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[2007] 2 SRI L.R. – PARTS 3-4

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(2007) 2 Sri L.R. Parts 3 - 4

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MAINTENANCE ACT, NO. 37 OF 1999, section 2(2) – Illegitimate child – Mother dumb – Reliability of the evidence – Corroboration required? – Evidence Ordinance, sections 118 and 119

Referring to the use of DNA tests, Cretney and Masson (Principles of Family Law, 15th Edition, 1990, pg. 497) state that DNA profiling can establish parentage with virtual certainty. Bromley and Lowe (Bromley's Family Law, 8th Edition, 1992, pg. 274), considering the use of blood and DNA tests to establish parentage state that the DNA tests, which are also known as genetic fingerprinting, could by matching the alleged father's DNA bands with that of the child's in question, after excluding such bands that match the mother's, would make positive findings of paternity with virtual certainty (P.M. Bromley and N.V. Lowe, pg. 274). Bromley and Lowe on the same issue further had commented that,

> "In cases where parentage (usually paternity) is in issue the most cogent evidence is likely to be obtained by blood tests in general and DNA tests in particular. Such tests may be used either to **rebut the presumption or allegation of paternity or to establish parentage"** (emphasis added).

It is thus apparent that a DNA test could be used by the appellant to rebut the allegation of paternity. Accordingly considering the circumstances of this appeal and based on reasons aforementioned, I answer the question at issue, in the negative.

For the reasons aforementioned this appeal is allowed and the judgment of the High Court of Ratnapura dated 14.09.2004 and the order of the Magistrate's Court, Balangoda dated 26.04.2001 are set aside.

I make no order as to costs.

AMARATUNGA, J. – I agree.

SOMAWANSA. J. – I agree.

Appeal allowed.

GUNAWATHIE

v

PRIYALAL

SUPREME COURT
SARATH N. SILVA, C.J.
SHIRANEE TILAKAWARDANE, J.
SOMAWANSA, J.
SC 81/2005
HC KANDY 1246/2003
MC 3150
APRIL 24, 2006
JULY 3, 2006

Maintenance Act No. 37 of 1999 – section 2(2) - Illegitimate child – Mother dumb – Reliability of the evidence – Corroboration required? – Evidence Ordinance , section 118, section 119.

The applicant-respondent-appellant filed action seeking maintenance from the respondent claiming that he is the father of the child born to her 'dumb' daughter. The mother of the child who was dumb gave evidence through an interpreter; the paternity of the child was put in issue by the respondent. The Magistrate's Court delivered its order in favour of the applicant-appellant. The High Court, in appeal reversed the said order. The respondent before the Supreme Court challenged the testimonial reliability and trustworthiness of the dumb witness on the purported infirmities in the interpretation and translation of her communications before Court.

Held:

(1) In a claim for maintenance of an illegitimate child, the burden of proof with respect to paternity vests in the party asserting such claim. Paternity must be proved through cogent evidence.

(2) Under the Maintenance Act, clear convincing and coherent evidence given by the claimant to establish the fact of paternity to the satisfaction of the Magistrate would suffice in establishing paternity as claimed by the claimant.

Per Shiranee Tilakawardane, J.

"Unlike under the old Ordinance the present Maintenance Act does not require additional corroboration of the mother's evidence, if the Magistrate is satisfied on the issue of paternity, based on evidence led to that effect by the claimant."

(3) The reliability of evidence adduced by a dumb witness must be considered in the light of the facts and circumstances of each case. There exists no general standard or straight jacket formula applicable to such cases.

(4) Under the Common Law, it is accepted that a person who is deaf and dumb is not incompetent, if he or she can be made to understand the nature of an oath and if intelligence can be conveyed to and received from him or her by means of signs. He or she may be examined through a sworn interpreter who understands her signs.

(5) The evidence that has been recorded discloses that the unfolding of the narrative of events that had occurred by the said witness was clear, convincing, concise and in a manner which could lead to clear conclusions.

Per Shiranee Tilakawardane, J.

"It is not the job of the Court to privilege certain terms of communications over others. Court will not raise a negative presumption against the understanding and intelligence of a witness based on the method of communication chosen by that witness or come to any unfounded assumptions on such evidence and to do so would be inequitable".

(6) In the instant case it is evident on an analysis of the evidence on record that the dumb witness-mother more than satisfies the criteria laid down in section 118 and her testimony is in accordance with the provisions of section 119.

7) The impartiality and independence of the interpretation has not been challenged at any stage of the proceedings. There is no evidence to prove improper conduct or any act of partiality or interest which could undermine the reliability of the interpretation in this case.

APPEAL from a judgment of the High Court of Kandy.

Cases referred to:

(1) *Venkattan* v *Emperor* 1972 13 CrCJ 27.

(2) *Somasunderam* v *The Queen* (1971) 76 NLR 10.

David Weeraratne for appellant respondent appellant.

T.G. Herath for respondent-appellant-respondent.

Cur. adv. vult.

March 16, 2007

SHIRANEE TILAKAWARDANE, J.

This appeal has been preferred against the Judgment of the High Court Kandy dated 01.08.2005. The applicant-respondent-appellant filed an application for maintenance, against respondent-appellant-respondent before the Magistrate's Court of Kandy, praying *inter alia* -

(d) that the respondent is the father of the child Pradeep Sasanka Kumara born to her disabled (dumb) daughter on 21.04.2000.

(c) that a monthly payment or Rs. 1500 be paid as maintenance against the respondent for the illegitimate child born to her daughter.

(f) for costs etc.

In his submissions the respondent has denied the paternity claimed by the appellant. The evidence tendered to Court included the testimony of Sriyani Pushpalatha a dumb witness who was the mother of the child whose paternity was in question. Her evidence was recorded with the assistance of the interpreter Mrs. Victoria de Cruz. The learned Magistrate delivered order dated 08.09.2003 in favour of the appellant.

The respondent preferred an Appeal against this Order to the High Court Kandy. The High Court allowed the respondent's appeal setting aside the order of the Magistrate, by its judgment dated 01.08.2005.

This appeal has been preferred against this judgment of the learned High Court Judge of Kandy by applicant respondent-appellant. Leave to appeal was granted on 27.02.2006 on the question of -

"*Whether the High Court erred in law in setting aside the order of the Magistrate made in favour of the applicant, which is based on an evaluation of the evidence that was recorded* ".

The appellant has claimed maintenance under section 2 (2) of the Maintenance Act, No. 37 of 1999. This section provides that:

"Where a parent having sufficient means neglect s or refuses to maintain his or her child who is unable to maintain himself or herself, the Magistrate may upon an application being made for maintenance and upon proof of such neglect or refusal, order such parent to make a monthly allowance for the maintenance of such child at such monthly rate as the Magistrate thinks fit, having regard to the income of the parents and the means and circumstances of the child".

Importantly, the proviso to this subsection stipulates clearly that:

"... no such order shall be made in the case of a non-marital child unless parentage is established by cogent evidence to the satisfaction of the Magistrate."

In a claim for maintenance of an illegitimate or non-marital child, the burden of proof with respect to paternity vests in the party asserting such claim.The statute prescribes that paternity must be proved through cogent evidence, to the satisfaction of the Magistrate in order for such a claim to succeed.

The term 'cogent evidence' as defined by the Blacks Law Dictionary contemplates evidence, which is "compelling or convincing". An instruction that evidence must be cogent denotes that it must be clear, constraining, impelling, or convincing. The evidence must be sensible and logical . It is the power to compel assent or belief.

To establish with 'cogent evidence' is to establish therefore convincingly, persuasively, clearly and with lucidity the fact so claimed. Therefore under the Maintenance Act, clear, convincing, and coherent evidence given by the claimant, to establish the fact of paternity to the satisfaction of the Magistrate would suffice in establishing paternity as claimed by the claimant.

It is important to note that unlike under the old Ordinance, the present law of maintenance does not require additional corroboration of the mother's evidence, if the Magistrate is satisfied on the issue of paternity, based on cogent evidence led to that effect by the claimant.

In the instant case, the dumb mother in her testimony has clearly identified the respondent as the father of the child born to her on 21.04.2000. The learned Magistrate, who had the opportunity to observe the demeanor of the witness and her response to questions, was satisfied that the evidence brought out in her testimony, clearly established the paternity of the respondent and has succinctly referred to the same in the findings of the Order.

The respondent has challenged the testimonial reliability and trustworthiness of the dumb witness merely on purported infirmities in the interpretation and translation of her communications before

Court. It is common ground that the dumb witness has received no formal education or training in sign language. Based solely on this fact, the respondent seeks to cast doubt upon the reliability and credibility of her testimony before Court. The respondent claims that the Court should assume that her lack of formal training in sign language would have seriously impaired and hindered the capability of the witness to properly understand the questions posed to her through the trained interpreter and effectively communicate her responses in Court.

Therefore on this assumption alone, it is the respondent's contention that the dumb mother's testimony, which identifies him as the father of her child, is unreliable and therefore the applicant has failed to produce cogent evidence before Court in support of their claim. The learned High Court Judge, evidently convinced by these arguments of the respondent, held in favour of the respondent in the judgment dated, 01.08.2005.

The reliability of evidence adduced by a dumb witness must be considered in the light of the facts and circumstances of each case. There exists no general standard or straightjacket formula applicable to such cases. Section 119 of the Evidence Ordinance, which deals with the evidence of dumb witnesses, provides that;

> "*A witness who is unable to speak may give his (or her) evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs in open Court. Evidence so given shall be deemed to be oral evidence".*

Under the common Law it is accepted that a person who is deaf and dumb is not incompetent, if he or she can be made to understand the nature of an oath and if intelligence can be conveyed to and received from him or her by means of signs. He or she may be examined through a sworn interpreter who understands his or her signs. [Vide, E.R.S.R. Coomaraswamy, "The Law of Evidence", 498].

Whereas a dumb witness could testify in open Court in the manner prescribed above, he or she must be a competent witness as contemplated under section 118 of the Ordinance. The section stipulates that;

"All persons shall be competent to testify unless the Court considers – that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind".

Therefore, in order to be reliable, the dumb witness must possess the requisite degree of intelligence to understand and answer the question in a rational manner. If she cannot understand the question or make her meaning intelligible, she cannot be examined as a witness. (Vide, *Venkattan* v *Emperor.*[1]) It follows that if a witness is so deaf and dumb that it is impossible to make him or her understand the questions put in cross-examination, that witness cannot be considered to be a competent witness.

In evaluating such evidence an essential prerequisite would be to ascertain and determine whether testimony given by the said witness, was understood with clarity and whether such question was answered logically. Importantly the Court must be satisfied as to whether the interpreter sufficiently understood the witness and was able to communicate in a like manner the evidence that was conveyed through him without distortion, so that such is recorded by the Court.

The evidence that has been recorded discloses that the unfolding of the narrative of events that had occurred by the said witness was clear, convincing, concise and in a manner which could lead to clear conclusions. The record does not reflect that there had been any breakdown in the communications between the witness and the interpreter. Indeed the details of the questions that have been answered and communicated to the Court through the interpreter reflect that there has been a clear line of communication through the interpreter. It is to be noted that the veracity of the interpreter has not been challenged on the ground of partial, biased or prejudicial interpretation.

In the instant case it is evident on an analysis of the evidence on record that the dumb witness, the mother of the non-marital child, more than satisfies the criterion set out in section 118 of the Evidence Ordinance and her testimony is in accordance with the provisions in section 119 of the Evidence Ordinance. The witness

has intelligently and intelligibly provided evidence before Court with regard to the paternity of the respondent. The witness has also clearly identified the respondent to the satisfaction of the learned Magistrate.

The primary and only requirement of any witness is to furnish evidence. Such evidence can be produced through the movement of lips, the production of a document, or in the case of a dumb witness through the medium of signs. What is important is that the evidence so furnished provides coherent, lucid, logical and persuasive evidence, a record of an unfolding of the narrative of events as known to the witness. It is not the job of the Court to privilege certain forms of communication over others. The Court will not raise a negative presumption against the understanding and intelligence of a witness based on the method of communication chosen by that witness or come to any unfounded assumptions on such evidence and to do so would be inequitable.

