THE

Sri Lanka Law Reports

Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

[2009] 2 SRI L.R. - PART 14

PAGES 365-392

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Co. Printers (Private) Ltd.

Price: Rs. 25.00

DIGEST

November 26th 2009

ANIL GOONERATNE, J.

This is an application for a Writ of Mandamus seeking the relief as in prayer (b) of the Petition. The said prayer reads thus:

> Issue a mandate in the nature of a Writ of Mandamus directing the Respondents to grant Petitioner the said refund of excess input tax of Rs. 17,726,294/- lawfully due in terms of Section 22 of the GST Act read with Section 22(4) of the VAT Act.

The entire case would rest on output tax, input tax and taxable activity in terms of Goods and Services Tax Act. In brief the Petitioner seeks a refund of excess of input tax. It is pleaded that the Petitioner Company carrys on a business of producer, manufacturer, supplier, exporter, importer, buyer, seller, marketer, distributor, franchiser, franchisee and dealer. It is evident that the Petitioner Company is involved in a variety of business activities.

At the hearing before me and as stated in the written submissions of the Petitioner for which there was no contrary view expressed by the Respondent's, Output tax would be the GST charged from at the time of supply of goods and services of those registered persons engaged in a taxable activity during a taxable period (Section 20). Input tax as in Section 76 of the Act is GST paid on purchase of goods or services from an another registered person to be used in carrying on a taxable activity and the GST paid on importation of goods which are used by such for the purpose of making taxable activity.

The Petitioner in order to demonstrate his point of view stress the following:

1. Section 22(2) of the GST Act provides that at the end of each taxable period, a registered person is entitled to a credit for the total input GST paid by him and this credit being effected by allowing him to deduct such amount from any output tax that is due from him.

2. Section 21(1) of the GST Act requires that every registered person shall furnish to the Commissioner General of Inland Revenue on or before the last day of the month after the expiry of the taxable period, in the specified format, a return of his supplies during that taxable period, indicating therewith the amount of tax payable by or the refund due to the registered person.

3. If the return so furnished under Section 21 of the GST Act indicates that the input tax exceeded the amount of output tax, in terms of Section 22(4) such excess of such input tax, **shall be set off against the output tax of the next succeeding taxable period** and so on, and however any excess input tax, if not, so **set off in the period of six months from the end of period in which such exceed first arose, where it not so refunded, shall be refunded**, upon application made to Commissioner General and, **further interest as specified under Section 59(1) of the GST Act is also payable on the excess input tax commencing on the expiration of two months from the end of such taxable period** in which the application for the refund was made and ending on the date of refund.

The Petitioner's GST returns were submitted as follows:

(a) P4 return for the period 01.01.2002 to 31.03.2002. It was acknowledged on 2.5.2002 by the Inland Revenue Department.

(b) P5 return for the period 01.04.2002 to 30.6.2002. It was acknowledged on 31.07.2002 by the Inland Revenue Department.

(c) P6 return for the period 01.07.2002 to 31.07.2002. It was acknowledged on 30.08.2002 by the Inland Revenue Department.

The Petitioner further support their case in the pleadings as follows:

1. Section 29 of the GST Act provides that where the **Assessor does not accept a return** furnished by any person under Section 21 of the GST Act for any taxable period and makes as assessment or an additional assessment for that taxable period, **he shall communicate to such person by registered letter why he is not accepting the return**.

2. The Petitioner states that to date it had not received any communication rejecting the aforesaid GST returns or issuing revised assessments for the taxable periods of **1st January 2002 to 31st March 2002, 1/4/2002 to 30/6/2002 and 1/7/2002 to 31/7/2002.**

3. The Section 58(1) of the GST Act requires any Application for refund of any tax paid in excess during a taxable period by a registered person to be made **within three years immediately after the end of the said taxable period**.

By P8 Petitioner made an application for refund and P8 was acknowledged on 30.12.2003. Paragraphs 31 to 34 of the petition gives details of requests made to the Inland Revenue Department for refund of GST by the Petitioner.

The position of the Respondents is that they do not deny paragraph 24 of the affidavit of the Petitioner. i.e. Respondents do not deny rejecting GST returns of the Petitioner or of issuing revised assessments for the taxable period in question. However Respondents state GST refunds can be made only after an audit is completed. In the objections of the Respondents it is stated, with the introduction of the Inland Revenue (Special Provisions) act No. 10 of 2003, these audits were halted and as a result there were instances where GST refunds were delayed. Respondents further plead according to the details furnished by the Petitioner (vide paragraph 11 of affidavit of 1R) the local purchases made by the Petitioner appeared to be exceptionally high when compared with the taxable supply, requiring a detailed audit to be conducted.

