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] 1 SRI L.R. - PART 1**

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# D I G E S T

# HAPUARACHCHI AND OTHERS
# vs
# COMMISSIONER OF ELECTIONS AND ANOTHER

SUPREME COURT
DR. SHIRANI BANDARANAYAKE. J
AMARATUNGA. J
MARSOOF. J
SC FR 67/08
NOVEMDER 11, 2008
DECEMBER 19, 23, 2008

*Constitution, Article 12 (1), 12(2), Art 14 (1)(C) - Parliamentary Elections Act, No. 1 of 1984 - Refusal to recognize a political party by the Commissioner of Elections - Failure to give reasons - Does it infringe the Fundamental Rights of the petitioner?*

The petitioners who had formed a political party X complained that the refusal of the 1st respondent to grant the said party the status of a recognized political party without assigning any reason is unreasonable, unfair and arbitrary and thereby had violated their fundamental rights guaranteed in terms of Article 12(1), 12(2) and 14(1) C.

The respondent contended that the failure to give reasons by the Commissioner is not a fatal error and cannot be conclusive to mean that there is no valid reason for the rejection and in the circumstances, there had not been any violation of the petitioners' fundamental rights.

**Held:**

(1) Equality, which could be introduced as a dynamic concept, forbids inequalities, arbitrariness and unfair decisions. Equality and arbitrariness are sworn enemies; one belongs to the Rule of Law in a Republic while the other, to the whim and caprice of an absolute Monarch.

(2) To deprive a person of knowing the reasons for a decision which affects him would not only be arbitrary, but also a violation of his right to equal protection of the law.

**APPLICATION** under Article 126 of the Constitution.

**Cases referred to:-**

(1) Samalanka Ltd. vs. Weerakoon, Commissioner of Labour 1994 1 Sri LR 405

(2) Karunadasa vs. Unique Gem Stones Ltd 1997 1 Sri LR 256

(3) Yassen Omar vs. Pakistan International Ancillaries Corporation and others - 1999 2 Sri LR 375

(4) N. Sam Nanayakkara vs. People's Bank and others - SC 525/02 - SCM 20.6.07

(5) Pure Spring Co. Ltd. vs. Minister of National Revenue 1947 1 DLR 501

(6) Marta Stefan vs. General Medical Council 1999 1 WLR 1293

(7) Minister of National Revenue vs. Weights Canadian Peoples Ltd - 1947 AL 109

(8) R vs. Gaming Board for Great Britain Ex.p. Benaim & Khaida - 1970 2 QB 417

(9) Mc Innes vs. Onslow Fane 1978 1 WLR 1520

(10) R vs. Civil Service Appeal Board - Ex.p. Cunningham 1991 4 All ER 310

(11) R vs. Secretary of State for the Home Development - Ex parte Doody 1994 1 AL 531

(12) Padfield vs. Minister of Agriculture Fisheries and Food 1968 Al 997

(13) Lal Wimalaratna vs. Asoka Silva and others SC 473/2003, SCM 4.8 2005

(14) Wijepala vs. Jayawardane - SC 89/95 SCM 30.6.95

(15) Manage vs. Kotakadeniya 1997 Sri LR 264

(16) Suranganie Marapana vs. Bank of Ceylon and others 1997 3 Sri LR 156

(17) Osmond vs. Public Service Board of New South Wales and another 1985 LRC (Const) 1041.

(18) E. P. Royapa vs. State of Tamil Nadu AIR (1974) SL 555

(19) Re Poyser and Mills Arbitration 1964 1 QB 46

(20) R vs. Industrial Injuries Commissioner Ex parte Haworth 1968 4 KIR 621

*K. Deekiriwewa with L. M. Deekiriwewa* and *Manel Herath* for *petitioners Viraj Dayaratne SSC* for respondent.

March 3, 2009

**Dr. SHIRANI BANDARANAYAKE, J.**

The petitioners, who had formed a political party known as *'Eksath Janatha Peramuna*' (hereinafter referred to as the Party), complained that the refusal of the 1st respondent Commissioner to recognize the aforementioned Party and the refusal to thereby grant the said Party the status of a recognized political party had infringed their fundamental rights guaranteed in terms of Articles 12(1), 12(2) and 14(1)(c) of the Constitution for which this Court had granted leave to proceed.

The fact of the petitioners' case as submitted by them, *albeit brief,* are as follows:

The petitioners had formed the said political party in 1999 and had formulated and adopted the party Constitution in the year 2000 at their 2nd annual national meeting (X2). The main objective of the said Party was to nominate candidates from the said Party to stand for General, Provincial and Local Elections as and when such elections are held. At the time of the filing of this application the party had over 2200 members.

On 31.10. 2007 the 1st petitioner, being the General Secretary had made an application to the 1st respondent Commissioner seeking registration of the Party as a recognized political party. That application had been returned as the 1st respondent Commissioner could not consider the said application in terms of the Parliamentary Elections Act, No. 1 of 1981 (X4). Thereafter by letter dated 14.12.2007, the petitioners had again made an application to the 1st respondent, seeking registration of the Party as a recognized political party (X5). By letter dated 07.01.2008 the petitioners were called on behalf of the Party for an inquiry to be held on 16.01.2008 regarding the Party's application for registration (X6). On 16.01.2008,the petitioners had represented the Party at the inquiry held by the 1st respondent Commissioner.

