaranteeing the best interest of children who come (or brought) before them. Afterall, the 'judicial power of the people' are exercised by courts,[37] and the Constitutional reference to 'courts' do not differentiate between appellate and primary courts. And, by and large, children are citizens of this country.

Conclusion

H. L. A. Hart's conviction is that morality should guide the judge in deciding hard cases. Ronald Dworkin argues that hard cases should be generated by principle and not policy. The 'morality' as propounded by Hart does not mean a judge's personal conviction, which may be influenced by socio-cultural prejudices or policy created by the sovereign or judicial tradition or jurisprudence. 'Morality'which guide a judge in hard cases and determine the legitimacy of the law they create are 'principles', i.e. human rights, which cannot be compromised for policy or tradition. Every child, irrespective of age, ethnicity, religion, caste, classor gender has rights, especially economic, social and cultural rights; the rights to dignity; to be respected and represented in court; to be heard; for his or her interests to be protected; and not to be discriminated against. Dworkin elaborates thus *"When a judge chooses between the rule established in precedent and some new rule thought to be fairer, he does not choose between history and justice. He rather makes a judgment that requires some compromise between considerations that ordinarily combine in any calculation of political right, but here compete."*[38] These rights have corresponding duties and obligations on parents, society or the state.

35 SC (FR) Application No. 677/2012] decided on 12.06.2019

36 Ibid, Justice Aluwihare P.C. at p. 19

37 Constitution of Sri Lanka, 1978, Art. 4 (c)

38 Ronald Dworkin, Hard Cases, 88 Harvard Law Review, April 1975, No 6, p 1063-1064

SOME THOUGHTS ON CHILD AND HIS BEST INTEREST

" Puttha Vatthu Manussanan "

Lord Buddha

"Children are the apple of a man's eye, the source of great joy and companionship. They make life sweet and, after Allah, they are the ones on whom he pins his hopes. Their blessings bring rizq (sustenance), mercy and abundance of reward."

Dr. Muhammad Ali Al Hashimini

- THE IDEAL MUSLIM (2003)p.111-

Article 3

(1). In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

CONVENTION ON THE RIGHTS OF THE CHILD

Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989.

ARTICLE 3

Best interest of the child

(2) The best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether undertaken by any social welfare institution, court of law, administrative authority or any legislative body.

THE CHARTER ON THE RIGHTS ON THE CHILD

(Sri Lanka)

"Children are to benefit from all the human rights guarantees available to adults. In addition, children shall be treated in a manner which promotes their sense of dignity and worth; which facilitates their reintegration into society; which reflects the best interests of the child; and which takes into account the needs of a person of that age."

Justice Buwaneka Aluwihare

Landage Ishara Anjali And Another Vs Warunu Bogahawathha

SC (FR) Application NO.677/2012

"It is by now well Settled that in all such matters, the interest and welfare of the minor children are of paramount importance, rather than the conflicting claims and interests of the parents. The right of the parents is not what is to be decided in these applications, but the right of the children to have a healthy environment and a physical, emotional and financial support for the development of their integrated personality, that is to be decided in these applications"

J.Selvan Vs. N.Punidha (2007 (4) MLJ 967)

"In matters where the interests of children are at stake, it is important that their interests are fully aired before the Court so as to avoid substantial injustice to them and possibly others. Where there is a risk of injustice, a court is obliged to appoint a curator to represent the interests of children. This obligation flows from the provisions of s 28(1)(h) of the Constitution."

Du Toit and another Vs Minister of Welfare and Population Development and Others

2003 (2) SA 198

"Where the parents have separated and one has the care of the child, access by the other often result in some upset in the child. Those upsets are usually minor and superficial. They are heavily outweighed by the long term advantages to the

child of keeping in touch with the parent concerned so that they do not become strangers, so that the child later in life does not resent the deprivation and turns against the parent who the child thinks, rightly or wrongly, has deprived him, and so that the deprived parent loses interest in the child and therefore does not make the material and emotional contribution to the child's development which that parent by its companionship and otherwise would make."

M Vs M 1973 (2) All ER 81

"The persons who are affected are the minor children who have been directly impacted because of the fact that their parents have not been able to resolve their differences. Children are very sensitive and due to the conflict of their parents could not be resolved at the earliest; the minor children became the victim of time for which they are not at fault but indeed the sufferers. It has to be examined in different perspective also that rights of the child as a progressive approach to the best interest of the child and what is needed in the best interest of the child is the one which has to be deciphered by us in the instant proceedings through the manifold arguments being advanced from both sides keeping in view the principles of law on the subject but still remain a guess work.

Before this Court may proceed to examine the question, there are plentitude of judgments of this Court but still each case has to be decided on its own facts and circumstances. Obviously, the ultimate goal which has to be kept in mind is the best interest of the child which is of utmost importance and a paramount consideration."

Justice Rastogi

Lahari sakhamuri Vs Sobhan Kodali

Supreme Court OF India

CIVIL APPEAL NO(s). 31353136 OF 2019

BEST-INTERESTS-OF-THE-CHILD DOCTRINE

Best-interests-of-the-child doctrine. Family law. The principle that courts should make custody decisions based on whatever best advances the child's welfare, regardless of a claimant's particular status or relationship with the child. One important factor entering into these decisions is the general belief that the child's best interests normally favor custody by parents, as opposed to grandparents or others less closely related. The doctrine is quite old, having been stated, for example, in the early-19th-century case of Commonwealth v. Briggs, 33 Mass. 203 (1834). —Sometimes shortened to best-interests doctrine; best-interest doctrine. See PARENTAL-PREFERENCE DOCTRINEE.

Black's Law Dictionary (8th ed. 2004) , Page 480

"The common perception would be that three competing legal interests would arise, namely, of the mother and the father and the child. We think that it is only the last one which is conclusive, since the parents in actuality have only legal obligations. A child, as has been ubiquitously articulated in different legal forums, is not a chattel or a ball to be shuttled or shunted from one parent to the other. The Court exercises *paren patrae* jurisdiction in custody or guardianship wrangles; it steps in to secure the welfare of the hapless child of two adults whose personal differences and animosity has taken precedence over the future of their child."

Justice Vikramajit Sen

Abc vs State (Nct Of Delhi) on 6 July, 2015

Supreme Court of India

"The decision appears to be based on the reality that the court is the upper guardian of a child."

Justice Shirani Tilakawardane.

