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D I G E S T

an offence punishable under Section 356 of the Penal Code. The 7th accused (the appellant) was charged for wrongfully keeping in confinement the said persons which is an offence punishable under Section 359 read with Section 356 of the Penal Code. After trial 1st to 6th accused were acquitted of the charges but convicted the 7th accused (the appellant) of the offences levelled against him. He was, on each count, sentenced to a term of seven years rigorous imprisonment (RI) and to pay a fine of Rs. 5,000/- carrying a default sentence of one year RI. This appeal is against the said conviction and the sentence.

The case for the prosecution is that the 1st to 6th accused took Bandula, Padumasena, and Jayantha into their custody and brought them to Yakalamulla Police Station and that thereafter the appellant, the OIC of Yakkalamulla Police station wrongfully kept them in confinement in the said Police Station from 20.6.90 to 4.7.90.

Sujatha, Siripala, Kusumawathi and Asilin said that 1st to 6th accused took Bandula, Padmasena and Jayantha into their custody and later they saw the said person in Yakkalamulla Police Station [herein after referred to as the Police Station]. Sujatha, Kusumawathi and Asilin stated in evidence that they could identify the 1st accused because long prior to the arrest of the said persons he had come to their village for inquires. In fact Sujatha said that she knew the 1st accused for about one year prior to the said arrest which was on 20.6.90. But the defence had produced evidence to prove that the 1st accused came to the Police Station only on 10.6.90. Witnesses have said that the 2nd accused was in Police uniforms. But the defence produced evidence that the 2nd accused could not wear police uniforms since he was a home guard. Asilin has said that his two sons including Jayantha went missing when they went to Imaduwa. Thus

her claim that Jayantha was arrested by 1st to 6th accused becomes doubtful. The learned trial Judge after considering all these matters did not rely on the evidence of the said prosecution witnesses with regard to the arrest of the said persons and acquitted the 1st to 6th accused. Learned trial Judge observed that the evidence of the prosecution witnesses with regard to the identity of the 1st to 6th accuse could not be accepted due to the difficulties in their identification and acquitted them but remarked that this acquittal was not due to the fact that they gave false evidence. Learned trial Judge accepted the evidence of Siripala and Kusumawathi with regard to the detention of the said persons to prove the fact that the said persons were detained in the Police Station. Learned President's Counsel contended that once the evidence of a witness was rejected on a certain point, his evidence cannot be accepted to establish another point. He cited *Queen vs. Vellasamy*(1) *Queen vs. Julis*(2), *RP Kandiah vs. SI Police Norton Bridge* (3) and *Francis Appuhamy vs. Queen*(4) to support his contention.

In *Queen vs. Vellasamy [supra]* Basnayake CJ held: "When evidence of a witness is disbelieved in respect of one offence it cannot be accepted to convict the accused of any other offence."

In *Queen vs. Julis [supra]* Basnayake CJ affter considering the decision in *Mohamad Faiz Baltsh vs. The Queen*(5) held: "that, by falsely implicating the 1st accused, the two witnesses gave false evidence on a material point. Applying the maxim *falsus in uno, falsus in omnibus* (He who speaks falsely on one point will speak falsely upon all), their evidence implicating the 4th and 5th accused should also be rejected. When such evidence is given by witnesses, the question whether other

portions of their evidence can be accepted as true should not be resolved in their favour unless there is some compelling reason for doing so."

In *RP Kandiah vs. SI Police Norton Bridge (supra)* Thambiah J remarked thus: "It is not permissible, in a criminal case, to disbelieve a witness on a material point and, at the same time, believe him on other points without corroborative evidence."

If *Francis Appuhamay vs. Queen (supra)* TS Fernando J after considering the Privy Council decision in Mohamad Faiz Baltsh held: "The remarks contained in the judgment of the Privy Counsil in *Mohamed Fiaz Baltsh v. The Queen (supra)* that the credibility of witnesses cannot be treated as divisible and accepted against one accused and rejected against another (a) was inapplicable in the circumstances of the present case and (b) cannot be the foundation for a principle that the evidence of a witness must be accepted completely or not at all." His Lordship Justice TS Fernando at 443 further observed: "Certainly in this Country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses. In that situation the judge or jurors have to decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

In *Samaraweera vs. The Attorney General*[6] this court considered how the maxim *falsus in uno falses im ominibus* should be applied. That was a case where "four accused were indicted for murder on charges under sections 296, 315,