It is worthy to reiterate that when considering – the evidence of a dumb witness, it is important that the witness be capable of understanding and communicating responses to questions put, in examination and cross-examination. This can be comprehended from the record of the evidence. It is also worth noting that any inability or incapacity to comprehend communications before Court on the part of the witness or the interpreter can be easily and contemporaneously brought to the notice of the Court. The presiding Judge would also have the independent opportunity to apprehend such a state through his or her own observation of the witness.

In my view, it follows that in the absence of any such communication, and in the absence of any apprehension in the mind of the Magistrate hearing the case, the Court cannot raise a presumption against the comprehension and capability of the dumb witness, based solely on an assumption which is not borne out by the facts in the instant case. Any inference originating from such an assumption would not be a finding on facts. Therefore an inference on such an assumption or a finding that there was an improper understanding between the witness and the trained interpreter would not be tenable in the circumstances of this case.

As admitted even by the respondent in his submissions, there is no doubt that the witness is certainly a competent witness and fully capable of communicating successfully with those around her. Section 119, Evidence Ordinance refers to communication through any other manner including signs. The Ordinance does not specify that such a testimony in order to be accepted by Court, must subscribe to any standard form of sign language. The interpreter must be skilled in the form of communicating through signs, understanding and expressing and translating the views of a dumb witness. Given that a significant number of dumb people in Sri Lanka do not have access to formal training in sign language, any rigid interpretation of section 119 would deny access to Court, to a large number of such litigants merely due to an artificial standard, that is not inclusive of their right to Justice, rights that equally belong to all those who are differently abled (disabled) or physically challenged in their speech.

I am of the opinion that despite the obvious and reasonable constraints on communication, the witness, Sriyani Pushpalatha was fully capable of comprehending the questions put to her and of communicating her responses through signs, despite her lack of formal training in sign language. This can be observed with much clarity in the manner, content and tenor of her evidence which is on record. Therefore in the absence of any evidence to the contrary I find that the learned High Court Judge erred in his assessment of the reliability of the evidence produced by the dumb witness, the claimant's mother against the respondent, based almost entirely on a lack of qualifications or expertise.

Apart from the capability of the witness, a further point of significance when assessing a dumb witness's, testimony is the impartiality and reliability of the interpreter. The interpreter must be skilled and sworn. The Court must establish that such person does not have any interest in the outcome of the case. In *Somasundaram* v *The Queen*[2] relied on by the respondent, the decision of the Court in rejecting the evidence of the dumb witness was influenced largely by the apparent partiality of the interpreter based on his close involvement in the case.

In the instant case, the impartiality and independence of the interpreter have not been challenged at any stage of the

proceedings. There is no evidence to prove improper conduct or any act of partiality or interest which could undermine the reliability of the interpreter in this case.

It is significant and a matter of importance in this case that the trial Judge had the opportunity to observe the demeanor of the witness and had the opportunity to also comprehend the evidence placed at the trial. The learned Magistrate was able to fully observe and analyze, directly, the competency of the witness and the cogency of her evidence. Even on an analysis of the evidence on record it is apparent that the witness comprehended the questions and that her responses were, clearly understood.The evidence given by her during cross-examination both reveals that not only did she comprehend the questions but that her answers were understood and that no prejudice whatsoever was caused thereby to the respondent.

In light of the evidence on record, it can with certainty be concluded that the Magistrate rightly determined that sufficient evidence had been adduced to establish the paternity of the respondent. In light of the above findings I set aside the judgment dated 01.08.2005 of the learned High Court Judge of Kandy, and affirm the order of the learned Magistrate, Kandy dated 08.09.2003. The Appeal is allowed. I order the payment of costs in a sum of Rs.5000/- by the respondent to the appellant.

S.N. SILVA, C.J. – I agree.

SOMAWANSA, J. – I agree.

Appeal allowed.

SARJUN
v
KAMALDEEN AND TWO OTHERS

SUPREME COURT
SARATH N. SILVA, CJ.
DISSANAYAKE, J.
SOMAWANSA, J.
SC FR 559/03
MAY 14, 2007

Constitution Article 11, 14 (1) h, 13(1) – What is torture? – Is it linked to a purpose? – Roads – Public property – Illegal obstructions by Police and security personnel – Equality?

The petitioner and 3 others were transporting household furniture in their lorry, from Colombo to Katuwana. As they reached Habarana at night, he decided to spend the night at Habarana and parked the lorry on the side of the road. The petitioner had a permit to transport obtained under the Forest Ordinance, although a permit was not necessary.The petitioner claims that he obtained same out of an abundance of caution valid from 1 p.m. on 18.9.03 to 12 noon 19.9.03. Later in the night the 1st respondent came up to the lorry and wanted to inspect the furniture, and had demanded a bribe which was not given. The petitioner was thereafter taken to the Police Station and was arrested for the illegal transportation of furniture. When the petitioner denied the charge, he was assaulted, and later produced before the Magistrate. The petitioner pleaded guilty and was fined. The lorry was later released by the Magistrate.

The petitioner complains of violation of Article 11, by being subjected to torture or to cruel, inhuman, degrading treatment or punishment.

Held:

(1) The evidence clearly shows that the petitioner was subjected to cruel, inhuman, degrading treatment or punishment.

(2) The plain meaning of the words in Article 11 does not warrant a qualification being placed on the word 'torture' by linking it to a purpose. The assault on the petitioner may not be linked to any purpose, however since it was an intentional infliction of severe pain a suffering petitioner's fundamental right to freedom from torture has been infringed.

Per Sarath N. Silva, CJ.

"This case typifies the vicious link between abuse of authority, pursuit of graft and the infliction of torture on a citizen who insists on his right not to cave into illegal demands of gratification and abuse of authority, whilst security concerns have to be addressed. Such action should be taken with the highest concern and respect for human dignity".

Held further:

(3) The presence of groups of armed police and security personnel who place illegal obstructions is a common sight on our roads. These officers as manifest in the facts of this case do not appreciate that roads constitute public property and that every citizen is entitled to the freedom of movement guaranteed by Article 14(1)(h); any interruption of the exercise of such freedom by Police/security personnel would amount to an arrest and has to be justified on the basis of a reasonable suspicion of having committed an offence.

(4) A tolerant society weighted between ruthless terrorism and the abuse of authority has lost the taste of freedom; it is only through a respect for human dignity and freedom guaranteed by the Constitution to all segments of our society that peace and normalcy could be restored.

Per Sarath N. Silva, CJ.

"A person freely moving on the road in compliance with the law could be stopped and made to alight from the vehicle only on a reasonable suspicion of illegal activity. Superior officers who do not take precautions to prevent any infringement by the subordinates who are detailed for duty would themselves be liable for the infringement of the freedom of movement and the freedom from arbitrary arrest guaranteed by Article 14(1)(h) and 13(1).

APPLICATION under Article 126 of the Constitution.

Case referred to:

(1) *W.M.K. de Silva* v *Chairman, Ceylon Fertilizer Corporation* 1989 2 Sri LR 393 at 405.

Nizam Kariapper with *M.I.M. Lynullah* for petitioner.

P.K. Prince Perera with *S.M.M. Mackan* and *I.K. Lalitha* for 1st respondent.

Cur. adv. vult.

July 31, 2007

SARATH N. SILVA, C.J.

The petitioner has been granted leave to proceed in respect of the alleged infringement of his fundamental right guaranteed by Article 11 of the Constitution, by being subjected to torture or cruel inhuman, degrading treatment or punishment.

The specific allegation is against the 1st respondent, a Reserve Police Constable attached to the Habarana Police. The 2nd respondent being the OIC had been discharged from the proceedings prior to the hearing of this matter.

The petitioner was at the time material a 29 year old employee of a leading business establishment in Colombo, who had a permanent residence at Kalmunai in the Eastern Province. He purchased household furniture in Colombo including some wooden items and made arrangements to transport them to Kalmunai in a lorry belonging to his father. It appears that the family has a business establishment at Kalmunai. Although a permit was not required, out of an abundance of caution the petitioner obtained one under the Forest Ordinance for the transport of the items of wooden furniture, valid from 1.00 p.m. on 18.9.03 to 12 noon 19.9.03.

The driver and two other persons being his father's employees travelled with the petitioner in the lorry. They set off at about 2.00 p.m. on the 18th from Colombo and reached Habarana at night-fall. Since they were warned of wild elephants on the Habarana-Polonnaruwa road, they decided to spend the night at Habarana and parked the lorry on the side of the road.

Late in the night the 1st respondent and two others (not identified) came up to the lorry and wanted to inspect the furniture. They said that the lorry cannot be parked on the side of the road and should be taken to the Police Station.

The 1st respondent demanded a bribe of Rs. 5,000/- to refrain from taking any further action.

The petitioner refused to pay the bribe and insisted that he had not done any illegal act and that the items of furniture were not

being transported for trade but for personal use. Nevertheless the petitioner was taken to the police station and produced before a senior officer who examined the permit and the receipt for the furniture and stated that the petitioner could re-commence journey at 4.00 a.m. It appears that transport is not permitted between 9.00 p.m. and 4.00 a.m.

The petitioner and the others remained in the police station. At about 3.00 a.m. the 1st respondent came upto him and said that they are under arrest for the illegal transportation of furniture. When the petitioner protested that they had done nothing wrong the 1st respondent and two others, who have not been identified attacked the petitioner with a wire causing him severe bodily pain and injuries. He was forced into police cell and kept there till about 12 noon when he was taken out and produced in the Magistrate's Court. The petitioner and the others were charged with having committed offences under the Forest Ordinance. They pleaded guilty and were imposed fines of Rs. 5000/-.

Since the lorry and the furniture were subject to forfeiture the petitioner's father and he made a claim for these items and both gave evidence at the inquiry that was held. The petitioner testified substantially on the lines stated above. The version suggested to him in cross-examination was that the lorry was stopped by the police when it was travelling in the direction of Polonnaruwa at 10.00 p.m. and that an offence was made out since transport was not allowed after 9.00 p.m. The suggestion was denied by the petitioner.

The Magistrate in a well considered order accepted the version of the petitioner that the lorry was parked at the time the 1st respondent purported to arrest the petitioner and held that although wittingly or unwittingly the petitioner pleaded guilty, it was not within the objective of the Forest Ordinance to forfeit the furniture and the lorry. He accordingly released the lorry and the furniture to the claimants, being the petitioner and his father.

The 1st respondent has in his affidavit filed in this Court reiterated the suggestion made to the petitioner at the inquiry in the Magistrate Court that he violated the condition of the permit by transporting furniture at 10.00 p.m. The 1st respondent has also

denied the assault and challenged the medical certificate P5 on the basis that it is belated.

I would now examine the two disputed questions of fact with regard to the time of arrest and assault on the petitioner.

As observed by the Magistrate a permit was not required for the transport of the items of wooden furniture, considering its value as disclosed in the receipts. The petitioner stated that he obtained a permit out of an abundance of caution probably having in mind the several check points that they would have to pass to reach Kalmunai from Colombo. Considering his plight even with a permit one could imagine the degree of peril if he insisted on his right to transport the furniture without a permit. Since the petitioner had taken such precautionary action he would never have violated the conditions of the permit that prevented transport after 9.00 p.m. As observed by the Magistrate the petitioner has a valid permit for the next day as well and could have continued the journey without any problem in compliance with the permit. Furthermore, the Magistrate has noted that it is commonly known that people refrain from night travel due to fear of confronting wild elephants on that stretch of the road. In these circumstances the petitioner had no alternative but to stop the lorry on the side of the road and stay there till dawn. The 1st respondent's version that the lorry was travelling at 10.00p.m. in the direction of the elephant infested area has to be rejected. His notes of an arrest at 10.00p.m. have been concocted to make out an offence where there was none. The petitioner became a victim of the fabrication since he refused to give the bribe that was demanded by the respondent.

The other matter is with regard to the assault.The petitioner has candidly stated that the senior officer noted that no offence had been committed and that he could recommence the journey at 4.00a.m. It appears that the 1st respondent was irked by the petitioner's refusal to pay the bribe and started attacking him at about 3.00 a.m. an hour before he was free to travel. The Medical Report P5 has been issued by the Consultant Surgeon of the Ashroff Memorial Hospital in Kalmunai. The petitioner has got himself admitted to the hospital on the 22nd, after he was released from Courts. P5 records that the petitioner had triangular imprint abrasions over left arm and back of chest and also notes that he complained of assault

by police officers at Habarana with a wire, hand and weapons. These injuries could never have been self inflicted, considering their location and the nature. Understandably the petitioner's first concern would have been to get back to his residence at Kalmunai. The delay of 2 days *per se* is not significant considering the circumstances that have been pleaded by the petitioner. The 1st respondent has admitted the arrest of the petitioner and was the officer in contact with the petitioner whilst in custody. He is therefore responsible for the assault resulting in injuries.