Dhama Sri Tissa Kumara Wijenaike Vs. Attorney General

(SC. Appeal No. 179/2012 – minutes of 18. 11. 2013)

JSA REFERENCE NO – JSALR/2019/II/21

SUPREME COURT

Landage Ishara Anjali and Another

Vs.

Waruni Bogahawatte, Matara Police Station, Matara and Others

Buwaneka Aluwihare PC, J.

Priyantha Jayawardena PC, J.

Vijith K. Malalgoda PC, J.

SC (FR) Application No. 677/2012

12. 06. 2019

Fundamental Rights - Article 11,12(1), 13(1) and 13(2) of the Constitution - Arrest.

This application filed by Landage Ishara Anjali a minor presented through her next friend (her mother Chulangani). In the present application the Petitioners contend that the conduct of the 1st Respondent, in taking the 1st Petitioner into custody and detaining her violated her fundamental rights guaranteed under Article 11, 12 (1), 13 (1) and 13 (2).

HELD

01. Restraining or subjugating somebody in a way that impedes freedom of movement falls well within the meaning of arrest in the Criminal procedure Code.

02. Arrest is legal only if it is clearly permitted by law.

03. There is no provision in our law which allows a police officer to arrest or take into custody a victim of an alleged offence.

04. This Court also takes an opportunity to note with concern the increasing number of incidents of abuse of power by law enforcement authorities. There is no doubt that what is brought before Courts is a fragment of the totality of incidents taking place across the country. In view of the pervasive practice, the Court considers this to be an opportune moment to direct the 3rd Respondent the Inspector General of Police to lay down guidelines to be followed by law enforcement authorities if such guidelines are already not in place. Guidelines that are thus formulated must reflect the legal safeguards in our law, international instruments and global best practices. The objective is to reinforce the content of the law, clarify any obscure areas and shed light on the rights and obligations of concerned parties. This Court stresses that law enforcement authorities must adhere to those guidelines in addition to the law and take every possible measure to end the abuse of power. 22 Guidelines should broadly cover the following aspects and may include any other area which the Inspector General of Police, the 3rd Respondent deems necessary, in furtherance of securing and advancing the rights of the public that are recognized under the Constitution and under the law.

- Law Enforcement Officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
- Law Enforcement Officials shall respect the principles of legality, necessity, non-discrimination, proportionality and humanity.
- Law Enforcement Officials shall at all times protect and promote, without discrimination, equal protection of law. All persons are equal before the law, and are entitled, without discrimination, to equal protection of the law.
- They shall not unlawfully discriminate on the basis of race, gender, religion, language, colour, political opinion, national origin, property, birth or other status.
- It shall not be considered unlawful or discriminatory to enforce certain special measures designed to address the special status and needs of women (including pregnant women and new mothers), juveniles, the sick, the elderly, and others requiring special treatment in accordance with international human rights standards.
- Children are to benefit from all the human rights guarantees available to adults. In addition, children shall be treated in a manner which promotes their sense of dignity and worth; which facilitates their reintegration into society; which

reflects the best interests of the child; and which takes into account the needs of a person of that age.

- Detention or imprisonment of children shall be an extreme measure of last resort, and detention shall be for the shortest possible time.
- Children shall be detained separately from adult detainees.
- Detained children shall receive visits and correspondence from family members.
- Law Enforcement Officials shall exercise due diligence to prevent, investigate and make arrests for all acts of violence against women and children, whether perpetrated by public officials or private persons, in the home, in the community, or in official institutions.
- Law Enforcement Officials shall take rigorous official action to prevent the victimization of women, and shall ensure that revictimization does not occur as a result of the omissions of police or gender-insensitive enforcement practices.
- Arrested or detained women shall not suffer discrimination and shall be protected from all forms of violence or exploitation.
- Law Enforcement Officials shall not under any circumstance use Torture and other cruel, inhuman or degrading treatment.
- No one shall be subjected to unlawful attacks on his or her honour or reputation.
- Law Enforcement Officials shall at all times treat victims and witnesses with compassion and consideration.
- Law Enforcement Officials shall at all times promptly inform anyone who is arrested of reasons for the arrest.
- Law Enforcement Officials shall maintain a proper record of every arrest made. This record shall include: the reason for the arrest; the time of the arrest; the time the arrested person is transferred to a place of custody; the time of appearance before a judicial authority; the identity of involved officers; precise information on the place of custody; and details of the interrogation.
- Anyone who is arrested has the right to appear before a judicial authority for the purpose of having the legality of his or her arrest or detention reviewed without delay.
- Law Enforcement Officials as far as possible shall take every possible measure to separate juveniles from adults; women from men; and non convicted persons from convicted persons.
- Law Enforcement Officials shall at all times ensure to obey and uphold the law and these rules.

Application Allowed.

Buwaneka Aluwihare PC. J, delivered the Judgment

JSA REFERENCE NO – JSALR/2019/II/22

COURT OF APPEAL

Ariyawathie De Silva

Vs.

Edirisinghe Devage Wijesena and Another

Samayawardhena, J.

CA/608/2000/F

01. 04. 2019

Partition- Identification of the corpus- Extent.

The plaintiff filed the action to partition the land known as Tennedeniyahena alias Pangollehena bounded on the North by the limit of Nagolla now owned by E. D. Baladewa, South by the fence of Weliketiyahena belonging to Sawwa, East by the limit of Tennedeniyecumbura belonging to Pansala and Lapaya and West by limit of Weliketiyehena belonging to Podda and Gansabawa Road in extent of one Amunam or five Pelas of paddy sowing area between the plaintiff and the Ist defendant.

Preliminary Plan No. 220 prepared by Welivita, L. S. depicts a land in extent 1 Acre and 27 Perches.

According to the Ist defendant one Amunam or five Pelas of paddy sowing area equals to 2 ½ Acres. On that basis the Ist defendant got Plan No. 1635 of Kiridena, L. S. prepared depicting a land in extent of 2 Acres 3 Roods and 24 Perches. This has been done by adding a portion (shown as Lot 2) to Plan

No.220, from the southern boundary. According to the Report of Plan 1635, Lot 2 is completely covered with cinnamon plantation. That part is possessed by the 2nd defendant.

HELD

01. The land to be partitioned is a land in extent of one Amunam or five Pelas of paddy sowing area. The 1st defendant was not satisfied with the Preliminary Plan because 2 ½ Acre land was not shown in that Plan. That shall not be a ground to reject the Preliminary Plan, if the other circumstances do not support such a view.
02. There is no hard and fast rule that one Amunam or five Pelas of paddy sowing area shall necessarily equal to 2 ½ Acres.
03. Land has to be identified more by the boundaries than by the extent.