314 of the Penal Code. At the end of the prosecution case the 1st and 4th accused were acquitted on the directions of the Judge to the jury. At the conclusion of the trial the 2nd accused was acquitted by the unanimous verdict of the jury while the 3rd accused-appellant was found guilty of culpable homicide not amounting to murder on the basis of grave and sudden provocation on the count of murder and acquitted on the other counts. The main challenge to the verdict was on the ground that it was unreasonable having regard to the fact that the same two witnesses who testified against the 3rd accused had testified against the 2nd accused who was acquitted. Having disbelieved the two witnesses as against the second accused, the jury should not have accepted their evidence against the 3rd accused - appellant. The maxim *falsus in uno falsus in omnibus* should have been applied. "His Lordship Justice PRP Perera observed thus: "The verdict was supportable in that the acquittal of the 2nd accused could be attributable to the fact that vicarious liability on the basis of common intention could not be imputed to him on the evidence even if the two witnesses were believed. The maxim *falsus in uno falsus in omnibus* could not be applied in such circumstances. Further all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration or mere embroidery or embellishment must be distinguished from deliberate falsehood before applying the maxim. Nor does the maxim apply to cases of testimony on the same point between different witnesses. In any event this maxim is not an absolute rule which has to be applied without exception in every case where a witness is shown to have given false evidence on a material point. When such evidence is given by a witness the question whether other portions of his evidence can be accepted as true may not be resolved in his favour unless

there is some compelling reason for doing so. The credibility of witnesses can be treated as divisible and accepted against one and rejected against another. The jury or judge must decide for themselves whether that part of the testimony which is found to be false taints the whole or whether the false can safely be separated from the true."

In the instant case, the learned trial judge having rejected the evidence of Siripala and Kusumawathi with regard to the identity of the accused who abducted Bandula, Padumasena and Jayantha used their evidence to establish that the said three persons were detained at the Police Station. The detention of the three persons was witnessed by Jayawickrama. The appellant even admitted to Jayawickrama that they were detained at the Police Station. Siripala says that he knows in and out of the Police Station since he was, on an earlier occasion, detained in the Police Station for 52 days. He even says that at certain times these three persons were detained in a shed behind the Police Station. In these circumstances can the court apply the maxim and decide that the said three persons were not detained at the police Station? I say no. For these reasons I hold that the maxim *'falsus in uno falsus in ominibus'* (He who speaks falsely on one point will speak falsely upon all) is not applicable in this case. For the above reasons I further hold that the said maxim cannot be considered as an absolute rule and that the Judge in deciding whether or not he should apply the maxim must consider the entirety of the evidence of the witness and the entire evidence led at the trial. I therefore hold that the decision of the learned trial Judge not to apply the maxim is right. For these reasons I reject the submission of the learned President's Counsel on this point.

Learned Presidents Counsel next contended that the evidence of Jayawickrama should not be accepted in view of the delay in making his statement to the police. The delay was seven years. Jayawickrama, a politician in the area, says that when relations of the said three persons informed about their abduction, he went and inquired from the OIC of the Police Station then he (the appellant) told him that they would be released after recording their statements. He, on a several occasions, saw the said three persons in the police cell. When he, on a subsequent occasion, asked the appellant about the three persons the latter informed him that they had been released on bail. Learned defence counsel did not challenge his evidence. No suggestion was made to him that he was giving false evidence on the account of delay. One should not forget at this stage the admission of the appellant made to him that three persons were detained at the police station. Although he could have made a statement to the police, he did not do so. His statement was recorded by Chief Inspector Jayasinghe attached to the Commission Investigating into disappearances of Persons. He who is not related to the relatives of the persons abducted appears to be an independent witness. When one considers all these matters, it has to be stated here that delay in making a statement to the police has not shaken his credibility. Therefore the learned trial Judge was right when he decided to accept his evidence. For these reasons I reject the submission of the learned Presidents Counsel on this point.

Now the question that remains for consideration is whether the prosecution has proved the fact that Bandula, Padumasena and Jayantha were detained at the Police Station. I now advert to this question. Siripala who even chopped fire wood during his 52 days of detention in the

police station says that one day when he went to the Police station the three persons were seated on a bench in the police station and spoke to Bandula. On other occasions he saw them in the cell and in the hut. He says he could go to the hut without much difficulty since he was known to the police officers as a result of his detention.

Kusumawathi the wife of Padumasena says that she saw all three in the police station and visited them in the Police Station from 20.6.90 to 3.7.90 and on certain occasions gave food to her husband. I have earlier referred to the evidence of Jayawickrama who says that he saw the three persons in the Police Station. When I consider the above matters, I hold that the prosecution has proved that Bandula, Padumasena and Jayantha had been detained at the Police Station.

Now the question that must be considered is whether these three persons were arrested persons or abducted persons. I now advert to this question. If they were arrested persons why didn't the appellant enter their names in the detention register and the diet register? ASP who was called by the defence says when he visited the Police Station on 25.6.90 and 28.6.90 he did not find these three persons in the Police Station nor did he find their names in the detention register or diet register. Siripala says that on certain occasions he saw them in the hut behind the Police Station. When I consider all these matters, I hold that these persons do not fall into the category of arrested persons.

Learned trial Judge at page 38 of the brief observed that if a person is wrongfully detained at a police station it has to be concluded that he was an abducted person. Learned Presidents Counsel contended that this was a wrong conclusion. It is possible for a police officer to wrongfully

detain a person who was lawfully arrested. No doubt the police officer on this occasion violates the law. I therefore hold that above conclusion of the learned trial Judge is wrong. But this misdirection has not caused prejudice to the appellant since there is evidence to establish that three persons were abducted persons. I have earlier held that these three people were detained at the police station. When the ASP visited the Police Station these three persons were not at the Police Station and their names were not found in the detention register or diet register. When I consider all these matters, I hold that these three people were abducted persons. The appellant was the OIC of the Station. Therefore it was his duty to maintain the detention register and the diet register. The appellant had admitted to Jayawickrama that three persons would be released after recording their statements. I therefore hold the appellant knew that these three persons were abducted persons. Prosecution has proved that they were kept in confinement in the Police Station. Faiure on the part of the appellant to enter their names in the detention register or the diet register proves that he wrongfully kept them in confinement.

