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with a Section in Sinhala

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WITH A DIGEST

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The appellant was given judgment in the High Court of Singapore. The trial judge accepted his evidence as that given by an honest and straightforward witness, and rejected the respondent's evidence as that given by a deliberate liar. The Court of Appeal of Singapore found that the trial judge's view of the appellant's evidence could not be accepted having regard to certain inferences from documents which they considered supported the evidence of the respondent.

Held : That the inferences to be drawn from these documents were not of sufficient strength to reinstate the respondent as a reliable witness, in view of the trial judge's deliberate refusal to accept the respondent's evidence as truthful ; and that the respondent had not discharged the heavy burden cast on him to displace the conclusion formed by the trial judge on a question of fact.

Held further : That although the mere failure by a party to object to inadmissible evidence cannot convert such evidence into legal evidence, a party may by his conduct at the trial be precluded from later objecting to such evidence.

Per THE JUDICIAL COMMITTEE :—" The principles upon which an appellate Court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas* v. *Thomas*, (1947) A.C. 484, at page 487 :' (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion ; (ii) The appellate Court may take the view that, without having seen or heard the witness, it is not in a position to come to any satisfactory conclusion on the printed evidence ; (iii) The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court '."

" The conclusion arrived at by the Court of Appeal was to a large extent based on the view that they were entitled to interfere with the trial Judge's findings because these were inferences drawn from the facts rather than the findings of specific facts. An appellate tribunal will more readily interfere with the trial Judge's decision on the former than on the latter (see *Benmax* v. *Austin Motor Co., Ltd.*, (1955) A.C. 370). In so far, however, as the trial Judge's decision was based on the credibility of the appellant and Goh Leh this was the finding of a specific fact that an agreement was reached between them, thus depending on the evaluation of their evidence as witnesses."

Appeals (Privy Council) Ordinance

Privy Council—Application for leave to appeal thereto by one of two executors—Should other executor have been joined as a party to such application ?

The petitioner, one of two executors, applied for conditional leave to appeal to the Privy Council from a judgment of the Supreme Court. In his affidavit he had explained that the other executor had not been joined as he was now resident in England. An affidavit from the other executor authorising the petitioner to act on his behalf and acquiescing in the steps taken by the petitioner was also filed. Objection was taken to the application on the ground that the other executor should have been made a party to such application.

Held : That it was competent for one of several executors to make an application for leave to appeal to the Privy Council. Although all parties who may be affected by the judgment of the Privy Council should ordinarily be joined, this was unnecessary in the case of executors who are sued or sue in their representative capacity as they " are regarded in law as an individual and the act of one is deemed to be the act of all. "

Bigamy

Bribery Tribunal

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A. was convicted by a Bribery Tribunal consisting of three members (not appointed by the Judicial Service Commission) and was sentenced to pay a fine of Rs. 1,000/-. On appeal, purporting to follow the decision in the case of *Senadhira* v. *The Bribery Commissioner*, (63 N.L.R. 133), the Supreme Court set aside the sentence, but did not quash the conviction as was done in that case. Their Lordships in the *Senadhira* case and in the case against *A.* did not hold that the Bribery Tribunal was an unconstitutional body in view of the same preliminary objection taken to both appeals.

Shortly after the setting aside of the sentence, *A.* filed this application for *certiorari* praying that the said findings and order of the Bribery Tribunal against him be quashed on the ground that it had no jurisdiction to hear the case, to make order on the charges framed, or to impose sentence.

Petitioner relied on a later case, viz., *Piyadasa* v. *The Bribery Commissioner*, 64 N.L.R. 385, in which the Supreme Court declared that all proceedings before the Bribery Tribunal, consisting of members not appointed by the Judicial Service Commission as required by section 55 of the Ceylon (Constitution) Order-in-Council, 1946, are null and void.

It was contended for the Crown-respondent :— (*a*) that the case of *Piyadasa* (*supra*) altered the law that stood at the time of the order against the petitioner ; (*b*) that the petitioner could not seek to quash the order made by the Supreme Court.

Held : (1) That it is not correct to state that the case of *Piyadasa* (*supra*) altered the law or that the petitioner was seeking to quash the order made by the Supreme Court in appeal.

(2) That the failure to declare, when the *Senadhira* case and the appeal of the present petitioner were decided, that the members of the said Tribunal were not vested with judicial power, because they were not appointed by the Judicial Service Commission, did not mean that that was not the law when those cases were decided, as section 55 of the Ceylon (Constitution) Order-in-Council was in operation at that date.

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Abandonment—Need for intention to be clear and unambiguous—Buddhist Temporalities Ordinance, (Cap. 318), section 41—Declaration under—How far is it " prima facie " evidence of facts stated therein ?

Plaintiff's tutor, the admitted Viharadipathy of the temple in question, died on 22nd February, 1952. Plaintiff filed action, No. 3760, D.C. Anuradhapura, on 18th May, 1953, against *P.* praying for a declaration as Viharadhipathy of the temple and ejectment. *P.* died on 31st January, 1954, during the pendency of this action. Plaintiff did not file a fresh action, but moved to substitute *P's.* pupil, the appellant in the room of the deceased to which the latter consented. The dispute continued and decree was entered in plaintiff's favour from which an appeal was taken.

A Divisional Bench of the Supreme Court held that the plaintiff's right to sue the appellant did not survive against him, a decision resulting in the appellant's favour.

When the plaintiff, pending the appeal, D.C. 3760, sought to execute the order for ejectment, the appellant left the temple and as soon as he succeeded he returned to the temple on 19th February, 1958.

Thereupon the plaintiff instituted this action against the appellant on 14th July, 1958, and the appellant resisted his claim on three grounds :—

(*a*) that the plaintiff's claim, if any, was prescribed in law ;

(*b*) that the plaintiff could not claim this temple as his tutor had abandoned the incumbency ;

(*c*) that the plaintiff was not, in fact, a pupil of his tutor, through whom he claimed his right to the temple.

The learned District Judge held in favour of the plaintiff on all the points and on an appeal taken to the Supreme Court—

Held : (1) That the plaintiff's cause of action arose when *P.* died on 31st January, 1954, and not on 19th February, 1958, when the appellant returned to the temple after succeeding in his appeal. Therefore, as the present action was instituted on 14th July, 1958, *i.e.*, three years after the cause of action arose, the plaintiff's claim was prescribed in law.

(2) That the contention on behalf of the appellant that when the appellant left the temple, the plaintiff regained his full rights to the incumbency, and the earlier cause of action against the appellant was extinguished is untenable. For, the mere fact that the appellant left the temple premises in obedience to a decree of Court did not mean that he restored to the plaintiff the full exercise of control over the temporalities of the temple ; nor was the running of prescription arrested by this.

(3) That in a case of abandonment the intention to renounce one's rights must be clear and unambiguous and if there is any doubt, the inference drawn should be against an abandonment. A review of all the evidence showed that there is, at least, a great deal of doubt in the present case as to whether the plaintiff's tutor had abandoned his rights, and hence, the inference drawn must be against an abandonment.

(4) That the entries in a Declaration under section 41 of the Buddhist Temporalities Ordinance, (Cap. 318), are *prima facie* evidence of the facts contained therein for purposes of administering the law laid down by the Ordinance in all Courts and for all purposes.

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Held : (1) That where an action is brought for the recovery of damages, the decree which the Court can pass after judgment is one in respect of payment of money only. The Court has no jurisdiction to grant any other relief in the absence of any prayer in the answer for such relief.

(2) That section 36 of the Courts Ordinance which bars the reversal of an order notwithstanding error, defect or irregularity, can have no application in a case where the Court has no jurisdiction to make the order until that jurisdiction had been invoked in permitted legal form.

(3) That where an order complained of is an appealable one, but instead of an appeal being preferred, an application in revision is made within the appealable period, the Supreme Court would act in revision, if in the circumstances, a speedier remedy is called for.

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Where a witness, whose name was not in the list of witnesses filed in terms of section 121 of the Civil Procedure Code, was permitted to give evidence because the Court was wrongly made to believe that his name was in such list.

Held : That the admission of the evidence of such witness was illegal in view of section 175 of the Civil Procedure Code, and his evidence could not form the basis of the judgment in this case.

Held further : That the judgment should be set aside and the plaintiff's action dismissed as the learned trial judge had formed almost all his conclusions on the basis of this witness' evidence.

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Section 217 (*g*)*—Claim only for declaration of a right—Whether plaintiff entitled to a writ of possession under decree which only declares his right.*

The plaintiffs sued for declaration of their right to draw water from a well and for damages for being deprived of that right, but did not claim any other relief. They obtained judgment and sought to obtain a writ of possession.

Held : That the decree was one which fell within the ambit of section 217 (*g*) of the Civil Procedure Code and that the plaintiffs were, therefore, not entitled to ask for a writ of possession.

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port, but also an affidavit filed by the judgment-debtor on an earlier occasion in asking for a stay of writ, before he issued the warrant—

Held : That the learned Judge had held a sufficient inquiry as required by section 298 of the Civil Procedure Code.

Court of Requests—Right of a defendant to call evidence—Civil Procedure Code, section 163.

At a certain stage in a trial in the Court of Requests, the learned Commissioner made the following order :—

" Plaintiff's case closed reading in evidence P 1 to P 9. I call no defence. Mr. Fernando reads D 1 in evidence."

Held : That in view of section 163 of the Civil Procedure Code, the defendant is entitled to call evidence if he so desires.

Per T. S. FERNANDO, J.—" In the hearing of a civil suit, there is no step quite like the calling upon of an accused person for his defence in a criminal case. Section 163 of the Civil Procedure Code permits a party to lead his evidence if he so desires."

Contempt of Court

Contempt of Court—Judicial act of a Magistrate—Contempt " ex facie "—Courts Ordinance, section 47.

Where a Rule under section 47 of the Courts Ordinance was issued by the Supreme Court calling upon the respondents to show cause why they should not be punished for contempt of Court in disrespect of the authority of the Magistrate's Court of Avissawella in that the following acts had been committed—

(1) The 1st respondent did place his arm on the right shoulder of the Magistrate, push him to a side at a time when he was engaged in eating his dinner and roughly enquire from the Magistrate : " Are you the Magistrate Moonemalle ? "

(2) The 1st respondent did address the said Magistrate and utter in the presence and hearing of other persons the following words, to wit, " You are a pathetic Magistrate to stay in the Resthouse. "

(3) The 1st, 2nd and 3rd respondents did publicly abuse the said Magistrate.

(4) The 1st and 3rd respondents did force open the window of the room occupied by the said Magistrate and demand of him that he should telephone the Police and order the release of the 2nd respondent who had been arrested by the Police on the orders of the Magistrate as he was behaving in a drunk and disorderly manner in the presence of the Magistrate.

Held : (1) That the acts particularised in (1), (2) and (3) above did not render the respondents punishable for contempt of Court as the Magistrate could not be said to have been acting judicially at the time those acts were committed and as the conduct of the respondents so particularised had no relation to a judicial act of the Magistrate.

(2) That the acts complained of in (4) above constituted a contemptuous interference in relation to a matter in which the Magistrate had been acting judicially.

Held further : That a contempt committed cannot be said to be *ex-facie* where it has relation to a Court which has ceased to act judicially, albeit temporarily.

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Burden of proof in criminal cases—Duty of Magistrates.

General or special defence—Burden of proof on an accused person—Duty of trial judge to direct jury on

alternative defences—Penal Code, section 294*—Evidence Ordinance, section* 105.

The Court of Criminal Appeal, by a majority decision, affirmed the conviction and dismissed this appeal. No reasons were given. Mr. Justice T. S. Fernando, who dissented, delivered the following judgment :—

Held : (*per* T. S. FERNANDO, J., *dissentiente*) :— (1) That notwithstanding that a particular defence has not been raised or relied on at a trial, that circumstance alone is insufficient to relieve the presiding judge of the duty of directing the jury in regard to any alternative defence if the evidence led at the trial could support a verdict based on the acceptance of that alternative defence.

(2) That where the defence seeks the benefit of an exculpatory or mitigatory plea based on general or special exceptions contained in the Penal Code or other law, the trial judge should direct the jury that the defence would succeed if it satisfies them that it is more probable or more likely that the circumstances it relies on existed in reference to the offence alleged.

(3) That the use of expressions—" preponderance of probability ", " preponderance of evidence ", " a burden no higher than the burden of proof on a plaintiff or defendant in a civil case " are capable of misleading a jury and should, therefore, be avoided by the trial judge.

Criminal Law—Sentence—Principles of punishment —Court's duty to safeguard the interests of public.

Held : That the menace of demanding " *kappan*", *i.e.*, protection-money, is so widespread that it is the duty of the Courts to pass deterrent sentences in such cases in order to safeguard the interests of the public.

Per SRI SKANDA RAJAH, J.— " The theory that punishment should fit the criminal appears to find favour with some persons, who shut their eyes to reality and adopt the following type of argument : ' No criminal is absolutely normal ; some criminals are insane ; therefore, all criminals are to some degree insane '. This is a dangerous theory to act on, This theory may be equated with one already familiar to philosophers under the name of polar generalisation, as remarked by T. B. Hadden in an article entitled ' A Plea for Punishment ' in the *Cambridge Law Journal* of April, 1965. Only the criminals themselves and those who defend them are likely to have a good word for Magistrates and Judges who pass lenient sentences. The public at large, for safeguarding whose interests the Courts exist, have nothing but condemnation for such sentences."

Criminal Procedure Code

Sections 122 (3), 190, 301 (1) *and* 306 (1)*—Statements of prosecution witnesses recorded in Information Book—Witnesses confronted with parts of such statements while giving evidence—Proof of these relevant parts of statements—Order by Magistrate to Police to produce the entire statements to enable him " to ensure that nothing had been taken out of its context " —Order complied with—Verdict thereafter convicting accused—No reference in judgment as to extent to which his decision was influenced by these statements— Legality of the order to produce them.*

Evidence Ordinance, sections 54, 165 *and* 167*— Evidence of bad character—Power of a Judge to order production of documents " ex mero motu ".*

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Burden of proof in criminal cases—Duty of Magistrates.

The two appellants were charged and convicted under section 314 of the Penal Code for voluntarily causing hurt to Dr. N. In the course of the trial the prosecution witnesses, Dr. N. and P., were confronted with certain alleged statements made by them to the Police which contradicted their evidence. These contradictory statements were proved through the Assistant Superintendent of Police called by the defence in the course of whose evidence the learned Magistrate made order requiring the witness to produce the full statements of the said two witnesses, Dr. N. and P. as recorded by him, as he wanted " to ensure that nothing has been taken out of its context and for no other reason. "

After the case for the defence was closed and counsel addressed Court, the learned Magistrate made the following order :—" Order tomorrow morning, as I have had no opportunity to read through the statements of Dr. Naganathan and witness, Pathmanathan, which I want to be produced to see that nothing is taken out of their context. I would like to go through the record of statements in the light of statements of counsel for the defence ".

These statements in full were produced marked ' X ' and ' Y ' from the Information Book and thereafter the Magistrate pronounced his verdict finding the accused guilty. In his reasons, he made no reference to them, and hence what importance he attached to the contradictions or the extent to which his decision was influenced by them was not clear.

Held : (1) That in using the said statements marked ' X ' and ' Y ' in their entirety the learned Magistrate acted in contravention of the provisions of section 122 (3) of the Criminal Procedure Code and, therefore, such use resulted in a fatal irregularity. It could not be said, that they were not used as evidence but merely used to aid the Court in the trial of the case.

(2) That the learned Magistrate's order to produce these statements *mero motu* was not justified by sections 165 of the Evidence Ordinance read with section 301 (1) of the Criminal Procedure Code. Under the former section a judge is entitled to order the production of any document of his own motion only to discover or to obtain " proper proof or relevant facts " which can be used for arriving at a verdict.

(3) That where in re-examination, counsel for the prosecution elicited from the complainant the fact that from the reports he heard, the 1st accused was one of the Police officers, who had conducted himself in a very unpleasant manner, and that he had referred to him in his speeches in Parliament, such evidence, though presumably led to show motive, amounts to evidence of bad character of the accused and, therefore, is inadmissible.

(4) That the objection to the first part of the evidence so elicited is rendered even stronger by the fact that it is hearsay. In the absence of an indication by the learned Magistrate that he was not in any way influenced by this evidence, one could not say that it did not affect his decision. The provisions of section 167 of the Evidence Ordinance were also inapplicable in the present case.

(5) That the Court of Appeal will not lightly interfere with a finding of fact by a Magistrate, but where there is good ground to do so in the circumstances of the case or where the judgment of the lower Court is unsound, not merely has the Appeal Court the right, but it is under a duty to reverse such finding.

(6) That in a criminal trial it is incumbent on the Judge to scrutinise the evidence for the prosecution and the defence carefully and not merely to have a preference for the prosecution version, but to be satisfied beyond reasonable doubt. For, implicit in an expression of preference is a reasonable doubt.

Per G. P. A. SILVA, J.—" It is to be noted that in all these cases cited by both counsel, bar one, the use of the Information Book was held to vitiate the conviction when such use was for a purpose other than those specified in section 122 (3) of the Criminal Procedure Code. In my view, when the Information Book has been used by the Court, even if it is doubtful whether such use was proper or not, or even if it is doubtful whether the Judge was, influenced by it or not, the accused must receive the benefit of the doubt, more particularly where the evidence for the prosecution is neither overwhelming nor compelling. In this connection the principle laid down by de Kretser, J., in the case cited by counsel for the appellant, *Coomarasamy* v. *Meera Saibo*, 5 Ceylon Law Journal, page 68, is of interest even though it was cited by counsel for a different puroose. It was held in that case, that even if a Judge is not, in fact, influenced, if the *accused gained the impression* that he had been influenced by some inadmissible evidence, that consideration was sufficient to vitiate a conviction having regard to the principle that the administration of justice should not only be pure, but should seem to be pure. (*The underlining is mine*). "

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Section 434—*Maintenance case—Can copies of depositions of witnesses in pending cases be issued to the parties.*

Held : That copies of depositions of witnesses in pending maintenance cases should not be issued to the parties as this is not warranted by law.

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Section 419—*Scope thereof—Jurisdiction conferred on Magistrate to decide right to possession of property produced in Court on suspicion that offence has been committed—How Magistrate's discretion should be exercised.*

Held : (1) That in exercising the jurisdiction conferred by section 419 of the Criminal Procedure Code on the Magistrate to " order as he thinks fit " the delivery of property (seized by the Police and reported to him as being property " alleged or suspected to have been stolen " . . .) to the person entitled to the possession thereof, he is not deciding a civil dispute, but only the right of possession in respect of property referred to therein.

(2) That where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to, and has power to, consider questions of title in order to determine " the best right to possession ".

(3) That the phrase, " as he thinks fit " in section 419, gives the Magistrate a discretion which he must exercise judicially. He should order the delivery of the property to the person from whose possession it was seized by the Police only if there is nothing to show that another is entitled to the property.

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Criminal Procedure Code, section 413—*Property recovered from third parties produced in Court in connection with an offence—Application for disposal after conviction of accused for dishonest misappropriation—What the Court has to determine—Sale of Goods Ordinance, sections* 24 (1) *and* (2).

One *F.*, superintendent of an estate had a gemming licence in respect of this estate. In the course of mining operations a blue sapphire was found by *S.*, one of the workmen who sold it to *H.*, for Rs. 27,000/- of which sum Rs. 18,000/- had been entrusted by *S.* to *T.* *H.* had cut the sapphire into several parts and disposed of them all except one. The police prosecuted and produced the Rs. 18,000/- and the portion of the sapphire from *T.* and *H.*, respectively. After the conviction of *S.* for the dishonest misappropriation of the blue sapphire, an application was made under section 413 of the Criminal Procedure Code for the disposal of the property produced and the learned District Judge ordered the said Rs. 18,000/- and the portion of the blue sapphire to be delivered to *F.*

H. appealed from this order and also made an application in revision.

Held : (1) That as there is no right of appeal from an order under section 413 of the Criminal Procedure Code, the appeal must be dismissed.

Held in revision : (2) That the conviction of *S.* being one for the offence of dishonest misappropriation, the property in the blue sapphire does not vest in *F.*, even if he were the owner, in terms of section 24 (2) of the sale of Goods Ordinance.

(3) That for the purpose of making an order under section 413 of the Criminal Procedure Code in respect of any property, the Court has to determine not the person who had title to that property but the person who was entitled to possess that property immediately before it was produced in Court.

(4) That, therefore, the learned District Judge should have ordered the return of the said portion of the blue sapphire to *H.*

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Criminal Procedure Code, section 151 (2) *and* 187 (1) *—Meaning of " forthwith " in section* 151 (2).

Held : That the word " forthwith " in section 151 (2) of the Criminal Procedure Code does not mean

that the person who brings the accused before Court should be examined on the same day. He can be examined within a reasonable time.

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Held : That where proceedings in a Magistrate's Court are instituted on a written report under section 148 (1) (*b*) of the Criminal Procedure Code, and the accused is at the same time brought before the Court in custody without process, it is not necessary for the Magistrate to record any evidence before he charges the accused.

Per SANSONI, C.J.—" The particulars of the charge in such a case could be taken from the report itself, though the Magistrate may record evidence in order to obtain further particulars before framing the charge."

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(2) That in any event where the earlier deed is void in terms of section 67 of the Partition Act, as it had been executed pending a partition action it could not be rectified by a deed of rectification. It is only a valid deed that can be so rectified.

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Evidence

Evidence—Burden of Proof—Alibi, defence of—Possibility of evidence led in support of alibi being neither accepted nor capable of rejection—Necessity of direction to jury on this point—Non-direction amounting to misdirection.

Evidence—Facts forming part of same transaction—Shouts of bystanders—Evidence Ordinance, section 6.

Where an accused person relies on the defence of an alibi, and leads evidence to support it—

Held : That the trial judge should direct the jury not only on the course they should follow if they accepted or rejected such evidence, but also as to what they were to do if they neither accepted such evidence as true nor rejected it as untrue.

Per T. S. FERNANDO, J.—" Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay on the prosecution. If Sirimane's evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection."

Where a witness testified that she had heard people going past her house shouting that the deceased had been stabbed by Yahonis (the accused).

Held : That these were not the shouts of bystanders and, therefore, did not come within the category of relevant facts admissible under section 6 or any other section of the Evidence Ordinance.

YAHONIS SINGHO *v.* THE QUEEN 50

Deposition of deceased witness in non-summary procedings—How may it be proved.

See under—WITNESS 48

Declaration under section 41 *of Buddhist Temporalities Ordinance—Whether prima facie evidence of facts stated therein.*

See under—BUDDHIST ECCLESIASTICAL LAW.

Effect of inadmissible evidence not objected to at the trial.

See under—APPEAL 33

Evidence Ordinance

Section 6

See under—EVIDENCE 50

Section 45—*Opinion of " specially skilled person ".*

SOLICITOR-GENERAL *v.* FERNANDO 100

Evidence—Trial by Jury—Bad character of accused transpiring in course of his cross-examination—Admissibility—Extent to which such evidence may influence the decision—Effect depends on facts and circumstances of each case—Evidence Ordinance, section 54.

On a charge of murder, the accused gave evidence stating that he accepted responsibility for the injuries on the deceased, which were of a serious nature, but that the incident started as a result of an attack by the deceased on him with hands, the deceased being admittedly a man who was physically much better built than the accused.

Crown Counsel, while cross-examining the accused, asked the following questions :—

" *Q.* You have already admitted that the deceased was a very huge man—strong man ?

A. Yes.

Q. When he assaulted you you must have been injured ?

A. Yes, I sustained an injury on my head.

Q. You must have made a complaint to the Police ?

A. Yes.

Q. Was there a case against the deceased ?

A. No.

Q. So, you must have been quite angry that the deceased man had not been punished ?

A. I was charged in that case."

Held : (1) That the effect of the last answer is both that the accused made a false statement to the Police and that he was, in fact, charged with presumably an attack upon the deceased, and as such it amounted to evidence of bad character of the accused.

(2) That, in the circumstances of this case, where the question for the jury was whether the accused launched an attack without any provocation or whether he attacked the deceased when he was himself attacked by him, it would be impossible to say that the jury would not be influenced by this evidence in considering the defence of the accused.

THE QUEEN *v.* BOTEJU 41

Evidence—Secondary evidence—Document compiled by witness after examination of books and records—Can such document be used for the purpose of refreshing witness' memory where secondary evidence of such books and records admissible—Evidence Ordinance, sections 66, 63 (5).

Employees' Provident Fund Act, No. 15 *of* 1958, *sections* 15, 37—*Non-payment of contributions to Employees' Provident Fund—Jurisdiction to entertain complaint in regard to such offences—Effect of Regulation* 7 *made under section* 46 *of the Act.*

Held : (1) That once the notice required by section 66 has been given, a witness who has compiled an extract of the contents of books or records kept by a person at his place of business, is entitled, under section 63 (5) of the Evidence Ordinance to utilise such extract for the purpose of refreshing his memory.

(2) That in view of Regulation 7 of the regulations made under section 46 of the Employees' Provident Fund Act, which requires every employer who is liable under the Act to pay contributions to send such contributions to the Central Bank of Ceylon, the proper Court to entertain a complaint of non-payment is the Magistrate's Court of Colombo.

PONNADURAI *v.* RATNAWEERA 54

Excise Ordinance

Excise Ordinance, section 18—*Sale of arrack without a licence—Proof of possession of licence—Burden of proof—Evidence Ordinance, section* 106.

Where an accused person is charged with selling arrack without a licence from the Government Agent in contravention of section 18 of the Excise Ordinance, and the prosecution has led evidence of the sale of the arrack—

Held : That under section 106 of the Evidence Ordinance, the burden is on the accused person to prove that he was in possession of a valid licence.

SOLICITOR-GENERAL *v.* DHARMASENA 45

Excise Ordinance, sections 17, 46—*Charge of possession of an excisable article—Proof.*

Evidence Ordinance, section 45 — *Opinion of " specially skilled person ".*

The respondent was charged under the Excise Ordinance with illegal possession of an excisable article, viz., fermented toddy. The liquid in question had not been forwarded to the Government Analyst for examination and report. Instead the prosecution sought to rely on the evidence of an Excise Inspector who claimed to have had more than 10 years' experience in the detection of excise offences relating to fermented toddy and to possess, therefore, the practical knowledge that qualified him as an expert on the question on which the Magistrate had to form an opinion, viz., whether the liquid was fermented toddy.

