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VITHANA AND ANOTHER
v
THE REPUBLIC OF SRI LANKA

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 18/2003
HC AVISSAWELLA 60/2001
MAY 19, 2007

Penal Code Sections 32, 315, 294 – Murder – Culpable homicide – Intention contemplated under the 4 limbs of Section 294 – Constitution – Art 138 – Applicability – Common intention ingredients – Criminal Procedure Code Section 283. Failure on the part of Court either to accept or reject dock statement? Evaluation of evidence.

The two appellants were convicted of murder of K and C, and two offences under S315. In appeal it was contended.

(1) that there was failure on the part of the trial Judge to consider whether there was antecedent probability of death resulting from the injury inflicted as opposed to a mere likelihood of death resulting from the injury inflicted.

(2) that ingredients relating to the common intention had not been established.

(3) that the trial Judge had failed to evaluate the evidence and thereby violated S283 of the Criminal Procedure Code.

(4) that the trial Judge had come to an erroneous conclusion that the 1st appellant had handed over the weapons (P1+P2) to the Police when they were not handed over by him.

(5) that the trial Judge has not rejected or accepted the dock statement.

Held:

(1) The intention that is contemplated in the 1st limb of S294 is the intention to cause death which is commonly known as murderous intention, but the intention that is contemplated in the 3rd limb of S294 is the intention to cause bodily injury. This injury should be

sufficient, in the ordinary course of nature to cause death. The emphasis here is on the sufficiency of the injury to cause death in the ordinary course of nature and not the intention.

Per Sisira de Abrew, J.
"The ingredients that must be proved by the prosecution in order to prove a charge of murder under the 3rd limb of S294 are that:

(i) The accused inflicted a bodily injury on the victim.

(ii) The victim died as a result of the above bodily injury.

(iii) The accused had the intention to cause the bodily injury.

(iv) The above injury was sufficient to cause the death of the victim in the ordinary course of nature".

In the instant case the prosecution has established all four ingredients of S294."

(2) Applying Art 138 of the Constitution, it is apparent that the failure on the part of the trial Judge to consider the above aspect of the law is not sufficient to vitiate the convictions, it has not resulted in a failure of Justice.

(3) In a case of murder against the main accused under limb 3 of S294 the intention contemplated there, being the 'intention to cause bodily injury', one cannot expect the prosecution to prove the other accused shared common murderous intention when proving the charge against the other accused. In a situation of that nature, what the prosecution is expected to prove is that the other accused shared 'common criminal intention contemplated in limb 3 of S294 – common intention to cause bodily injury.

In the instant case, from the evidence it is crystal clear that the 2nd appellant had entertained a common intention to cause bodily harm to C with the 1st appellant which is the intention contemplated in limb 3 of S294.

(4) The trial Judge has evaluated the evidence, and had commenced the judgment by referring to the defence suggestion to the witness.

(5) It is true that the 1st appellant did not personally hand over the weapons to the Police, but the evidence of the Police was that the 1st appellant pointed out the weapon and the Police Officer took them into custody – at the time of recovery the 1st appellant was only 2 feet away from the Police Officer.

Per Sisira de Abrew, J.
"Though we do not condone the failure on the part of the trial Judge to arrive at a conclusion whether to accept or reject the dock statement, such failure has not occasioned a miscarriage of Justice".

APPEAL from the judgment of the High Court of Avissawella.

Cases referred to:

(1) *Mendis* v *Queen* – 54 NLR 177.
(2) *Virsa Singh* v *State of Punjab* – AIR (1958) SC 465 at 467.
(3) *Hajinder Singh* v *Delhi Administration* – AIR 1968 (SC) 867.
(4) *Mahadeo Ganpat Badwana* v *State of Maharashtra* – AIR 1977 SC 1756.
(5) *L.S.P. de Silva* v *Republic of Sri Lanka* – CA 124/2004 – CAM 28.2.2007.
(6) *Bakhawar* v *State of Haryana* – AIR 1979 – SC 1006.
(7) *Rajwant Singh* v *State of Kerala* – AIR 1966 (Sc) 1874 at 1878.
(8) *State of Maharashtra* v *Arun Savalaram* – 1989 – CR LJ 191.
(9) *Ande* v *State of Rajasthan* – AIR 1966 (SC) – 148 at 151.
(10) *Sumanasiri* v *A.G.* – 1991 – 1 Sri LR 309.

Dr. Ranjith Fernando for appellants.
Shavindra Fernando DSG for the Republic of Sri Lanka.

June 28, 2007

SISIRA DE ABREW, J.

Two appellants were convicted of the murder of V. Kusumawathi and the murder of T. Chaminda Kumara (hereinafter referred to as Chaminda) and sentenced to death. They were also convicted of two offences under section 315 of the Penal Code and sentenced to 12 months rigorous imprisonment (RI) on each count. This appeal is against the said convictions and the sentences. The facts of this case can be quite briefly summarized as follows:

Around 9.30 p.m. on15th August 1999 when Priyantha the husband of Kusumawathi was getting ready to have dinner with his friend Chaminda who came to his house little before the beginning of the incident, described by the prosecution, both appellants entered the house of Priyantha. The 1st appellant, armed with a *kithul* club went inside the house passing Priyantha and immediately thereafter Priyantha was attacked by the 2nd appellant with a sword when he blocked the 2nd appellant from going inside the house. Priyantha grappled with the 2nd appellant while Chaminda with the 1st appellant. Dilhani, the daughter of Priyantha, pushed the 2nd appellant away when he attempted to

attack Priyantha with the sword. The appellants made a request to settle the matter but the next moment without any provocation from the victims' party both appellants started attacking Chaminda with their weapons. Unable to witness the attack on Chaminda any longer Kusumawathi, the wife of Priyantha, requested them not to attack, then she too was attacked by both appellants. Thereupon both appellants intensified the attack on Priyantha. Both deceased persons and Priyantha received injuries. When Dilhani, who was about 12 years old, was dragged by the 2nd appellant near the father, the 1st appellant told him to release the child and as such she was released. Fearing further attack both Priyantha and his daughter Dilhani went into a room and locked themselves in. The appellants threatened Priyantha and Dilhani to tell the Police the appellants were wearing masks at the time of the incident and could not be identified.

One of the grounds urged by the learned Counsel for the appellant as militating against the maintenance of the convictions for murder was that the failure on the part of the learned trial judge to consider independently the degree of probability of causing death as a result of the injuries caused to Kusumawathi and Chaminda. In short failure on the part of the learned trial judge to consider whether there was great antecedent probability of death resulting from the injury inflicted, as opposed to a mere likelihood of death resulting from the injury. He cited *Mendis* v *Queen*[1] in support of his argument. In *Mendis* v *Queen*, Gratiaen, J. observed: "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** by Gratiaen, J. "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 order to appreciate this argument 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."

It is clear that the intention that is contemplated in the 1st limb of section 294 of the Penal Code (sec. 294) is the intention to cause death which is commonly known as murderous intention. But the intention that is contemplated in the third limb of sec. 294 is the intention to cause bodily injury. This injury should be sufficient, in the ordinary course of nature, to cause death. The emphasis here is on the sufficiency of the injury to cause death in the ordinary course of nature and not on the intention. This position is amply justified by illustration 'c' to sec. 294 which is reproduced below:

"A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although he may not have intended to cause Z's death."

This illustration says that 'A' is guilty of murder although he may not have intended to cause the death of 'Z'. This shows that prosecution can prove a charge of murder even if the accused, charged with murder, did not entertain murderous intention at the time of inflicting the bodily injury if the accused entertained an intention to inflict bodily injury and that this injury is sufficient, in the ordinary course nature, to cause the death of the victim. In my view

an accused person charged with murder cannot claim, when the victim has succumbed to the injury which is sufficient, in the ordinary course of nature, to cause death, that he did not intend to cause the death of the victim but he only intended to inflict bodily injury and that he should be exonerated from the charge of murder. This view is supported by the following opinion expressed by His Lordship Justice Bose in *Virsa Singh* v *State of Punjab*(2) at 467: "No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional." This judgment was cited with approval and applied in *Hajinder Singh* v *Delhi Administration*(3), *Mahadeo Ganpat Badwana* v *State of Maharashtra*(4). His Lordship Ranjith Silva cited the above dictum with approval and applied in *L.S.P. de Silva* v *Republic of Sri Lanka*(5).

As was pointed out earlier the intention contemplated in the 3rd limb of sec. 294 is the intention to inflict a bodily injury. According to 3rd limb of sec. 294, this injury must be sufficient to cause death in the ordinary course of nature. The emphasis in the 3rd limb of sec. 294 is on the sufficiency of the injury in ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary course of nature which evidence must be elicited from the doctor who conducted the post-mortem who is called upon to express an opinion on the post-mortem report. The decision of the Indian Supreme Court in *Bakhtawar* v *State of Haryana*(6) lends support to the above view. Indian Supreme Court held as follows: "For the commission of the offence of murder it is not necessary that the accused should have the intention to cause death. It is now well settled that if it is proved that the accused had the intention to inflict the injuries actually suffered by the victim and such injuries are found to be sufficient in the ordinary course of nature to cause death, the ingredients of clause Thirdly, of sec. 300 of the Indian Penal Code are fulfilled and the accused must be held guilty of murder punishable under sec. 302 of the Indian Penal Code." Section 300 of the Indian Penal Code is in terms identical to sec. 294 of the Ceylon Penal Code.

Their Lordships of the Indian Supreme Court considered the provisions of sec. 300 of the Indian Penal Code in *Rajwant Singh* v *State of Kerala*(7) at 1878 and remarked thus: "Third clause discards the test of subjective knowledge. It deals with acts done with 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 way 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 *Virsa Singh* v *State of Punjab (supra)*, Indian Supreme Court discussing the third limb of sec. 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 sec. 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 enquiry 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 enquiry 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 sec. 300 thirdly. It does not matter that there was no intention to cause death. It does 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 enquiry 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 (supra)*, *Hajinder Singh* v *Delhi Administration (supra)* and *State of Maharashtra* v *Arun Savalaram*[8].

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."

In *Ande* v *State of Rajasthan*[9] at 151 Indian Supreme Court remarked thus: "The emphasis in clause thirdly is on the sufficiency of the injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and if the causing of the injury is intended, the offence is murder." This judgment was cited with approval and applied by the Indian Supreme Court in *Rajwant Singh* v *State of Kerala (supra)*.

In *Sumanasiri* v *A.G.*[10] Jayasuriya, J., held: "Clause 3 of sec. 294 requires that "the probability of death resulting from the injury inflicted was not merely likely but very great though not necessarily inevitable."

In the light of the above judicial decisions and the observation made by me, I set down here the ingredients that must be proved by the prosecution in order to prove a charge of murder under third limb of sec. 294.

