THE
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[2005] 2 SRI L. R. - Part 9

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2. *Werasinghe Vs. Gamage* - SC 682/2001-SCM 19.09.02

J. C. Weliamuna with *Shantha Jayawardena* for petitioner.

Yuresha de Silva, State Counsel for respondents.

Cur. adv. vult

ERIC BASNAYAKE, J

The petitioner filed this application seeking a writ of certiorari to quash the decision of 1st to 3rd respondents not recommending the petitioner for promotion and a writ of mandamus compelling the respondents to recommend and promote the petitioner to the rank of Squadron Leader from 06.09.1999.

The petitioner passed out as a Medical Doctor from Zaporoazhye Medical Institute of the Soviet Union in 1992. On 24.08.1992 (P1) the Sri Lanka Medical Council had accepted the petitioner's foreign degree. On 26.03.1993 she was placed in the merit order list of medical graduates for the post of Intern Medical Officers for the year 1993. She had been placed at 394 out of 423 officers. On 31.03.1993 the petitioner was provisionally registered as a Medical Practitioner at the Sri Lanka Medical Council under section 31 of the Medical Ordinance (P3, P3a). The petitioner having completed her internship received her post intern appointment at the General Hospital, Galle.

The petitioner had applied for the post of Medical Officer in the Sri Lanka Air Force in response to an advertisement appearing in The Sunday Observer on 24.04.1994 (P7).

The advertisement invited applications for Commissioned officers in the Medical and Dental Branches in the Regular and Volunteer Air Force. The minimum qualifications required were MBBS or BDS/LDS or **Equivalent**

and provisional or full registration with the Sri Lanka Medical Council. Those following **internship too** were eligible to apply and the **selected candidates would be commissioned in the rank of Flight Lieutenant** or Squadron Leader in keeping with their qualifications and experience. The advertisement said **"Excellent prospects for further promotions exist for those seeking to make a career in the Air Force"** (emphasis added).

The petitioner was called for an interview on 02.08.1994 which she attended and was selected on the 2nd itself as a student officer of the Regular Force. She was commissioned as a Flight Lieutenant after successful completion of her training.

The petitioner states that a Medical Officer who serves in the Air Force for a continuous period of not less than 5 years shall on the recommendation of the Commander and with the approval of Her Excellency the President of Sri Lanka, be promoted to the rank of Squadron Leader provided he has passed such examinations. In terms of the Air Force Order 375 (P12) the only examination the petitioner is required to pass is the Officers Promotion Examination B which would qualify her for the promotion to the rank of Squadron Leader. The petitioner passed Examination B on 16.11.1998 (P13). The respondents marked 2R3 the Regulations 1961 made by the Minister of Defence and External Affairs under section 155 of the Air Force Act, 41 of 1949.

Nos. 5, 6 and 8 of those Regulations are as follows :-

> 5. "Every medical or dental officer of the Air Force shall on appointment be commissioned in the rank of Flight Lieutenant.
>
> 6. (1) **A medical or dental officer who has served in the Air Force for a period of eight years shall, on the recommendation of the Commander of the Air Force and with the approval of the Governor-General, be promoted to the rank of Squadron Leader, provided that he has passed such examination as may be determined in that behalf by the Commander of the Air Force.**
> 7. .....

8. Notwithstanding the provisions of regulations 6 and 7 of these regulations the Commander of the Air Force may, in such circumstances as he may deem exceptional, determine the rank of a medical or dental officer. Every such determination shall be made with the concurrence of the Permanent Secretary, Ministry of Defence and External Affairs and with the approval of the Governor-General".

The petitioner states that although eligible, she was not promoted and states that she made constant inquiries from the 2nd respondent with regard to her promotion without any result. The petitioner was summoned for an interview by the 2nd respondent and at the interview held on 15.07.2003 the petitioner was informed that she has to pass Act 16 examination to be promoted. However the petitioner was not officially informed of the reason not to promote her in spite of her agitation (P17).

The petitioner states that she became aware of a letter sent by the Director General of Health Services to the 2nd respondent on 19.12.2003. This letter admittedly was in response to a query made by the 2nd respondent on 12.11.2003. The 2nd respondent had apparently sought advice from the Director General of Health in terms of Regulation 10 of the regulations of 1961 which states thus,

"the rates of pay and allowances of medical and dental officers of the Air Force shall be revised to equate them to those recommended and accepted at any future date for medical and dental officers in the Department of Health Services".

The letter (2R2) addressed to the Director General of Health with the heading **Appointment of medical officers with foreign degrees - Sri Lanka Air Force** states thus,

"The Sri Lanka Air Force has enlisted medical officers, who have obtained their basic MBBS/MD qualification (recognized by the Sri Lanka Medical Council) from abroad. However some of the SLAF medical officers have not completed their Act 16 examination.....to obtain full registration from the Sri Lanka Medical Council. This has created dilemma in placing them on a proper salary scale.

Hence it is kindly requested that the SLAF is advised regarding the salary scale pertaining to the following categories.

a ....

b ....

c. Medical officer with provisional registration and has completed internship training but not completed Act 16.

d. .....

The Director General states in reply by his letter (P 15) dated 19.12.2003 as follows :-

1.....

2. **Up to 1997 overseas medical graduates obtained their provisional registration before completing Act-16 examination**, once their degrees were accepted by the medical council they were then selected for the Internship. Act 16 examination is not compulsory for this purpose but they have to complete Act 16 to obtain full registration.

3. From 1997 Sri Lanka Medical Council has made Act 16 a compulsory requirement for the provisional registration and these medical officers cannot start Internship without the provisional registration. Therefore Act-16 examination at present is a compulsory qualification to join the Department of Health.

4. **Those Medical Officers (medical officer who has completed medical degrees before 1997) absorbed into the department without Act 16 examination are entitled for their grade promotion and salary increments as per the medical officers with full registration. Once they complete two years of service and pass E-bar examination they can be confirmed in service with the promotion to grade II (emphasis added).**

The petitioner states that she has a reasonable expectation of being promoted without having to pass Act 16 examination. The petitioner also complains that Squadron Leader K. R. Jayalath, a Registered Medical

Practitioner, was enrolled as a Pilot Officer and was promoted to the rank of Squadron Leader. The petitioner also complains that one could remain as a Flight Lieutenant only for a period of 11 years. By reckoning the period of stay of the petitioner, she is only left with about few more months in the Air Force.

