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DIGEST

WANIGASOORIYA
vs
DANAWATHIE AND OTHERS

COURT OF APPEAL
ABDUL SALAM. J
CA 658/04 (F)
DC KULIYAPITIYA 12417/99
NOVEMBER 12, 2007

Permissive access given - Plaintiff unable to protect cultivation - Alternate access available - Prescriptive title? - Roadway used for over 50 years - Rights adverted to the plaintiff? - Right of servitude - Proof - Way of necessity.

The plaintiff-appellant filed action alleging that her father had permitted the defendants predecessor to have access to his land, over and along the land of the plaintiff, and sought a declaration to close down the road, and further alleged that the defendant has alternate way.

The defendant-respondent contended that, the roadway in question had been used by him over a period of 50 years and moved for a dismissal of the action. The trial Court held with the defendant-respondent.

Held:

(1) The judgment does not support even by a stretch of imagination that the defendants used the right of way for a long period of time exceeding 50 years adverse to the rights of the plaintiff, but merely states that they had used their path.

The judgment does not identify the use being adverse to the rights of the plaintiff on a title ten years immediately preceding the institution of the action.

The consequence of this finding would be that according to the trial Judge the defendant had not acquired any prescriptive rights to the roadway.

(2) It is quite clear that the trial Judge has erred in not appreciating that there was lack of evidence regarding the acquisition of a right of way of necessity.

APPEAL from the judgment of the District Court of Kuliyapitiya.

Cases referred to:-

1. *Brampy Appuhamy vs. Gunasekara* 50 NLR 253 at 255
2. *De Soysa vs. Fonseka* - 58 NLR 501

Collin Amarasinghe with *Roland Munasinghe* for plaintiff-appellant
N. R. M. Daluwatte PC with *Gaithri de Silva* for defendant respondent

May 11, 2009

ABDUL SALAM, J.

This is an appeal from the judgment of the learned additional district Judge of Kuliyapitiya, dismissing the action of the plaintiff-appellant (hereinafter referred to as the "plaintiff").

The background to the appeal briefly is that the plaintiff filed action against the defendant-respondents (hereinafter referred to as the "defendants") alleging that the father of the plaintiff permitted the defendant's predecessor in title to have access to his land, over and along the land of the plaintiff. The plaintiff's position is that the said permissive access given to the defendants and their predecessors has resulted in a division of her land and therefore she is unable to protect or improve her cultivation. The plaintiff further averred in her plaint that alternative access is available to the defendants to avoid such a division of the land and defendants by not using the alternative way have caused damages to her in a sum of rupees 3500/- per month.

The defendants whilst admitting the ownership of the plaintiff to the land in question claimed that the roadway had been used by them over a period of 50 years and moved for a dismissal of the plaintiff's action.

At the commencement of the trial paragraphs 1, 2 and 3 were admitted by the defendants, Paragraph 1 of the plaint

deals with the situation of the land and as to the places where the defendants resided. Paragraph 2 of the plaint deals with the ownership of the plaintiff to the subject matter along which the defendants were using the roadway. Paragraph 3 of the plaint deals with the manner in which the plaintiff became the owner of the subject matter over which the defendants are using the alleged permissive roadway.

The material facts and the law on which the parties were at variance included as to whether defendants were permissive users of the road in question and whether the plaintiff is entitled to close down the road, since the defendants have an alternative roadway to gain access to their land. As has been referred to above, the title of the plaintiff to the land in question was never an issue before the learned district Judge. However in his judgment the learned district Judge whilst arriving at the finding that the defendants had failed to prove a right of servitude on prescription and by way of necessity avoided holding the plaintiff as being the owner of the subject matter. The learned counsel of the plaintiff has submitted that the learned judge was patently in error when he failed to find on the plaintiff's ownership and thereafter proceeded to enter a decree for the dismissal of the plaintiff's action.

For purpose of lucidity and comprehension of the actual dispute and to ascertain the exact approach adopted by the learned judge towards the resolution of the dispute, it is appropriate to produce a translation of the issues and the manner in which they were answered in the judgment. When translated into English they appear to me as follows…

1. Did the husband of the 1st defendant who is also the father of the 2nd defendant serve the father of the plaintiff as a watcher? Yes

2. During that period with the leave and licence of the father of the plaintiff and subsequently with the leave and

licence of the plaintiff, (after the plaintiff became the owner of the subject matter) did the defendants use the roadway referred to in the plaint and depicted in plan No 129 A/71? Not established.

