THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 1 SRI L.R. - PART 1**

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**WANASINGHE V. HON. ATTORNEY GENERAL AND OTHERS**

supreme court

g.amaratunga, j.,

marsoof, j. and

ekanayake, j.

s.c. appeal no. 35/2010

h.c. colombo hcmca 169/2007

m.c. colombo 88222/1

september 8th, 2010

***Code of Criminal Procedure Act - Section 110(1) - Provisions relating***

***to the recording of statements in the course of an investigation -***

***Section 110(3) - Statements to police offcer or inquirer to be used***

***in accordance with Evidence Ordinance - Bribery Act - Section 26 -***

***When penalty to be imposed in addition to other punishment -***

***Section 26 A - Additional fne to be imposed - Section 16 -***

***Bribery of police offcers, peace offcers and other public offcers -***

***Evidence order Section 3.***

at the trial before the learned magistrate, the complainant had stated

that he pointed out to the a.s.p. the person who took money from him,

but he could not say positively that it was the accused (appellant), who

was present before court, that was pointed out by him before the a.s.p.

the main question before the magistrate therefore was whether the

person pointed out by the complainant before the a.s.p. was the

appellant who was present in court as the accused.

after trial the accused was convicted by the learned magistrate. the

conviction was affrmed by the High Court in appeal. The Appellant

appealed to the supreme court against the conviction and the

sentence.

**Held:**

(1) section 110(3) of the code of criminal procedure act prohibits the

use of the written record of a statement recorded under and in

term of section 110(1) in the course of an investigation. section

110(3) does not shut out direct evidence of a police offcer of any

thing done or said by a witness or an accused (except a confession

of an accused) in his presence and seen or heard by such offcer.

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per gamini amaratunga, j., -

 ". . . . somathilake who was present at the time the complain-

ant pointed out the appellant had seen the complainant point-

ing out the appellant as the person who took money from him.

this is direct evidence given by somathilake as to what the

complainant did in his presence. section 3 of the evidence

ordinance provides that a "fact" means and includes "any thing.

. . capable of being perceived by senses." somathilake had seen

the complainant pointing out the appellant. this is evidence of

fact (the act of the complainant pointing out the accused) seen by

somathilake (perceived by his senses)......"

(2) the witness remembered that on a previous occasion he had

identifed the relevant person, but could not remember at the time

of the trial the exact person identifed by him on that previous

occasion. In such situation other evidence is admissible to show

that the witness identifed a particular person.

(3) In terms of section 26 of the bribery act, where a court convicts a

person for an offence committed under part II of the bribery act by

accepting a sum of money, a sum which is equal to the gratifcation

accepted shall be imposed as a penalty. the stipulation in section

26 is mandatory.

**Cases referred to:-**

*(1) King v. Hendrick* 48 nlr 396

*(2) Regina v. Osborne and Virtue* (1973) Qb 678

**AppeAl** from the judgment of the high court (colombo)

*Ranjan Mendis* with *Ashoka Kandambi* and *Ms. Sunimal Mendis* for the

accused appellant.

*Thusith Mudalige, S.S.C.,* for respondents

*Asitha Anthony, Asst. Director (Legal),* commission to Investigate

allegations of bribery or corruption for the 2nd respondent.

*Cur.adv.vult*

july 21th 2011.

**gAmini AmArAtungA, J.**

this is an appeal, with leave granted by this court,

against the conviction and the sentence of the accused

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appellant (the appellant) on charges framed under the

provisions of the bribery act.

before I set down the question of law on which leave

to appeal was granted, it is pertinent to set out in brief the

facts relevant to the case presented against the appellant. In

the early hours of 01.11.2002 the dambulla police detected

the complainant piyasoma driving a motor vehicle with a

defective headlight. the police warned him to replace the

defective headlight within fourteen days and show the vehicle

to the police. his driving licence was taken by the police and

he was given a temporary licence valid for fourteen days.

the complainant failed to replace the defective headlight

within the stipulated time period. on 18.11.2002 he visit-

ed the bambulla police station to get his temporary licence

extended. When he spoke to the Offcer in Charge of the

traffc branch, he was referred to another offcer (the appellant)

of the traffc branch, who was dressed in civilian clothes.

That offcer asked the complainant to wait out side. A little

while later that offcer came out and asked the complainant

"how much money do you have?" When the complainant said

that he had Rs. 300/-, that offcer told him that in the event

of a case being fled against him, the fne would be around

rs. 750/-. the appellant asked for rs. 300/- to return the

complainant's driving license. When the complainant said

that he needed rs. 100/- for his bus fare, the appellant asked

for rs. 200/- to return the licence. the complainant who had

a currency note of rs. 200/- denomination gave it to the

appellant and got back his driving licence from the appellant.

