News Letter

THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

2024 VOLUME 02

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Letters Sent by JSA

Letter to Hon. Secretary to JSC dated 31.05.2024

JSA has taken steps to indicate the difficulties faced by members of the minor judiciary about the staff shortage and how it affects the administration of justice in the country. Accordingly, the letter was sent on 31. 05. 2024 to the Hon. Secretary to the JSC with copies to the secretary to the Ministry of Finance and secretary to the Ministry of Justice and Prison Reform, seeking relief.

සංජීව සෝමරත්න මහතා,

ලේකම්,

අධිකරණ සේවා කොමිෂන් සභාව,

කොළඹ 12.

<u>දෛනික අධිකරණ කටයුතු බිඳ වැටීමක් අභිමුව.</u>

ඉහළ ගොස් ඇති රාජකාරී ස්වභාවයන්ට සාපේක්ෂව අධිකරණ සේවක සංඛ්‍යාව වසර ගණනකින් යාවත්කාලීන නොකර තිබියදී පවා ශ්‍රී ලංකාවේ අධිකරණ පද්ධතිය තුළ ඇති වී ඇති 1500 ක ප්‍රමාණය දක්වා පෙර නොවූ තරමේ විශාල කාර්ය මණ්ඩල පුරප්පාඩු ප්‍රමාණය හේතුවෙන් සෑම අධිකරණයකම පාහේ යුක්තිය පසිඳලීමේ ක්‍රියාවලිය ප්‍රමාණාත්මක අතින්ද ගුණාත්මක අතින්ද කඩා වැටීමකට ලක් වෙමින් ඇති බව ඒ සම්බන්ධයෙන් සාමාජික විනිශ්චයකාරවරුන් විසින් ඉදිරිපත් කරන ලද කරුණු සලකා බැලීමේදී අප සංගමය වෙත නිරීක්ෂණය වී ඇත.

අධිකරණය යනු ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 3 ව්‍යවස්ථාව ප්‍රකාරව මහජනතාවගේ පරමාධිපත්‍ය පාලන බලතල තුනෙන් එක් ප්‍රධාන කාණ්ඩයක් වන අධිකරණ බලය ක්‍රියාත්මක කරන ආයතනය බැවින් රාජ්‍යයේ නීතියේ පාලනය පවත්වා ගෙන යෑමේ සමස්ථ ආයතනික ව්‍යුහයන්හි අවසානාත්මක පුරුක ලෙස එය සැලකිය හැකිය. රටක කවර ආකාරයේ ආර්ථික හෝ සාමාජීය තත්ත්වයක් පැවතුණද ඒ හේතු ඉදිරිපත් කරමින් අධිකරණ පද්ධතිය කඩා වැටීමට සැලැස්වුවහොත් එය සමාජයේ සෑම ක්ෂේත්‍රයකම කඩා වැටීමේ ආරම්භය වන බවට විවාදයක් නැත.

කාර්ය මණ්ඩල පුරප්පාඩු හේතුවෙන් වසර දෙකක පමණ කාලයක් තිස්සේ ක්‍රමිකව වර්ධනය වෙමින් තිබූ අධිකරණ වල එදිනෙදා කටයුතු වලට සිදු වන අහිතකර බලපෑම විනිශ්චයකාරවරුන්ගේ සහ නිලධාරීන්ගේ ස්වේච්ඡාසහගත අතිරික්ත රාජකාරී ඉටු කිරීම මගින් යම්තාක් දුරකට පාලනය කර ගැනීමට උත්සහ දැරුවද මේ වන විට ඇති වී ඇති අති විශාල පුරප්පාඩු වල ප්‍රමාණයද එහි ප්‍රතිඵලයක් වශයෙන් සේවයේ යෙදී සිටින එක්

නිලධාරියකුට පැවරෙන අතිරික්ත රාජකාරී වගකීම් ප්‍රමාණය ඉහල යෑම සහ ආකර්ශනීය නොවන සේවා කොන්දේසි හේතුවෙන් නිලධාරීන්ගේ මානසික තත්ත්වය පිරිහීමකට ලක් වීමද මත මින් ඉදිරියට මහජනතාවට අගතිදායක ලෙස බලපාන පරිදි අධිකරණ කටයුතු බිඳ වැටීමක් ඇති වීම වැළැක්විය නොහැකි වීමේ අවදානමක් අප විසින් නිරීක්ෂණය කර තිබේ. මෙම පුරප්පාඩු ප්‍රමාණය සහිතව බාධා වීම් මධ්‍යයේ වුවද දෛනික අධිකරණ කටයුතු පවත්වා ගෙන යෑමේ උපරිමය දැන් ඉක්මවා ඇත.

පුරප්පාඩු පිරවීම විෂයෙහිලා අධිකරණ සේවා කොමිෂන් සභාව විසින් අධිකරණ අමාත්‍යාංශය හා මුදල් අමාත්‍යාංශය වෙත ඉදිරිපත් කර ඇතැයි දැන ගන්නට ලැබී ඇති කරුණු සම්බන්ධයෙන් කඩිනම් ප්‍රතිචාර නොදැක්වීම නීතියේ පාලනය බිඳ වැටීමේ තත්ත්වයක් දක්වා ගමන් කරමින් තිබීම සම්බන්ධයෙන් අප දැඩි කනස්සල්ල පළ කරන්නෙමු. කාරණයේ බරපතලභාවය පාලනය කළ නොහැකි මට්ටමට ගමන් කරමින් තිබුණද විනිශ්චයකාරවරුන්ට තම වෘත්තියේ උසස් සම්ප්‍රදායන් අනුව ඒ පිළිබඳ ප්‍රසිද්ධ ප්‍රකාශයන් නිකුත් කිරීම, වෘත්තිය ක්‍රියා මාර්ග ගැනීම ආදිය සිදු කිරීම කළ නොහැකි බැවින් නියමිත මූල්‍ය බලධාරීන් කාරණයේ බරපතලභාවය අවබෝධ කර ගෙන රජය පාලනයේ දෛනික කටයුතු පවත්වාගෙ යෑමට අත්‍යාවශ්‍ය කාරණයක් ලෙස සලකා මෙම පුරප්පාඩු කඩිනමින් පිරවීම සඳහා ප්‍රතිපාදන වෙන් කරනු ඇතැයි අප තවදුරටත් අපේක්ෂා කරන්නෙමු.

ශ්‍රී ලංකාවේ දිසා විනිශ්චයකාරවරුන්ගේ සහ මහෙස්ත්‍රාත්වරුන්ගේ අනන්‍ය වෘත්තිය සංගමය වන අප සංගමය විසින් ඉදිරිපත් කර ඇති මෙම සැල කිරීම් කෙරෙහි බරපතල අවධානය යොමු කර හදිසි කරුණක් සේ සලකා ශීර්ෂගත පුරප්පාඩු නොපමාව පිරවීම සඳහා ප්‍රතිපාදන වෙන් කිරීම අත්‍යාවශ්‍ය බවද එසේ නොකළහොත් නුදුරේදීම අධිකරණ කටයුතු වල බිඳ වැටීමක් ඇතිවීම වැළැක්විය නොහැකි බවද නිසි බලධාරීන් වෙත දන්වන ලෙසද එයට ආනුෂංගික සියලු පියවර ගන්නා ලෙසද කාරුණිකව ඉල්ලා සිටිමු.

ඉසුරු නෙත්තිකුමාරගේ,
ලේකම්,
අධිකරණ සේවා සංගමය.

2024.05.31 වන දින,

ගාල්ල මහෙස්ත්‍රාත් අධිකරණයේදී ය.

පිටපත: 1. මහින්ද සිරිවර්ධන මහතා, ලේකම්, මුදල් හා ආර්ථික ස්ථායිකරණ අමාත්‍යාංශය. (සුදුසු කඩිනම් පියවර සඳහා)

2. එම්.එන්. රණසිංහ මහතා , ලේකම්, අධිකරණ හා බන්ධනාගාර කටයුතු අමාත්‍යාංශය. (සුදුසු කඩිනම් පියවර සඳහා)

Letter to Hon. Secretary to JSC dated 03.06.2024

As there was a proposal by the JSC to provide women personal security officers to lady judges, the JSA wrote to the JSC stating the grievances of the membership and requested to reconsider the proposal as the security of all judicial officials are equally important.

Hon. Sanjeewa Somaratne.
The Secretary,
The Judicial Service Commission,
Colombo 12.

Security of the Women Judicial Officers

The Judicial Service Association (JSA) was reliably informed that subsequent to a meeting held between the Inspector General of Police (IGP) and the Judicial Service Commission (JSC), the Director of Judicial Security Division of Sri Lanka Police is in the process of formulating policy decisions regarding the security of the Judicial Officers of Sri Lanka. It was further informed that one of the aspects they are considering to be implemented is to deploy only women police officers as Personnel Security Officers (PSOs) of the women judges.

As per a decision taken at the Executive Committee meeting of the JSA held on 18.05.2024, it was decided to express its complete disagreement for that proposal of deploying women Personal Security Officers. The JSA considers such positioning of PSOs for women judges would amount to a gender based discrimination since the women judges might not receive an equal level of security. Also, it is similarly contrary to the long established practices of the Sri Lanka

Judicial Service. Moreover, it would cause an insult towards women judicial officers who provide their services with utmost dedication to maintain the professional and moral values. While acknowledging that some isolated incidents may be reported where certain women judicial officers have failed to uphold the expected standards of professionalism, the JSA believes such occurrences should be addressed individually without generalizing the same for the entire women judicial officers of the country.

In this context, the JSA eagerly urges the JSC to reconsider the proposal of positioning women Personal Security Officers for women judges and issue directions to the Inspector General of Police accordingly.

Thank You,

Isuru Neththikumarage,
Secretary,
Judicial Service Association.

On this day 03rd of June 2024,
At Galle Magistrate Court.

Letter to Hon. Secretary to JSC dated 04.06.2024

Recognising the necessity of having a focal point at the Ministry of Justice to communicate with the judicial officials regarding administrative issues, the JSA requested to appoint a member from the first instance courts as an assistant secretary to the MOJ.

Hon. Sanjeewa Somaratne,
The Secretary,
Judicial Service Commission.

Request to appoint a Judicial Officer for the post of Additional Secretary (Judicial) of the Ministry of Justice

As a result of the lengthy discussion commenced on the request of Judicial Service Association (JSA), by the letter dated 20.04.2016 of Secretary of Ministry of Justice, it was informed that a Judicial Officer had been appointed as the Additional Secretary (Judicial) to the Ministry of Justice (A copy is attached herewith for your kind reference).

It was considered as a focal point to coordinate administrative functions directly between Judges and Ministry of Justice and immensely benefited in numerous ways in efficiently resolving administrative matters concerning Judicial Officers such as matters related to official bungalows, official vehicles, court administration and staff issues etc.

However recently it has been observed that members of JSA face considerable administrative difficulties due to the non-availability of a Judicial Officer in the said post which was originaly formulated for a Judicial Officer.

Having considered this backdrop, it is with great concern, Executive Committee of JSA has unanimously decided to respectfully request the JSC to consider in appointing a suitable District Judge or Magistrate for the post of Additional Secretary (Judicial) of the Ministry of Justice as to meet the initial purpose of it's formulation.

Thank You,

Isuru Neththikumarage,
Secretary,
Judicial Service Association.

On this day 04th of June 2024,
At Galle Magistrate Court.

Letter to His Lordship the Chief Justice dated 24.06.2024

As per the decision taken at the special executive committee meeting held on 20th June 2024, JSA wrote to His Lordship Chief Justice Jayantha Jayasuriya P.C indicating the displeasure of the JSA regarding the speech made by Dr. Wijedasa Rajapakse, Minister of Justice in the parliament and request immediate steps to uphold the independency and the public trust of the judiciary.

Judicial Service Association of Sri Lanka

His Lordship Chief Justice Jayantha Jayasuriya,

Chamber of the Chief Justice,

Superior Court Complex,

Colombo 12.

Re: The controversial speech made by the Minister of Justice in the parliament on 19.06.2024 undermining the Independence of the Judiciary

(1) A special Exco meeting of the Judicial Service Association (JSA) was held on 20.06.2024, in consequent to the highly controversial speech made by the Minister of Justice in the Parliament regarding the judiciary on 19.06.2024. Having deeply discussed about the negative impact of the same, the JSA made following observations:

- that the underlying purpose of that controversial speech is to fulfill ulterior political goals by undermining the independence of the judiciary and removing, transferring or discouraging the strong and independent high officials in the judicial sector.

- that the past period of nearly 6 years reflects the golden era of the judiciary, since the judges were able to work independently without any internal pressure or interferences from the Judicial Service Commission (JSC) or its' Secretariat. It is evident that such an independent judiciary has become a bar to achieve some ulterior political goals.
- that the JSA had foreseen the possibility of generating this type of a critical scenario and has already informed to the JSC by its' letter dated 07.05.2024.
- that this is not a critical situation, which was created suddenly, but a situation gradually created from time to time in the recent past.

(2) While it is the prime duty of the Minister of Justice to safeguard the judiciary in and outside the parliament, he has attacked the same disregarding the noble responsibility vested on his shoulders as per the high standards of Westminster Parliamentary System. If there are allegations against some judges, it is the responsibility of the Minister of Justice to refer them to the relevant authority for necessary steps. The JSA is shocked by this sudden, improper and irresponsible move of the Minister to attack the entire judiciary which can amount to a bad precedent as well. If the Minister of Justice was aggrieved by an order of the court while being a party to a litigation, he should have followed the proper legal procedure, without making malicious statements publicly in the house under the cover of parliamentary privileges.

(3) In the absence of the intervention of the JSC at this crucial juncture, this type of targeted attempt to weaken the independence of the judiciary and take control of the same to the hand of the legislature or the executive may be a success and it would badly affect the constitutional concept of separation of powers derived by peoples' sovereignty. In the near future, the judiciary may sometimes have to fulfill some decisive constitutional tasks and to protect the law and order. The burden of discharging this utmost important task properly rests on the shoulders of judges. For that purpose, judges must be able to work independently and fearlessly. In the presence of this type of a critical stage, removal of strong and independent high officials in the judicial sector from their responsibilities will discourage all judges and it will be a cause to collapse the good

image of the judiciary before the public as well. Hence, it is the high time to make firm and prompt decisions.

(4) Accordingly, the JSA draw your Lordships' attention to the following factors:

(a) It is the inevitable responsibility of members of the judiciary to defeat all attempts of destroying the independence and good image of the judiciary and safeguard the same unconditionally.

(b) It is the task of the JSC to make all necessary inquiries promptly, regarding the judges who have some allegations and reveal the outcome of it to the society in order to build up eroding public confidence over the entire judiciary.

(c) There is an urgent need to discourage the attempt of the Minister of Justice to influence over the independence of the judiciary, by deposing the present Secretary of JSC in order to succeed hidden agendas through the judiciary.

In order to control the present critical situation, the JSA requests the JSC to take abovementioned steps immediately and create a safe environment for the judges to work independently, impartially and fearlessly.

Isuru Neththikumarage,

Secretary,

Judicial Service Association.

Isuru Neththikumarage
Secretary
Judicial Service Association

On 24th June 2024,

At Galle Magistrates' Court.

Media Statement Issued by JSA

As per the decision taken at the special executive committee meeting held on 20th June 2024, JSA issued a media statement condemning the controversial statement made by the Minister of Justice in the Parliament on 19th June 2024.

මාධ්‍ය නිවේදනය

2024.06.19 වන දින ශ්‍රී ලංකා පාර්ලිමේන්තුවේ විවාදයක් අතරතුරදී අධිකරණ අමාත්‍යවරයා විසින් අධිකරණ පද්ධතිය නිර්දය විවේචනයට ලක් කරමින් ඉදිරිපත් කරන ලද වගකීම් විරහිත ප්‍රකාශයන් පිළිබඳව ශ්‍රී ලංකාවේ දිසා විනිශ්චයකාරවරුන්ගෙන් හා මහෙස්ත්‍රාත්වරුන්ගෙන් සමන්විත වන ශ්‍රී ලංකා අධිකරණ සේවා සංගමයේ දැඩි අවධානය යොමු වී ඇත.

සමස්ථ අධිකරණ පද්ධතියට බලපෑම් වන පරිදි ඉදිරිපත් කරන ලද එම විවේචනයන් අසත්‍යයෙන් සත්‍යය වෙන් කර නොගෙන ප්‍රතිපාර්ශ්වයන් විසින් දේශපාලනමය වශයෙන් තමන්ගේ පැවැත්ම අභියෝගයට ලක් කර ඇති නඩුකරයන් වලදී අදාල අධිකරණයන් විසින් නීතියට අනුකූලව නිකුත් කරන ලද තීන්දු හා නියෝග වලින් අතෘප්තියට පත් වීම මතම සැලැසුම් සහගතව සිදුකරන ලද්දක් බව අපගේ නිරීක්ෂණයයි. යම් අධිකරණ තීරණයකින් අතෘප්තියට පත් වන පාර්ශ්වයක් ව්‍යවස්ථාපිත අභියාචනා කාර්යපටිපාටිය වෙත යොමු නොවී මහජනතාවගේ පරමාධිපත්‍යය ක්‍රියාත්මක කරන එක් කුළුණක් වන උත්තරීතර ව්‍යවස්ථාදායකය භාවිතා කර ස්ථාවර නියෝග 91(ඊ) වගන්තිය මගින් පවතින නඩුවකට බලපෑම් වන පරිදි අදහස් ප්‍රකාශ කිරීම වළක්වා තිබීම නොසළකා පාර්ලිමේන්තු වරප්‍රසාද වලට මුවා වී එකී මහජනතාවගේ පරමාධිපත්‍යය බලය ක්‍රියාත්මක කරන තවත් කුළුණක් වන අධිකරණය වෙත ද්වේෂසහගත ලෙස විවේචන එල්ල කිරීම ප්‍රජාතන්ත්‍රවාදී සමාජයක් සඳහා අත්‍යාවශ්‍ය පදනමක් වන අධිකරණයේ ස්වාධීනත්වය ප්‍රසිද්ධියේ අභියෝගයකට ලක් කිරීමක් ලෙස අපි දකිමු.

