

**ABEYAGUNAWARDANE**  
**v**  
**SAMOON AND OTHERS**

COURT OF APPEAL  
IMAM, J.  
SARATH DE ABREW, J.  
CA PHC 34/2007 (REV.)  
HC COLOMBO 2006/04  
NOVEMBER 9, 2007

*Evidence (Special Provisions) Act 14 of 1995 – Section 4(1) (a) (b) (c) and (d) – Section 7 (1) (a) – Requirements to be satisfied before admission of video evidence? – Is it mandatory to comply with Section 7 where the document is in the possession of the adverse party? – Do the provisions of Act 14 of 1995 override the provisions in any other law – Poisons Opium and Dangerous Drugs Ordinance Act 13 of 1984?*

An Application was made to lead evidence of a video recording. The High Court made order directing the petitioner to satisfy Court of compliance with the requirements of Section 4 (1), (b) (c) and (d) of Act 14 of 1995. After inquiry, the High Court made order refusing the application to lead video evidence. The petitioner moved in revision.

**Held:**

- (1) After the Evidence (Special Provisions) Act 14 of 1995 came into operation admission of video recordings is governed solely under the provisions of the said amendment.
- (2) In accordance with Section 2 it is clear that the provisions of the amending Act 14 of 1995 overrides both the Evidence Ordinance or any other written Law. Therefore Section 4 (1) (a) – (d) have to be complied with.
- (3) It is apparent that
  - (1) Evidence led by both prosecution and defence prove that there was no contemporaneous recording of the raid.
  - (2) Evidence clearly establishes that whatever recording that was made was not kept in safe custody at all material times.
  - (3) No sufficient precautions were taken to prevent the possibility of such recording being altered or tampered with.

It is clearly seen that provisions of Section 4 (1) (a) – (d) of Act No. 14 of 1995 have not been complied with – the video cassette is not admissible in evidence.

**Cases referred to:**

- (1) *Abeygunawardane v Samoon and others* – CA 212/2000 CAM 23.1.2007 (where the same petitioner was directed to make a fresh application with regard to leading of evidence of the video tape).
- (2) *Wijepala v Attorney-General* – 2001 – 1 Sri LR 46
- (3) *Q v Abubucker* – 54 NLR 546
- (4) *Karunaratne v Q* – 69 NLR 10

*Faiz Musthapha PC with Gaston Jayakody, Amarasiri Panditharatne and Ms. T. Machado* for 2nd accused-petitioner.

*Shavindra Fernando DSG with Chetiya Goonasekera SSC* for the 3rd complainant-respondent.

November 21, 2007

**IMAM, J.**

The 2nd accused-petitioner (hereinafter referred to as the "Petitioner" has tendered a Revision Application 34/2007), and a Leave to Appeal Application (39/2007) respectively seeking to set aside the Order of the learned High Court Judge of Colombo dated 28.02.2007 as prayed for in paragraph (a) of the Prayer to the Petition in Revision Application No. 34/2007 and paragraph (c) of the Prayer to the Petition in the Leave to Appeal Application No. 39/2007

respectively. The "petitioner" further seeks to lead in evidence the Video recording marked as "2V1A" as prayed for in paragraph (b) – of the Prayer to the Petition of the Revision application (No. 34/2007) and paragraph (d) of Prayer to the Petition of the Leave to appeal Application (No. 39/2007) respectively. One order is made in respect of the aforesaid 2 applications as a matter of convenience, for the parties are the same, the subject matter the same, and the Applications similar. 10

