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DIGEST

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In 1997 on annual transfers, the petitioner was released to the 'Title Registration Pilot Project' in which he served until May 2001 (P8). This project had required the use of modern equipment and familiarity with 'high tech devices' and precise digital measuring instruments. Accordingly Field Staff Circular 24/92 was issued requiring the Staff to be trained in the use of such devices. However, the said training had not been provided (P9).

Due to the training facilities not being granted to the petitioner, he found it difficult to carry out the duties entrusted to him under the Pilot Project. The petitioner had requested the management on many occasions for such training and even in the performance appraisal form for the year 1998, it was reiterated that the petitioner should be provided with the training in modern technical equipment (P10). The petitioner had received three (3) letters withholding his increments for the period 1997 to 2000 on the basis that he is inefficient in his work (P11(a), P11(b) and P11(c)). Only in November to December 2000, the Surveyor-General's Department had conducted a training programme, which the petitioner had successfully completed (P12).

In April 2001, the petitioner was transferred to the Provincial Office in Kurunegala to serve as the Assistant Superintendent of Surveys (P13). While the petitioner was functioning at the said office, he received a show cause letter dated 26.02.2002, issued by the Public Service Commission, alleging that the petitioner had been inefficient during the period 1997 to 2000 (P14). The petitioner had requested that an inquiring officer be appointed and that he be permitted to peruse the documents, for which the Public Service Commission had responded by letter dated 10.06.2002 stating that there will not be a formal inquiry and for the petitioner to reply to the show cause letter within 3 weeks of the receipt of that letter (P15 and P15(a)). The petitioner replied to the said show cause letter by his letter dated 27.08.2002 (P16).

Thereafter the petitioner received a copy of the letter of 9th respondent dated 05.08.2005 addressed to the Secretary, Publc Administration stating *inter alia* that,

(a) a decision had been taken to retire the petitioner with effect from 07.07.2005 on account of general inefficiency; and

(b) further recommending that 1% of his pension be deducted (P18 and P18(a)).

According to the petitioner, in terms of a Directive dated 16.07.1999, if a Surveyor is inefficient he should be transferred and be placed under the direct supervision of the Assistant Superintendent of Surveys (P21). Also when there were similarly placed surveyors, who had a progress less than 100%, he was singled out and treated differently.

In the circumstances, the petitioner alleged that the aforesaid decision to retire him with effect from 07.07.2005 on account of inefficiency and the recommendation to deduct 1% of his pension is unreasonable, unfair and irrational and is violative of his fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

Learned Deputy Solicitor-General for the respondents contended that the 9th respondent had clearly demonstrated the reasons for the decision contained in the document marked P18, which refers to the retirement of the petitioner on the basis of inefficiency.

In her objections, the 9th respondent had stated that,

> *"Since the petitioner was generally weak in his administrative functions and has not shown any improvement in performance of his duties, recommendation to retire him under Section 33 of Chapter XLVIII of the Establishments Code had been made by Secretary/Land and the Surveyor General."*

The contention of the learned Deputy Solicitor-General for the respondents was that the petitioner had not shown progress of 100% in his performance although he was warned so by letter dated 15.02.1999. It was also submitted that the petitioner's progress during the period of 1997 to 2000 was well below 100% and therefore on three occasions his increments had been deferred. Accordingly learned Deputy Solicitor-General for the respondents submitted that the petitioner's unenviable record of having his salary increments deferred for a continuous period of 03 years alone should clearly indicate the incompetency and inefficiency of the petitioner. He therefore contended that on the

aforesaid grounds the decision of the Public Service Commission to retire the petitioner prematurely could be justified.

The question that has to be addressed by this Court thus would be whether such decision to retire the petitioner and the deduction of 1% of his pension by the respondents was warranted.

On a perusal of the documents tendered by the respondents it is apparent that the progress of work during 1997 to 2000 of the petitioner had been taken into consideration for the aforementioned decision to retire the petitioner on the basis of inefficiency.

The contention of the learned Deputy Solicitor-General was two fold. Firstly, he stated that the petitioner's progress during the period 1997 to 2000 was below 100%. Secondly, he submitted that the petitioner's increments were deferred on three(3) occasions.

The 9th respondent, being the Secretary, Public Service Commission in her affidavit had averred that, clause 33.1 of Chapter XLVIII was strictly adhered to when proceeding with this matter.

Clause 33.1 of the Establishments Code reads as follows:

> *"Where warnings, reprimands and other punishments imposed on an officer over a long period of time on various occasions during his period of service for acts of misconduct or misdemeanor or negligence or inadvertence have failed in improving his conduct and efficiency, the Disciplinary Authority may, if he determines that his continuation in the service is detrimental to the efficiency of the Public Service, retire the officer for general inefficiency."*

A careful examination of the aforesaid clause reveals that in order to take steps under clause 33.1, it is necessary to have proof that the officer in question had failed to improve his conduct and efficiency for a continuous period of time.

It would be pertinent in these circumstances, to refer to the submissions made by the learned Deputy Solicitor-General for the respondents, indicating that the petitioner's conduct at work had not shown any progress,

According to the learned Deputy Solicitor-General the progress of work performed by the petitioner during the period of 1997 to 2000 was as follows:

"9R1 H - Reveals that the salary increment cannot be approved, as his grading for the year 1999 is 62.5%

9R1 I - It is the confidential report for the period covering 01.01.1999 till 30.08.1999. The reasons for non-granting of promotion/increment is disclosed in cages 14 and 16 thereof.

9R1 J - Reveals salary increment withheld. In 1998 scored 33% and in 1999 scored 64%.

9R1 L - Confidential Report from 01.09.1999 till 31.12.1999 reveals progress is very poor, increment not recommended.

9R1 M&O - Reveals that in 2000 obtained 64%, increment not recommended.

9R1 P - Confidential Report from 01.01.2000 to 22.06.2000 reveals progress very poor, increment deferred.

9R1 R- Reveals increment deferred in view of poor progress.

9R1 S- Confidential Report from 23.06.2000 till 31.12.2000 reveals poor progress and increment deferred."

It is to be noted, as referred to earlier, that in 1997 the petitioner was released to the 'Title Registration Pilot Project', where he had served until May 2001. That project needed the use of modern equipment and the knowledge to use high tech device' and precise digital measuring instruments. The circular issued for such purpose had clearly identified the staff training as one of the requirements for the successful implementation of the project (P9). It is not disputed that such training was not provided for the petitioner at the time he was released to the 'Title Registration Pilot Project'.

Notwithstanding the absence of training, the petitioner's progress for the years 1998, 1999 and 2000 had been 33%, 63% and 64% respectively (9R1 to 9R7). Although in terms of the

assessments made by the respondents, a progress of 60% is unsatisfactory, it cannot be disputed that the petitioner had shown a remarkable improvement as his progress has risen upto 64% from, what it had been earlier. It is also interesting to note that the immediate Supervising Officer of the petitioner had recommended the petitioner's increments for the period 01.01.1999 to 30.08.1999 (P17a), 01.09.1999 to 31.12.1999 (P17b) and from 01.01.2000 to 22.06.2000 (P17c). Recommending his increments, the Supervising Officer had stated that the petitioner had served satisfactorily during the time he functioned under his supervision.

Accordingly, when the petitioner's conduct and efficiency is considered in the light of clause 33.1 of the Establishments Code, it is apparent that petitioner had made satisfactory progress in his work and conduct during the period 1997 to 2000. In fact, the petitioner's progress, which had been 0% in 1997 had risen upto 64% in 2000.

In the light of the aforesaid circumstances I would now turn to examine the petitioner's grievance before this Court.

The petitioner's allegation was that the decision to retire him in terms of clause 33 of the Establishments Code was arbitrary and that it is violative of Article 12(1) of the Constitution. Article 12(1), which deals with the right to equality is in the following terms.

> *"All persons are equal before the law and are entitled to the equal protection of the law."*

Thus the constitutional provision in terms of the right to equality embraces both the non-discrimination as well as the wider concept of equality that would include the right to equal treatment of all classes without any discrimination.

An allegation of mere inequality will not be sufficient in terms of Article 12(1) of the Constitution to hold that equal protection has been denied. In order to hold that there had been a violation of equal treatment it is necessary to show that the alleged decision was 'actually and palpably unreasonable and arbitrary' (*Arkansas Gas Co.* v *Railroad Commission*[1]). When a decision against the executive and-or administrative action is challenged before Court, It is necessary to point out that the decision in question is

unreasonable and arbitrary and has no rational basis to the main object in order to come within the scope of Article 12(1)of the Constitution. This position has been clearly stated in *Ameeroonissa* v *Mahboob*(2) where it was stated that,

> "*Mere differentiation or inequality of treatment does not per se amount to discrimination within the inhibition of the equal protection clause. To attract the operation of the clause it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any rational basis having regard to the object which the legislation has in view.*"

The decision of the Public Service Commission to retire the petitioner due to inefficiency had been based on the show cause letter, the petitioner's reply to the said show cause letter and the recommendation of the Secretary to the Ministry of Lands. The said recommendation of the Secretary to the MInistry of Lands appears to have been based on the letter of the then Survey-General. The said letter is dated 17.10.2002 (9R7).

The Public Service Commission had thereafter in June 2003, (9R4) made inquiries from the Secretary, Ministry of Lands referring to the Surveyor-General's letter of 17.10.2002 (9R7), the reasons for the **decision of the Surveyor-General** to retire the petitioner on the basis of inefficiency. In fact the said letter of the Surveyor-General (9R7) repeatedly states that **arrangements are being made to retire the petitioner on the basis of inefficiency**.

The Public Service Commission had responded to this letter by its communique dated 20.06.2003 addressed to the Secretary of Ministry of Lands. This letter, which is reproduced below, is most revealing as it discloses not only the progress of the petitioner and the reluctance of the Public Service Commission, quite rightly to take any action against the petitioner, but also the interest the then Surveyor-General had shown in order to retire the petitioner on the basis of inefficiency (9R4).

2003 ජූනි මස 20 දින

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රජයේ මිනින්දෝරු 111 පන්තියේ I ශ්‍රේණියේ
නිලධාරී- එස්. පී. මුණසිංහ මහතා

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ඔබේ සමාංක හා 2002.11.13 දිනැති ලිපිය හා බැඳේ.

02. මිනින්දෝරු මුණසිංහ මහතා විසින් ඉදිරිපත් කර ඇති 2002.08.27 දිනැති නිදහසට කරුණු හා ඒ පිළිබඳ **නිර්දේශ** ඉදිරිපත් කරන ලද මැනුම්පතිගේ 2002.10.17 දිනැති ලිපියේ සඳහන් කරුණු අනාවරණය විය.

I. මිනින්දෝරු ව්‍යවස්ථාවේ 8.1 ඇ වගන්තිය අනුව මුණසිංහ මහතා සහකාර මිනින්දෝරු අධිකාරී වශයෙන් ඉහල තනතුරකට **සර්වේයර්** ජනරාල්ගේ 2001.04.18 දිනැති ලිපියෙන් කුරුණෑගල කොට්ඨාශයේ නුරුණෑගල ප්‍රාදේශීය කාර්යාලයට අනුයුක්ත කර ඇති බව (නිලධාරියාගේ පෞද්ගලික ලිපිගොනුවේ 137 පිටුව)

II. 2000 **වර්ෂය** සඳහා වන ඔහුගේ **කාර්ය** සාධන ඇගයීම පිළිබඳව බස්නාහිර පළාතේ මිනින්දෝරු අධිකාරී විසින් වාර්තා කර ඇති පරිදි 75% ක සතුටුදායක ප්‍රගතියක් ලබාගෙන ඇති බව (පෞද්ගලික ලිපිගොනුවේ 139-ඒ පිටුව).

III 2001.05.29 සිට 2001.12.31 දක්වා කාලය සඳහා වූ නිලධාරියාගේ රහස්‍ය වාර්තාවෙහි 12 වෙනි ඡේදයෙහි කුරුණෑගල මැනුම් අධිකාරි විසින්, ඔහුගේ **කාර්ය** සාධනය සම්බන්ධයෙන් විශේෂ කරුණු දක්වා ඇති අතර, **කාර්ය**සාධනය 82.65% දක්වා වර්ධනය වී ඇති බව හා ඒ අනුව වැටුප් වර්ධකද නිර්දේශ කර ඇති බව (පෞද්ගලික ලිපිගොනුවේ 163-ඒ පිටුව).