For the reasons stated above I would accept the version of the petitioner in respect of both disputed questions of fact.

The petitioner has stated that the assault on him resulted in severe bodily pain and injuries. The medical report supports this allegation with regard to the injuries and undoubtedly an assault of this nature would have resulted in severe bodily pain.The petitioner has alleged that he was assaulted in the presence of his father's employees to humiliate him since he refused to pay the bribe and insisted on his innocence. Further, he was pushed into the cell and kept there several hours till he was taken to the Court house the next day. These allegations are proved by the circumstances relevant to the arrest, the institution of criminal proceedings admitted by the 1st respondent and the Medical Report P5. The petitioner was thus subjected to cruel, inhuman, degrading treatment or punishment.

In the case of *W.M.K. de Silva* v *Chairman, Ceylon Fertilizer Corporation*(1) at 405, an observation has been made in an opinion stated by the Judge that to constitute torture the intentional infliction of severe pain or suffering whether physical or mental should be for one of the purposes set out in the judgment. The link to a purpose has been derived with reference to the provisions of the UN Declaration on Torture of 1975 and the Torture Convention (C.A.T.). On that line of reasoning the infliction of severe pain or suffering would amount to torture if it is for the purpose of obtaining information or a confession or as a punishment for an act that has been committed or for some reason based on discrimination. The question is whether to constitute torture in terms of Article 11 of our Constitution the infliction of severe pain or suffering should be linked to such a purpose.

Article 11 reads as follows:

"No *person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

The plain meaning of the words does not warrant a qualification being placed on the word "torture" by linking it to a purpose.

As noted by Dr. Wickremaratne in his work titled "Fundamental Rights in Sri Lanka" – 2nd Ed. Pages 272 to 274, "the freedom from torture is declared in Article 11 as an absolute right and entrenched by Article 83, which bars any inconsistent legislation without a two-third majority in Parliament and approved by the People at a Referendum and should be given its ordinary meaning as prohibiting any act by which severe pain or suffering whether physical or mental that is intentionally inflicted, without any requirement of proof of purpose. This guarantee safeguards human dignity which is a material element in the concept of law. "The principle of human dignity is described as the point of convergence of the contentual elements which sustain the structure of every order of positive law".

The assault on the petitioner may not be linked to any purpose as stated above. However, since it was an intentional infliction of severe pain or suffering I hold that the petitioner's fundamental right to freedom from torture has been infringed.

The facts of the case reflect the hapless plight of an innocent citizen who takes every precaution to comply with the law of the land. The concern of national security resulting from the threat of terrorism has made it necessary to impose safeguards and check points on our public roads. The case typifies the vicious link between abuse of authority ,pursuit of graft and the infliction of torture on a citizen who insists on his right not to cave into illegal demands of gratification and abuse of authority. Whilst security concerns have to be addressed such action should be taken with the highest concern and respect for human dignity.

The presence of groups of armed police and security personnel who place illegal obstructions is a common sight on our roads. These officers as manifest in the facts of this case do not appreciate that roads constitute public property and that every citizen is entitled to the freedom of movement guaranteed by Article 14(1)(h) of our

Constitution being the Supreme Law of the Republic. Any interruption of the exercise of such freedom by police/security personnel would amount to an arrest and has to be justified on the basis of a reasonable suspicion of having committed an offence. A tolerant society wedged between ruthless terrorism and the abuse of authority has lost the taste of freedom. It is only through a respect for human dignity and freedom guaranteed by the Constitution to all segments of our society that peace and normalcy could be restored. Therefore a heavy responsibility lies on all Senior officials who detail armed personnel on our roads to take every precaution to ensure that ordinary officers such as the 1st respondent (being only a Reserve Police Constable) do not abuse their authority, violate the law or inflict suffering on innocent citizens. Such personnel have to be firmly instructed that they have to act with the highest degree of caution and sensitivity with due respect for human dignity.

A person freely moving on the road in compliance with the law could be stopped and made to alight from the vehicle only on a reasonable suspicion of illegal activity. Such suspicion would have to be justified in Court. Superior Officers who do not take precautions to prevent any infringement by their subordinates who are detailed for duty would themselves be liable for the infringement of the freedom of movement and the freedom from arbitrary arrest guaranteed by Article 14(1)(h) and 13 (1) of the Constitution.

For the reasons stated above, I allow the application and grant the declaration prayed for in prayer "b" of the prayer of the petitioner that the petitioner's fundamental rights guaranteed by Article 11 of the Constitution has been infringed.

The 1st respondent is directed to pay a sum of Rs. 100,000/- as compensation to the petitioner and the State will pay a sum of Rs.50,000/- as costs.

The Registrar is directed to send copies of the judgment to the Secretary, Ministry of Defence and Inspector General of Police, for their information and necessary action.

DISSANAYAKE, J. - I agree.

SOMAWANSA, J. - I agree.

Application allowed.

GILBERT AND COMPANY ENGINEERING (PVT.) LTD.
v
A.B. DE SILVA AND SONS LTD.

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 438/2004
DC COLOMBO 9483/RE
JUNE 20, 2005
MARCH 9, 2006

Evidence Ordinance , section 65, section 66-66(1) – Notice to produce documents? - What is the sole object? - Can a party object to the production of a copy of a document while denying the receipt thereof?

As the defendant disregarded the notice to quit, action was instituted to evict the defendant. The defendant's position was he was never a tenant.

At the trial, the plaintiff sought to produce a copy of a letter sent to the defendant informing him to pay a certain sum as the rent for a specified month. The defendant objected on the ground that notice had not been given to the defendant under section 66 of the Evidence Ordinance to produce the original document. This objection was overruled by Court.

Held:

(1) Rules as to notice to produce documents are found in section 66 Evidence Ordinance. Notice is required in order to give the opposing party sufficient opportunity to produce the document. When the defendant states that he did not receive such a document, there is no requirement to give notice to the defendant– the defendant has denied tenancy and the receipt of the document.
(2) The document may be useful for Court to decide the question of tenancy.

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

Case referred to:

(1) *Joonos* v *Chandraratne* 1993 1Sri LR 86 at 92.

Thisath Wijegunawardane with *Sadun Withana* for defendant-petitioner.
C.E. de Silva for plaintiff-respondent.

March 16, 2007
WIMALACHANDRA, J.

This is an application for leave to appeal from an order of the learned Additional District Judge of Colombo dated 2.11.2004. The plaintiff-respondent (plaintiff) instituted the action bearing No. 9483/RE in the District Court of Colombo against the defendant-petitioner (defendant) *inter alia* for the ejection of the defendant from the premises in suit.

It was the plaintiff's case that he rented the premises to the defendant on a monthly rental of Rs. 763/75 on a tenancy agreement. As the defendant effected unauthorised structural alterations in the said premises without the approval of the plaintiff, and the local authority, the notice to quit was sent by the plaintiff on 8.4.2003 terminating the tenancy with effect from 31.5.2003. As the defendant had disregarded the notice to quit, the plaintiff instituted this action on 8.7.2003. The defendant filed answer denying the several averments in the plaint and pleaded that he was never a tenant of the plaintiff in the premises in suit and prayed for the dismissal of the action.

After framing issues, the case proceeded to trial. At the trial the plaintiff sought to produce a copy of a letter dated 9.4.2002 sent to the defendant informing him to pay a sum of Rs. 595/08 as the rent for the month of March 2002. The defendant objected to the said document being marked on the ground that notice had not been given to the defendant under section 66 of the Evidence Ordinance to produce the original document.

The learned Counsel for the defendant submitted that the said document sought to be produced by the plaintiff is a copy of a letter of demand requiring the defendant to pay rent and it does not fall into the category of a notice. The learned Counsel submitted that section 66(1) of the Evidence Ordinance applies only to notices and not to letters of demand. The learned Counsel further submitted that the denial of the receipt of the said letter by the defendant is not an excuse for the plaintiff not to give notice under section 66 of the Evidence Ordinance.

It is not in dispute that in the answer filed by the defendant he has denied tenancy and denied the receipt of the said document. It appears that the said document dated 9.4.2002 was a notice informing the defendant that he is in arrears of rent in a sum of Rs. 595/08 for the month of March 2002 in respect of the premises in suit and demanding the payment of the same. The tenant is bound to pay the rent to the landlord when informed by the landlord, unless he is not in arrears of rent.

Rules as to notice to produce documents are found in section 66 of the Evidence Ordinance. Section 66 states as follows:

> *"Secondary evidence of the contents of the documents referred to in section 65, subsection (1), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the documents is, or to his proctor, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:*
>
> *Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it:*
>
> Section 66 (1) when the document to be proved is itself a notice;
>
> Section 66 (2) to (6) are omitted"

In my view notice is required in order to give the opposing party sufficient opportunity to produce the document. When the defendant states that he did not receive such a document, there is no requirement to give notice to the defendant. The defendant in this case has denied the tenancy and the receipt of the said document.

Cross on Evidence, 6th edition at p.606 states thus:

> **"In certain circumstances, service of notice to produce is excused, and a party may adduce secondary evidence of the contents of a document if the original is not produced by the opponent. The most important case in which this is so is when the document in question is itself a notice."**

The proviso to section 66 of the Evidence Ordinance states that notice shall not be required in order to render secondary evidence admissible under section 66(1) when the document to be proved is itself a notice [Section 66(2) to (6) are omitted].

The purpose of giving notice to produce the original in terms of section 66 of the Evidence Ordinance is explained by Justice Dheeraratne in *Joonoos* v *Chandraratne*(1) at 92 in the following words;

> **"By paragraph 12 of the plaint, the plaintiff-respondent has averred that by letter dated 15.1.1983 he gave one year's notice in writing of the termination of the tenancy .....The defendant-appellant denied the plaintiff-respondent's averment. The direct inference of that denial is that the plaintiff-respondent did not send such a notice to the defendant-appellant and therefore the defendant-appellant did not receive the same. In this context, it would be a sheer pretence to give notice to the defendant-appellant to produce the original of the notice. It is difficult to imagine that the law expects the plaintiff-respondent to indulge in such a meaningless charade. Notice to produce (the original) is not served in order to give the opponent notice that the document mentioned in it will be used by the other party, and thus enable the opponent to prepare counter evidence, but so as to exclude the objection that all reasonable steps have not been taken to procure the original document."**

Thus it will be seen that the sole object of a notice to produce is to enable the other party (defendant) to have the document in Court to produce it if he likes and if he does not, to enable his opponent (the plaintiff) to give secondary evidence thereof, so as to exclude the argument that the latter has not taken all reasonable means to obtain the original which he must do before he can be permitted to make use of secondary evidence.

In the circumstances I am of the view that in the instant case the learned Judge has correctly exercised the discretion in terms of section 66 and admitted the copy of the document to be produced. In any event the defendant cannot object to the production of the copy

of the said document dated 9.4.2002 while denying the receipt thereof. The said document may be useful for the Court to decide the question of tenancy in respect of the premises in suit.

For these reasons, leave to appeal against the order of the learned Additional District Judge dated 2.11.2004 is refused with costs fixed at Rs. 7,500/-. The learned District Judge is directed to give precedence to this case and to conclude the same as expeditiously as possible.

Application refused.

MENDIS
v
MENDIS

COURT OF APPEAL
WIMALACHANDRA, J.
BASNAYAKE, J.
CALA 190/2003
DC HOMAGAMA 5758/D
OCTOBER 22, 2004
NOVEMBER 11, 2004

Civil Procedure Code – section 93(2), section 603 – Amendment of pleadings – Cause of action based on adultery – Could it be allowed. - Has a trial Judge in a matrimonial action a wider discretion than he has under section 93(2)?

The plaintiff-respondent instituted divorce action against the defendant-petitioner on the ground of malicious desertion. The defendant-petitioner prayed for a dismissal of the action and averred that the plaintiff deserted the defendant maliciously and premeditatedly to be able to carry on her intimacy with 'X' (party sought to be added). After the plaintiff's evidence was taken, the defendant-petitioner moved to amend the answer by adding X – this was disallowed by the District Judge.