The petitioner complains that to consider a requirement non existent at the time of enlisting and to introduce a new condition for promotion is unreasonable and arbitrary.

The respondents categorically state that a medical officer having foreign qualifications is required to sit Act 16 examination in order to be fully registered and to be promoted.

Admittedly the petitioner has served in the Air Force until today having been enlisted as a Flight Lieutenant in 1994. The petitioner is a foreign graduate whose degree was accepted by the Medical Council of Sri Lanka. In view of that acceptance she was provisionally registered as a Medical Practitioner. She has completed her internship. Soon after her internship she had seen this advertisement calling for applications to join the Air Force. The Air Force called for applicants with MBBS etc or equivalent qualifications. The first question to be considered is whether those who had obtained degrees from foreign universities had the 'equivalent qualifications'. Then the Air Force wanted provisionally registered ones. Who had provisional registration ? Were those who possessed degrees from foreign universities eligible for such registration ? The advertisement did not specifically call for applications from "fully registered" doctors but first invited the provisionally registered doctors to apply. It called for applications from either or both the provisionally/fully registered doctors. The attraction of the advertisement was for those with provisional registration. It appears that the advertisement was directed at the foreign graduates. This may be due to the dearth of doctors. This is evident by the fact of extending the invitation to interns. Nowhere in the advertisement did it mention of any requirement of having to pass Act 16 examination.

In terms of Regulation 6 (1) a medical or dental doctor shall on the recommendation of the Commander of the Air Force and with the approval of Her Excellency the President be promoted to the rank of Squadron

Leader after eight years of service, provided he or she has passed such examination as may be determined by the Commander. The only examination that is required for promotion is the Officers Examination B which the petitioner had successfully completed.

The petitioner was perturbed when she found some officers junior to her had been promoted. In the meantime the petitioner too was summoned for an interview. The petitioner was summoned as she possessed the necessary qualifications for promotion and not to be informed that her case cannot be considered as she has not obtained the full registration or that she has not passed Act, 16 Examination. It appears that the authorities themselves were not certain with regard to the rules that should be applied. This is what prompted the 2nd respondent to write to the Director General of Health, the letter marked 2R2. In response to this letter the D. G. H. sent P15 to the 2nd respondent which is self explanatory. According to this letter Act 16 became a requirement only after the year 1997. Prior to 1997, doctors without Act 16 were taken to the Department of Health and are entitled to their grade promotions and salary increments as per the medical officers with full registration.

The petitioner joined the Air Force to make it a carrier in view of the "**excellent prospects for further promotion**". It does not appear that the petitioner ever intended to leave the job after eleven years. She had successfully completed the "Officers Examination B" with the intention of rising in her chosen carrier. It may have been humiliating to see others junior to her rise above her position (due to an invalid reason). That period is sufficient for any officer to gain the next promotion. It may be too late for her to choose another carrier now. She had served in several stations in the Force and has a legitimate expectation of getting her promotions in due time.

She was qualified to join the Department of Health as a Medical Practitioner without having to sit Act 16 examination. The Act 16 examination became compulsory only after year 1997. Instead of joining the Department of Health, she chose a carrier in the Air Force. If she was in the Department of Health, without Act 16 examination she would have obtained her promotions provided she passed the Efficiency Bar examination. After serving in the Air Force for nine years, to be told that she needs to pass Act 16 examination is unreasonable.

The respondents reluctantly admit promoting K. R. Jayalath a Registered Medical Practitioner who was enlisted as a Pilot officer in 1987 to the rank of Squadron Leader on 18.11.2001. The respondents state that K. R. Jayalath was promoted after having served as Flight Lieutenant for approximately 10 years. Why does not the petitioner then, having joined the service as Flight Lieutenant and served more than 10 years in that capacity, deserve a promotion ?

In *Dr. Ishanthe Gunatilake* vs. *Vice Admiral H. C. A. C. Tissera, Commander of the Navy and others*[1] Fernando J said "all medical doctors were invited to join as Surgeon Lieutenants, including those who only had "temporary registration", and there was nothing which even hinted at the possibility that "temporary registration" would be given lower priority or might result in a lower rank or position, or that "full registration" must be obtained even later..... There was thus no ambiguity in the advertisement. Had there been an ambiguity, that would have had to be construed *contra proferentem*, and in favour of the petitioner. A notice calling for applications for employment must be clear guide for the honest applicant, and public institutions and their advisers must not resort to strained constructions in order to covert them into devious snares for the unwary.....If the Navy wished to impose any condition, it should have done so in the advertisement or at the stage of appointment". Fernando J held further that "as I had occasion to point out in *Weerasinghe vs. Gamage* [2] an employer must exercise his powers with due care and restraint, for just as it is implicit in every contract of service that the employee shall be loyal, shall treat his superiors with due respect, and shall guard the reputation of the employer, so also it is implicit that the employer in his treatment of employees shall have care for their dignity and reputation and shall not cause them unnecessary personal distress and prejudice. Often distress and prejudice cannot be avoided, but where it can be avoided, it must be avoided. The petitioner was entitled in law to a full explanation, and as a matter of courtesy, to an expression of regret for the alleged error. The impugned message was hardly the kind of signal which builds morale and inspires loyalty and dedication, especially in those called upon to risk their lives in the course of duty ; and a prolonged failure to disclose a reason would have added to the petitioner's stress and frustration, liable to result in poor

performance of duties to the detriment of the Navy" is equally fitting to the facts of the present case.

One could see how desperate the Air force was at that time by not only inviting provisionally registered Medical Practitioners and Interns, but by inviting the petitioner to accept the appointment at the interview itself. This appears to be the first job that the petitioner applied for no sooner than she finished her internship. She too, it appears, accepted the job no sooner than it was offered to her.

