News Letter

THE JUDICIAL SERVICE ASSOCIATION OF SRI LANKA

2021 VOLUME I

Indisputable integrity with duty and diligence are pillars for a meaningful administration of justice in the sphere of new normalcy!

Judicial Service Association expresses heartfelt congratulations to the newly appointed High Court Judges!

01. Ms. S.H.M.N Lakmali
02. Mr. V Ramakamalan
03. Ms. N.K.D.K. I Nanayakkara

His Lordship the Chief Justice

04. Mr. R.L Godawela
05. Mr.U.R.V.B Ranathunga
06. Mr. D.G.N.R Premaratne

01. Mrs. N.A Suwandurugoda
02. Mr. Mahi Wijeweera
03. Ms. W.D Wimalasiri

His Lordship the Chief Justice

04. Mr. M.M.M Mihal
05. Mr. I.P.D Liyanage
06. Mr. J Trosky

Inside the News Letter

Editorial

First time in our life, we are much delighted when people say we are negative; that is when we hear our polymerase chain reaction or PCR test result. Covid -19 has made many significant changes in our day-to-day life. It transformed our lifestyle and made us more accommodating. Was it possible for a lawyer or litigant or even a judge to sit in the open court with a face mask a few years ago? It was a sign of remonstration and amount to contempt or misconduct. Now the law insists everyone wear a face mask as a necessity for protection. A sign of misconduct has become the sign of protection. Therefore, no tradition or custom is indispensable when it is not helpful to human existence.

I believe that a plain reading of a law passed by the legislature will not be sufficient for understanding its nature. When law evolves from its previous position to respond to the new challenge, the stakeholders of the administration of the justice system should be in the position to receive it with understanding. For that, personal development skills such as legal knowledge and comprehension in the legal analysis are paramount. A judicial officer who is willing to take part in the process of a meaningful administration of justice has to enhance his/her legal consciousness by a comparative legal analysis of how the law operates in our legal system and of how it functions in the other jurisdictions.

Legal consciousness helps us to produce high standard professionalism with diligence, and that leads to maintaining integrity. Integrity helps to win public confidence, and which is the cornerstone for an administration of the justice system in a democratic framework. Therefore, creating legal consciousness via legal education helps us winning public confidence by providing a meaningful administration of justice with a high standard of integrity.

This newsletter aims to help the members of the Judicial Service Association to engage in the process of expanding their legal knowledge. I am grateful to the members who spent their valuable time writing their articles despite their heavy workload. I sincerely thank my editorial board for helping me make the newsletter colourful, jokes and cartoons. I am indebted to my Assistant Editor Mr. Harshana De Alwis for, his kind support to make this newsletter successful. It would not have been possible for me if he had not extended his helping hand during this prevailing pandemic situation.

A. A. Anandarajah
Editor

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Secretary's Note

Let me first congratulate the editors of the newsletter on making their debut. The newsletter has always been a bridge between the Executive Committee and the general membership.

I also take this opportunity to thank you for the confidence in electing me to the post of Secretary of the Judicial Service Association.

The year 2021 brought along with it many challenges to our members. Covid 19 pandemic has undoubtedly become an impediment for many initiatives as much as it has affected day-to-day activities. In this regard, JSA has already taken precautionary measures and arrangements to reach out and facilitate the members and their loved ones if they are in need.

Judicial Service Association has been highly respected for its integrity and impartiality backed by its longstanding noble traditions. It has gone beyond the mere matter of welfare and moved forward to protecting the independence of the judiciary. I would like to note here only for the archival purpose that JSA had an unprecedented move in deposing its president elected on 19.12.2020, by a Special General Meeting held at Civil Appellate Court of Homagama on 28.03.2021 preceded by a "No faith" resolution which was passed by the Exco with a majority of 28:1. This was an emphasis that JSA would not compromise its values for any unnecessary gains, diminishing the hard-earned recognition over the decades.

As I mentioned above Covid 19 has placed numerous and novel difficulties in achieving our goals. However, as a team, we are dedicated to thrive for the betterment of our members and believe that members will extend their support in our future endeavours.

Finally, I thank the Office bearers and the Executive committee Members who allocate their precious time despite their busy schedules.

Nilupulee Lankapura
Secretary JSA

A Few Elements Regarding the Use of Police Information Book in a Trial, Under Sec 110(3) of the Criminal Procedure Code

Priyantha Liyanage
Magistrate, Fort Magistrate's Court

1. Neither the counsel for the defense nor the counsel for the prosecution nor even the court is entitled to elicit evidence which would suggest that the contents of the statement corroborate the evidence given by a witness in court. A statement here includes oral or recorded in writing. *(Rathinam V the queen 74 NLR 31, Sirisena V The queen 72 NLR 389.)*

   However, the disqualification mentioned in sec.110(3) of the Cr.P.C has no application to voluntary statements given to a police officer alleging the commission of a crime (deemed to be first information) and such statement can be used to corroborate under sec 157 of the Evidence Ordinance *(Silva V Abeysekara 30 NLR 383)*.

   Nevertheless, it was held in *Wanasinghe V AG [2011(1) SLR 1] by Amarathunga J* that section 110(3) of the Code of Criminal Procedure Act prohibits the use of the *written record* of a statement recorded in the course of an investigation and it does not shut out direct evidence of a police officer of anything done or said by a witness or an accused (except a confession of an accused) in his presence and seen or heard by such officer.

   At the same time, the first information has little or no value when it is used to corroborate after having access to the statement and becoming aware of its contents. *(Buddhadasa 58 NLR 8)*

2. Such corroboration however may be elicited by the court in the course of contradicting a false answer given by a police officer when he refers to the written record while giving evidence for the purpose only of refreshing his memory, without the necessity of proving the written record. *(Sirisena 72 NLR 389)*

3. The disqualification mentioned in (1) above cannot be extended to the records of a police officer regarding arrest of suspects after the inquiries are concluded. *(Amaradasa V the state 76 NLR 505)*

4. If the witness has made a vital omission in evidence there is no reason to object to the police officer refreshing his memory from his record and giving oral evidence of the omission. This is proper use of provisions of law in regard to refreshing memory. *(Sirisena 72 NLR 389)*

5. A statement given to a police officer in the course of investigations can only be used

   (a) Proving that the witness made a different statement at a different time

   or

   (b) To refreshing the memory of the officer who recorded it. *(Sirisena 72 NLR 389, de Silva 42 NLR 57, Gabriel 39 NLR 38)*

6. A statement cannot be used merely to form the basis for an inference that the conduct of the person who made it was suspicious. *(The queen V Kularatne 71 NLR 129)*

7. When the Information Book is used to discredit a witness, the recorded statement does not become substantive evidence in the case *(R V Cooray 28 NLR74, Binduwa V Siriya 28 NLR126)*

8. The defense can only look at the IB entries if they are used to refresh the memory or discredit the witness under Sec 145 of the Evidence Ordinance. In such case the defence cannot look right through the book, but must confine the inspection to the specific entry actually dealt with-*Per Wood Renton CJ in Attygala Murder Case (1907)*

9. The contents of a statement recorded during the course the of investigation cannot be used as substantive evidence. *(Rathinam V The queen 74 NLR 317)* Nor can it be used by as evidence for the purpose of testing the credibility of a witness by comparing his evidence with a statement given by him to the Police *(Peiris V Eliyathamby 44 NLR 207, Wickremasinghe V Fernando 29 NLR 403)* It can only be used by the judge to aid the Court at the inquiry or trial *(Keerthi Bandara Vs The Attorney General [2000] 2 SLR 245)*. When the defence counsel spot lights an omission or seeks to mark a contradiction, the trial judge must peruse the Information Book and decide whether the sentence in the statement which the defence counsel intends to mark as a contradiction is in fact found in the statement or the defence counsel is trying to confront the witness with an incomplete sentence in the statement or decide whether the omission is correct. This is how court uses the Information Book to aid the trial or inquiry and the Judge has to do the above things in open court during the trial *(Anura Alias Marrai V AG- CA 200/2005 Decided on 8.11.2012)*

10. The judge cannot use of the information book for the purpose of arriving at a decision *(Paulis Appu v. Don Davit 32 NLR 335)*

11. However, it can be used as substantive evidence only as a dying declaration under Sec 32(1) of the Evidence Ordinance (R.F Dias, *Commentary on Criminal Procedure Code* Vol 2 -241- Note; There is no case law that support R. F. Dias's view in this regard whereas the case law has dealt only with the first information on which Sec.110(3) limitation does not apply. E.g. John Peiris 42 NLR 49)

12. When the defence counsel seeks to mark a contradiction or wants to spotlight an omission the trial judge cannot and should not permit the entire statement to be marked. He can permit the defence counsel to mark only the portion of the statement which contradicts the evidence in court, *(Anura Alias Marrai V AG- CA 200/2005 Decided on 8.11.2012)*

13. There is no distinction between oral statements and written statements. Accordingly, evidence with regard to oral statements made by a witness in the course of investigation cannot be lead *(Sirisena V The queen 72 NLR 389, Ramasamy 66 NLR 265)*

14. A confessional statement or a statement interwoven with confessionary part cannot be used by the prosecution to contradict the accused while giving evidence. *(King V Kiriwasthu 40 NLR 289, Sirisena V The queen 72 NLR 389)*

15. When there is an omission on the part of a witness a statement made by him can be used solely for the purpose discrediting the witness. *(Mutu Banda V the Queen 73 NLR 8)*

16. The failure of the magistrate to advert in his judgment to the statements (if he used in the trial) and in what way he used them is a fatal irregularity. *(Ramasamy 66 NLR 265)*

17. The limitation in regard to the use of statements recorded by the Police in the course of investigation does not apply in *maintenance actions*. The respondent in a maintenance case does not stand in the same position of an accused person and the prohibitions applicable in criminal proceedings do not apply in maintenance actions. *(Punchibanda V Seelawathie 1986 (2) SLR 414-CA)* However, a different judicial view is recorded in a 1947 case of *Zoysa V Wilbert (Vide note 18)*

18. A statement recorded by a police officer can be used for the purpose of contradicting a witness in civil proceedings *(Goonewardana V De Saram 64 NLR 145, Chetty V Peries 41 NLR 145)*. Note; *Goonewardana V De Saram* does not say that such a statement can be used for the purpose of corroboration

of evidence of the person who made the statement. In *Zoysa V Wilbert (35 CLW 78)* which was a maintenance action it was held that the disqualification mentioned in Sec 110 (3) of the Cr.P.C. applies to both criminal and civil proceedings.

However, in, *Buddhadasa V Mahendran (58 NLR 80)* it had been held that a certified copy of a first information cannot be used in civil proceedings either to corroborate or to contradict a witness whose statement it purports to be on the basis that it is not a statement of the witness but a statement of the police officer as to what the witness told to him. Note; It is submitted that the former view in Goonewardana V De Saram is more preferable than banning the use of a statement in a civil case.

19. Prosecution can be permitted after the case for defense had been closed to lead evidence of the statement made by the accused to the police officer. *(Ruparatne V the Queen 56 NLR 353, King V Ahamadu 42 NLR 297)*

20. A statement can be used to corroborate (First information) or to contradict (First Information or a Statement recorded in the course of investigation) only after the witness has given evidence. *(Ranhamy V Jayawardena 54 NLR 395).* Therefore, evidence of the police officer with regard to the statement of the accused before his evidence being lead is premature for the reason that a witness cannot be contradicted in advance (Haramanisa 45 NLR 532)

21. A magistrate is not entitled to frame additional charges against the accused by using the Information Book (Jayawardana V Dharmaratne 54 NLR 524)

22. When a contradiction is sought to be marked the statement recorded must be produced. The reason for this requirement is that Sec 110(1) requires the oral statements to be reduced to writing and Sec 91 of the Evidence Ordinance excludes oral evidence of a document. *(Ramasamy 66 NLR 265, Jayasena 68 NLR 369)* Therefore oral evidence in relation to contents of a statement made to a police officer is inadmissible. *(Queen V Abeyratne 64 CLW 68, Queen V Samanatissa Thero 61 CLW 97)*

23. The restriction in 110(3) would apply although the statement has not been signed by the witness. *(Goonewardana V De Saram 64 NLR 145)*

24. The use of Information Book is a matter entirely within the discretion of the judge. He must take care however not to make use of the statements contained in it as evidence to draw any conclusion as to the guilt of the accused *(Kitnapulle V Christoffel 49 NLR 401)*

25. A statement made to a police officer in the course of investigations can be used for contradicting a witness in any other case than the trial of the offence for which he is charged. *(King V Kadiresu 46 NLR 4)*

26. The phrase 'in the course of investigation" in Sec. 110 covers a wide field and is not limited merely to the examination by putting questions. The investigation includes the search for incriminating evidence and the examination of locus in quo and the locality of scene of the crime.

27. A statement which led to the discovery of a relevant fact made admissible by section 27 of the Evidence Ordinance must be reduced to the form of a document and it is only that document that could be proved as evidence in a case. No oral evidence of the contents of such a document is admissible in evidence. *(Samson Atygala V A.G. 1986 (1) SLR 39)*

28. When a statement recorded during the course of investigation is used for contradicting a witness, there would attach to the record the rebuttable presumption referred to in section 114 of the Evidence Ordinance that an official act has been regularly performed *(Goonewardana V De Saram 64 NLR 145)*

JSA News Letter
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Law Relating to Addition of Parties in a Civil Action

Nuwan Tharaka Heenatiagala[1],
Additional District Judge Negombo.

Introduction

Parties to a civil action can be generally categorized as 'Plaintiff/Plaintiffs' and 'Defendant/Defendants'. However there are provisions in the Civil Procedure Code to add parties during the pendency of the case in order to effectually completely adjudicate the action. Section 18[1] and 18[2] of the Civil Procedure Code [hereinafter mentioned as 'Code'] provides provisions for adding parties during the pendency of the action.

> *"The court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added."*[2]
>
> *"Every order for such amendment or for alteration of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added, the added party or parties shall be named, with the designation "added party ", in all pleadings or processes or papers entitled in the action and made after the date of the order."*[3]

There have been many decisions of our superior Courts which have examined the type of person who will fall within the description set out in Section 18 (1) and who, therefore, should be added as a party to a pending action. In these examinations, our Courts mostly looked to the English Law since Section 18 (1) of our Civil Procedure Code, which was introduced in 1889, is very similar to Order 16, rule 11 of the Rules of the Supreme Court of England 1883 which, stated that, the Court may order:

> "….. The names of any parties, whether plaintiffs or defendants, who ought to have been joined, or
>
> whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter be added".

Therefore this article will discuss the English Law decisions and Sri Lankan Courts decisions on addition of parties, to ascertain the true nature, scope and effect of the circumstances in which a person should be added as a party, under and in terms of Section 18 (1) of the Civil Procedure Code.