Appeal Dismissed.

JSA REFERENCE NO – JSALR/2019/II/23

COURT OF APPEAL

Warakapitiya Mudiyanselage Yasantha Warakapitiya and Another

Vs.

Kasthurisinghe Mudiyanselage Sisira Kumara Kasthurisinghe and Others

K.K. Wickramasinghe, J.

Mahinda Samayawardhena, J.

CA (PHC) 79/2015

08. 05. 2019

Section 66 application under the Primary Courts' Procedure Act - Failure to call for police observation notes- Infringement of natural justice.

This is an application filed by the two petitioners against the two respondents under section 66(1)(b) of the Primary Courts' Procedure Act, No.44 of 1979.

HELD

01. There is no necessity to call for police observation notes even though upon his discretion the Magistrate can call for a report. However there is no such mandatory legal requirement. Both parties have field copious documentary evidence to substantiate their positions, and therefore the Magistrate had enough material before him to decide the matter without "police observation notes".

Appeal Dismissed.

Samayawardhena, J. delivered the Judgment.

JSA REFERENCE NO – JSALR/2019/II/24

COURT OF APPEAL

Rankothpedige Nandasena Arandara and Another

Vs.

Rankothpedige Sandara and Others

Mahinda Samayawardhena, J.

CA/9/2000/F and CA/10/2000/F

08. 05. 2019

Partition - Section 150 of the C.P.C - Change the character of the case.

The plaintiff filed this action in the District Court to partition the land described in the schedule to the plaint among the plaintiff and the 1st-10th defendant. After trial the learned District Judge entered Judgment as prayed for by the plaintiff. Being dissatisfied with that Judgment, the 1st defendant and the 12th defendant have filed separate appeals.

1st defendant in the Petition of Appeal is that the 13th defendant in the course of the trial produced Plan 13D1 made in 1934, and according to that Plan, the plaintiffs cannot maintain this action as there is no common ownership of the land because parties possessed the land as separate lots.

The 1st defendant has never taken up such a clear position in his statement claim or in issues raised at the commencement of the trial. However after the closure of the case for the plaintiff and at the re-examination of the 1st defendant the counsel for the 1st defendant for the first time has raised an issue (No.26) to say that as the corpus has been possessed by the parties as divided portions for well over 50

years the plaintiffs cannot maintain this action. This has been rightly objected to by the counsel for the plaintiff, but the learned District Judge has accepted that issue.

HELD

01. The learned District Judge should not have allowed that issue to be raised at that stage of the case as, on the one hand, it causes prejudice to the case of the plaintiffs, and, on the other, it changes the character of the 1st defendant's case presented to Court by way of his statement of claim.
02. If the corpus has been possessed by the parties as divided lots for well over 50 years, the 1st defendant should have taken it in the forefront of his statement of claim and sought dismissal of the action on that ground alone. He cannot suddenly realize that important matter after the closure of the case for the plaintiffs, and at the tail end of his evidence, and raise it as an issue to spring a surprise to others.
03. Whether a case is a partition case or otherwise, a party cannot change the character of his case as he goes along to suit the occasion. He must present his case at the trial the way he pleaded in his pleadings and issues raised and his opponent is prepared to meet. (*Candappa nee Bastian v. Ponnambalampillai* [1993] 1 Sri LR 184, *Hildon v. Munaweera* [1997] 3 Sri LR 220, *YMBA v. Abdul Azeez* 1997 BALJ 7, *Ranasinghe v. Somawathie* [2004] 2 Sri LR 154).

1st Defendant's Appeal Dismissed.

JSA REFERENCE NO – JSALR/2019/II/25

COURT OF APPEAL

Wcikremasinghe Raigamage Ranjith alias Lokka

Vs.

Attorney General

Shiran Gooeratne, J.

Priyantha Fernando, J.

CA 256/2017

01. 04. 2019

Duty of the Prosecutor – Prosecution is not bound to call all the witness on the indictment - Section 114(F) of the Evidence Ordinance.

The accused was indicted in the high court of Embilipitiya on the count of murder punishable under the section 296 of the Penal Code. After the trial, learned High Court Judge convict the accused and sentence him to death. Athula Bandara alias Bike Bandara had been a witness who was named by the prosecution as a witness No 11 in the indictment. However, prosecution had not called him to give evidence. The above Bandara had been listed as a witness for the prosecution. Therefore, his statement to the police had been disclosed to the defense. Bandara had been present at the crime sense according to the evidence adduced by the prosecution. He had come with the accuse and accuse fled the sense on Bandara's bike.

HELD

01. The prosecution enjoys discretion whether to call, or tender, any witness there required to attend, but discretion is not unfettered. The discussion must be exercise in the interest of the justice.
02. Prosecutor must direct his mind to his overall duty of fairness.
03. The prosecutor is the primary judge of whether or not a witness for the material events is incredible, or unworthy of belief.
04. In the event the prosecution is reluctant to call a particular witness, if so wish defence may call him.
05. In case of *Walimunige John Vs The State* (76 NLR 488) was held, the prosecution is not bound to call all the witnesses whose names appear on the back of the indictment or to tender them for cross-examination. Further, it is not incumbent on the trial Judge to direct the jury, save in exceptional circumstances, that they may draw a presumption under section 114 (f) of the Evidence Ordinance adverse to the prosecution from its failure to call one or more of its witnesses at the trial without calling all. The question of a presumption arises only where

a witness whose evidence is necessary to unfold the narrative is withheld by the ' prosecution and the failure to call such witness constitutes a vital missing link in the prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance.

06. In the instant case the defence had not even requested the trial judge to order the prosecution to call Bandara as a witness. It was also open for the defence to call the witness if they so wished.

In the above circumstances the Court of Appeal of the view that it was not incumbent upon the trial judge to draw an adverse presumption against the prosecution in terms of section 114(f) of the Evidence Ordinance.

Appeal Dismissed

Priyanth Fernando, J. delivered the Judgment.

JSA REFERENCE NO – JSALR/2019/II/26

COURT OF APPEAL

Senanayake Arachchilage Sanjaya Senanayake

Vs.

Officer-in-Charge, Special Crimes Investigation Unit, Vahara, Kurunegala

K. K. Wickremasinghe, J.

Mahinda Samayawardhena, J.