අපක්ෂපාතී විනිශ්චයකාරවරුන් අපකීර්තියට පත් කිරීම සඳහා වූ නිශ්චිත ඉලක්කගත ව්‍යාපෘතියක් කොටස් වශයෙන් දිගහැරෙමින්

පවතින බව අප සංගමය නිරීක්ෂණය කරමින් ඇති බවද අධිකරණ පද්ධතියට එල්ල වන බාහිර බලපෑම් වළක්වා එහි යහපැවැත්ම උදෙසා වැදගත් තීරණයන් ගනු ලැබූ විනිශ්චයකාරවරුන් ස්ථාන මාරු වී ගිය පසු ඔවුන්ට පෞද්ගලිකව අපකීර්තියක් ඇති වන මතවාද නිර්මාණය කිරීම එහි එක් පියවරක් වශයෙන් සිදුවෙමින් පවතින බවද එහි අවසාන අරමුණ විනිශ්චයකාරවරුන් නිර්භීතව හා අපක්ෂපාතීව අධිකරණයේ ස්වාධීනත්වය වෙනුවෙන් බලවත් ලෙස පෙනී සිටීම වළක්වා බාහිර බලවේගයන්ට අවශ්‍ය ආකාරයට මෙහෙයවිය හැකි දුර්වල තත්ත්වයකට පත් කිරීම බවද එහිදී මූලික වශයෙන් කොළඹ හිටපු ප්‍රධාන මහෙස්ත්‍රාත්වරයා හා ගල්කිස්ස හිටපු මහෙස්ත්‍රාත්වරයා ඉලක්ක කරමින් ඇති බවට අනාවරණය වී ඇති බවද අප සංගමය 2024.05.07 වන දින අධිකරණ සේවා කොමිෂන් සභාව වෙත ලිඛිතව වාර්තා කරන ලදී.

එයට සමගාමිව ඉතිහාසය පුරා විවිධ අවස්ථාවන් වලදී අඩු වැඩි වශයෙන් මුල් අවස්ථා අධිකරණ කටයුතු වලට එල්ල වූ බාහිර බලපෑම් විනිශ්චයකාරවරුන්ට සන්නිවේදනය වීම නතර කරන ලද පුද්ගලයා වන අධිකරණ සේවා කොමිෂන් සභාවේ වර්තමාන ලේකම්වරයා එම තනතුරෙන් ඉවත් කිරීම සඳහා ව්‍යාජ මතවාද නිර්මාණය කිරීමේ ව්‍යාපෘතියක්ද ක්‍රියාත්මක වෙමින් ඇති බව අප නිරීක්ෂණය කර තිබුණි. මුල් අවස්ථා අධිකරණ වල තීරණයන් තමන්ට අවශ්‍ය පරිදි හසුරුවා ගැනීමට අවශ්‍ය වූ සියලු දූෂිත බලවේගයන් විටින් විට ඔහුව ඉලක්ක කිරීමේ අවස්ථාවන් කිහිපයක් මීට පෙරද අප විසින් කල් තබා නිරීක්ෂණය කර පරාජයට පත් කර තිබේ. තීරණාත්මක අවස්ථාවන්හීදී එම උත්සාහයන් නව මුහුණුවරකින් නැවත නැවත ඉදිරිපත් විය හැකි බවට අප දැන සිටි අතර අධිකරණ පද්ධතියට එල්ල වන බාහිර බලපෑම් වලින් විනිශ්චයකාරවරුන් ආරක්ෂා කර ගැනීමට බලවත් සහ වෙහෙසකාරී කාර්යභාරයක් ඉටු කරමින් සිටින ලේකම්වරයා ආරක්ෂා කිරීමට අප සංගමය කොන්දේසි විරහිතව හා ඒකමතිකව පෙනී සිටින්නෙමු. ශීර්ෂගත පාර්ලිමේන්තු විවාදයේදී අධිකරණ අමාත්‍යවරයා විසින් තම නිර්දය විවේචනයන්ට පාදක කර ගනු ලැබුවේද සමහරක් සමාජ මාධ්‍යයන් හරහා නිර්මාණය කරමින් තිබෙන්නේ යැයි අප විසින් පුර්වාපේක්ෂණය කරන ලද එම කරුණුම වේ.

අධිකරණ අමාත්‍යවරයා යනු අධිකරණයේ සාමාජිකයෙකු නොවුනද වෙස්ට්මින්ස්ටර් පාර්ලිමේන්තු ආකෘතිය තුල අධිකරණයේ ස්වාධීනත්වයට හා යහපැවැත්මට එල්ල වන බාහිර බලපෑම් වලදී විනිශ්චයකාරවරුන්ට තම වෘත්තීයේ උසස් සම්ප්‍රදායන් හේතුවෙන් ඒවාට එරෙහිව ප්‍රසිද්ධියේ ක්‍රියා කිරීමට නොහැකි වීම මත ව්‍යවස්ථාදායකය හෝ විධායකය තුලදී හා ඉන් පිටතදී අධිකරණ පද්ධතියේ ගෞරවය ආරක්ෂා කරන පුද්ගලයා බවට සාම්ප්‍රදායිකව පත්ව සිටියේ ඔහුය. එවැනි නීතියේ පාලනය උදෙසා වැදගත් හා සංවේදී වගකීමක් දරණ තැනැත්තෙකු අධිකරණය ඉදිරියේ විනිශ්චයට

භාජනය වී ඇති නඩුකරයක පාර්ශ්වකරුවෙකු වී එහි තීරණයෙන් අතෘප්තියට පත් වීම හේතුවෙන්ම උත්තරීතර පාර්ලිමේන්තු සභාව තුලදී අධිකරණ පද්ධතිය හෑල්ලුවට ලක්වන ප්‍රකාශයන් නිකුත් කිරීම ව්‍යවස්ථාදායකය හා අධිකරණය අතර අනවශ්‍ය ගැටුමක් ඇති කිරීමට හේතු විය හැකි බවද එය බරපතල හා විනාශකාරී ප්‍රතිවිපාකයන් ඇති විය හැකි කොන්දේසි විරහිතව පරාජය කළ යුතු තත්ත්වයක් බවද අපගේ නිරීක්ෂණය වේ. අධිකරණ අමාත්‍යවරයා රටේ අධිකරණ පද්ධතියේ විශ්වාසය අහිමි කරගත් වගකීම් විරහිත පුද්ගලයෙකු බවට පත්වීම කෙරෙහි අපි බෙහෙවින් කනස්සල්ලට පත්ව සිටිමු.

ශිෂ්ඨ සම්පන්න සමාජයක් උදෙසා ස්වාධීන අධිකරණයක පැවැත්ම ආරක්ෂා කර ගැනීම සෑම පුරවැසියෙකුටම ඇති අත්හල නොහැකි හා සාමූහික වගකීමක් වේ. එහිදී පුරවැසියාගේ පරමාධිපත්‍යය බලතල ක්‍රියාත්මක කරන ප්‍රධාන ආයතන ත්‍රිත්වය එකිනෙකාගේ වගකීම් හා ගෞරවය කෙරෙහි අවබෝධයෙන් ක්‍රියා කිරීමට සමත් පුද්ගලයින්ගෙන් සංගෘහිත විය යුතුය. ඒවායේ සාමාජිකයින් වගකීම් විරහිතව පුද්ගලික අවශ්‍යතා මත අනිකා කෙරෙහි වෛරී ආකල්පයකින් ක්‍රියා කරන තත්ත්වයකට පත් වුවහොත් එයම පාරාවළල්ලක් වී ආයතන ත්‍රිත්වය කෙරෙහිම මහජන විශ්වාසය ක්‍රමිකව බිඳ වැටීම වැළැක්විය නොහැක. අධිකරණ අමාත්‍යවරයාගේ වගකීම් විරහිත ප්‍රකාශයන්හි අවසන් ප්‍රතිඵලය එය විය හැකි බවට අප සංගමය පාලන ක්‍රමයේ වැදගත් වගකීම් දරණ සියලු පාර්ශ්වයන්ට අනතුරු අඟවන්නෙමු.

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2024.06.24 වන දිනදීය.

FIRM STAND AND PROMPT RESPONSE OF JUDICIAL SERVICE ASSOCIATION TO THE ALLEGATIONS MADE BY THE MINISTER OF JUSTICE AGAINST THE JUDICIARY

The allegations made by the Minister of Justice Dr. Wijeyadasa Rajapakse against the judiciary in parliament on 19th June 2024 have sparked significant debate and concern within the legal community and society. In response to those allegations a Special Executive Committee meeting was held on 20th June 2024 and unanimously decided to issue a media statement condemning the controversial statement made by the Minister of Justice in Parliament House and write a comprehensive letter to all three commissioners of the Judicial Service Commission seeking firm and prompt decisions to safeguard the independence of the judges and the judiciary.

Accordingly on 24th June 2024, a media statement signed by the president and secretary of the JSA was released. Thereafter, the Minister of Justice Dr. Wijeyadasa Rajapakse wrote to Honorable Speaker of the Parliament by letter dated 25th June 2024 alleging that the press release issued by the JSA has infringed upon parliamentary privileges and requested the Honorable Speaker to summon the president and the secretary of JSA before the powers and privileges committee of parliament.

In the Special Executive Committee Meeting held on 26th June 2024, the Executive Committee decided to call a Special General Meeting to discuss the negative impacts of malicious statement against judicial decisions or judges and issues related thereto. On 30th June 2024 the Special General Meeting was successfully held with the participation of 141 members and in the said Special General Meeting members of the JSA unanimously decided that,

1. All the decisions taken by the Executive Committee of the Judicial Service Association upon the controversial statement made by the Minister of Justice are the collective decisions which reflect the view of the general membership of the Judicial Service Association.
2. Judicial Service Association further observes that there is a danger of loosing the public confidence on the administration of justice system due to the irresponsible statement of the Minister of Justice. Therefore, it is the inevitable duty of all members of the pillars which execute the people's sovereignty to assure the independence of the judiciary and proper functioning of check & balance system
3. Convey the aforementioned decisions in (1) & (2) to the Judicial Service Commission and further inform the relevant institutions when a necessity is arisen.

His Lordship Chief Justice Jayantha Jayasuriya PC by letter dated 26th June 2024 to the Honorable Speaker addressed the issues raised by Justice Minister Dr. Wijeyadasa Rajapakse. In addition, His Lordship Chief Justice Jayantha Jayasuriya PC as the chairman of the JSC and its members directed separate observations to the Honorable Speaker with regard to the allegations raised by the Justice Minister. In the said observations Honorable Members of the JSC stated that the press release of the JSA was based on an official matter of

the JSA and paragraph 02 of the JSC circular no. 328 only states that if the independence and dignity of the judiciary is harmed by issuing a media statements appearing in the electronic and print media, such actions should be voided.

On 9th July 2024 by addressing the parliament Justice Minister informed that he is not making the request that they (two judges who signed the media statement) should be summoned at this time.

On a decision taken at the Special Executive Committee meeting held on 18th July 2024, four representatives of JSA Executive Committee had discussions with JSC and its Secretary on 22nd July 2024. During the meeting His Lordship Chief Justice and other two Commissioners of JSC and its' Secretary highly appreciated the duty done by the JSA alone for the protection of the entire judiciary when it was absolutely necessary. Having considered the representation made by JSA, the JSC has decided to postpone the appointment process of a new Secretary to JSC in this crucial moment.

The executive committee of the JSA salute its' proud members for raising their voice to safeguard the independence of the judiciary in the crucial time without fear.

“ When you were made a leader, you weren't given a crown; you were given the responsibility to bring out the best in others. ”

Jack Welch (An American business executive, chemical engineer, and writer 1935-2020)

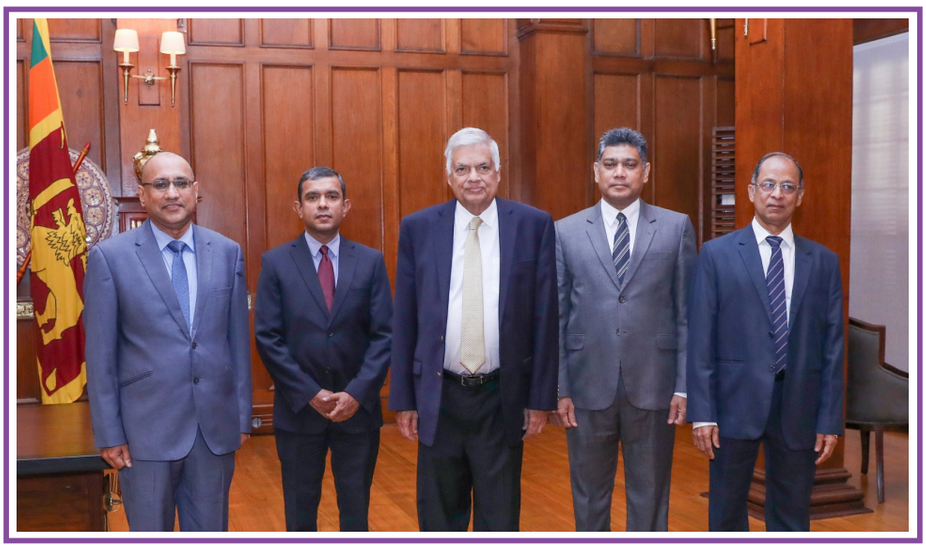
Retirement of His Lordship Justice Vijith K. Malalgoda

His Lordship Justice Vijth K. Malalgoda retired from His Lordship's Nobel service to the Sri Lankan Judiciary on 19th August 2024.

Justice Malalgoda is an old boy of Dharmaraja College, Kandy. Justice Malalgoda entered Law College in 1979 and enrolled as an Attorney-at-law in 1982. Thereafter, Justice Malalgoda joined the Attorney General's Department as a state Counsel and served in several posts in Attorney General's Department including those of Senior State Counsel, Deputy Solicitor General and Additional Solicitor General.

Justice Malalgoda was appointed as President of Court of Appeal on 9th September 2014. After serving as President of Court of Appeal Justice Malalgoda was appointed as a Judge of Supreme Court on 10th May 2017. Justice Malagoda assumed duties as a member of Judicial Service Commission in 2023.

JSA appreciate the valuable service rendered by His Lordship Vijith K. Malagoda for the Judiciary of Sri Lanka and JSA wish His Lordship success, a long life and contended and happy retirement.



New Appointments to the Court of Appeal

Judges of the High Court, K.M.G.H. Kulatunga, D.Thotawatte, R.A. Ranaraja and Senior Deputy Solicitor General M.C.L.B. Gopallawa have been appointed as Judges of Court of Appeal on 6th September 2024.

JSA wishes all the best on their Lordship's new appointments.

Experience sharing webinars organised by the JSA

JSA Webinar No. 3 on Practical issues relating to Court Administration – From the perspective of Head of the Department – Part 2 (Applicability of Financial Regulations) was held on 24th July 2024 under the patronage of His Lordship Vikum Kaluarachchi, judge of the Court of Appeal and Hon. Lanka Jayarathne, judge of the High Court.

JSA Webinar No. 2 on Practical issues relating to Court Administration – From the perspective of Head of the Department – Part 1 (Applicability of Establishment Code) was held on 12th June 2024 under the patronage of His Lordship Vikum Kaluarachchi, judge of the Court of Appeal and Hon. Lanka Jayarathne, judge of the High Court.

Evaluation of Evidence in Criminal Case; A Practical Approach

Justice Wickum A. Kaluarachchi
Judge of the Court of Appeal

What is Evidence?

Definition of the Judicial Evidence is "statements of the witnesses or production of the documents permitted by law in order to prove or disprove matters of facts under inquiry".

Section 3 of the Evidence Ordinance (hereinafter referred to as 'EO) explains what is oral evidence and what is documentary evidence.

The 'best evidence' rule contains in sections 60 and 64 of the EO. Simply, the best evidence is direct oral evidence and primary evidence of documents.

Oral Evidence and Documentary Evidence

Oral Evidence: All statements permitted by the court to be elicited from witnesses in relation to matters of facts under inquiry.

Documentary Evidence: Any evidence introduced at a trial or hearing in the form of a document. Primary evidence is the document itself.

Direct Evidence and Circumstantial Evidence

Direct Evidence consists of the testimony or assertions of a person who claims to have perceived facts with his own sense. It includes the production of documents.- section 60 explains what is direct oral evidence.

Circumstantial Evidence: Any fact from which the fact in dispute may be inferred: In a murder case, the discovery of a crime weapon, blood stains, The government analyst's or EQD's opinion, the accused running away from the crime scene, evidence of absconding, and prior acts that infer the motive are circumstantial evidence.

Real Evidence and Hearsay Evidence

Real Evidence consists of objects produced for inspection by the court to prove the existence or non-existence of the fact in issue. Eg: material objects such as a weapon used in a crime, bloodstained clothing, photographs, fingerprints, palm impressions. Real evidence generally requires an introduction or explanation by oral evidence.

Hearsay Evidence - The Evidence Ordinance does not state anywhere that hearsay is inadmissible. However, the rule of inadmissibility of hearsay evidence is based on section 60 of the EO which states; If it refers to a fact that could be seen or heard, it must be the evidence of a witness who saw or who heard that fact. In certain exceptional circumstances, hearsay is admissible-section 17 to 39 of the Evidence Ordinance.

Tests applied in Evaluation of Evidence

1. Test of Probability and Improbability. - In deciding the truthfulness of evidence, the trial Judge must ask himself whether the story narrated by the witness is probable.
2. Test of Means of knowledge. - Witness who says that he saw the incident must give reasons for his presence at the scene and the reasons must be acceptable. If there are no reasons or they are unacceptable, Court has the discretion to reject the evidence of the witness.

3. Test of inconsistency per se; - inconsistencies in witness's own evidence. Internal inconsistencies at the trial itself and inconsistencies with what he had said on the other occasions. Eg; the first complaint made to the police in terms of section 109 read with section 444 of the CCPA, Section 157 of the EO

4. Test of inconsistency inter se; - Inconsistencies of his evidence with other witnesses 'evidence.

5.Tests of promptness /spontaneity- It is important that the witness makes a prompt statement to the police. This shows that the witness is a credible witness.