**The facts pertaining to the aforesaid applications are as follows:**

The petitioner tendered a Revision Application (P5) bearing No. 212/2006 in another division of this Court consequent to an Interlocutory Order made by the learned High Court Judge of Colombo dated 16.10.2006 having refused an Application by the 'Petitioner' to admit as evidence a Video recording. Subsequently their Lordships S. Srisankarajah, J. and W.L.R. Silva, J. in CA 212/2006 (P5) and CA 212/2006 on 23.01.2007<sup>(1)</sup> directed the learned High Court Judge of Colombo to permit the Defence to make a fresh Application with regard to the leading of evidence of the Video tape (2VIA) in the relevant High Court, and to support such Application with relevant evidence. The aforesaid Lordships observed that the Honourable Attorney-General was at liberty to take any objections at the relevant time, and that the learned High Court Judge was entitled to make an order with regard to the Admission and Reception of Evidence. Accordingly, the 'petitioner' made a fresh Application for the Admission of the aforementioned Video evidence on 08.02.2007. On evaluating the Submissions of the learned President's Counsel for the 'petitioner' the learned High Court Judge directed the 'petitioner' to lead evidence to satisfy Court that the requirements of section 4(1)(a) (b) (c) and (d) of the Evidence (Special Provisions) Act No. 14 of 1995 have been complied with before an Order is made. On 28.02.2007 the learned High Court Judge delivered his order refusing the leading of the said Video as Evidence, as the learned High Court Judge held that the 'petitioner' had failed to establish the compliance of section 4(1)(a)(b)(c) and (d) of the Evidence (Special Provisions) Act No. 14 of 1995. 20 30 40

Hence the 'petitioner' has filed this Revision Application before this Court claiming to be aggrieved by the aforesaid Order of the learned High Court Judge of Colombo dated 28.02.2007. The 3rd respondent avers that the Application of the 'petitioner' cannot

succeed for reasons specifically adduced in his Written Submissions. The petitioner was indicted by the Attorney-General along with the 1st and 3rd accused on charges of abetting the 1st accused in the commission of trafficking of approximately 1.290 kilograms of heroin, an offence punishable under the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984. The indictment consisted of six counts. The 1st and 2nd counts in the indictment related to the possession and trafficking by the 1st accused of 1.290 kilograms of heroin respectively, the 3rd count was as mentioned before against the 2nd accused for abetting the 1st accused in the trafficking of 1,290 kilograms of heroin. Count 4 was against the 1st and 3rd accused of possession of 1.290 kilograms of heroin. Count 5 was against the 1st accused of trafficking in 7,796 kilograms of heroin, and count 6 was against the 3rd accused of abetting the 1st accused in trafficking in 1.290 kilograms of heroin. The total quantity of heroin was 23 kilograms, which was considered to be the biggest haul detected in recent years. According to the Government Analyst the quantity of pure heroin was 9.086 kilograms. The detection was made at the Ward Place residence of the 1st and 3rd accused, the street value haul of which was nearly Rs. 450 lakhs. The petitioner is a tri-shaw driver indicted for abetting the 1st accused in the trafficking of heroin, as more fully set out in the indictment.

### **The case for the Prosecution**

The case for the prosecution is that on information received a party of policemen led by IP Priyantha Liyanage, PS Rajitha Manappriya and others, positioned themselves at approximately 7 a.m. on 28.11.2003 outside the Ward Place residence of the 1st and 3rd accused. At about 10.00 a.m. they observed a 3 wheeler (Trishaw) driven by the petitioner being parked outside the **small gate** of the aforesaid premises, after which the petitioner went towards the **small gate** with 2 black polythene bags (referred to as "tulip bags") consequent to which the 1st accused came out, took the 2 bags from the 'petitioner' and went into the house, while the 'petitioner' remained outside. A short while later the 1st accused came out towards the petitioner carrying a polythene bag. They were both apprehended by the police and the polythene bag was found to contain 1.290 kilograms of heroin which constitutes the 1st, 2nd and 3rd charges. On the house being searched by the Police, 7.796 kilograms of heroin was found in a suitcase under the bed in the master bedroom, which

constitutes the subject matter of the other charges. The prosecution is of the view that the video cassette recording cannot be marked as evidence and the relevant statute has been discussed in detail in the course of this Order.