CA (PHC) 106/2015

28. 05. 2019

Purpose of Revisionary powers – Sentencing

The accused was charged in the Magistrate's Court of Wariyapola under 04 counts for cheating a sum of Rs.1,050,000/= by using a forged deed. The appellant pleaded not guilty on 01.03.2011 and accordingly the case was fixed for trial. However on the first date of the trial, namely on 14.06.2011, the appellant revised his plea and pleaded guilty to the charges. The appellant agreed to pay a sum of Rs.100,000/= per month from January 2012 to the aggrieved party. The learned Magistrate convicted the appellant and imposed a term of 06 months rigorous imprisonment r and a fine of Rs.1000/= with a default term of 03 months simple imprisonment for each charge. Accordingly the aggregated term of imprisonment with default sentence was 03 years.

HELD

01. The extraordinary jurisdiction of revision can be invoked only on establishing the exceptional circumstances.

02. The purpose of revisionary powers is not to relieve grievances of a party but to correct any errors, irregularities or illegalities in lower court orders.

03. In determining the proper sentence the Judge should consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration.

04. Once an accused is found guilty and convicted on his own plea, or after trial, the trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other. In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organization in respect of which it

has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime.

Appeal Dissmissed

Wickremasinghe, J. delivered the Judgment.

JSA REFERENCE NO – JSALR/2019/II/27

COURT OF APPEAL

J.P. Willson And Another

Vs.

Attorney General

Deepali Wijesundara, J.

Achala Wengappuli, J.

CA 159/2008

09. 09. 2019

Credibility of a witness- Common intention

The appellants along with six others were indicted in the High Court of Hambantota for offences punishable under section 140, 296 and 410 of the Penal Code. After trial the appellants were found guilty on the fourth charge for murder and sentenced to death.

HELD

01. The testimony of a witness cannot be believed to convict one accused and disbelieved to acquit another accused.
02. On the charge of common intention mere presence is not sufficient to convict an accused.
03. Common (murderous) intention must be shared before a person can be convicted for murder under section 32.
04. When convicting accused on common intention the trial Judge should consider the evidence against each accused separately and see whether they have been acting with common murderous intention when the offence was committed.
05. In the instant case when the trial Judge acquitted some of the accused the common intention failed and he has erroneously convicted the appellants on common intention. The trial Judge failed to evaluate the evidence of each appellant separately before coming to the conclusion that they committed the murder with common murderous intention.

Appeal Allowed.

Deepali Wijesundara, J. delivered the Judgment.

JSA REFERENCE NO – JSALR/2019/II/28

COURT OF APPEAL

Hettiaraehehilage Swarnalatha And Others

Vs.

Thalarambha Withanage Ekanayake and Others

C.A. Appeal No. 817/2000 (F)

Janak de Silva, J.

Priyantha Fernando, J.

15. 05. 2019

Declaration of title - Undivided Land

Plaintiffs instituted this action praying for a declaration of title to the land described in schedule 'b' of the plaint and to eject the defendant from the said land.

After trial the learned District judge dismissed the plaint. Among other reasons, the learned District Judge said in her Judgment that the appellant had asked for declaration of title for undivided land and that he had changed his stance at the trial.

HELD

01. It is settled law that a declaration of title cannot be sought on an undivided land. The property has to be clearly identified.
02. The land in question includes an undivided share of a larger land and that the plaint should be dismissed.

Appeal Dismissed

Priyantha Fernando, J. delivered the Judgment.

JSA REFERENCE NO – JSALR/2019/II/29

COURT OF APPEAL

Ambagahagedara Nimal Ratnayake

Vs.

Attorney General

Gaffoor, J.

Wickremasinghe, J.

CA 24/2011

01. 04. 2019.

Absence of cross examination - Discrepancies of a testimony of a witness- Ellenborough dictum.

The Accused was indicted for committing the murder of Dissanayake Mudiyanselage Siriyawathi on or about 6th July 2004. The deceased was a fifteen-year-old girl living together with the Accused as husband and wife. She was not legally married to the Accused.

The Prosecution after leading evidence of several witnesses and marking P-01 to P06 closed the case for the prosecution. After conclusion of the prosecution case as there was a *prima-facie* case against the Accused the Learned High Court Judge had called for the defence.

For the defence Accused opted to give a dock statement. Accused in his dock statement stated that a person by the name of Karunaratna is the person who is responsible for the death of the deceased. Accused further said Karunaratna is the person who told him to surrender to the Police. This position had never been suggested by any of the prosecution witnesses including the investigating Police Officers.

HELD

01. Absence of cross examination of Prosecution Witnesses of certain facts leads to inference of admission of that fact.

02. It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted.

03. Discrepancies that do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance.

04. A girl of young as fifteen years old had to leave this world as a result of the action of the Accused. A young girl of fifteen should have been under her parent's love and care. Instead of looking after her Accused had killed her. After the incident Accused had gone to his mother's house and informed her that he killed Siriyawathi and then gone to the Police. There are many areas which he had to explained at the trial, but not done by the Accused as per the Ellenborough dictum. We also take this in to consideration when coming to a finding against the Accused.

Appeal dismissed

Gaffoor, J. delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/II/30

COURT OF APPEAL

A. K. Jagoda

Vs.

Ravi Prasad Kalupahana

A. L. Shiran Gooneratne, J.

Mahinda Samayawardhena, J.

CA/PHC/156/2015

25. 06. 2019

Agrarian Development Act – Filling a paddy land – Identify the land described in the schedule.

The Respondent, The Commissioner of Agrarian Development, filed action against the Petitioner-Appellant in terms of Section 33(3) of the Agrarian Development Act No. 46 of 2000 (Act), in the Magistrate's Court of Galle, for filling a paddy land of 60 perches, in part of a land extent of 2 Acres, as describing the schedule attached to the affidavit. The learned Magistrate issued an order restraining the Appellant from filling the land described in the said schedule and the Learned High Court Judge affirmed said order in the revision application filed by the Appellant.

HELD

1. The learned Magistrate without considering the Appellants cause against the issue of an interim

order has made order under Section 33(5) of the Act, confirming the said interim order and restraining the Appellant filling the land on the basis that in terms of Section 33(7), the Court is not competent to call for any evidence from the Respondent in support of this application.

2. According to section 33(8) of the Act, when the person on whom summons has been issued appears in Court and show cause against issuing of such an order the Court may proceed forthwith to inquire into the same or may set the case for inquiry on a later date. (Section 33(6)(b)
3. In the instant application, it is clear that the Court failed to consider the Appellants cause challenging the identity of the land described in the schedule to the said application before issuing the impugned order, which substantially questions the legality of the enforcement process.