The learned Deputy Solicitor General who appears for the Respondent does not deny the fact that refunds can be made, but submit to court that it could be done after an audit had been carried out. Reference is made to Section 58(1) of the Vat Act. It reads thus *"where a registered person makes an application for a refund of any tax or any penalty paid by him in excess during the taxable period and satisfies the Commissioner General that such person has paid any tax or any penalty in excess, of any amount which he was liable to pay or that period, such person shall be entitled to a refund of the amount paid in excess, subject to provisions of sub section 3".*

The learned Deputy Solicitor General having submitted the above emphasis that the law does not contemplate an automatic refund but require the 1st Respondent to make an objective decision and also state that factual matters involving the verification of figures and values cannot be gone into by court. I see no reason to disagree with the views of the learned

Deputy Solicitor General. A writ of mandamus would not lie if there is no public/statutory duty owed to the Petitioner. However I am compelled to observe that the Department of Inland Revenue is under a duty to carry out a proper Audit and decide whether a refund should be made. This seems to have not happened for a very long time and had caused much inconvenience to the Petitioner, which could also result in a pecuniary loss to the Petitioner over the year.

The relief sought by Mandamus as in sub paragraph (b) of the prayer to the Petition refer to the refund of excess Input Tax of Rs. 17,726,294/= lawfully due. This Court cannot decide on the question of the said sum and cannot give a direction to refund or pay a particular sum as in the prayer to the Petition. Even if the Petitioner should have the benefit of the above provisions of the law this court cannot give a direction by way of Mandamus to refund a particular sum unless an audit is done and it is beyond any doubt that in terms of the law the Petitioners are entitled to the said sum referred to in paragraph 'b' of the prayer to the petition. Further the Commissioner General the 1st Respondent should be satisfied in terms of Section 58(1) that the ingredients of the said Section are fulfilled.

In all the above circumstances I am reluctantly compelled to refuse the Petitioner's application. Application is dismissed without costs. However dismissal of this application is no bar for the Respondents to conduct an audit and make a refund upon being satisfied as in Section 58(1) of the said Act.

Application dismissed.

ASSOCIATED MOTORWAYS PLC VS. COMMISSIONER GENERAL OF INLAND REVENUE

COURT OF APPEAL
SRISKANDARAJAH, J.
LECAMWASAM, J.
CA 893/2007 (WRIT)
SEPTEMBER 8, 2009
OCTOBER 9, 2009

Writ of Certiorari – Stamp Duty Act – 43 of 1982, Section 18, Section 12, Section 21, Section 71 Stamp Duty (Sp Prov) Act 12 of 2006 – Section 3, Section 10 – Stamp duty on bonus shares – Finance Act 11 of 2002 – Section 15 – What is the prescribed rate? Factors to be taken into consideration in determining the duty? Market or Par Value – Deviation from the earlier circular?

The Petitioner Company resolved to capitalize part of the reserves standing to the share premium account and distribute same to the shareholders as "Bonus Shares".

The Commissioner of Inland Revenue issued a notice in terms of Section 10 of the Stamp Duty (Sp Pro) Act determining the stamp duty on the bonus issue of share was payable at the value of Rs. 170/- per share being open market value and a penalty.

The petitioner challenged the said order and contended that the valuation of the shares ought to have been determined on the par value specified in the share certificate and not the market value.

Held

(1) Stamp duty imposed under the Stamp Duty Act 43 of 1982 is on the market value of the share. Finance Act 11 of 2002 which came into operation on 01.05.2002 abolished the Stamp Duty imposed on any instrument, by this provision no stamp duty was imposed on any "Share instrument" issued in consequent to a share transaction.

(2) The Stamp Duty (Sp Pro) Act 12 of 2006 which came into operation on 01.04.2006 repealed Part III of the Finance Act 11 of 2002 and Re-imposed Stamp Duty. The re-imposition on share certificates reverts the imposition of stamp duty back to the Stamp Duty Act where Section 2 of the Stamp Duty Act states that, there shall be charged on every instrument a stamp duty at the prescribed rate. The Stamp Duty (Sp Prov) Act 12 of 2006 in Section 3 provides that there shall be charged a stamp duty as such rate the Minister many determine by order published in the gazette on every instrument.

(3) The Minister's power under the Stamp Duty (Sp Prov) Act is only to determine the rate from time to time but the basis of changing the stamp duty is based on the Stamp Duty Act (Section 13).

Per Sriskandarajah, J.

"Therefore the value of a share cannot be interpreted anything other than the market value of the share as interpreted in the Stamp Duty Act."

(4) The market value determined by the Commissioner General becomes irrelevant in relation to public quoted companies, but when stamp duty was imposed on special instruments issued by all Companies the stamp duty payable on any share certificate issued is based on the aggregate value of such number of shares. The word value cannot be interpreted as transacted value and par value or face value and it has to be interpreted as the meaning given in the Act itself.

APPLICATION for a Writ of Certiorari.

K. Kanag Iswaran PC with *Nigel Batholameusz and Shivaan Kang – Iswaran* for petitioner.

Farzana Jameel DSG with *Nirmalan Wigneswaran SC* for the respondents.