Section 359 of the Penal Code reads as follows: "Whoever, Knowing that any person has been kidnapped or has been abducted, wrongfully conceals or keeps such person in confinement, shall be punished in the same manner as if he kidnapped or abducted such person with the same intention or knowledge or for the same purpose as that with or for which he conceals or detains such person in confinement."

To prove a charge under Section 359 of the Penal Code prosecution must prove the following ingredients.

1. Person against whom the offence was committed (person mentioned in the body of the charge) is a person who was kidnapped or abducted.
2. The accused knew that the said person is a person who was either kidnapped or abducted.
3. The accused concealed or kept the said person in confinement.
4. When the accused concealed or kept the said person in confinement, he did so wrongfully.

Prosecution as I pointed earlier has proved the above four ingredients in the 4th and 5th counts. Jayarathne was a son of Asilin who said in her statement to the Police that her two sons after going to Imaduwa on 20.6.90 did not return home. I therefore do not want to affirm the conviction of the 6th count. I acquit the appellant on the 6th count and set aside the conviction and the sentence on the said count.

For the above reason I hold that the learned trial Judge has rightly convicted the appellant for 4th and 5th counts. I therefore affirm the convictions and the sentences on the 4th and 5th counts and dismiss the appeal. Terms of imprisonment on the 4th and 5th counts should run concurrently. The appellant on bail should submit to his bail. The sentence affirmed by this court on the 4th and 5th counts should be implemented from the date on which he submits to his bail or is brought before the trial court.

ABEYRATHNE, J. - I agree.

Conviction and the sentence on the 6th count are set aside.

Convictions and the sentences on the 4th and 5th counts are affirmed.

appeal dismissed - subject to variation

THIRIMAVITHANA VS. URBAN DEVELOPMENT AUTHORITY AND OTHERS

COURT OF APPEAL
SRIPAVAN, J.
SISIRA DE ABREW, J.
CA 378/2005
NOVEMBER 14, 2005
JANUARY 25, 2006
MAY 8, 10, 15, 16, 17, 23, 25, 26, 29, 2006
JUNE 1, 6, 15, 27, 2006
SEPTEMBER 6, 2006

Writ of Certiorari - Acquisition of Land reserved for play ground/ recreational activities for residents - possession taken over - under unlawful arbitrary capricious? - Urban Development Authority law (UDA) law of 41 of 1978 as amended - Section 18(1). Alienation of UDA land - is the approval of the minister necessary? Availability of Judicial review - failure to follow procedure laid down in law - total? - Legitimate Expectation - to have the ground kept as a play ground? change of promise - overriding public interest?

The petitioners are the owners/residents/ occupiers of the houses situated within the Jayanthipuara Housing Scheme - 65 Acres. The Land was originally divided amongst the original owners and a block of land of about 5 Acres 3 Roods was identified as open space. A portion of this area - in extent one Acre had been used as a playground and for recreational activities by the residents and the school children of the area.

The 1st respondent UDA sought to acquire the said 1 Acre and the adjoining 20 Perch land to be given to a State Department and possession had been handed over to the State Department. The Petitioners sought to quash the said decision on the basis that the said decision is unlawful, arbitrary capricious and offends the principles of unreasonableness, Legitimate Expectation and natural justice.

Held

(1) Section 18 of the UDA Law suggests that the UDA can alienate any land or interest in any land held by the UDA with the approval of the Minister in charge of the subject of Urban Development. It appears that the UDA derives power to alienate any land or interest in any land held by the UDA only with the approval of the Minister. The UDA has alienated a land held by it without obtaining the approval of the Minister.

(2) The UDA took the decision to alienate the land on 8.4.2003 - the Minister had given approval only in October 2004.

(3) The UDA in the circumstances has acted without any legal basis.

Per Sisira de Abrew, J.

> "Acting without power, in my view, is more offensive to the rules of Administrative Law than exceeding power when the principle laid down in the judicial decisions apply to the facts of this case; the decision alienating the Land to the State Department has to be quashed."

(4) The possession was handed over on 18.9.2002. The approval of the Minister was on 25.10.2004. Approval was granted 2 years after handing over of the Physical possession of the land to the State Department. This decision is ultra vires the UDA law.

(5) Section 18 of the UDA law contemplates on instruments of alienation. No such instrument has been produced. Section 18 further states that when lands are alienated the UDA will have to prescribe the terms and conditions as determined by the Minister. This is a safeguard to protect the purpose for which the land was alienated - purpose of Urban Development.

In Sisira De Abrew, J.

> "Even if the petitioners have not come to Court on the basis that the UDA had failed to follow the procedure laid down in law, if it is brought to the notice of Court that the respondents have taken decisions after violating the procedure so laid down and without following the mandatory requirements can the Court exercising supervisory Jurisdiction over the decisions made by the public bodies, turn a blind eye to such decisions - the answer is No."