3. Thereafter during the time the defendants were using the said roadway has the plaintiff suffered damages as referred to in paragraph 9 of the plaint? **Not established**

4. As the defendants enjoy an alternate right of way to their land, has the plaintiff got the right to close down the road used by the defendant with the leave and licence of the plaintiff? **No**

5. Have the 1st, 2nd and the 3rd defendants and before them their predecessors used the right of way depicted as X1B in plan X for a long period of time exceeding 50 years? **The defendants have enjoyed it for a long period of time.**

6. Are the defendants entitled to the said right by way of necessity? **According to the facts proved the defendants are not entitled to a right of way of necessity.**

7. Are the defendants entitled to the reliefs prayed for in their answer in the event of 5,6 being answered in favour of them? **Certain reliefs can be obtained.**

8. If the defendants are in need of a right of way of necessity are they entitled to obtain the same as referred to in their answer? **No**

The learned counsel of the plaintiff has adverted to the failure on the part of the defendants to make a specific claim of a right of way over the plaintiff's land by prescription and the failure to state even an issue relating to such a claim. Paragraph 5 of the answer merely confines to the defendants and their predecessors having enjoyed a right of way for a

period of 50 years. At this stage it may be useful to refer to the judgment in the case of *Brampy Appuhamy Vs Gunasekara*[1] at 255 where Basnayaka J (as he then was) held in relation to the limitation of actions under the statute (Prescription Ordinance) – section 5, 6, 7, 8, 9, 10, and 11 unless it is specially pleaded by way of defence. The crux of the decision in the said case, when applied to the facts of the present matter would reveal that the learned district Judge has in fact erred with regard to the proper application of the law.

The impugned judgment of the learned district Judge in answer to issue 5 does not support even by a stretch of imagination that the defendants used the right of way depicted as X1B in plan X for a long period of time exceeding 50 years, **adverse to the right of the plaintiff** but merely states that they had used the path. In other words the finding of the learned district Judge inter alia was that the 1st, 2nd and the 3rd defendants and their predecessors have used the right of way depicted as X1B in plan X for a long period of time exceeding 50 years, but does not identify the use as being adverse to the right of the plaintiff on a title independent and whether they enjoyed the same without any interruptions for a period of 10 years immediately preceding the institution of the action. The consequence of this finding would be that according to the learned judge the defendants had not acquired any prescription rights to use the roadway.

The learned counsel of the plaintiff has suggested that the failure to find in favour of the defendants on adverse possession was on account of the admission of the two defendants who testified in court and the answer to issue No 1 to the effect that the husband of the 1st defendant who is also father of the 2nd defendant had served the father of the plaintiff as a watcher. The unambiguous nature of the finding of the learned district Judge was that defendants have failed

to establish a right of servitude by long and prescriptive user attached to the land.

It is pertinent at this stage to reiterate the legal principle set out by his Lordship Basnayaka CJ in *De Soysa Vs Fonseka*(2) as to the nature of the evidence required to prove the acquisition of a right of way by prescription. His Lordship stated that clear and unmistakable evidence of the commencement of an adverse user for a prescriptive period is necessary to entitle the licensee to claim a servitude in respect of the premises.

The learned district judge has also found that the defendants are not entitled to a right of way of necessity either. In the circumstances, it is quite clear that the learned district Judge has erred basically in answering some of the issues, when there was clear admission as to the ownership of the plaintiff and lack of evidence regarding the acquisition of a right of way of necessity or a right of way of prescription by the defendants. The error thus committed by the learned district Judge has ended up in a serious miscarriage of justice. As the plaintiff who is legitimately entitled to a declaration that she is the owner of the property in question without any burden of servitudes has been unduly denied of a declaration to that effect and this in my opinion is perverse and needs to be corrected.

For the foregoing reasons it is my considered view that the learned district Judge should have answered the issues in the following manner:

1. Did the husband of the 1st defendant who is also the father of the 2nd defendant serve the father of the plaintiff as a watcher? **Yes**

2. During that period with the leave and licence of the father of the plaintiff and subsequent to the plaintiff having

become the owner with the leave and licence of the plaintiff, did the defendants use the roadway referred to in the plaint and depicted in plan 129A/71? **Yes**

3. Thereafter during the time the defendants were using the said roadway, has the plaintiff suffered damages as referred to in paragraph 9 of the plaint? **Not established**

4. As the defendants enjoy an alternate right of way to their land, has the plaintiff got the right to close down the road used by the defendant with the leave and licence of the plaintiff? **Yes**

5. Have the 1st, 2nd and the 3rd defendants and before them their predecessors used the right of way depicted as X1B in plan X for a long period of time exceeding 50 Years? **The defendants have enjoyed it for a long period of time.**

6. Are the defendants entitled to the said right by way of necessity? According to the facts proved the defendants are not entitled to a right of way of necessity.

7. Are the defendants entitled to the reliefs prayed for in their answer in the event of 5, 6 being answered in favour of them? **Not entitled to any reliefs.**

8. If the defendants are in need of a right of way of necessity are they entitled to obtain the same as referred to in their answer? **No**

Subject to the above variations made in relation to the answers given to the issues by the learned district Judge, it is my view that this case should be decided in favour of the plaintiff as prayed for in the plaint but without damages. The learned district Judge is directed to enter decree afresh accordingly.