In the field of public law, individuals may not have strictly enforceable rights but they may have legitimate expectations. Such expectations may stem either from a promise or representation made by a public body.....Decisions affecting such legitimate expectations are subject to judicial review [2] thus the decision of the respondents not to recommend Judicial remedies in Public Law by Lewis the petitioner for promotion is therefore liable to be quashed. However this court is unable to quash the said decision since it is not before court. However the court issues a writ of Mandamus directing 1 to 3 respondents to make the necessary recommendation within one month to Her Excellency the President to promote the petitioner to the rank of Squadron Leader with effect from 06.09.1999, the date on which others who joined along with the petitioner were promoted. I also award Rs. 25,000.00 as costs of this application to the petitioner payable by the 1st respondent.

SRIPAVAN J. — I agree.

Writ of Mandamus issued.

KARUNARATNE

VS

ATTORNEY-GENERAL

COURT OF APPEAL
BALAPATABENDI, J
SISIRA DE ABREW, J
C.A. 88/2000
H.C. BALAPITIYA HCB 268
MAY 16, 2005
JUNE 29, 2005
JULY 15, 2005
SEPTEMBER 22, 2005
OCTOBER 20, 2005

Penal Code - Section 296 - Murder - Conviction based on circumstantial evidence - Essetial ingredients ? - Evidence reliable - Discrepancies and technical errors - Criminal Procedure Code - Section 279, 283, 436 - Violating the statutory provisions - Procedural irregularity - Could it be cured ?

The accused appellant was convicted after trial for committing murder of one "P" and was sentenced to death. The Prosecution relied solely on circumstantial evidence of three witnesses.

HELD

(i) The primary advantage of circumstantial evidence is that the risk of perjury is minimized since it, unlike direct evidence, does not emanate from the testimony of a single witness. It is therefore more difficult to fabricate circumstantial evidence, than it is to resort to falsehood in the course of giving direct evidence.

(ii) There is no principle of the law of evidence which precludes a conviction in a criminal case based entirely on circumstantial evidence. There are no uniform rules for the purpose of determining the probative value of circumstantial evidence. This depends on the facts of each case.

(iii) Where eveidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors.

(iv) The faliure of the presiding Judge to date the judgment at the time of pronouncing it is only a procedural irregularity curable under section 436 of the Code - it had not occasioned a failure of justice.

APPEAL from the judgment of the High Court of Balapitiya.

Cases referred to :

1. *State of U.P. vs. Dr. Ravindra Prakash Mittal, 1992 2 SCJ 549*
2. *Podi Singho vs. King - 53 NLR 49*
3. *K.vs. Appuhamy 46 NLR 128*
4. *Tamil Nadu vs. Rajendran 1999 Cri J 4552*
5. *State of U.P. vs. M.K. Anthony 1984 2 SC J 236*
6. *King vs Seeder Silva 41 NLR 337*
7. *Iqbal Ismil Sadawala vs. Registrar, High Court, Bombay, AIR 1974 SC 1880*

Ranjith Abeysuriya, PC, with Ms. Thanuja Rodrigo

W.N. Bandara, Deputy Solicitor General for Attorney-General

Cur.adv.vult

January 17, 2006

JAGATH BALAPATABENDI J.

The Accused appellant was indicted for committing murder of one Bolanda Hakuru Dalin *alias* Piyadasa on 24.06.1994. After trial the learned High Court Judge convicted the accused-appellant for murder and sentenced him to death on 16.11.2000.

The prosecution relied solely on circumstantial evidence of the witnesses Alpi Nona, Josalin and Somapala.

The evidence led by the prosecution at the trial briefly as follows :- The witness Alpi Nona had stated that on the day in question around 3.00 p.m. the deceased (her son) was at home, the accused - appellant (Kalu Chutiya)

had come to her house with a bottle in his hand and asked the deceased " අයියා මා එක්ක තරහද ?" " Thereafter, both of them had been in conversation for a long period of time consuming the bottle of liquor (වයින්) and eating " Kurumba". After sometime the witness (mother) had given the deceased two bottles to bring kerosene oil and coconut oil. When (her son) the deceased left her house on his bicycle to bring oil, the accused-appellant had also joined the deceased and sat on the luggage carrier of the bicycle both of them had left home. Thereafter on hearing the people talking that a man had been killed on the road, she had gone to the place of incident and seen her son (the deceased) killed, lying on the road with the bicycle placed on his body.

The witness Josalin had stated that when she was at home around 5 p.m. she had seen two persons fallen on the road near Somapala's house and she could not identify them at a distance of about 20 ft. away, one person dressed in white shirt and a sarong in a seated position moving his hand upward and downward in a stabbing motion, the other person lying flat on the road, little later she had seen the accused-appellant running past her house wearing only a red colour under wear. (at page 91 of the brief) - The witness has stated as follows :-

ප්‍ර තමන්.ඒ ආපු කෙනා අඳුනා ගත්තද ?

උ ඔව් එයාගේ නම සෝමරත්න ගෙදරට කියන්නේ චූටි, විත්තිකරු හඳුනාගනී.

ප්‍ර තමන් ඊට කලින් චූටිව දැකලා තියෙනවද ?

උ එයාත් ගමේනේ නැයොක් වෙනවා අපේ ගෙවල්වලට පස්ස පැත්තේ පාරේ තමයි ඉන්නේ

Thereafter the witness had gone to the scene after arrival of the police and seen the deceased killed lying dead on the road at the place where she saw the incident.

The witness Somapala had stated, on the day in question around 5 p.m. when he was near the well of his house, he had seen the deceased riding a bicycle and the accused - appellant seated on the luggage - carrier; when he came out of the house about 15 to 30 minutes later he had seen the deceased fallen on the road and the accussed-appellant running away

from the scene of crime towards Elpitiya wearing a red colour underwear at page 132 of the brief the witness has stated as follows :-

ප්‍ර ඒ වෙලාවේ සිද්ධිය දැක්කා ද?
උ බයිසිකලය වැටිලා තිබෙනවා දැක්කා

ප්‍ර ඊට අමතර මොනවාද දැක්කේ ?
උ කලු චූටි රතු ලන්කට් එකක් ඇඳගෙන ඇල්පිටිය පැත්තට දිව්වා.