English Law decisions on addition of parties

An examination of the decisions of the Courts of England which applied Order 16, rule 11 of the Rules of the Supreme Court of England, 1883 will help to understand the nature, scope and effect of Section 18 (1) of the Code in Sri Lanka.

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2 Section 18[1] of the Civil Procedure Code

3 Ibid Sec 18[2]

In early cases English Courts considered the circumstances in which a party may be added to a pending action and held that, the Court should decide such an issue by ascertaining whether the plaintiff had a cause of action against the person sought to be added which ought to be determined in the pending action itself.[4] Lord Coleridge C.J held:-

> *"It seems to me to be correctly argued that those words plainly imply that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint, which ought to be determined in the action, and that it was never intended to apply where the person to be added as defendant is a person against whom the plaintiff has no claim, and does not desire to prosecute any."*[5]

This approach described as 'narrower construction' since this limited the addition of parties to persons against whom the plaintiff had a cause of action which ought to be determined in the pending action itself. Thereafter in BYRNE vs. BROWN AND DIPLOCK and in MONTGOMERY vs. FOY, MORGAN AND CO cases English courts adopted a less restricted approach of the circumstances which would justify the addition of a party to a pending action which described as 'wider construction. The approach adopted by Lord Esher Master of Rolls in aforesaid cases was followed in the latter case of BENTLEY MOTORS LTD. vs. LAGONDA LTD.[6]

In AMON vs. RAPAHEL TUCK AND SONS LTD[7] case it was described set of tests for determining whether a person should be added as a party. Delvin J. in AMON's case observed that in Order 16 Rule 11 have two limbs. They are:-

- First Limb- all the parties who 'ought to have been joined'
- Second Limb- 'necessary parties'

Devlin J formulated the following test which may be applied when determining whether a person should be added as a party under the aforesaid second limb.

> *"What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a relevant witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ……..The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be so settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party"*[8]

Devlin J identified another test which may be applied when determining whether a person is a "necessary party" who should be added and stated "I think the test is: May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights?

Further in AMON's case two further tests were described by the Delvin J and stated that a plaintiff or a defendant would be entitled to add a person whose presence before the Court as a party to the pending action is required to enable one of them to either:-

- effectually and completely establish their case; or
- to effectually and completely obtain the reliefs they seek in the action; even if that person is not bound by the determination of a pending action and his legal rights are not affected by the Orders sought in that action

4 NORRIS vs. BEAZLEY [1877 2 C.P.D. 80]
5 Ibid at page 83
6 1945 2 AER 211
7 1956 1 AER 273
8 Per Delvin J. in AMON's Case

However, Devlin J observed that, the aforesaid tests he formulated were neither universal nor exhaustive. In AMON's Case Delvin J. held that, a person's "commercial interests" being affected, would not justify his addition as a party. Lord Denning in the subsequent Case of GURTNER vs. CIRCUIT[9] took a different view and held that even a person whose pec 'uniary interests' or 'commercial interests' may be affected, could be added as a party, in appropriate circumstances.

Order 16, rule 11 of the Rules of the Supreme Court of England, 1883, which was examined in the English decisions referred to above was replaced by Order 15, rule 6 (2) (b) (i) and (ii) of the Rules of the Supreme Court of England, 1965. Order 15 rule, 6 (2) (b) (ii) introduced in 1965 permitted the addition of "any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter". Therefore the criteria for the addition of parties under Rules of the Supreme Court of England, 1965 are significantly wider than the wording of Section 18 (1) of our Code. These criteria were further expanded when Rule 19 of the Civil Procedure Rules, 1998 of England came into effect.

The decisions of the Courts of England after 1965 on the issue of the addition of parties may not be of direct assistance to us when determining the tests or criteria to be used to decide issues relating to the addition of parties under our law, in terms of Section 18 (1) of the Sri Lankan Code.

Sri Lankan Case Law on addition of parties

Section 18 [1] of our Civil Procedure Code in the same way as in Order 16, rule 11 in England shows that, Section 18 (1) has two limbs which contemplate the addition of two different types of persons namely:-

- Persons who "ought to be have been joined, whether as plaintiff or defendant"
- Persons whose "presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action"

This fact was highlighted in WEERAPERUMA vs. DE SILVA[10] by Basanayaka C.J as it was held in the case as follows:

> *"…the grounds on which a person may be added as a party to an action are either (i) that he ought to have been joined as a plaintiff or defendant or (ii) that his presence is necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action"*

In WEERAPERUMA case[11] and in THE CHARTERED BANK vs. DE SILVA[12] it was held that when ascertaining whether a party who is sought to be added is a person "who ought to have been joined, whether as plaintiff or defendant" in terms of the first limb, Section 18 (1) should be read with Section 11 and Section 14 of the Civil Procedure Code. Therefore in the case of an application to add a party under the first limb of Section 18 (1) on the basis that he "ought to have been joined as plaintiff", that person will be a third party who claims a right to relief upon the cause of action which is the subject matter of the case and who ought to have been joined as a plaintiff, as required by Section 11 of the Civil Procedure Code. On the other hand in the case of an application to add a party under the first limb of Section 18 (1) on the basis that he "ought to have been joined as defendant", that person will be a third party who is alleged to be liable upon the cause of action which is the subject matter of the case and who ought to have been joined as a defendant, as required by Section 14 of the Civil Procedure Code.

9 1968 1 AER 328
10 61 NLR 481
11 Ibid
12 67 NLR 135

Next, we have to examine the type of person who should be added on the basis of the second limb of Section 18 (1) as being someone "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action". According to the wording of the Section 18[1] of the Code [use of the word "or" in the section] the second type of persons will be persons who may not be entitled to relief upon or be liable upon the cause of action which is the subject matter of the case but, nevertheless, are persons whose presence before the Court is necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in that action. These types of persons, whom should be added under and in terms of the second limb of section 18 (1), are usually referred to as "necessary parties".

In KUMARIHAMY vs. DISSANAYAKE[13], the defendant in a hypothecary action pleaded as his defense that he had paid the monies due to the plaintiff to the plaintiff's agent and obtained an Order from the District Court adding the plaintiff's agent as a defendant. In appeal from this Order of the District Court, the Supreme Court held that, the plaintiff's agent was wrongly added since he was no more than an important witness and his presence as a party was unnecessary to effectually and completely adjudicate upon and settle the questions involved in the action.

In BANDA vs. DHARMARATNE[14] where it was held that, the plaintiff in a hypothecary action was entitled, under Section 18 (1), to add as a defendant, a person to whom the mortgaged property had been transferred before the judgment was delivered and who was, therefore, a "necessary party" as contemplated by Section 18 (1) since the presence of the transferee, who was in possession and would be affected or be bound by the Orders which may be made, was necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the action.

When considering above judgments it is apparent that our courts considered that, a person would be considered a "necessary party" under and in terms of the second limb of Section 18 (1) of the Civil Procedure Code if he had rights in the subject matter of the litigation and may be prejudiced by the Order that would be made in the case or if it was necessary that he be bound by the Order and, therefore, his presence as a party in the action was necessary to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the action. However after the Devlin J's judgment in AMON vs. RAPAHEL TUCK AND SONS LTD[15] the decisions of our Courts show that the Supreme Court approved of and applied the approach formulated in that case.

In THE UNITED FIRE AND GENERAL INSURANCE CO., LTD vs. WEINMAN[16] the Supreme Court referred to and applied some of the aforesaid tests formulated by Devlin J in AMON's case and held that an insurer in respect of third party risks under the Motor Traffic Act is not entitled to be added as a party under Section 18 of the Civil Procedure Code in action for damages resulting from a collision with a motor car unless he can show that his legal rights would be prejudiced if judgment were to be entered against the party or parties on the record.

Then, in GOVERNMENT AGENT, KALUTARA vs. GUNARATNE[17] the Supreme Court held that, one of the grounds on which the addition of a person as a party to a pending action should be permitted under Section 18 (1) is the fact that, the Order prayed for in the action would affect that person in the enjoyment of his legal rights.

In ARUMUGAM COOMARASWAMY vs. ANDIRIS APPUHAMY[18] it was held that in deciding whether the addition of a new party should be allowed under section 18[1] of the Civil Procedure Code the wider construction adopted by English Courts is to be preferred. The actual criteria that the Ranasinghe

13 37 NLR 493
14 24 NLR 210
15 1956 1 AER 273
16 59 NLR 495
17 71 NLR 58
18 1985 [2] SLR 219

J based his decision in this case the tests formulated by Devlin J in AMON's case such as the fact that, the determination of the case will not be effective unless the person who seeks to be added is made a party and is bound by the determination of the case and the pending action cannot be effectively determined without that party being added as a party.

In ROBERT DASSANAYAKE & ANOTHER vs. PEOPLES BANK[19] Ranaraja J, with Silva J agreeing, referred to COOMARASWAMY's case and stated "That judgment lays down the guidelines applicable to the addition of parties thus, `if a plaintiff can show that he cannot get effectual or complete relief unless the new party is joined or a defendant can show that he cannot effectually set up a defense which he desires to set up unless the new party is joined, the addition should be allowed".

Thereafter in HILDA ENID PERERA vs. SOMAWATHIE LOKUGE[20] Shirani Bandaranayake J. held that in order to avoid multiplicity of actions and to diminish the cost of litigation and for the effective and complete adjudication of all questions involved in the case the court can add a party and followed the "wider construction" favored by Lord Esher M.R in BYRNE's case. Subsequently, in FERNANDO vs. TENNAKOON[21], Marsoof J also applied the "wider construction expounded by Lord Esher.

In these circumstances it appears that our Supreme Court endorsed Lord Esher's view that, the second limb of Section 18 (1) of the Civil Procedure Code should be given the "wider construction" and that, when deciding questions regarding the addition of parties, a Court should keep in mind the desirability of reducing the multiplicity of litigation by adding parties provided, of course, the addition is permissible under and terms of and within the ambit of Section 18 (1) of the Civil Procedure Code. Further it is apparent that our Supreme Court disapproved of Lord Coleridge's "narrower construction" that, the addition of parties should be allowed only where the plaintiff had a cause of action against the person sought to be added which had to be decided in the pending action itself.

However our courts did not set out the tests to be applied when determining whether a person should be added as a party under Section 18 (1). In a recent judgment delivered by Prasanna Jayawardena J. in NEW LANKA MERCHANTS MARKETING [PVT] LIMITED and OTHERS vs. SEYLAN BANK and OTHERS[22] analyzed English Courts decisions and Sri Lankan Courts decisions on addition of parties and formulated following facts which need to be considered by a court when deciding on whether a party to be added or not. They are:-[23]

- A Court should keep in mind the desirability of reducing the multiplicity of litigation and, therefore, interpret Section 18 (1) widely.
- However, the object of preventing the multiplicity of litigation does not justify the addition of a party if the addition is not permitted by the words used in Section 18 (1).
- In terms of the first limb of Section 18 (1), a person who must be added because he is a party "who ought to have been joined, whether a plaintiff or defendant", will be a person who should have been named as a plaintiff in terms of Section 11 of the Civil Procedure Code or who should have been named as a defendant in terms of Section 14 of the Civil Procedure Code.
- In terms of the second limb of Section 18 (1), a person who should be added because he is a "necessary party", is a person whose presence before the Court is necessary in order to enable the Court to, effectually and completely, adjudicate upon and settle all the questions involved in the pending action.

19 1995 [2] SLR 320
20 2000 [3] SLR 200
21 2010 [2] SLR 22
22 SC Appeal 198/2014 decided on 19th May 2017
23 Ibid pages 24 & 25

- Accordingly, a person will be a "necessary party" if he will be bound by the determination of the pending action.
- Similarly, a person will be a "necessary party" if the determination of the pending action will affect his legal rights.
- Further, a person will be a "necessary party", in appropriate circumstances, if the determination of the pending action will affect his pecuniary interests or commercial interests.
- A person who is not bound by the determination of a pending action or whose legal rights, pecuniary interests or commercial interests are not affected by the Orders sought in that action may, nevertheless, be added as a "necessary party", if his presence before the Court as a party to that action (and not merely as a witness) is required to, effectually and completely, adjudicate upon and settle all the questions involved in that action. For example, to enable one of the parties to effectually and completely establish their case or to effectually and completely obtain the reliefs they seek in the action.
- Unless one or more of the circumstances described above exist, a person should not be added to a pending action upon a claim that he is a "necessary party" merely because one of the parties to that pending action has a separate dispute with or claim against him or merely because he has a separate dispute with or claim against one of the parties to that action.
- A person is not a "necessary party" merely because he has relevant evidence to give or because he is interested in and wishes to involve himself in the correct solution of the case or because he wishes to be heard in the case or to assist a party to the case.

Addition of parties and Prescription

The purpose of addition of parties according to Section 18(1) is to enable the Court to "effectually and completely adjudicate upon and settle all the questions involved" in an action. However it is necessary to consider whether the provisions in Section 18[1] are subject to the provisions in the Prescription Ordinance[24]. This issue was resolved in a recent judgment decided by the Supreme Court. In RANJITH SUMANASEKERA and OTHERS vs. M.T.M.MEEZAM[25] the learned District Judge after inquiry allowed the addition of the 3rd Defendant on the basis that it is necessary to allow amendments and add parties for the proper dispensation of justice even after the prescriptive period. In Supreme Court it was held that even though the purpose of addition of parties according to Section 18(1) is to enable the Court to "effectually and completely adjudicate upon and settle all the questions involved "in an action, the addition of a party should be subject to any positive rule of law that would be applicable in relation to the cause of action against such party sought to be specially relating to limitation of time as set out in S.9 of the Prescription Ordinance No.22 of 1871 which states that "No action shall be maintainable for any loss, injury, or damage, unless the same shall be commenced within two years from the time when the cause of action, shall have arisen". Therefore according to this judgment the Court cannot permit to add a party after the prescriptive period.

Conclusion

This article describes the appropriate approach and tests to be used when determining whether a party should be added under and in terms of Section 18 (1) of the Civil Procedure Code. However this not intended to be a complete list of guidelines and every case will turn on its own facts. Further it is prudent to keep in mind that the provisions on addition of parties are subject to any positive rule of law.