Appeal allowed

DABARE
vs
REPUBLIC OF SRI LANKA

COURT OF APPEAL
SISIRA DE ABREW. J
ABEYRATNE. J
CA 111/2006
HC COLOMBO 231/99
MAY 04, 2009

Criminal Procedure Code - Section 203 - Failure to comply - Does it affect the conviction? - Provisions are they mandatory? - Duty of trial Judge to deliver judgment?

The appellant was convicted for being in possession of heroin. The case was concluded on 7.6.2006, judgment was put off for 1.8.2006, but after two postponements judgment was delivered on 30.11.2006. The appellant contended that the trial Judge failed to comply with Section 203.

Held:

The provisions of Section 203 are directory and not mandatory. This is a procedural obligation that has been imposed upon the Court and its non compliance would not affect the individuals rights unless such non compliance occasions a failure of justice.

Per Sisira de Abrew. J.

> "Courts below cannot use this judgment as an authority to refrain from delivering the judgments within the time period in Section 203, one should not forget that after the close of the defence case, the accused is generally remanded till the delivery of judgment. Thus when the judgment reserved is put off without reasons the accused would continue to be in the custody of remand without reasons. It is the duty of the trial judge to deliver his judgment within the time period stipulated in Section 203 - failure to comply with Section 203 or postponing judgments with out reasonable grounds would lead to erosion of public confidence in the judicial system and would lead to laws delay".

APPEAL from the judgment of the High Court, Colcmbo.

Case referred to:-

Anura Shantha Silva vs. A. G. 1999 1 Sri LR 299

Dr. Ranjith Fernando for accused-appellant
Rohantha Abeysuriya DSG for Attorney General

cur.adv.vult

June 5, 2009

SISIRA DE ABREW J.

The accused appellant in this case was convicted for being in possession of 25.7 grams of heroin. The learned trial Judge sentenced the appellant to life imprisonment. This appeal is against the said conviction and the sentence.

The only ground urged by the learned counsel for the appellant is that the learned trial Judge failed to comply with section 203 of the Criminal Procedure Code (CPC). The case was concluded on 7.6.2006 and the judgment was put off for 1.8.2006. The case was not called on 1.8.2006. On 29.9.2006 and 10.10.2006 the case was called but the judgment was not delivered. The learned trial Judge delivered the judgment on 30.11.2006. It is therefore clear that the judgment was not delivered within the period stipulated in Section 203 of the CPC.

The important question that must be decided is whether the failure to comply with Section 203 of the CPC would affect the conviction. In *Anura Shantha Silva vs A.G*[1] His Lordship Justice De Silva held: "The provisions of Section 203 of the Code are directory and not mandatory. This is a procedural obligation that has been imposed upon the Court and its non compliance would not affect the individual's rights unless such non compliance occasions a failure of justice."

According to the facts of this case when IP Liyanage attached to the Police Narcotic Bureau arrested the appellant, who was having a parcel containing heroin, when he came out of his house. His evidence was corroborated by PS Senarathne. Learned Counsel did not challenge the evidence of the prosecution. I have gone through the evidence of the case and am of the opinion that the case has been proved beyond reasonable doubt. When the case has been proved beyond reasonable doubt, failure to comply with Section 203 of the CPC would not affect the conviction. I therefore hold that non compliance of Section 203 has not occasioned a failure of justice. I would like to state here that the courts below cannot use this judgment as an authority to refrain from delivering their judgments within the time period specified in Section 203 of the CPC. One should not forget that after the close of the defence case the accused is generally remanded till the delivery of the judgment. Thus when the judgment reserved is put off without stating reasons, the accused would continue to be in the custody of remand without reasons. It is the duty of the trial judge to deliver his judgment within the time period stipulated in Section 203 of the CPC. If he can't do so, he must state his reasons for his inability and should deliver it within a reasonable time. The superior Court can then examine the reasons and decide whether his inability is justified or not. Failure to comply with Section 203 of the CPC or postponing judgments without reasonable grounds would lead to erosion of public confidence in the judicial system and also would lead to laws delay.

As I pointed out earlier, non compliance of Section 203 of the CPC in the instant case has not occasioned a failure of justice. For the aforementioned reasons, I upholding the conviction and the sentence of the accused appellant, dismiss this appeal.

ABEYRATHNE, J. - I agree.

Appeal dismissed.

WIMALAWATHIE
vs
HEMAWATHIE AND OTHERS

COURT OF APPEAL
ABDUL SALAM. J
CA 825A-825B/2001 (F)
DC COLOMBO 14522 P
SEPTEMBER 24, 2007

Partition Act No.16 of 1951 - Law No. 44 of 1973 - Partition Law No. 21 of 1977 - Section 68 - Proof of documents - Evidence Ordinance of 1895 Section 68 compared - Earlier law giving place to a later - law lex posterior derogate priori - leges posteriors priores contrarias abrogant - non-est novum ut priores leges and posteriors.

In the partition action instituted by the plaintiff appellant to partition the corpus, the trial judge rejected the deeds of the plaintiff as the plaintiff could not prove the execution of the said deeds. The said deeds were marked subject to proof but not proved.