Appeal Allowed.

Shiran Gooneratne, J. delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/II/31

SUPREME COURT

Ceylinco Insurance PLC

Vs.

Ispat Corporation (private) Limited

S. Eva Wanasundara PC, J.

Anil Gooneratne, J.

H. N. J Perera, J.

SC CHC Appeal 21/2010

15. 11. 2016

Malicious damages caused by a third party under an insurance policy – Bargaining claim and fraudulent claim –Evidential value of a document marked as subject to prove at the trial but not objected at the closure of the case.

The 1st Defendant issued an insurance Policy in favour of the Plaintiff and thereby, insured the Plaintiff's factory against many risks and perils. It was alleged that the insurance was against inter alia, all loss and / damage to the Plaintiff's factory and premises and the plant and machinery, equipment and stocks therein including malicious damages.

With the knowledge of the 1st Defendant, the management of the Plaintiff's company was handed over to another company for six years and the said company was in sole and exclusive possession and control of the Plaintiff's factory from 04. 04. 2000 to 01. 03. 2001. Since the said company failed to perform its duties, the Plaintiff terminated the agreement for management and had taken over the possession of the factory. It was thereafter revealed that the said company had removed machinery in the Plaintiff's factory and the Plaintiff demanded the 1st Defendant to cover the said loss and damage by the insurance policy as the lass and damage was caused by malicious, willful and wrongful acts. The 1st Defendant refused to comply with Plaintiff's demand on the basis that the alleged loss and damage was occasioned by the willful act of the Plaintiff and that the damage thus caused by another company not come under "malicious damage" but can be categorized as burglary or pilfering which is not covered by the Insurance Policy and the claim is excessive.

The 1st Defendant was sued before the Commercial High Court by the Plaintiff. The learned High Court Judge held with the Plaintiff and the 1st Defendant made this direct appeal to the Supreme Court.

HELD

1. It is established that the mere fact that a claim has been inflated is not conclusive evidence of fraud and that bargaining claims and innocent overvaluation will not defeat the assured. In the absence of independent evidence of the assureds state of mind, the decisive dividing factor between fraud and innocence will generally be the degree to which the claim has been inflated, as the greater the inflation the easier it becomes to impute a fraudulent intent to the assured. Thus, a hundredfold exaggeration of the degree of loss will be fraudulent, as will a claim for the purchase price of goods which were at the time of the loss seriously defective or of goods which the assured did not actually loose, whereas a claim for the value of new goods under a policy which provides

cover for replacement value only is a bargaining claim and cannot be regarded as fraud (quoting Colinvaux's Law of Insurance)

2. The survey Report had been done during the period of a few months. The Plaintiff's managing director produced this report at the trial. He was not cross examined regarding the contents of the report. There was no dispute over the contents of the Report. It was marked subject to proof but at the closing of the case of the Plaintiff, the Defendant did not object to any of the documents which were marked subject to proof. Therefore as a matter of law, according to the ratio decedendi of the case of *Sri Lanka Ports Authority and Another Vs. Jugolinija – Boat East* 1981, 1 SLR 18, the said document stands proven.
3. The Plaintiff alleged and proved with evidence that the company which the management was given had taken lorry loads of machinery and equipment thus causing damage and loss to the insured property which the security personnel could not stop. Even at the time of giving notice to the Insurance Company, the damage was continuing. Therefore it was held that the loss and damage to the insured property was done by a third party acting maliciously.

Appeal Dismissed.

Eva Wanasundara PC, J. delivered the Judgment

JSA REFERENCE NO. – JSALR/2019/II/32

COURT OF APPEAL

Chandana Ukwatte

Vs.

Deputy Provincial Commissioner of Revenue.

K. K. Wickremasinghe, J.

Janak De Silva, J.

CA(PHC) 45/2009

03. 05. 2019

Defaulter – Liability of the principal officer in a company – Rules of natural justice – Vicarious liability.

The Complainant filed a certificate against Three Coins Company (Pvt) Limited under section 89 of the Financial Statute of the Western Province No. 06 of 1990 as amended (Statute) for the recovery of turnover tax in the Magistrates Court of Colombo. The Respondent Company was noticed to show cause. The Appellant filed an affidavit in his official capacity as the Chairman of the Respondent Company and took up several objections to the application. After due inquiry the learned Magistrate held that the Respondent Company is liable to pay the amount set out in the certificate and directed the Respondent-Company to deposit the said sum in Court. He made further order that in the event the Respondent Company failed to do so, the said amount should be recovered as a fine from the Appellant and imposed a default sentence of 12 months rigorous imprisonment. The Appellant filed a revision application in the High Court of the Western Province and the same was dismissed.

HELD

1. The learned Presidents Counsel for the Appellant relying on section 89(1) of the Statute submitted that it requires a certificate filed there under to identify the "defaulter" which in this case was the Respondent Company and as the Appellant was not cited as a defaulter there was no legal basis to make order against the Appellant when the law permitted orders to be made only against the "defaulter".
2. The learned DSG submitted in response that the provisions of the Statute require a purposive interpretation and that in terms of the deeming provision in section 85(3) read with section 21(1) of the Statute the term "defaulter" includes both the Respondent Company and the Appellant.
3. The ratio of M. E. De Silva v. The Commissioner of Income Tax is that a Managing Director of adefaulting company cannot be named in the certificate filed before the Magistrates Court under section 80 of the Income Tax Ordinance as a defaulter for the recovery of the amount in defaultof the company from his personal assets. Here the Respondent Company who was assessed

and had to pay the turnover tax was named as the defaulter.