(It appears that at the time of this transaction currency notes

of rs. 200/- denomination were in circulation but had been

withdrawn later by the central bank).

having got his driving licence, the complainant walked

into the A.S.P’s Offce which was in the premises adjoining

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the police station and complained to the a.s.p. that money

was taken from him by a police offcer to return his driv-

ing licence without fling a case against him. The A.S.P. then

telephoned the dambulla police station and ordered all

offcers of the traffc branch to come to his offce. Thereafter

several police offcers, led by the O.I.C., Traffc, appeared

before the a.s.p. and the latter then explained the reason

for summoning those offcers to his offce and requested that

if any offcer had taken money from the complainant such

offcer should come forward and own it. None came forward.

Then the O.I.C., Traffc, suggested to ask the complainant

to point out the person who took money from him. the

complainant then pointed out the appellant. It is pertinent to

note that according to the evidence led at the trial, there was

no immediate protest of innocence by the appellant when he

was pointed out by the complainant as the person who took

money from him.

According to the evidence of I.P. Somatilaka, O.I.C., Traffc

(against whom there was not even a suggestion at the trial

that he was giving false evidence against the appellant) after

the complainant pointed out the appellant, the a.s.p. told

the appellant to hand over the money he had taken from the

complainant and then, the appellant, in response to that

request handed over a currency note of rs. 200/- denomi-

nation to the a.s.p. this is an item of evidence relating to

the conduct of the appellant, relevant and admissible under

section 8(2) of the evidence ordinance. after the appellant

handed over the currency note, he was searched by the o.I.c.

(on the order of the a.s.p.) and the appellant had no money

with him.

at the trial before the learned magistrate, four years later,

the complainant had stated that he pointed out to the a.s.p.

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the person who took money from him, but he could not say

for sure, that it was the accused (the appellant), who was

present before court, was the person pointed out by him

before the a.s.p.

thus this case presented a situation where the witness

remembered that on a previous occasion he had identifed

the relevant person, but could not remember at the time of

the trial the exact person identifed by him on that previous

occasion. In such a situation other evidence is admissible

to show that the witness identifed a particular person. This

legal position was recognized in sri lanka in *King vs.*

*Hendrick*(1). even in english law the position is the same.

*Regina vs. Osborne and Virtue*(2).

I.p. somathilaka who was present when the complainant

pointed out the appellant in the presence of the A.S.P. testifed

that it was the appellant who was the person pointed out by

the complainant. this evidence established the identity of the

appellant as the person picked up by the complainant in the

presence of the a.s.p.

at the trial the appellant had made a dock statement

denying the allegation made against him. he was convicted

by the Magistrate on the evidence I have briefy set out above.

The conviction was affrmed by the High Court in appeal.

 this court had granted leave to appeal on the following

question of law. "did the high court err in its failure to

appreciate that the learned magistrate has admitted and

acted upon the evidence of a.s.p. lal kumara and I.p.

somathilake in contravention of section 110(3) of the

criminal procedure code, particularly in relation to the

identifcation of the accused?"

section 110 of the code of criminal procedure act

no. 15 of 1979 makes provision relating to the recording of

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statements in the course of an investigation commenced

under section 109 of the code regarding the commission of

an offence.

section 110(3) of the code provides that "a statement

made by any person to a police offcer in the course of any

investigation may be used in accordance with the provisions

of the evidence ordinance except for the purpose of

corroborating the testimony of such person in court."

In the present case, according to the evidence of a.s.p.

lal kumara, when the complainant informed him of the fact

of taking Rs. 200/- by a police offcer, he did not commence

an investigation into the commission of an offence under the

bribery act. he merely wanted to ascertain the identity of

the police offcer to take disciplinary action against him. That

was the sole object of his endeavour to ascertain the identity

of the culprit. according to the a.s.p. after he ascertained

the identity of the offcer who had taken money from the

complainant, he submitted a report to his superior offcer to

take disciplinary action against him and the superior offcer

had referred the matter to the bribery commission.

according to the a.s.p.'s evidence no statement was

recorded by him in terms of section 110 from the complainant

before the latter picked up the appellant as the person who

took money from him. at the trial, the complainant's evidence

was that he pointed out the person who took money from him

to the a.s.p. , but he could not say with certainty whether

it was the appellant who was present at the trial as the

accused. there was no question of corroboration arising from

this evidence. the question that was before the court at that

stage was whether the person pointed out by the complainant

before the a.s.p was the appellant who was present in court

as the accused. evidence on this fact came from witness

somatilake who was present at the time the complainant

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pointed out the appellant. somatilake had seen the

complainant pointing out the appellant as the person who

took money from him. this is direct evidence given by

somathilake as to what the complainant did in his presence.

section 3 of the evidence ordinance provides that a "fact"

means and includes "any thing... capable of being perceived

by senses." somatilake had seen the complainant pointing

out the appellant. this is evidence of a fact (the act of the

complainant pointing out the accused) seen by somatilake

(perceived by his senses). this is direct evidence of somatilake

of an act done by the complainant in his presence and seen

by him.

section 110(3) of the code of criminal procedure act

prohibits the use of the written record of a statement recorded

under and in terms of section 110(1) in the course of an

investigation. In this case there was no such statement in

existence. section 110(3) does not shut out direct evidence of

a police offcer of any thing done or said by a witness or an

accused (except a confession of an accused) in his presence

and seen or heard by such police offcer.