In appeal it was contended that calling for proof of documents produced by the plaintiff appellant contravenes Section 68 of the Partition Law.

Held:

(1) The finding in relation to the want of proof of the documents produced by the plaintiff and the 10th defendant blatantly contravenes Section 68 of the Partition Law, which provides that it shall not be necessary in any proceedings under that law to adduce formal proof of the execution of any deed which on the face of it, purports to have been duly executed unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed or unless the Court requires such proof.

(3) The execution of documents required by law to be attested should be proved by calling at least one subscribing witness - Section 68 Evidence Ordinance which was enacted in 1895. This precedes

the Partition Act 16 of 1951, Law 44 of 1973 and Partition Law, 21 of 1977, thus later laws repeal earlier laws in-consistent - there with and earlier act must give place to a later, if the two cannot be reconciled.

APPEAL from the judgment of the District Court of Colombo.

Cases referred to:-

1. *Sri Lanka Ports Authority vs. Jugolinga* - 1981 - 1 Sri LR 18
2. *Cooper vs. Wilson* - 1937 - 2 KOB 300

L. W. Wettasinghe with *Kapila Jayasekera* for plaintiff-appellant
Rohan Sahabandu for 10th defendant-respondent

cur.adv.vult

May 05, 2009

ABDUL SALAM, J.

The question that arises for determination in this appeal involves an important aspect of the law relating to the mode of proof of deeds, in a partition action. Understandably, there are no precedents on a similar legal question originating either from this Court or any other courts of superior jurisdiction. It is therefore necessary, to set out in detail the circumstances that had led up to the present appeal and the law that is applicable.

The plaintiff-appellant (Plaintiff) filed a partition suit against the 1st to 10th defendant-respondents (hereinafter collectively referred to as the "defendants" or individually as 1 to 10 defendants as the case may be) to partition a land alleged to be owned in common. Some of the defendants denied the devolution of title set out by the plaintiff, but put forward a chain of title, which materially deferred from that of the title pleaded by the plaintiff. The plaintiff and the 1st to 9th defendants are siblings and cousins and the 10th defendant is the mother of the 1st, 2nd, 6th ,7th, 8th and 9th defendants. The main question that arose for determination was whether the

subject matter of the action should be partitioned as per the pedigree set out in the plaint or in the statement of claim of the contesting defendants.

At the trial the plaintiff gave evidence in support of her case and produced 7 deeds marked as P1 to P7 in order to establish her title and led the evidence of the Notary Public who attested the documents marked as P3 and P6. Remarkably five of these deeds were originals and the rest were certified copies. P1 has been executed as far back as in 1913, P2 in 1943, P3 in 1971, P4 in 1952, P5 & P6 in 1971 and P7 in 1956. The partition action has been instituted on 3rd July 1986. The deeds produced by the plaintiff were 23 to 81 years old as at the time when they were produced in court in the year 1994.

None of the defendants chose to impeach the genuineness of the deeds produced at the trial marked as P1 to P7, even though they denied in their statement of claim, the devolution of title set out by the plaintiff. However, when P1 and P3 to P7 were sought to be produced in evidence, the 1st and 5th to 8th defendants insisted on the proof of the same. The learned district Judge thereupon allowed the documents to be produced **subject to proof.** As referred to above, the plaintiff called evidence only in proof of the execution of P3 and failed to call the notary or the subscribing witnesses to P1, P3 to P7. At the end of the plaintiff's case, the defendants who insisted on proof of the said deeds, pointed out to court that they have not been proved and the learned district Judge accordingly made a note to that effect. Thereafter based on the judgment in *Sri Lanka Ports Authority vs Jugolinija*[1] learned District Judge rejected the said deeds and held that the plaintiff's prescriptive possession should also fall as she could not prove the execution of the said deeds.

The learned counsel of the plaintiff has submitted that the error of law in rejecting the deeds of the plaintiff is contrary

to the provision of section 68 of the Partition Law and has completely dominated the learned district Judges thinking in arriving at his conclusion, as it stands repeated at seven places in the judgment, to wit; at pages 387, 392, 394,395,396 and 402 of the brief.

Furthermore the 10th defendant who was the mother of some of the parties who claimed life interest to house No 414 (her matrimonial home) on deed 10 D 1 (P5) that vested title on the plaintiff, had marked the said deed and 8 other documents. Even assuming that the burden cast formally to prove deeds in a partition action cannot be faulted, yet the learned district Judge had totally misdirected himself when he had not considered the evidence of the only surviving subscribing witness to the said deed Somadasa (page 258) whose uncontested testimony was with regard to the due execution of the said deed. This evidence was completely ignored by the learned District Judge who proceeded to arbitrarily dismiss the 10th defendants claim contrary to his own misinterpretation of the law. Moreover, the learned district Judge has failed to appreciate that none of the documents produced by the 10th defendant had been objected to by the contesting defendants.

