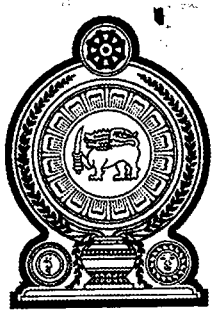

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DIGEST

LEELAWATHIE MENIKE AND ANOTHER

v

ATTORNEY-GENERAL

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA 178/1999
HC RATNAPURA 101/94
FEBRUARY 14, 2006
JULY 30, 2007
SEPTEMBER 3, 2007
DECEMBER 13, 2007

Penal Code – Sections 102, 113(b) and 296 – Murder – Conspiracy to commit murder – Code of Criminal Procedure – Act. No. 15 of 1979, Sections 279, 280, 283(1), 283(5), 334(2), 335(2) and 436 – Non-compliance – Evidence Ordinance Sections 33, 35 and 114 – Best evidence rule – Applicability – Constitution Article 138(1) – Is there substantial miscarriage of justice – Evidence given in a former judicial proceeding – When relevant? When could it be used ?– Exception to hearsay rule?

The 3 accused-appellants were charged on three counts under Section 296 read with Section 113(b) and Section 102 of the Penal Code with conspiracy to commit the murder of one E. In the 2nd count the 2nd and 3rd accused were charged with murder of E. In the 3rd count the 1st accused was indicted with the abetment of the 2nd and 3rd accused to commit the murder of E. Accused were sentenced to death – 2nd accused had died.

In appeal it was contended that the trial judge erred in law by failing to comply with Sections 279 -283 in that the judgment had not been pronounced in open Court immediately after the verdict in the presence of the accused and dated by the Judge and that the judgment has not been explained to the accused and a copy given. It was contended that the handwritten judgment had been written very much later and annexed to the case record without a date. It was further contended that the trial judge had erred in placing a probative value and relying upon evidence in breach of Section 33 of the Evidence Ordinance – the Best Evidence Rule – by relying upon the evidence of witness R who could not be procured to give evidence but whose evidence at the non-summary inquiry was led in evidence under Section 33.

Held:

(1) In determining whether the grounds of appeal raised in this case are sufficient to vitiate the conviction, the following *criteria* have to be carefully considered.

(a) Whether such ground has prejudiced the substantial rights of the appellants or occasioned a failure of justice.

(b) Whether on the available evidence the appellants might reasonably have been convicted.

(2) Judgment consists of the verdict, reasons and sentence. The verdict and the sentence had been delivered on 2.12.99 forthwith immediately after trial was concluded. Section 203 envisages a situation where the verdict and reasons could be pronounced within 10 days of the conclusion of the trial. The above provision is merely directory and not mandatory. If the verdict and sentence is delivered forthwith and the reasons for the judgment recorded later within a reasonable time, the failure to date and pronounce the judgment in Open Court and explain same to the accused must be considered in the context whether such defect and, or irregularity has prejudiced the substantial rights of the appellants or occasioned a failure of justice or whether such defect or irregularity could be cured under Section 436 of the Code.

(3) The appellants have not even attempted to satisfy Court that as a result of the defect or irregularity whether the substantial rights of the appellants were prejudiced and therefore it has occasioned a failure of justice. A perusal of the evidence reveals cogent evidence on which the appellants must reasonably have been convicted.

In the interest of justice even though there is some merit in the 1st ground of appeal, as the appellants have failed to show that a substantial miscarriage of justice has actually occurred resulting from same, in the face of clear and cogent evidence that justify the conviction, the 1st ground of appeal by itself would not be sufficient to vitiate the conviction and sentence.

Held further

(4) Court has no discretion as to admitting a deposition when the witness is dead, cannot be found, is incapable or is kept out of the way, deposition of such witness is declared to be relevant and must therefore be admitted.

(5) When the requirements in Section 33 of the Evidence Ordinance are satisfied Section 33 governs the reception as substantive evidence of the testimony given in a former judicial proceeding. The reception of narrated testimony permitted by Section 33, is tantamount to an exception to the hearsay rule the basis is that the evidence was originally given on oath and was subject to cross-examination. These characteristics invest the evidence so introduced with a degree of reliability comparable to a greater extent with pure *viva voce* evidence – the trial judge had not erred in relying on the evidence of witness R under Section 33.

Per Sarath de Abrew, J. -

"When the only eye-witness cannot be found where his evidence in a former judicial proceeding is introduced under Section 33 where thoroughly filtered through cross-examination, where the veracity of such evidence is sustained through other independent corroborative testimony, such evidence may be relied on to sustain a conviction".

APPEAL from the judgment of the High Court of Ratnapura.

Cases referred to:

1. *Sinha Ratnatunga* v *State* 2001 2 Sri LR 172 at 211.
2. *Sheela Sinharage* v *A.G.* 1985 1 Sri LR 1.
3. *Moses* v *State* 1999 3 Sri LR 401.
4. *Punchibanda* v *Seelawathie* 1986 2 Sri LR 44.
5. *Ekanayake* v *A.G.* 1987 1 Sri LR 107.
6. *Mutusamy* v *David* 50 NLR 423.
7. *King* v *Fernando* 51 NLR 224 at 225.

Dr. Ranjit Fernando for 1st and 3rd accused-appellants.

Kapila Waidyaratne D.S.G. for the respondent.

Cur.adv.vult.

June 13, 2008

SARATH DE ABREW, J.

The 1st, 2nd and 3rd accused-appellants were indicted before the High Court of Ratnapura on three counts as follows:- In count one, all three accused were charged under Section 296 read with Sections 113(b) and 102 of the Penal Code with conspiracy to commit the murder of one Dr. Elvitigala between 1st January 1986 and 31st March 1986 at Kaluaggala in the Kosgama police area in the Avissawella Magistrate Court Jurisdiction. In the second count, the 2nd accused (deceased at the time of the second trial) and the 3rd accused-appellant were charged with the murder of deceased Dr. Elvitigala under Section 296 of the Penal Code. In the 3rd count, the 1st accused-appellant was indicted with the abetment of the 2nd accused and 3rd accused-appellant to commit the murder of Dr. Elvitigala under section 296 read with section 102 of the Penal Code.

The three accused were originally indicted before the High Court of Ratnapura Case No. 65/92 (the first trial), where after trial before

a jury, the 1st accused was convicted on counts 1 and 3, the 2nd accused was convicted on counts 1 and 2, while the 3rd accused was acquitted on count 1 but convicted on count 2, and all three accused were sentenced to death accordingly. However, on appeal (CA 41-43/93) the aforesaid conviction and sentence was set aside as against all three accused and a retrial was ordered.

Before the second trial without a jury in High Court Ratnapura Case No. 101/94, the 2nd accused had died and the indictment was amended accordingly. At the conclusion of the second trial on 02.12.1999 the learned trial Judge convicted the 1st and 3rd accused-appellants (hereinafter sometimes referred to as 1st and 3rd appellants respectively) of all charges and sentenced them to death. Being aggrieved of the aforesaid conviction and sentence, the 1st and 3rd appellants have tendered this appeal to this Court.

The facts pertaining to this case are briefly as follows:- The deceased Dr. Elvitigala had left his first wife and of mutual consent lived with the 1st appellant Leelawathie Menike by whom he had four children. Dr. Elvitigala used to practice medicine at his clinic at Embilipitiya during week days and return to his family residing at Kaluaggala, Kosgama during the weekend. The 2nd accused and 3rd appellant were also from Kaluaggala and used to visit the 1st appellant's house frequently and according to the evidence, the 2nd accused (now deceased) had developed an illicit intimacy with the wife of the deceased, the 1st appellant.

At the dispensary in Embilipitiya the deceased had employed 03 nurses and a person by the name of Jayaratne to assist him. Apparently there was displeasure between the 1st appellant and the deceased doctor over the alleged involvement of the deceased with one of his nurses (Ramanayake) to whom he had gifted Rs. 25,000/= to set up a house. The deceased used to spend the week at Embilipitiya, have his meals from the house of his assistant Jayaratne, and was in the habit of returning to Kaluaggala for the weekend while returning to his dispensary at Embilipitiya on Sunday evening or Monday morning.

On 24.03.1986 evening the deceased had accordingly left Embilipitiya to come to Kaluaggala and thereafter had not returned to Embilipitiya after the weekend. Jayaratne had come to

Kaluaggala in search of the deceased and met the wife of the deceased, the 1st appellant, who had maintained that the deceased had left their house in Kaluaggala on 25.03.1986 to go to Embilipitiya. Having made further inquiries from the sisters of the deceased and on being satisfied as to the disappearance of the doctor, witness Jayaratne had made a complaint to the Embilipitiya police on 30.03.1986.

The evidence also disclose that the 1st appellant had maintained that she received a letter by post demanding a ransom of Rupees Five Lakhs to release the deceased and therefore she suspects the JVP for the disappearance of the deceased. Witness Kaithan had also stated that the 1st appellant had attempted to induce him to falsely state that he saw the deceased get into a vehicle at Kaluaggala on the day the deceased allegedly left to return to Embilipitiya but never returned.

Against this backdrop, the main prosecution witness Jayantha Rupasinghe, a female domestic servant in the Kaluaggala house, told a different story and directly implicated the 1st, 2nd and 3rd accused in the murder of Dr. Elvitigala. This witness Jayantha had given evidence at the non-summary inquiry and also at the first trial before the High Court of Ratnapura. However at the second trial, as her whereabouts were not known and the prosecution was unable to procure her attendance, the learned trial Judge had granted permission for the prosecution to lead in evidence the testimony of Jayantha given at the non-summary inquiry under Section 33 of the Evidence Ordinance.

According to witness Jayantha, she had been a domestic servant in the Kaluaggala household at the time of the incident. According to her evidence, the deceased had come home from Embilipitiya around 8.00 p.m. on 24.03.1986 and had his dinner. The 1st appellant had given the deceased a cup of tea to which she had administered two pills or tablets before the deceased went to sleep. Around 10.30 p.m. the 1st appellant had woken Jayantha stating that she wanted to go to the toilet and had sent the domestic help to the kitchen to boil water. Then witness Jayantha had heard a noise of assault inside the house and had seen the 1st appellant seated on a chair in the hall. Thereafter Jayantha had gone near

the room where the deceased slept and had seen the 2nd accused squeezing the male organ of the deceased and the 3rd appellant strangling the neck of the deceased. The deceased thereafter had been tied with a rope in a reclining position and thrust into two gunny bags which were firmly tied with a rope given by the 1st appellant. The body inside the gunny bags had been carried out of the house by the 2nd accused and the 3rd appellant. An iron rod and a sword too was seen near the bed of the deceased. The 2nd accused had returned in the morning to remove the bag and shoes used by the deceased. The 1st appellant had cautioned witness Jayantha to state that the deceased had left the house to go to Embilipitiya if anyone questioned her. On a subsequent date Jayantha had divulged the entire gruesome episode to witness Wijesiri Fernando at the Bellanvila temple after obtaining an oath from the latter before a deity that he would not divulge this to anyone. When the 1st appellant found this out, the 1st appellant had threatened Jayantha who had left the house thereafter.

The evidence of Jayantha had been corroborated by witness Wijesiri Fernando who had struck up a friendship with the 1st appellant while travelling in a bus from Embilipitiya to Ratnapura. Subsequently Wijesiri Fernando, who had given his name to the 1st appellant as Dharshana Mayadunne, had visited the 1st appellant's house at Kaluaggala two or three times on the pretext of getting foreign employment to 1st appellant's son, and had developed sexual intimacy with the 1st appellant. On the request of domestic help Jayantha, Wijesiri Fernando had met her at Maharagama and gone to the Bellanvila temple, when after an oath before a deity that he would not divulge the secret, witness Jayantha had poured out to witness Wijesiri Fernando an eyewitness account of the gruesome details of what she saw on the night of 24.03.1986 as to the murder and disappearance of the deceased Dr. Elvitigala. Wijesiri Fernando had finally informed the police which led to the arrests of the 1st, 2nd and 3rd accused. On a statement made by the 2nd accused, the body of the deceased was found buried in an abandoned gem pit some distance away from the house. The police have also recovered a sword, an iron rod and a mammoty based on the statements of the accused.