It was contended by the defendant-petitioner that he had no knowledge of sexual intercourse between the plaintiff and X at the time of filing the answer.

Held:

(1) The defendant did not seek a divorce in the answer, he only prayed for dismissal of the plaintiff's action. This would have been the reason for

not making X a party. It was due to the same reason the defendant intentionally avoided making an allegation of adultery against the plaintiff.

The averments in the answer lead to one conclusion that is, the plaintiff was having an adulterous relationship with X.

The defendant knew about the adulterous conduct of the plaintiff with X-at the time of filing of answer.

Held further:

Per Eric Basnayake, J.

"Section 93 is in relation to amendment of pleadings. This solitary section is dealt with under Cap XV of the Code. I am of the view that this section is applicable to the procedure involving all the sections of the Code. Section 603 makes provision to grant any husband or wife the same relief in the same action. This section enables Court to allow the defendant to proceed with her claim in reconvention for divorce – section 603 does not relate to amendment of pleadings".

(2) The question whether an action filed by the wife of X alleging adultery committed between the plaintiff and X – the mere fact that an action is filed on the basis of adultery will have no evidentiary value and therefore would be shut out.

APPLICATION for leave to appeal with leave being granted.

Cases referred to:

(1) *Ebert* v *Ebert* 22 NLR 310 at 312.
(2) *Allen* v *Allen and Bell* 1894 1R CA 248 at 251-252.
(3) *Luhi Balakumar* v *Balasingham Bala Kumar* – BASL 1997 Vol 11 Part 1-22.
(4) *Nihal Ignatious Perera* v *Ajantha Perera nee Seneviratne* 1991 1Sri LR 331.
(5) *Bednarz* v *Bednarz* – 2992 1 Sri LR 11.
(6) *Kuruppuaratchi* v *Andreas* 1996 – 2 ri LR 11.

A.R. Surendran, PC with *K.V.S. Gawsharaja* for defendant-petitioner.

Ranjan Suwadaratna with *Asha Ratnayake* and *Mahinda Nanayakkara* for plaintiff-respondent

Cur.adv.vult.

March 5, 2007

ERIC BASNAYAKE, J.

This is a leave to appeal application filed by the defendant-petitioner (Hereinafter referred to as the defendant) on 9.6.2003 seeking to have the order of the learned District Judge of Homagama dated 21.5.2003 set aside. By this order the District Judge had rejected the amended answer. Having considered the submissions of the Counsel, Amaratunga, J. on 17.6.2004 granted leave to appeal on the following questions namely:

(1) Whether the learned trial Judge's conclusion that, in view of the averments set out in the defendant's answer regarding the plaintiff's intimate relationship with the co-respondent sought to be added, the defendant had knowledge about the adulterous relationship between the plaintiff and the co-respondent sought to be added, was a correct conclusion to be drawn from the averments?

(2) In view of the provisions of section 603 of the Civil Procedure Code, whether a trial Judge has in a matrimonial action, a wider discretion than he has under section 93(2) with regard to the amendment of pleadings?

(3) Whether the mere fact that in another action filed by the wife of the co-respondent, sought to be added to this action, had alleged adultery between the plaintiff-respondent to this action and the co-respondent sought to be added to this action, is sufficient to raise an allegation of adultery in this action against the plaintiff-respondent and the co-respondent sought to be added?

The first question

The plaintiff-respondent (hereinafter referred to as the plaintiff) was married to the defendant in 1983. On 30.11.2000 the plaintiff had left the matrimonial house. On 15.6.2001 she had filed this divorce action against the defendant on the ground of constructive malicious desertion. The defendant filed answer on 30.10.2001 praying for a dismissal. In the answer filed, the defendant specifically averred (paragraph 11) that the plaintiff deserted the defendant maliciously and premeditatedly to be able to carry on her intimacy with X (the party sought to be added as co-respondent). In

paragraphs 10ඉ, ඊ, උ, ඌ & එ he had given vast information with regard to an affair the plaintiff was having with X. Some of that information is as below:

"He becomes more intimate with the plaintiff. The plaintiff was being given lifts to office by X in a clandestine manner .... A deeper intimacy developed between the plaintiff and X which turned in to infatuation and the plaintiff became neglectful of her marital obligations ... When she was confronted she admitted it ... The defendant questioned X who first denied and later admitted and apologized and promised not to repeat such conduct ... X's wife on 21.1.2000 publicly reproved the plaintiff for "hanging on" to her husband. The flame of intimacy between the plaintiff and X became more intense and did not abate but grew in to a stronger conflagration resulting in the plaintiff coming late home in the night and allegedly leaving for work on public holidays and leaving home more frequently without informing the defendant ..."

The trial was first fixed for 20.2.2002 on which date the issues were framed. The plaintiff's evidence was taken on 12.6.2002. On 2.1.2003 the defendant moved to amend the answer. The plaintiff objected and after inquiry the learned District Judge made order disallowing the amended answer which is the subject matter of this application.

Submission of the Counsel for the defendant

The learned President's Counsel submitted that the information given in the answer was short of sexual intercourse between the parties. He contended that the defendant had no knowledge of sexual intercourse between the plaintiff and X at the time of filing the answer.

In the case of *Ebert* v *Ebert*[1] at 312 Schneider, J. quotes Lopes, J. in the case of *Allen* v *Allen and Bell*[2] at 251-252.

> **"It is not necessary to prove the direct fact of adultery, nor is it necessary to prove a fact of adultery in time and place, because to use the words of Sir William Scott in *Loveden* v *Loveden* if it were otherwise, there is not one case in a hundred in which that proof would be attainable; it is very rarely indeed that the parties are surprised in the direct fact**

of adultery. In every case almost the fact is inferred from circumstances which lead to it by fair inference as a necessary conclusion; and unless this were the case, and unless this were so held, no protection whatever could be given to marital rights". To lay down any general rule, to attempt to define what circumstances would be sufficient and what insufficient upon which to infer the fact of adultery is impossible. Each case must depend on its own particular circumstances. It would be impractical to enumerate the infinite variety of circumstances. It would be impractical to enumerate the infinite variety of circumstantial evidentiary facts, which of necessity are as various as the modifications and combinations of events in actual life. A jury in a case like the present ought to exercise their judgment with caution, applying their knowledge of the world and of human nature to all the circumstances relied on in proof of adultery, and then determine whether those circumstances are capable of any other reasonable solution than that of guilt of the party sought to be implicated.

The defendant in paragraph 5 of the petition states thus "further, for the sake of the child the defendant petitioner did not seek divorce on the basis of malicious desertion either on the part of the plaintiff respondent". The defendant did not seek a divorce in the answer filed. He only prayed for a dismissal of the plaintiff's action. This would have been the reason for not making X a party. It was due to the same reason the defendant intentionally avoided making an allegation of adultery against the plaintiff. The averments in the answer lead to one conclusion, that is that the plaintiff was having an adulterous relationship with X. I am of the view the learned District Judge rightly concluded that the defendant at the time of filing the answer knew about the adulterous conduct of the plaintiff with X. The question is therefore answered in the affirmative.

The second question

Section 603 of the Civil Procedure Code is as follows:

"In any action instituted for dissolution of marriage, if the defendant opposes the relief sought on any ground which would have enabled him or her to sue as plaintiff for such

dissolution, the Court may in such action give to the defendant on his or her application the same relief to which he or she would have been entitled in case he or she had presented a plaint seeking such relief."

The learned President's Counsel placed reliance on the judgment in *Lulu Balakumar* v *Balasingham Balakumar*[3] with regard to the interpretation of section 603 of the Civil Procedure Code. The headnote to this case reads as follows: "section 603 of the Civil Procedure Code gives the trial Judge in a matrimonial action a wider discretion than he has under section 93(2) of the Code". This headnote I find is misleading. There is no such decision arrived at in this case. The question for decision was whether the defendant in that case was guilty of laches. Fernando, J. held that "In this case there was a delay of four months, which in the context of Sri Lanka is by no means unusual although undesirable and not to be encouraged .... The need for amendment arose unexpectedly .... It was not unreasonable for the defendant to have been content to obtain a dismissal of the plaintiff's action, in order later to pursue his claim against his wife and the alleged adulterer in the Gampola action". Fernando, J. thereafter reproduced another submission of the Counsel as follows:

"Learned Counsel for the defendant also drew our attention to section 603, the effect of which is that, since the defendant had opposed the relief sought by the plaintiff on the ground of adultery, the Court had the discretion to give the defendant, on his application the same relief to which he would have been entitled if he had presented a plaint seeking relief on the ground of adultery. **He submitted** *that in exercising that discretion the Court would be justified in permitting appropriate amendments to the answer, and that section 603 did not restrict the stage at which this discretion could be exercised; section 603 thus gave the trial Judge a wider discretion than he had under section 93(2).*

Fernando, J. having summarised the submission of the Counsel stated thus "taking all those matters in to consideration I am of the view that the defendant was not guilty of laches...

Section 93 is relating to the amendments of pleadings. This solitary section is dealt with under chapter XV of the Civil Procedure Code. I am of the view that this section is applicable to the procedure involving all the sections of the Code. Section 603 make provision to grant any husband or wife the same relief in the same action. This section enables court to allow the defendant to proceed with her claim in reconvention for divorce (*Nihal Ignatious Perera* v *Ajantha Perera nee Seneviratne*[4]). Although a defendant had in his answer referred to it as a claim in reconvention, in fact he was counter suing for divorce as provided for by section 603 of the Civil Procedure Code (*Bednarz* v *Bednarz*[5]). Thus this section does not relate to amendment of pleadings. The question is answered in the negative.

The third question

The question is whether an action filed by the wife of X alleging adultery committed between the plaintiff and X is sufficient to raise an allegation of adultery in this case? The learned Counsel for plaintiff submitted that the action referred to is concluded. However judgment had not been entered on the ground of adultery. If the learned Counsel for the defendant is seeking to bring some evidence, he may have to bring that evidence in terms of the provisions of the Evidence Ordinance. The mere fact that an action is filed on the basis of adultery will have no evidentiary value and therefore would be shut out. The answer to this question is in the negative.

The facts in *Kuruppuarachchi* v *Andreas*[6] are almost identical to the present case. G.P.S. de Silva, C.J. with Kulatunga, J. and Ramanathan, J. agreeing held that at 13 "The amendment introduced by Act No. 9 of 1991 was clearly intended to prevent the undue postponement of trial by placing a significant restriction on the power of the court to permit amendment of pleadings on or after the day first fixed for the trial of the action ... the defendant was well aware of the fact that the plaintiff was living in adultery at the time the answer was filed, but she has chosen not to rely on that ground in her answer. After the second date of trial, she is seeking to amend the answer by including a cause of action based on adultery. In these circumstances, the conclusion of the Court of

Appeal, that the defendant is guilty of laches and that the amended answer has to be rejected in terms of section 93(2) (as amended) must be affirmed".

This application is therefore dismissed. On the facts I award no costs.

WIMALACHANDRA, J. - I agree.

Appeal dismissed.

DON LIYERIS

v

DIRECTOR-GENERAL OF THE COMMISSION TO INVESTIGATE ALLEGATIONS OF BRIBERY AND CORRUPTION

COURT OF APPEAL
BALAPATABENDI, J.
BASNAYAKE, J.
CA 55/98
HC COLOMBO B/29097
OCTOBER 20, 2005
NOVEMBER 11, 2005
JANUARY 16, 2006

Bribery Act – sections 12, 19, 90, and 90(c) – Offence of bribery – Is it one of strict liability? - Should there be actus reus *together with* mens rea? *– Bribery? – Donation to a community center? – Is it a bribe?*

Held:

However laudable the purpose for which the money is to be finally utilized and whatever his intentions were with regard to the use of the money, an offense is committed by a public servant under section 22 if he solicits or accepts any gratification for performing any official act.

APPEAL from the High Court of Colombo.

Case referred to:

(1) *Rupasinghe* v *Attorney-General* 1986 2 Sri LR 329.

Dr. Ranjith Fernando with *Deshani Jayathilaka* and *Amila Umayanganie* for the accused-appellant.