November 09 2009

SRISKANDARAJAH, J.

The Petitioner Company at a meeting of the Board of Directors held on 5th September 2006 resolved to capitalize

part of the reserves standing to the Share premium Account and distribute same to the share holders of the Company in the proportion of five (5) new shares for every one (1) held. Thereafter following the appropriate procedure and after obtaining necessary approvals share certificates dated 18th October 2006 were issued.

The Petitioner submitted that as advised by the tax consultants, the Company forwarded a cheque for Rs. 2, 318,650.00, for onward transmission to the Department of Inland Revenue being 0.5 per cent of the aggregate value of the number of shares issued by way of the bonus issues. On the 6th of December 2006 the Deputy Commissioner of Inland Revenue issued a notice (marked P12) in terms of Section 10 of the Stamp Duty (Special Provisions) Act No. 12 of 2006 determining that Stamp Duty on the bonus issue of shares was payable at the value of Rs. 170.00 per share being open market value as determined by the Colombo Stock Exchange. The said notice imposed a 10% penalty for the delay in payment and returned the cheque for Rs. 2,318,650.00. When the Petitioner instituted proceedings in CA Writ Application No. 826/2007 the Senior State Counsel informed court that the document P12 was not an assessment, on the undertaking that a notice in terms of section 10 will be issued the Petitioner withdrew the said application with liberty to file a fresh application. On 17.10.2007 the Petitioner received a stamp duty assessment sheet dated 12th October 2007 (Marked P17 (b)). The said Stamp Duty Assessment Sheet (P17b) assessed the stamp duty payable on the issue of bonus shares as Rs. 39,417,050.00 and it has imposed a penalty of Rs. 11,129,520/- representing 30% of the alleged balance stamp duty payable.

The Petitioner in this application is seeking a writ of certiorari to quash the stamp duty assessment dated 12th

October 2007 marked P17b and to issue a writ of mandamus directing the 1st Respondent to accept the sum of Rs. 2,318,650.00 as stamp duty payable by the Petitioner and to waive any penalty imposed for delayed payment.

It is important to consider the background on the imposition of the stamp duty on 'specified instrument'/'share certificate'.

The Stamp Duty Act No. 43 of 1982 certified on the 14th of December 1982 provided the instruments chargeable with duty in Section 2. It reads as follows 2. There shall be charged on –

(a) Every instrument which is executed, drawn or presented in Sri Lanka:

(b) .....

(c) .....

(d) .....

A stamp duty at the prescribed rate. Different rates may be prescribed in respect of different classes or categories of instruments.

Chapter VII of the said Act provides for Valuation for Stamp Duty:

Section 15 of the Act under the said Chapter provides:

15. (1) Where any property is conveyed by an instrument, the stamp duty with which such instrument is chargeable shall be calculated on the value of the property conveyed.

(2) .....

(3)……

Section 71 defines the value as follows:

"Value" with reference –

(a) to any property (other than immovable property which is gifted) and to any date, means the price which in the opinion of the Assessor, that property would have fetched in the open market on that date.

The above sections provide that any property conveyed by an instrument, the stamp duty with which such instrument is chargeable shall be calculated on the value of the property conveyed. The value of the property conveyed. The value of the property is the market value of the property.

This Act in relation to certain transactions has specifically provided that the chargeable stamp duty is on the consideration set out in such instrument (Section 18 & 21)

It is evident from the above provisions that when the above law was in operation the Valuation on Stamp duty on 'specified instrument/share certificate' was based on the aggregate market value of the number of the shares issued.

The Finance Act No. 11 of 2002 which came into operation on 8th July 2002 in part III provided for abolition of certain levies or stamp duty with effect from 1st May 2002. Section 15 of the said Act provides:

15. No stamp duty shall be imposed or paid under the Stamp Duty Act No. 43 of 1982 (hereinafter is this part referred to as the "principal enactment") on any instrument executed or any document presented or filed on or after the date on which the provisions of this part shall come into force.

By the above provisions of law the Stamp duty on 'specified instrument/share certificate' was not levied or paid.

The Stamp Duty (Special Provisions) Act No. 12 of 2006 which came into operation on 1st April 2006 repealed Part III of the Finance Act No 11 of 2002 and Re-Imposed Stamp Duty. Section 3 provided for the change of Stamp duty on "specified instruments" as such rates as may be determined by the Minister and published in the Gazette.

Section 3 of the said Act provides;

3. (1) From and after the date of the coming into operation of this Act, there shall be charged a duty (hereinafter to be called "stamp Duty") at such rate as the Minister may determine by Order published in the Gazette on every "specified instrument" –

(a) executed, drawn or presented in Sri Lanka; or;

(b) executed outside Sri Lanka being an instrument which relates to property situated in Sri Lanka, at the time such instrument was presented in Sri Lanka.