(6) Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority upon the

existence of a regular practice which the claimant can reasonably expect to continue. There is a clear promise given by the UDA that the land would be kept as a the play ground for the residents of the scheme - The petitioners also claim that they have been using this land as a play ground since 1964 when the housing scheme was originated. The promise had generated legitimate expectations in the minds of the petitioners to keep this land as a play ground.

(7) Her Excellency the President in a Cabinet Memorandum - 30.01.2001 - stated that a land at Robert Gunawardene Mawatha Battaramulla had been assigned by the UDA for the purpose of constructing a Head Office Complex for the State Department. Then can be an overriding public interest to give the land which is at Jayathipura Battaramulla to the State Department - There is no overriding public Interest to give this Land to the State Department. It is not possible for the UDA to say that they changed their policy as there was an overriding public Interest.

(8) The public authorities are bound by its undertakings/promises provided (1) That they do not conflict with its statutory duty (2) that there is an overriding public interest justifying the departures from the earlier undertakings or promises.

Per Sisira De Abrew, J.

"Hence after the promise or undertaking, if parties enter in to an agreement on the strength of the said promise or undertaking and if such agreement is violated, since in such a situation relationship between the parties is a contractual. No right lies to remedy the grievances arising from alleged breach of contract."

(9) If a public authority decides to act contrary to its published policy or decisions to frustrate Legitimate Expectation created among the individuals by way of promise or undertaking such decisions, unless there is an overriding public interest are liable to be quashed by way of Writ of Certiorari".

APPLICATION for a writ of Certiorari . . .

Cases referred to :-

(1) *R. vs. North and East Devon Health Authority ex parte Coughlen* - 2000 3 All ER 850 at 873

(2) *Preston vs. IRC,* 1985 2 All ER 327 at 337, 1985 AC 835 at 862

(3) *Gunarathne vs. Chandrananda de Silva* 1998 3 SLR 265

(4) *Associated Provincial Picture House Ltd vs. Wednesbury Corporation (1948)* - 1KB 223 at 229

(5) *Bradbury and Others vs. Enfield London Borough Councial*- 1967 1 WLR 1311 at 1324

(6) *Regine vs. Hull University Ex Parte* - (1993) AC 682 at 701

(7) *Boddington vs. British Transport Police* 1999 2 AC 143 at page 171

(8) *Jayantha Wijesekera and Others vs. Attorney General and Others* SC (FR) 243-245/2006

(9) *Council of Civil Services Union vs. Minister for the Civil Service* - (1985) AC 374 at 410

(10) *Tokya Cement Co. Ltd vs. Gunrathne and Others* (SC Appeal No. 23/2004)

(11) *Attorney General of Hong Kong vs. Ng Yuen Shiu* (Privy Council) 1983) 2 AC 629

(12) *Regina vs. Liverpool Corporation, Ex parte Liverpool Taxi Fleet Operators Association (1972)* -2 QB 299

(13) *Council of Civil Services Union vs. Minister for the Civil Service* (1984) 3 All ER 935

(14) *Wickremaratne vs. Jayaratne and other* 2001 3 SLR 161

(15) *Sirimal and Others vs. Board of Directors of the Co-operative Wholesale Establishment and others* 2003 2 SLR 23

(16) *Regina vs. Secretary of State for Education and Employment, Ex-parte, Begbio* 2000 1 WLR 1115

(17) *R vs. Home Secretary exp Asif Mahmood Khan* (1984) 1 WLR 1337

(18) *Dayarathne and Others vs. Minister of Health and Indigenous Medicine* (SC) (1999) 1 SLR 393 at 412

(19) *Chanfradasa vs. Wijeratne* (1982) 2 SLR 412

(20) *Weligama Multipurpose Co-operative Society vs. Chandradasa Daluwatta* (1984) 1 SLR 195 at 199

(21) *Jayaweera vs. Wijeratne* (1985) 2 SLR 413

(22) *De Alwis vs. Sri Lanka Telecom* (1995) 2 SLR 38

(23) *K. S. De Silva vs. National Water Supply & Drainage Board and Another* (1989) 2 SLR 1

(24) *Jayawardene vs. Peoples Bank* (2002) 3 SLR 17

Sanjeewa Jayawardene with *Rajeev Amarsinghe* for the Petitioner.

Farzana Jameel SSC with *Anusha Samaranayeke SC* for the respondnets.

October 26th 2006
SISIRA DE ABREW J.

The facts

The petitioners are the owners and/or residents and/or occupiers of the houses situated within the Jayanthipura Housing Scheme which comprises approximately 65 acres (26.31 Hectares) of land bordering the Battaramulla - Pannipitiya Road and Parliament State Drive. There are approximately 2500 residents living in this housing scheme. According to the petitioners when the said land was originally divided amongst the original owners, a block of land extent of which is about 5 Acres and 3 Roods was identified as open space and the said land is depicted as lot 5 in plan marked P3. The petitioners state that a portion of this land amounting to one acre had, since 1954, when the housing scheme was originated, been used as a play ground and for recreational activities by the residents and the school children of Battaramulla.