Ms. M. Liyanage, Deputy Director-General of Bribery, the Bribery Commission.

February 27, 2006

JAGATH BALAPATABENDI, J.

The accused-appellant was charged by an indictment as follows:

Count (1) that the accused-appellant on the 18.1.1996 whilst being the Chairman of the Homagama Pradeshiya Sabha did solicit from one Nalin Priyantha Perera a sum of Rs. 100,000/- as an inducement or gratification in order to grant approval for a Building Plan submitted to the said Pradeshiya Sabha, thereby committing an offense punishable under section 22 of the Bribery Act.

Count (2) related to the corresponding charge under section 19(c) of the Bribery Act as amended.

Count (3) that the accused-appellant on the 20th January 1996 whilst being the Chairman of the Homagama Pradeshiya Sabha did accept from one Nalin Priyantha a sum of Rs. 10,000/- as an inducement or gratification in order to grant approval for a Building Plan submitted to the said Pradeshiya Sabha, thereby committing an offence punishable under section 22 of the Bribery Act.

Count (4) related to the corresponding charge under section 19(c) of the Bribery Act as amended.

After conclusion of the trial the learned High Court Judge convicted the accused-appellant on all 4 counts as charged and sentenced him to 2 years R.I. and suspended the term of imprisonment for 10 years. In addition a fine of Rs. 5000/- and in default of the fine 06 months RI was imposed.

This appeal is preferred against the said conviction and sentence.

Facts of the case in brief are as follows: The evidence of the witness Nalin Priyantha Perera revealed that, a Building Plan submitted to the Homagama Pradeshiya Sabha by the witness on behalf of Nemico Industries had been rejected. When the witness

made representations to the Chairman of the said Pradeshiya Sabha the accused-appellant, had indicated that the approval of the Building Plan could be made if a donation of Rs.200,000/- is made to the construction of the Community Center in the area. Subsequently the witness has agreed to pay Rs.100,000/- as a donation for the construction of the community center. Thereafter the witness had lodged a complaint in the Bribery Commission and in consequence to the said complaint a raid had been carried out by the Officers of the Bribery Commission at the time the money (Rs.100,000/-) was handed over.

The witness has stated at page 37 as follows:-

ප්‍ර ඊට පස්සේ තමුන් ගියා

උ ඔව්. මම ප්‍රාදේශීය සභාවේ සභාපති තුමා මුණ ගැසීම සඳහා ගියා. ඒ යන විට සභාපති තුමා ඉඹුල්ගම ප්‍රදේශයේ ප්‍රජා ශාලාවකට මුල් ගල් තැබීමට යාමට සූදානම් වෙමින් හිටියා. ප්‍රජා ශාලාව සෑදීමේ වැඩ පිළිවෙලට අදාල කටයුතු වල මහු නියැලී සිටින බව කිව්වා.

ප්‍ර ඊට පස්සේ තමුන් ආ සිද්ධිය තමුන් කිව්වාද?

උ කිව්වා. ඊට පස්සේ මහු කිව්වා අපි ප්‍රජා ශාලාවක් හදනවා. එය තැනීම් කටයුතු සඳහා මුදලක් ලබා දෙන්න කියා. බල කිරීමක් කර සිටියේ නැත. මෙම ගොඩනැගිලි සැලැස්ම අනුමත කර දෙන්න නම් අදාල යෝජිත ප්‍රජා ශාලාවේ අරමුදල සඳහා යම් මුදලක් පරිත්‍යාග කරන්න කීවා.

ප්‍ර ඒ මුදල කීයක් කියාද කීවේ?

උ ලක්ෂ දෙකක් (රු 200,000/-) කීවේ

at page 40 the witness had stated as follows:

ප්‍ර ඒ කියන්නේ මොකටද කැමති වුනා කීවේ?

උ යෝජිත ප්‍රජාශාලාවට ආධාර පිණිස රු. ලක්ෂයක මුදලක් අරගෙන ගොඩනැගිලි සැලැස්ම අනුමත කරවා දෙන්න මහු කැමති වුනා.

At the trial the accused-appellant had made a dock statement more or less admitting the facts stated by the Prosecution witnesses, and taken up a defence that the soliciting and accepting of the said money was '*bona fide*' without any intention that it was solicited and accepted as a bribe or gratification. The witness Nalin Perera was informed by him that the donation was for the construction of the community center.

The only ground of appeal urged by the Counsel for the accused-appellant was that the learned Trial Judge erred in law by coming to a conclusion that "however laudable the purpose for which the money is to be finally utilized," and "what ever his intentions were with regard to the use of this money" an offence had been committed by a public servant under section 22 of the Bribery Act if he solicits or accepts any gratification for performing any official act."

The contention of the Counsel for the accused-appellant was that the offence of bribery is not one of 'strict-liability' but requires the usual elements of any offence viz: the '*actus-reus*' together with '*mense-rea*' should be established together to complete the commission of such an offence. The offence of bribery can only be committed by a person who not only commits the '*actus-reus*' but also does it with the required '*mens-rea*' (corrupt intention).

Further he contended that the definition given for 'bribery' in Modern legal usage (2 edition) by Garner is: "The corrupt payment, receipt, or solicitation of a private favour for official action of the bribe-taker (or bribe-giver). Also "a 'bribe' is a reward or favour given or promised to a person in a position of trust in order that the person's judgment will be skewed of conduct corrupted in one's favour." Thus, he submitted that the learned High Court Judge had come to a finding that section 22 of the Bribery Act contemplates a 'Strict liability' offence and mere act or the '*actus reus*' was sufficient enough to constitute an offence under the section.

The contention of the Counsel for the Complainant-respondent was that the interpretation given in the provisions of section 90 and 90(c) of the Bribery Act constitutes the offence committed by the accused-appellant. The witness Nalin Perera had stated that the accused-appellant solicited a sum of Rs. 200,000/- and subsequently brought down to Rs. 100,000/- and accepted the same amount to grant an approval for the Building Plan; where he is not authorized by law or any other Regulations to solicit or to accept any money in discharge of an official act.

In support of her contention the Counsel cited the decision in the case of *Rupasinghe* v *Attorney-General*[1].

Now I would like to examine the findings of the learned High Court Judge in his judgment. At the outset the learned High Court Judge

after analysis of the evidence in the case has posed a question; viz "Can a public servant solicit or accept any money from any person who comes to get an official act done however laudable the purpose for which the money is to be finally utilized? Clear answer to this question is 'No'. According to the section 22 of the Bribery Act, soliciting any gratification for performing any official act is an offence."

The learned High Court Judge finally had come to a correct conclusion on analysis of evidence that the accused-appellant solicited a sum of Rs. 100,000/- from the witness (Nalin Perera) for performing an official act, to wit: - the approval of the Building Plan, whatever his intentions were with regard to use of this money.

So it is clear from the findings in the Judgment that the learned High Court Judge had dealt with the question of '*mense-rea*'.

Thus I do not agree with the contention of the Counsel for the accused-appellant, that the above mentioned findings were incorrect in law.

Further, I would like to mention the remark he had made in his Judgment, which I fully endorse that "in terms of the Bribery Act section 22 soliciting and accepting money by a public servant from a person who comes to get an official act done as an inducement for performing an official act, is a bribe. If not public officers could be come collecting agents for various charities and other organizations from the public who come to them to get official work done by them."

For the reasons aforesaid, I am of the opinion that the findings of the learned High Court Judge in his Judgment were correct in law and on facts.

BASNAYAKE – I agree.

Appeal is dismissed.

INSTITUTE OF CHARTERED ACCOUNTANTS OF SRI LANKA
v
INSTITUTE OF CHARTERED PUBLIC ACCOUNTANTS AND OTHERS

COURT OF APPEAL
WIMALACHANDRA, J.
CALA 388/2005
DC COLOMBO 7262/SPL
JULY 3, 15, 2006
AUGUST 4, 2006

Institute of Chartered Accountants Act incorporated under Act No. 23 of 1959 – section 10, section 22 (as amended)– Institute of Chartered Public Accountants established under the Companies Act No. 17 of 1982 – section 19(2) – Right to use the term "Chartered" – Is State approval required for the use of "Chartered" by any person – Is "Chartered" a restrictive word under the Companies Act – Interim injunction – Prima facie *case.*

The plaintiff – Institute of Chartered Accountants of Sri Lanka – sought an interim injunction restraining the 1st defendant – Institute of Chartered Public Accountants from wrongfully, unlawfully, and illegally establishing that the 1st defendant company has the right, privilege and authority to confer on its members the right to use the term "Chartered Public Accountants" and its abbreviation "CAA". The defendant company is an institution established under the Companies Act. The District Court refused the relief sought on the basis that the plaintiff is guilty of laches, that the plaintiff does not have the exclusive right to use the term "Chartered", that the 1st defendant company has registered the name of "Institute of Chartered Public Accountants under the Companies Act, the word "Public" exclusively belongs to the 1st defendant company.

On leave being sought, with leave being granted,

Held:

(1) The Institute of Chartered Accountants Act No. 23 of 1959 (ICA Act) established the Institute of Chartered Accountants of Sri Lanka, S22(1) and provides that no person, not being a member of the Institute shall take and use the title "Chartered Accountants". Chartered Accountant is a title recognised by Parliament as a professional qualification in the profession of practicing accountancy.

(2) In terms of the ICA Act the plaintiff is the only body that has been established by an Act of Parliament relating to the practice of accountancy in Sri Lanka as "Chartered Accountants", whereas the 1st defendant company is an Institute established under the Companies Act.

Per Wimalachandra, J:
"It can be seen that the use of the title "Chartered Accountant" is not one which can be used arbitrarily and capriciously to the liking of a business or a company exploiting the same for personal gain. The name "Institute of Chartered Public Accountants" is a calculated attempt to show the public that the 1st defendant is an organization that has the state patronage to confer the "Chartered Public Accountants" similar in status to the plaintiff."

APPLICATION for leave to appeal from an order of the District Court of Colombo with leave being granted.

K. Kanag Iswaran, PC with *Chanaka de Silva* and *Aruna Samarajeewa* for plaintiff-petitioner.

A.P. Niles with *Saman de Silva* and *Arosha de Silva* for 1st defendant-respondent.

Cur.adv.vult

March 16, 2007

WIMALACHANDRA, J.

This is an application for leave to appeal from the Order of the learned District Judge of Colombo dated 19.9.2006. By that Order the learned District Judge refused to grant the interim-injunctions prayed for by the plaintiff-petitioner (Plaintiff) in prayers (j), (k), (l) and (m) of the plaint.

Briefly, the facts are as follows:

The plaintiff is a body corporate established under the Institute of Chartered Accountants Act No. 23 of 1959 (as amended) having the capacity to sue and be sued in its corporate name. The 1st defendant-respondent (1st defendant) is a company incorporated under the Companies Act No. 17 of 1982. The 2nd to 8th defendants-respondents (2nd to 8th defendants) are the directors of the 1st defendant-company.

The main complaint of the plaintiff is that the 1st to 8th defendants by acting in violation of the express provisions in the Institute of

Chartered Accountants of Sri Lanka Act No. 23 of 1959, have attempted wrongfully, unlawfully and illegally to establish, represent and hold that the 1st defendant-company has the right, privilege and authority to confer on its members the right to use the term "Chartered Public Accountant" and its abbreviation "CPA".

The plaintiff instituted this action in the District Court of Colombo against the defendants *inter alia* for the declaratory reliefs and the permanent injunctions prayed for in the plaint.

The plaintiff also sought an interim-injunction restraining the 1st defendant, its directors, servants, agents and all those acting under and/or through them and/or from and on its behalf from doing any of the matters referred to in the aforesaid declarations and also sought an enjoining-order pending the determination of the interim-injunctions prayed for by the plaintiff.

The 1st to 8th defendants filed objections to the application for the interim-injunctions. When the application for the aforesaid interim-injunctions were taken up for inquiry, the parties agreed to tender written-submissions and invited the Court to decide the matter on the written-submissions filed by the parties. Thereafter, the learned Judge reserved his Order for 15.9.2005 and subsequently delivered the Order on 19.9.2005 refusing the grant of the interim-injunctions prayed for by the plaintiff on the basis that the plaintiff is guilty of laches, the plaintiff does not have the exclusive right to use the term "Chartered", the 1st defendant-company has registered the name "Institute of Chartered Public Accountants" under the Companies Act, the names of the plaintiff and the 1st defendant-company are distinct in that the word "Public" exclusively belongs to the 1st defendant-company and there are well qualified personnel in the field of accountancy in the Board of Directors of the 1st defendant-company. The learned District Judge also held that the plaintiff has failed to establish a *prime-facie* case in its favour.