By letter dated 21.01.2008, the 1st respondent Commissioner had rejected the application made by the Party for registration, without assigning any reasons for his decision (X7).

The petitioners submitted that in January 2008, at or about the time the petitioners had made their application on behalf of the Party, the 1st respondent Commissioner had accepted and registered five new political parties, namely,

1. *Okkoma Rajawaru Okkoma Wasiyo*
2. *Muslim Vimukthi Peramuna*
3. *Nawa Sihala Urumaya*
4. *Padmanada Eelam Janatha Viplavakari Vipulanari*
5. *T. M. V. P.*

The aforesaid parties, according to the petitioners, had not been actively engaged in political activities and the petitioners' Party had been in active politics since 1999.

The petitioners therefore claim the decision of the 1st respondent to reject their application without assigning any reasons is unreasonable, unfair and arbitrary and thereby had violated their fundamental rights guaranteed in terms of Articles 12(1), 12(2) and 14 (1)(c) of the Constitution.

Learned Senior State Counsel for the respondents did not dispute the fact that in his letter dated 21.01.2008, the Commissioner of Elections had not given any reasons for the rejection of the application preferred by the petitioners. Learned Senior State Counsel referring to the decisions in **Samalanka Ltd. v Weerakoon, Commissioner of Labour *et al*[1] Karunadasa v Unique Gem Stones Ltd, *et al*[2]** and **Yaseen Omar v Pakistan International Airlines Corporation and others[3]** stated that the failure to give reasons by the Commissioner is not a fatal error and cannot be concluded to mean that there is no valid reason for the said rejection as claimed by the petitioners.

Accordingly learned Senior State Counsel for the respondents contended that in the circumstances, there had not been any violation of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

It is not disputed that in his letter dated 21.01.2008, sent to the petitioners informing that their application for registration had been rejected, the 1st respondent Commissioner does not refer to any reasons for his decision. The said letter (X7) is as follows:

"

2008.01.21

ලේකම්,
එක්සත් ජනතා පෙරමුණ,
306/සී, උතුරු බටගම,
ජාඇල.

මහත්මයාණෙනි,

**දේශපාලන පක්ෂයක් වශයෙන් පිළිගනු ලැබීම සඳහා වූ ඉල්ලීම**
**1988 අංක 29 දරන පනතින් සංශෝධිත 1981 අංක 1 දරන**
**පාර්ලිමේන්තු මැතිවරණ පනත**

ඔබගේ 2007.12.14 දිනැති ඉල්ලීම හා ඉන් අනතුරුව 2008.01.16 වන දින මගේ කාර්යාලයේදී පැවැත්වූ පරීක්ෂණයට ඔබගේ අවධානය යොමු කරවනු කැමැත්තෙමි.

02 ඔබගේ ඉල්ලුම් පත ප්‍රතික්ෂේප කරන ලද බව කණගාටුවෙන් දන්වමි.

. . . ."

As stated earlier, the main contention of the learned Counsel for the petitioners at the hearing was that no reasons were given by the 1st respondent for his decision. In the light of the aforementioned, it is apparent that it would be necessary to examine whether the failure to give reasons to petitioners by the 1st respondent had infringed the fundamental rights of the petitioners guaranteed in terms of Article 12(1) of the Constitution.

As stated earlier, learned Senior State Counsel strenuously contended that not giving reasons for the rejection of the petitioners' application is not a fatal error and the learned Counsel for the petitioners contended that such failure has amounted to a violation of the petitioners' fundamental rights and relied on the decision of this Court in **Karunadasa v Unique Gem Stones Ltd.** (supra)

The contention of the respondents regarding the question for the need to give reasons is that the failure to give reasons by the Commissioner is not a fatal error and cannot be construed to mean that there is no valid reason for the rejection of the petitioners' application as claimed by the petitioners. Further it was submitted that the failure to give reasons does not take away from the fact that the Commissioner formed his opinion after a proper inquiry and further the failure to give reasons by the Commissioner in his letter is not fatal as the reasons have been adequately explained to this Court by way of the 1st respondent's affidavit.

An examination of the decisions relied on by the respondents in support of their contention clearly shows that those decisions have spelt out the general position regarding the necessity to give reasons for a decision. For instance in **Samalanka Ltd. v Weerakoon, Commissioner of Labour and others** (supra) this Court had held that in the absence of a statutory requirement, there is no general principle of administrative law that natural justice requires the authority making the decision to adduce reasons, provided that the decision is made after holding a fair inquiry. The decision in **Yaseen Omar** (supra) also had been on the same lines, where it was held that neither the common Law nor principles of natural justice requires as a general rule that administrative tribunals or authorities should give reasons for their decisions that are subject to judicial review. Considering the question that arose in that appeal it was held that there is no statutory requirement imposed on the Commissioner to give reasons for his decision.