However, evidence should not be rejected on the ground of delay itself. In Sumanasena V. Attorney General - (1999) 3 Sri L.R. 137, it was held that "Just because the witness is a belated witness Court ought not to reject his testimony on that score alone, Court must inquire into the reason for the delay and if the reason for the delay is plausible and justifiable, the Court could act on the evidence of a belated witness"

Bandara V. The State - (2001) 2 Sri L.R. 63 - delayed witness's evidence could be acted upon if there were reasons to explain the delay.

6. Test of interest and disinterestedness - officers of Bribery Department (evidence of a Decoy) are interested witnesses. - see also Weragodagamage Don Sunil V. The Attorney General - (1999) 3 Sri L.R. 191.

7.Test of demeanour.

10. Test of falsehood.

Presumption of Innocence-

James Silva V. The Republic of Sri Lanka - (1980) 2 Sri L.R. 167

Then there is this serious misdirection in law, namely, to quote the trial Judge,

"I had considered the defence of the accused and I hold that it is untenable and false in the light of the evidence led by the prosecution."

It is a grave error of law for a trial Judge to direct himself that he must examine the tenability and truthfulness of the evidence of the defence in the light of the evidence led by the prosecution. Our criminal law postulates a fundamental presumption of the legal innocence of every accused till the contrary is proved. This is rooted in the concept of legal inviolability of every individual in our society; now enshrined in our Constitution. There is not even a surface presumption of truth in the charge with which an accused is indicted. Therefore, to examine the evidence of the accused in the light of the prosecution witnesses is to reverse the presumption of innocence.

Proving a Criminal Case - The Burden of ProofIn Pantis V. The Attorney General - (1998) 2 Sri L.R. 148, it was held that "The burden of proof is always on the prosecution to prove its case beyond reasonable doubt and no such duty is cast on the accused and it is sufficient for the accused to give an explanation which satisfies courts or at least is sufficient to create a reasonable doubt as to the guilt".

Karunadasa V. OIC Motor Traffic Division, Police Station, Nittambuwa-(1987)1Sri L.R. 155.

The Magistrate must give reasons for his conclusions and scrutinize the evidence led on behalf of the accused. Failure to give reasons can occasion a failure of justice. An outline of the facts embellished with phrases like "I accept the evidence of the prosecution", 'I disbelieve the defence" is insufficient to discharge the duty cast on the Judge. Section 283 (1) of the Code of Criminal Procedure Act makes it imperative to give reasons in the judgment. The Magistrate has said "the evidence of the witness called by the accused does not in any manner

help the defence. Therefore, I accept the evidence adduced on behalf of the prosecution'. This shows that the Magistrate has given his decision very largely on the weakness of the defence rather than on the strength of the prosecution. It is an imperative requirement that the prosecution must be convincing no matter how weak the defence is before the court can convict. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed by the law and his guilt must be established beyond a reasonable doubt.

Ellenborough dictum

The dictum of Lord Justice Ellenborough in Rex V. Cochrane and others-1814Gurney's Reports 479, could be quoted as follows;

"When the prosecution establishes a strong and incriminating cogent evidence against the accused, the accused in those circumstances was required in law to offer an explanation of the highly incriminating circumstances established against him".

The Attorney General V. Potta Naufer and Others (Ambepitiya Murder Case) -(2007) 2 Sri L.R. 144

The 'Ellenborough dictum" has been extensively discussed in this case. The following portion of the said Judgment is important to understand the said dictum.

"It was in this context that the trial Judges have referred to the dictum of Lord Ellenborough which I set out below: "No person accused of a crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but nevertheless if he refuses to do so, where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious appearance which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or adduced would operate adversely to his interest." Lord Cochrane and others (supra). As quoted by E.R.S.R.Coomaraswamy-Law of Evidence, Vol.I page 21".

Baddewithana V. Attorney General - (1990) 1 Sri L.R.275

It was his contention that the learned trial Judge had misdirected himself in drawing an adverse inference in terms of section 114 (f) against the accused-appellant in the present case. I regret I am unable to subscribe to this view contended for by Counsel. The inference that evidence which an accused might have called but has withheld was unfavourable to him is no doubt incompatible with the fundamental rule that an accused is free to elect whether he will or will not call evidence. However, it may be necessary to consider in an appropriate case, whether it is an inference that should in any case be drawn. The proper effect to be given to the failure of an accused to offer evidence when a prima facie case has been made out by the prosecution and the accused is in a position to offer an innocent explanation, is set out in the dictum of Abbott, J. in Rex v. Burdett- (1820)4 8 & Ald. 95, 120

llangatilaka And Others V. The Republic of Sri Lanka - (1984) 2 Sri L.R. 38.

Where a strong prima facia case has been made out against an accused and when it is in his own power to offer evidence, if such exists, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it would justify the conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interests.

Only admissible evidence should be considered

Hearsay Evidence

In the case of Subramaniam V. Public Prosecutor - (1956) 1 W.L.R. 965,Privy Council held that "Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence not the truth of the statement but the fact that the statement was made."

The hearsay principle is explained by E.R.S.R.Coomaraswamy in the following manner;

"The term 'hearsay' is sometimes misunderstood and is supposed to exclude evidence of the following nature, "I heard X say....." Such evidence is admissible and becomes direct evidence under section 60(2) of the EO as to the fact that the statement was made. But if the Court is called upon to assume the truth of what X said, the statement is inadmissible as hearsay"

Somasiri V.Queen-75 NLR 172-what the deceased told the accused, if someone heard, that is direct evidence. But if someone says that he heard the deceased was telling this to his father, it is hearsay.

Dias V.Queen-77 NLR 68-The first information is as much as hearsay as any other statement made outside a Court.

In terms of section 6 of the Evidence Ordinance, facts forming part of the same transaction are relevant. Illustration (a) of section 6 reads as follows:

> **"A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after it as to form part of the transaction is a relevant fact."** (Emphasis added)

·In evaluating documentary evidence also, only proved documents have to be taken into consideration.

Eg: Originals or secondary evidence when permitted, Deeds, from whose custody it was produced.

Sole Witness

The Attorney General V. Potta Naufer and Others (Ambepitiya Murder Case) -(2007) 2 Sri L.R. 144

In terms of section 134 of the Evidence Ordinance, the criminal charges against an accused can be proved by one witness alone, if the evidence is cogent, convincing, accurate, and credible and if on that evidence the ingredients of the charge could be proved beyond a reasonable doubt.

In the case of the Attorney General V. Devunderage Nihal- S.C. Appeal: 154/10,decided on 12th May 2011 it was held that "there is no requirement in law that the evidence of a police officer who conducted an investigation or raid resulting in the arrest of an offender need to be corroborated in material particulars." It was held further that "if such a proposition were to be accepted, it would impose an added burden on the prosecution to call more than one witness on the back of the indictment to prove its case in a drug-related offence, however satisfactory the evidence of the main police witness would be."

Police officers may make mistakes

It is to be noted that in the case of The Attorney General V. Sandanam Pitchi Mary Theresa-S.C. Appeal No. 79/2008, decided on 06.05.2010, it was observed that "Police officer are not infallible observers and may, like any other witness, make honest mistakes."

Evidence given by vulnerable parties

The approach to cross-examination of children and vulnerable witnesses is markedly different from that in relation to adults. The Judge has a clear obligation to control the cross-examination of children and vulnerable witnesses. In Barker (2010) EWCA Crime 4, the Lord Chief Justice considered the circumstances in which very small children might give evidence in criminal trials. The Court acknowledged that whilst the right of the defendant (accused) to a fair trial must not be undiminished, the trial process must cater for the needs of child witnesses and that the forensic techniques had to be adapted to enable the child to give the best evidence of which he or she is capable. (Crown Court compendium part I, May 2016)

Evidence of a child witness

A child does not have the same experience of life or the same degree of maturity, logic, perception, or understanding as an adult. So, a child may find it difficult to understand a question. Also, a child would not be able to describe things accurately and precisely.

A child may be tempted to agree with questions asked by an adult, whom the child may see as being in authority, particularly in a setting such as Courthouse. Also, if a child feels that what she/he is asked to describe is bad or naughty in some way, this may itself lead to the child being embarrassed and reluctant to say anything about it or to be afraid that she/he may get into trouble.

A child may not fully understand the significance of some things that have happened (which may be sexual) at the time they happened and this may be reflected in the way she/he remembers or describes them.

A child may not be able to explain the context in which events occurred and may have particular difficulty when answering questions about how he/she felt at the time or why she/he did not take a particular course of action.

A child's reason for the silence

The child may be confused about what has happened or about whether or not to speak out.

He/she may be blamed and punished for what has happened.

·The child may feel that she/he may not be believed.

The child may have been told to say nothing and threaten with the consequences of doing so.

·The child may be embarrassed because he/she did not appreciate at the time that what was happening was wrong.

The child may feel conflicted; loving the abuser but hating the abuse.

In the case of ThimbirigolleSirirathana Thero V. OIC, Police Station,Rasnayakepura - CA No. 194/2015, decided on 07.05.2019 It was held that "when a child is sexually assaulted by an adult, it is also natural for the victim's family to think twice before making a complaint to the police". Also held that"in cases of sexual offences, Courts have found that victims of sexual offences can react in different ways. Some may complain immediately. Others may feel for example afraid, shocked, ashamed, confused or even guilty and may not speak out until some time has passed. There is no typical reaction". (Crown Court compendium part I, May 2016) It was also held in the said Judgment that "When it comes to a child victim, he or she may even find it difficult to explain to Court the delay in making the complaint. The Trial Judge before whom the witnesses testified is the best person to decide on the credibility of the victim and the other witnesses, as he observed the demeanour and deportment of the witnesses".

All these matters in respect of vulnerable witnesses should be considered by the Judges in evaluating their

evidence. Evidence of vulnerable witnesses should not be evaluated as same as the other witnesses. It is better if you can get an expert's opinion on the mental condition of a child who was a victim of a crime or a witness of a crime.

Contradictions and Omissions

Contradictions - When marking contradictions, the trial Judge must not permit Counsel to produce the entire statement made by the witness in the course of the investigation. There is no provision to mark the entire statement.

Section 145 of the EO-"...If it is intended to contradict him by the writing, his attention must, before the writing can be proved; be called to those parts of it which are to be used for the purpose of contradicting him".

Omissions-

where is a provision to mark an omission? Who has the right to mark an omission? Banda and others V. Attorney General - (1999) 3 Sri L.R. 168

The right to mark omissions and proof of omissions is related to the right of the Judge to use the Information Book to ensure that the interest of justice are satisfied. Omissions do not stand in the same position as contradictions and discrepancies. The rule in regard t consistency and inconsistency is not strictly applicable to omissions.

Queen V. Muthu Banda -73 NLR 8- The failure of the witnesses to mention in their Police statements that the deceased handed the gun to Indranee before he was attacked is an omission on a vital part of the transaction.....How then could this vital matter be brought to the notice of the jury? Under Section 122(3) of the Criminal Procedure Code. (This is the section of the old Criminal Procedure Code and the present section of the Code of Criminal Procedure Act is 110(3)) it is the Court that has overall control over the statements recorded in the course of a Police investigation and the Court has a right to utilise the statements to aid it at the inquiry or trial. We are of the view that this is a case which required the intervention of the court in the administration of justice.

Oliver Dayananda Kalansuriya alias Raja V. The Democratic Socialist Republic of Sri Lanka-C.A. 28/2009, Decided on 13.02.2013.

"It is an accepted principle that a criminal case cannot be proved with a mathematical accuracy as it has to be proved by the evidence give by human witnesses. Thus, discrepancies, errors and contradictions are bound to occur. If they do not create a reasonable doubt in the prosecution case, Court should disregard them. Courts should not reject evidence of witnesses on the basis of minor discrepancies and contradictions".

The observations made in State of Uttar Pradesh v. Anthony - 1985 AIR SC 48are cited in the aforesaid case of Sunil v. Attorney General in the following way. **"The danger of disbelieving an otherwise truthful witness on account of trifling contradictions has been spotlighted. The Indian Judge observed that the witness should not be disbelieved on account of trivial discrepancies, especially where it is established that there is substantial reproduction in the testimony of the witness in relation to his evidence before the Magistrate or in the session Court and that minor variation in language used by witness should not justify the total rejection of his evidence".**

Also, it was held in Bandara V. The State- (2001) 2 Sri L.R 63 that **"discrepancies and inconsistencies which do not relate to the core of the prosecution case, ought to be disregarded especially when all probabilities factor echoes in favour of the version narrated by a witness".**

In Bhoginbhai Hirjibhai V. State of Gujarat AIR 1983 SC 753, The Indian Supreme Court held as follows:

"By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

Ordinarily, it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

Ordinarily, a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused or mixed up when interrogated later on".

The aforesaid portion of the Indian Supreme Court Judgment is cited in the case of A.K. Kamal Rasika Amarasinghe V. OIC Special Investigation Unit and Hon.Attorncy General- SC Appeal No.140/2010-Special Leave to Appeal No.118/10,decided on 18.07.2018.

Minor Discrepancies

Minor discrepancies do not affect the credibility of the witnesses or the prosecution case.

In the case of Sunil vs. The Attorney General (1999) 3 Sri LR 191, it was observed that **"the Court must not be unmindful of the fact that they are human witnesses and it is a hallmark of human testimony that such evidence is replete with mistakes, inaccuracies, and misstatements.** Also, it is stated in this judgment that **the court has to be equally mindful of the fact that the evidence tendered by human testimony will suffer from certain deficiencies and defects. It is in this light that Justice Cannon in Attorney General v. Visuavalingam -47 NLR 286 emphasized that no prudent and wise Judge would disregard testimony for the mere proof a contradiction but that a wise Judge should critically assess and evaluate the contradiction. He emphasized the Judge must give his mind to the issues what contradictions are material in discrediting the testimony of a witness".**

Rebutting a Contradiction

Dharmadasa Wijesekera Pathirana alias Chutimalli and another V. The State-C.A.No.100/2005, Decided on 04.12.2008

"I hold that when a contradiction is marked with a former statement of a witness, the prosecution or the defence as the case may be, is entitled in re-examination to mark the other portions of his statement to remove the wrong impression created by the contradiction".

Evidence that was not disputed is accepted.

The Indian judgment of Sarvan Singh v. State of Punjab (2002 AIR SC (iii) 3652)pages 3655 and 3656, was cited in the case of Ratnayake Mudiyanselage Premachandra v. The Hon. Attorney General C.A Case No. 79/2011, decided on 04.04.2017 as follows:

" 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."

In the case of Himachal Pradesh v. Thakur Dass (1983) 2 Cri. L. J. 1694 at 1701V.D Misra CJ held that "whenever a statement of fact made by a witness is not challenged in cross-examination, it has to be concluded that the fact in question is not disputed. Similarly in Motilal v. State of Madhya Pradesh (1990) Criminal Law Journal NOC 125 MP it was held that "Absence of cross-examination of prosecution witness of certain facts,

leads to inference of admission of that fact."

Trial Judge is entitled to peruse the statement of the witness

It is vital to examine whether the Trial Judge is entitled to peruse the statement of the witness.

In the case of King V. Cooray-28 NLR 74, the accused were charged with the murder of an Inspector of Police. At the trial the Presiding Judge, at the instance of the jury, called a witness, who, it was alleged, had heard the accused call to a police constable, traveling in a passing 'bus, to the following effect: "There, your Inspector is killed." When the witness denied that he heard such a statement, the Judge read out the statement made by him and recorded in the Police Information Book.

It was held that the statement did not amount to a confession within the meaning of section 25 of the Evidence Ordinance and a Court is entitled to use the in formation book to assist it in elucidating points which appear to require clearing up find are material for the purpose of doing justice (Queen Empress v. Manu (supra)). (Emphasis added)

In addition, in the case of K.B. Muttu Banda V. The Queen - 73 NLR 8, it was held that where, in a statement made by a witness to a police officer in the course of an investigation under Chapter 12 of the Criminal Procedure Code, the witness omitted to mention a material fact narrated by him in evidence subsequently at the trial, the statement to the police as recorded in the Information Book may be utilised by the Court under section 122 (3) of the Criminal Procedure Code to aid it at the trial in order to discredit the witness.

The following observations were also made in the said case: The failure of the witnesses to mention in their Police statements that the deceased handed the gun to 'Indranee' before he was attacked is an omission on a vital part of the transaction. In Queen v. Raymon Fernando | (1962) 66 N. L. R.1J it was held that an omission to mention in a statement a relevant fact narrated by the witnesses in evidence subsequently, does not fall within the ambit of the expression 'former statement" in Section 155 of the Evidence Act. How then could this vital matter be brought to the notice of the jury? Under Section 122 (3) of the Criminal Procedure Code, it is the Court that has overall control over the statements recorded in the course of a Police investigation and the Court has a right to utilise the statements to aid it at the inquiry or trial. We are of the view that this is a case which required the intervention of the court in the administration of justice. fa police officer who recorded the statement of a witness in the course of a police investigation was asked whether there was any mention in the statement of a material fact and he answered in the negative after refreshing his memory from the written record, we see no reason why the oral evidence so elicited should not be admissible without the necessity of the record being proved and marked. Different considerations would apply fa party wishes to prove the written record. To prevent the defence from discrediting a prosecution witness in such a case would be a serious fetter on the right of cross-examination. Moreover, if the statement is used by the police officer for the purpose of refreshing his memory, the defence have a right to cross-examine the witness on the statement. We are therefore, with all respect, not inclined to adapt the decision in the case of Raymon Fernando. The proper approach to the cross-examination of witnesses from the statements recorded in the course of a Police investigation is found in the observations of Garvin A.C.J. in the Divisional Bench case of King v. Cooray |(1926)28 N. L. R. 74 at 83.] (Emphasis added)

Accordingly, the Court of Criminal Appeal did not follow the decision of Queen v.Raymon Fernando and the decision of King v. Cooray was followed. Accordingly, it was held that for proper adjudication of the case, the trial judge is entitled to peruse the statements recorded in the course of the police investigations.

