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DIGEST

These particulars cannot possibly serve any purpose from the perspective of national security nor can such information safeguard public order. The result of this futile exercise carried on by the virtually mobile Police Stations referred above is to delay and harass persons lawfully exercising their fundamental right to the freedom of movement. It is manifest that this process has gone on for many years without the Executive bringing its mind to bear on the purpose of maintaining these illegal "Check Points". People over the years have suffered in silence probably under the assumption that some useful information is collected from the perspective of national security. These "Check Points" in their present semi permanent state and lit up in the night can be seen at a distance and their locality is well known. No person who has committed an offence, let alone a terrorist would ever drive up to such a "Check Point" and virtually submit himself to be arrested. That probably is the reason for their minimum use in respect of which the former IGP was lamenting in 5R3.

Counsel submitted that even law abiding persons avoid these "Check Points" by taking a detour along by – roads to avoid being unnecessarily stopped.

In considering the foregoing matters we have been mindful of the serious situation that the Executive is confronted with since on the very day this matter was heard there were two explosions in the City, one causing serious loss of life and injuries. It is to be noted that these explosions have taken place in areas hemmed in on several sides and direction by "Check Points". There has been a profuse presence of armed personnel on the nearby roads. It is clear that such obtrusive presence of armed personnel and "Check Points" have not deterred in any way the terrorists in carrying out the dastardly attacks.

The city of Colombo and the suburbs are now cosmopolitan in every sense. There are a large number of Tamils, Muslims and Sinhalese who live in the City. Many Tamil persons have sought refuge in the City and the suburbs and it is the incumbent duty of the State to ensure that they are afforded security from the threats which probably compelled them to evacuate from their previous places of abode. On the other hand, it is the basic duty of one and all who benefit from the safety and security of the City to ensure that such security is preserved without the intrusion of terrorist activity.

In the circumstances it would be well for the Executive to enlist the support of all residents in the task of preserving national security by establishing Citizens Committees, shop-keepers Committees and so on. Such Committees should have a direct link with the Police and Security Personnel in ensuring that there is a quick, ready and effective response to any threat that is noted.

Such action would have prevented the explosions, loss of life and destruction of property that we have experienced.

A similar observation has also to be made of the action taken by Police and Security Personnel to stop all traffic and to check all vehicles. This action has resulted in serious congestion of traffic. In a situation where innocent civilians are also targeted by terrorist activity such congestions of traffic may unnecessarily endanger many. As noted above even the Emergency regulations do not warrant such arbitrary action.

Considering the matters stated above, we uphold the submissions of the Counsel for the petitioner and make a direction that in terms of Article 126(4) of the Constitution that 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 be discontinued since such action amounts to an infringement of the fundamental right to the freedom of movement guaranteed by Article 14(l)(h) of the Constitution and deny to the people the equal protection of the law guaranteed by Article 12(l) of the Constitution. The power to search arrest and detain should be exercised in terms of Regulation 20(l) of the Emergency (Miscellaneous Provisions and Powers) Regulation cited above on the basis of reasonable grounds of suspicion of the commission of an offence or being concerned in the commission of an offence under the Emergency Regulations. Officers assigned such functions should be duly informed of the fundamental right to the freedom of movement guaranteed by Article 14(l)(h) and the guarantee of the equal protection of the law as contained in Article 12(l) of the Constitution. It is to be noted that the S.O.P. (5R3) produced by the I.G.P. makes no reference to these matters.

2. The total prohibition of parking vehicles on certain principal roads that deny to the people the equal protection of the law.

Counsel for the petitioner submitted that the total prohibition on parking of vehicles on certain principal roads within the City is not permitted by any law and that the executive action in this regard denies to the people the equal protection of the law guaranteed by the Article 12(l). We have to note that the Motor Traffic Act is the applicable law. In terms of section 166(l)(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 local authority. It appears that the prohibitions complained of have been purportedly made by the Senior Superintendent of Police (traffic) and not by local authority being the Colombo Municipal Council. It is to be noted that in terms of section 164 (l)(a) of the Motor Traffic Act a police officer not below the rank of Superintendent of Police or Assistant Superintendent of Police may affix traffic signs only for the 'temporary regulation of traffic'. Hence permanent boards that are now seen in most streets purportedly by order of the SSP (traffic) are patently illegal and deny to the people the equal protection of law guaranteed by Article 12(l) of the Constitution.

In the circumstances we make a direction in terms of Article 126(4) of the Constitution that such illegal signs be removed forthwith and proper orders be made if necessary, in terms of the provisions of the Motor Traffic Act. In making such an order suitable arrangements should be made to permit the parking of vehicles at least on one side of the road at alternate times depending on the intensity of the movement of traffic.

3. Intermittent stoppage of traffic to permit "VIP Movement"

Counsel submitted that at times traffic is brought to a halt on principal roads at peak hours causing severe congestion which in itself is a security threat. It was further submitted that security personnel engaged in these tasks at times even rudely drive the pedestrians away. It appears that no one knows the persons who make such arrangements or give such orders. We have to note that such measures deny to the people the equal protection of law. It has to be borne in mind that our State is a Democratic Socialist Republic in which all persons are equal. The obstruction of traffic

on public roads and the consequential restriction of the freedom of movement would be an infringement of the fundamental rights of the citizens guaranteed by Article 14(1)(h) of the Constitution.

In the circumstances 5th and 7th respondents 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 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.

The 5th respondent is directed to report to Court on 7-1-2008 of the action taken.

For the reasons stated above the application is allowed and we make a declaration that the petitioner's fundamental rights guaranteed by Article 12(1), 13(1) and 13(2) have been infringed by executive or administrative action.

Considering the nature of infringements we direct the payment of compensation to the petitioner personally in a sum of Rs. 75,000/- each by the 1st, 2nd, 3rd and 4th respondents. The State will pay costs in a sum of Rs. 25,000/-.

The Registrar is directed to forward a copy of the judgment containing the directions made in terms of Article 126 (4) of the Constitution to the 5th, 6th and 7th respondents for necessary action in terms of these directions.

Mention on 7-1-2008.

TILAKAWARDANE, J.- I agree.

BALAPATABENDI, J. - I agree.

Application allowed.

Directions issued.

MALRAJ PIYASENA
v
ATTORNEY-GENERAL AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
UDALAGAMA, J. AND
SOMAWANSA, J.
S.C. (F.R.) APPLICATION NO. 390/2005
27TH JULY 2006

Fundamental Rights – Infringement of Article 126 of the Constitution - Is the Associated Newspapers of Ceylon Ltd. (ANCL), a Limited Liability Company amenable to fundamental rights jurisdiction - Whether the impugned acts of 7th and 8th respondents constitute executive or administrative action – Supreme Court Rules 44(1) C of the Supreme Court Rules (1990).

At the hearing two preliminary objections were raised, namely –

(a) the petitioner cannot invoke the fundamental rights jurisdiction of the Supreme Court, as the impugned act/s by the 2nd to 8th respondents do not constitute executive or administrative action/actions.

(b) the petitioner has not complied with the Rule 44(1)(C) of the Supreme Court Rules of 1990, as he had not taken steps to file relevant and necessary documents along with his petition or thereafter.

Held:

(1) Fundamental rights jurisdiction cannot and should not be frustrated on the grounds of lack of jurisdiction without ascertaining the true character of the Institution and therefore it is essential that the true legal character of the Institution in question be examined before arriving at a decision.

(2) ANCL is an instrumentality or an agency of the State, subject to direct control by the Government. In such circumstances, there is no possibility of construing that the acts of ANCL cannot come under the jurisdiction of fundamental rights, guaranteed in terms of Article 126 of the Constitution.

(3) In terms of Rule 44(1)(C), what is necessary is to tender to Court only the documents and affidavits which are available to the petitioner.

There is no compulsion in terms of Rule 44(1)(C) to make, an effort to tender documents, which are not in the possession of the petitioner. The petitioner should plead for any other relevant documents and should file them as and when they are available to the petitioner with the permission of the Court.

(4) In terms of Article 126 read with Article 4(d) of the Constitution, it is apparent that fundamental rights guaranteed by the Constitution cannot be 'abridged', 'restricted' or 'denied' and it is evident that it would be the duty of the Supreme Court to ensure that such rights are not abridged, restricted or denied to the People.

It is not possible to restrict the applicability of fundamental rights through mere technicalities.

per Dr. Shirani Bandaranayake, J:

"The sole purpose of incorporating a Chapter on Fundamental Rights in the Constitution was to protect and promote such rights and this was done on behalf of the people. These rights have established a firm foundation for a democratic society, which is rid of all inequalities, which should lead to a new social order and thus the fundamental rights are chiefly for the betterment of the individual and would eventually lead to the formation of a just society."

Cases referred to:

(1) *Thadchanamurthi* v *Attorney-General* FRD(1) 129.

(2) *Velmurugu* v *Attorney-General* (1981) 1 SLR 406.

(3) *Ireland* v *United Kingdom* January 18, 1978 Decisions of the European Court of Human Rights.

(4) *Mariadas* v *Attorney-General and another* FRD Vol. 2, 397.

(5) *Wijetunga* v *Insurance Corporation* (1982) 1 SLR 1.

(6) Gunawardena v Perera (1983) 1 SLR 305.

(7) *Perera* v *University Grants Commission* FRD (1) 103.

(8) *Peter Leo Fernando* v *Attorney-General and others* (1985) 2 SLR 341.

(9) *Rajaratne* v *Air Lanka Ltd.* (1987) SLR 128.

(10) *Leo Samson* v *Air Lanka* (2001) 1SLR 94.

(11) *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Company Ltd.* (2002) 1 SLR 365.

(12) *Som Prakash Rekhi* v *Union of India* AIR (1981) S.C. 212.

(13) *Sukdev Singh* v *Bhagatram* AIR (1975) S.C. 1331.

(14) *Ramana Dayaram Shetty* v *The International Air Port Authority of India* AIR (1979) S.C. 1628.

(15) *Ajay Hasia* v *Khalid Mujib* (1981) AIR S.C. 487.

(16) *Romesh Thappar* v *State of Madras* AIR (1950) SC124.

(17) *Prem Chand Garg* v *Excise Commissioner, U.P.* AIR (1963) S.C. 996.

(18) *B.V.M. Fernando and others* v *Associated Newspapers of Ceylon Ltd.* S.C. (FR) 274/2004.

APPLICATION for infringement of Fundamental Rights.

J.C. Weliamuna for petitioner.

Aravinda Athurupana for 2nd, 3rd, 4th, 5th, 7th and 8th respondents.

Cur.adv.vult.

November 23, 2006

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, an Assistant Manager Security Services (Operations) of the Associated Newspapers of Ceylon Ltd., viz., the 2nd respondent (hereinafter referred to as ANCL) alleged that by the promotion granted to the 7th respondent as manager Operations at ANCL, his fundamental right guaranteed in terms of Article 12(1) of the Constitution was violated for which this Court granted leave to proceed.