ප්‍ර එතකොට ඩාලිං වැටිලා හිටියේ කොහේද ?
උ අපේ ගේ ඉස්සරහා
ප්‍ර ජොසලින් ගේ ගෙදර තිබෙන්නේ කොයි පැත්තෙ ද?
උ ඇල්පිටිය පැත්තේ

ප්‍ර ජොසලින්ගේ ගෙදර පැත්තට කරුණාරත්න දිව්වේ ?
උ ඔව් පාර දිගේ ගියා. අපේ ගෙදර ලඟ ඉඳලා දිව්වේ.

(at page 134)

ප්‍ර තමන් කිව්වා තමන් ගෙයින් එලියට ආවා ඒ අවස්ථාවේ කලු චූටි දුවනවා දැක්කා
උ ඩාලිං මරපු තැන ඉඳලා දුවනවා දැක්කේ.

The witness Jayasuriya had stated he saw the accused - appellant running towards Elpitiya wearing only a red colour underwear, abusing in foul language. The accused-appellant in his dock statement had admited that he went to the deceased house on the day in question and both of them consumed a bottle of liquor, thereafter he left the house of the deceased with the deceased, and went home in a different direction.

The wife of the accused - appellant Suneetha (called by the defence) in giving evidence had stated, that on the day in question the accused-appellant left home around 2 p.m. dressed in a white shirt and a sarong and came back home around 4.30 p.m. When they were at home around 7p.m. they heard that the deceased had been killed; but did not go out to see the deceased. She knew that there existed an animosity between the accused-appellant and the deceased, prior to this incident the accused-appellant had neither visited the house of the deceased, nor had consumed liquor with the deceased.

At the hearing of the appeal the following grounds were urged by the counsel for the accused - appellant.

1) Whether one person could have possibly caused all the injuries (24 injuries) single handed.

2) Evidence of the witnesses Josalin and Somapala as to the place where they made the statements to the police, contradict the police officer's evidence who recorded their statements, and also belatedess of their statements to the Police.

3) Arrest of another suspect named Gunaratne by the Police and remanded in connection with the case.

4) There was no record made, that the Judgement was pronounced on 16.11.2000, by the trial judge, thus violating the provisions of the sections 279 and 283 of the criminal procedure Code.

Now I would like to deal with the principles governing the evidence of circumstantial nature. Circumstantial evidence may be used to establish the facts in issue in the absence of direct evidence or to supplement and corroborate direct evidence when doubt is cast on it or when the effect of direct evidence, standing by itself is too slender to enable proof of the fact in issue (*Vide*, Law of evidence by Coomaraswamy)

The primary advantage of circumstantial evidence, is that the risk of perjury is minimized since it is unlike direct evidenced, does not emanate from the testimony of a single witness. It is therefore more difficult to fabricate circumstantial evidence, than it is to resort to falsehood in the course of giving direct evidence.

Thus, there is no principle of the law of evidence which precludes a conviction in a criminal case based entirely on circumstantial evidence.

There are no uniform rules for the purposes of determining the probative value of circumstantial evidence. This depends on the facts of each case.

In the case of ***State of U.P. vs Dr. Ravindra Prakash Mittal*** [1] it was held that the essential ingredients to prove guilt of an accused person by circumstantial evidence are :-

1) The circumstances from which the conclusion was drawn should be fully proved :

2) The circumstances should be conclusive in nature;

3) All the facts so established should be consistent with the hypothesis of guilt and inconsistent with innocence;

4) The circumstance should; to a moral certainty, exclude the possibility of guilt of any person other than the accused.

In the case of ***Podi Singho vs. King*** [2] it held that "in a case of circumstantial evidence it is the duty of the trial judge to tell the jury that such evidence must be totally inconsistent with the innocence of the accused and must only be consistent with his guilty. In the case of ***King Vs. Appuhamy*** [3] *Keuneman* J. held that in order to justify the inference of guilt purely on circumstantial evidecnce, the inculpatory facts must be incompatable with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt"In the case of State of ***Tamil Nadu vs Rajendran*** (4) justice Pittanaik observed that " In a case of circumstantial evidence when an incriminating circumstances is put to the accused and the said accused either offers no explanation or offers an explanation which is found to be untrue, then the same becomes an additional link in the chain of circumstance to make it complete"

It is to be noted that the following items of circumstantial evidence available in this case.

The Accused - Appellant having a animosity with the deceased, visited the deceased on the day in question with a bottle of liquor and consumed it with the deceased. Thereafter Accused- Appellant left the house of the deceased with the deceased on a bicycle.

The Witness Josalin :- Saw two people fallen on the road, one person dressed in a white shirt and a sarong in a seated position moving his hand up and down in a stabbing motion, thereafter she saw the accused - appellant clad in a red colour under wear running towards Elpitiya-passing her house.

The witness Somapala saw the deceased going with the accused - Appellant on a bicycle when he was near the well of his house. and about 15 to 30 minutes later accused-appellant running away clad in a red colour underwear from the place of incident where the deceased was fallen dead.

The witness Jayasuriya has also seen the Accused-Appellant running towards Elpitiya clad in red colour underwear, abusing in foul language. The evidence of the wife of the accused-appellant as to the existed animosity between them, and for the first time the accused-appellant visiting the house of the deceased on the day in question and had consumed liquor with the deceased.

The medical evidence revealed that the deceased had twenty four (24) stab injuries on the body, and the injuries 8,9 and 10 were necessarily fatal injuries (at page 43 of the Brief).

The Doctor in his evidence had stated as follows :

ආයුධ දෙකක් භාවිතා කිරීම මට එකඟ වන්න හෝ එකඟ නොවීම කර ගන්න අමාරුයි. නමුත් තුවාලවල ගැඹුර අනුව එකම ආයුධයෙනුත් ඒ පිළිබඳව යොදන බලය අනුව කරන්නපුලුවන්. නමුත් ආයුධ දෙකක් භාවිතා කරනවා ද යන්න මට එය පැහැර හරින්න බැහැ.