When this matter was taken up before this Court on 13.10.2005, leave to appeal against the said Order of the District Judge was granted by consent of the parties. The Counsel for the defendants consenting to the grant of leave to appeal against the order of the District Judge itself shows that there is a serious matter to be looked into in this Application.

The main issue in this application is whether the 1st to 8th defendants are acting in violation of the provisions of the Institute of Chartered Accountants of Sri Lanka Act No. 23 of 1959 and whether the 1st

defendant has the right to use the term "Chartered" as the 1st defendant-company was registered as the Institute of Chartered Public Accountants and its abbreviation "CPA", under the Companies Act.

The question now arises as to whether State approval is required for the use of the word "Chartered" by any person. As pointed out by the learned President's Counsel, this does not require factual evidence. Hence, this is a question of law that has to be determined by the Court. The learned Counsel directed the question, "does the law relating to Corporations in Sri Lanka, permit the use of the word "Chartered" as part of the name of the 1st defendant without the specific sanction for the use of that word being granted by the Parliament."

The Institute of Chartered Accountants Act No. 23 of 1959 (ICA Act) established the Institute of Chartered Accountants of Sri Lanka. Section 22(i) of the said Act provides that "No person, not being a member of the Institute shall take or use the title "Chartered Accountants". Thus, it will be seen that 'Chartered Accountants' is the title recognised by the Parliament as a professional qualification in the profession of practicing accountancy. In the circumstances, can the 1st defendant-company use the term 'Chartered' legally without the authority of the Parliament? In terms of the ICA Act, the plaintiff is the only body that has been established by an Act of Parliament relating to the practice of accountancy in Sri Lanka as "Chartered Accountants", whereas, the 1st defendant-company is an Institution established under the Companies Act.

The learned Counsel for the defendants submitted that the Registrar of Companies had ruled that the word 'Chartered' is not a restrictive word under the Companies Act. The learned Counsel submitted that hence, the ICA Act does not confer any exclusive right to the plaintiff to use the word 'Chartered '.

At this stage this Court is not going to decide the plaintiff's action but is only concerned whether the learned District Judge erred in law when he made the Order dated 19.9.2005 refusing to grant the interim injunction prayed for by the plaintiff. In every application for an interim-injunction pending the determination of the action, the Court must be satisfied that the party seeking the interim-injunction has a *prima facie* case. He must satisfy Court that there is a serious question to be tried at the hearing and there is a probability that he is entitled to the relief claimed by him.

Kerr on injunctions, 6th Edition at page 2 states thus:

> **"It is enough if he can show that he has a fair question to raise as to the existence of the right he alleges".**

The plaintiff has been established by an Act of Parliament to engage in the practice of accountancy as Chartered Accountants. In terms of section 22 (1) of the said Act, no person not being a member of the Institute shall take or use the title "Chartered Accountants". The plaintiff seeking an interim-injunction is not required to establish his case. All he has to show is that he has a legal right and that there is an invasion of that right. At this stage the Court is not required to resolve the disputed question of law or question of fact which will have to be decided at the trial. It is to be noted that the *status quo* which is sought to be protected is what existed at the beginning of the controversy.

In the instant case, the plaintiff is not required to prove his case but he must only show that he has a fair question to raise as to the existence of the legal right. He must show that the interim-injunction sought by him is necessary to preserve the rights claimed by the plaintiff.

Moreover, the 9th defendant, the Registrar of Companies in his answer dated 27.6.2005 has admitted paragraphs 39, and 40 of the plaint. Paragraph 39 of the plaint states thus:

> **"The plaintiff states that the 1st defendant, not having been incorporated by the State and not having any relationship or patronage of the State, has no legal right and/or privilege and/or entitlement to use the term 'Chartered' in its name. The plaintiff further states that the 1st defendant is wrongfully and unlawfully using the term 'Chartered' in its name and is wrongfully and unlawfully using the name Institute of Chartered Public Accountants."**

Besides, the Registrar of Companies, the 9th defendant has admitted paragraph 41(ii) of the plaint, thereby, admitting that the 1st defendant has not received the consent of the Minister to use the term 'Chartered' and/or to use the name "Institute of Chartered Public Accountants" and accordingly, it violates the provisions of section 19(2) of the Companies Act No. 17 of 1982.

The learned District Judge has failed to address his mind to the aforesaid admissions made by the Registrar of Companies in his

answer. The learned Judge has failed to consider the specific provisions of section 22(i) of the Institute of Chartered Accountants Act No. 23 of 1959 which states that 'No person, not being a member of the Institute (the Plaintiff) shall take the title "Chartered Accountant". The learned Judge has misdirected himself in coming to the conclusion that the plaintiff and the 1st defendant-company are two distinct entities as the word 'Public' appears in the name of the 1st defendant. The learned Judge has also failed to understand that the plaintiff's case is not based on the confusion of names but on illegality, as the name of the 1st defendant violates the provisions of section 22(i) of the ICA Act. This fact has been admitted by the 9th defendant in his answer (vide paragraph 3 of the answer). The learned District Judge was mainly concerned with the question whether the plaintiff has the exclusive right to use the term 'Chartered'. The learned District judge has not considered and looked closely at the effect of section 22(i) of the ICA Act. Section 22(i) provides that, no person, not being a member of the Institute (plaintiff) shall take or use the title "Chartered Accountant" or any addition mentioned in section 6 of the ICA Act. Hence, it can be seen that the use of the title "Chartered Accountant" is not one which can be used arbitrarily and capriciously to the liking of a businessman or a company exploiting the same for personal gain. In my view, using the term 'Public' in between the term "Chartered Accountants" by the 1st defendant who confers the title Chartered Public Accountants to practice as "Chartered Accountants" appears contrary to the section 22(i) of the ICA Act. The name "Institute of Chartered Public Accountants" is a calculated attempt to show the public that the 1st defendant is an organisation that has the State patronage to confer the title "Chartered Public Accountants" similar in status to the plaintiff.

In deciding whether the plaintiff has a *prima facie* case, all that the Court has to see is, that on the face of it whether the plaintiff has a case which needs consideration and which is not bound to fail by some apparent defect. In order to decide whether the plaintiff has a *prima facie* case, the Court is not required to come to a conclusion that the plaintiff is entitled to relief by examining closely the plaintiff's case on its merits.

The facts and circumstances of this case show that there is an existence of a legal right in favour of the plaintiff. The plaintiff has shown a *prime facie* case, in that in all probability obtaining relief in favour of the plaintiff on the material placed before Court. In this case there is no dispute as to the legal right of the plaintiff. When the plaintiff's legal right

is not being disputed and the fact of its violation is denied, the best course for the Court is to grant the injunction. However, before granting the injunction, the Court must consider in whose favour the balance of convenience lies.

The burden lies upon the plaintiff, as the person applying for the injunction, of showing that his inconvenience exceeds that of the defendants.

Section 9(2) of the ICA Act states the duties conferred upon the plaintiff. It appears that the plaintiff has a bounden duty to maintain a very high professional and accounting standard in the field of accountancy.

The defendants in their statement of objections have claimed that the 1st defendant is a non-profit organisation (Paragraph 18 of the statement of objections). Hence, no loss of profit can arise to the 1st defendant from the grant of an injunction.

The 1st defendant by claiming to confer a professional qualification of the "Chartered Public Accountant" is attempting to represent wrongfully to the public that it provides a professional qualification equivalent to the professional qualifications of "Chartered Accountant" granted by the plaintiff. The 1st defendant also by claiming to confer the abbreviation 'CPA' is attempting to portray and represent to the public and to the world at large that it provides professional qualifications equivalent to or in par with the Certified Public Accountants (CPA) qualification granted by the United States of America.

In these circumstances, it appears that continuance of the business of the defendant tends to violate the provisions of section19(2) of the Companies Act and the provisions of section 22(i) of the ICA Act. Where the plaintiff has established that he has a right which has been infringed and further infringement is threatened, the plaintiff is entitled to an interim-injunction.

In my view an interim-injunction will not inflict a greater injury on the 1st defendant as the 1st defendant has admitted that it is not a profit making body.

Kerr on injunctions, 6th Edition at pp. 25 states thus:

"If on the other hand, it appears that greater damage would arise to the plaintiff by withholding the injunction, in the event of the legal right proving to be in his favour, than to the

defendant by granting the injunction, in the event of the injunction proving afterwards to have been wrongly granted, the injunction will issue."

In the instant case, the Registrar of Companies who had granted permission to register the 1st defendant is clearly of the view that the 1st defendant is in violation of the provisions of section 19(2) of the Companies Act as previously stated. The material issues relevant to this application are whether the 1st defendant is entitled to use the name "Institute of Chartered Public Accountants" and confer the title "Chartered Public Accountant" and its abbreviation "CPA". In view of the provisions of section 19(2) of the Companies Act and section 22(i) of the ICA Act, it appears that the defendants are acting unlawfully in using the term 'Chartered'. The learned Judge has not considered the loss and harm that will be caused to the plaintiff and there will be an erosion in the standards of accounting in Sri Lanka. The learned District Judge has not addressed his mind to the dangerous precedent which the 1st defendant is trying to establish.

The learned District Judge also held that the application for interim-injunction had been made by the plaintiff after the lapse of a considerable period of time. The learned District Judge has stated that the 1st defendant made the application to register its name in May 2003 and the plaintiff has filed this action on 17.3.2005 and there was a delay of nearly two years and held it is fatal to the plaintiff's application for an interim-injunction. The learned Judge has not considered the explanation given by the plaintiff. The plaintiff's position is that it had come to know about the 1st defendant on a newspaper advertisement which appeared on 11.2.2005, by which the 1st defendant advertised that it is offering an educational programme on accountancy and successful candidates will be awarded the title "Chartered Public Accountant" with its abbreviation "CPA". After making inquiries about the said advertisement, the plaintiff for the first time had come to know about the activities of the 1st defendant. It is only thereafter the plaintiff had instituted this action in the District Court of Colombo on 17.3.2005. Even though the plaintiff has explained the delay, the learned District Judge has not addressed his mind to the explanation given by the plaintiff.

On the question of delay, Kerr on injunction (6th edition) P.43 observes:

> **"Mere delay will not be fatal to the application if no mischief is caused thereby to the defendant."**

It lies upon the defendant to show that as a result of the delay on the part of the plaintiff, a right has been lost or his right has been affected. Where the delay has not prejudiced the defendant, the Court should not on account of mere delay of the plaintiff, hold against the plaintiff. In the instant case, the plaintiff, in my view, has given a plausible explanation for the delay. In any event, it appears that the 1st defendant has violated section 22(i) of the ICA Act and section 19(2) of the Companies Act, hence, even if there is any delay on the part of the plaintiff, the act committed by the 1st defendant remains illegal and in such situation delay in detecting such illegal acts shall not prevent the plaintiff from taking legal action against the defendant. If a wrongful act is a continuing one, the person wronged is normally entitled to an injunction against the person who causes harm to him, even if there is delay in filing action.

For the reasons stated above, I set aside the Order of the learned District Judge of Colombo dated 19.9.2005 and I make order granting the interim-injunctions prayed for in paragraph (i), (j) and (k) of the prayer to the plaint (English copy of the plaint). Accordingly the Appeal is allowed, with costs.

Appeal allowed.

RODRIGO
v
IMALKA
SUB-INSPECTOR OF POLICE, KIRULAPONE AND OTHERS

SUPREME COURT
SARATH N. SILVA, CJ.
SHIRANEE TILAKAWARDANE, J.
BALAPATABENDI, J.
SC FR 297/2007
NOVEMBER 28, 2007

Constitution – Articles 12, 12 (1), 13 (1), 13 (2), 14(1) (h), 15 (7) ,126 (4) – Penal Code – section 454, section 459 – Criminal Procedure Code – section 32 (1) – Searched and checked at check points – legality ? Reasonable ground of suspicion essential to warrant a search – Restriction and freedom of movement – Directions issued under Article126 (1) – Public Security Ordinance – section 12 – Placing of Boards by Police on Roads – Legality?