The case for the accused is that the heroin was introduced by officers of the Narcotic Bureau at the instigation of Chief Inspector Amarajith the then Officer-in-Charge of the Narcotics Bureau who had fallen out with the 1st accused. According to the defence witness Sunil Fonseka, a large consignment of heroin was seized by officers of the Narcotic Bureau from the residence of the 1st accused on 28.11.2003, amongst which officers namely IP Liyanage and PS Rajitha Manappriya were present. The position of the accused is that the Police team waited near the Dewatagaha Mosque, until the three-wheeler driven by the 'petitioner' arrived, consequent to which the 'Petitioner' was asked as to whether he was involved in distributing heroin. It was contended by the accused that the 'petitioner' was assaulted by several police officers who included PS Manappriya. The 'petitioner' complains that he was pushed at gun point onto the rear seat of the three wheeler, restrained by the police officers, that PS Manappriya drove the three-wheeler, and that the other police officers followed in a police vehicle, until they arrived at the Ward Place residence of the 1st accused, where PS Manappriya drove the three-wheeler and parked it near the **Main Gate** as against the prosecution version that the three-wheeler was parked opposite the **small gate**. The defence states that at about 10.30 a.m. the main gate was opened to enable a car driven by the 3rd accused to enter the premises. Subsequently the three wheeler was driven towards the gate and stopped just outside it, when the police officers forcibly entered the house. The defence suggests that the heroin was introduced at the main hall into a bag, which was found in the premises. The position of the 1st accused is that this introduction was engineered by OIC Amarajith with whom he had been associating very intimately when this officer was attached to the Katunayake airport, when the 1st accused used to travel abroad regularly on business. The OIC had as the 1st accused claimed fallen out with him when the OIC had demanded a sum of Rs. 2.5million from the 1st accused which he had refused to oblige, with the result that the OIC had become very hostile towards the 1st accused. The position of the accused was that PS Karunatilake videoed the evidence at the residence.

## **Relevance of the Video Evidence**

The 'petitioner' contends that the video evidence is paramount in determining whether the prosecution's version or the accused's version, is true. The 'petitioner' contends that the following issues which are of a fundamental nature would be resolved by viewing the video.

### **(i) Position in which the three wheeler was parked**

- (a) IP Liyanage stated that the three wheeler was parked opposite the small gate. He said that only the pavement which was about 15 feet was between the gate and the three-wheeler.
- (b) On the contrary PS Manappriya stated that the three wheeler was parked on the opposite side of the road, and that the distance between the three wheeler and the residence of the 1st accused was about 25 to 30 meters.
- (c) Sunil Fonseka the defence witness stated that the three wheeler was parked opposite the main gate.
- (d) The 2nd accused in his Dock Statement stated that the three wheeler was parked outside the main gate.

The 'petitioner' states that the video cassette was played before counsel on both sides by Mutual Agreement on 15.09.2006. The viewing was however interrupted within five minutes as Power Supply was inadvertently disconnected as the learned Deputy Solicitor General accidentally tripped on the connecting cord. The 'petitioner' contends that during the five minutes the video was viewed it displayed the three wheeler being parked at Ward Place opposite the Main Gate of the residence of the 1st accused. This was not contested by the prosecution. The three wheeler was taken into custody, and is listed as a production in this case.

### **(ii) Whether infact, the small gate was ever opened**

The 'petitioner' asserts that counsel appearing in the Trial Court had been instructed that this gate had been locked from inside.

The 'petitioner' avers that if the events in the residence had been videoed as claimed by the defence, a view of the cassette would

be of the utmost evidential value in determining whether the prosecution version is true or not.

