News Letter

THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

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Editorial

Independence of the Judiciary is the major component of the concept of Rule of Law. The Article 111 (c) of the constitution of the Democratic Socialist Republic of Sri Lanka Reads thus,

111c.

(1) Every Judge, presiding officer, public officer or other person entrusted by law with judicial powers of function or with functions under this Chapter or with similar functions under any law enacted by Parliament shall exercise and perform such powers and functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal, institution or other person entitled under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or performance of such powers or functions.

(2) Every person who, without legal authority, interferes or attempts to interfere with the exercise or performance of the judicial powers of functions of any judge, presiding officer, public officer or such other person as is referred to in paragraph (1) of this Article, shall be guilty of an offence punishable by the high court on conviction after trial without a jury with imprisonment of either description for a term which may extend to a period of one year or with fine or with both such imprisonment and fine and may, in addition be disqualified for a period not exceeding seven years from the date of such conviction from being and elector and from voting at a Referendum or at any election of the President of the Republic or at any election of a Member of Parliament or any local authority or from holding any public office and from being employed as a public officer.

According to the Article 111 (c) of the constitution of the Democratic Socialist Republic of Sri Lanka the Supreme Law of the Country guarantees that the Judicial functions to be carried out without any favour, fear or affection. During the last few months, some of the Judicial decisions were criticized willfully without proper basis by several Social Media and several print media carried similar news items criticizing the personal lives of some Judicial officers. It is noted with regret that those authors lack rationality and have no basis of any sort for their callous scribbles.

Furthermore, it goes without saying that the baseless criticism and attack on the judiciary will negatively impact the confidence that the general public has placed on this most revered pillar of democracy.

Undoubtedly reporting and publishing judicial news is a need of the day. However it is equally important to establish a regulatory body to ensure suitable mechanism to do so.

It is the paramount duty of the Judges to perform and discharge their duties without favour, fear or affection with more confidence. Unnecessary, baseless and irrational criticism against the Judiciary and carrying out personal attacks on the Judicial officers do nothing but tarnish the public trust and the public confidence on the Judicial system of the country and it will put the independence of the judiciary at stake.

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JSA Welcomes Justice Buwaneka Aluwihare To The Judicial Service Commission

Honourable Justice Buwaneka Aluwihare, President's Counsel, hails from a respectable family from Kandy. He had completed his early education at St. Sylvester's College, Kandy. Thereafter he entered Sri Lanka Law College in the year 1979 and was called to the Bar in October 1982.

Having practiced as a member of the unofficial Bar for a period of one year, His Lordship joined the Attorney General's Department as an Acting State Counsel on the 1st November 1983.

Justice Aluwihare had successfully completed the final Examination of the Law Society of England and Wales and was enrolled as a Solicitor of England and Wales in February 1989. His Lordship obtained a Master Degree in Law from the Queen Mary College of the University of London in the year 2004. He served as a Prosecutor in the United Nations Transitional Administration in East Timor, dealing with War Crimes and Crimes against Humanity.

Justice Aluwihare had functioned as an Additional Solicitor General from June 2013. On the 04th December 2013, He was appointed as a Judge of the Supreme Court.

JSA warmly welcome Honourable Justice Buwaneka Aluwihare, President's Counsel, as the new member of the Judicial Service Commission and wish him the blessing of the Noble Triple Gem.

New Appointments to the Supreme Court and the Court of Appeal

Three newly appointed judges to the Supreme Court and two newly appointed judges to the Court of Appeal were sworn in before His Excellency the President Maithripala Sirisena at the President Secretariat.

The President of the Court of Appeal Justice Preethi Padman Surasena and the Judges of Court of Appeal Justice S. Thurairaja and Justice E.A.G.R Amarasekara took oaths as Judges of the Supreme Court. High Court Judge Honourable K.P. Fernando, took oaths as a Judge of the Court of Appeal on the 09th January 2019. Further High Court Judge Honourable Bandula Karunarathne, took oaths as a Judge of the Court of Appeal on the 6th March 2019.

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

Honourable Yasantha Kodagoda, President's Counsel appointed as the President of the Court of Appeal

Honourable Yasantha Kodagoda, Senior Additional Solicitor General, President's Counsel, took oaths as the President of the Court of Appeal on the 28th March 2019 before his Excellency the President. The JSA wishes all the best on His Lordship's new appointment.

Synopsis of the keynote address by Justice A W A Slam

at the annual Conference of the Sri Lanka Judges Association on 14.12.2018 at Hotel Hilton, Colombo.

Mr. President and other honourable Judges of the Sri Lanka Judges Association, let me wish you a pleasant morning and a fruitful conference today and tomorrow.

'THE JUDICIARY AS THE GUARANTOR OF THE RULE OF LAW is the theme of the conferece this year.

I owe an expression of gratitude to you the president your executive committee and every individual Judge present here, for the confidence you have reposed in me and the honour bestowed.

I have the great satisfaction of having very closely worked with JSA as a member, secretary to the JSC and president, Court of appeal.

When I joined the JSA as a member there were only 52 members. 36 years thereafter, the Association has now grown into a massive Tree, spreading its roots deep and wide into the hard soil, with branches spreading over all four corners of the country and being blessed with the capacity to stay up even during the heaviest storm thus giving shade to its entire membership of 215 in all type of weather conditions.

Judicial Service Association has a longstanding reputation for being the bastion of the rule of law and for its struggle to restore judicial independence. The Association has fought hard to preserve the dignity of Judges in many ways. Your Association for the first in the history in the year 2014 took the drastic measure to keep away from work as a collective professional body when there was controversy over the procedure adopted to remove the Chief Justice at that time.

To my knowledge, Your Association is the only professional organization which has functioned for over 6 decades without a written constitution adhering to the age-old traditions. From time immemorial the Judges and the Judicial Service Association in particular, along with the support readily extended by the Bar have jealousy safeguarded the independence of the judiciary and attempted to establish the rule of law in the country, despite the various type of pressures exerted from outside at different times.

You are well aware that the constitution of the Democratic Socialist Republic of Sri Lanka assures to everyone freedom, equality, justice, fundamental human rights and on top of that the independence of the judiciary as the intangible heritage that guarantees the dignity and well-being of succeeding generations of the people of Sri Lanka.

According to the constitution, the sovereignty is in the people and is inalienable. The Sovereignty includes the powers of government, fundamental rights, and the franchise.

In terms of Article 4 the Legislative power of the people is exercised by Parliament through the elected representatives and the executive power by the president of the Republic. The judicial power quite importantly is exercised by Parliament but only through Courts, tribunals and institutions created and established by the Constitution and other laws.

You will now see therefore the Supreme Court Court, Court of appeal and the High Court of Sri Lanka are the creations of the Constitution itself while the Courts of First Instance and Civil Appellate Courts are created by the Judicature Act, in terms of the enabling Provision contained in Article 105.

Hence, the judicial power of the people is exercised by these courts. It is a rigid rule that the Parliament is

not permitted to exercise the judicial power of the people by itself. The parliament is empowered to exercise judicial power for the very limited purpose. That is to decide matters relating to the breach of Parliamentary Privileges.

A close Supreme Scrutiny of article 4 which sets out the various mechanisms through which the sovereignty is exercised shows a clear separation of powers among various institutions. This is quite evident to establish the salutory concept of checks and balances in our system.

Besides, the Legislature executive and judiciary being the indispensable components of our democratic system enjoy a wide range of powers, wielding enormous influence over one another and constantly is able to prevent any one of the three branches abusing its powers.

Yesterday's historical judgment of the Supreme Court is a classic example to demonstrate the clear separation of powers.

It also speaks for volumes as to the independence of Judiciary and the no interfering policy of the three organs with the functions vested in each other.

Turning to the theme of the conference, let me remind ourselves at the outset of the endevours this country has taken forward towards the restoration of the rule of law. These endevours include the drastic legislative measures initiated to re-establish a more independent judiciary.

The 19th amendment to the constitution was one such step taken forward appreciably without any controversy and every member of Parliament voting for it.

One of the objectives of the amendment was to regularise the appointment of the President and other Judges of the court of appeal, and the Chief Justice and other Judges of the Supreme Court.

An independent judiciary is the cornerstone of a democratic society based on the rule of law. We are proud to be the citizens of a country in which serious endevours are taken forward to establish the rule of law.

Establishing or restoring the rule of law in any country would undoubtedly command the public confidence and therefore it is the paramount duty not only of the Judiciary but the Executive and the Legislature as well to promote the rule of law.

There is also a corresponding duty cast on every citizen of this country to preserve and protect the independence of the judiciary and its dignity. We live in a society in which the judicial institutions are treated as sacred as our places of worship.

The people of the country, therefore, are obliged to protect the judicial independence not for the benefit of the judiciary alone but for their own benefit. Judicial independence means and includes that Judges are not subject to pressure and influence and are free to make impartial decisions solely on the fact and law.