When this matter was taken up for hearing, learned Counsel for the 2nd to 5th, 7th and 8th respondents (hereinafter referred to as the learned Counsel for the 2nd respondent), took up a preliminary objection stating that ANCL is not amenable to fundamental rights jurisdiction, as ANCL, which is a limited liability Company or its officers is/are not instrumentalities of the State and that the petitioner has not filed any material to show that ANCL falls within the meaning of executive or administrative action in terms of Article 126 of the Constitution.

Accordingly learned Counsel for the 2nd respondent submitted that -

i. the petitioner should have annexed the gazette notification referred to in paragraph 3(b) of the petition to indicate that ANCL has been listed as an institution under the Ministry of Information and Media;

ii. as ANCL is a Company, the petitioner should have filed Form 48 and share certificates to indicate that the State has the majority of the shares in ANCL; and

iii. for the reasons referred to in i and ii above, learned Counsel for the 2nd respondent contended that there was non-compliance with Rule 44(1) (c) of the Supreme Court Rules of 1990.

In the circumstances, it was decided to take up the preliminary objection for consideration and both learned Counsel were so heard.

On a consideration of the preliminary objection raised by the learned Counsel for the 2nd respondent, it is apparent that his objection is based mainly on two grounds; namely

A. the impugned act/s by the 2nd to 8th respondents do not constitute executive or administrative action and therefore the petitioner cannot invoke the fundamental rights jurisdiction of this Court; and

B. the petitioner has not complied with the Rule 44(1)(c) of the Supreme Court Rules of 1990, as he had not taken steps to file relevant and necessary documents along with his petition or thereafter.

Having stated the objections of the learned Counsel for the 2nd respondent, let me now turn to examine the said objections.

A. Whether the impugned act/s by the 2nd to 8th respondents constitute executive or administrative action

Although Article 126 of the Constitution refers to executive or administrative action, with reference to fundamental rights, the Constitution does not provide any definition to this concept. It would therefore be necessary to analyze the case law in order to consider the definition in this respect. The case law, it is to be noted, clearly indicates a gradual evolution towards broadening the concept, since the early decisions after 1978.

In *Thadchanamurthi* v *Attorney-General* [1] at 129 a very narrow view was taken while considering an infringement of fundamental rights by executive or administrative action, where it was stated that torture inflicted by police officers were unlawful and *ultra vires* of the duties of the police officers and therefore it would not amount to state action. It was also stated that the State would be liable for

the wrongs of its subordinate officials only when an 'administrative practice' had been adopted. A few years later in *Velmurugu* v *Attorney-General*[2] at 406 in the majority view it was held that if liability is to be imputed to the State it must be on the basis of an administrative practice and not on the basis of an authorization, direct or implied, or that those acts were done for the benefit of the State. However, in the minority decision, Sharvananda, J. (as he then was) had taken a broader view in giving a meaning to the phrase 'executive or administrative action' to encompass all actions by State officials. Referring to several judgments of other jurisdictions and especially the decision in *Ireland* v *United Kingdom*[3] Sharvananda, J. (as he then was) stated that,

> "There is no justification for equating 'executive or administrative action' in Article 126 to 'administrative practice' or to acts resulting from administrative practice. 'Practice' denotes 'habitual or systematic performances' and contemplates a series of similar actions. No known or limited constitution of the phrase 'executive or administrative action', which, ordinarily understood, embraces in its sweep all acts of the administration, especially when what is at stake is the subject's Constitutional remedy. In my view, all that is required of a petitioner under Article 126 is that he should satisfy this Court that the act of infringement complained of by him is the action of a State official or repository of State power. Any violation of fundamental rights by public authority, whether it be an isolated individual action or consequent to administrative practice, furnishes, in my view, sufficient basis for an application under Article 126."

This view expressed in 1981 was reiterated by Sharvananda, J., (as he then was) in *Mariadas* v *Attorney-General and another*[4] and in *Wijetunga* v *Insurance Corporation*[5] at 397. The interpretation thus propagated by Sharvananda, J. (as he then was) was again referred to in *Gunawardena* v *Perera*[6] at 305.

In *Perera* v *University Grants Commission*[7] at 103 Sharvananda, J. (as he then was), again referred to the phrase 'executive or administrative action' within the framework of Articles

17 and 126 of the Constitution and stated that,

> "The expression 'executive or administration action' embraces executive action of the State or its agencies or instrumentalities exercising governmental functions."

A Divisional Bench of this Court in *Peter Leo Fernando* v *Attorney-General and others*(8) at 341 referred to the interpretation given by Sharvananda, J. (as he then was) to the phrase 'executive or administrative action' in *Velmurugu* v *Attorney-General and others* (*supra*), *Perera* v *University Grants Commission (supra)* and in *Wijetunga* v *Insurance Corporation and another (supra)* and quoted with approval the principle, which had emerged through the aforementioned decisions in giving a meaning to the concept of 'executive or administrative action'. Colin-Thome',J. in his judgment, thus stated that the test to be applied in deciding, whether the action in question is executive or administrative, is to examine the nature of the function and the degree of control that has been exercised.

In *Rajaratne* v *Air Lanka Ltd.*(9) at 128 the question, which arose was as to whether the actions of Air Lanka Ltd., would come within the meaning of 'executive or administrative action'. Atukorale, J. after an exhaustive examination of Sri Lanka and Indian cases, took the view that the expression executive or administrative action in terms of Articles 17 and 126 of the Constitution should be given a broad construction and Air Lanka Ltd., was a Company formed by the government, owned by the government and controlled by the government and these functions render Air Lanka an agent or organ of the government, which is thereby amenable to the fundamental rights guaranteed in terms of Articles 17 and 126 of the Constitution.

The Divisional Bench decision in *Leo Samson* v *Air Lanka*(10) at 94 and the decision in *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Company Ltd.*(11) at 365 on the other hand had used different parameters in deciding whether government control is exercised over a respondent Company. Accordingly in *Leo Samson's* case *(supra)*, the Court had applied the 'deep and pervasive control test' whereas in *Jayakody (supra)* the Court after examining the structure of the respondent Hotels Company had

held that although it was carrying on 'commercial functions' it would still be a State agency.

Having said that, let me now turn to examine the position of the application under review.

The petitioner in his petition had stated that the 2nd respondent is in terms of the provisions of section 2 of the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No 28 of 1973 (hereinafter referred to as the Law), a Company other than a private Company within the meaning of the Companies Act, No. 17 of 1982. In such circumstances could it be possible to hold that the action of the 2nd respondent comes within the purview of 'executive or administrative' in terms of Articles 17 and 126 of the Constitution?

It is not disputed that the 2nd respondent falls within the category of a Company. The chief contention of the learned Counsel for the 2nd respondent was that, since the decision of *Leo Samson (supra)*, the necessary requirement in proof of 'executive or administrative action' would be the 'deep and pervasive' test. Learned Counsel further contended that 'neither *Leo Samson's case (supra)* nor *Jayakody's case (supra)* has whittled down the requirement of deep and pervasive state control'.

In *Leo Samson's case (supra)* one of the petitioners had alleged that the termination of his services by the Chief Executive Officer of Sri Lankan Airlines Ltd was violation of Article 12(1) of the Constitution. The other petitioner had alleged, *inter alia*, that his being posted as Manager, Kuwait is violative of Article 12(1) of the Constitution.

A preliminary objection was raised on behalf of Sri Lankan Airlines that consequent to the Shareholders Agreement signed by the Government with Air Lanka and Emirates Airlines and the amended Articles of Association of Air Lanka, the impugned acts do not constitute 'executive or administrative action'. This Court held that the 'executive or administrative action' would include executive or administrative action of the State or its agents or instrumentalities. In deciding so Ismail, J. had stated that, it was clear from the provisions of the Memorandum and Articles of Association and the Shareholders Agreement that the management

power, control and authority over the business of the Company were vested in the Investor with certain management decisions, being vested exclusively in it.

It is thus clear that the Court had based its decision on a consideration of the provisions of the amended Articles of Association and the Shareholders Agreement and accordingly had held that the Government had lost the 'deep and pervasive' control exercised earlier by it over the Company.

The decision in *Jayakody (supra)*, had considered the rationale of *Leo Samson (supra)* and answered in the negative the question as to whether the judgment in the latter would affect the decision taken in *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Co. Ltd. (supra).* The Court in *Jayakody's case (supra)* took the view that the 2nd respondent in that case is a State agency and therefore its actions are executive or administrative in character. Therefore in *Jayakody (supra)* the Court had taken the view that the test to decide whether an act comes within the purview of executive or administrative action would be to consider whether the party in question is a State agency and to consider whether the State has the effective ownership of such establishment and if so whether such an establishment would come under the category of State Agency.

Therefore it is apparent that whilst *Leo Samson (supra)* had considered the kind of control, which is necessary to come within the framework of executive or administrative action, in *Jayakody (supra)* the Court had examined the character of the establishment in order to decide whether there could be executive or administrative action carried out by such an institution. Accordingly it is apparent that the decision in *Jayakody (supra)* could be clearly distinguished from the decision in *Leo Samson's case (supra).*

Considering the circumstances and the questions that has arisen in the present application, it is apparent that they are quite similar to the questions, which had been considered in *Jayakody* v *Sri Lanka Insurance and Robinson Hotel Co. Ltd. (supra).* Moreover on such a comparison, and for the reasons aforementioned, it is also apparent that the present application could thus be distinguished from that of the decision of *Leo Samson (supra).*

The question before this Court therefore is to examine whether ANCL, is a State Agency.

Learned Counsel for the 2nd respondent strenuously contended that ANCL is not an entity controlled by the State, but that it is a Company and its decisions cannot be questioned in terms of Article 126 of the Constitution.

It is however an accepted fact that fundamental rights jurisdiction cannot and should not be frustrated on the grounds of lack of jurisdiction without ascertaining the true character of the Institution and therefore it is essential that the true legal character of the Institution in question be examined before arriving at a decision. In fact this position has been considered by Krishna Iyer,J. in *Som Prakash Rekha* v *Union of India*(12) upholding the views of Mathew, J. in his land mark decision in *Sukhdev Singh* v *Bhagatram*(13) which was adopted by Bhagwati, J. in *Ramana Dayaram Shetty* v *The International Air Port Authority of India*(14).

In *Ramana Shetty's case (supra)*, Bhagwati, J. considering the doctrine of agency propounded by Mathew, J. in *Sukhdev Singh (supra)* stated that,

> "Where a Corporation is wholly controlled by government not only in its policy making, but also in carrying out the functions entrusted to it by the law establishing it or by the Charter of its incorporation, there can be no doubt that it would be an instrumentality or agency of government ..."

Upholding the views expressed by Mathew, J. in *Sukhdev Singh (supra)* Bhagwati, J. in the judgement of a Divisional Bench in *Ajay Hasia* v *Khalid Mujib*(15) at 487 clearly stated that,

> "The Government in many of its commercial ventures and public enterprises is resorting more and more frequently to this resourceful legal contrivance of a corporation because it has many practical advantages and at the same time does not involve the slightest diminution in its ownership and control of the undertaking. In such cases, **the true owner is the State, the real operator is the State and the effective controllorate is the State and**

accountability for its actions to the community and the Parliament is of the State." (emphasis added).