The medical testimony was that the deceased sustained contusions in the scrotum and the root of the penis, on the left side of the neck, on the upper region of the neck, on the right side of the back of the chest, and left side of the chest with a fracture of the 12th rib, which injuries were consistent with the eyewitness account of domestic help Jayantha.

Witness Upatissa had testified that he was aware that the 1st appellant and the 2nd accused were having an illicit affair as he had seen them bathing together and even feeding each other. Further, Upatissa had testified that on a day in March 1986 he had met the 2nd accused, and having partaken in some illicit liquor, the 2nd accused had taken Upatissa to a close by field where a foul smell emanated from a gunny bag. The 2nd accused had confessed to Upatissa that Dr. Elvitigala was inside the gunny bag. Under threat the 2nd accused had forced Upatissa to assist him to carry the gunny bag to a nearby abandoned gem pit at Salawe estate, Moonamale, where the 2nd accused had finally buried the body.

Witness Kaithen had also testified that he lived in the neighbourhood of the 1st appellant who had informed him that the deceased was abducted by the insurgents. However, according to Kaithen, the 1st appellant had also requested him to state that he saw the deceased get into a vehicle on 25th March, the day that the deceased disappeared.

The 1st appellant had made a dock statement on 03.11.1999 denying the charges against her but had admitted that the 2nd accused was known to her and that he assisted her in the household chores. She had taken up the position that the deceased had many enemies who may have committed the murder. According to her, she was not aware of what happened to the deceased until the body was found in September 1986. The 3rd appellant had not given evidence but had remained silent.

After the addresses of the State Counsel and the two Defence Counsel on 02.12.1999, the learned trial Judge had proceeded to convict the 1st and 3rd appellants of all charges levelled against them and after compliance with section 280 of the Code of Criminal Procedure (*Allocutus*), had sentenced them to death.

At the hearing of this appeal, the learned Counsel for the 1st and 3rd appellants propounded two grounds of appeal on which he was relying on.

Ground I

The learned trial Judge had erred in law by failing to comply with Section 279 and Section 283(1) and (5) of the Code of Criminal Procedure Act No. 15 of 1979 which are mandatory statutory provisions relating to the mode of delivering Judgments in respect of Judgments of the Superior Courts.

Ground II

The learned trial Judge had erred in placing a probative value and relying upon evidence in breach of Section 33 of the Evidence Ordinance and acceptable principles and criteria laid down with regard to the best evidence principle.

Having perused the entirety of the proceedings and the written submissions submitted by both parties, I now proceed to deal with the 1st ground of appeal adduced on behalf of the appellants.

The learned Counsel for the 1st and 3rd appellants submitted that the documentary record, the record of proceedings and the journal entries on the appeal brief do not in any way confirm that the judgment in the case had in fact been pronounced in open Court before the accused and/or their attorneys-at-law and argued further that consequently the points for determination, the decisions thereon and the reasons for the decision could not have been pronounced in open Court and explained to the accused affected thereby as mandatorily required under Section 279 and 283(1) and (5) of the Code of Criminal Procedure, Act No. 15 of 1979, for the following reasons:-

(a) It would have been humanly impracticable and impossible to have delivered and pronounced a 52 page Judgment in open Court on 2.12.1999 immediately after the lengthy and exhaustive submissions of both Counsel lasting over 03 hours after days of trial and an unusual 21 page dock statement.

(b) The fact that the journal entries or proceedings do not confirm any where that a judgment was pronounced in open Court.

(c) That no Petition of Appeal had been filed by the Attorney-at-Law although a motion had been filed to obtain a certified copy, the supplying of which has not been recorded on any date.

(d) That the prisoners themselves had filed Petitions of Appeal through the Prison Authorities.

(e) That the purported judgment runs into 52 hand written pages, undated, with the case number interpolated in different hand-writing.

(f) That the Registrar of the High Court places on record that the High Court Judge had taken away the case record from the Registry and consequently there was a delay of over 3 years to prepare the Brief in Appeal due to the non-availability of the case record.

On the strength of the above circumstances, the learned Counsel for the appellants disputed the validity of the handwritten undated judgment found in the case record on the basis that the learned trial Judge failed to comply with the mandatory provisions embodied in sections 279 and 283(1) and (5) of the Code of Criminal Procedure Act, as stated below.

Section 279: The Judgment in every trial under the Code shall be pronounced in open court immediately after the verdict is recorded or save as provided in Section 203 at some subsequent time of which due notice shall be given to parties or their pleaders, and the accused shall if in custody be brought up or if not in custody shall be required to attend to hear judgment delivered except when his personal attendance during the trial has been dispensed with and the sentence is one of fine only or when he has been absent at the trial.

Section 283: The following provisions shall apply to judgments of Courts other than the Supreme Court or Court of Appeal:-

(1) *The Judgment shall be written by the Judge who heard the case and shall be dated and signed by him in open court at the time of pronouncing it, and in case where appeal lies shall*

contain point or points for determination, the decision thereon, and reasons for the decision.

(5) The Judgment shall be explained to the accused affected thereby and a copy thereof shall be given to him without delay if he applies for it.

Section 203: When the case for the prosecution and defence are concluded the Judge shall forthwith or within 10 days of the conclusion of the trial record a verdict of a acquittal or conviction giving his reasons therefore and if the verdict is one of conviction pass sentence on the accused according to law.

However, in *Sinha Ratnatunga* v *State*(1) at 211 it has been held that requirement to record the verdict and pronounce reasons forthwith or within 10 days after the conclusion of the case is merely directory and not mandatory.

The question that would arise for determination is whether whatever irregularity in the judgment or the mode of passing of judgment would necessarily vitiate the conviction, or whether such irregularity could be cured under Section 436 of the Code of Criminal Procedure Act, if there is no failure of justice.

Section 436: Subject to the provisions hereinbefore contained any Judgment passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account:-

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, Judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this code; or

(b) of the want of any sanction required by section 135, unless such error, omission, irregularity or want has occasioned a failure of Justice.

In determining whether a failure of Justice has been occasioned, the above provision should be interpreted in the light of other relevant statutory provisions which have a direct bearing on the Jurisdiction and powers of the Court of Appeal in the exercise of its appellate powers.

While dealing with the jurisdiction of the Court of Appeal, the proviso to Article 138(1) of the Constitution also stipulates:-

No judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity; which has not prejudiced the substantial rights of the parties or occasioned a failure of Justice.

Similarly, in determination of appeals in cases where High Court trials were held without a Jury, Section 335(1) of the Code of Criminal Procedure Act, No.15 of 1979 provides that in an appeal from a verdict of a Judge of the High Court at a trial without a Jury the Court of Appeal may if it considers that there is no sufficient ground for interfering dismiss the appeal.

In Section 334(1) of the Code, pertaining to determination of appeals in cases where trial was before a jury, the following *proviso* is enacted which is not found in Section 335.

"Provided that the Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

In *Sheila Sinharage* v *AG*[2] the Supreme Court has decided that the principle in the above *proviso* will apply only to cases of trial before a jury. However, the Court of Appeal in a much later decision. Hector Yapa, J. held in *Moses* v *State*[3] "Though Section 334(2) refers to cases of trial by Jury, it is reasonable and proper to assume that the intention of the legislature must necessarily be the same, whether it is a trial before a Jury or Judge sitting alone. The deciding factor being that there should be evidence upon which the accused might reasonably have been convicted.

After careful consideration of the aforesaid provisions and case law authorities, I am strongly inclined to conclude that, in determining whether the grounds of appeal raised in this case are sufficient to vitiate the conviction, the following *criteria* have to be carefully considered.

(1) Whether such ground has prejudiced the substantial rights of the appellants or occasioned a failure of Justice.

(2) Whether on the available evidence in this case the appellants might reasonably have been convicted.

In the light of the above conclusion, I now return to consider the first ground of appeal propounded by the appellants, in respect of which the following features may be noted.

(1) The appellants have not disputed or challenged the authenticity and contents of the hand written reasons for the Judgment filed of record. There is also no dispute that the Judgment contains the points for determination, the decisions thereon and the reasons for the decision.

Further there is no dispute that the Judge who heard the case had written the judgement and signed it.

(2) The accused appellants have disputed that the Judgment or reasons for the Judgment had not been pronounced in open court immediately after the verdict in the presence of the accused and dated by the learned trial Judge. The appellants have further disputed that the Judgment or reasons for the Judgment had not been explained to the accused and a copy thereof had not been given to them in spite of applying for same. The implied allegation was that the hand-written reasons for the judgment has been written very much later and annexed to the case record without a date.

(3) Even though the appellants have taken up the position that on 02.12.1999, as the 1st appellant made a dock statement comprising of 21 pages and as the State Counsel and the two Defence Counsel had also addressed Court for about 03 hours, it was not practicable on the very same day for the learned trial Judge to write and record a 52 page Judgment, this position is not factually correct.

A perusal of the case record reveals that after the 1st accused had made her dock statement on 03.11.1999, the case had been postponed to 11.11.99 for correction of proceedings and again postponed to 18.11.99 on which date the trial Judge was on leave and finally postponed to 02.12.99 when the verdict was recorded after submissions of Counsel. Therefore the learned trial Judge had sufficient time from 3.11.99 to 2.12.99 to prepare his Judgment if he so endeavoured.

(4) It must also be noted that the submission that a copy of the Judgment requested by the appellants had not been received

is not substantiated and had not been stated in the Petition of Appeal.

(5) The learned Deputy Solicitor-General had further submitted that the endorsement made by the Registrar as to the delay in preparing the brief for appeal does not specifically substantiate that the reasons for the judgment was not already filed of record.

(6) The learned D.S.G. had also submitted that the very fact that the learned trial Judge had made order on 06.12.99 to issue a copy of the judgment and on 17.12.99 and 13.01.2000 had made further orders to accept the Petitions of Appeal and forward the case record to the Court of Appeal is further indicative that the reasons for the Judgment had been filed of record.

(7) In the absence of proof to the contrary, the presumption under Section 114(d) of the Evidence Ordinance that the disputed judicial act had in fact been regularly performed would operate to the disadvantage of the appellants.

The Judgment comprises of the verdict, reasons and sentence. There is no dispute that the verdict and sentence had been delivered on 02.12.99 forthwith, immediately after the trial was concluded. The dispute remains as to when the reasons were annexed to the case record and the fact that the reasons were not dated and pronounced in open court and explained to the 1st and 3rd accused . Section 203 of the Code of Criminal Procedure Act No. 15 of 1979 envisages a situation where the verdict and reasons for Judgment could be pronounced within 10 days of the conclusion of the trial. As stated earlier, the above provision is merely directory and not mandatory. (eg. Singha *Ratnatunga* v *State (supra).* Therefore if the verdict and sentence is delivered forthwith and the reasons for the Judgment recorded later within a reasonable time, the failure to date and pronounce the reasons in open Court and explain same to the accused must be considered in the context whether such defect or irregularity has prejudiced the substantial rights of the appellants or occasioned a failure of justice, or whether such defect or irregularity could be cured under section 436 of the Code of Criminal Procedure Act. Equally, the sequence is first the verdict, then the reasons and finally the sentence if any. Although the general consensus is that

reasons should precede the sentence, in practice it often happens that the reasons follow the sentence, as in this case, which would be an irregularity. The *cursus curiae* is that such an irregularity in the judgment is not necessarily fatal to vitiate a conviction but can be cured under Section 436 of the code unless it can be shown that such a defect or irregularity had occasioned a failure of Justice.

In *Punchibanda* v *Seelawathie*(4) it had been held that the mere fact that the Judgment or order has not been dated does not constitute a fatal irregularity.