It is a concept widely spoken but hardly put into effect except in very few countries across the globe. A question worth being raised at this point is whether we have ever enjoyed such an independence, commanding the public respect or had there been any serious threat to the independence of the judiciary in the past?

We have had several threats to the independence during the past 40 years under the 1978 constitution. During the last 40 years, we have faced 3 unsuccessful impeachment motions against the Chief Justices.

In addition, there was also a threat to summarily dismiss the Supreme Court Judges and send them home for allegedly not taking the oath in terms of the 6th amendment in 1983.

In terms of the 6th amendment, the Supreme Court Judges were under a duty to subscribe to an oath before the president to the effect that they would not support any attempt to establish a separate state.

The Supreme Court Judges by an oversight took their oath before each other and not before the president. Upon this default, the Chambers of the Supreme Court Judges were locked up and kept under police guard not allowing them to enter.

There was wide speculation that they had vacated their posts. Moves were underway to reappoint Judges leaving out those whom the President did not like.

In this scenario, the question was raised in the Supreme Court as to whether it is mandatory to take the oath before the President himself or whether it could be considered as sufficient compliance if the oath was taken before someone who is empowered to administer the oath.

The Supreme Court being the sole authority to interpret the constitution ultimately, by their bold and fearless interpretation held that it is the fact of taking an oath which is mandatory but not the person before whom it is taken.

This was a landmark Judgment of the Supreme Court which asserted the independence of the judiciary in a remarkable manner.

The next attempt was to impeach the former chief Justice Nevil Samarakoon on the basis that he had criticized the government on the job bank issue at a prize-giving ceremony held at the sinnathurai institute, Wellawatte.

Serious objection was taken in that case before the Parliamentary select committee as to the jurisdiction of the select committee to hear and determine the allegation against the Chief Justice based on the fact that the select committee was going into a question of judicial nature which has to be tried after the procedure for the proof of misbehavour or incapacity is provided by parliament.

The select committee found the objection to be of meaningful and substantial in nature but did not find the Chief Justice guilty of having made a statement rendering him totally unbecoming of a Chief Justice.

After this decision, the Chief Justice was exonerated but later he tendered his resignation so as to avoid a conflict. Hence this impeachment also failed.

The next impeachment motion was directed aginst former Chief Justice Sarath N Silva. That too was defeated when the President in the exercise of her prerogative powers vested in her under the constitution prorogued the Parliament.

The next was against Chief Justice Shirani Bandaranaike. Interpreting the provisions of the constitution governing the impeachment of the apex court Judges a bench of three judges led by Late Justice Gamini Amaratunga including former Chief Justice Priyasath Dep held that the inquiry into the allegation cannot be heard by the select committee, unless and until the Parliament provide for the procedure by passing a law as to the mode of proof of the allegations.

Based on this interpretation the court of appeal issued a writ of certiorari quashing the proceedings of the select committee.

However, the impeachment motion was passed in Parliament.

As no specific follow up action had been taken thereafter to lawfully dismiss the CJ from the post, the impeachment was deemed not to have been passed and the Chief Justice was reinstated.

Consequently, you will find all three impeachment motion and the attempt remove all the Supreme Court Judges under the 1978 Constitution have failed.These are clear historic events that demonstrate the independence of the judiciary.

I need to mention certain other developments of Chief Justice Bandaranayaka'a impeachment motion.In that case after the SUPREME COURT interpretation and CA ruling were entered, an appeal was preferred to the SUPREME COURT by the Attorney General and another bench of the Supreme Court later held that the writ of certiorari issued on the select committee was bad in law and the interpretation is given by the Supreme Court also is erroneous.

Therefore the present position remains that a select committee appointed under the standing orders of the Parliament can go into the allegations leveled against Judge of the apex court.

In order to preserve the independence of the Judges, it is hoped by the right thinking members of the legal

fraternity that it would be desirable to deviate from the Supreme Court judgment on this interpretation, either by an amendment to the constitution or by the Supreme Court deciding on the matter on the same issue in a different way with a greater number of Judges subscribing to a different opinion consistent with the principles of justice and fair play.

The 19th amendment took one step further to re-assure and to re-affirm more effectively the degree of independence of the Judges of the courts of the first instance by making provisions for the appointment of the members to the JSC by the president with the approval of the restructured constitutional council.

Quite remarkably, the 19th amendment guarantees the independence in a more effective manner by further introducing a provision under article 111D to appoint at least one member of the JSC with experience as a Judge of a Court of First Instance into the JSC.

Never in the history before, was it laid down that a Judge of the SUPREME COURT having the exposure as a Judge of the court of the first instance should necessarily be a member of the JSC.

Although we were late in introducing such a provision, it gives the satisfaction that at least the Constitution has now recognized that the affairs of the original court Judges should be monitored with the assistance of a Judge who has once adorned the bench in an original Court, presumably due to its peculiar nature of intricacies.

This is a very salutary move and it is my humble point of view that at least 2 career Judges should be on the Judicial Service Commission as the decisions of the commission are taken on the basis of simple majority unless they are unanimous.

There is no gainsaying that the Judges could contribute in a great way to achieve judicial independence. I am quite confident that if the Judicial independence is fully achieved the establishment of rule of law in an effective manner in this country is going to be effortless.

The concept of Judicial independence takes us through to the thought that the judiciary should be independent of the other branches of the government.That is, courts should not be subject to improper influence from the other branches of government or from private parties.

If the judiciary is independent, then it can make fair decisions upholding the rule of law, an essential element of any genuine constitutional democracy.

Let us focus on the provisions of the constitution to the type of independence conferred on the original Court Judges.

We all know that the Judicial Service Commission itself enjoys immense guarantee as to its independence. In terms of article 111 L of the constitution a person who otherwise than in the course of such person's lawful duty directly or indirectly influences or attempts to influence the decision of the commission shall be guilty of an offence.

The framers of the constitution did not stop at that.

The Legislature in its own wisdom and enthusiasm has taken many further measures to provide more independence to the Judges of the original court, so as to make them fearlessly independent from being interfered with either by the Government or private individuals.

One such measure taken forward by the Legislature is to grant absolute freedom to decide cases.

The type of independence you enjoy is such; even the JSC adheres to the non-interference principle in your day to day judicial function.

As matter of fact, the JSC exercises powers only in relation to your appointment, transfers, promotions and more importantly in the area of disciplinary control. This being the degree of respect given to you, it is incumbent on you not to compromise your independence in exchange for any consideration, be it money, gift, kindness, sympathy, hatred, anger, malice, jealousy, religion, race, sex, age or any other consideration.

It does not mean that once you convict a person you should not take the mitigatory circumstances into

consideration but to find a person's liability you must not take irrelevant matters into consideration.

It is said that love is blind. please keep that it is not only love but Justice is also blind. This expression means that justice is impartial and objective. You know there is an allusion to the Greek statue for justice, wearing a blindfold so as not to treat friends differently from strangers, or rich people better than the poor.

A Judge should not make orders to please the politicians or people holding high office to be in their good books or on the other hand fearing that your promotional prospect would suffer if you hold a matter referred to you for judgment in a particular way be it a conviction, acquittal discharge or even grant or refusal of bail.

Now that you have been listening to me for quite some time, let me break the monotony and narrate something different.

This is a story I read recently. There was a young boy who got married to a pretty girl and both of them were on their way to a particular destination to spend their honeymoon.

On the way, they were waylaid by a group of robbers who subjected them to a thorough search. In their possession, they only found a brand new smartphone. The robbers took away the smartphone and the young wife into their custody and told the husband, he can have either the pretty young girl or the smartphone back. Although the phone was very expensive the boy at once expressed his option. I will forego the phone.. please release my wife back. The wife was then released and both of them reached their destination safely.

After 1 year they were on their way to the same destination to celebrate their wedding anniversary and got caught to the same Highway robbers. This time also, they had a mobile phone with them. As usual, the robbers grabbed the phone and then took the wife into their custody and put the same question to the husband.

What do you prefer to have this time? The phone or the wife?.

The answer came out from the husband in a second.

I will have the phone.

Surprised by the option exercised by the husband the chief of the robbers asked him what made you prefer the phone to your wife.

The husband answered the question promptly. I preferred the phone to my wife because the phone can be put on silent mode.

This is exactly what is expected from our Judges as well irrespective of whether you are wife husband or single. The judicial ethics demand you to be on silent mode unless for a pressing need you want to put it on vibration for a short time. Certainly not on sound mode.

So please remember the Judge on the bench is always on silent mode but the rare exception is to be on vibration.

This is because that the Judges are paid to listen and the lawyers are to talk.

It is said that an over-speaking Judge is no well-tuned cymbal. Cymbal you know is a musical instrument. In civil cases, the role of the Judge is said to be that of an umpire. He does not play the game but watches the same and gives rulings. In order to win over the public confidence, a Judge should exceptionally display judicial temperament.