The aforesaid finding of the learned judge in relation to the want of proof of the documents provided by the plaintiff and the 10th defendant, blatantly contravenes section 68 of the Partition Law which provides that it shall not be necessary in any proceedings under that law to adduce formal proof of the execution of any deed which, on the face of it, purports to have been duly executed, unless the genuineness of that deed is impeached by a party claiming adversely to the party producing that deed, or unless the court requires such proof.

Noticeably the only deed that had been so challenged was P3. Even in respect of P3, evidence in rebuttal had been led

through the 10th defendant. This aspect of the case has also not been properly considered by the trial judge.

The execution of documents, required by law to be attested should be proved by calling at least one subscribing witness is contained in section 68 of the Evidence Ordinance that was enacted in 1895. This precedes the Partition Act No. 16 of 1951, Law No 44 of 1973 and Partition Law 21 of 1977. In this connection it is appropriate to refer briefly to the maxims *Lex Posterior derogat priori* and *Leges posteriors priores contrarias abrogant* which respectively mean that later laws repeal earlier laws inconsistent therewith and earlier Act must give place to a later, if the two cannot be reconciled. The maxim *non est novum ut priores leges and posterios* also would be applicable in this context. (see *Cooper Vs Wilson*)[2]

The learned counsel of the contesting defendants has contended that even if the genuineness of a deed had not been impeached in the statement of claim, yet the learned district Judge is entitled to insist on the proof of a deed as he is vested with the discretion to do so under section 68 of the Partition Act. Even though the contention of the learned counsel on this matter is not incorrect, a careful scrutiny of the entire proceedings clearly points to the fact that the learned District Judge had in reality not insisted on the proof of the deeds produced by the plaintiff on his own volition, in the exercise of the discretion vested in him under section 68, but merely as a matter of routine allowed the documents to be marked subject to proof, upon being insisted to that effect by the contesting defendants, without considering the applicable law.

As such it would be seen that the learned judge has manifestly failed in his fundamental duty to properly

investigate title which had resulted in a grave miscarriage of justice. Hence, the impugned judgment and interlocutory decree should necessarily be set aside on this ground alone and accordingly I set aside the same. The learned district Judge is directed to investigate title once again.

I make no order as to costs.

Appeal allowed

Trial de Novo Ordered

JAYASOORIYA AND OTHERS
vs
ATTORNEY GENERAL

COURT OF APPEAL
ROHINI MARASINGHE. J
SARATH DE ABREW, J
CA 152/2002/HC
PHC (WP) GAMPAHA 20/2001
FEBRUARY 25, 2009
MARCH 30, 2009

Penal Code - Section 296 - Murder - Offensive Weapons Act - Section 4 (2) - 15 of 1979 - amended by 11 of 1988 - Section 195 (ee) - Section 351, Section 465A - Failure to offer to accused option to be tried by a jury - Statutory duty - Fatal? - Evidence Ordinance - Section 35 - Section 114 (d) - Relevancy - Constitution Art 13 (3) - Code of Criminal Procedure - Section 351 - retrial?

The 2nd accused-appellant along with two others were indicted and convicted under Section 296 and causing injuries to ten others - punishable under the provisions of the Offensive Weapons Act.

It was contended that, the trial Judge failed to comply with Section 195 (ee) of the Code of Criminal Procedure Act and the failure to offer the accused the option to be tried by a jury is fatal.

It was contended by the respondent that, there is no statutory provision which imposes a duty upon a trial Court to record every such detail, and the presumption in Section 114 (d) Evidence Ordinance should operate in favour of the respondent.

It was further contended that, the failure to aver such a fundamental defect as a ground of appeal in the petition of appeal would lead to the conclusion that the jury option was in fact offered, and that the entry as to a non-jury trial in the official file maintained by the prosecuting State Counsel is relevant under Section 35 of the Evidence Ordinance and further the Court of Appeal in the interest of justice could act under Section 351 of the Criminal Procedure Code.

Held:

(1) It is settled law that failure to offer the jury option to an accused person under Section 195 (ee) is a fundamental breach which cannot be cured under Section 465 (A)

Per Sarath de Abrew. J

> "Every trial judge has, an obligation and responsibility to maintain a proper and accurate record of what transpires before him in every trial ..... the appellate Court should always be guided by what transpires in the case record and not on some extrinsic material of which the trial judge had no control whatsoever."

(2) Fundamental defect cannot be cured by invoking the presumption under Section 114(d). It would have been desirable that the petition of appeal pleaded the fundamental breach as a failure to offer the jury option, it would not necessarily debar an appellant from raising such an important question of law at the hearing, if it has occasioned a substantial miscarriage if justice.

Per Sarath de Abrew. J

> "To ensure a fair trial, the legislature in its wisdom from time to time has promulgated several fundamental concepts and statutory duties into our criminal law, the offering of the jury option is one such concept".