In *Ekanayake* v *A.G.*(5) the argument was raised that the trial Judge had failed to comply with Section 203 of the Code and that he did not give reasons for the conviction nor deliver judgment in open court. A judgment dated 23.8.83 signed by the Judge was filed of record. It was held that the circumstance that the appellant appealed against the Judgment and finding shows that the Judge did deliver Judgment. It was also held that the presumption that an official act had been done correctly would apply and hence there was sufficient compliance of Section 203 and 279 of the Code. In *Muthusamy* v *David*(6) it was held that failure to comply in every particular with section 306 (Section 283 of the new code) of the Criminal Procedure Code does not by itself vitiate a conviction.

The journal entries and the trial proceedings however do not indicate that the learned trial judge had pronounced the Judgment or given reasons for the Judgment in open Court and explained same to the accused as required under Section 279 and 283 of the Code. If the situation is such, this Court strongly disapproves the irresponsible conduct of the learned trial Judge who had a paramount duty to do so. Nevertheless, in the interests of justice, this Court has a duty to examine whether the aforesaid defect or irregularity should necessarily be construed as a fatal irregularity especially so where there is overwhelming evidence to justify the conviction. In such a situation the Court is entitled to examine whether a failure of justice has occurred detrimental to the appellants as a result of the aforesaid defect or irregularity.

In this case the appellants have not even attempted to satisfy Court that as a result of the aforesaid defect or irregularity whether the substantial rights of the appellants were prejudiced and therefore it has occasioned a failure of justice. The defect has not

precluded the appellants from submitting their appeals on time. The hand-written reasons for Judgment contain the points for determination, the decisions thereon and the reasons for such decisions to base their argument at the hearing of the appeal. A perusal of the evidence reveals cogent evidence on which the appellants might reasonably have been convicted. Therefore, in the interests of justice, even though there is some merit in the 1st ground of appeal, as the appellants have failed to show that a substantial miscarriage of justice has actually occurred resulting from same, in the face of clear and cogent evidence that justify the conviction, I hold that the first ground of appeal by itself would not be sufficient to vitiate the conviction and sentence imposed on the 1st and 3rd appellants.

The second ground of appeal is that the learned trial Judge had erred in placing a probative value and relying upon the evidence of domestic servant Jayantha Rupasinghe who could not be procured to give evidence at the second trial but whose evidence at the non-summary inquiry was led in evidence under Section 33 of the Evidence Ordinance which the appellants alleged was in breach of the best evidence principle.

Section 33 of the Evidence Ordinance stipulates as follows:

Evidence given by a witness in a judicial proceeding or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable.

Provided:-

(a) that the proceeding was between the same parties or their representatives in interest;

(b) that the adverse party in the first proceedings had the right and opportunity to cross-examine.

(c) that the questions in issue were substantially the same in the first as in the second proceeding.

Explanation: A criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section.

The submission raised on behalf of the appellants was that even though the defence had vehemently objected to the application by the State to lead the evidence of the domestic help Jayantha Rupasinghe relating to the non-summary Magistrate Court proceedings which had not been subject to cross-examination when in fact her evidence and testimony in the High Court at the previous trial which had been under Oath and tested by cross-examination was readily available, was in breach of the best evidence principle.

Contrary to the aforesaid submission raised on behalf of the appellants a careful perusal of the original case record reveals the following vital information.

(1) At the time of the second trial, the prosecution could not procure the presence of this vital witness Jayantha as she could not be found and her whereabouts were not known. P.C. Heenbanda of the CID had given evidence to this effect (page 327-345) and had produced written reports XI to X5. Therefore there was adequate material for the learned trial Judge to conclude that the above witness cannot be found.

In the case of *King* v *G.W. Fernando*[7] at 225 Jayatilleke SPJ expressed the view that "the court has no discretion as to admitting a deposition when the witness (1) is dead (2) cannot be found (3) is incapable or (4) is kept out of the way; the deposition of such witness is declared to be relevant and must therefore be admitted."

In view of the above, the decision taken by the learned trial Judge to admit the evidence of Jayantha Rupasinghe (P4) cannot be assailed.

(2) The submission of the learned Counsel for the appellants that the non-summary evidence of witness Jayantha which was admitted at the second trial as P4 was not subject to cross-examination is indeed a fallacy and may be construed as an attempt to mislead Court. Witness Pinidiya Senadheera Perera, interpreter-mudaliyar of Ratnapura High Court, had given evidence and had read in evidence the entirety of the testimony

of witness Jayantha given at the non-summary Inquiry marked P4 as follows:

Original record pages 370-385 – Evidence in chief
pages 385-386 – Questions by the learned trial Judge.
pages 387-397 – cross-examination on behalf of 1st accused
pages 398-404 – cross-examination on behalf of 2nd accused.
pages 404-407 – cross-examination on behalf of 3rd accused
pages 407-408 – Re-examination.

Therefore the evidence of eye-witness Jayantha contains 20 pages of thorough cross-examination. Her credibility has not been challenged by the appellants. As her evidence has been corroborated in material particulars by the medical evidence and other direct and circumstantial evidence, the learned trial Judge had correctly relied on her evidence.

(3) The non-summary evidence of the deceased witness No. 18, Kaithan too similarly had been admitted under Section 33 of the Evidence Ordinance. (Page 410 of the Record). Therefore it cannot be sustained that the prosecution discriminately and selectively relied on Jayantha's evidence at the non-summary as against her evidence at the 1st High Court trial in order to derive an undue advantage and thereby violating the best evidence principle, as witness Jayantha's non-summary evidence too had been under oath and thoroughly tested by cross-examination.

(4) Pages 353-357 of the original record clearly disclose that as one of the Defence Counsel had objected to leading Jayantha's evidence given at the 1st trial under Section 33 of the Evidence Ordinance on the mistaken premise that there was no such provision in Section 33, the State Counsel had resorted to lead Jayantha's evidence led at the non-summary. Page 357 and 369 of the record clearly indicate that the defence had not objected to this move at this stage.

(5) Where the requirements contained in Section 33 of the Evidence Ordinance are satisfied, section 33 governs the reception, as substantive evidence, of the testimony given in a former judicial proceeding. The reception of narrated testimony, permitted by Section 33, is tantamount to an exception to the heresay rule. The basis of the exception is that the evidence was originally given on oath and was subject to cross-examination. These characteristics invest the evidence so introduced with a degree of reliability comparable to a great extent with pure *viva voce* evidence. Therefore when the only eye-witness cannot be found, where his or her evidence in a former judicial proceeding is introduced under Section 33, where thoroughly filtered through cross-examination, and where the veracity of such evidence is sustained through other independent corroborative testimony, such evidence may be relied on to sustain a conviction. Accordingly the learned trial Judge had not erred in relying on witness Jayantha Rupasinghe's evidence introduced under Section 33 of the Evidence Ordinance.

(6) The appellants had further submitted that part of witness Wijesiri Fernando's evidence would tantamount to heresay evidence on the failure of the prosecution to call witness Jayantha to give viva voce evidence. I am inclined to reject this contention as witness Jayantha's non-summary evidence (P4) introduced under Section 33 of the Evidence Ordinance too forms part of the substantive evidence led at the trial.

On the basis of the above material gleaned from the original record, there is no substance in the defence submission that the best evidence principle had been observed in the breach. Neither have the appellants succeeded in sustaining a failure of justice. Therefore I do not see any merit in the 2nd ground of appeal propounded by the appellants and therefore I reject same.

Due to the aforesaid reasons I am unable to conclude that a failure of justice had occurred with regard to the 1st and 3rd appellants in respect of the grounds of appeal adduced on their behalf. Therefore, I do not perceive any sufficient ground to interfere with the conviction and sentence.

In view of the above conclusion I dismiss the appeal and affirm the conviction and sentence imposed by the learned High Court Judge of Ratnapura dated 02.12.1999 on both the 1st and 3rd appellants.

Accordingly appeal is dismissed.

IMAM, J. - I agree.

Appeal dismissed.

ANANDA DHARMADASA AND OTHERS
v
ARIYARATNE HEWAGE AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE,
BALAPATABENDI, J. AND
SRIPAVAN, J.
S.C. (F.R.) APPLICATION NO. 206/2006
MAY 14TH, 2006

Fundamental Rights – Violation of Fundamental Rights guaranteed under Article 12(1) of the Constitution – Equality before law – Equal treatment by law – Article 126(2) of the Constitution – Time frame within which an application has to be made to the Supreme Court.- lex non cogit ad impossibilia.

The petitioners complained that due to the non-appointment of the petitioners to Class III in the Sri Lanka Educational Administrative Service (SLEAS), the respondents had violated their Fundamental Rights guaranteed in terms of Article 12(1) of the Constitution. The respondents *inter alia* took up a preliminary objection that the petition has not been filed within the time frame stipulated in terms of Article 126 of the Constitution.

Held:

(1) Although the time limit specified under Article 126(2) of the Constitution is mandatory, in cases where there is no delay or fault on the part of the petitioner and on the application of the principle *lex non cogit ad impossibilia*, the Supreme Court has a discretion to entertain an application made out of time.

(2) The concept of equality postulates the basic principle that equals should not be placed unequally and at the same time unequals should not be treated as equals, without any purposive differentiation.

(3) the object of Article 12(1) of the Constitution is to treat all persons equally, so that there would be equal treatment by law, unless there is some rational reason or intelligible differentia which distinguishes the persons, who have been grouped together to treat them differently.

Per Dr. Shirani Bandaranayake, J. -

"It has to be borne in mind that every differentiation would not constitute discrimination and accordingly classification could be founded on intelligible differentia. A classification, which is good and valid cannot be arbitrary and such classification could be found if the following conditions are satisfied:

(i) that the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

(ii) that the differentia must bear a reasonable or a rational relation to the objects and effects sought to be achieved."

(4) The petitioners were not qualified to have been considered for the appointment for the post of Class III of Sri Lanka Educational Administrative Service. In such circumstances, it would not be correct for the petitioners to state that there was no justification for the treatment meted out to them.

Cases referred to:

(1) *B.M. Jayawardena* v *Attorney-General and others* (Fundamental Rights Decisions, Vol.1 pg. 175).
(2) *A.K.T.J. Gunawardena and others* v *E.L. Senanayake and others* (Fundamental Rights Decisions, supra. pg. 778).
(3) *M. Thadchanamoorthi* v *Attorney-General* and *Mahenthiran* v *Attorney-General* (Fundamental Rights Decisions, supra, pg. 129).
(4) *K.G. Sarathchandra* v *The People's Bank,* S.C. (Application) No. 104/2004 – S.C. minutes of 20.06.2007.
(5) *Hewakuruppu* v *G.A. de Silva, Tea Commissioner and others,* S.C. (Application) No. 118/84 – S.C. minutes of 10.11.1984.
(6) *Edirisuriya* v *Navaratnam and others* (1985), 1 SLR 100.
(7) *Siriwardene* v *Brigadier J. Rodrigo* (1986) 1 SLR 384.
(8a) *Gamaethige* v *Siriwardena* (1988) 1 SLR 385.
(8b) *Nama Sivayam* v *Gunawardena* (1989) 1SLR 394.
(9) *Gomez* v *University of Colombo* (2001) 1 SLR 273.
(10) *Royappa* v *State of Tamil Nadu* AIR 1974, S.C. 555.
(11) *Venkat Raj* v *State of Andhra Pradesh,* AIR (1985) S.C. 724.
(12) *Ram Krishna Dalmia* v *Justice Tendolkar* AIR (1958) S.C. 538.

APPLICATION complaining of violation of Fundamental Rights.

J.C. Weliamuna with *Maduranga Ratnayake* for petitioner.
Uditha Egalahewa with *Ranga Dayananda* for 1st to 5th respondents.
N.M. Mohideen for 6th and 7th respondents.

Cur.adv.vult.

October 9, 2008

DR. SHIRANI BANDARANAYAKE, J.

The petitioners, who are Planning Officers attached to the Divisional Education Offices within the purview of the Provincial Ministry of Education of Uva Province, complained that due to the non-appointment of the petitioners to Class III in the Sri Lanka Educational Administrative Service (hereinafter referred to as SLEAS) with effect from 10.11.1999, the respondents had violated their Fundamental Rights, guaranteed in terms of Article 12(1) of the Constitution.