In *Ajay Hasia (supra)* the society in question was registered under the Societies Registration Act for the purpose of establishing an Engineering College, which was sponsored, supervised and financially supported by the Government. The Indian Supreme Court held that such a society should be an instrumentality or an agency of the State.

It is therefore evident that careful attention should be given to several factors, which are relevant in considering whether a Company or a Corporation is an agency or an instrumentality of the Government. Having this in mind let me now turn to examine the status of the 2nd respondent.

It is not disputed that ANCL is a creature of a statute as its status was changed by the Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No. 28 of 1973 (as amended). The preamble to this Law clearly states that it is,

> "A Law to change the status of the company carrying on business under the name of the Associated Newspapers of Ceylon Limited, to provide for the redistribution of the shares of such company, and for the reconstitution of the body responsible for the management and administration of the business and affairs of such company...."

Provision has been made in this Law that not less than 75% of the total number of all the shares of the Company to be vested in the Public Trustee on behalf of the Government (section 2(b) of the Law). Moreover, unlike the other Companies, in terms of section 17 of the Law, the Minister is empowered to make regulations for the purpose of giving full force and effect to the principles and provisions of this Law. Section 11 of the Law provides the Minister to revoke or amend the Memorandum and Articles of Association of the Company by regulation published in the Gazette.

It is pertinent to note the provisions made in terms of section 16(1) of the Law read with sections 9 to 12 of the Public Corporations (Financial Control) Act, where the accounts and property of ANCL are to be audited by the Auditor-General.

Considering the aforementioned factors, it is thus clear that ANCL is *prima facie* a statutory body with government control.

Learned Counsel for the petitioner in fact submitted that as averred in paragraph 3(b) of the affidavit of the petition, ANCL is an institution, which functions under the direct purview of the Ministry of Information and Media. The petitioner had thus averred that,

> "..... Moreover, by Order of Her Excellency the President, published in the Government Gazette (Extraordinary) of 28.04.2004, the ANCL has been listed as an institution under the purview of Ministry of Information and Media."

On a consideration of all the aforementioned facts and circumstances, it is evident that ANCL is an instrumentality or an agency of the State, subject to direct control by the government. In such circumstances, there is no possibility of construing that the acts of ANCL cannot come under the jurisdiction of fundamental rights, guaranteed in terms of Article 126 of the Constitution. Accordingly could it be said that the impugned acts by ANCL do not constitute executive or administrative action and therefore the petitioner cannot invoke the fundamental rights jurisdiction of this Court? The answer to this question is clearly in the negative as it is clearly evident from the reasons aforesaid that ANCL is an authority, which falls within the parameters of an instrumentality or agency of the State.

B. Non-compliance with Rule 44(1)c of the Supreme Court Rules of 1990.

Learned Counsel for the 2nd respondent strenuously contended that the petitioner had not complied with Rule 44(1)c in reference to two matters alleged in paragraph 3(b) of his petition. Paragraph 3(b) of the petition as referred to earlier, deals with the legal status of ANCL, where the petitioner had stated that,

> "In terms of the provisions of section 2 of the Associated Newspapers of Ceylon Ltd. (Special Provisions) Act, No. 28 of 1993 (hereinafter ANCL Act), the 2nd respondent Associated Newspapers of Ceylon Limited (hereinafter ANCL) is a Company other than a private Company within the meaning of the Companies Act, No. 17 of 1982. Further

in terms of section 2(b) of the ANCL Act not less than seventy-five *per centum* of all the shares of the Company shall vest in the Public Trustee on behalf of the Government. Moreover, by Order of Her Excellency the President, published in the Government Gazette Extraordinary of 28.04.2004, the ANCL has been listed as an institution under the purview of Ministry of Information and Media."

Learned Counsel for the 2nd respondent submitted that the petitioner cannot rely on the Law by itself and submit that 75% of the shares of ANCL are held by the Public Trustee as at the date the petitioner had filed his petition.

Learned Counsel for the 2nd respondent further contended that if the petitioner had wanted to rely on share holding position, he should have filed a copy of the Annual Return of ANCL. He also submitted that if the petitioner has not annexed to the petition any such document to indicate that at least 75% of the total shares of ANCL, being vested in the Public Trustee, as at the time of the petition, that would amount to non-compliance with Rule 44(1)(c) of the Supreme Court Rules of 1990.

Rule 44 of the Supreme Court Rules of 1990 is contained in Part IV, which deals with the applications under Article 126. Rule 44(1)(c) of the aforesaid Rules is in the following terms:

> "tender in support **such petition, such affidavits and documents as are available to him**;" (emphasis added).

It is thus apparent that in terms of Rule 44(1)(c), what is necessary is to tender to Court only the documents and affidavits, which are available to the petitioner. In such circumstances could it be possible for this Court to consider that in terms of Rule 44(1)(c), the petitioner is under an obligation to tender all the relevant documents?

Rule 44(1)(c) clearly specifies that the petitioner has to tender to Court in support of his application, the petition, affidavit and other documents **as are available** to him. Thus Rule 44(1)(c) is emphatic on the point of the types of documents that should be tendered to Court. What it states is that, the petitioner should tender only the documents, which are available to him. In other words, there is **no**

compulsion in terms of Rule 44(1)(c) to make an effort to tender documents, which are not in the possession of the petitioner. What is necessary in terms of Rule 44(1)(c) is to tender all relevant documents to support the petitioner's application, that are available to him at the time of filing the application. The petitioner should plead for any other relevant documents and should file them as and when they are available to the petitioner with the permission of the Court.

The basis of this position could be clearly understood by examining the nature of the fundamental rights jurisprudence *vis a vis,* the civil and criminal litigation process.

Article 126 of the Constitution clearly states that the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV of the Constitution. Article 4(d) emphasizes on the exercise of sovereignty through the fundamental rights jurisdiction and states as follows:

> "the fundamental rights, which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided; ...."

It is therefore to be noted that in terms of Article 126 read with Article 4(d) of the Constitution, it is apparent that the fundamental rights guaranteed by the Constitution cannot be 'abridged, restricted or denied' and it is evident that it would be the duty of this Court to ensure that such rights are not abridged, restricted or denied to the People.

These rights, which are fundamental in nature, are inalienable as Article 3 of the Constitution clearly states that,

> "In the Republic of Sri Lanka sovereignty is in the People and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise,"

Fundamental rights are conferred on the People, which are inalienable. Therefore such rights are to be enjoyed by them. The sole purpose of incorporating a Chapter on Fundamental Rights in the Constitution was to protect and promote such rights and this was done on behalf of the People. These rights have established a firm foundation for a democratic society, which is rid of all inequalities, which should lead to a new social order and thus the fundamental rights are chiefly for the betterment of the individual and would eventually lead to the formation of a just society. Unlike an ordinary legal right, which is protected and enforced by the ordinary law, the fundamental rights are guaranteed and protected by the Constitution and they are available only against executive or administrative action. Referring to such fundamental rights, Patanjali Sastri, J.; (as he then was) in *Romesh Thapper v State of Madras*(16) at 124 commented that,

> "This Court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights."

A decade later, in 1963, Gajendragadkar, J.; *Prem Chand Garg* v *Excise Commissioner, U.P.*(17) emphasized the important position held by the fundamental rights jurisdiction in a democratic system in the following words:

> "The fundamental right to move this Court can, therefore, be appropriately described as the cornerstone of the democratic edifice raised by the Constitution."

In such circumstances it is quite clear that it is not possible to restrict the applicability of fundamental rights through mere technicalities.

Having said that let me now turn to examine the contention of the learned Counsel for the 2nd respondent in his preliminary objection on the ground of non-compliance with Rule 44(1)(c) of the Supreme Court Rules of 1990.

The main submission of the learned Counsel for the 2nd respondent is that,

(a) the petitioner had not filed Form 63 of the Companies Act; and

(b) the petitioner had not filed the Gazette Notification to support the submissions referred to in paragraph 3(b) of the petition.

It is not disputed that the petitioner in his petition dated 28.09.2005 referred to the legal status of the 2nd respondent in paragraph 3(b) of the petition, which paragraph was re-produced earlier. That paragraph clearly stated the number of shares that was vested with the Public Trustee and referred to the Gazette Extraordinary of 28.04.2004, where ANCL was listed as an institution under the purview of the Minister of Information and Media.

The Company Secretary of ANCL in her affidavit dated 04.01.2006, denied the averments in paragraph 3(b) and had averred that,

> "I deny the averments in paragraph 3(b) of the said petition except that the provisions of the Associated Newspapers of Ceylon Limited (Special Provisions) Act, No. 28 of 1973 are applicable to the 2nd respondent."

Paragraph 3(b) of the petition, as referred to earlier, speaks of the Law and its provisions, which states that not less than seventy-five *per centum* of its shares being vested in the Public Trustee.

It is thus evident that ANCL had not denied this position and therefore it is apparent that the reference to the Law had been sufficient to justify the proposition propounded by the petitioner.

Considering the fundamental rights jurisdiction exercised by this Court in terms of Rule 44(1)(c) of the Supreme Court Rules of 1990, it has been the practice of this Court to have a liberal approach in entertaining documents. There have been many instances, where parties have moved Court to call for necessary documents. Needless to say that, documents are necessary and vital for the purpose of ascertaining whether there has been a violation of any fundamental rights as the said jurisdiction is exercised and facts are ascertained through affidavits and

documents. It has also to be borne in mind that in terms of Article 126(2) of the Constitution that in order to exercise the fundamental rights jurisdiction, an aggrieved person should apply to this Court by way of petition **within one month** of the alleged infringement. Thus in order to advance the fundamental rights jurisdiction and also to ensure that such jurisdiction is not 'abridged, restricted or denied' to the People, it would be necessary to give a liberal and a purposive construction to Rule 44(1)(c) of the Supreme Court Rules of 1990.

Considering all the aforementioned factors, it is evident that in terms of Rule 44(1)(c), once a petitioner **has pleaded a document** in his petition he would be entitled to submit it '**as is available to him**' and with the permission of Court or move Court to call for such document.

It is also important to note that, it was the responsibility of the 2nd respondent to have disclosed relevant and material facts if they were to deny the averments of the petitioner. If the respondents were to deny the position taken by the petitioner, the onus was on the respondents to produce such material facts and disclose that to this Court. It is however not disputed that the respondents have not produced any material either to deny the contention of the petitioner or to substantiate their position. In such circumstances it would not be correct for the learned Counsel for the 2nd respondent to state that the petitioner had not complied with Rule 44(1)c as he has not filed Form 63 of the Companies Act.

Learned Counsel for the 2nd respondent also contended that the petitioner should have filed the Gazette Extraordinary of 28.04.2004 along with the petition.