(3) The file maintained by the State Counsel is not part of the case record and is not in the custody and control of Court - and is not by itself satisfactory proof that the jury option has in fact been offered.

APPEAL from a judgment of the High Court of Gampaha.

Case referred to:-

A.G. vs. Segulebbe Latiff - SC 794/2007 - SCM 12.9.2008

Aravinda Athurupane for 2nd accused-appellant

Buwaneka Aluwihare - DSG for Attorney General

June 19, 2009

SARATH DE ABREW, J.

The 2nd Accused –Appellant (hereinafter sometimes referred to as the Appellant) along with two other accused were indicted in the High Court of Gampaha and convicted of the following offences:

(a) On or about 10th May 1996 at Gampaha committing the murder of one Peiris Subasinghe punishable under Section 296 of the Penal Code.

(b) Committing the murder of one K. Kaushalya Hapugoda punishable under section 296 of the Penal Code.

(c) Causing injuries to ten others (10 other counts) with a hand grenade punishable under section 4(2) of the offensive Weapons Act.

At the conclusion of the trial the 2nd and 3rd accused were convicted of the aforesaid charges while the 1st accused was acquitted. Being aggrieved of the above convictions the 2nd and 3rd accused preferred appeals to this Court. When the appeals were taken up for hearing the 3rd accused appellant withdrew his appeal. At present only the appeal lodged by the 2nd accused (Appellant) remains for consideration.

On behalf of the Appellant the learned counsel raised a preliminary issue that the learned trial judge had failed to comply with section 195(ee) of the Code of Criminal Procedure as amended as follows:

(a) The failure to offer to the accused the option to be tried by a Jury.

(b) The denial of the right of the accused to be informed of his statutory right to be tried by a jury. The learned

counsel further contended that failure to comply with the aforesaid statutory duty would be to render all proceedings, conviction and sentence invalid. In support several case law authorities were cited including the recent Supreme Court decision in *A.G. Vs. Segulebbe Latiff and others*.(1) At the time of the serving of the indictment, the Court proceedings and the journal entries disclose that the learned trial Judge had failed to record that section 195(ee) of the Code of Criminal Procedure had been complied with.

The learned Deputy Solicitor General did not dispute the fact that the offer of Jury option to the accused by the learned trial Judge is not recorded anywhere in the Court proceedings or the journal entries. However, the learned D.S.G. endeavoured to distinguish the facts in the present case to fall into a category where the Jury option had in fact been offered but due to an oversight and/or some inadvertence, that part of the proceedings has not got recorded in the proceedings. In support of this contention the learned D.S.G. relied heavily on a minute made by the prosecuting State Counsel in the file maintained by the Attorney General's Department that a non-jury trial was fixed pertaining to this case. It was the contention of the respondent that the jury option had in fact been offered though not recorded and the complaint of the appellant therefore is bereft of any merit. Even in the absence of a specific recording to that effect in the Court record, the learned DSG contended, the following factors would enable the Appellate Court to take due cognizance of the fact that the statutory duty embodied in section 195(ee) of the Code of Criminal Procedure as amended has been duty complied with to the satisfaction of Court. In furtherance of the above, the learned DSG submitted the following:

(a) There is no statutory provision or duty cast by law which imposes a duty upon a trial Court to record every such detail.

(b) The presumption contained in section 114(d) of the Evidence Ordinance "that judicial and official acts have been regularly performed" should operate in favour of the respondent, unless the Appellant proves otherwise.

(c) While appreciating the right of the Appellant to raise fresh grounds of appeal not stated in the petition of appeal, it is significant that the Appellant had failed to aver such a fundamental defect as the failure to offer the jury option as a ground of appeal in the petition of appeal, which omission would lead to the reasonable conclusion that the jury option was in fact offered, though not recorded, which the Appellant was well aware of at the time of drafting the petition of appeal, especially so as the very same counsel who defended the Appellant at the trial was responsible for drafting of the petition of appeal.

(d) The entry as to a non jury trial in the official file maintained by the prosecuting state counsel is relevant under section 35 of the Evidence Ordinance to determine as to whether the jury option had in fact been offered.

(e) The Court of Appeal may, if it thinks necessary or expedient in the interest of justice act under section 351 of the Code of Criminal Procedure which enables Court to " order the production of any document, exhibit or other thing connected with the proceedings, the production of which appears to it necessary for the determination of the case," and order the production of the aforesaid official file and peruse the entry concerned.

Having carefully perused the written submissions tendered by both counsel, I am inclined to reject the several contentions urged by the learned D.S.G. for the following reasons.