Held : That the opinion of the Excise Inspector was relevant.

Per T. S. FERNANDO, J.—". . . not only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitled him to be regarded as a competent expert. So the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law. Analogously the training, practical knowledge and experience of a person who is not a professional analyst may be sufficient in certain cases to qualify him as a competent expert on a question of examination or analysis of a substance."

SOLICITOR-GENERAL *v.* FERNANDO 100

Executors and Administrators

Application for leave to appeal to Privy Council by one of two executors—Should other executor be joined as party to application ?

BRITO-MUTHUNAYAGAM *v.* RATNAYAKE 49

Ex Mero Motu

Power of judge to order production of documents.

PERERA AND ANOTHER *v.* NAGANATHAN 1

Gaming Ordinance

Gaming Ordinance, section 5—Search warrant—Magistrate's failure to find that the premises was a common gaming place—Legality of search warrant.

Where in issuing a search warrant under section 5 of the Gaming Ordinance, a Magistrate failed to record his finding that the premises was kept as a common gaming place—

Held : That the issue of the search warrant was illegal and, therefore, the conviction and sentence should be set aside and the accused acquitted.

BELING AND OTHERS *v.* STEPHEN 83

Habeas Corpus

Habeas corpus, Writ of—"Corpus" to be produced not in the Island and living abroad at date of hearing—Can the respondents prove their inability to comply with order and obtain discharge ?

Held : That in a return to a writ of *Habeas Corpus* the respondents could prove their inability to comply with the order, and if they did so they were entitled to be discharged.

EDWARD *v.* NATHERMAL AND OTHERS 104

Husband and Wife

Penal Code, section 362 B—Marriage Registration Ordinance, section 18, 19 and 64—Muslim Marriage and Divorce Act, 1951.

Marriage—Person contracting a monogamous Christian marriage—Whether having become a convert to Islam during the subsistence of such marriage he can contract a second marriage valid by the law of his adopted faith—Is such person guilty of the offence of bigamy ?

In September, 1933, the respondent married a Christian lady according to Christian rites. In 1957 the respondent's wife left him and obtained a maintenance order against him. The respondent himself at the time of this marriage had been of the Christian faith and was married under the provisions of the Marriage Registration Ordinance which specifically excluded Muslims from its operation.

In June, 1959, the respondent and a divorced Christian lady by the name of Fatima Pansy were converted to the Muslim faith and on 16th July, 1959, they were duly married under the provisions of the Muslim Marriage and Divorce Act, which permits a Muslim to contract more than one marriage.

On 28th October, 1961, the respondent was indicted for the offence of bigamy under section 362 B of the Penal Code. He was thereafter convicted and sentenced to three months' rigorous imprisonment. He appealed against his conviction and the Supreme Court in appeal quashed it. Thereupon the Attorney-General appealed to the Privy Council.

The appeal before the Privy Council was argued upon the express admission of Counsel for the Attorney-General that the conversion of the respondent to the Muslim faith was sincere and genuine.

Held : (1) That the fact that the respondent contracted a monogamous Christian marriage did not prohibit him, during the subsistence of that marriage, from changing his faith and thereby becoming subject to a different personal law.

(2) That in a country like Ceylon where there were many races and creeds and a number of Marriage Ordinances, there was an inherent right in inhabitants domiciled there to change their religion and personal law and so to contract a polygamous marriage valid by the personal law of adoption, notwithstanding the subsistence of an earlier monogamous Christian marriage.

(3) That the Attorney-General had not established that the respondent's second marriage was void by the law of Ceylon and that, therefore, his appeal should be dismissed.

ATTORNEY-GENERAL *v.* REID 57

Income Tax

Income Tax Ordinance—Profit from trade or business—Adventure in the nature of a trade.

The appellant, being desirous of living close to the school where her children studied, discovered a building site of about 2 1/2 acres in extent at Alexandra Place. She tried to buy a part of it but the owner was only willing to sell the site as a whole.

The appellant agreed with the owner to buy the whole site, paying an advance of Rs. 45,000, and undertaking to pay the balance of Rs. 405,000 at a later date.

The appellant blocked up the land into lots and found purchasers for all but two of the lots which she kept for her own house. These purchasers obtained a direct conveyance of their respective lots from the owner. The prices paid by the purchasers amounted to Rs. 434,725, and out of this the balance of Rs. 405,000 was duly paid. The appellant thus

had to find only Rs. 15,275 of her own money for the two lots which was to be the site of the house. The market value of this site was Rs. 87,040.

The Commissioner of Inland Revenue made an assessment on the appellant on the basis that the whole transaction was an adventure in the nature of a trade. The net profit accruing to the appellant from the acquisition of her site being Rs. 66,331. The appellant appealed to the Board of Review on the ground that this transaction was not an adventure in the nature of a trade.

The Board of Review on an analysis of the evidence took the view that although the appellant had a desire to live near the school for the sake of the education of her children, the dominant motive was not so much this desire, as a desire to block up the land and sell it at a profit in order to obtain her site for an amount which was much lower than its market value.

Held : (1) That if, in order to get what he wants the tax-payer has to embark on an adventure, which has all the characteristics of trading, his purpose or object alone cannot prevail over what he, in fact, does.

(2) That the appellant's actions were suggestive of trading as regards the greater part of the site which she bought.

(3) That although the appellant's case was a borderline one, the Board of Review had found as a fact that the appellant's dominant motive was to make a profit ; and on the facts Their Lordships found it impossible to hold that they were not entitled to reach that conclusion.

Information Book

Statements of prosecution witnesses recorded in—Witnesses confronted with parts of such statements—Proof of these relevant parts of statements—Order by Magistrate to Police to produce entire statements to enable him " to ensure that nothing has been taken out of its context "—Verdict convicting accused—No reference in judgment as to extent to which his decision was influenced by these statements—Legality of order to produce them.

Injunction

Injunction—Courts Ordinance, section 20—*When may it be granted ?*

Application for injunction to restrain implementation of verdict at referendum taken not under any provision of law, but for purposes of public policy—Is injunction available in these circumstances ?

Action for declaration that such referendum was conducted illegally and, therefore, void—Could a decree be entered in these terms ?—Civil Procedure Code, section 217.

The petitioner, describing himself as a supervisor employed by a company (a Tally contractor belonging to the Tally Contractors' Association and working in the Port of Colombo), applied for an injunction under section 20 of the Courts Ordinance to restrain the respondents—the Commissioner of Labour and the Permanent Secretary of the Ministry concerned—and their subordinate officers from implementing the verdict at a referendum and altering the *status quo* in regard to Tally personnel and in regard to the petitioner in relation to the service.

The referendum referred to was one held by the 2nd respondent (the Permanent Secretary) before a Collective Agreement entered into under the Industrial Disputes Act, (Cap. 131), between the Colombo Tally Contractors' Association and certain Workers' Unions came into force, for the purpose of ascertaining whether the Tally personnel wished to continue the " contract system " or a new system of employment suggested by one of the unions and advising the Minister accordingly.

This referendum was not held under the provisions of any law or in pursuance of any legal obligation owed by the respondents to the petitioner. The main object of holding it was the preservation of industrial peace in the Port, involving a question of public policy, so that no act became illegal by the implementation of the verdict.

The petitioner had also under section 461 of the Civil Procedure Code given notice to the Attorney-General of an action for a declaration that the referendum in question was conducted illegally and was void and that the verdict was illegal.

The petitioner's affidavits stated—

(I) that the referendum was vitiated on the following grounds :—

(*a*) ballot papers were printed only in English and Sinhala and that Tamil personnel were prejudiced thereby ;

(*b*) that there were cases of impersonation ;

(*c*) that members of a particular union indulged in acts of violence and thuggery which prevented the free exercise of the vote.

(II) that he feared that " the implementation of the verdict of the referendum would result in a modification of their terms of employment before matters in controversy could receive adjudication in the District Court " ;

(III) that the verdict of the referendum was to be of vital materiality in the formulation of the ensuing policy of the Minister.

Held : (1) That the material placed before the Court did not justify the inference that irremediable mischief is likely to ensue if the verdict of the referendum is implemented. Therefore, an injunction under section 20 of the Courts Ordinance could not be granted.

(2) Further, that the action of which notice had been given by the petitioner to the Attorney-General, was one that did not fall within the ambit of section 217 of the Civil Procedure Code.

(3) That where the question involved is one of public policy the appropriate remedy is not by way of injunction.

Judgment

Judgment—Judgment written by a Judge after his transfer to another Court—Validity thereof—Civil Procedure Code, section 184.

Appeal—Finding of fact by trial Judge—Case dependent on oral testimony—Judgment delivered long after conclusion of trial—Weight to be attached to such findings of fact by appellate Court.

Held : (1) That a judgment written and signed by a Judge who at that time was not qualified to function as a Judge of the District Court in which the trial was held is not a valid judgment in terms of section 184 of the Civil Procedure Code.

(2) That where the decision in a case depends on oral testimony, the appellate Court cannot place much reliance on findings of fact made in a judgment delivered two years after the conclusion of the trial.

Kandyan Law

Kandyan Law—Woman given in "deega" marriage by her deceased mother's associated fathers with dowry provided by them—Living after marriage with husband for four or five years in her family "mulgedara"—Thereafter leaving for husband's home and continuing to live there up to date of action—Claim for "paraveni" property through deceased mother—Forfeiture of her rights—Test of forfeiture.

Kandyan Law Declaration Ordinance, (Cap. 59), *section* 10*—Limitations imposed by Common Law applicable to Kandyans.*

The questions in issue were : (*a*) whether the plaintiff, who was a Kandyan woman, was married in *deega*, and thereby forfeited her rights to the family inheritance ; (*b*) whether she is an heir *ab intestato* to the estate of her maternal associated grandfathers, her mother having predeceased the grandfathers.

On the 1st question, her marriage registration certificate produced by the contesting defendants showed that she was married in *deega*. She was not able to prove that she regained her rights.

Her own evidence was that for four or five years she lived in the family *mulgedara* with her husband and thereafter went to her husband's home where she still continues to live.

Held : (1) That quite apart from the evidence provided by the marriage certificate, on the plaintiff's own evidence that she had left the family home and continued to live away from it, she had forfeited her rights to the family inheritance.

(2) That the test of forfeiture is the severance of the daughter from her family during the life of the parent to whose estate she claims to succeed, and this may occur at any time after marriage, *not necessarily on the day she is married.*

(3) That the plaintiff was precluded from claiming as heir to the estate of her maternal grandfathers as on the uncontradicted evidence in the case she was given in *deega*-marriage with a dowry provided by the grandfathers after the mother's death and as there were other descendants entitled to succeed to their estate on their death.

(4) That the general rule contained in the provisions of section 10 of the Kandyan Declaration Amendment Ordinance, (Cap. 59), which recognise a person as heir to his/her maternal grandfathers immovable property through the deceased mother is subject to limitations imposed by the common law applicable to the Kandyans.

Landlord and Tenant

Landlord and tenant—Tenancy governed by Rent Restriction Act commencing on first of month—Legal requirement of three months' notice—Notice received by tenant on 30*th August*, 1962, *to quit on or before* 30*th November*, 1962*—Sufficiency of notice.*

Where a tenancy commenced on the first of a month and a three months' notice as required by the Rent Restriction Act was received by the tenant on 30th August, 1962, requesting him to quit on or before 30th November, 1962.

Held : (1) That the notice was valid in law.

(2) That a calendar month's notice given and received by the tenant before that date on which the monthly tenancy commences, to quit on the last day of the following month on which the monthly tenancy ends, is sufficient in law.

Magistrate

Duty of—Regarding burden of proof in criminal cases.

Jurisdiction of—To decide right to possession of property produced in Court on suspicion that offence has been committed—Exercise of discretion.

Maintenance

Can copies of depositions of witnesses in pending cases be issued to the parties.

Maintenance—Order granting maintenance in respect of illegitimate child—Failure on the part of Magistrate to state where corroboration of applicant's evidence to be found—Conduct and false evidence of defendant sufficient corroboration.

This is an appeal from an order of maintenance in respect of an illegitimate child. The applicant (mother) who is a school-girl sixteen years of age, testified that the defendant was its father. The defendant was a sales-assistant at a store in the mother's village. The mother made a complaint to the Village Headman on 8th May, 1962. When the Headman sought to meet the defendant thereafter he learnt that the latter had already left the village. The defendant stated that he left the store only on 30th May, 1962, but the Magistrate chose not to accept his evidence on this point. He preferred the evidence of the Headman.

The Magistrate, in making the order for maintenance did not state in so many words where corroboration of the mother's evidence is to be found.

Held : That it was competent for the Magistrate to find the necessary statutory corroboration in the conduct of the defendant in suddenly leaving the store about the time the mother complained to the headman, and his lying in respect of this sudden departure.

Mandamus

Writ of Certiorari and/or Mandamus, application for—Procedure at hearing—Cross-examination of parties.

Held : That in an application for a Mandate in the nature of a Writ, before cross-examination in respect of the case for the respondent is permitted, the Court must be satisfied that the petitioner himself has made out a case calling for answer.

Marriage Registration Ordinance

Sections 18, 19 *and* 64.

Section 21

Master and Servant

Summary termination of service by master—Whether remedy by way of certiorari available.

Minors

Minors—Donation to minors—Requirement of acceptance on behalf of minor—Donor not a parent—Validity of acceptance by person who is not a legal representative or natural guardian—Marriage Registration Ordinance, section 21.

Maria Perera was married to *S. R.* and they begot a son, *E.* Thereafter Maria Perera eloped with *J.* and by that adulterine union they had a son, *G.* Maria Alwis, mother of *J.*, executed a gift by deed P 2 of 1922 in favour of *E.* and *G.* (minors), which was accepted on their behalf by *J.* At the date of the gift *S. R.* was alive.

Held : (1) That *G.*, being a child procreated in adultery, *J.* was for all time, prohibited from being his natural guardian. Therefore, he could not validly accept the gift on behalf of *G.* Maria Perera, his mother, was his only natural guardian.

(2) That as regards the gift to *E.*, his father, *S. R.*, was alive at that date, and hence his natural guardians were his father, *S. R.*, and mother, Maria Perera. Only one of them could accept the gift to him.

(3) That, therefore, the deed P 2 conveyed no title to *E.* and *G.*

Per SRI SKANDA RAJAH, J.—"In the case of a donation to a minor the law requires acceptance by the natural or legal guardian of the minor, *Silva* v. *Silva*, (1908) 11 N.L.R. 161. This has been accepted as correct in later cases, including *Nagalingam* v. *Thanabalasingham*, (1952) 54 N.L.R. 121 (P.C.) and *Nagaratnam* v. *John*, (1958) 60 N.L.R. 113."

Delict—Collision between two motor cars—Car driven by owner's minor child—Whether presumption of liability from ownership affected thereby.

Misdirection

Court of Criminal Appeal—Misdirection—Statement of the deceased admitted under section 32, *Evidence Ordinance—Jury should be properly directed thereon.*

Held : That although the statement of a deceased person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in a case in which the cause of a person's death comes into question, is declared by section 32 of the Evidence Ordinance to be a relevant fact, the jury should be adequately and properly directed as to the weight that should be attached to it in the circumstances of a given case.

Muslim Marriage and Divorce Act

Person contracting monogamous Christian marriage—Whether, having become a convert to Islam during the subsistence of such marriage, he can contract a second marriage.

Negligence

Delict—Collision between two motor cars—Negligence—Contributory negligence.

Car driven by person other than the owner—Presumption of liability from ownership—Whether such presumption affected by fact that driver was owner's minor child.

Held : (1) That a plaintiff's action for recovery of damages for negligence is not defeated by a plea of contributory negligence if the defendant's negligence was the decisive and effective cause of the collision.

(2) That the fact of ownership of a car is evidence against the owner that it was either driven by a servant in the course of his employment or by an agent within the scope of his authority. The owner is liable if he does not lead evidence to meet the *prima facie* case raised against him by the fact of ownership.

(3) That the liability of the owner is unaffected by the fact that the car is driven by a minor child of the owner.

In this case the plaintiff had suffered injuries which affected his work as a Surgeon and his power to earn was, to this extent, impaired. He had stated that he intended to retire from Government Service and start a private practice. This practice was bound to suffer because of his disability.

Held further : (4) That in all the circumstances of this case, a sum of Rs. 30,000/- would be adequate compensation.

DE SILVA *v.* GUNAWARDENA 105

Partition Act

Partition Act, (*Cap.* 69) *section* 67—*Invalidity of deed executed pending partition—Rectification of such deed not possible in any event.*

JAYASURIYA *v.* SENEVIRATNE 30

Partition Act—Interlocutory decree—Accidental omission—Power of Court to amend such decree—Civil Procedure Code, section 189.

Held : An interlocutory decree in a partition action may be amended by the trial judge if it appears that the decree is not in conformity with the judgment and that it has been entered as a result of an *accidental omission* on his part.

WIJESUNDARA *v.* HERATH APPUHAMY AND OTHERS.. 63

Partition Act, sections 27 (2), 31 *an* 32—*Surveyor in his scheme of Partition introducing feature not authorised by the interlocutory decree or direction in the commission—Court's power to confirm such scheme—Surveyor's duty in submitting such a scheme.*

Where on a commission issued to a Surveyor to partition the land described in the commission in conformity with the interlocutory decree, with a direction to submit a plan of partition with a schedule of appraisement, summary of distribution and a report in terms of section 32 of the Partition Act, the Surveyor submitted a scheme of partition in which he provided two roads together with the values of the land covered thereby.

Held : That the surveyor had no authority to demarcate the roads in question, and the Court had no power to confirm the scheme and the plan as he had introduced into them features he was not authorised to put in.

PERERA AND ANOTHER *v.* PERERA AND ANOTHER .. 108

Penal Code

Section 294—*Burden of proof.*

DON SOMAPALA *v.* THE QUEEN 12

Section 362 *B.*

See under—HUSBAND AND WIFE 57

Penal Code, sections 32, 140, 146, 427 *and* 433—*Criminal trespass, being members of unlawful assembly—Permission to enter estate asked for by Trade Union officials for the purpose of persuading labourers on strike to give up "Satyagraha"—Refusal—Entering into estate despite refusal—Later proceeding on estate road in defiance of police—Arrest an prosecution—Conviction—Elements required to constitute offence of criminal trespass.*

The eight appellants were charged with and convicted of : (1) Being members of an unlawful assembly, the common object of which was to commit criminal trespass by entering into an estate to the annoyance of its superintendent, *R.*, who was in occupation thereof, and thereby committed an offence punishable under section 140 of the Penal Code ; (2) committing criminal trespass as aforesaid in prosecution of the common object of the said assembly an offence punishable under section 433 read with section 146 of the Penal Code ; (3) committing criminal trespass as aforesaid in furtherance of the common intention of all, an offence punishable under section 433 read with section 32 of the Penal Code.

The relevant prosecution evidence was as follows :—

(*a*) that there had been a strike in the said estate since 24th December, 1958, and negotiations for its settlement were being conducted between the Employers' Federation and the Democratic Workers' Union, a trade union ;

(*b*) that *S.*, an official of the Trade Union and one of the appellants, was told by *R.*, that till negotiations were completed, no official of the union should enter the estate ;

(*c*) that on 1st February, *A.*, the President of the Trade Union (one of the appellants) spoke to *R.* on the telephone and said that he wished to enter the estate and go to where the workers were performing "*Satyagraha*" in order to persuade them to give it up and go to their rooms ;

(*d*) that later *R.* told *A.*, that he could not grant that request ;

(*e*) that on 4th February, 1959, two cars drove to the main gate of the estate, ten people got out of them and entered the estate by a side entrance ;

(*f*) that the Police arrived in the estate and while proceeding along the road leading to the Factory with *R.* met the appellants and that *R.* was annoyed at their presence in the estate ;

(*g*) that on the Police Inspector informing *A.* that *R.* had protested at their entry, and at his request, some of the party turned back and left ; but *A.* asked for a few minutes to discuss the matter with his friends to which the Inspector replied saying that he was committing an offence. Thereupon, after a short discussion among themselves persisted in proceeding and the eight appellants (seven of whom were trade union officials) were arrested and taken to the Police Station ;

(*h*) that when the Inspector spoke to *A.*, the latter said that he wanted to meet the strikers ;

(*i*) that on the 20th February, *A.* accompanied by a Police Officer and a Labour Officer entered the estate with *R's.* permission to call off the strike.

A., the first appellant gave evidence that his purpose in going to the estate on 4th February, 1959, was to persuade the strikers to give up the hunger strike and return to their lines, as was said on 1st February, 1959, in the telephone conversation with *R.* and that he never imagined that his action would cause any embarrassment to the estate management.

The Magistrate in convicting the appellants stated : (*a*) that the claim put forward by the 1st appellant was merely a pretext for him to enter the estate against the wishes of the superintendent ; (*b*) that the appellants by deliberately defying the police and persisting in going to the estate not only constituted themselves into an unlawful assembly, the common object of which was to commit criminal trespass, but also in pursuance of the said common object, committed criminal trespass again.

Held : (1) That to constitute the offence of criminal trespass it must be established beyond reasonable doubt that the intent or object with which the trespass was committed was one of those specified in section 427 of the Penal Code. The evidence in the case did not suffice to establish beyond reasonable doubt that the object of trespassing on the estate was to annoy *R.*

(2) That the finding by the Magistrate that the claim of the 1st appellant was merely a pretext for entry did not exclude the possibility that the real object of the trade union officials in making this trespass was to meet the strikers.

(3) That as the charges framed were only in respect of committing criminal trespass by entering the estate and not in relation to their conduct when upon the estate, the appellants could not be guilty of committing criminal trespass again as referred to in the learned Magistrate's order.

Per THE JUDICIAL COMMITTEE :—" It may well be the case that the commission of civil trespass does cause annoyance in the majority of cases to the occupiers of the property trespassed upon, but to constitute the offence of criminal trespass, it must in the Lordships' view be established beyond reasonable doubt that the intent or object with which the trespass was committed was one of those specified in section 427 of the Penal Code, namely, to commit an offence or to intimidate, insult or annoy any person in occupation of the property. "

Penal Code, sections 352 *and* 32*—Charge of kidnapping against two persons—One not present when the offence was committed—Can his conviction be sustained ?*

Held : That in order to sustain a charge against two persons based on common intention it is essential that both accused persons must be physically present at or about the scene of offence.

Plaint

See under—PLEADINGS.

Privy Council Decisions

Pleadings

Pleadings—Amendment of plaint—Action to recover money lent and advanced—Denial in answer—Amendment sought to plead that money lent not to defendant alone but to defendant and his son and that defendant agree to repay entire sum—Is such amendment permissible—Alteration of character of action—Civil Procedure Code, section 46.

The plaintiff filed plaint on the basis that he had lent and advanced a sum of Rs. 5,010/75 to the defendant at the latter's request. The defendant filed answer denying that he at any time borrowed such a sum from the plaintiff. Thereafter the plaintiff filed an amended plaint in which he pleaded *inter alia* that he had lent to the defendant and his son various sums of money, which after accounts were looked into totalled Rs. 5,010/75. The plaintiff further averred that thereafter it had been agreed between the plaintiff and defendant that the said amount should be treated as a loan given by the

plaintiff to the defendant on the date of such agreement. The defendant objected to such amendment but it was allowed by the trial Judge. The defendant appealed.

Held : (1) That where a plaintiff bases his claim on a specific legal relation alleged to exist between him and the defendant he should not be allowed to amend the plaint so as to base it on a different legal relation. This was what the plaintiff sought to do in this case.

(2) That the proposed amendment should not be allowed as it would have the effect of converting an action of one character into action of another and inconsistent character, thereby violating the proviso to section 46 of the Civil Procedure Code.

Pleadings—Amendment of plaint—Buddhist monk sued personally for money due for work and labour done—Later amendment of plaint sought to sue him as Viharadipathy—Futile nature of such amendment.

Plaintiff sued Rev. Amunugama Rajaguru Vipassi Anunayake Thero of Malwatte Vihare, Kandy, for recovery of money due for work and labour done at his instance. Later, the plaintiff sought to amend his plaint by adding to the said defendant's description the words " as Viharadipathy of the Lankatilaka Raja Maha Vihare ".

Held : That the amendment sought was a futile one, for when a person who functions as a Viharadipathy of a temple enters into a contract with another person for the supply of work and labour to the temple, he is personally liable, and the trust properties cannot be made liable.

Prescription

Buddhist Law—Claim to incumbency.

Questions of Fact

Finding by trial judge—Extent of burden on party who seeks to displace finding.

Rectification

Rectification of deeds.

Rent Restriction

Rent Restriction (Amendment) Act, No. 10 of 1961, section 13 (1) (c)—Meaning of the expression " wanton damage. "

Held : (1) That the expression " wanton damage" in section 13 (1) (*c*) of the Rent Restriction (Amendment) Act, No. 10 of 1961, means purposeless damage of the kind which irresponsible schoolboys and soldiers of an invading army have been known to cause on certain occasions.

(2) That the damage caused in the present case was, in fact, reckless and purposeless and would come within the meaning of the expression " wanton damage. "

Revision

Appealable order—Application filed within appealable time—Necessity for specific remedy—When will Court act in revision ?

Sale of Goods Ordinance

Section 24 (1) and (2).

Search Warrant

Sentence

Tort

Vidyodaya University and Vidyalankara University Act No. 45 of 1958

Master and servant—Summary termination of service by master—Whether remedy by way of a writ of certiorari available to servant.

Vidyodaya University and Vidyalankara University Act, No. 45 of 1958, sections 17, 18, 33, 61, 62—Dismissal of teacher at Vidyodaya University—Whether duty lay on University Council to " act judicially " and give him an opportunity of being heard before such dismissal—Availability of remedy of certiorari to such teacher.

The respondent was a duly appointed Lecturer in the Department of Economics of the Vidyodaya University and was subsequently promoted to the post of Professor and Head of the Department of Economics and Business Administration. The appellants were at the material time members of the University Council of the said University.