1. The accused inflicted a bodily injury on 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.

It must be noted that as was pointed out in *Virsa Singh case (supra)* the intention that is contemplated in third limb of sec. 294 is **the intention to cause bodily injury** and not the intention to cause bodily injury that is sufficient to cause death in the ordinary course of nature.

In the instant case, it is undisputed that 1st, 2nd and 3rd ingredients stated above had been established. Did the prosecution establish the 4th ingredient stated above? Dr. Niranjan referring to the injuries of Kusumawathi testified that 8th to 14th injuries are fatal in the ordinary course of nature. Referring Chaminda's injuries Dr. Niranjan testified that injury No. 1 is fatal in the ordinary course of nature. Thus the prosecution has establish the 4th ingredient stated above. Since the prosecution has established all four ingredients in 3rd limb of sec. 294, the offence of murder has been established. Failure on the part of the learned trial judge to consider the above aspect of the law, in my view, has not resulted in a failure of justice. In this regard I would like to consider the Article 138 of the Constitution which reads as follows:

"The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance, tribunal or other institution and sole and exclusive cognizance by way of appeal revision and restitutio in integrum of all causes, suits, actions, prosecutions, matters and things of which such High Court of First Instance, tribunal, or other institution may have taken cognizance;

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

I apply the proviso to Article 138 of the Constitution and hold that the said failure on the part of the trial judge is not sufficient to vitiate the convictions. For the above reasons I hold that the

contention of the learned Counsel for the appellant is devoid of merit and wholly untenable.

Learned Counsel for the appellant next contended that the ingredients relating to the common intention had not been established by the prosecution. As regards this contention I must state here that the prosecution adduced evidence that both appellants had attacked Kusumawathi, Chaminda and Priyantha and as such the common intention had been well established. For the purpose of completeness I must mention here when the prosecution has established a charge of murder under **limb three** of sec. 294 against the main accused, one can't expect the prosecution to prove common intention to cause death of the victim which is the intention contemplated in **limb one** of sec. 294 and commonly known as the murderous intention against the other accused persons, charged on the basis of common intention. In such a situation in order to prove the charge of murder against the other accused, what the prosecution is expected to prove is that they (other accused) shared common 'criminal intention' contemplated in limb three of sec. 294. When the prosecution has established a charge of murder under **limb three** of sec. 294 against the main accused, and if the prosecution establishes that the other accused shared the common 'criminal intention' contemplated in **limb three** of sec. 294. i.e. the intention to cause bodily injury, the offence of murder against the other accused is established provided of course the other three ingredients of **limb three** of sec. 294 discussed above are proved. If I may put it in a nutshell, in a case of murder where the accused persons are charged under sections 32/296 of the Penal Code, when the prosecution established a charge of murder against the main accused under **limb three** of sec. 294, the intention contemplated there being the '**intention of cause bodily injury**', one cannot expect the prosecution to prove that other accused shared common **murderous intention** when proving the charge against the other accused. In a situation of that nature, what the prosecution is expected to prove is that the other accused shared 'common criminal intention' contemplated in **limb three** of sec. 294 i.e. the '**common intention to cause bodily injury**'.

In the instant case, the doctor testified that the injuries 8 to 14 of Kusumawathi are fatal in the ordinary course of nature. Injuries 8,

9,10, and 13 are cut injuries while injury no. 14 is a depressed fracture. Injury no. 14 which was corresponding to injury no. 11 was a contusion. It was in evidence that the 1st appellant attacked Kusumawathi with a club and 2nd appellant with a sword. It appears from the evidence that both appellants entertained intentions to cause bodily injuries to Kusumawathi and the injuries caused by both of them are sufficient to cause death in the ordinary course of nature. As regards the injuries caused to Chaminda, the injury no. 1 which is a deep cut from which brain substance was peeping out, the doctor said that this was fatal in the ordinary course of nature. Evidence revealed that Chaminda was attacked by both appellants. The 1st appellant was armed with a club and the 2nd appellant was with a sword.The injury no. 13 found on the body of Chaminda was a contusion. From the evidence it is crystal clear that the 2nd appellant had entertained a common intention to cause bodily injury to Chaminda with the 1st appellant which is the intention contemplated in limb three of section 294 and the injury caused by the 2nd appellant was sufficient in the ordinary course of nature to cause death. For the above reasons the contention that the prosecution had failed to prove common intention is untenable.

Learned Counsel for the appellant also contended that the learned trial Judge had failed to evaluate the evidence and thereby violated section 283 of the Criminal Procedure Code. The learned trial judge has commenced the judgment by referring to the defence suggestion to the witnesses. The suggestion of the defence was that this crime had been done by some people wearing masks. I have gone through the judgment of the learned trial judge and I am unable to agree with the contention of the learned Counsel for the appellant.

Learned Counsel for the appellant also contended that the learned trial Judge had come to the erroneous conclusion that the 1st appellant had handed over the weapons marked P1 and P2 to the police officer when in fact they had been handed over by the 1st appellant. I now turn to this contention. Evidence of the police officer was that the 1st appellant pointed out the weapons and the police officer took them into his custody. [*vide* 168 and 169 of the brief]. At the time of the recovery the 1st appellant was only two feet away from the police officer. It is true that the 1st appellant did not

personally hand over the weapons to the police officer. When one considers the evidence relating to the recovery of the weapons, the above contention should be rejected as there is no merit.

Learned Counsel for the appellant next contended that the learned trial Judge had not rejected or accepted the dock statements made by the appellants. The appellants, in their dock statements, denied the incident. Whilst we do not condone the failure on the part of the trial Judge to arrive at a conclusion whether to accept or reject the dock statement, such failure, in my view, has not occasioned a miscarriage of justice. I therefore apply the proviso to Article 138 of the Constitution and proceed to reject the said contention of the learned Counsel.

I have considered the evidence relating to the 4th count. In my view prosecution has not led sufficient evidence to prove the 4th count. When 2nd appellant dragged Dilhani near Priyantha, the 1st appellant told 2nd appellant to release the child. This evidence should be considered in favour of the 1st appellant. I acquit both appellants of the 4th count and set aside the sentence imposed on that count.

For the reasons set out in my judgment, I affirm the conviction and sentences on 1st, 2nd, and 3rd counts.

Subject to the variation in count no. 4 the appeal is dismissed.

SILVA, J. – I agree.

Appeal dismissed subject to variation.

HATTON NATIONAL BANK LTD.
v
JAYAWARDANE AND OTHERS

SUPREME COURT
JAYASINGHE, J.
TILAKAWARDANE, J.
MARSOOF, J.
SC (CHC) APPEAL 6/06
SC LA (CHC) 73/2005
CHC 108/2004 (01)

Recovery of Loans by Banks (Sp. Prov.) Act 4 of 1990 – Sections 15(1), 15(2), 15(3), 16 – Parate Execution – Property of 3rd parties mortgaged – Cannot be sold – Directors property mortgaged – Could the property be parate executed? Civil Procedure Code – Section 207. Principle of Laesio Enomes – Not applicable when Bank re-sells property? Lifting the veil of incorporation.

The respondents were directors of Company N obtained banking facilities and to secure the loans granted hypothecated the properties belonging to the respondent Directors. As the Company defaulted the petitioner Bank adopted a resolution in terms of Law 4 of 1990, to sell the property by way of parate execution. The defendant-respondents instituted action in the Commercial High Court (CHC 252/2001 (1)) and sought an enjoining order to restrain the Bank from conducting the public auction. The enjoining order granted was later dissolved the special leave to appeal application filed in the Supreme Court against the order dissolving the enjoining order was rejected. Later the defendant-respondents withdrew the action.

Subsequently the property was sold by public auction and purchased by the petitioner Bank.

The defendant-respondents instituted action again in the Commercial High Court and sought an order that, the purported auction sale is a nullity and the auction should be declared null and void on the ground of *laesio enomes.*

The Commercial High Court granted an interim injunction, holding that the relief claimed in the present case was different from the case – CHC 252/2001 and that the ratio in *Ramachandra* v *Hatton National Bank* is applicable and

the petitioner Bank cannot sell the property of the Directors, mortgaged to secure the loan taken by the petitioner Bank.

Held:

(1) On examination of the reliefs claimed in Case No. 252/2001 (1) and the relief claimed in the instant case, though they do not appear to be identical, but based on the resolution adopted by the Bank and the consequent procedural steps the Bank would take in terms of the resolution, the Commercial High Court erred in holding that the reliefs claimed are dissimilar.

Held further

Per Nihal Jayasinghe, J.

"The 1st and 2nd respondents cannot hide behind the veil of incorporation of Company N whilst being the alter ego" of the said Company of which the 1st respondent has been the Managing Director and the 2nd respondent who is the wife of the 1st respondent has been a Director."

(2) Although the independent personality of the Company is distinct from its Directors and shareholders Courts have in appropriate circumstances lifted the veil of incorporation. In particular Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a devise to defraud creditors.

Per Nihal Jayasinghe, J.

"It is quite obvious that the 1st and 2nd respondents being Directors of the Company benefited from the facilities made available to the said Company by the petitioner Bank and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third party mortgagee" as contemplated in the majority judgments of the Court in *Ramachandra* v *Hatton National Bank*".

Per Nihal Jayasinghe, J.

"It would be an exercise totally illogical to seek to differentiate the 1st and 2nd respondents as third party mortgagors".

(3) In terms of section19 if the Bank purchased the property the Bank is obliged to resell the property within a reasonable period in order to recover the amount due to the Bank. Since the actual sale of property purchased by the Bank comes after the resale of the property under section 19, and the property is resold by the Bank under section 10 – there cannot be an application to set aside the sale on the basis of *laesio enormis*."

APPEAL from an order of the Commercial High Court.

Cases referred to:

1. *Ramachandra* v *Hatton National Bank* – (distinguished)
2. *Haji Omar* v *Wickremasinghe* – 2002 – 1 Sri LR 105
3. *Salomon* v *A. Salomon and Co. Ltd.* – 1897 – AC 22
4. *Merchandise Transport Ltd.* v *British Transport Commission* – 1962 – 2QB 173
5. *Jones* v *Lipman* – 1962 1 WLR 832
6. *Atlas Maritime Co. SA* v *Avalon Maritime Ltd.* – 1991 – 4 All ER 769 at 779

Romesh de Silva, PC with *Palitha Kumarasinghe* PC and *Sugath Caldera* for appellant.

Mohan Peiris PC with *M.C.M. Muneer* and *Ms. Nuwanthi Dias* for respondents

July 31, 2007

NIHAL JAYASINGHE, J.