(a) Section 195(ee) of the Code of Criminal Procedure, Act No.15 of 1979, as amended by Act No. 11 of 1988, reads as follows:

"If the indictment relates to an offence triable by a jury, inquire from the accused whether or not he elects to be tried by a jury." Section 195 further entails other duties cast upon a presiding High Court Judge when an accused person is brought before Court for serving of the indictment. In view of the Supreme Court decision in *AG Vs Segu Lebbe Latiff & other*[2] it is now settled law that failure to offer the jury option to an accused person under section 195(ee) is a fundamental breach which cannot be cured under section 456A of the Code. Even though the learned D.S.G. contended that there is no statutory duty cast by law for the learned trial Judge to record every detail, I am of the view that every trial judge has an obligation and responsibility to maintain a proper and accurate record of what transpires before him in every trial, especially so the compliance with fundamental requirements such as serving of the indictment, offering the jury option, entering a plea of guilty, recording a verdict and sentence. As the learned counsel for the Appellant had pointed out in his written submission all the requirements under section 195 of the Code has been complied with and recorded in the case record except the requirement under section 195(ee), namely the offering of the jury option. Therefore the argument that the jury option has in fact been offered but not recorded due to some inadvertence cannot succeed. The Appellate Court should always be guided by what transpires in the case record, and not on some extrinsic material of which the learned trial Judge had no control whatsoever.

(b) The case record is proof of all judicial acts performed and recorded therein. Where there is no specific record of performance of a fundamental statutory duty cast on a trial Judge, this fundamental defect cannot be cured by invoking the presumption under section 114(d) of the Evidence Ordinance.

(c) Although it would have been desirable that the petition of appeal pleaded the fundamental breach such as a failure to offer the jury option, it would not necessarily debar an Appellant from raising such an important question of law at the time of hearing of the Appeal if it has occasioned a substantial miscarriage of Justice.

(d) The entry as to a non jury trial contained in the official file maintained by the prosecuting State Counsel by itself is not satisfactory proof that the jury option has in fact been offered. The file maintained by the State Counsel is not part of the case record and is not within the control and custody of Court. Even if this file is perused by this Court under section 351 of the Code, it would only give credence to the fact that this instant case was fixed for non-jury trial after serving of the indictment. This particular entry would not establish beyond doubt that section 195(ee) of the Code had been complied with and the Jury option was in fact offered to the accused. It could very well be that the jury option was not offered and no jury was summoned for the trial date and the case was listed for trial as a non-jury case. Therefore the entry in the file of the State Counsel cannot be considered as conclusive on a matter where the case record itself is silent and where a fundamental right of an accused person in our criminal jurisprudence is in question.

Article 13(3) of our Constitution promulgates that "Any person charged with an offence shall be entitled to be

heard, in person or by an attorney-at-law, at a fair trial by a competent court." To ensure a fair trial, the legislature in its wisdom, from time to time, has promulgated several fundamental concepts and statutory duties into our criminal law. The offering of the jury option is one such concept. There is a duty cast on the learned trial judge not only to inform an accused person his right to select as to the jury option but also to accurately record what option the accused had selected. Where there is a dispute whether this fundamental duty had been in fact performed, the Appellate Court would prefer to be guided by the case record and would hesitate to consider extrinsic material such as a file maintained by the State Counsel.

The indictment reveals that the alleged offences have been committed on 10th May 1996, 13 years hence. The learned trial Judge had delivered judgment on 31.07.2002, around 07 years ago. There would be no purpose served in sending this case back for a retrial after such a long period, especially so as the Appellant had apparently been in remand for over 10 years before and after being convicted. Due to a vital lapse on the part of the learned trial judge, it would be unjustifiable to direct the Appellant to undergo the hazards of a second trial after an intervening period of 13 years. In view of the above, this Court is not inclined to order a retrial.

In view of the foregoing conclusions, I uphold the preliminary issue raised by the Appellant, and set aside the conviction and sentence imposed by the learned trial Judge of Gampaha, and acquit the Accused-Appellant. The appeal is therefore allowed. The Registrar is directed to send a copy of this order with the original case record to the High Court of Gampaha.

MARASINGHE, J. - I agree

Appeal Allowed

GODAMUNE
vs
MAGILIN NONA

COURT OF APPEAL
SALAM. J
CA 396/2006 (F)
DC COLOMBO 17237/L
MAY 26, 2008

Right of way of necessity - Purchase of a landlocked subdivided portion of a larger land - Is he entitled in law to seek a way of necessity over the adjacent land? - Can a splitting of a land impose a servitude upon the neighbours?

The plaintiff-respondent claimed a servitude consisting of a right of way based on prescription, and also access by way of necessity over a land owned by the defendant.

The trial Judge rejected the claim based on prescription but came to the conclusion that the plaintiff is entitled to use the strip of land as a way of necessity.

The defendant-appellant contended that, a person who had purchased a landlocked sub divided portion of a larger land which had a road frontage to a public road is not entitled in law to seek a way of necessity over the adjacent land, without making a claim for such a way against his vendor or the owners of the other subdivided lots of the larger land.

Held:

(1) An owner of a land, who by his own act deprives himself of access to a road is not entitled to claim a right of way of necessity over the land of another.

(2) When a piece of land is split into two or more parts, the back portion must retain its outlet over the front portion ever though nothing was said about it, because the splitting of the land cannot impose servitude upon the neighbours.