This Court granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

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

The petitioners had joined the public service as Graduate Assistant Teachers, as set out in the following table:

	School	Date of appointment
1st petitioner	Badulla Nagolla Vidyalaya	02.01.1984
2nd petitioner	Monaragala Viharagala Vidyalaya	04.12.1985
3rd petitioner	Karawila Kanishta Vidyalaya	26.04.1982
4th petitioner	Bulupitiya Kanishta Vidyalaya	16.08.1987
5th petitioner	Kandakepuulpatha Maha Vidyalaya	16.04.1985
6th petitioner	Ampara Galapitigala Maha Vidyalaya	01.10.1979
7th petitioner	Badulla Wewegama Maha Vidyalaya	26.12.1985
8th petitioner	Kudalunuka Kanishta Vidyalaya	02.01.1984
9th petitioner	Kehelpotha Yaya 12 Kanishta Vidyalaya	27.12.1984

The then Deputy Director of Education of Badulla, by his letter dated 06.03.1992 had called for applications from teachers in the Uva Province to be attached to Divisional Education Offices as Planning Assistants (P2). In terms of the said letter only Graduate

Teachers were eligible to be considered for the posts of Planning Assistants and the purpose of recruiting such Planning Assistants from and among the Assistant Teachers was to properly manage the planning units of the Divisional Education Offices. After calling the petitioners for an interview, they had received letters from the then Secretary to the Provincial Ministry of Education of the Uva Province, appointing them as Planning Officers attached to Divisional Education Offices (P5). Accordingly 23 Planning Officers were appointed to the 23 Divisional Education Offices in the Uva Province (P6).

By the decision dated 03.08.1994, the then Cabinet of Ministers had approved a Cabinet Memorandum submitted by the then Minister of Education and Cultural Affairs where it was stated, *inter alia*, that the Cabinet of Ministers had approved the creation of 375 posts on a supernumerary basis in Class III of SLEAS and had approved the appointment to the said Class III of SLEAS, the officers, who were performing in the scheduled posts of SLEAS and those officers appointed to function in the posts parallel to those of SLEAS, with effect from 01.06.1993 (P8).

The petitioners claimed that in terms of the said Cabinet decision, the petitioners became entitled to be appointed as Planning Officers to Class III of SLEAS with effect from 01.06.1993 as they had been performing as Planning Officers, which is a scheduled post in SLEAS (P9). However, in terms of the said Cabinet decision (P8) no appointments were made to Class III of SLEAS immediately.

By letter dated 01.09.1999 Additional Secretary (Planning and Management) of the Ministry of Education informed all Provincial and Zonal Directors of Education to furnish details of those non-SLEAS officers, who were performing in the scheduled posts in SLEAS for the purpose of formulating a government policy in respect of the said officers (P10).

Although the said document (p10) was received by the Zonal Directors of Education, where petitioners were attached to, they had informed the petitioners that P10 was not applicable to them and consequently the Zonal Directors of Education had not submitted the details of the petitioners. However, the Planning

Officers of other Zones whose details had been submitted by the respective Zonal Directors of Education were called for an interview and the petitioners on their own had submitted their details to the Ministry of Education (P11). Thereafter the Secretary to the Education Service Committee had requested the petitioners to tender several documents for verification (P12).

Subsequently the then Minister of Education and Higher Education submitted a Cabinet Memorandum No. 87/99 dated 03.11.1999 to the Cabinet of Ministers for approval (P13), which was approved on 10.11.1999 (P14). However, on 29.12.1999, the petitioners learnt that 12 Planning Officers were appointed to Class III of SLEAS (P15).

The remaining 11 officers were not appointed and they had made representations to the authorities resulting in two interviews being held in year 2000 and in 2001 (P16, P17(a), P17(b)). Since the outcome of the interviews were not disclosed, one of the petitioners had made representations to the Ombudsman (P19) and the Ombudsman had directed the relevant authorities that the qualified officers must be appointed.

Since the petitioners were not appointed, they wrote to the relevant provincial authorities, which were forwarded to the Public Service Commission (P22). Thereafter, a Senior Assistant Secretary of the Ministry of Education, by his letter dated 23.05.2006 (P23) had informed that the Public Service Commission had declined to implement the Cabinet decision, marked P8. The petitioner's position is that this application was filed on 13.06.2006, on the basis of the aforementioned letter.

When this matter was taken up for hearing, learned Senior State Counsel for the respondents took up a preliminary objection that the petition has not been filed within the time frame stipulated in terms of Article 126 of the Constitution. The contention of the learned Senior State Counsel for the respondents was that the petitioners were aware that in or around 29.12.1999 that 12 Planning Officers were appointed to Class III of the SLEAS, pursuant to the Cabinet decision of 03.08.1994 (P8), but they had come before this Court only on 13.06.2006. Accordingly the contention of the learned Senior Counsel was that this application should be dismissed in *limine*.

Article 126 of the Constitution deals with the fundamental rights jurisdiction and its exercise and Article 126(2) specifically deals with the time frame within which an application has to be made to the Supreme Court. Article 126(2) of the Constitution thus states that,

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf,* ***within one month thereof,*** *in accordance with such rules of Court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement ...."* (emphasis added).

The applicability of Article 126(2) of the Constitution has been considered in several decided cases.

In the early decisions of *B.M. Jayawardena* v *Attorney-General and others*(1) and *A.K.T.J. Gunawardena and others* v *E.L. Senanayake and others*(2), the Supreme Court had held that the applications should be dismissed as they were not made within one month of the petitioners becoming aware of the alleged discrimination against them. A similar view was taken by Wanasundara, J. in *M. Thadchanamoorthi* v *Attorney-General* and *Mahenthiran* v *Attorney-General*(3).

Accordingly, as stated by Bandaranayake, J. in *K.G. Sarathchandra* v *The People's Bank*(4) it is apparent that the Court has constantly proceeded on the basis that the time limit of one month in terms of Article 126(2) of the Constitution is mandatory.

The decision in *K.G. Sarathchandra (supra)*, also noted the instances in which the Court could exercise its discretion in the applicability of Article 126(2) of the Constitution.

For instance, in *Mahenthiran* v *Attorney-General (supra)* and in *Hewakuruppu* v *G.A. de Silva, Tea Commissioner and others*(5), this

Court had noted that although in terms of the provisions of Article 126(2) of the Constitution, an application regarding a violation of Fundamental Rights should be filed within one month of the alleged infringement, the Court has a discretion 'in a fit case, to entertain an application made outside the specific time of one month'. However, for that discretion to be exercised, the Court had held that, it is necessary for the petitioners to provide an adequate excuse for the delay in presenting the petition. This position was discussed in details in *Edirisuriya* v *Navaratnam and others*(6), where it was held that,

> *"The time limit of one month set out in Article 126(2) of the Constitution is mandatory. Yet, in a fit case the Court would entertain an application made outside the limit of one month provided an adequate excuse for delay could be adduced. If the petitioner had been held incommunicado, the principle lex non cogit ad impossibilia would be applicable."*

This position was reaffirmed in *Siriwardene* v *Brigadier J. Rodrigo*(7), where it was further emphasized that an application regarding any infringement must be filed within one month from the date of the commission of the administrative or executive act, but if the petitioner establishes that he had become aware of the alleged infringement only on a later date, the one month will run from that date.

The watershed of all the decisions, which considered the applicability of Article 126(2) of the Constitution, in my view, was *Gamaethige* v *Siriwardena*(8a), which brought in a new approach in interpreting the said provision.

Considering the question of the applicability of Article 126(2) of the Constitution, Mark Fernando, J., referred to the Judgments, which had discussed the constitutional provision pertaining to time limit and stated that,

> *"The time limit of one month prescribed by Article 126(2) has thus been consistently treated as mandatory; where however by the very act complained of as being an infringement of a petitioner's fundamental right, or by an independent act of the respondents concerned, he is denied such facilities and freedom (including access to*

legal advice) as would be necessary to involve the jurisdiction of this court, this court has discretion, possibly even a duty, to entertain an application made within one month after the petitioner ceased to be subject to such restraint. The question whether there is a similar discretion where the petitioner's failure to apply in time is on account of the act of a third party, or some natural or man-made disaster, would have to be considered in an appropriate case when it arises .... While the time limit is mandatory, in exceptional cases on the application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay, on the part of the petitioner, this court has a discretion to entertain an application made out of time."

This position was well considered and adopted by Sharvananda, C.J., in *Nama Sivayam* v *Gunawardena*[8b], where it was clearly stated that Article 126(2) must be given a generous and purposive construction. It was further held that,

"To make the remedy under Article 126 meaningful to the applicant, the one month prescribed by Article 126(2) should be calculated from the time that he is under no restraint. If this liberal construction is not adopted for petitions under Article 126(2) the petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory .... A literal interpretation, of the period of limitation will defeat the petitioner's right to his constitutional remedy."

Accordingly, on a careful consideration of all these decisions, it is quite clear that although the time limit specified under Article 126(2) of the Constitution is mandatory, in cases, where there is no delay or fault on the part of the petitioner and on the application of the principle *lex non cogit ad impossibilia*, the Supreme Court has a discretion to entertain an application made out of time.

In this matter, the petitioners in their petition dated 13.06.2006, had claimed that, in terms of the Cabinet decision of 03.08.1994 (P8), the petitioners became entitled to be appointed to Class III of SLEAS with effect from 01.06.1993. Thereafter, the petitioners had learnt that some of the Planning Officers of other zones, whose details were

submitted by the respective Zonal Directors of Education, were called for interviews and the petitioners had tendered their details to the Ministry of Education in November 1999 (P11).

The said details were sent by the Zonal Directors of Education on the basis of a letter dated 01.09.1999 by the Additional Secretary (Planning and Management) of the Ministry of Education, who had requested from all Provincial and Zonal Directors of Education to furnish details of those non-SLEAS officers, who were performing in the scheduled posts in SLEAS, for the purpose of formulating a government policy regarding these officers' promotions.

Accordingly, the petitioners were aware by September 1999 that they were not entitled to be considered for the appointments to Class III of the SLEAS in terms of the Cabinet decision of 03.08.1994 (P8).

During the said period, the then Minister of Education and Higher Education had submitted a Cabinet Memorandum No.87/99 dated 03.11.1999 to the Cabinet of Minister for approval, which sought *inter alia* that the officers performing in the scheduled posts, to be appointed to Class III of SLEAS on supernumerary basis (P13).

The petitioners having made the aforementioned submission had categorically stated that, on or about 29.12.1999, they had learnt that 12 Planning Officers were appointed to Class III of SLEAS, although the petitioners had not even received a response to their applications. In support of their contention, the petitioners had filed a true copy of a letter of appointment issued to one of the said 12 Planning Officers (P15). This document dated 24.12.1999 states that in terms of the approval granted by the Cabinet of Ministers dated 10.11.1999, recipient of that letter (P15) has been appointed to Class III SLEAS on supernumerary basis with effect from 10.11.1999.

Accordingly, the petitioners had prayed that they be appointed as Assistant Directors (Planning) Class III of SLEAS with effect from 10.11.1999.

It is therefore not disputed that by 29.12.1999, the petitioners had known that the appointments to Class III of SLEAS were made to 12 Planning Officers.

Notwithstanding the above, since 29.12.1999, the petitioners, as has been referred to earlier, had embarked on a voyage to obtain administrative relief without endevouring to invoke the fundamental rights jurisdiction guaranteed in terms of Article 126(2) of the Constitution.

In *Gamaethige* v *Siriwardena (supra)*, Mark Fernando, J. had clearly stated that the time limit prescribed by Article 126(2) of the Constitution begins to run when the infringement takes place and in pursuit of other remedies, does not prevent or interrupt the operation of the time limit specified in Article 126(2) of the Constitution.