IV. කුරුණෑගල නියෝජ්‍ය සර්වේයර් ජනරාල් විසින් කාර්ය සාධනය සම්බන්ධයෙන් කර ඇති නිර්දේශ පරිදි සහකාර මිනින්දෝරු අධිකාරිවරයෙකු වශයෙන් මුණසිංහ මහතාගේ කාර්යසාධනය සතුටුදායක වී ඇති බව දක්වා ඇති අතර, ඒ අනුව වැටුප් වර්ධකයද අනුමත කර ඇති බව (පෞද්ගලික ලිපිගොනුවේ 163 පිටුව).

03. නිලධාරියාගේ කාර්ය සාධනයේ ප්‍රගතියක් පෙන්නුම් කර ඇති බව ඉහත කරුණු අනුව පෙනී යන අතර, එසේ නිබියදී ඔහු අකාර්යක්ෂමතාව මත විශ්‍රාම ගැන්වීම මැනුම්පති විසින් නිර්දේශ කර ඇත්තේ කුමන හේතුවක් මතද යන්න විමසීමටත්, ඒ පිළිබඳ නිරීක්ෂණ හා නිර්දේශ ඉදිරිපත් කරන ලෙස දැනුම්දීමටත් රාජ්‍ය සේවා කොමිෂන් සභාව නියෝග කර ඇත.

04. ....."

Taking into consideration the contents of the aforesaid letter along with the sequence of events that took place since February 2002, and the fact that allegations set out in the document dated 26.02.2002 (P14) relate to incidents that had occurred more than 20 years ago at the time the petitioner was a Cadet, clearly indicate that the decision to retire the petitioner on the basis of inefficiency without following the provisions of clause 33 of Chapter XLVIII of the Establishment Code and Circular 6/97 (P20) read with the Directive dated 16.07.1999 (P21) is arbitrary and unfair.

Considering the present day administrative functions, there is no doubt that it is necessary to confer authority on administrative officers to be used at their discretion. Nevertheless, such discretionary authority cannot be absolute or unfettered as such would be arbitrary and discriminatory, which would negate the equal protection guaranteed in terms of Article 12(1) of the Constitution. Examining the discretionary powers and stressing the importance of the well known House of Lords decision in ***Padfield* v *Minister of Agriculture, Fisheries and Food***[3] Lord Denning M.R. in *Breen* v *Amalgamated Engineering Union*[4] stated that,

> *"The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this; the statutory body must be guided by relevant considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by Padfield v Minister of Agriculture, Fisheries and Food (supra) which is a landmark in modern administrative law."*

Article 12(1) of the Constitution strikes at arbitrariness and ensures fairness and equality in treatment. In a series of Indian decisions it was clearly laid down that the basic concept of the right to equality is not restricted to the doctrine of classification. **In *E.P. Royappa* v *State of Tamil Nadu*[5]**, Bhagwati, J., (as he then was) clearly defined equality in the following terms:

> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch ...."*

The concept of equality explored in ***Royappa*** *(supra)* by Bhagwati, J. (as he then was) was 'reaffirmed and elaborated' in ***Manekha Gandhi* v *Union of India***[6]) and in *International Airport Authority*[7].

Thus it is well established and well settled law, as stated in the aforesaid decision that an action, which is arbitrary must necessarily involve negation of equlity.

Commenting on the applicability of equality clause in terms of Article 14 of the Indian Constitution Bhagwati, J. (as he then was) in ***Ajay Hasia Khalid Mujib***[8] stated that,

> *"Wherever therefore there is arbitrariness in State action whether it be of the legislature or of the executive or of an 'authority' under Article 12, Article 14 immediately springs into action and strikes down such State action. In fact, the concept of reasonableness and non-arbitrariness pervades the entire constitutional scheme and is a golden thread which runs through the whole of the fabric of the Constitution (emphasis added)."*

It is not disputed that there was no formal inquiry, which examined and considered the allegations that were leveled against the petitioner. It is also not disputed that no opportunity was given to the petitioner to respond to the allegations leveled against him. On a consideration of the totality of the circumstances in this

application it is apparent that the decision to retire the petitioner on alleged inefficiency without following the provisions of the Establishment Code and the relevant Circular and Directives, is not only arbitrary, but also unreasonable and unfair.

In the circumstances, for the reasons aforesaid I hold that the 1st to 10th respondents have acted in violation of the petitioner's fundamental right guaranteed in terms of Article 12(1) of the Constitution. I accordingly hold that the decisions contained in the document dated 05.08.2005 marked P18 are null and void.

I make no order as to compensation and costs.

DISSANAYAKE, J. - I agree.

RAJA FERNANDO, J. - I agree.

Relief granted.

DISSANAYAKE
v
GENERAL MANAGER, RAILWAYS AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
FERNANDO, J.
SOMAWANSA, J.
FR 256/2005
OCTOBER 13, 2006
NOVEMBER 8, 2006
FEBRUARY 27, 2007
APRIL 5, 2007
MAY 1, 21, 2007
JULY 2, 2007

Fundamental Rights – Article 12(1) – Promotion – Marks for excellence in sports – Can sports and umpiring be treated as one and the same? Applications called to fill 4 vacancies when it was alleged that there were 7 – Could this be taken up subsequently? Time limit?

The petitioner a Sub-Inspector attached to the Railway Protection Force alleged that, his fundamental rights guaranteed in Article 12(1) has been violated by the

non-granting of the promotion to the post of Inspector. The petitioner contended that the respondents had acted arbitrarily in calling for applications for only four vacancies when in fact 7 vacancies had existed as at the date of calling for applications. The petitioner also contended that he was not given any marks for excellence in sports – as he had officiated as an umpire in several international and national cricket tournaments.

Held:

(1) The notice calling for applications for the promotions to the post of Inspector have specifically referred to the number of vacancies as four. The applications were called to fill the said number of vacancies. If the said number of vacancies had been clearly stated in the notice, the petitioner could have taken up that issue at the time the notice in question was published. It is well settled law that the time frame which the application has to be made to the Supreme Court specified in Article 126(2) is mandatory – the question with regard to the number of vacancies raised by the petitioner cannot be taken up as it is clearly out of time in terms of Article 126(2).

(2) It is abundantly clear that sports and umpiring cannot be treated as one and the same.

(3) The petitioner's contention that he should be given full marks under the category of excellence in sports as another candidate was given marks for excellence in sports on the basis of infringement of Article 12(1) – cannot be accepted.

The right to equality means that among equals the law should be equal and should be equally administered and thereby like shall be treated alike. It is abundantly clear that provisions of Article 12(1) would provide for the equal protection of the law and shall not provide for equal violation of the law.

APPLICATION under Article 126)1) of the Constitution.

Cases referred to:

1. *Satish Chander* v *Union of India* AIR 1953 SC 250.
2. *Ram Prasad* v *State of Bihar* AIR 1953 SC 219.
3. *C.W. Mackie and Company Ltd.* v *Hugh Molagoda, Commissioner General of Inland Revenue and others* 1986 1 Sri LR 300.
4. *Gamaethige* v *Siriwardane* 1988 1 Sri LR 384.
5. *Jayasekera* v *Wipulasena and others* 1988 2 Sri LR 237.
6. *R.P. Jayasooriya* v *R.C.A. Vandergert, Secretary, Ministry of Foreign Affairs and others* SC FR 620/97 SCM 30.10.1998.
7. *Jayawardane* v *Attorney-General and others* FDD Vol. 1-175.
8. *Gunawardane and others* v *E.L. Senanayake and others* FDR Vol. 1-178.
9. *Thadshanamoorthi* v *Attorney-General* 1978-79-80 1 Sri LR 154.

10. *Mahenthiran* v *Attorney-General* FRD Vol. 1-129.
11. *Nama Sivayam* v *Gunawardena* 1989 1 Sri LR 394.
12. *Gomez* v *University of Colombo* 2001 1 Sri LR 273.
13. *Karunadasa* v *People's Bank* SC 147/2004 SCM 20.6.2007.

Uditha Egalahewa with *Gihan Galabadage* for petitioner.
Harsha Fernando SSC for respondents.
Bimba Jayasinghe Tillakaratne DSG for respondents.

July 25, 2007

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, a sub-Inspector attached to the Railway Protection Force of the Sri Lanka Railway Department, alleged that his fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the non-granting of the promotion to the post of Inspector, for which this Court had granted leave to proceed.

The fact of this application, as submitted by the petitioner, *albeit* brief, are as follows:

The petitioner joined the Sri Lanka Railway Department as a sub-Inspector of the Railway Protection Force on 02.05.1988 (P1). According to the relevant Scheme of Promotions, the petitioner's next promotion was to the post of Inspector and the sub-Inspectors were eligible to make their applications for the said promotion on completion of seven (7) years of service in that post. Accordingly, the petitioner became eligible for promotion to the post of Inspector on 02.05.1995. Since the petitioner's initial appointment to the post of sub-Inspector in 1988, no applications were called for subsequent promotions until 2002 (P2).

Applications were called for the promotions to the post of Inspector from among the sub-Inspectors, who had completed seven (7) years in the said post. The notice calling for applications had stated that there were **four (4)** vacancies as at the date of calling for applications (P3).

In terms of the notice calling for applications for promotions to the post of Inspector, a competitive examination was held on 19.07.2003. By letter dated 19.11.2003, the General Manager (Operations) had informed the petitioner that he had successfully completed the

competitive examination and that the interview will be held on 25.11.2003. The said interview was postponed on several occasions and later was held on 23,09.2004. The results of the examination or the interview were not published until 11.07.2005 (P8).

By letter dated 23.06.2005, four (4) sub-Inspectors were promoted to the posts of Inspector with effect from 19.07.2003 (P7). Upon inquiry, the 1st respondent had informed the petitioner that he had been the 6th in order of merit at the interview and had obtained marks as follows:

Competitive Examination		
	Subject 1	58 marks
	Subject 2	58 marks
Interview		56 marks
Total		172 marks

Upon inquiry the petitioner had become aware that he had not been given marks adequately at the interview and on that basis his allegations against the respondents were mainly two fold:

(A) that he has not been given marks according to the Scheme of Recruitment;

(B) that there were seven (7) vacancies in the post of Inspector as at the date of calling for applications and such, the petitioner should have been appointed to the said post of Inspector.

The petitioner along with two others, who obtained the 5th and 7th position in order of merit at the interview, had appealed to the 2nd respondent through the 3rd respondent. They had referred to the three (3) additional vacancies that were available as at the date of calling for applications for the post of Inspector and had requested that they be appointed to fill the aforesaid vacancies (P14 and P15).

By letters dated 20.06.2005 and 27.06.2005 the 3rd respondent had referred the aforementioned appeals to the 2nd respondent and had recommended that this matter be looked into (P16 and P17). Thereafter, the 2nd respondent, by his letter dated 27.06.2005 had requested the 3rd respondent to submit details of sub-inspectors, who had served the Sri Lanka Railway Force as at 27.01.2005. The

3rd respondent had furnished the relevant information by letter dated 05.07.2005 (P18 and P19).

Accordingly the petitioner took up the position that the 1st to 3rd respondents have acted arbitrarily in calling for applications for only four(4) vacancies in the post of Inspector, when in fact seven (7) vacancies had existed as at the date of calling for applications. In support of this position it was further stated that posts in the Sri Lanka Railway Protection Force had ceased to be cadre based and varying numbers have served in the post of Inspector at different points of time.

In the aforementioned circumstances, the petitioner alleged that the petitioner's fundamental right to equality and equal protection of the law guaranteed in terms of Article 12(1) of the Constitution had been violated by the 1st to 3rd respondents.

Learned Deputy Solicitor-General for the respondents contended that the petitioner cannot now challenge the number of vacancies that existed in these proceedings as the notice calling for applications for the post of Inspector was in January 2001 and that it had specifically stated that the said notice was in respect of 'existing vacancies as of now'. Her position was that the number of vacancies, which existed at the time of the calling of the applications, had been only four (4).

The contention of the learned Counsel for the petitioner was that the petitioner was not given any marks for excellence in sports despite the fact that he was engaged in several extra curricular activities during his period of service in the Sri Lanka Railway Department.

In the circumstances let me now turn to consider the main allegations referred to earlier, which were raised by the learned Counsel for the petitioner.