AN APPEAL from a judgment of the District Court of Colombo.

Cases referred to:-

1. *Wilhelm vs. Norton* - 1935 FDL 143 at 169
2. *Peacock vs. Hodges* - 6 Buch at 69 (Buchanam, James & EJ Reports)
3. *Suppa Navasivayam vs. Janapathipillai* 33 NLR 44
4. *Nagalingam vs. Kathirasa Pillai* - 58 NLR 371
5. *Costa vs. Rowell* - 1992 - 1 - Sri LR 5 at 9

Gamini Marapona PC with *Navin Marapona* for defendant-appellants

Nihal Jayamanne PC with Dilhan de Silva for plaintiff-respondent

April 28, 2009

ABDUL SALAM, J.

The plaintiff-respondent (plaintiff) sued the defendant-appellant (defendant) for a declaration that she is the owner of the allotment of land marked as 4 C depicted in plan No 3021 made by M. Sathyapalan, Licensed Surveyor. There was no contest as regards the ownership of the allotment of land marked as 4C and the learned district Judge quite rightly declared the plaintiff as being the owner of the said allotment.

The main dispute that arose in the case was whether the plaintiff is entitled to use lot 5 depicted in the said No 3021 as a right of way to have access to the said lot No 4. Admittedly the defendant is the owner of lot 5.

At the trial, as has been correctly observed by the learned district Judge, the plaintiff has failed to establish her claim for a servitude constituting a right of way over lot 5 and therefore rejected the plaintiff's claim based on prescription.

However, the learned district Judge came to the conclusion that the plaintiff is entitled to use the strip of land depicted

as lot 5, belonging to the defendant as a way of necessity to have access to her allotment of land marked as lot 4. The present appeal has been preferred against the judgment of the learned district Judge dated 7th July 2000, declaring the plaintiff to be entitled to use lot 5, as the means of access to her allotments of land as a right of way of necessity.

The learned president's counsel of the plaintiff has submitted that a way of necessity *(via necessitates or noodweg)* is a right of way granted in favour of a property over an adjoining one, constituting the only means of ingress to and egress from the former property to some place with which it must of necessity have a communicating link. In this respect the learned President's Counsel has cited *Grotius 2.35.8 and 11,* where it is stated that such a right of way, may be a permanent way to enable access to public road. He has also referred me to the judgment in *Wilhem vs.Norton*(1) at 169, where it is stated that the land that do not adjoin a high way or neighbours road are entitled to the necessary access to a high way.

The learned President's Counsel has further submitted that the grant of a right of way of necessity originated in Roman law and that it can be claimed from the neighbouring owner, as of right when the circumstances warrant it *(Voet 8.3.4)* and in terms of the judgment in *Peacock Vs Hodges*(2) at 69, such claim for a way of necessity should be restricted to the actual necessity of the case. In other words the contention made on behalf of the plaintiff is that she has been rendered Landlocked and the use of the defendants land is sheer necessity to enter upon and depart from the land in question.

On the other hand, on behalf of the defendant the learned president's counsel has persistently argued that a person who had purchased a landlocked sub divided portion of a larger

land is not entitled in law to seek a way of necessity over the adjacent land, to wit; over lot 5 belonging to the defendant.

The facts as revealed in the evidence and relevant to the background of the dispute need to be elaborated. Lot 4C belonging to the plaintiff was part of a larger land known as lot 4 which in turn was a part of several amalgamation of lands known as Kebellagahawatta, Migahawatta, Siyambalagahawatta, Galtotawatta, Jambolagahawatta and Galtotewatta Kebella Gahawatta in extent 6 Acres 1 Rood and 5 perches. It was owned in common by several people including Seelawathie Perera, the immediate predecessor in title of the plaintiff. By indenture bearing No 895 dated 3rd July 1980, Atapattu Corenelis Perera, Hewagama Seelawathie Perera co-owners amicably partitioned the said land among them by mutually allotting to each party divided and defined allotments of land in lieu of their undivided rights, as per plan of partition bearing No 37638 dated 22nd May 1980 made by N. S. Sirisena, Licensed Surveyor.

As far as the present dispute is concerned, Hewagamage Seelawathie Perera was allotted lot plan No 3763 in extent 2 Roods and 35.5 perches with considerable road frontage and lot 5 being an elongated strip of land presumably serve as a means of access in extent 21.61 perches and lot 2 in extent 3 Roods and 6.33 perches to Hewagama Albert Perera. Admittedly Hewagama Albert Perera by deed No 24490 dated 3rd September 1984 attested by D.W. Ratnayaka N.P has transferred all his rights from and out of the said lots 2 and 5 to the defendant in this case.

Hewagamage Seelawathie Perera having seized and possessed of the said lot No 4 in plan No 3763 had subdivided the same into four allotments of land identified as 4A,4B,4C and 4D thus rendering lot 4A to continue to remain as the only subdivided block with total road frontage on the west and