The 1st plaintiff-respondent (hereinafter referred to as the 1st respondent) was the owner of the property morefully described in schedule 1 of the plaint and the 1st respondent and the 2nd plaintiff (hereinafter referred to as the 2nd respondent) were joint owners of the property morefully described in schedule 2 of the plaint. The 1st respondents at all times material to this application was the Managing Director and the 2nd respondent Director of Nalin Enterprises Private Limited. The said Nalin Enterprises obtained certain banking facilities from the defendant-petitioner Bank(hereinafter referred to as the petitioner) against the recovery of which, upon default of Nalin Enterprises, the 1st and 2nd respondents hypothecated the properties described in schedules 1 and 2 of the plaint. It was urged on behalf of the plaintiffs-respondents that the 1st and 2nd respondents were not borrowers or beneficiaries of the facilities granted by the petitioner Bank but merely guarantors to the loan granted to Nalin Enterprises. Since Nalin Enterprises defaulted making payment as agreed upon the petitioner Bank in terms of section 4 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 adopted a Resolution to sell the properties described in the schedules to the plaint by way of Parate Execution at a public auction in order to recover the unpaid loan installments. Accordingly the public auction was fixed

for 24.10.2001. It is to be noted that 2nd plaintiff as the Attorney of the 3rd respondent filed partition action No. 19430/P on the basis that the 3rd respondent is the owner of the land and building and sought an enjoining order preventing the auction scheduled for 24.10.2001. The Court however refused to grant the enjoining order but issued notice of interim injunction. The District Court of Colombo having considered the Petitioner's objection in the partition action dismissed the application for interim injunction and subsequently terminated the proceedings. After the enjoining order was refused on 15.10.2001 the 1st and 2nd respondents instituted action No. 252/1(i) in the Commercial High Court for enjoining order and an interim injunction preventing the sale fixed for 24.10.2001 suppressing the filing of the partition action 19430/P and the refusal of the enjoining order by the District Court and obtained an enjoining order from the Commercial High Court. The Commercial High Court after inquiry refused the application for interim injunction on the basis of suppression of the partition action and held that the Bank was entitled to sell the property mortgaged to the bank as security for loans in default. Thereafter the 1st and 2nd respondents sought leave to appeal SCLA 18/2003 against the said order which was dismissed by the order dated 26.06.2003 by the Supreme Court. Subsequently the said case No. 252/2001(i) was withdrawn in the Commercial High Court and was dismissed and decree entered accordingly.

The petitioner Bank by letter of 11.09.2003 informed the respondents that the petitioner Bank had purchased the said property and certificate of sale issued in petitioner's favour.

The respondents thereafter instituted another action HC Civil 108/04(i) on 31.05.2004 in the Commercial High Court against the petitioner seeking -

(a) A declaration that the purported auction sale conducted in respect of the properties referred to in the schedules to the plaint is null and void.

(b) That the said auction be declared null and void on the ground of *Laesio Enormis*.

(c) The petitioner be restrained from taking any steps to eject the occupants including the respondents from the premises in the 1st and 2nd schedules to the plaint until the final determination of this matter.

(d) The petitioner be restrained by way of interim injunction from selling, alienating or transferring the properties described in the 1st and 2nd schedules to the plaint to third parties pending the determination of this action.

The Commercial High Court on 25.10.2005 granted an interim injunction as prayed for by the respondents. It is against this order the petitioner Bank has invoked the jurisdiction of this Court.

The petitioner contended that the High Court failed to consider the fact that the Case No. 252/2001(i) had been dismissed and by the said dismissal the respondents forfeited their right to agitate the same matter in any other court. That the Court also failed to consider the fact that the liability of the 1st and 2nd respondents to repay the said facilities was joint and several along with the said Nalin Enterprises Private Limited. That in terms of section 16 of the Act No. 4 of 1990 the petitioner is entitled to make an application for delivery of possession of the property and any interim injunction issued would be inconsistent with the statutory right of the petitioner to have vacant possession through judicial intervention. It is the contention of the petitioner Bank that as there were no bidders at the auction held for the sale of the property set out in the schedules the petitioner Bank purchased the property and the Board of Directors issued a certificate of sale under section 15(1) of the Act.

Section 15(1) provides that -

> "If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser, and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser."

Section 15(2) provides that -

> "A certificate signed by the Board under sub section (1) shall be conclusive proof with respect to the sale of any property, that all the provisions of this Act relating to the sale of that property have been complied with".

Section 16(1) provides that -

> "The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where the property is situate, and upon the production of the certificate of sale issued in respect of that property under section 15 shall be entitled to obtain an order for delivery of possession of that property".

After the respondents supported for notice of interim injunction on 01.06.2004 and the same served on the petitioner the petitioner filed its objections and prayed for dismissal of the application for interim injunction. Parties thereafter agreed to dispose of the said inquiry by way of written submissions. Subsequently, on the application of the petitioner Court permitted the petitioner to tender additional written submission in view of the Divisional Bench judgment *Ramachandra* v *Hatton National Bank*(1) and in the said written submissions the petitioner contended that -

(a) The 1st and 2nd respondents and the said Nalin Enterprises instituted action in the Commercial High Court No. 252/2001(i) praying for a declaration that the resolution adopted by the petitioner is illegal and therefore null and void and no force or avail in law and prayed for an interim injunction preventing the Bank from auctioning the property.

(b) That the learned High Court Judge of the Commercial High Court dismissed the respondents' application for interim injunction.

(c) That the application for leave to appeal against such order to the Supreme Court No. 18/2003 was dismissed by the Supreme Court.

(d) That the said 252/2001(i) was dismissed and decree entered accordingly.

(e) That decree entered in Case No. 252/2001(i) operates as *res judicata*.

Section 207 of the Civil Procedure Court enact that

> "All decree passed by the Court shall, subject to the appeal, when an appeal is allowed, be final between the parties, an no plaintiff shall hereafter be non-suited.
>
> Explanation – Every right of property, or to money, or to damages, or to relief of any kind which can be claimed, set up, or put in issue between the parties to an action upon the cause of action for which the action is brought, whether it be actually so claimed, set up, or put in issue or not in the auction, becomes, on the passing of the final decree in the action, a *res* adjudicata, which can not afterwards be made the subject of action for the same cause between the same parties."

It is the submission of the petitioner that when there is a decree in an action instituted by a person on a particular property right, damage or other relief, the parties to the said action cannot institute further proceedings for the same property, right, damage or the relief whether any matter was put in issue or not. That the respondents who instituted action to set aside the resolution adopted by the Bank on the basis that the resolution is null and void cannot institute another action after the dismissal of the previous action for a declaration that the auction conducted in pursuance of the said resolution is null and void. While the said matter was pending for order on the written submissions filed on 04.04.2005 the respondents instituted action No. 20693/L in the District Court of Colombo for a declaration that the property described in the schedule thereto has not been vested with the petitioner in view of the decision of the Divisional Bench in *Ramachandra* v *Hatton National Bank (supra)* and prayed for an enjoining order and interim injunction preventing the petitioner from possessing the property. The respondents having obtained the enjoining order *ex-parte* dispossessed the petitioner who was in possession of the said property on the strength of the enjoining order. Consequently, the

District Court dismissed the application 20693/L.

It is in this context that the Commercial High Court by its order on 25.10.2005 issued interim injunction:

(a) Preventing the petitioner from ejecting the respondents and those holding under them and claiming title to the property,

(b) Restraining the respondent Bank reselling the property described in the schedule to the plaint.

The learned High Court Judge held that

"as far as the reliefs prayed by the plaintiffs are concerned it cannot be strictly construed that the reliefs prayed for in this case and the earlier case are similar or identical in any form. Consequently, I should express in my inability to apply section 207 as being a bar to the institution and maintainability of this action by the plaintiff."

On examination of the reliefs claimed in Case No. 252/2001(i) and the relief claimed in Case No. 108/2004(1) though they do not appear to be identical, but based on the Resolution adopted by the Bank and the consequent procedural steps the Bank would take in terms of the Resolution. The learned Judge of the Commercial High Court was in error in holding that the reliefs claimed are dissimilar.

It has been urged by the plaintiff-respondents that in terms of the judgment in the case of *Ramachandra* v *Hatton National Bank (supra)* property mortgaged by a third party who is not a borrower cannot be sold by way of Parare Execution under and in terms of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990. There is of course as urged by the plaintiff a bar preventing the petitioner from Parate Execution of the land mortgaged by a third party who is not a borrower after the judgment of Ramachandra. What the plaintiff-respondents are seeking to accomplish in this application is to invite the Court to adopt the reasoning of *Ramachandra* v *Hatton National Bank (supra)* to the circumstances of the present case which in my view is a far cry.

The petitioner contended that in view of the certificate of sale that has been issued the matter is finally laid to rest and there

cannot be any scope for challenging the validity of the certificate of sale and submitted that even though the property was purchased for a sum of Rs. 1000/- for want of competitive buyers, when a sum of Rs. 34 million and interest thereof from 1990 is due and therefore the sale is void on the ground of *laesio enormis* is not tenable in law. Counsel submitted that *laesio enormis* is not applicable for public auctions conducted with the authority of statute or court and that in any event Parate Execution is available in terms of Act No. 4 of 1990. After Parate Execution and certificate of sale issued, which is enforced under the provisions of Civil Procedure Code *Laesio enormis* is not applicable. In *Haji Omar* v *Wickremasinghe*(2) Supreme Court held that -

> "..... it is my view that where it is not open to a person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to and in the property to move to invalidate a sale certainly it cannot be said that the borrower on whose title and interest in the property a third party's claim is based, has right to move the invalidate the sale."

That in terms of section 19 of the Act if the Bank purchased the property the Bank is then obliged to resell the property within a reasonable period in order to recover the amount due to the Bank. Since the actual sale of property purchased by the Bank comes after the resale of the property under section 19 and the property is resold by the Bank under section 19 there cannot be an application to set aside the sale on the basis of the principle *laesio enormis*.

In my considered opinion, the 1st and 2nd respondents cannot hide behind the veil of incorporation of Nalin Enterprises (Pvt) Ltd, while being the "alter ego" of the said company of which the 1st respondent has been the Managing Director and the 2nd respondent, who is the wife of the 1st respondent, has been a Director. Although the independent personality of the company as distinct from its directors and shareholders has been recognized by the Courts since the celebrated decision of *Salomon* v *A. Salomon and Co. Ltd.*(3), Courts have in appropriate circumstances lifted the veil of incorporation. In particular, Courts have been vigilant not to allow the veil of incorporation to be used for some illegal or improper purpose or as a device to defraud creditors –

Merchandise Transport Ltd. v *British Transport Commission*(4) and *Jones v Lipman*(5). As Staughton L.J. observed in *Atlas Maritime Co. SA* v *Avalon Maritime Ltd.*(6) at 779 -

> "To *pierce* the corporate veil is an expression that I would reserve for treating the rights or liabilities or activities of a company as the rights or liabilities or activities of its shareholders. To *lift* the corporate veil or *look behind* it, on the other hand, should mean to have regard to the shareholding in a company for some legal purpose."