for the reasons set out above. I answer the question of

law on which leave to appeal was granted in the negative.

the learned counsel for the appellant, in his additional

written submissions tendered after the hearing of the appeal

has submitted that the evidence of identity alone was not

suffcient to fnd the accused appellant guilty of the charges

framed against him. he has submitted that the recovery of a

rs. 200/- note from the appellant is not an item of evidence

supporting the charges against him as it is not unusual for

a person to have a rs. 200/- note in his possession as his

own money. the substance of this submission is that the

appellant's possession of a rs. 200/- note is a mere

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coincidence. If it was a mere coincidence, the appellant

indeed is a very unfortunate man!

on the other hand, at no stage, either in the presence

of the a.s.p. and I.p. somatilake or at the trial before the

learned magistrate, the appellant had taken up the posi-

tion that the rs. 200/- note was his own money which he

had in his possession. In his dock statement the appellant's

position was that nothing was recovered from him! I therefore

reject the submission made by the learned counsel. at

the time the complainant frst came before the A.S.P. the

complainant had his driving licence with him which had been

taken by the police two weeks prior to that date. there was no

entry in the relevant books kept at the police station regard-

ing the return of the licence to the complainant. the evidence

of the O.I.C. traffc showed that the appellant had opportunity

to have access to driving licences kept in the traffc branch.

on the evidence led at the trial, the learned magistrate had

quite rightly convicted the appellant and the high court was

justifed in dismissing the appeal. This appeal is accordingly

dismissed.

In respect of charges 1 and 3 framed under section 16(b)

of the bribery act, the appellant has been sentenced to eight

months rI in respect of each count making the total period

of imprisonment sixteen months. In addition a fne of

rs. 5,000/- has been imposed in respect of each count. In

respect of counts 2 and 4 framed under section 19(c) of the

Bribery Act, a fne of Rs. 5,000/- has been imposed for each

count. The total amount of fnes is Rs. 20,000/-. A default

term of one month R.I. for each fne was also imposed making

the total period of default term four months.

In terms of section 26 of the bribery act, where a court

convicts a person for an offence committed under part II of the

Bribery act by accepting a sum of money as a gratifcation,

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in addition to any other punishment imposed by court, a

sum of money equal to the gratifcation accepted shall be

imposed as a penalty. the stipulation in section 26 is

mandatory. the learned trial judge has not imposed the

mandatory penalty. I therefore, in addition to the punish-

ments imposed by the learned trial judge, impose a penalty

of rs. 200/- on the appellant and a default term of one month

r. I. in respect of the penalty. thus the total period of the

default term is fve months R.I.

the learned chief magistrate of colombo is hereby

directed to take steps to activate the sentence imposed on the

accused appellant. this court wishes to place on record the

court's appreciation of the prompt action taken by a.s.p. lal

Kumara to deal with an errant police offcer who has brought

the police service into disrepute.

**mArsoof, J.** - I agree.

**ekAnAyAke, J.** - I agree.

*Appeal dismissed.*

*Mandatory penalty imposed.*

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**CHANDRASIRI V. ATTORNEY GENERAL**

supreme court

srIpavan, j.,

ekanayake, j. and

prIyasath dep. j.

s.c. appeal no. 100/2010

s.c. (spl.) la no. 90/2010

h.c. nuWaraelIya no. 30/2009 (appeal)

m.c. nuWaraelIya no. 17340

september 19th 2011

***Penal Code - Section 298 - Causing death by negligence - Death***

***should have been the direct result of a rash or negligent act of the***

***accused - Burden of Proof - Charge Sheet defective?***

the accused - appellant was convicted in the magistrate's court for

riding a motor cycle in a rash and/or negligent manner and causing the

death of a person which is an offence punishable under section 298 of

the penal code. the accused- appellant appealed against the convic-

tion and the sentence passed on him to the provincial high court of

kandy. his appeal was dismissed. he sought leave to appeal from the

supreme court and was granted leave.

the main issue was whether the accused rode the motor cycle in a rash

and/or negligent manner, and caused the death of the person.

**Held:**

(1) It is for the prosecution to prove the case beyond reasonable doubt

that the accused acted in a rash or negligent manner. It is not

for the accused to prove that he did not act in a rash or negligent

manner.

(2) the weakness of the defence case will not strengthen or bolster the

otherwise weak prosecution case. the evidence must establish the

guilt of the accused, not his innocence. his innocence is presumed

by the law and his guilt must be established beyond reasonable

doubt.

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per priyasath dep, j.,-

 I fnd that the learned Magistrate and the learned High Court

judge failed to give due consideration to the subsequent conduct

of the accused. The Accused after the accident did not fee from

the scene and assisted in despatching the injured to the hospital

and also returned to the scene to assist the investigating offcer.

the conduct of the accused is exemplary. therefore his version

should not be lightly disregarded... In the above circumstances

it is necessary to consider whether the conduct of the accused

amounts to criminal negligence.