(A) Marks for excellence in sports

Admittedly, the petitioner was not given any marks for excellence in sports. His allegation that he should have been given marks at the interview for excellence in sports was based on the fact that he had officiated as an umpire in several international and national cricket tournaments.

The petitioner had stated that he had also played cricket at national level since 1990 and that he had submitted the relevant certificates at the interview, which were submitted marked P32(a) to P32(h). Certificates marked as P32(a), (b), (c), (d) and (f) were issued by the Sri Lanka State Services Cricket Association for participants at the Inter-club Tournament and the Annual Tournament and the certificate marked as P32(e) was issued by the Railway Sports Club. The rest of the documents (P32(a), P32(h)) were news items, which stated that the petitioner had been selected as the best umpire from among the cricket umpires' examination held in 1994.

Considering these certificates, the 2nd respondent in his affidavit had averred that marks under the heading of 'excellence in sports' was given for national level sports activities engaged in by the officer concerned during his tenure of office, provided that the applicant produces certificates indicating achievements in sports. Further it was averred that umpiring was not considered as a category for which marks would be given, as umpiring was not considered as being 'an engagement in national level sports'.

A careful perusal of the petitioner's bio-data and the certificates submitted by him clearly reveals that most of his achievements are in the field of umpiring. As stated earlier, the criteria stipulated in the allocation of marks at the interview, specifically stated that to a maximum of 10 marks could be given for 'excellence in sports'. Based on this criterion, the respondents had decided to allocate marks for participating in national level sports activities by the officer concerned during his tenure of office. For this purpose, admittedly, it is necessary for the officer in question to produce certificates indicating his achievements in sports. Umpiring was not considered by the respondents, quite correctly in my view, as a category for which marks could be given, as that was not considered being 'an engagement in national level sports'.

It is not disputed that the marks were to be allocated for excellence in sports. The word 'sport' is defined in the Oxford English Dictionary (2nd Edition, Vol. XVI, Clarendon Press, 1989 pg. 315) to read as follows:

> *"Participation in games or exercises, esp. those of an athletic character or pursued in the open air; such games or amusements collectively."*

The words 'umpire' and umpiring' on the other hand, have been defined in the following terms (Oxford English Dictionary, *(supra)* Vol. XVIII pg. 836).

"umpire – One who decides between disputants or contending parties and whose decision is usually accepted as final; an arbitrator.

Umpiring – The action of acting as an umpire, exp. of doubtful points in game."

Considering the aforementioned definitions, it is abundantly clear that 'sports and umpiring' cannot be treated as one and the same and if a decision had been taken by the respondents to allocate marks for 'excellence in sports' that cannot be used to adduce marks for umpiring. Accordingly, I am of the view that the respondents cannot be found fault with for not allocating marks for the certificates submitted by the petitioner on umpiring.

Learned Counsel for the petitioner also contended that, the respondents had not allocated marks for excellence in sports, although the petitioner had taken part in several cricket tournaments. As pointed out earlier, the certificates submitted by the petitioner were from the Sri Lanka Railway Association, which cannot be accepted as achievements in sports at the national level.

Learned Counsel for the petitioner, took up the position that the State Counsel, who appeared for the respondents at the commencement of the hearing had produced a certificate issued by the 'Government Service Sports Society Limited' and had stated that it has been accepted as national level sports and that candidate, who was one of the promotees was allocated marks for that certificate. Learned Counsel for the petitioner therefore contended that if the said person was given marks for the said certificate issued by the 'Government Service Sports Society Limited', the petitioner should also be given full marks under the category of 'excellence in sports'. Learned Counsel for the petitioner had however conceded that the said person has been given marks for excellence in sports although he had never taken part in national level sports activities.

Accordingly, would it be possible for this Court to come to a conclusion that, because the other candidate was given marks for

sports, although such was not at the national level, that the petitioner also should be given marks for excellence in sports on the basis of an infringement of fundamental rights guaranteed in terms of Article 12(1) of the Constitution?

Article 12(1) of the Constitution, which deals with the right to equality reads as follows:

> *"All persons are equal before the law and are entitled to the equal protection of the law".*

The right to equality in simple terms, means that among equals, the law should be equal and should be equally administered and thereby the like should be treated alike (***Satish Chander* v *Union of India***[1], ***Ram Prasad* v *State of Bihar***[2]. Sir Ivor Jennings, Law of the Constitution, 3rd Edition, 49). The purpose of the concept of the right to equality is to secure every person against intentional and arbitrary discrimination. However, it is abundantly clear that the provisions in terms of Article 12(1) of the Constitution would provide only for the equal protection of the law and shall not provide for the equal violation of the law. It cannot be understood as requiring officers to act illegally because they have acted illegally previously. This position was considered by Sharvananda, C.J., in *C.W. Mackie and Company Ltd.* v *Hugh Molagoda, Commissioner General of Inland Revenue and others* [3], where it was clearly stated that,

> *"But the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act. Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, founded in law in contradistinction to an illegal right which is invalid in law."*

In *Mackie's* case the petitioner Company had paid the Business Turnover Tax and had complained that the denial of the refund of the said tax paid by it was *mala fide* and constitutes unlawful discretion as the respondents had not collected or enforced the payment of the said tax from other dealers in rubber, who were similarly placed and liable to pay the said tax.

This principle stipulated in *C.W. Mackie (supra)* was referred to and followed in ***Gamaethige* v *Siriwardane***[4], where Mark Fernando, J. stated thus:

"Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong."

This position was considered and affirmed once again in *Jayasekera* v *Wipulasena and others*(5) without referring to *C.W. Mackie case (supra)*, where it was held by G.P.S. de Silva, J. (as he then was) that Article 12(1) cannot confer on the petitioner a right to which he is not entitled in terms of the very contract upon which he found his complaint of 'unequal treatment'.

This question was again considered in *R.P. Jayasooriya* v *R.C.A. Vandergert, Secretary, Ministry of Foreign Affairs and others*(6), where reference was made to the decision in *C.W. Mackie (supra)* to hold that Article 12(1) of the Constitution provides only for the equal protection of law and not for the equal violation of the law.

It is to be borne in mind that the petitioner had not made any of the successful candidates respondents nor has he prayed for the cancellation and holding a fresh interview in order to re-evaluate all the candidates.

In such circumstances, it is apparent that the petitioner cannot rely on the provisions of Article 12(1) of the Constitution, which guarantees the right to equality and equal protection of the law to compel the relevant officers to act illegally and add marks under the heading of 'excellence in sports', because it is alleged that they have acted illegally with regard to another candidate.

(B) <u>The number of vacancies in the post of Inspector</u>

Learned Counsel for the petitioner contended that although in terms of the Scheme of Promotion (P2) and the notice calling for applications (P3) had stated that there were only four (4) vacancies in fact there were seven (7) vacancies in the post of Inspector and accordingly the petitioner, who was placed sixth in order of merit should have been selected for the promotion to the post of Inspector.

It is not disputed that the notice calling for applications for the promotions to the Post of Inspector by document dated 07.01.2002, had specifically mentioned that there are only four (4) vacancies to be filled. The said notice had further stated that these four (4)

vacancies should be filled on the basis of the highest marks obtained at the written competitive examination, the marks awarded for seniority and at the interview. It was also clearly stated that a waiting list would not be maintained in regard to the said promotions for the post of Inspector.

The contention of the learned Counsel for the petitioner was that, prior to the competitive examination, the petitioner and several others had inquired from the administration as to the actual number of vacancies and they had been informed that although six (6) Inspectors were retired, two (2) of them had retired under Public Administration Circular No. 44/90 and as such according to the said circular these vacancies cannot be filled. The petitioner's position is that the said contention is not correct and those vacancies could be filled.

Learned Counsel for the petitioner in his written submissions had clearly stated that by letter dated 14.06.2005 the petitioner had informed the 2nd respondent that seven vacancies in the post of Inspector were available as at the date of calling for applications. According to the petitioner, two vacancies arose as a result of the cancellation of Public Administration Circular No. 44/90 and the third vacancy was due to one N.W.A.C. de Silva's promotion to the post of Assistant Superintendent being backdated to 15.01.1993.

The 2nd respondent, being the Additional General Manager (Administration) in his affidavit had categorically stated that, the departmental cadre is periodically reviewed and with regard to the estimates for the year 2002, the approved cadre in the grade of Inspector had been 13(R3). When applications for the said post were called in 2002, nine (9) officers had been holding the posts of Inspector and accordingly only 4 vacancies had existed at the time of calling for applications as stated in the notice dated 07.01.2002.

The 2nd respondent had further averred that the appeals referred to earlier sent by the petitioner had been considered, but relief could not be granted as the number of vacancies in the posts of Inspector were limited to four (4).

It is to be noted that, the applications for the promotion to the post of Inspector were called by notice dated 07.01.2002 (P3), which as stated earlier, has specifically referred to the number of vacancies as

four (4). The applications were therefore called for to fill the said number of vacancies without maintaining a waiting list. In such circumstances it is apparent that if the said number of vacancies had been clearly stated in the notice (P3), the petitioner should have taken up that issue at the time the notice in question was published.

It is now well settled law that the time frame within which an application has to be made to the Supreme Court, specified in Article 126(2) of the Constitution, is mandatory. A long line of cases had considered this matter (*Jayawardane* v *Attorney-General and others*[7], *Gunawardane and others v E.L. Senanayake and others*[8], *Thadshanamoorthi* v *Attorney-General* [9] and *Mahenthiran* v *Attorney-General*[10], *Gamaethige* v *Siriwardane (supra), Nama Sivayam* v *Gunawardane*[11], *Gomez* v *University of Colombo*[12], *Karunadasa* v *The People's Bank*[13].

As correctly submitted by the learned Deputy Solicitor-General for the respondents, the question with regard to the number of vacancies now raised by the petitioner cannot be taken up in these proceedings as it is clearly out of time in terms of Article 126(2) of the Constitution.

On a consideration of the aforementioned circumstances I hold that the petitioner has not been successful in establishing that his fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the 1st to 3rd respondents. This application is accordingly dismissed, but in all the circumstances of this case, without costs.

FERNANDO, J. - I agree.

SOMAWANSA, J. - I agree.

Application dismissed.

CEYLON OXYGEN LTD.
v
BIYAGAMA PRADESHIYA SABHAWA AND OTHERS

COURT OF APPEAL
SRISKANDARAJAH, J.
CA 501/2005
MARCH 14, 21, 28, 29-2007
JUNE 4, 2007

Pradeshiya Sabha Act No.15 of 1987 – Sections 2(3), 157(2), 158, and 160, Levying of rates on immovable property – Seizing of movable property legality – No reason given – Not pleaded – Consequences? – Seizure under warrant – No specific authority to seize an item – Ultra vires? – Disputed questions of fact – Writ lies?

The respondent issued a statutory notice of assessment indicating that, the machinery and plant were considered as immovable property. The petitioner contended that, the said plant/machinery is movable property and therefore not liable for tax under Section 157 (2). Subsequently the respondent seized a browser containing liquid Nitrogen, as the tax was not paid. The petitioner challenged the said seizure and the order to pay tax on the plant and machinery.

It was contended that, the respondents had not given any reasons for the decision and that, at the point of seizing the bowser the revenue officer was not conferred with any statutory power to come to any decision or to make a determination to seize a particular item. It was further contended that, Section 157 authorizes the Pradeshiya Sabhawa to levy tax on immovable property and not on movable property.

Held:

(1) The petitioner has not challenged the impugned order in the petition on the ground that no reasons were given for the said decision. If this ground was raised in the petition the respondents would have had an opportunity to disclose the reasons to support the said decree.

In the absence of a specific statutory provision to give reasons, reasons need be communicated but if the reasons are given and if it is in the file of the relevant authority would be substantiate compliance with the requirement of the duty to give reasons.

Per Sriskandarajah, J.
"The failure of the petitioner to raise the objection in the petition had deprived the respondent from disclosing reasons in support of his decision ..... this objection cannot be considered by Court.

Held further:

(2) The main challenge to the decision is on the basis that the plant machinery and the fixtures in the said property are movable property. This is a disputed question of fact and it cannot be determined in these proceedings. The appropriate forum to determine whether the plant, machinery and the fixtures are movable properties in the District Court.

(3) It is revealed that the seizure was under Section 158 (1) in terms of a warrant signed by the 3rd respondent issued to the 4th respondent. The 4th respondent – Revenue Inspector was not given specific authority to seize the bowser under the warrant but was given a general authority to seize movable property. When executing the warrant the 4th respondent had used his discretion and decided to seize the bowser which contains Nitrogen – this act of seizing the bowser is *ultra vires* the provisions of Section 160 – as the bowser seized is a restricted article under Section 160 of the Act.