24 No.22 of 1871

25 SC Appeal 04/2011 decided on 07/06/2012 [Bar Journal 201 Vol. XIX Part II page 156]

The New AG/IGP Circular No. 2693/2020 under Dangerous Drugs Ordinance, its Implementation and Practical Concerns

[The Assistant Editor has written this article with the guidance and assistance of Hon. Ranga S.A Dissanayake, High Court Judge, Balapitiya]

Whilst the issues of prison over-crowding and prison unrest has persistently been in the forefront of social issues which required redress, with the outbreak of Covid 19 amongst the prison communities, these issues were thrust into the spotlight, requiring urgent remedial action. As it was reported in April 2020 there are around 13000 remanded detainees and out of them around 8000 detainees had been in remand for drug related offences[1]. The problem of overcrowding of prisons has been long debated with little progress; according to the Commissioner General of Prisons, Mr. Thushara Upuldeniya, prisons in Sri Lanka are overcrowded by 173 percent with the Colombo Welikada Prison being overcrowded by 300 percent[2].

Therefore, a mechanism for regulating and systematic release of drug related detainees on a rational legal basis was needed. In the circumstances, Inspector General of Police Circular No. 2693/2020 (Crime Circular No. 09/2020 dated 18th November 2020 (hereinafter referred to as the **"New Circular"**), was formulated pursuant to the Attorney General's Letter dated 9th November 2020. The purpose of said New Circular is to differentiate drug addicts from drug traffickers with the view to expeditiously conclude the bail inquiry and the filing of charges, which will ultimately contribute to reducing unprecedented overcrowding of prisons[3].

The New Circular was the result of discussions among the Hon. Attorney General, Chief Advisor to the President, Commissioner General of Prisons, and Mr. Ajit Rohana Deputy Inspector General of Police.

The Statistical Analytical Report of Government Analyst[4] has been considered in distinguishing drug addicts from large scale commercial drug traffickers. The most striking element of the New Circular is the formulation of a clear definition of quantities of narcotics used by drug addicts as opposed to substantive quantities possessed by large scale commercial drug traffickers. Especially, the guidelines for the heroin prosecutions (diacetylmorphine) has been classified in relation to gross weight as well as net weight of narcotic substance, which is introduced for the first time, and has been derived from rational considerations made in the Government Analyst Report.

Thus, the purpose of this article is focused on ascertaining the practical operation of the New Circular No.2693, and considering its rationale and effectiveness especially when considering the complex provisions of the under Dangerous Drugs Ordinance No. 17 of 1929 as amended by the Amendment Act No. 13 of 1984[5].

1 Lakmal Sooriyagoda, 'AG formulates guidelines to release minor drug offenders on bail', Daily News (Colombo, 9 April 2020).
2 Asiri Fernando, 'Police to expedite drug users to get bail', Daily FT (Colombo, 3 December 2020).
3 Letter dated 9th November 2020 by Hon. Minister of Justice M.U.M Ali Sabry addressed to Hon. Attorney General of Sri Lanka.
4 The Letter by the Additional Government Analyst, D. A. L. W. Jayamanne dated 9th November 2020 addressed to Hon. Attorney General of Sri Lanka.
5 Poisons, Opium, and Dangerous Drugs Ordinance No. 17 of 1929 (as amended), Poisons, Opium And Dangerous Drugs (Amendment) Act No. 13 of 1984 and Poisons, Opium And Dangerous Drugs (Amendment) Act No 26 of 1986.

Development of Narcotic Circulars in Past and the Rationale
Complications in the Dangerous Drugs Ordinance pursuant to Amendment Act No. 13 of 19846

As the Dangerous Drugs Ordinance No. 17 of 1929 was inadequate to counter the social crisis caused by exponential increase in narcotic sales, and the increase in drug trafficking and procuring, the Dangerous Drugs Ordinance (Amendment) Act No. 13 of 1984 (hereinafter referred to as the **"1984 Amendment"**) was introduced.

The purpose of the 1984 Amendment was described succinctly by the Supreme Court in Subramnium vs. Thrichelvam[7], especially with regard to Part III of the 3rd Schedule of the Act as follows;

> *"As rightly submitted by Mr. C.R de Silva Deputy Solicitor General on a reading of part III the 3rd Schedule as a whole it is clear that the legislature intended a graded scale of punishment. Having regard to the quantity of Heroin found in possession of an accused person, legislature enacted an acceding scale of punishment".*

Therefore, the intention of the legislature was to make provisions for imposition of rigorous punishments and introduce a graded scale of punishment based on the quantity and type of narcotics.

However, the complications in the 1984 Amendment can be summarized as follows:

a. The previous section 78(a) of the Dangerous Drugs Ordinance was repealed and replaced with the new section 78(5) by the Amendment Act No. 13 of 1984, resulting in penal provisions for violations of the Ordinance except for breaches of Section 54A, which provides that punishment for offences under Section 54A (a) - (c), including manufacturing heroin, cocaine, opium or morphine are to be read with the graded scale of punishment defined in relation to Column II and III of the 3rd Schedule;

b. Although, the terminology used in section 54A subsection a) b) and c) is "in excess of", when considering the 3rd Schedule of the 1984 Amendment, various terms therein are contradictory, and uses the term "not exceeding", such as "not exceeding 1 gram (1000mg) of Morphine", "not exceeding 1 gram (1000mg) of Heroin" and "not exceeding 5 Kilograms of Cannabis";

c. Consequently, confusion has arisen as to under which circumstances action should be instituted in the Magistrate's Court in terms of Section 78(5) and under which circumstances action should be instituted in the High Court under Section 54 A.

d. Thus, a considerable ambiguity exists when determining in which court, and under which provision an action ought to be instituted;

e. In the circumstances, the intention of the legislature to introduce a graded ascending scale of punishment considering the amount and type of the dangerous drugs is defeated.

This ambiguity was analyzed in their Lordships of the Supreme Court in the case of AG vs. Siripala[8] discerned that "on an examination of the provisions of the relevant provisions of the Dangerous Drugs Ordinance, it is clear that one of the objectives of the legislature sought to achieve is to vest a wider discretion in the prosecuting authorities either to indict the offender under Section 54A or 54B in the High Court or to charge the suspect in the Magistrate's Court depending on circumstances of each case."

Moreover, in the case of AG vs. Sunethra[9] His Lordship Imam observed that if the amount of heroin involved in alleged transaction under Section 54A (d) 1984 Amendment, is less than the amounts stated in

6 Hon. Ranga S.A Dissanayake, Additional Magistrate Panadura (Currently Hon. Ranga S.A Dissanayake, High Court Judge, Balapitiya.), Complications Consequent to Dangerous Drugs Ordinance (Amendment) Act No. 13 of 1984.
7 Subramnium vs. Thrichelvam 1995(2) SLR 130.
8 AG vs. Siripala 1990 (2) SLR 141.
9 AG vs. Sunethra - Judgement dated 4th April 2007 in the case bearing No. CA (PHC) APN 511/2006.

column II Part III of the 3rd Schedule, then Section 54A does not apply and in such event the State is vested with the option to proceed under Section 78(5)(a) or 78(5)(b).

In making such a finding it was held that "except as permitted by or otherwise in accordance with provisions of this chapter or a license of the Director, as enumerated in subsections of Sections 54A, which the Learned High Court Judge failed to consider. Thus, the Attorney General is vested with discretion to indict an accused taking into consideration facts of each case. In the case Accused has three previous convictions and a pending case all being Heroin cases possibly prompted the Attorney General to indict the Accused under Section 54 A(d) of the Dangerous Drugs Ordinance Amendment Act No. 13 of 1984".

Consequent Complications as to Bail for Narcotic Offences

In terms of Section 3 of the Bail Act No. 30 of 1997 when express provisions are provided by a written law in respect of bail, the Bail Act shall not apply. As expressly provided in terms of Section 83 of Dangerous Drugs Ordinance (as amended), no-person suspected or accused of an offence under Section 54A or 54B of the Dangerous Drugs Ordinance shall be released on bail except by High Court under exceptional circumstances.

Therefore, the discretion of the Magistrate in considering bail is inevitably linked with the decision of the prosecuting authorities under which section the prosecution is maintained. If the facts are reported under Section 54A or 54 B, the bailing power of the Magistrate Court is ousted and only when prosecution is maintained under Section 78(5) of the Dangerous Drugs Ordinance is the Magistrate Court empowered to grant bail.

This juxtaposition of statutory positions was considered by Her Ladyship Shirani Bandaranayake in Danny *Vs. Sirinimal Silva*[10]

"Magistrate should not issue remand orders to satisfy the sardonic pleasure of an opinioned investigator or prosecutor" remanding a person is a judicial act and as such Magistrate should bring his judicial mind to bear on that before depriving a person of his liberty"[11].

In other words, Magistrate should not be a rubber stamp of the police.

The aforesaid circumstances, originally resulted in the issuance of the IGP Circular No. 1877/200 5 (Crime Circular No. 28/2005) pursuant to the Attorney General's advice dated 30th October 2005. However, owing to same being unsuccessful in rectifying the aforesaid issues with the lapse of time the earlier issued IGP Circular No. 2349/2012 (Crime Circular 04/2012) issued pursuant to the Attorney General's advice, came into operation. The operation of the said Circular 2349/2012 provided a considerable degree of clarity and thus the overwhelming discretion exercised by the police was regulated by such guidelines. The aforesaid circulars covered wide range of narcotics including not only those falling within the ambit of the Dangerous Drugs Ordinance but also those falling within the ambit of the Convention Against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances Act No. 01 of 2008.

The further IGP Circular No. 2690 (Crime Circular No. 08/ 2020) dated 11th October 2020 was issued, as a mode of remedying the problems relating to the overcrowding of prisons, however this was repealed and subsequently, the New Circular No. 2693/2020 came into operation during the second wave of the Covid 19 pandemic.

Charges framed in the Magistrate's Court under the New Circular No. 2693:

The most contentious issue in relation to the Circular No. 2693/2020 (hereinafter referred to as the **"New Circular"**) is the possibility of framing charges or instituting proceedings in terms of Circular Rule

10 Danny v. Sirinimal Silva, Inspector of Police Station of Chilaw and Others [2001] 1 SLR 29.
11 Ibid., at page 35.

No. 2(ii) in the Magistrate's Court where the gross weight of heroin is less than two (2) grams (2000mg). This is because the sentencing Schedule to Dangerous Drugs Ordinance does not differentiate net weight (pure quantity) from gross weight in any manner whatsoever. On the other hand, on the face of the said penal schedule a heroin quantity in excess of one gram (1000mg) extends beyond the jurisdiction of the Magistrate's Court.

Application of the New Circular No. 2693/2020

Charges in the Magistrates Court in terms of Section 78(5) of the Dangerous Drugs Ordinance:

Under the New Circular the instances in which the charges are maintained in the Magistrate's Court are as follows:

1. Net weight is less than 1000 milligrams (1g) of heroin: This criterion could be elaborated as follows;
   i. In the absence of clear evidence of trafficking,
   ii. In the absence of prior convictions, and
   iii. Thus, the charge should be referred to as the "Possession of Heroin (diacetylmorphine) is less than 1 gram(1000mg) of Heroin",
2. Gross weight is less than 2 grams (2000mg) of heroin;
   i. In the absence of clear evidence as to trafficking,
   ii. In the absence of prior convictions, and
   iii. However, the charge sheet must be "possession Heroin (diacetylmorphine) less than 1 gram (1000mg) of Heroin".

Reporting facts in terms of Section 54 A 1984 Amendment for considering indictments to High Court

The possibility of High Court Indictments should be considered in terms of Section 54 A of the Dangerous Drugs Ordinance:

1. If the gross weight is in excess of 2 grams (2000 mg) prior to the government analyst report,
2. Upon the government analyst report, if the Net Weight (Pure quantity of Heroin) is in excess of 1 gram along with the following;
   i. Clear evidence of trafficking,
   ii. Existence of one or more prior convictions of which the quantity in one prior conviction exceeds one gram (1000 milligrams), and
   iii. Existence of three (3) or more pending cases of which at least in quantity in one of the pending cases exceeds 1 gram (1000mg) of heroin.
3. If the gross weight is less than two (2) grams of heroin, with the following;
   i. Existence of clear evidence of drug trafficking,
   ii. Existence of one or more prior convictions of which the quantity in one of the prior convictions exceeds 1 gram (1000mg), and
   iii. Existence of three (3) or more pending cases of which at least the quantity in one of the pending cases exceeds one (1) gram (1000mg) of heroin.[12]

12 Based on a graphical chart in respect of application of the New Circular concerning Heroin prepared by Hon. Ranga S.A Dissanayake, High Court Judge, Balapitiya.

Cannabis Sativa L

High Court Indictments under Section 54 A of the Dangerous Drugs Ordinance occurs if;

1. The quantity of Cannabis Exceeds 5 kilograms, and
2. When the alleged quantity is less than 5 kilograms,
   i. Existence of one prior conviction, which the quantity exceeds 5 kilograms, or
   ii. Existence of three pending cases with at least onepending case where the quantity exceeds 5 kilograms.

Magistrate's Court Prosecutions under Section 78(5) of the Dangerous Drugs Ordinance if;

1. If the alleged quantity is less than 5 kilograms, in the absence of clear evidence of trafficking, and/or in the absence of prior convictions
2. If the quantity is less than 5 kilograms,
   i. Despite the existence of prior convictions, none of the prior convictions exceeds 5 kilograms
   ii. Despite the existence of pending cases none of the pending cases exceeds 5 kilograms[13]

Connected and Incidental Matters Concerning Practical Operation of the New Circular:

Difference between selling of heroine (diacetylmorphine) in terms of Section 54(1) of the Dangerous Drugs Ordinance No. 17 of 1929 and trafficking of heroine under Section 54 A (b) of the 1984 Amendment

Despite the New Circular, actions for the selling of small user quantities of heroine (diacetylmorphine) must necessarily have to be maintained under Section 54(1) of the Dangerous Drugs Ordinance since the definition of "Trafficking" in terms of Section 54 A of the 1984 Amendment is linked to the question whether the quantity is a substantive quantity used by commercial drugs traffickers or whether the quantity sold in question is simply a user quantity.

Although, the New Circular did not repeal the Previous Circular bearing No. 2349/2012 (hereinafter referred to as the **"Previous Circular"**), by letter dated 18th April 2012 by the Hon. Attorney General said Previous Circular must be made relevant as much as possible in relation to both Heroin and Cannabis as well. This is because in the absence Previous Circular being applied in relation to Cannabis and Heroin a lacuna arises in relation selling of user quantities.