 . . . In this case there is an absence of evidence regarding the

manner in which the motor cycle was ridden at the time of the

accident. The evidence given by the accused defnitely raises

reasonable doubt regarding the mental element of negligence.

according to his evidence the deceased crossed the road suddenly.

there is no evidence to controvert this fact."

(3) the conduct of the accused does not amount to criminal negligence.

The charge fled under Section 298 of the Penal Code is defective

as it failed to enumerate the specifc acts of rashness or

negligence.

**Cases referred to :-**

(1) *Karunadasa v. Offcer in Charge, Police Station Nittambuwa* - 1987

1 sri l.r. 155

(2) *Lourenz v. Vyramuttu* - 42 nlr 472

(3) *King v. Leighton* - 47 nlr 283

(4) *Andrews v. Director of Public Prosecutions* - 106 l.j.k.b. 370

(5) *R. v. Batman* - 96 l.j.k.b. 791

**AppeAl** from the judgment of the high court, kandy.

*Dr. Ranjith Fernando* for the accused - appellant - petitioner.

*Shanaka Wijesinghe, S. S. C.,* for the attorney-general

*Cur.adv.vult*

december 16th 2011

**priyAsAtH Dep p.C, J.**

the accused appellant was convicted in the magistrate’s

court of nuwara eliya for riding a motor cycle in a rash

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and/or negligent manner and causing the death of abosally

farook an offence punishable under section 298 of the

penal code. he was sentenced to 10 months rigorous

imprisonment and was ordered to pay a fne of Rs. 1500/-.

In view of this conviction the learned magistrate acquitted

the accused on two alternative charges fled under the Motor

Traffc Act.

the accused appellant appealed against the said

conviction and the sentence to the provincial high court

of kandy. his appeal was dismissed. he sought leave to

appeal to the supreme court against the said order of the

high court. the supreme court granted leave and the appeal

was argued before us.

It is appropriate to deal with the facts of the case briefy.

the main witness for the prosecution is one mohamed Illiyas

who was working as a cashier in a shop. the accident had

occurred on the 18th of september 1998 in nuwara eliya town

in a busy street near the urban council premises. the daily

pola was also located close by. the accident occurred between

12.00 – 1.00 pm and at that time people were busy rushing

to a nearby mosque. Witness mohomed Illiyas had seen the

deceased been thrown and falling near his shop. he saw the

accused parking his motor cycle on the side of the road and

approaching towards the injured (deceased) and assisting the

others who were gathered there to dispatch the injured to the

hospital. this witness did not observe any damage caused

to the motor cycle. he says there was a pedestrian crossing

nearby and he is unable to say whether the accident occurred

on the pedestrian crossing or not.

The next witness was the Investigating offcer, Sub

Inspector seneviratne. on receipt of information he came to

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the scene and by that time the deceased was dispatched to

the hospital. the accused who came there pointed out the

place of the accident to the Police Offcer. He observed broken

pieces of glass and pieces of signal lights near the place of the

accident. this witness contradicts the earlier witness on this

point. he is unable to say whether the place of impact was on

or near the pedestrian crossing. he went to the extent to state

that due to heavy showers in nuwara eliya the yellow lines

of the pedestrian crossing could have faded. the evidence of

this witness is rather vague and at times contradictory. he

had failed to make proper observation notes of the scene.

the prosecution called two other witnesses i.e. the wife

and cousin of the deceased who identifed the dead body of

the deceased at the post mortem examination.

The Main witness for the prosecution Illiyas identifed

the accused as the person who rode the motor cycle. this

was made possible due to the fact that after the accident the

accused halted the motor cycle and came to assist the

injured to be taken to the hospital. s.I. seneviratne was able to

identify the accused because he came to the scene and

pointed the place of the accident. therefore, the prosecu-

tion was able to establish the identity of the accused beyond

reasonable doubt.

the post mortem examination report was marked and

produced in court. the post mortem report attributes the

death to a head injury sustained by the deceased. It was

established that the act of the accused caused the death of

the deceased.

the main issue that has to be considered is whether the

accused had acted in a rash and/or negligent manner. there

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is no direct evidence to establish that the accused rode the

motor cycle in a rash or negligent manner. the prosecution

attempts to establish this ingredient by resorting to items of

circumstantial evidence. It was emphasized that this accident

occurred in a busy street in the heart of the town and during

the rush hour. therefore, the accused should have exercised

a high degree of care and also should have been concerned

about the other users of the road. I fnd that these items it-

self are not suffcient to establish criminal negligence. There

is a serious infrmity in the Prosecution case. Although the

accident occurred in a busy street there were no witnesses to

testify as to the manner of riding the motor cycle and also how

this accident occurred. If the Accused fed the scene without

coming to the assistance of the injured and also did not

return to the scene to assist the Investigating Offcer, there

could not have been any evidence to establish the identity of

the accused.

the trial judge and the learned high court judge acted

on the basis that Illiyas is an eye witness and his testimony

was confrmed by S.I. Seneviratne.

the accused gave evidence and denied that he rode the

motor cycle at an excessive speed. he denied that he was

negligent or acted in a rash manner. In his evidence he stated

that the deceased suddenly crossed the road and he could

not avert the accident. the learned high court judge had

remarked that the accused did not call evidence to corroborate

his version and his evidence confrmed the prosecution case.