The aforesaid judicial authority refers to section 122(3) of the old Criminal Procedure Code. Sections 110(3)

and 110(4) of the present Code of Criminal Procedure Act contain comparable provisions to those found in Section 122(3) of the Old Criminal Procedure Code. The relevant sections of the old Criminal Procedure Code and the present Code of Criminal Procedure Act are reproduced here for convenience.

Section 122(3) Of the Old Criminal Procedure Code

122(3) than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court; but if they are used by the police officer or inquirer who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police officer or inquirer, the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply.

Nothing in this subsection shall be deemed to apply to any statement falling within the provisions of section 32 (1) of the Evidence Ordinance, or to prevent such statement being used as evidence in a charge under section 180 of the Penal Code.

Sections 110(3) and 110(4) of the present Code of Criminal Procedure Act 15 of 1979.

110(3) A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in court:

Provided that a statement made by an accused person in the course of any investigation shall only be used to prove that he made a different statement at a different time.

Anything in this subsection shall not be deemed to apply to any statement falling within the provisions of section 27 of the Evidence Ordinance or to prevent any statement made by a person in the course of any investigation being used as evidence in a charge under section 180 of the Penal Code

110 (4) Any criminal court may send for the statements recorded in a case under inquiry or trial in such court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial. Save as otherwise provided for in section 444 neither the accused nor his agents shall be entitled to call for such statements, nor shall he or they be entitled to see them merely because they are referred to by the court but of they are used by the police officer or inquirer or witness who made them to refresh his memory, or if the court uses them for the purpose of contradicting such police offence or inquirer or witness the provisions of the Evidence Ordinance, section 161 or section 145, as the case may be, shall apply:

Provided that where a preliminary inquiry under Chapter XV is being held in respect of any offence, such statements of witnesses as have up to then been recorded shall, on the application of the accused, be made available to him for his perusal in open court during the inquiry.

Circumstantial Evidence

In the case of Sajeewa alias Ukkuwa and others V. The Attorney-General (Hokandara Murder Case) - (2004) 2 Sri L.R. 263 at pages 279 and 280 an English decision regarding "Rope Theory" which was considered in King v Gunaratne-47 NLR 145 at 149 has been cited in the following way: "It is also to be borne in mind that the English decisions have evolved a set of principles and rules of caution which have been followed in Sri Lankan cases. Consideration of circumstantial evidence has been vividly described by Pollock C.B. in R v Exall

cited in King v Gunaratne - 47 NLR 145 at 149 in the following words:

"It has been said that circumstantial evidence is to be considered as a chain, and each piece as a link in the chain, but that is not so, for then of any one link breaks, the chain would fall. It is more like the case of a rope comprised of several chords. One strand of the rope might be insufficient to sustain the weight, but three strands together may be quite of sufficient strength. Thus, it may be in circumstantial evidence."

there may be a combination of circumstances, no one of which would raise a reasonable conviction or more than a mere suspicion; but the three taken together may create a conclusion of guilt with as much certainty as human affairs can require or admit."

There is along line of Judicial Authorities that explain how to prove a criminal charge on circumstantial evidence.

In Junaiden Mohomed Haaris Vs. Hon. Attorney General - SC Appeal 118/17,decided 09.11.2017, it was held that**"It was incumbent on the prosecution to establish that the circumstances the prosecution relied on, are consistent only with the guilt of the accused-appellant and not with any other hypothesis".**

In the case of King Vs. Abeywickrama -44 NLR 254, it was held that **"In order to base a conviction on circumstantial evidence the Jury must be satisfied that the evidence was consistent with the guilt of the accused and inconsistent with any reasonable hypothesis of his innocence".**

In King Vs. Appuhamy - 46 NLR 128, it was held that **"In order to justify the inference of guilt from purely circumstantial evidence, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explaining upon any other reasonable hypothesis than that of his guilt".**

It was also held in the case of Podisingho Vs. King-53 NLR 49 that **"In a case of circumstantial evidence, it is the duty of the trial judge to tell the Jury that such evidence must be totally inconsistent with the innocence Of the accused and must only be consistent with his guilt".**

In Don Sunny Vs. Attorney General (Amarapala murder case) - (1998) 2 Sri L.R.1 it was held that "when a charge is sought to be proved by circumstantial evidence the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence. On a consideration of all the evidence, the only inference that can be arrived at should **be consistent with the guilt of the accused only". It was held further in the said case that "the prosecution must prove that no one else other than the accused had the opportunity of committing the Offence, the accused can be found guilty only and only if the proved items of circumstantial evidence is consistent with their gilt and inconsistent with their innocence'.**

Common Intention

The case of David & another V. The Queen - 71 CLW 75 set out the guidelines to establish common intention.

(a) That the inference of common intention must not be reached unless the evidence irresistibly leads to it.

(b) That the mere presence of a person at the scene of the offence does not justify an inference of guilt.

(c) That the evidence against each accused must be considered separately.

Jayasinghege Wimalaratne alias Wimale Mudalali and Others V. The Attorney General (Shyama Dedigama Casel - (1997) 1 Sri L.R. 309, explains how 'common intention' and 'unlawful assembly' charges are proved.

"In order to attract liability under Section 32, the act of one accused should be made attributable to the others and there must be a sharing of a common murderous intention". (at page 330)

"Even if one or more of them had caused the injuries that resulted in the death of Shyama Dedigama then all the others who were members of that unlawful assembly would attract liability for the killing if the killing had been done by one or more of them irrespective of his or their identity as long as they were members of that unlawful assembly".(at page 329)

Queen V. Vincent Fernando and two others - 65 NLR 265

To be liable under section 32, a mental sharing of the common intention is not sufficient, the sharing must be evidence by a criminal act.

King V Assappu -50 NLR 324

Piyathilaka and two others V. Republic of Sri Lanka - (1996) 2 Sri L.R. 141

"Mere presence of the accused at the scene is not sufficient to establish that he shared a common intention upon which liability could be imposed on him".

Richard V. State (supra) - 76 NLR 534 at 546

"That in the absence of explanation..... entitled to draw the reasonable inference from all the circumstances that his presence at the scene was a "participatory presence" as distinguished from a mere presence which would have entitled him to an acquittal".

However, the physical presence till the conclusion of the event is not essential to prove participatory presence.

In Sarath Kumara V. Attorney General - C.A. No. 207/2008, Decided on 04.04.2014, it was held that "..... once a participatory presence in furtherance of a common intention is established at the commencement of an incident, there is no requirement that both perpetrators should be physically present at the culmination of the event unless it could be shown by some overt act that one perpetrator deliberately withdrew from the situation to disengage and detach himself from vicarious liability."

In the case of The Queen V. Mahatun -61 NLR 540 it was held that "Under section 32 of the Penal Code when a criminal act is committed by one of several persons in furtherance of the common intention of all, each of them is liable for that sot in the same manner as if it were done by him alone. If each of several persons commits a different criminal act, each act being in furtherance of the common intention of all, each of them is liable for each such as if it were done by him alone.

To establish the existence of a common intention, it is not essential to prove that the criminal act was done in concert pursuant to a pre-arranged plan. A common intention can come into existence without pre-arrangement. It can be formed on the spur of the moment".

Expert Evidence

In the case of Chandrasena alias Rale V. Attorney General- (2008) 2 Sri L.R.255it was held that "A medical witnesses called in as an expert s not a witness of fact. His evidence is really of an advisory character given on the facts submitted to him. Whilst the opinion of expert being a guide to Court, it is the Court which must come to its own conclusion with regard to the issues of the case. A Court is not justified in delegating its function to an expert and acting solely on latter's opinion."

It is to be noted that in a rape case the doctor can express his opinion whether a rape had been taken place. In a murder case, the Judicial Medical Officer could express his opinion whether it is a natural death or a crime had been taken place. Whether it is a murder or culpable homicide not amounting to murder or a death caused by negligence has to be decided on the other evidence of the case. Therefore, it has to be proved by the evidence of other witnesses that the offence set out in the indictment/charge sheet has been committed by the accused

and no one else.

In the case of A. Gratiaen Perera V. The Queen - 61 NLR 522 identical issue, hand-writing expert's evidence regarding a forgery has been discussed and held that "where a hand-writing expert testifies of forgery, his testimony should be accepted only if there is some other evidence, direct or circumstantial which tends to show that the conclusion reached by the expert is correct." A relevant portion of the decision of Mendis V. Jayasuriya - (1930) 12 C.L.R 44 has been cited in this case as follows: "Akbar J. took the view that the expert evidence should be used only in corroboration of a conclusion arrived at independently and not to convict a person on a charge of forgery if the other evidence is not conclusive. It would create some kind of suspicion but would not go beyond it."

In the case of H. A. Charles Perera and another V. M.L. Motha and another-65NLR 294 also it was held that "The evidence of a handwriting expert must be treated as only a relevant fact and not as conclusive of the fact of genuineness or otherwise of the hand-writing in question. The expert's opinion is relevant but only in order to enable the Judge himself to form his own opinion."

In Samarakoon V. The Public Trustee- 65 NLR 100 it was held that on an issue of forgery, the court may accept a hand-writing expert's testimony, provided that there is some other evidence, direct/circumstantial, which tends to show that the conclusion reached by the expert is correct.

In the case of Lily Perera V. Chandani Perera and others - (1990) I Sri L.R. 246it was held that the evidence of the hand-writing expert is a relevant fact but will to use only to assist the Judge himself to form his opinion.

The following potion stated in this Judgment is also important to determine the issue before us. "The law of evidence" 2nd Edition (1989) Volume 1in summing up the effect of the authorities, E. R.S.R. Coomaraswamy (at page 627) states thus: The correct position as to the value of the evidence of the hand-writing expert seems to be that his evidence must be treated as a relevant fact and not as conclusive of the fact of genuineness or otherwise of the hand-writing:His opinion is relevant but only in order to enable the Judge himself to form his opinion. (Charles Perera V. Motha) (1961) 65 N.L.R. 294 at 296, State of Gujarat V. Vinaya Lal Pathi AIR (1967) S.C. 778; (1967) Crime L.J. 668.

In Charles de Silva V. Ariyawathie de Silva and another- (1987) I Sri L.R.261 it was held that "Evidence of a handwriting expert is to be considered only as relevant fact and not conclusive of the genuineness or otherwise of the handwriting in dispute and that it is only relevant to enable the Judge to form his opinion".

It is apparent from the aforesaid Judicial Authorities that the expert's evidence is only relevant evidence of advisory character. Expert evidence should be used only in corroboration of a conclusion. But to arrive at a conclusion there must be some other evidence, direct or circumstantial.

Analyzing the Defence Case

Section 4(d) of the "International Covenant on Civil and Political Rights (ICCPR)Act No. 56 cf 2007" states that "a person charged of a criminal offence under any written law shall be entitled to examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him".

the Supreme Court of India, held in the case of Dudh Nath Pandey vs The State Of U.P, decided on 11th February 1981, reported in 1981 AIR 911,1981 SCR (2)771 that "defence witnesses are entitled to equal treatment with those of the prosecution. And, Courts ought to overcome their traditional, instinctive disbelief in defence witnesses. Quite often, they tell lies but so do the prosecution witnesses".

As decided in Kamal Addaraarachchi V. State - (2000) 3 Sri L. R. 393 that "it is a grave error for a trial Judge to direct himself that he was examined the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution".

Accused remain silent- Gunasekera V. Attorney General - 79(1) NLR 348 -Presumption 114(f) of the EO has no application to an accused in a criminal case when he exercised his statutory right to remain silent.

However, it is apparent that presently, our courts have deviated from the aforesaid decision of Gunasekera V. Attorney General.

Dock Statement

In the case of P.P. Jinadasa V. The Attorney General - C.A.167/ 2009, Decided on 21.11.2011, it is stated that "For the benefit of the legal practitioners and the trial Judge's in this country, we set down the following guidelines regarding evaluation of a dock statement. The court must consider the dock statement as evidence subject to the following two infirmities.

1. The dock statement is not made under oath.
2. The dock statement is not tested by cross-examination.

Trial Judge must bear in mind the following guide lines when dock statement is evaluated.

1. If the Court believes the dock statement it must be acted upon.
2. If the dock statement raises a reasonable doubt in the mind of the Court about the prosecution case, defence must succeed.
3. Dock statement should not be used against another accused.

In Wijeratne Mudiyanselage Jayantha Wijeratne V. The Hon. Attorney General -C.A. Appeal No. 218/2008, Decided on 06.03.2013 also same guidelines are set out.-See also Kularatne V.Queen-71 NLR 529

You have to find valid reasons if you are going to reject the position taken up by the Dock Statement.

Not taken up the position taken up in the D/S, at the stage of the prosecution is one ground.

Taken up a different version than the version taken up at the stage of the prosecution is another ground.

Improbability is another ground.

Alibi- Gunasiri & two others V. Republic of Sri Lanka - (2009) 1 Sri L.R. 39 -The failure to suggest the defence of alibi to the prosecution witness, who implicated the accused, indicates that it was a false one.

Identification of the Accused

Turnbull rules or guidelines were set out in the case of Regina V. Turnbull-(1976)3 WLR 445. It is to be noted that the Turnbull principle applies to mistaken identity. According to the Turnbull rules, it has to be examined closely the circumstances in which the identification by each witness had been made. How long did the witness have the accused under observation? At what distance? In what light? are material factors to be considered.

When you focus your mind on the aspects we discussed, I believe that you will be able to correctly analyze evidence in cases and write good Judgments.

Thank you.

Fixed Boundaries and General Boundaries in a Survey

The paramount duty vested to the court to identify the corpus of a partition action. When there is no fixed boundary but want it to be re-established and re-defined according to a previous plan, it is necessary to identify well-defined features of the prior plan to take as points of fixation. The degree of certainty is dependent upon the amount of fixation data on the old plan, which can be surveyed and shown on the new plan. Hon. Prabha Kumari Dela, Civil Appellate High Court Judge of Matara has discussed the difference between fixed boundaries and general boundaries which are commonly used for superimposition in the light of technics of surveying in the case of A. K. Indrani Chandralatha V A.L.A. Chandima Priyantha [SP/HCCA/MA/15/2023(F) - Decided on 07.08.2024]

As there is lack of authorities on that point, the said Judgment is herewith publish for your perusal.

Departmental Survey Regulations

https://www.survey.gov.lk/sdweb/pages_act_regulations.php?id=df211e328984885c33b1ddc602d286e8e63f4377

Technical Manual for the licence surveyors

https://www.landsurveycouncil.org/pdf/Hand%20Book%20for%20Guideline.pdf

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IN THE CIVIL APPELLATE HIGH COURT OF THE SOUTHERN PROVINCE HOLDEN AT MATARA OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

SP/HCCA/MA/15/2023(F)
DC Matara
Case No. P/23793

Anguru Kankange Indrani Chandralatha,
No.58, Paramulla Road,
Paramulla.

Plaintiff

- Vs -

1. Abeysingha Liyana Arachchige Chandima Priyantha,
   "Nandana Sewana", Madagoda,
   Kamburugamuwa.
2. Abeysingha Liyana Arachchige Nirosha Dilrukshi
3. Abeysingha Liyana Arachchige Nayosha Dilhani
   Both are at No.58, Paramulla Road, Paramulla.

4. Raigama Koralage Kamalawathie
5. Raigama Koralage Janaka Udaya Kumara
6. Kavisekara Malawarage Miyurin
7. Dharmadasa Samaraweera
8. Raigama Koralage Nandadasa

All are at Kekunagahahena, Labima, Kamburugamuwa.

Defendants

AND NOW BETWEEN

Anguru Kankange Indrani Chandralatha,
No.58, Paramulla Road, Paramulla.

Plaintiff-Appellant

- Vs -

1. Abeysingha Liyana Arachchige Chandima Priyantha,
   "Nandana Sewana", Madagoda,
   Kamburugamuwa.
2. Abeysingha Liyana Arachchige Nirosha Dilrukshi
3. Abeysingha Liyana Arachchige Nayosha Dilhani
   Both are at No.58, Paramulla Road, Paramulla.
4. Raigama Koralage Kamalawathie
5. Raigama Koralage Janaka Udaya Kumara
6. Kavisekara Malawarage Miyurin
7. Dharmadasa Samaraweera,
8. Raigama Koralage Nandadasa
   All are at Kekunagahahena, Labima, Kamburugamuwa.

Defendant- Respondents

BEFORE : Prabha Kumari Dela - H.C.J. (CA)
Chamath Madanayake - H.C.J. (CA)

COUNSEL : Mr. Chandima Perumpuliarachchi, AAL with
Mr. Suresh Samaranayake, AAL instructed by
Ms. Nilanthi Abeysundara, AAL appears for
the Plaintiff-Appellant.

Mr. Sampath Wijesinghe, AAL instructed by
Ms. T.N. Pinidiya, AAL appears for the 1st
Defendant-Respondent and instructed by
Ms. Manjula Kodithuwakku, AAL appears for the 2nd and 3rd Defendant-Respondents.

Mr. Amara Divakara Liyanarachchi, AAL with Mr. Chamith Gamage, AAL instructed by
Ms. Thanuja Weeraman, AAL appears for the
4th- 8th Defendant–Respondents.

WRITTEN SUBMISSIONS ON:
13.12.2023, 29.07.2024 (Plaintiff-Appellant)
30.01.2024 (by 1st Defendant-Respondent,
4th- 8th Defendant-Respondents, 2ndand 3rd Defendant-Respondents)
04.07.2024 (by 4th-8th Defendant-Respondents)
25.07.2024 (by 1st Defendant-Respondent)

ARGUED ON : 04.06.2024 (by way of written submissions)

DECIDED ON : 07.08.2024

JUDGMENT

PRABHA KUMARI DELA– HCJ (CA)

The partition action bearing No. P/23793 was instituted by the Plaintiff-Appellant (Plaintiff) for Lot 4, which is a divided and defined portion shown in the final partition plan No. 2000/12, prepared in the case No. P/17252 for the land known as Kolonnawila Kumbura. The devolution of title posited by the Plaintiff proposed that it should be apportioned amongst himself and the 1st to 3rd Defendant-Respondents (1st to 3rd Defendants) as per the schedule of shares delineated in the plaint. The 4th to 7th Defendants (Contesting Defendants), having been added as parties to the action, contested the corpus on the basis that lots 7, 8, and 9 in the preliminary plan are parcels of their land called Kekulugahahena and, therefore, should be excluded from the corpus. After the trial, the learned District Judge, by his judgment dated 17.11.2022, dismissed the case for lack of proof regarding the identification of the corpus. Dissatisfied with this outcome, the Plaintiff has preferred the instant appeal. The crux of their contention is that the trial Court failed to properly evaluate the evidence concerning the identification of the corpus, particularly the evidence related to the fixation of the previous plan on the survey of the present land.