It had been revealed that the injuries on the deceased could be caused either with one weapon or with two weapons. at page 57 doctor had stated as follows : -

ප්‍ර මෙම තුවාල සමස්ථයක් වශයෙන් නිරීක්ෂණ කරන විට මෙම තුවාල සිදු කළ ආයුධය ගැන මතයක් ප්‍රකාශ කළා. හරස් ප්‍රශ්ණ අහන කොට මෙම තුවාල සියල්ලම එකම ආයුධයකින් වෙනස් බලයක් යෙදීමෙන් සිදුවෙන්න පුලුවන් ද?

උ සිදුවන්න පුළුවන්.

The contention of the Deputy Solicitor General was that, the accused - appellant may have got the deceased drunk, and could have caused few injuries to incapacitate the deceased, thereafter when the deceased fell down caused the other injuries. Further, the evidence in the case revealed that though there were twenty four (24) stab injures, there was no evidence to connect an involvement of another person other than the accused - appellant to the incident. Also, there had been no doubt created that one person could have inflicted 24 stab injuries.

For the reasons mentioned above I disagree with the contention of the counsel for the accused - appellant that one person could not have possibly caused all the injuries single handed.

The evidence revealed that the witness Alpi Nona had made a statement to the Police on the 25th at 2 p.m. (the following day of the incident) and the witness Somapala had made a statement to the Police on the 26th at 10.30. a.m.

The witness Alpi Nona had stated in evidence that she did not come forward to give evidence at the inquest held by the Acting Magistrate near the scene of crime as the Acting Magistrate was her lawyer who appeared for her in Court when she was charged for possession of illicit liquor and further she had stated she did not make a prompt statement on the same day of the incident, as no one came forward to give evidence when her husband was killed, thus the explanation given by her, why she did not make a statement to the police on the same day in the evening could be accepted as a reasonable explantion.

The second ground of appeal urged by the counsel was that, the witnesses Josalin and Somapala had stated that they made the statements at the Police Station, where as Inspector Silva had stated statements of these two witnesses were recorded at their residences. Thus, the evidence of these two witnesses is open to suspension and unworthy of being acted upon.

I do not agree with his cotention, as it was not an important factor to disbelieve the evidence of these two witnesses completely; with the lapse of time. (over 6 years) may affect the memory of the witnesses, as to the place where they made the statements to the Police.

In the *case of state of U.P. Vs M. K. Anthony*[5] it was held that "Where evidence is generally reliable, much importance should not be attached to the minor discrepancies and technical errors."

The third ground of appeal urged by the counsel for the accused-appellant was that, an another suspect by the name Gunaratne had been arrested and remanded in connection with this case, and the prosecuting counsel or the learned High Court Judge not elicited an explanation from the police witness as to why an additional suspect had been arrested, this factor had created a doubt and mystery in the prosecution version.

It behove this Court in the interest of justice to ascertain the circumstances that led to the arrest and remand of an another suspect namely one Gunaratne, only on perusal of "B" reports filed in the Magistrate's Court. The "B' reports dated 27.6.94 and 08.08.94 indicate that, investigations had revealed, that the suspect Gunaratne being the brother of the accused-appellant had met the accused-appellant on the way and taken him home after the incident, he was never charged at any stage of the proceedings in this case, as there was no evidence against him in connection with the incident. Hence the above contention of the counsel for the accused-appellant should fail.

In the case of King Vs Seeder Silva Howard CJ observed that "A" strong prima facie case was made against the appellant on evidence which was suffieient to exclude the reasonable possibility of someone else having committed the crime, without an explanation from the appellant the jury was justified in coming to the conclusion that he was guilty"

Thus, in my opinion, the circumstantial evidence available against this accused - appellant were so strong and incriminating; incompatible and inconsistent with the innocence of the accused-appellant and consistent with his guilt, the only conclusion that could be arrived at on such evidence is that the accused-appellant is guilty of the offence charged.

The fourth ground urged by the counsel was that, there was no record made, that the judgment was pronounced on 16.11.2000, by the trial judge, thus violating the statutory provisions of the sections 279, 283 of the Criminal Procedure Code.

It is apparent from the proceedings on 16.11.2000 after the conclusion of the address by both counsel the allocutus had been recorded, thereafter the verdict and the sentence was passed on the accused-appellant. The learned High Court Judge on the same day (16.11.2000) has recorded as follows :-

මෙම තීන්දුවේ පිටපත් සහ විනිසුරුවරයාගේ නිරීක්ෂණ අතිගරු ජනාධිපති තුමිය වෙත යැවීමට නියෝග කරමි. බන්ධනාගාර අධිකාරි අමතන වරෙන්කුව අත්සන් තබමි. මරණීය දන්ඩනය ප්‍රදානය කිරීමේ ප්‍රකාශය විවෘත අධිකරණයේ කියවා ගොනු කරමි. අත්සන් තබමි.

Further the journel entry on 16.11.2000 written by the learned High Court Judge himself states as follows සටහන් බලන්න. 280 යටතේ කටයුතු කරමි. මරණ දඬුවම් නියම කරමි. ලේඛන ගොනු කරමි. තීන්දුව හා නිර්දේශ ජනාධිපති තුමියට යවමි.

The contention of the Deputy Solicitor General was that, the above factors indicate that the learned High court judge on the 16.11.2000 may have dictated the judgment in Open Court to the stenographer, and the stenographer had typed it later, eventhough the date of the judgement appears as 2000.11 ..... the judgment had been signed by the Leaned High Court Judge.

In support of his contention he has cited the decision in the case of ***Iqbal Ismail Sadawala vs Registrar High Court Bombay*** [6] It has been held that failure of presiding Judge to date and sign the judgement at the time of pronouncing it is only procedural irregularity curable under section 436 of the Criminal Procedure Code.

Hence, the Deputy Solicitor General submitted that, in the instant case failure to date the Judgement is only a procedural irregularity curable under section 436 of the Criminal Procedure Code.