As referred to earlier, the question of the aforesaid Gazette notification not being filed by the petitioner came up at the stage of hearing, when preliminary objections were raised by the learned Counsel for the 2nd respondent. Learned Counsel for the petitioner submitted that, at the time of filing the petition, a copy of the said Gazette was not available and stated that a copy would be submitted along with his written submissions. In fact the learned Counsel for the petitioner had filed a copy of the said Gazette, marked X, along with his written submissions.

In these circumstances, the objection by the learned Counsel for the 2nd respondent on the ground of non-compliance of Rule 44(1)(c) of the Supreme Court Rules of 1990 cannot be sustained.

It would be worthy to note before I part with this judgment the submission of the learned Counsel for the petitioner where he stated that, there were several cases filed against ANCL and that this Court had considered those on their merits and none had held that the actions of ANCL are not executive or administrative action in terms of Article 126 of the Constitution. He cited the recent decision by this Court in *B.V.M. Fernando and others* v *Associated Newspapers of Ceylon Limited*[18], where the Court had considered ANCL as an agent of the State.

On a consideration of all the material placed before this Court I hold that the 2nd respondent, namely the Associated Newspapers of Ceylon Ltd., is a State agency and that its actions were therefore executive or administrative in character and that the petitioner had complied with Rule 44(1)(c) of the Supreme Court Rules of 1990.

I according overrule the preliminary objection, with costs in a sum of Rs.10,000/- payable by ANCL (2nd respondent) to the petitioner. This amount to be paid within one month from today.

Since this matter cannot be concluded before this Bench, this will be listed before any Bench for hearing on the merits, on a date next term to be fixed by the Registrar of the Supreme Court.

UDALAGAMA, J. - I agree.

SOMAWANSA, J. - I agree.

Preliminary objection overruled.
Matter set down for Argument.

DISSANAYAKE
v
PRIYAL DE SILVA

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

Constitution – Article 12 (1) – Right to equality – Equal protection of the law and not equal violation of the law – Time frame – Mandatory? – Excellence in sports – Can sports and umpiring be treated as one and the same?.

The petitioner, a Sub-Inspector attached to the Railway Protection Force of the Sri Lanka Railway Department alleged that his fundamental rights guaranteed in terms of Article 12(1) had been violated. He claimed that, he was not given marks for excellence in sports – as he has officiated international and national cricket tournaments. He further alleged that another candidate was given marks for sports, although such was not at the national level.

Held:

(1) The right to equality means that among equals, the law should be equal and should be equally administered and thereby the like should be treated alike. Provisions in Article 12 (1) would only provide for the equal protection of the law and shall not provide for the equal violation of the law.

It cannot be understood as requiring officers to act illegally because they have acted illegally previously.

(2) It is abundantly clear that 'sports and umpiring' cannot be treated as one and the same and if a decision had been taken to allocate marks for 'excellence in sports that cannot be used to adduce marks for umpiring'.

(3) Time frame within which an application has to be made to the Supreme Court, specified in Article 126(2) is mandatory.

APPLICATION under Article 126 of the Constitution.

Cases referred to:

1. *Satish Chander* v *Union of India* AIR 1953 SC 250.
2. *Ram Prasad* v *State of Bihar* AIR 1953 SC 219.
3. *C.W. Mackie and Company Ltd.* v *Hugh Molagoda, Commissioner General of Inland Revenue and Others* 1986 1 Sri LR 300.
4. *Gamaethige* v *Siriwardane* 1988 1 Sri LR 384.
5. *Jayasekera* v *Wipulasena and others* 1988 2 Sri LR 237.
6. *R.P. Jayasuriya* v *R.C.A. Vandergert, Secretary, Ministry of Foreign Affairs and Others* SC FR 620/97 SCM 30.10.1998.
7. *Jayawardane* v *Attorney-General* FRD Vol. 1 175.
8. *Gunawardane and others* v *E.L. Senanayake and others,* FRD Vol. 1.175.
9. *Thadchanamoorthy* v *Attorney-General* 1979 79 801 Sri LR 154 (SC)
10. *Mahenthiran* v *Attorney-General* FRG, Vol. 1 175.
11. *Namasivayan* v *Gunawardane* 1989 1 Sri LR 394.
12. *Gomez* v *University of Colombo* 2001 1 Sri LR 273.
13. *Karunadasa* v *People's Bank* SC 147/2007 SCM 20.6.2007.

Uditha Egalahewa with *Gihan Galabodage* for petitioner.
Harsha Fernando SSC for respondents.
Bimba Jayasinghe Tillekeratne DSG for respondents.

Cur.adv.vult.

July 25, 2007

DR. SHIRANI BANDARANAYAKE, J.

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

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

The petitioner joined the Sri Lanka Railway Department as a Sub-Inspector of the Railway Protection Force on 02.05.1988 (P1). According to the relevant scheme of promotions, the petitioner's next promotion was to the post of Inspector and the sub-Inspectors were eligible to make their applications for the said promotion on completion of seven (7) years of service in that post. Accordingly, the petitioner became eligible for promotion to the post of Inspector on 02.05.1995. Since the petitioner's initial appointment to the post

of sub-Inspector in 1988, no applications were called for subsequent promotions until 2002 (P2).

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

In terms of the notice calling for applications for promotions to the post of Inspector, a competitive examination was held on 19.07.2003. By letter dated 19.11.2003, the General Manager (Operations) had informed the petitioner that he had successfully completed the competitive examination and that the interview will be held on 25.11.2003. The said interview was postponed on several occasions and later was held on 23.09.2004. The results of the examination or the interview were not published until 11.07.2005 (P8).

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

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

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

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

(b) that there were seven (7) vacancies in the post of Inspector as at the date of calling for applications and as such, the

petitioner should have been appointed to the said post of Inspector.

The petitioner along with two others, who obtained the 5th and 7th positions in order of merit at the interview, had appealed to the 2nd respondent through the 3rd respondent. They had referred to the three (3) additional vacancies that were available as at the date of calling for applications for the post of Inspector and had requested that they be appointed to fill the aforesaid vacancies (P14 and P 15).

By letters dated 20.06.2005 and 27.06.2005 the 3rd respondent had referred the aforementioned appeals to the 2nd respondent and had recommended that this matter be looked into (P16 and P17). Thereafter, the 2nd respondent, by his letter dated 27.06.2005 had requested the 3rd respondent to submit details of sub-Inspectors, who had served the Sri Lanka Railway Force as at 27.01.2005. The 3rd respondent had furnished the relevant information by letter dated 05.07.2005 {P18 and (19)}.

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

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

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

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

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

(A) Marks for excellence in sports

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

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

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

A careful perusal of the petitioner's bio-data and the certificate submitted by him clearly reveals that most of his achievements are in the field of umpiring. As stated earlier, the criteria stipulated in the

allocation of marks at the interview, specifically stated that upto a maximum of 10 marks could be given for 'excellence in sports'. Based on this criterion, the respondents had decided to allocate marks for participating, in national level sports activities by the officer concerned during his tenure of office. For this purpose, admittedly, it is necessary for the officer in question to produce certificates indicating his achievements in sports. Umpiring was not considered by the respondents, quite correctly in my view, as a category for which marks could be given, as that was not considered being 'an engagement in national level sports'.

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

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

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

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

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

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

Learned Counsel for the petitioner also contended that, the respondents had not allocated marks for excellence in sports, although the petitioner had taken part in several cricket

tournaments. As pointed out earlier, the certificates submitted by the petitioner were from the Sri Lanka Railway Association, which cannot be accepted as achievements in sports at the national level.

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

Accordingly, would it be possible for this Court to come to a conclusion that, because the other candidate was given marks for sports, although such was not at the national level, that the petitioner also should be given marks for excellence in sports on the basis of an infringement of fundamental rights guaranteed in terms of Article 12(1) of the Constitution?

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

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

The right to equality in simple terms, means that among equals, the law should be equally administered and thereby the like should be treated alike *Satish Chander* v *Union of India*[1], *Ram Prasad* v *State of Bihar*[2], (Sir Ivor Jennings, Law of the Constitution, 3rd Edition 49). The purpose of the concept of the right to equality is to secure every person against intentional and arbitrary discrimination. However, it is abundantly clear that the provisions in terms of Article 12(1) of the Constitution would provide only for the equal protection of the law and shall not provide for the equal

violation of the law. It cannot be understood as requiring officers to act illegally because they have acted illegally previously. This position was considered by Sharvananda, C.J., in *C.W. Mackie and Company Ltd.* v *Hugh Molagoda, Commissioner General of Inland Revenue and others*(3), where it was clearly stated that,

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

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

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

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

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

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

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

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

(B) The number of vacancies in the post of Inspector

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

It is not disputed that the notice calling for applications for the promotions to the Post of Inspector by document dated 07.01.2002, had specifically mentioned that there are only four (4) vacancies to be filled. The said notice had further stated that these four (4) vacancies should be filled on the basis of the highest marks obtained at the written competitive examination, the marks awarded for seniority and at the interview. It was also clearly stated that a waiting list would not be maintained in regard to the said promotions for the post of Inspector.

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

Learned Counsel for the petitioner in his written submissions had clearly stated that by letter dated 14.06.2005 the petitioner had

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

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

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

It is to be noted that, the applications for the promotion to the post of Inspector were called by notice dated 07.01.2002 (P3), which as stated earlier, has specifically referred to the number of vacancies as four (4). The applications were therefore called for to fill the said number of vacancies without maintaining a waiting list. In such circumstances it is apparent that if the said number of vacancies had been clearly stated in the notice (P3), the petitioner should have taken up that issue at the time the notice in question was published.

It is now well settled law that the time frame within which an application has to be made to the Supreme Court, specified in Article 126(2) of the Constitution, is mandatory. A long line of cases had considered this matter *Jayawardane* v *Attorney-General and others*[7], *Gunawardane and others* v *E.L. Senanayake and others*[8], *Thadchanamoorthi* v *Attorney-General*[9] and *Mahenthiran* v *Attorney-General*[10] *(supra* 129), *Gamaethige* v *Siriwardane (supra* 385), *Namasivayam* v *Gunawardane*[11], *Gomez* v *University of Colombo*[12] *Karunadasa* v *The People's Bank* [13] .

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

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

FERNANDO, J. – I agree.

SOMAWANSA, J. – I agree.

Application dismissed.

THE ATTORNEY-GENERAL
v
POTTA NAUFER AND OTHERS
(AMBEPITIYA MURDER CASE)

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
UDALAGAMA, J.
DISSANAYAKE, J.
AMARATUNGA, J. AND
SOMAWANSA, J.
S.C. APPEAL (TAB) 01/2006
9TH OCTOBER, 2006

Murder – Sections 294, 295 – Application of common intention, section 32, Penal Code - Offence of conspiracy, section 113(a), Evidence Ordinance – Section 10, section 120, section 27, section 134 – Utilization of D.N.A. evidence.

The 1st accused was charged on counts of conspiracy to murder High Court Judge, Mr. Ambepitiya, abetment of murder of Mr. Ambepitiya, and abetment of murder of Police Inspector Upali Ranasinghe. The 2nd, 3rd, 4th and 5th accused were charged on counts of conspiracy to murder Mr. Ambepitiya, murder of Mr. Ambepitiya, and murder of Inspector Upali Ranasinghe.