**(iii) Credibility of IP Liyanage**

The 'petitioner' contends that the parties are at issue, as to whether as claimed by the prosecution, the events initially commenced with the police intervening at the point when the 1st accused came out of the house towards the 2nd accused having moments earlier taken charge of the two 'tulip bags' which had been handed over to him by the 2nd accused. According to the prosecution they were both apprehended at this stage, and the bag which the 1st accused brought from within the house was taken over by IP Liyanage. This officer claims that this bag was retained by him throughout the raid at the residence. It was suggested to him by defence counsel that he had been handling gems which were found in the residence of the 1st accused, and that the aforesaid bag was not in his hands as claimed by him, which suggestion was denied by him. The petitioner's position is that the video would resolve this issue. IP Liyanage and PS Manappriya deny that any videoing took place, although PS Karunathileka admits having made a video recording at the instance of OIC Amarajith, but states that the video recording was made subsequently at the Narcotics Bureau, and not during the raid at the residence of the 1st accused. Learned President's Counsel for the 'petitioner' does not accept this view of the aforementioned Police officers as on the occasion of viewing of the video by Counsel which was subsequently interrupted, Ward Place and the interior of the house were seen on the video which contradicts the view of the police officers.

**Sequence of events leading to the order complained of**

As IP Liyanage categorically denied that there was a video recording of any sort, counsel for the petitioner made an application on 28.04.2006 for permission to produce a copy of a portion of the video which had come to the possession of the defence in order to discredit the witness. The learned High Court Judge made order refusing the application on the following grounds.

- (a) That the prosecution case has not been concluded, and the application had been made in the midst of the prosecution case.

- (b) Non-compliance with requirement of Notice in terms of the Evidence (Special Provisions) Act No. 14 of 1995.

PS Manappriya was the 2nd police witness called by the prosecution. On cross-examining him on 13.06.2006 Defence Counsel put to him an entry in the RIB maintained by the Narcotics Bureau, which entry the witness identified as being in the handwriting of PS Karunatileka, which was in Sinhala and was to the effect that a video cassette had been handed over by PS Karunatileka to Chief Inspector Balachandra, the then OIC of the Narcotics Bureau which had been underlined in red by OIC Balachandra.

On the basis of this evidence, defence Counsel cited the case of *Wijepala v Attorney General*<sup>(1)</sup> and submitted that it was necessary for the Court to call for the video tape, and make a copy available to the defence for the purpose of cross-examination in the interests of a fair trial. The State objected to the Application on the basis that the entry in the RIB had been after the service of the Indictment, and that the video tape was not a part of the prosecution case. The learned High Court Judge of Colombo made Order on 28.04.2006 disallowing the application of Defence Counsel on the following grounds.

- (a) The Defence had the knowledge of the contents of the video tape whereas the prosecution's position was that there was no such tape. That being so, the learned High Court Judge took the view that it was for the defence to produce the video tape and
- (b) That it was open to the defence to do so in the course of the case for the defence.

After the closure of the prosecution case, the defence led evidence *inter-alia* to establish that there was a video-recording of the raid at the residence of the 1st defendant in the possession of the Narcotics Bureau. The 1st, 2nd and 3rd accused made the Dock Statements that the raid at the house was video-recorded. Defence witness Sunil Fonseka also gave evidence that the aforesaid raid was video-recorded. The defence also called 3 police officers, namely the following in this regard.

- (a) PS Ranjan testified that he had possession of the tape from 29.11.2005 when he received it from OIC Balachandra until he produced it in Court on 15.09.2006. The video was physically



produced in evidence by PS Ranjan and marked as 2V1, but not admitted in evidence.

- (b) OIC Balachandra stated that he received the tape from PS Karunatileke on 28.11.2005 and placed it in an envelope which he sealed. PS Karunatileke made the IB entry pertaining to the delivery of the tape, and he underlined it in red. He handed over the tape to PS Ranjan on 29.11.2005 to be kept in safe custody. The tape was identified by OIC Balachandra.
- (c) PS Karunatileke's evidence was that he did a video recording on the instructions of OIC Amarajith, but that the recording was of the subsequent events at the Narcotics Bureau and not of the raid at the residence. He identified the particular tape by reason of an entry made by him on the video cassette itself which contained references to the relevant IB Entry pertaining to the raid at Ward Place.