I agree with the contention of the Deputy Solicitor General, that it was an irregularity curable under section 436 of the criminal Procedure Code, which had not occasioned a failure of justice.

At the outset the counsel for the accused-appellant conceded the fact that who ever who killed deceased has rendered himself to be found guilty of the offense of murder and nothing less, as the deceased had 24 stab injuries caused by a knife of which 8th, 9th and 10th injuries were necessarily fatal.

For the reasons aforesaid, the grounds of appeal urged by the counsel for the accused-appellant are of no merit. I am of the view that the leaned trial judge has rightly found the accused-appellant guilty of the offence charged. Appeal is dismissed.

Sisira de Abrew, J.. I agree,

Appeal dismissed.

WIJERATNE BANDARA

vs.

DIRECTOR GENERAL OF PREVENTION OF BRIBERY AND CORRUPTION

COURT OF APPEAL
BALAPATABENDI, J.
DE ABREW, J.
CA 138/2001
H. C. COLOMBO B 1121/95
APRIL 29TH, 2005
MAY 25TH, 2005
JUNE 20TH 2005

Bribery Act - Sections 2(a),(b), 20(b), 28(b) - Trial - Convicted - Charges general and ambiguous ? - Wider construction to be given - Code of Criminal Procedure Act - Section 165.

The accused -appellant was indicated on two counts for committing offences under Section 28(b) of the Bribery Act. After trial the High Court Judge convicted the accused appellants.

On appeal it was contended that :

Section 20(b) on its own makes reference to seven instances where the conduct amounts to offences, as spelt out in section 20(a), even though the seven instances which spelt out in section 20(a) are contained in items (i) to (vii), the charges in the indicment did not specify the offences committed with reference to any of the limbs (i) to (vii) or section 20(a).

Held

(1) Section 20 is designed to punish those who use the advantage of personal or family position for the actual or pretended purpose of influencing the commission by offici als of offences under other sections of the Act.

(2) The legislature intended to prevent or punish even ordinary citizen who accept gratifications as inducement to influence public offcials with a view to acting or not acting in a particular way in the discharge of the official functions;

(3) The words "grant or benefit" in section 20(vi) must be widely construed ;

(4) The two charges have specified the purpose of soliciting and accepting the money,and thus contain all necessary particulars enough to give the accused appellant a notice of the nature of the offence charged with.

APPEAL from the judgment of the High Court of Colombo.

Cases referred to :

1. *Gunasekara vs. Queen, 70 NLR 457*

2. *Perera vs. Attorney - General 1. Sri Kantha LR 73(sc)*

Dr. Ranjith Fernando with H. Gunawardena for accused appellant.
M. Liyanage, Deputy Director General, Bribery Commission for complainant respondent.

Cur.adv. vult.

October 6, 2005

JAGATH BALAPATABENDI, J.

The Accused-Appellant was indicted on two counts for committing offences under section 28(b) of the Bribery Act. After trial the learned High

Court Judge convicted the Accused-Appellant as charged, and sentenced him to 5 years R. I. on each count and directed that both sentences should run concurrently, and a fine of Rs. 2500 imposed on the 1st count in default one year R.I, a fine of Rs. 2500 imposed on the 2nd count in default one year RI, a further penalty of Rs. 3,000 imposed in default one year R. I., the default terms to run consecutively.

At the hearing of the Appeal the counsel for the Accused-Appellant contended that, the evidence led at the trial did not support the particulars of the offence described in the indictment, and the charges mentioned in the indictment under section 20(b) of the Bribery Act were general and ambiguous, thus not in compliance with the section 165 of the Code of Criminal Procedure Act No 15 of 1979. The Counsel for the Accused - Appellant alleged that section 20(b) of the Act on its own makes reference to seven instances where the conduct amount to offences as spelt out in section 20(a) of the Act, Eventhough the seven instances spelt out in section 20(a) are contained in limbs (i) (ii) (iii) (iv) (v) (vi) and (vii), the charges in the indictment did not specify the offence committed with reference to the any of the limbs (i) to (vii) of the section 20(a) of the Act.

The charges in the indictment read as follows :-

1. වර්ෂ 1991 ක් වූ මැයි මස 29 දින හා වර්ෂ 1991 ක් වූ ජූලි මස 15 වනදින අතරතුර කාලපරිච්ඡේදයේ දී මෙම අධිකරණ බල සීමාව තුළ පරකඩුවේදී යුෂ්මතා ආණ්ඩුවෙන් ප්‍රතිලාභයක් ලබා දීමට එනම් ආරච්චිලාගේ ලලිතා පද්මිණී යන අයගේ ස්වාමිපුරුසයා වන ගිල්මන් දයාපාල යන අය පොලිස් අත් අඩංගුවෙන් මුදවා දීම සඳහා ආධාර කිරීමට පෙළඹවීමක් හෝ ත්‍යාගයක් වශයෙන් රු. 3500 ක් වූ මුදලක තුටු පඩුරක් එකී ආරච්චිලාගේ ලලිතා පද්මිනී යන අයගෙන් අයැදීමෙන් අල්ලස් පනතේ 20(අ) වන වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් කළ බවය.

2. වර්ෂ 1991 ක් වූ මැයි මස 29 දින හා වර්ෂ 1991 ක් වූ ජූලි මස 15 වන දින අතරතුර කාල පරිච්ඡේදයේ දී මෙම අධිකරණ බල සීමාව තුළ පරකඩුවේදී ඉහත (1) වන චෝදනාව සඳහන් ක්‍රියා කලාපයේ දීම යුෂ්මතා ආණ්ඩුවෙන් ප්‍රතිලාභයක් ලබා දීමට එනම් ආරච්චිලාගේ ලලිතා පද්මිණී යන අයගේ ස්වාමිපුරුෂයා වන ගිල්මන් දයාපාල යන අය පොලිස් අත් අඩංගුවෙන් මුදවාදීම සඳහා ආධාර කිරීමට පෙළඹවීමක් හෝ ත්‍යාගයක් වශයෙන් රු. 3,000 ක් වූ මුදලක තුටු පඩුරක් එකී

ආරච්චිගේ ඩිංහිරි මහත්තයා මාර්ගයෙන් ආරච්චිලාගේ ලලිතා පද්මිණී යන අයගෙන් භාර ගැනීමෙන් අල්ලස් පනතේ 20(ආ) වන වගන්තිය යටතේ දඬුවම් ලැබිය යුතු වරදක් කළ බවය.