In May 1995, the petitioners received information that certain interested parties were making attempts to acquire the said land and on making inquires, the 1st respondent by letters marked P9 and P11 informed the petitioners that the 1st respondent had not given any approval to allocate this playground to any outside party for development and that this land has been reserved for Jayanthipura Housing Scheme for the last 40 years. However when the representatives of the petitioners met the Director (Lands) of the 1st respondent on 4.6.2003 they were informed that the land used as playground had been earmarked to be given to a Government Department. The document marked 1R16 indicates that lot No.1 of plan No. 664 dated 18.09.2002 has been given to Director, Department of Wild Life Conservation on 18.9.2002.

The petitioners, inter alia, move for a writ of certiorari to quash the decision of the 1st, 2nd and 3rd respondents and/or 7th to 13th respondents to allocate and/or grant and/or transfer the land depicted as lot No. 5 in plan marked P3. The Petitioners also move for a writ of prohibition on the 1st to 3rd and 5th respondents from using and/or utilizing the said land for any purpose other than as an open space and playground. The 1st, 2nd and 3rd respondents in paragraph 16(n) of their statement of objections admit that physical possession of lot no 1 of plan No. 664 dated 18.9.2002 prepared by AJB Wijekoon Licensed Surveyor amounting to one acre was duly handed over to the Department of Wild Life Conservation (Department of WLC) on 18.9.2002. It is significant to note that the date of the plan in 18.9.2002 and the handing over of the said block of land was also done on the same date. From the pleadings filed by the petitioners and the respondents it is safe to conclude that physical possession of the playground has been handed over to the said department and it is this playground and the adjoining block of 20 perches that the petitioners are complaining of. The petitioners allege, inter alia, that the decision of the 1st to 3rd respondents and 7th to 13th respondents to allocate the above land is unlawful, arbitrary, capricious and offends the principles of unreasonableness, fairness, proportionality, natural justice, legitimate expectation and for improper motives. I will first advert to this contention. Under section 18 of the Urban Development Authority Law (UDA Law) No. 41 of 1978 as amended, the Urban Development Authority (hereinafter referred to as the UDA) has the power to alienate any land held by the UDA. Section 18(1) of the UDA Law provides as follows:-

"The Authority may, with the approval of the Minister, alienate, by way of sale, lease, rent or rent purchase for the purpose of urban development, any land or interest in land

held by the Authority, subject to such terms and conditions including the use or uses for which the land or interest in land is alienated as may be determined by the Minister, and in particular, but without prejudice to the generality of the foregoing provisions of this section, a condition to the effect that the alienation effected by the instrument of alienation may be cancelled or determined in the event of a failure to comply with any other condition specified in such instrument, or in the event of any money due to the Authority under such instrument remaining unpaid for any such period as may be specified therein"

A close reading of Section 18 suggests that the UDA can alienate any land or interest in any land held by the UDA with the approval of the minister in charge of the subject of urban development (hereinafter referred to as the Minister). Considering the scheme provided in Section 18(1) of the UDA Law, it appears to me that the UDA derives power to alienate any land or interest in any land held by the UDA only with the approval of the Minister. Thus, the UDA, before proceeding to alienate a land held by the UDA, must first obtain the approval of the Minister and then proceed with the alienation. According to Section 18(1) of the UDA Law, terms and conditions which should be included in the instrument of alienation must also be determined by the Minister. This shows that the Minister's approval is a necessary requirement prior to the alienation of the land. It is therefore seen that if the UDA has alienated a land held by it without obtaining the approval of the Minister, such decision has been taken without any legal authority.

Decision taken without authority

In the present case, physical possession of the land was handed over to the Department of WLC on 18.9.2002. The UDA took the decision, according to the respondents, to

alienate the land on 8.4.2003 (1R14). The respondents claim that the Minister gave the approval to alienate the land only in October 2004 (1R18). Thus, the decision to alienate the land was taken without the approval of the Minister. It is therefore seen that the UDA, when it decided to alienate the land to the department of WLC, has acted without any legal basis. I have elsewhere in this judgment dealt with this aspect in detail. It is undisputed that the UDA derives power to alienate lands from the UDA Law. Then, can the UDA go against the very same statue which gives it the power to alienate? I think not. "It is axiomatic that a public authority which derives its existence and its powers from statute cannot validly act outside those powers." [Vide Lord Wolf MR in *R. vs North and East Devon Health Authority ex parte Coughlen*[1]. "Judicial review is available where a decision making authority exceeds its power, commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuse its powers." Vide Lord Templeman in *Preston. Vs IRC,*[2] at 337, at 862 (House of Lords). This dictum was considered by lord Wold MR in *Coughlen's case (supra).*