As far as this case is concerned, it is quite obvious that the 1st and 2nd respondents, being Directors of Nalin Enterprises (Pvt) Ltd.; benefited from the facilities made available to the said company by the petitioner Bank, and to that extent they cannot claim that the mortgages which secured the said facilities fall within the category of "third party mortgage" as contemplated in the majority judgments of this Court in "*Ramachandra* v *Hatton National Bank (supra).*

The 1st and 2nd plaintiff are integrated to Nalin Enterprises and when Nalin Enterprises sought to obtain facilities from the petitioner Bank the borrowers are in fact the said Nalin Enterprises along with the 1st and 2nd plaintiffs. It would be an exercise totally illogical to seek to differentiate the 1st and 2nd plaintiffs as third party mortgagers within the meaning of *Ramachandra* v *Hatton National Bank (supra).*

I accordingly set aside the order dated 25.10.2005 of the Commercial High Court marked 'G'. Application of the plaintiff-respondents for interim injunction as prayed for in the prayer of the petition is dismissed with costs.

TILAKAWARDANE, J. – I agree.

MARSOOF, J. – I agree.

Appeal allowed.
Interim injunction vacated.

ASHIK
v
BANDULA AND OTHERS
(Noise Pollution Case)

SUPREME COURT
SARATH N. SILVA, C.J.
TILAKAWARDANE, J.
SOMAWANSA, J.
SC FR 38/2005
NOVEMBER 9, 2007

Constitution – Art 3 – Art 126 – 126(4) – Art 12(1) – Non issue of a loudspeaker permit – Police Ordinance Section 80 – Imposing of restrictions – Breach of fundamental rights? National Environment Act 47 of 1980 – Sections 23P – 23R – Amended by Act 56 of 1988 – Penal Code – Section 26 – Sound Pollution – Standards – Directions by the Supreme Court. – Public Nuisance.

The petitioners complained that, non issuing of loudspeaker permits under S80 Police Ordinance to the trustees of the Jumma Mosque Weligama and imposing restrictions on such use is in violation of their fundamental rights.

Held:

Per Sarath N. Silva C.J.

"A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity."

(1) People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by S23P of the National Environmental Act 47 of 1980 (amended) to safeguard the public from harmful effects of noise pollution – No guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Art 12 (1) have been issued.

The Supreme Court having considered the matters before it, issued specific directions in terms of Art 126(4) of the Constitution.

APPLICATION under Art 126(1) of the Constitution.

Cases referred to:

1. *Marshall* v *Gunaratne Unnanse* – 1 NLR 179
2. *Church of God (full Gospel) in India* v *K.K.R.M.C. Welfare Association* – 1AR 2000 – SC – 2773.
3. *In Re Noise Pollution* – AIR 205 – SC 3136

Ikram Mohamed PC for the petitioners.

Ms. Indika Demuni de Silva – 2nd, 3rd, 4th respondents.

Ms. B.J. Tilakaratne, Deputy Solicitor General for Central Environmental Authority.

Uditha Egalahewa for 7th respondent.

March 9, 2007

SARATH N. SILVA, C.J.

The proceedings in this case commenced with an application by the Trustees of the Kapuwatte Mohideen Jumma Mosque of Weligama impleading the action of the 2nd respondent (ASP) in not issuing a loudspeaker permit under section 81 of the Police Ordinance to the extent permitted in previous years and in imposing restrictions on such use, as being in breach of their fundamental rights.

When the matter was supported on 25.2.2007 for leave to proceed the Court noted that the application raises fundamental issues with regard to sound pollution and the standards that should be enforced by the Central Environmental Authority, and the guarantee of the equal protection of the law (Article 12(1)) in this regard.

Accordingly notice was issued on the Central Environmental Authority which was later added as the 6th respondent.

The Environmental Foundation Limited being a non-governmental organization that has consistently engaged in public interest litigation to preserve and protect the environmental was permitted to intervene in the case in view of the general concern that emerges in this case requiring adequate legal safeguards to protect the People from exposure to harmful effects of sound pollution.

Mr. Senaka Weeraratne, Attorney-at-Law, sought to intervene representng the interests of persons affected by noise pollution. He was added as the 8th respondent.

In his affidavit dated 29.6.2007, he contradicted the claim of the petitioners for unrestricted use of loudspeakers in the call to prayer from the Mosque. He also contended *inter alia* that such unrestricted use makes:-

> *"Captive listeners of people of other religious faiths and violates the fundamental rights of the general public, such as the right to silence and the right to quiet enjoyment of property."*

As a matter of personal experience, he contended in paragraph 4 of is affidavit that he is an aggrieved party as a result of similar conduct of a place of worship situated on the Marine Drive between Jaya Road and Nimal Road in a residential area in Colombo where

> *"the high pitched sound of a call to prayer is amplified five times a day beginning in the early hours of the morning, that is at 5.00 a.m. and ending at 8.15 p.m. and repeated daily and which conduct is causing unnecessary hardship and much disturbance, to residents in the neighbourhood the majority of whom belong to other religious faiths and which locality comprise in addition to residential dwellings, schools e.g. Holy Family Convent, private Accountancy Studies Institutions, Buddhist temples, Kovils, Churches....."*

With the inclusion of the aforesaid parties, and considering the material presented and the submissions that were made the Court proceeded with the matter as being of public interest, to make a determination as to the effective guarantee of the fundamental right enshrined in Article 12(1) of the Constitution for the equal protection of the law in safeguarding the People from harmful effects of noise pollution. The impact of pollution is pervasive and its effect cannot be identified with the right of any particular person. The matter has to be viewed as being of general and public concern affecting the community as a whole.

The second respondent whose action has been impleaded in this case filed an affidavit supported with several other affidavits and documents. It appears that the particular dispute with regard to the action of the 2nd respondent, the ASP, being himself a Muslim, arose as a result of loudspeakers permits granted to three mosques situated in close proximity in the village of Kapuwatte in Weligama.

The dispute is between the Kapuwatte Mohideen Jumma Mosque and Jiffery Thakkiya Mosque on the one hand and the Jamiul Rahman Jumma Mosque on the other.

In paragraph 5 of the affidavit the 2nd respondent has stated that to the best of his knowledge from about April 2004 residents in the area where the three Mosques are located have complained of noise pollution due to the excessive use of the loudspeakers by the three mosques.

That, subsequently a dispute had arisen between the persons associated with the Mohideen Jumma Mosque and Jamiul Rahman Mosque with regard to the use of loudspeakers which resulted in the parties lodging complaints against each other at the Weligama Police Station. The Police conducted investigations into the incidents and being apprehensive of an imminent breach of peace filed a "B" Report bearing No. 2154/04 in the Magistrate Court of Matara citing persons associated with the said Mosques as parties. It appears that the proceedings are continuing. The allegation now appears to be that the 2nd respondent has given more favourable treatment to the Jamiul Rahman Mosque.

The 2nd respondent has produced marked "2R4A" to "2R4G" photocopies of some of the complaints and affidavits of persons, all of whom are Muslims that specifically state that noise pollution resulting from excessive noise emitted from loudspeakers of the Mosque, has caused severe health problems. Two of the deponents have coronary ailments and have produced medical evidence in support. The ASP has stated that it was in these circumstances that he reduced the use of loud speakers in the call for prayer to 3 minutes since in his view as a Muslim that period is adequate. The petitioners have not sought to contradict the material adduced by the 2nd respondent.

It is seen that complaint emerge from Muslims themselves as to the harmful effects of excessive emission of noise from loudspeakers in Mosques. Thus Mr. Weeraratne does not stand alone as a victim of such excessive noise.

Although there is no contest in the case as to the harmful effects of noise pollution the case has gone on for more than 2 years to enable suitable regulations to be made to be implemented by the Central Environmental Authority effectively.

Section 23P to section 23R of the National Environmental Act No. 47 of 1980 as amended provides for restrictions on noise pollution. The scheme of section 23P and 23R is that it would be an offence to emit noise in excess of the volume intensity and quality of the standards or limitations that are prescribed which thus becomes a prerequisite for the effectiveness of these provisions. Deputy Solicitor General submitted that the standards and limitations that have now been prescribed in relation to industrial noise cannot be used in respect of community noise (Vide, proceedings 28.3.05).

In the circumstances the parties agreed for adjournments to facilitate the formulation of Regulations.

Draft regulations have been tendered from time to time to Court.

The Environmental Foundation limited made a comprehensive written submission that the initial draft regulations would be unworkable and ineffective and that in contrast the existing legal regime as contained in; section 80 of the Police Ordinance regarding the grant of permits for the use of loudspeakers, amplifiers and the like; section 261 of the Penal Code with regard to the offence of public nuisance; the provisions of the Code of Criminal Procedure with regard to the abatement of any nuisance and the National Environmental (Noise Control) Regulations No. 1 of 1996; are adequate and that suitable directions could be issued by this Court in terms of Article 126(4) of the Constitution to assure the people equal protection of the applicable legal regime.

The Court noted that it is desirable to grant further time to formulate suitable Regulations and the added parties were

permitted to make representations to the relevant authority to improve the draft. Several postponements have been granted but there appears to be indecision, disputes, vacillation and on the whole a lack of collective will to take positive action. Deputy Solicitor General now submit that she has received instructions to move to add the Ministry of Religious Affairs as a party. This, in our view puts the matter back to square one. It has to be firmly borne in mind that Sri Lanka is a secular State. It terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race religion language and the like. Especially in the area of preserving the environment and the protection of public health, being of immediate concern in this case, there could be no exceptions to accommodate perceived religious propensities of one group or another. No religion advocates a practice that would cause harm to another or worse still a would cause pollution of the environment, a health hazard or a public nuisance being an annoyance to the public.

We have had in this country probably the oldest jurisprudential tradition of a secular approach in dealing with matters that constitute a public nuisance. I would refer to the Judgment of this Court handed down in the year 1895 in the case reported in *Marshall* v *Gunaratne Unnanse*(1). In that case the principal trustee of a Buddhist Vihare in Colombo was charged for creating noise in the night and disturbing the inhabitants of the neighbourhood. The report to Court was under the then applicable section 90 of the Police Ordinance. Considering the particular circumstances of the case Bonsor C.J., upholding the conviction stated as follows (at page 180):

> *"..... the idea must not be entertained that a noise, which is an annoyance to the neighbourhood, is protected if it is made in the course of a religious ceremony.*
>
> *No religious body, whether Buddhist, or Protestant, or Catholic, is entitled to commit a public nuisance, and no license under section 90 of The Police Ordinance, 1865 will be a protection against proceedings under the Penal Code, though it may protect them from proceedings under the Police Ordinance."*

It is to be noted that in terms of section 261 of the Penal Code a person is guilty of public nuisance who does any act or is guilty of an illegal omission, which causes *inter alia* any annoyance to the public or to the people in general who dwell or occupy any property in the vicinity. Section further states as follows:

"*A public nuisance is not excused on the ground that it causes some convenience or advantage.*"

The proposition of Bonser, C.J., which could be cited as a classic statement of a secular approach in dealing with a public nuisance is referable to the final sentence of section 261 cited by me above. A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a "public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity".