APPLICATION for a writ of certiorari.

Cases referred to:

1) *Thajudeen* v *Sri Lanka Tea Board and another* 1981 2 Sri LR 471.
2) *R* v *Fulham etc Rent Tribunal exp Zerek* 1951 2 KB.
3) *R* v *Home Secretary exp. Zamir* 1980 A1 930-949.
4) Abayadeera v *Dr. Stanley Wijesundera Vice-Chancellor University of Colombo* 1983 2 Sri LR 767.
5) *Culasubadhara* v *University of Colombo* 1985 1 Sri LR 244.
6) *J.B. Textile Ltd.* v *Ministry of Finance and Planning* 1981 2 Sri LR 238.
7) *Kusumawathie and others* v *Aitken Spence and Another* 1996 2 NLR 18.
8) *Yassen Omar* v *Pakistan International Lines Corporation Ltd.* 1999 2 NLR 375.
9) *R* v *Higher Education Funding Council ex parte Institution of Dental Surgeons.*
10) *R.* v *Civil Service Appeal Board ex parte Cunningham.*
11) *Doody* v *Secretary of State.*
12) *William Singho* v *AGA Matara* 41 NLR 215.
13) *De Silva* v *Konnamalai* 30 NLR 128.
14) *Fernando* v *Nelum Gamage Bribery Commissioner* 1994 3 Sri LR 194.
15) *R* v *Inland Revenue Commissioner, ex-parte Ross Minister Ltd.* 1980 Al 952.

Mohan Peiris PC with *Nuwanthi Dias* for petitioner.
Dr. Sunil Cooray for respondents.

September 3, 2007

SRISKANDARAJAH, J.

The petitioner is a public quoted company engaged in the business of production of industrial & medical gases and liquids. Its ancillary businesses include the trading of electrodes, transformers, medical equipments and imported gases. The petitioner in May 1998 established and commissioned an air separation plant at Sapugaskanda Biyagama industrial estate. The petitioner submitted that the air separation plant is mounted on the base of a container with a vertical cold box being bolted to the ground and the pre-liquid storage tank stands on the ground. The control panel is also mounted inside the container. In terms of the Pradeshiya Sabhas Act No. 15 of 1987 a Pradeshiya Sabha "may, subject to the approval of the minister, impose and levy a rate on the annual value of any immovable property or any species of immovable property situated in localities declared by the Pradeshiya Sabha." By gazette notification dated 3rd March 2000, the local authority published its intention of imposing a 5% tax on the annual value of the properties within its jurisdiction.

The petitioner was served with a statutory notice of assessment on the 7th of August 2000 for the years July 1998 to December 1998, 1999 and 2000. The petitioner disputed the said assessment on the basis that the said assessment had included the movable property in the said assessment namely; air separation plant and the petitioner indicated that it is willing to pay the tax on the immovable property. The position of the 3rd respondent is that the machinery and the plant were considered as immovable property and that the respondent would not be amending or reducing the amount already calculated. The petitioner had been served with another statutory notice of assessment on the 1st January 2001 for the same amount that was set out in the previous notice. The 3rd respondent made another request to pay the said amount stipulated in the earlier notice of assessment by his letter dated 2nd July 2001. On the 7th of February 2002 the 3rd respondent informed the petitioner that the 1st respondent would proceed to take steps in terms of Section 158 of the said Act in the event the petitioner failed to pay the tax as informed.

The petitioner submitted that the 1st respondent has failed and /or neglected to consider the several appeals made by the petitioner in

terms of the said Act and continued to demand the petitioner to pay the tax. The petitioner was served with a final notice dated 10.10.2003 before the seizure of the property. On the request of the petitioner the 3rd respondent by letter dated 30th October 2003 provided the petitioner the manner in which the property has been assessed and the breakdown of the sum claimed as tax. The petitioner was also served with the notice of assessment for the year 2004 on the same basis. The objections to the said assessments were investigated and a decision was communicated to the petitioner by letter dated 31.12.2004 by the 2nd respondent that no change to be made to the assessment already made. The petitioner submitted that on 11th March 2005 the 4th respondent arrived at the factory premises of the petitioner, seized and took into his custody a bowser containing liquid nitrogen.

The petitioner in this application has sought a writ of *certiorari* to quash the decision of the respondent to impose a tax on movable property of the petitioner (namely plant and machinery) as intimated by letter dated 31st December 2005, a *mandamus* to re-assess the petitioner's property in terms of the law and a writ of *certiorari* quashing the decision to seize the bowser of liquid nitrogen for the non-payment of tax.

The petitioner's main contention in the said application is that the imposition of tax on movable property (plant and machinery) is contrary to the provisions of the Act wherein it is expressly stated in Section 134(1) that "every Pradeshiya Sabha may subject to the approval of the Minister, impose and levy a rate on the annual value of any immovable property or any species of immovable property situated in locations declared by the Pradeshiya Sabha as built up locations. The respondent contended that the decision conveyed by the letter of 31.12.2004 has been made after the investigation held as required by Section 141(5) in the presence of the authorised representatives of the petitioner. The respondent has assessed the tax on the basis that the plant and machinery of the petitioner in the said premises are permanently affixed to the ground and are irremovable, and constitute immovable property within the meaning of the Pradeshiya Sabha Act.

The main challenge to the said decision is on the basis that the plant, machinery and the fixtures used by the petitioner in the said property are movable property and it cannot be considered as

immovable property. This is a disputed question of fact and this question cannot be determined in these proceedings. In *Thajudeen* v *Sri Lanka Tea Board and Another*[1] the Court held:

> *"Where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct a writ will not issue."*

Devilin, J. in *R* v *Fulham etc. Rent Tribunal exp. Zerek*[2] held:

> *"Where the question of jurisdiction turns solely on a disputed point of law, it is obviously convenient that the court should determine it then and there. But where the dispute turns to a question of fact, about which there is a conflict of evidence, the court will generally declined to interfere."*

Lord Wilberforce in *R* v *Home Secretary exp. Zamir*[3] at 949 similarly described the position of the court, which hears applications for judicial review:

> *"It considers the case on affidavit evidence, as to which cross-examination, though allowable does not take place in practice. It is, as this case will exemplify, not in a position to find out the truth between conflicting statements."*

On the other hand the Pradeshiya Sabha Act under Section 142(1) provides that any person aggrieved by the decision of the assessment of any property could institute an action in the District Court. Section 142(3) provides that every such court shall hear and determine such action according to the procedure prescribed by law for the time being in force, for the hearing and determination of civil action and that decision of such court shall in all cases be subject to appeal to the Court of Appeal. Hence the District Court is the appropriate forum to determine whether the plant, machinery and the fixtures used by the petitioner in the said property are movable property or immovable property under the given circumstances.

The petitioner at the stage of argument challenged the said decision on the basis that no reasons have been given for the decision which was conveyed to the petitioner by letter dated

31.12.2004 and therefore the decision is bad in law. The respondents objected to this submission as the petitioner is not entitled, at the stage of the argument, to rely on a ground which it has not pleaded in its petition. The respondent in support of this contention relied on the judgments delivered in *Abayadeera* v *Dr. Stanley Wijesundera, Vice-Chancellor, University of Colombo*(4); *Culasubadhara* v *University of Colombo*(5); *J.B. Textiles Industries Ltd.* v *Ministry of Finance and Planning*(6). The respondents further submitted that the scheme of the Act neither provides for an inquiry nor did it make provision for any evidence to be led in support of the objections to the assessment.

Section 141(4) provides: *"The Pradeshiya Sabha shall cause to be kept a book to be called the "Book of Objections" and cause every objection to an assessment or verification to be registered therein. The Pradeshiya Sabha shall cause to be given notice in writing to each objector and the owner or occupier of the house, building, land or tenement or cultivated land of the day on which and the place and the time at which the objections will be investigated".* This section provides only for an investigation of an objection to an assessment. It further provides in subsection (5). "At the time and place so fixed the Pradeshiya Sabha shall cause to be investigated the objections in the presence of the objector, owner and occupier or their authorized agents who may be present. Such investigation may be adjourned from time to time for reasonable cause". This section does not even mandate the presence of the objector when his objection is investigated and subsection (6) provides that the decision to be notified to the objector. But the Act provides for the challenge of the assessment in the District Court under Section 142 of the said Act and in that proceedings the objector has a right to be heard and he also has a right for a reasoned decision.

The issue whether in the absence of a specific statutory requirement to give reasons the Commissioner has to communicate his reasons in compliance with the principles of natural justice was considered in *Kusumawathie and others* v *Aitken Spence and Co. Ltd. and Another*(7). In this case S.N. Silva, J. (as he then was) held:

> "The finding that there is no requirement in law to give reasons should not be construed as a gateway to arbitrary decisions and orders. If a decision that is challenged is not a speaking order,

when notice is issued by a Court exercising judicial review, reasons to support it have to be disclosed. Rule 52 of the SC Rules 1978 – is intended to afford an opportunity to the respondents for this purpose; the reasons thus disclosed form part of the record and are in themselves subject to review. Thus if the Commissioner fails to disclose his reasons to Court exercising judicial review, an inference may will be drawn that the impugned decision is *ultra vires* and relief granted on this basis".

In *Yaseen Omar* v *Pakistan International Airlines Corporation*[8]

Bandaranayake, J. held: that the Court of Appeal erred in setting aside the impugned order on the ground that giving of reasons is *sine qua non* for a fair hearing. In this Judgment Bandaranayake, J. observed:

"In *R* v *Higher Education Funding Council, ex parte Institute of Dental Surgery*[9], the Queen's Bench Division had examined the decisions in *R* v *Civil Service Appeal Board, ex parte Cunningham*[10], *Doody* v *Secretary of State for the Home Department*[11] and several other judgments regarding the need to give reasons for the decision. In this case the respondent council, which was established by Section 131 of the Education Reform Act 1988, was responsible for administering state funding for the provision of education and research by universities. By Section 131(6) the council had power to make grants for research to universities. The council appointed a panel of academic specialists to assess and rate universities and other research institutions falling within the council's remit for the purpose of providing funding on the basis of the quality of the research undertaken. In 1992 the applicant institute, a university college entirely dedicated to post-graduate teaching and research in dentistry, was rated 2.0 on a 5 point scale. The applicant institute had previously been rated 3.0 and the lower rating was directly reflected in a reduction in funding of approximately 270,000 sterling pounds. No reasons were given for the reduction in the applicant institute's rating and in further correspondence the chief executive of the council refused to disclose the panel's reasons for the lower rating and refused to consider any appeal against the assessment unless it was shown that the assessment had been made on the basis of erroneous information. The applicant institute applied for judicial

review of the council's decision to assess its rating as 2.0 contending, *inter alia*, that the council had acted unfairly in failing to give reasons for its decision and stating that in the absence of its reasons its decision was irrational.

It was held that there was no duty cast on administrative bodies to give reasons for their decisions either on general grounds of fairness or simply to enable any grounds for judicial review of a decision to be exposed. After an exhaustive examination of the legal position relating to the 'duty to give reasons', Sedley, J. stated in a summary that-

1. there is no general duty to give reasons for a decision, but there are classes of cases where there is such a duty;
2. one such class is where the subject-matter is an interest so highly regarded by the law – for example personal liberty – that fairness requires that reasons, at least for particular decisions, be given as of rights.
3. another such class is where the decision appears aberrant."

In this application the petitioner has not challenged the impugned order in the petition on the ground that no reasons were given for the said decision. If this ground was raised in the petition the respondent would have had an opportunity to disclose the reasons to support the said decision when notice is issued by this Court. In the absence of a specific statutory provision to give reasons the reasons need not be communicated but if the reasons are given and if it is in the file of the relevant authority would be substantial compliance with the requirement of the duty to give reasons. The failure of the petitioner to raise this objection in the petition had deprived the respondent from disclosing reasons in support of his decision. Hence the petitioner's objection which was raised first time at the stage of argument that no reasons was given for the impugned decision cannot be considered by this Court.