(2) Different rates may be determined in respect of different classes or categories of instruments.

(3) .....

(4) .....

"Specified instrument" – is defined is Section 4 of the Stamp Duty (Special Provisions) Act, to mean: a share certificate on new or additional issue or on transfer or assignment;

The relevant Minister by order Under Section 3 published in the Government Gazzete No. 1439/1 dated 3rd April 2006 (marked P8) determined the Stamp duty chargeable, with effect from 04th April 2006 on every specified instrument.

The said Order provides:

On the issue, transfer or assignment of any share of a company, other than a quoted public company on the market value determined by the Commissioner General of Inland Revenue on the date of such issue, transfer or assignment of such share;

For each Rs. 1,000 or part thereof of such market value of the value of the shares

The above Order was rescinded by the Minister of Finance and planning on the 6th of October 2006 by an Order published in the Gazette No. 1465/19 dated 5th October 2006 marked P9. The said Order determined the Stamp duty chargeable, with effect from 06th October 2006 on every specified instrument. It states: Any share certificate issued consequent to the issue, transfer or assignment of any number of shares of any company,

For every Rs. 1,000 or part thereof of the aggregate value of such number – Rs. 5.00

It is common Ground that stamp duty is payable to the 'share certificate' issued by the Petitioner but what was in dispute was the valuation of the shares issued for the purpose of stamp duty. The Petitioner's contention is that the valuation of the shares ought to have been determined on the par value specified in the share certificate and not the market value. The Petitioner submitted that there is a paradigm shift on the basis of duty levy between the order published in

Gazette No. 1439/1 dated 3rd April 2006 (marked P8) and the Order published in Gazette No. 1465/19 dated 5th October 2006 (marked P9) which replaced it. Therefore the value of the share specified in P9 cannot be the market value of the share as specified in P8. The Petitioner indentified four important deviations;

Firstly, in 'P9' stamp duty is levied on the "share certificate" issued consequent to the issued, transfer or assignment of any number of shares.

Secondly, "P9" included "any company" and not limited to a company other than a quoted public company.

Thirdly, the words "market value" finds no place in the gazette "P9"as opposed to their presence in "P8".

Fourthly, the "Commissioner General of Inland Revenue" has no role in respect of "P9" as "aggregate value of such number" of shares is easily determinable from the "share certificate" as opposed to the "market value" having to be determined by the Commissioner General as in "P8".

In relation to the first deviation mentioned by the Petitioner I do not see any deviation from the Gazette P8 and P9. Gazette P8 states: Stamp duty shall be chargeable on **every instrument specified in any entry in Column I.** Column I has the following: On the issue, transfer or assignment of any share of a company, other than a quoted public company on the market value determined by the Commissioner General of Inland Revenue on the date of such issue, transfer or assignment of such share;

Gazette P9 states: Stamp duty shall be chargeable on **every specified instrument specified in any entry in Column I.** Column I has the following: Any share certificate

issued consequent to the issue, transfer or assignment of any number of shares of any company.

In these two gazettes the stamp duty is chargeable on the specified instrument specified in Column I. Even though in Column I of "P8" do not specify an instrument but it provides for the issue, transfer or assignment of any share of a company. The issue, transfer or assignment of any share of a company can only be done by means of a document called 'Share certificate' and it is the only instrument that gives a prima facie marketable title to the shares. Therefore the stamp duty chargeable under "P8" in also on the **instrument that reflects the** issue, transfer or assignment of any share of a company. Therefore I see no difference or deviation between the two gazette "P8" and "P9" on this matter.

Second deviation shown by the petitioner between "P8" and "P9" is a policy change. The Government at the time of re-imposing stamp duty on specified instruments restricted the imposition of stamp duty to specified instruments issued by companies other than a quoted public company. Thereafter the Government has decided to extend it to all companies and it was reflected in "P9". But this does not have any bearing on the stamp duty payable on the specified instrument.

I will now deal with the **third and forth** deviation shown by the Petitioner between "P8" and "P9". The words "market value" finds no place in the gazette "P9" as opposed to their presence in "P8" and the "Commissioner General of Inland Revenue" has no role in respect of "P9".

It is important to place emphasis not on the "market value" mentioned in P8 but on the words "market value determined by the Commissioner General of Inland Revenue" As I have observed above that the stamp duty in "P8" was imposed on

specified instruments on the issue, transfer or assignment of any share of a company, other than a quoted public company. The market value of a share of a quoted company on a given date is determined by the stock exchange. But in relation to the market value of the share of a company other than a quoted company can only be determined by a cumbersome process of calculation and it can be often disputed therefore the authorities has vested the power to determine the market value by the Commissioner of Inland Revenue. But by "P9" when the stamp duty was imposed on specified instruments issued by all companies including quoted public companies the Commissioner General cannot determine the market value of a share of a quoted public company as is determined by the Stock Exchange.