The decision in **Karunadasa v Unique Gem stones Ltd. and others** (supra) had taken the view that natural justice also means that a party is entitled to a reasoned consideration of his case.

Therefore it would be apparent that none of the decisions referred to earlier, which were relied on by the respondents supports the contention that not giving reasons for a decision by an administrative authority is not a fatal error.

In such circumstances, it would be pertinent to examine the legal position pertaining to the need to give reasons.

For a long period of time, as stated by Bandaranayake, J., in **N. S. A. M. Nanayakkara v Peoples Bank and others**[4] the commonly accepted norm in English Law had been that there is no general rule or a duty to state reasons for judicial or administrative decisions (**Pure Spring Co. Ltd. v Minister of National Revenue)**[5] Statements of Reasons for Judicial and Administrative Decisions, Michael Akehurst, M. L. R. Vol. 33, 1970, pg. 154). As pointed out by Michael Akehurst, a statement of reasons is not required by the rules of natural justice and therefore there is no duty to state reasons for the decisions of Courts, juries, licensing justices, administrative bodies and tribunals or domestic tribunals (Michael Akehurst (supra)). This position was again considered in **Marta Stefan v General Medical Council**[6] by the Privy Council, where it was held that there was no express or implied obligation on the Health Committee to give reasons for its decision within either the Medical Act 1983 or the General Medical Council Health Committee (Procedure) Rules Order of Council 1987. Referring to right to reasons, S. A. de Smith (De Smith's Judicial Review 6th Edition, 2007, pg 411) had clearly stated that,

> "On this view, a decision - maker is not normally required to consider whether fairness or procedural fairness demands that reasons should be provided to an individual affected by a decision because the giving of reasons has not been

considered to be a requirement of the rules of procedural propriety."

This position is well compatible with the theory that there is no general common law duty to give reasons for decisions (**Minister of National Revenue v Wrights' Canadian Ropes Ltd.** [7] **R v Gaming Board for Great Britain, Ex. p. Benaim and Khaida**[8] **MC Innes v Onslow - Fane**[9] **R v Civil Service Appeal Board Ex. p. Cunningham**[10]

However, this position has changed dramatically and as pointed out by de Smith (supra, pg. 413),

". . . . it is certainly now the case that a decision - maker subject to the requirements of fairness should consider carefully whether, in the particular circumstances of the case, reasons should be given. Indeed, so fast is the case law on the duty to give reasons developing, that it can now be added that fairness or procedural fairness usually will require a decision - maker to give reasons for its decision. **Overall the trend of the law has been towards an increased recognition of the duty to give reasons. . . ."** (emphasis added).

Thus it appears that although the common law had failed to develop any general duty regarding the need to give reasons, there are several exceptions to this general principle.

One clear method, as pointed out in **N.S.A.M. Nanayakkara v People's Bank** (supra) was through statutory intervention, which came into being by the recommendations of the Report of the Committee on Administrative Tribunals and Enquiries, commonly known as Franks committee (Cmnd. 218 (1957)). The Franks Committee recommended the need to give reasons ((supra), para 98, 351), that came into being through the Tribunals and Inquiries Act, 1958, which was replaced by the Tribunals and Inquiries Act, 1992.

The Franks Committee Report of 1957 ((supra) at para 98), in fact highlighted the issue as to why reasons should

be given, referring to ministerial decisions taken, after the holding of an inquiry.

> "It is a fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision had been taken. **Where no reasons are given the individual may be forgiven for concluding that he has been the victim of arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the Minister's decision in the courts or elsewhere. Moreover as we have already said in relation to tribunal decisions, a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more truly to have been properly thought out"** (emphasis added).

In addition to the above there are several other instances in which the common law had imposed a duty to give reasons for its decisions. One such method was developed on the basis that the absence of reasons would render any right of appeal or review nugatory. Thus in **Minister of National Revenue v Wrights Canadian Ropes** Ltd. (supra), which considered an appeal from an income tax assessment, the Privy Counsel stated that,

> "Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action. . . . But this does not mean that the Minister by keeping silent can defeat the tax payer's appeal. . . . The Court is. . . always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are. . . insufficient in law to support it, the determination cannot stand. . . . "

A number of other decisions had taken a similar approach. For instance, in **R v Civil Service Appeal Board, *Ex parte* Cunningham** (supra), Lord Donaldson Mr and McCowan and Leggatt, LJJ., had held that although there was no general rule that required administrative tribunals to give reasons, that such an obligation could arise as an incident of procedural fairness in appropriate circumstances.

This approach had been followed in other cases. In **R v Secretary of State for the Home Department *Ex parte* Doody**[11] which considered whether the Secretary of State is required to inform the prisoner the reasons as to why he was deciding on a certain period of time for imprisonment, Lord Mustill expressed the view that, although there was no general duty to provide reasons, there was a duty to give reasons in that instance, as it would facilitate any judicial review challenged by the prisoner. Lord Mustill had clearly stated in **Doody** (supra) that,

> ". . . I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon, 'transparency', in the making of administrative decisions."