4. Section 85(3) of the Statute deems every person liable to pay the tax as a defaulter. In the case of natural persons this will in most instances be the person assessed. However, in relation to every company or body of persons corporate or unincorporated there is no natural person who can be held liable to perform the acts that must be done for example by a company in terms of the Statute which is a consequence of the artificial imputation of legal personality on a company by law.
5. The section 21 seeks to make certain category of officers liable to perform such acts which arerequired to be done under the Statute by a company or body of persons corporate or unincorporate. This is because a company can only act through its employees, from the board of directors down.
6. The word "defaulter" in section 89(1) of the Statute includes the Respondent Company which was assessed and the Secretary, Manager, Director or other Principal Officer of the Respondent Company on whom a statutory obligation to perform all acts of the Company has been imposed by section 21(1) of the Statute.
7. The Appellant contends that he was never summoned under section 89(1) of the Statute and asked to showcause.There is no dispute that the Appellant filed an affidavit and was heard by the learned Magistrate. He appeared before court voluntarily. He cannot now be heard to state that he was not given a hearing.
8. Similarly, given that the Appellant is the Chairman of the Respondent Company and the fact thatthe Respondent Company has not assailed the order of the learned Magistrate, and that the Appellant has failed to explain as Chairman why the Respondent Company has not paid the turnover tax is a ground by itself which entitled the learned High Court Judge to refuse any relief to the Appellant in the revision application.
9. No vicarious liability has been imposed on the Appellant. The first part of the order holds that the Respondent Company is liable to pay the amount set out in the certificate and directs the Respondent-Company to deposit the said sum in Court. In the event the Respondent Company failed to do so, the said amount should be recovered as a fine from the Appellant, who appeared as the Chairman of the Respondent Company, and imposed a default sentence of 12 months rigorous imprisonment. Hence the second part of the order became effective if and only when the Respondent Company failed to deposit the money as directed and is based on the provisions contained in sections 85(3) and 21(1) of the Statue. In other words, the liability of the Appellant arises as he failed to do all such acts, matters or things as are required to be done under the provisions of the Statute by the Respondent Company.

Application Dismissed

Janak De Silva, J. delivered the judgment.

JSA REFERENCE NO. – JSALR/2019/II/33

Court Of Appeal

H.M.E. Samarakoon Bandara

Vs.

The Hon Attorney General

K. K. Wickremasinghe, J.

K. Priyantha Fernando, J.

CA (PHC) APN: 127/18

16. 05. 2019

Section 48 of the Judicature Act

The Petitioner and his wife were indicted in the High Court of Anuradhapura with 1st and 2nd counts on offences punishable under sections 308(a)2 and 298 of the Penal Code respectively. Evidence of prosecution witnesses No. 01 and 02 had been led before the learned High Court Judge Mr. R.M.P.S.K. Ratnayake and thereafter witnesses No. 05, 06, 03, 24, 25, 26, 11, 14 were led before the learned High

Court Judge Mr. Manjula Thilakaratne. When the matter was called for trial on 11.06.2018, it was the learned High Court Judge Mr. K. Weeraman who presided, as Mr.Thilakaratne had gone on transfer to another Court. On that day the case was re-fixed for 25.09.2018 for want of witnesses. Thereafter, the case was called on 25.09.2018 for trial and the prosecution moved for summons on witness No.24. According to the proceedings on record, the defence counsel has requested Court to send the case to be heard by Mr. Thilakaratne the learned High Court Judge, as evidence of more witnesses were recorded before him. At that stage, the learned High Court Judge has questioned the defence counsel as to whether Mr. Thilakaratne had recorded any demeanour or deportment of any witnesses, where the defence counsel answered in the negative. Hence, the learned High Court Judge refused the application by the defence to send the case back to his predecessor Mr. Thilakaratne. Being aggrieved by the said order, the petitioner filed the instant application to get it revised.

HELD

01. Transfer of a HCJ from a station is covered by the words 'other disability' in Section 48 of the Judicature Act..
02. The plain reading of section 48, that the successor Judge has the discretion to continue with the case subject to the proviso. It is obvious that the proviso is to safeguard the right of accused to a fair trial in a criminal case, as the successor Judge would be able to see the demeanour of a witness already led, if necessary. For that purpose, the accused is given the opportunity to demand that the witness be re-summoned and reheard.
03. That Section 48 was amended giving discretion to the succeeding judge to continue with the proceedings. The exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witness recorded by the Judge who previously heard the case.
04. There no necessity for the succeeding Judge to make an order giving his reasons for his decision to continue with the evidence already recorded.

Appeal Dismissed

K. Priyantha Fernando, J. delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/II/34

Court Of Appeal

Rajapakse Pedidurayalage Wimalasena

Vs.

Rajapakse Pedidurayalage Menika

Janak De Silva, J.

K. Priyantha Fernando, J.

C.A. Appeal No. 98/2000(F)

03. 07. 2019

Section 03 of the Prescription Ordinance- Adverse Possession.- Burden of proof.

Plaintiff instituted this action against the Defendant, seeking a declaration of title to the land more fully described in the 2nd schedule to the plaint, to eject the Defendant there from and for damages. The Defendant filing answer claimed for prescriptive title over the land. After trial, the learned District Judge delivered the judgment in the Defendants favour stating that the Defendant has prescriptive title to the land in suit over the Plaintiff.

HELD

01. A person who bases his title in adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In order to constitute adverse possession, the possession must be in denial of the title of the true owner. Where there is no hostility to or denial of the title of the true owner there can be no adverse possession.
02. In deciding whether the alleged acts of the person constitute adverse possession, regard must be had to the animus of the person doing those acts, and this must be ascertained from

the facts and circumstances of each case and the relationship of the parties.

03. Possession which may be presumed to be adverse in case of a stranger may not attract such a presumption, in the case of persons standing in certain social or legal relationships. The presumption represents the most likely inference that may be drawn in the context of the relationship of the parties.

04. The Court will always attribute possession to a lawful title where that is possible. Where the possession may be either lawful or unlawful, it must be assumed, in the absence of evidence, that the possession is lawful.

05. Thus, where property belonging to the mother is held by the son, the presumption will be that the enjoyment of the son was on behalf of and with the permission of the mother. Permissive possession is not in denial of the title of the mother and is consequently not adverse to her. It will not enable the possession to acquire title by adverse possession.

06. Where possession commenced with permission, it will be presumed to so continue until and unless something adverse occurred about it.

Appeal Allowed.

K. Priyantha Fernando, J. delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/II/ 35

COURT OF APPEAL

Karunkalage Chandana Silva

Vs.

N Sudharshani And Another

Deepali Wijesundera, J.

Achala Wengappuli, J.

C.A.(HB) Application No.03/2017

28th June, 2019

Section 24(3) of the Judicature Act - Section 112 of the Evidence Ordinance- Best interest of the child.