The petitioner complains that he was stopped at a 'check point' and asked for his driving licence. The petitioner had handed over his temporary driving licence issued by the Commissioner of Motor Traffic. The respondents had informed the petitioner that it is a forgery and a bribe was sought. As the bribe was not paid, he was detained at the Fraud Bureau and was produced before the Magistrate on a B'report on the basis that the petitioner was in possession of a forged temporary driving licence and had thereby committed an offence under section 459 – section 454 of the Penal Code. He was remanded by the Magistrate and later when it came to light that the document was a genuine document, the Magistrate discharged the petitioner.

The petitioner complained of violation of Articles 14 (1)(h), 12 (1), 13 (1) and 13 (2) of the Constitution.

Considering the continuing pattern of infringement affecting the freedom of movement and the guarantee of the equal protection of the law by measures purportedly taken in the interest of national security and the prevention of public order, the Counsel for the petitioner submitted that it is just and equitable to make directions in terms of Article 126 (4).

Held :

(1) Section 32(2) of the Code of Criminal Procedure Act permits the arrest of a person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having being so concerned. The Emergency Regulations (Miscellaneous Provisions And Powers) has a wide power in Regulation 20 (1).

(2) The members of the armed forces called out by the President in terms of section 12 – Public Security Ordinance have the fullest power to maintain public order and to taken action against those who are waging war and committing related offences, but when action is directed against persons who are not thus engaged in war and committing related offences, every precaution and safeguard has to be taken to minimize the resultant hardships.

Per Sarath N. Silva C.J:

"A reasonable ground of suspicion is essential to warrant a search. There is no provision of law which permits arbitrary action in stopping and searching persons who travel on our public roads in the exercise of the fundamental right to the freedom of movement. It is paramount that any restriction of the fundamental rights guaranteed by the Constitution should only be as ' prescribed by law'. The Police and members of the armed forces have to bear in mind firstly that they don the uniform and bear weapons only as permitted by law, to uphold the law and to respect, secure and advance the fundamental rights declared by the Constitution".

Per Sarath N. Silva C.J:

"Superior officers who do not take precautions to prevent any infringement by their subordinates who are detailed for duty would themselves be liable for the infringement of the freedom of movement and the freedom from arbitrary arrest guaranteed by Article 14(1)(h) and 13(1).

Per Sarath N. Silva C.J:

" The facts presented above clearly reveal a clear instance of the abuse of power, rampant dishonesty and corruption and also misuse of the process of law that takes place at 'check points' that have sprouted up. I may at this stage state that the erection of virtually permanent barriers on public road done at the ' check points' is not authorized by any law".

Directions issued under Article 126(4) –

1. The prevalent executive action in operating permanent 'check points' with unlawful obstructions of public roads and the stoppage of all traffic resulting in serious congestion to be discontinued since such action amounts to an infringement of the fundamental right to the freedom of movement guaranteed by Article 14(1)(h) and deny to the people the equal protection of the law guaranteed by Article 12 (1). The public roads are vested in the Local Authorities to ensure that they are maintained for people to exercise their freedom of movement.

2. In terms of Section166 (1)(a) of the Motor Traffic Act any prohibition or restriction of halting or parking of motor vehicles on a highway or part of a highway in any area has to be by order of the relevant authority. It appears that the prohibitions complained of have been purportedly made by the Senior Superintendent of Police (Traffic) (SSP Traffic) and not by the Local Authority – Colombo Municipal Council – Hence the permanent boards that are now seen in most streets purportedly by order of the SSP (Traffic) are patently illegal and deny the people the equal protection of law guaranteed by Article 12 (p). Such illegal signs should be removed forthwith.
3. At times traffic is brought to a halt on principal roads at peak hours causing severe congestion which in itself is a security threat (V.I.P. movement). Such measures deny to the people the equal protection of law. The obstruction of traffic on public roads and the consequential restriction of the freedom of movement would be an infringement of the fundamental rights guaranteed by Article 14 (1)(h).

   The rights are directed to ensure that no such obstructions as alleged take place. If security measures have to be taken to safeguard any person who is specially threatened such measures should be taken with minimum inconvenience caused to the citizens who are exercising the freedom of movement. Such measures should in any event be avoided at peak hours since they cause serious congestions that would itself pose a threat to security.

APPLICATION under Article 126 of the Constitution.

Cases referred to:-

1. *Sarjun* v *Kamaldeen* PC 39573 Police Station Habarana SCFR 559-03 – SCM 31. 7. 2007
2. *Liyanage* v. *Gampaha Urban Council* 1991 1 Sri LR 8

W. Dayaratne for petitioner.

Manohara de Silva PC for 1st and 2nd respondents

K. Parinda Ranasinghe SC with *L. Munasinghe* SC for 3 – 7 respondents.

Cur.adv.vult.

December 3, 2007

SARATH N. SILVA, C.J.

The petitioner has been granted leave to proceed on the alleged infringement of several fundamental rights the ambit of which would be adverted to in the course of this judgment.

Counsel for the petitioner submitted that although the application has been filed specifically on the infringement of the petitioner's

fundamental rights, the case is being presented more from the perspective of the public interest in protecting, securing and advancing the fundamental rights of the people. That, the alleged infringements are typical of the travails, hardship and harassments the people, peacefully engaged in their lawful pursuits and who travel on our public roads in the exercise of the fundamental right to the freedom of movement guaranteed by Article 14 (1)(h) of the Constitution are subjected to, thereby denying to such person the equal protection of the law guaranteed by Article 12(1) and the freedom from arbitrary arrest and detention guaranteed by Articles 13(1) and 13(2).

Considering the submissions based on the public interest, the Court permitted the motion of the petitioner to add the Secretary, Ministry of Defence as a party respondent. When the matter came up for hearing on the specially fixed day, 17. 10. 2007, further time was sought by the 4th respondent being the Officer in Charge of the Kirulapona Police Station to file objections. Since no objections had been filed by the Inspector General of Police and the Secretary, Ministry of Defence and considering the general ambit of the application, the Court granted further time for objections to be filed. Thereafter, objections have been filed by the Inspector General of Police, but no objections have been filed by the Secretary, Ministry of Defence.

On the basis of all the material that has been adduced in Court, it is common ground that the petitioner had not committed any offence or done or omitted to do anything so as to be illegal or contrary to law, in respect of the incidents which resulted in his arrest and detention, including a period in remand custody.

The facts are briefly as follows.

On 28.07.2007 at about 12.00 noon the petitioner was stopped whilst driving his vehicle along the main road from Kirulapona towards Colombo. The place where he was stopped is described as the "Polhengoda Police Check Points". This is one of the many "Check Points" that have sprouted up on our high roads and bridges in different parts of the country, where the roads are barricaded with sand filled barrels and other crude implements, and often with an over-hanging shelter for the officers who serve at these points and illuminated with electrical bulb with a supply drawn from some temporary connection. These points are seen at times as temporary Police Stations at which entries are being recorded. The facts presented in this case reveal the activity that goes on in these temporary "Stations" located on roadsides and on bridges and would be adverted to, hereafter.

As noted above the petitioner was not stopped in connection with the commission of any offence. When his vehicle was brought to a half, the 1st respondent, being the officer-in-charge of the "Check Point" asked for his driving licence. The petitioner handed over his temporary Driving licence issued by the Commissioner of Motor Traffic since the original driving licence had been lost and the issuance of a duplicate was being processed by the Department of Motor Traffic. The petitioner was informed that his temporary driving licence is a forgery and a bribe was sought to refrain from prosecuting him. The petitioner replied that he did not have any money with him. At that point the officer opened the 'cubby hole' of the petitioner's vehicle and seeing a bottle of perfume, demanded that the bottle be given to him. When the petitioner refused to give the bottle of perfume the officer threatened that the temporary driving licence would be torn and destroyed and that he would be prosecuted. The petitioner protested his innocence and produced even the receipt issued by the Commissioner of Motor Traffic in respect of the application for the duplicate licence. At that stage the officer abused him and asked him to leave the place immediately whilst retaining the temporary driving licence.

The petitioner being in peril of driving without the temporary licence went to the Kirulapona Police Station which is nearby and informed the 2nd respondent, being the Officer in Charge of the Traffic Branch, of the incident. The 2nd respondent requested him to go back to the 'Check Point'. When he returned to the check point and informed the 1st respondent and the others present that he met the 2nd respondent, these officers became furious and abused him in filthy words. They got in to the petitioner's vehicle and came to Kirulapona Police Station. The 1st respondent who came with the petitioner handed over the temporary driving licence of the petitioner to the 2nd respondent and the petitioner gave the receipt issued by the Commissioner of Motor Traffic in respect of his application for the duplicate licence. Thereafter the 2nd respondent perused the documents P1 and P2 stated that the temporary driving licence is a forgery and took petitioner into his custody. Subsequently a statement was recorded from the petitioner and at about 4.30 p.m. he was handed over to the Fraud Bureau at Wellawatte, with the intervention of the 4th respondent being the Officer-in-Charge of the Police Station. The petitioner was detained overnight at the Fraud Bureau and was produced before the Magistrate on a "B Report" bearing No. B 5084/2 by an order of the 3rd respondent being the Officer-in-Charge of the Fraud Bureau. It was reported to Court that the petitioner was in possession of a forged temporary driving

licence and had thereby committed offences under section 459 and 454 of the Penal Code. The petitioner was remanded by the Magistrate on this Report.

It appears that the Magistrate requested the Police to check on the authenticity of the temporary driving licence. That was done by the 3rd respondent who filed further report on 1.8.2007 which revealed that the Deputy Commissioner of Motor Traffic Mr. Weerakoon reported that what was produced by the petitioner (P1) was a genuine document and the Magistrate discharged the petitioner from the proceedings.

The 1st respondent has filed an affidavit in which the arrest of the petitioner is admitted. She has stated that the petitioner "was subjected to a routine inspection" and that she entertained a suspicion as regards the genuineness of the temporary driving licence because of the demeanour of the petitioner. She has further stated that the petitioner confessed that he obtained a temporary driving licence by offering a bribe of Rs. 500/- to an officer in the Motor Traffic Department.

The 1st respondent has denied that she sought a gratification from the petitioner and or that she demanded the bottle of perfume.

The 2nd respondent denied the allegation against him and has stated that the "Check Point" did not come under his supervision. He has specifically stated that on 28.7.2007 he set out from the Kirulapona Police Station at 9.15 a.m. on patrol duty and returned to the Police Station at about 8.20 p.m.

The 4th respondent being the Officer-in-Charge of the Kirulapona Police Station has filed an affidavit and stated that after the petitioner was produced in the Police Station he made an attempt to contact the Commissioner of Motor Traffic at Werahera by phone in order to verify the authenticity of the temporary driving licence produced by the petitioner and since "a reply was not forthcoming immediately", the petitioner was handed over to the Fraud Bureau for further investigation.

The 3rd respondent being the Officer in Charge of the Fraud Bureau at Wellawatte has stated that the petitioner was brought to his Police Station at about 5.45 p.m. by an officer of the Kirulapona Police. He has stated that he requested Police Sergeant Edirisinghe to investigate the matter and "accordingly the said officer recorded a detailed statement from the said accused in respect of the charge levelled against him." He has further stated that the recording of the statement continued till 8 p.m. and for this reason the petitioner was detained overnight and produced before the Magistrate at 10 a.m. on the next day.

I have now to consider the conflict of testimony with regard to the circumstances in which the petitioner was arrested, kept in custody and later remanded. As noted above the respondents conceded that the petitioner committed no offence whatsoever whilst travelling on the road and at the stage he was stopped.

The temporary driving licence, marked P1 is manifestly a genuine document with contains even the photograph of the licence holder. It is in a machine numbered official form to be used in terms of section 126 (4) of the Motor Traffic Act. There are no alterations or erasures and it bears all the endorsements of the respective officials. It contains the number of the petitioner's driving licence and of his national identity card. The receipt that the petitioner produced marked P2 has also been issued by the Commissioner of Motor Traffic in the official form. It clearly states that the relevant documents have been received at their office for the issuance of a duplicate of the driving licence.