Another method and one which was extremely important from the practical point of view, indirectly imposed a requirement that reasons be stated and if not had decided that the result reached in the absence of reasoning is arbitrary. Thus in the well known decision in **Padfield v Minister of Agriculture Fisheries and Food**[12] the House of Lords decisively rejected the notion that the absence of a duty to state reasons, precluded the Court from reviewing the reasons for the decision. It was therefore stated by Lord Pearce in **Padfield** (supra) that,

> "If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him

in that regard, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions."

Accordingly an analysis of the attitude of the Courts since the beginning of the 20th century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision, is treated according to the standard of fairness. In such a situation without a statement from the person, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try to assess the validity of the decision. Considering the present process in procedural fairness vis-à-vis, right of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement.

Referring to reasons, fair treatment and procedural fairness, Galigan (Due Process and Fair Procedures, Clarendon Press, Oxford, pg. 437) stated that,

"If the new approach succeeds, so that generally a statement of reasons for an administrative decision will be regarded as an element of procedural fairness, then various devices invented in the past in order to allow the consequences of a refusal of reasons to be taken into account will gradually lose their significance."

The necessity to give reasons was considered by this Court, as referred to in Bandaranayake, J.'s judgments

in **Lal Wimalasena v Asoka Silva and others**(13) and in **N. S. A. M. Nanayakkara v People's Bank** (supra), in **Wijepala v Jayawardene**(14), **Manage v Kotakadeniya**(15), **Suranganie Marapana v The Bank of Ceylon and others** and in **Karunadasa v Unique Gemstones** (supra)

In **Wijepala v Jayawardene** (supra) considering the necessity to give reasons, at least to this Court, Mark Fernando, J., was of the view that,

> "The petitioner insisted, throughout that established practice unquestionably entitled him at least to his first extension and that there was no relevant reason for the refusal of an extension. . . .
>
> Although openness in administration makes it desirable that reasons be given for decisions of this kind, in this case I do not have to decide whether the failure to do so vitiated the decision, **However, when this Court is requested to review such a decision, if the petitioner succeeds in making out a prima facie case, then the failure to give reasons becomes crucial. If reasons are not disclosed, the inference may have to be drawn that this is because in fact there were no reasons - and so also, if reasons are suggested, they were in fact not the reasons, which actually influenced the decision in the first place"** (emphasis added).

In **Manage v Kotakadeniya and others** (supra), where an application of a Post Master for his extension of service, upon reaching the age of 55 years was refused, Amerasinghe, J., was of the view that,

> "the refusal to extend the service of the petitioner was not based on adequate grounds."

The order of retirement was thus quashed on the basis that the petitioner in that case was treated unequally and that there had been discriminatory conduct against the petitioner.

In **Suranganie Marapana v The Bank of Ceylon and others** (supra) it was held that the Board failed to show the Court that valid reasons did exist for the refusal to grant the extension, which was recommended by the corporate management and therefore it was held that the refusal to grant the extension of service sought was arbitrary, capricious, unreasonable and unfair. Considering the question in issue the Court had stated that,

> "Even though Public Administration Circular No. 27/96 dated 30.08.96 (P8), which was an amendment to Chapter 5 of the Establishments Code, does not have any direct application to the matter before us, it clearly sets out the attitude of the State in regard to the question of extension of service of public sector employees, when it states that where extensions of service of State Employees are refused **there should be sufficient reasons to support such decision beyond doubt"** (emphasis added).

It is also noteworthy to refer to the views expressed by Mark Fernando, J., in **Karunadasa v Unique Gem Stones** (supra) with reference to the need to give reasons for a decision, where it was stated that,

> ". . . whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision 'may be condemned as arbitrary and unreasonable'; certainly the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion."

On a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons for an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Moreover in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily, in coming to their conclusion. These aspects have been stated quite succinctly in the following passage, where

Prof. Wade had expressed the view that, (Administrative Law, 9th Edition, pg. 522),

> "Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. **A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others"** (emphasis added).
>
> And more importantly,
>
> **"Notwithstanding that there is no general rule requiring the giving of reasons, it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully"** (emphasis added).

The importance of giving reasons, irrespective of the fact that there are no express or implied obligation to do so, had been clearly shown in many decisions and it would be pertinent to mention the views expressed in **Osmond v Public Service Board of New South Wales and Another**(17) and **Marta Stefan v General Medical Council** (supra).

In **Osmond** (supra), the appellant was employed in the New South Wales Public Service. In 1982 he applied for promotion to the vacant post of Chairman of the Local Lands Board. He was not recommended for this appointment and appealed to the Public Service Board under section 116 of the Public Service Act 1979. Soon after his appeal was heard by the Board he was informed orally that it had been dismissed, although no written notice of the decision was ever given to him and requests for a written decision with reasons were refused on the ground that it was not the Board's practice to give reasons.

It was held that natural justice required that the appellant should be given the reasons for the decision of the Board in his appeal and Kirby, J. had stated that,

> "The duty of public officials, in making discretionary decisions affecting others in the exercise of statutory powers, is to act justly and fairly; this will normally impose an obligation to state the reasons for their decisions. Such an obligation will exist where the absence of reasons would render nugatory a facility provided to appeal against the decision or would diminish a facility to test the decision by judicial review and ensure that it complies with the law and that relevant matters only have been taken into account."