In view of the aforesaid evidence. Counsel for the petitioner moved on 15.09.2006 that he be permitted to produce in Evidence and exhibit the video tape, which Application was objected to by the State on the basis that the authenticity and the chain of evidence pertaining to proper custody of the tape had not been established. The learned High Court Judge, made order on 15.09.2006 refusing the application of the 'petitioner' on the following grounds.

- (i) Failure to give Notice to the prosecution in terms of section 7(1)(a) of the Evidence (Special Provisions) Act No. 14 of 1995.
- (ii) That the witnesses had not admitted that the events at the Ward Place residence had been videoed.

Subsequently Counsel on both sides agreed to view the video in the presence of the Interpreter Mudaliyar which they did. However after the tape was run for 5.51 minutes the learned DSG accidentally trod on the connecting-cord and the power supply was interrupted, without a resumption of the viewing. The said video during the period of screening depicted Ward Place (including the traffic), the outside view of the residence, the three-wheeler parked in front of the gate, some bags containing a powder, some currency notes displayed, and a travelling bag (P1) opened on the white coloured floor of the said residence.

On 27.09.2006 the Defence served Notice on the Attorney-General in terms of section 7(i)(a) of the Evidence (Special Provisions) Act No. 14 of 1995 of the intention to produce the video in evidence.

On 16.10.2006 Counsel for the 'petitioner' made a two-fold application namely:

- (a) for the resumption of viewing the video and
- (b) to produce the video in evidence and in the event of the prosecution or the Court requiring the lapse of 45 days after the service of the notice as contemplated by section 7(i)(a) of the Evidence (Special Provisions) Act No. 14 of 1995, the proceedings be adjourned to cover the prescribed period.
- (c) the State declined to recommence the viewing. The DSG admitted the receipt of the notice and specifically stated that the prosecution was not insisting on the lapse of 45 days and thus waived this requirement. The DSG however stated that with regard to the Application made by the Defence Counsel, if an application is made under section 165 of the Evidence Ordinance, he would respond to such an Application.

The learned DSG however maintained that such an Application should be made after the prosecution and the defence have closed their respective cases.

The learned High Court Judge on 16.10.2006 (P5) made order refusing this Application on the following grounds.

- (i) That the requirement of a 45 day Notice prior to the date fixed for Trial as envisaged in section 7(1)(a) of the Evidence (Special Provisions) Act No. 14 of 1995 was mandatory.
- (ii) The Defence has failed to take steps to comply with this requirement despite the orders made by the learned High Court Judge on 28.04.2006 and 15.09.2006.
- (iii) That statutory requirements could not be waived by parties.
- (iv) That the viewing of the video by the parties was based on agreement between them and the Court did not propose to make an order on that account.

The 'petitioner' being aggrieved by the said order lodged a Leave to Appeal bearing No. CA 213/2006 and Revision Application bearing No. CA 212/2006. When the matter came up for argument before their Lordships Sriskandarajah, J. and W.L.R. Silva, J. the DSG appearing for the State conceded that it was not mandatory to comply with the requirement of Notice stipulated in section 7 of the Evidence (Special Provisions) Act No. 14 of 1995, where the document is in the possession of the adverse party. It was held by Their Lordships in the aforementioned cases that 'The video tape was with the prosecution', and set aside the Order of the learned High Court Judge (P5). Their Lordships directed the Trial Judge to permit the defence to make a fresh application with liberty to lead evidence if necessary and subject to the right of the State to object to the Application.

**Proceedings subsequent to the Orders in CA. 212/2006 and CA 213/2006.** When proceedings were resumed before the learned High Court Judge of Colombo, Counsel for the 'petitioner' made an application to lead evidence of the video. The learned High Court Judge made Order directing the 'petitioner' to satisfy the Court of compliance with the requirements of section 4(1)(a)(b)(c) and (d) (Y1).