As persistently held by our Courts the identification of corpus in a partition action is of paramount importance, so much so that, in failing which investigation of title becomes unneeded. In Jayasooriya v Ubaid [(1957) 61 NLR 352] it was held that "In a partition action there is a duty cast on the judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose, it is always open to him to call for further evidence (in regular manner) in order to make a proper investigation" .-{ Brumpy Appuhamy V Mendis Appuhamy [(1958) 60 NLR 337], Uberis V Jayawardane [(1959) 62 NLR 217] Hapuarachchi and Others V Podi Nilame [2021/1 Sri.L.R /134]}-It is of no doubt that the Plaintiff who seeks the partitioning has a cardinal duty to show with certainty, the land to be so partitioned. In failure to do so the entire case must stand dismissed.

The preliminary plan by the commissioner and his report would constitute vital evidence, in conjunction with rest of the evidence of the case as to the identity of the land.

The land proposed to be partitioned is depicted as Lot 4 in plan No. 2000/12, of the partition case No. P/17252, encompassing an extent of 4 acres and 18.30 perches. It is bounded as follows:

- North: Lot 3 of the same land defined in the same plan, Kotawilawaththa, Pinniyagodella, and Kekulugahahena.
- East: Pinniyagodella, Kekulugahahena, and Lot 1A in plan No. 1014
- South: Lots C, D, and E in plan No. 1014
- West: Lots C, D, and E in plan No. 1014 and divided and defined Lot 3 of this land called Kotawilawaththa.

The formation of the said land, the title thereto derived from the said partition case, and the devolution of title as set out in the plaint are undisputed. The sole matter in dispute is the identity of the corpus.

The licensed surveyor, Mr. Ivon P. Gallage, who served as the commissioner of the case, prepared the preliminary plan No. 2010/29 dated 28/11/2010, marked as "X" at trial. In this plan, the land is depicted from Lots 1 to 9. The boundaries and the extent coincide with the previous plan No. 2000/13 (P2). Some allotments from the northern direction were determined by superimposing plan P2 on the present surveyed boundaries of the land.

The contesting Defendants' position is that lots 7, 8, 9 are parts of their land called Kekulugahahena which is on the North of the corpus. Those allotments are outside the present physical boundaries, but within the superimposed lines delineating lot 4 in the plan P2.

Thus, it is a matter of common boundary between the said Defendants' land and the corpus. The Plaintiff has shown by way of the preliminary plan, the plan P2 and its superimposition on the former that the disputed lots belong to the corpus. The contesting Defendants testify that they possessed them as parts of their land for more than decades and the common boundary between the two lands should be the physical boundary existing on the ground as shown in the preliminary plan.

The Court was invited to adjudicate that question, upon considering the contrary positions taken up by the opposing parties.

The District Court found that the super imposition of the surveyor is not accurate as the points of fixation used therefor had been unreliable and susceptible to change; though used as data, certain changes in the stream to the South of the land are observable even to the naked eye; though it is stated that a road is used to identify the Northern boundary, a strip of land exists between the said road and the boundary, shown in red in the plan X. Hence, the evidence of the commissioner as to the identification of the northern boundary was considered to be false. It is further unacceptable to state that a ridge (Niyara) existed as the western boundary and was used for fixation. All in all, the purported points of fixation were held to be uncertain and impermanent, making the superimposition not proved to be accurate and acceptable. Without being satisfied as to the identity of the corpus, the action was dismissed.

The land to be partitioned is lot 4 in the plan P2 which is the final partition plan of the action bearing No.17252. As it is prepared by licensed surveyor Mr. Ivon. P. Gallage, he can be presumed to have been the commissioner in that case as well. The said plan P2 is dated 22.05.2000. The apportioning and division of the land has been done on 13.05.2000. The preliminary survey in that case had been done on 21.01.1995.

Mr. Gallage has been commissioned in this case to survey lot 4 in his previous plan P2, which he has done and depicted in the plan X. He has surveyed the present land on the ground and superimposed the plan P2 on that.

His fixation is the pivotal issue in this case. The commissioner has been called for oral examination in terms of Section 18 of the Partition Law. In his testimony he has described how he carried out the survey and identified the corpus. He has explained the points of fixation used and that he is satisfied that it is a precise super imposition.

The key points of fixation revealed in his testimony are the stream which is on the southern boundary; the road which runs across the land; the live fence along the road; the culvert at the south-western corner of the land; the ridge, lying along the southern boundary.

In the judgment the learned trial judge has referred to the points of fixation used to identify each boundary. He has stated that though the northern boundary is identified by the live fence, it has been subject to certain

changes; though it is said that with the aid of other points of fixation like road and culvert the commissioner was able to determine the northern boundary, there are no such features towards the northern part of the land. Likewise, it has been further held that the points of fixation used to identify the other boundaries are also incorrect.

When examining the judgment, it appears that the learned trial judge had been of misconception that for determination of each and every boundary, there should be separate or distinct points of fixation.

In a survey, there can be fixed boundaries and general boundaries. Let me quote from the Technical Manual for The Licensed Surveyors (2015), prepared by the Surveyor General.

Definition of Boundaries

a) Fixed boundary: it is a boundary that is of man-made features and consists of permanent features such as land marks, boundary walls, walls, wire fences with concrete posts or natural rock walls. Missing features on a fixed boundary should be able to be re-established accurately.
b) General Boundary: it is a boundary that consists of natural features of which position is vague (cannot be determined precisely). Some of the examples are live fences, hedges, banks, ridges, ditches, grass lines etc.

On this subject the Departmental Survey Regulations of Sri Lanka Survey Department can be referred to have some guidance. As it states when there is no fixed boundary but want it to be re-established and re defined pursuant to a previous plan for the same, it is necessary to identify well defined features from the previous plan to take as points of fixation. They can be permanent features or impermanent features which are prone to change. The degree of accuracy of a fixation depends on the number and the quality of such points.

Fixation is the term used for laying down the boundaries of old plans. In case where old pickets are not available, features and boundaries on the old plan which are still on the ground should be surveyed, plotted on the new plan, and the best possible fit of an accurate tracing prepared from the old plan should then be obtained. The detail surveyed for "fixing" old work is known as "fixation data". The degree of certainty is dependent upon the amount of fixation data on the old plan, which can be surveyed and shown on the new plan. It is therefore essential that as much data as possible should be picked up, and that the most suitable and reliable data are adopted for fixation. They are used as key control points when laying the tracing or accurately in positioning and aligning the old plan on top of the new one. When laying the old plan or tracing of it, the fixation points act in guidance in aligning the plans accurately. Once they are so aligned the boundaries from the old plan would be traced to the new plan and those boundaries will represent the original land and its other features. In that manner the old boundaries on the present plan can be ascertained and shown with accuracy.

When the facts of the case in hand are considered in the above context, it can be seen, that the commissioner had been able to trace several fixation data, such as the road, stream, culvert, live fence, ridge along the stream etc. According to the contesting Defendants themselves, the road had remained unchanged for more than 5 decades. (vide proceedings on testimony of the 7th Defendant dated 02/08/2017 at page 11,13, and proceedings dated 03/02/2016 on the testimony the 8th defendant at page 14). So does the stream which flows right along the southern boundary. I cannot accede the personal observation of the trial Court that a difference in plans is seen to the naked eye, especially at the place where No.4 is mentioned. What matters most is the coinciding of the boundaries which are closer to the place in issue and not the distance away in determining the boundary in issue. In this instance the stream, the culvert, and the road stand as well-defined

fixation data. In the judgment the stream and the road have been considered not as a permanent fixation. The duration or the time difference between the two plans, viz P2 and X, deserves attention. They are prominent physical features on the ground which cannot, when taken the ordinary course of things happening, be assumed to be highly susceptible especially within a short span of time as 9 years. No evidence was before the Court to assume so. The stream as the surveyor explains, is running across a marshy land; hence no room would be there to get widened by erosion of river banks which happens in other cases. A ridge is shown on both plans. Generally, ridges are maintained by farmers to protect their paddy fields from high flow of water coming into the fields, especially when they are alongside the streams.

The contesting Defendants have contended that ridges cannot be taken as a permanent data as they are been re-established by placing mud, or converted as part of the paddy field. But when the ordinary practices of paddy cultivation and ploughing are considered, I cannot agree with that submission. It is true that when a new cultivating season starts the paddy field including the ridges are cleared. However, it is hardly that a ridge is converted to a paddy field for it is an essential part of the paddy field. It divides paddy land into allotments; gives access to farmers; serves as the boundary; protect the field from unnecessary water flawing-in. Such does not subject to change whenever a new cultivating season, either Yala or Maha starts. Given that, changing or converting a ridge is not common but a rare occurrence. Specially ridges at the edge of the paddy field along streams are highly unlikely to be subject to such changes as it stands as a barrier in between the stream and the paddy field. In the absence of evidence to that effect, it has to be presumed that the ordinary course of things has followed its due course.

Similarly, the public road also cannot be presumed to have changed, when there is evidence to say that it existed without changes. Not an iota of evidence is there of any widening or change of the track. In the circumstances, within a short span of 9 years it is not possible or sensible to assume any considerable change of that data.

When the live fence on the north and along the road is taken, it has existed at the time of the preparation of the plan P2 as well. Despite some changes of it, the commissioner states it can be taken as a fixation data. The contesting Defendants have confirmed the fact that the said fence did exist unchanged for over decades. (vide proceedings dated 11/03/2015 at page 4, 03/02/2016) When the evidence was such, to presume otherwise is unwarranted and unfounded.

The trial Court had declined accepting it on the premise that it is not on the boundary but in between the superimposed boundary and the road. Points of fixation need not be at boundaries. They can be anywhere even outside the corpus. Much points as possible on the ground need to be depicted in the survey plan, appearing both in the old plan and in the present plan. Hence, such points can be used to position the old plan and then to superimpose with same accurate or reliable position on the ground in the present survey, according to science of survey. Accordingly, the superimposing would reveal if the present land on the ground is the same as in the old plan and the comparison between the old plan against the present physical existence of the land.

Above all, the culvert, obviously is the best fixation point. It is permanent and closely located to the disputed boundary. Closer the fixation point, higher the sensitivity and accuracy it gives to the superimposition.

In view of the above, this can be identified as an instance where ample points of fixation including permanent data were available. The commissioner cannot be faulted for treating road and the stream as permanent points of fixations due to the short time span lapsed since the preparation of plan P2, during which it is unlikely that such fixations get changed. Especially in the light of the evidence that the road and the live fence remained

unchanged, I see no reason to disregard such points of fixation. When the distance to boundaries were calculated, the surveyor has found them to be accurate thereby concluded that the stream has not changed. The fact that it flows across a low land has contributed to reach his conclusion.

When the surveyor was questioned as to the area of lot 7, 8 and 9 totaling 17 perches is ensued upon an error of superimposition, he vehemently denies that such large extent cannot be attributed to such error.

When examining the commissioner's evidence, in the first place he is an expert on his subject, an officer of Court who can be presumed to act independently, in the absence of reasons to think otherwise. Mere unfounded allegation of being partisan would not discredit his trustworthiness as an expert witness.

More often than not, the previous plans to be superimposed are plans prepared decades prior to the present survey, so much so that the physical features depicted in them to consider as points of fixation are no more on the ground. Here is an instance where almost all the features in the old plan are present as they were before, unchanged, possibly due to the short duration between the two surveys. The calculations, scales, scientific modes of surveying and superimpositions, observations, conclusions arrived at by a surveyor cannot be easily frowned upon from what we see to the naked eye. When considering the above I am compelled to disagree with the findings of the trial Court on the accuracy of the superimposition of the plan P2 in the plan X and to hold that the evidence of the commissioner is acceptable, reliable and safe to act upon. Thus, it is proved as per the plan X, that lots 7,8 and 9 are parts of the corpus.

Superimpositions can be graded as P, Q or R. Expecting permanent points of fixation alone is unrealistic. There can be instances where even Q or R superimpositions become acceptable in the light of the facts and circumstances of each case. Data which existed long ago, would be hardly available, when the same are looked for after a long period. That does not mean that no superimposition could be done successfully. In such a situation, a wholistic approach should be adopted to analyze the evidence of each case.

The contesting Defendants who have claims for disputed lots have not opted to adduce such scientific expert evidence to disprove or discredit the findings of the commissioner. In their deeds the land they claim is described with reference to the plan No. 1679 dated 08.05.1971/21.05.1971 of licensed surveyor S. Wikramasooriya. Surprisingly they have not produced that plan to the commissioner to superimpose on the preliminary plan, at the time of the preliminary survey or at a later stage. No plausible explanation is given for not taking out a commission to show the boundary as per their plan. That could have been the best, easiest and reliable mode of ascertaining the common boundary between the two lands. That plan has not even been tendered to Court. Having refrained from doing what they could have done, they simply relied on their oral evidence to defeat the commissioner's evidence, which has miserably failed. The trial Court was supposed to weigh the evidence before it, rather than burdening the Plaintiff with impossible. A case must be decided on a balance of probabilities; not compelling the Plaintiff to prove his case beyond a reasonable doubt or to the hilt. Partition action, like other Civil matters, is to be decided on preponderance of evidence.

The following observation in the case Franciz Samarawikrama V Pathirana (1997/3SLR/231), though referred to Section 25 of the Partition Law explains that the burden of proof in a partition suit is no different to any other Civil litigation.

> **"As I have stated our system of Civil Law is one of confrontation. Abstruse interpretation of Section 25 is a dangerous exercise which could lead to dangerous and unreasonable situations from which it is best to desist from, but to follow the time-tested pattern, procedure and methodology of the general Civil Law and in particular the generally applied procedure under Partition Act is in my view most prudent and reasonable."**

In this instance, the trial Court has erred in evaluating evidence on the preliminary plan in the correct perspective. Despite having sufficient evidence to conclude that it correctly depicts the subject land, it held otherwise, even in the absence of reliable competing evidence in support of the contesting Defendants' version. Hence the trial Court has failed in deciding the case on preponderance of evidence and on a balance of probabilities.

In the circumstances, I hold that the findings and determination of the trial Court is bad in law and in facts, thus cannot be allowed to stand. I hold that the corpus is correctly depicted in the preliminary plan consisting of lots 1 to 9.

Title

The subject land is owned by the 2nd Defendant in the case No. 17252, namely, Abesinghe Liyanarachchige Pannadasa. He had died leaving his wife (Plaintiff) and three children (1st, 2nd and the 3rd Defendants). Accordingly, it is proved that the Plaintiff is entitled to a moiety and the other moiety is entitled to by the 1st, 2nd and the 3rd Defendants in equal shares.

Claim on prescription of the contesting Defendants.

In their pleadings the said Defendants have claimed rights on prescription, in the alternate to their main claim for exclusion of lots 7, 8, 9 as hereinbefore discussed. The issue No. 7 is raised on that basis.

A party who claims prescription is required to establish their possession clothed with the qualifications stipulated by Section 3 of the Prescription Ordinance, in the disputed area. Such possession must be independent of and adverse to the true owners of the land.

> De Silva V Commissioner General of Inland Revenue (8- NLR 292- at page 295/296)
>
> The principle of law is well settled that 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.

Here what is underlined by the contesting Defendants is that they did possess, not the land of the Plaintiff, but only the land Kekulugahahena, owned by them; and the disputed area belongs to that.

Thus, it is abundantly clear that possessing the adjoining land against its owners had never been their intention. Now it is proved, as held above, that the disputed area belongs to the corpus. There had been only a misunderstanding or misconstruing of the common boundary as they have believed the live fence existed to be the correct boundary. Never have they expressed their intention to possess parts of corpus and make claims thereby.

If it was known to the contesting Defendants that this belonged to the land Kolonnawila Kumbura, they would not have possessed or made claims thereto. It could be inferred that they possessed the land not against the ownership of the land Kolonnawila Kumbura, but possessed under the genuine belief that it is their own land

Kekulugahahena. Given that, no adverseness can be imputed on the said Defendants' possession, though lasted for a considerable period, in the disputed area. Thus, no rights on prescription could be acquired.

Conclusion

For the foregoing reasons, the judgment of the trial Court is hereby set aside. Though the appellant and the 1st to 3rd Defendants have moved that a re-trial be ordered, I see it unneeded as all the evidence is already before this Court and all the disputes have been delved into and adjudicated in view of the above discussion and reasons.

The schedule of shares should be as follows;

The Plaintiff 3/6

1st Defendant 1/6

2nd Defendant 1/6

3rd Defendant 1/6

Those owners of the soil should be entitled to all the plantation in the corpus. The 8th Defendant Nandadasa should be entitled to compensation for the improvement marked as "a" in lot 9 in the preliminary plan.

The District Court is directed to enter interlocutory decree according to this judgment and take further necessary steps in terms of the Partition Law. In consideration of all the circumstances of the case, I make no order for costs.

Appeal allowed without costs.

Registrar of this court is directed to send the original case record along with a copy of this judgment to the District Court of Matara.

PRABHA KUMARI DELA
JUDGE OF THE HIGH COURT
(CIVIL APPEAL)

I agree.

CHAMATH MADANAYAKE
JUDGE OF THE HIGH COURT
(CIVIL APPEAL)

SUPREME COURT Judgments

JSALR 2024/II//1

U. G. Sunil, R. M. Jayarathne, (Deceased) D. M. Priyantha Kumara, Sunil Rajapakshe, Sunil Samanthilake, Chaminfa Bandara, (Deceased) Vs. Office–In –Charge, Police station Udu Dumbara and Hon Attorney General.