Acting without power, in my view, is more offensive to the rules of Administrative Law than exceeding power. When the principles laid down in the above judicial decisions apply to the facts of this case, the decision of the UDA alienating the land to the Department of WLC has to be quashed. The above view is also supported by the judicial decision pronounced in the case of *Gunarathne. vs. Chandrananda de Silva*[3]. In that case the petitioner, a Senior Deputy Inspector General of Police, was set on compulsory leave by the Secretary Defence as the Commission of Inquiry (Batalanda Commission) had made adverse findings against the petitioner. It was contended that the decision to place the petitioner on compulsory leave

is ultra vires and therefore is void in law for the reason that the said decision has not been taken by the proper authority namely by the PSC. Gunawardene J in the above case at page 288 held: "The decision of the respondent (Secretary/ Defence) being vitiated, as it is by a jurisdictional error, that is a decision that had been made in the exercise of a power or jurisdiction which the Secretary Defence clearly did not possess the decision had been legally void from the beginning." In this connection it is relevant to consider a passage from Administrative Law by Wade & Forsyth 8th edition page 36. "Any administrative act or order which is ultra vires or outside jurisdiction is void in law, i.e. deprived of legal effect. This is because in order to be valid it needs statutory authorization, and if it is not within the powers given by the Act, it has no legal led to stand on. Once the court has declared that some administrative act is legally a nullity, the situation is as if nothing had happened. In this way the unlawful act or decision may be replaced by a lawful one." As observed earlier, when the UDA decided to alienate the land it had acted without power. Considering the principles laid down in the above legal literature, I hold that the decision of the UDA alienating the land to the department of WLC is a nullity. At the hearing of this case, learned SSC, at one stage, admitted that the UDA cannot alienate lands without the approval of the Minister. She conceded that the Minister's approval is a necessary requirement for the UDA to alienate lands. But she contended that the UDA could take decisions to alienate lands without the Minister's approval and seek Minister's approval later. She even contended that the physical possession of the land could be handed over to the prospective buyer and the buyer could commence development activities on the land such as constructing buildings without the said approval of the Minister. Here, I ask the question: What

happens, after taking the said steps, if the Minister refuses to grant approval? Then, can the UDA be heard to say that, since the prospective buyer has developed the land, leave aside the Minister's approval, alienation of the land must be proceeded with? If this is permitted, then the purpose of Section 18 will be rendered nugatory and the Minister will be just a figure head who becomes unable to use his discretion in the decision making process. The legislature, in enacting this law, did not, in my view, permit the existence of this kind of absurd situation. One should not forget that according to Section 18 of the UDA Law, terms and conditions in the instrument of alienation should be determined by the Minister. May be for the sake of convenience the UDA stipulates terms and conditions and seeks the Minister's approval but the final decision with regard to the terms and conditions is left with the Minister. Although the learned SSC contended that the Minister, by letter marked 1R18, had granted approval to allocate the land to the department of WLC on 25.10.2004, the Coordinating Secretary of the Ministry of Urban Development & Water Supply, on 17.2.2005, admitted by letter marked 1CA9 that the Minister had not granted such approval. This is a letter written by the said Secretary to the Director General UDA. This letter was produced to Court along with the counter objections. The relevant paragraph of this letter is reproduced below. "In the absence of either Ministerial or Cabinet approval Hon. Minister has directed me to inform you to shift the site from the present site to the area with Pannipitiya road frontage as agreed upon by JSS and to release the block of land required by JSS." The Minister being the 5th respondent did not even file an affidavit stating that he granted approval under section 18 of the UDA law. For the above reasons, I am unable to agree with the contention of the learned SSC.

Failure to follow the procedure laid down in law

When the 1st to 3rd respondents decided **to hand over the physical possession** of the land as averred by paragraph 16(n) of their statement of objections, did they have the relevant approval? According to 1R16 filed by the 1st to 3rd respondents, physical possession of the land had been given to the Department of WLC on 18.09.2002. The 1st and the 3rd respondents claim that the approval of the Minister was obtained on 25.10.2004. (Vide 1R18). Thus, this approval was granted two years after the handing over of the physical possession of the land to the Department of WLC. Respondents claim that the UDA took the decision to alienate the land on 8.4.2003. Then it is clear that the UDA has failed to obtain the Minister's approval before taking the decision to alienate the land to the Department of WLC and before taking the decision to hand over the physical possession of the land. Therefore the decisions of the UDA to hand over the physical possession of the land to the department of WLC and to alienate the said land are ultra vires the UDA law as the UDA has taken the decisions without following the procedure laid down in Section 18(1) of the UDA law.

Under Section 18 of the UDA Law, the UDA has the power to alienate lands held by the UDA by way of sale, lease, rent, or rent purchase. The modes of alienation are already spelt in the said section. So when the UDA handed over the physical possession of one acre land on 18.9.2002 to the Department of WLC did alienation take place by way of sale, lease, rent or rent purchase? Section 18 of the said Law contemplates an instrument of alienation. Is there an instrument of alienation in this case? The respondents have failed to produce any instrument of alienation. Therefore handing over of the physical possession of the said land (one acre) was contrary to Section 18(1) of the said Law. According to the