The 'petitioner' filed a list of witnesses comprising of 05 police officers. On 22.02.2007 the 'petitioner's' learned Counsel led the evidence of Shimran Shyam, the 10 year old daughter of the 1st and 3rd accused. In evidence she stated that she remembered the day, when her father and mother were taken away by some persons. She said that on that day her mother and household servants were made to sit at a table in the main hall, on which occasion some persons videoed the house. Upon the conclusion of evidence Counsel for the 'petitioner' stated that as the witnesses had testified with regard to a video recording he was not calling any further evidence in that regard, and moved to mark the video in evidence. The DSG objected and made submissions. Learned President's Counsel who appeared for the 'petitioner' in this Court stated that PC Pradeep was called as a witness in the High Court, where he testified that at approximately 11.30 a.m. on 21.02.2007 a person whose voice he later identified as that of PS Ranjan, telephoned him and asked him to give evidence in favour of the accused. Learned President's Counsel admitted that PC Pradeep made no reference to any of the accused, was not tendered for cross-examination, and that although the learned High Court

Judge did not come to a finding was highly influenced by this allegation. The learned High Court Judge made Order on 28.2.2007, refusing to lead the video evidence. The present Revision and Leave to Appeal Application are to set aside the aforesaid orders of the learned High Court Judge dated 28.2.2007. The learned President's Counsel referring to the claim with regard to the video cassette accepted in his Written Submissions that the recording had been in the custody of the Narcotics Bureau from the time the recording was effected until it was produced. Learned President's Counsel cited (1) *Queen v Aboobucker*<sup>(2)</sup>, where the recording of a speech made at a public meeting was held to be admissible, provided there was evidence that the recording had been correctly done, and that the machine was functioning properly. (2) *Karunaratne v The Queen*<sup>(3)</sup>, where it was held that a tape recording of a telephone conversation could have been admitted subject to the same qualifications.

I have considered the application of the petitioner, the evidence led in this case, the Written Submissions tendered by both sides, the provisions of the prevailing Evidence (Special Provisions) Act No. 14 of 1995 and connected matters. Learned President's Counsel for the petitioner state that the accused were in possession of parts of the video. Learned President's Counsel did not state the manner in which the accused obtained the aforesaid possession. The learned High Court Judge directed the 'petitioner' to lead evidence to satisfy Court that the requirements of section 4(1)(a)(b)(c) and (d) of the Evidence (Special Provisions) Act No. 14 of 1995 have been complied with before making any order. After the aforesaid Act became law, admissibility of video recordings is governed solely under the provisions of the said amendment. In accordance with section 2 of the said Act it is clear that the provisions of the Amendment Act No. 14 of 1955 override both the Evidence Ordinance or any other Written Law. Hence for such video evidence to be led the provisions of section 4(1)(a)-(d) have to be satisfied. Section 4(1)(b) reads as follows:

"The recording or reproduction was not altered or tampered with in any manner whatsoever during or after the making of such recording or reproduction or that it was kept in safe custody at all material times, during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered

with, during the period in which it was in such custody." The aforesaid provision makes it manifestly clear that a contemporaneous recording could only be admitted as evidence, only if the requirements of section 4(1)(d) are satisfied. The prosecution avers that no contemporaneous recording by video took place at the time of the raid, although the defence claims that such a recording took place. The prosecution emphasizes the fact that the raid took place at the Ward Place residence of the 1st and 3rd accused. Besides the possibility that the video may have been tampered with editing and altering of any video is possible which can completely distort the true picture using modern technology techniques. P.S. Karunathilaka in his evidence stated that he placed a piece of paper for identification at the time he handed over the cassette as testified by him when he handed over the video to the Narcotics Bureau. He however said that the piece of paper could not be found by him as it was not there, when the envelope containing the cassette was opened in Court. P.S. Karunathilaka also described the manner in which the video cassette lay for two years in a dark room, which dark room was not padlocked, nor the envelope that contained the video cassette sealed, as in the case of other productions, and accessible to many others, before he was instructed to hand over the video cassette to Chief Inspector Balachandra.