Subsequent jurisprudential developments in other countries follows a similar trend of reasoning.

In the case of *Church of God (full gospel) in India* v *K.K.R.M.C. Welfare Association*(2) at 2773 the Supreme Court of India posed the selfsame question as follows:

"*Whether a particular community or sect of that community can claim rights to add to noise pollution on the ground of religion?*"

Shah, J. in his Judgment at 2774 stated as follows in answer to that question

"*Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums. In our view, in a civilized society in the name of religion activities which disturb old or infirm persons, students, or children having their sleep in the early hours or during day-time or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without*

there being any unnecessary disturbance by the neighbours. Similarly, old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick people afflicted with psychic disturbances as well as children upto 6 years of age are considered to be very sensitive to noise. Their rights are also required to be honoured."

It transpired in the course of the submissions that at times there is rivalry between respective religious groups. In this case the rivalry appears to be between different places of worship of one religious group. It is commonly known that when there is call to prayer in the early hours of the morning at about 5.00 a.m. on the other hand amplifiers and loudspeakers blare forth recorded chanting of "pirith". The proceedings in this case evoked much response of persons who are buffeted by the countervailing forces of such amplified noise.

It may be appropriate here to state *albeit* briefly some matters with regard to the chanting of "pirith" which dates back to the time of the Buddha. The chanting of "pirith" takes place only upon an invitation addressed three times to the Maha Sangha. Chanting follows with compassion to the devotees who address the three-fold invitation.

Much respected Piyadassi Thero in his work titled "The Buddhas Ancient Path" has stated as follows (at page 17) that benefit could be derived only, "*by listening intelligently and confidently to paritta sayings because of the power of concentration that comes into being through attending whole-heartedly to the truth of the sayings.*"

Thus there must necessarily be a close proximity between the person chanting and the person who is listening. Blaring forth the sacred suttas and disturbing the stillness of the environment, forcing it on ears of persons who do not invite such chant is the antethesis of the Buddha's teaching.

I would finally refer to the important case in India. In *Re. Noise Pollution*(3) at 3136, especially because in that case the Supreme Court of India issued several directions in order to safeguard the people from the harmful effects of noise pollution. The motion of the

intervenient 6th respondent is that similar directions be issued pertinent to our legal context in terms of Article 126(4) of the Constitution.

The Chief Justice of India commences his judgment delving into the etymology of the term "Noise" itself and has noted that it is derived from the Latin "Nausea" defined as unwanted sound. He has cited a leading authority which describes unwanted sound as "a potential hazard to health and communication dumped into the environment without regard to the adverse effect it may have on unwilling ears and has continued to state that

> "noise is more than just a nuisance. It constitutes a real and present danger to people's health. Day and night, at home, at work, and at play, noise can produce serious physical and psychological stress. No one is immune to this stress. Though we seem to adjust, to noise by ignoring it, the ear, in fact, never closes and the body still responds – sometimes with extreme tension, as to a strange sound in the night."
>
> Further, "that noise is a type of atmospheric pollution. It is shadowy public enemy whose menace has increased in the modern are of industrialisation and technological advancement." (at 3141 and 3142).

The Supreme Court of India has firmly rejected the contention that there is a fundamental right to make noise associated with the freedom of speech and expression. The Chief Justice observed -

> "Nobody can claim the fundamental right to create noise by amplifying sound of his speech with the help of loudspeakers. While one has a right to speech, and others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression." (at 3141)

In an exhaustive survey, the Supreme Court of India has dealt with the developments in many other jurisdictions where comprehensive provisions have been made to safeguard people from the harmful effect of the public nuisance of noise pollution and finally the Court issued several directions (at 3164-3165) including

a direction that "no one shall beat a drum or tom tom or blow trumpet or beat or sound any instrument or use any sound amplifier at night (between 10.00p.m. and 6 a.m.) except in public emergencies".

There is no dispute in this case that People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by section 23P of the National Environmental Act No. 47 of 1980, as amended by Act No. 56 of 1988 to safeguard the public from the harmful effects of noise pollution. The facts also reveal that there are no guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Article 12(1) of the Constitution.

Accordingly, we consider it to be just and equitable in the circumstances of the case to make the following directions in terms of Article 126(4) of the Constitution:

(i) That the emission of noise by the use of amplifiers, loudspeakers or other equipment or appliances which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity be considered a public nuisance in terms of section 261 of the Penal Code and that the Police should entertain complaints and take appropriate action for the abatement of such public nuisance;

(ii) That all permits issued by the Police under section 80(1) of the Police Ordinance shall cease to be effective forthwith;

(iii) That no permits shall be issued in terms of section 80(1) of the Police Ordinance for the use of loudspeakers and other instruments for the amplification of noise as specified in that section covering the period 10 p.m. (night) to 6 a.m. (morning). Such permits may be issued for special religious functions and other special events only after ascertaining the views of persons who occupy land premises in the vicinity, a record of such matters to be maintained and the grant of any such permit shall be forthwith reported to the nearest Magistrate Court;

(iv) That in respect of the hours from 6.00 a.m. to 10.00 p.m. permits may be issued for limited periods of time for specific purpose subject to the strict condition that the noise emitted from such amplifier or loudspeaker or equipment does not extend beyond the precincts of the particular premises.

(v) Where a permit is issued in terms of section 80(1) as provided in direction (iii) and (iv) sufficient number of Police Officers should be designated and posted to the particular place of use to ensure that the conditions imposed are strictly complied with;

(vi) That the Police will make special arrangements to entertain any complaint of a member of the public against any person guilty of an offence of public nuisance as provided in section 261 of the Penal Code or of using any loudspeaker, amplifier or other instrument as provided in section 80 of the Police Ordinance contrary to any of these directions and take immediate steps to investigate the matter and warn such person against a continuance of such conduct. If the conduct is continued after that warning to seize and detain the equipment as provided in section 80(4) of the Police Ordinance and to report the matter to the Registrar of this Court.

Copies of this Judgment to be sent to the Secretary, Ministry of Defence and the Inspector General of Police for immediate action to be taken in regard to – Directions stated above.

The Inspector General of Police to submit a report to Court as to the action taken on the judgment.

Mention case on 10.12.2007.

TILAKAWARDENA, J. – I agree.

SOMAWANSA, J. – I agree.

Direction issued under Article 126(4).

Ed. Note - The Supreme Court made order that till the Regulation is made the directions that have been issued and the circulars issued by the I.G.P. would continue to be in operation and enforced by the S.C.

PERERA
v
GEEKIYANA

COURT OF APPEAL
EKANAYAKE, J.
GOONERATNE, J.
CA 829/94(F)
D.C. COLOMBO 15554/L
MARCH 14, 2007

Civil Procedure Code – Section 46, 48, 38, 93 – Caption read District Court of Mt. Lavinia and the word Mt. Lavinia was struck off – and the word Colombo inserted in handwriting – Application to initial alteration – refused – Dismissal of action – Validity – should the plaint be amended?

A preliminary objection was raised stating that the caption of the plaint reads as District Court of "Mt. Lavinia" and the word "Mt. Lavinia" had been struck off and the word "Colombo" has been inserted in handwriting.

The trial Judge inquired from Counsel whether he wishes to amend the plaint, the Counsel indicated that the plaint need not be amended but sought permission from Court to initial/endorse the caption showing the alteration.

This was refused by the trial Judge and the action was dismissed.

Held:

(1) There was no necessity to apply to Court to amend the plaint. Amendment of pleadings will become necessary only to ascertain the points in issue in case of doubt, function of the pleadings is to clarity the issues so that the real issues between the parties may be tried.

(ii) It is settled law that cause of justice cannot be thwarted by procedural technicalities. A party cannot be refused just relief mainly because of some mistake, negligence or inadvertence;

(iii) Court should always be mindful of the fact that merits of the case should be considered unless the objection raised by Counsel indicates a material defect in the pleadings which needs amendments in compliance with section 93;

(iv) Attitude of Courts should be to avail frivolous technicalities *"Supreme Court is a Court of Law which should not be tramelled by technical objections and that it is not an academy of law"* – Chief Justice Abrahams in *Velupillai* v *Chairman, U.C. Jaffna.*(7)

APPEAL from the Judgment of the District Court of Colombo.

Cases referred to:

(1) *J.E. Senanayake* v *V.H.L. Anthonisz and another* – 69 NLR 225 at 227.

(2) *Fernando* v *Soysa* – 2 NLR 40.

(3) *Mohideen* v *Gnanaprakasam* – 14 NLR 33.

(4) *Soysa* v *Soysa* – 17 NLR 118.

(5) *Avva Ummah* v *Casinader* – 24 NLR 199.

(6) *W.M. Mendis* v *Excise Commissioner* – 1999 (1) SLR 351.

(7) *Velupillai* v *Chairman U.C., Jaffna* – 39 NLR 464.

N.R.M. Daluwatte, P.C., with *Rohan Gunapala* for the appellant.

Romesh de Silva P.C., for respondent.

Cur.adv.vult.

May 21, 2007

ANIL GOONERATNE, J.

This appeal arises from the order of dismissal of the plaintiff's action on 31.5.1994 by the learned Additional District Judge, Colombo where a preliminary objection was raised at the trial by the defendant-respondent to the plaint filed of record stating that the caption of the plaint reads as District Court of Mt. Lavinia and the word Mt. Lavinia had been struck-off and the word Colombo inserted in hand writing. The original Court Judge after hearing both the learned President's Counsel for the defendant on the above objection and the Counsel for the plaintiff, had inquired from the Counsel for the plaintiff as to whether he wishes to amend the plaint but Counsel for the plaintiff indicated to Court that the plaint need not be amended but sought permission from Court to allow the registered Attorney of the plaintiff to initial or endorse the caption showing the alteration with the word Colombo which was handwritten on the plaint.

Court had not permitted the registered Attorney to initial or endorse the plaint as aforesaid but in the order, Additional District

Judge has made reference to the fact that in these circumstances what should be done was for the plaintiff to have applied to Court to amend the plaint but when the answer to court by Counsel for plaintiff was in the negative, Original Court dismissed the plaint with costs as the plaint filed of record is not a valid plaint.

It was contended on behalf of the defendant-respondent that

(a) Failure to initial the caption is indicative of the fact that the caption would have been altered at any time on any date.

(b) Service copy of the plaint too has the same alteration which is also unsigned / not initialed.