SC Appeal No : 27/2019

Before : Vijith K. Malalgoda P.C, J.

K..Kumuduni Wickremasinghe, J.

Janak De Silva, J.

Burden of proof in a criminal case / Interested and Disinterested witness / Dock statement.

Decided on : 05.06.2024

K. Kumuduni Wickremasinghe, J.

1. It has been firmly established that, in a criminal case, that the charges against the Accused should be proved beyond reasonable doubt. Proof beyond reasonable doubt generally means the Court must carefully consider the entirety of admissible evidence to such scrutiny to see whether the ingredients of the charges are proved. If the Court is not satisfied the accused person must be acquitted.

2. Proof beyond reasonable doubt however does not mean proof beyond the shadow of doubt. A clear distinction made on what exactly proof beyond reasonable doubt means was explained by Lord Denning in MILLER v Minister of Pension [1947] 2 A. E. R 372, at 373: "Proof beyond reasonable doubt does not mean proof beyond shadow of doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice if the evidence is so strong against a man as to leave only a remote possibility in his favour..... the case is proved beyond reasonable doubt but nothing short of that will suffice."

   As per section 3 of the Evidence ordinance "A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man might, under the circumstances of the particular case, to act upon the supposition that it exists."

3. In this case, the prosecution relies heavily on the testimonies provided by the witnesses to prove the guilt of the Accused. PW2 and PW3 testimonies collaborate the testimony of PW1 regarding the incident and the sequence of events. The credibility of a witness is a question of fact, not of law. Appellate judges have repeatedly stressed the importance of the trial judges' observations of the demeanor of witnesses in deciding questions of fact.

4. Considering the testimonies provided by PW1 and PW2, it is evident that PW2 promptly complained to the relevant Police Stations that her husband had been kidnapped by the Appellants immediately after the incident had taken place. PW1 in his testimony stated that the Appellants informed him that they were taking him to Dehiattakandiya and they had dropped him at Hasalaka town. PW1 also maintained in his examination in chief that the 5th Accused was armed with a pistol. PW1 testified that he was afraid that the Appellants were actually attached to the Uda Dumbara Police station owing to which he had proceeded to Theldeniya Police Station and lodged a complaint about the incident. The two witnesses' testimonies have remained for the most part consistent throughout the trial.

5. A key test of credibility is whether the witness is an interested or disinterested witness.

Rajaratnam J. in Tudor Perera v. AG (SC 23/75 D.C. Colombo Bribery 190/B – Minutes of S.C. Dated 1/11/1975) observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinised with some care. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide, Halsbury Laws of England 4th Edition para 29). Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness.

6. Applying the above-mentioned principal to the testimony of PW3 who can be considered as an independent witness. PW3 was present at the house of PW1 purchasing items from PW2 in the shop that PW1 and PW2 had established in part of their house when the incident in concern occurred. PW3's testimony collaborated with the testimony of PW2 and the sequence of events. Therefore, applying the above-mentioned principle, the testimony of PW3 being a disinterested witness should be considered with considerable weight when concluding accuracy of the testimonies of PW1 and PW2.

7. It must be noted that a Dock Statement is considered evidence, however, subject to the infirmity that it was not given under oath and therefore, not subject to cross examination.

8. When a judge considers a dock statement, they typically evaluate it as part of the overall evidence presented in a case. The judge assesses its relevance, whether the dock statement is relevant to the case at hand. It should pertain to the facts or issues in dispute. Another factor considered by the judge is the credibility of the dock statement. A judge may consider factors such as the source of the statement, any potential biases or motives of the person making the statement, and whether there is corroborating evidence. If there are inconsistencies between the dock statement and other evidence or statements presented in court, the judge will take note of these discrepancies and may question the reliability of the dock statement. The judge also determines whether the dock statement meets the legal standards for admissibility. This includes considerations such as whether it was obtained lawfully and whether any hearsay rules apply. Finally, the judge assigns weight to the dock statement relative to other evidence in the case. They may give more weight to statements that are supported by other evidence or that are more consistent with the overall facts of the case.

9. However, it's essential to note that the admissibility and weight of dock statements can vary depending on the specific circumstances of each case and the discretion of the presiding judge.

10. The Learned Magistrate has taken into consideration the evidence led which included testimonies from PW1 and the investigating Police Officers when concluding that a kidnapping had taken place. The Learned magistrate has considered the evidence in totality and not just the dock statement of the Appellant when concluding the guilt of the Appellants as the dock statement admitting that PW1 was in the van belonging to the 2nd Appellant only adds onto the evidence which has been led at trial.

11. The dock statement made by the appellant does not create any doubt in the case of the prosecution. It has been held in many of our cases that when a dock statement is made that

it has to be acted upon if the court believes the version even if it is not subjected to cross examination.

12. Due to the abovementioned reasons, I hold that there is no ground to interfere with the judgment of the learned High Court Judge and the learned Magistrate.

13. This Appeal is hereby dismissed.

Full Judgment

https://www.supremecourt.lk/images/documents/sc_appeal_27_2019.pdf

JSALR 2024/II//11

Rajapaksha Gamaralalage Chathuranga Harshana Vs. Office–In –Charge,Police Station Kegalle and Hon Attorney General.

SC Appeal No : 89/2022

Before : P. Padman Surasena, J.
Yasantha Kodagoda, PC, J.
Mahinda Samayawardhena, J.

Excise Amendment Act No. 18 of 2019 / Section 52(1) (a) Of the Excise Ordinance.

Decided on : 31. 05. 2024

P. Padman Surasena, J.

1. The Accused-Appellant-Appellant (hereinafter referred to as the Accused) was charged in the Magistrate's Court of Kegalle; the charge stated that on or about 23-05-2017, he had in his possession, an excisable article, an offence punishable under section 47(1) of the Excise Ordinance. As the Accused had pleaded not guilty, he was tried. After the case for the prosecution was closed, evidence of the Accused as well as the evidence of three more witnesses on his behalf had been led as the case for the defence. After the trial, the learned Magistrate by his judgment dated 28-10-2019, had proceeded to convict the Accused for the offence in the Charge Sheet. The learned Magistrate had imposed a fine of Rs. 25,000/= with a default sentence of one-month imprisonment. The Magistrate has also sentenced him to a term of three months' imprisonment the operation of which was suspended for five years.

2. Being aggrieved by the conviction and the sentence imposed on him, the Accused had appealed to the Provincial High Court of Sabaragamuwa Province.

3. Before the Provincial High Court, the Accused had raised the issue that the police officers had no power to institute the instant proceedings in the Magistrate's Court which led to his conviction and sentence. He relied on section 52(1) of the Excise Ordinance. The learned High Court Judge, having held that there was no bar for the Accused to have raised that issue in the appeal as a preliminary issue, had proceeded to reject the said argument advanced on behalf of the Accused in the High Court. Thereafter the learned High Court Judge, having also considered the merits of the appeal, had proceeded to affirm the conviction and the sentence imposed on the Accused by the learned Magistrate. It is against that conclusion that the Accused had filed the instant appeal before this court.

4. It is clear that the central issue to be decided by this court revolves around the interpretation of Section 52(1) of the Excise Ordinance which is as follows:

(1) No Magistrate shall take cognizance of an offence punishable-

a) under sections 46, 47, or 50, except on his own knowledge or suspicion, or on

the complaint or report of an excise officer; or

b) under section 48 or section 49, except on the complaint or report of the Commissioner General of Excise, Government Agent, or an excise officer authorized by either of them on that behalf.

5. Since the charge against the Accused is under Section 47(1) of the Excise Ordinance, it is Section 52(1)(a) that would apply in the instant case. According to section 52(1)(a), it is not open for any Magistrate to take cognizance of an offence punishable under Section 47 of the Excise Ordinance upon a complaint of a police officer.

6. The correctness of this position is buttressed by the Excise Amendment Act No. 18 of 2019 which had proceeded to amend the original Section 52 of the Excise Ordinance to read as follows:

"Section 52 of the principal enactment is hereby amended in subsection (1) thereof as follows:-

1) by the repeal of paragraph (a) thereof and the substitution therefor of the following:-

a) under section 46, section 47 or paragraph (a) of section 48, except on his own knowledge or suspicion or on the complaint or report of an excise officer or a police officer:

Provided however, where a police officer makes a complaint or produces a report under paragraph (a) of section 48, such officer shall be an officer not below the rank of a sub inspector and shall obtain the written sanction of the Commissioner-General of Excise or any other officer authorized by the Commissioner General of Excise;"

Thus, it is only with the Excise Amendment Act No. 18 of 2019 that hitherto non-existent new category 'police officer' was introduced to Section 52(1)(a) Of the Excise Ordinance.

7. In view of the above positions, I conclude that the proceedings instituted and conducted against the Accused in the Magistrate's Court is a proceeding which had been illegally instituted. Therefore, the whole proceeding against the Accused in the Magistrate Court is ab initio void.

8. Appeal is allowed.

Full Judgment

https://www.supremecourt.lk/images/documents/sc_appeal_89_2022.pdf

JSALR 2024/II//III

Nagaratnam Ratnakumara Vs. W. M.W. P. K. Amarasekera, Public Health Inspector and The Hon Attorney General.

SC Appeal No : 136/2014

Before : Murdu N.B. Fernando, PC, J.
Kumuduni Wickremasinghe, J.
K. Priyantha Fernando, J.

Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 / Procedure in filing appeals from the final orders / judgments or sentences of the High Court.

Decided on : 30.05.2024

K. Priyantha Fernando, J.

1. The Accused-Appellant-Appellant (hereinafter referred to as the appellant) was charged in the Magistrate's Court of Wattala for an offence punishable in terms of section 262 of the Penal Code. After trial, by his judgment dated 04.05.2012, the learned Magistrate convicted the appellant for the charge and fixed the date for 18.05.2012 for identification and sentence. Before the date that was fixed for sentencing

which was 18.05.2012, the appellant appealed against the judgment of the learned Magistrate to the High Court of Negombo.

2. Upon the hearing of the appeal, the learned High Court Judge by his order dated 27.03.2014, ordered a retrial before the learned Magistrate. Being aggrieved by the above order of the learned High Court Judge, the appellant submitted a petition of appeal to the High Court Registry on 09.04.2014. In the said petition of appeal, the appellant has prayed for an acquittal instead of the retrial ordered by the High Court.

3. This petition of appeal that was submitted to the High Court Registry was addressed to the Supreme Court. Upon receiving the petition of appeal, the learned High Court Judge has forwarded it to this Court (vide journal entry dated 24.04.2014). The journal entry directs the registry of the High Court to accept the petition of appeal, to file the same of record and to forward the Court record to the Supreme Court, keeping a sub file.

4. When analyzing the issue at hand, it is noted that this appeal has been preferred against the judgment of the High Court, which exercises the appellate jurisdiction against the judgment of the Magistrate's Court. Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (the Act) provides for the procedure in filing appeals from the final orders, judgments, or sentences of the High Court.

5. The appellant is entitled to make an application to obtain leave to appeal against the judgment of the High Court from the High Court itself, in terms of section 9(a) of the Act. The appellant is also entitled to file an application seeking special leave to appeal directly from the Supreme Court. Without adhering to the above provisions, the appellant has filed a direct petition of appeal in the High Court which was addressed to the Supreme Court without seeking for leave to appeal to the Supreme Court from the High Court. The appellant has also failed to seek special leave from this Court.

6. In the instant case, no application for leave to appeal was made to the High Court. Once such application is made, if the High Court decides to grant leave, it is incumbent upon the High Court to specify the substantial question of law on which leave is granted. No such order is made in the instant case by the High Court as no leave to appeal application was made, not even ex mero motu, as provided in section 9 (a) of the Act.

7. Thus, the appellant has failed to properly invoke the jurisdiction of this Court. Hence the appeal is rejected.

Full Judgment

https://www.supremecourt.lk/images/documents/sc_appeal_136_2014.pdf

JSALR 2024/II//IV

SC Appeal No : TAB 001/2023

Before : Justice Vijith K. Malalgoda PC,
Justice Thurairaja, PC,
Justice A.L. Shiran Gooneratne.
Justice Achala Wengappuli.
Justice Priyantha Fernando.

Decided on : 08.08.2024

Credibility of a witness/Delay in making statement / Interested and Independent witness.

Vijith K. Malalgoda PC, J.

1. The 2nd Accused-Appellant Lamahewage Emli Ranjan (hereinafter referred to as the 'Appellant') was indicted before the High Court of Colombo along with two others (the 1st and the 3rd Accused) on 33 counts under the

Penal Code. The Indictment served on the three Accused contained a count of conspiracy to commit murder, eight counts of murder based on unlawful assembly, another eight counts of murder based on common intent, a count of criminal trespass against the 1st Accused, a count for being members of an unlawful assembly, and 14 counts of abducting with intent to cause the death of 7 persons based on unlawful assembly and common intent.

2. Out of the 33 counts in the Indictment, the 25th count was based on unlawful assembly for the murder of Dewamullage Malith Sameera Perera alias 'Konda Amila' and the 33rd count was based on common intention for the murder of the same person.

3. After the trial, the Trial at Bar having acquitted the 1st Accused namely Moses Newamal Rangajeewa of all charges leveled against him, had convicted the 2nd Accused (Appellant before this Court) on the 33rd count of the Indictment for the murder of Malith Sameera Perera alias 'Konda Amila' and sentenced him to death. It is also important to note that the Trial at Bar had not found any accused guilty of the death of the other 07 prisoners referred to in the Indictment.

4. Being aggrieved by the said conviction and sentence the 2nd Accused had preferred the instant appeal to this Court on several grounds.

5. The incident that led to the death of 27 inmates including the 8 deceased persons referred to in the Indictment served on the three Accused including the Appellant had taken place on 9th and 10th November 2012 at the Welikada Prison in Colombo. At the time of the incident, the Appellant was the Superintendent of the Magazine Prison which is located in close proximity to the Welikada Prison.

6. According to witness Kuda Bandara, he refrained from telling the truth to the officials who conducted inquiries into the incident that took place on the 9th and 10th of November. As already observed by this Court, 1st statement implicating the Appellant was made only in 2015 at the Nambuwasam Committee although he was present as a witness at Wickremasinghe Committee and Bandula Atapattu Committee between 2012 and 2015.

7. The reason given by him for his sudden change of mind was another anonymous call said to have been received by him after 2015 informing him to come out with the truth.

8. It is trite law that belatedness in giving evidence is a factor that casts doubt on the credibility of a witness. If a witness delays making a statement that would leave room for him to implicate innocent persons for reasons best known to him. The Court would be reluctant to act on such belated evidence unless there is a plausible explanation given as to the cause of belatedness.

9. When analyzing the case against the Appellant, the Trial at Bar had considered the evidence of the mother and the mistress of the deceased 'Konda Amila" and had come to a conclusion that the said evidence establishes the motive entertained by the Appellant to make use of the opportunity to commit harm to the deceased "Konda Amila". It was elicited from the evidence of Jayantha Arachchige Merlin, mother of the deceased 'Konda Amila' and Tania Dulari Jayaweera, mistress of the deceased 'Konda Amila' that the deceased was not happy and complaining against the Appellant who was the Superintendent of the Magazine Prison.

10. In this regard, this Court is further mindful of the fact that witness Taniya Dulari is the mistress of the deceased, and witness Jayasingha Arachchige Merlin is the mother of the deceased. They are not eye witnesses to the alleged abduction. The prosecution has called these two witnesses to establish that the appellant had a motive to cause the death of the deceased. Can they be considered as interested witnesses?.

11. There exists no hard and fast rule stating that family members could never be true witnesses and that they would always give false evidence in Court in order to take revenge from an accused. It depends on the circumstances of each case.

12. Rajaratnam J. in Tuder Perera vs. AG (SC 23/75D.C. Colombo Bribery 190/B minutes of SC dated 1/11/1975) observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preferred to an interested witness in case of conflict.

13. When examining an interested witness who has some enmity with the accused, Court should take greater care and caution than when examining the evidence of a disinterested and unrelated witness. In the instant case the two witnesses Tania Dulari and Merlin, are clearly interested witnesses as their interest is with regard to exacting revenge from the Appellant rather than having an interest in furthering the course of justice. Their grievance is that, the Appellant in following the administrative rules in the prison as the Superintendent of prisons, is not favouring the deceased. After the Appellant was appointed as the Superintendent, he had stopped all illegal favours that the deceased Amila, had enjoyed in the prison. Their vengeance is against maintaining the law and order of the prison to their disadvantage, therefore the evidence of these two witnesses will have to be considered with great caution.

14. In the said circumstances if anyone has a motive, it is 'Konda Amila's family that would entertain a motive to implicate the Appellant for the death of 'Konda Amila'. It is further observed that the prison inquiry which was pending against the deceased was also proceeding and certain inmates had testified during the inquiry. The inquiry panel had found the deceased guilty of the charges against him and sentenced him to a jail term. When considering the period in which these incidents had taken place, it is clear that complaints made to the Human Rights Commission and Borella Police too had taken place during the same period.

15. In the absence of any material to establish a personal grudge against the deceased, it is clear that any disagreement between the Appellant and the deceased 'Konda Amila' was due to the proper implementation of administrative duties and responsibilities by the Appellant as the Prison Superintendent.

16. The Trial at Bar had failed to explain, why they decided to act on the evidence of several witnesses, as indicated above only against the Appellant but rejected and/or was reluctant to act on their evidence with regard to the involvement of the 1st and the 3rd Accused. In this regard this Court is reminded of the maxim falsus in uno falsus imnibus which is treated as a common law legal principle, that a witness

who falsely testifies about on one matter is not credible to testify about any matter which was not totally rejected by common law jurisdiction, but applied with restriction.

17. The prosecution had heavily relied on the evidence of witness Kuda Bandara against both the I[st] and the 2[nd] Accused before the High Court Trial, but when accepting the said evidence, the Trial at Bar was not in favour of accepting the said evidence against the I[st] Accused. Similarly when analyzing the evidence of witnesses Senerath Bandula Liyanarachchi and Indika Perera, the Court was not prepared to act on the said evidence against the I[st] Accused but analyzed favourably the portion of evidence given by them against the Appellant, but as already observed, the Court had failed to consider whether there is any compelling reason to apply the divisible rule and accept their evidence only against the Appellant, when the impugned statement had been given almost three years later giving ample opportunity for them to falsely implicate the accused.