I am of the view that the trial judge as well as the learned

high court judge misdirected on the question of burden

of proof. It is for the prosecution to prove the case beyond

reasonable doubt that the accused acted in a rash or

negligent manner. It is not for the accused to prove that he

did not act in a rash or negligent manner.

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It is settled law that the weakness of the defence case

will not strengthen the prosecution case or bolster the

otherwise weak prosecution case. In *Karunadasa vs.*

*Offcer in Charge, Police Station Nittambuwa*(1) it was held that

‘ It is an imperative requirement that the prosecution must

be convincing no matter how weak the defence is before the

court can convict. the weakness of the defence must not

be allowed to bolster up a weak case for the prosecution.

the evidence must establish the guilt of the accused, not his

innocence. his innocence is presumed by the law and his

guilt must be established beyond reasonable doubt’

In this case there is an absence of evidence regarding

the manner in which the motor cycle was ridden at the time

of the accident. The evidence given by the accused defnitely

raises reasonable doubt regarding the mental element of

negligence. according to his evidence the deceased crossed the

road suddenly. there is no evidence to controvert this fact.

I fnd that the learned Magistrate and the learned High

court judge failed to give due consideration to the subsequent

conduct of the accused, the accused after the accident did not

fee from the scene and assisted in despatching the injured

to the hospital and also returned to the scene to assist the

Investigating Offcer. The conduct of the accused is exemplary.

therefore his version should not be lightly disregarded.

In the above circumstances it is necessary to consider

whether the conduct of the accused amounts to criminal

negligence as opposed to civil negligence. It is appropriate to

refer to case law on this point.

sri lankan cases including *Lourensz v. Vyramuttu*(2) and

*The King vs. Leighton*(3) consistently followed a long line of

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english decisions as regard to what constitute criminal

negligence.

the house of lords case of *Andrews v. Director of*

*Public Prosecution*(4) is a case very often cited in the sri lankan

judgments. In giving the judgment in that case lord

atkin cited with approval the dictum of the lord chief justice

in *R. v. Bateman*(5).

“In explaining to juries the test they should apply

to determine whether the negligence, in the particular case,

amounted or did not amount to a crime, judges have used

many epithets, such as ‘culpable’, ‘criminal’, ‘gross’, ‘wicked’,

‘clear’, ‘complete’. but whatever epithet be used and whether

an epithet be used or not, in order to establish criminal

liability the facts must be such that, in the opinion of the

jury, the negligence of the accused went beyond a mere

matter of compensation between subjects and showed such

disregard for the life and safety of others as to amount to a

crime against the state and conduct deserving punishment.”

after citing this dictim, lord atkin continued as follows:-

“the principle to be observed is that cases of manslaughter

in driving motor cars are but instances of a general rule

applicable to all charges of homicide by negligence. simple

lack of care such as will constitute civil liability is not

enough; for purposes of the criminal law there are degrees of

negligence and a very high degree of negligence is required to

be proved before the felony is established. probably of all the

epithets that can be applied ‘reckless’ most nearly covers the

case.”

having considered the facts and circumstances of this

case and relevant english and sri lankan cases, I fnd that

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the conduct of the accused does not amount to criminal

negligence.

I also fnd that the charge fled under section 298 of the

Penal Code is defective as it failed to enumerate the specifc

acts of rashness or negligence.

I therefore set aside the conviction and sentence

imposed by the magistrate and the judgment of the

High Court affrming the said conviction and sentence.

**sripAvAn J.** - I agree

**ekAnAyAke J.** - I agree

*Appeal allowed.*

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**DANANJANIE DE ALWIS V. ANURA EDIRISINGHE**

**(COMMISSIONER GENERAL OF ExAMINATIONS)**

**AND 7 OTHERS (Z SCORE - CASE 1)**

supreme court

dr. shIranI a. bandaranayake, c.j.,

Imam, j. and

suresh chandra, j.

s.c. applIcatIon (fr) no. 578/2009

february 23th 2011

***Fundamental rights - Article 12(1) of the Constitution - Right to***

***equality - Concept of legitimate expectation - Principle of equal-***

***ity - Principle of rational or reasonable classifcation - Z score -***

***formula - Mean and standard deviation.***

the petitioner was a student of kalutara balika national school who sat

for her g.c.e. (advanced level) for the second time in august 2008 and

the results were released on 03.01.2009. according to the said results,

the petitioner had obtained a ‘Z’ score of 1.8887 with a district rank of

49 from the kalutara district.

the petitioner had received a fresh sheet of results on 07.07.2009 which

was backdated to 03.01.2009. according to the results she received on

07.07.2009, her Z score had been reduced to 1.8860 from the earlier

score of 1.8887. The Z score given in July 2009 was not suffcient for

her to enter into a faculty of medicine.

the petitioner’s grievance is based on the revision of the Z score and

alleged that the respondent had arbitrarily reduced and/or had

amended her Z score without any basis for such reduction and without

giving any explanation for such reduction and thereafter had released

a revised schedule of the advanced level results and thereby had

decided that the petitioner has not been selected to a faculty of medicine.

the petitioner accordingly complained to the supreme court that her

fundamental right to equal protection guaranteed in terms of article

12(1) of the constitution had been violated by the respondents and

relied on the concept of legitimate expectation.