This is an application by the Petitioner seeking issuance of a mandate in the nature of writ of Habeas Corpus against the 1st Respondent to bring the 2nd Respondent, a girl child of seven years of age, before this Court. The Petitioner states that she is the daughter of the 1st Respondent. The Petitioner met the 1st Respondent, who already had a male child elder to the 2nd Respondent, in Colombo during 2008 when his services, as a three wheeler driver, was obtained by her. The 1st Respondent's marriage to her husband was already" estranged". At that time, her husband was employed in a foreign country and the Petitioner's regular interaction with the 1st Respondent transformed their relationship in to an "affair" and "as a result of the said affair the 2nd Respondent above named was born on 25th April 2010." He believed that he is the "natural father" of the 2nd Respondent. After the 2nd Respondent's birth, the Petitioner claimed that he had looked after the welfare of the 1st Respondent and her two children. The Petitioner had then left Sri Lanka for foreign employment in 2015 and left his A TM card with the 1st Respondent to facilitate him to remit some of his earnings for their maintenance. Whilst engaged in his employment overseas, the Petitioner had maintained his relationship with the 1st Respondent as he was "very attached to his daughter", the 2nd Respondent. Upon his return to Sri Lanka in March 2016, the Petitioner was told by the 1st Respondent that she did not wish to continue their" affair".

The 1st Respondent filed her objections resisting the application of the Petitioner and moved Court to dismiss it in limine. She denied the claim of paternity of the Petitioner and stated that her husband was in Sri Lanka during the period May to July 2009 and she became pregnant with the 2nd Respondent during this time. The 2nd Respondent was born on 25th April 2010 at a private hospital in Colombo and it was her husband who funded her hospital bill of Rs. 150,150.00. The 1st Respondent with her two 3 children visited her husband in Dhabi, United Arab Emirates, where he was employed in 2012.

HELD

01. The principles of the Roman Dutch law it is clear that the mother of an illegitimate child is the natural guardian and entitled as such to the custody of the child as against a stranger.

02. The question of legitimacy and paternity should be decided between the parties who are directly affected by such a question.

03. A third party may only lead evidence of such facts elicited in a contest between the parties in a Court of law regarding such matter. A third party who is not a party to a contract of marriage when he files an action in a Court of law to canvass the validity of a marriage or the legitimacy or paternity of the children born during that valid marriage is trying to import his opinion on what had taken place. The question of validity of a marriage, paternity and legitimacy of the children are personal matters to be decided by a Court of competent jurisdiction amidst the parties affected by the marital contract.

04. A third party should not have any legal right to attack the validity of such a contract of marriage nor its consequences. Of course, a third party may make use of the facts proving the relationship that existed between the contracting parties, provided they are relevant to the matters in issue.

05. The marriage between the wife and her husband continued to be a valid marriage until her husband's death. Therefore, the children born during the continuance of that valid marriage are presumed legitimate children.

06. A Court will always consider what is best in the interest and welfare of the children. In such a situation the mere denial of paternity by the husband will not make the children illegitimate.

07. Court of Appeal of the view that, the Petitioner cannot be allowed to challenge the paternity of the 2nd Respondent who was born to the 1st Respondent during a legally valid marriage.

08. The 2nd Respondent is clearly entitled to the protection of her presumed paternity as reflected in her birth certificate under Section 112 of the Evidence Ordinance.

09. Even in relation to an illegitimate child, a third party cannot generally override the natural rights of its mother.

Petition Dismissed.

Achala Wengappuli, J. delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/II/36

COURT OF APPEAL

A. M. Ranbanda,

Vs

Anula Abeykoon,

K.K. Wickramasinghe, J.

Mahinda Samayawardhena, J

CA (PHC) 109/2012

03. 06. 2019

Section 66 of the primary Courts Procedure Act No 44 of 1979 - Agrarian Development Act, No. 46 of 2000,- Inherent jurisdiction/power to order to maintain status quo.

This is an application filed by the police under section 66 of the Primary Courts' Procedure Act, No. 44 of 1979, over a dispute between the 1st party appellant and the 2nd party respondent regarding possession/ cultivation of a paddy filed.

The Magistrate's Court held with the appellant on the basis that it was the appellant who was in possession of the paddy field when the first information was filed in Court and the respondent has not proved forcible dispossession within two months prior to the filing of the first information.

This order was set aside by the High Court in revision; this appeal is from the said Judgment of the High Court.

HELD

01. Where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that tribunal and not to others.

02. The Agrarian Development Act is a special Act passed inter alia to particularly resolve the disputes between landlords and tenant cultivators of paddy lands. Hence the jurisdictions of the ordinary courts to entertain and determine such disputes are ousted.

03. The jurisdiction of the Magistrate's Court is ousted, if, and only if, the two contesting

parties in the first place accept a relationship of landlord and tenant cultivator between them. If one party denies it, the Court has the jurisdiction to determine the matter. If the party claims to be a tenant cultivator says that he is the tenant cultivator of someone else who is not a party to the case, as in this case, the Court definitely has jurisdiction to determine the matter between the two parties before Court.

04. Further, when the Court decides that it has no jurisdiction due to the relationship of landlord and tenant cultivator being accepted, still, the Court has inherent jurisdiction/power to order to maintain status quo until the parities seek relief under the provisions of the Agrarian Development Act.

Appeal Allowed

Samayawardhena, J. delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/II/37

COURT OF APPEAL

Dolewatta Arachchige Don Martin Perera

Vs.

Hemawathie Gunarathne and Others

A.H.M.D. Nawaz, J.

C.A. Case No.1332/2000 (F)

30. 05. 2019

Partition- Identification of the corpus Section 16,18 of the Partition Law - Duty of the surveyor.

The Plaintiff instituted this action to partition a land called "Lot B of Delogodawalawwe Watte" which is more fully described to the schedule to the plaint.

One of the issues raised at the trial on behalf of the I[st] Defendant-Respondent liyanage Herath Perera was whether the land referred to in the schedule has been identified by the preliminary plan bearing No.2435. The learned District Judge of Gampaha by his judgment dated 30.11.2000 held inter alia that the Plaintiff failed to establish the identity of the corpus and accordingly the Plaintiff's action was dismissed with costs. It is against the said judgment that the 4(a) Defendant-Appellant has preferred this appeal.

HELD

01. Partition Law stands in a class *sui generis* and there are specific provisions that apply to partition suits alone.

02. The land surveyed must be the land to which the deeds apply. The Plaintiff is only entitled to get a partition decree of a land to which he is entitled on the deeds. A corpus is identified by reference to boundaries in the schedule to the deeds. With the passage of time names of boundaries may differ but the divergence must be explained by a Plaintiff who seeks to partition a land. Or the change may even be manifested in the preliminary plan.