said Section when lands are alienated, the UDA will have to prescribe the terms and conditions as determined by the Minister. Further, this Section provides that there should be a condition in the instrument of alienation to the effect that the alienation to be cancelled in the event of a failure to comply with any of the conditions specified in such instrument. This condition too must be determined by the Minister. The idea of this condition, in my view, is to ensure adherence of the terms and conditions specified in the instrument by the person in whose favour the instrument is effected. This, in my view, is a safeguard to protect the purpose for which the land was alienated. One should not forget the fact that the alienation of the land under Section 18(1) is effected for the purpose of urban development. Thus the intention of the legislature, in Section 18, is to ensure that the land is utilized for the purpose of urban development. This is one of the reasons why Section 18 of the UDA Law expects the terms and conditions to be specified in the instrument of alienation. No instrument of alienation setting out the terms and conditions is produced in this case. Considering the above observations, I am of the opinion that the Minister's approval and the determination of terms and conditions in the instrument of alienation by the Minister are mandatory requirements in Section 18(1) of the UDA Law. As I pointed out earlier, the UDA has failed to follow the mandatory requirements set out in law and therefore the decision of the UDA to alienate the land is a nullity. Considering all these matters it is clear that the UDA has taken a decision to alienate the land without following the procedure laid down in Section 18(1) of UDA Law. Learned SSC contended that this was not the basis on which the petitioners came to Court. That is to say the UDA had failed to follow the procedure laid down in the Law. Learned SSC however argued that the petitioners are not entitled to claim the reliefs prayed for. When considering this contention one

should not forget paragraph 64 of the petition. The petitioners, in paragraph 64 of the petition, claim that the decision of the 1st to 3rd respondents is unlawful, arbitrary and offends the principles of reasonableness and fairness. In this regard I cannot resist quoting an excerpt from an eloquent pronouncement of Lord Greene MR in the case of *Associated Provincial Picture House Ltd. vs Wednesbury Corporation*[4]. To quote: "It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance. A person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting unreasonably."

In the present case has the UDA, entrusted with the discretion of alienating lands under section 18 of the UDA Law, directed itself properly in law? Has it called its attention to the matters which it is bound to consider? The answer is clearly no. For the above reasons, I am unable to agree with the contention of the learned SSC.

Even if the petitioners have not come to court on the basis that the UDA had failed to follow the procedure laid down in law, if it is brought to the notice of court that the respondents have taken decisions after violating the procedure so laid down and without following the mandatory requirements, can the court, exercising supervisory jurisdiction over the decisions made by the Public Bodies, turn a

blind eye to such decisions? The answer is no. "If a local authority does not fulfill the requirements of law, this court will see that it does fulfill them." [Vide Lord Dening MR in the case of *Bradbury and Others vs. Enfield London Borough Council*[5] at 1324. What happens when the procedure laid down in law is not followed by Public Bodies? What is the duty of court when such violations are brought to the notice of Court? In this connection, I would like to cite the following passage from the judgment of Danckwerts LJ reported in *Bradbury's case (supra)* at 1325. "It is imperative that the procedure laid down in the relevant statute should be properly observed. The provisions of the statute in this respect are supposed to provide safeguards for Her Majesty's subjects. Public Bodies and Ministers must be compelled to observe the law; and it is essential that bureaucracy should be kept in its place." Lord Denning MR in the above case observed thus: "If a local authority does not fulfill the requirements of the law, this court will see that it does fulfill them. It will not listen readily to suggestions of 'chaos.' The department of Education and other local education authority are subject to the rule of law and must comply with it, just like everyone else." Bradbury's case (supra) was a case where petitioners, by their writ, claimed, inter alia, for a declaration that the defendants' resolutions carrying out of the proposed reorganization of secondary education in the borough were ultra vires and of no effect. It response to circular issued by the government, many of the local education authorities began to reorganize their system of secondary education. One of them was the council for London Borough of Enfield. Chief Education Officer submitted proposals to the relevant Department. A week later Department replied indicating that revised proposals were acceptable but giving a reminder to the Council that, under the statute, public notice had to be given before the proposals could be officially approved. The Council

issued public notices in regard to a number of schools. Thereafter several persons objected and submitted their objections to the Minister. He considered the objections. He gave his official approval to the proposals for those schools. But in respect of eight of the schools, no public notice was given and as such members of the public were not given an opportunity to voice their objections. Under the law of England when the Council intends "to establish a new school" or to "cease to maintain" an existing school, Council was under a duty to submit their proposals to the Minister and forthwith give public notice of the proposals in the prescribed manner. Thereupon any ten local government electors could, within three months, submit objections to the Minister. Under the law the Minister, after considering the objections may approve the proposals. A local education authority cannot do anything to implement their proposals until they have been approved by the Minister. After considering the proposals of the council, Court took the view that in regard to the eight schools, the intention of the education authority was to "cease to maintain" them (schools) and "to establish new" schools within Section 13 of the Act. Lord Denning MR delivering the judgment remarked as follows: (page 1323) "They ought, therefore, to have given public notices of their proposals, so that the people could object. On objection being lodged, the Minister would have to consider them. Not till then could the Minster give his approval. . . . It is implicit in Sections 13(3) and (4) that the Minister cannot approve unless he has considered all objections submitted to him. . . . . I hold that, therefore, the council has not fulfilled the statutory requirements of Sections 13(3) and (4) in regard to the eight schools. They must continue to maintain them (schools) and must not cease to maintain them until the statutory requirements are fulfilled."