The University is a corporation established by the Vidyodaya University and Vidyalankara University Act, No. 45 of 1958. Section 17 of the Act provides that the University Council shall be the executive body of the University. Section 18 gives the Council power " to appoint officers . . ., and to suspend or dismiss any officer or teacher on the ground of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University." The respondent's appointment as a teacher at the University was terminated by a unanimous resolution of the Council. He thereupon made an application to the Supreme Court for writs of certiorari and mandamus to quash the order of the Council and to direct the respondents as members of the Council to recognize him as Professor and Head of the Department of Economics and Business Administration. He alleged : (1) that one member of the Council, who was present and participated in the meeting of the Council at which his appointment was terminated, was biased against him ; (2) that the members of the Council acted in violation of the rules of natural justice by : (*a*) failing to disclose the nature of the accusations made against him ; and (*b*) by not affording him an opportunity of being heard in his defence.

Held : That inasmuch as the respondent had no other status or position than that of an employee or servant of the University, he could not invoke the remedy by way of writ of certiorari when the University terminated his employment summarily.

Per THE JUDICIAL COMMITTEE :—" The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari. If the master wrongfully ends the contract then the servant can pursue a claim for damages."

VIDYODAYA UNIVERSITY *v.* SILVA 22

Witness

Evidence—Death of witness whose name is on back of indictment and who had given evidence in non-summary proceedings—How may his deposition be proved at the trial ?

Held : That, where a witness who has given evidence before the inquiring magistrate and whose name is on the back of the indictment dies before the trial, the correct procedure to produce the deposition of such witness is by calling the Chief Clerk of the Magistrate's Court or any officer of the District Court connected with the custody of the record of non-summary proceedings to produce it.

A certified copy of the deposition should also be produced by the witness

STEPHEN & OTHERS *v.* THE QUEEN 48

Evidence given by witness whose name not included in list filed under section 121 *of Civil Procedure Code—Legality of such evidence.*

TIKIRI BANDA *v.* LOKU MENIKA & OTHERS .. 55

Words and Phrases

" calendar month."

EDWARD *v.* DHARMASENA 44

" forthwith "—in Criminal Procedure Code

DINORIS SILVA AND OTHERS *v.* INSPECTOR OF POLICE, NEGOMBO 88

" wanton damage "—in Rent Restriction Act

ARUMUGAM *v.* CAROLIS 20

Writs

Certiorari

See under—BRIBERY TRIBUNAL 84

See under—CERTIORARI 62

See under—VIDYODAYA UNIVERSITY & VIDYALANKARA UNIVERSITY ACT 22

Habeas Corpus

See under—HABEAS CORPUS

Mandamus

See under—MANDAMUS 62

Present : **G. P. A. Silva, J.**

G. W. PERERA & ANOTHER *vs.* NAGANATHAN

S.C. 226, 227/1963—*M.C. Jaffna, No.* 24240.

Argued on : 30th and 31st July, 21st August and 9th September, 1964.
Decided on : 23rd September, 1964.

Criminal Procedure Code, sections 122 (3), 190, 301 (1) *and* 306 (1)— *Statements of prosecution witnesses recorded in Information Book—Witnesses confronted with parts of such statements while giving evidence—Proof of these relevant parts of statements—Order by Magistrate to Police to produce the entire statements to enable him " to ensure that nothing had been taken out of its context "—Order complied with —Verdict thereafter convicting accused—No reference in judgment as to extent to which his decision was influenced by these statements—Legality of the order to produce them.*

Evidence Ordinance, sections 54, 165 *and* 167—*Evidence of bad character—Power of a Judge to order production of documents " exmero motu. "*

Appeal on questions of fact—When Appeal Court should interfere.

Burden of proof in criminal cases—Duty of Magistrates.

The two appellants were charged and convicted under section 314 of the Penal Code for voluntarily causing hurt to Dr. N. In the course of the trial the prosecution witnesses, Dr. N. and P., were confronted with certain alleged statements made by them to the Police which contradicted their evidence. These contradictory statements were proved through the Assistant Superintendent of Police called by the defence in the course of whose evidence the learned Magistrate made order requiring the witness to produce the full statements of the said two witnesses, Dr. N. and P. as recorded by him, as he wanted " to ensure that nothing has been taken out of its context and for no other reason ".

After the case for the defence was closed and counsel addressed court, the learned Magistrate made the following order :—" Order tomorrow morning, as I have had no opportunity to read through the statements of Dr. Naganathan and witness, Pathmanathan, which I want to be produced to see that nothing is taken out of their context. I would like to go through the record of statements in the light of statements of counsel for the defence ".

These statements in full were produced marked ' X ' and ' Y ' from the Information Book and thereafter the Magistrate pronounced his verdict finding the accused guilty. In his reasons, he made no reference to them, and hence what importance he attached to the contradictions or the extent to which his decision was influenced by them was not clear.

Held : (1) That in using the said statements marked ' X ' and ' Y ' in their entirety the learned Magistrate acted in contravention of the provisions of section 122 (3) of the Criminal Procedure Code and, therefore, such use resulted in a fatal irregularity. It could not be said, that they were not used as evidence but merely used to aid the Court in the trial of the case.

(2) That the learned Magistrate's order to produce these statements *mero motu* was not justified by sections 165 of the Evidence Ordinance read with section 301 (1) of the Criminal Procedure Code. Under the former section a judge is entitled to order the production of any document of his own motion only to discover or to obtain " proper proof or relevant facts" which can be used for arriving at a verdict.

(3) That where in re-examination, counsel for the prosecution elicited from the complainant the fact that from the reports he heard, the 1st accused was one of the Police officers, who had conducted himself in a very unpleasant manner, and that he had referred to him in his speeches in Parliament, such evidence, though presumably led to show motive, amounts to evidence of bad character of the accused and, therefore, is inadmissible.

(4) That the objection to the first part of the evidence so elicited is rendered even stronger by the fact that it is hearsay. In the absence of an indication by the learned Magistrate that he was not in any way influenced by this evidence, one could not say that it did not affect his decision. The provisions of section 167 of the Evidence Ordinance were also inapplicable in the present case.

(5) That the Court of Appeal will not lightly interfere with a finding of fact by a Magistrate, but where there is good ground to do so in the circumstances of the case or where the judgment of the lower Court is unsound, not merely has the Appeal Court the right, but it is under a duty to reverse such finding.

(6) That in a criminal trial it is incumbent on the Judge to scrutinise the evidence for the prosecution and the defence carefully and not merely to have a preference for the prosecution version, but to be satisfied beyond reasonable doubt. For, implicit in an expression of preference is a reasonable doubt.

Per G. P. A. SILVA, J.—"It is to be noted that in all these cases cited by both counsel, bar one, the use of the Information Book was held to vitiate the conviction when such use was for a purpose other than those specified in section 122 (3) of the Criminal Procedure Code. In my view, when the Information Book has been used by the Court, even if it is doubtful whether such use was proper or not, or even if it is doubtful whether the Judge was influenced by it or not, the accused must receive the benefit of the doubt, more particularly where the evidence for the prosecution is neither overwhelming nor compelling. In this connection the principle laid down by de Kretser, J., in the case cited by counsel for the appellant, *Coomarasamy* v. *Meera Saibo*, 5 Ceylon Law Journal, page 68, is of interest even though it was cited by counsel for a different purpose. It was held in that case, that even if a Judge is not, in fact, influenced, if the *accused gained the impression* that he had been influenced by some inadmissible evidence, that consideration was sufficient to vitiate a conviction having regard to the principle that the administration of justice should not only be pure, but should seem to be pure. (*The underlining is mine*)".

Cases referred to : *Bartholomeusz* v. *Velu*, (1931) 33 N.L.R. 161 ; 1 C.L.W. 27.
Paulis Appu v. *Don Davith*, (1930) 32 N.L.R. 335 ; 8 Times of Ceylon L.R. 59; 3 C.A.R. 138
King v. *Soysa*, (1924) 26 N.L.R. 324.
Wickremasinghe v. *Fernando*, (1928) 29 N.L.R. 403.
Kitnapulle v. *Christoffelsz*, (1948) 49 N.L.R. 401 ; XXXVII C.L.W. 2.
Coomarasamy v. *Meera Saibo*, (1940) 5 C.L.J. 68.
Ibrahim v. *Inspector of Police, Ratnapura*, (1957) 59 N.L.R. 235.
Thuraiya v. *Pathumany*, (1939) XV C.L.W. 119
Aron v. *Amarawardene*, (1948) 49 N.L.R. 167.
Stirland v. *D.P.P.*, (1944) A.C. 315 ; (1944) 2 A.E.R. 13 ; 171 L.T. 78 ; 60 T.L.R. 461 ; XXVIII C.L.W. 17.
The King v. *Pila, et al.*, (1912) 15 N.L.R. 453.
The King v. *Perera*, (1941) 42 N.L.R. 526.
Fernando v. *Inspector of Police, Minuwangoda*, (1945) 46 N.L.R. 210.
The King v. *Fernando*, (1930) 32 N.L.R. 251 ; 8 Times of Ceylon L.R. 66 ; 3 C.A.R. 146.
Milan Khan v. *Sagai Bepari*, 23 A.I.R. Cal. 347.
Watt v. *Thomas*, (1947) 1 A.E.R. 582 ; (1947) A.C. 484 ; 176 L.T. 498 ; 63 T.L.R. 314.
Griffiths v. *Harrison*, (1962) 1 A.E.R. (909) ; (1962) 2 W.L.R. 909
The King v. *Eliatamby*, (1937) 39 N.L.R. 53.

H. W. Jayewardene, Q.C., with *N. R. M. Daluwatte, L. C. Seneviratne* and *I. S. de Silva*, for the accused-appellants.

M. Tiruchelvam, Q.C., with *A. Mahendrarajah, M. Amarasingham* and *Henry Jayakody*, for the complainant-respondent.

G. P. A. SILVA, J.

The two accused-appellants in this case, G. W. Perera and S. B. Pilapitiya, both Sub-Inspectors attached to the Jaffna Police, were charged on two counts of voluntarily causing hurt to Dr. E. M. V. Naganathan at the Jaffna Police Station on 5th June, 1962, offences punishable under section 314 of the Penal Code. There was a separate charge in respect of each of them of having committed this offence in the course of the same transaction. The learned District Judge, who was also an Additional Magistrate, found both the accused guilty at the conclusion of the trial and sentenced Sub-Inspector Perera to one month's simple imprisonment and Sub-Inspector Pilapitiya to a fine of Rs. 100/-, in default four weeks' simple imprisonment. Both the accused have appealed. In view of this sentence passed against Sub-Inspector Perera, which is not appealable, he has also filed papers in revision before this Court. The appeal has been strenuously argued on both sides, the argument lasting four days, and I am indebted to both counsel for their exhaustive analysis. As the cases of both accused are inextricably interwoven

with each other, being part of the same incident, it will be convenient to deal with both the appeal and the application in revision together. Counsel for the respondent has very properly conceded that the same considerations will apply to the appeal and the application in these circumstances.

The first submission made by counsel for the appellant, based on certain provisions of the Criminal Procedure Code, is that the statements made to the Police by the complainant and his witness were *used* as evidence by the learned Magistrate. His contention was that such use of Police statements was clearly contrary to the provisions of section 122(3) of the Criminal Procedure Code, which says :—" No statement made by any person to a Police officer or an inquirer in the course of any investigation under this Chapter shall be used otherwise than to prove that a witness made a different statement at a different time, or to refresh the memory of the person recording it. But any Criminal Court may send for the statements recorded in a case under inquiry or trial in such Court and may use such statements or information, not as evidence in the case, but to aid it in such inquiry or trial ". Counsel argued that the only course authorised by this section for a Court is to send for the statements recorded in a case under inquiry or trial, so that they may be used to aid the Court in such inquiry or trial but that it would be irregular for a Court under any circumstances to have entire statements made to the Police by prosecution witnesses to be produced in the case and that the moment such statements are produced they become part of the evidence. It seems to me that there is force in this contention. In the conduct of criminal cases, it is imperative that the provisions of the Criminal Procedure Code must be strictly adhered to. In a country where there is a statute or code governing criminal procedure, the rule is that a Court can only do what it is authorised to do and no other discretionary powers can be exercised, unless the code itself permits such discretionary powers over and above what is specifically laid down. That being so, *a fortiori*, where the code makes a definite prohibition regarding any matter such as the use of Police statements during the proceedings, a violation of such a prohibition must be considered to be a fatal irregularity, whatever may be the use to which such statements have been put. The objection is rendered stronger when the Judge has failed, in the course of his judgment, to advert to the statements produced in the teeth of a prohibition in the code and to say in what way he has used the statements. Silence on such a matter would leave this Court without any material to adjudicate on the question as to the use made thereof or as to the extent to which the learned Magistrate may have been influenced by such statements in arriving at his decision against the accused.

In the case of *Bartholomeusz* v. *Velu*, 33 New Law Reports, page 161, it was held by Macdonell, C.J., that where a Magistrate at the conclusion of the evidence in a case sent for and perused the Police Information Book for the purpose of arriving at a decision, the use of the Information Book was irregular and that a Magistrate who wished to use the Information Book should call the Police officer who recorded the information. In that case after the prosecution and the defence had closed, having called witnesses on both sides, the Magistrate made an order, " Let I.B. Extracts be produced tomorrow ". They were accordingly produced and filed in the record of the case the next day and, on the day after that, the Magistrate found the accused guilty. Macdonell, C.J., in setting aside the conviction observed, " These entries in the record can, I think, only mean this, that after hearing the evidence on both sides, the learned Police Magistrate was not quite satisfied which side he should believe, and that he sent for the Information Book to assist him. This is a purpose for which the Information Book must not be used and to my thinking it vitiates the conviction ". While saying that there was abundant authority for this proposition he cited one case, namely, that of *Paulis Appu* v. *Don David*, 8 Times of Ceylon Law Reports, page 59, in which case, too, the Magistrate had done almost identically the same thing. In the instant case what happened was that when the prosecution witnesses gave evidence, they were confronted with certain alleged statements made to the Police which contradicted their evidence. Later, when the Assistant Superintendent of Police gave evidence for the defence, these contradictory statements were proved with a view, of course, to showing that the prosecution evidence should not be accepted owing to their inconsistency with previous statements. This course is sanctioned by section 122 (3) of the Criminal Procedure Code read with sections 145 and 155 of the Evidence Ordinance. At some stage of the evidence of the Assistant Superintendent of Police the Magistrate made the following order :—" I order the witness to produce the full statement of Pathmanathan and the full statement of Dr. Naganathan as recorded by him, as I want to ensure that nothing has been taken out of its context and for no other reason ". The Assistant

Superintendent of Police being the last witness to be called for the defence, counsel made their addresses after which the learned Magistrate made the following order :—" Order tomorrow morning, as I have had no opportunity to read through the record of statements of Dr. Naganathan and witness, Pathmanathan, which I want to be produced to see that nothing is taken out of their context. I would also like to go through the record of statements in the light of statements of the counsel for the defence ". These two statements appear at the end of the record marked ' X ' and ' Y ' and on the next morning (1st February, 1963) the Magistrate pronounced his verdict finding both accused guilty and ordered the accused to be present on 14th February, 1963, for reasons to be delivered and sentence to be imposed. These were accordingly done. There appears to have been some misunderstanding about this date owing to a Press report that the reasons were to be delivered on 15th February, 1963, and the learned Magistrate delivered his reasons on the 15th. In his reasons, however, he has made no reference to the statements which he ordered to be produced and which, in fact, have been produced as ' X ' and ' Y '. It would appear that the contradictions that were put form a very small proportion of the fairly long statements made by the prosecution witnesses. It is not possible for one to say that the contradictions which were put have been taken out of their context. In the absence of any observations by the learned Magistrate regarding this aspect of the contradictions, it must be assumed that, at the time they were proved, he considered the contradictions to have been material, for, if they were immaterial contradictions, no useful purpose would have been served by the Magistrate going through the entirety of the statements in order to discover for himself whether such immaterial contradictions were in or out of context. If then he ordered the statements to be produced because he considered the contradictions to be material, unless they were taken out of their context, and if, after perusal of the statements, he found that the contradictions were not out of context, what importance did he attach to the contradictions. Unfortunately, the judgment does not furnish an answer to this question. In these circumstances, it is not possible for this Court to say to what use the learned Judge put these Police statements nor to assess to what extent, however, imperceptibly, he would have been influenced by the Police statements in coming to his decision. Further, the note by the Magistrate that he would also like to go through the record of the statements in the light of the statements of the counsel for the defence suggests that he may quite unwittingly have put these statements to a use other than that which is authorised by the code.

Counsel for the appellants further argued that the only provisions which permitted a Judge to order the production of a statement are contained in section 165 of the Evidence Ordinance and that it must, therefore, be presumed that he ordered the production of the statements made to the Police by the prosecution witnesses in terms of this section. He submitted that in criminal proceedings that section must be read with sections 190 and 301 (1) of the Criminal Procedure Code, the last section dealing only with the requirement for the Magistrate to initial and date any document produced as evidence, which requirement has been complied with in this instance by the Magistrate. Section 165 of the Evidence Ordinance provides as follows :—" The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases . . . and may order the production of any document or thing . . . ". Section 190 of the Criminal Procedure Code says :—" If the Magistrate after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced finds the accused not guilty . . . , etc.". On an interpretation of these two sections read together it would appear that a Judge is entitled to order the production of any document of his own motion only to discover or to obtain proper proof of relevant facts which can be used in arriving at a verdict. Conversely, unless a Judge wishes to discover or to obtain proper proof of relevant facts he has no power to order the production of any document *mero motu*. It seems to me, therefore, that a Judge is not empowered under this section to order any documentary evidence to be produced in order to check whether an alleged contradiction has been taken out of its context. This principle would apply with greater force when the documentary evidence ordered to be produced consists of a complete statement to the Police which itself is prohibited from being used as evidence under section 122 (3) of the Criminal Procedure Code, even though the Magistrate has stated that he was ordering their production for some other purpose. It was, therefore, either irregular for the Court to have ordered the productions of documents ' X ' and ' Y ' as there was no enabling provision to do so or, if they were produced in terms of section 165 of the Evidence Ordinance in order to discover or obtain proper proof of

relevant facts, and the Magistrate made use of such statements which he caused to be produced of his own motion in arriving at his verdict under section 190 of the Criminal Procedure Code, acting on such evidence would be a flagrant violation of the provisions of section 122 (3) of the Criminal Procedure Code.

The answer of the counsel for the respondent to this submission is that section 122 (3) of the Criminal Procedure Code empowers a criminal Court in the course of a trial or inquiry to send for Police statements and that the Judge in this case did no more than that. He also submitted that there was not one word in the judgment to show that the Court was influenced in its decision by these Police statements. Counsel cited to me several cases in support of his argument. In the first of them, *King* v. *Soysa*, 26 New Law Reports, page 324, while Jayawardena, A.J., expressed the view that the improper use of the entries in the Information Book will not necessarily vitiate a conviction of the accused if there is other reliable independent evidence to support the conviction, he held that a Judge was not entitled to use statements in the Information Book for the purpose of corroborating the prosecution evidence. It is important here to note the qualifications in the expression of this opinion. The other evidence referred to must be both independent and reliable. The complainant's oral evidence alone unsupported by any other witness—Pathmanathan's evidence being admittedly unreliable—or any circumstance such as the presence of injuries on the complainant based on a medical report, can hardly be called other reliable independent evidence which Jayawardena, A.J., had in mind. His pronouncement about the improper use of the Information Book, however, is categorical and he set aside the conviction although I must say that the trial Judge in that case appears to have gone much further in the use of the Information Book statements than in the instant case. In the next case cited, *Paulis Appu* v. *Davit*, 32 New Law Reports, page 335, after the case was closed the Magistrate deferred judgment noting down that he wished to peruse the Information Book and gave his decision convicting the accused some time thereafter. Akbar, J., citing two previous cases in support acquitted the accused holding that it was wrong for the Magistrate to have looked at the Information Book to enable him to come to a decision.

Of the two cases cited by Akbar, J., one was the 26 New Law Reports case already referred to and the other one was that of *Wickremasinghe* v. *Fernando*, 29 New Law Reports, page 403, where, too, the accused was acquitted in appeal when the Magistrate referred to the Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a statement by him to the Police. In this respect this case bears some similarity to the instant case. In this case Jayawardena, A.J., went on to illustrate some of the uses to which statements in the Information Book can be put, namely, " to discover out of them any matter of importance bearing upon the case and then to call for the necessary evidence to have the matter legally proved ". It would thus appear that it requires careful discrimination and wise judgment to make a proper use of the Police records and while they may be resorted to in the course of an inquiry or trial for the history of the several stages through which the Police investigation into a crime has passed they are unsafe to be relied on for any purpose relating to the finding of guilt. The other case cited by counsel for the respondent was that of *Kitnapulle* v. *Christoffelsz*, 49 New Law Reports, page 401, in which Basnayake, J., held that the use of the Information Book was a matter entirely within the discretion of the Judge. He qualified his decision by saying that a Judge should, however, take care not to make use of statements or facts contained in the Information Book as evidence for any purpose whatsoever or to draw any conclusion of guilt from such statements. On a perusal of this judgment it would appear that the Magistrate had in his judgment stated the specific purpose for which he read the Police statement : " There were some discrepancies between the statement to the Police and evidence but these do not go to the root of the incident. On the evidence it is clear beyond doubt that the accused are the persons who committed the offence ". In this particular case, therefore, the Appeal Court had some material in the judgment from which it could definitely be satisfied as to what use the Magistrate had made of the Information Book, and secondly, there seems to have been other weighty evidence to prove clearly the guilt of the accused. In the instant case while the Judge stated in the course of the proceedings why he was calling for the two statements he has not stated, for the benefit of this Court, what opinion he formed after a perusal of the statements in regard to the contradictions. It is to be noted that in all these cases cited by both counsel, bar one, the use of the Information Book was held to vitiate the conviction when such use was for a purpose other than those specified in section 122 (3) of the Criminal Procedure Code.

In my view, when the Information Book has been used by the Court even if it is doubtful whether such use was proper or not, or even if it is doubtful whether the Judge was influenced by it or not, the accused must receive the benefit of the doubt, more particularly where the evidence for the prosecution is neither overwhelming nor compelling. In this connection the principle laid down by de Kretser, J., in the case cited by counsel for the appellant, *Coomarasamy* v. *Meera Saibo*, 5 Ceylon Law Journal, page 68, is of interest even though it was cited by counsel for a different purpose. It was held in that case, that even if a Judge is not, in fact, influenced, if the *accused gained the impression* that he had been influenced by some inadmissible evidence, that consideration was sufficient to vitiate a conviction having regard to the principle that the administration of justice should not only be pure but should seem to be pure. (*The underlining is mine*).

The next point taken up by counsel for the appellant was that the learned Magistrate had not given reasons for his decision in the manner that he is required to do in terms of the provisions of section 306 (1) of the Criminal Procedure Code. Two cases have been cited to me in support of his submission, namely, *Ibrahim* v. *Inspector of Police, Ratnapura*, 59 New Law Reports, page 235, and *Thuraiya* v. *Pathaimany*, 15 Ceylon Law Weekly, page 119. In the latter case which was followed in the former, it was held that a mere outline of the case for the prosecution and defence embellished by such phrases as, " I accept the evidence " for the prosecution, " I disbelieve the defence ", is by itself an insufficient discharge of the duty cast upon a Magistrate by section 306 (1) of the Criminal Procedure Code. In his submission there was a narration of facts for the prosecution and defence by the Judge which ran into about $3\frac{1}{2}$ pages, at the end of which he merely said, " I have no hesitation at all in preferring the doctor's version to that of Sub-Inspector Perera. While the doctor made an excellent impression in the box, Sub-Inspector Perera cut a very sorry figure under cross-examination ". I do not think that there is substance in this contention for the Judge has, in fact, given reasons for his finding. There is, however, a grave fallacy in his reasoning. For, having disbelieved the Sub-Inspector, the Judge thereafter went on to give some reasons for his disbelief almost all of which were based on his being contradicted by Sergeant Dharmalingam. I could even have appreciated this line of reasoning if the learned Magistrate had formed a very favourable impression of the witness, Dharmalingam. But I find that the learned Magistrate had condemned Dharmalingam as a perjurer for more reasons than one. At various times in the course of the judgment he has made the following observations in regard to Sergeant Dharmalingam :—

> " Police Sergeant Dharmalingam has obviously been prevailed on to fall into line with the Sub-Inspector's version of what the Sub-Inspector claimed that the doctor did in regard to the taking of the seat . . . The Sergeant's story of how the doctor pulled him off the seat was obviously untrue . . . The statements of Police officers were not commenced until 12.25 a.m. when Dharmalingam's statement was recorded. This obviously gave the Police officers ample opportunity not only to concoct a defence to the known facts of the case but also to prevail on Dharmalingam to fall into line, if, indeed, he had ever intended to tell the truth. Dharmalingam did not appear to me to be made of the stuff that heroes are made of and it is obvious that he would have to be a very brave man to go counter to his superior officers and continue to work with them at the Jaffna Police Station."

This being his view of Dharmalingam as a witness, his disbelief of Sub-Inspector Perera, because he was contradicted by Dharmalingam, appears to me illogical. Further, the serious point of contradiction which the learned Magistrate has referred to is the one in regard to the table at which complaints were recorded and as to the conflicting reason given by each of them for getting the complainant away from the reserve table. While the 1st accused stated that complaints were recorded by the Reserve Sergeant at a table other than the table at which he sat, Dharmalingam denied this and although the 1st accused stated that the ammunition at the Reserve Sergeant's table was not under lock and key Dharmalingam said that the drawers were locked and the key was with him. The question at issue to which this evidence related was whether there was a table other than the Reserve Sergeant's table at which complaints were recorded. It has to be borne in mind that even if this was a material contradiction it was on an incidental matter which, though it has a bearing on the circumstances that led to the alleged assault, does not affect the main question whether the accused assaulted the complainant. Secondly, counsel for the appellant submitted that the 1st accused was speaking to a practice that obtained for years having himself been attached to the Jaffna Police for some time while Dharmalingam had been there only for five days and could not have been at the Reserve table for more than one or two days at the most. Thirdly, he has brought to my notice that on this crucial matter when the complainant was ques-

tioned in cross-examination whether it was not the fact that the 1st accused asked him to go and sit at the table in question and make the statement, he refused to do so, he gave no answer, the suggestion of the counsel, of course, being that this conduct of the complainant supported the evidence of the 1st accused. It would thus appear that while counsel's submission that the Magistrate has given no reasons whatsoever for his finding is incorrect, because the Magistrate has, in fact, given some reasons, the reasons for the conclusions and the inferences drawn do not bear scrutiny and the conclusions appear from one point of view to be based on misdirections on questions of fact. For, on the evidence there is no justification for holding either that Dharmalingam shaped his testimony to fall in line with the accused nor that there was an unexplained *mala fide* delay on the part of the Assistant Superintendent of Police to record the statements of the accused and Dharmalingam which " obviously gave the Police officers ample opportunity not only to concoct a defence . . . but also to prevail on Dharmalingam to fall into line " when such a suggestion was not made even by the prosecuting counsel.