(c) No application has been made to rectify the error and as such plaint has to be dismissed.

The plaintiff-appellant contends that the objection taken by the defendant is highly technical/frivolous and that it is a curable defect which would not cause any prejudice to the defendant. The appellant also submitted to this Court that

(a) any objection of this nature should be taken at the earliest opportunity by motion prior to the trial date.

(b) Plaint had been tendered to the registry on 29.9.91 and accepted on 30.9.91. (date stamp placed)

(c) Plaint accepted after the caption was altered correctly.

(d) Service copy has been subscribed by the registered Attorney for plaintiff.

On a perusal of the record I find that although an objection to the plaint was raised on 31.5.1994, there had been several dates prior to 31.5.94, where this case had been called in the District Court of Colombo, and prior to 31.5.94 the case had been fixed for trial on 6.1.94. On that date the journal entry indicates that the case had been re-fixed for trial/settlement on 31.5.1994. As such this objection should have been taken on a motion prior to filing the answer of the defendant.

The learned Additional District Judge's order of 31.5.94 dismissing the action needs to be examined. The trial Court Judge *inter alia* refer to the following matters in her order.

(a) mistakes do occur and its not unusual.

(b) request by plaintiff to endorse the pleadings or initial the alterations cannot be permitted after same has been filed of record.

(c) the place of alteration in the pleadings should be initialed by the registered Attorney. It is his responsibility.

(d) in this instance Court is unable to state as to when the alteration of the caption was done. It might have been after acceptance of the plaint.

(e) although the District Court seal has been affixed by the Registrar on the plaint, it would not mean that Court has accepted same.

(f) if the name of Court is incorrectly inserted plaint should be initially rejected. However if a correction is done without the endorsement/initial of the Attorney-at-law it is an invalid plaint.

(g) as observed above, when Court inquired from the plaintiff's Counsel as to whether plaint needs to be amended the answer to same was in the negative. At this point when Court inquired from the plaintiff he should have moved to amend the plaint/caption.

(h) since the plaint is not valid Court dismissed the plaint with costs.

The trial Court Judge's findings as stated above may in a way be of some relevance to the day to day functioning of the original Court but the ultimate decisions to dismiss the plaint is an erroneous decision of the original Court since the error suggested by Court and the Defence Counsel is of a trivial nature and a curable defect. (If it is the view of the original Court that there is an alteration done in the caption to the plaint).

A plaint could be returned for amendment or rejected according to the provisions referred to in section 46 of the Civil Procedure Code.

Section 48 of the Civil Procedure Code requires the order for return or rejection to specify the fault or defect and the date of filing

plaint and by whom it was filed and such order to be filed of record and signed by the Judge. Section 48 reads thus:

> Every order returning or rejecting a plaint shall specify the date when the plaint was presented and so retuned or rejected, the name of the person by whom it was presented and whether such person was plaintiff or registered Attorney, and the fault or defect constituting the ground of return or rejection; and every such order shall be in writing signed by the Judge, and filed of record.

In this instance the original Court had not made an order in compliance with section 48 of the Code.

Plaintiff's position was that an amendment was not necessary or that there is nothing to be done to amend the plaint other than to place the initial of the Attorney in the place where the word 'Colombo' (hand written) appears, since the plaint has been presented and accepted by Court by that time the objection was raised by the defence. If that position of the plaintiff is accepted the only lapse if at all on his part would be his failure to endorse or initial the place where the word 'Colombo' appears on the plaint. To this extent the learned District Judge is correct as any slight alteration needs to be initialed by the registered Attorney-at-Law. However, I am inclined to accept the position of the plaintiff's Counsel that there was no necessity to apply to Court to amend the plaint, other than to place one's initials with permission of Court at the point where hand written word appears on the plaint. Amendment of pleadings will become necessary only as ascertain the points in issue in case of doubt and it has been considered by our courts that the function of the pleadings is to clarify the issues so that the real issues between the parties may be tried. *J. E. Senanayake* v *V. H. L. Anthonisz and another*(1) at 227.

In fact the earlier view was that a Judge cannot reject or return a plaint after having accepted it and ordered summons. *Fernando* v *Soysa*(2) and *Mohideen* v *Gnanaprakasam*(3). However the cases reported in *Soysa* v *Soysa*(4) and *Avva Umma* v *Casinader*(5) changed the position to enable Court to take steps to return or reject the plaint if the material defect has been pointed out by the

defendant at a subsequent stage. This principle is being followed even in recent times.

The original Court Judge should have given her mind to the question whether the objection raised by the defence is valid (prior to dismissal of the plaint) for the following reasons:

(a) Is there any prejudice or injustice caused to the defence?

(b) Is the objection of a trivial nature, which can be cured? 130

(c) Is an amendment of the caption really necessary?

(d) Should the merits of the case be considered and permit the parties to proceed to trial rather than dismissing the case without considering the merits, merely because plaintiff took the view that there is no need to amend the plaint.

(e) Is it not apparent on a perusal of the plaint that with or without an amendment to the caption scope of the action or its character would not change.

It is settled law that cause of justice cannot be thwarted by 140 Procedural technicalities. In *W.M. Mendis & Co.* v *Excise Commissioner*.(6) The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence.

A Judge hearing civil cases in the original court should always peruse the pleadings and decide as to whether there is a real necessity to amend the pleadings according to accepted procedure. Court should always be mindful of the fact that merits of the case should be considered unless the objection raised by 150 Counsel indicates a material defect in the pleadings which needs amendment in compliance with section 93 of the Code. Attitude of courts should be to avoid frivolous technicalities.

"Supreme Court – is a court of law which should not be trammelled by technical objections and that it is not an academy of law" *per* Chief Justice Abrahams (*Velupillai* v *Chairman U.C. Jaffna*).(7)

It is unfortunate that this case had been dismissed some years ago on a highly technical issue, without considering the merits of the case. In the circumstances I set-aside the order of the learned Additional District Judge of Colombo dated 31.5.1994, with costs, fixed at Rs. 10,000/- and I direct that the case proceed to trial on the pleadings filed of record.

EKANAYAKE, J. – I agree.

Appeal allowed.

ARPICO FINANCE CO. LTD.
v
PERERA AND OTHERS

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 230/2005
DC MT. LAVINIA 2457/99M
SEPTEMBER 27, 2006

Civil Procedure Code – Sections 121(2), 175, 175(2) – Document in additional list filed after the case was first fixed for trial – Exceptional circumstances to exercise discretion – Interest of justice – Paramount consideration.

The plaintiff-petitioner pleaded that, the 1st defendant-respondent entered into a lease agreement with the plaintiff-petitioner in respect of a Toyota bus. Though the defendant-respondent agreed to pay the lease rentals he defaulted. At the trial, the plaintiff-petitioner sought to produce another lease agreement, this was objected to, on the basis that the document had been listed in the additional list but which was filed after the first date fixed for the trial. The District Court held with the defendant-respondent.

Held:

(1) Provisions of section 121 (2) empowers the Court to require the list of documents to be filed not less than 15 days before the date fixed for trial.

(2) Section175 (2) empowers Court to use its discretion and grant leave to produce a document which is not listed in terms of section 121(2).

(3) Whether leave should be granted or not is a matter eminently within the direction of the trial Judge.

(4) The defendant had notice of this document when the plaintiff raised Issue No. 12, and further the lease agreement has been pleaded in the replication.

(5) The principle of filing a list of witnesses is to prevent an element of surprise and thereby not cause any prejudice to the other party.

(6) The 1st defendant cannot be heard to say that she was taken by surprise.

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia.

Cases referred to:

(1) *Kandiah* v *Wiswanathan and another* – 1991 – 1 Sri LR 269.

(2) *Girantha* v *Maria* – 50 NLR 519 at 522.

(3) *Casiechetty* v *Senanayake* – 1999 – 3 Sri LR 11 at 14 and 15.

Palitha Kumarasinghe PC with *M.I.U. Idroos* for plaintiff-petitioner.

S. Gunawardane with *J. Hissella* and *S. Athuladewa* for 1st and 4th defendant-respondents.

May 04, 2007

WIMALACHANDRA, J.

This is an application for leave to appeal filed by the plaintiff-petitioner (plaintiff) from an order of the learned Additional District Judge of Mount Lavinia dated 2.6.2005. 01

The plaintiff instituted the above action against the defendant-respondents (defendants) jointly and severally for a judgment in a sum of Rs. 2,442,385/62 and the legal interest at the rate of 4% per month from 7.10.1999 till the date of the decree. The plaintiff has pleaded in the plaint that the 1st defendant entered into a lease agreement bearing No. LF/1208/25/98 dated 27.11.1988 with the plaintiff in respect of a Toyota-Coaster bus described in the schedule to the plaint. The 1st defendant had agreed to repay the total sum in the lease in 48 monthly instalments. In the event of a default, the parties had agreed that the plaintiff is entitled to 10

terminate the lease agreement and charge default interest and to recover statutory and other charges arising out of the agreement. The 2nd, 3rd, and 4th defendants were the guarantors of the lease agreement. When the plaintiff instituted this action in the District Court of Mount Lavinia, the 1st, 2nd and 3rd defendants expressed their willingness to settle the action and a consent motion was filed.

However, the 1st, 2nd and 3rd defendants failed to comply with the terms of the settlement and hence the plaintiff made an application for writ of execution. Thereafter on an application made by the defendants the District Court set aside the settlement and fixed the matter for trial.

When the case came up for trial on 30.06.2004, the plaintiff called an executive officer attached to the plaintiff-company. The examination in chief could not be concluded on that day and the matter was re-fixed for further hearing on 7.10.2004. On 7.10.2004 the trial was refixed for 26.5.2005. When the trial was resumed, the plaintiff continued to lead the evidence of the earlier witness and he told Court that the 3rd defendant entered into another lease agreement bearing No. LF/1207/25/98 on 27.11.1998. The plaintiff then sought to produce the said agreement marked 'P19'. At that stage the Counsel for the 1st defendant objected to the said document being produced on the ground that the said document had been listed in the additional list which was filed on 14.6.2004, which was after the first date fixed for the trial to this action. This objection was upheld by the learned Additional District Judge by order dated 2.6.2005.

When this matter was taken up for inquiry into the granting of leave, by consent of the parties, leave to appeal was granted on the question whether the lease agreement bearing No. LF/1207/25/98 referred to in the proceedings dated 2.6.2005 should be allowed in evidence. Thereafter, the parties agreed to dispose of this matter by way of written submissions.

When the trial resumed on 2.6.2005 the Counsel for the plaintiff moved to produce and mark the said lease agreement bearing No. LF/1207/25/98, and the Counsel for the defendants objected to producing the said document on the basis that the said document was listed in the additional list filed on 14.6.2004, which

was after the case was first fixed for trial. The learned District Judge upheld the objection and rejected the said document.