18. The illegalities already discussed in this judgment are fatal in nature which permits me to answer the questions of law that were raised before this Court in favour of the Appellant, and to set aside the conviction imposed on the Appellant (2[nd] Accused –Appellant) by the Trial at Bar.

19. Accordingly, the Appeal before us is allowed and the 2[nd] Accused-Appellant is acquitted.

Full Judgment

https://www.supremecourt.lk/images/documents/sc_tab_01_2023_ed1.pdf

JSALR 2024/II//V

Hettiarachchige Weerasekara Vs. Danthasinghe Patabendige Shanthi Anoma & 4 others

SC Appeal No. : 49/2014

Before : Hon. Justice E. A. G. R. Amarasekara.
Hon. Justice Achala Wengappuli.
Hon. Justice Mahinda Samayawardhena.

Article 138(1) of the Constitution / Section 5A of the High Court of the Provinces (Special Provisions) Act / No. 19 of 1990 as introduced by Act No. 54 of 2006 / Error / defect or irregularity of judgments / orders or decrees of original Courts.

Decided on : 29.08.2024

Samayawardhena, J.

The Plaintiff-Respondent-Appellant (hereinafter sometimes referred to as the Plaintiff) instituted action relevant to this case in the District Court of Homagama against I[st] Defendant-Respondent seeking declaration of title to, ejectment of the defendant from, the land described in the schedule to the plaint, and damages. The plaintiff's position was that he became the owner of the land by the Deed of Transfer marked P3. The 1st defendant filed answer seeking dismissal of the plaintiff's action. Her position was that P3 is not an outright transfer although it appears to be so, but rather a mortgage. She also averred that her four children should be added as defendants. Those four children were subsequently added as 2[nd] to 5[th] defendants. Thereafter the I[st] defendant passed away and the plaintiff's Attorney-at-Law informed the Court that the plaintiff would proceed with the case only against the 2[nd] to 5[th] defendants. There was no objection to this application.

The 2[nd] to 5[th] defendants filed a joint answer dated 03.02.1998 seeking dismissal of the plaintiff's action and a declaration that the 2[nd] to 5th defendants are the absolute owners of the land. Additionally, they prayed that in the event the case is decided in favour

of the plaintiff, the plaintiff should be ordered to pay a sum of Rs. 100,000 to the said defendants for improvements. The 2nd to 5th defendants claimed title to the land on prescriptive possession. They did not state that P3 is a mortgage, not a transfer. At the trial, issues were raised on the aforesaid basis. After trial, the District Court entered judgment for the plaintiff. Being dissatisfied with the judgment of the District Court, the 2nd to 5th defendants preferred an appeal to the High Court of Civil Appeal of Avissawella. The High Court set aside the judgment of the District Court on the basis that, since the plaintiff did not take steps to proceed with the case against the 1st defendant, the District Court should have abated the action.

The plaintiff came before the Supreme Court against the judgment of the High Court. The leave to appeal had been granted on the question of law: Was there any necessity for substituting the legal representatives in the room of the deceased when the legal representatives had already been parties to the action and when they had no desire to proceed with the reliefs sought by the deceased 1st defendant and instead had made a claim in reconvention on their own?

Held:

1. Having failed the case on the merits in the trial Court, the parties cannot render the judgment nugatory by pointing out procedural defects for the first time before the appellate Court. A wrong procedure can be validated by acquiescence, waiver or inaction on the part of the parties.
2. The language of the proviso to Article 138(1) of the Constitution makes it mandatory for the Court of Appeal not to reverse or vary the judgments, decrees or orders of the original Courts on any error, defect, or irregularity unless it is shown that such error, defect, or irregularity has prejudiced the substantial rights of the parties or occasioned a failure of justice. The Constitution places a premium on substantive justice over rigid procedural compliance.
3. Provincial High Courts exercising civil appellate and revisionary jurisdiction over judgments and orders of the District Courts must adhere to that requirement as per Section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 (which was introduced by Act No. 54 of 2006).
4. After the death of their mother (the 1st defendant), the 2nd to 5th defendants filed a separate answer and contested the case on their own. They did not take up any objection regarding the procedure in the District Court. They waived any objections and acquiesced to the procedure. Even if there were procedural errors, no prejudice has been caused to the 2nd to 5th defendant thereby.
5. The High Court of Civil Appeal has not adverted to those express provisions which prevent the High Court from setting aside the judgments of the District Court on procedural defects unless such defects caused prejudice to the substantial rights of the parties or occasioned a failure of justice.

Accordingly it had been decided that the 2nd to 5th defendants contested the case on their own, there was no necessity to abate the action upon the death of the 1st defendant.

The judgment of the High Court of Civil Appeal was set aside and restored the judgment of the District Court. The appeal was allowed.

Full Judgment

https://www.supremecourt.lk/images/documents/sc_appeal_49_2014.pdf

JSALR 2024/II//VI

Senadeeralage Don Chandrawathie Vs. Senadeeralage Don Chandrasiri

SC Appeal No. : 69/2012

Before : Vijith K. Malalgoda, PC, J.
E. A. G. R. Amarasekara, J.
Mahinda Samayawardhena, J.

Burden of proof of establishing the mental capacity of a person at a time of a juristic act / Presumption of continuation of mental illness / Different approaches in English Law and Roman Dutch Law.

Decided on : 22.08.2024

E. A. G. R. Amarasekara, J.

The Plaintiff-Respondent-Appellant (hereinafter sometimes referred to as the Plaintiff) instituted action relevant to this case in the District Court of Gampaha against Defendant-Appellant- Respondent seeking declaration that the Defendant is in unlawful occupation of the premises described in the schedule to the Plaint and the ejectment of the Defendant from the said premises. Facts:-

- Baby Nona, the mother of the Defendant and the mother-in-law of the was the original owner of the property in suit. The said Baby Nona by Deeds of gift bearing Nos. 165 dated 18.12.1974 and 166 dated 18.12.1974 gifted undivided half share of the said property reserving the right to revoke respectively to the Defendant and Gamaralalage Gunarathne.
- Thereafter, the said Baby Nona by Deed of Revocation bearing No. 2070 dated 02.04.1980 revoked the aforesaid Deed of Gift bearing No. 166 which was in favour of the said Gamaralalage Gunaratne and by Deed of Revocation bearing No. 13878 dated 17.03.1984 revoked the aforesaid Deed of Gift bearing No. 165 in favour of the Defendant.
- Subsequently, the said Baby Nona by way of Deed of Transfer bearing No. 2523 dated 04.08.1987 transferred the entirety (including the portions originally gifted to the Defendant and to the said Gamaralalage Gunaratne) of the said property to the Appellant who was her son in law.

After the trial, learned District Judge delivered his Judgment dated 08. 02. 2006 in favour of the Plaintiff rejecting the claims made by the Defendant. The learned District Judge was of the view that the Defendant failed to prove those issues which were raised on behalf of the Defendant as to whether Baby Nona did not have the mental capacity to execute the deed of revocation Number 13878 which revoked the deed of gift made to the Defendant at the time of executing the said deed.

Being aggrieved by the said Judgment of the District Judge of Gampaha, the Defendant preferred an Appeal to the Civil Appellate High Court of the Western Province holden in Gampaha and Honourable High Court Judges pronounced their judgment allowing the Appeal of the Defendant with costs. The learned High Court Judges were of the view that it was the Plaintiff who should prove that Baby Nona was in proper mental status to understand the gravity of her acts at the time of executing the relevant deeds and hence, the learned District judge erred in his decision in coming to the conclusion.

Being aggrieved by the said judgment of the Civil Appellate High Court, the Plaintiff preferred an appeal to the Supreme Court on the question of laws as to the burden of proof of establishing the mental capacity of Baby Nona and the discharge of such burden of proof.

Held:

1. As per the English Law and the position in Indian Law, there is a presumption of continuance of mental incapacity of a person

who has been proved or is admitted to have so mentally disordered as to be incapable for purpose of contract or disposition. So, the party who assert or rely on the validity of the contract has to prove that it was made during a period when the mental disorder has ceased or the relevant person was recovered from such disorder or during a lucid interval.

2. Our common law is Roman Dutch Law (RDL) and the RDL principles in this regard is different. As per the RDL, when there is a declaration made by Court, it is a conclusive proof of such mental illness as at the time such declaration was made and there is a presumption of the continuation of that condition. When there is no such declaration made by a Court, the acts performed by the person alleged to be suffering from mental illness become null and void when it is shown that the said person was actually mentally ill and hence lacked the capacity to act at the relevant time.

3. In this present case, as there was no declaration or adjudication by a court to state that Baby Nona was of unsound mind and/or she was not capable of managing her affairs that is to say whether her mind was such that she could not understand and appreciate the transaction into which she purported to enter, it was the task of the Defendant to establish such incapacity existed at the time of executing the impugned deeds. Even though the Defendant's Counsel made submissions on shifting of the burden of proof, first the Defendant must prove what he asserts.

4. As there was no adjudication or declaration as to her mental incapacity, there was no presumption that the mental disorder of Baby Nona continued from 1980 even after her release from the mental hospital. As such, the learned High Court Judges erred in their findings.

The judgment of the High Court of Civil Appeal was set aside and the judgment of the learned District Judge was restored. The appeal was allowed with costs.

Full Judgment

https://www.supremecourt.lk/images/documents/sc_appeal_69_12.pdf

JSALR 2024/II//VI

Property Finance and Investment (Pvt) Ltd & 2 others Vs. Sri Lanka Savings Bank Limited

SC (CHC) Appeal: 26/2018

Before : S. Thurairaja, PC, J.
A. L. Shiran Gooneratne, J.
K. Priyantha Fernando, J.

Section 90A and 90C of the Evidence Ordinance / Definition of the term 'Certified Copies' in term of Section 90A of the Evidence Ordinance

Decided on : 09.08.2024

S. Thurairaja, PC, J.

This case is an appeal preferred to the Supreme Court by the Defendant-Appellants against the judgment of the Commercial High Court of Colombo dated 30th January 2018. The 1st Defendant-Appellant is a Company incorporated under the Companies Act No.07 of 2007 and the 2nd Defendant-Appellant is the Managing Director of the 1st Appellant Company. The 3rd Defendant-Appellant is the wife of the 2nd Defendant, and a Director of the 1st Defendant Company (1st, 2nd and 3rd Appellants hereinafter sometimes jointly referred to as "the Appellants"). This case is based on two causes of action arisen against the Appellants for the recovery of a Term Loan of Rupees Six Million (Rs.6,000,000) with 17.5% interest per annum under the first cause of action, and a Short-Term Loan of Rupees Eleven

Million (Rs.11,000,000) with 17.5% interest per annum under the second cause of action, both which have been granted by Pramuka Savings and Development Bank (hereinafter referred to as the "Pramuka Bank") which was subsequently acquired by the Plaintiff-Respondent namely Sri Lanka Savings Bank Limited (hereinafter sometimes referred to as the "Respondent Bank").

Being aggrieved by the judgment of the Commercial High Court, the Appellants preferred this application to the Supreme Court and the questions of law to be decided were as follows;

"(i) Did the Learned Judge of the Commercial High Court of Colombo err by failing to appreciate that the purported statements/documents marked as "P7", "P8", "P9", "P10", "P14" and "P15" were erroneous, incorrect, and irregular, and therefore, could not have been relied on in evidence and/or were they not of any cogent probative value?

(ii) Did the Learned Judge of the Commercial High Court of Colombo err by failing to duly and properly assess and/or evaluate the documentary evidence place before the said Court?"

Held:

1. In order to qualify as a certified copy in terms of Section 90A of the Evidence ordinance, It should be a copy of any entry in the books of a bank together with a certificate written at the foot of such copy;
   - that it is a true copy of such entry,
   - that such entry is contained in one of the ordinary books of the bank,
   - that it was made in the usual and ordinary course of business and
   - that such book is still in the custody of the bank.
2. The interpretation to the findings in Agostin v Kumaraswamy [59 NLR 132] as provided by His Lordship Justice Aluwihare in Chandra Gunasekara v. People's Bank [SC Appeal 43/2012 decided on 11.10.2019] was followed, which states as follows;

   "What was produced in Court in the case of Agostinu was a bare statement, without any certification, and based on some entries which had been certified by the accountant of the bank. It appears, then, that although the original entries of the bank had been certified by the accountant, the transcription of those entries that was produced in Court carried no certification. Basnayake C.J. correctly held that the statement was inadmissible in as much as it is a mandatory requirement under Section 90C, that what is produced in Court should be certified as stipulated in Section 90A of the Evidence Ordinance."
3. The learned Judge of the Commercial High Court of Colombo did not err by failing to appreciate that the purported statements/ documents marked as 'P7', 'P8', 'P9,' 'P10', 'P14' and 'P15' were erroneous, incorrect and irregular, and therefore, could have been relied on in evidence. The learned Judge of the Commercial High Court of Colombo did not err by failing to duly and properly assess and/or evaluate the documentary evidence place before the said Court. In conclusion, both questions of law were answered negatively, and hold in favour of the Respondent Bank

The judgment of the Commercial High Court was affirmed and the appeal was dismissed with costs.

Full Judgment

https://www.supremecourt.lk/images/documents/sc_chc_appeal_26_2018.pdf

JSALR 2024/II//VII

Suraweera Arachchige Milton Suraweera Vs. Konni Arachchige Sriyanthi Samanmali

SC Appeal No. : 107/2019

Before : Vijith K. Malalgoda, PC, J.
Mahinda Samayawardhena, J.
Arjuna Obeysekere, J.

Requirements of an Aquilian action / Proof of negligence / Quantum of damages

Decided on : 02.08.2024

Obeysekere, J.

The Plaintiff-Appellant-Respondent (hereinafter sometimes referred to as the Plaintiff) instituted action relevant to this case in the District Court of Moratuwa against the Defendant-Respondent-Appellant (hereinafter sometimes referred to as the Defendant) seeking damages for the death of her husband from a road traffic accident, claiming that the accident was caused due to the negligence of the Defendant. While travelling on the Galle Road from Moratuwa towards Panadura, the left rear wheel/s of the water bowser driven by the Defendant had run over Prasanna Ranjith, the husband of the Plaintiff, who was riding a push bicycle on the main road and caused his death. Plaintiff had stated that her husband was the sole breadwinner of the family and was responsible for providing for their three young children. She had claimed a sum of Rs. 1,500,000 as damages from the Defendant. In his answer, the Defendant admitted that he was the driver of the said bowser but denied that Prasanna Ranjith was run over after being knocked down by the bowser. It was the position of the Defendant that he was not negligent and that the said accident occurred due to the negligence of the deceased.

After a trial spanning over ten years, the learned District Judge had dismissed the Plaint. On appeal, the learned Judges of the High Court set aside the said judgment, and awarded the Plaintiff the sum of Rs. 1,500,000 claimed as damages. Being aggrieved by the said judgment, the Defendant had preferred an appeal to the Supreme Court claiming, among such other grounds, that Plaintiff has failed to establish the fact that the said accident had taken place due to the negligence and/or reckless driving on the part of the Defendant

Held:

1. Where injury has been suffered as a result of a motor accident involving a vehicle driven by any person other than the owner of such vehicle, it is not mandatory that the owner be added as a defendant. However, as a matter of practice, the owner is named as a defendant on the basis that the owner is vicariously liable for the acts of his servant or agent who was driving the vehicle.
2. The Aquilian action is the general remedy for wrongs to interests of substance (monetary or financial loss) in Roman-Dutch Law of delict. Where death or physical injury has been caused in motor accidents, the legal remedy for seeking civil damages is the Aquilian action.
3. The three essentials for liability in the Aquilian action are; first, a wrongful act; secondly, pecuniary loss resulting to the Plaintiff; and, thirdly, fault on the part of the Defendant.
4. Considered as an objective test, negligence may be defined as conduct which involves an unreasonable risk of harm to others. It is the failure in given circumstances to exercise that degree of care which the circumstances demand. No duty of care exists if the Defendant could not reasonably have foreseen that his act might cause harm to the Plaintiff.
5. A Plaintiff is only entitled to damages in respect of calculable pecuniary loss as he can prove that he has actually sustained or is likely to sustain. But, a court is not justified in refusing to award

the Plaintiff damages, merely because the quantum is difficult of assessment.

6. As per the evidence led in the District Court, the Plaintiff in the instant case has established that the accident took place due to the negligence on the part of the Defendant. Although no reasons have been given by the High Court for awarding the said sum of Rs. 1,500,000, taking into consideration the factual situation of the case, a sum of Rs. 1,500,000 as damages is a reasonable assessment of the damages sustained by the Plaintiff.

The judgment of the High Court is affirmed and the appeal is dismissed.

Full Judgment

https://supremecourt.lk/images/documents/sc_appeal_107_19.pdf

COURT OF APPEAL JUDGMENTS

JSALR 2024/II//VIII

Panawala Widanalage Joseph Douglas Peiris (1stAccused – Appellant) Ratnayake Adilari, Perennehelage Shantha, Gamini Rathnayake (2nd Accused – Appellant) Ihala Panditha Gedara (3rd Accused – Appellant) Mahadurage Ranathunge, (4th Accused – Appellant) Baddegama Ranjith Jayasekara (5th Accused – Appellant) Accused – Appellant) Vs Hon Attorney – General,

Court of Appeal No: 157-158/2009

Before : Menaka Wijesundera, J.

Wikum A. Kaluarachchi, J.

Identification in a criminal case / When the Turnbull Guidelines can be applied / Voice Identification.

Decided on : 25.07.2024

Wikum A. Kaluarachchi, J.

1. The five accused-appellants were indicted in the High Court of Gampaha on seven counts. All five accused were convicted by the learned High Court Judge by his Judgment dated 26.08.2009, only for the fifth count of the indictment, i.e. for abducting one Rathnachandra Liyanage in order to murder him, acting in furtherance of a common intention, an offence punishable under Section 355 of the Penal Code read with Section 32. Accordingly, five years of rigorous imprisonment were imposed on each accused-appellant. Against the said conviction, the 1st accused preferred one appeal and the 2nd to 5th accused preferred another appeal. Both appeals have been filed against the conviction but not against the sentence.