A Judge who says he loses his temper on the bench is not fit to be a Judge in the strict sense of the discipline and such a Judge is incapable of promoting a sense of judicial independence and the rule of law. Those who cannot demonstrate patience, open-mindedness, courtesy, tact, and courage should not be considered for elevation or extension.

Promotional prospects of Judges should not only be confined to seniority or the number of judgments an officer writes. If a Judge sleeps on the bench as a matter of practice or generally rude to the lawyers and the general public on the bench or prevents the lawyers from citing authorities saying that he or she knows the authority or habitually attempts to influence his colleagues in his judicial decisions or tries to throw his weight

about or discriminating treats the equals to achieve an ulterior motive, if detected at the beginning, should be effectively prevented from climbing the ladder, be it to the High Court, the Court of Appeal, or the Supreme Court.

If you keep granting promotions irrespective of these shortcomings then you will have one day a set of Judges in the Apex courts committing the same mistake. What is the guarantee that such a Judge who is used to constantly fall asleep on the bench in the Magistrates court, will not fall asleep in a Higher Forum?

If promotional prospects are considered inter alia for good conduct, then the Judges will find that they are sufficiently rewarded for the good qualities they develop on the bench.

Well, these are only a few thoughts I thought I share with you. It is up to the JSA and secretary to JSC to give their valuable thought if they find any merit in the suggestion.

The secretary to the JSC should be able to assist the Commission to ascertain the level of the good qualities a Judge displays on the bench and in his Chambers and feed the Commission with such information.

As regards your relationship with the secretary to the JSC, I think I need to add a few things. Arising from the jealously guarded constitutional provision, we need to avoid always mistakenly identifying the secretary to the JSC as the legal advisor to the Judges. This is certainly not the correct approach.

I have never given any legal advice to any Judge as to how to decide a case, as the Secretary to the JSC or as Consultant to the Judges Institute. All of you will bear testimony to this fact.

What I am trying to emphasize at this point is that you as Judges enjoy 100% independence and it is your decision and your decision alone based on evidence supported by the legal principles that should produce a judgment after hearing the parties.

Therefore we must not embarrass causing inconvenience to the secretary by seeking legal advice. If you do that the secretary will not advise you.

Article 116 of the constitution which is renumbered as 111 D deals with the prohibition against the interference with the judiciary. The offence of interfering with the judiciary carries a sentence of imprisonment of either description for a term which may extend to a period of one year or with fine or with both and in addition the offender may be disqualified for a period not exceeding 7 years from such conviction from exercising certain civic rights including holding a public office.

Therefore, any interference with the course of justice should be promptly discourage by every one of us, irrespective of the quarter from which the interference proceeds.

I am quite aware of your strict observance of Article 111 C of the Constitution.

No Judge in this Counry has ever attempted to influence his brother Judge except a neglegible number of one or two selfish Judges.

However, it is our duty to keep the public informed of this provision so that they will know to what extent we honour independence and shun interference.

How can we do this?. If any member of the public expects you to do this please don't just refuse, instead show them the constitutional provision and ask him whether he wants to lose his right of franchise for 7 years.

I strongly feel that the secretary to the Ministry or Secretary to the JSC can arrange sufficient number of the reprint of the Article 111 C from the government press and exhibit this on the notice board of every court so that the people will know what a grave offence it is to interfere with the Judge's decision otherwise than it is permitted in law.

At this point, I need to emphasize on one other matter of importance. Since the concept relating to the independence of the judiciary has a direct impact on the image of the Judge and the judiciary at large in the minds of the general public we are under a duty to avoid even the appearance of suspicion that the judicial officer has interfered with the performance of the judicial powers.

Justice is the unfailing disposition to give everyone his legal due.

To do this we have to expound and interpret the law and, it must be so done honestly, fairly, patiently, attentively and impartially without fear or favour.

These are essential prerequisites for the people to continue to repose their trust and confidence in us when we exercise their sovereign judicial power in terms of Article 4 of the Constitution.

When talking about the independence of the judiciary, one should necessarily run through the preamble to our constitution.

The preamble amongst other matters reads that the people of Sri Lanka while assuring the INDEPENDENCE OF THE JUDICIARY has enacted the present constitution as our principal law.

As such, to achieve the several objectives and the goals of our constitution, first and foremost, we as the members of the judiciary are bound to demonstrate our independence in all our matters be it official or unofficial.

Thereafter, the Legislature and the executive have to follow suit in a concerted effort to establish the true independence of the judiciary. From ancient time, Judges were considered as not being even second to religious dignitaries and the courthouses which they preside as not being inferior to a place of worship.

For this very reason, we the Judges should make every possible endevour to demonstrate the courts are as sacred as our temples.

To achieve this Judges should work hard with dedication and in a team spirit. The slightest impropriety committed by one single Judge reflects adversely on the entire judiciary. If the most junior Judge commits an act which is unbecoming of the office he holds, the reflection of it would tarnish the good image of the entire judiciary that is from the Chief Justice downwards and vice versa.

The independence of the judiciary, we need to keep in mind, does not mean that we are given the power or license to do whatever we like undermining the law and the widely accepted judicial ethics.

The misuse of the independence and the abuse of the privilege of the office of a Judge would always lead to the erosion of the public confidence. Quite importantly a fearless and independent judiciary always result in the strict establishment of the rule of law.

There can be no controversy over the power of a court or tribunal to maintain its own authority and dignity. Any challenge offered from outside against the dignity of the court is contempt offered to that court.

It is for the sake of the administration of justice and in order to maintain the authority and decency of judicial proceedings, that this extensive and summary power is conferred on Judges. However, the summary power to deal with the person committing contempt should be used only when the circumstances demand such a draconian step. Therefore, the negligible acts like mobile phones going off or chewing betel etc. should not be looked at as serious incidents of contempt.

What is important here is to look at the act complained being contempt with a touch of sympathy, unless the gravity of the act is such which calls for deterrent punishment. You need to distinguish between act of contempt which is intentional or and accidental. In other words, as was observed by Lord Dennings this power must be sparingly exercised.

The most heinous crime ever committed on our land challenging the authority of the judiciary is the murder of Hon Ambepitya, the High Court Judge of Colombo in the year 2004.

A straightforward Judge of our time Hon Ambeypitya, who maintained the dignity and decorum of the court to its very letter, was shot dead by assassins hired by an accused who had several murder cases before him.

The motive behind the shooting was to get rid of him, as he had indicated to the parties in an open court of the nature of an incidental order he was going to make the following day against the accused in a murder case.

Our judicial system is founded upon a number of interrelated principles.

The first of these principles is the rule of law, which is needed in order to restrict arbitrary government power. The rule of law is put into effect through a constitutional system by which power is separated and balanced among three branches of government.

Under the separation of powers, the judiciary functions as an independent branch of the government so that it may enforce the rule of law.

An independent judiciary can properly enforce the rule of law only if it is learned in the law and is characterized by impartiality and integrity. The doctrine of separation of powers identifies the judiciary as a separate branch of government that is coequal to the legislative and executive branches of government.

It is the doctrine of separation of powers that underlies the need for an independent judiciary that acts as a counterweight to the Legislature and executive.

Accordingly, there is a delicate balance between the three branches of government. To maintain this balance, the judiciary has been granted the power of judicial review. This means that the courts have the authority to review the acts of the other branches of government to determine whether they meet constitutional standards.

If in the opinion of the courts, an act of the Legislature or executive is contrary to the Constitution, the courts have the authority to nullify that act. Thus, the judiciary stands as the final arbiter of the Constitution and has the responsibility to review legislative and executive action to determine its constitutionality, and hence its validity. Judicial review is the most significant function performed by the judiciary and operates as an integral wheel in the system of checks and balances created by the Constitution.

Ladies and gentlemen, it cannot be easily forgotten that the Judges of the original court particularly the Magistrates and the district Judges are the back born of any judiciary. Without exaggeration the Judges of the original court can be identified as "the pillars of our entire system of justice," and therefore the public has a right to demand "virtually irreproachable conduct from anyone performing the judicial function in an original court.

In actual truth, the Judges of the original court are more independent than the higher judiciary.

They are equally knowledgeable in the law and willing to undertake in-depth legal research, and able to write decisions that are clear and cogent. Judges should be fair and open-minded and should appear to be fair and open-minded. They should be good listeners but should be able, when required, to ask questions that get to the heart of the issue before the court.

They should be courteous in the courtroom but firm when it is necessary to rein in a rambling lawyer, a disrespectful litigant or an unruly spectator.

Judges who have served in a lower court are sometimes promoted to a higher court, such as a High Court, Court of Appeal and Supreme Court.

As far as the elevations to the Higher Courts are concerned appointments to those Courts from and among the most senior sitting Judges had never given rise to any controversies.