In this order the learned Judge held that there are no exceptional circumstances to exercise his discretion under the proviso to section 175(2) of the Civil Procedure Code to allow the said document. The question that arises in this appeal is whether the discretion of Court in terms of section 175(2) has been correctly applied.

Section 175(2) reads thus:

"A document which is required to be included in the list of documents filed in Court by a party as provided by section 121 and which is not so included shall not, without the leave of the Court, be received in evidence at the trial of the action."

The provisions of section 121(2) of the Civil Procedure Code require the list of documents to be filed not less than 15 days before the date fixed for trial. Section 175(2) empowers the Court use its discretion and grant leave to produce a document which is not listed in terms of section 121(2) of the Civil Procedure Code.

The purpose of listing of witnesses and documents is to prevent an element of surprise and thereby not cause any prejudice to the opposite party. It also prevents false documents from being introduced after the institution of the action.

It was held in the case of *Kandiah* v *Wisvanathan and another*[1] that when an unlisted document is sough to be produced by a party in a District Court trial, the question as to whether leave of Court should be granted under section 175(2) of the Civil Procedure Code is a matter eminently within the discretion of the trial Judge. The precedence indicates that leave may be granted:

(1) where it is in the interest of justice to do so.

(2) where it is necessary for the ascertainment of the truth.

(3) where there is no doubt about the authenticity of the documents (as for instance a certified copy of a public document or records of judicial proceedings).

(4) where sufficient reasons are adduced for the failure to list the document (as for instance where the party was ignorant of its existence at the trial)

Where the Court admits such a document, an appropriate order for costs will generally alleviate any hardship caused to the said party.

The learned Counsel for the plaintiff submitted that the lease agreement LF/1207/25/98 has been referred to in paragraph 10 of the replication filed by the plaintiff. Therefore, the 1st defendant had notice of the said lease agreement.

Now I shall proceed to consider whether leave of Court should be granted under section 175(2) of the Civil Procedure Code to allow the said document to be included in the list of documents.

As pointed by Gratiaen, J. in *Girantha* v *Maria*(2) at 522, the purpose of the requirement of section 175 that each party should know before the trial the names of the witnesses whom the other side intends to call is to prevent surprise. The proviso to section 175 of the Civil Procedure Code authorizes the Court to permit a witness to be called although his name does not appear on the list of witnesses filed before the commencement of trial is such course is "advisable in the interest of justice".

Jayasuriya, J. in *Casie Chetty* v *Senanayake* at 14 and 15 quoted with approval the opinion expressed by Gratian, J. in *Girantha* v *Maria* (*supra*) and held:

> **"In exercising under section 175 of the Civil Procedure Code where it is sought to call a witness whose name was not in the list, the paramount consideration of the Judge is the ascertainment of truth and not the desire of a litigant to be placed at an advantage by some technicality."**

The same principle applies to the listing of documents.

In *Kandiah* v *Wisvanathan and another (supra)* at 275, 276, Wijeyaratne, J. too held that among other grounds upon which the Court should consider granting leave of Court to receive an unlisted document, are where it is necessary for the ascertainment of the truth and it is in the interest of justice to admit such a document.

The learned Counsel for the plaintiff submitted that the plaintiff by its replication dated 13.6.2003 marked 'J', in paragraph 10, denied the 1st defendant's position taken up by her in paragraph 8 of her answer

and in reply the plaintiff by its replication marked 'J' annexed to the petition has stated in paragraph 10 that the mortgage bond No. 5443 attested by D.L. Liyanage, N.P. was executed as security against the lease agreements No. LF/1207/25/98 and No. LF/1208/25/98 and the said mortgage has been released and sold and the proceeds were credited to both lease agreements. Furthermore the 1st defendant has put this matter in issue No. 12 and the plaintiff has raised a consequential issue No. 27.

The issue 27 reads as follows:

"27(අ)3 වන විත්තිකරු විසින් අත්සන් කරන ලද උකස් ඔප්පුව පැමිණිලිකරුගේ ප්‍රති උත්තරයේ 10 වන ඡේදයේ සඳහන් පරිදි ගිවිසුම් දෙකක් සම්බන්ධයෙන් වලංගුව නිබුණේ ද?

(ආ) එකී උගස්කරවලින් ලැබෙන මුදල් එකී ගිවිසුම් දෙකෙහිම ගිණුම් සඳහා බැරකර ඇත්තේ ද?"

In the circumstances, it appears that the 1st defendant was aware of this document, the lease agreement bearing No. LF/1207/25/98. Therefore it cannot be said that the 1st defendant was taken by surprise when the said document was listed in the additional list of documents. The 1st defendant had notice of this document when the plaintiff raised the issue No. 12. The principle of filing a list of witnesses is to prevent an element of surprise and thereby not cause any prejudice to the other party.

In the circumstances, to ascertain the truth which should be the paramount consideration, and in the interest of justice the lease agreement LF/1207/25/98 listed in the additional list should be allowed as the said document is necessary to decide the aforesaid issues Nos. 12 and 27. Furthermore if this document is not allowed grave injustice would be caused to the plaintiff as the plaintiff will be unable to explain the facts relevant to the execution of the mortgage bond No. 5443 attested by D.L. Liyanage, N.P. In any event no prejudice would be caused to the 1st defendant as she had notice of this document. Moreover, the 1st defendant cannot be heard to say that she was taken by surprise as this document, the lease agreement LF/1207/25/98, has been pleaded by the plaintiff in paragraph 10 of the replication and it was out in issue by raising the issue No. 27.

In the circumstances the learned Additional District Judge was in error when he refused to exercise the discretion of Court and refused leave to produce this document. 160

For these reasons stated above I set aside the order of the learned Additional District Judge dated 2.6.2005. Accordingly, the appeal is allowed with costs.

Appeal allowed.

KARUNARATNE
v
ALWIS

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 7/2002
DC NEGOMBO 4787/L
DECEMBER 13, 15, 2007
MARCH 15, 2007

Civil Procedure Code – Section 93(1) – Section 93(2) – Amendment of pleadings – What is the day first fixed for trial? Is it the day the trial actually begun?

Held:

The day first fixed for trial could mean the day the trial actually began. Any amendment made prior to the date the trial was begun comes under S93(1) empowering the Judge granting wide discretion in allowing amendments.

"It is clear that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed".

APPLICATION for leave to appeal from an order of the District Court of Negombo.

Cases referred to:

(1) *Ceylon Insurance Company* v *Nanayakkara and another* – 1999– 3 Sri LR 50 at 52.

(2) *Siripura Hewavasam Pushpa* v *Leelawathie Bandaranayake and three others* – 2004 – 3 Sri LR 162 (SC)

Padmasiri Nanayakkara with *Indika de Alwis* for defendant-petitioner.

Dr. S.F.A. Cooray with *D.H. Siriwardane* for plaintiff-respondent.

June 15, 2007

ERIC BASNAYAKE, J.

The defendant-petitioner (defendant) filed this application seeking to have the order of the learned District Judge dated 31.12.2001 set aside. By this order the learned District Judge had allowed the amended plaint.

This case was filed on 11.10.1993. The answer was filed in March 1994. A replication was filed on 4.10.1994. On 26.2.2001 the defendant filed an amended answer to which the plaintiff filed objections on 5.4.2001. However, on 10.5.2001 the plaintiff withdrew the objections due to which the amended answer was accepted. On 26.6.2001 the plaintiff filed an amended plaint together with a motion giving separately the amendments. This was objected to by the defendant. The learned District Judge after inquiry accepted the amended plaint by his order dated 31.12.2001 marked "J".

Order dated 31.12.2001

The learned Judge stated in the order that the plaintiff moved to amend the plaint to include the deed number and to describe i n detail the last will proved in Court. The schedule had been amended to give a detailed description. The trial had not yet begun. The answer had been amended prior to this. Therefore the learned Judge had concluded that no prejudice would be caused to the defendant.

The petitioner averred that the learned Judge had failed to consider section 93 of the Civil Procedure Code and also to satisfy that grave and irremediable injustice would be caused to the defendant if the amendment is not allowed. The petitioner further complained that the leaned Judge had failed to consider the negligence and the long delay.

The learned Counsel for the defendant complained that the impugned order could not be considered as one valid in law. He further submitted that the learned Judge has not considered the law that is applicable to the amendments of pleadings contained in section 93 of the Civil Procedure Code. The learned Counsel mentioned the case of *Ceylon Insurance Company* v *Nanayakkara and another*(1) at 52 where Weerasuriya, J. held that "as set out in section 93 (2) the amendment of pleadings on or after the first date of trial can now be allowed only in limited circumstances. It prohibits Court from allowing an application for amendment (a) unless it is satisfied that grave and irremediable injustice be caused if the amendment is not allowed and (b) the party applying has not been guilty of laches. Further the Court is required to record reasons for concluding that both conditions referred to above have been satisfied".

The learned Counsel submitted that the learned Judge has failed to consider both aspects namely whether grave and irremediable injustice would be caused to the plaintiff if the amendment is not allowed and whether the plaintiff is guilty of laches.

Section 93 of the Civil Procedure Code is as follows:

> 93 (1) **Upon application made to it before the day first fixed for trial** of the action ..... the court shall have full power of amending in its discretion, all pleadings in the action, by way of addition or alteration or of omission.
>
> (2) On or after the day first fixed for the trial of the action and before the final judgment, no application for the amendment of any pleadings shall be allowed unless the court is satisfied, for reasons to be recorded by the Court that grave and irremediable injustice will be caused if such amendment

is not permitted, and on no other ground and that the party so applying has not been guilty of laches.

(3) Not reproduced.

(4) Not reproduced.

In *Siripura Hewawasam Pushpa* v *Leelawathie Bandaranayake and three others*[2]. S.N. Silva C.J. referring to the day first fixed for trial said thus: "**it is clear that the date of trial is not necessarily the first date on which the case is fixed for trial, but would also include any date to which the trial is postponed**" (emphasis added).

Therefore the day first fixed for trial could mean the day the trial actually began. Any amendment made prior to the date the trial was begun therefore comes under section 93 (1) empowering the Judge granting wide discretion in allowing amendments. While considering the impugned order, it appears that the learned Judge had considered the fact that the trial had not yet begun. He also seems to be conscious of the fact that the defendant too was allowed to amend the answer a few days before. He had also considered the fact that the amendment gives a detailed description of the plaintiff's title. The order of the learned Judge contains only 12 lines as referred to by the learned Counsel for the defendant. However those 12 lines contain all that is required.

Therefore I do not find any reason to interfere with the order of the learned District Judge. The defendant's application is dismissed with costs fixed at Rs. 10,000/-.

WIMALACHANDRA, J. - I agree.

Application dismissed.