This position, as referred to in *K.G. Sarathchandra* v *The People's Bank (supra), was clearly stated in Gomez v University of Colombo*[9].

In that matter, the petitioner was appointed as a Probationary Lecturer in Law in the University of Colombo by letter dated 03.04.1990. In terms of clause 8 of the said letter, the petitioner was required to pass the prescribed proficiency test in Sinhala/Tamil within a period of one year or obtain exemption from sitting the test by teaching in Sinhala or Tamil during the first year of appointment. Clause 8 also stipulated that failure to pass the proficiency test or to gain exemption, would result in the termination of appointment without compensation. Even by 16.04.1999 the petitioner had not complied with the aforesaid conditions of appointment. He did not sit for the proficiency test nor did he lecture in Sinhala.

Accordingly by letter dated 23.08.1999, the Vice Chancellor of the University informed the petitioner that the Council had decided to terminate the petitioner's services with effect from 01.09.1999 for non-compliance with his letter of appointment dated 02.04.1990. The petitioner complained that the said termination of his services was in violation of his fundamental rights guaranteed in terms of Article12(1) of the Constitution.

This Court held that the termination was a consequence of his failure to comply with Clause 8 of his letter of appointment dated 03.04.1990 and if he was complaining of such clause then he should have challenged the said clause within one month from that date. The petitioner in *Gomez* v *University of Colombo (supra)* had come before this Court only on 23.09.1999. In the circumstances, the Court dismissed the application on the basis that the application was time barred.

In the present application, as stated earlier, the petitioners were aware that the letter dated 01.09.1999 (P10) was not applicable to them and accordingly that they were not considered for the appointments to Class III of the SLEAS as contemplated by the Cabinet decision of 03.08.1994 (P8). Moreover, the petitioners had become aware in or around 29.12.1999 that 12 Planning Officers were appointed to Class III of the SLEAS pursuant to the aforementioned Cabinet decision. It is common ground that the petitioners had come before this Court only on 13.06.2006. On a consideration of the aforementioned, it is apparent that the petitioners had not invoked the fundamental rights jurisdiction guaranteed to them, in terms of the provisions stipulated in Article 126(2) of the Constitution.

In the circumstances, for the reasons stated above, I uphold the preliminary objection raised by the learned State Counsel for the respondents.

Although this application could be dismissed *in limine* on the basis of the preliminary objection raised by the learned Senior State Counsel for the respondents, both parties were heard on the merits of the matter. I would therefore, now turn to consider whether there was a violation of the petitioner's fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

The petitioners' complaint is that out of the 22 officers who were similarly circumstanced, only 12 were appointed to Class III of SLEAS on 10.11.1999.

Admittedly, the petitioners were appointed as Planning Officers attached to the Divisional Education Offices of the Uva Province with effect from 04.10.1992 and the said letters were issued by the then Secretary to the Ministry of Education of the Uva

Province (P5). However, it is to be noted that the said letters of appointment (P5) had clearly indicated that the petitioners were only attached to the Zonal Department of Education as Planning Officers, in order to assist the Zonal Directors of Education. Except for the said attachment there was no such absorption at that point of the petitioners to the SLEAS.

The petitioners' allegation was that in terms of the Cabinet decision dated 03.08.1994 (P8) and Cabinet decision dated 10.11.1999 (P14) they were entitled to be appointed to Class III of SLEAS.

The Cabinet decision of 03.08.1994 (P8), which was later suspended by a subsequent Cabinet decision of 31.08.1994 refers to the *'appointment to Class III of the Sri Lanka Educational Administrative Service of the Performing Circuit Education Officers (Assistant Directors of Education), the officers performing in the scheduled posts of the Sri Lanka Educational Administrative Service and those officers appointed to function in the posts parallel to those of the Sri Lanka Educational Administrative Service'.*

The Cabinet decision of 10.11.1999 (P14), on which the petitioners have relied upon, refers to the *'appointment of the officers performing in the posts relating to different subject areas, in the special cadre of the Sri Lanka Educational Administrative Service into the permanent cadre of the Sri Lanka Educational Administrative service'.*

The Cabinet decision of 10.11.1999 (P14) as well as the Cabinet Memorandum of 03.11.1999 (P13), however had categorically stated that these appointments would be made on a supernumerary basis provided that such officers are found to be possessing the necessary qualifications in terms of the Minutes of the service. The said Cabinet decision therefore stated that,

> *".... approval was granted to appoint the officers into the Class III of the Sri Lanka Educational Administrative Service as personal to them, on a supernumery basis provided they are found to be possessing the necessary qualifications in terms of the Minutes of the service".*

Another important point in this regard was clearly stipulated in the relevant Cabinet Memorandum of 03.11.1999 (P13). The said Memorandum clearly stated that these appointments would be given to officers, who have been 'appointed to perform' in such posts. Accordingly in order to be qualified to be considered under the Cabinet decision of 10.11.1999 (P14), it would be necessary for the officers to have fulfilled the following conditions:

1. the officers should have been appointed to perform in the posts relating to different subject areas in the Special Cadre of the SLEAS; and

2. the officers should possess the necessary qualifications in terms of the Minutes of the service.

A careful examination of both Cabinet decisions clearly indicates that the said decisions referred to officers, who had been performing duties in specified positions. Accordingly, the Cabinet decision of 03.08.1994 (P8) stated that it would be applicable to 'performing Circuit Education Officers (Assistant Directors of Education) performing in the scheduled posts of the SLEAS'. The Cabinet decision of 10.11.1999 (P14) on the other hand referred to officers performing in the posts relating to different subject areas, in the Special Cadre of the SLEAS.

It is not disputed that the petitioners only held substantive positions of Assistant Teachers at the time they were attached to the Zonal Department of Education (P1 and P5). The petitioners were to function only as Planning Officers to assist the Deputy Zonal Directors of Education. Since the appointments, which were made in October 1992, there had been no change in their substantive positions. The petitioners, at no time have contended that they have functioned in any other position other than in the posts of Assistant Teachers and Planning Officers.

It is in the light of the above, that it would be pertinent to consider the application made by the 1st petitioner on 29.11.1999 (P12) in response to a letter he had received from the then Secretary to the Education Service Committee requiring the 1st petitioner to tender documents for verification. This was in response to a letter sent by the petitioners, when they had become aware that other officers had been called for interviews (P11).

The application that was sent to the 1st petitioner clearly stated that applications were only being considered from among those performing as Assistant Directors of Education. In fact the letter dated 29.11.1999 (P12) clearly indicates that, it was sent as they had received information to the effect that the 1st petitioner has been functioning as an Assistant Director of Education. The relevant parts of the said letter are as follows.

"ශ්‍රී ලංකා අධ්‍යාපන පරිපාලන සේවයේ විශේෂසේවක සංඛ්‍යාවට අයත් විවිධ විෂයය කේෂ්ත්‍ර යටතේ කාර්ය නියුක්ත සහකාර අධ්‍යාපන අධ්‍යක්ෂකවරුන් ශ්‍රී ලංකා පරිපාලන සේවයට පත්කිරීම සදහා සලකා බැලීම.

ඔබ ශ්‍රී ලංකා අධ්‍යාපන පරිපාලන සේවයේ විශේෂ සේවක සංඛ්‍යාවට අයත් විෂයය කේෂ්ත්‍රයන් යටතේ කාර්යයෙහි නියුක්ත සහකාර අධ්‍යාපන අධ්‍යක්ෂ තනතුරක් දරන බවට අධ්‍යාපන හා උසස් අධ්‍යාපන අමාත්‍යංශයෙන් තොරතුරු ලැබී ඇත.

...."

The letter further indicated that along with the other details, the 1st petitioner should forward the copy of the letter of appointment to the post of performing Assistant Director of Education.

It is therefore apparent that in terms of the Cabinet decision of 10.11.1999 (P14) only the performing Assistant Directors of Education were qualified to be considered for appointment to Class III of SLEAS. The petitioners admittedly were only performing functions as Planning Officers and had been only assisting the Zonal Director of Education in the Uva Province and were not qualified to have applied for the appointment to Class III of SLEAS.

The petitioners alleged that their fundamental rights guaranteed in terms of Article 12(1) were violated as there was no justification for the non-appointment of the petitioners to Class III of SLEAS and since 12 Planning Officers were appointed to Class III of SLEAS, that the petitioners were discriminated against and were singled out.

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 concept of equality postulates the basic principle that equals should not be placed unequally and at the same time unequals should not be treated as equals. referring to this concept Bhagawati, J. in *Royappa* v *State of Tamil Nadu*[10], had stated that equality, which is a dynamic concept is antithetic to arbitrariness. In his words,

> *"Equality is a dynamic concept with many aspects and dimensions and it cannot be 'cribbed, cabined and confined' within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies."*

The object of Article 12(1) of the Constitution is to treat all persons equally, so that there would be equal treatment by law, unless there is some rational reason or intelligible differentia which distinguishes the persons, who have been grouped together to treat them differently *(Venkata Raj* v *State of Andhra Pradesh*[11].

It also has to be borne in mind that every differentiation would not constitute discrimination and accordingly classification could be founded on intelligible differentia. As stated in *Ram Krishna Dalmia* v *Justice Tendolkar*[12] a classification, which is good and valid cannot be arbitrary and such a classification could be found if the following conditions are satisfied:

(1) that the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

(2) that the differentia must bear a reasonable or a rational relation to the objects and effects sought to be achieved.

The contention of the petitioners was that 12 officers were selected to be appointed to Class III of SLEAS and that the petitioners and those 12 officers, belonged to one group. Therefore, the petitioners claimed that by the non-selection of the petitioners to Class III of SLEAS, the respondents had singled them out and that such decision is in violation of Article 12(1) of the Constitution.

Considering the circumstances of this matter, it is obvious that the intention of the respondents was to select the persons, who were suitably qualified and they had decided not to select the petitioners since they were not qualified for Class III of SLEAS. The right to equality, as stated earlier, means that, equals should not be treated unequally and at the same time unequals cannot be treated equally, without any purposive differentiation. In this matter it is quite clear that the petitioners and the 12 officers, who were selected to Class III of SLEAS do not belong to the same category. Moreover it is to be noted that the said 12 officers, who had been appointed were not made respondents in this application. Also, no particulars of the said officers' qualifications and the basis on which they were absorbed into the Department of Education were revealed by the petitioners. In such circumstances, it would neither be possible nor relevant to consider them with the petitioners as there is no material to indicate that the said officers and the petitioners were similarly circumstanced. More importantly, as pointed out earlier, it was quite clear that the petitioners were not qualified to have been considered for the appointment for the post of Class III of SLEAS. In such circumstances it would not be correct for the petitioners to state that there was no justification for the treatment meted out to them.

For the reasons aforementioned, I hold that the petitioners have not been successful in establishing that their fundamental rights guaranteed in terms of Article 12(1)had been violated by the respondents. The application is accordingly dismissed.

I make no order as to costs

BALAPATABENDI, J. - I agree.

SRIPAVAN, J. - I agree.

Application dismissed.

SARATHCHANDRA
v
ATTORNEY-GENERAL

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA 169/2003
HC GAMPAHA 48/94
MARCH 12, 2008
APRIL 29, 2008
JUNE 16, 2008

Penal Code – Sections 296, 297 – Code of Criminal Procedure Act, No.15 of 1979 – Sections 196, 207, 204 and 436 – Retrial – Failure to read out the charge and record a plea – Is it fatal? – Constitution Article 138, Articles 13(3),13(4) – Circumstances warranting a fresh trial? – Fair Trial – A Fundamental Right?

The accused-appellant along with his brother were originally indicted for having committed the murder of one N. After trial without a jury, the trial Judge convicted the accused under Section 297 and acquitted his brother. The appeal lodged by the accused-appellant was upheld and a retrial was ordered.

At the conclusion of the retrial – without a jury – the trial Judge convicted the accused-appellant under Section 296 and sentenced him to death.