In other words, the elevation from and among the sitting Judges had proved to be quite safe. The sitting Judges have proved themselves that they are worthy of being elevated, and both the bar and the public at large had expressed full satisfaction over such appointments.

The Judicial independence is now turning to be better than ever before.

The appointment of a carrier Judge as the Chief Justice after a lapse of 3 decades has brought fame and global recognition to the Sri Lankan Government. Let me congratulate the JSA for its achievement for being blessed with the fortune to have one of its former members to adorn the Supreme Court as the chief justice.

Long live the JSA.....Long live the Judiciary.

Thank you very much for being attentive.

JSA REFERENCE NO. – JSALR/2019/I/01

COURT OF APPEAL

Pitigala Arachchige Shelton Abeywickrama

Vs.

The Hon. Attorney General

L.T. B. Dehideniya J

Shiran Gooneratne J

CA/MC/RV/24/2016

09.10.2017

Section 5 of the Maintenance Act No.37 of 1999 -Section 14 of the Criminal Procedure Code- Maximum term of imprisonment by the Magistrate Court.

Petitioner was ordered to pay the maintenance for his wife but was in arrears of 38 months and the Court has imposed a term of 38 months imprisonment.

HELD

1. Under the proviso to the section 14 the Criminal Procedure Code the Magistrate Court can impose any term of sentence if it is governed by any enactment in force whereby special powers of punishment are given. The Maintenance Act is such an enactment where special powers given to the Magistrate Court. Therefore the term of imprisonment that could be imposed by the Magistrate Court in a maintenance case for not complying the order to pay the allowance is governed by the Maintenance Act.
2. The maximum term of imprisonment is determined by Section 5 of the Maintenance Act and not by section 312 of the Criminal Procedure Code.

Petition dismissed.

Dehideniya J. delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/I/02

COURT OF APPEAL

Mohamed Shariff Mohamed Sanoon

Vs

Mohamed Yoosuf Junaid

Mahinda Samayawardhena, J.

CA/417/1998/F

18.01.2019

***Rei vidicatio* action-Burden of proof- Permissive possession to become adverse possession - Starting point of adverse possession - Overt act - The doctrine of approbates and reprobate -Affirms and disaffirms the same transaction.**

The plaintiff filed this action against the two defendants seeking declaration of title to the land described in the 2nd schedule to the plaint, ejectment of the defendants there from and damages. The defendants sought dismissal of the plaintiff's action and also made several contradictory claims in reconvention including a declaration that the plaintiff is holding the property in trust for the defendants and the defendants have acquired prescriptive title to the land. District Judge dismissed the plaintiff's action and entered Judgment for the defendants on the basis that the defendants have prescribed to the land.

HELD

1. Permissive possession, however long it may be, is not prescriptive possession. Permissive possession to become adverse possession to claim prescriptive possession, there shall be compelling cogent evidence. In that setting, firstly, the defendants must establish a starting point for their acquisition of prescriptive rights. The defendants are not entitled to do so by forming a secret intention unaccompanied by an act of ouster.
2. When the relationship between the two parties is so close such as in the instant action, the overt act manifesting the commencement of adverse possession and strong affirmative evidence to establish continuance of adverse possession are all the more important.

3. It is settled law that a party cannot be inconsistent in his approach in legal proceedings. He cannot blow hot and cold, affirm and disaffirm the same transaction simultaneously to suit the occasion. The doctrine of approbate and reprobate forbids him from doing so.
4. In a vindicatory action, when the legal title to the premises is admitted or proved to be in the plaintiff, the burden of proof is on the defendant to show that he is lawful possession.

Appeal allowed.

JSA REFERENCE NO. – JSALR/2019/I/03

SUPREME COURT

SMB Leasing PLC

Vs

Hewapathiranage Don Cletus Jeyrad And Others

S. Eva Wanasundera PCJ

H. N. J. Perera J

Murdu Fernando PCJ

SC Appeal 147/2015

05. 10. 2018.

Section 337 of the C.P.C.- Writ of execution

HELD

1. Section 337(3) when a writ of execution has been issued once by Court at the application by the Judgment Creditor, thereafter, if it is unexecuted for whatever the reason, shall remain in force for one year only from the date of issue. It may be renewed at any time before its expiration by the Judgment Creditor for one year from the date of such renewal. What has to be understood is that when the one year is passing, before one year passes by, the Judgment Creditor should make an application to Court and get the writ of execution extended by another year. Then that one year is effective from the date of extension granted by the Judge. The Judgment Creditor can keep on extending the writ of execution from time to time. By any chance, if he could not get the writ of execution extended within each year, the Judgment Creditor is entitled in law, according to Section 337(3)(b), to get a fresh writ be issued by Court until satisfaction of decree is obtained, subject to Sec. 337(1)
2. The provisions of procedural law contained in Section 337 of the Civil Procedure Code does not call upon the Judge to give notice to the Judgment Debtor at any time. Yet in the normal course of hearing cases before a Court, the Judge always has the discretion of sending notice to the other party before the Judge makes an order at the instance of any party making any application against the other party.

Appeal dismissed.

Wanasundara PCJ, Delivered the Judgement.

JSA REFERENCE NO. – JSALR/2019/I/04

SUPREME COURT

Bambarawana Liyanagamage Dayawahie alias Daya Abeyawicsrama

Vs

Magage Nimal Dias and Others

Tilakawardane, J.

Dep, PC., J.

Wanasundera, PC, J.

SC. Appeal No. 80/2011

07.12.2012

Servitutede-Right of way-Abandonment- Permanent injunction

Plaintiff instituted action against the 1st to the 4th, seeking inter alia for a declaration that the deceased Plaintiff is entitled to commonly possess Lot 'A3' (described in No. 1 of the Schedule to the Plaint and No.2 of the Schedule of Deed No. 5301 dated 26th January 1976 attested by S. Wickremasinghe, Notary Public) together with other owners of that property, for an order directing the removal of all constructions and obstructions.

Plaintiff became the owner of the property described in No. I of the Schedule to the Plaint together with the right of access described as the second land in the Schedule to the Plaint by way of Deed No. 5301 dated 26th January 1976 attested by S Wickremasinghe, Notary Public (marked as 'P1') and Plan No. 903 dated 05th September 1942 made by J. P. Melony, Licensed Surveyor, (marked as 'P2').

The defendant deny inter alia the claims made by the deceased Plaintiff to the said road, expressing strongly that the deceased Plaintiff never used the said right of access in question and that it is only used for the purpose of gaining access to Lot 'A1' in Plan 'P2'.

The Learned District Judge entered Judgment in favour of the deceased Plaintiff.

The Respondents thereafter sought relief by way of appeal to the Civil Appellate High Court bearing case No. WP/HCCA/Mt/118/07 F. The Learned Judges of the Civil Appellate High Court entered judgment in favour of the Respondents.

HELD

1. An action for the use of servitude could be filed by a person who owns the soil rights of the property in question.
2. The law is clear that a servitude or right of way acquired through notarial grant, as distinguished from one created by verbal agreement or use through prescription, could only be abandoned if such abandonment was deliberate and intentional.
3. A mere none possession of a right does not amount to losing the said right or servitude.
4. The abandonment should be continuous, rather than from time to time.
5. According to Roman-Dutch Law, non-user or abandonment of the right should be for a third of a hundred years, i.e. 33 and 1/3rd years.
6. In the case of a private right of way the ownership of the ways is in the owner of the soil, though such ownership does not entitle him to obstruct the way to any substantial degree. At the same time, the owner of the right is entitled only to reasonable user.
7. Two main questions arise in the case of an obstruction to a private right of way. Firstly, whether the interference is substantial and, secondly, reasonable user of the way by the owner of the right.

Appeal allowed.

Thilakawardena J, delivered the Judgement.

JSA REFERENCE NO. – JSALR/2019/1/05

COURT OF APPEAL

Henakaralge Nimal Karunatilleka And Another

Vs

Hon. Attorney General

S.Thurairaja PCJ

Shiran Goonaratne J

Case No. 91-92/2015

296 of the penal code – Murder- Identification of the production- Circumstantial evidence

Attorney General indicted under Section 296 to be read with Section 32 of the Penal Code against 1st Accused- 2nd accused for committing the Murder and robbery of Henakaralalge Dingiri Appuhamy. For the 1st Count appellants were found guilty after the trial and convicted and sentenced to death and for the 2nd count 5 years Rigorous Imprisonment and a fine of Rs.5000/ each, in default 6 months Simple Imprisonment. Being aggrieved with the said conviction the Appellants have appealed to the Court of Appeal.