2. In this case, an identification parade had not been held.

According to PW-1 and PW-2, the 2nd accused-appellant came to their residence and showed his official identity card to prove his identity. Then PW-1 had identified him as Ratnayake. However, the learned Counsel for the 2nd, 3rd and 5th appellants contended that when PW-1was asked to identify the said Ratnayake, he went and showed the 3rd accused-appellant. The learned Counsel contended that this is a serious issue regarding the identity. It is correct that in the evidence in chief he showed the 3rd accused as Ratnayake. However, the said mistake has been rectified in cross-examination and when PW-1 was cross-examined, he correctly pointed out the 2nd accused as Ratnayake (as the 1st accused was absconding, the 2nd accused was there as the 1st accused). It is recorded in the non-summary inquiry that the PW-1 pointed out the accused, Shantha Gamini Ratnayake. Therefore, it is clear that the person who came that day to their house had proved his identity as Ratnayake by showing

his identity card and PW-I identified him as the 2nd accused of this case.

3. At this juncture, it is important to consider the "Turnbull Guidelines" regarding identification. In the written submissions tendered on behalf of the 1st appellant, the attention of the Court has been drawn to the "Turnbull Guidelines". I wish to consider whether the "Turnbull Guidelines" can be applied for the identification of any of the appellants in this case.

4. Turnbull rules or guidelines were set out in the case of R. V. Turnbull – [1976] 3 All E.R. 549. It is to be noted that the Turnbull guidelines apply to mistaken identity. According to the Turnbull rules, it must be examined closely the circumstances in which the identification by each witness had been made. How long did the witness have the accused under observation? At what distance? In what light? are material factors to be considered.

5. In the case of Keerthi Bandara v. Attorney General – [2000] 2 Sri L.R 245, it has been stated as follows;

"In Rex vs Oakwell at 1227 Lord Widgery, CJ in dealing with a similar contention that the directions given in Rex vs Turnbull were not applied to the identification issue which is alleged to have arisen in that case, succinctly, observed:

"This is not the sort of identity problem which Rex vs Turnbull is really intended to deal with. Rex vs Turnbull is primarily intended to deal with the ghastly risk run in cases of fleeting encounters. This certainly was not that kind of case".

6. Undoubtedly, this is not a case where the accused were identified on fleeting encounters. Especially, PW-3 after seeing the 2nd, 3rd, 4th and 5th appellants at his residence on the occasion that they came to arrest him, PW-3 saw the 2nd, 3rd, and 4th appellants again when he was brought to an unknown place. PW-3 stated in his testimony that he was brutally assaulted and when his blindfold was dropped, he saw the 2nd, 3rd and 4th appellants with clubs in their hands (pages 123 and 124 of the appeal brief). Hence, in two occasions PW-3 saw these appellants. In addition, PW-3 stated that the person called "Ranatunga" (whom he identified as the 4th accused) took a statement from him at the "Peliyagoda Police Station" (Page 127 of the appeal brief). So, PW-3 had the opportunity to see the 2nd, 3rd, and 4th appellants closely for a long time and certainly, those were not fleeting encounters.

7. It appears that the learned defence Counsel appeared in the High Court attempted to show that PW-3 had not seen his brother, Rathnachandra at "Batalanda" although he said that he identified his brother by his voice. It is to be noted that voice identification is also a mode of identifying people. However, the evidence of voice identification must be accepted carefully.

8. When the witness and the other person is not closely acquainted, voice identification evidence is not reliable. However, it is apparent from the following decisions that if the witness had previous acquaintance with the person and the person is intimately known to the witness, evidence of voice identification can be considered reliable.

9. In the Indian case of Dalbir Singh v. State of Haryana, Criminal Appeal No.899 of 2008 decided on 15th May 2008, the accused was the grandson of the witness. Therefore, the voice identification was accepted.

10. In the case of Kishnia and Others v. State of Rajasthan - Case No: Appeal (crl) 120 of

1998 decided on 10th September 2004, voice identification has been accepted. In this case, witnesses had previous acquaintance with the appellants as their properties were situated close to the field of the deceased.

11. In Sri Lankan judgment Hatangalage Ariyasena v. The Attorney General CA 68/2011 decided on 21st February 2013, the witness Kalyani was living in her ancestral house and the accused was living in the same land. So, it was held that Kalyani could identify accused's voice. In this case, the decision of the Indian case Kirpal Singh v. The State of Uttar Pradesh - AIR 1965, 712 has been cited as follows: "Where the accused is intimately known to the witness and for more than a fortnight before the date of the offence, he had met the accused on several occasions in connection with the dispute, it cannot be said that identification of the assailant by the witness from what he heard and observed was so improbable.

12. In view of the aforesaid decisions, the voice identification evidence of PW-3 could be accepted without any reasonable doubt because PW-3 heard his younger brother's voice from the day that he was born.

13. Accordingly, the convictions and sentences imposed on the 1st, 2nd, 3rd, and 4th accused-appellants are affirmed.

14. The conviction and sentence imposed on the 5th accused-appellant is set aside.The 5th accused-appellant is acquitted.

15. The 1st, 2nd, 3rd, and 4th accused-appellant's appeals are dismissed. The 5th accused-appellant's appeal is allowed.

JSALR 2024/II//IX

Wasala Herat Mudiyanselage Manel Kapukotuwa Vs. Rev. Yogaraj Steven, Officer-in-Charge, Police Station,Chilaw and The Hon. Attorney General,

Court of Appeal No : CA(PHC) APN 0081/21

Before : Sampath B. Abaykoon, J.

P. Kumarsratnam, J.

Section 98(1)(a) of the Code of Criminal Procedure Act / Public nuisance / What is meant by a public place / Sound pollution.

Decided on : 01.08.2024

Sampath B. Abaykoon, J.

1. This is a matter where the learned Magistrate of Chilaw has considered an application made to him by the police, seeking an order to prevent a public nuisance allegedly caused due to the sound pollution caused by the activities of the Church maintained by the respondent.

2. It is clear from the final order of the learned Magistrate made on 17-10-2017, that the application has been considered in terms of section 98(1) (a) of the Code of Criminal Procedure Act (hereinafter referred to as the Act).

3. As it was strenuously argued by the learned Counsel for the respondent that the alleged nuisance complaint, namely, the sound pollution, was not a matter covered by the said section, I find it necessary to consider the said contention to determine whether it has merit.

4. The relevant section 98(1) (a) of the Act under which the learned Magistrate has considered the application made to the Court reads as follows;

98. (1) Whenever a Magistrate Considers on receiving report or other information and on taking such evidence (if any) as he thinks fit-

(a) that any unlawful obstruction or nuisance should be removed from any way, harbour, lake, river, or channel which is or may be lawfully used by the public or from any public place, or

5. The main argument advanced by the learned Counsel for the respondent was that this section is applicable only to public ways, harbours, lakes, rivers or channels. Therefore, a place of worship as in this case, cannot be considered as applicable in terms of the said section. It was also argued that, anyway, a Church or a place of worship cannot be considered as a public place in terms of section 98(4) of the Act.

6. Since section 98(4) has been cited, for the completeness of this judgment, I would now reproduce the relevant section which reads as follows.

98. (4) For the purpose of this section a "public place" includes also property belonging to the State or a corporation or vested in the public officer or department of state for public purpose and ground left unoccupied for sanitary or recreative purpose.

7. I am in no position to agree with any of the positions taken by the learned Counsel in that regard. A careful scrutiny of section 98 (1) (a) becomes clear that the said sub-section has two applicable parts.

8. For matters of clarity, I would like to breakdown the relevant section in the following manner.

The sub-section is applicable in relation to any unlawful obstruction or nuisance that should be removed;

(i) from any way, harbour, lake, river, channel which is or may be lawfully used by the public or,

(ii) from any public place.

9. It is clear from the order of the learned Magistrate that the learned Magistrate has considered the application before him in terms of the 2nd applicable part of the subsection, namely, the nuisance complained of should be removed or remedied considering the place as a public place, for which I find no reason to disagree.

10. I find no basis to agree with the learned High Court Judge's view that the places of worship cannot be considered as a public place for the purposes of this section.

11. It is clear from the section that, to avoidance of any doubt, the legislature by its wisdom has stated that a public place should include the places mentioned in the section, which means that any other place also comes within the meaning of a public place according to the facts and circumstances of each case.

12. When it comes to a matter of a noise pollution, it needs to be understood that what is meant by a public place in such a situation would not only be the place that emanates the noise, but the surrounding areas which get affected as a result of the noise created from the place. In the instant situation, the noise creator is the Church run by the respondent. It is clear that the people who live in the vicinity of the Church are the persons affected by the said nuisance.

13. It is clear from the proceedings before the Magistrate's Court of Chilaw that once the report was received by the learned Magistrate, the learned Magistrate has not decided the matter arbitrarily. The learned Magistrate has called for evidence, and after having considered the relevant law and the decisions reached by Superior Courts in similar circumstances, has decided to issue a conditional order preventing the respondent from using instruments that emanate loud sounds until the next date of the

matter. I find that the learned Magistrate has acted within the powers vested with him when pronouncing the order, which is a clear order that can be given effect.

14. For a person against whom a conditional order has been made, the procedure he should follow has been stipulated in section 98(2) of the Act, which reads as follows;

    98. (2) Any person against whom a conditional order has been made under subsection I may appear before the Magistrate making that order or any other Magistrate of that Court before the expiration of the time fixed by that order and move to have the order set aside or modified in manner hereinafter provided.

15. The proceedings before the Magistrate's Court shows that the respondent has chosen not to call evidence in that regard, but to make oral submissions in order to challenge the conditional order, seeking to set aside it. The learned Magistrate has ordered that the conditional order should be made absolute based on the stand taken by the respondent. He has not sought for a modification of the order, but for a total setting aside of the order on the earlier considered basis that no order can be made in terms of section 98 of the Act against the alleged noise pollution.

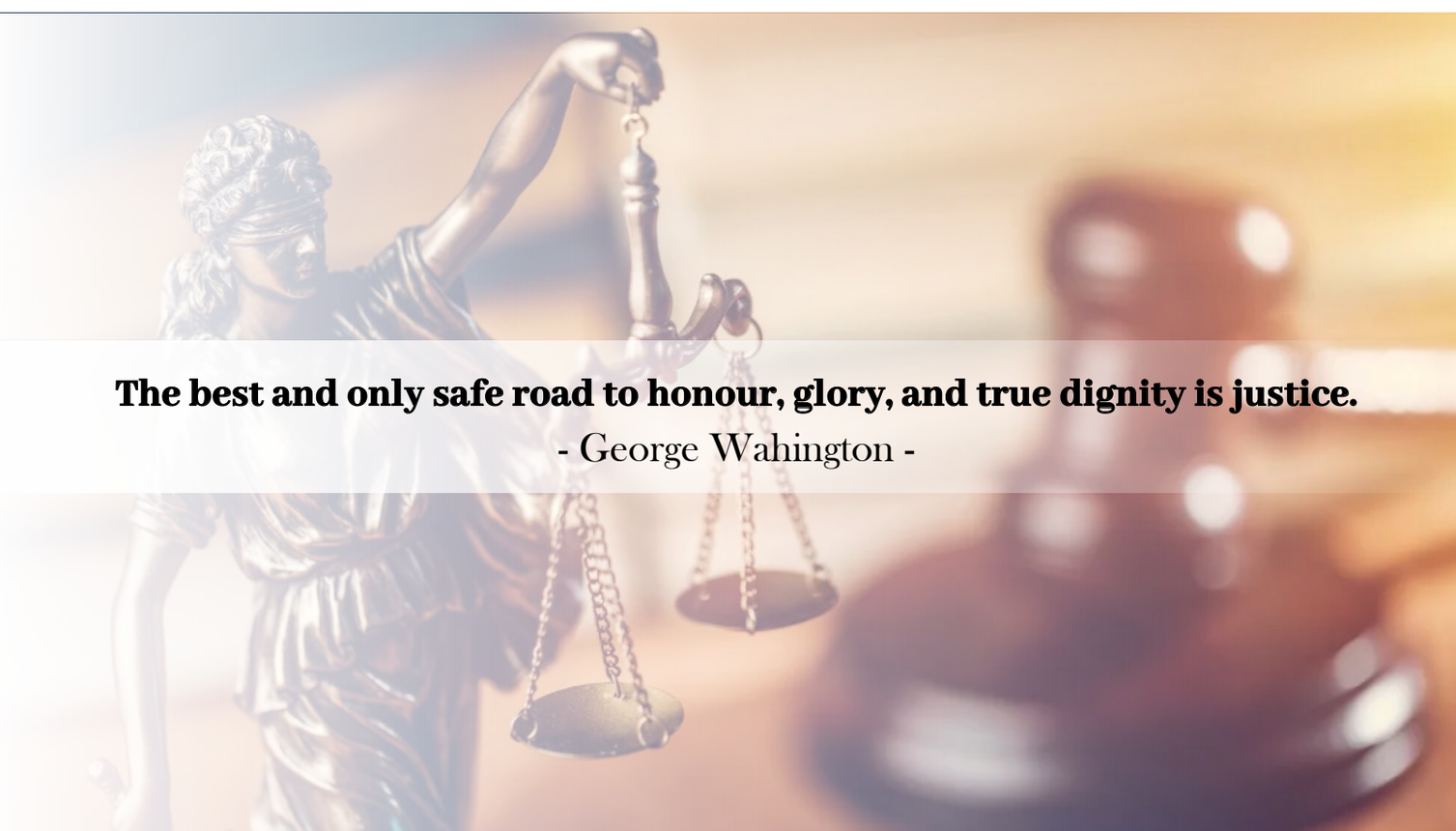
16. Under the circumstances, it is my view that although the application by the petitioner has been to have some control over the noise emanating from the Church when the services were being conducted using loudspeakers, the learned Magistrate has had no option, but to make the earlier order absolute under the given circumstances.

17. The order has been not to stop the respondent from conducting religious activities, but to stop using loudspeakers in conducting such religious activities.

18. I am of the view that no one is permitted to create such public nuisance in the guise of religious freedom or any other right, as the persons who suffer because of sound pollution nuisances are also entitled to similar basic fundamental rights.

19. For the aforementioned reasons, I am of the view that the judgment dated 21- 05-2021 by the learned High Court Judge of the High Court of the North Western Province Holden in Chilaw cannot be allowed to stand.

20. Accordingly, I set aside the said judgment and affirm the order dated 17-10-2017 pronounced by the learned Magistrate of Chilaw.



Acts Passed after JSA News Letter 2024 Volume I

MEDICAL (AMENDMENT) ACT, No. 47 OF 2024
http://www.documents.gov.lk/files/act/2024/8/47-2024_E.pdf

MEDICAL (AMENDMENT) ACT, No. 46 OF 2024
http://www.documents.gov.lk/files/act/2024/8/46-2024_E.pdf

ECONOMIC TRANSFORMATION ACT, No. 45 OF 2024
http://www.documents.gov.lk/files/act/2024/8/45-2024_E.pdf

PUBLIC FINANCIAL MANAGEMENT ACT, No. 44 OF 2024
http://www.documents.gov.lk/files/act/2024/8/44-2024_E.pdf

CIVIL PROCEDURE CODE (AMENDMENT) ACT, No. 43 OF 2024
http://www.documents.gov.lk/files/act/2024/8/43-2024_E.pdf

SRI LANKA TELECOMMUNICATIONS (AMENDMENT) ACT, No. 39 OF 2024
http://www.documents.gov.lk/files/act/2024/7/39-2024_E.pdf

SRI LANKA NATIONAL COMMISSION FOR THE UNESCO ACT, No. 38 OF 2024
http://www.documents.gov.lk/files/act/2024/7/38-2024_E.pdf

WOMEN EMPOWERMENT ACT, No. 37 OF 2024
http://www.documents.gov.lk/files/act/2024/7/37-2024_E.pdf

SRI LANKA ELECTRICITY ACT, No. 36 OF 2024
http://www.documents.gov.lk/files/act/2024/6/36-2024_E.pdf

INSTITUTE OF CHARTERED SHIPBROKERS OF SRI LANKA (INCORPORATION) ACT, No. 34 OF 2024
http://www.documents.gov.lk/files/act/2024/6/34-2024_E.pdf

PUBLIC DEBT MANAGEMENT ACT, NO. 33 OF 2024
http://www.documents.gov.lk/files/act/2024/6/33-2024_E.pdf

SHOP AND OFFICE EMPLOYEES (REGULATION OF EMPLOYMENT AND REMUNERATION) (AMENDMENT) ACT, No. 28 OF 2024
http://www.documents.gov.lk/files/act/2024/5/28-2024_E.pdf

PARTITION (AMENDMENT) ACT, No. 27 OF 2024
http://www.documents.gov.lk/files/act/2024/5/27-2024_E.pdf

RECOVERY OF LOANS BY BANKS (SPECIAL PROVISIONS) (AMENDMENT) ACT, No. 26 OF 2024
http://www.documents.gov.lk/files/act/2024/5/26-2024_E.pdf

CODE OF CRIMINAL PROCEDURE (AMENDMENT) ACT, No. 25 OF 2024
http://www.documents.gov.lk/files/act/2024/5/25-2024_E.pdf

Both Men's and Women's cricket teams of JSA

Participated for the Battle of the Black - Day and Night cricket encounter 2024 organized by Tangall Bar Association and JSA women's team won the women's tournament. JSA congratulate JSA Women's cricket team for winning the tournament.


BATTLE OF THE BLACK
Lawyers' Cricket Encounter
- 2024 -
JSA


JSA
07

JSA GET TOGETHER – 2024

The annual JSA get-together was held as a residential family event with many adventures and entertainment at the Laya Leisure Resort, Kukulegaga on the 20th and 21st of July 2024. JSA appreciate the entertainment committee headed by Mr. Suranga Munasinghe for organizing such a wonderful event.

News Letter

THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

ASKA PUBLICATION

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