This brings me to the other submission very strongly urged by counsel for the appellants that the adverse conclusion of the learned Magistrate against the Assistant Superintendent of Police who recorded the statements is most unjustified having regard to the evidence in the case. He has argued with considerable force, that, in fairness to the Police officer he should have been given an opportunity, when he was giving evidence, to meet the adverse inferences that were made against him in the course of the judgment by at least, a question being asked either by the counsel for the prosecution or by the Court as to his conduct. On an examination of the evidence of Assistant Superintendent of Police Senarath, it would appear that having come to the Station at some stage he took over the inquiry himself and continued to record the statements of the complainant which Inspector Marso had started recording. Immediately after he finished the complainant's statement, at about 8.30 p.m. he recorded the statement of the witness, Pathmanathan. As there was reference in these statements to persons who were not mentioned by name and who were not known to the deponents, he held an identification parade at 10.25, presumably, in order to make sure who the assailants were. It should be appreciated that the parade was an essential prerequisite to the questioning of the alleged assailants, as Pathmanathan, the only witness for the complainant, referred to them by description, such as " the dark Inspector " and " the person with a banian ". Pathmanathan's statement was concluded about 9.30 p.m. and after that the statement of Mr. Navaratnam, Member of Parliament. The Assistant Superintendent of Police then held an identification parade. He next went to the Hospital and after returning from there he recorded the statements of Inspector Marso, Sergeant Dharmalingam and thereafter, the statements of the two accused around 1 a.m. It is very important to remember, in regard to the complaint made by counsel for the appellant, firstly, that the Assistant Superintendent of Police must have the basis of the complaint from the complainant's statement and the supporting evidence and secondly, that the alleged assailants must be either known to the complainant and the witness and if not known, should be identified before they can be questioned in regard to the charges. It would, therefore, not be practicable to record the statements of the alleged assailants before these steps are taken nor would it be useful for some other officer to record simultaneously the statements of those who may possibly be the assailants. Considering the length of the statements of the complainant and witness, Pathmanathan, it would certainly have taken some time to record them. Seeing that the steps taken by the Assistant Superintendent of Police were not only correct but necessary and also considering that Sergeant Dharmalingam's statement was recorded *before* those of the two accused, can it be said that the Assistant Superintendent of Police was acting with improper motives to enable the accused to concoct their defence, particularly, when not one question was asked by counsel for the prosecution or by the Judge, directly suggesting such improper conduct, in which case, the Assistant Superintendent of Police would have had an opportunity of further explaining the course he took. It also seems to me that the learned Judge's finding both against the Assistant Superintendent of Police, that he gave this opportunity and against Dharmalingam, that he made use of the opportunity of the delay to fall in line with accused's version, considerably loses force when it is found that Dharmalingam made his statement before the accused. For, how could Dharmalingam who made his statement at 12.15 a.m. fall in line with the statements of the accused that were to be made later, unless, of course, one concludes that this, too, was a part of the conspiracy to meet a possible attack of concoction of an agreed defence which may be directed against the accused at the subse-

quent trial. If one always imputes bad faith there would, of course, be no end to such inferences. It must be appreciated that recording of each statement, depending on its length, making arrangements for an identification parade, conducting such parade and such other matters necessarily take some time. The only question to consider is whether having regard to all this and the requirements of the case there was delay on the part of the Assistant Superintendent of Police which could not be explained. I am not able to say that the learned Magistrate has given his mind to all these aspects nor that he has given an opportunity to the Assistant Superintendent of Police to meet the grave charge of dishonesty and partiality implied in his finding before such finding was arrived at. In the circumstances, I am compelled to hold that the facts of the case do not warrant the finding of the learned Magistrate either against Dharmalingam or against the Assistant Superintendent of Police.

The final submission of law made by counsel for the appellants was in regard to the leading of the inadmissible evidence of character. This was based on the fact that in re-examination of the complainant by his counsel, it was elicited that from the reports he heard the 1st accused, Perera, was one of the Police officers who had conducted himself in a very unpleasant manner and that he had referred to him in speeches in Parliament. It is submitted that this evidence constituted bad character of the 1st accused and that it should not have been led. Counsel who conducted the prosecution presumably led this evidence to show motive on the part of the 1st accused, Perera, towards the complainant. However, it must be said that this evidence came out in re-examination and did not arise out of any cross-examination on behalf of the 1st accused. While the fact of the complainant having referred to the accused, Perera, in Parliament could even remotely have been justified on this basis, there is considerable substance in the contention of counsel for the appellant that the rest of the evidence was objectionable as evidence of bad character. I think that the objection is rendered even stronger when the bad character deposed to was derived not from personal knowledge but from hearsay, which itself should not find its way into proceedings in Court.

Counsel for the respondent has sought to meet this objection by the argument that the mere reception of inadmissible evidence will not vitiate a conviction if there is other evidence to support it, and secondly, if it cannot be shown that the Judge was influenced by such inadmissible evidence. He cited section 167 of the Evidence Ordinance and also certain decisions of this Court in his favour. In the first case cited by him, *Aron* v. *Amarawardene*, 49 New Law Reports, page 167, Basnayake, J., held that in a case where irrelevant evidence as to character has been admitted it is open to the Appellate Court to apply the provisions of section 167 of the Evidence Ordinance and uphold the verdict if there is sufficient admissible evidence to justify it. Basnayake, J., referred in his judgment to various cases in which different views were taken on this matter and the two decisions on which he appears to have relied for his own view were *Stirland* v. *Director of Public Prosecution*, (1944) 2 All England Law Reports, page 13 ; and *King* v. *Pila*, 15 New Law Reports, page 453. In the former, the House of Lords did not interfere with a conviction in a case where apart altogether from the impeached evidence there was an overwhelming case proved against the accused. In the latter, Lascelles, C.J., observed that there was no question but that the Appellate Court, under section 167 of the Evidence Ordinance, has power to uphold a conviction if it was of opinion that the evidence improperly admitted did not affect the result. The other case cited by counsel was that of *King* v. *Perera*, 42 New Law Reports, page 526, in which a Bench of two Judges decided that evidence of bad character of the accused given in a trial before a District Court is not fatal to a conviction if there is other evidence to convict the accused and if there is nothing to indicate that the District Judge was influenced by the irrelevant evidence. It would, therefore, appear that in *Stirland* v. *Director of Public Prosecution* there was an overwhelming case proved against the accused on the admissible evidence and in the case of *King* v. *Perera* the concluding sentence shows that the District Judge convicted the accused on ample admissible evidence and there was nothing to show that the Judge was influenced by the inadmissible evidence. Where, however, the other evidence is by no means overwhelming nor abundant and is unsupported by any independent circumstance and where there is no indication by the Judge that he has not been in any way influenced by the inadmissible evidence and the matter is left in a state of doubt and where there is also a larger volume of evidence for the defence which is worthy of note, different considerations would apply.

In this case the facts are admitted by both sides up to a point and the question of the probability

or improbability of the 1st accused assaulting the complainant is the vital issue. The admission of this item of inadmissible evidence, therefore, which is irrelevant in two ways—hearsay and bad character—has to be given considerable weight, particularly in view of the observations in the judgment regarding the discourteous treatment of the complainant by the 1st accused and the necessity for the Police officers to show the utmost courtesy to a Member of Parliament. One cannot, in these circumstances, say with certainty, in the absence of an indication to the contrary by the Magistrate, that his knowledge that the 1st accused was a man who had been accused in Parliament for conducting himself in a very unpleasant manner—which accusation is aggravated as it is based on hearsay and may well have been without foundation—did not even unconsciously colour his approach to the vital point that had to be decided in the case. The 1st accused should, in my view, have the benefit of this possible and even likely prejudice. It is in this connection that the pronouncement of de Kretser, J., in the case cited earlier will directly apply.

In regard to all these three matters raised by the appellants, namely, improper use of the Police statements, reception of evidence of bad character of the 1st accused and the inadequacy of the reasons of the Magistrate for his conclusions, counsel for the respondent has strongly urged me to consider that the decision is by a Judge of great experience who must be presumed to have been able to steer clear of these difficulties even if the irregularities may be technically present. While I appreciate the force of this argument and will attach great weight to the findings of the trial Judge, it is also necessary for this Court to look at the question objectively from the point of view of the accused and to be cautious before drawing such presumptions in the absence of material as would have the effect of tilting the case against the accused.

For the above reasons, two out of the three points of law raised by counsel have to be resolved, in my judgment, in favour of the appellants and, in regard to the third point, although I do not accept counsel's contention, I hold that the reasons given by the Magistrate do not bear examination. The finding of the learned Magistrate has, therefore, perforce to be set aside on these grounds of law.

If these were the only criticisms of the judgment I would have been inclined to consider seriously whether there should not be a fresh trial in this case. Counsel for the appellants has argued that, apart from questions of law, the finding of the learned Magistrate cannot be sustained even on the facts and that there is abundant reason for this Court to interfere with the decision. He cited in support the case of *Martin Fernando* v. *Inspector of Police, Minuwangoda*, 46 New Law Reports, page 210, in which it was held that an Appellate Court is not absolved from the duty of testing the evidence in a case both extrinsically and intrinsically although the decision of a Magistrate on questions of fact based on the demeanour and credibility of witnesses carries great weight and that where a close examination of the evidence raises a strong doubt as to the guilt of the accused, he should be given the benefit of the doubt. That was a case in which evidence had been led both for the prosecution and the defence and the Magistrate gave reasons for the acceptance of the prosecution evidence as well as for his rejection of the defence. Wijeyewardene, J., proceeded to examine the reasons and went on to say in the judgment :—" I do not see any reason for disbelieving the evidence of accused or (his witness) Charles. Nor am I impressed by the reasons given by the Magistrate for rejecting the defence ". For the view in regard to the duty of the Appellate Court to test the evidence he also relied on the case of *King* v. *Fernando*, 32 New Law Reports, page 251. In the course of his judgment in this case, Akbar, J., cited the case of *Milan Khan* v. *Sagai Bepari*, 23 All India Reporter, Calcutta, page 347, which he followed. The dictum in that case clearly set out the difference in the approach that should be made by an Appellate Court in a civil and criminal case. While in a civil case the Court must be satisfied before setting aside the order of the lower Court that the order was wrong, in a criminal case, if the Judge of the Appellate Court has any doubt that the conviction is a right one the accused should be discharged. Counsel for the respondent, however, cited several cases in support of his submission to the contrary, namely, that this Court should not disturb a finding of fact arrived at by the trial Judge who has had the advantage of hearing the witnesses and watching their demeanour. He relied strongly on the case of *Watt* v. *Thomas*, (1947) 1 All England Law Reports, page 582, in which it was held that when a question of fact has been tried by a Judge without a Jury and there is no question of misdirection of himself by the Judge, an Appellate Court which is disposed to come to a different conclusion on the evidence should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by

reason of having seen and heard the witnesses could not be sufficient to explain or justify the Judge's conclusion. Counsel drew my attention to the observation of the Lord President, Viscount Simon, in this case, in the course of which he said that if the evidence, as a whole, can reasonably be regarded as justifying the conclusion arrived at at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the Appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. The Lord President, however, went on to qualify this statement when he observed, " This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals he may go wrong on a question of fact but it is a cogent circumstance that a Judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of appeal) of having the witnesses before him and observing the manner in which the evidence is given . . . I would only add that the decision of an Appellate Court whether or not to reverse conclusions of fact reached by the Judge at the trial must naturally be affected by the nature and circumstances of the case under consideration ". These are observations with which I respectfully agree and even though the observations were made in respect of a civil case I think that they are no less applicable even in a criminal case and would be most useful to a Judge of appeal who should, however, never overlook the essential difference in the burden of proof in a civil and a criminal case. While in a civil case a Judge of appeal is making use of this principle to decide whether the trial Judge's *preference* for one version was justified, in a criminal use the Judge of appeal has to decide whether the trial Judge's assessment of the evidence was sufficient to establish the prosecution case beyond reasonable doubt. Counsel for the respondent also referred me to an unreported case, S.C. 918/M.C. Kuliyapitiya—18416 (S.C. minutes of 21st February, 1964) in which Sri Skanda Rajah, J., quoting in support a dictum of Lord Justice Denning in the case of *Griffiths* v. *Harrison*, (1962) 1 All England Law Reports, at page 916, refused to interfere with the trial Judge's decision on a question of fact. The important words of Lord Justice Denning which Sri Skanda Rajah, J., quoted were " But there comes a point when a Judge can say that no reasonable man could reasonably come to that conclusion. Then, but not till then, is he entitled to interfere ". On a reading of Lord Justice Denning's judgment, however, it would appear that this pronouncement was made not on the question whether a finding of fact should be interfered with but on a question of law whether on the proved facts the inference *could* reasonably be drawn, the case under consideration being one in which there was a right of appeal only on a question of law. In other words, the Court of Appeal was called upon to decide whether a certain finding of fact was " erroneous in point of law ". The dictum in this case, therefore, would not apply to the question under consideration in the instant case.

The substance of all these decisions is that the Court of Appeal will not lightly interfere with a finding of fact by a Magistrate but where there is good ground to do so in the circumstances of the case or where the judgment of the lower Court is unsound not merely has this Court the right but it is under a duty to reverse such finding. The last case cited by counsel for the appellant in further support of this view is that of *King* v. *Eliatamby*, 39 New Law Reports, page 53, where Abrahams, C.J., disturbed a finding of fact by a District Judge observing that where there is a mixture of truth and falsehood on both sides, it has to be remembered that the burden of proof is on the prosecution and that the defence has to prove nothing beyond what is necessary to instil a reasonable doubt in the view of the Court.

In the instant case what are the items of evidence that the Magistrate had before him ? On the side of the prosecution there was the evidence of the complainant supported by one witness, Pathmanathan, who was materially contradicted by his own statement to the Police in regard to the 2nd accused. Having stated to the Police that he did not see anyone except the dark Inspector (the 1st accused) assaulting the complainant, he stated to Court that the 2nd accused with his right hand gave a blow on the forehead of the complainant. This serious contradiction must necessarily diminish the value of this evidence even as against the 1st accused and would shake one's confidence in the prosecution case, more particularly as against the 2nd accused, seeing that he took no part at all even in the argument between the complainant and the 1st accused, which preceded the assault. The prosecution derives no support from any independent circumstance such as any injuries on the complainant despite four blows from two young Sub-Inspectors

in the region of the forehead. As against this there is the defence case put forward by the 1st accused himself who denied any assault, supported strongly in material particulars by the evidence of Sergeant Dharmalingam with an unblemished record of 27 years' service in the Police and having nothing in common with either of the accused, and also deriving indirect circumstantial support from the absence of injuries on the complainant to bear out an assault. As I stated earlier the main reason of the learned Magistrate for his disbelief of Dharmalingam is the deliberate delay on the part of the Assistant Superintendent of Police in recording the statements of the Police officers in order to give an opportunity to concoct a false defence. In view of my holding that the learned Judge has misdirected himself on this issue, I am constrained to say that the rejection of Dharmalingam's evidence is not based upon sound reasoning. But for this misdirection the learned Magistrate would have been faced with the oral testimony of the complainant unsupported by any other reliable oral evidence or any item of circumstantial evidence, against the testimony of the 1st accused and his witness, Dharmalingam, who had no interest in the 1st accused, belonged to a community different from the 1st accused, had an untarnished record of service in the Police, had been in the Jaffna Police Station only for five days, and gave his evidence in Court long after the accused had been transferred out of the Jaffna Police Station, where, had they remained up to that time, some semblance of influence over Dharmalingam may even have remotely been suggested. This evidence of the defence together with any inference to be drawn from the absence of any circumstantial support for the prosecution story would surely have left the learned Magistrate in reasonable doubt in regard to the prosecution case, without necessarily going so far as to reject the testimony of the complainant, and the accused would then have been entitled to an acquittal. No wanton attack by the accused on the complainant being ever suggested, and there being no trace of any injury is it not possible that when the 1st accused forcibly removed the complainant from the stool at which the latter was not entitled to sit and the complainant resisted, the accused's hands struck the forehead of the complainant in the course of the ensuing struggle and the complainant honestly believed that he was assaulted and stated in evidence what he believed to be true.

There is one final aspect of the case, relating the burden of proof, which, when considered from one angle, goes to the root of this case and affects the correctness of the conviction. Even though neither counsel has raised the question, I feel it is of fundamental importance. The judgment shows that what the learned Magistrate stated after setting out the facts was, " I have no hesitation at all in preferring the doctor's version to that of Sub-Inspector Perera ". In a criminal trial in which the case against the accused must be proved beyond reasonable doubt, it is not sufficient for a Judge to express a preference for the prosecution version. The concept of preference of one version to another based on a preponderance of evidence or a balance of probability essentially arises only in a civil case, or in a criminal case where the burden has been shifted on the accused to prove certain circumstances according to law. But where no such obligation is cast on the accused and a Judge is considering the question whether a case against the accused has been established by the prosecution it is incumbent on him to scrutinise the evidence for the prosecution and the defence carefully and not merely to have a preference for the prosecution version but to be satisfied beyond reasonable doubt. For, implicit in an expression of preference is a reasonable doubt. I am fortified in this view by the opinion expressed by Sir Sidney Abrahams, C.J., in the 39 New Law Reports case which has already been referred to earlier in another connection. After enumerating the facts he went on to say :

> " The learned District Judge said that the first question is whether the fight took place in the circumstances alleged by the defendants. He says that the story of the genesis of the quarrel, as told by the prosecution, is very much more likely than that told by the defence. Then he says, ' On the evidence and the probabilities of the case, I am inclined to think that it was the accused party who were the aggressors and who went and created a disturbance in the complainant's house ', and he says finally, ' The chief question is whether the accused were the aggressors or whether they were waylaid by the complainant's party and assaulted by them. As I said before, on the evidence and the probabilities of the case, I think there can be no doubt that it was the accused who went to the complainant's house and created a disturbance '. It appears to me that the learned District Judge overlooked the burden which lay upon the Crown to prove its case beyond all reasonable doubt, and was rather inclined to consider a balance of probabilities between two conflicting stories."

In view of all the reasons stated above the convictions of the accused cannot be allowed to stand. I, therefore, allow the appeal of the 2nd accused and set aside his conviction and sentence and acquit him, and, in the exercise of my powers of revision, I set aside the conviction and sentence of the 1st accused and acquit him.

Accused acquitted.

IN THE COURT OF CRIMINAL APPEAL

Present : **Basnayake, C.J. (President), T. S. Fernando, J., and Abeyesundere, J.**

U. A. DON SOMAPALA *vs.* THE QUEEN

Appeal No. 118 *of* 1963—*with Application, No.* 122 *of* 1963—
S.C. No. 139/*M.C. Colombo, No.* 17354/*C.*

Argued and decided on : 17th and 18th February, 1964.
These reasons delivered on: 20th April, 1964.

Criminal Law—General or special defence—Burden of proof on an accused person—Duty of trial judge to direct jury on alternative defences—Penal Code, section 294*—Evidence Ordinance, section* 105.

The Court of Criminal Appeal, by a majority decision, affirmed the conviction and dismissed this appeal. No reasons were given. Mr. Justice T. S. Fernando, who dissented, delivered the following judgment :—

Held : (*per* T. S. FERNANDO, J., *dissentiente*) :—

(1) That notwithstanding that a particular defence has not been raised or relied on at a trial, that circumstance alone is insufficient to relieve the presiding judge of the duty of directing the jury in regard to any alternative defence if the evidence led at the trial could support a verdict based on the acceptance of that alternative defence.

(2) That where the defence seeks the benefit of an exculpatory or mitigatory plea based on general or special exceptions contained in the Penal Code or other law, the trial judge should direct the jury that the defence would succeed if it satisfies them that it is more probable or more likely that the circumstances it relies on existed in reference to the offence alleged.

(3) That the use of expressions—" preponderance of probability ", " preponderance of evidence ", " a burden no higher than the burden of proof on a plaintiff or defendant in a civil case " are capable of misleading a jury and should, therefore, be avoided by the trial judge.

Cases referred to : *Sodeman* v. *Rex*, (1936) 2 A.E.R. 1138 ; 80 Sol. Jo., 532.
King v. *Vidanalage Abraham Appu*, 40 N.L.R. 505; XV C.L.W. 37
King v. *Nikulas Buiya*, 43 N.L.R. 385 ; XXIII C.L.W. 90.
King v. *James Chandrasekera*, 44 N.L.R. 97 ; XXV C.L.W. 1.
Rex v. *Sterne*, Surrey Summer Assizes, (1843) M.S., (Best on Evidence, p. 82).
McNaughton's Case, (1843) 10 Cl. and Fen. 200.

[**Editorial Note:**—His Lordship in his dissenting judgment traces the development of our law in respect of the nature and extent of the burden of proof that lies upon an accused person when he relies on a general or special exception contained in the Penal Code or in any other law defining the offence alleged to have been committed by him, culminating in the case of The King *vs* James Chandrasekera (1942) 44 N.L.R. 97: 25 C.L.W. 1.

His Lordship's observations regarding the expressions generally used in explaining to juries the extent of the burden that lies on the defence are useful.]

Colvin R. de Silva with *Sunil Rodrigo*, *N. S. A. Goonetilleke* and *J. N. David* (*assigned*), for the appellant.

R. Abeysuriya, *Crown Counsel*, for the Attorney General.

T. S. FERNANDO, J.

The only question raised on this appeal that merited consideration was whether the learned trial judge directed the jury correctly or adequately in respect of the burden of proof that lay on the appellant to bring himself within one or other of the special exceptions 1 and 4 to section 294 of the Penal Code. Counsel for him contended, and counsel for the Crown conceded, that in regard to this question there was in the trial judge's charge to the jury a non-direction amounting in the circumstances of this case to a misdirection. As this misdirection was on so vital a matter as the nature and extent of the burden of proof that lies on an accused person, I was of the opinion that the conviction should be set aside and a conviction in respect of the offence of

culpable homicide not amounting to murder substituted in terms of section 6 (2) of the Court of Criminal Appeal Ordinance. The majority of the Court, however, decided to dismiss the appeal without reasons stated. I desired in the circumstances to state my own reasons why the appeal should have been decided otherwise and a verdict substituted as indicated above, and it was agreed that I should be free to set down those reasons in a judgment to be pronounced separately.

The charge against the appellant was that on April 3, 1962, he committed murder by causing the death of one Christian Perera. He was found guilty of that offence by the unanimous verdict of the jury and sentence of death was pronounced on him by the Commissioner of Assize who presided at the trial.

Although the case for the prosecution was that the deceased person was stabbed in the middle of the road at the Kiribathgoda junction in the Peliyagoda Police area at about 3 o'clock in the afternoon, only one person testified at the trial to give an eye-witness's account of the stabbing. According to the testimony of this witness, Ranjith, he came along the road on his bicycle in order to get to a shoe-repairing establishment and, just as he stopped in front of that place, he heard a voice from behind say " goriak, goriak ". (" Goriak " (ගෝරියක්) is a slang Sinhala expression commonly understood as meaning a row, and it is clear that it was so understood by the trial judge himself who referred to it in his charge as signifying an altercation). When he heard these words, the witness turned round to look in the direction from which the shout came and saw the appellant with knife up-raised trying to stab the deceased. The blow so attempted to be delivered did not alight on the deceased. The deceased then struck the appellant with his hand whereupon the latter stabbed the deceased somewhere on the head. The deceased fell face downwards, and the appellent again stabbed the deceased, this time on the abdomen. Having done so, the appellant pulled the knife out of the body of the deceased and ran away. Another witness, Siyoris, said that as he was walking along the road on this day towards the spot described by Ranjith he saw a crowd collected there, and also saw the appellant walking fast towards him with some pointed thing in his hand. He did not speak to the appellant, but proceeded towards the crowd.

The appellant testified at the trial in an effort to establish an alibi for himself. The verdict of the jury indicates that the evidence of the appellant did not cause the jurors to entertain any reasonable doubt as to the identity of the appellant as the actual assailant. It is now well established that notwithstanding that a particular defence has not been raised or relied on at a trial, that circumstance alone is insufficient to relieve the presiding judge of the duty of directing the jury in regard to any alternative defence if the evidence led at the trial could support a verdict based on the acceptance of that alternative defence. The rejection by the jury of the denial of the appellant that he was the assailant did not prevent the jury from considering any circumstances of mitigation or extenuation of his act as appearing in the evidence in the case, irrespective of whether it be evidence led by the defence or the prosecution itself.

In the present case, the learned trial judge, if I may say so, with respect, correctly left it to the jury, if they were satisfied beyond a reasonable doubt that the appellant was the assailant, to return a verdict of guilty on a lesser charge. To use his own words, he said :—" If you think that the accused did inflict these injuries, but there were certain extenuating circumstances, his offence can be reduced to culpable homicide not amounting to murder ". The question that arises on this appeal is, as I have already stated, whether the trial judge's direction to the jury in regard to the onus of proof that lies upon a person who seeks to satisfy the Court that a defence he relies on has been established was correct or adequate.

The learned judge invited the jury to consider whether the evidence justified the appellant's case being brought within exception 1 to section 294 of the Penal Code based on the existence of grave and sudden provocation or exception 4 based on the existence of a sudden fight. In regard to the burden of proof that lies upon a person claiming the benefit of an exception within the meaning of section 105 of the Evidence Ordinance, what the learned judge stated is to be found only in the two passages from his charge reproduced below :—

(*a*) " These are the exceptions, and generally speaking if a person claims the benefit of an exception it is for him to show that these circumstances existed or that their existence is so probable that any reasonable man will act on that supposition . . . You must look at the entirety of the evidence and if a jury takes the view that the offender did in point of fact act under grave and sudden provocation although he does not say so, well the jury is entitled to bring in a verdict of culpable homicide not amounting to murder ".