The market value determined by the Commissioner General becomes irrelevant in relation to quoted public companies hence "P9" has only stated that the stamp duty payable on any share certificate issued is based on the aggregate value of such number of shares. It has neither mentioned the market value nor the determination of the Commissioner. The value is defined in the Stamp Duty Act as the market value hence the aggregate value of such number of shares can only be interpreted as aggregate market value of such number of shares. The word value in the above circumstances cannot be interpreted as transacted value or per value or face value and it has to be interpreted as the meaning given in the Act itself unless the context otherwise provide. It can be seen under the Chapter of Valuation of Stamp Duty in the Stamp Duty Act in Section 18. "stamp duty is chargeable on consideration set out in such instrument" Section 21 states: certain agreement or contract for the conveyance or transfer of any business or share of a business to be chargeable with same ad valorem duty i.e. on the value shown on the face of the deed of transfer.

If one analyze the background of the imposition of the stamp duty on "Share certificate", the stamp duty imposed under the Stamp Duty Act, No. 43 of 1982 is on the market value of the share transacted. Finance Act No. 11 of 2002 which came in to operation on 1st May 2002 abolished the stamp Duty imposed on any instrument. By this provision no stamp duty was imposed on any "Share certificate" issued in consequent to a share transaction. The Stamp Duty (Special Provisions) Act No. 12 of 2006 which came into operation on 1st April 2006 repealed Part III of the Finance Act No 11 of 2002 and Re-Imposed Stamp Duty. The re-imposition of Stamp duty on share certificate reverts the imposition of stamp duty back to the Stamp Duty Act. The Stamp Duty Act in Section 2 provides; there shall be charged on every instrument a stamp duty at the prescribed rate. The Stamp Duty (Special Provisions) Act No. 12 of 2006 at Section 3 provides; there shall be charged a stamp duty as such rate the Minister may determine by order published in the Gazette on every specified instrument. The Ministers power under the Stamp Duty (Special Provisions) Act is only to determine the rate from time to time by notification but the basis of charging the Stamp Duty on instruments is based on the Stamp Duty Act. If there is an inconsistence only The Stamp Duty (Special Provisions) Act will prevail over the Stamp Duty Act (Section 13) Therefore the value of a share cannot be interpreted anything other than the market value of the share as interpreted in the Stamp Duty Act Hence there is no illegality or impropriety in the stamp duty assessment sheet dated 12th October 2007 (Marked P17 (b)).

For the above reasons this court dismisses the application of the Petitioner without costs.

LECAMWASAM, J. – I agree.

Application dismissed.

MENDIS VS. WIJESURIYA AND OTHERS

COURT OF APPEAL
ROHINI MARASINGHE, J.
SARATH DE ABREW. J.
CALA 493/2005 (LG)
D.C. AVISSAWELLA 23044/L
OCTOBER 26, 2009

Civil Procedure Code – Rei Vindicatio Action – Section 93 (1), Section 93 (2) – Amendment of pleadings – amending the schedule to be in conformity with Commissioner's Plan – Refusal?

The plaintiff-petitioner first sought to amend the plaint before the first date of trial (Section 93 (1)). The amendment was sought after the Commissioner tendered the plan. This was allowed, but it had not been filed on the day fixed for the amended plaint; however Court rejected the amended plaint when it was subsequently filed.

After answer – replication – another application was made to amend the plaint – Section 93 (2) – on the first date of trial. This was refused. Leave being sought the Court of Appeal granted leave.

Held

(1) The petitioner intends to amend the schedule to the plaint to be in conformity with the Commissioner's plan.

Irremediable injustice would be caused to the plaintiff-petitioner if such amendment is not allowed.

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

Ranjan Mendis with *A Kandambi* for accused appellant

Haripriya Jayasundera S.S,C for *A.G*

Cur.adv.vult.

October 26, 2009
ROHINI MARASINGHE, J.

The plaintiff - petitioner had made this leave to appeal application to have the order dated 29 -11 set aside. This court

made order and granted leave on 5-6-2007. The facts are briefly as follows:

The plaintiff-petitioner had sought to amend the plaint before the first date fixed for trial under section 93(1) of the CPC. The plaintiff-petitioner had obtained a commission and based on the said commission plan the Petitioner had sought permission of court to amend the plaint. The court had allowed that application. But on the day fixed the draft amended plaint had not been ready. And when it was subsequently filed it had been rejected on 4-3-2005.

A date for answer had been given and after the answer the replication also had been filed. The second application to amend the plaint had been made under section 93(2). The amendment had been sought on the first day of trial.

According to the draft plaint we observe that the Petitioner intends to amend the schedule to the plaint to be in conformity with the commission plan. In a rei vindication action such as this the identification of the land is a fundamental requirement.

We are of the view that grave and irremediable injustice would be caused to the plaintiff – petitioner if such amendment is not allowed.