1st accused appellant is a grandson of the deceased. He was working at Colombo. The main two witnesses are son and the granddaughter of the deceased. The 1st appellant and the 2nd appellant were workmates and residing in Colombo. According to evidence of the prosecution it was revealed that both appellants were seen coming in a push bicycle, when they saw a bus, abandoned the bicycle and got into the bus with a parcel in hand. A police officer who was there fell suspicious and stopped the bus, when examining the

appellants it was found that they had blood stains in their cloths and they were carrying a parcel wrapped in a pillow cover. On suspicion he took them to the police station.

The main witness, who was 14 years at the time of the incident, identified many items including chain, wrist watch, purse, coins, pillow case and a milk powder tin. The chain, she identified as that it was given to her by the deceased grandfather when she attended puberty. Since she had only one chain she could clearly identify the same. Further she identified the wrist watch and the milk powder tin (Anchor tin) as a tin on which her grandfather collected coins. She also identified many items which belong to them.

There were no eye witnesses in this case, prosecution was depend on circumstantial evidence

HELD

1. When a case rest upon circumstantial evidence such evidence must satisfy the following tests.
   - I. The circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
   - II. Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
   - III. The circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and;
   - IV. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.
2. In a case circumstantial Evidence, if an inference of guilt is to be drawn against the accused such inference must be the one and only irresistible and inescapable inference that the accused committed the crime.

Appeal dismissed.

Thurairaja PCJ, delivered the Judgement.

JSA REFERENCE NO. – JSALR/2019/1/06

COURT OF APPEAL

Galmankanda Dewage Nimal Jayasooruya and Another

Vs

Hon Attorney General

S.Thurairaja PC,J

Shiran Goonaratne J

Case No. 145-146/2015

11.12.2018

Credibility of a witness

1st ,2nd, 3rd and 4th Accused ,together with persons unknown to the prosecution, were indicted in the High Court of Puttalam in terms of Section 140, Section 146 read with Section 357, Section 364(2), and 10 other counts under the Penal Code in relation to the offence of abduction and rape of Disna Piumi Sirimanne (PW1).

The only ground of appeal preferred by the Appellant is that the identification of the Appellant had not been proved beyond reasonable doubt.

PW1, in her evidence has clearly identified the Appellant as one of the accused who dragged her into the van and thereafter got into it. PW1 has recognized the Appellant by mane and as a person living in the same village. She also claims that she has known the Appellant for 3 years to the date of the incident. PW1 has observed that the Appellant was engaged in a conversation with the rest of the accused. PW1 had been forcibly kept in a house, where the offence of rape had been committed by the 1st Accused repeatedly. In cross examination, she has reiterated her position that she remember having seen

the Appellant at the time, the abduction took place. The stand taken by Appellant that PW1 has not seen the Appellant at the time of abduction together with the rest of the Accused has been firmly denied. There were no contradictions marked regarding the identity in cross examination.

Tharanga Dilshani (PW3), the sister of PW1 who was present at time of the abduction of PW1, has also identified the Appellant as one of the accused seen seated near the door of the van. PW3 was not cross examined regarding the identity of the Appellant. Evidence of identification deposed to by PW1 was corroborated by PW3.

The Appellant in his statement from the dock did not suggest that the evidence given by PW1 or PW3 was false.

HELD,

1. Where the accused never suggested in his dock statement that the prosecutrix or PW3 gave false evidence was a fact could be relied on in deciding the credibility of the two witnesses. (Abeygunawardane Vs. Attorney General C.A. 105/97 decided on 18/05/99)

   Accordingly, court of appeal of the view that the prosecution has proved the identity of the Appellant and also that the Appellant being a member of an unlawful assembly in prosecution of the common object, did commit the offence of abduction of PW1.

Appeal allowed.

Shiran Goonaratne J, delivered the Judgment

JSA REFERENCE NO. – JSALR/2019/1/07

SUPREME COURT

Godallawattage Somawathie and Others

Vs

Hewahakuruge Evgin and Others

Priyasath Dep, Pc, J. (As He Was Then)

Sisira J De Abrew, J.

Upaly Abeyrathne, J

SC / Appeal / 162/2012

29.06.2017

Section 187 and 773 of the Civil Procedure Code-duty of the Trial Judge-Powers of the Appellate Court

Plaintiff instituted an action against the Defendants seeking to partition a land called Bomaluwe Godella containing in extent of 02 acres as described in the schedule to the plaint. 04th and 17th Defendants, 6th Defendant, 7A to 13th Defendants, 26th 27th and 30th Defendants, 30th Defendant and 43rd Defendant have filed separate statements of claims seeking to partition the said land as averred in their statements of claims. Accordingly, the case proceeded to trial on 52 issues. At the end of the trial, the learned District Judge has dismissed the Plaintiff's action without answering the said 52 issues framed by the parties.

HELD,

1. Section 187 of the Code stipulates the requisites of a judgment. In terms of the said Section, the judgment shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively.
2. Trial judge when writing a judgment should safely consider the points for determination and should record his decision thereon. He should answer the points of contest after due evaluation of the evidence led before court. Issues accepted by trial court should not be left unanswered. Trial judge is bound 13 by a legal duty under section 187 of the Civil Procedure Code to deliver a proper and complete judgment.
3. Section 773 does not confer any power to the Appellate Courts, upon hearing of appeal, to order or to direct the trial judge to write a fresh judgment upon the evidence already led at the trial. The High Court is only empowered to order a new trial or further hearing as justice

may require. Hence the said order of the High Court, to wit; to write a fresh judgment upon the evidence already led at the trial, contravenes Section 773 of the Civil Procedure Code.

Appeal dismissed.

Upali Aberatne J, delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/1/08

COURT OF APPEL

Gamage Don Karunadasa,

Vs

Chalosingho alias Charles Pathmaperuma and others

M.M.A. Gaffoor J.

Janak De Silva J.

Case No 600/99(F)

14.12.2017

Jurisdiction of the District Court- Inheritance powers of the court- Section 189, 839 of the civil procedure code -Vacate or alter an order or a judgment - Section 48 of the Partition Law- Consent of the parties.

On 17th of August 1988 the plaintiff, 4th, 5th, 6th and 11th defendants were present and represented by counsel. They informed court that parties had agreed on a settlement and sought permission to lead evidence of it. The plaintiff gave evidence and during his evidence several documents were marked and led in evidence at the close of the case of the plaintiff. The learned District Judge on the same day delivered judgment. Interlocutory decree was entered.

On 17th February 1999, nearly 10 years after the first judgment and interlocutory decree was entered, the matter came up before the then Additional District Judge of Avissawella. The record indicates that the plaintiff, 4th,5th, 6th, 7A, 8th ,lOA, 11th, 12th ,13th and 14th defendants were represented. It further indicates that the parties informed court that they agree to set aside the judgment and decree entered previously and for trial to commence de novo. Accordingly, the learned Additional District Judge commenced trial de novo. Plaintiff gave evidence and several documents were marked in evidence. On 17th September 1999 the learned Additional District Judge delivered judgment.

HELD

1. The District Court is a statutory creation and its powers are essentially statutory. The District Court has no jurisdiction conferred by law to re-hear, review, alter or vary its judgments in the absence of express statutory provisions. Power to amend its own decree must be expressly conferred on a subordinate Court as has been done in sections 84, 86, 87 and 707 of the Code.
2. District Court has no jurisdiction, except as provided by section 189 of the Civil Procedure Code, to vacate or alter an order after it has been passed. In Dionis Appu v. Arlis it was held that it is not competent to a Judge to reconsider or vary his judgment after delivering it in open Court, except as provided by section 189 of the Civil Procedure Code.
3. Section 48(1) of the Partition Act states that, subject to any appeal which may be preferred there from or subject to subsections (4) and (5) therein, an interlocutory decree entered under section 26 shall be "final and conclusive" for all purposes against all persons. In my view the phrase "final and conclusive" therein signifies that once interlocutory decree has been entered it cannot be changed by the District Court except in the situations coming within subsections (4) and (5) therein. This "final and conclusive" effect is given to an interlocutory decree notwithstanding any omission or defect of procedure or in the proof of title adduced before the court.
4. There is no inherent power in a Court of subordinate jurisdiction to set aside its own decree even though it be wrong.
5. Inherent powers of the District Court cannot apply where there are specific statutory provisions.
6. Consent of the parties cannot bestow jurisdiction upon the District Court to act outside the specific procedures laid down in Section 48 of the Partition Act as the interlocutory decree entered

in terms of section 26 of the Partition Act is, subject to the limitations specified in Section 48 therein, given final and conclusive effect against the whole world. It is not open to a person to confer jurisdiction by consent and no amount of acquiescence would confer jurisdiction upon a tribunal or Court where such jurisdiction did not exist.

Appeal allowed.

Janak de Silva J, delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/1/09

SUPREME COURT

Horathal Pedi Durayalage Nimal Ranasinghe

VS

Officer- in- charge, Police Station, Hettipola

Sisira J De Abrew J

V.K. Molalgoda PC J

L.T.B Dehideniya J

SC Appeal 149/2017

SC (SPL.L.A)50/2017

21.06.2018

The omission mentioned in a Charge Sheet the penal section is not a fatal irregularity.