After trial the accused were convicted and sentenced in respect of the charges made against them.

Held:

(1) In a case of conspiracy there is no legal requirement regarding a mode of concurrence in the common purpose or the manner in which such concurrence may be established by the prosecution. To establish conspiracy it is possible that there could be one person around whom the rest resolve.

Per Shirani Thilakawardane, J.

"....Although an agreement is at all times the essence of conspiracy it does not necessarily contemplate a physical meeting of the conspirators or prior contract and correspondence between or among the accused as being an essential or necessary ingredient to prove a charge of conspiracy ...."

(2) There must be proof against each conspirator that he had knowledge of the common plot and design although it is not necessary that each should be equally knowledgeable in this regard.

(3) Section 10 of the Evidence Ordinance embodies the principle that when various persons conspire to commit an offence the acts done by one in reference to the common intention are considered to be the acts of all.

(4) In a case of murder against all the accused, where the accused are sought to be made liable on the basis of section 32, of the Penal Code, the common intention must necessarily be a murderous common intention. While each of the accused may have a similar intention with a common object in view, it does not attract the application of section 32 of the Penal Code.

(5) The principle underlying section 27 of the Evidence Ordinance is that the danger of admitting false confession is taken care of as the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.

(6) In terms of section 134 of the Evidence Ordinance, the criminal charges against an accused can be proved by one witness alone, if the evidence is cogent, convincing, accurate and credible and if on that evidence the ingredients of the charge could be proved beyond a reasonable doubt.

(7) The motive which induces a man to do a particular act, is known to him and to him alone. Therefore the prosecution is not bound to prove a motive for the offence to prove a charge. However, the presence of a motive is extremely relevant in establishing the *actus reus* or *mens rea* or both in most criminal cases. Nevertheless, criminal intention sustains responsibility and the law does not go behind proved intention to investigate motive.

(8) When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offence.

Per Shiranee Thilakawardane, J:

".....When faced with contradictions in a testimonial of a witness the Court must bear in mind the nature and significance of the contradictions .... The Court must come to a determination regarding whether this contradiction was an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead Court..."

(9) The Courts in Sri Lanka have applied the principle commonly known as "*Ellenborough dictum*" in *Rex* v. *Lord Cochrane* (1814) Gurney's Report 479 hand in hand with the principle set out in Woolmington V.DPP (1935 AC 462).

Per Shiranee Thilakawardane, J:

".....While the judgment in *Cochrane's* case provides the basis for the development of the law in this area, the principle attached has undeniably evolved far beyond its roots in the statement of Lord Ellenborough. This Court is not prepared to halt the development of the law through a deliberate and regressive step in the opposite direction to the march of the Law in this field ...."

Per Gamini Amaratunga, J:

".....I reject the learned President's Counsel's submission that there is no dictum called the dictum of Lord Ellenborough; that the words attributed to Lord Ellenborough is a fabrication by Wills; and that the views expressed by Lord Ellenborough is not a part of the Law of Sri Lanka ...."

Cases referred to:

(1) *Cooray* (1950) 51 NLR 433.
(2) *Kanagaratnam* (1952) 47 CLW 42.
(3) *Meyrick* 21 Cr. AR 94.
(4) *Sundaram* (1943) 25 CLW 38.
(5) *Queen* v *Liyanage* (1965) 67 NLR 193.
(6) *Don Sunny* v *Attorney-General* (1998) 2 Sri LR.
(7) *Pieris* v *Silva* (1913) 17 NLR 139.
(8) *King* v *Attanayake* (1931) 34 NLR 19.
(9) *Barendra Kumar Ghose* AIR (1952) PC 1.
(10) *Mudalihamy* (1957) 59 NLR 299.
(11) *Ranasinghe* (1946) 47 NLR 373.

(12) *Wilson Silva* v *The Queen* (1969) 76 NLR 414.
(13) *In re. Asappu* (1948) 50 NLR 324.
(14) *Mahabub Shah* AIR (1945) PC 118
(15) *Ekmon* (1962) 67 NLR 49.
(16) *Appuhamy* (1960) 62 NLR 484.
(17) *Punchi Banda* v *The Queen* (1969) 74 NLR 494.
(18) *Wasalamuni Richard* v *The State* (1973) 76 NLR 534.
(19) *Weerasinghe* v *Kathirgamathamby* (1957) 60 NLR 87.
(20) *Vincent Fernando* v *Clock* (1963) 65 NLR 265.
(21) *Edwin* v *Check* (1943) 44 NLR 297.
(22) *Queen* v *Albert* (1960) 66 NLR 543.
(23) *Queen* v *Jinadasa* (1960) 59 CLW 97.
(24) *R* v *Krishnapillai* (1968) 74 NLR 438.
(25) *Gangaram* v *Emperor* 62 IC 545.
(26) *Hazarat Gulkhan* v *Emperor* AIR (1928) Cal. 430.
(27) *Emperor* v *Balram Das* 49 Cal 358.
(28) *Shree Kanthiah Ramyya* v *State of Bombay* AIR (1955) SC 287.
(29) *Queen* v *Buddharakkita* 63 NLR 451.
(30) *R.* v *Palmer*
(31) *Bharwada Bhogibhai Hirjabhai* v *State of Gujrat* (1983) Cri. L.J. 1096.
(32) *R* v *Lord Cochrane* (1814) Gurney's Report 479.
(33) *Prematillake* v The *Republic of Sri Lanka* (1972) 75 NLR 506.
(34) *Woolmington* v *DPP* (1935) AC 462.
(35) *Mawaz Khan* v *R.* (1967) AER 80 PC.
(36) *King* v *Gunaratne* (1946) 47 NLR 145.
(37) *Illangathilleka* v *Republic of Sri Lanka* (1984) 2 SLR 38.
(38) *Seetin* v *The Queen* (1965) 68 NLR 316.
(39) *Commonwealth* v *Webster* 5 Cush, 316, quoted in Amir Ali's Law of Evidence, 59 Mass - 5 Cush 295, Mcguire - Evidence -Cases and Materials.
(40) *Inspector Aroundstz* v *Pieris* 10 CLW 122.
(41) *The King* v *Wickremasinghe* 42 NLR 316.
(42) *The King* v *Pieris Appuhamy* 43 NLR 412.
(43) *The King* v *Seeder Silva* 41 NLR 344.
(44) *The Queen* v *Sumanasena* 66 NLR 350.
(45) *R* v *Burdett* (1820) 4 Barnwell and Anderson 95 at 120.
(46) *McQueen* v *Great Western Rail Company,* 1875 LR 10 QB 569.
(47) *Somaratne Rajapakse and others* v *The Attorney-General* SC Appeal 2/2002 (TAB) c. minutes of 3.2.2004.
(48) *Queen* v *Santin Singho* (1962) 65 NLR 445.
(49) *Richard* v *The State.*

APPEAL from the judgment of the High Court of the Western Province.

R. Arsakularatne, PC with *W. Batagoda, J. Koralage* and *R. de Silva* for the 1st accused-appellant.

Dr. Ranjith Fernando with *Ms. S. Munasinghe* for the 2nd to 5 accused-appellant.

C.R. de Silva P.C.,S.G. with *Sarath Jayamanne* DSG and *Ms. H. Jayasundara*, SSC for the Attorney-General.

Cur.adv.vult.

December 8, 2006

SHIRANEE THILAKAWARDANE, J.

This appeal has been preferred against the judgment of the Trial at Bar dated 04.07.2005, in High Court Colombo case No. 2365/2005.

The 1st accused was charged on counts of conspiracy to murder High Court Judge, Mr. Ambepitiya, abetment of murder of Mr. Ambepitiya, and abetment of murder of IP Upali Ranasinghe. The 2nd, 3rd, 4th, and 5th accused were charged on counts of conspiracy to murder Mr. Ambepitiya, murder of Mr. Ambepitiya, and murder of IP Upali Ranasinghe. The accused were found to be guilty of all counts preferred against them and accordingly convicted and sentenced.

At the appeal the counsel for the appellants relied on several grounds of appeal, including the failure of the prosecution to establish the charge of conspiracy beyond reasonable doubt, the wrongful application of sections 10 and 27 of the Evidence Ordinance, the improper application of section 32 of the Penal Code and the application of the non-existent *Ellenborough dictum* to the accused. It was also submitted that the trial at bar erred in attaching a probative value to the identification parade evidence, in its appreciation of the opinion of the fingerprint expert and in its failure to attach significance of the infirmities related to the recovery of Nokia phone number 0722716108 (hereinafter referred to as 108) from the 2nd accused. It was further submitted on behalf of the 1st accused that the trial at bar erred with respect to the question of motive, and misdirected itself in the appreciation of evidence given by Tilak Sri Jayalath.

It is pertinent at this stage to examine the evidence against the accused with respect to the several charges against them.

The 1st witness for the prosecution case, Susantha Pali, was the driver of van No. 253-0882 who was employed as a van driver for the Leads Cab Service. At about 12.30 p.m. on 19.11.2004, the witness was instructed by his office to pickup some passengers from a place proximate to the Elphinston Theatre. The witness arrived at the Elphinston Theatre at 12.40 p.m. and was flagged down in front of the theatre by a man who identified himself as the person who had hired the van. About 10 minutes later he, together with three other persons got into the van. One person was seated in front alongside the driver and the other three were seated in the passenger seats in the rear of the vehicle. Having thereby had the opportunity to clearly see the passengers, the witness subsequently identified the 2nd, 3rd, 4th and 5th accused as the persons who traveled in his van on 19.11.2004, at an identification parade conducted on 29.11.2004. He specifically identified the 3rd accused as the person who first stopped the van, and the 5th accused as the person who sat in front alongside the driver's seat and was even able to describe the fact that he wore a gold chain around his neck. This witness also made a dock identification of the four accused at the trial.

The accused informed the witness that they were traveling to Moratuwa, and detailed the route to be followed in proceeding to their specified destination. The first stop was at the John de Silva Theatre at around 1.00 p.m. where the accused alighted from the van. The witness observed that the 3rd accused was engaged in a conversation over a mobile phone. The accused informed the witness that a person they referred to as 'Sir', whom they alleged was a director of video tele-dramas, was late, and that they were traveling to Moratuwa to meet this person. At around 1.15 p.m. the accused got back into the van and the witness was directed to drive them to a restaurant, later identified by the witness as the 'Steam Boat' restaurant situated on Kynsey Road, approximately 100-200 metres from the Borella cemetery roundabout.

The witness entered the restaurant together with the accused, and was seated in a room to the left of the entrance. According to this witness, the accused requested that they be served food that

could be prepared in a hurry and also consumed half a bottle of Arrack together with their food. The witness as the driver of the vehicle had understandably refrained from drinking any alcohol at the restaurant.