The petitioner has also challenged the seizure of the said bowser as *ultra vires* and illegal on the basis that section 160 of the Pradeshiya Sabha Act mandates that "no property of any class or description set out hereunder shall be seized or sold in execution of any warrant issued under this Act" which includes "the tools, utensils

and implements of trade or business of such person..." The petitioner contended that the respondents have seized the petitioner's implements of trade (a bowser containing liquid nitrogen) in total disregard to and contrary to the express provisions of the said Act.

The respondent contended that the words "the tools, utensils and implements of trade or business of such person ...." have been in our statute book long prior to being incorporated in the Pradeshiya Sabhas Act. Similar words in Section 218(b) of the Civil Procedure Code have been interpreted in *William Singho* v *A.G.A. Matara*(12) that the words "tools, utensils and implements of trade or business" are qualified by the words" as may be reasonably necessary to enable him to earn his livelihood as such". In *Dr. Silva* v *Konamalai*(13) it was held that a large fishing board is not an implement of trade of a fisherman. In view of the above interpretation the bowser seized is not restricted from seizure under Section 160 of the said Act.

The decision in *De Silva* v *Konamalai (supra)* cannot be directly applied to this case as words in Section 218 of the CPC are different from the words used in Section 160 of the Pradeshiya Sabha Act.

Civil Procedure Code in Section 218 when describing the properties that are not liable to be seized, in Section 218(b) provides; "tools, utensils and implements of trade or business .... as may **in the opinion of the Court** be necessary to enable him to earn his lively hood:

Section 160 of the Pradeshiya Sabha Act when describing the properties that are not liable to be seized in Section 160(b) provides: "the tools, utensils and implements of trade or business of such person .... as may be reasonably necessary to enable him to earn his lively hood;

Unlike in Section 218(b) of the Civil Procedure Code, Section 159 read with Section 160 of the Pradeshiya Sabha Act does not permit the authority exercising the powers under these sections to form an opinion as to whether a particular property is reasonably necessary to enable him to earn his livelihood.

As contended by the petitioner it is primarily engaged in the business of production of industrial & medical gases and liquids, namely oxygen, nitrogen, nitrous oxide, carbon dioxide, dry ice

dissolved acetylene and the petitioner has three bowsers out of which two are used for the storage of liquid nitrogen whilst the other is used for the storage of liquid oxygen and in the absence of any other material contrary to this position, the respondent cannot come to the conclusion that the bowser is neither a tool, utensil, or implements of the trade or business of the petitioner nor that the bowser seized is not reasonably necessary to enable the petitioner to earn his livelihood. Hence the court holds that the bowser seized is a restricted article under Section 160 of the said Act.

The learned Counsel for the respondent submitted that in any event the act of seizing the bowser cannot be quashed by Certiorari for the reason that at the point of seizing the bowser, the revenue officer of the Pradeshiya Sabha is not conferred with any statutory power to come to any decision or to make a determination about anything. He relied on the Judgment of the Supreme Court in *Fernando* v *Nelum Gamage, Bribery Commissioner*(14) it was held that the decision of the investigating police officer to make an application to the Magistrate to make an order to assist the conduct of a criminal investigation (including an order for the holding of an identification parade) is not amenable to *certiorari*. The learned Counsel submitted that the Court came to this conclusion because at this stage the state did not require the investigating police officer to come to any finding, decision or determination before making such application. In reply to the submissions of the learned President's Counsel for the petitioner that the decision to seize is a decision amenable to judicial review and the citation of the judgment of *R.* v *Inland Revenue Commissioners, Exparte Ross Minister Limited*(15) in support of this contention, the learned Counsel for the Respondent contended that in the said case the officers of the inland revenue had exceeded the powers expressly conferred on them by Section 20(c) of the Taxes Management Act of 1970 to seize and remove during the search of a premises on a search warrant "anything whatsoever found there" which they had "reasonable cause to believe may be required as evidence of a tax fraud" and the matter in issue in the said case is not the decision to seize.

The facts and circumstances of the instant case reveals that the seizure under Section 158(1)(a) of the said Act took place in terms of a warrant dated 10.1.2005 signed by the 3rd respondent and issued

to the 4th respondent. The 4th respondent was not given specific authority to seize the bowser under the said warrant but he was given a general authority to seize the movable property of the petitioner. When executing the said warrant the 4th respondent had used his discretion and decided to seize the bowser which contains nitrogen. This decision to seize the bowser is *ultra vires* to the provisions of Section 160 of the said Act as discussed above. Hence this Court issues a writ of *certiorari* quashing the decision to seize the bowser of the petitioner for non-payment of tax.

This application is allowed without costs, only in relation to the above relief.

Writ of certiorari quashing the decision to seize the bowser for non-payment of tax issued.

Application partly allowed.

CHANDRASENA ALIAS RALE
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJIT SILVA, J.
SISIRA DE ABREW, J.
CA 34/2002
HC RATNAPURA 119/93
MAY 21, 22, 2007

Penal Code Sections 293, 294 and 295 – Section 419 – proving a charge of murder? Requirements – Expert opinion – Is it only a guide ? Sufficient to cause death – Proof? – Nexus between the injuries and cause of death Third and fourth limb of Section 294.

The accused-appellant was convicted of the murder of one P and of the offence of causing mischief to the boutique of PS..

In appeal it was contended that (1) the identity of the accused-appellant had not been established (2) that the prosecution had failed to prove the charge of murder – that the death of the accused was not the direct result of the injuries caused by the burns but was on account of some supervening circumstances (septicemia) not resulting from injuries. (3) that the prosecution failed to establish a charge of murder under the third limb of Section 294.

Held:

(1) At the time of the incident witness Premarathne, who knew the appellant for nearly 10 years, saw the appellant running away from the compound of the boutique. In the light of the above evidence, there was no question that Premarathne making mistake about the identity of the appellant.

(2) "Sufficient to cause death" in the ordinary course of nature means the injury, if left to the nature without resorting to proper medical remedies and skillful treatment has resulted in death.

(3) A medical witnesses called in as an expert is not a witness of fact. His evidence is really of an advisory character given on the facts submitted to him. Whilst the opinion of expert being a guide to Court it is the Court which must come to its own conclusion with regard to the issues of the case. A Court is not justified in delegating its function to an expert and acting solely on latter's opinion.

(4) The victim in the instant case died due to septicemia following infected ulcers, infected ulcers caused as a result of the burns infected by an act of the appellant – there is direct *nexus* between the burns and the cause of death. In a case of murder even if the death of the victim was not directly due to the injuries inflicted by the accused but due to other conditions such as septicemia occurred a result of the injuries inflicted by the accused, it is justifiable to conclude and should conclude that it was the act of the accused that caused the death of the victim.

Held further

(5) In order to establish a charge of murder under the third limb of Section 294 the prosecution must prove the following ingredients beyond reasonable doubt.

(1) Accused inflicted bodily injury to the victim.
(2) The victim died as a result of the above bodily injury.
(3) Accused had the intention to cause the above body injury.
(4) Injury was sufficient to cause the death of the victim in the ordinary course of nature

Per Sisira de Abrew, J.

"The victim was in her boutique at the time of the incident. The prosecution case was that the appellant threw an object like a bottle. Immediately thereafter the victim was in flames and the boutique was engulfed in flames. Thus the appellant knew that it was imminently dangerous that it must in all probability cause death of the inmates of the boutique by his act and bodily injuries have been caused to the victim which were not only likely to cause death but are sufficient in the ordinary course of nature to cause death. This act was done by the appellant without any excuse. Thus in my view the appellant was guilty of murder under the fourth limb of Section 294.

APPEAL from the judgment of the High Court of Ratnapura.

Cases referred to:

1. *Queen* v *Mendis* 54 NLR 177.
2. *Abeysundara* v *Queen* 74 NLR 169.
3. *Sumanasiri* v *A.G.* (1999) 1 SLR 309.
4. *Rex* v *Mubila* (1956) SALR.31
5. *Ruhunuge Palitha* v *AG* CA 1/2004 decided on 15.5.2007.
6. *Virsa Singh* v *State of Punjab* AIR 1958 (SC) 465 at 467.
7. *Charles Perera* v *Motha* 65 NLR 294.
8. *Gratiaen Perera* v *Queen* 61 NLR 522.
9. *Sudarshan Kumar* v *State of Delhi* AIR 1974 SC Vol. 61 page 2328.
10. *Queen* v *Mendis* 54 NLR 177.
11. *Abeysundara* v *Queen* 74 NLR 169.
12. *R* v *Smith* 1959 2 All ER 193 at 198.
13. *Regina* v. *Blaue* (1975) 1 WLR 1411.
14. *R.* v *Jordan* (1956) 40 Cr. App. Rep. 152.
15. *Lord* v *Pacific Steam Navigation Co. Ltd.* (1943) 1 All E.R. 211 at 215.
16. *Virsa Singh* v *State of Punjab* AIR 1958 Vol. 45 at 465.
17. *Rajwant Singh* v *State of India* AIR 1966 SC 1874.
18. *Hajinder Singh* v *Delhi Administration* AIR 1968 SC 867.
19. *State of Maharashtra* v *Arun Savalaram* 1989 Cri. LJ 191.
20. *Rajwant Singh* v *State of Kerala* AIR 1966 SC 1874 at 1878.

Ranjith Abeysuriya PC with *Thanuja Rodrigo* for appellant.
Menaka Wijesundara SSC for Attorney-General.

July 19, 2007

SISIRA DE ABREW, J.

The accused appellant (the appellant) was convicted of the murder of a woman named Premawathi and of the offence of causing mischief to the boutique of Podisingho (an offence under Section 419 of the Penal Code). On the 1st count the appellant was sentenced to death and on the 2nd count he was sentenced to five years rigorous imprisonment.

Facts

The case for the prosecution may be quite briefly summarized as follows:

Podisingho, the father of Premawathi, was running a boutique. Premawathi too worked in the boutique especially doing the cashier's work. Around 7.00 p.m. on 26th of September 1991, Jayawardene a son of Podisingho, on seeing his father's boutique on fire, ran towards the boutique and saw his father and sister Premawathi

suffering from extensive burn injuries. Premawathi who was suffering from extensive burn injuries told him that Chandrasena attacked her with a glass bottle. Premawathi told the same thing to Jayawardene when she was being taken to the hospital. Chandrasena, the appellant, is also referred to 'Rale'. When Premarathne one of the brothers of Premawathi was approaching the boutique he heard from a distance of 20 feet from the boutique a sound of a chimney being broken. As he rushed to the scene he saw the appellant running away from the compound of the boutique. Premawathi who was in flames told him that Rale attacked her. In order to douse the fire he covered her body with a gunny bag. At that time the boutique, which was usually illuminated by three lamps, kept at various places, was in flames. Premawathi who was rushed to the hospital died after seventeen days.

Identity of the appellant

Learned President's Counsel for the appellant contended that the identity of the appellant had not been established by the prosecution. Learned President's Counsel, however, did not challenge the reception of the dying declaration as evidence. At the time of the incident, Premarathne, who knew the appellant for nearly ten years, saw the appellant running away from the compound of the boutique. In the light of the above evidence, there was no question that Premarathne making a mistake about the identity of the appellant. Premawathi, the deceased, in her statement marked P1 made to IP Sirinil de Silva stated that Rale alias Chandrasena came to the boutique and threw a glass object to her face and immediately thereafter a fire broke out; that her clothes caught fire; and that she too was in flames. Premawathi who was elder to Premarathne should also know the appellant since she, in her dying declaration, referred to the appellant in both names. Learned President's Counsel, referring to Jayawardene's evidence at page 86, contended that the deceased Premawathi, in her dying declaration, had told that it was a person like Chandrasena who attacked her. This was in response to a question by the defence on the same premise. Considering the question and the answer at page 86 of the brief, I have to express the view that there is no merit in this contention and therefore the same is rejected.

In the light of the above evidence, I hold that the identity of the appellant had been established beyond reasonable doubt. I therefore

reject the contention of the learned President's Counsel.