We are also of the view that plaintiff-petitioner has not been guilt of laches.

The order dated 29-11-2005 is set aside. The Learned District Judge is directed to accept the amended plaint.

The plaintiff-Petitioner should deposit a sum of Rs. 5000 payable in favour of the defendants as costs, and such should be paid on or before the next hearing of the case.

SARATH DE ABREW, J. – I agree.

Appeal allowed.

DRIVER GUNE VS. REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW, J.
ABEYRATNE, J.
CA 142/2005
JUNE 1, 2, 2009
HC AMPARA HC/HMP/905/2004

Penal Code – Murder – Evidence Ordinance Section 25 – Confessionary statement as substantive evidence to impeach the evidence – confession? Permitted? Circumstantial evidence – principles – Criminal Procedure Code – Section 122 (1) – Exculpatory statements?

The accused-appellant was convicted of the murder of one N and was sentenced to death. In appeal it was contended that confessionary statement of the accused had been led as substantive evidence and as well as to impeach the evidence of the appellant.

Held

(1) The admission of a fact or of a bundle of facts, from which guilt is directly deductible, or which within and of themselves import guilt may be denominated a confession but not so with the admission of a particular act or acts or circumstances which may or may not invoke guilt and which is dependant for such result upon other facts or circumstances to be established.

(2) A statement made by an accused to a Police Officer in the course of the investigation under Section 122 (3) of the Criminal Procedure Code may be used to contradict him provided the statement is not a confession within the meaning of Section 25 of the Evidence Ordinance. The confessionary statement of the appellant - made to the police officer was used to discredit the appellant.

APPEAL from the judgment of the High Court of Ampara.

Cases referred to:-

(1) *Q vs. Anandagoda* - 64 NLR 73 at 80

(2) *K vs. Emanis* - 42 NLR 166

(3) *K vs. Kiriwastu* – 40 NLR 289

(4) *Seyadu vs. K* – 53 NLR 251

(5) *Regina vs. Batcho* – 57 NLR 100

Shanaka Ranasinghe with *Saraj Rajapakse* for accused-appellant.

Dappula de Livera DSG for A. G.

June 16th 2009

SISIRA DE ABREW J.

The accused appellant (the appellant) in this case was convicted of the murder of a man named Dewala Wattegedara Nandoris and was sentenced to death. This appeal is against the said conviction and the sentence.

Facts of this case may be briefly summarized as follows:

On 29.6.2002 around 10.00 a.m. the appellant made an accusation to the deceased that he had stolen his arrack. Thereupon the deceased who apparently did not accept the said allegation took an axe and pushed the appellant towards a nearby booklet. When the said brawl came to an end the appellant told the deceased to examine his horoscope. This was the motive suggested by the prosecution for the murder of the deceased. The appellant, the deceased, Premarathne and Rajapakshe were in the habit of spending the nights during the cultivation season in their huts in the paddy fileds in order to protect their cultivation from wild elephants. Around 8.30 p.m. on 29.06.2002 when Premarathne and Rajapakshe were in their huts, they heard the deceased shouting in the following language: "Gune came to shoot me." Soon thereafter they heard gunfire from the direction of the deceased's hut. Two hours later when they went to the deceased's hut they found the deceased lying fallen on the ground with bleeding injuries. Around 11.00 p.m. the appellant came to Suneetha

Manike's house and requested the motor cycle to go to the pharmacy and thereafter he went to Damana town with one Gunathilake but he did not go to the pharmacy. He was seen going towards the Police Station. Police officer after recording a statement from the appellant came to the scene of offence and found the deceased lying fallen on the ground with bleeding injuries. During the investigation the appellant who was in the custody of the Police escaped but he was later arrested on the same day (30.06.2002). The investigating officer in consequence of a statement made by the appellant recovered a gun and five cartridges.

Learned Counsel for the appellant urged following grounds as militating against the maintenance of the conviction.

1. Concessionary statement of the appellant which is prohibited in terms of Section 25 of the Evidence Ordinance has been led as substantive evidence and as well as to impeach the evidence of the appellant.

2. Learned trial Judge has not considered the principles governing cases of circumstantial evidence.

The appellant in his evidence under oath denied the charge. Learned Prosecuting State Counsel in the course of the cross examination produced following statements of the appellant made to the Police to impeach the credibility of the appellant.

1. Whilst I was talking to Molle Malli I took the gun which was on my Shoulder to my right hand. This statement was produced as P4. Molle Malli is the deceased in this case.

2. Just then when Molle Malli stood up and tried to sit, the gun fired and it struck on the stomach of Molle Malli. This statement was produced as P5.

3. I came home and without telling anybody at home kept the gun at home and came to the Police Station. This was marked as P6.

Learned DSG contended that these statements were not inculpatory statements and were exculpatory statements. He contended that in any event improper reception of evidence is not a ground to quash the conviction. He further contended that reception of the said evidence has not caused prejudice to the accused.