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**Held:**

(1) considering the doctrine of legitimate expectation in terms of

expectation to be consulted or heard, if a person relies on

legitimate expectation, such a person would have to satisfy

that he had been deprived of a past practice that had been

withdrawn or changed suddenly without any notice or reason for

such withdrawal or change.

 In the present application there is no material to indicate that

the past practice has been changed or withdrawn at the time the

petitioner had sat for the advanced level examination or at the

time the results were released. on the contrary the same system

which was used in the previous year had been followed and the

candidates were told that depending on the results of the

re-scrutiny of papers, the Z score could change. therefore it would

not be correct for the petitioner to state that the previous scheme

had been changed without giving her an opportunity to express

her views on the selection of candidates to universities.

(2) considering the basis on which the constitutional provision in

article 12(1) deals with the right to equality and the applicability

of legitimate expectation on that basis, it is apparent that the

expectation in question should have been founded upon a

statement or an undertaking given by the authority in question,

which would make it inconsistent or irrational with the gener-

al administration to deny such an opportunity a petitioner has

been claiming through his petition. otherwise the petitioner must

show that there is the existence of a regular practice on which the

petitioner can reasonably rely upon to continue in his favour.

 It is clear that the 1st or the 2nd respondents had not given any

promise or undertaking that the ‘Z score’ would be decided on

the basis of the provisional results released on 03.01.2009. It was

made to understand that the ‘Z’ scores would be fnally deter-

mined and announced only after the re-scrutiny of the results are

fnalized and this had been the practice for several years.

(3) the steps that were taken by the respondents, as alleged by

the petitioner, cannot be categorised as arbitrary and unlawful.

the petitioner has not been successful in establishing that her

fundamental rights guaranteed in terms of article 12(1) of the

constitution had been infringed by the respondents.

(4) The applicable fnal Z score and the District rankings would be

available only after the rescrutiny marks are fnalized.

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**Cases referred to :-**

(1) *Schmidt v. Secretary of State for Home Affairs -* (1969) 1 all e.r.

904.

(2) *Breen v. Amalgamated Engineering Union* - (1971) 1 all e. r. 1148

(3) *Re Westminster City Council* - (1986) a. c. 668

(4) *Attorney General of Hong Kong v. Ng Tuen Shiu* - (1983) 2 all e.r.

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(5) *Council of Civil Service Unions v. Minister for the Civil Service*

*(The GCHQ Case) -* (1984) 3 all e.r. 935

*(6) Gauri Shankar v. Union of India* - aIr (1995) sc 55

(7) *Ashutosh Gupta v. State of Rajasthan* - (2002) 4 scc 34

(8) *Western Uttar Pradesh Electric Power and Supply Co. Ltd. v. State of*

*Uttar Pradesh* - aIr (1970) sc 21

(9) *R. K. Grag v. Union of India -* aIr (1981) sc 2138

(10) *Re: Special Courts Bill* - aIr (1979) sc 478

(11) *State of Uttar Pradesh v. Kamla Palace* - aIr (2000) sc 633

**AppeAl** for infringement of fundamental rights

*Saliya Pieris* with *Thanuka Nandasiri* for petitioner.

*Mahen Gopallawa, S. S. C.,* for the respondents.

*Cur.adv.vult*

november 01st 2011

**Dr. sHirAni A. BAnDArAnAyAke, CJ**

the petitioner was a student of kalutara balika national

School, who sat for her General Certifcate of Examination

(advanced level), (hereinafter referred to as the advanced

level examination) for the second time in august 2008.

she complained that, on the basis of her results at the said

examination, she verily believed that she had attained a

satisfactory Z score to follow the course of studies in medicine.

however, she had applied for her third attempt for the said

examination in 2009 prior to the release of the cut-off marks.

the petitioner alleged that the respondents had arbitrarily

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reduced and/or had amended her Z score without any basis

for such reduction and without giving any explanation for

such reduction and thereafter had released a revised schedule

of the advanced level results and thereby had decided

that the petitioner has not been selected to a faculty of

medicine.

the petitioner accordingly complained that her fun-

damental rights guaranteed in terms of article 12(1) of the

constitution had been violated by the respondents for which

this court had granted leave to proceed.

the facts of this application, as submitted by the

petitioner, *albeit* brief are as follows.

the petitioner had sat for the advanced level examination

for the frst time in August 2007 and had obtained two very

good passes (b) for biology and physics and a credit pass (c)

for chemistry. having received a Z score of 1.5567, on the

basis of the said results, she had applied for university

admission and had been selected to follow a course in

bio science in the university of sri jayawardeanapura. since

the petitioner’s ambition was to follow a course in medicine

and as the Z score she had obtained was insuffcient for

the said purpose, she had not taken steps to register at the

said university, but decided to sit for the advanced level

examination for the second time.

the results of the advanced level examination of august

2008 were released on 03.01.2009 and the said results were

put on the school’s notice board.

accordingly she had obtained a distinction (a) for biology

and two very good passes (b) for chemistry and physics. she

had also obtained a distinction for general english and 072

marks for the common general test.