It was stated in the 1st and 2nd counts of the indictment that "the Accused-Appellant "solicited" and "accepted" (a sum of money as mentioned in the charges) "to procure a benefit from the Government".

The Section 20(a) limb(vi) states as follows:

"A person who offers any gratification to any person as an inducement or a reward for "his procuring, or furthering the security of, any grant, lease or other benbefit from the Government, for the first mentioned person or for any other person."

In the case of **Gunasekera vs. Queen**[1] H. N. G. Fernando C. J. observed that "section 20 of the Bribery Act is designed to punish those who use the advantage of personal family position for the actual or pretended purpose of influencing the Commission by "officials" of offences under other sections of the Act, it is obvious that if ordinary citizens are deterred from using their position in that way, there is likelihood that 'officials' can be bribed. Again, although it may be very difficult to prove a direct act of bribery by or to an 'offcial', it may be well easy to prove the taking of a gratification by a person who is only an actual or pretended intermediary. I am satisfied that the Legislature intended as far as possible to prevent or punish even ordinary citizen who accept gratifications as inducements to influence public officials with a view to acting or not acting in a particular way in the discharge of the official functions. **Common sense therefore requires that in paragrah (vi) of section 20 the expression 'grant or benefit' must be widely construed**. It was held that " the operative word in paragraph (vi) is the word 'benefit' and that its ordinary wide meaning is not narrowed down by its association with the words 'grant' or 'lease' which precede it."

In the case of ***Perera vs. Hon. Attorney-General***[2]

It was held "Section 20 of the Bribery Act is not restricted to and does not refer to the offering or taking of gratification to

or by public officer. Any person who solicits or accepts gratification as an inducement for procuring, or furthering the securing of any grant, lease or other benefit from the Government,is guilty of Bribery.

For the reasons aforesaid, it is very clear the two charges in the indictment have specified the purpose of soliciting and accepting the money, thus contain all necessary particulars sufficient enough to give the Accused-Appellant a notice of the nature of the offence charged, also the charges were incompliance with the section 165 of the Code of Criminal Procedure Act. Hence, the point raised by the Counsel for the Accused-Appellant is not tenable in law.

The facts in brief are as follows : On the 30th May 1991 one Dayapala had been arrested by Ratnapura Police for investigation on a charge of attemped murder of one Jayantha Watowita and for being involved in JVP activities. Dayapala's wife Lalitha Padmini (prosecution witness No. 1) had testified that the Accused-Appellant (the Chairman of Gramodaya Mandalaya in the area) had visited her and her uncle Dingirimahatmaya (procecution witness No. 3) several times during the period between 29th May to 15th July 1991 and informed them if a payment of Rs. 3500 is made to a police officer named one Wijeratne they could get Dayapala released from Police Custody. Both witnesses No. 1 and No. 3 have testified that the solicitation of Rs. 3500 was made by the Accused-Appellant at Dingirimahatmaya's residence (at the Residence of witness No. 3). Eventually during the said period a sum of Rs. 3000 had been given to the Accused-Appellant by the Witness No. 3 (Dingirimahatmaya) in the presence of the witness No. 1(Lalitha Padmini) at the residence of Dingirimahatmaya.

Dayapala had been given a suspended jail term for the attemped murder case, and was sent to Boossa Detention camp for his involvement in J. V. P.activities. Thereafter, in August/September 1992 Dayapala was released from Boossa Detention Camp. The complaint was made by Lalitha Padmini (wife of Dayapala) in october 1992 against the Accused-appellant in the Bribery Commission.

At the trial the Accused-Appellant had made a dock-statement denying the allegation, and had stated that Lalitha Padmini thinks that Dayapala was arrested on the information given by him. (The Accused-Appellant).

The evidence led at the trial was very clear that the solicitation of Rs. 3500 had been made by the Accused-Appellant from both witnesses namely Lalitha Padmini (wife of Dayapala) and her uncle Dingirimahattaya, a sum of Rs. 3000 was given to the Accused-Appellant by Dingirimahattaya in the presence of Lalitha Padmini at Dingirimahattaya's residence.

On a perusal of the Judgement it is clear that the learned High Court Judge had correctly considered with reasons the two infirmities in the evidence of Lalitha Padmini alleged by the Counsel for the Accused-Appellant eventhough it was immaterial, and the findings of the learned High court Judge had been based on correct evaluation of the evidence led at the trial and on corroborated testimony of Lalitha Padmini.Hence, I do not see any irregularity in the Judgement of the learned High Court Judge, as alleged by the counsel for the Accused-Appellant.

Thus, we affirm the conviction and the sentences imposed, and dismiss the appeal.

Judge of the Court of Appeal.

SISIRA DE ABREW, J. — I agree.

Appeal dismissed.

SUKUMAL
VS
MUNICIPAL COUNCIL OF COLOMBO

COURT OF APPEAL,
AMARATUNGA, J.,
WIMALACHANDRA, J.
CALA 249/2003
D. C. COLOMBO 6086/SPL
MARCH 29 2004
AUGUST 9, 2004

Municipal Councils Ordinance - Section 49 (1), Section 177 - Appointment to any post or office in the Council - who could appoint?- Is it the Mayor or the Municipal Council Commissioner.

The Plaintiff Petitioner instituted action seeking a declaration that he be declared as the permanent caretaker of the Public Toilet of Colombo Municipal Council at a particular bus stand, and a permanent injunction restraining the Defendants from removing him from the said post. He claimed that he was appointed by the Mayor of the Council. Interim relief was refused by the District Court.

On leave being sought.