I shall now advert to the contentions raised by both Counsel. The most important question that must be decided is whether P4, P5 and P6 are confessionary statements or not. In this regard I am guided by the judgment of the Privy Council in *Queen vs. Anandagoda*[1] at 80. The Privy Council in interpreting the definition of a confession stated thus: "We take it that the admission of a fact, or of bundle facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession, but not so with the admission of a particular act or acts or circumstances which may or may not invoke guilt, and which is dependent for such result upon other facts or circumstances to be established."

Prosecution case is that the appellant shot the deceased with his gun and the deceased died due to gun shot injuries. P4, P5 and P6 clearly suggest that the appellant shot the deceased. I hold that these statements are confessions within the meaning of Section 25 of the Evidence Ordinance.

Learned Prosecuting State Counsel in the course of the cross examination of the appellant used the above statements to discredit the appellant. The course adopted by the learned State Counsel has offended Section 25 of the Evidence

Ordinance. In this connection I would like to consider certain judicial decisions. In *King vs. Emanis*[2] De Krester J held: "A statement made by an accused person to a Police Officer in the course of an investigation under section 122(3) of the Criminal Procedure Code may be used to contradict him provided the statement is not a confession within the meaning of section 25 of the Evidence Ordinance."

In *King vs. Kiriwastu*[3] "A confession made to a Police Officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself."

In *Seyadu vs. The King*[4] Court of Criminal Appeal held: "Under section 25 of the Evidence Ordinance, a confession made to a police officer is inadmissible as proof against the person making it whether as substantive evidence or in order to show that he has contradicted himself. The circumstance that no objection was taken to the reception of such evidence at the time is immaterial."

In *Regina vs. E. W. Batcho* [5] at 100 Court of Criminal Appeal held: "It is contrary to the provisions of section 25 of the Evidence Ordinance to cross-examine an accused person on what are, in effect, the contents of a confessional statement made by him to the Police."

Applying the principles laid down in the above judicial decisions I hold that a confession made to a Police Officer cannot be used as evidence or to discredit the evidence of an accused and that reception of such evidence would vitiate the conviction.

Learned Prosecuting State Counsel in the instant case, used the above concessionary statements of the appellant

made to the Police Officer to discredit the appellant. The learned trial Judge did not give reason to reject the evidence of the appellant. But he has, at pages 328 and 329 used P5 and P6 to discredit the accused. The learned trial Judge has, thereby, offended Section 25 of the Evidence Ordinance. The above procedure adopted by the learned trial judge has caused severe prejudice to the appellant and deprived him of a fair trial. In my view in a criminal trial if the Prosecuting Counsel or the defence counsel tries to lead illegal evidence it is the duty of the trial judge to stop such evidence being led irrespective of the fact that an objection is raised or not. In the instant case the learned trial Judge used illegal evidence led by the learned Prosecuting State Counsel. This, in my view, is sufficient to vitiate the conviction.

For the aforementioned reasons, I set aside the conviction and the death sentence. The next question remains for consideration is whether I should order a retrial or acquit the appellant. I have earlier set out the facts of this case. In my view there is evidence that should be considered by the trial court. I therefore send the case back to the trial court with a direction that the appellant be tried again on the same indictment. I direct the learned High Court of Ampara to hear and conclude the case without delay.

ABEYRATHNE J. – I agree.

Appeal allowed.

Re-trial ordered.

CENTRE FOR POLICY ALTERNATIVE (GUARANTEE) LTD. AND THREE OTHERS (In the matter of a Reference under Article 129(1) of the Constitution)

SUPREME COURT
SARATH. N. DILVA. CI
AMARATHUNGA,J
MARSOOF, J
SOMAWANSA, J AND
BALAPATABENDI, J
S. C. REF. NO. 01/2008
MARCH 17TH, 2008

Constitution – Article 129(1) – Consultative Jurisdiction – The President of the Republic may refer a question of law or fact that has arisen of is likely to arise which is of such a nature and of such public importance, that it is expedient to obtain the opinion of the Supreme Court – He may refer such question to the Supreme Court for consideration and the Court shall report its determination and opinion to the president within the period specified in such reference – International Covenant on Civil and Political Rights

His Excellency the President referred the following two questions in terms of Article 129 (1) of the Constitution to obtain the opinion of the Supreme Court.

1. Whether the legislative provisions cited in the reference that have been taken to give statutory recognition to Civil and Political Rights in the International Covenant, on Civil and Political Rights of the United Nations adhere to the general premise of the Covenant and whether individuals within the territory of Sri Lanka would derive the benefit and the guarantee of rights as contained in the Covenant through the medium of the legal and constitutional processes prevailing in Sri Lanka?

2. Whether the said rights recognized in the Covenant are justifiable through the medium of legal and constitutional process prevailing in Sri Lanka?