As I pointed out earlier, in the present case, the decisions of the UDA to hand over the physical possession of the play ground and to alienate the play ground are without authority. The UDA has taken the said decisions without following the procedure laid down in Section 18 of the UDA law. When I apply the principles laid down in Bradbury's case (supra), I have to make an order quashing the said decisions of the UDA.

In *Regina vs. Hull University Ex parte*[6] at 701 (House Lords) Lord Brown Wlikinson observed thus: "The fundamental principle (of judicial review) is that courts will intervene to ensure that the powers of public decision –making bodies are exercised lawfully. In all cases. . . this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with the fair procedures and, in a Wednesbury sense *(Associated Provincial Picture House Ltd. vs. Wednesbury Corporation (supra)*, reasonably. If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting ultra vires his powers and therefore unlawfully. . . ." The above dictum of Lord BrownWilkinson was followed by Lord Steyn in the case of *Boddington. Vs. British Transport Police (House of Lords*)[7] at 171.

In *Jayantha Wijesekera and Others vs. Attorney General and Others SC* [8] the question in relation to the validity of Proclamation effecting a merger of Northern and Easterns Provinces was considered by a bench of five Judges of the Supreme Court. The Supreme Court observed thus: Whilst Section 37(1)(a) of the Provincial Councils Act No. 42

of 1987 empowers His Excellency the President to make a Proclamation declaring two or three Provinces would form one administrative unit, sub paragraph (b) of Section 37 (1) of the said Act contains an exception in respect of the Northern and Eastern Provinces where special conditions have to be satisfied as to the surrender of weapons and cessation of hostilities before an order of merger is made. Those conditions are:

(a) that arms, ammunition, weapons, explosives and other military equipment which on 29.7.1987 were held or under the control of terrorist militants or other groups having as their objectives the establishment of separate State, have been surrendered to the Government of Sri Lanka or to authorities designated by it, and;

(b) that there has been a cessation of hostilities and other acts of violence by such groups in the said Province.

Terrorist militants continued to do acts of violence in the said Provinces even after enactment of the said Provincial Councils Act. Therefore two conditions for the merger as stated in Section 37(1)(b) of the Provincial Councils Act No. 42 of 1987 as to the weapons being surrendered by terrorist militants and a cessation of hostilities had not been met when the President made the impugned order of merger. His Lordship Chief Justice S.N. Silva held as follows:

"The next question to be decided is in relation to the validity of order P2 effecting a merger of the Northern and Eastern Provinces. Section 37(1)(b) contains two mandatory conditions that have to be satisfied before a Proclamation effecting a merger is issued. The address made by the President to the Parliament and the statements as to the security situation seeking an approval of the Proclamations

of the state of Emergency in the year 1988 referred to in the preceding analysis clearly establish that the President could not have been possibly satisfied as to either of these mandatory conditions. . . . . The Proclamation P2 made by the then President declaring that the Northern and Eastern Provinces shall form one administrative unit has been made when neither of the conditions specified in Section 37(1)(b) of the Provincial Councils Act No. 42 of 1987 as to the surrender of weapons and the cessation of hostilities, were satisfied. Therefore the order must necessarily be declared invalid since it infringes the limits which Parliament itself had ordained."

In view of the foregoing analysis, I hold the view that if an order has been made by an administrative tribunal without following the procedure laid down in law or if an order, made by an administrative tribunal, infringes the limits ordained by the Parliament such an order can be declared invalid by Court exercising the writ jurisdiction.

In the instant case, at the time the land was alienated to the Department of WLC, the UDA had not obtained the Minister's approval. As was pointed out earlier, the Minister granted the purported approval two years after the handing over of the physical possession of the land. Under section 18 of the UDA law, UDA derives power to alienate the lands only when the Minister grants the approval. Therefore when the principle laid down in the *Hull University case (supra)* is applied to the facts of this case, the UDA has exercised its powers outside the jurisdiction conferred in alienating the land, and the procedure adopted by the UDA is irregular. Thus, I hold that the UDA has acted ultra vires its powers and therefore the said decision of the UDA is unlawful. Thus, the decision of the UDA to alienate the land must be quashed on this ground alone. When the above judicial decision is

considered in relation to the facts of this case, can there be an argument that the petitioner is not entitled to seek judicial review in this case? I say no.

What happens when a Public Body does not fulfill the requirements of law when taking decisions?

Lord Diplock, in *Council of Civil Services Union. Vs Minister for the Civil Service*[9] at 410 observed thus: "By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the State is exercisable."

In the present case, the UDA did not obtain the approval of the Minister prior to the two decisions dated 18.9.2002 and 8.4.2003. Further when the land was handed over to the Department of WLC on 18.9.2002, there was no decision by the UDA to hand over the physical possession of the land. Thus handing over of the physical possession of the land is contrary to section 18 of the UDA law. There is no instrument of alienation. Terms and conditions which should be included in the instrument of alienation have not been determined by the Minister. These are some of the requirements stipulated in section 18 of the UDA law. I pause here to ask the question: Has the decision maker namely the UDA understood the law (section 18 of the UDA law) correctly? I think not. Then, when the above dictum of Lord Diplock is applied to the facts of this case, the decisions of the UDA alienating and handing over of the physical possession of the land will have to be quashed.