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according to the said results, the petitioner had

obtained a Z score of 1.8887 with a district rank of 49 from

the kalutara district.

the petitioner stated that applications were called for

admission to the universities and accordingly she had

sent her application for which she had received an

acknowledgement.

the petitioner submitted that although the results

were released on 03.01.2009, the 2nd respondent had failed

to release the cut off marks for university admissions

until 03.07.2009. she further submitted that during previous

years, the said marks were released within two to three

months from the date of the release of the results, which had

helped the students to decide whether they should re-sit the

said examination.

however, the petitioner did not pay much heed to the

said delay as she had, in her view, obtained a Z score which

was over and above the general requirement to enter a

faculty of medicine, when compared with the Z scores of

previous years.

the petitioner had received a fresh sheet of results on

07.07.2009, which was backdated to 03.01.2009. according

to the said document her Z score had been reduced to 1.8860

from the earlier Z score of 1.8887. on a comparison of the

two sets of Z scores, the petitioner had realized that the

Z score given in July 2009 was not suffcient for her to enter

into a faculty of medicine.

later on 10.07.2009, the petitioner had received a letter

from the university grants commission that she has been

selected to follow the course of study in dental surgery in

the university of peradeniya and had informed her to meet

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the registrar of the university of colombo for the purpose of

registration. the petitioner stated that she had registered

with the faculty of dental surgery at the said university

although she verily believed that the reduction of her Z score

was incorrect, arbitrary and discriminatory and had no legal

basis.

the petitioner had appealed to the commissioner

general of examinations to rectify the error with regard to

her Z score and to allow her to follow a course of study in a

faculty of medicine. she submitted that she had decided to

register with the faculty of dental surgery as she would be

deprived of her chances to undergo higher studies.

the petitioner accordingly has complained that her

fundamental rights to equal protection had been violated by

the respondents and this allegation is based on the grounds

that,

1. the respondents had arbitrarily reduced or amended the

petitioner’s Z score without any basis and without giving

any reasons for such reduction;

2. the release of a revised schedule of the results of the

advanced level examination after the cut off mark for

the university admissions were released; and

3. by causing a delay in the release of the results of the

advanced level examination and the cut off mark for the

university admissions.

the 1st respondent, being the commissioner of

examinations, had averred that although the results of the

advanced level examination held in august 2008, were

initially released on 03.01.2009 by the department of

examinations, that they were subject to change and were

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considered as provisional until confrmed by the offcial

results issued by the department of examinations. the 1st

respondent had further averred that all the principals of

schools were informed of this situation by his letter dated

01.01.2009 (1r1). the reason for such change was based on

the fact that time had to be granted for candidates who sat

for the advanced level examination to apply for re-scrutiny

and the notice for such re-scrutiny was published on

09.01.2009.

the process of re-scrutiny had taken over 5 months and

the fnal results including the revised Z scores had been

issued to the university grants commission on 24.06.2009

and to the candidates on 29.06.2009. accordingly, the

petitioner had received a Z score of 1.8860, which was below

the cut off point of 1.8864 that was necessary to be admitted

to follow a course of study in medicine.

the petitioner’s grievance is based on the revision of

her Z score. admittedly along with her results released on

03.01.2009 it was stated that her Z score was 1.8887, which

was over and above the cut-off point of 1.8864 from the

kalutara district to enter a faculty of medicine. this posi-

tion clearly indicates that two sets of Z scores were issued

to the petitioner on which the petitioner had stated that she

had a legitimate expectation that she could enter a faculty of

medicine without sitting for the advanced level examination

for a further time. the respondents had taken the position

that the frst sets of results were only provisional and not fnal

and therefore there cannot be any legitimate expectation

based on the original sets of results. a question therefore

arises as to at which point the Z score could be fnalized.

It is not disputed that since 2001 in sri lanka, the

university admissions were based on the Z scores

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obtained by the individual candidates at the advanced level

examination. this method was introduced by the university

grants commission in order to avoid any unfairness in the

process of selection. the said method, which was commonly

known as the Z score, was a process of standardization, which

was carried out using the statistics that were based on the

marks obtained by the students. the Z score was calculated

using the following formula.