Section 171 and section 166 of the criminal procedure code-Who is an accomplice?

Date of the commission of the offence was not mention in the charge sheet.

The question that must be decided is whether any prejudice was caused to the accused- appellant as a result of the said defect in the charge sheet or whether he was misled by the said defect. It has to be noted here that the accused-appellant, at the trial, had not taken up an objection to the charge sheet on the basis of the said defect.

HELD

1. The omission to mention in a charge sheet penal section is not a fatal irregularity if the accused has not been misled by such omission. In such a case section 166 of the criminal procedure code is applicable.
2. No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admission of the facts showing that he had such a hand. If the evidence of a witness falls short of these tests, he is not an accomplice; and his testimony must be judged on principles applicable to ordinary witnesses.

Appeal dismissed.

Sisira de Abrew,J, delivered the Judgment.

JSA REFERENCE NO. – JSARL/2019/1/10

SUPREME COURT

Anuradhapura Nandawimala Thero

VS

R.M. Dharamatissa Herath

Priyasath Dep PC, J

S.E. Wanasundera PC, J and

Prasanna Jayawardena PC,J

SC Appeal No 159/2010

08.10.2018

Actions for Malicious prosecution - The substantive requirements of the prove action for malicious prosecution.

The Plaintiff instituted action on 05.11.1999 in the District Court of Kurunagala against the Defendant seeking damages in a sum of Rs.2.5 million for instigating the police to institute criminal proceedings against him in Magistrate's Court (malicious prosecution) without any reasonable or probable cause whatsoever.

HELD

1. R.G. Mekerron (Low of Delict-6th platinum Re-print 2009 at page at 259) stated:

   "Every person has a right to set the law in motion, but a person who institutes legal

proceedings against another maliciously and without reasonable and probable cause abuses that right and commits an actionable wrong. Although the rule is directly traceable to the influence of English Law it has its origin in principles which are common to our law and the law of England."

2. In the case of Karunaratne Vs Karunaratne 63NLR 365, in which Basnayake J has observed as follows;

   " To succeed in an action of this nature, the plaintiff must establish that the charge was false and false to the knowledge of the person giving the information that it was made with a view to prosecution, that it was made 'animo injuriandi' and not with a view to vindicate public justice and that it was made without probable cause…"

3. The substantive requirements of the action for malicious prosecution can be described as follows;
   a) The institution of proceedings
   b) The absence of reasonable and probable cause
   c) Malice
   d) The termination of proceedings in Plaintiff's favor
   e) Damages

Appeal dismissed.

Priyasath Dep PC, CJ delivered the judgment.

JSA REFERENCE NO. – JSALR/2019/I/11

COURT OF APPEAL

Thalduwa Lekam Gamaralage Seelawathi And Another

VS

J.C.M. Priyadarshani

Janak De Silva J

Achala Wengappuli J

CA (PHC) Appeal No 79/2012

22.02.2019

The State Lands (Recovery of possession) Act No 07 of 1979 -Powers of the Magistrates under section 05 and 09 of the Act.- Identification of the state land.

HELD

The Magistrate's Court had taken a pragmatic approach when it foresaw that could be a difficulty in executing its writ if it is issued as per the schedule to the application and therefore directed the Respondent to produce a survey plan. This cause of action adopted by the Magistrate's Court, though not legally sanctioned by any of the provisions of the said Act, could not be faulted due to the peculiar circumstances of this appeal. The 2nd order that had been made by the Magistrate's Court on 27.07.2010, was in relation to the said clearly demarcated and identified parcel of State land, which had already been described in the schedule to the application of the Respondent.

The Magistrate's Court, in advising the Appellants as to their legal entitlement in view of its order of ejectment, has explained to the Appellants of the provisions contained in Section 12 and 13 of the State Lands (Recovery of possession) Act.

Appeal dismissed.

AchalaWengappuli J delivered the judgment.

JSA REFERENCE NO. – JSALR/2019/I/12

COURT OF APPEAL

A.H.M.D. Nawaz J

CA/Case No 303/2000(F)

D.C.Balapitiya Case No 1933/L

26.09.2016

Burden of proof. Due execution and proof of document required by law to be attested. Section 68 and 101 of the Evidence Ordinance.

Section 154 (3) of the civil procedure code and subject to proof.

The original plaintiff –Appellant instituted this action against the Defendant-Respondent seeking in the main a declaration of title to a land called "Kadewatte" with an appurtenant boutique standing thereon, which was more fully described in the schedule to the paint ejectment of the Defendant and all those holding under him.

HELD

1. "Due execution" means:-
   a) That the formalities of the law which are mandated for the execution of a document have been complied with;
   b) That the signatures of the party or parties who executed the document and of any attesting witnesses must be proved;
2. Section 101 of the Evidence Ordinance is premised on the Latin tag –*"Ei qui affirmat 'non ei negat, incumbit probation"* – the proof lies upon him who affirms, not upon him who denies. It is expressed in the commonplace dictum – one who asserts must prove.

   Section 101 places the legal burden of proof on the party who asserts the existence of any fact in issue or relevant fact. Section 101 of the Evidence Ordinance obligates a party seeking judgment in the suit to prove his case. He has to prove it to the standard required as defined in Section 3 of the Evidence Ordinance. In a civil case it would be on a balance of probabilities - for a classic exposition of "balance of probabilities".
3. When the impugned deed (P1) was originally marked, there was no objection raised. It was only later that the learned District Judge allowed the Attorney - at Law for the Defendant to raise the objection- "subject to proof". This procedure is in my view impermissible – Section 154 (3).

Appeal allowed.

A. H. M. D. Nawaz J delivered the judgment

JSA REFERENCE NO. – JSALR/2019/1/13

COURT OF APPEAL

Prathapasinghe Rathnayake

VS

Abeyesinghe Vidana and Others

M.M.A.Gaffoor J

CA.No.991/97 (F)

30.11.2018

Amendment of judgments decrees and orders - Section 186,187 and 189(2) of the Civil Procedure Code. Reasonable notice of any proposed amendment under this section shall in all cases be given to the parties or their registered attorneys.

Learned District Judge delivered his judgment without answering the issues on 10.10.1997 and on 11.10.1997 he had answered the all 9 issues, giving the justification for his doing so was that he mistakenly not included the answers in his judgment dated 10.1 0.1997.

HELD

1. This power of court is to be exercised entirely at the discretion of court. Thus court is not bound to allow each and every application for the amendment of a judgment, order or decree. The discretion should be exercised sparingly and in general, to avoid a miscarriage of justice. If not, the principle of finality of a judgment and decree will have no meaning.
2. Section 189 cannot be invoked by court for the purpose of correcting mistakes of its own, in law or otherwise even though apparent on the face the order. Nor can a judge reconsider or vary his judgment after delivering it in open court, except as provide for in this section.
3. The District Judge has no power to amend or alter his order, expect in conformity with section 189 of the code without giving any notice to the parties or their respective Registered Attorney (vide MUTTU RAMANA

CHETTY vs. MOHAMMEDU [21NLR 97], DOINIS APPU vs. ARLIS [23 NLR 346], REZAN vs. RATHNAYAKE [49 NLR 31] and GUNAWARDENA vs. FERDINANDIS [(1982) I SLR 256])

Appeal allowed.

M.M.A. Gaffoor J- delivered the judgment.

JSA REFERENCE NO. – JSALR/2019/I/14

COURT OF APPEAL

Noor Suveira and Another

VS

Julian Pushpadevi And Others

K.K. Wickremasinghe J

Janak De Silva J

CA (PHC) APN 79/2017

02.11.2018.

Stay of proceedings by mere lodging of appeal- Similar relief in both District court and Primary court-Stare Decisis- The binding effect of Supreme Court decisions on Court constituted by the1978 constitution.

While the action in D.C. Colombo case no. 17070/L was pending the Respondents instituted proceedings in M.C. Colombo case no. 2781/06/2012 under the Primary Courts Procedure Act (Act) by way of private information in relation to a right of way. The learned Magistrate made order under section 69 of the Act declaring the Respondent entitled to the right of way. The petitioners filed a revision application against the said order in the Provincial High Court of Colombo case no. HCRA 150/2012. The learned High Court Judge dismissed the said revision application by order dated 09.10.2015. the petitioners preferred an appeal to this Court against the said order4 which appeal is currently pending.

Thereafter, the Respondents made an application to execute the writ in the Magistrates Court based on the order of dismissal dated 09.10.2015 made in High Court Colombo case no. HCRA 150/2012. The Petitioner objected to this application, the learned Magistrate after hearing parties delivered order dated 26.09.2016 allowing the application of the Respondents to execute the writ.