(*b*) " If you are of the view that the accused did inflict the injuries, but that there was a fight and that when he inflicted the injuries he did so while he was acting under grave and sudden provocation or in the course of a sudden fight, without premeditation and in the heat of passion, his offence is reduced to culpable homicide not amounting to murder ".

Our law in respect of the nature and extent of the burden of proof that lies upon an accused person when he is relying on a general or special exception contained in the Penal Code or in any other law defining the offence alleged to have been committed by him came to be crystallized after the decisions in three local cases a little over twenty years ago. It will be recalled that in 1936, Viscount Hailsham, L.C., on an appeal to the Privy Council from a decision of the Supreme Court of the State of Victoria, adverting to the burden of proof resting upon an accused to prove insanity, stated that that burden is not as heavy as the burden of proof resting upon the prosecution to prove the facts which it has to establish. Said the Lord Chancellor :—" In fact, there is no doubt that the burden of proof for the defence is not so onerous. It has not been very definitely defined . . . But it is certainly plain that the burden in cases in which an accused has to prove insanity may fairly be stated as not being higher than the burden which rests upon a plaintiff or defendant in civil proceedings ".—[see *Sodeman* v. *Rex*, (1936) 2 A.E.R. 140] About this time it was not uncommon to find certain judges presiding at assize trials in Ceylon instructing jurors that it was sufficient for the defence to raise a doubt as to whether the evidence relied on brought its case within a general or special exception in the Penal Code. It is necessary to remember in this connection that a Court of Criminal Appeal came into being in Ceylon only on April 27, 1940. In view of the lack of uniformity of opinion among the judges in regard to the burden of proof when it lay on the defence, the Attorney-General in the year 1939 raised the question before the Supreme Court by way of a case stated in terms of section 355 of the Criminal Procedure Code in the case of *The King* v. *Vidanalage Abraham Appu*, (1939) 40 N.L.R. 505. Soertsz, A.C.J., with whom two other judges agreed, considering the question only in relation to the defence of insanity, held that the defence is not proved if the circumstances bringing the case within any of the exceptions are involved in doubt. The extent of the burden of proof that lies upon a person who seeks to prove insanity was again raised after the establishment of the Court of Criminal Appeal, in the year 1942, in the case of *The King* v. *Nikulas Buiya*, (1942) 43 N.L.R. 385. There Howard, C.J., delivering the judgment of the Court of Criminal Appeal stated that—

> " that burden, however, is no higher than that resting upon the plaintiff or defendant in a civil case or, in other words, is discharged by an accused person who tenders a preponderance or balance of evidence in support of such a plea. In our opinion, there is nothing inconsistent in this dictum with regard to the burden of proof with the principle formulated by the Judges in *M'Naughton's* case that insanity must be clearly proved. The Judges in *M'Naughton's* case did not express any opinion as to the weight of evidence that would constitute clear proof. Adverting to the present case, we do not consider that the distinction between the burden resting on the Crown to prove its case and that resting on the appellant to prove insanity was sufficiently brought home to the minds of the Jury by the language used by the learned Judge in the summing up."

The question was adverted to again—this time not confined to the defence of insanity but embracing all defences where one or other of the exceptions referred to in section 105 of the Evidence Ordinance are relied on—in the well-known case of *The King* v. *James Chandrasekera*, (1942) 44 N.L.R., at p. 120. There Howard, C.J., observed :—" Moreover, I am unable to understand any logical necessity for imposing on an accused who raises a defence of insanity a greater burden than on an accused who pleads the existence of circumstances indicating that he was exercising the right of private defence or had lost the power of self-control by reason of grave and sudden provocation ". Earlier in the same judgment,—see page 117—the learned Chief Justice, after referring to the definition of the expression " proved " appearing in section 3 of the Evidence Ordinance observed that the fact that the definition contains the words " under the circumstances of the particular case " permits a " prudent man " to require in a criminal case a standard of proof different from that he may require in a civil case. He relied on the statement of Baron Parks in *R.* v. *Sterne*, Surrey Summer Assizes, 1843, M.S., Best on Evidence, p. 82, that in a criminal case owing to the serious consequences of an erroneous condemnation both to the accused and society the persuasion of guilt must amount to such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt, and observed as follows :—" Hence a prudent man in criminal proceedings when the burden of proof is on the prosecution requires the establishment of the case against the accused beyond all reasonable doubt ".

There is, therefore, ample authority in our law for the proposition that there is a distinction between the extent of the burden that lies upon the prosecution to establish the elements of the charge and the extent of the burden that lies upon the defence based upon one of the exceptions above referred to. Sometimes judges, in explaining to a jury the extent of this burden that lies upon the defence, are wont to employ the expressions " preponderance of probability " or " preponderance of evidence ". At other times judges instruct juries that the extent of this burden is no higher than the burden of proof on a plaintiff or defendant in a civil case. With the utmost respect, I venture to submit, in regard to the former expressions, which are ugly in themselves and capable of misleading a jury, that they may well be avoided in an address to a body of laymen, particularly at the present day in this Country. Simpler expressions like " is it more probable ", " is it more likely " may with advantage be adopted instead. In regard to the latter, while a body of lawyers or law-students may well be familiar with the nature of the burden of proof in civil proceedings, it may well be doubted whether a direction on these lines conveys something intelligible to a body of laymen who must be assumed to be unacquainted with rules of evidence. In *Chandrasekera's case* (*supra*), the trial judge (Moseley, J.), instructed the jury—intending at the time, as I happen to know, to send the case up to the Court of Criminal Appeal by way of a case stated in the event of a conviction—as follows :—

> " So, when we speak of the preponderance or balance of evidence, what we mean is, is it more probable ? In that case (referring to the re-trial in the case of *The King* v. *Nikulas Buiya*) was it more probable that he was insane than that he was sane."

Ever since the decision in *Chandrasekera's Case*, on the question of the nature and extent of the burden of proof that lies on the defence when it seeks the benefit of the exculpatory or mitigatory pleas based on general or special exceptions contained in the Penal Code or other law, trial judges have been adopting a more or less uniform direction to juries that the defence succeeds if it satisfies them that it is more probable or more likely that the circumstances it relies on existed in reference to the offence alleged.

The question that now arises is whether the learned Commissioner who directed the jury in the present case brought adequately to the notice of the jury the distinction between the burden of proof that lies on the prosecution and the burden of proof that lies on the defence. When he dealt with this important question of the burden of proof on the defence all he said was that the accused must show that the circumstances which he relies upon " existed or that their existence is so probable that any reasonable man will act on that supposition". In the only relevant passages in his summing-up which suffers, if I may say so, with all due respect to the learned Commissioner, from an over-simplification of the issue, the jury was instructed that it must find that the accused did *in point of fact* act under grave and sudden provocation or that there was a fight. The accused, in my opinion, was entitled to come within the exceptions if he satisfied the jury respectively that it was more probable than not that he acted under grave and sudden provocation or that it was more probable than not that there was a sudden fight. The failure to direct the jury accordingly constitutes, in my opinion, a non-direction on a question of law on which it was incumbent on the trial judge to direct the jury adequately. Learned Crown Counsel, on the question being put to him specifically during the argument, expressly stated to the Court that there was here a non-direction amounting to a misdirection. This misdirection being on so vital a matter as the burden of proof on the defence, the conviction on the charge of murder calls to be quashed, and I would accordingly quash it. Should the case be remitted for a new trial or should the Court here exercise the power vested in it by section 6 (2) of the Ordinance ? The evidence of the witness, Ranjith, which we must now assume the jury accepted, itself discloses the strong probability that some row did take place. No witness was available to be called to show how that row began or the course it took until the appellant was seen raising a knife. The deceased had only two serious injuries on his body. Other cut injuries on the fingers and scratches on the body all lend colour to a strong probability of a fight between the appellant and the deceased. If I may say so, the facts disclosed in the evidence in this case are not unlike those present in many a case in the Assize Courts where pleas of guilty of lesser offences are frequently tendered and accepted before or during the trial. I would substitute a verdict of guilty of culpable homicide not amounting to murder on the basis of the existence of a sudden fight (exception 4) and pass on the appellant a sentence of 10 years' rigorous imprisonment.

Appeal dismissed.

Present : **Sri Skanda Rajah, J.**

YAPA *vs.* MISSINONA

S.C. 189/'64—*M.C. Colombo South*, 27620/*B*.

Argued and decided on : 22nd June, 1964.

Criminal Procedure Code, section 434—*Maintenance case—Can copies of depositions of witnesses in pending cases be issued to the parties.*

Held : That copies of depositions of witnesses in pending maintenance cases should not be issued to the parties as this is not warranted by law.

Maureen Seneviratne, for the defendant-appellant.

Kumar Amarasekara, for the applicant-respondent.

SRI SKANDA RAJAH, J.

This is an appeal in a maintenance case from the Magistrate's Court of Colombo South. The appeal is by the defendant from the order of the Magistrate, that he is the father of the applicant's illegitimate child.

Corroboration of the mother's evidence is necessary in such cases and there was such evidence : so I see no reason to disturb the order and, therefore, I dismiss the appeal with costs.

Before I part with this case I would like to make the following observations :—This application was filed on 15th August, 1962, but was decided only on 20th July, 1963, *i.e.*, a year after it was filed. It had come for inquiry on no less than five dates. On the first date, viz., 30th January, 1963, the journal entry reads : " This is a long case ". For that reason the inquiry was postponed for 3rd April, 1963, on which date the Magistrate made another entry, " I have no time to take up this case for trial today. I am going on with a non-summary case where the accused is on remand ". On the next date this was partly heard and on the following date also it was partly heard. On 22nd June, 1963, it appears to have been concluded but the order was delivered only on 20th July, 1963. Such delays in Magistrate's Court cases is unfortunate and still more unfortunate in maintenance cases.

This is a Magistrate's Court case and copies of proceedings are not available to the parties as far as I am aware. The only provision in the Criminal Procedure Code is section 434 with regard to the issue of copies of depositions or part of the record. It reads thus :—

> " If any person affected by a judgment or final order of a criminal Court desires to have a copy of any deposition or other part of the record he shall on applying for such copy be furnished therewith by the Court upon payment therefor of such reasonable sum not exceeding twelve cents for a folio of one hundred and twenty words as the Court may direct, unless the Court for some special reason thinks fit to furnish it free of cost."

I find a note in the record by the Magistrate that certified copies of proceedings are made available to parties in the Magistrate's Court. Issuing of copies in pending cases is not warranted by law and it is further likely to lead to corruption. In fact, records of Magistrate's Courts should not be handled by other than the Court officers. Though this is a maintenance case it is in the Magistrate's Court ; so copies of the depositions of witnesses in the cases should not be issued.

Dismissed.

SUPPLEMENT

The following are the farewell address and the reply by the Hon'ble The Attorney-General and His Lordship The Chief Justice, Hema H. Basnayake respectively, on the occasion of His Lordship's retirement from office on 31-8-1964.

THE HONOURABLE THE ATTORNEY-GENERAL. *

May it please Your Lordship,

This day marks the end of an era. For the last 20 years Your Lordship, The Chief Justice, has dominated the legal scene in one capacity or another—as a law Officer of the Crown or as a judge of this Court—and it is difficult for us to realise that when the next term commences, we shall not see you in your accustomed seat on this Bench.

When Your Lordship was appointed Chief Justice in 1955, the Bench consisted of nine Judges and today only one of your old colleagues remains. During your period of office there have been many changes and some upheavels, but your continuing presence was an assurance to us that all was well. Some of us were already here when you were called to the Bar. Many of us have watched with admiration your swift and steady progress over the years as you advanced from one high office to another and all of us have had the privilege of appearing before Your Lordship and we have always received the utmost consideration and courtesy at your hands. We cannot let this occasion pass without an expression of our regret at your departure.

Today we look back, if only for a moment, to remind ourselves of one of the most remarkable legal careers of our time spent almost entirely in the service of the Crown.

It is a career which will serve as an inspiration and an encouragement to all those who enter our profession lacking the advantages which a beginner at the Bar values in his pursuit of success.

In the department of the Attorney-General where you commenced your official career you quickly earned a reputation for hard work and the standards which you cherished have remained with us to this date.

You were the youngest of the select band of Crown Counsel all of whom were ultimately to reach the Supreme Court Bench and of them you were the only one to be appointed Attorney-General and thereafter Chief Justice. You still have your admirers in the department and I need hardly assure Your Lordship that you will always be remembered by us with affection. As the head of an expanding department you proved yourself to be a capable administrator and you won the confidence and esteem of your subordinates.

Then came your period of office as Chief Justice in which office you have served the country for a longer period than any of your predecessors. The Law Reports bear ample testimony to the active part you have played in the interpretation of the Law. You never hesitated to disagree even with your brother Judges when the occasion demanded and in that way you have been one of the most independent Judges we have had.

In the Court of Criminal Appeal over which you regularly presided you have been responsible for some of the most momentous decisions of recent years.

The achievement of the last 37 years has been founded on an exceptional devotion to duty, an unbounded capacity for work, a well-disciplined and ordered life, and a meticulous regard for precision.

You will be missed in many other spheres of activity where your wise counsel and your ability to deal with business expeditiously were greatly appreciated—at the meetings of the judicial Service Commission, in the deliberations of the Council of Legal Education and in the Law Library Committee ; and perhaps you will be missed most of all when the preparation of the next Edition of our Legislative Enactments becomes necessary.

If success in life is to be measured in terms of personal happiness then no man ever had a more successful life than Your Lordship. You have every reason to survey your record with pride and satisfaction.

* For Sinhala translation, see Sinhala section, Vol. 9 part 1, p. 1

It has been a long and hazardous journey bravely undertaken and faithfully accomplished. Only you can know what it cost in personal sacrifices made even in your early years.

And, finally, if I may, I wish to add my personal thanks—the thanks of one who was your junior in the profession—who was closely associated with you for many years and who, today quite fortuitously, has the honour of conveying to Your Lordship the goodwishes of the Bar.

For many acts of kindness, for words of encouragement and advice in season, for assistance readily given I wish to express my gratitude.

As you divest yourself of the robes of office for the last time may there be no regrets and no reproaches.

May the memory of this day when your old friends and a host of your admirers have assembled to bid you farewell sparkle in your mind in the days that are to come and with those words I wish Your Lordship goodbye.

His Lordship's Reply. *

MR. ATTORNEY,

I am greatly touched by your generous and kind words. I value them the more, as they come from one, who was a trusted colleague when I was a Law Officer of the Crown. The good opinion of one's fellow-men is a thing to be proud of, and it is comforting to hear the kind sentiments expressed on behalf of the Bar.

It is 37 years since I was admitted to the office of advocate. Of that period, 23 years have been spent on the official side of the Bar. During that time I witnessed from within and at close quarters the change from the Colonial Constitution to the Donoughmore and then to the Soulbury Constitution.

One constant factor throughout those changes was the respect shown for Law by the highest to the lowest in the Executive hierarchy. The Courts were held sacred and the Rule of Law prevailed. The Attorney-General performed the dual functions of adviser to the Crown and guardian of civil liberty. I presume his functions are the same now. It would be a sad day for the country if ever the latter function were abandoned by him.

I first came on the Bench in 1947. In 1951 I reverted to the Bar as Attorney-General, and in 1955 I assumed my present office. I acknowledge with gratitude the assistance and co-operation I have received from the Bar during my thirteen years of judicial office. I am convinced that in our system the functions of a Judge cannot be satisfactorily performed without that assistance and co-operation. There were times when the Bar and I did not see eye to eye ; but those differences soon gave way to better understanding.

The administrative work of the Supreme Court has been greatly hampered by the inability of the Executive to appreciate its problems. Many measures designed to increase the efficiency of the Court have been turned down. The request for a draftsman to be attached to the Supreme Court for drafting statutory rules which it is empowered to make was never granted, and no rules whatsoever have been made under 15 statutes. Under seven other statutes, many more rules remain to be made.

Proposals intended to benefit the Supreme Court staff have not been sanctioned. The interpreters and the stenographers, who are such a vital part of the machinery of this Court, especially at criminal trials, have nothing to look forward to however efficient they may be.

As Clerks of Assize the interpreters perform functions once discharged by Registrars with no extra remuneration for the added responsibility, Similarly, the stenographers, as Clerks of Appeal. are called upon to assume similar responsibility with no additional benefit to themselves. They are not paid as much as the reporters in Parlia-

* For Sinhala translation, see Sinhala Section, Vol. 9 Part 1, p. 2.

ment, although their work is by no means less important. I am particularly sorry for these two groups of officers whose talent receives no recognition. Even the Registrar and his deputies are not more fortunate. Their emoluments do not compare favourably with those of officers in similar positions in other Commonwealth countries, nor even with those having like responsibility in our own country. They are all the victims of an obstinate Treasury. I must take this opportunity of paying my tribute to them for their efficiency and devotion to duty.

In the course of over a hundred years there have come into existence certain conventions which govern the relations between the Supreme Court and the Executive. They had been scrupulously observed through the years ; but in recent times there has been a departure from those conventions.

Legislation affecting the Supreme Court has been introduced without prior consultation with the Judges. Appointments to the Supreme Court have been made without ascertaining the views of those whom it was the convention to consult. The Registry which has been under the Supreme Court since its inception has, without any legal authority in that behalf, been placed under the Ministry of Justice, thereby bringing the Registry and appointments to offices therein under the control of the Executive. The Supreme Court vote, which once occupied a place of its own, not under any Ministry, and next to that of the Prime Minister, has now been placed under the Ministry of Justice. Legislation (No. 9 of 1958) has been introduced enabling the Minister of Justice to direct the production of the record of any Court for his inspection, the direction being communicated by the Permanent Secretary, in the case of the Supreme Court, to the Chief Justice. I trust, that wiser Counsel will prevail and that there will soon be a reversion to the established conventions.

Under our system of justice the Bench and the Bar are components of one unit. The impairment of one inevitably affects the other. It behoves the Bench, therefore, to uphold the rights and privileges of the Bar, and the Bar to guard the prestige and sanctity of the Bench. Recent events show that this inter-dependence of the Bench and the Bar has not received the attention it deserves, for, measures which adversely affect this Court have been introduced without the voice of the Bar being raised in protest. Greater vigilance will, I trust, be shown in the future. The public expect it and the safety of our realm demands it.

The prestige which the judiciary enjoys today is the cumulative effect of high traditions built up and sacredly preserved by a succession of Judges for over a century and a quarter. That prestige has increased over the years. The State should do nothing that will impair it in the slightest degree. It should not regard decisions against the State as unfriendly acts and resort to retaliatory measures, whether they be legislative or administrative. It should, like any other litigant, learn to abide by the judgment of the final Court. That is the surest way to increase its own stature and the power of the institution which it must in its own interests safeguard.

A judiciary is not independent unless the Courts of Justice are enabled to administer law by absence of pressure from authority, whether exerted through the blandishments of reward or the menace of disfavour. It is the duty of the Executive to preserve its independence. It should, therefore, be assiduous not to leave room even for the merest impression that such pressure is being exerted.

Judges, too, should remember that the prestige now enjoyed by the judiciary imposes on them a very heavy obligation to preserve and foster its fair name and honour. They should so regulate their conduct both in and out of Court as to further increase the public confidence in them.

To the people the judiciary is the sole protection against tyranny, autocracy and the intemperate acts of the bureaucracy. To them, it is the forum in which the liberty of the subject can be asserted. To them, it is the place where their wrongs can be remedied, be they committed by a

fellow-citizen or by the State. To them, it is the only forum in which they can challenge the State on even ground. Every step that the Government takes to preserve the independence of the Courts, every measure introduced to safeguard them, will inevitably redound to its credit. No State is safe with a subservient judiciary. It is the bane of a country, and it enfeebles a nation and makes cowards of its citizens.

So much for the judiciary ; let me say a word about the Bar. In recent times the Bar appears to have lost that initiative it once had in influencing public opinion. I do hope that lost ground will soon be re-captured, and that once more the voice of the Bar will be raised in protest to prevent precipitate action by a nervous Government, and that same voice will be heard when measures contrary to those principles which we hold sacred are threatened. The timely warning by those whose opinion matters will, more often than not, prevent ill-considered action. It is important to remember that an independent judiciary, an independent and fearless Bar, and, may I add, a Free Press, and a vigorous public opinion are the surest assurances against the scourge of dictatorship and the horrors of revolution.

I should not fail to advert to one other matter, and that is the cost of litigation. Many shudder at the prospect of it. Like everything else, it has gone up, and the price of asserting one's rights has been found to be too high and often a citizen has to submit to might and wrong, because of this high price. A solution to this problem must be urgently sought. When liberty is assailed, want of money should not be in the way of its defence ; and if the price of asserting one's liberty is too high, liberty itself will perish for want of money. Human rights, Fundamental rights, are of little avail if they exist only in the Charters or Constitutional Instruments in which they are enshrined.

Before I conclude, let me once again thank the Bar for the assistance and co-operation given me. To my colleagues, both those who are with me now and those who have in the course of these nine years left the Bench, I owe a debt, for, without their assistance and co-operation my task would have been difficult. Whatever has been achieved during my term of office has been due to a combination of many factors.

Forgive me for detaining you longer than usual. I have done so, because I feel it my duty on this occasion, to express what I have said, so that my colleagues on the Bench and those at the Bar may be more watchful than before against the invasion of authority.

I have served my country with devotion for over a third of a century. I shall now lay aside my wig and robes—the symbols of this office—and turn to my religious, social service and educational activities which require more time than I have been able to give all these years. When the shackles of office are shed, I shall be free to dedicate myself to the service of the people in many ways. This is the end of one phase of my life and the beginning of another to which I eagerly look forward.

Mr. Attorney, I am happy to see here today the faces of friends who left these Halls years ago and distinguished themselves in other spheres. Let me, in conclusion, thank each and everyone of you for assembling here.

I shall carry with me the pleasantest memories of my life at this Bar and on the Bench.

I bid you Farewell and Good-bye.

Present : **Sri Skanda Rajah, J.**

SUGATHAPALA *vs.* THAMBIRAJAH

S.C. 89/1964—*M.C. Colombo*, 35434/*C.*

Argued on : March 20 and 24, 1964.
Decided on : April 6, 1964.

Criminal Procedure Code, section 419—*Scope thereof—Jurisdiction conferred on Magistrate to decide right to possession of property produced in Court on suspicion that offence has been committed—How Magistrate's discretion should be exercised.*

Held : (1) That in exercising the jurisdiction conferred by section 419 of the Criminal Procedure Code on the Magistrate to "order as he thinks fit" the delivery of property (seized by the Police and reported to him as being property "alleged or suspected to have been stolen" . . .) to the person entitled to the possession thereof, he is not deciding a civil dispute, but only the right of possession in respect of property referred to therein.

(2) That where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to, and has power to, consider questions of title in order to determine " the best right to possession. "

(3) That the phrase, "as he thinks fit" in section 419, gives the Magistrate a discretion which he must exercise judicially. He should order the delivery of the property to the person from whose possession it was seized by the Police only if there is nothing to show that another is entitled to the property.

Not followed : *Punchinona* v. *Hinniappuhamy*, (1959) 60 N.L.R. 518; LIX C.L.W. 33.
Piyadasa v. *Punchi Banda*, (1959) 62 N.L.R. 307.
Jayasuriya v. *Warnakulasuriya*, (1958) 61 N.L.R. 18.

Commented on : *William* v. *Silva*, (1921) 22 N.L.R. 403.
Lakshmichand Rajmal v. *Gopikisan Balmukund*, A.I.R. (1936) Bombay 171.
Vaiyapuri Chetty v. *Sinniah Chetty*, A.I.R. (1931) Madras 17.
Martin Silva v. *Kanapathipillai*, (1939) XIV C.L.W. 41.
Katha v. *Meera*, (1898) 3 N.L.R. 90.
Thambipulle v. *Ramaswamy*, (1909) 4 Balasingham Reports 89.
Doloswala v. *Eknelligodde*, (1912) 7 Weerakoon Reps. 37.
Costa v. *Peiris*, (1933) 35 N.L.R. 326; 13 C.L.Rec. 73.
Fernando v. *Wijesekera*, (1964) 66 N.L.R. 23.
Srinivasamurti v. *Narasinhalu Naidu*, 50 Madras 916.

No appearance for the appellant or respondent.

V. S. A. Pullenayagam, Crown Counsel, with *D. S. Wijesinghe, Crown Counsel*, as *amicus curiae.*

SRI SKANDA RAJAH, J.

The facts relevant to this appeal may be summarised as follows :—

The appellant, Sugathapala, complained to the police that his motor car, 1 Sri 4307, had been stolen from his possession on 31st March, 1963. On 3rd May, 1963, the police seized the car which was in the possession of the respondent, J. K. Thambirajah, who claimed to have purchased it in April, 1963, from two persons alleged to bear the names, A. J. R. Fernando and K. A. Martin. The police have not been able to trace them. At the time of the seizure the car carried false number plates—1 Sri 1693—but the chassis No. FAA 21/488286 and engine No. APJML 46006 were those of car 1 Sri 4307. Also, the genuine number plates, 1 Sri 4307, were still on the car, but very cleverly concealed under the false number plates. The police produced the car before the Magistrate with their report and moved for an order for its disposal.

In short, the Magistrate was called upon to make an order under section 419 of the Criminal Procedure Code, the relevant portion of which is reproduced below :—

Section 419 (1): "The seizure by any police officer of property taken under section 29 or alleged or suspected to have been stolen or

found under circumstances which create suspicion of the commission of any offence shall be forthwith reported to a Magistrate who shall make such order as he thinks fit respecting the delivery of such property to the person entitled to the possession thereof, or if such person cannot be ascertained respecting the custody and production of such property."

This provision and the corresponding provision of the Indian Code of Criminal Procedure, section 523, are in identical terms.

After hearing Counsel the Magistrate, following *Punchinona* v. *Hinniappuhamy*, 60 N.L.R. 518, held that he had " no alternative but to order the property to be delivered back to the person from whose possession it was seized ", viz., Thambirajah. It is from that order that this appeal has been taken.