It is relevant that the police recovered this empty bottle of Arrack on the same day, after the incident, from the 'Steam Boat' restaurant and the fingerprints of the 2nd and 3rd accused were identified on the bottle. It is important to note that this recovery of the fingerprints took place after the incident had taken place and before any of the accused had been taken into custody.

The witness stated that once the bill was settled by one of the accused, they got back into the van and the journey was resumed. However, on the way, this witness was asked to halt at a bar near the Castle Hospital on Castle Street, where they bought another 1/2 bottle of arrack. On the direction of the 5th accused who was seated in front, the witness parked around 50 metres past the Otters Sports Club on Sarana Road, where the accused thereupon, consumed this alcohol. The witness observed the 3rd accused vomiting near the wall where the van was parked. He also observed that the accused were in constant communication over a mobile phone during this time.

About 15 to 20 minutes later, the accused suddenly got back into the van and ordered the witness to drive ahead and turn down a road to the left. Driving down this road, the witness observed a car parked in a garage nearby and a person standing next to the car in a white shirt and black trousers. Soon after, the witness was ordered to stop the van and all the accused simultaneously jumped out of the vehicle. According to this witness, the sounds of gunshots were heard moments later. Immediately following the shots, the 2nd to the 5th accused returned to the van hurriedly and the witness stated that the 5th accused thereupon ordered the witness to get out of his vehicle. Fearing for his life, the witness complied promptly, abandoned the van and sought refuge in a building site nearby. He used a phone available at the site, to inform his office of what had transpired. It is noteworthy that the shooting took place approximately at 3.15 p.m. on the same date.

The witness stated that he walked back to the scene of the shooting around 5 to 10 minutes later and observed that his van

was missing. He again contacted his office and requested that they inform the police about the loss of his van and the shooting. The van was later found by police, abandoned near the Elvitigala Flats along the Baseline Road. Police investigations conducted on this abandoned vehicle revealed several fingerprints. It is significant that the fingerprints of the 3rd and 5th accused were later identified on the vehicle, as it confirms that the accused definitely traveled in the vehicle as testified by this witness.

Later, on the same day, the witness retraced his journey with the 2nd to 5 accused for the benefit of IP Vedasinghe, the Investigation Officer in charge, and pointed out to him the place where the van was parked and the 3rd accused had vomited as well as the Steam Boat Restaurant where they had consumed the half bottle of Arrack and their meal. IP Vedasinghe contemporaneously collected a sample of vomit from the place pointed out by the witness, and the empty bottle of Arrack, containing the aforesaid fingerprints was recovered from the Steam Boat Restaurant.

It is of extreme relevance to the integrity of the investigation and the authenticity of the evidence collected that at the point of recovery of both the empty bottle and the identification of prints from it, as well as collection of the sample of vomit, and the recovery of the prints on the van that no arrests had been made or the accused identified in relation to the murder. Therefore the timing of the recoveries effectively rules out the possibility of any subsequent introduction, tampering or tainting of this forensic evidence, in order to deliberately and falsely implicate the accused.

The trustworthiness of the witness's statement has not been assailed under cross-examination. In his responses during cross-examination the witness stated that he had participated in the identification parade and that he was not introduced either to the accused or shown pictures of the accused prior to his participation in the said parade. Also the witness explained that he was able to remember the accused clearly due to the special and unusual circumstances surrounding their hire, during the time leading up to and after the shooting. The frequent stops made by them on their journey would reasonably have provided the witness with ample time to closely observe the accused, enabling such a positive identification.

It is also important to note that the witness had no knowledge or relationship with the accused prior to 12.40 p.m. on 19.11.2004, and that his relationship with the accused up to the time when he was ordered off the vehicle was cordial. No suggestions, alternatives or reasons were even suggested or adduced under cross-examination that gave any reason whatsoever for the witness to have falsely implicated any of the accused. Therefore this witness is an entirely disinterested witness whose credibility and testimonial trustworthiness was not only untouched by the extensive cross-examination, but rather enhanced by the lack of any motive on his part to falsely implicate any of the accused.

The testimony of Susantha Pali was corroborated on material aspects by that of Harshani Perera, an employee of the Leeds Cab Service, who stated that the van driven by Susantha Pali was connected to the base phone number 071-2349273. The informant, who identified himself as Nalaka, asked her not to call for the indicating number and informed her that four people would be traveling in the van and that they had to carry a small box with them. She then informed Susantha Pali of the hire, and asked him to pickup the passengers from outside the Elphinston Theatre. After the incident, a call was received by fellow employee Surangi Arunila by which communication Susantha Pali informed the office that the persons travelling in van No. 253-0882 had committed a murder.

The next witness called by the prosecution was Achala Wijerama, a waiter at the Steam Boat Restaurant. He stated that as part of his daily routine he had removed all empty bottles from the previous day and cleared the crates for the business of the new day. He observed the arrival of a group of five men aged around 30 years, between 1.15 p.m. to 1.30 p.m. who seated themselves in a room to the left of the entrance. He identified three of them subsequently as the 2nd, 3rd and 5th accused.

This witness stated that the accused ordered half a bottle of arrack, soda, coke and lunch. The bar order form (BOT) and the kitchen order form (KOT) relevant to the orders placed by his group were produced in evidence. The witness observed that with the exception of one person, all others in the group, consumed liquor. Importantly, the witness also observed a black bag placed on the lap of one of the accused.

This witness stated that after he cleared the table he placed the empty arrack bottle in a crate, and that he had handed over the same bottle to the police later, on the same day. The witness had confirmed that there were no other customers between 11.00 a.m. and 2.00 p.m. at the Steam Boat restaurant who ordered alcohol on 19.11.2004 and therefore the empty bottle handled by the accused was the only one in the crate. This eliminates even the possibility of confusion or any contamination of the evidence. The witness also identified Susantha Pali who accompanied the police to the Steam Boat Restaurant at around 7.00 p.m. on the same day, as the person who had sat with the accused and refrained from consuming any alcohol. This witness thereby corroborated even such minute details of the evidence as given by witness Susantha Pali.

The defence has failed under cross-examination of this witness or by any other evidence to assail the credibility of the witness Achala Wijerama. He positively identified the 2nd, 3rd, and 5th accused. The witness has categorically denied any tutoring by the police prior to his participation in the identification parade. It stands to reason that had the witness been tutored he would have also identified the 4th accused at the identification. While the failure of the witness to identify the 4th accused does not preclude the latter's presence and involvement, it does however, contribute to the genuineness and credibility of the witness's testimonial creditworthiness.

There is no evidence or facts placed before court to rebut the presumption of regularity and legitimacy, attached to the conduct of the identification parade by the police officers in charge. Importantly the witness's statements have been corroborated by fingerprint evidence, 'real' evidence. Furthermore there is patent consistency in the statements and evidence given by both, this waiter Achala Wijerama and Susantha Pali, where all material details as to the events that had occurred have been corroborated.

The evidence of Inspector Vedasinghe is that he obtained and studied the Mobile Transmission Report from Celltel Lanka Pvt. Ltd. and identified a pattern of incoming and outgoing calls at or about the time of incident on phone number 108. His investigations revealed that a person by the name of Dilip Kumara living in

Gunasinghepura owned the mobile number 108. Upon questioning the said Dilip Kumara, it was found that the mobile was given to a person named Lasantha. Further investigations tracing the possession of this phone through this Lasantha, led the police to the 2nd accused.

The 2nd accused was arrested at his residence on 25.11.2004 and at the time of his arrest, had in his possession a 9mm Browning pistol marked as T3P1 and a mobile telephone and Rs. 34000 in cash. Upon placing a call from the recovered phone to the phone of his fellow officer, Inspector Vedasinghe identified the number of the phone recovered as No. 108. Based on information provided by the 2nd accused, which was recovered under section 27 of the Evidence Ordinance, Inspector Vedasinghe also recovered a wembley Mark IV revolver marked as T3P4, a Smith and Wesson's revolver marked as T3P2 and a locally manufactured revolver marked as T3P5 and some live cartridges, which were concealed in a house situated in Mabima, Heiyantuduwa.

The 3rd accused was arrested on 26.11.2004 and at the time of his arrest the police recovered an Armenias type revolver marked as T3P3 from his possession. The 5th accused was arrested at about the same time. The 4th accused was arrested on 26.11.2004 in Wattala.

Comparison and analysis of the weapons recovered from the 2nd and 3rd accused with the empty casings and bullets recovered at the crime scene by the Government Analyst Department, confirmed that the empty casings had been fired from the 9mm Browning pistol marked as T3P1 that was recovered from the possession of the 2nd accused and the Wembley Mark IV revolver marked as T3P4, that was recovered in consequences of information provided by the 2nd accused under section 27 of the Evidence Ordinance.

IP Vedasinghe who gave evidence on these matters, under cross-examination vehemently denied any suggestion that the pistol and revolver had been introduced by the police to implicate these accused falsely. This bald suggestion however was not founded on any fact that emerged in the evidence of his or any other witness. The imputation of this suggestion was therefore not grounded on any evidence whatsoever and is therefore not

tenable. Furthermore had the police been interested in planting such evidence, a much stronger case could have been made out even against the 4th accused whose conviction was based solely on the credible identification, and the cogent, convincing, trustworthy and un-assailed testimony given by the witness Susantha Pali.

The Government Analyst report stated that the aforesaid weapons that were recovered based on the statement of the above mentioned accused were identified to be in good and working condition and included as a "gun" in terms of the definition contained in section 2(a) of the Fire Arms Ordinance.

The expert witness on ballistics, explosives and firearms, from the Government Analyst Department, Mr. Gamini Gunatillake, a renowned authority on this subject, in his evidence detailed the manner in which a bullet can upon analysis be accurately forensically matched with the gun from which it was fired. He detailed that the barrel of each gun has certain unique features and markings, invisible to the naked eye, which casts an imprint upon the bullet and the empty casing upon firing, leaving unique tracings, which could consequently be matched.

The witness stated that in the instant case, he was able to identify conclusively that the empty casings marked as T2BA1, T2BA2, T2BA3, T2BA4, T2BA5, T2BA6 and T2BA8, were fired from the 9mm Browning pistol marked as T3P1. He also identified that the bullet marked as T2nd N1 was fired from the same browning pistol marked as T3P1 and that the bullet marked as T2nd N2 was fired from the Wembley Mark IV revolver marked as T3P4.

This testimony gains additional testimonial trustworthiness in the light of IP Vedasinghe's evidence above, that these relevant weapons which were consistent with the markings on the empty casings, and bullets recovered from the scene of the crime were recovered from the possession of the 2nd accused and in consequence of information provided by him under section 27 of the Evidence Ordinance.

Also significant and of substantial probative evidential value is the evidence of the Registrar of Fingerprints and other officers attached to his bureau who testified to the discovery of fingerprints

on the vehicle No. 253-0882 and the bottle of arrack recovered from the restaurant. Both the vehicle and the bottle were found and recovered on the same day as the murder, before any of the accused had been taken into custody, thereby completely militating against any fabrication by the police. The Registrar of Fingerprints stated that the prints of the 3rd and 5th accused were identified on the vehicle and the 2nd and 3rd on the empty bottle. The Registrar of Fingerprints was categorical in his assertion that the procedure and technique employed in the lifting and identification of prints was accurate and sufficient to confirm the identity of the accused.