The other ground urged by the learned President's Counsel as militating against the maintenance of the conviction of murder was that the prosecution had failed to prove the charge of murder. It was contended by the learned President's Counsel that the death of the deceased was not the direct result of the injuries caused by the burns but was on account of some supervening circumstances (septicemia) not resulting from the injuries and therefore the appellant could not be held guilty of murder. He further contended that there was no great antecedent probability of death resulting from the injuries inflicted, as opposed to mere likelihood of death and as such the prosecution had failed to prove the charge of murder under limb three of Section 294 of the Penal Code. He sought to strengthen his argument by drawing our attention to the fact that the victim died seventeen days after the infliction of the injuries. It was his argument that appellant, at the most, could have been convicted of attempted murder or culpable homicide not amounting to murder. In support of his argument he cited *Queen* v *Mendis*(1) and *Abeysundara* v *Queen*(2). Learned SSC cited *Sumanasiri* v *AG.*(3)

Section 294 of the Penal Code

I now turn to the above contentions. In order to appreciate these contentions it is necessary to consider Section 294 of the Penal Code which is reproduced below:

"Except in the cases hereinafter excepted, culpable homicide is murder -

Firstly - if the act by which the death is caused is done with the intention of causing death; or

Secondly - If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused; or

Thirdly - If it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

Fourthly - If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

Explanation 2 to Section 293 of the Penal Code states as follows:

" Where death is caused by bodily injury ,the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented ".

The meaning of 'sufficient to cause death in the ordinary course of nature'.

'Sufficient to cause death in the ordinary course of nature', in my view, means "the injury, if left to the nature without resorting to proper medical remedies and skillful treatment, has resulted in death. This view is supported by the following opinions. Justice Jayasuriya, in *Sumanasiri* v *AG (supra)* citing the case of *Rex* v *Mubila*(4) at 31 remarked thus; "Where death is caused by a bodily injury, the person who cases such bodily injury, shall be deemed to have caused death although by resorting to proper remedies and skillful treatment death might have been prevented."

"If a wound is inflicted and death results the person who inflicted the wound will be held to have caused the death although the victim may have neglected to use proper remedies or have refused to undergo a necessary operation". Vide Haulsbury's Laws of England – 4th edition Vol.ii, Criminal Law, Evidence and Procedure page 616.

Expert's opinion is only a guide to Court. Court must come to its conclusion with regard to the issues of the case.

In the instant case, the death of the deceased was due to septicemia following superficial ulcers. According to the doctor who

performed the post-mortem, 65% of the surface of the body was burnt and in the anterior side burns were found from face to waist and in the posterior side from neck to waist. The entire face except eyes was burnt. The death has resulted due to infected burn injuries even after treatment for seventeen days. Septicemia sets in as a result of the germs getting collected on the wounds. This was the evidence of the doctor. Although the doctor did not, in his evidence, use the exact words the injuries were 'sufficient to cause death in the ordinary course of nature', if this position was clear from the doctor's evidence the absence of such words should not disturb the findings of Court. In my view, that is a decision that should be reached by Court on the evidence placed before Court, if not, the sacred and important decision whether the accused should be convicted for the charge of

murder or not is abdicated to the doctor by Court. I may pose here to ask a simple question. In a case of murder where severance of the neck of the victim to a degree of 75% could be seen and is testified by the doctor who performed the post-mortem but the opinion whether the injury was sufficient to cause death in the ordinary course of nature was not elicited, does one need an expert medical opinion to say that such an injury was sufficient, in the ordinary course of nature, to cause death. In such a case if the accused is acquitted of the charge of murder due to the absence of the said medical opinion such a decision inevitably lead to absurdity. In my view, on the available evidence, if the Court can come to its independent decision, then Court should not turn a blind eye to such evidence and shirk its responsibility on the basis that the words set out in law had not been expressed by the medical expert. In such a situation, it should be open for Court to come to its independent decision with regard to the fact in issue. If the Court below had not come to specific finding on a matter of this nature that does not mean that the Court of Appeal should blindly follow the path of the court below and shirk from its responsibility. The Court of Appeal in such a situation can come to the right conclusion on the available evidence.

The opinion expressed by His Lordship Justice Ranjith Silva in the case of *Ruhunuge Palitha* v *AG*(5) lends support to the above contention. His Lordship remarked thus: "It does not matter whether the Prosecution failed to elicit in evidence from the medical officer that there was great antecedent probability for the injury to cause death. The outcome of a case to my opinion should not depend on some specific words uttered by a medical expert and must be left to the decision of the Judge." One must, in this regard, should not forget the fact that the injury was sufficient to cause death in the ordinary course of nature must be proved objectively as observed by the Indian Supreme Court in *Virsa Singh* v *State of Punjab*(6) at 467. His Lordship Justice Bose in the above case commenting on the question whether the injury should be sufficient to cause death in the ordinary course of nature observed thus: "This part of the enquiry is **purely objective** and **inferential** and has nothing to do with the intention of the offender." (Emphasis added).

For the above reasons, I am of the opinion that it is open for Court on the evidence led at the trial and with the assistance of medical jurisprudence, to come to the conclusion whether the injuries were

sufficient to cause death in the ordinary course of nature. In my view primary function of Courts is to arrive at the correct decision on the evidence placed before Courts. Thus failure by the medical expert to pronounce certain words stated in law should not shut the sacred duty being performed by Courts. This principle is equally applicable to the Court of Appeal as well. In *Charles Perera* v *Motha*[7] Basnayake CJ held thus: "The evidence of a handwriting expert must be treated as only a relevant fact and not as conclusive of the fact of genuineness or otherwise of the handwriting in question. The expert's opinion is relevant but only in order to enable the Judge himself to form his own opinion."

In *Gratiaen Perera* v *Queen*[8] Sinnathamby J. remarked thus: "A Court is not justified in delegating its function to an expert and acting solely on latter's opinion."

Sarkar on Evidence 15th edition Vol. 1 page 901 dealing with medical opinion states thus: If the oral evidence leads to a positive conclusion one way or the other the opinion of experts have to yield or have to be accepted or rejected in accordance with the finding arrived at on appraisal of direct oral evidence . ...A medical witness called in as an expert is not a witness of fact. His evidence is really of an advisory character given on the facts submitted to him." The above judicial decisions and legal literature will show that whilst the opinion of expert being a guide to Court it is the Court which must come to its own conclusion with regard to the issues of the case.

When more than 50 percent of the surface of the body is burnt, are the injuries fatal?

In the present case, what is the medical evidence placed before Court in this regard? Both sides of the body were burnt. Burns on the anterior side from face to waist and on the posterior side from neck to waist were found. Sixty five percent of the surface of the body was burnt. Burns were infected and septicemia was set in as a result of the infected burns. She was given medical treatment for 17 days and died in the General Hospital Ratnapura.

'Sufficient to cause death in the ordinary course of nature means the injury, if left to the nature without resorting to proper medical remedies and skillful treatment, resulting in death. In the present case, the injuries even after being treated in Godakawela Hospital and General Hospital at Ratnapura resulted in the death of the victim.

Thus it can't be said that the injuries were not sufficient to cause death in the ordinary course of nature. This position goes to show that the injuries were sufficient to cause death in the ordinary course of nature.

Modi in his book titled "Medical Jurisprudence and Toxicology" 12th edition page 184 referring to burns of a human body states thus: "There is marked fluid loss resulting in shock when over 20 percent of the body is affected and usually over 50 percent is fatal." Modi at the same page states thus: "Burns of the genital organs and lower part of the abdomen are often fatal." "... In supportive cases death may occur after five six weeks or even longer." (*ibid* pg. 186.)

Taylor says that after the fourth day of the injury, "the chief danger to life is the occurrence of sepsis in the burned areas." (See Taylor's Principles and Practice of Medical Jurisprudence 12th edition Vol. I page 331.)

Supreme Court of India in *Sudarshan Kumar* v *State of Delhi,*(9) considering the above medical jurisprudence affirmed the conviction of murder of a victim who died of Septicemia following infected ulcers caused by acid burns which were inflicted by the accused twelve days before the death.

In *Sudarshan Kumar's* case *(supra)* the facts are as follows:

"The accused poured acid on the body of the deceased who died in consequence thereof. It was very clear from the medical evidence that the injuries caused to the deceased were of a dangerous character and were sufficient collectively in the ordinary course of nature to cause death. The medical evidence was clear that 35% of the surface of the body of the deceased was burnt as a result of the injuries received by her and that if the burns exceeded 30%, the same would be dangerous to life. It was also clear from the prosecution evidence and the dying declaration of the deceased that the accused threatened the deceased that if she did not marry him, she will have a lingering death. Supreme Court of India held: "that the act of the accused in pouring acid on the body was a pre-planned one and he intended to cause the injury which he actually caused. As the injuries caused were sufficient in the ordinary course of nature to cause death, the accused was guilty of an offence punishab under Section 302. The fact that the deceased lingered for about 12 days would not show that the death was not the direct result of the act of the accused in throwing acid on her. So also the fact that the deceased developed

symptoms of malaena and respiratory failure and they also contributed to her death could not in any way affect the conclusion that the injuries caused by the acid burns were the direct cause of her death."

Section 302 of the Indian Penal Code prescribed the punishment for those who are guilty of murder.

In the present case, burns were found from face/neck to waist. That is, according to the doctor, 65 percent of the surface of the body. In my view, prosecution has placed sufficient evidence for court to conclude that the injuries found on the body of the deceased were sufficient to cause death in the ordinary course of nature. In the light of the above medical jurisprudence and the legal literature, in the present case I ask the question: Were the injuries sufficient to cause death in the ordinary course of nature? This question has to be answered in the affirmative. Thus, there is no doubt that the injuries were sufficient in the ordinary course of nature to cause death.

The person who inflicted the injury will be held to have caused the death of the victim if the nexus between the injuries and the cause death is established.

Premawathi, the victim in the instant case, died due to septicemia following infected ulcers. Infected ulcers were caused as a result of the burns inflicted by an act of the appellant. Thus direct nexus between the burns and the cause of death is established.

In *Queen* v *Mendis Gratiaen*[10] J. held: "Where toxaemia supervened upon a compound fracture which resulted from a club blow inflicted by the accused and the injured person died of such toxaemia -

Held that as the injured man's death was not immediately referable to the injury actually inflicted but was traced to some condition which arose as a supervening link in the chain of causation, it was essential in such cases that the prosecution should, in presenting a charge of murder, be in a position to place evidence before the Court to establish that 'in the ordinary course of nature'. there was a very great probability (as opposed to a mere likelihood) (a) of the supervening condition arising as a consequence of the injury inflicted, and also (b) of such supervening condition resulting in death."

In *Abeysundara* v *Queen*[11] Alles, J. remarked: "The accused-appellant, who was charged with murder, was convicted at the trial of culpable homicide not amounting to murder. The deceased, who was stabbed on the abdomen by the appellant, was operated on the same day and the injuries were healing at the time of her death nearly two weeks later. A post-mortem examination showed that death was due to cardio-respiratory failure following extensive broncho-pneumonia of the lung. According to the medical evidence, broncho-pneumonia was a possibility and not a probability, and there was a reasonable doubt whether the death of the deceased was, as a result of the injuries inflicted by the appellant.

Held, that, on the medical evidence led, the charges of murder or culpable homicide not amounting to murder should have been withdrawn from the consideration of the jury. Accordingly, the verdict should be altered to one of attempted culpable homicide not amounting to murder."

In *Abeysundara's* case (*supra*) there was a reasonable doubt whether the death was as a result of the injuries inflicted by the appellant. But in the instant case, I have pointed out the existence of the direct nexus between the burns caused by the appellant and the cause of death and as such *Abeysundara's* case has no application here.

In *Sumanasiri* v *Attorney-General* (*supra)* His Lordship Justice Jayasuriya held: "Death was traceable to the direct cranio-cerebral injury inflicted by the first accused-appellant on the head of the deceased with a heavy sledge hammer using considerable force. The prosecution case thus comes within the purview of clause 3 to Section 294 of the Penal Code. An accused person is liable not only for the direct consequences of his act but he is equally liable for the consequences of any supervening condition which is directly traceable to his act."

In *R* v *Smith*[12] at 198, Lord Parker CJ, stated thus; "It seems to the Court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating."

In *Regina* v *Blaue*[13] the facts are as follows: "The defendant stabbed young woman of 18 with a knife, which penetrated her lung.