In **Marta Stefan** (supra), the question related to a doctor, who was subjected to suspension of her registration for varying periods following decisions of the Health Committee of the General Medical Council that her fitness to practice was impaired. In February 1998 her case came before the Health Committee again and the Committee concluded that her registration should be suspended indefinitely. The only reason given for the decision was that the Committee have carefully considered all the information presented to them and continue to be deeply concerned about her medical condition and that the Committee have again judged her fitness to practice to be seriously impaired and have directed that her registration be suspended indefinitely.

Allowing the appeal by the Doctor, it was held that there was no express or implied obligation on the Health Committee to give reasons for its decision within either the Medical Act 1983 or the General Medical Council Health Committee (Procedure) Rules Order of Council 1987, but that in the light of its judicial character, the framework in which it operated and the provision of a right of appeal against its decisions there was a common law obligation to give at least a short statement of the reasons for its decision, that the extent and substance of the reasons would depend upon the circumstances and they did not need to be elaborate or lengthy, but they should

be such as to tell the parties in broad terms, why the decision was reached. It was also decided that the doctor's case would be remitted to a freshly constituted Health Committee for rehearing with reasons to be given for its decision.

The petitioners had complained of the infringement of their fundamental right guaranteed in terms of Article 12(1) of the Constitution. Article 12(1) of the Constitution deals with the right to equality and reads as follows:

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

Equality, which could be introduced as a dynamic concept, forbids inequalities, arbitrariness and, unfair decisions. As pointed out by Bhagwati, J. (as he then was) in **E. P. Royappa v State of Tamil Nadu**(18)

> "From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a Republic while the other, to the whim and caprice of an absolute monarch."

In such circumstances to deprive a person of knowing the reasons for a decision, which affects him would not only be arbitrary, but also a violation of his right to equal protection of the law.

As pointed out by Craig (Administrative Law, 4th Edition, 1999 pg. 430) referring to Rabin (Job Security and due Process: Monitoring Administrative Discretion Through a Reasons Requirement (44 U. Chi. L.R. 60)) the very essence of arbitrariness is to have one's status redefined by the State without an adequate explanation of its reasons for doing so.

It is therefore apparent that as pointed out by Professor Wade (Administrative Law, supra pg. 527), the time has now come for the Court to acknowledge that there is a general rule that reasons should be given for decisions based on the principle of fairness. Prof. Wade (supra) had further stated that,

> "Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them,"

It is to be noted that there have been instances where Courts had quashed the decisions when only vague reasons had been given (**Re Poyser and Mills' Arbitration**[19] or in circumstances where ambiguous reasons were provided (**R v Industrial Injuries Commissioner, *Ex parte* Howarth**

It is not disputed that in the instant application, although the 1st respondent had informed this Court his reasons for the refusal of petitioners' application for the recognition of the Party in question, that in his communiqué to the petitioners on 21.01.2008 (X7) referred to above, no reasons whatsoever were given, which in my view means a denial of justice, an error of law and more importantly in connection to this matter, the said decision to withhold the reasons is arbitrary, unfair and unreasonable within the framework of Section 12(1) of the Constitution.

In such circumstances for the reasons aforementioned I hold that the decision reflected in the document dated 21.01.2008 (X7) is null and void and therefore the 1st respondent had violated the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution. The petitioners' application is accordingly allowed. I direct the 1st respondent to re-consider the application submitted by the petitioners and to give reasons for his decision following such re-consideration.

I make no order as to costs.

**AMARATUNGA, J.** - I agree.

**MARSOOF, J.** - I agree.

*Application allowed. Respondent directed to reconsider the application and to give reasons for his decision.*

# SAMAN KUMARA
# vs
# REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J
UPALY ABEYRATNE. J
CA 29/04
HC RATNAPURA 107/2002
JULY 7, 2009

*Evidence Ordinance Section120 (2), 120 (3) - Penal Code 363 (a) -Rape- Both get married - Convicted - Prosecutrix wife of accused? - Is the prosecutrix a competent witness to give evidence against the accused - Does Section120 (3) apply when sexual intercourse is performed on his wife by the husband? - Marriage Registration Ordinance Section19, Section 42 - Criminal Procedure Code, Section 607.*

The accused - appellant was convicted for raping a girl. Two years after the incident both of them got married. The trial Judge concluded that, the prosecutrix was a competent witness to give evidence.

It was contended that, the prosecutrix being the wife of the accused is not a competent witness, and the trial Judge had used illegal evidence to convict the accused.

**Held:**

(1) It cannot be concluded that sexual intercourse was performed by the accused on the prosecutrix without her consent.

(2) To call the wife of the husband under Section 120 (3), it should be proceedings instituted against the husband for causing bodily injury or violence to the wife. Section 120 (3) envisages a situation where husband or wife assaults his or her spouse - but not when sexual intercourse was performed on his wife by the husband.