The Previous Circular consisted of a clarification Rule I explanation, which distinguished the "selling of drug" from "drug trafficking" in the following manner;

> *"Explanation: trafficking and selling are not one and the same offence and selling of small quantities of is appropriate to be considered as selling of several packets of narcotics" This differentiating Rule under Previous Circular performed a crucial function since the definition "restriction on sale and supply of dangerous drug" in terms of Section 54(1) of the Dangerous Drugs Ordinance contained similar terminology to the definition of "traffic" in terms of Section 54 A of the Dangerous Drugs Ordinance as amended by Act No. 13 of 1984".*

Section 54(1) of the Dangerous Drugs Ordinance No. 17 of 1929 as amended by Section 13 of Act No. 12 of 1939 states as follows:

> *"Sec 54(1) No person shall administer, sell, supply, or procure any dangerous drug to or for any person, whether in Ceylon or elsewhere, or advice any such drug for sale, except as permitted by or otherwise by the provisions of the Ordinance and under a license in that behalf from the Director".*

13 Based on a graphical chart in respect of application of the New Circular concerning Cannabis prepared by Hon. Ranga S.A Dissanayake, High Court Judge, Balapitiya

Clear evidence of drug trafficking

Trafficking is defined in terms of Section 54 A of the 1984 Amendment as follows;

i. to sell, give, store, procure, administer, transport, send, deliver or distribute, or
ii. to offer to do anything mention in paragraph (a).

Thus, although it appears on the face of the New Circular Rule No. 5 and 6 that the Previous Circular is only applicable to suspects concerned with Dangerous Drugs / Narcotics other than cannabis and heroin, which includes psychotropic substances like methamphetamine in respect of Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act No. 01 of 2008, from a practical point of view the said Previous Circular must be made applicable in relation to selling of all narcotics, especially cannabis and heroin.

The definition "trafficking" in terms of Section 54A of the Dangerous Drugs Ordinance is was discussed in the recent Supreme Court in recent case Mohamed Iqbal Sadath vs. Hon. Attorney General[14] by taking a up a quantity based approach, it was discerned that although what constitutes 'Trafficking' is a contextually dependent question of fact in relation to substantive/ large commercial quantities of narcotics inference of trafficking seems obvious.

Can a prosecution indictable to High Court be maintained under Section 54 A of 1984 Amendment if the gross quantity in question is less than 1 gram or 2 grams?

The simple answer is no, since in terms of the New Circular Rule 6, the Previous Circular is applicable in relation to other narcotics. However, a question arises whether terms "other narcotics" amphetamine, methamphetamine and narcotics in relation to Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substance's Act or whether this New Circular Rule still permits application of the previous IGP Circular No. 2349/2012.

In view of the previous IGP Circular No. 2349/12, the Rule I. Explanation is as follows: *"trafficking and selling is not the same offence and selling packets containing small quantities is appropriate to be interpreted as selling"*. Thus, this permits charge sheets to be filed in the Magistrate's Court in terms of Section 54(1) of Dangerous Drugs Ordinance.

Therefore, in view of the said Rule I Explanation in the Previous IGP Circular No. 2349/2012 a clear distinction exists between selling in respect of Section 54(1) of the Dangerous Drugs Ordinance and "Trafficking" under Section 54 A of the 1984 Amendment.

As his Lordship Buwaneka Aluwihare held in *Mohamed Iqbal Mohamed Sadath vs. Hon.* AG case, what factual circumstances amounts to trafficking is a question of fact not a question of law and consequently, a wide discretion has been granted to the prosecuting officers who are well positioned during preliminary stages of investigation to ascertain what constitutes trafficking. However, the quantity-based approach set out in the New Circular as well in said case demonstrates that in the absence of at least one prior/previous convictions or a pending case where the quantity exceeds one gram of heroin, a prosecution for Trafficking under Section 54A of the Dangerous Drugs Ordinance No. 13 of 1984 could hardly be maintained. In other words, despite a series of prior convictions with at least one exceeding 1 gram (1000mg) of heroin only a charge for selling in terms of Section 54(1) of the Dangerous Drugs Ordinance could be maintained.

Prior to the Government Analyst Report can a Charge Sheet be maintained in respect of gross quantity of Heroine between 1 gram and not in excess of 2gram?

Yes, in such event, the wording of the Charge Sheet should be *"possession of less one (1) gram (1000mg) of Heroin (diacetylmorphine)". If the Accused who is charged with such charge pl*eads guilty prior to government analyst report it will only be recorded as a prior conviction less than one gram of heroin. This new gross weight-based criteria appears to have been based on the Statistical Analytical Report of the

14 Mohamed Iqbal Sadath vs. Hon. Attorney General in the case bearing No. SC. Appeal 110/2012.

Government Analyst dated 9th November 2020, which confirmed that in relation to general samples received by the Government Analyst up to 2 grams (2000mg) of heroin, the instances in which Net Weight exceeded 500 milligrams while the instances in which the Net Weight exceeded one gram is less than one percent.

The New Circular Rule No. 3.1(b) requires existence of prior convictions

This criterion is explicitly illustrated under Rule 3.2 of the New Circular, which distinguishes substantive quantities of heroin from user quantities by a clear definition. If the net weight or pure quantity is less than 1 gram (1000mg) of heroin that is used by drug addicts, such quantity is only a user quantity and if the pure quantity is more than 1 gram (1000mg) the same is a substantive quantity. Thus, in terms of said New Circular Rule 3.2, the criteria for prior convictions and/or pending cases are exclusively relevant to amounts not being user quantities and therefore, in respect of substantive quantities, it should exceed 1gram (1000mg) net weight.

The Duty Placed on the Magistrate's Court and Legal Validity of the Circular

In terms of the Section 182 of the Code of Criminal Procedure Act, framing charges is a duty cast upon Magistrate and thus at the time of Charge Sheet as well as during pending investigation Magistrate is empowered to ascertain the accuracy of the steps taken by prosecuting police. *In Tunnaya alias Gunapala vs. Officer in Charge Police Station Galewela*[15] Her Ladyship Shiranee Bandaranayake distinguished preliminary stages of investigation where a suspect is produced before Magistrate in respect of Section 116(1) of the Code of Criminal Procedure Act No. 15 of 1979 from institution of proceedings against an accused in respect of Section 136(1) of the Criminal Procedure and held that,

> *"…a report involving a well-founded case under Section 116(1) of the Code of Criminal Procedure Act cannot be equated to institution proceedings against an accused under 136(1) (b) of the Code and thus, until the final investigation report in terms of Section 120(3) of Code no proceedings cannot be considered as being instituted. This pre-bail Act legal position where institution of proceedings in terms of Section 136(1) (b) of the Code of Criminal Procedure Act are distinguished from reporting facts concerning a well-founded case in terms of Section 116(1) and consequent bail powers of the Magistrate under Section 115(3) of the Code demonstrate that a Magistrate is empowered to intervene when the circumstances of the case demands".*

In line with the aforesaid jurisprudence, the reasons as to why Magistrate should maintain scrutiny over prosecutions are as follows:

1. The power to frame charge sheet if sufficient grounds exists against the accused is vested in the Magistrate in terms of Section 182 of the Code of Criminal Procedure Act;
2. The power to issue court process when sufficient grounds exist against the accused in terms Section 139 of the Code of Criminal Procedure Act is also vested in the Magistrate;
3. The discretion placed in Magistrate in view of the final investigation report in terms of Section 120(3) of the Code of Criminal Procedure Act on the question whether to discharge the suspect or proceed against the suspect;
4. Therefore, at the time of preliminary process as well as at time of framing charges the question as to the existence of sufficient grounds to proceed against the accused must be determined by Magistrate;
5. Under Section 124 of the Code of Criminal Procedure Act Magistrate may provide assistance to an investigation by making appropriate orders and process of court;
6. The legal framework prior to the Bail Act No. 30 of 1997 is reflected in the case of Tunnaya alias Gunapala vs. AG, that a well-founded case under Section 116(1) of the Code of Criminal Procedure Act is distinguishable from institution of proceedings under Section 136(1)(b) of the Code of Criminal

15 Tunnaya alias Gunapala vs. Officer in Charge Police Station Galewela [1993] 1 SLR 61.

Procedure Act that in the absence of proceedings instituted in Magistrate's Court or High Court before the expiration of three months under Section 115(3) of the Code of Criminal Procedure Act, a person shall be released on bail;

7. The famous judicial dictum by Her Ladyship Shiranee Bandaranayake in Danny vs. Sirinimal Silva, Inspector General of Police, Chilaw & others which states,

"I must express my concern over Magistrates issuing orders of remand mechanically, simply because police want orders made. I cannot do better than to quote the words of my brother, Dheeraratne J said in connection with Magistrates issuing warrants of arrest (in Mahanama Thilakaratne vs. Bandula Wicremasinghe[16]) Magistrates should not issue remand orders to satisfy the sardonic pleasure of the opinionated investigator or a prosecutor. Remanding a suspect is a judicial act and such a Magistrate should bring his judicial mind to bear on that matter before depriving a person of personal liberty";

Thus, a duty to maintain constant review over narcotic prosecutions is placed on the Magistrate in all said instances. However, a Magistrate must exercise extreme caution in interfering with the discretion of the prosecuting authorities in determining the nature of prosecutions.

Quantity as a Criteria in Determining Definition of Illegal Drug Trafficking

In the recent Supreme Court judgment *Mohamed Iqbal Mohamed Sadath vs. Hon. Attorney General*[17] His Lordship Hon. Buwanwka Aluwihare PCJ considered the question whether mere quantity was sufficient to convict the Accused-Appellant on charges of Trafficking in terms of Poisons Opium and Dangerous Drugs Ordinance while upholding the position that the word "traffic" and as such whether a person has trafficked any of drugs as contemplated definition of trafficking is not a question of law but a question of fact. His Lordship in his dicta held,

"The final question to be decided is as to whether the 'possession' was sufficient to convict the Accused Appellant on charges of trafficking in terms of Poisons, Opium and Dangerous Drugs Ordinance. As far as the mental element is concerned, I am of the view that the offence of [drug] trafficking is similar to possession, since it requires to be established that the perpetrator knowingly possessed or had control over the Dangerous Drug in trafficking while being unaware that he or she is possession of a drug or if he or she has mistakenly believed that the substance is legal.

The offence of drug trafficking, however also required that the Prosecution establish that the perpetrator was involved in the selling, storing, administering, transporting, delivering or distributing of such drugs or had offered to do anything referred to in the definition of the term traffic "traffic" in Section 54 A of the Dangerous Drugs Ordinance. It is this addition requirement of this Act that transforms the status of the offence of possession to trafficking.

Since the possession and trafficking can look the same at first glance, Prosecution for drug trafficking typically requires producing of additional circumstantial evidence to indicate that the Accused was in possession of the drugs not for personal use but for commercial purposes. The quantity of drug detected would be a good indicator to decide whether the perpetrator is a user [an Addict] or is trading drugs. This would be question of fact."[18]

This recent view of the Supreme Court confirms the understanding that the inference of drug trafficking could be drawn by the quantity itself and it is exclusively a question of fact, which is crucial in distinguishing a drug addict involving user quantities as opposed to a drug trafficker concerning substantive quantities.

Even under the New Circular No. 2693/2020 the quantity is the most decisive determinant in the definition of "trafficking". However, wide discretion is entrusted on prosecuting authorities such as police and

16 Mahanama Thilakaratne vs. Bandula Wicremasinghe [1999] 1 SLR 372 at page 382.

17 Mohamed Iqbal Mohamed Sadath vs. Hon. Attorney General judgement dated 14th December 2020 in the case bearing No. SC Appeal 110/2015.

18 bid., at paragraphs 15 and 16.

Excise officers in determining under which provision a prosecution should be maintained remains during the preliminary stages of investigation must not lightly be interfered by Magistrate but same must be handled with extreme caution exclusively when obvious intervention is permitted by the circumstances. The New Circular Rule No. 07 and 08, which ensures that the said wide discretion is over-seen by higher authorities like Deputy Inspector General of Police, District Officer, and Director Legal Division etc.

Conclusion

The fundamental purpose of the New Circular was to remedy the unrest and overcrowding of prisons particularly in light of the prevalent Covid19 pandemic. This is sought to be achieved by differentiating between **drug addicts** who resort to **user quantities** of narcotics from **commercial drug traffickers** who are concerned with **substantive quantities.**

A clear definition of user quantities from substantive quantities of narcotics is the most influential element of the New Circular No. 2693/2020. Moreover, setting a legal criteria for considering gross weight of heroin prior to obtaining government analyst report aids the expeditious filing/conclusion of cases and can be considered as of significant practical importance in accomplishing the very purpose of the New Circular.

A the Dangerous Drugs Ordinance No. 17 of 1929 was riddled with inconsistences and lacunas the 1984 Amendment was enacted with the intention of updating the Ordinance in pursuance of modern social necessities especially in view of rapid increasing in trafficking of narcotics. However, on account of the ambiguities within the legislation itself, thus legislative intention was defeated and several IGP Circulars including Previous IGP Circular No. 2349/2012 was given effect in order to remedy its defects.

The criteria for determining when charges should be framed for selling of narcotics in terms of Dangerous Drugs Ordinance No. 17 of 1929 in the Magistrate Court as opposed to maintaining a an action for trafficking of heroine under Section 54 A (b) of the 1984 Amendment in High Court is still covered by the Previous IGP Circular No. 2349/2012 Rule No. I. Explanation.

As discerned by the Supreme Court *in Mohamed Iqbal Mohamed Sadath vs. Hon.* AG during recent times what constitutes trafficking is a contextually dependent question of fact and in consideration of the scheme of the New Circular No. 2693 read with the Previous Circular No.2349/2012 the definition of trafficking is inevitably linked with the inference created by the quantity and whether such quantity is a user quantity or a substantive quantity.

The intention of the legislature in terms of the Dangerous Drugs Ordinance as ascertained in *Subramanium Thrichelwam Vs. AG* was to develop a graded scale of punishment based on the quantity and type. Although the difference between "trafficking" under Section 54 A of the 1984 Amendment and "selling" in terms of Section 54(1) of the Dangerous Drugs Ordinance is a contextually dependent question of fact, the Previous Circular No. 2349/2012 Rule I explanation read with the New Circular 2693/2020 demonstrate that in relation to user quantities an indictable allegation under Section 54 A could hardly be maintained.

The inquisitorial nature of powers vested in the Magistrate ranging from Section 182, 120(3) and 124 of the Code of Criminal Procedure Act, which ensure that both the maintenance of allegations during preliminary investigation stages of investigation to charge sheet is subjected to the scrutiny of Magistrate Court.

Moreover, the well-known judicial dictum *in Danny vs. Sirinimal Silva* that a Magistrate should not function as the rubber stamp of police reflects the duty cast on the Magistrate to intervene concerning improper prosecutions blatantly in disregard of the IGP Circulars in pursuance of AG's advice. However, caution must be exercised by the Magistrate in such intervention especially in the context where the inquiring police officers are well positioned with a thorough grasp of investigation, in order to determine the nature of prosecution and the extent of intervention should not extend beyond directing prosecution of the appropriate section in accordance with IGP Circulars.