The evidence of P.S. Karunathilaka in my view clearly establishes that the requirements as set out in section 4(1)(d) of the aforesaid Evidence (Special Provisions) Act No. 14 of 1995 were **not** complied with. Section 4(2) of the aforesaid Act makes it clear that the video cassette could be admissible in evidence only if the conditions set out in section 4(1) are satisfied. However the question remains as a how parts of the cassette got into the possession of the accused. The learned High Court Judge interpreted section 7 of the aforesaid Act, and observed that although the requirement of 45 days notice was brought to the attention of the defence by the learned High Court Judge as early as 28.4.2006, the accused had not complied with the aforesaid requirement. Despite an opportunity being granted by the learned High Court Judge by his Order dated 8.2.2007 to lead evidence to satisfy Court that there was compliance with section 4(1)(a) to (d) of the Evidence (Special Provisions) Act No. 14 of 1995, the 2nd accused ('petitioner') nor the 1st and 3rd accused did not avail themselves of the opportunity much to their detriment.

The right of the accused to a fair trial is enshrined in our Constitution. It is an established principle that all the parties are entitled to a fair trial as a constitutional right. However in applying such a right to the production of the video cassette, the relevant question to be considered is as to whether the video cassette passes the test of authenticity, and whether it was altered or tampered with, as stipulated by the Evidence (Special Provisions) Act No. 14 of 1995. In my view the video cassette produced by PS Karunatilaka does not satisfy the requirements of section 4(1)(d) of the aforesaid Act, as

- (a) the video cassette was not contained in a sealed envelope,
- (b) the piece of paper which PS Karunathilaka attached to the video cassette initially to enable him to identify the video cassette was missing,
- (c) the video cassette was kept in a dark room which was unlocked for a period 2 years, during which period there was time for tampering with the video-cassette as it was left exposed,
- (d) numerous persons used to come and go to the dark room,
- (e) there was no evidence that there was a proper sealing of the envelope that contained the video-cassette in the presence of other officers ..... etc, and thus there was *no contemporaneous*, which could be led as Evidence. However this situation cannot be construed as a violation of the provisions of the Right to a fair Trial guaranteed to an accused, as envisaged by the Constitution.

The conduct of Chief Inspector Balachandra is questionable namely.

- (i) Why did he not seal the video cassette in the presence of PS Karunatilaka?
- (ii) Why did he wait until the following day to handover the envelope not sealed in the presence of any one else to PC Ranjan?
- (iii) What happened to the piece of paper placed by PS Karunathilaka inside the cassette?
- (iv) Why didn't he record anything in the envelope?

No plausible explanation has been given as to how the petitioner came to be in possession of parts of the video cassette.

During the Trial the prosecution led the evidence of it's main witness IP Priyantha Liyanage who was the Officer in Charge of the raid.

This witness in cross examination specifically denied any videoing of the raid inside the residence of the 1st and 3rd accused. Although Counsel who appeared for the 2nd accused (petitioner) stated that the accused were in possession of parts of the video, there was no evidence led as to the manner in which parts of the video were obtained. The prosecution also called PS Rajitha Manampriya who participated in the raid with I.P. Liyanage and was attached to the Police Narcotics Bureau at the time of the raid. During cross examination of this witness Counsel for the 2nd accused's (petitioner) attention was drawn to certain notes made by PS Karunathilaka and CI Balachandra. The said notes indicate that a CD pertaining to the case was handed over by PS Karunathilaka to CI Balachandra on the said date. However this witness denied that any videoing was done by any of the officers of the Narcotics Bureau.