(3) The prosecution in a case of rape cannot call the wife of the accused to give evidence against her husband. The prosecutrix is not a compatible witness against the accused unless and until the marriage is declared void by the District Court.

**APPEAL** from a judgment of the High Court of Ratnapura.

**Case referred to:**
*K. C. Morjan vs. Attorney General* - CA 3/2002-CAM 13.1.2003

*Dharmasiri Karunaratne* for accused-appellant
*Sarath Jayamane DSG* for AG

July 16, 2007

**SISIRA DE ABREW, J.**

Heard both counsel in support of their respective cases.

The accused-appellant in this case, was convicted for raping a girl named Kuttigahawattalage Chandrika Priyadharshani and was sentenced to a term of 10 years rigorous imprisonment and to pay a fine of Rs. 10,000/- carrying a default sentence of one years imprisonment. This appeal is against the said conviction and the sentence.

Learned Counsel for the accused-appellant submits that the prosecutrix is not a competent witness to give evidence against the accused-appellant since she is the wife of the accused-appellant. Therefore the most important question that must be decided in this case is whether the prosecutrix is a competent witness to give evidence against the accused-appellant. The prosecutrix in her evidence admitted that the accused-appellant was her husband (vide page 49-51). She has further admitted that the said marriage was in existence at the time she gave evidence.

In order to find an answer to the question that must be decided in this case, it is necessary to consider section 120(2) and 120(3) of the Evidence Ordinance.

**120(2) of the Evidence Ordinance read as follows:-**

**"In criminal proceedings against any person the husband or wife of the such person respectively shall be a competent witness if called by the accused, but in that case all communications between them shall cease to be privileged".**

**120(3) reads as follows:-**

**"In criminal proceedings against a husband or wife for any bodily injury or violence inflicted on his or her wife or husband, such wife or husband shall be a competent witness and compellable witness."**

It is necessary to mention here that according to her evidence she is not judicially separated from the accused-appellant. Therefore section 363(a) of the Penal Code does not apply to the facts of this case.

In order to find an answer to the question that must be decided, it is also necessary to find out whether the sexual intercourse was performed on the prosecutrix with or without her consent. Prosecutrix says that the sexual intercourse was performed without her consent.

According to Agoris who is the grandfather of the prosecutrix, the accused-appellant on the day of the incident came to the prosecutrix's house and thereafter both the prosecutrix and the appellant disappeared from the house. Later when Agoris went in search of them, he found the accused-appellant and the prosecutrix behaving as husband and wife. When both of them saw Agoris they ran way from the place.

When we consider the said evidence, we are unable to conclude beyond reasonable doubt that the appellant performed sexual intercourse on the prosecutrix without her consent. Two years after the incident, both of them got married. When one considers section 120(3)of the Evidence Ordinance it is possible to argue that bodily injury would be caused to the female when the sexual intercourse was

performed and therefore wife is a competent witness to give evidence against the husband. Can bodily injury be caused to a person with his consent? The answer is No.

In this case, we are unable to conclude that the sexual intercourse was performed by the appellant on the prosecutrix without her consent. When we consider the evidence, we feel that sexual intercourse was performed with her consent. Therefore we are unable to conclude beyond reasonable doubt that bodily injury or violence has been caused to the prosecutrix.

Further to call the wife of the accused under section 120(3) of Evidence Ordinance, it should be the proceedings instituted against the husband for causing bodily injury or violence to the wife. Section 120(3) of the Evidence Ordinance envisages of a situation where husband or wife assaults his or her spouse, but not when sexual intercourse was performed on his wife by the husband.

For the above reasons, I hold that the section 120(3) of the Evidence Ordinance is not applicable to the facts of this case. The prosecutrix in this case was called to give evidence not by the accused but by the prosecution. It is therefore clear that the prosecution in a case of rape cannot call the wife of the accused to give evidence against her husband.

For the above reasons, I hold that the prosecutrix in this case was not a competent witness to give evidence against the accused-appellant. When this question was raised before the learned trial Judge, he concluded that the prosecutrix was a competent witness to give evidence. We have gone through the reasons given by the learned trial Judge and we are unable to agree with the said reasons.

In the case of **K. C. Morgan vs. Attorney-general**[1] the same question arose for consideration. In the said case, the prosecutrix was the legally married wife of the accused. When the matter was brought to the notice of the trial Judge, he

over-ruled the objection raised by the defence. His Lordship Justice Raja Fernando held as follows:- "In terms of section 19 of the Marriage Registration Ordinance or section 607 of the Civil Procedure Code it is only the District Court that has the jurisdiction to either dissolve or annul a marriage. Further section 42 of the Marriage Registration Ordinance makes the certificate of marriage proof of marriage. We hold the prosecutrix was not a compellable witness against the accused unless and until the marriage is declared void by the District Court".

In the instant case the marriage between the prosecutrix and the accused-appellant has not been dissolved by the District Court. I have earlier held that the prosecutrix in this case was not a competent witness to give evidence against the accused-appellant. I therefore hold that the learned trial Judge had used illegal evidence to convict the accused-appellant. This is sufficient to vitiate the conviction.

For above reasons, we set aside the conviction and the sentence and acquit the accused-appellant of the charge levelled against him.