JSALR 2021 /I//1

Kariyawasam Bendigodagamage Premawathi

Plaintiff-Appellant-Petitioner-Appellant

Vs,

Paranavithanage Don Jayathilake Perera (dead)

Paranavithanage Don Nishantha Kumara Perera

Substituted Defendant- Respondent-Respondent

SC Appeal 212/2014

SC SPL LA 141/2014

Judgment on : 10.03.2021

Before : **Justice Vijith K. Malalgoda, PC**
Justice E.A.G.R. Amarasekara
Justice Yasantha Kodagoda, PC

[The Plaintiff-Appellant-Appellant (hereinafter referred to as "the Appellant") instituted proceedings before the District Court of Colombo, against the original Defendant seeking inter alia a declaration of title and ejectment from the premises in dispute. The original Defendant passed away immediately after the instant case had been filed. Thereafter original defendant's son was substituted in her place.

The substituted Defendant-Respondent-Respondent (hereinafter referred to as "the Respondent") filed his answer denying the averments contended in the plaint and took up the position that the said premises is governed by the Rent Act No 07 of 1972 (hereinafter referred to as "the Rent Act") and prayed for a dismissal of the action, as he was the lawful tenant of the premises in question.

There is no reference to any tenancy agreement in the plaint. The Respondent did not directly admit the Appellant's title to the land by his answer, but he took up the position that his late father (Martin Perera) was the tenant of the Appellant until his death.

The Respondent's claim was that after the death of his father, his mother (original Defendant) succeeded to the tenancy by operation of law and similarly, the Respondent too succeeded to the tenancy on the demise of his mother by operation of law. The Respondent further stated that both his late mother and himself had been occupants of the said premises during the tenancy of his late father.

The Appellant's original position at the District Court was that the Appellant, being the lawful owner of the premises in dispute, was entitled to the declaration and ejectment of the original Defendant, who was in illegal occupation of the said premises claiming to be a tenant. The Appellant had further denied the tenancy of the said Defendant.

Based on the evidence led at the trial, the learned Judge of the District Court had delivered Judgment dismissing the plaint.

Being aggrieved by the said Judgment of the District Court, the Appellant appealed to the Court of Appeal, but the said appeal was dismissed.

The Appellant preferred the appeal to the Supreme Court against the said judgement of the Court of Appeal.]

Held: (*per* Vijith K. Malalgoda, PC J)

As further observed by this court, the plaint before the District Court was instituted seeking a Declaration of Title and to eject the Defendant (the Respondent) from the premises in question. However, the evidence transpired a vindicatory action in order to recover possession of the said property.

Availability of a vindicatory action as against a Declaratory action was discussed by Gratiaen J in the case of **Pathirana Vs. Jayasundara 58 NLR 169 at page 173** as follows;

> *"A decree for a declaration of title may, of course be obtained by way of additional relief either in a rei vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his overholding tenant (which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of contractual relationship which forbids a denial that the lessor is the true owner"*

In the absence of any valid challenge by the Respondent to the title of the property in question, the learned District Judge had correctly decided the title to the property in question in favour of the Appellant.

The action was mainly intended to eject the original Defendant and the Respondent in the instant appeal who were the wife and the child of the original tenant, said Martin Perera. The main contention of this action and the evidence led before the trial seems to be, the ejectment of the original Defendant and the Respondent, after the death of Martin Perera. In this regard, the Appellant took up the position that the original defendant as well as the Respondent were unlawful occupiers of the said property but not tenants under the provisions of the Rent Act.

At this juncture, it is important to consider whether the original Defendant or the Respondent in the instant appeal are protected tenants under the provisions of the Rent Act. The Appellant in her evidence before the District Court admitted that Martin Perera was the tenant of the property in question until his death and the original defendant was his wife and the Respondent was his son.

[The Appellant's position was that the Appellant did not accept the original Defendant or the Respondent as tenants of the property in question, even though the original Defendant and the Respondent continued to deposit the rent to the Municipality under the name of Martin Perera (the Respondent's later father). As per the Appellant, the Respondent or the original Defendant did not make any application either to the rent board or to the Appellant, requesting them to continue as tenants at the premises in question.]

The facts of the case clearly show that the tenancy of the Martin Perera was admitted by the Appellant while giving evidence at the trial. Further, there was an application before the Rent Board, but no objection was raised on the ground of lack of jurisdiction. Other than that, the rent of the premises was continuously deposited at the Municipality during the latter part of the time of Martin Perera which was accepted by the Plaintiff. In the said circumstances, the Court concludes that the premises in question is covered by the provisions of the Rent Act.

In the above context, it is necessary to consider the legality of the position taken up by the Appellant before this court.

Under Common law, the contract of tenancy comes to an end on the death of the tenant. Therefore, it is open for the landlord to decide who his tenant should be. On the other hand, under Section 18 of the Rent Restriction Act, No. 29 of 1948, it was possible for certain persons to continue the tenancy on the death of the tenant with giving notice prescribed by the said Act to the landlord [vide: ***Karunaratne vs Fernando, 73 NLR 457***]. In the said circumstances, the failure to give such notice would result in him losing his right to continue with the Tenancy.

However, with the introduction of the Rent Act, the question of such notice does not arise, since giving of notice by prospective tenant has been excluded and the **Section 36 of the Rent Act** precisely defines the continuance of the tenancy after the death of the tenant. Therefore, giving notice is not required to continue the tenancy. Under this section, the landlord has no choice and is bound to accept as tenant one of the persons specified in the said section.

In the Court of Appeal decision of ***Abdul Kalyoom and others vs Mohomed Mansoor (1988) 1 SLR 361,*** S. N Silva J (as he then was) examined the said Section 36 as follows;

> *"Tenancy right being personal do not pass to the tenant's heirs but under the Rent Laws special provision has been made for such tenancy rights to pass to successors eligible under the special statutory criteria – Section 18 of the Rent Restriction Act and now Section 36 of the Rent Act of 1972. While under S. 18 of the Rent Restriction Act succession to the tenancy would depend upon the eligible person giving written notice to the landlord, under S. 36 of the Rent*

Act, no such notice is required. The eligible person succeeds to the tenancy without such notice…..."

The Appellant did not dispute the fact, that the original Defendant and the Respondent were the surviving, or the lawful spouse and the child of the said tenant, Martin Perera.

However, the Appellant argued that, there cannot be double succession, based on the death of the Original Defendant, but I do not think it is necessary to consider the said argument at this juncture, since the court has to decide the case, as at the date of instituting the action.

The next argument of the Appellant was the Respondent's failure to attorn their names as the new tenants. However, on the perusal of the submissions made by the Counsel for the Appellant with regard to the attornment and presumption of attornment, it is clear that this question will only arise if there is a change of the ownership. There was no change of ownership in the instant case after the death of Martin Perera whose tenancy was not in dispute. In addition, as already observed in this judgement, no notice is required to be given to the landlord, under Section 36 of the Rent Act.

[The Appellant further argued that the said Respondent had failed to pay the rent and therefore, he was in unlawful occupation of the said premises. Witness from the Municipal Council revealed that the original Defendant and the Respondent had continued to pay rent to the Municipal Council under the name of the said Martin Perera. The Appellant only collected the rent deposited by said Martin Perera, but she did not collect the rent deposited by the Respondent in the absence of a new contract between the Appellant and the Defendant.]

The Appellant took up the position that the original Defendant as well as the Respondent failed to pay the rent in their names and therefore, she refused to accept those payments.

Section 36 (3) of the Rent Act was discussed by Sarath N Silva J in Abdul Kalyoom and Others Vs. Mohomed Mansoor (Supra) as follows;

"Under the section 36 (3) of the Rent Act the landlord is obliged to apply to the Rent Board for an order declaring which if any of the persons who may be deemed to be tenants under subsection 2 shall be the person who shall for the purpose of the Act be the tenant. In every situation where prima facie there are one or more persons eligible to succeed to the deceased tenant on the stipulated criteria the landlord is obliged to make an application to the Board for a determination.

The Board has exclusive power to make positive order declaring that a person who is qualified to succeed to the deceased tenant on the criteria stipulated in Section 36 (2), is the tenant for the purpose of the Act or to make a negative order declaring that no such person will succeed the deceased tenant. Consequently, an action filed by a landlord in the regular courts, without making an application to the Board, will fail, if it is established that any of the Defendants may be deemed a tenant of the premises in terms of section 36 (2)"

The Appellant failed to follow the provisions of Sections 36 (1), (2), (3) and (6) of the Act. Appellant accepted that Martin Perera was her tenant whilst giving evidence before the District Court. Therefore, the Original Defendant and/or the Respondent cannot be found fault for making the payment in the name of the deceased tenant Martin Perera.

The succeeding tenants are also entitled to make payments with the authorized person as stipulated in Section 21 of the Rent Act.

[As per Section 21(4) of the Rent Act "authorized person" means the Mayor or Chairman of the local authority within whose administrative limits the premises are situated or the person authorized in writing by the Mayor or Chairman to receive rents paid under this section or where the Minister so determines the board of the area within which the premises are situated.]

It is possible for a tenant, in the event of the landlord refusing to accept rent, or for any other cause, to pay the rent of the premises to the authorized person instead of the landlord. Payment of the rent to the authorized person shall be deemed to be payment to the landlord. Further, this section does not stipulate that the rent should be paid in the name of the personal representative or the deceased tenant.

Therefore, it is incorrect to argue that the original defendant as well as the Respondent has failed to pay the rent, when they deposited the rent with the authorized person in the name of the deceased tenant Martin Perera.

In the case of the ***Husseniya Vs. Jayawardena and Another 1981 (1) SLR 93 SC,*** it was held that, when depositing rent in the Municipal Council, it has to be paid in the name of the tenant or on behalf of the tenant. [Vide: ***DMJ De Silva Vs. Mallika Perera 1989 (2) SLR 352***]

The Respondent successfully established before the District Court that the Defendant was the statutory tenant of the Appellant and therefore entitled to continue with the tenancy agreement. In the said circumstances, the Appellant was not entitled to bring a suit to vindicate title and therefore it is misconceived in law.

In ***Hewamallika Vs. Soma Munasinghe (1982) 1 SLR 339,*** where Soza J has observed; that whenever the tenancy is not terminated, a vindicatory suit is misconceived and does not lie.

In ***Mensina Vs. Joslin reported in 1 Sris Kantha's Law Report 76,*** it was further held, that

> *"…….. The plaintiff was not entitled to institute a vindicatory action as the Defendant had become his tenant by the operation of law."*
>
> *"…….. The plaintiff however has not brought the action on the contract of tenancy that has arisen in his favour by operation of law. He has brought the action for declaration of title and for the ejectment of the defendant as a trespasser. This action is therefore misconceived"*

The Supreme Court held; that the Appellant could not bring a *rei vindicatio* action since the tenancy agreement between the Appellant and the Respondent continued upon the death of the original tenant. Therefore, the Respondent has a right to possess the land in suit.

[The Supreme Court affirmed the judgments of the Court of Appeal and the District Court and dismissed the Appeal.]

JSALR 2021 /I//2

Priyantha Lal Ramanayake

Accused – Appellant - Petitioner

Vs.

The Hon. Attorney General

Respondent - Respondent

SC. Appeal No. 31/2011

SC. SPL. LA. 99/2010

CASE NO. HCA 13/2010

Hambantota Case No. 85662

Before : **Sisira J. De Abrew, J.**
S. Thurairaja, PC. J. &,
E. A. G. R. Amarasekara, J.

Judgment on 27.1.2020

[Learned Magistrate convicted the Accused-Appellant and sentenced him to a term of 01-year RI and to pay a fine of Rs. 1500 carrying a default sentence of 01 RI for the offence of robbery of a chain which is an offence punishable under Section 380 of the Penal Code. In addition, the learned Magistrate ordered to pay a sum of Rs. 100,000 as compensation to the victim.

The learned High Court Judge affirmed the conviction and the sentence and dismissed the appeal. Being aggrieved by the said judgment of the learned High Court Judge, the Accused-Appellant has appealed to the Supreme Court.

The main point urged by the learned Counsel for the Accused-Appellant was that the learned Magistrate has made a grave error in law on the burden of proof. Learned Magistrate in his judgment stated that the Accused must prove his defence on a balance of probability.

The Accused-Appellant who gave evidence under oath stated that he did not commit this offence. Then his defence was a denial of the offence. The Accused-Appellant has not relied on a general or special exception contained in the Penal Code, but he denied the charge.

The learned Magistrate has neither rejected nor accepted the evidence of the Accused-Appellant.

Was the learned Magistrate correct when he, in his judgment dated 17.06.2009, decided that the Accused must prove his defence on a balance of probability?]

Held: *per* **Sisira J. De Abrew, J.**

In the case of **Martin Singho Vs Queen 69 CLW 21 at page 22** wherein His Lordship Justice T S Fernando held as follows;

> *"As this Court has pointed out on many occasions in the past, where an accused person is not relying on a general or special exception contained in the Penal Code, there is no burden on him to establish any fact."*

According to the law of this Country, this decision of the learned Magistrate is completely erroneous and wrong in law. When we consider the said misdirection committed by the learned Magistrate, we are unable to affirm the conviction of the Accused-Appellant. We hold that the learned Magistrate was completely wrong on that point.

Appellant. In ***Ariyadasa Vs. Queen*** (68 NLR page 66) also reported in 68 CLW page 97 His Lordship Justice T.S. Fernando held as follows;

> *"1) If the Jury believed the Accused-Appellant, he was entitled to be acquitted.*
>
> *2)Accused is also entitled to be acquitted even if his evidence though not believed was such that it caused the jury to entertain a reasonable doubt in regard to his guilt."*

It is relevant to consider the judicial decision in ***Martin Singho Vs. Queen (Supra)*** His Lordship Justice T.S. Fernando in the said case made the following observation.

> *"Even if the jury declined to believe the Appellant's version, he was yet entitled to be acquitted on the charge if his version raised in their mind of the jury a reasonable doubt as to the truth of the prosecution case."*

In ***Queen Vs. Kularatne*** 71 NLR 529Court of Criminal of Appeal considering the question as to how to evaluate a dock statement of the Accused, held as follows:

> 1)*If they believe the unsworn statement it must be acted upon.*
>
> *2)If it raises a reasonable doubt in their minds about the case for the prosecution the defence must succeed.*

For the benefit of the trial Judges and the legal practitioners of this Country, we make the following guidelines as to how the evidence given by an accused person should be evaluated.

1. If the evidence of the Accused is believed by Court it must be acted upon.

2. If the evidence of the Accused raises a reasonable doubt in the prosecution case, the defence of the accused must succeed.

3. If the Court neither rejects nor accepts the evidence of the Accused, the defence of the accused must succeed.

[Learned Magistrate made a grave error in law, when reaching the conclusion regarding the burden of proof, as he neither rejected nor accepted the Accused-Appellant's evidence.