03. The imperative duty to identify the corpus with certainty that Section 18(i)(a)(iii) of the Partition law requires the surveyor to transmit to court a report, substantially in the form set out in the Second schedule to the law, verified by affidavit, which states inter alia: "whether or not the land surveyed by him is in his opinion substantially the same as the land sought to be partitioned as described in the schedule to the plaint".

04. The legislative intent of Section 16 to compel the mandatory attachment of a copy of the plaint with commission papers is aimed at facilitating the commissioner to identify the corpus depicted in the plaint with existing physical boundaries and metes and the opinion of the Surveyor has to be mandatorily in the form of surveyor's report as given in the Second Schedule and a mere mention of the name of the land on the plan as in the plaint is not a due compliance with the imperative requirement of Section 18(1)(a)(iii).

05. The surveyor under Section 18(1)(a)(iii) must in his report state whether or not the land surveyed by him is substantially the same as described in the schedule to the plaint. Considering the finality and conclusiveness that attach in terms of Section 48(1) of the Partition Law to the decree in a partition action, the Court should insist upon its compliance with this requirement by the surveyor.

06. When the land surveyed is substantially different from the land as described in the schedule to the plaint, the Court has to decide at that stage whether to issue instructions to the surveyor to carry out a fresh survey in conformity with the commission or whether the action should be proceeded with in respect of the land as surveyed.

07. There was definitely an abdication of a mandatory duty on the part of the surveyor but though Court of Appeal will not go to the extent of holding that then on compliance with Section 18 is not per se a ground to vitiate a decree, The Court of Appeal take the view that if the preliminary plan and report are returned to Court without coming with Section 18(2) of the Partition Law, such noncompliance deprives the report of its evidentiary value as to identification of corpus and the Plaintiff has to resort to evidence aliunde to establish that what was surveyed was what had been depicted in the schedule to the plaint. The importance of proof of identity becomes more pronounced if a specific issue has been raised as regards the identity of the corpus. If there is divergence of descriptions between the deeds and the preliminary plan as to identity of the corpus, the Plaintiff must offer evidence to explain the divergence and this evidence can even take the form of summoning the surveyor to give evidence.

Appeal Dismissed.

There can be no keener revelation of a society's soul than the way in which it treats its children.

Nelson Mandela
(8th May 1995)

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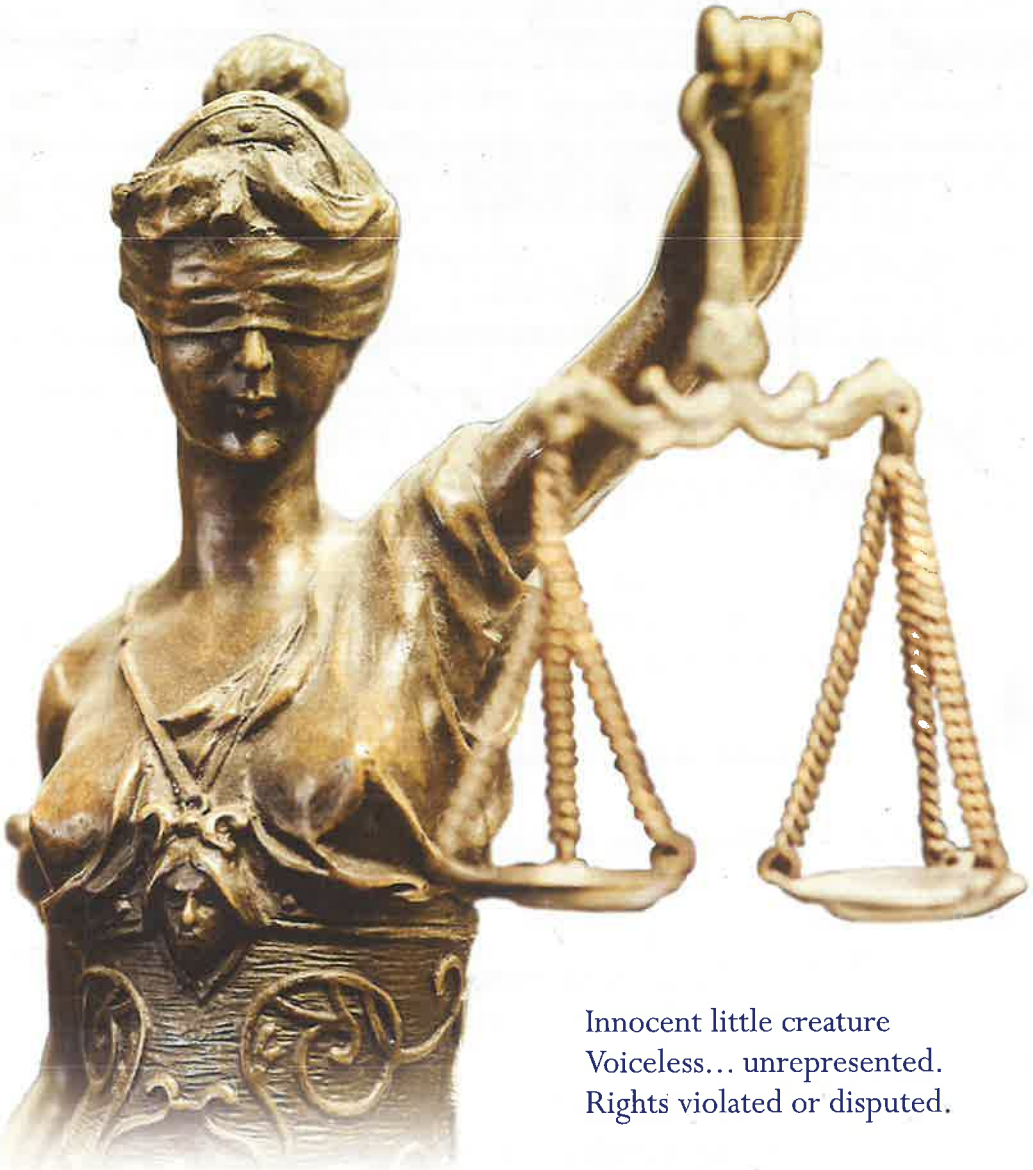

Innocent little creature
Voiceless... unrepresented.
Rights violated or disputed.

Those who claim you
Raise voices mostly paid
And hired...
Curators, guardians, next friends?
I still have doubts..

Yet have no fear
For above all I stand
As the upper guardian
Securing your best interest...

Albeit blind folded
I hear you and
I shall be the voice of you

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