RANASINGHE
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJIT SILVA, J.
SISIRA DE ABREW, J.
C.A. 15/2004
H.C. AVISSAWELLA 44/2003
MARCH 28, 29, 2007

Penal Code – Section 296 – Murder – Dying declaration – inherent weakness not considered – Principles relating to dying declarations – Evidence Ordinance – Section 27 – Discovery in consequence of a section 27 Statement – Important of giving reasons?

The accused-appellant was convicted of murder of his mother-in-law and was sentenced to death.

In appeal, it was contended that the trial Judge had not considered the inherent weaknesses of a dying declaration and that there was an erroneous approach with regard to section 27 Statement of the appellant.

Held:

(i) When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge/Jury must bear in mind the following weaknesses.

  (a) The statement of the deceased person was not made under oath;

  (b) The statement of the deceased person has not been tested by cross examination,

(ii) The trial Judge/Jury must be satisfied beyond reasonable doubt on the following matters:

  (a) whether the deceased in fact made such a statement;

  (b) whether the statement made by the deceased was true and accurate;

(c) whether the statement made by the deceased could be accepted beyond reasonable doubt?

(d) whether the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt?

(c) whether the witness is telling the truth;

(f) whether the deceased was able to speak at the time the alleged declaration was made;

(iii) The trial Judge had totally failed to consider the principles relating to the dying declaration and the risk of acting upon a dying declaration;

(iv) The conclusions reached by the trial Judge about the recovery of the iron club removed from a well is erroneous since discovery is consequence of a section 27 statement only leads to the conclusion that the accused had the knowledge as to the weapon being kept at the place from which it was detected;

(v) The trial Court must declare its reasons for the acceptance of the prosecution evidence and the rejection of the defence evidence.

APPEAL from the Judgment of the High Court of Avissawella.

Cases referred to:

(1) *King* v *Asirivadam Nadar* – 51 NLR 322

(2) *Justinpala* v *Queen* – 66 NLR 409

(3) *Queen* v *Anthonypillai* – 68 CLW 57

(4) *Moses* v *State* – 1993 – 3 Sri LR 401

(5) *Heen Banda* v *Queen* – 75 NLR 54

Dr. Ranjith Fernando for appellant.

Dappula de Livera, D.S.G. for the Attorney-General.

Cur.adv.vult.

May 09, 2007

SISIRA DE ABREW, J.

The appellant was convicted of the murder of his mother-in-law and was sentenced to death. This appeal is against the said conviction and the sentence. The prosecution mainly relied upon the following items of evidence to prove the fact that the appellant inflicted injuries on the deceased.

(1) The utterances made by the appellant. Around 12.30 p.m. on the day of the incident the appellant addressed the witness Manel Perera, one of the daughters of the deceased in the following language. "I will kill all of you. I have written in the Police Station and come."

(2) At the time the appellant made the above utterances he was armed with an iron club which was identified by the witness at the trial.

(3) This iron club was recovered by the investigating officer from a well in consequence of a section 27 statement made by the appellant.

(4) Dying declaration made by the deceased to witness Manel Perera to the effect that the appellant attacked her with an iron club.

(5) The enmity that the appellant was having with the deceased with regard to a land dispute.

Learned Counsel for the appellant complained that the learned trial Judge had not considered the inherent weaknesses of a dying declaration before accepting the dying declaration as evidence in this case. In order to appreciate the contention of the learned Counsel it is necessary to consider dying declaration made by the deceased and the relevant answers given by the witness Manel Perera who went to see her mother on hearing that her mother had been attacked.

Witness Manel Perera saw the deceased almost crawling in her direction away from the house of the deceased when she went to the house of the mother. On being asked as to who assaulted her the deceased who was bleeding at the time first replied in the following words: "Elder son-in-law attacked me with an iron club." Learned Prosecuting State Counsel who was apparently not satisfied with this answer given by the witness Manel Perera told the witness to use the exact words used by the deceased. The answer to this question by the witness is as follows: "Mother said son-in-law attacked me." When questioned by Court she said the deceased used the following words: "Wijelal attacked me." When the witness questioned the deceased for the second time the deceased used the following words: "Elder son-in-law Wijelal attacked me." It is therefore seen that witness Manel

Perera had given four different answers with regard to the words used by the deceased. They are as follows:

(1) Elder son-in-law attacked me with an iron club.

(2) Son-in- law attacked me.

(3) Wijelal attacked me

(4) Elder son-in-law Wijelal attacked me.

Are these the words used by the deceased? Are these the words used by the witness or is this a mixture of words used by both the witness and the deceased? Learned trial Judge should have been mindful of these questions.

When a dying declaration is considered as an item of evidence against an accused person in a criminal trial the trial Judge or the jury as the case may be must bear in mind following weaknesses. (a) The statement of the deceased person was not made under oath. (b) The statement of the deceased person has not been tested by cross examination; vide *King* v *Asirivadam Nadar*[1] and *Justinpala* v *Queen*[2]. (c) That the person who made the dying declaration is not a witness at the trial.

In the case of *Queen* v *Anthonypillai*[3] H.N.G. Fernando, J., held that "the failure on the part of the learned trial Judge to caution the jury as to the risk of acting upon a dying declaration, being the statement of a person who is not a witness as the trial, and as to the need to consider with special care the question whether the statement could be accepted as true and accurate had resulted in a miscarriage of justice."

As there are inherent weaknesses in a dying declaration which I have stated above, the trial Judge or the jury as the case may be must be satisfied beyond reasonable doubt on the following matters. (a) Whether the deceased, in fact, made such a statement. (b) Whether the statement made by the deceased was true and accurate. (c) Whether the statement made by the deceased person could be accepted beyond reasonable doubt. (d) Whether the evidence of the witness who testifies about the dying declaration could be accepted beyond reasonable doubt. (e) Whether witness is telling the truth. (f) Whether the deceased was able to speak at the time the alleged declaration was made.

I have gone through the judgment of the learned trial Judge and I find that the learned trial Judge had failed to consider the above weaknesses of a dying declaration. Further the learned trial Judge had not directed his mind to the above matters referred to in (a) to (g) above. However there is some reference to criterion (f) above in the judgment but even here he had not been mindful that this was a matter that should be proved beyond reasonable doubt. In my view the learned trial Judge should have been mindful of the inherent weaknesses in a dying declaration before he decided to act upon the dying declaration. The learned trial Judge should also have been satisfied beyond reasonable doubt about the other matters set out in (a) to (g) above. The learned trial Judge should have been cautious and careful before he decided to accept the dying declaration especially in view of the different answers, which I have already mentioned, given by the witness Manel Perera. It is true that the trial Judge who has a trained legal mind need not state all these principles in his judgment but it must be apparent from the judgment that he had directed his mind to the principles of law governing the dying declaration. The learned trial Judge failed to give reasons for the acceptance of the dying declaration. In this regard I would like to consider a passage from the judgment of Justice Hector Yapa in the case of *Moses* v *State*[6]."Furnishing of reasons not only assist the Court of Appeal in scrutinizing the legality and the correctness of the order made by the lower Court, but also the existence of reasons will tend to support the idea of justice and would enhance the public confidence in the judicial process. Failure to give reasons may even lead to the inference that the trial Judge had no good reasons for his decision." I endorse this view and add further that in a case of murder it must be borne in mind that the Court which hears the trial is dealing with the liberty of the accused because in the event of the charge being proved the accused would be sentenced to death. Thus the trial Court must declare its reasons for the acceptance of the prosecution evidence and the rejection of the defence evidence. In the instant case 1 it is dangerous to permit the conviction to stand as the learned trial Judge had totally failed to consider the principles relating to the dying declaration which I have stated above and the risk of acting upon a dying declaration.

The next complaint made by the learned Counsel for the appellant was that the erroneous approach of the learned trial Judge with regard to section 27 (Evidence Ordinance) statement of the appellant (hereinafter referred to as section 27 statement). Learned trial Judge, referring to recovery of iron club recovered from a well, observed as follows: *"This iron club was recovered from a well in consequence of the accused's statement. This shows that the accused tried to hide the weapon which was used to commit the crime."* In my view the above conclusion of the learned trial Judge is erroneous since discovery in consequence of a section 27 statement only leads to the conclusion that the accused had the knowledge as to the weapon being kept at the place from which it was detected. This view is supported by the judgment of His Lordship Justice Sirimane (with whom Samarawickrama, J. and Weeramantry, J. agreed) in the case of *Heenbanda* v *Queen*[7] which states as follows: "Where part of a statement of an accused person is put in evidence under section 27 of the Evidence Ordinance, it is the duty of the trial Judge to explain to the Jury that such a statement is only evidence of the fact that the accused knew where the article discovered could be found, and nothing more."

Learned Counsel for the appellant also complained about the basis of the rejection of the dock statement by the learned trial Judge. He submitted that the learned trial Judge had rejected the dock statement on the basis that it had not been corroborated. But I am unable to agree with this submission. Learned trial Judge observed that the dock statement was an uncorroborated one. Although there is no requirement in law that a dock statement should be corroborated in order to accept it, the observation made by the learned trial Judge revealed the factual position. The learned trial Judge came to the conclusion that the dock statement was not capable of creating a reasonable doubt in the prosecution case. It is not necessary for me to comment on the findings of the learned High Court Judge with regard to the rejection of the dock statement in view of the conclusion reached earlier by me with regard to conviction of the appellant.

If the evidence of witness Manel Perera is properly considered having due regard to the law relating to dying declarations and keeping in mind the demeanor and

deportment of the witness, trial might even end up in a conviction.

For the reasons set out in my judgment I set aside the conviction of the appellant and the death sentence imposed on him and order a retrial.

SILVA, J. – I agree.

Appeal allowed.

Retrial ordered.

RENUKA SUBASINGHE
v
ATTORNEY-GENERAL

COURT OF APPEAL
RANJITH SILVA, J.
SISIRA DE ABREW, J.
CA 139/2001
HC COLOMBO 9143/98
MARCH 27, 2007
MAY 7, 2007

Penal Code – Amended by Act 22 of 1995 – section 308A – Cruelty to children – Credibility of victim – Contradictions per se and inter se – faulty memory – lack of corroboration – Criminal Procedure Code – Section 414(1) – Proof of age of victim – Evidence Ordinance – Section 45, Section 114(f) – Expert evidence – Evidence not challenged considered as admitted?

The accused-appellant was indicted for acts of assault committed on one "S" – an offence punishable under section 308(A) Penal Code – cruelty to children.

It was contended by the accused appellant that:

(i) the victim was coached by the Police and hence unreliable;
(ii) evidence of the victim was not credible as there were material contradictions;
(iii) evidence of the victim was not corroborated;
(iv) no evidence to prove that the victim was below the required age

Held:

(i) The only witness to the alleged act of cruelty was the victim, and there are significant contradictions *per se* and *inter se*.