The Supreme Court set aside both judgments of the learned High Court Judge and the learned Magistrate and acquitted the Accused-Appellant.]

JSALR 2021 /I//3

Inconvelt Ifisharans Lafabar

(Presently Deceased)

Liyana Mohottige Liyani Bernadeck Kabral,

Substituted Defendant-Petitioner-Respondent-Petitioner

Vs

Palani Muruganandan

Plaintiff-Respondent-Petitioner-Respondent

SC. Appeal No.88/2011

SC.HC.CALA NO.424/10

Before : **Sisira J. De Abrew, J.**
Murdu N.B. Fernando, PC, J. &
S. Thurairaja, PC, J.

DECIDED ON: 13.02.2021.

Held: (*per* Sisira J. De Abrew, J.)

The Plaintiff - Respondent - Appellant - Respondent (hereinafter referred to as the Plaintiff-Respondent) filed a case in the District Court of Colombo stating that his roadway has been blocked by the Defendant

- Petitioner - Respondent - Appellant (hereinafter referred to as the Defendant - Appellant). The parties entered into a settlement. The learned District Judge entered the consent decree on the terms of settlement suggested by the parties. The consent decree of the learned District Judge contained the following conditions;

1. සංශෝධිත පැමිණිල්ලේ ආයාචනයේ "ආ" ඡේදයේ ඉල්ලා ඇති පරිදි පැමිණිලිකරුගේ වාසියට නඩුව තීන්දු කිරීම සම්බන්ධයෙන් විත්තිකරුවන් එකඟත්වය පළකර සිටී.
2. තවද ''විත්තිකරුවන් විසින් සඳහන් කර සිටින එකී ප්‍රවේශ මාර්ගයට බාධා අවහිර වන ආකාරයට දැනට කිසිදු කටයුත්තක් කර නොමැති බවත්'' ඉදිරියටත් බාධා අවහිර කිරීම් නොකරන බවටත් විත්ති කරුවන් එකඟතාවය පළ කරයි.
3. වෙනත් දීමනා හෝ නඩු ගාස්තු නොමැති බවටත් පාර්ශවකරුවන් එකඟ වේ.

After the consent decree had been entered the Defendant-Appellant filed papers in the District Court to vacate the said consent decree. Then the learned District Judge ordered to vacate the consent decree.

Being aggrieved by the said order of the learned District Judge, the Plaintiff-Respondent appealed to the Civil Appellate High Court. The Civil Appellate High Court set aside the said order of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court the Defendant-Appellant has appealed to the Supreme Court.

The main argument of the learned Counsel for the Defendant-Appellant is that there is no corpus in this case. Therefore, he contends that the consent decree was a mistake.

But the Defendant-Appellant in his amended answer admitted that there is an access road. Thus, the contention of learned Counsel for the Defendant-Appellant that there is no corpus fails in limine. Further, the Defendant-Appellant in the consent decree has admitted that there is an access road. Thus, even on the basis of condition No.2 of the consent decree, the contention of learned Counsel fails. Therefore, the contention that there was a mistake in the consent decree is hereby rejected.

In the case of Gunasekara Vs. Leelawathie Srikantha Law Report Volume 5 page 86 Court of Appeal held as follows;

> *"A compromise decree is but a contract with the command of a judge superseded to it. It can therefore be set aside on any of the grounds, such as fraud, mistake, misrepresentation etc., on which a contract may be set aside."*

The main argument of the learned Counsel for the Defendant-Appellant is that there was a mistake in the consent decree. I have rejected the said contention. Thus, applying the principle laid down in the case of *Gunasekara Vs. Leelawathie (supra),* I hold that the learned District Judge could not have set aside the consent decree in this case. We, therefore, hold that the learned Judge was in error when he set aside the consent decree.

"The learned District Judge has erred in law".

[The Supreme Court affirmed the judgment of the learned Judges of the Civil Appellate High Court and dismissed the appeal with costs.]

JSALR 2021 /I//4

Kadireshan Kugabalan

Plaintiff-Respondent- Petitioner-Appellant

vs.

Sooriya Mudiyanselage Ranaweera Gajabapura,

Defendant-Appellant Respondent-Respondent

Sooriya Mudiyanselage Kanthi Ranaweera

Substituted Defendant-Appellant Respondent-Respondent

SC Appeal 36/2014

SC (HCCA) LA No, 232/2012

CP/HCCA/KAN/136/2010(FA)

DC. Nuwara Eliya Case No. 1279/L

Decided on 12.2.2021

Before : Sisira de Abrew J
S Thurairaja J
Gamini Amarasekara J

[The Plaintiff - Appellant - Respondent - Appellant (Plaintiff - Appellant) instituted an action against Defendant - Appellant - Respondent - Respondent (Defendant - Respondent), seeking a declaration that the Plaintiff - Appellant is the owner of the property

in question, along with ejectment of Defendant - Respondent.

The Plaintiff-Appellant took up the position that the Defendant-Respondent conveyed the property in question to him by the Deed bearing No. 10650 dated 13.12.2001 marked P1 alleged to have been attested by the Sinnathamby Dhayumanavan Notary Public.

Defendant-Respondent denied his signature on said ***P1*** *and he further argued that he neither sold the property nor placed his signature to the same.*

Thus, the District Court held in favour of the Plaintiff-Appellant. Defendant-Respondent filed an appeal in the Civil Appellate High Court of Kandy. The Civil Appellate High Court set aside the judgement of the District Court.

The Plaintiff-Appellant appealed to the Supreme Court in which the leave to appeal was granted on the following questions of law:

1. Did the Honourable High Court err and/or misdirect itself in holding that the Plaintiff had failed to prove the said deed of transfer (P1) and (P1c) by calling a witness from the Divisional Secretariat thereby leave room to draw a presumption adverse to the Plaintiff under Section 114 of the Evidence Ordinance in as much as when the aforesaid documents were read at the close of the Plaintiff's case when no objection was taken it stood as evidence for all purposes of the law?
2. Does the judgment of Honourable High Court stand as a judgment given *per incuriam* of the authoritative precedent laid down by Your Lordships' Court in *Sri Lanka Ports Authority Vs Jugolinija Boal- East (1981) 1 SLR 18?*

The Plaintiff-Appellant called the Notary Public to prove Deed (marked P1) as a witness, but he did not call the attesting witnesses in the said deed. Notary Public in the attestation of the said deed, states that the executants were unknown to him and he admits that Defendant-Respondent was unknown to him at the time of the attestation of the Deed marked P1.

When the Notary Public gave evidence before the learned District Judge, he admitted that he, in his attestation, stated the above matter. Further in the attestation of the deed (marked P1), Notary Public has failed to state that the attesting witnesses knew the Defendant-Respondent, the alleged executant in the deed (marked P1).

The most important question decided, in this case, is whether the Deed bearing No.10650 dated 13.12.2001 (marked P1) alleged to have been attested by Sinnathamby Dhayumanavan, Notary Public has been proved in court in accordance with Section 68 of the Evidence Ordinance.]

***Per* Sisira de Abrew J**

……. it is necessary to consider whether Sinnathamby Dhayumanavan Notary Public can be regarded as an attesting witness in the deed (marked P1). In order to find an answer to this question it is necessary to consider Section 68 of the Evidence Ordinance and relevant judicial decisions that may be stated below.

Section 68of the Evidence Ordinance reads as follows.

> *"If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence."*

In ***Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560*** Basnayake CJ held as follows.

> *"A Notary who attests a deed is an attesting witness within the meaning of that expression in sections 68 and 69 of the Evidence Ordinance."*

In ***Marian Vs Jesuthasan 59 NLR 348*** Sinnetamby J held as follows.

> *"Where a deed executed before a notary is sought to be proved, the Notary can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance provided only that he knew the executant personally and can testify to the fact that the signature on the deed is the signature of the executant."* His Lordship Justice Sinnetamby at page 349 further held as follows.
> *"To become an attesting witness a notary must personally know the executant and be in a position*

to bear witness to the fact that the signature on the deed executed before him is the signature of the executant."

In Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560 Basnayake CJ delivered the judgment on 6.7.1956. In Marian Vs Jesuthasan 59 NLR 348 Sinnetamby J delivered the judgment on 20.7.1956. Therefore, it is seen that Sinnetamby J delivered the judgment after Basnayake CJ delivered the judgment in Wijegoonetilleke Vs Wijegoonetilleke 60 NLR 560. I would like to follow the judgment in the case of Marian Vs Jesuthasan (supra).

In the case of ***Ramen Chetty Vs Assen Najna [1909] Current Law Reports of Ceylon 256*** Hutchinson CJ and Middleton J held as follows.

"The evidence of the Notary who attested a document, to the effect that the signatory and the witnesses signed in his presence and in the presence of one another, is not sufficient to prove the document, where the signatory was not known to the Notary. To prove a document, whether notarially attested or otherwise, it must be proved that the signature of the signatory is in his handwriting."

Section 31(9) of the Notaries Ordinance reads as follows

"He shall not authenticate or attest any deed or instrument unless the person executing the same be known to him or to at least two of the attesting witnesses thereto ; and in the latter case, he shall satisfy himself, before accepting them as witnesses, that they are persons of good repute and that they are well acquainted with the executant and know his proper name, occupation, and residence, and the witnesses shall sign a declaration at the foot of the deed or instrument that they are well acquainted with the executant and know his proper name, occupation, and residence."

Considering the above legal literature, I hold that when a deed executed before a Notary Public is sought to be proved in evidence, the Notary Public can be regarded as an attesting witness within the meaning of section 68 of the Evidence Ordinance only if the following matters are satisfied.

1. There must be evidence from the Notary Public to the effect that he knew the executant personally at the time the executant placed his signature on the deed OR that he (the Notary Public) knew the attesting witnesses personally and the attesting witnesses knew the executant personally.
2. There must be evidence from the Notary Public to the effect that the signature found in the deed is the signature of the executant.
3. There must be evidence from the Notary Public to the effect that two attesting witnesses placed their signatures in his presence.

I have earlier pointed out that the Notary Public who is alleged to have attested Deed bearing No.10650 dated 13.12.2001 (marked P1) did not know the executant in the said deed and that the Notary Public has, in his attestation, failed to state that the attesting witnesses knew the executant personally. For the above reasons, I hold that the Notary Public in Deed bearing No.10650 dated 13.12.2001 (marked P1) cannot be regarded as an attesting witness.

For the above reasons, I hold that the Deed bearing No.10650 dated 13.12.2001 (marked P1) has not been proved in accordance with Section 68 of the Evidence Ordinance and that it cannot be used as evidence in this case.

The next point urged by learned counsel for the Plaintiff-Appellant was that Deed bearing No.10650 dated 13.12.2001 (marked P1) was **not objected by the Defendant-Respondent when the case for the Plaintiff-Appellant was closed.** Learned counsel therefore contended that the Defendant-Respondent has admitted the said deed marked P1. He relied on the judgment in the case of ***Sri Lanka Ports Authority and Another Vs Jugolinija Boal-East [1981] 1 SLR 18*** wherein this court held as follows.

"If no objection is taken, when at the close of a case documents are read in evidence, they are evidence for all purposes of the law. This is the curses curiae of the original civil courts."

In Balapitiya Gunananda Thero Vs Talalle Methananda Thero [1997] 2 SLR 101this court held as follows.

"Where a document is admitted subject to proof but when tendered and read in evidence at the close of the case is accepted without objection, it becomes evidence in the case. This is the curses curiae."

In the present case, Deed bearing No.10650 dated 13.12.2001 (marked P1) was produced at the trial subject to proof. But it was not objected to when the Plaintiff-Appellant closed his case. It has to be noted here that the Defendant-Respondent in his evidence took up the position that he never signed the said deed. I have earlier held that the that the Notary Public in Deed bearing No.10650 dated 13.12.2001 (marked P1) cannot be considered as an attesting witness.

In the case of Robins Vs Grogan 43 NLR 269 wherein Howard CJ held as follows.

> *"A document cannot be used in evidence, unless its genuineness has been either admitted or established by proof, which should be given before the document is accepted by Court."*

Therefore, it is seen that although a document is produced in court with or without objection, it cannot be used as evidence if it is not proved. If the principle enunciated in the case of ***Sri Lanka Ports Authority and Another Vs Jugolinija Boal-East (supra)*** is accepted in respect of deeds, even a fraudulent deed marked subject to proof can be used as evidence if it is not objected by the opposing party at the close of the case of the party which produced it. In such a situation, one can argue that courts will have to disregard section 68 of the Evidence Ordinance. I do not think that the principle enunciated in the case of ***Sri Lanka Ports Authority and Another Vs Jugolinija Boal-East (supra)*** extends to such a situation. Whether the opposing party takes up an objection or not to a deed which is sought to be produced, the courts will have to follow the procedure laid down in law.

In the case of **Perera and others Vs Elisahamy 65 CLW 59** His Lordship Basnayake CJ held as follows.

> *"Even though no objection was taken to the document when its contents were first spoken to by a witness, it should not have been used as evidence and acted upon by the Court. A Court cannot act on facts which are not proved in the manner prescribed in the Evidence Ordinance."*

Considering all the above matters, I hold that when a document which is required to be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance is produced in evidence subject to proof but not objected to at the close of the case of the party which produced it, such a document cannot be used as evidence by courts if it is not proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance. I further hold that failure on the part of a party to object to a document during the trial does not permit court to use the document as evidence if the document which should be proved in accordance with the procedure laid down in section 68 of the Evidence Ordinance has not been proved.

For the aforementioned reasons, I answer the 1st question of law as follows.

The Plaintiff-Appellant has failed to prove the Deed bearing No.10650 dated 13.12.2001 marked P1 and the learned Judgers of the Civil Appellate High Court have not made any error in their judgment.

I answer the 2nd question of law as follows.

The judgment of the Civil Appellate High Court is correct.

For the above reasons, I affirm the judgment of the Civil Appellate High Court dated 14.5.2012 and dismiss this appeal with costs. The Defendant-Respondent is entitled to the costs of this appeal and the courts below.

Appeal dismissed.

JSALR 2021 /I//5

Matara Kiri Liyanage Mary Agnes Fernando and others

Plaintiff- Appellant-Petitioners

Vs

Galabodage Thiboshius Silva and others

Defendant-Respondent-Respondents

SC/APPEAL/NO. 129/14.

SC/HC/(CA) LA/25/2014

Vijith K. Malalgoda PC J

Murdu N. B. Fernando PC J

E.A.G.R. Amarasekara J.

Decided On: 18th December 2020

[The Plaintiff - Appellant - Petitioners (hereinafter referred to as the plaintiffs or Appellants) instituted this action in the District Court inter alia seeking for a declaration of a right of way with regard to an

alleged 10 feet wide roadway based on prescriptive user and/or as a way of necessity.