When this appeal came up before me on 20th March, 1964, there was no appearance for either party. As my view of section 419 differed from that taken in recent decisions of this Court, I informed Mr. D. S. Wijesinghe, Crown Counsel, who was in Court, that I would very much appreciate assistance. In response, Mr. Pullenayagam, Crown Counsel, appeared with him on 24th March, 1964, as *amicus curiae*. I am indebted to him for his assistance. Three of the cases cited by him, viz., *William* v. *Silva*, 22 N.L.R. 403, *Lakshmichand Rajman* v. *Gopikisan Balmukund*, A.I.R., (1936) Bombay 171 ; *Vaiyapuri Chetty* v. *Sinniah Chetty*, A.I.R., (1931) Madras 17, support my view.

In *Martin Silva* v. *Kanapathipillai*, 14 C.L.W. 41, the subject-matter of the order of the Magistrate was some money. Abrahams, C.J., thought that the Magistrate had acted under section 413 of the Criminal Procedure Code and held that that section had no application. He did not express any view regarding section 419, because his attention does not appear to have been drawn to it. He, however, went on to express the view that a criminal Court should not be employed as a tribunal to investigate rival claims to property.

In *William* v. *Silva*, 22 N.L.R. 403, property seized by the police from the pocket of the accused was directed by the Magistrate to be returned to the complainant after he disbelieved the charge and discharged the accused. The accused then moved that the property be returned to him. That was refused. Thereupon the accused appealed to this Court. His appeal was dismissed for more than one reason. In the course of the judgment, Schneider, A.J., said: ". . . , the Magistrate did not act upon the provision of section 413, but upon a well-recognized principle that where property is brought into Court as having been in the possession of a particular person upon an allegation that an offence has been committed, it *may* order the restoration of the property to the person in whose possession it had been found (*Katha* v. *Meera*, 3 N.L.R. 90 ; *Thambipulle* v. *Ramaswamy*, 4 Balasingham Reports 89 ; *Doloswala* v. *Eknelligode*, 7 S.C.D. 37)."

I have already pointed out that the Magistrate did not return the money to the accused in whose possession it was when seized by the police. In the next sentence the learned Judge continued, " *In making such an order the Magistrate may also have acted under section* 419 *of the Criminal Procedure Code.* "

Schneider, A.J., was, therefore, of the view that when the Magistrate acts under section 419 it is open to him, " *if he thinks fit* ", to direct the property found in the possession of one person to be delivered to another " person entitled to the possession thereof ".

In *Costa* v. *Peiris*, 35 N.L.R. 326; 13 C.L. Rec. 73, de Silva, A.J., said : " When the property seized has been removed from the possession of a person a Court has a larger discretion under section 413 as to the order it can make than it has under section 419. Under the latter section it has either to return the property to the same person or refuse to do so if it thinks necessary to detain the property for the purposes of proceedings before it. The former power was referred to in *William* v. *Silva*, 22 N.L.R. 403, and is in accordance with the decisions in the cases referred to herein. The possession of property cannot be lightly interfered with, and I do not think it has power under the section to order property seized and removed from the possession of one person to be given to another person. If a Court under section 413 finds that an offence has been committed in respect of property produced before it or that it has been used for the commission of an offence, then it may make order interfering with the possession of the person from whom the property was taken. If it does not arrive at one of these findings, then the ' person entitled to possession ' is the person from whom it was taken. Any person disputing his rights must do so in civil proceedings ".—35 N.L.R., at 328.

If I may say so with great respect to one who was later elevated to the Judicial Committee of the Privy Council, it is difficult to reconcile this with what the learned Judge said later on at the same page : " Under section 419 a Court has to exercise a judicial discretion. It should hear both the complainant and the accused before doing so ". If the Magistrate acting under section 419 is bound to hand over the property seized to the person from whom it was taken (unless he thinks it necessary to detain it for the purposes of the proceedings before him), as stated earlier, there would be no useful purpose in hearing the complainant, though he may have " the best right to possession ", to borrow the words from Beaumont, C.J., (v. *infra*).

I would observe that the " judicial discretion " vested in the Magistrate by the words " as he thinks fit " is not such a limited one but includes the right to hand over the property even to the complainant if the latter establishes that he is entitled to the possession thereof. I would also point out that it is only when " the person entitled to the possession " of the property in question " cannot be ascertained " that the Magistrate can make order " respecting the custody and production ", " for the purpose of the proceedings before him ", in the words of de Silva, A.J., or " official " custody, in the words of H. N. G. Fernando, J., 60 N.L.R., at 519 (*infra*). It is for the purpose of ascertaining the person entitled to the possession of the property that the complainant is also heard.

If by the words, " the former power was referred to in *William* v. *Silva* . . . " in the above passage, de Silva, A.J., referred to the power under section 413, I would respectfully point out that Schneider, A.J., said that the order of the Magistrate was not made under section 413. If, on the other hand, he referred to the earlier words, " it has . . . to return the property to the same person . . . ". I would also respectfully point out that in *William* v. *Silva*, the property was returned not " to the same person " but to the complainant.

In *Punchinona* v. *Hinniappuhamy*, 60 N.L.R. 518, H. N. G. Fernando, J., quoted the earlier of the above passages from the judgment of de Silva, A.J., in *Costa* v. *Peiris* (*supra*) and added " section 419 is not a provision which confers jurisdiction to decide disputed claims to possessions ".

The same learned Judge took the same view in *Piyadasa* v. *Punchi Banda*, 62 N.L.R. 307, decided by him on the same day as the 60 N.L.R. case and in the earlier case of *Jayasuriya* v. *Warnakulasuriya*, 61 N.L.R. 189, where he referred to *Martin Silva* v. *Kanapathipillai* (*supra*).

In the 61 N.L.R. case the original " intimation to the Court " by the police who produced the boat and asked for an order regarding its possession was that " there was a dispute between the parties claiming ownership of the boat ". The police did not report that the boat was " alleged or suspected to have been stolen . . . ". In short, the seizure of the boat was not under the circumstances referred to in section 419.

No one will dispute the proposition that a criminal Court cannot assume civil jurisdiction. Recently I had occasion to remark that parties cannot, even by agreement, confer civil jurisdiction on a criminal Court : Application for revision in M.C. Colombo, cases Nos. 29426/B and 33359/B—S.C. No. 33/64 with application No. 524/63 ; S.C. minutes of 20th February, 1964.*

But the legislature has by section 419 conferred jurisdiction on the Magistrate to " order as he thinks fit . . . the delivery of *such property*, (*i.e.*, . . . alleged or suspected to have been stolen . . .) to the person entitled to the possession thereof . . . ". In the exercise of this jurisdiction he is given the power to decide as to who is entitled to the possession of such *property*. In order to decide it, he must first make investigation. In exercising that power given him by section 419, he is not deciding a civil dispute, but only the right of possession in respect of property referred to therein.

In *Lakshmichand Rajmal* v. *Gopikisan Balmukund* (*supra*), Beaumont, C.J., who, too, was later elevated to membership of the Judicial Committee of the Privy Council, with whom Macklin, J., agreed, said : " Under section 523 (our section 419) what the Magistrate has to consider is, who is entitled to the possession of property which has been seized by the police. Where it is proved that the person from whose possession the property was seized came by it dishonestly, the Magistrate may have to consider the questions of title in order to determine the best right to possession ".

In *Vaiyapuri Chetty* v. *Sinniah Chetty* (*supra*), a decision under section 517 (our section 413), at page 18 : " It may, therefore, seem that the simple rule should be that if no crime is made out the Magistrate should return the property to the

* 66 N.L.R. 23

person from whom it was taken. But the rule is just too simple. Suppose, to take a common example, the accused person whom the Magistrate acquits, has pleaded that the property was foisted upon him [as in *William* v. *Silva* (*supra*)]. There would then be no sense in the Magistrate telling him to keep it. Other instances can, no doubt, be imagined, but, except in these special cases, the Magistrate should return the property to the person from whom it was taken. The same rule is laid down in *Srinivasamurti* v. *Narasinhalu Naidu*, 50 Madras 916, in almost identical terms on page 919. It should be returned to the person from whom it was seized, unless there are special circumstances which would render such a course unjustifiable. "

The phrase " as he thinks fit " in section 419 gives the Magistrate discretion. He should exercise such discretion judicially. In the absence of anything to show the title to the property, it should be ordered to be delivered to the person in whose possession it was when seized by the police. This Court will not interfere with the judicial discretion exercised by the Magistrate if it appears that he had applied his mind as to who was entitled to possession and come to a conclusion on the materials placed before him.

Are there such special circumstances in this case and/or did Thambirajah come by this car dishonestly ?

Recent possession of the stolen car would raise the presumption—rebuttable, no doubt—that Thambirajah was either the thief or that he received it knowing or having reason to believe that it was stolen property—that he came by the car dishonestly. This is further evidenced by the fact that the true number plates were concealed under false ones.

Sugathapala, the registered owner of the car, was entitled to its possession. Possession of a car can be transferred only in a special way. Notice of transfer signed by the vendor and vendee should be forwarded to the Registrar of Motor Vehicles. If, as was submitted by Thambirajah's Counsel to the Magistrate, Sugathapala's agents had sold the car to him, he wouid have insisted on Sugathapala himself signing the transfer form.

The above two questions should, therefore, be answered in the affirmative.

For these reasons, I am of opinion that Sugathapala had " the best right of possession ". Therefore, I set aside the order made by the learned Magistrate and direct him to have the car delivered to Sugathapala.

Appeal allowed.

Present : **T. S. Fernando, J.**

K. S. ARUMUGAM *vs.* C. G. D. CAROLIS

S.C. No. 244 *of* 1961—*C.R. Colombo*, 80058.

Argued on : September 29, 1964.
Decided on : October 14, 1964.

Rent Restriction (*Amendment*) *Act, No.* 10 *of* 1961, *section* 13 (1) (*c*)—*Meaning of the expression* " *wanton damage* ".

Held : (1) That the expression "wanton damage" in section 13 (1) (*c*) of the Rent Restriction (Amendment) Act, No. 10 of 1961, means purposeless damage of the kind which irresponsible schoolboys and soldiers of an invading army have been known to cause on certain occasions.

(2) That the damage caused in the present case was, in fact, reckless and purposeless and would come within the meaning of the expression "wanton damage".

Case referred to : *Clarke* v. *Hoggins*, (1862) 11 C.B. (N.S.), at pp. 551-52 ; 142 Eng. Rep., at p. 912.

M. Tiruchelvam, Q.C., with *S. Sharvananda* and *Mark Fernando*, for the defendant-appellant.

K. N. Choksy, for the plaintiff-respondent.

T. S. FERNANDO, J.

The only question arising at this stage in this action for ejectment instituted by a landlord against his tenant is whether certain damage to the premises let which the learned Commissioner of Requests has found was caused by the tenant is wanton damage within the meaning of that expression occurring in section 13 (1) (*c*) of the Rent Restriction (Amendment) Act, No. 10 of 1961.

According to the findings of the Commissioner, the tenant has partitoned the entire ground floor of the premises in such a manner as to make it impossible for any heavy articles of furniture to be taken up the staircase of the premises. Although the premises had been let to the tenant, he does not appear to have lived there himself. From the manner of partitioning it would appear that a number of other persons have been living in the premises, possibly put in there by the tenant himself. The landlord requested the tenant to quit by the end of April, 1961, and it was conceded by the tenant that he himself came into personal occupation of these premises only on 10th June, 1961. He could not bring in his furniture through the front entrance because of the manner—already referred to—of the partitioning of the ground floor. He, therefore, climbed to the roof of the lavatory, then got on to the roof of the main building, and took in through an upstair window a number of articles of furniture hauled up to the roof with the aid of a ladder. Workmen had to get on to the roof and move about thereon to manoeuvre the entry of the furniture through the window. A lorry load of furniture appears to have been so taken in. Included in this lorry load were big boxes and a wardrobe. In the result about 250 tiles of the roof were broken and some rafters and two beams had also to be replaced. The replacement of the damage cost the landlord a sum of Rs. 265/-. The rent of the premises was Rs. 69.40 a month.

The word " *wanton* " in the expression " *wanton damage* " in the context in which it appears in the Rent Restriction Act should be given its ordinary meaning. According to the Oxford English Dictionary, the word " *wanton* " (adjective) literally means " Undisciplined ". One of the meanings of the word " *wanton* " (verb) is " to deal carelessly or wastefully (with property, resources) ". I was referred by counsel to the meaning of the adverb " *wantonly* " as " not having a reasonable cause " to be found in Stroud's Judicial Dictionary. I find that the reference is taken from a judgment of Willes, J., in *Clarke* v. *Hoggins*, (1862) 11 C.B. (N.S.), at pp. 551-52 ; 142 Eng. Rep., at p. 912. That learned judge was there interpreting a penal statute and he held that the mere fact of a man being instructed to deliver papers at a house of a third person was no answer to a complaint charging him with having " wilfully and *wantonly* " disturbed the party and his family by very violently knocking and ringing at the door at an unreasonable hour in the night. I do not think the citation is of much assistance in interpreting the adjective *wanton* in the statute we are here concerned with. In the context in which we find it in the Rent Restriction Act, I think, the word means " purposeless ", and the expression " wanton damage " means purposeless damage of the kind which irresponsible school boys and soldiers of an invading army have been known to cause on certain occasions.

To partition a house in such a way that the doors thereof cannot be put to one of their ordinary uses and, having done so, to take a large quantity of heavy articles of furniture over the roof through an upstair window causing not inconsiderable damage to the roof was, to my mind, to put the roof to irresponsible use. Notwithstanding that the tenant achieved his purpose of taking the furniture into the house, the damage caused was reckless and purposeless. It was, in my opinion, wanton damage.

I dismiss the appeal with costs.

Appeal dismissed.

Privy Council Appeal, No. 42 *of* 1962.

Present : **Lord Cohen, Lord Morris of Borth-Y-Gest, Lord Hudson, Lord Guest.**

THE UNIVERSITY COUNCIL OF THE VIDYODAYA UNIVERSITY OF CEYLON AND OTHERS *vs.* LINUS SILVA

From
THE SUPREME COURT OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DELIVERED THE 5TH NOVEMBER, 1964.

Master and servant—Summary termination of service by master—Whether remedy by way of a writ of certiorari available to servant.

Vidyodaya University and Vidyalankara University Act, No. 45 *of* 1958, *sections* 17, 18, 33, 61, 62—*Dismissal of teacher at Vidyodaya University—Whether duty lay on University Council to "act judicially" and give him an opportunity of being heard before such dismissal—Availability of remedy of certiorari to such teacher.*

The respondent was a duly appointed Lecturer in the Department of Economics of the Vidyodaya University and was subsequently promoted to the post of Professor and Head of the Department of Economics and Business Administration. The appellants were at the material time members of the University Council of the said University.

The University is a corporation established by the Vidyodaya University and Vidyalankara University Act, No. 45 of 1958. Section 17 of the Act provides that the University Council shall be the executive body of the University. Section 18 gives the Council power " to appoint officers . . ., and to suspend or dismiss any officer or teacher on the ground of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfiit to be an officer or teacher of the University ". The respondent's appointment as a teacher at the University was terminated by a unanimous resolution of the Council. He thereupon made an application to the Supreme Court for writs of certiorari and mandamus to quash the order of the Council and to direct the respondents as members of the Council to recognize him as Professor and Head of the Department of Economics and Business Administration. He alleged : (1) that one member of the Council, who was present and participated in the meeting of the Council at which his appointment was terminated, was biased against him ; (2) that the members of the Council acted in violation of the rules of natural justice by (*a*) failing to disclose the nature of the accusations made against him and (*b*) by not affording him an opportunity of being heard in his defence.

Held : That inasmuch as the respondent had no other status or position than that of an employee or servant of the University, he could not invoke the remedy by way of writ of certiorari when the University terminated his employment summarily.

Per THE JUDICIAL COMMITTEE—" The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari. If the master wrongfully ends the contract then the servant can pursue a claim for damages. "

Cases referred to : *Ridge* v. *Baldwin*, (1964) A.C. 40 ; (1963) 2 A.E.R. 67
Francis v. *The Municipal Councillors of Kuala Lumpur*, (1962) 1 W.L.R. 1411; (1962) 3 A.E.R. 633
Barber v. *Manchester Regional Hospital Board*, (1958) 1 W.L.R. 181; (1958) 1 A.E.R. 322; 102 Sol. Jo. 140.

Distinguished : *Vine* v. *National Dock Labour Board*, (1957) A.C. 488; (1956) 3 A.E.R. 939; (1957) 2 W.L.R. 106
Fisher v. *Jackson*, (1891) 2 Ch. 84; 64 L.T. 782; 7 T.L.R. 358; 60 L.J. Ch. 482
Suriyawansa v. *The Local Government Service Commission*, (1947) 48 N.L.R. 433; XXXV C.L.W. 36
Abeygunasekera v. *Local Government Service Commission*, (1949) 51 N.L.R. 8.

The judgment of the Supreme Court is reported in LXII C.L.W. 1.

Dingle Foot, Q.C., with Dick Taverne and M. I. Hamavi Haniffa for the appellant.

J. G. Le Quesne, Q.C., with Gerald Davies for the respondent.

LORD MORRIS OF BORTH-Y-GEST

In order to decide the issues which are raised in this appeal it is necessary to consider the nature of the position which the respondent held in the Vidyodaya University. He had a teaching appointment in that University. At a meeting of the Council of the University it was unanimously resolved to terminate his appointment. He thereupon petitioned the Supreme Court to grant a mandate of a writ of certiorari to quash the " order " of the Council. His petition was based upon the contention that in terminating his appointment the University Council were bound to " act judicially " and should, therefore, have given him an opportunity to be heard after being made aware of the grounds upon which the termination of his appointment was to be considered. The Supreme Court directed " that the order of the University Council of 4th July, 1961, terminating the petitioner's appointment as from that day be quashed ". On appeal from the judgment of the Supreme Court it has been submitted that the relationship between the University and the respondent was that of master and servant, and that the contract of employment was terminated by the University, and that in those circumstances it was not competent for the Supreme Court to issue a mandate of a writ of certiorari. In effect it was contended that the proceedings were entirely misconceived and that even if, contrary to the appellants' contention, the respondent had any ground of complaint it could be raised only in an action and not by seeking the remedy of certiorari.

The law is well settled that if, where there is an ordinary contractual relationship of master and servant, the master terminates the contract the servant cannot obtain an order of certiorari. If the master rightfully ends the contract there can be no complaint ; if the master wrongfully ends the contract then the servant can pursue a claim for damages.

A recent statement of principle is to be found in *Ridge* v. *Baldwin*, (1964) A.C. 40. In his speech in that case Lord Reid, at page 65, said :—

> " The law regarding master and servant is not in doubt. There cannot be specific performance of a contract of service, and the master can terminate the contract with his servant at any time and for any reason or for none. But if he does so in a manner not warranted by the contract he must pay damages for breach of contract. So the question in a pure case of master and servant does not at all depend on whether the master has heard the servant in his own defence ; it depends on whether the facts emerging at the trial prove breach of contract. But this kind of case can resemble dismissal from an office where the body employing the man is under some statutory or other restriction as to the kind of contract which it can make with its servants, or the grounds on which it can dismiss them. The present case does not fall within this class because a chief constable is not the servant of the watch committee or indeed of anyone else."

To a similar effect were the words of Viscount Kilmuir, L.C., in his speech in *Vine* v. *National Dock Labour Board*, (1957) A.C. 488. Vine was a registered dock labourer who as such was employed under a scheme embodied in an order made under a section of the Dock Workers (Regulation of Employment) Act, 1946. He was invalidly dismissed. Because this was so his name had not been validly removed from the register of Dock Workers and he continued to be in the employ of the National Board. At page 500, Lord Kilmuir said :

> " This is an entirely different situation from the ordinary master and servant case ; there, if the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated albeit in breach of contract. Here, the removal of the plaintiff's name from the register being, in law, a nullity, he continued to have the right to be treated as a registered dock worker with all the benefits which, by statute, that status conferred on him. It is, therefore, right that, with the background of this scheme, the Court should declare his rights."

In the same case Lord Keith (at page 507) said :—

> " This is not a straightforward relationship of master and servant. Normally, and apart from the intervention of statute, there would never be a nullity in terminating an ordinary contract of master and servant. Dismissal might be in breach of contract and so unlawful but could only sound in damages."

The House of Lords approved the dissenting judgment which had been given by Jenkins, L.J., in the Court of Appeal. In the course of his judgment Jenkins, L.J., said, [(1956) 1 Q.B., at page 674] :—" But in the ordinary case of master and servant the repudiation or the wrongful dismissal puts an end to the contract and the contract having been wrongfully put an end to a claim for damages arises. It is necessarily a claim for damages and nothing more. The nature of the bargain is such that it can be nothing more ". See also the judgment of Their Lordships' Board in *Francis* v. *The Municipal Councillors of Kuala Lumpur*, (1962) 1 W.L.R. 1411.

It becomes important to consider, therefore, whether the respondent had any other position or status than that of an employee or servant of the University. The Vidyodaya University is a Corporation established by the Vidyodaya University and Vidyalankara University Act, No. 45 of 1958, which was assented to on the 19th December, 1958. The University has power (*see* section 5 of the Act) to institute Professorships, Lectureships and any other posts or offices which may be required and to make appointments thereto. The Vice-Chancellor (*see* section 11) is a whole time officer of the University and is the principal executive and academic officer of the University ; he holds office for a term of five years but he may be re-appointed. The Authorities of the University (*see* section 13) are the Court, the Council, the Senate, the Faculties, the General Board of Studies and Research, and such other bodies as may be prescribed by Statute as Authorities of the University.

Section 17 of the Act relates to the Council. Its provisions are as follows :—

" 17. (1) The University Council shall be the executive body of the University.

(2) The Council shall consist of the following persons :—

(*a*) The *ex-officio* members who shall be—

(i) the Vice-Chancellor,
(ii) the Director of Education, and
(iii) the Dean of the Faculties.

(*b*) Other members who shall be—

(i) three members appointed by the Chancellor,
(ii) two members elected by the Court from among its own body,
(iii) two members elected by the Senate from among its own body, and
(iv) in the case of the Vidyodaya University of Ceylon five members elected by the Vidyadhara Sabha from among its own body, and in the case of the Vidyalankara University of Ceylon five members elected by the Vidyalankara Sabha from among its own body.

(3) Members of the Council other than *ex-officio* members shall hold office for a period of three years :

Provided that the members of the Council elected under the provisions of sub-paragraphs (ii) and (iii) of paragraph (*b*) of sub-section (2) shall retain their membership so long only within the said period of three years as they continue to be members of the body which elected them.

(4) The quorum for a meeting of the Council shall be prescribed by Statute."

Section 18 defines the powers and duties of the Council : some of these call for mention :—

" 18. Subject to the provisions of this Act and of the Statutes, Regulations and Rules, the Council shall have and perform the following powers and duties :—

. . . . . .

(*d*) after consideration of the recommendations of the Senate, and subject to ratification by the Court, but without prejudice to anything done by the Council before such ratification,—

(i) to institute, abolish, or suspend Professorships, Lectureships, and other teaching posts, and
(ii) to determine the qualifications and emoluments of teachers ;

(*e*) to appoint officers whose appointment is not otherwise provided for, and to suspend or dismiss any officer or teacher on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University ;

(*f*) to appoint, and to suspend, dismiss or otherwise punish persons in the employ of the University other than officers and teachers " ;

It is provided by section 31 that every appointment to a post of Professor or Lecturer in the University is to be made by the Council after considering the recommendation of a Board of Selection and by section 32 it is provided that every appointment to a post of teacher other than that of Professor or Lecturer is to be made by the Council after considering the recommendation of a Selection Committee.

Section 33 is in the following terms :—

" 33. (1) Every appointment of a teacher, Registrar or Librarian shall be upon an agreement in writing between the Corporation and such teacher, Registrar or Librarian. Such agreement shall—

(*a*) in the case of experienced persons who have already gained distinction in their subjects, be for such period and on such terms as the Council may resolve, and

(*b*) in other cases, be for a probationary period of three years which may be extended by the Council by resolution for a further period not exceeding one year, if the Council thinks fit.

(2) In the case of agreements entered into by the Corporation under sub-section (1) (*b*), any renewal thereof upon the expiration of the probationary period shall be expressed to be and remain in force, subject to the reservations hereinafter referred to, until the teacher, Registrar or Librarian appointed thereby has completed his sixtieth year, or, if he completes his sixtieth year in

the course of an academic year, until the last day of such academic year, and in any such agreement there shall be expressly reserved—

(*a*) a right for the Corporation to annul the agreement on any ground on which it shall be lawful for the Council, under the provisions of section 18 (*e*), to dismiss a teacher, Registrar or Librarian ; and

(*b*) a right for the teacher, Registrar or Librarian to terminate the agreement at any time upon three months' notice in writing to the Vice-Chancellor."

By the Interpretation Section (section 61) " officer " means the Vice-Chancellor, the Registrar, the Dean of any Faculty, the Librarian, or the holder of any office created by Statute and " teacher " includes Professor, Lecturer and any other person imparting instruction in the University and who is in receipt of an annual salary, or, in the case of a Bhikkhu, an allowance.

The first Vice-Chancellor of the University had power (*see* section 62) to make such appointments as he might think necessary for the purpose of bringing the University into being and for such purpose to exercise any power which the Act conferred on any Authority of the University. Pursuant to this power the Vice-Chancellor by letter dated the 15th May, 1959, appointed the respondent to " the post of Lecturer, Grade I, in the Department of Economics ". The letter was in the following terms :—

" 15th May, 1959.

LINUS DE SILVA, ESQRE.

Dear Sir,

POST OF LECTURER—
DEPARTMENT OF ECONOMICS

With reference to the discussion you had with my Administrative Assistant, I am pleased to appoint you to the post of Lecturer, Grade I, in the Department of Economics of this University. You will continue to be the Head of the Department and will represent it at the various University bodies.

The scale of salary attached to the post is Rs. 8,800/- to Rs. 13,200/-.

Please acknowledge receipt of this letter.

DHARMASASTRONNATIKAMI,
Vice-Chancellor."

On the 1st September, 1960, the Vice-Chancellor wrote to the respondent in the following terms :—

" VIDYODAYA UNIVERSITY OF CEYLON,
Colombo 10,
1st Sept., 1960.

LINUS SILVA, ESQ.,
Head of the Dept. of Economics,
Colombo.

POST OF PROFESSOR AND HEAD OF THE DEPT. OF ECONOMICS & BUSINESS ADMINISTRATION.