Held

(1) The fundamental rights declared and recognized By the Constitution form part the sovereignty of the People and have to be respected, secured and advanced by all organs. The fundamental rights acquire a higher status as forming part of the Supreme Law of the land and cannot be abridged, restricted or denied except in the manner and to the extent expressly provided for in the Constitution.

(2) If and when a law is sought to be made to create an ex-post facto offence, the constitutionality of that law would be considered by the Supreme Court on the basis of the firm guarantee as contained in Article 13(6) that there shall be no enactment of expo facto offence.

(3) Article 27 of the Covenant makes specific reservation for customary and special laws that are deeply seated in the social milieu of the county. It could not be contended that the provisions of Article 16 (!) of the Constitution that only provides for the continuance in force of the already operative law could be considered to be inconsistent with the Covenant only on the ground that there are certain aspects of Personal Law which may discriminate women. The Covenant should not be considered as an instrument which warrants the amendment of such Personal laws.

(4) In the case of ministerial acts of the President proceedings could be instituted against the Attorney-General in terms of Article 35(3) of the Constitution. However, there is no such remedy in respect of acts performed as Head of State.

(5) Article 121 (1) of the Constitution empowers any citizen to challenge the constitutionality of a Bill within one week of the Bill being presented to Parliament. Upon such challenge, the Supreme Court is empowered in terms of Article 123 to determine whether any provision of the Bill is inconsistent with the Constitution. There is no provision is the Covenant which mandates judicial review of the legislation.

(6) The process of impeachment of Superior Court Judges in terms of the provisions of Article 107 of the Constitution which provides for impeachment before the Parliament of any Judge of a Superior Court, read with Rule 78 of the standing Orders of Parliament provides for inquiry to be held by a Panal consisting of Members of Parliament.

(7) In terms of the Article 3 of the Constitution, the sovereignty is reposed in the people and is inalienable, and it cannot be contended that any group or party of the totality of people should have a separate rights of self-determination.

Per Sarath Silva, CJ.

> ". . . .. the process of impeachment of Superior Court Judges can be held like a sward of Damocles over incumbent Judges who would be in peril of an inquiry to be held within Parliament by a Penal consisting of Members of Parliament. However, this by itself does not amount to an inconsistency wit Article 14 of the Constitution which mandates equality before the Courts of Law and a fair and public hearing by competent, independent and impartial tribunal. . ."

(8) The legislative measures referred to in the reference and the provisions of the Constitution and of other law, including decisions of the Superior Courts of the Sri Lanka give adequate recognition to the Civil and Political rights contained in the International Covenant on Civil and Political rights and adhere to the general premise of the Covenant that individuals within the territory of Sri Lanka derive the benefit and guarantee of rights as contained in the Covenant.

(9) The rights recognized in the Covenant are justifiable through the medium of the legal and constitutional process prevailing in Sri Lanka.

Cases referred to:

1. *Weerawansa V. Attorney General* – (2000) 1 Sri L.R. 387
2. *Mallikarachchi v. Siva Pasupathy* – (1985) 1 Sri L.R. 74

Reference made by His Excellency the President in terms of Article 129 (1) of the Constitution to obtain the opinion of the Supreme Court.

M. A. Sumanthiran with *Ms. Vamadeva* and *Ms. Ermiza Tegal* for the 1st and 2nd Intervenient Petitioners.

Dr. Jayampathy Wickramaratne P.C. with *Ms. Pubudini Wickeamaratne* for the 3rd intervenient Petitioner.

Nuwan Peris, Mahesha De Silva for the 4th intervenient Petitioner.

P. A. Ratnayake, P.C. Addititonal Solicitor General with *Bimba Thilakaratne, D.S.G., N. Pulle, S.S.C.* and *Rajive Goonathilake, S.C.* for the Attorney General.

Cur.adv. vult.

March 17th 2008

SARATH N. SILVA, CJ

His Excellency the President has been pleased to make a reference in terms of Article 129 (1) of the Constitution to obtain the opinion of this Court on the following questions.

1. Whether the legislative provisions cited in the reference that have been taken to give statutory recognition to Civil and Political Rights in the International Covenant, on Civil and Political Rights of the United Nations adhere to the general premise of the Covenant and whether individuals within the territory of Sri Lanka would derive the benefit and the guarantee of rights as contained in the Covenant through the medium of the legal and constitutional processes prevailing in Sri Lanka?

2. Whether the said rights recognized in the Covenant are justifiable through the medium of legal and constitutional process prevailing in Sri Lanka?

Article 129(4) of the Constitution provides that the proceedings in connection with such a reference shall be held in private, unless the Court for special reasons directs otherwise. Considering the public importance of and interest in the matter in respect of which His Excellency was pleased to make reference we decided that the questions be considered at a public sitting of the Court of which advance notice was given to enable interested parties to appear and make submissions, to assist Court in considering the opinion to be given