The circumstances urged by the 1st respondent to justify the arrest viz: that the petitioner stammered and appeared to be excited and so on are a figment of her imagination. It is possible that he gave a bribe of Rs. 500/- to the Motor Traffic Department for the duplicate licence. But, does that mean that a further bribe should be given to the Police?

As between the version of the petitioner and the 1st respondent there is no doubt whatsoever that the petitioner's version is acceptable. It is obvious that the 1st respondent retained the temporary driving licence produced by the petitioner and thereafter threatened to destroy it leaving the petitioner helpless in the matter. If that was done the petitioner would have no witness to support him except the other police officers who would never have assisted him in the matter. The 1st respondent continued to retain the temporary driving licence knowing fully well that the petitioner would have to return to collect the document from her. Thus the payment of a bribe was assured. The demand of the bottle of perfume alleged by the petitioner can also be believed in the circumstances that have been presented.

The petitioner did the obvious in the circumstances by going up to the Police Station to report the injustice that had been meted out. The 2nd respondent denied that he was at the Police Station and sought to support his alibi by an extract from the Information Book produced marked 2R2. The entry produced to say the least is preposterous. It merely records that the 2nd respondent left the Station on a motor cycle bearing a particular number at 9.15 a.m. and returned to the Police Station only at 8.15 p.m. in the night. It merely records that the 2nd

respondent travelled along High Level Road, Baseline Road, Poorwarama Road, Wijaya Kumarathunga Mawatha etc. These are names of a few roads in the vicinity virtually within walking distance. He claims to have travelled about 30 k.m. in this area. There is no official record of anything that he has done in the nearly 11 hours period he claims to have been outside the Police Station. He seems to have gone without meals and everything else. The denial is palpably false and entry 2R2 has been fabricated for the purpose of producing it in Court to support his *alibi* that there was no contact with the petitioner.

The method by which these Police Officers all being in the rank of Police Inspectors operated is obvious. When the petitioner complained of the conduct of the 1st respondent being a Sub Inspector of Police at the security "Check Point", the 2nd respondent engineered a situation where the petitioner is brought back to the Police station with the relevant document. Having got the petitioner within their full control, they obviously decided to teach the petitioner a lesson by concocting a charge of using as genuine a forged document and referred the matter to the Fraud Bureau for further harassment.

The 3rd respondent sought to justify the detention of the petitioner overnight on the basis that after he was brought in at 5.45 p.m. a "detailed statement" was recorded till 8 p.m. But, the Information Book extract produced by him marked 3R3 does not contain any statement of the petitioner. It appears that the Fraud Bureau has acted true to its name and has endeavoured to perpetrate a fraud on the Court. 3R3 is a long typewritten document which contains a series of guidelines generally addressed to an investigating officer. Beneath that there is an entry by P.S. 32453 Edirisinghe who according to the 3rd respondent (OIC) recorded a detailed statement till 8 p.m., that he obtained a statement from the Motor Traffic Department. Whereas, nothing in fact was obtained from the Motor Traffic Department. This is once again a part of the vicious scheme of the Police to punish the petitioner. To justify his detention overnight and to produce him before the Magistrate on the next day being a Sunday and a public holiday knowing fully well that the petitioner would be remanded without an inquiry.

It appears that the intervention of the Magistrate resulted in the obvious course of action in getting the document checked from the Commissioner of Motor Traffic, resulting in the petitioner being discharged on 1st of August 2007.

The facts presented above reveal a clear instance of the abuse of power, rampant dishonesty and corruption and also misuse of the

process of law that take place at "Check Points" that have sprouted up. The tragedy is that a multitude of offences have been committed by Police officers whose duty it is to use their "best endeavours" and ability to prevent all crimes, offences and public nuisances (vide Section 56 (a) Police Ordinance). **I may at this stage state that the erection of virtually permanent barriers on public roads as done at these "Check Points" is not authorised by any law.**

In the month of July this year being the very month the present incident took place, this Court entered a judgment in a similar case where a person who was transporting furniture for his personal use having obtained a permit under the Forest Ordinance, although such permit was not required, was wrongfully arrested, detained and tortured because he refused to give a bribe of Rs. 5000/- that was demanded (*Sarjun* v *Kamaldeen*)(1).

The observations made at 7 of the Judgment apply with equal force to the facts of this case.

"The facts of the case reflect the hapless plight of an innocent citizen who takes every precaution to comply with the law of the land. The concern of national security resulting from the threats of terrorism has made it necessary to impose safeguards and check points on our public roads. This case typifies the vicious link between abuse of authority, pursuit of graft and the infliction of torture on a citizen who insists on his right not to cave into illegal demands of gratification and abuse of authority. Whilst security concerns have to be addressed such action should be taken with the highest concern and respect for human dignity.

The presence of groups of armed Police and Security personnel who place illegal obstructions is a common sight on our roads. These officers as manifest in the facts of this case do not appreciate that roads constitute public property and that every citizen is entitled to the freedom of movement guaranteed by Article 14 (1)(h) of our Constitution being the Supreme Law of the Republic. Any interruption of the exercise of such freedom by Police/ security personnel would amount to an arrest and has to be justified on the basis of a reasonable suspicion of having committed an offence. A tolerant society wedged between ruthless terrorism and the abuse of authority has lost the taste of freedom. It is only through a respect of human dignity and freedom guaranteed by the Constitution to all segments of our society that peace and normalcy could be restored. Therefore a heavy responsibility lies on all Senior officials who

detailed armed personnel on our roads to take every precaution to ensure that ordinary officers such as the 1st respondent (being only a Reserve Police Constable) do not abuse their authority violate the law or inflict suffering on innocent citizens. Such personnel have to be firmly instructed that they have to act with the highest degree of caution and sensitivity with due respect for human dignity.

A person freely moving on the road in compliance with the law could be stopped and made to alight from the vehicle only on a reasonable suspicion of illegal activity. Such suspicion would have to be justified in Court. Superior Officers who do not take precautions to prevent any infringement by their subordinates who are detailed for duty would themselves be liable for the infringement of the freedom of movement and the freedom from arbitrary arrest guaranteed by Article 14 (1)(h) and 13(1) of the Constitution."

This Court issued a special direction in that case that copies of the judgment be sent to the Secretary, Ministry of Defence and the Inspector General of Police considering the pattern of serious infringements of fundamental rights that take place by the abuse of authority on the part of personnel who check vehicles and people travelling in our public roads in the exercise of their fundamental right to the freedom of movement, particularly because such action is directed at persons who have not committed any offence and against whom there is no reasonable suspicion of having committed any specific offence. Further, in regard to the purported basis of executive action it is noted that Article 15(7) of the Constitution permits restrictions of the fundamental rights adverted to above only if such restrictions are "prescribed by law in the interests of national security."

Section 32 (1) of the Code of Criminal Procedure Act permits the arrest of a person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. The Emergency (Miscellaneous Provisions and Powers) Regulations has a wider power in regulation 20(1) which reads as follows:-

"Any Public officer, any member of the Sri Lanka Army, the Sri Lanka Navy or the Sri Lanka Air Force, or any other person authorized by the President to act under this regulation may search, detain for purposes of such search, or arrest without warrant, any person who is committing or has committed or whom he has reasonable ground for suspecting to be concerned in, or to be committing, or

to have committed, an offence under any emergency regulation, and may search seize remove and detain any vehicle, vessel, article, substance or thing whatsoever used in, or in connection with the commission of the offence."

Thus a reasonable ground of suspicion is essential to warrant a search. There is no provision of law which permits arbitrary action in stopping and searching persons who travel on our public roads in the exercise of the fundamental right to the freedom of movement. This Court has repeatedly held that the Rule of Law is the basis of our Constitution. Waging war against the State is the severest of offences punishable with death in terms of section 114 of the Penal Code. There are also connected offences in chapter VI of the Penal Code. The members of the Armed Forces called out by the President in terms of section 12 of the Public Security Ordinance have the fullest power to maintain public order and take action against those who are waging war and committing other related offences. **But, when action is directed against persons who are not thus engaged in war and committing related offences, every precaution and safeguard has to be taken to minimize the resultant hardships. It is paramount that any restriction of the fundamental rights guaranteed by the Constitution should only be as 'prescribed by law. The Police and members of the Armed Forces have to bear in mind firmly that they don uniform and bear weapons only as permitted by law; to uphold the law and to respect, secure and advance the fundamental rights declared by the Constitution.**

Although copies of the judgment were sent to the respective officials in the background stated above, as submitted by Counsel for the petitioner, no remedial executive action has been taken. Hence, considering the continuing pattern of infringements affecting the freedom of movement and the guarantee of the equal protection of the law, by measures purportedly taken in the interests of national security and the preservation of public order, Counsel submitted that it is just and equitable to make directions in terms of Article 126(4) of the Constitution in the public interest to secure and advance the fundamental rights of the people.

Counsel submitted that such directions be made in three related aspects affecting the freedom of movement and equal protection of law that result from executive or administrative action purportedly taken in the interest of national security. They are-

(i) the restriction of the freedom of movement that result at "Check

Points" referred above and the general measures taken at times to stop all traffic and check all vehicles and persons travelling on public roads causing heavy congestion of traffic, inordinate delays, hardships and loss;

(ii) the total prohibition of parking of vehicles on certain principal roads that deny to the people the equal protection of the law;

(iii) the intermittent stoppage of all traffic to permit what has been described as "VIP movements" – that deny the people the freedom of movement and the equal protection of the law;

Counsel for respondents had no objections that these aspects being considered by Court for the purpose of making appropriate directions.

(1) "Check Points" and stoppage of all vehicles for checking

Counsel for the petitioner submitted that the establishment of near permanent "Check Points" along public roads and on bridges referred above has been done without any legal basis. These public roads are vested in the local authorities to ensure that they are duly maintained for the people to exercise their freedom of movement.

In the case of *Liyanage* v *Gampaha Urban Council and others*[2], a writ of *certiorari* was issued on a local authority that caused certain obstructions on a public road by converting it to a market place on a particular day. The Court analysed the provisions of the Urban Councils Ordinance (similar provision being contained in the Municipal Councils Ordinance) and concluded that,

> *"the legislative purpose underlying these provisions is very clear. It is to ensure that a council, being the administrative authority at local level will have the public thoroughfares within its area, free of obstructions, well maintained and improved with the passage of time. So that the people for whose benefit these thoroughfares are meant can use them freely and without impediment....."*

An obstruction of a public road which is not for the maintenance or repair is clearly not warranted by any law. The illegal erection of virtually mobile police stations partly obstructing public roads have been done by officials whose duty it is to uphold the law in flagrant violation of the law itself as noted above. Even disregarding the illegality in establishing these "Check Points" I would now examine the further issue whether the action taken at these "Check Points" as

revealed by the material adduced by the respondents can be justified from the perspective of national security and preserving public order.

The 5th respondent being the Inspector General of Police has produced several documents that have been issued in respect of "Check Points". He has produced marked "5R3" a circular issued by his predecessor in office last year, bearing the title "Implementation of Police Check Points Effectively".

The 2nd paragraph of this circular states very categorically that these "Check Points" erected in all Police areas throughout the country have been of 'minimal use'. The IGP has noted this as a personal observation and given as the reason for such a dismal state the fact that there is no proper scheme or plan for the operation of these "Check Points". A Standard Operational Procedure (SOP has been annexed to "5R3"). In the introduction to the SOP, it is repeated once again that the effectiveness of these "Check Points" is very minimal "ඉතා අවම". It further states that there has been very few arrests and even few instances of persons taking illegal items such as weapons and explosives. Ironically, the IGP has stated that in a recent incident terrorist suspects had transported two boats filled with explosives up to Negombo passing ten "Check Points". According to the IGP this has been discovered from a later confession of a suspect who was arrested elsewhere. What should be added as post script to the IGP's virtual tale of woe are the serious incidents of abuse of power, corruption and the harassment of innocent persons referred to above.

The 1st respondent being the Officer in charge of Kirulapona Police Station has produced marked "4R2" a document which specifies the particulars the Officers have to take down at these "Check Points". They are as follows :-

1. The date of inspection.
2. Time of inspection.
3. Number of the vehicle.
4. Make of vehicle.
5. Full name and address of the driver.
6. Driver's National Identity Card number.
7. Driving Licence number.
8. Number of females who travel in the vehicle.
9. Number of males who travel in the vehicle.
10. Any other particulars to be stated.