We would like to mention here that the Commissioner General of Prisons is not entitled to keep the accused-appellant in his custody once he receives a copy of this judgment. It is not necessary for the Prison Authorities to produce the accused-appellant in the High Court and get an order of release.

**UPALY ABEYRATHNE, J.** - I agree.

*Appeal allowed.*

# AJITH
# vs
# ATTORNEY GENERAL

COURT OF APPEAL
SISIRA DE ABREW. J
UPALY ABEYRATNE. J
CA 212/2003
HC AMPARA 725/2002
JULY 28, 29, 30, 2009

*Kidnapping - Rape - Victim reliable witness or not? - Court should seek corroborative evidence - If not reliable? - Opinion of medical experts - Court to act on the opinion of the independent medical expert?*

**Held:**

(1) If the prosecutrix in a rape case is not a reliable or believable witness, the evidence seeking to corroborate her story cannot strengthen her evidence. Court should seek corroborative evidence only if the prosecutrix is a reliable witness.

Per Sisira de Abrew. J:

"Refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule is adding insult to injury".

(2) When opinions of medical experts are led in evidence and if one expert is not an independent witness, Court should act on the opinion of the independent medical expert and should not place reliance on the other expert.

**APPEAL** from the judgment of the High Court of Ampara.

Cases referred to:-

1. *Sunil and another vs. Attorney General* 1986 1 Sri LR 230
2. *Gurcharan Singh vs. State of Haryane* AIR (1972) SC 2661
3. *Bhoginbhai Hiribai vs. State of Gujarat* 1983 AIR SC 753

*Dr. Ranjith Fernando* for accused appellant.
*Sarath Jayamanne DSG* for AG

July 30, 2009

**SISIRA DE ABREW, J.**

The accused-appellant in this case was convicted for kidnapping a girl named Samitha Jeevani Kumari Basnayake and was sentenced to a term of 5 years rigorous imprisonment and to pay a fine of Rs. 7500/- carrying a default sentence of 18 months rigorous imprisonment. He was also convicted for raping the said girl and was sentenced to a term of 10 years rigorous imprisonment and to pay a fine of Rs. 10,000/- carrying a default sentence of 2 years rigorous imprisonment. Being aggrieved by the said conviction and the sentence the accused-appellant has appealed to this Court. Facts of this case may be briefly summarised as follows:-

The accused-appellant was known to the prosecutrix in this case as he was a teacher of her school. On the day of the incident around 12.30 p.m. when the prosecutrix was returning home after a tuition class the accused-appellant dragged her to a lonely place in the jungle which is about 40 meters away from the road. Vide page 147 of the brief. He thereafter removed all her clothes including the vest and undergarment against her will. He removed his clothes as well. Thereafter the accused-appellant put the prosecutrix on the ground and committed sexual intercourse on her against her will. She stated that the place where the sexual intercourse was committed was a rough surface. After the incident she noticed bleeding from her vagina. Vide page 92 of the brief. According to her there were abrasions on her legs. Vide page 151 and 163 of the brief. It has to be noted, at the very inception, that although she says that there were abrasions on her legs, Dr. Herath and Dr. Gunasekera the Medical Officer and the District Medical Officer respectively did not observe abrasions on her legs when they examined her on the 24th of March (the following day of the incident). Although the prosecutrix complains that the sexual intercourse was committed on a rough surface it has to be

noted here that the doctors who examined the victim on the following day did not find any abrasions on her back side. Learned D. S. G., heavily relied on the evidence of Gunapala. According to Gunapala he saw the accused-appellant on the top of the body of the victim when he came to the place of incident to fetch water for his cows. At this time the accused-appellant was fully naked. The victim was wearing a skirt. Gunapala is an uncle of the victim. Although the victim says that accused-appellant dragged, removed her clothes, forcibly put her on the ground and committed sexual intercourse against her will, she did not make any complaint to Gunapala when he saw the incident. Vide page 433 of the brief. Instead of complaining she pleaded with him not to tell her mother. Vide page 434 of the brief. If the incident described by the victim was committed by the accused-appellant, one would expect her to complain immediately when the incident was witnessed by Gunapala who is an uncle of the victim. This conduct of the victim raises a serious doubt about the truthfulness of her story.

The most important question that must be decided in this case is whether the victim is a reliable witness or not. In order to find an answer to this question I must consider the medical evidence in this case which played an important role. Dr. Herath who was the Medical Officer in charge of the hospital examined the victim on 24th of March (the following day of the incident) at 8.15 p.m. He used two torches to examine the victim since the electricity supply, given to the hospital was not sufficient enough. He examined the victim from head to the foot but did not find any injury on her body. He did not find a hymen in her vagina. He further says that he examined the vagina but did not find any blood or semen. Within 15 minutes of his examination he got down the District Medical Officer Dr. Gunasekera and requested him to examine the victim. Vide page 679 to 681 of the brief. Dr. Gunasekera who examined the patient did not find any injuries on her body. When he examined the vagina he did not find any fresh injuries nor did he find any blood in the vagina. At this stage