In appeal it was contended that (1) the indictment and the charge had not been read out to the accused and a plea recorded at the second trial (2) the charge had not been appropriately amended at the second trial, deleting the name of the other accused who had been acquitted (3) in view of the infirmities and the unsatisfactory nature of the only eye witness, the conviction could not stand.

Held:

(1) On a plain reading of Sections 196, 197 and Sections198, 204 of the Code, in a High Court trial with or without a jury, it is abundantly clear that (1) the indictment containing the charge/charges shall be read over and explained to the accused, irrespective of the fact whether he is defended by Counsel (2) the plea of guilty or not guilty shall be obtained and recorded, unless he refused to plea.

(2) A retrial is not a continuation of the abortive first trial, but a distinct and separate trial where the mandatory provisions of the Criminal Procedure Code have to be adhered to.

Compliance of the provisions of Section 196 of the Code at the trial does not discharge or absolve the trial-Judge from desisting in his duty to comply with the mandatory provisions at the second trial.

Per Sarath de Abrew J.

"Section 436 of the Criminal Procedure Code and Article 138 of the Constitution cannot be regarded as a panacea for all ills especially where the fundamental mandatory provisions are blatantly disregarded which would occasion a failure of justice."

(3) It is a fundamental right of an accused to be entitled to a fair trial in accordance with the procedure established by law in accordance with Article 13(3) and Article 13(4) of the Constitution.

(4) Section 207 of the Code provides for an accused to plead not guilty to the charge presented in the indictment, but to plead guilty to a lesser offence; the non-compliance of Section 196 would have denied this opportunity to the accused, which would become a failure of justice.

(5) In view of the infirmities and the unsatisfactory nature of the evidence of the eye-witness the circumstances do not warrant a fresh trial; twenty years have already elapsed since the incident in 1988. The appellant had undergone the hazards of two High Court trials already.

Per Sarath de Abrew, J.

"As the appellant has already undergone eight years of incarceration, I am satisfied that the ends of Justice have been already met".

APPEAL from the judgment of the High Court of Gampaha.

Dr. Ranjith Fernando with *Ms. Chanya Perera* for accused-appellant.

Palitha Fernando PC Addl. Solicitor-General with *Rohantha Abeysuriya* SSC for Attorney-General.

December 5, 2008

SARATH DE ABREW, J.

The present accused-appellant (2nd accused), along with his brother Amaratunga Arachchige Nihal Padmasiri (1st accused), originally were indicted before the High Court of Gampaha for having committed the murder of one Wijesinghe Pedige Nimal on 13.05.1998 at Halwatha, Keerithitha under Section 296 of the Penal Code. After trial without a Jury, the learned High Court Judge acquitted the 1st accused and convicted the 2nd accused, the present accused-appellant, under Section 297 of the Penal Code for culpable homicide

not amounting to murder on the basis of sudden fight and sentenced the Accused-Appellant to a term of 05 years imprisonment.

The Accused-Appellant (hereinafter sometimes referred to as the appellant) appealed to this Court against the conviction and sentence and the Court of Appeal ordered a re-trial in CA No. 207/96, on the basis that there had been a complete failure to elicit from the doctor who gave evidence as to whether the injuries would constitute a great antecedent probability of death resulting as opposed to a mere likelihood. At the conclusion of the re-trial by the Gampaha High Court Judge without a jury, the learned trial Judge on 23.10.2003 convicted the appellant under Section 296 of the Penal Code for the offence of murder and sentenced him to death. Being aggrieved of the above, the Appellant has preferred the present Appeal against the above conviction and sentence.

The facts pertaining to this case may be set out briefly as follows. This incident had occurred around 7.30 p.m. on 13.05.1998 at Halwatta, Keerithitha in Weliveriya Police Area. The Appellant Wimal, his younger brother Nihal (who was acquitted as the 1st accused in the original trial) and their mother Yasawathi lived in close proximity to the cadjan hut of the deceased, where the deceased Nimal, his elder brother Sunil and elder sister Ranjani, who were witnesses for the prosecution and the husband and children of Ranjani were residing. According to the main witness Ranjani, elder sister of the deceased, on the day of the incident the appellant and the deceased have had lunch together at Ranjani's house and both of them had gone together to have a bath. Towards evening that day, Ranjani, on hearing a noise of a quarrel from the direction of the house of the appellant, had rushed there to investigate. The accused-appellant (Lokka) and his younger brother (Rala) had been present there along with the deceased. Ranjani had implored on them not to harm the deceased. Inspite of her pleas, the younger brother of the appellant (Rala) had stabbed the deceased with a knife and as the deceased fell down, the appellant had repeatedly dealt blows on the deceased with a long knife like weapon. Thereafter a police jeep had arrived at the scene and removed the deceased to the Gampaha Hospital where he was pronounced dead. Elder brother of the deceased, Wijesinghe Pedige Sunil too had given evidence to the effect that on hearing cries of Ranjani that the deceased was being done to death, he too rushed to

the scene to find his brother the deceased fallen on the ground opposite the house of the appellant with severe bleeding injuries, while the accused-appellant was standing there with a weapon like a long knife or a katty. Thereafter the villagers had gathered there with torches to dispel the darkness while Ranjani had wept embracing the fallen deceased.

Then Officer-in-Charge, Weliveriya Police Station retired Inspector of Police Ratnayake had given evidence as to visiting the scene the following day morning and recovery of the knife P2. I.P. Dharmadasa, then a Sub-Inspector attached to Weliveriya Police, on mobile duty that fateful night, had given evidence to the effect that on receipt of a message from the Police Station, he arrived at the scene by 10.30 p.m. that night and removed the deceased in the jeep to Gampaha Hospital where the deceased was pronounced dead. Dr. Asoka Premaratne, then DMO Gampaha, had produced the Post-Mortem Report and given evidence to the effect that there were 10 external injuries on the face and right side of the neck of the deceased out of which 09 injuries were cut wounds. The Post-Mortem Report (P5) had disclosed that the cause of death was due to shock and hemorrhage following flow of blood to the brain due to multiple cut injuries.

After the closure of the prosecution case, the appellant has made a dock statement denying complicity to the effect that he returned from Ambatale that evening around 11 p.m. having gone there for work to give manual help for masonry work. On his return he went to the house of his grandmother who had informed him that the the deceased had attempted to rape his mother whereupon his younger brother had attacked the deceased. The mother Yasawathi, who had given evidence for the defence to the above effect at the first trial, had failed to do so at the second trial.

The learned trial Judge had rejected the plea of *alibi*, and also the mitigatory pleas of sudden fight and grave and sudden provocation, and convicted the appellant for the offence of murder under section 296 of the Penal Code.

At the hearing of the Appeal, the learned Counsel for the appellant raised the following grounds in support.

(1) The indictment and the charge had not been read out to the accused and a plea recorded at the second trial.

(2) The charge on the indictment had not been appropriately amended at the second trial, deleting the name of the 1st accused in the first trial, who had been acquitted.

(3) (a) The evidence of the main witness Ranjani was unreliable as she had categorically told the police that the deceased was attacked with a club (V4) and at the first trial too she had stated the same (V1).

(b) Witness Sunil too had told the police that his sister Ranjani had told him that deceased was attacked with a club (page 217).

(c) I.P. Ratnayake had recovered a blood stained piece of firewood (P4), which had not been sent to the Government Analyst.

(d) Ranjani had also testified that the brother of the present appellant, (who had been acquitted at the first trial) who had given the first information to the police about the incident, too had attacked the deceased with a bread knife. Therefore the defence contended that the evidence of the prosecution witnesses were unsatisfactory as to the vital aspect as to the nature of the weapon used.

(4) The *alibi* adduced by the appellant had not been given due consideration by the learned trial Judge.

(5) In any event the conviction for the offence of murder was not justifiable as the evidence disclosed mitigatory pleas of grave and sudden provocation and/or sudden fight.

I have carefully perused the Information Book Extracts, the totality of the proceedings and the written submissions adduced by both sides. I now propose to examine the main contention adduced on behalf of the appellants as to the failure to read out the charge to the accused-appellant and record a plea at the commencement of the second trial which would have a conclusive effect in deciding this appeal.

The mandatory provisions of Section 196 (Trial without a Jury) and Section 204 (Trial by Jury) of the Code of Criminal Procedure Act, No. 15 of 1979 with regard to the arraignment of accused persons at the commencement of a trial before the High Court read as follows:-

"When the Court is ready to commence the trial the accused shall appear or be brought before it and the indictment shall be read and explained to him and he shall be asked whether he is guilty or not guilty of the offence charged."

Section 197 of the Code further provides that *"If the accused pleads guilty and it appears to the satisfaction of the Judge that he rightly comprehends the effect of his plea, the plea shall be recorded on the indictment and he may be convicted thereon."*

Section 198 of the Code also provides that *"if the accused does not plead or if he pleads not guilty, he shall be tried."*

On a plain reading of the above provisions of the Criminal Procedure Code, in a High Court trial with or without a Jury, it is abundantly clear that the following mandatory requirements have to be fulfilled before a verdict is entered. The use of the word shall in Section 196 of the Code, to my mind, is not merely directory but mandatory, and confers jurisdiction to try the accused only after compliance of this mandatory provision.

(a) The indictment containing the charge or charges should be read over and explained to the accused, irrespective of the fact whether he is defended by Counsel.

(b) His plea of guilty or not guilty should be obtained and recorded, unless he refused to plead.

A perusal of the proceedings of 15.10.1999, 22.02.2000, 24.07.2000, 21.06.2001, 12.11.2001, and finally 29.09.2003 on which date the second trial commenced before the High Court of Gampaha disclose that the learned trial Judge had failed to comply with the mandatory provisions of Section 196 of the Code as stated above. (Pages 182-187 of the Record). It is most unfortunate that the learned trial Judge had failed to perform his sacrosanct duty in this regard.

The learned Additional Solicitor-General endeavoured to circumvent this procedural disaster by taking refuge under the *proviso* to Article 138 of the Constitution which reads as follows: *"Provided that no judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."* The learned Additional Solicitor-General, though conceding

that the reading of the charge to the accused in the second trial was necessary, submitted that the failure to do so would constitute only a procedural irregularity, as the accused was already familiar with the charge as it had been read over to him at the abortive first trial, and therefore it cannot be said that this irregularity caused material prejudice to the accused which occasioned a failure of Justice.

I am unable to agree with the above contention of the learned Additional Solicitor-General for the following reasons.

(a) A re-trial is not a continuation of the abortive first trial, but a distinct and separate trial where the mandatory procedural provisions of the Criminal Procedure Code have to be adhered to. Compliance of the provisions of Section 196 of the Code at the first trial does not discharge or absolve the learned trial Judge from desisting in his duty to comply with this mandatory provision at the second trial. Further, this argument cannot hold water as the accused is always informed of the charge at the Non-summary Inquiry, and this cannot be regarded as an excuse for not reading out the charge and recording his plea at the High Court trial.

(b) Section 436 of the Code of Criminal Procedure, Act No. 15 of 1979 and the *proviso* to Article 138 of the Constitution quoted above cannot be regarded as a panacea for all ills, especially where the fundamental mandatory procedural provisions are blatantly disregarded which would occasion a failure of justice.

(c) It is a Fundamental R ight of an accused person to be entitled to a fair trial in accordance with procedure established by law, in accordance with Article 13(3) and 13(4) of the Constitution. In the absence of the charge being read out to the accused and his plea recorded, it is unfair and unreasonable to subject an accused person to a trial where he would be handicapped as to giving proper and necessary instructions to his defending Counsel and preparing his defence. As this was a retrial, and not a fresh trial, there was no serving of the indictment on the accused, in which event, there is

nothing on record to indicate that the accused was aware of the details of the indictment.

(d) Further Section 207 of the Code provides for an Accused person to plead not guilty to the charge presented in the indictment, but to plead guilty to a lesser offence. In this case, if the accused-appellant was willing to plead guilty to the lessor offence of culpable homicide not amounting to murder under Section 297 of the Penal Code on the basis of grave and sudden provocation or sudden fight, the non-compliance of the provisions of Section 196 of the Code would have denied this opportunity to the accused, which would occasion a failure of justice.