The Judicial Medical officer, Mr. Alwis identified the cause of death of Mr. Ambepitiya and Mr. Ranasinghe Arachchige Upali as the cerebral laceration caused by the discharge of bullets from a rifled firearm. In this sense a rifled firearm is a weapon equipped with a grooved bore as distinguished from a smooth bore such as a shotgun. This evidence was accepted under section 420 of the Criminal Procedure Code. His report as to the number, location and possible sequence of the bullets wounds on the victim's bodies has not been challenged by the defence.

DNA evidence given by Dr. Maya Gunasekera of Genetech was conclusive in matching the DNA from the sample of vomit collected from near the Otters Sports Club with that of the 3rd accused, thereby placing him definitely in the Otters area, and further confirming the testimony of Susantha Pali.

The record shows that the witness is highly specialized in her field and has vast experience in the area of DNA typing. Her expert evidence is accepted as credible evidence on account of her experience, expertise, the precautions taken to ensure the safety of the sample to prevent contamination and maintain the authenticity of the material and credibility of the findings. It is also relevant that the high standard of technology and procedure maintained by Genetech where the tests were conducted, also contributes to the acceptability of her evidence in this case.

In order to gain a proper understanding of the relevance of DNA evidence to this case, it is important to have a degree of familiarity with the technical process of DNA extraction and analysis. Detailing the basis and method of DNA extraction, the witness stated that DNA evidence is based on the fact that human beings are made of

cells. Within each of these cells there is an area called the nucleus, which contains chromosomes. There are 23 pairs of chromosomes in every cell. These chromosomes are made up of a chemical known as deoxyribonucleic acid also known as DNA. DNA is a long thread like polymeric molecule that is made up of units known as nucleotides. These nucleotides are in turn made up of a sugar molecule, a phosphate molecule, and a nitrogenous base. There are four different types of nitrogenous bases. The sequence in which these bases are arranged differs from individual to individual.

DNA contains all the information that is necessary for the structure and the function of the cell and thereby the entire individual. DNA is known as genetic material because it is inherited from the parents of an individual.

An individual's genetic constitution is unique in so much as there are no two individuals who have the same DNA. By analyzing DNA of an individual it is possible to say that the chance of finding another person with matching DNA is less than one in a trillion. This is analogous to hand fingerprinting techniques and that is why DNA fingerprinting has received the degree of acceptability which is similar to hand fingerprinting in courts the world over.

Any two individuals are 99% genetically similar. However there is around 1% of a person's genes which differs from individual to individual. This is known as polymorphic DNA. In the analysis of DNA a scientist examines parts of the DNA in which individuals differ from one another. These are called genetic loci or locations, which are hyper variable, as they, vary from individual to individual. One such type of hyper variable is known as short tandem repeats (STR). By analyzing these STR a scientist is able to distinguish one individual from another.

The analysis of short tandem repeats involves the counting of the number of repeating units at a given genetic location. The number of repeating units at a given location varies from person to person. For example at a particular STR location one person may have 3 repeating units and another may have 5 repeating units. Each of these are known as alleles. Therefore we would say that a person has allele 3 and another person has allele 5.

In order to determine which allele a person has, the scientist must first extract DNA from some biological material of an individual. After DNA extraction is done, the DNA is subjected to a

process known as polymerase chain reaction (PCR). In this technique the scientist is able to select particular STR locations and make a large number of copies of that genetic location. Subsequently the scientist is able to analyze this copied DNA and determine how many repeats there are at that STR location. This is done by a process known as, Gel Electrophoresis. During Gel Electrophoresis the copied DNA runs through a gel matrix under the influence of an electric current. The STR alleles separate inside this matrix according to their repeat numbers (size). By reading the DNA pattern on this gel it is possible to measure the size of the STR alleles and thereby record the DNA pattern. From this the scientist can determine which alleles a person has. A scientist would analyze a minimum of nine such STR locations.

The combination of alleles at all 9 locations can be expressed as a series of numbers, which is known as that person's DNA profile. This is unique to that individual and is the basis of identifying persons based on biological material. (This DNA profile is given in the DNA report sent to courts) When two DNA profiles match, it is necessary to express the possibility of having another person in the population who might have this same DNA profile. The scientist usually expresses this in terms of a probability value. This is known as the match probability.

With regard to the biological evidence subjected to DNA analysis by her, the witness stated that when the sample was received it was first placed in the fridge and subsequently two aliquots (samples) were taken; one onto a piece of filter paper and the other onto a cotton bud.

The sample of vomit was taken for analysis because it was expected to have human cellular material in it. When a person vomits, undigested food moves out of the stomach through esophagus and the mouth. During this passage cellular material from the inner well (mucus membrane) of the stomach, esophagus and mouth may come out with the vomit. This cellular material would contain mostly epithelial cells. Therefore, DNA extracted from these epithelial cells can be subjected to DNA analysis.

Firstly, DNA is extracted from these cells. This extraction was performed using a DNA extraction kit. Utilizing the chemicals that are found in this kit, DNA was extracted from the filter paper, and

cotton bud, which contained the vomit. After DNA was extracted, it was subjected to polymerase chain reaction (PCR). The PCR products were further analyzed, in order to determine the STR alleles in the sample. From this it was possible to obtain a DNA profile of the person whose vomit was analyzed.

This procedure was followed for two samples of vomit in order to determine which sample was better and the amount of DNA subjected to PCR was also varied in order to obtain optimal results. (The amount of DNA-2.5, 5.5, and 7.5 micro liters) Eleven such STR locations were analyzed for this sample of vomit and the DNA pattern obtained was photographed and the digital images were stored in the laboratory computers. At the same time the DNA profile was also determined and recorded in a record book maintained by Genetech.

Pictures of the DNA profiles were shown in court. In the first picture it was possible to observe the DNA pattern at 3 STR loci. The 3 STR loci are named, CSF1PO, TPOX and TH01. It was determined that at the STR locations CSF1PO alleles number 11 and 13 were present. At TPOX alleles number 9 and 10 were present. At TH01 alleles number 8 and 9 were present. This profile was obtained for the first vomit sample.

The second vomit sample was tested for these same three STR loci and was found to be identical. Subsequently the second vomit sample was also further tested for a total of 11 STR loci.

Males have a Y chromosome, which is not found in women. The analysis of the Y chromosome makes it possible to compare the DNA of two males. The Y chromosome analysis was performed on the vomit sample, and it was determined that this vomit originated from a male individual.

Based on the above findings a report was submitted to court. This report contained the DNA profile obtained from the vomit sample. A request was also made to the magistrate to produce blood samples from any suspects in this case in order to compare with the DNA profile obtained from the vomit sample.

A blood sample was received, which was taken from the suspect Sampath Thusahara Wijewardena Abeywickrame. About 2 ml of blood had been collected into a plastic tube and had been placed in an envelope and the envelope had been duly sealed with sealing

wax. The seals were found to be intact. The blood sample had been drawn by the JMO Colombo, and was accompanied by a letter from the office of the JMO signed by Dr. Alwis. RM Abeyrathne Rajapakse delivered the sample. Genetech sent a letter of receipt and acknowledgement to the magistrate and Mr. Rajapakse signed the same. It is clear that the chain of transmission of the sample precluded any tampering with the sample.

Subsequently DNA was extracted from the blood sample and subjected to polymerase chain reaction (PCR) and Gel Electrophoresis and the STR alleles at 12 STR locations were determined. From this it was possible to obtain the DNA profile of the suspect. The DNA profile was then compared with the DNA profile obtained from the vomit sample. This comparison was given in a table in the report submitted to courts. It was found that the alleles in all the tested loci in the vomit sample were identical to the alleles in the samples of blood.

Explaining the conclusive nature of her findings the witness stated that the match probability was calculated as one in four hundred and seventy nine trillion. As the entire world population is about 7 billion, this number far exceeds the number of people in the world. Therefore, it can be concluded that no other random person could have the same DNA profile. These findings were included in the final report, which was also signed by Dr. Gaya Ranawake and Mr. Ruwan Illeperuma and duly authenticated and produced in court.

The sample of vomit and the remaining sample of blood from the suspect have both been stored in the deep freezer at Genetech and are available for examination.

During cross-examination this witness stated that although it is good if the biological material does not contain any other organisms, the DNA test analyses specifically human DNA and therefore the inclusion of microbial DNA will not hinder the test. However the inclusion of another human beings DNA will cause complications in the testing.

This witness also stated that while there can be human DNA on the road where the vomit was found this could be easily detected. In the vomit sample it was found that there was DNA only from one person. At a given STR locus there can be only a maximum of 2

alleles. If there are more than 2 alleles, it can be said that there is a mixture of DNA from more than 1 person. During this analysis, they did not detect more than 2 alleles in any of the STR loci.

Furthermore, this witness clarified that the process of Gel Electrophoresis is carried out on a gel, which is on a glass plate. When the blood sample was analyzed, the gel which contained the DNA from the vomit sample was not present, since the gel is destroyed and the glass is cleaned, once the analysis is over. However prior to destroying the gel, it is read and the alleles are determined and recorded. Therefore when the blood sample was analyzed, the alleles in the blood sample were also similarly read and compared with the alleles that had been recorded for the vomit sample. This was recorded in the DNA typing record book.

This evidence clearly establishes that the vomit found at the place pointed out by Susantha Pali belonged to the 3rd accused and confirms and corroborates the evidence of Susantha Pali, confirming that he was with the accused and had the knowledge that he had vomited at the spot pointed out by him, thereby affording him the clear opportunity to make the identification of the accused subsequently.

Thus it has been proved beyond a reasonable doubt from the aforesaid witness, testimonies that there exists a strong sequence of evidence linking the accused with the murder of Mr. Ambepitiya, and of IP Upali Ranasinghe.

Considering the grounds of appeal submitted on behalf of the 2nd to the 5th accused, the first submission was that the trial at bar erred in its application of the charge of conspiracy to the instant case. It was submitted that the trial at bar erred in not holding that the prosecution had failed to establish the charge of conspiracy against the 2nd to the 5th accused.