The Plaint does not directly say that the roadway claimed by the Plaintiffs exists over the land that belongs to the Defendants. The Plaint also does not expressly describe the Plaintiffs' land and defendants' land as the dominant tenement and the servient tenement respectively. plaintiffs have failed in naming the owner of the correct servient tenement as a Defendant and/or defining the correct servient tenement.

The Plaintiffs' action is not based on soil rights or on an alleged right of the Plaintiffs to use a public roadway or on an alleged encroachment caused by the Defendants. The cause of action was based on obstructions caused to a right of way and the claim was based on a servitutal right of way by the prescriptive user and/or on necessity.

The learned District Judge rejected the claim of the Plaintiffs for a servitutal right of way based on prescription on the grounds that the Plaintiffs failed in proving the user of 10 feet wide road and the user of a definite strip/ track of land. Civil Appellate High Court also affirmed Judgement of the District Court, conceding the above reasons.]

Held: *per* E. A. G. R. Amarasekara J

A servitude can be defined as *'a real right constituted for the exclusive advantage of a definite person or definite piece of land, by means of which single discretionary rights of user in the property of another belongs to the person entitled'*- **Vide Von Vangerow, Pandekten, Volume III, page 338** (The Law of Property Volume Three- 2nd edition by G L Peris at pages 1 and 2). *'In other words, it is a right constituted over the property of another, by which the owner is bound to suffer something to be done with respect to his property, or himself to abstain from doing something on or with respect to his property, so that another person may derive some advantage from it.'* (Maasdorp's Institutes of South African Law, Vol. 11, The Law of Things, eighth edition by C. G. Hall at page 125)Thus, a servitude is a right one has over another's property.

Hall and Kellaway on Servitudes 2nd edition at pages 135 and 136 states that;

"the actions recognized by Roman Dutch Law were the actio confessoria and the actio negatoria or contraria, the former being an action to enforce servitude, and the latter to declare a property free from a servitude. The actio confessoria embraced (a) the removal of all obstructions or replacement of anything destroyed, through which the servitude is rendered useless (b)… (c)…. (Voet, 8.5.3). the actio negatoria could be brought by an owner against anyone claiming the right to exercise servitude over his property for the purpose of ascertaining whether the servitude existed." (Also quoted in Karunadasa V Subasinghe – Hultsdorp Law Journal 2018 at page 285)

[Accordingly, this action filed by the Plaintiffs can be identified as an *actio confessoria* since they assert a right of way by prescription as well as of necessity.]

Maasdorp observes: *"The action will in any case lie against the owner of the servient tenement and, if there are several joint owners, all will have to be joined……..". – vide* **Institutes of Cape Law (2nd Edition), volume II, page 229.** (The Law of Property Volume Three- 2nd edition by G L Peris at page 156)

Nathan states: *"Generally, this action (the actio confessoria) lies against the owner of the servient tenement; and, if there are two or more owners, against each of them for the whole servitude (in solidum)". – vide* **Common Law of South Africa (2nd edition), Volume I, page 543.**

Chief Justice Basnayake in ***Velupillai Vs Subasinghe 58 NLR 385 at 386*** delivering the judgment succinctly remarked as follows;

"The kind of servitude claimed in the instant case is a real or praedial servitude. Such a servitude cannot exist without a dominant tenement to which rights are owed and a servient tenement which owes them. A servitude cannot be granted by any other than the owner of the servient tenement, nor acquired by any other than by him who owns the adjacent tenement."

As was correctly observed by the Chief Justice Basnayake, the existence of a dominant and a servient tenement is crucial in establishing a servitutal right.

Yet, the mere existence of a dominant and a servient tenement is not good enough, they must also be defined.

"Strict compliance with the provisions of Section 41 of the Civil Procedure Code is necessary for the judge to enter a clear and definite judgment declaring the servitude of a right of way and such definiteness is crucially important when the question of execution of the judgment and decree entered arises for consideration. The fiscal would be impeded in the execution of the decree and the judgment if the servient tenement is not described with precision and definiteness as spelt out in section 41 of the Civil Procedure Code." - Vide ***David Vs Gunawathie 2000 (2) Sri LR page 352 at page 366***

Hence, to bring a successful *actio confessoria*, the Plaintiff must correctly define the servient tenement and he must file the action against the owner/s of the servient tenement.

In order for the Plaintiffs to be successful there must be sufficient material before the trial court to establish that plaintiffs have acquired the said right of way by prescription, or it is needed as a way of necessity.

To claim a right of way as a servitude by prescription, one has to establish that the adverse user of the right has been used in relation to a particular defined area over the servient tenement.

In ***Karunaratne V Gabriel Appuhamy 15 N L R 257 at 259,*** Lascelles CJ held that *'In the system of law which prevails in Ceylon rights of way are acquired by user under the Prescription Ordinance, and the course or track over which the right is acquired is necessarily strictly defined'.*

The action of the Plaintiff was dismissed in ***Kandaiah V Seenitamby 17 N L R 29*** where the Plaintiff could not prove the user of a definite path but only proved that he had generally walked across the land of the defendant for more than 10 years. De Sampayo A. J. quoted Wendt J in ***C.R. Mallakkam 16,800 S.C. Minutes 26.01.1909*** to say that *'The evidence to establish a prescriptive servitude of way must be precise and definite. It must relate to a defined track, and must not consist of proof of mere straying across an open land at any point which is at the moment most convenient.'* This principle was restated in ***Fernando V Fernando 31 N L R 126 at 127*** where Fisher C J held that *"user of a definite track is the only way in which a right of way over the land of another can be acquired by prescription."* Our courts articulated a similar view in ***Morgappa V Casie Chetty 17 N L R 31, Hendrick V Saranelis (1940) 17 C L W 87, Marasinghe V Samarasinghe 73 N L R 433.*** However, in ***Thambapillai V Nagamanipillai 52 N L R 225*** Gratiaen J followed the same principle and expressed in obiter that a slight deviation of the route that may take place for the convenience and with the concurrence of all the parties may be permissible.

Thus, as per our law, to claim a right of way by prescription it is necessary to prove that a defined area over the servient tenement was used through the prescriptive period.

In appeal plaintiffs took up the position by citing ***Saparamadu V Melder (2004) 3 Sri L R 148*** that to stop a person travelling through a path or a road, the person who blocks the road must have soil rights.

Saparamadu V Melder was an action filed to declare a property free from servitude, in other words, it was an *actio negatoria.* When the Plaintiffs filed this action against the Defendants for a declaration of a right of way by prescription and on necessity describing the Plaintiffs' and Defendants' lands in the schedules to the Plaint, the action as explained above is *actio confessoria.*

[If the cause of action was with regard to the encroachment of the path or obstructing of the said path, the disputed land or the path has to be described in the schedule to the plaint as per Section 41 of the Civil Procedure Code, in addition to the description of the cause of action accordingly.]

The other question of law is based on the claim of the Plaintiffs to use a right of way as a way of necessity.

Plaintiffs had prayed for a right of way to take vehicles instead of the foot path and the learned District Judge had lawfully rejected their claim since the Plaintiffs had not proved their necessity of a roadway that can take vehicles to their land.

[The Defendants tendered a plan to show the existence of an alternative roadway. Whether there is an alternative road is a matter of fact and the Learned District Judge who heard the evidence of the surveyor who made that plan had come to the conclusion that the Plaintiffs could use the said alternative roadway.

The learned District Judge had observed in his Judgment that the Plaintiffs were not using any private vehicles and even as per the nature of their livelihood it is not apparent that they have any need to use a private vehicle. No evidence seems to have led to show that a fair need to take a vehicle regularly to the Plaintiffs' land had arisen. The Plaintiffs had only testified of a cart bringing Cadjan leaves to thatch a hut that may happen once in 12 months or 18 months. One of the Plaintiffs testified that this was done lastly in 1979/1980 over the roadway they claim, while another had contradictorily stated it was in 1992 posing a question of reliability on this story.]

Burden is on the Plaintiffs to prove the necessity of a permanent cart road through evidence placed before Court.

In **Fernando V de Silva 30 N L R 56,** it was held that the owner of a land which had access to the High Road by a path, could not claim a cartway unless the actual necessity of the case demanded it. In **Amarasuriya V Perera 45 N L R 348 at 350** Wijewardene J held as follows;

"I think that a judge would be taking an unreal view of the conditions obtaining in this country if he held that owner of a compound of half an acre requires a cartway for transporting his coconuts. The granting of the cartway claimed will impose a very heavy burden on the defendant whose land appears to be not even an acre in extent."

Thus, it appears that when a foot path is available the Plaintiffs can claim a cart way on necessity only when there are special circumstances which calls for the exercise of the court's discretion in Plaintiffs' favour. No such special circumstances seem to have been adduced in evidence before the Learned District Judge. As stated in **Chandrasiri V Wickramasinghe 70 N L R 15,** the onus lies on the person/s who claims the right of way of necessity to show that it is necessary. In the present action, the Plaintiffs failed in proving the need of a cart road and the Defendants have proved to the satisfaction of the Court the existence of an alternative foot path.

[The learned District Judge had observed that even if there was a cart road over the Defendants' land, the Plaintiffs had abandoned it since the Plaintiffs had not taken any step to stop the building made by the Defendants on the purported roadway claimed by the Plaintiffs. As per the evidence of the 3rd Plaintiff, this building was completed in 1970s. The plaint in this case was filed only in 1993 December. In this regard learned District Judge had cited Paramount Investment Limited V Cader (1986) 2 S L R 309 to indicate that tacit abandonment takes place where the servient owner is permitted to do something that necessarily obstructs or make inoperative the exercise of servitutal right.]

However, in the case at hand, purported servitude claimed by the plaintiffs is not one created by a deed, as such the proposition of law stated in the said case that, under our law, a servitude of right of way created by a notarial grant cannot be lost by non-user has no relevance.

According to Roman Dutch Law, in order for the right to be abandoned, non-user or the abandonment of the right should be for a third of hundred years, i.e. 33 and 1/3 years- vide **Dayawathie V Dias and others, The Bar Association Law Journal 2013 Vol. XX page 20.**

If one abandons his right of way, he cannot be allowed to claim it as a way of necessity again. However, even to consider abandonment, first there must be proof for that, at a given time in the past, there was a servitude of right of way over the Defendants' land.

[The Supreme Court dismissed the appeal as the Plaintiffs failed to prove that there was the servitude of right of way over the Defendant's land or the servient tenement.]

"No law or ordinance is mightier than understanding"

- Plato -

Legal NEWS

[We report a few published news in the electronic media for the benefits of our members. The purpose is to provide information on the current affairs, which will help members to enhance their knowledge and help them to do further studies in their interested fields of law.]

Amending Environmental Laws: Need of the hour

This article urges the need for substantive amendments to The National Environmental Act (NEA), which is more than 40 years old. The main purpose of the NEA is to find solutions to tackle the surge in harm done to the environment, but NEA has not been amended in a considerable period. The Ministry of Environment recently revealed that 42 new clauses would be introduced to the Act as a means of giving it stronger legal force.

Environment Minister Mahinda Amaraweera highlighted that the provisions which are currently in place did not suffice for environmental protection, especially given the state of destruction the environment is facing today.

The new amendment intends to give a definition and certain regulations for wetlands as the present law does not have any provision regarding it.

Dr. Anil Jasinghe, Secretary to the Ministry of Environment highlights the plans on employing the "polluter pays" principle, especially concerning industrial effluents, he said: "The payments would depend on the scale of pollution that they create. A delay fine is also proposed concerning environmental protection licenses (EPL) in situations where EPLs are not being renewed in time."

Extended producer responsibility is another policy that has been proposed in the new clauses, especially with regard to plastic and polythene production, thereby shifting the responsibility of post-consumer disposal from municipalities back to the producers.

"We are planning on introducing Strategic Environmental Impact Assessment (SEIA), which is based on the Government's strategy for development, along with clauses regarding environment rehabilitation as well," added Dr. Jasinghe.

Dr. Jagath Gunawardena, a renowned environmental lawyer insisted that "Not only do we need to bring in new management tools into the Act and also make sure that we have more effective countermeasures against pollution, we have to think futuristically and bring in planning tools also into the process. Planning tools such as Strategic Environment Assessment is something we have been discussing for over a decade."

"There are two types of tools, one is the planning tool and the other is the management tool. The management tool that the NEA has been using for nearly three decades is the EPL, and in 2008, they introduced another tool that is linked to this called the waste handling licence (Waste Generation and Waste Handling License). When it comes to the waste handling licence scheme, there are gaps in the law that prevents it from being more effective and efficient in operation, so we need to bring that to the landscape of the law."

Dr. Jagath Gunawardena emphasises that the environment is the common property of all. Therefore "A person who releases different kinds of effluents into the environment, should be given different types of charges, which is called the polluter-based principle. Those who intend to release/send waste material into the environment should pay for what they are setting out into the environment."

Noting that the checks and balances system in the country itself remains quite hazy, emphasising the importance of the effective and efficient implementation of the law, Dr. Gunawardena said: "A person who violates an EPL or a waste handling license should be forced to stop all operations until the person complies with the requirement, by bringing miscreants to book, effectively. A person who gets approval for a project through a SEIA and tries to have their way should also be stopped until the person complies with the approval conditions, or they should be forced to pay for losses to the environment. Someone who pollutes the environment wouldn't just have to pay the fine, they would also have to pay for the clean-up too."

(Yumiko Perera has written this article on 'the morning' blog. We have published the summary of the article. For the full article, see https://www.themorning.lk/amending-environmental-laws-need-of-the-hour/)

Priya Ramani's Acquittal, Female Solidarity and the Rise of a #MeToo Judicial Conscience

A deep dive into a judgment which goes some way in fighting the need to vilify and suspect survivors of sexual harassment.

On October 8, 2018, journalist Priya Ramani shared her story about being sexually harassed in 1993 by a leading Indian politician and Minister (Hereinafter mentioned as X), back in the day when X was the editor of an Indian leading English newspaper.

On October 18, 2018, X filed a criminal defamation complaint against Ramani.

On February 17, 2021, the Additional Chief Metropolitan Magistrate accepted the defence presented by Ramani and acquitted her of the charge of criminal defamation under Section 499 of the Indian Penal Code. The Court observed that the accused had spoken the 'truth in furtherance of public interest' which is an exception to criminal defamation under Section 499, IPC.

The judgment showcases how recent discourse around sexual harassment has the potential of creating a more sensitive treatment by the judiciary to the underlying dynamics that survivors are subject to.