In the present case, there was a duty cast on the learned trial Judge to delete the name of the 1st accused who was acquitted in the first trial and amend the indictment accordingly and then comply with the provisions of Section 196 of the Code and read out the amended charge to the present accused-appellant. I am satisfied that the failure to do so has occasioned a failure of justice. Non-compliance of Section 196 of the Code is not a mere technical irregularity but a fundamental defect which would vitiate the conviction and sentence.

I have also perused the totality of the evidence in this case and in view of the infirmities and unsatisfactory nature of the evidence of the only eye-witness Ranjani, I am satisfied that the circumstances do not warrant ordering a fresh trial. Twenty years have already elapsed since the incident in 1988. The appellant had undergone the hazards of two High Court trials already. As the appellant has already undergone eight years of incarceration, I am satisfied that the ends of justice have been already met, taking into consideration all aspects led in evidence in this case.

In view of the above the main contention adduced on behalf of the appellant should succeed. In the event, I do not propose to examine the other contentions in detail, as it would be a futile exercise.

For the foregoing reasons, I allow the Appeal of the appellant and set aside the conviction for murder under Section 296 of the Penal Code and the consequent death penalty imposed on the appellant by the learned High Court Judge of Gampaha dated 13th May 1998 and acquit the accused-appellant.

The Registrar is directed to inform the Prison authorities accordingly and to send a copy of this Judgment to the High Court of Gampaha forthwith.

IMAM, J. – I agree.

Appeal allowed.

Conviction set aside.

ROMESH COORAY
v
JAYALATH, SUB-INSPECTOR OF POLICE AND OTHERS

SUPREME COURT
DR. SHIRANI BANDARANAYAKE, J.
RAJA FERNANDO, J. AND
SOMAWANSA, J.
S.C. (F.R.) APPLICATION NO. 663/2003
JUNE 25th, 2007

Fundamental Rights – Article 11 and 13(1) of the Constitution – Cruel and inhuman treatment in violation of Article 11 – violation of Article 13(1), arrested not according to procedure established by law – Article 126(2) – time frame within which an application regarding an infringement of fundamental rights guaranteed by the Constitution must be made – Supreme Court Rules – 30(4), 45(6), 45(8) – Human Rights Commission of Sri Lanka Act – Section 13(1) – computation of time for the purpose of Article 126 of the Constitution.

The Supreme Court Granted leave to proceed for the alleged violation of Articles 11 and 13(1) of the Constitution.

The 6th respondent also raised a preliminary objection that the petitioner has not filed the application within time in terms of Article 126(2) of the Constitution.

Held:

(1) A preliminary objection should be raised at the earliest opportunity; either in his objections or in the written submissions.

Per Dr. Shirani Bandaranayake, J.

"The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the

petitioner's objections are taken along with the objections and/or written submissions. filed by the respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the applications could be heard without prejudice to any one's rights."

(2) Section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996 deals with the computation of time for the purpose of Article 126 of the Constitution. As the petitioner has complied with provisions laid down in Section13(1) of the Human Rights Commission Act and had complained to the Human Rights Commission within one month of the alleged infringement of his Fundamental Rights, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month. In the circumstances the petitioner has filed his application before the Supreme Court within the stipulated time frame in terms of Article 126(2) of the Constitution. Preliminary objection overruled.

Per Dr. Shirani Bandaranayake, J.

"It has to be borne in mind that torture, cruel, inhuman and degrading treatment or punishment could take many forms, viz; psychological and/or physical and the circumstances of each case would have to be carefully considered to decide whether the act/s in question had led to a violation of Article 11 of the constitution."

(3) When the allegations are considered in the light of section 12 of the Torture and other Cruel, Inhuman or Degrading treatment or Punishment Act, along with the available medical evidence, and on a consideration of the totality of the facts and circumstances and the conclusion and opinion of the Assistant Judicial Medical Officer, it is clear that the petitioner's fundamental right guaranteed in terms of Article 11 of the Constitution had been infringed by executive action.

(4)(i) As there was no material produced before the Supreme Court to show that there had been any complaint against the petitioner or that there had been credible information or a reasonable suspicion that had existed against the petitioner, it is apparent that the arrest of the petitioner was unlawful and not according to the procedure established by law.

(ii) The petitioner's fundamental rights guaranteed by Articles 11 and 13(1) of the Constitution had been violated by the 1st to 3rd respondents.

Cases referred to:

(1) *Gamaethige* v *Siriwardena and others* (1988) 1 SLR 384.

(2) *Collins* v *Jamaica* (Communication No. 240/87).

(3) *Kumarasena* v *Sub-Inspector Sriyantha and others* S.C. Application No. 257/93 – S.C. Minutes of 23.5.1994.

(4) *Wijayasiriwardena* v *Kumara, Inspector of Police, Kandy and two others* .

(5) *Hobbs* v *London and South Western Railway Co.* (1875) L.R. 10 Q.B. 111.

APPLICATION complaining of infringement of the fundamental rights.

Mahohara de Silva, P.C. with *W.D. Weeraratne* for petitioner,

Mohan Peiris, P.C. with *Nuwanthi Dias* for 1st, 2nd and 3rd respondents.

Romesh Samarakkody for 5th respondent.

Senany Dayaratne for 6th respondent.

Harshika De Silva, S.C. for 7th respondent.

Cur.adv.vult.

July 2nd, 2008

DR. SHIRANI BANDARANAYAKE, J.

The petitioner, who was the Managing Director of Ranbima Janitorial Services (Pvt.) Limited, which operated a Janitorial Service in the country at the time material to this application, complained of the violation of his fundamental rights guaranteed in terms of Articles 11, 12(1) and 13(1) of the Constitution due to the conduct of the 1st to 6th respondents. This Court granted leave to proceed for the alleged violation of Articles 11 and 13(1) of the Constitution.

The petitioner's case, as presented by the petitioner, *albeit* brief, is as follows:

The petitioner, a 26 years old bachelor, was living with his parents at his parents' house in Panadura, at the time the incident in question took place. On 06.07.2003 around 12.30 a.m., the 1st, 2nd and 3rd respondents came to his residence and had inquired about a person by the name of Romesh Cooray. At that time, only the petitioner's mother, brother and the petitioner had been present in his house and the petitioner had identified himself as Romesh Cooray.

The 1st respondent had then informed the petitioner that they are arresting him and while the petitioner was getting dressed, the 1st to 3rd respondents had searched his house, but had not found anything incriminating the petitioner.

Soon after the 1st to 3rd respondents had arrested the petitioner and had accompanied him out of his house. A white coloured van had been parked outside his residence, which was driven by a person, who was clad in a white T-shirt. The petitioner believed that the vehicle and the driver did not belong to the police.

The 1st respondent had directed the petitioner towards the said van and instructed him to sit at the back. The 2nd and 3rd respondents also sat with the petitioner whilst the 1st respondent sat in the front seat next to the driver. There were two (2) others seated at the back of the vehicle, whom the petitioner had later identified as the 4th and 5th respondents.

Before they took off, the 3rd respondent had blindfolded the petitioner with a piece of cloth. The vehicle had thereafter travelled for about 25 minutes and when the vehicle stopped, the petitioner was dragged inside a premises and afterwards his blinds were removed. The petitioner realized that he was in a room with the 1st to 5th respondents and he identified the place as the Lunawa Restaurant.

No sooner the blindfolding was removed, the 1st, 2nd and 3rd respondents started assaulting the petitioner with their fists, wooden clubs and a hose pipe, which continued for about 10 minutes. Whilst the petitioner was being assaulted, he was questioned about a house breaking of the residence of the 6th respondent. The 3rd respondent had stated that the petitioner had taken part in the said house breaking and that he had possessed a gun.

The petitioner had denied any involvement in the said housebreaking and had also denied a gun being in his possession. His position had been that the 6th respondent was a rival businessman in Panadura and that there had been a certain amount of rivalry between the two families and this had been well known in the Panadura area.

When the petitioner had denied any involvement in the said house breaking, the 1st, 2nd and 3rd respondents had started assaulting the petitioner and inquiring about the gun. When the petitioner had clearly stated that he does not possess a gun, the 4th respondent had also started kicking the petitioner. The petitioner at this point had fallen on the ground and both the 2nd and 3rd respondents had joined kicking the petitioner on his stomach and head. This had continued for over 15 minutes at which point, the petitioner had feared for his life as the 'assaults were intense and unbearable'. In the circumstances, the petitioner had told the 1st respondent that he would show where he had hidden the gun although there was no gun to show. He told that

he had kept it at his uncle's house as he believed that if he was taken to the uncle's house, he would come to his rescue.

Soon after, the kicking stopped and the petitioner was dragged into the van as he was not in a position to walk. When the petitioner was told to give instructions as to where he had hidden the gun, he gave directions to his uncle's house in Panadura. When they reached the petitioner's uncle's house, the 1st respondent told the petitioner not to reveal about the assault.

The petitioner had nevertheless informed his uncle about the beating and the search of the gun, which he does not possess. At that point the petitioner's uncle had told the 1st respondent to leave the petitioner with him and that he would bring him to the police the next day. However, the 1st respondent had not agreed to the said suggestion and had taken the petitioner in the van to the Lunawa Restaurant owned by the 4th respondent. The 2nd and 4th respondents had assaulted the petitioner inside the same room where he was put earlier for over 30 minutes and had thereafter taken him to the Panadura beach.

Then the petitioner was thrown on to the beach and the 1st and 2nd respondents had assaulted the petitioner for over 15 minutes. The 2nd respondent had taken a cellophane bag filled with petrol and made the petitioner to inhale the petrol fumes from the said bag. While all the aforesaid was happening the 3rd, 4th and 5th respondents were watching the same without rendering any assistance to the petitioner.

Thereafter the 2nd respondent had taken the petitioner to the office of the Special Crimes Division situated at Walana, Panadura, where he was pushed in to a washroom. There, the 1st and 2nd respondents had again assaulted the petitioner and had thrown him under a shower. Thereafter the petitioner was put to a room, where he was kept locked until around 11.00 a.m. in the morning.

The petitioner was brought to the Police Station and at that time his parents were present at the Police Station and the petitioner had informed them about the assault.

The petitioner was kept in the Police Station until around 2.00 a.m. and later he was taken to a Government Medical Officer. Thereafter the petitioner was brought back to the Police Station and was put in a

cell. That particular cell was occupied by another person, namely one Samson Kulatunga. The petitioner had later learned that he had been assaulted on an allegation of housebreaking.

Thereafter the 1st and 2nd respondents had produced the petitioner and the said Samson Kulatunga before the Magistrate, Panadura on an allegation of housebreaking. The petitioner was released on bail in a sum of Rs. 5,000/- (P8 and P9).

After he was released on bail, the petitioner had got himself admitted to the General Hospital, Kalubowila.

The Panadura Police had filed a B Report on 06.03.2003 informing Court of a complaint made by the 6th respondent on 28.02.2003 and the 5th respondent had stated that the petitioner had met him on two occasions armed with a pistol and had inquired from the 5th respondent as to the place where the 6th respondent keeps his valuables and jewellery. However, the respondents had not been able to maintain the Magistrate's Court case No. 24638 at the Magistrate's Court, Panadura as there was no evidence and accordingly the learned Magistrate had discharged the petitioner from the proceedings. Accordingly the petitioner alleged that the aforementioned action had violated his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution.

When this matter was taken for hearing, learned Counsel for the 6th respondent took up a preliminary objection on the basis that the application is time barred and therefore it should be rejected and/or dismissed *in limine*. In the circumstances, before I examine the alleged infringement of the petitioner's fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution, let me consider the submissions of the 6th respondent on the basis of his preliminary objection.