She was taken to hospital where she was told that a blood transfusion and surgery were necessary to save her life. She refused to have blood transfusion on the ground that it was contrary to her religious belief as Jehovah's Witness and she died the following day. The cause of death was bleeding into the pleural cavity, which would not have been fatal if she had accepted medical treatment when advised to do so. The defendant was charged with murder. The judge, in directing the jury on the issue of causation, said that they might think that they had little option but to find that that the stab wounds were still an operative or substantial cause of death when the victim died. The defendant was convicted of manslaughter on the ground of diminished responsibility. The prosecution admitted at the trial that had she had a blood transfusion when advised to have one she would not have died. The evidence called by the prosecution proved that at all relevant times she was conscious and decided as she did deliberately, and knowing what the consequences of her decision would be. The contention of the defence was that her refusal to have blood transfusion had broken the chain of causation between the stabbing and her death." *Held:* "dismissing the appeal, that the death of the victim was caused by a loss of blood as a result of the stab wounds inflicted by the defendant and the fact that she had refused a blood transfusion did not break the causal connection between the stabbing and the death; that since the criminal law does not require the victim to mitigate her injuries, and since assailant was not entitled to claim that the victim's refusal of medical treatment because of her religious beliefs was unreasonable, the jury were entitled to find that the stab wounds were an operative or substantial cause of death."

In *R* v *Smith* (*supra*) the deceased person who was a soldier received two bayonet wounds from the accused, one in the arm and one in the back. The injury in the back, unknown to any body, had pierced the lung and caused haemorrhage, A fellow member of his company (another soldier) tried to carry him to the Medical Reception Station. On the way he tripped over a wire and dropped the victim. He picked up him again, went a little further, and fell causing the victim to be dropped again. Ultimately the victim was, with the help of the others, brought into the Medical Reception Station. The Medical Officer at the station and his orderly who were trying to cope up with a number of other urgent cases did not appreciate the seriousness of the victim's condition. He died after he had been in the station about

an hour which was about two hours after the original stabbing. There was evidence that there was a tendency for a wound of this sort to heal and for haemorrhage to stop. Dr. Camps, who gave evidence for the defence, said that his chances of recovery were as high as seventy five percent. It was contended on behalf of accused if there had been any other cause whether resulting from negligence or not and if something had happened which impeded the chances of the victim recovering then the death had not resulted from the wound inflicted by the accused. Lord Parker CJ rejecting the said argument and affirming the conviction of murder said: "It seems to the Court that if at the time of death the original wound is still an operating cause and a substantial cause, then death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wound is merely the setting in which another cause operates, can it be said that death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of its history can it be said that death does not flow from the wound."

Lord Parker CJ, in the above case, did not follow *R* v *Jordan*[14]. Referring to that case Lord Parker CJ said: "The Court is satisfied that *R* v *Jordan* was a very particular case depending on its exact facts. It incidentally arose in the Court of Criminal Appeal on the grant of an application to call further evidence, and, leave having been obtained, two well-known medical experts gave evidence that in their opinion death had been caused, not by the stabbing, but by the introduction of Terramycin after the deceased had shown that he was intolerant to it and by the intravenous introduction of abnormal quantities of liquid. It also appears that, at the time when it was done, the stab wound, which had penetrated the intestine in two places, had mainly healed. In those circumstances the Court felt bound to quash the conviction..."

It is pertinent to quote a passage from the judgment of Lord Wright. In *Lord* v *Pacific Steam Navigation Co. Ltd., the Oropsea*[15] where His Lordship said that to break the chain of causation" "It must always be shown that there is something which I will call extraneous, something unwarrantable, a new cause coming in disturbing the sequence of events, something that can be described as either unreasonable or extraneous or extrinsic." This quotation was cited with approval and applied by Lord Parker CJ in *R.* v *Smith* (*supra*).

In *Mendis's* case (*supra*) both accused attacked the deceased with

a sword and a club and the deceased received a compound fracture in his right leg. The death of the deceased was due to toxaemia from gas gangrene following the compound fracture of the right leg. Medical opinion was that gangrene which was quite a common infection in Ceylon was brought by bacterial infection. Thus the operating and substantial cause appears to be the compound fracture of the leg. Therefore it is possible to argue that in *Mendis's* case the causal connection between death and the compound fracture was not broken. On a comparison, the judgment in *Mendis's* case does not accord with the sacred and respected views expressed by Lord Parker CJ in *R* v *Smith* (*supra*). The judgment of Lord Parker CJ was followed in *Regina* v *Blaue* (*supra*). Justice Jayasuriya, having considered the *Mendis's* case, applied the *dicta* of Lord Parker CJ in *Sumanasiri* v *AG (supra).* Justice Gratiaen in *Mendis's* case stated thus: "As the injured man's death was not immediately referable to the injury actually inflicted but was traced to some condition which arose as supervening link in the chain of causation ..." Thus, if, in a case where the injured man's death was immediately referable to the injury actually inflicted by the accused, the judgment delivered in *Mendis's* can't have an application to such a case. In the present case I have, earlier, pointed out the establishment of direct nexus between the burns inflicted by the appellant and cause of death. Further according to Modi's Medical Jurisprudence (supra) page 184 if the body is burnt over 50% such injuries are fatal. Medical Jurisprudence by Taylor (supra) page 331 says that 'the chief danger to life is the occurrence of sepsis in the burned areas'. It is therefore seen that the death of the deceased in the instant case, was immediately referable to the injuries inflicted by the appellant. Thus the judgment delivered in *Mendis's* case has no application to this case.

In the present case I would like to apply the dictum of Lord Parker CJ and hold that the death of the deceased was caused as a result of the act of the appellant.

In the light of the above judicial decisions, I hold that in a case of murder even if the death of the victim was not directly due to the injuries inflicted by the accused but due to other conditions (such as septicemia) occurred as a result of the injuries inflicted by the accused it is justifiable to conclude and should conclude that it was the act of the accused that caused the death of the victim.

When a victim died of septicemia following infected ulcers occurred as a result of burns inflicted by the accused, the contention that the accused should be exonerated from the charge of murder on the basis that he did not inflict the injuries that caused the death namely septicemia is wholly untenable and should be rejected.

Since the learned President's Counsel advanced an argument before us that the prosecution had failed to establish the charge of murder under third limb of Section 294 of the Penal Code, I would like to consider whether this argument is tenable. In this regard, I must consider the ingredients that must be proved under third limb of Section 294 of the Penal Code. This matter was considered at length by the Indian Supreme Court in *Virsa Singh* v *State of Punjab*(16). Indian Supreme Court discussing the third limb of Section 300 of the Indian Penal Code which is in terms identical with Section 294 of the Ceylon Penal Code observed as follows: "To put it shortly, the prosecution must prove the following facts before it can bring a case under Section 300 'thirdly';

First, it must establish, quite objectively, that a bodily injury is present;

Secondly, the nature of the injury must be proved; These are purely objective investigations.

Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say that it was not accidental or unintentional or that some other kind of injury was intended.

Once these elements are proved to be present, the inquiry proceeds further and ,

Fourthly, it must be proved that the injury of the type just described made up of the three elements set out above is sufficient to cause death in the ordinary course of nature. This part of the inquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout) the offence is murder under Section 300 thirdly. It dose not matter that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature .... Once the intention to cause bodily injury actually found to be present is proved, the rest of the inquiry is purely objective and the only question is whether, as a matter of purely objective inference, the

injury is sufficient in the ordinary course of nature to cause death." This judgment was cited with approval in so many later cases such as *Rajwant Singh* v *State of Kerala*[17], *Hajinder Singh* v *Delhi Administration*[18], and *State of Maharashtra* v *Arun Savalaram*[19].

In *State of Maharashtra* v *Arun Savalaram (supra)* Indian Court observed thus: "For the application of this clause it must be first established that an injury is caused, next it must be established objectively what the nature of that injury in the ordinary course of nature is. If the injury is found to be sufficient to cause death one test is satisfied. Then it must be proved that there was an intention to inflict that very injury and not some other injury and that it was not accidental or unintentional. If this is also held against the offender the offence of murder is established."

Their Lordships of the Indian Supreme Court considered the provisions of Section 300 of the Indian Penal Code in *Rajwant Singh* v *State of Kerala*[20] at 1878 and remarked thus: "Third clause the intention of causing bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary course of nature the offence is murder whether the offender intended causing death or not and whether the offender had a subjective knowledge of the consequences or not."

In order to establish a charge of murder under third limb of Section 294 of the Penal Code, prosecution must prove the following ingredients beyond reasonable doubt.

1. The accused inflicted a bodily injury to the victim.
2. The victim died as a result of the above bodily injury.
3. The accused had the intention to cause the above bodily injury.
4. The above injury was sufficient to cause the death of the victim in the ordinary course of nature.

Conclusion

In the instant case, the fact that the appellant caused injuries to the victim was proved. The appellant came to the boutique and threw an object similar to a glass bottle. Immediately thereafter Premawathi

was in flames and the boutique was engulfed in flames. Thus the intention of the appellant to inflict injuries to Premawathi was proved. I go one stop further and say that the intention of the appellant was not only to inflict bodily injury but to cause death of the victim. Thus it is clear that the appellant had done this act with the intention of causing death of the deceased. The injuries inflicted by the appellant were sufficient to cause death in the ordinary course of nature. The victim died as a result of the injuries inflicted by the appellant. Thus the prosecution had proved the aforementioned four ingredients in limb three of Section 294 of the Penal Code beyond reasonable doubt. Applying the principles enunciated in *Virsa Singh* v *State of Punjab (supra)*, I hold that the charge of murder had been established under limb three of Section 294 of the Penal Code. I therefore reject the contention of the learned President's Counsel that the prosecution had failed to establish the charge of murder Section 294 of the Penal Code.

It is worthwhile to consider whether the act of the appellant comes under the 4th limb of Section 294 of the Penal Code which reads as follows: *"Except in the cases hereinafter excepted, culpable homicide is murder.*

Firstly - (omitted)

Secondly - (omitted)

Thirdly - (omitted)

Fourthly - If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and commits such act

without any excuse for incurring the risk of causing death or such injury as aforesaid."

The victim was in her boutique at the time of the incident. The prosecution case was that the appellant threw an object like a bottle. Immediately thereafter the victim was in flames and the bo utique was engulfed in flames. Thus the appellant knew that it was imminently dangerous that it must in all probability cause death of the inmates of

the boutique. By his act bodily injuries have been caused to the victim which were not only likely to cause death but are sufficient in the ordinary course of nature to cause death. This act was done by the appellant without any excuse. Thus, in my view the appellant was

guilty of murder even under the fourth limb of Section 294 of the Penal Code.

Evidence led at the trial revealed that the appellant threw a glass object to the deceased's face. Immediately thereafter a fire broke out and the deceased was in flames. This shows that the appellant has done an act with the intention of causing death of the deceased. According to 1st limb of Section 294 if the act by which the death is caused is done with the intention of causing death then the accused is guilty of murder. Thus the appellant was guilty of murder even under the 1st limb of Section 294 of the Penal Code. I am unable to find fault with the learned trial judge who found the appellant guilty under the 1st limb of Section 294.

For the above reasons the grounds urged by the learned President's Counsel are untenable and should fail. Hence, I uphold the conviction and the sentence imposed on the appellant and dismiss the appeal

Appeal dismissed.

RANJITH SILVA, J. - I agree

Appeal dismissed.

RATHNAYAKE AND OTHERS

v

UNIVERSITY GRANTS COMMISSION AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
SISIRA DE ABREW, J.
CA 1689/2006
FEBRUARY 6, 8, 2007

Writ of certiorari – Quashing decision rejecting application for University admission already registered to follow a Course – Applicability of Rule 6.2 of the rule of the University Grants Commission – Is there a last date for registration? – Decision arbitrary or unreasonable – Rules must not be partial and unequal among students belonging to the same class/category.

The petitioners sought to challenge the decision of the 1-3 respondents rejecting the application for University admission. The petitioners were registered in July 2006 to follow a Course of study (NDT) at the Institute of Technology of the University of Moratuwa (ITUM) on the basis of the results of the examinations held in 2005 (A' Level). As they obtained better results at the examination held in 2006, they submitted their applications seeking admision to Universities for the academic year 2006/07,and before doing so they got their registrations at the ITUM cancelled in October 2006. The respondents refused to accept the applications on the basis that, they had violated Rule 6.2 of the U.G.C.

It was contended by the respondents that, since the petitioners had not withdrawn their registration of the ITUM within a period of 30 days from the last date for the registration of the NDT course the applications have to be rejected.

Held:

(1) According to Rule 6.2 a student who is already registered for a particular Course of study at a Higher Educational Institute set up under the Universities Act No.16 of 1978 could apply for admission to another course of study on the basis of the results of the G.C.E. (A/L) examination held in a later year to another course of study only if he/she had withdrawn his/her registration within a period of 30 days from the last date for registration.