At the time of the relevant incidents, there was no legal protection in the form of the Sexual Harassment of Women at Workplace (Prevention, Prohibition, and Redressal) Act, 2013 (POSH), Vishakha Guidelines, or the 2013 criminal law amendments.

What was recognised in the judgment?

Priya Ramani's statements claiming that X had sexually harassed her were made at the peak of the #MeToo movement in India, which was a largely-online social movement against sexual abuse and harassment.

The point of the #MeToo movement was to enable an environment of solidarity for women who may have been fearful of their abuser, left without any recourse at the time, ashamed, or unwilling to relive their trauma in the court process. This also led to counter questions regarding the validity of supposed 'kangaroo courts' that could 'tarnish a man's reputation' by evading due process. This judgment addresses both these concerns, and more, by entering into a nuanced and empathetic discussion on the trauma suffered by women subject to such instances of workplace harassment.

Legitimacy of Informal Platforms

#MeToo has often been critiqued as a form of mob-justice, where the accused is punished without

duly adhering to the procedure established under law. In her testimony, Ramani expressed how the movement helped her feel empowered to be open about her own harassment at the hands of X. She expressed how this amounted to her showing solidarity with other women, including one of her witness Wahab.

Ramani's primary defence in this trial was that she spoke the truth, and that it was in the interest of the public for her to share her truth. Her only intention in making the disclosure against X was to empower women to speak against their harassers and abusers, and to better understand their rights at the workplace.

After recognising that no woman should be punished for speaking out against her abuser, the court expressly held that "The woman has a right to put her grievance at any platform of her choice and even after decades."

Non-relevance of delay in disclosures

In the quote above, the court also acknowledges the right of a woman to speak even after decades about the incident of harassment. The intentions of Ramani and Wahab were subject to questions around the timing of their statements and the purportedly conspicuous delay. In response to such spurious queries, both of them echoed similar reasons: fear of familial resistance towards their jobs, loss of economic freedom, lack of institutional support or grievance redressal mechanism, and internalised societal belief of 'silence being a virtue'.

The court took an emphatic note of the fact that survivors of sexual abuse very often find it difficult to vocalise their experience of abuse for many years. This is unfortunately not always the case.

The judgment primarily attributed such delay to the "shame" and "social stigma" faced by the survivors rather than the role of other structural factors in such silencing (such as intimidation by the abuser, ineffective grievance redressal bodies, and hierarchy-based structures that silence the voices of survivors).

Sexual harassment can be both physical and verbal

In her evidence, Ramani deposed that the complainant had not physically assaulted her, he had made sexually coloured remarks. The court recognised that even though there was no overt physical act, the complainant might still have sexually harassed the accused.

This understanding of sexual harassment is also found in Section 2(n) of POSH which includes sexually coloured remarks and unwelcome non-verbal sexual conduct.

Identifying abusers among men of stellar reputation

One of the ingredients to prove criminal defamation under Section 499 of the IPC is that the individual has a reputation in society, and that this reputation has been lowered due to the statements made by the person accused. In support of his contention that the complainant was a man of stellar reputation, X recited his many professional and political qualifications and had five other witnesses take the stand to corroborate his assertion. He pushed forward the narrative that a successful and influential man is incapable of committing the acts that the complainant has attributed to him.

The court unequivocally rejected the assertion that the complainant is a man of stellar reputation while accepting the truth in the statements made by Ramani and Wahab describing their experience of sexual harassment and assault.

The court noted that abusers are not merely outliers in society but can be just like everyone else – with friends, families, and respect in society. In fact, it is this position of power that fosters a sense of impunity in the minds of abusers who expect no consequences for their actions.

Criminal defamation complaints are weaponised to suppress women

The court denounced the weaponisation of criminal defamation law by holding:

"The woman cannot be punished for raising voice against the sex-abuse on the pretext of criminal complaint of defamation as the right of reputation

cannot be protected at the cost of the right of life and dignity of woman as guaranteed in Indian Constitution under article 21 and right of equality before law and equal protection of law as guaranteed under article 14 of the Constitution."

Issues with the implementation of the law

While this judgment is certainly more than a glimmer of hope and must be celebrated, we must not forget that we are revelling in a court not punishing a sexual harassment survivor.

The implementation and enforcement of the laws on sexual harassment continue to be weak. A survey by the Indian National Bar Association revealed that 69% of survivors of sexual harassment at the workplace did not report the offence for various reasons, including fear, embarrassment, no awareness about their rights, and a lack of faith in the redressal mechanism. Women from privileged backgrounds who work in the formal sector of employment find it difficult to find any justice or closure, and this reality is far more pronounced in the case of marginalised women in the informal sectors.

A criminal defamation complaint instantly inverses the position of a survivor from the victim to the accused, with the consequent limitations on liberty.

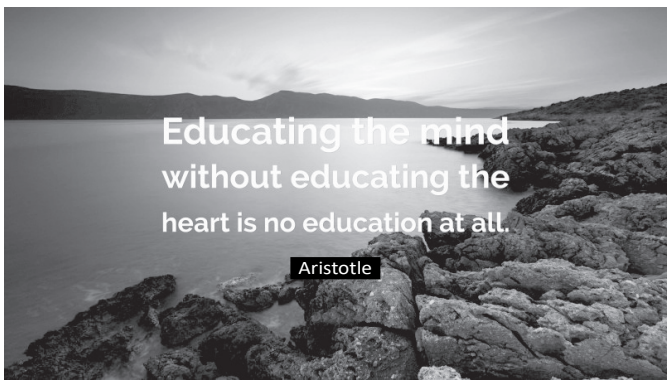
Aside from issues on implementation, the laws themselves are imperfect and can sometimes be a danger to the women they purport to protect. An example of this is found in Section 14 of POSH which penalises 'false and malicious' complaints. Although the section states that the inability to prove your case would not automatically attract this provision, the ambiguity of how to prove malice has had a chilling effect on women who feel deterred to come forward as they fear they may not have enough evidence to back their claim. Illustratively, in 2019, the Delhi high court imposed a fine of Rs 50,000 on a woman who was unable to prove her case before the Internal Complaints Committee.

However, Ramani's case is a reminder that truth can be a more powerful weapon than a brigade of lawyers and people of influence. It is a reminder of being sensitive to the agency of a survivor to decide when, if, and what recourse she should take. But most importantly, it is a reminder of the strength of female solidarity and power.

(For the Judgment of the Delhi District Court see https://www.livelaw.in/pdf_upload/mobashar-jawed-akbar-vs-priya-ramani-389297.pdf)

[Defamation is no longer a Penal offence in Sri Lanka. Section 3 of the Amendment Act, No 12 of 2002, of the Penal Code, repealed the Chapter XIX of the Penal Code, which defined Defamation as an offence.]

(Anushree Malaviya is an advocate based in New Delhi, India and she is a member of the Women in Criminal Law Association (WCLA). She has written this article on 'The WIRE' blog. We have published the summary of the article. For the full article, see https://thewire.in/law/priya-ramanis-acquittal-female-solidarity-and-the-rise-of-metoo-judicial-conscience)



Don't open the door

A man takes his wife to get tested. Two days later, He gets a call from the lab.

Doctor: I am sorry to inform you that your wife's test results were mixed up with another patient's. We are not sure if she has COVID-19 or Alzheimer's disease.

Man: So, what am I supposed to do now?

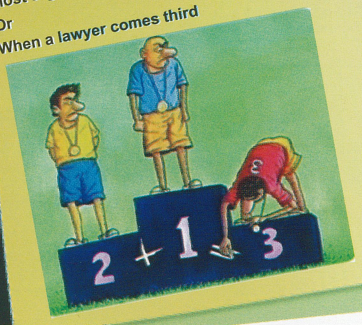
Doctor: Take her for a long walk and leave her. If she finds her way back home, don't open the door.

****

Most arguments in the court of law,,,,

Or

When a lawyer comes third



Covid Joke

Husband: You are negative

Wife: And you are stubborn, arrogant, a low life, care about no one but yourself and your friends, all you are interested in is yourself, all your life not fulfilled even one of your promises. It is only I who is putting up with such a miser and insensitive man. You are good for nothing, fat, ugly man. Even your hair transplant failed.

Husband: I was just informing you that your Covid test is negative.

Wife: oh, Thank you!

Caught you red-handed

APPLICATION FOR EMPLOYMENT

I refer to the recent death of the Technical Manager at your Company and hereby apply for the replacement of the deceased manager.

Each time I apply for a job, I get a reply that there is no vacancy but in this case I have caught you red-handed and you have no excuse because I even attended the funeral to be sure that he was truly dead and buried before applying.

Attached to my letter is a copy of my C.V. and his death certificate.

Laughter is the best medicine

On Trial ;

A defendant was on trial for murder. There was strong evidence indicating guilt, but there was no corpse. In the defence's closing statement the lawyer, knowing that his client would probably be convicted, resorted to a trick.

"Ladies and gentlemen of the jury, I have a surprise for you all," the lawyer said as he looked at his watch. "Within one minute, the person presumed dead in this case will walk into this courtroom." He looked toward the courtroom door. The jurors, somewhat stunned, all looked on eagerly. A minute passed. Nothing happened.

Finally, the lawyer said, "Actually, I made up the previous statement. But you all looked on with anticipation. I, therefore, put to you that you have a reasonable doubt in this case as to whether anyone was killed and insist that you return a verdict of not guilty." The jury, clearly confused, retired to deliberate. A few minutes later, the jury returned and pronounced a verdict of guilty.

"But how?" inquired the lawyer. "You must have had some doubt; I saw all of you stare at the door."

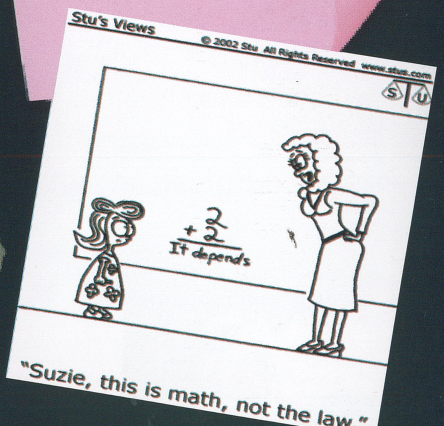
The jury foreman replied: "Oh, we did look, but your client didn't."

Friends forever

Bro! I just heard someone stole your iPhone 12.

Yes 😭

Can u give me the charger? 🙂



He took the car I stole

Carlson was charged with stealing a Mercedes Benz, and after a long trial, the jury acquitted him. Later that day Carlson came back to the judge who had presided at the hearing.

"Your Honor," he said, "I wanna get out a warrant for that dirty lawyer of mine."

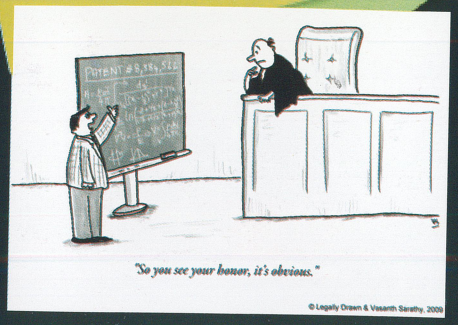
"Why ?" asked the judge. "He won your acquittal. What do you want to have him arrested for?"

"Well, Your Honor," replied Carlson, "I didn't have the money to pay his fee, so he went and took the car I stole."

During school exam

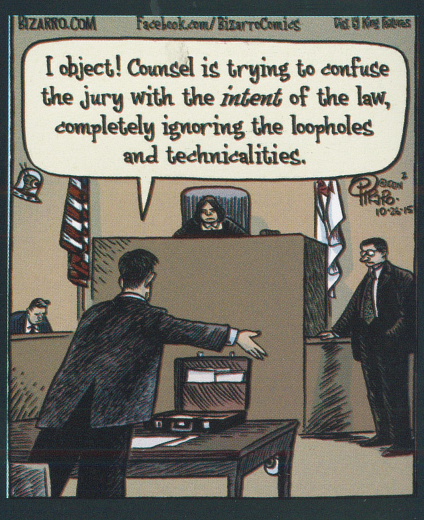
Do you still remember those awkward days in schools during exams?

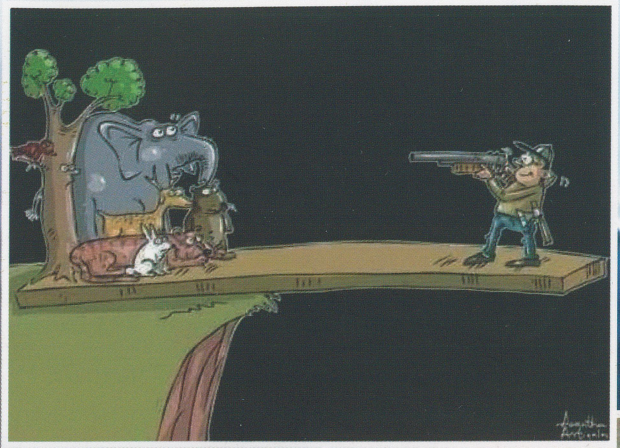
- When a bright student tells the invigilator that question No 4 has a problem, but you have already answered it...
- When a fellow student asks for a graph paper, but you are finished and did not see anywhere where it was required...
- When the invigilator says to jump to question 6 we will rectify it later, but it was the question you enjoyed most when answering.
- When you see people using rulers, but you are wondering what is going on...
- When you hear your friends arguing after the exam whether the answer to question 5 was 35.5% or 36% and your answer was Africa

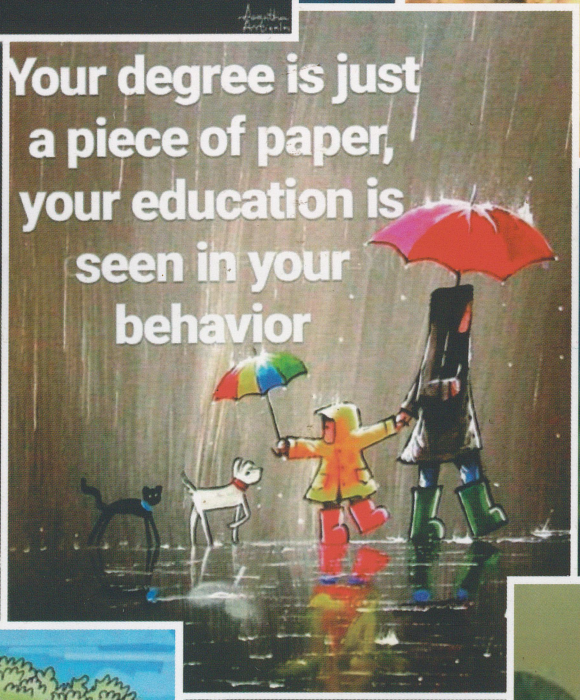


If I had no sense of humor, I would long ago have committed suicide.

Mahatma Gandhi







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