In pursuance of the decision of the Council to establish a Department of Business Administration in order to widen the scope of the Department of Economics, I am pleased to promote you to the Post of Professor and Head of the Department of Economics and Business Administration with effect from the 1st October, 1960. The salary scale attached to the post is Rs. 15,000/- 4 of Rs. 600/- and 4 of Rs. 900/- Rs. 21,000/-. You will be entitled to cost of living, special living, and rent allowances according to Government Rates. You will continue to be a contributor to the University Provident Fund.

This promotion is, however, subject to the passage of the University Budget for 1960/61.

Please acknowledge receipt of this letter. I shall be glad if you will please undertake the reorganisation of the Departments immediately so that the two Departments will commence academic work from the beginning of the Third Academic Year.

(Sgd.) DHARMASASTRONNATIKAMI,
Vice-Chancellor."

By letter dated the 2nd September, 1960, the respondent accepted the appointment.

On the 4th July, 1961, the Vice-Chancellor sent a letter to the respondent terminating his appointment. The letter was in the following terms :—

" VIDYODAYA UNIVERSITY OF CEYLON,
Colombo 10,
4th July, 1961.

MR. LINUS SILVA,
P.O. Box 1342,
Colombo 1.

Dear Sir,

TERMINATION OF APPOINTMENT

You are hereby informed that the Council at its meeting held on the 4th of July, 1961, has unanimously resolved to terminate your appointment in the University as from today.

The Council has also decided to pay a sum equivalent to three months' salary less whatever amounts are due from you. The total now due is Rs. 1,151.15, as shown in the Schedule hereunder.

I am hereby conveying to you the decision of the Council. I enclose the cheque No. D/9 207613 for Rs. 3,346.15 (Three thousand three hundred and forty-six Rupees and Cents Fifteen only) ; being the balance due to you in terms of the decision of the Council.

Any books, answer scripts or other property of the University now in your custody should be returned by you.

(Sgd.) DHARMASASTRONNATIKAMI,
Vice-Chancellor.

Schedule referred to :—

Allowance as Head of Department since appointment as Professor, Oct., '60 to June, '61	Rs.	900.00
Cost of Telegrams, paid from Petty Cash	,,	5.65
Due on account of sale of Publications..	,,	10.00
Lectures delivered by Mr. K. T. R. de Silva in Feb., 1961	,,	235.50
TOTAL DUE ..	Rs.	1,151.15 "

The respondent thereupon made application to the Supreme Court of Ceylon by Petition dated the 8th August, 1961. He sought mandates in the nature of writs of certiorari and mandamus to quash the order of the Council and to direct the members of the Council (whom he made respondents to his Petition) to recognise him as Professor and Head of the Department of Economics and Business Administration. In his Petition and in his Affidavit he stated that one member of the Council who was present at and participated in the meeting of the Council of the 4th July was biased against him and that the decision was, therefore, wrongful and illegal and that the order of the Council was made " maliciously, unlawfully and for reasons extraneous to those contained in section 18E " of the Act. He further submitted that the Council in ordering his dismissal in terms of section 18E of the Act " acted wrongfully and unlawfully and in violation of the rules of natural justice by not making me aware of the nature of the accusations against me and also by not affording me an opportunity of being heard in my defence. "

In the statement of objections of the members of the Council it was submitted that the application was misconceived in that the Council was not a judicial or quasi-judicial body but was the executive body responsible for the administration of the University which did not maintain a record and did not make orders capable of being reviewed or questioned by means of a writ of certiorari and that a decision to terminate an employment could not be reviewed by way of certiorari. It was further submitted that it was not a fit case for the exercise of a discretion to grant either certiorari or mandamus.

In an Affidavit of the Vice-Chancellor it was stated that there was a form of agreement for use on the appointment of teachers in the University and it was stated that the respondent had been given a draft agreement in the usual form in order that he should sign it but that he had failed and neglected to sign it. The paragraphs in the form of agreement included the following :—

" 1. The Professor agrees diligently and faithfully to perform such duties as the Vidyodaya University may require him to undertake in accordance with the Act and the Statutes, Acts and Regulations made thereunder and shall obey the lawful orders of the Vice-Chancellor."

" 4. (i) The Professor may terminate this agreement by giving to the Vice-Chancellor three months' notice in writing ending at the end of a term.

(ii) If the Professor terminates this agreement otherwise than in accordance with this agreement, the Vidyodaya University may not be bound to pay him any salary to which he would otherwise have become entitled.

5. The appointment shall continue subject to this agreement until the end of the session after the Professor completes his fifty-fifth year but may by resolution of Council be extended for a further period until the Professor attains his sixtieth year.

6. The Vidyodaya University may annul this agreement on any ground on which it may be lawful for the Council, under the provisions of section 18 of the Act to dismiss a teacher provided that the terms of that paragraph are complied with.

7. The Professor shall, as long as he is employed by the Vidyodaya University and has not completed his fifty-fifth year contribute to the Vidyodaya University Provident Fund in accordance with Part VIII of the Act."

In an Affidavit in reply the respondent denied that any draft agreement was sent to him and stated his belief that no form of agreement was in existence at any material time.

At their meeting on the 4th July the Council had before them a memorandum prepared by the Registrar and also various other documents but it

is common ground that the respondent was not shown these and was not told the nature of the accusations against him and was not given an opportunity of being heard in his own defence. In a joint Affidavit it was stated by a number of members of the Council who were present on the 4th July that they were satisfied that the respondent's conduct was such that he was unfit to continue in the employment of the University and that they were satisfied that the best interests of the University would be served by the termination of the respondent's appointment. They emphatically denied that their action was in any way actuated by malice or that it was not within the powers and duties imposed by section 18 (*e*) of the Act.

Their Lordships have in no way been concerned to consider the matters referred to in the various Affidavits in reference to the conduct of the respondent. The sole issue raised in the appeal is whether it was appropriate and competent for the Court to issue a mandate in the nature of a writ of certiorari. In the Supreme Court the appellants submitted that even if it were competent for the Court to proceed to quash the " order " of the University Council there were various reasons why the Court should not so proceed. Thus, for example, it was submitted that the appellant had acquiesced in the discontinuance of his services. The submissions here referred to were, however, not advanced before Their Lordships' Board.

On behalf of the respondent it has not at any time been suggested that less than two-thirds of the members of the Council concurred in the decision reached.

In his judgment in the Supreme Court the learned Judge (T. S. Fernando, J.) recorded that learned Counsel appearing for the appellants admitted that the respondent was not informed of the accusations against him and was not afforded any opportunity of defending himself against them but had contended that those circumstances were of no relevance because the Council were not acting in a judicial or quasi-judicial capacity but purely in an administrative capacity. The learned Judge said :—

> "Learned counsel for the petitioner, while not disputing that in deciding whether the petitioner was unfit to be a teacher of the University the Council acts in an administrative capacity argued that in making that administrative decision as to unfitness the relevant law required the Council to ascertain the existence of certain facts objectively, and that in the ascertainment of these facts the Council was required to act judicially. It can hardly be doubted that, if in the process of arriving at a decision as to unfitness of the petitioner to remain as a teacher the Council is throughout acting in an administrative capacity, there is no room for the requirement of the observance of the rules of natural justice. The application, therefore, turns on the question whether at any stage in arriving at the administrative or subjective decision as to unfitness the Council is required to consider certain matters judicially. If so, the Council would be amenable to *certiorari*. If not, this application must fail."

After referring to various authorities the learned Judge came to the conclusion that the Council was " under a duty to act judicially at the stage of ascertaining objectively the facts as to capacity or misconduct " and that as they had not acted judicially (in the sense of giving a hearing after notifying the grounds of complaint) the respondent was entitled to succeed. The sole issue involved in the appeal is whether there was as a matter of obligation a duty in the Council to give the respondent an opportunity to be heard and a duty to do all that in law is denoted by the words " act judicially ".

Certain of the authorities referred to by the learned Judge were cases dealing with other relationships than that of master and servant and Their Lordships do not find it necessary to discuss those cases in detail. Some of them were referred to in the speeches in the House of Lords in *Ridge* v. *Baldwin* (*supra*). The case of *Vine* v. *National Dock Labour Board* (*supra*) depended upon the special position of Dock Workers under the Dock Workers (Regulation of Employment) Act, 1946, and the Regulations which were made. As Lord Kilmuir, L.C., said there was " an entirely different situation " from the ordinary master and servant case ; and as Lord Keith said there was not a " straightforward relationship " of master and servant.

Under the Dock Workers (Regulation of Employment) Order S.R. & O., 1947, No. 1189, dock workers are in the employment of the National Dock Labour Board (*see* Clause 8 (2) of the Scheme) but are then allocated (*see* Clause 4) to work for individual employers. There were, however, certain statutory limitations on the power of dismissal (*see* Clauses 16, 17 and 18 of the Scheme).

Vine was allocated work with a stevedoring company but failed to report to them. There was a complaint lodged with the National Dock Labour Board. The complaint was heard by a disciplinary committee appointed by the local dock labour board. They upheld the complaint and, purporting to act under Clause 16 of the

Order, gave Vine notice to terminate his employment with the National Dock Labour Board. He appealed to a tribunal set up under the scheme. The appeal was dismissed. He then brought an action claiming damages and claiming a declaration that his purported dismissal was illegal, ultra vires and void. It was held that his dismissal was invalid inasmuch as the local labour board had no power under the scheme to delegate their disciplinary powers to a disciplinary committee. The decision of the disciplinary committee was therefore a nullity. The House of Lords held that in the circumstances of the case and having regard to the background of the scheme it was proper that that the Court should declare the plaintiff's rights. His name had not been validly removed from the register and he continued to be in employ of the National Board.

In that case therefore there was a statutory scheme which gave a number of rights and imposed a number of obligations going far beyond any ordinary contract of service and, in his judgment in the Court of Appeal, Jenkins, L.J., having examined the scheme said :—" In the face of those provisions, to my mind, it becomes plain that no analogy to this case can be found in the case of master and servant. "

No case was cited to Their Lordships in which an order of certiorari had been made directing the quashing of an " order " of dismissal of a servant and Their Lordships do not consider that support for the respondent's contentions is to be derived from the case of *Fisher* v. *Jackson*, (1891) 2 Ch. 84, upon which reliance was placed. It was rather a special case. A deed of trust establishing an endowed school provided that the master of the school should be appointed by the vicars of three specified parishes and power was given to the three vicars to remove the master for certain specified causes. The plaintiff was appointed master of the school in April, 1890, and in December, 1890, two of the vicars served on him a notice of dismissal signed by themselves which stated certain reasons for his dismissal. No meeting of the vicars had been summoned to consider the question of the plaintiff's dismissal and he had not had any opportunity of being heard in his defence. There was no evidence that the third vicar had been consulted. The Court granted an injunction restraining the defendants from removing him from his office until after the holding of a meeting of the vicars in accordance with the terms of the Deed of Trust and until he should have had an opportunity of being heard at such meeting. That case was referred to in the House of Lords in *Ridge* v. *Baldwin* (*supra*) and was treated (*see* page 67) as a case where the plaintiff was the holder of an office.

In a straightforward case where a master employs a servant the latter is not regarded as the holder of an office and if the contract is terminated there are ordinarily no questions affecting status or involving property rights. It becomes necessary therefore, to consider whether in the present case there are any features which suggest a relationship other than that of master and servant. It was submitted on behalf of the respondent, firstly, that if someone has the power to determine what the rights of an individual are to be then a duty to act judicially arises simply from the nature of the power, and secondly, that where the power is a power to dismiss from an office (and it was contended that the respondent could be said to be the holder of an office) and to dismiss not at discretion but by reason of misconduct then there is a duty to act judicially. In Their Lordships' opinion the first of these submissions is too wide and cannot be accepted. The second calls for an examination of the position which the respondent occupied having regard to the facts concerning his appointment and having regard to the provisions of the Act. It was contended that the respondent had certain statutory rights and that certiorari could be granted in order to enforce them and in order to ensure obedience to the provisions of the Act.

It appears to be common ground that the respondent did not sign the form of agreement which was referred to in his Affidavit by the Vice-Chancellor. The respondent was undoubtedly a " teacher ". Was his appointment within the scope of section 33 (1) (*a*) or was it within section 33 (1) (*b*) ? There may not be adequate evidence to enable a conclusion to be reached as to this or as to whether the appointment could have been terminated by the giving of some specific period of notice. No such notice was however given. What took place was that the respondent was dismissed in purported reliance upon the power of dismissal reposed in the Council by section 18 (*e*) of the Act. The provisions of that section make a distinction between an " officer or teacher " [*see* section 18 (*e*)] and " persons in the employ of the University other than officers and teachers " [*see* section 18 (*f*)]. In regard to persons within the latter grouping the ordinary law of master and servant would apply. An officer or teacher, on the other hand, may be suspended

or dismissed " on the grounds of incapacity or conduct which, in the opinion of not less than two-thirds of the members of the Council, renders him unfit to be an officer or teacher of the University ". These are solemn powers with which the Council is entrusted. It may be assumed having regard to the composition of the Council that the legislature had confidence that the powers would be exercised with a full sense of responsibility and with a desire to do what was right and fair. In many situations doubtless the Council would wish, quite apart from any question as to any obligation, to give an opportunity to anyone whose capacity or conduct was in question to offer explanation or justification. It is not for Their Lordships to say whether or not that course would have been desirable or helpful in the present case. The limited and rather narrow question for Their Lordships is whether there was an obligation to take the course of acting judicially.

Though the groups of " officers and teachers " are both liable under and within section 18 (*e*) to be dismissed or suspended by the Council it does not follow that the relationship towards the University is the same in the case of both groups. Thus, for example, it may be that the Vice-Chancellor or some other " officer " is in a different position from that of a " teacher ". Their Lordships do not have to decide that question or to express any opinion in regard to it. Nor does the definition of an " officer " which is contained in section 61 necessarily and of itself bring it about that for the purposes now being considered an " officer " is not within the ordinary relationship of master and servant. It is to be observed further that there is no provision in the Act giving a right to be heard nor any provision as to any right of appeal to any other body. The present case is not one, therefore, in which there has been a failure to comply with statutory provisions.

The circumstances in the present case differ from those which existed in the cases of *Suriyawansa* v. *The Local Government Service Commission*, 48 N.L.R. 433 and *Abeyagunasekera* v. *Local Government Service Commission*, 51 N. L. R. 8 and Their Lordships do not find it necessary to discuss those cases ; there were Rules which laid down the manner in which charges against someone in the service of the Commission were to be examined.

It seems to Their Lordships that a " teacher " who has an appointment with the University is in the ordinary legal sense a servant of the University unless it be that section 18 (*e*) gives him some altered position.

The circumstance that the University was established by statute and is regulated by the statutory enactments contained in the Act does not involve that contracts of employment which are made with teachers and which are subject to the provisions of section 18 (*e*) are other than ordinary contracts of master and servant. Comparison may be made with the case of *Barber* v. *Manchester Regional Hospital Board*, (1958) 1 W.L.R. 181. In his judgment in that case Barry, J. (at p. 196) said : " Here despite the strong statutory flavour attaching to the plaintiff's contract I have reached the conclusion that in essence it was an ordinary contract between master and servant and nothing more. "

It may be said that if those or some of those who are " officers " of the University have a special position which takes them out of the category of employed servants, as to which matter Their Lordships express no opinion, and if as a result the Council would in their case have to act judicially in exercising the power of dismissal under section 18 (*e*), it would seem strange if it were different in the case of " teachers " who are linked with " officers " in section 18 (*e*). Any difference would, however, only be a consequence of the application of the law to the facts. The present case depends, therefore, upon ascertaining the status of the respondent. He invoked a procedure which is not available where a master summarily terminates a servant's employment and for the reasons which have been expressed Their Lordships do not consider that the respondent was shown to be in any special position or to be other than a servant.

Their Lordships will, therefore, humbly advise Her Majesty that the appeal should be allowed and that the Order of the Supreme Court dated the 22nd November, 1961, be set aside. The respondent must pay the costs before the Supreme Court and the costs of the appeal.

The respondent must have his costs of the consent petition to enable the appeal to be set down for hearing without further Orders of Revivor and there will be a set-off.

Appeal allowed.

Present : **Sri Skanda Rajah, J., and Alles, J.**

E. D. A. JAYASURIYA *vs.* A. S. J. SENEVIRATNE*

S.C. 403 (*F*)/'62—*D.C. Kalutara, L.* 595.

Argued and decided on : 25th September, 1964.
Reasons delivered on : 2nd October, 1964.

Deeds—Rectification of deed on ground of clerical error and mistake—No such mistake proved—Whether deed of rectification operative to rectify earlier deed.

Partition Act, (*Cap.* 69), *section* 67—*Invalidity of deed executed pending partition—Rectification of such void deed not possible in any event.*

Held : (1) That rectification of a deed could only be had if there was a mutual mistake. Where there was no such mistake a purported subsequent deed of rectification could not operate to rectify the earlier deed.

(2) That in any event where the earlier deed is void in terms of section 67 of the Partition Act, as it had been executed pending a partition action, it could not be rectified by a deed of rectification. It is only a valid deed that can be so rectified.

J. A. L. Cooray with *D. A. E. Thevarapperuma*, for the plaintiff-appellant.

A. C. Gooneratne with *N. S. A. Goonetilleke*, for the defendant-respondent.

SRI SKANDA RAJAH, J.

We now set down the reasons for the order we made on 25th September, 1964, allowing the appeal.

By deed No. 64 of 4th March, 1961, (D 3) Don Philip Jayasuriya gifted to the defendant his share in the land called Attuwawatte. D 3 was registered on 6th March, 1961, when it would have been apparent that,

(1) the last deed registered in that folio was the title deed referred to in D 3 ; and

(2) on 8th February, 1961, the lis in a partition action filed by the donor himself was registered ; therefore,

(3) D 3 was void and could convey no title to the defendant as it was executed *pendente lite* (*v.* section 67 of the Partition Act, Cap. 69).

On 6th March, 1961, itself deed No. 65 (D 1) was attested. It purports to be a deed of rectification granted by the donor to the defendant. It is recited in D 1 that owing to clerical error and mistake the schedule in D 3 referred to Attuwawatte instead of Bogahawatte and the schedule should be read as Bogahawatte. The schedule in D 1 was completely different from that in D 3 not only in regard to the name and the boundaries but also regarding the number of the premises, the extent and the title.

Thereafter, by deed No. 583 of 10th April, 1961, (P 1) Don Philip Jayasuriya gifted his share in the land Bogahawatte referred to in the schedule in D 1 to the plaintiff.

The learned District Judge's finding is : " In the present case the evidence shows that at the time of the execution of the deed of gift D 3 the defendant was aware that the land that the donor Jayasuriya was gifting to her was Attuwawatte and not Bogahawatte and the donor was himself quite clear in his mind that what he was gifting on D 3 was Attuwawatte and not Bogahawatte ".

This negatives the recital in D 1 that there was clerical error and mistake in D 3. One cannot resist the conclusion that it was the discovery that D 3 was executed pending a partition action in respect of Attuwawatte and, therefore, void that led to the execution of D 1.

Rectification would imply that a mistake had been made and it should be put right. But, there was no mistake at all in D 3 that needed rectifica-

* For Sinhala translation, see Sinhala section, Vol. 9 part 2, p. 7

tion. Rectification can only be had if there is a mutual mistake. That situation was not present in the deed D 3. Therefore, D 1 cannot operate to rectify D 3.

As pointed out earlier, D 3 is void. A deed which is void cannot be rectified by a deed of rectification. Therefore, D 1 cannot operate to convey title to Bogahawatte, for there is in reality no other conveyance for it to be read with. Only a mistake in a valid deed that can be rectified.

Therefore, the judgment and decree under appeal were set aside. Decree will be entered as prayed for in the plaint but damages being restricted to what was agreed upon on 26th June, 1962. Plaintiff will be entitled to costs both here and below.

ALLES, J.
I agree.

Appeal allowed.

Present : **Sirimane, J., and Manicavasagar, J.**

PERERA *vs.* PERERA *et al.**

S.C. 73/'63 (*Inty.*)—*D.C. Negombo, Case No.* 762/*M.*

Argued and decided on : 20th November, 1964.

Civil Procedure Code, section 217 (*g*)—*Claim only for declaration of a right—Whether plaintiff entitled to a writ of possession under decree which only declares his right.*

The plaintiffs sued for declaration of their right to draw water from a well and for damages for being deprived of that right, but did not claim any other relief. They obtained judgment and sought to obtain a writ of possession.

Held : That the decree was one which fell within the ambit of section 217 (*g*) of the Civil Procedure Code and that the plaintiffs were, therefore, not entitled to ask for a writ of possession.

S. Sharvananda with *V. Nanayakkara*, for the defendant-appellant.

J. A. L. Cooray with *Bala Nadarajah*, for the plaintiffs-respondents.

SIRIMANE, J.

The plaintiffs-respondents filed this action for a declaration that they were entitled to draw water from a well and for a sum of Rs. 250/- as damages for being deprived of that right. The plaint also contained a prayer for restraining the defendant-appellant from polluting the water during the pendency of the action. This had been refused by the learned District Judge. When the case came up for trial there was only a prayer for the declaration of a right to draw water and to recover damages in a sum of Rs. 250/-.

The plaintiffs-respondents obtained a decree and thereafter moved for a writ of possession which was allowed. The appeal is from that order. Counsel for plaintiffs-respondents point out that the right to draw water carries with it the right to use a footpath. That may be so, but the question to be decided is, whether the plaintiffs-respondents, having failed to ask for anything more than a declaration of their right and damages, can now ask for a writ of possession.

In my opinion, the decree entered in this case is one which falls within the ambit of section 217 (*g*) of the Civil Procedure Code and the plaintiffs-respondents are, therefore, not entitled to ask for a writ of possession.

The appeal is allowed with costs.

MANICAVASAGAR, J.
I agree.

Appeal allowed.

* For Sinhala translation, see Sinhala section, Vol. 9 Part 2, p. 8.

Present : **Basnayake, C.J., and H. N. G. Fernando, J.**

MOHOTA *vs.* SARANA & ANOTHER

S.C. No. 624—*D.C. Kurunegala, No.* 7541.

Argued and decided on : March 25, 1960.

Judgment—Judgment written by a Judge after his transfer to another Court—Validity thereof—Civil Procedure Code, section 184.

Appeal—Finding of fact by trial Judge—Case dependent on oral testimony—Judgment delivered long after conclusion of trial—Weight to be attached to such findings of fact by appellate Court.

Held : (1) That a judgment written and signed by a Judge who at that time was not qualified to function as a Judge of the District Court in which the trial was held is not a valid judgment in terms of section 184 of the Civil Procedure Code.

(2) That where the decision in a case depends on oral testimony, the appellate Court cannot place much reliance on findings of fact made in a judgment delivered two years after the conclusion of the trial.

D. S. Jayawickreme, Q.C., with *N. Sinnetamby*, for the plaintiff-appellant.

H. W. Jayewardene, Q.C., with *W. Wickremasinghe* and *L. C. Seneviratne*, for the defendants-respondents.

BASNAYAKE, C.J.

In this case learned counsel for the appellant submits that Mr. Kariapper, the judge who heard the evidence, had been transferred to another Court, and that on the date he wrote and signed the judgment he was not a Judge of the District Court of Kurunegala. Therefore, the judgment has not been written and pronounced in accordance with the provisions of section 184 of the Civil Procedure Code. Although the judgment was pronounced by Mr. Kariapper's successor the judgment had been written at a time when Mr. Kariapper was not qualified to function as a Judge of the District Court of Kurunegala. A further matter which has been brought to our notice is that the trial in this case was concluded on 2nd November, 1955, and that the judgment was pronounced two years later, on 7th November, 1957. Learned counsel for the appellant submits that the decision of the case depended on oral testimony and that such a long delay in pronouncing judgment is prejudicial to the parties. There is force in the submission of counsel. The impression created by the witnesses on the Judge is bound to have faded after such a long delay. The appellate Court cannot place the same reliance on findings of fact made after such a long delay as they would on such findings in a judgment delivered promptly after the hearing. We deplore the fact that there should have been such a long delay in delivering judgment. In these circumstances we have no other course open except to quash all the proceedings on and after the 9th January, 1953, and direct that the case be sent back for re-trial. We accordingly quash all the proceedings on and after the 9th January, 1953, and direct that the case be sent back to the lower Court for a fresh trial on the pleadings already filed by the parties.

There will be no costs of this appeal.

H. N. G. FERNANDO, J.

I agree.

Set aside and sent back.

Privy Council Appeal, No. 17 *of* 1961.

Present : **Lord Jenkins, Lord Morris of Borth-Y-Gest and Lord Guest.**

TAY KHENG HONG *vs.* HEAP ENG MOH STEAMSHIP CO., LTD.

From
THE COURT OF APPEAL OF THE STATE OF SINGAPORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 14TH JANUARY, 1964.

Appeal—Finding by the trial judge on questions of fact—Extent of burden on a party who seeks to displace a finding of fact by the trial judge—Effect of inadmissible evidence not objected to at trial.

The appellant was given judgment in the High Court of Singapore. The trial judge accepted his evidence as that given by an honest and straightforward witness, and rejected the respondent's evidence as that given by a deliberate liar. The Court of Appeal of Singapore found that the trial judge's view of the appellant's evidence could not be accepted having regard to certain inferences from documents which they considered supported the evidence of the respondent.

Held : That the inferences to be drawn from these documents were not of sufficient strength to reinstate the respondent as a reliable witness, in view of the trial judge's deliberate refusal to accept the respondent's evidence as truthful ; and that the respondent had not discharged the heavy burden cast on him to displace the conclusion formed by the trial judge on a question of fact.

Held further : That although the mere failure by a party to object to inadmissible evidence cannot convert such evidence into legal evidence, a party may by his conduct at the trial be precluded from later objecting to such evidence.

Per THE JUDICIAL COMMITTEE—" The principles upon which an appellate Court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas* v. *Thomas*, (1947) A.C. 484, at page 487 : ' (i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion ; (ii) The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence ; (iii) The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court '."