(2) The ITUM has not specified a last date for registration of students for the NDT course registration had been done on various dates – Rule 6.2 does not contemplate 'last dates' it only specifies 'a last date'. The Rule does not state that the student must withdraw his registration within a period of 30 days fromthe last date of his registration.

(3) The Rule in its application must not be partial and unequal among students who belong to the same class or category.

Thus there is no violation of Rule 6.2.

(4) The 1st - 3rd respondents did not consider whether the petitioners had in fact violated Rule 6.2. The impugned decision of the 1-3 respondents is arbitrary and unreasonable.

APPLICATION for a *Writ of Certiorari.*

Cases referred to:

1. *Nadeeka Hewage* v *UGC* SC No. 627/2002 SCM 8.8.2003.
2. *Fernando* v *University Grants Commission* CA 2524/2004 CAM 24.4.2006.
3. *Wheeler* v *Leicester City Council* 1985 AC 1054 (HC).
4. *Rex* v *Tynemouth District Council* 1896 2 QB 219.
5. *Regina* v *Birmingham Licensing Planning Committee* 1972 QB 140.
6. *Associated Provincial Picture House Ltd.* v *Wednesbury Corporation* 1948 1KB 223d 229.

Dulinda Weerasuriya with *Amila Vithana* for petitioners.
Kumar Arulananthan DSG for respondents.

February 22, 2007

SISIRA DE ABREW, J.

This is an application for a *writ of certiorari* to quash the decision of the 1st to 3rd respondents rejecting the applications of the petitioners for university admission. The petitioners further seek a *writ of mandamus* directing the 1st to 3rd respondents to consider the applications of the petitioners when making selection for admission to universities for the academic year 2006/2007.

The petitioners got themselves registered in July 2006 to follow a course of study known as National Diploma in Technology (hereinafter referred to as NDT) at the Institute of Technology of the University of Moratuwa (ITUM) for the academic year 2006/2007 on the basis of the results that they obtained at the GCE Advanced Level (AL) Examination held in 2005. The petitioners, who obtained better results at the GCE (AL) Examination held in 2006, submitted their applications to the 1st respondent seeking admission to universities for the academic year 2006/2007. However before doing so they got their registrations at the ITUM cancelled in October 2006. The 1st to the 3rd respondents have refused to accept/or entertain the said applications of the petitioners seeking admission to universities for the academic year 2006/2007 on the basis that they had violated rule 6:2 of the rules of the University Grants Commission printed in the Hand Book titled "*Admission to Undergraduate Courses of the Universities of Sri Lanka*" (hereinafter referred to as rule 6:2) marked as 2R2. Learned Counsel for the petitioners contended that the said decision of the 1st to 3rd respondents was *ultra vires* and an error on the face of the record. Learned Counsel further contended that the 1st to 3rd respondents had acted in violation of the rules of natural justice since the petitioners were not given an opportunity to explain as to why rule 6:2 was not applicable to them. Learned DSG for the respondents, in reply, contended that since the

petitioners had not withdrawn their registrations at the ITUM within a period of thirty days from the last date for the registration of the NDT course the applications of the petitioners had been rightly rejected. He further contended that the petitioners had violated rule 6:2. Learned Counsel for the petitioners, however, contended that there was no last date for the registration of the NDT course since the registration had been done at various stages as evidenced in P5(a), P5(b), P10, P11, P15 and P16.

The dates of registration in the said letters issued by the ITUM run from 15.7.2006 to 30.11.2006.

I now turn to these contentions. In order to appreciate the said contentions, it is necessary to consider rule 6:2 in detail which is reproduced below:

"A student who is already registered for a particular course of study at a Higher Educational Institution/Institute set up under the Universities Act No. 16 of 1978 including the institutes mentioned in paragraph 1.4 above could apply for admission to another course of study on the basis of the results of a GCE (A/L) examination held in a later year, only if he/she had withdrawn his or her registration within a period of 30 days from the last date for registration. Candidates who have not withdrawn their registration within the stipulated period of time given by the respective Higher Educational Institution/Institute will not be eligible for admission as they come under 6.1(b) above. The 30 day concession stated herein will not be given to candidates who will get selected to fill a vacancy and who will be selected to any course of study under paragraph 18(a) (b) (c) (d) (e) and 19 of this handbook."

The ITUM is included in paragraph 1.4 of 2R1. According to rule 6:2 a student who is already registered for a particular course of study at a Higher Educational Institution/Institute set up under the Universities Act No. 16 of 1978 could apply for admission to another course of study only if he/she had withdrawn his/her registration within a period of 30 days from the last date for registration. The words "within a period of 30 days from the last date for registration" need consideration. Was there a last date for registration for the NDT course at the ITUM? The

learned DSG placing reliance on paragraphs 4 of P5(a), P5(b), P10, P11, P15, and P16 contended that the dates given in those letters should be considered as last dates for registration. Paragraph 4 of the said letters reads as follows: "If you do not register on this date, the place offered to you will be given to another applicant in the waiting list." As I pointed earlier the registration of students for the NDT course had been done on various dates. How can, then. there be a last date for registration? Can it be contended that in respect of one student the last date for registration is 15.7.2006 and for another 30.11.2006? One should not forget, in this connection, the date for registration given in P15 is 30.11.2006 and in P5(a) it is 15.7.2006. It is significant to note that rule 6:2 does not contemplate "**last dates**" it only specifies "**a last date**". If the contention of the learned DSG that the dates given in letters P5(a), P5(b), P10, P11, P15, and P16 should be considered as last dates, then one student has been given time till 15.8.2006 to withdraw his registration whilst the other student has been given time till 30.12.2006. In between 15.8.2006 and 30.12.2006, if the cut off mark of the Z-score is released, then the student who has been given time till 30.12.2006 will be on an advantageous position than the other student who may sometimes have obtained better results than the other one. In this way a student placed at a lower level of Z-score can get selected to universityover a student placed at a higher level of Z-score. From the above observations it appears that there is no uniformity in the application of the last date for registration by the ITUM. The last date for registration varies from one student to another. The rule of certainty is that in order to be binding on the parties it should not be ambiguous. The rule 6:2 contemplates only on one date to be given by the Higher Educational Institution as the "last date for registration". This rule does not permit different dates being given to different students. The rule in its application must not be partial and unequal among students who belong to the same class or category. Therefore, in my view, the impugned decision of the 1st to 3rd respondents is unrasonable. Under these circumstances can it be said that rule 6:2 has been applied uniformly to all students. The answer is no. Further what rule 6:2 says is that the student must withdraw his/her

registration 'within a period of 30 days from the last date for registration. But it does not say that the student must withdraw his/her registration within a period of 30 days from the last date **of his registration**. For these reasons, I am unable to agree with the contention of the learned DSG. Learned DSG tried to argue that 20.9.2006 should be considered as the last date for registration since the Inauguration Ceremony and the Orientation Course have commenced on 19.9.2006 and 20.9.2006 respectively. (Vide 4R2). But this argument is negated by the decision of the ITUM to register students even after 20.9.2006. This is evidenced by P15 by which the ITUM has invited one student to register himself on 30.11.2006 to follow the NDT course. It has to be noted that the student referred to in P15 has been invited not to fill a vacancy. Therefore it is seen that the ITUM has continued to register students even after the commencement of the Orientation Course. This shows that the ITUM has not specified a last date for registration for the NDT Course. Thus the contention which the learned DSG tried to advance should fail. Considering all these matters, I hold the view the ITUM has not specified a last date for registration for the NDT course. In this regard it is appropriate to consider a passage from the judgment of His Lordship Justice Mark Fernando delivered in the case of *Nadeeka Hewage* v *University Grants Commission and others*(1): "Assuming that the existing rule 6:2 is valid, it is nevertheless necessary to remember that access to higher education is a right won by a small minority of students by their sustained effort over a considerable period of time, and not by luck or by chance. ....Rule 6:2 must be read as conferring a right or option to a registered student in respect of access to higher education for a subsequent year, and not as providing a mere gamble; and as enhancing access based on merit rather than restricting access. It follows, that a student must be given all relevant information subject to any reasonable requirement of confidentiality, necessary for the exercise of his option by means of an informed and reasoned decision as to his prospects of success. Rule 6:2 must not be reduced to the level of a chance to try his luck."

The above passage was considered by Sripavan J. in *Fernando* v *University Grants Commission*(2). Considering the above observations, I hold the view that the impugned decision of the 1st to 3rd respondents is unreasonable. Having considered all these matters, it is safe to conclude that the ITUM had not specified a last date for registration of the NDT course and as such there is no violation of rule 6:2 by the petitioners. Therefore in my view the 1st to the 3rd respondent came to the wrong conclusion that the petitioners had violated rule 6:2. This, in my view, is an error on the face of the record. The petition of the petitioners should be allowed on this ground alone. Learned DSG contended that the students mentioned in P5(a), P5(b), P10, P11, P15 and P16 were invited to register for the NDT course to fill vacancies and as such dates mentioned in these letters should be considered as last dates. But he failed to submit the last date for registration of the NDT course given by the ITUM. Further P5(a), P5(b), P10, P11, P15 and P16 do not state that the students mentioned therein were invited to fill vacancies. If the argument of the learned DSG is correct then the 30 day concession given in rule 6:2 will not be applicable to the petitioners. The Senior Assistant Secretary of 1st respondent, by 4R10, made inquiries inquiries from the Director of the ITUM whether the petitioners had withdrawn their registration within a period of thirty days from the last date for registration. This means the 1st respondent has admitted that 30 day concession was applicable to the petitioners. Then the argument of the learned DSG that the petitioners were invited to fill vacancies also fails. For these reasons I reject the contention of the learned DSG. Considering the above matters I hold the view that the impugned decision of the 1st to 3rd respondents is arbitrary and unreasonable. What happens when the decision of the respondents is arbitrary and unreasonable?

In the case of *Wheleer* v *Leicester City Council*(3), (House of Lords) "a city Council had refused, contrary to its previous practice, to allow a local rugby football club to use the city's sports ground because three of its members had played in South Africa." The House of Lords held that it was unreasonable to punish the club for not conforming to the Council's political

attitudes. The Council's decision was quashed. Lord Templeman in the above case remarked thus: "A private individual or a private organization cannot be obliged to display zeal in the pursuit of an object sought by a public authority and cannot be obliged to publish views dictated by a public authority. ..... The council could not properly seek to use its statutory powers of

management or any other statutory powers for the purposes of punishing the club when the club had done no wrong."

In the case of *Rex* v *Tynemouth District Council*[4] Lord Russell CJ held as follows. "A Local Authority was not entitled, as a condition of approving building plans, to stipulate that the

applicant should provide and pay for sewers outside his own property." Issuing the *writ of mandamus* against the Council, Lord Russell CJ further held that this decision of the Council was utterly unreasonable.

In the case of *Regina* v *Birmingham Licensing Planning Committee*[5], "An elaborate system had been set up by the statutory licensing planning committee in Birmingham to deal with the licences relating to the many public houses destroyed in the Second World War. With Home Office approval and for some twenty years they had refused to approve applications unless the applicant purchased outstanding licences sufficient to cover his estimated sales. The main object of the policy was to relieve the city of the cost of compensating the holders of the outstanding licences. At the current market price of these licences the proprietors of a large new hotel would have had to pay over 14000 pounds. At their instance the Court of Appeal condemned the whole system as unreasonable." Lord Denning MR said: "I think it is unreasonable for a licensing planning committee to tell an applicant: 'we know that your hotel is needed in Birmingham and that it is well placed to have an on-licence, but we will not allow you to have a license unless you buy out the brewers.' They are taking into account a payment to the brewers which is a thing they ought not to take into account."

Lord Greene MR in the case of *Associated Provincial Picture House Ltd.* v *Wednesbury Corporation*(6) at 229 stated thus: "It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably."

In the present case, did the 1st to 3rd respondents call their attention to the matters which they were bound to consider? Did the 1st to 3rd respondents consider whether the petitioners had in fact violated rule 6:2. I think not. On this ground alone the impugned decision of the 1st to 3rd respondents will have to be quashed.

For the reasons set out in my judgment. I, issuing a *writ of certiorari*, quash the decisions of the 1st to 3rd respondents refusing to accept/or entertain the applications of the petitioners for admission to universities and I direct the 1st to 3rd respondents by way of *mandamus* to consider the applications of the petitioners for admission to universities for the academic year 2006/2007.

SRIPAVAN, J. - I agree

Application allowed.