HELD

1. The mere lodging of an appeal done not *ipso facto* stay the execution of the order of the Original Court and that something more has to be done by the aggrieved party and something more has to be shown, to stay the execution of the judgment or order.
2. Jayantha Wickremasinghe Gunasekera alias Kananke Dhammadinna v. Jayatissa Wickremasinghe Gunasekera and others [CA(PHC)APN 17/2006; C.A.M. 30.09.2011] where it was held that the mere lodging of an appeal against the judgment of the High Court in the exercise of its revisionary power in terms of Article 154p (3)(b) of the Constitution to the Court of Appeal does not automatically stay the execution of the order of the High Court.
3. The binding effect of Supreme Court decisions on Court constituted by the1978 constitution.
   a) One judge sitting alone as a rule follows a decision of another sitting alone. Where a judge sitting alone finds himself unable to follow the decision of another sitting alone the practice is to reserve the matter for the decision of more than one judge.
   b) A judge sitting alone regards himself as bound by the decision of two or more judges.
   c) Two judges sitting together also as a rule follow the decision of two judges. Where two judges sitting together find themselves unable to follow a decision of two judges, the practice in such cases is also to reserve the case for the decision of a fuller bench although the Courts Ordinance does not make express provision in that behalf as in the case of a single judge.

d) Two judges sitting together regard themselves as bound by a decision of there or more judges.

e) Three judges as a rule follow a unanimous decision of three judges, but if three judges sitting together find themselves unable to follow a unanimous decision of three judges a fuller bench would be constituted for the purpose of deciding the question involved.

f) Four judges when unanimous are regarded as binding on all benches consisting of less than four. In other words, a bench numerically inferior regards itself as bounded by the unanimous decision of a bench numerically superior.

g) The unanimous decision of a collective Court I. e; a bench consisting of all the judges for the time being constituting the Court is regarded as binding on a bench not consisting of all the judges for the time being constituting the Court even though that bench is numerically superior to the collective court owing to the increase in the number of judges for the time being constituting the Court.

Application dismissed.

Janak de Silva J, Delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/I/15

SUPREME COURT

Chandrani Epitawala & Western Provincial Council

V.

Kothmale Gajanayake Mudiyanselage Sanduni Rasanjali Bandara And Others

Priyasath Dep, PC, CJ,

Buwaneka Aluwihare, PC, J,

Priyantha Jayawardena, PC, J

SC Appeal No 152/2011

11.10.2018

Action for damages – Duty of care – Obligation of the staff/ Para medical personals of the hospital – Difference between medical negligence and medical misadventure –Vicarious liability.

The Plaintiff-Respondent-Respondents instituted action for claiming damages alleging that formation of blood clots in the 1st Plaintiff-Respondent-Respondent's arm was a result of a damage caused to an artery by the negligence of the 1st Defendant-Petitioner-Appellant whilst attempting to insert a cannula and the same resulted to the amputation of the forearm of the 1st Plaintiff-Respondent-Respondent.

HELD

1. The staff of the hospital was under an obligation to exercise due care and diligence in respect of all the patients under their care at all times. In addition to the said collective duty, each member of the medical and para medical staff which include nursing staff are personally responsible for their conduct while they treat patients. The degree of care set out in Rex V. Bateman (1925) 19 Cr.App P8 and HaribhauKhodwa V. State of Maharashtra AIR (1996) SC 2377 are not only applicable to the doctors but also to all para medical personnel.
2. When a patient is admitted to a hospital, a contract is formed between the patient and the hospital, not only to treat the patient but also to exercise due care for the said patient. Accordingly, necessary treatment and care should be provided by the hospital through its medical staff and para medical staff. Therefore, the hospitals owe a duty of care to the patients whilst they are in the hospital. The admission of a person into the hospital for treatment involves an implied undertaking on the part of the hospital that due and reasonable skill will be exercised by the staff of the hospital.
3. Medical misadventure is considered as personal injury resulting from medical error or medical mishap, or an unintended outcome of an intended action. The term negligence denotes the absence

of due care where there is a duty to exercise due care and the failure to exercise such care. The conduct could be wrongful or carelessness arising from an omission or commission of an act.

4. The standard of care can be assessed in an objective manner according to the task undertaken by the professional, irrespective of his qualification and job title. The standard of care has to be judged as to what ought to have been done and the requirement to have foresight is to be assessed as to what ought to have been foreseen in the particular circumstances. The test is whether a reasonable man would not do, and not doing something a reasonable man would do.

Appeal dismissed.

Priyantha Jayawardena, PC, J delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/1/16

SUPREME COURT

Dialog Broadband Networks (Private) Limited

V.

Electroteks Network Services (Private) Limited

Buwaneka Aluwihare PC. J

Sisira De Abrew J

Nalin Perera J

SC.(CHC) Appeal No 53/2012

12.12.2018

Action for damages – Loss of reputation and goodwill – Contractual liability and delictual liability - Section 187 of the Civil Procedure Code.

The Plaintiff-Appellant instituted action for recovery of damages from the Defendant-Respondent which was allegedly due pursuant to a series of agreements entered into between parties for the provision of some telephone lines. After withdrawing the claim of the Plaintiff-Appellant, the trial proceeded on the Defendant-Respondent's counter claim which was held in favour of the Defendant-Respondent by the Commercial High Court.

HELD

1. There is no doubt that a cause of action in respect of injury to reputation lies in the law of delict. The law of delict provides for damages, where the necessary ingredients are present, whether or not the said reputational injury has caused a financial loss. There is no requirement to prove actual damage. On the other hand, an award of damages for breach of contract has a different objective which is "compensation for financial loss suffered by a breach of contract."
2. As often seen in matters involving commercial entities, the distinction between damage to reputation and financial loss can become blurred. Damage to the reputation of professional persons, or persons carrying on a business, frequently causes financial loss.
3. In so far as a commercial entity is concerned, financial losses incurred by loss of reputation caused by a breach of contract is a 'patrimonial loss' and not a compensation for 'pain or suffering'. There is no punitive element involved.
4. The claimant must prove that the breach of contract which caused a reputational loss and damages to goodwill gave rise to a financial loss.
5. The hardships which are alleged by the Defendant-Respondent does not follow that they have suffered any financial losses by the alleged damages to their goodwill. There is nothing which indicates that other trader/service providers were not inclined to continue their relationships with the Defendant-Respondent. Neither is there any evidence to suggest that the Defendant-Respondent missed out on other contractual opportunities or business prospects because of the alleged breach of contract.
6. In the absence of cogent evidence, other than the Defendant-Respondent's mere say so, a claim of reputational loss and damages to Goodwill causing financial loss arising out of the breach of contract cannot be sustained. In fact, what the Defendant-Respondent attempts to claim

under the purported damage to Goodwill is not a financial loss but compensation for purported 'injury or suffering'. As I indicated earlier, claims involving pure injury and suffering cannot be deemed patrimonial loss. They are in fact damnum injuria for which the legal remedy lies in the law of delict.

7. Appellate Courts generally attach great value to the views formed by the Judge of First Instance who had seen the witnesses and noted their demeanor. How the Judge who tried the suit, reacted to the evidence of a witness may not always be found from the printed record. It is for this reason that a judgment revealing the trial judge's thought process becomes an essential attribute of a trial. A mere order deciding the matter in dispute not only prejudices the rights of the parties but whittles down the importance attached to the judicial process. It colors the decision as one of whim or fancy instead of judicial approach to the matter in contest.

Appeal allowed.

Buwaneka Aluwihare PC. J delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/1/17

COURT OF APPEAL

Jayasinghage Abeysuriya And Others

V.

Jayasinghage Premarathna Jayasinghe And Others

A.H.M.D Nawaz, J

CA case No. 1005/1997(F)

30.07.2018

Partition action – Proof of inheritance – Admissibility of a plaint filed in a previous case –Section 17, 21, 18, 21, 32 and 50 of the Evidence ordinance – Ante litem motam

The 4th Defendant's claim for the subject matter which was made under his paternal inheritance was disputed by the Plaintiff-Respondent at the trial. In order to show the connection of his heirs, the 4th Defendant produced a previous Plaint which had been filed by the father of the Plaintiff-Respondent in an anterior Partition action over the same land. According to the said Plaint, it was stated that the 4th Defendant's father and the Plaintiff's father were brothers. Learned District Judge disregarded the same and held in favour of the Plaintiff.