On 13.06.2006 Counsel for the 2nd accused (petitioner) made an application for the production of the video. At this stage no reference was made to the earlier submission that the accused were in possession of parts of the video. However a reference was made that the Counsel had received instruction that certain officers of the Narcotics Bureau are clearly seen in the video now in the custody of the Narcotics Bureau. The prosecution expressed surprise as to how the accused was making submissions as to what was in the cassette which was not a part of the prosecution case, and which the prosecution was not even aware of. The learned High Court Judge referred to the evidence of the prosecution, where it was stated that they did not video the raid. The learned High Court Judge held that as the accused appeared to have a good understanding of the video, if the video is to be produced it should be done in accordance with the provisions of the Evidence Ordinance, and during the case of the defence.

CI Balachandra who was called by the defence, in his evidence stated that he took the production (cassette) from PS Karunatilake, and according to his recollection he placed some seals, and handed it over for safe-keeping to the person in charge of the room where the IBE's are kept. Witness said that there was a cassette with a plastic

cover with a marking "RIB 1104/2107. During his evidence although the cassette was not marked as a production a marking "2V1A" was given only to show that the aforesaid cassette was a given to Court by this witness. Under cross-examination CI Balachandra accepted that he did not take part in the raid, and that he did not know what the cassette contained. The next witness called by the Defence PS Karunathilake, in his evidence stated that he handed over to CI Balachandra what he videoed at the Narcotics Bureau pertaining to the raid of 23 kilograms of heroin at a residence at Ward Place. He very specifically stated that he never videoed any part of the raid nor anything outside the Narcotics Bureau.

On an analysis of the raid it is evident that IP Priyantha Liyanage led the raid and PS Rajitha Manampriya also partook in the raid, if any video cassette was found in the raid the officers who partook in the raid could have marked it as a production and sealed it. However in this case PS Karunathilaka who did not take part in the raid but stated in evidence on being called by the defence that he videoed the Police Narcotics Bureau consequent to the raid, and handed over the video cassette to CI Balachandra who was also called by the Defence as a witness, PS Karunathileke and CI Balachandra did not partake in the raid. Hence there is no evidence by the Prosecution witnesses that a videoing took place during the raid. On the contrary the prosecution witnesses denied that any videoing took place during the raid.

Apparently consequent to the raid PS Karunathileke videoed at the Police Narcotics Bureau consequent to the raid, which is said to be contained in the video cassette marked as "2V1A". The 2nd accused (petitioner) however seeks to mark a video cassette which is not a production in this case. From a perusal of the evidence, the prevalent Law namely the Evidence (Special Provisions) Act No. 14 of 1995, and related matters it is my view that;

- (i) The evidence led by the both the prosecution and defence prove that there was no contemporaneous recording of the raid.
- (ii) The evidence clearly establishes that whatever recording that was made (filming of the Productions at the Police Narcotics Bureau) was not kept in safe custody at all material times.



- (iii) Insufficient precautions were taken to prevent the possibility of such recordings being altered or tampered with. (Counsel for the accused have admitted that they were in possession of such recording or part thereof).

Hence it is manifestly well established that the Provisions of section 4(1)(a)-(d) of the Evidence (Special Provisions) Act No. 14 of 1995 have not been complied with , and thus it is my view that the marking of the video cassette is **not** admissible under section 4(2) of the aforesaid Act.

For the aforesaid reasons I do not permit the 2nd accused-petitioner to lead in evidence the said video recording marked as '2V1A'. I uphold the Order dated 28.02.2007 made by the learned High Court Judge of Colombo which is in conformity with the legal provisions, and as such I hold that the learned High Court Judge did not misdirect himself on the law and facts in the aforesaid orders.

Hence for the aforesaid reasons, I dismiss both 34/2007 (Revision) and 39/2007 (Leave to Appeal) Applications of the 2nd accused-petitioner without costs. The learned High Court Judge is hereby directed to proceed with the case.

**SARATH DE ABREW, J.** - I agree.

*Application dismissed.*