it is relevant to note that according to the victim she was a virgin prior to the incident described by her and that she was bleeding from her vagina after the incident. Vide page 92 and 127 of the brief. According to the doctor if she was a virgin and the sexual intercourse was committed on the 23rd of March, he would expect blood on her vagina. He further says that in such an event he would expect blood on the gloves that he used to examine the victim's vagina. The evidence of the two doctors, therefore, raises a serious doubt in the testimonial trustworthiness of this story of the prosecutrix. According to both doctors they did not find any fresh injury on the body of the victim on the 24th of March. Quite surprisingly in the following morning (25th) Dr. Herath found abrasions on the hand of the victim. Vide page 682 of the brief. After the said evidence of Dr. Herath, on the application of the defence Counsel, victim was recalled and questioned about the injuries found on her hand. The victim admitted that after the examination by two doctors namely Dr. Herath and Dr. Gunasekera at Maha Oya Hospital her father came and inflicted abrasions by abrading her hand. This evidence was not challenged by the prosecution. Vide page 698 of the brief. It is therefore seen that the father of the victim had fabricated evidence to establish the charge against the accused-appellant or to strengthen the version of the victim. This item of evidence raises a very serious doubt in the truth of the prosecution case. On the 25th of March Dr. Gunasekera, the D. M. O. of the Maha Oya Hospital, transferred the victim to Ampara Hospital apparently to get a report from the V.O.G. Dr. Lankathilaka Jayasinghe who was not a V.O.G. examined the victim in Ampara Hospital. He found two ruptures in the hymen and expressed the opinion that they were fresh injuries. He stated that these injuries were 3 to 4 days old. Vide page 250 of the brief. Therefore it appears that there are two expert medical opinions expressed by three doctors. At this stage it is relevant to consider the conduct of Dr. Lankathilaka Jayasinghe. According to the evidence led at the trial after the discharge of the victim from Ampara

Hospital Dr. Jayasinghe with some members of the hospital staff visited the girl at home and gave her Rs. 300/- Vide page 688 of the brief. Dr. Lankathilaka Jayasinghe further instructed the girl not to marry the accused since the victim was underage. This instruction was given to victim's mother. Vide page 392 of the brief. When the victim said that she was sent home by the principal of the school, Dr. Jayasinghe remarked that the principal should be sent to jail. He further said that he would send newspaper reporters. Vide page 688 of the brief. His conduct therefore shows that he had taken an undue interest in this case. Considering all these matters I conclude that Dr. Jayasinghe was not an independent witness in this case. When opinions of medical experts are led in evidence and if one expert is not an independent witness Court should act on the opinion of the independent medical expert and should not place reliance on the other expert. There is no evidence in this case to say that Dr. Herath and Dr. Gunasekera are not independent witnesses. When I consider all these matters I hold that it is safe to place reliance on the opinions expressed by Dr. Herath and Dr. Gunasekera. According to the opinions expressed by Dr. Herath and Dr. Gunasekera victim did not have fresh injuries in her vagina nor did they find any bleeding in the vagina. Victim says she was a virgin prior to the incident and noticed blood in her vagina soon after the alleged sexual intercourse. But the two doctors who examined the victim on the following day did not find fresh injuries in her vagina. According to the prosecutrix she was dragged a distance of 40 meters soon before the alleged sexual intercourse. She further says she sustained injuries on her legs. Vide page 151 and 163 of the brief. But the medical evidence does not support this position. When I consider all these matters I have to state here that her story that she was raped on the 23rd is very doubtful and unacceptable. I further hold that she is not a reliable witness.

If the prosecutrix in a rape case is not a reliable or believable witness, the evidence seeking to corroborate her

story cannot strengthen her evidence. Court should seek corroborative evidence only if the prosecutrix is a reliable witness. I therefore hold that Gunapala cannot corroborate the story of the prosecutrix. This view is supported by the judicial decision in ***Sunil And Another vs. The Attorney General***[1] wherein His Lordship Justice Dheeraratne held thus:

> *"Corroboration is only required or afforded if the witness requiring corroboration is otherwise credible. If the evidence of witness requiring corroboration is not credible his testimony should be rejected and the accused acquitted. Seeking corroboration of a witness's evidence should not be used as a process of inducing belief in such evidence where such evidence in not credible.*
>
> *It is very dangerous to act on the uncorroborated testimony of a woman victim of a sex offence but if her evidence is convincing such evidence could be acted on even in the absence of corroboration."*

As I pointed out earlier the evidence of Dr. Herath and Dr. Gunasekera contradicts the position taken up by the prosecutrix. I have earlier expressed the view that Dr. Lankathilaka Jayasinghe is not an independent medical expert. I have earlier expressed the view that Gunapala could not corroborate the evidence of the prosecutrix.

In a charge of rape why does Court expect the victim's evidence to be corroborated by independent evidence. I now advert to this question. Charge of rape being the easiest charge that a woman can make against a man in this world, Courts in some cases of rape especially when the accused claims the allegation to be a false one or when the accused claims that sexual intercourse was performed with the consent of the woman, insist on corroboration of the testimony of the prosecutrix.