Preliminary objection

The 6th respondent contended that the alleged infringement of the petitioner's fundamental rights by the 1st to 6th respondents had taken place on 06.07.2003, whereas the present application of the petitioner had been filed in this Court only on 11.12.2003. His contention was that, Article 126(2) of the Constitution has made clear provisions to the effect that any application on the basis of an

allegation regarding an infringement of a fundamental right guaranteed in terms of the Constitution, must be made within one month from the alleged infringement and that the petitioner has come before this Court well after the period provided in terms of Article 126(2) of the Constitution. Learned Counsel for the 6th respondent had referred to the decision by Mark Fernando, J., in *Gamaethige* v *Siriwardene and others*[1] in support of his contention.

Learned President's Counsel for the petitioner strenuously contended that the preliminary objection taken by the 6th respondent cannot be sustained for two reasons, Firstly, it was submitted that the 6th respondent has taken the said objection belatedly and after all the Court pleadings were completed. Secondly, it was submitted that the petitioner before filing this application had made a complaint to the Human Rights Commission in terms of Section 13(1) of the Human Rights Commission Act,No. 21 of 1996 and therefore this application cannot be regarded as time barred as that matter was pending at the time this application was made before this Court.

The petitioner filed this application admittedly on 11.12.2003 and the alleged infringement had taken place on 06.07.2003. This application was supported for leave to proceed on 13.02.2004. When leave to proceed was granted, respondents were given four (4) weeks time to file objections. Accordingly, the 6th respondent had filed his objection on 13.07.2004. In the said statement of objections, no preliminary objection regarding the time bar was taken by the 6th respondent. It is not disputed that the said objection was taken for the first time only on 25.06.2007, when this matter was taken for hearing.

The contention of the 6th respondent was that there was no necessity to have raised the said objection in his statement of objections. Learned Counsel for the 6th respondent referred to Rule 45(6) of the Supreme Court Rules of 1990, in support of his contention. The said Rule reads as follows:

> *"Each respondent may file counter-affidavits within fourteen days of the receipt of such notice, with notice to the petitioner and the other respondents. The petitioner may in like manner file a counter-affidavit, within seven days, replying to the allegation of fact contained in any respondent's affidavit."*

Accordingly his position was that the respondent's objection should contain only 'allegations of fact' and that there is no need for matters of law and the issue of time-bar to be specially referred to in the statement of objections.

Rule 45 (6) is contained in Part IV of the Supreme Court Rules of 1990. The said Part IV deals with applications under Article 126. Nevertheless it is to be borne in mind that Rule 45(6) cannot be taken in isolation in this regard, as the other Rules also deal with specific details in filling written submissions, etc., regarding the appeals and applications and that the Supreme Court Rules are not confined to the procedures pertaining to statement of objections, as Rule 45(7) deals with the filing of the written submissions by all parties. According to Rule 45(7),

> *"The petitioner and the respondent shall file their written submissions at least one week before the date fixed for the hearing of the application, with notice to every other party."*

The contents that should be included in the written submissions are specified under the general provisions regarding appeals and applications in Part II of the Supreme Court Rules, 1990. Rule 45(8), refers to the provisions of Part II of the Rules and states that,

> *"The provisions of Part II of these rules shall apply, mutatis mutandis, to applications under Article 126."*

Rule 30(4) specifically deals with the contents of the written submissions of the respondents and states that,

> "The submissions of the respondent shall contain as concisely as possible –
>
> (a) a statement, in reply to the appellant's statement of facts, confining whether, and if not to what extent, the respondent agrees with such statement of facts; and a statement of the other relevant facts, referring to the evidence, both oral and documentary ....;
>
> (b) the questions of law or the matters which are in issue in the appeal;
>
> ....."

Accordingly on a consideration of the aforementioned Rules, it is evident that a preliminary objection should be raised at the time the objections are filed and/or should be referred to in the written submissions that has to be tendered in terms of the Rules. The objective of this procedure is quite easy to comprehend. The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the petitioner's objections are taken along with the objections and/or written submissions filed by the respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the applications could be heard without prejudice to any one's rights. Therefore, as correctly pointed out by the learned President's Counsel for the petitioner, the earliest opportunity the 6th respondent had of raising the aforementioned preliminary objection was at the time of filing his objections and written submissions in terms of the Supreme Court Rules, 1990; as the objections and/or the written submissions should have contained any statement of fact and/or issue of law that the 6th respondent intended to raise at the hearing.

Admittedly, the 6th respondent had not raised the preliminary objection on the ground of the application being filed out of time either in his objections or in the written submissions. In the circumstances, it is apparent that there is no merit in the objection raised by the 6th respondent.

It is not disputed that the petitioner had filed this application on 11.12.2003 complaining of the infringement of his fundamental rights guaranteed in terms of Articles 11,12(1) and 13(1) of the Constitution, which arose out of the incident/s, which took place on 06.07.2003. Admittedly, the petitioner had complained to the Human Rights Commission about the said infringements on 08.07.2003. The petitioner in paragraph 47 of his petition dated 11.12.2003 clearly stated thus:

> *"The petitioner states that he has made a complaint to the Human Rights Commission on 08th July 2003 against the aforesaid unlawful conduct of the respondents and the inquiry in respect of the same is pending in the Human Rights Commission. The petitioner annexes hereto a copy of the*

letter issued by the Human Rights Commission marked P11 in proof thereof."

The document marked P11 is issued by the Human Rights Commission of Sri Lanka, which refers to the complaint made on behalf of the petitioner on 08.07.2003. Accordingly, a complaint had been made to the Human Rights Commission within one month from the date of the alleged incident. Section 13(1) of the Human Rights Commission of Sri Lanka Act, No. 21 of 1996, deals with the computation of time for the purpose of Article 126 of the Constitution. This section reads as follows:

"Where a complaint is made by an aggrieved party in terms of Section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution."

Considering the aforementioned circumstances, it is clear that the petitioner had complied with the provisions laid down in Section 13(1) of the Human Rights Commission Act and had complained to the Human Rights Commission within one month of the alleged infringement of his fundamental rights. Further, when he had filed the present application before this Court on 11.12.2003, the inquiry before the Human Rights Commission had been still pending.

In the circumstances, it is quite clear that the petitioner had filed his application before this Court within the stipulated time frame in terms of Article 126(2) of the Constitution.

For the reasons aforesaid the preliminary objection raised by the learned Counsel for the 6th respondent is overruled.

I would now turn to examine the alleged infringement of the petitioner's fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution.

Alleged infringement of Article 11 of the Constitution

As stated earlier the petitioner's complaint was that he was brutally assaulted by the 1st to 3rd respondents. Since the petitioner's version was stated earlier, let me now turn to consider submissions made by the 1st to 3rd respondents.

According to the submissions made, at the time material to this application, the 1st respondent was assigned the task of investigating into the robbery of the 6th respondent's residence and was stationed in the Special Crimes Unit of Panadura, Walana Police Station. This was, according to the 1st respondent, as the officers of the Panadura, Walana Police were not successful in the investigations. The 2nd and 3rd respondents had assisted the 1st respondent in the said investigations.

According to the 1st respondent, the 6th respondent had made a complaint on 28.02.2003 of a robbery at his residence of valuables amounting to approximately Rs. 450,000/-. In the course of his investigations, the 1st respondent had received information from the 5th respondent that the petitioner had sought his assistance to burgle the residence of the 6th respondent, as he was 'familiar with the' 6th respondent and his family. In relation to the said assistance, the petitioner had offered a sum of Rs. 50,000/- to the 5th respondent and although the 5th respondent had not participated in the said robbery he had been aware of the robbery and that the petitioner was responsible for the said robbery.

On the basis of this information, the 1st respondent had arrested the petitioner at his residence on 06.07.2003. The petitioner was informed of the reasons for his arrest, he was questioned inside the van and was taken to the Police Station, where he was handed over to the officers to be produced before the Judicial Medical Officer. After being examined by the Government Medical Officer, the petitioner was brought back to the Police Station and thereafter produced before the learned Magistrate. Accordingly the 1st respondent had categorically denied the allegations levelled against him by the petitioner.

The petitioner was examined by the Assistant Judicial Medical Officer of the Teaching Hospital, Colombo-South on 07.07.2003, after the petitioner was admitted to the said hospital on 06.07.2003. The Medico-Legal Report deals with several injuries and the

conclusions and opinion refer to the nexus between the said injuries and the history given by the petitioner. In the circumstances, I give below the relevant portions of the Medico-Legal Report, which deal with the history given by the petitioner, the injuries on examination and the conclusion and opinion of the Judicial Medical Officer, who examined the petitioner.

"**History given by the patient**"

As said by the patient on 06.07.2003 around 12.15 a.m. three (3) police officers came to the place, said they are from Police – Mirihana and took him to custody. Then put him to a hired private van, blindfolded him and took him away. Later they took him to a house at Lunawa, removed the blind fold. There were 04 people – 03 persons who were said to be of police and a person called Prasanna, the driver of the van. All of them assaulted him. He was assaulted by following ways for about 1 1/2 - 2 hrs. duration.

(1) with a wooden pole

(2) rubber hose

(3) batten

(4) butt of a gun

(5) threw petrol on to the body

(6) asked to breath into a petrol filled polythene bag (face was pushed into the bag)

According to him, he was assaulted on the head, back of the chest, abdomen, elbow and knee joint, soles and thighs. Later he was put into same van, asked to sit on the floor. Then he was taken to a beach. He was asked to kneel down and then assaulted in a similar manner for about another hour.

Then he was put back to the same van, asked to sit on the floor and brought back to the same house. After that the driver of the van left the scene. The other three assaulted him in the same way as the previous two episodes ..."

Examination of Injuries

1. A contusion, tender and bluish colour measuring 5x6c.m. in size lying over the left buttock.
2. Tenderness over both soles. No visible injuries.
3. Tramline contusion on right lower shin placed on the anterior aspect each in measuring 6x0.5 c.m. in size and lying 2 c.m. apart placed obliquely with lateral end being above the medial end.
4. Contusion, bluish in colour, lying on the medial aspect of right ankle, measuring 6x8 c.m. extending to the sole.

....

Conclusion and Opinion

1. Injury No. 1 is due to blunt trauma and could have been caused by one or more methods of assault described by him. The colour and appearance of the injury is compatible with the time period given by the victim.
2. Injury No. 3 is due to blunt trauma caused by a weapon with a cylindrical striking surface. The colour and appearance is compatible with the time period given by the victim.
3. Tenderness over both soles have caused by blunt trauma. The absence of visible injuries does not exclude blunt force trauma.
4. Injury No. 4 is due to blunt trauma. The colour and appearance is compatible with the period given by the victim."

The medical evidence thus supports the version placed before this Court by the petitioner with regard to the violation of his fundamental rights guaranteed in terms of Article 11 of the Constitution.

Learned President's Counsel for the 1st respondent contended that not every unkind act or punishment will constitute torture, but

only the act that is qualitatively of a specially reprehensible kind would meet the necessary requirement to satisfy Article 11 of the Constitution. Accordingly his contention was that the conduct complained of by the petitioner falls short of the qualitative standard of reprehensible conduct required to meet for the grant of a declaration in terms of Article 11 of the Constitution.

This submission of the learned President's Counsel that a particular act should be 'qualitatively of a specially reprehensible kind' comes out clearly in the words of Resolution 3452(xxx) adopted by the General Assembly of the United nations at its 30th session in 1975. Article 1 of that Resolution reads as follows:

> *"For the purpose of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he committed, or intimidating him or other persons."*

The kind of torture in terms of Article 7 of the International Covenant on Civil and Political Rights had been considered in *Collins* v *Jamaica*(2), where a man, who was found guilty of murder and was in death row had been subjected to search during which he was injured and forced to undress in the presence of other inmates, wardens, soldiers and policemen. He was also subjected to severe beatings, when he had invoked his rights under prison legislation. It was held that the assault by the prison wardens and subsequent injuries were violative of Article 7 of the International Covenant on Civil and Political Rights.

Article 7 provides that *'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.* It also states that *'in particular, no one shall be subjected without his free consent to medical or scientific experimentation'.*

Article 11 of the Constitution, which deals with the freedom from torture, is as follows:

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