HELD

1. The admission coming through the plaint in the previous partition action is admissible against the Plaintiffs under Section 17 (I) of the Evidence Ordinance, since it is their father who had made this admission.
2. If someone makes a statement against his proprietary interest, the statement is provable against him and his successors in title. This is the effect of Sections 18 (3)(a) and 21 of the Evidence Ordinance.
3. The statement made by the father of the Plaintiff-Respondent's to this appeal in his plaint dated June 1972 falls fair and square under Section 18 (3) of the Evidence Ordinance. It is admissible against the Plaintiff under both heads of sections 18 (3)(a) and 18 (3)(b) of the Evidence Ordinance. Section 21 would render the admission in the plaint of June 1972 provable against the Plaintiffs of this case since it is their father's binding admission against them.
4. Admissions may be made in the first instance by a party to the proceeding himself, or it may be an admission falling into one of the categories of vicarious admissions. Sections 18 of the Evidence Ordinance gives one of the instances of vicarious admissions in that it indicates that not only an agent but also a predecessor in title of a party to a suit can vicariously bind such party to the proceedings, by virtue of an admission which has been made out of court.
5. The deed was executed on 26th November 1959. The plaint was filed in this case almost 25 years later in 1985. The assertion of title had thus been

made long before the litigation arose between the parties. The deed was indeed *ante litem motam*. According to Black's Law Dictionary (9th Edition) p 107, the expression *ante litem motam would mean "before an action has been raised"* i.e., at a time when the declarant had no motive to lie. This phrase was generally used in reference to the evidentiary requirement that the acts upon which an action is based occur before the action is brought.

6. A birth certificate affords prima facie evidence of the matters stated therein but it is not the only mode of proof of paternity or maternity. It is not conclusive of the facts stated therein and Sections 32(5), 32(6) and 50 of the Evidence Ordnance are also relevant to ascertain the relationship of one person to another.

Appeal allowed.

A.H.M.D Nawaz, J delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/1/18

SUPREME COURT

Cader Meedin Mohamed Anzar

V.

Henry Perera Samarakoon

S. Eva Wanasundara PC. J,

Vijith K. Malalgoda PC. J,

Murdu N. B. Fernando PC. J,

SC appeal No 95/2015

12.12.2018

Interpretation and meaning of section 402 of the Civil Procedure Code – plaintiff's duty to prosecute the case.

ThePlai ntiff-Respondent instituted action by claiming a land on constructive trust. The claim against the 1st Defendant was dismissed after informing that the same will not be pursued. According to Journal entry dated 21.06.2010 the Court fixed the case for ex-parte trial against the 2nd defendant and trial against the 5th defendant. The post script to the Journal entry of the date states 'Plaintiff is not aware of the 3rd and 4th Defendants. Take steps and move.

By motion dated 22.02.2012, the 5th Defendant moved Court to dismiss or lay-by the case as the plaintiff has failed to take steps for a period exceeding 12 months. The District Court heard the Plaintiff and the 5th Defendant pertaining to the above application, rejected the motion and made order that action can proceed when the addresses of the 3rd and 4th defendants are known. The Civil Appellate High Court also affirmed the said order.

HELD

1. It is undisputed that the plaintiff filed this action to obtain relief and the principal relief sought was against the 4th Defendant. Thus, for the plaintiff to obtain relief prayed for plaintiff should bring the 4th defendant before Court. Failure of the Plaintiff to do so would be to his own detriment. The first step to bring the 4th Defendant before Court is to serve summons on him and if the Plaintiff fails to do so, he should bear the consequences. In the instant case, the plaintiff has failed to give the address of the 4th Defendant to Court for serving of summons. Thus from the institution of the action in 2006 until the motion was filed to lay by the case in February 2012, for a period of 5 ½ years, summons could not be served on the 4th defendant.
2. In the instant case, Plaintiff has taken five and half years to serve summons and yet has not been able to ascertain the correct address. In such a situation, were the steps taken by the 5th Defendant correct or in accordance with the law in moving Court to lay by the case and/or to dismiss the case for failure to prosecute the action by the Plaintiff or should the case remain in the case list until the Plaintiff obtain the addresses.
3. Court has power under Section 402 of the Civil Procedure Code to make an order of abatement *ex meromotu*. Nevertheless, it is desirable that a Court, before making an order of abatement

should notice the parties, as far as it conveniently can, to give them an opportunity of showing cause against the order.

4. In the instance case, as stated earlier, the addresses of the 3rd and 4th Defendants should have been tendered by the Plaintiff. The Court has no duty to obtain addresses. It is the Plaintiff's action and there is a duty cast upon the Plaintiff to take steps as directed by Court to tender addresses. If the Plaintiff fails to fulfill same and does not take steps to prosecute or continue with the action *ex meromotu* the Court on its own could have made order to abate the action after hearing the parties.
5. Even in an instance in which the plaintiff could not obtain the addresses of the 3rd and 4th Defendants, there were steps for the Plaintiff to take. The Plaintiff could have made an application to serve Summons by way of substituted service on the last known addresses of the 3rd and 4th Defendants or move for an appropriate order from Court not to proceed against the 3rd and 4th Defendants but to proceed against the 2nd defendant against whom ex parte trial had been fixed and against the 5th defendant against whom trial had been fixed.

Appeal allowed.

Murdu Fernando PC. J delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/1/19

SUPREME COURT

Kotuwila Kankanamlage Premalal Leonard Perera

V.

Attorney General

Nalin Perera CJ

S.E. Wanasundara PC. J

Vijith K. Malalgoda PC. J

SC Appeal 220/2014

09.11.2018

Fair trial – Section 182, 183 and 184 of the Code of Criminal Procedure - Right of an accused person to be informed of his rights

The Accused-Appellant was charged before the Magistrate's Court of Wellawaya on two counts under sections 418 and 486 of the Penal Code. At the conclusion of both the prosecution and the defence cases, the learned Magistrate delivered the judgment convicting the Accused-Appellant of the first count whilst acquitting him of the 2nd count. The High Court affirmed the said conviction and the Accused Appellant appealed against the said judgment.

It was submitted on behalf of the Accused Appellant that there is no record of reading charges to the Accused-Appellant before the Magistrate's Court. Secondly it was submitted that there is no record of prosecution closing its case and the accused being explained his rights by the learned Magistrate.

HELD

1. According to the journal entry dated 29.09.2010, the learned Magistrate had endorsed that the plaint had been filed and charges were explained to the accused. The above journal entry which was properly signed by the leaned Magistrate is a clear indication of the learned Magistrate complying with Section 182 of the Code of Criminal Procedure.
2. None of the provisions in the ICCPR Act or the Code of Criminal Procedure Act No. 15 of 1979 speaks of a right of an accused person to be informed of his rights.what is required by Law is to afford a fair opportunity for an accused person to submit his defence during a criminal trial before a Court of Law.
3. The case for the prosecution was concluded on 16.05.2012 and the learned Magistrate had fixed the defence case for 20.06.2012 and permitted the accused who was represented by an Attorney-at-Law to obtain copies of the proceeding for him to get ready with his case. During the defence case the accused had given evidence and summoned three witnesses to give evidence on his behalf. The above procedure adopted before

the Magistrate's Court clearly indicates that the accused was afforded a fair trial during the trial before the learned Magistrate.

Appeal dismissed.

Vijith K. Malalgoda PC. J delivered the Judgment.

JSA REFERENCE NO. – JSALR/2019/I/20

COURT OF APPEAL

Kudarallalage Seela Pemalatha

V.

Kudarallalage Jayawardena And Others

Mahinda Samayawardhena, J

CA 648/1999/F

16.01.2019

Partition action – *res judicata* – Impact of a decision in a reivindicatio action to a subsequent partition action.

The three plaintiffs filed action against the three defendants seeking to partition the land described in the schedule to the plaint between the 3rd plaintiff and the 1st defendant in equal shares. The 2nd and 3rd defendants, according to the plaint, were made parties because they are in forcible occupation of the land without any soil rights. The 1st defendant did not contest the case of the plaintiff. The 2nd and 3rd defendants took up the position that the plaintiffs cannot maintain this action on res judicata in view of the decree entered in case No.17478. The District Court held against the 2nd and 3rd Defendants.

HELD

1. The case No 17478 was filed by the same three plaintiffs against the 2nd and 3rd defendants on the same basis seeking virtually the same reliefs. In other words, the difference between the two cases are that the earlier one was a declaration of title action and the present one is a partition action. The earlier case was dismissed due to want of appearance of the Plaintiff under section 87(1) of the Civil Procedure Code and the subsequent application made under section 87(3) was also refused.
2. "The cause of action upon which a partition action is based is inconvenience of common ownership." However did the plaintiffs file the partition action to achieve that objective? In the facts and circumstances of this case, they did not. There was no dispute between the plaintiffs and the 1st defendant regarding ownership or possession of the land. When the plaintiffs conclusively failed to eject the 2nd and 3rd defendants by filing a declaration of title action, immediately after the final decision, they filed this partition action, to achieve the same objective and not to end co-ownership between the plaintiffs and the 1st defendant. This is nothing but abusing the provisions of the Partition Law to achieve the ulterior motive of the plaintiffs, which is the ejectment of the 2nd and 3rd defendants from the land.

Appeal allowed.

Samayawardhena J. delivered the Judgment.

ACTS OF SRI LANKA 2018

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