The offence of conspiracy is defined under section 113(a) of the Penal Code as; *"If two or more persons agree to commit or abet or act together with a common purpose for or in committing or betting an offence, whether with or without any previous concert or deliberation, each of them is guilty of the offence of conspiracy to commit or abet that offence as the case may be."*

The essence of conspiracy lies in the common agreement or concurrence or accord of minds, which is arrived at between the accused. This view was endorsed by Gratiaen, J. in *Cooray*(1) and it was reiterated in *Kanagaratnam*(2), where Choksy, J. summarized the principles laid down in *Cooray* as follows: *"Under our law as it now stands it is the agreement per se to commit or abet a criminal offence which is intended to be penalized, whether or not an overt act follows the conspiracy, so long as the existence of the conspiracy can be proved .... the common concurrence of minds – of more minds than one – with a view to achieving an object which is an offence under our law that constitute criminal conspiracy under the Penal Code.".*

While agreement is at all times the essence of conspiracy it does not necessarily contemplate a physical meeting of the conspirators or prior contact and correspondence between or among the accused as being an essential or necessary ingredient to prove a charge of conspiracy. There is no legal requirement regarding a mode of concurrence in the common purpose or the manner in which such concurrence may be established by the prosecution. In a case of conspiracy it is possible that there could be one person around whom the rest revolve. [Vide *Meyrick*(3) cited with approval by Gratiaen, J. in *Cooray*]. The prosecution must simply establish an agreement to act together with a common purpose for or in committing an offence. Hearne, J. in *Sundaram*(4) has stated explicitly that; "*the gist of the offence of conspiracy is agreement*".

With respect to the degree of proof, it has been held in *Queen* v *Liyanage*(5), that the question is not whether the inference of conspiracy can be drawn but whether the facts are such that they cannot reasonably admit any other inference but that of conspiracy. As the evidence in support of a charge of conspiracy is often circumstantial, the actual facts of the conspiracy may be inferred from the collateral circumstances of the case. A charge of conspiracy can often be proved only by an inference from the subsequent conduct of the parties in committing some overt acts, which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen from an agreement to bring them about.

This court further observed that a conjectural interpretation is placed on each isolated act and an inference is drawn from an aggregate of these interpretations. Therefore the detached acts of conspirators relative to the main design are admissible as steps to establish the conspiracy itself. The circumstances attendant on the acts of a conspirator may indicate association with others and as such these circumstances may be availed of as a valid part of the proof of a conspiracy. There must be proof against each conspirator that he had knowledge of the common plot and design although it is not necessary that each should be equally knowledgeable in this regard.

When relying on circumstantial evidence to establish the charge of conspiracy to commit murder and the charge of murder, the proved items of circumstantial evidence when taken together must irresistibly point towards the only inference that the accused committed the offences. In a consideration of all the evidence the only inference that can be arrived at should be consistent with the guilt of the accused only. [Vide *Don Sunny* v *Attorney-General*[6] concerning the *Amarapala murder*].

There is no doubt whatsoever that the evidence of all the above witnesses taken as a totality and considered as a whole corresponds directly to this legal requirement for the offence of conspiracy under our legal system. Of particular relevance is the testimony of Susantha Pali wherein it was confirmed and clarified that the 2nd to the 5th accused traveled together in the van with a shared common purpose and a common intention. The call made to the Leeds Cab Service by one who identified himself as Nalaka is significant as it displays a premeditated intention on the part of the 2nd to 5th accused to travel together and to carry what they referred to as a small box with them, and this was further identified as a bag by the waiter at the Steam Boat Restaurant. This proves beyond a reasonable doubt the existence of an agreement and shared knowledge on the part of all accused.

The numerous phone conversations, delays and stops as well as documentary evidence relating to the mobile phone records of phone number 108 possessed by the accused reveal that the accused were in constant communication with another person, who was in effect directing the actions of the accused via his mobile

phone communications. This other person is later identified conclusively as the 1st accused who is linked to the actions of the 2nd to the 5th accused through credible documentary and witness evidence which will be referred to later. It is clear that the ingredients of conspiracy are met in the instant case based on the evidence against all the accused. It is apparent from the evidence that the accused were clearly in agreement and bound by a common intention and purpose to commit the murder of Mr. Ambepitiya and that the prosecution has proved this charge beyond reasonable doubt.

Another submission on behalf of the 2nd to the 5th accused was that the trial at bar misdirected itself in the application of the principles contained in section 10 of the Evidence Ordinance to the facts of the instant case.

Section 10 of the Evidence Ordinance provides that *"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said or done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by each of the persons believed to be so conspiring; a) as well for the purpose of proving the existence of the conspiracy, b) as for the purpose of showing that any such person was a party to it."*

The provision embodies the principle that when various persons conspire to commit an offence the acts done by one in reference to the common intention are considered to be the acts of all. These acts are themselves evidence of the conspiracy to be established and the part played by each conspirator in it.

In *Liyanage, (supra)* several important rules were laid down with respect to the degree of proof required for a charge of conspiracy. This court observed that, while agreement following upon intention is the essence of conspiracy, the existence of such agreement is generally proved by circumstantial evidence. It is not necessary to prove any direct concert or any meeting of the conspirators as the actual fact of conspiracy is inferred from the collateral circumstances of the case. It suffices to prove isolated acts as

steps by which conspiracy may be proved. There must be proof against each conspirator that he had knowledge of the common plot and design although it is not necessary that each should be equally knowledgeable in this regard.

Once there is *prima facie* evidence of conspiracy between certain defendants the acts and declarations of a person party to the conspiracy and done or made before it was completed are admissible under section 10 to all those who were party to it. The court also recognized that it is impossible to lay down a general rule in this regard and that each case must be judged on its particular facts and circumstances.

The principle laid down in *Peiris v Silva*(7) is that in order for section 10 to be applied there must be an antecedent finding that reasonable grounds to believe in a conspiracy exists, and this reasonable belief must be based on independent evidence. This view is supported in the case of *King* v *Attanayake*(8), where it was held that the judge should in each case determine whether reasonable grounds exist to believe that a conspiracy exists on the basis of evidence led to this effect, and the assurance of the prosecution that further evidence would be led.

In the instant case, the prosecution has clearly and beyond reasonable doubt, established the charge of conspiracy against the 2nd to the 5th accused, based on the conduct of all the accused which displayed shared intention and evidence of an agreement to commit the murder of Mr. Ambepitiya. The prosecution has also led independent documentary and oral evidence linking the 1st accused with the other accused, proving beyond all reasonable doubt the existence of such a conspiracy to murder Mr. Ambepitiya.

The evidence places the 2nd to the 5th accused together in a vehicle hired by them for the purpose of transporting themselves to the residence of Mr. Ambepitiya and in which they made their getaway upon commission of the offence. There appears to have been a communion of action between these accused evidenced by the several stops made by them along the way. What is evident therefore is a concert of events, linked through the mobile phone conversations, interlinking communication between them at a time

relevant to the commission of the offence which culminates with the shooting of Mr. Ambepitiya and IP Upali Ranasinghe.

It is clear from the evidence of Susantha Pali which is corroborated by documentary evidence by way of phone records submitted by both Mobitel Lanka Pvt. Ltd. and Celltel Lanka Pvt. Ltd. with respect to phone number 0723323418 (hereinafter referred to as 418) possessed by the 1st accused and No. 108 possessed by the 2nd accused, that the accused were in regular contact with the 1st accused during the course of the day and were biding their time until the arrival of Mr. Ambepitiya at his residence. The tower report indicating the coverage of incoming and outgoing calls made on No. 108 details the path traveled by the accused and is consistent with the evidence of Susantha Pali, adding credence to his testimony. At no point did the accused break ranks or deviate from their common purpose, even when the 3rd accused was evidently sick and had vomited near the Otters Sports Club where the vehicle was parked waiting for that specified moment of action. The only plausible, possible inference from this joint and concerted conduct of the accused considered along with other circumstantial evidence is that each of them was party to a conspiracy to commit the murder of Mr. Ambepitiya.

Therefore a *prime facie* case of conspiracy for the purpose in terms of section 10 of the Evidence Ordinance has been very clearly established by the prosecution, and the objection to the application of this section by the defence is not tenable in law.

There is however credence in the prosecution argument that as the charge against the accused has been confirmed based on their joint conduct it does not require the application of section 10 to prove the existence of a conspiracy as all acts were done by the conspirators in the presence of each other and through linked communication. Also with respect to the application of the *Ellenborough dictum* to the accused, it is immaterial to enter into the validity of extending the principle in this charge, as the charge of conspiracy has been clearly established beyond any reasonable doubt against all accused based on their joint conduct and communications with the 1st accused.

A further ground of appeal submitted is that the trial at bar failed to recognize the legal requirements for consideration of a common

intention to commit murder in the application of section 32 of the Penal Code to the facts of the instant case. Section 32 of the Penal Code provides that, *"Where a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for the act in the same manner as if it were done by him alone."*

The law in Sri Lanka follows the view expressed by the Privy Council in *Barendra Kumar*(9) in which it was observed that where each of several persons commits a different criminal act, each act being in furtherance of the common intention of all, each of them is liable for each such act as if he did it alone. As per the *dictum* in *Mudalihamy*(10) the effect of the application of section 32 is that the casual effectiveness of the act of each accused to produce the harm is no longer treated as a relevant consideration.

The operation of the section preconceives a shared intention by all the accused but does not depart from the principle that each accused is punished based on his or her individual intention. The section also requires that a criminal act be conducted by each of the accused in furtherance of the common intention of all.

There exists an important distinction between a common intention and a same or similar intention or common object. While each of the accused may have a similar intention with a common object in view, this does not attract the application of section 32 of the Code. The same intention becomes a common intention only when it is shared by all. This principle emerges clearly in *Ranasinghe*(11) and the judgment of Weeramantry, J. in *Wilson Silva* v *The Queen*,(12) in which he pronounced that "... *the crucial distinction they (the jury) should have in mind was that, even if this was a simultaneous attack such attack should have been in consequence of a sharing of intentions ...*" In a case of murder against all the accused where the accused are sought to be made liable on the basis of section 32, the common intention must necessarily be a murderous common intention.

In *Asappu*(13) several persons were accused of being responsible for an attack which caused the death of the victim.

Dias, J. in his judgment laid down the rules that in order to justify the inference of common intention there must be evidence, direct or circumstantial, either of pre-arrangement or a pre-arranged plan or a declaration showing common intention or some other significant fact at the time of the commission of the offence. This principle has also been recognized in the Indian case of *Mahbub Shah*(14).

The distinction between common intention and common object was emphasized by Basnayake C.J. in *Ekmon*(15). In *Appuhamy*(16) Sansoni, J. observed that *"a common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the offence is committed."* The significance of a common murderous intention was again stressed in the case of *Punchi-banda* v *The Queen*(17).

Significantly in *Wasalamuni Richard* v *The State*(18) eye-witness testimony was conclusive only against the 1st and 2nd accused. The evidence against 3rd accused the younger brother of the 1st accused was circumstantial in that he was present on the road at the time of the abduction and at the time and place of the killing and on the direction of the 1st accused he prevented the witness from leaving the scene of the crime. The court in this case held that the circumstantial evidence against him was sufficient in the absence of any explanation tendered by him with regard to his presence, to establish that he acted in furtherance of a common murderous intention shared with the other accused as his presence was a participating presence.

In *Weerasinghe v Kathirgamathamby,*(19) several indicia were used by court in coming to a conclusion of common intention. The fact that the accused had arrived together to the scene of the crime, that one accused was carrying an explosive substance and used it without protest from the other accused, that the other accused had taken action in furtherance of their common intention, and that they all made away upon the approach of officers, were considered relevant by court in determining liability based on common intention.