*X - X*

Z =

 *S*

the said formula of the Z score could be described as

follows:

*Z - score = Raw marks obtained by a student - Mean mark for the subject*

 *Standard deviation of marks for the subject*

this clearly indicates that the mean mark for the relevant

subject is necessary to arrive at the Z score. such mean

marks would have to be obtained, not at the time the original

results are released, but only after the re-scrutiny results are

fnalized. Therefore although the provisional results may be

released on an earlier date, such a release would not assist

the students to decide as to which course of study that they

would be able to follow. the reason for this process is that by

its nature, the Z score would depend not only on the marks a

particular student had obtained, but on the marks the others

students had scored at that examination in a given subject.

accordingly it is not correct for the petitioner to state that

although the results were released on 03.01.2009, the cut-off

marks were not released until 03.07.2009. due to the very

nature of the calculation of the Z score, it would not have

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been possible to release the cut-off marks until the re-scrutiny

results were fnalized by the Department of Examination.

the petitioner’s complaint as clearly stated earlier was

that in terms of the results issued prior to the re-scrutiny

results were released, she had a Z score which was over and

above the cut-off point that was necessary to enter a faculty

of medicine. due to the said position, the petitioner had stated

that she had a legitimate expectation that she could enter the

medical stream.

as stated earlier the introduction of the method of selecting

students to universities and their different faculties on

the basis of the Z score was to eliminate diffculties and

distortions caused to candidates by varying standards of

marking adopted in different subjects. however, since its

inception in 2001, it was known that the Z score of a subject

could always vary due to the re-scrutiny marks. this would

occur even in situations where the candidate in question

had not applied for re-scrutiny. the formula for the Z score,

as shown earlier, is based on the mean and the standard

deviation in respect of subjects and whenever there is any

change in the marks occur that would affect the Z score.

referring to the said changes, the 1st respondent had

averred that due to the changes in marks of the other

candidates who had applied for re-scrutiny and due to the

changes in their marks, there had been a downward revision

of the petitioner’s Z score from the original Z score of 1.8887

to 1.8860. consequently, the petitioner’s district ranking also

got revised from 49 to 52. In support of his averment, the

1st respondent had tendered a document which contains the

details of the manner in which the changes during re-scrutiny

had affected the Z score of the petitioner (1r7).

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on an examination of the documents which were placed

by the petitioner as well as the respondents, it is quite clear

that the applicable fnal Z score and the District Ranking of a

candidate would be available only after the re-scrutiny marks

are fnalized.

It is not disputed that the fnal results of the re-scruti-

ny were released on 29.06.2009 and the cut-off points for

the admission to universities and to their different faculties

were issued only on 02.07.2009 by the university grants

commission. the petitioner had stated that she had received

the fnal results on 07.07.2009. By 07.07.2009, the petitioner

was well aware that the Z score she had obtained was not

suffcient to enter into a Faculty of Medicine.

In such circumstances, could the petitioner rely on the

concept of legitimate expectation?

legitimate expectation is a concept which has been

developed through the years since its introduction by lord

denning in *Schmidt v. Secretary of State for Home Affairs*(1)

mostly on the basis of procedural fairness and the removal

of arbitrary decision. In **schmidt** (supra), the court,

referring to a decision of the government to reduce

the period already allowed to an alien to enter and

stay in england, had held that the said person had a

legitimate expectation to stay in that country, which cannot

be violated without following a reasonable procedure. the

decision in **schmidt** (supra) was followed soon after in

*Breen v. Amalgamated Engineering Union*(2).

legitimate expectation has been described as a concept

which derives from an undertaking given by someone in

authority. there is no compulsion for such an undertaking to

be in written formula, but would be suffcient if that could be

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known through the surrounding circumstances. discussing

this concept, david foulkes (administrative law, 7th edition,

butterworths, 1990, pg. 272) had expressed the view that

a promise or an undertaking could give rise to a legitimate

expectation. discussing his position with regard to the

concept foulkes had stated that,

 “the right to a hearing, or to be consulted, or generally

to put one’s case, may also arise out of the action of the

authority itself. this action may take one of two, or both

forms; a *promise* (or a statement or undertaking) or a reg-

ular *procedure.* **Both the promise and the procedure**

**are capable of giving rise to what is called a legiti-**

**mate expectation, that is, an expectation of the kind**

**which the Courts will enforce”** (emphasis added).

prof. galligan (due process and fair procedures, a study

of administrative procedures, clarendon press, oxford, 1996,

pg. 320) had described the concept of legitimate expectation

to something equal to the idea of an interest raised due to

an undertaking that had been given. explaining his theory,

prof. galligan had stated thus:

 “In one sense legitimate expectation is an extension

of the idea of an interest. the duty of procedural

fairness is owed, it has been said, when a person’s rights,

interests or legitimate expectations are in issue.**one might**

**have no right or interest at stake, but because of some-**

**thing said or done by the authority, an expectation**

**mayberaised,whichshouldnotbedisappointedwithout**

**following certain procedures.** an example is an alien

seeking an extension of a visa to stay in the united

kingdom. under english law he has no right or legitimate

interest in being allowed to stay; but he might acquire

a legitimate expectation from an undertaking or holding

out that he will be allowed to stay” (emphasis added).