HELD:

(i) The public toilet is the porperty of the Colombo Municipal Council. the Provisions relating to appointments are found in section 40(1) and section 177.

(ii) It is the Municipal Council and/ or the Commissioner authorised by the Council who could make appointments. The Mayor had no authority to make such appointments.

(iii) Court will grant an injunction only to support a legal right.

APPLICATION for leave to appeal from an Order of the District Court of Colombo.

Dr. Jayathissa de Costa with D. D. P. Dassanayake for Plaintiff Petitioner.
Ms. M. Silva for Defendant Petitioner.

Cur adv vult

November 3, 2004

WIMALACHANDRA, J.

This is a leave to appeal application against the order dated 26. 06. 2003 of the learned Additional District Judge of Colombo, refusing to grant an interim injunction against the 1st and 2nd defendants respondents (defendants) as prayed for in the paragraph.

The plaintiff - pettioner (plaintiff) instituted the action bearing No. 6086/ Spl in the District Court of Colombo, seeking a declaration that the plaintiff be declared as the permanent caretaker of public toilet of the Colombo Minicipal Council at the Gunasinghepura Bus stand, and a permanent injunction restraining the defendant - respondents (defendants) from removing the plaintiff from the position of the permanent caretaker of the said public toilet. He also prayed for an interim injunction against the defendants, restraining them from removing him from the said position until the determination of the plaintiffs action.

When the application for an interim injunction was taken before the learned Additonal District Judge of Colombo the parties were directed to file wtitten submissions and therafter the learned Judge delivered the order on 26. 06. 2003 refusing the interim injunction prayed for by the plaintiff. It is against this order the plaintiff has filed this application for leave to appeal.

Admittedly, the said Public Toilet is the property of the 1st defendant, the Colombo Minicipal Council. The plaintiff claims that he was appointed as the permanent caretaker of the said Public toilet by the then Mayor Mr. Ratnasiri Rajapakse in 1993. However the plaintiff did not produce the letter of appointment at the inquiry held before the learned Judge. The provisions relating to the appointments under the Municipal Counicl Ordinance are found in section 40(1) of the Municipal Council Ordinance. Section 177 of the Ordinance states as follows:

"Notwithstanding anythin in any orther written law, the Commissioner may, if so authorized by the Council, form time to time, appoint or promote any person to any post or office in the service of the Council (other than a post in the Local Government Service) the initial salary of which does not exceed such sum as may be specified in the resolution of the Council whereby such authority is delegated to the Commissioner."

Therefore it is to be seen that is the Municipal Council and/ or the Commissioner authorized by the Council who makes such appointments. The Mayor has no authority to make such appointment.

The plaintiff admitts in paragraph 9 of the affidavit annexed to the plaint that there was no contract between the plaintiff and the 1st defendant, the Colombo Municipal Council. The relevant portion in paragraph 9 reads as follows:

"මාගේ පත් කිරීම කිසියම කාල පරිච්ඡේදයකට සීමා කරන ගිවිසුමක් මත සිදු නොවූ අතර එය ස්ථිර පත් කිරීමක් විය. එය පැ3 ලේඛනයෙන්ද මේ පිළිබඳ කිසියම හෝ ගිවිසුමක් විත්තිකාර නගර සභාව සහ මා අතර නොතිබීමක්ද මනාව පැහැදිළිවේ."

The plaintiff's original position is that the then mayor, Mr. Rajapaksha appointed him as the permanent caretaker of the said Public Toilet and he states that it was a permanent appointment.

The plaintiff also takes a different position and states that he submitted sealed quotations for the post of caretaker of the Goonesinhepura Public toilet in response to a notice of invitation to tender, dated 28. 11. 1988 pulished in the Dinamina News Paper (a copy of which is annexed to the plaint marked "P4") and the mayor, Mr. Rajapakse appointed him as the caretaker of the said Public toilet.

It is to be observed that the plaintiff claims that he became the caretaker of the said Public Toilet after being appointed by the former Mayor, Mr. Rajapakse. He has also taken up the position that he was appointed as the successful tenderer after he had tendered for the Gonnesinghepura Public toilet in response to a tender notice published in the Dinamina News Paper dated 28. 1. 1988 (a copy of which is annexed to the plaint marked "P4"). It appears that the plaintiff has taken two contrary positions with regard to how he became the caretaker of the said Public Toilet.

In any event he has failed to produce any letter of appointment given either by the Colombo Municipal Council or by the former Mayor, Mr. Rajapakse.

However, it will be seen that in terms of the provisions of the Municipal Council Ordinance it is the Municipal Council, acting by itself or through the Commissioner, which can make appointments. The plaintiff has also failed to produce a written agreement entered into with the Colombo Municipal Council relating to the Goonesinghepura Pulic Toilet. In these circumstances, it appears that the plaintiff does not possess any such valid document of appointment at all.

Admittedly, there is no agreement in writing between the plaintiff and the 1st defendant for the maintenance of the Goonesinghepura Public Toilet belonging to the 1st defendant. It is apparent on the material placed before Court that there has been no commitment on the part of the 1st and 2nd defendants to hand over the said Public Toilet to the plaintiff. The plaintiff has failed to establish the existence of a written agreement for leasing the said Public toilet to him.

In these circumstances, I am of the opinion that the plaintiff has failed to establish a *prima facie case* in his favour. The Court will grant an injunction only to support a legal right. The plaintiff first tried to show that he was appointed by the former Mayor. Mr. Rajapakese but failed to produce any letter of appointment. Thereafter he tried to show that he was the successful tenderer who was awarded the tender and on this ground he is entitled to be appointed as the caretaker of the said Public Toilet. But he failed to establish that he was the successful tenderer who was awarded the tender as the highest bidder by documentary evidence.

Accordingly, the plaintiff has failed to establish a *prima facie* case. It is only when there is a *prima facie* case the court would consider where the balance of convenience lie.

This Court therefore sees no reson to interfere with the order of the learned Additional Additional District Judge dated 26. 03. 2003. The application for leave to appeal is dismissed with costs fixed at Rs. 2,500/-

Amaratunge J. - *I agree*

Application dismissed.