" The conclusion arrived at by the Court of Appeal was to a large extent based on the view that they were entitled to intefere with the trial Judge's findings because these were inferences drawn from the facts rather than the findings of specific facts. An appellate tribunal will more readily interfere with the trial Judge's decision on the former than on the latter (see *Benmax* v. *Austin Motor Co., Ltd.*, (1955) A.C. 370). In so far, however, as the trial Judge's decision was based on the credibility of the appellant and Goh Leh this was the finding of a specific fact that an agreement was reached between them, thus depending on the evaluation of their evidence as witnesses. "

Cases referred to : *Watt or Thomas* v. *Thomas*, (1947) A.C. 484 ; (1947) 1 A.E.R. 582
Clarke v. *Edinburgh & District Tramways Co., Ltd.*, (1919) S.C. (H.L.) 35
Benmax v. *Austin Motor Co., Ltd.*, (1955) A.C. 370 ; (1955) 1 A.E.R. 326
Jacker v. *International Cable Co., Ltd.*, (1888) 5 T.L.R. 13.
Gilbert v. *Endean*, (1878) 9 Ch. D. 259 ; 39 L.T. 404

LORD GUEST

This appeal is from a decision of the Court of Appeal of the State of Singapore allowing the respondents' appeal against the judgment of Ambrose, J., in the High Court of Singapore awarding the appellant £30,711.60 by way of demurrage under a contract for the transhipment of cargoes of rice.

The appellant's evidence was that on 18th October, 1958, he and Goh Leh acting on behalf of the respondents had made a verbal contract whereby the appellant was to act as the lighterage contractor of the respondents. Rates of payment for the appellant's services had been agreed, including demurrage of 60 cents per ton. It is common ground between the parties that the appellant transhipped cargoes of rice from two steamers, the "Planet" and the "Incharran" which had arrived at Singapore on 21st October and 27th November, 1958, respectively. These cargoes were ultimately bound for Indonesia on coastal steamers. The respondents paid the appellant £71,128.71 for lighterage, towing and stevedoring of these two cargoes.

Goh Leh gave evidence for the respondents denying that he had ever discussed rates and conditions of lighterage with the appellant. The respondents denied that any contract for lighterage had ever been made between them and the appellant.

In this state of the evidence Ambrose, J., accepted the appellant's evidence that he and Goh Leh had made an agreement in the terms narrated. He saw no reason to disbelieve the appellant who was subjected to a severe cross-examination. The appellant, he said, impressed him as a simple, honest and straightforward witness. The trial Judge said he was satisfied that Goh Leh told a deliberate lie in saying he had no discussions with the appellant.

The Court of Appeal found that there was a considerable volume of independent evidence both documentary and oral which was consistent only with the respondent's case. Buttrose, J., who delivered the judgment of the Court considered that Ambrose, J., was plainly wrong in accepting the appellant's evidence.

It is apparent from an examination of the evidence that there is a direct conflict of evidence between the appellant and Goh Leh. The possibility of a misunderstanding is eliminated by the fact that Goh Leh denied having any discussion with the appellant about lighterage. One or other of these two witnesses must be lying. The trial Judge who saw and heard the witnesses has reached the conclusion that it was Goh Leh who was untruthful and that the appellant was telling the truth.

There is a heavy onus on a party who seeks to displace the conclusion formed by the trial Judge on questions of fact. The principles upon which an appellate Court should act in reviewing the decision of a judge of first instance were stated by Lord Thankerton in *Watt or Thomas* v. *Thomas*, (1947) A.C. 484, at page 487 : "(i) Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate Court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion ; (ii) The appellate Court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence ; (iii) The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court". Later His Lordship quoted with approval a passage from the speech of Lord Shaw in *Clarke* v. *Edinburgh & District Tramways Co., Ltd.*, (1919) S.C. (H.L.) 35, at page 37 : "In my opinion, the duty of an appellate Court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, Am I—who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case—in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong ? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment". Before the Court of Appeal in Singapore was entitled to reject the trial Judge's estimate of the credibility of the appellant and Goh Leh they would have to be satisfied that the trial Judge's view was plainly wrong and that any advantage

which he enjoyed by having seen and heard the witnesses was not sufficient to explain his conclusion.

Before dealing with the judgment of the Court of Appeal it is necessary to dispose of a point, not taken so far as appears from the judgment before the Court of Appeal, but argued by the respondent's counsel before the Board. He suggested that by reason of inconsistencies and discrepancies in the appellant's evidence the trial Judge ought not to have accepted him as a credible witness. Without elaborating the criticisms made by respondents' counsel it is sufficient to say that Their Lordships are not satisfied that any of these inconsistencies were of a material character or that taken either individually or collectively they indicated that the appellant was not an honest witness. The appellant's memory on occasions may have been at fault, but any minor inconsistencies there may have been appeared on the face of the appellant's evidence and these are the very matters which the trial Judge must have taken into account when assessing the credibility of the witness's evidence.

Before returning to the judgment of the Court of Appeal it will be convenient to narrate the appellant's and respondents' evidence in some detail.

The appellant is a lighterage contractor in Singapore having been on his own from May, 1958. He was introduced to the respondents by one Khoo and he met Goh Leh, the respondents' shipping manager, on a date which was probably October 18th, 1958. He gave a detailed account of the discussion as to lighterage during which terms were agreed between him and Goh Leh for lighterage charges including 60 cents per ton for demurrage. Khoo and an Indonesian were present at the meeting. The first vessel the "Planet", came in the 21st October, 1958, and he carried out the work from 22nd October on this vessel and subsequently on the "Incharran" which arrived on 27th November. Demurrage arose on these cargoes because ships were not available for Indonesia when the incoming ships arrived. He drew up the bills for demurrage and signed them and left them at the respondents' office, one in November, 1958, one in January, 1959, and one in March, 1959. These bills have not been paid. The accounts for lighterage on the "Planet" and the "Incharran" have been paid by the respondents. The bills on the "Planet" were all paid by 12th December and the bills on the "Incharran" by 16th December, 1958. On two of the bills, one for the "Planet" and one for the "Incharran" rendered by the appellant to the respondents for lighterage charges appear the words "Free Demurrage". The appellant who did not understand English explained that he asked Khoo to give the appellant's typist the draft to type. The trial Judge accepted the typist's evidence that she typed these words on the bills on the instructions of Khoo and that the appellant was not aware that these words were on the bills when he signed them. Khoo who occupied an office in the same building as the appellant was paid a commission of 20 cents per ton in consideration of his recommendation of the appellant to the respondents.

There was no corroboration of the appellant's evidence of the agreement between him and Goh Leh. Other lighterage contractors, however, gave evidence that they have never heard of free demurrage and that demurrage was bound to arise on such lighterage contracts.

In his evidence for the respondent Goh Leh, their shipping manager, said that his company only handled the husbanding in relation to the "Planet" and the "Incharran". The stevedoring, lighterage and on carriage were in the hands of Khoo of the South Sumatra Shipping Co. on behalf of the Indonesia Sugar Line and the Indonesia Samudra Line. He produced a memorandum undated and unsigned which he said contained the instructions given to him by his managing director, Mr. Haalebos. These were that his company were to act as husbanding agents for the "Planet", and that Khoo had arranged with Mr. Aus Suriatna of the Indonesia Samudera Line and the Indonesia Sugar Line for the discharge of rice into lighters and for the on carriage. He denied taking part in any discussions with the appellant or Khoo or Suriatna in regard to lighterage charges. He first met the appellant on 21st October on a motor launch proceeding to the "Planet". He says that Khoo gave him to understand that there would be no demurrage charges and he further stated that the demurrage bills were never presented to him for payment by the appellant. Khoo was making a profit of £4 per ton on the on freight of £18. The first he knew of these bills was when they were rendered to the respondents by the appellant's solicitor in January, 1959.

The Court of Appeal found that the trial Judge's view of the appellant's evidence could not be accepted having regard to certain documents which they considered supported the evidence of Goh Leh and were consistent only with the respondents' case.

A number of the documents to which the Court of Appeal referred were said to be documents which were inadmissible in evidence as being hearsay but which had been tendered by the respondents at the trial without objection by the appellant. The appellant's counsel submitted to the Board that as these documents were inadmissible as hearsay evidence, the Court of Appeal were not entitled to place any reliance on them. Reference was made to *Jacker* v. *International Cable Company, Limited*, (1888) 5 T.L.R. 13. The mere failure of a party to object to evidence tendered cannot convert inadmissible evidence into legal evidence, but a party may by his conduct at the trial be precluded from objecting to such evidence (*Gilbert* v. *Endean*, (1878) 9 Ch. D. 259). In the circumstances of the present case Their Lordships feel unable to say that the documents to which objection was taken before the Board were not material to which the Court of Appeal was entitled to have regard.

The documents particularly relied upon the Court of Appeal were the undated and unsigned memorandum by Mr. Haalebos to Goh Leh already referred to and a letter dated 29th October, 1958, from the respondents to Aus Suriatna in which the respondents part in the handling of the "Planet" was confirmed. These documents afforded some support to the respondents' case that a contract had been made between the respondents and the owners in regard to the handling of the cargo, but they are by no means inconsistent with a contract having been made between Goh Leh for the respondents and the appellant or with some private arrangement between Goh Leh and the appellant on the terms stated by the latter.

The Court of Appeal also placed reliance on the evidence of Mr. Lambert and Tan Yat Chin as being consistent only with the respondents' case. Mr. Lambert of the Barretto Shipping & Trading Co. said he was approached by Mr. Aus Suriatna of the Indonesia Sugar Line and the Indonesia Samudera Line to handle the cargo of rice from the "Planet". However, owing to the fact that his company was not put in funds by the owners before the arrival of the "Planet" nothing came of the matter. This had no possible bearing on any subsequent arrangement between the appellant and Goh Leh. Tan Yat Chin who worked for the appellant as a clerk on the "Planet" and "Incharran" spoke to having discussed tally clerks on board the ship with Goh Leh. He rendered his bills to and was paid by the respondents. So far from this witness's evidence being consistent only with the respondents' case, it appears to Their Lordships to give some support to the appellant's evidence that Goh Leh did concern himself with the lighterage contract contrary to his own evidence.

Respondents' counsel presented an elaborate reconstruction of the history of the case in which Khoo prominently figured as the villain of the piece. He was not disposed to argue that Khoo did not make a contract with the appellant for the lighterage in regard to both vessels, a contract which, he conceded, probably included demurrage. He proceeded, however, to suggest that Khoo had deceived the respondents into thinking that the contract was "Free Demurrage" by having these words typed in after the appellant had signed the bills. His motive in doing so is not clear, but it may have been to retain his profit on the on carriage. If this, however, is what happened and Khoo was acting on behalf of the owners in employing the appellant it is difficult to understand why the appellant did not sue Khoo and/or the owners. He would have had a stronger case against these defendants as he would have obtained corroboration from the bill heads which included the names of the owners. The explanation suggested for his not suing the owners that the companies were registered in Indonesia is not convincing. This reconstruction of the history is, however, in the absence of Khoo from the witness-box pure speculation. No criticism can certainly be made of the appellant for his failure to call Khoo as a witness, if he had as suggested swindled the appellant.

A number of difficulties undoubtedly arise on the presentation of the case both from the appellant's and the respondents' point of view. It may be that the whole truth has not been disclosed. But in that state of affairs with two possible explanations, the safest course is in Their Lordships' view to accept the trial Judge's estimate of the credibility of the two witnesses, the appellant and Goh Leh. If this be the correct view, it becomes necessary to consider how far the appellant's evidence will carry him.

The conclusion arrived at by the Court of Appeal was to a large extent based on the view that they were entitled to interfere with the trial Judge's findings because these were inferences drawn from the facts rather than the findings of specific facts. An appellate tribunal will more readily interfere with the trial Judge's decision on the former than on the latter (see *Benmax* v. *Austin Motor Co., Ltd.*, (1955) A.C. 370). In so far, however, as the trial Judge's decision was based on the credibility of the appellant and Goh Leh this was the finding of a specific fact that an agreement was reached between them, thus depending on the evaluation of their evidence as witnesses. It may be that the Court of Appeal's acceptance of the evidence of Goh Leh depended on inferences from documents, but these inferences are not sufficient in Their Lordships' opinion to reinstate Goh Leh as a reliable witness in face of the trial Judge's deliberate refusal to accept this evidence as truthful. If the appellant is an honest witness whose evidence must be accepted, this would establish that a contract was made between him and Goh Leh for lighterage charges which included demurrage. Respondents' counsel conceded that in these circumstances the personal liability of the respondents was involved.

Upon the whole matter Their Lordships have reached the conclusion that there was not sufficient material before the Court of Appeal to entitle them to reject the result arrived at by the trial Judge.

They will accordingly report to the Head of Malaysia their opinion that the appeal should be allowed with costs in the Court of Appeal and the judgment of Ambrose, J., dated 28th May, 1960, restored, and that the respondents should pay the costs of this appeal. The appellant having been granted leave to prosecute his appeal *in forma pauperis* these costs should be taxed upon the pauper scale.

Appeal allowed

Present : **T. S. Fernando, Sri Skanda Rajah and G. P. A. Silva, JJ.**

U. K. SURANIMALA *vs.* GRACE PERERA

In the matter of an Application for Revision in case No. 57189 *of the District Court of Colombo.*
S.C. Application, No. 533/63.

Argued and decided on : September 16, 1964.
Reasons delivered on : September 30, 1964.

Civil Procedure—Action by contractor for recovery of damages against owner on building contract—Order made on motion before trial to deliver possession of house built to owner—Has the court power to make such order?

Courts Ordinance, section 36*—Lack of jurisdiction—Not an error, defect or irregularity within the meaning of this section—Proceedings void, not voidable.*

Revision—Appealable order—Application filed within appealable period—Necessity for speedier remedy.

Held : (1) That where an action is brought for the recovery of damages, the decree or order which the Court can pass after judgment is one in respect of payment of money only. The Court has no jurisdiction to grant any other relief in the absence of any prayer in the answer for such relief.

(2) That section 36 of the Courts Ordinance which bars the reversal of an order notwithstanding error, defect or irregularity, can have no application in a case where the Court has no jurisdiction to make the order until that jurisdiction had been invoked in permitted legal form.

(3) That where an order complained of is an appealable one, but instead of an appeal being preferred, an application in revision is made within the appealable period, the Supreme Court would act in revision, if in the circumstances, a speedier remedy is called for.

Cases referred to : *Gurdeo Singh* v. *Chandrikah Singh*, (1908) I.L.R. 36, Cal. 193.
Alagappa Chetty v. *Arumugam Chetty*, (1920) 2 C. L. Rec. 202.
Odiris Appuhamy v. *Caroline Nona*, (1964) 66 N.L.R. 241.
Bribery Commissioner v. *Ranasinghe*, (1964) LXVI C.L.W. 1.
In re : Hettiaratchillage Ranasinghe, (1964) LXVI C.L.W. 104.
S.C. 111/1962 ; C.R. Colombo, 82243 ; S.C. Minutes of 17.1.1964.

T. K. Curtis, for the plaintiff-petitioner.

G. T. Samarawickreme, for the defendant-respondent.

T. S. FERNANDO, J.

The plaintiff, on 27th September, 1962, instituted in the District Court of Colombo an action which was numbered 57189/M seeking to recover from the defendant a sum of Rs. 7,017.60 alleged to be due to him in terms of a contract entered into between the parties for the building of a house for the defendant. The contract which was pleaded as part of the plaint contained, *inter alia*, the following condition :—

> " After all the works such as the fixing of door-shutters and window-shutters, painting, white-washing and samara-washing are completed all the balance money due should be paid and take delivery of the building."

The defendant, in her answer, alleged that the plaintiff had not completed the work to be done under the contract, had done some of the work in a defective manner and had become liable to pay damages to her, which damages could not be assessed without inspection by a competent architect. She, therefore, prayed for the issue by the Court of a commission to an architect to inspect and make a report on the work done by the plaintiff. She further prayed for an assessment by the Court of compensation (damages) due to her arising out of the delay by the plaintiff to hand over the house to her.

The District Court, on 17th July, 1963, made an order as follows :—" Defendant and her architect if necessary to inspect the premises on any week day ". The trial was fixed for 17th January, 1964. Before the date of trial, viz., on 19th November, 1963, the defendant by motion prayed that the Court do order the plaintiff to deliver possession of the house to her pending the trial. When this motion was submitted on behalf of the defendant to the plaintiff's proctor the latter endorsed thereon : " I object to the averments contained in this motion ". The matter of this motion was fixed for inquiry on 3rd December, 1963, on which day the plaintiff who appears to have been present in Court without his proctor objected to the handing over of the house. The learned District Judge, observing that the " possession of the house will not help him in any way ", made the undermentioned order :—

> " I, therefore, direct that the house be handed over to the defendant and the trial do proceed on 17th January, 1964.
>
> " If the plaintiff does not hand over possession the defendant can take out writ and take possession."

It is this order of 3rd December, 1963, that was brought up for consideration by this Court in the exercise of its revisionary power. The application in revision came up before us on account of disagreement between the two judges before whom it had been first argued.

It is reasonably plain that action No. 57189/M, being one for recovery of damages only, the decree or order the Court could ordinarily have passed after judgment would have been one in respect of payment of money only. Upon the suit instituted, no jurisdiction existed in the Court to order delivery of possession of the house which, according to the contract, remained in the plaintiff.

Learned Counsel for the defendant attempted to support the order of 3rd December on the ground that the District Court had essential jurisdiction, and that what had taken place was, at the worst, an irregular exercise of jurisdiction. He sought to invoke in aid of his argument certain dicta of the High Court of Calcutta in the case of *Gurdeo Singh* v. *Chandrikah Singh*, (1908) I.L.R. 36, Cal. 193, later quoted by Bertram, C.J., in *Alagappa Chetty* v. *Arumugam Chetty*, (1920) 2 Cey. Law Rec. 202. In the former of these two cases, Mookerjee, J., stated (*see* page 208) :—

> " To put the matter from another point of view, it is only when a Judge or Court has no jurisdiction over the subject-matter of the proceeding or action in which an order is made or a judgment rendered that such order or judgment is wholly void and that the maxim applies that consent cannot give jurisdiction ; in all other cases, this objection to the exercise of jurisdiction may be waived, and is waived when not taken at the time the exercise of the jurisdiction is first claimed."

I fail to see how the argument for the defendant can gain support from the judgment invoked when here the plaintiff has not merely not waived the objection to exercise of jurisdiction but has, in fact, objected thereto in writing. If the defendant was interested in obtaining possession of the house she should obviously have instituted a proper suit for that purpose or taken other steps available at law. Shock tactics, if the motion of 19th November, 1963, and the steps following thereon may be so described, have only resulted in delay and expense that might well have been avoided.

We were invited to refrain from disturbing the order for delivery of possession of the house on the ground that no prejudice had been caused to the substantial rights of the plaintiff. Section 36 of the Courts Ordinance which bars the reversal of an order notwithstanding error, defect or irregularity can, in our opinion, have no application in a case like the present where the Court had no jurisdiction to make the order until that jurisdiction had been invoked in permitted legal form.

It was finally urged that the order in question was an appealable one and, as no appeal was preferred, revision should not be allowed. This application in revision was presented to this Court on 13th December, 1963, *i.e.*, within ten days of the order. In certain circumstances revision can prove a speedier remedy than an appeal which today appears to take considerable time before it can be disposed of by this Court. We were of the view that this order was one that called for a speedy quashing.

I have indicated above the reasons for the order we made at the conclusion of the argument setting aside the order made by the District Court on 3rd December, 1963, and directing a return of the record to that Court so that it may now order the defendant-respondent to restore possession of the house to the plaintiff-petitioner.

The plaintiff-petitioner is entitled to the costs of his application to this Court.

G. P. A. Silva, J.
I agree.

Sri Skanda Rajah, J.

I have had the advantage of reading the reasons set down by my brother, Fernando. I now proceed to set down my reasons for the order that we made on 17th September, 1964.

This application came before us in consequence of disagreement between Tambiah, J., and Abeyesundere, J., as to the order that should be made. The former, who can claim considerable experience as a practitioner, was moved to describe the order of the District Judge as " savouring of a dictatorial order which our Courts have not in my experience ever made " and wanted to set it aside. I am in respectful agreement that this is a dictatorial order similar to others this very same judge has made and two of which were dealt with by this Court not long ago. They will be cited later.

This suit was instituted for the recovery of money alleged to be due to the plaintiff-petitioner in respect of a building erected by him for the defendant-respondent on a contract. The answer filed by the defendant-respondent did not alter the character of the suit. In particular, it did not contain a prayer that the plaintiff be ordered to deliver possession of the building to the defendant.

It would have been clear even to a tyro that this is a simple money suit. The jurisdiction of a Court, *i.e.*, its power and authority to hear and determine judicially a suit, depends on the allegations in the pleadings. It would also be obvious that the Court had jurisdiction regarding this suit only in respect of money claims and had no jurisdiction to make an order for delivery of possession of the house.

The case was set down for trial on 25th October, 1963, and re-fixed for 17th January, 1964. What happened between these two dates is the subject of this application. A typed motion dated 19th November, 1963, was filed by the defendant's proctor moving the Court to order the plaintiff to deliver possession of the house to the defendant pending trial. At the end of it was typed : " Received notice to be called on 22nd November, 1963 ". The plaintiff's proctor made the endorsement : " I object to the averments contained in this motion. "

The journal entry of 19th/22nd November, 1963, reflects this motion, the objection endorsed on it and the judge's order " notice plaintiff for 28th November, 1963 ". Notice was issued on 26th November, 1963. It was returned with the report dated 27th November, 1963, that it could not be served as plaintiff was out of Colombo. Thereupon, the office minuted :

" 28.XI.63 : Notice not served on defendant. Re-issue for 16.1.64."

(The word " defendant " was an obvious mistake for " plaintiff ").

The judge himself scored off the words. " Reissue for 16.1.64 " and made order : " Inquiry on 3.12.63 ".

The judge would not wait till the notice was served on the plaintiff. He was not concerned even with the principles of natural justice or the *audi alteram partem* rule.

On 3. 12. 63 the plaintiff happened to be present in person, though notice had not been served on him. He was not represented. The judge made the following order :—

> " The plaintiff has no witnesses and objects to the handing of the houses on the ground of recovery of his money. This is a frivolous objection. The house admittedly belongs to the defendant and the plaintiff has constructed it.
>
> " The defendant claims that the house is getting deteriorated for non-possession and she is asking for possession of the house.
>
> " The plaintiff's objection is merely to collect the money, which he can do so at the trial stage. Possession of the house will not help him in any way.
>
> " I, therefore direct that the house be handed over to the defendant immediately and the trial to proceed on 17th January, 1964. If the plaintiff does not hand over possession, the defendant can take out writ and take possession."

The plaintiff was not afforded an opportunity to be represented, nor was he asked if he wanted time to be represented. The judge proceeded to describe the plaintiff's objection as " frivolous ". It was for the defendant to satisfy the Court as to the legality of the application and to point to the provision, if any, under which the Court could act. The motion itself did not refer to any provision. Nor does the order of the judge indicate under what provision he was acting. The judge did not pause to ask himself why it was necessary for the plaintiff to produce witnesses to oppose this application. Speed, and not justice, appears to have been his only concern. " This Court must not decline to open its eyes to the truth ", in the words of the Privy Council in the *Bribery Commissioner* v. *Ranasinghe*, 66 C.L.W. 1 at 5, however unpalatable the truth may be.

I understood Mr. Samarawickreme to admit that the order in question was wrong ; but, he attempted to describe it as merely irregular—not illegal—and sought to bring it under the last sentence of section 36 of the Courts Ordinance :

> " The appellate jurisdiction of the Supreme Court shall be ordinarily exercised only at Colombo. Subject to the provisions in that behalf in the Criminal Procedure Code or any enactment amending the same contained, such jurisdiction shall extend to the correction of all errors, in fact, or in law which shall be committed by any Judge of the Supreme Court sitting alone as hereinafter provided ; to the correction of all errors, in fact, or in law which shall be committed by any District Court ; to the correction of all errors, in fact, or in law which shall be committed by any Court of Requests in any final judgment or any order having the effect of a final judgment ; and to the correction of all errors, in fact, or in law committed by any Magistrate's Court or by the Court of any Municipal Magistrate. *But no judgment, sentence, or order pronounced by any Court shall on appeal or revision be reversed, or amended on account of any error, defect, or irregularity which shall not have prejudiced the substantial rights of either party.*"

He did not, however, dispute the correctness of the proposition, " . . . that every act of a Court which lacks jurisdiction in the sense that it has no power to act at all is void and not merely voidable " : *per* Sri Skanda Rajah, J., in *Odiris Appuhamy* v. *Caroline Nona*, 66 N.L.R. 241, at 247. As pointed out earlier the Court had no jurisdiction to make an order directing the delivery of possession of the house. Such an order is, therefore, illegal. Therefore, Mr. Samarawickreme's submission is untenable.

Now I shall cite the two instances referred to earlier :—

1. *S.C.* 111/1962 ; *C.R. Colombo*, 82243 ; *S.C. Minutes of* 17.1.1964 :

In a tenancy action there was no issue as to whether the defendant, who was served with summons, had filed answer, was present in person and represented by counsel at the trial, was some person other than the plaintiff's tenant. This judge looked at the proxy, which was signed in a foreign language, proceeded to hold that the person present in Court was not the tenant, would not even permit the defendant's counsel to participate in the trial and entered judgment for the plaintiff. In appeal the plaintiff-respondent's counsel admitted that he could not support the judgment.

2. *Application S.C.* 226/1964 ; *D.C. Kandy D* 1610 ; *S.C. Minutes of* 9.7.1964. *

* 66 C.L.W. 104.

A witness for the defendant's wife gave false evidence in a matrimonial action and this judge made the following order : " I direct the police to take necessary action with regard to this witness who has given palpably false evidence in this case . . . Such conduct would not be tolerated by this Court. I, therefore, remand him, to be produced in the Magistrate's Court, till the police take the necessary action. "

This was an order remanding the witness for an indefinite period, *i.e.*, till the police completed their inquiries. What the law empowered him to do was to send the witness in custody to the Magistrate at or before the judge adjourned Court for the day or to take bail from the witness to appear before the Magistrate (v. section 835 (1) of the Civil Procedure Code). As the witness continued to be on remand he applied to this Court to have the order set aside. In the course of the order setting it aside, Tambiah, J., said that the procedure adopted by the judge cannot be supported and added, " It is a matter for regret that the learned District Judge should have made this order depriving a citizen of his liberty. It is a very serious matter ", and I remarked, " I regret to have to observe that this particular District Judge adopts procedures which are contrary to law. "

It is amazing that this judge, who should be presumed to have considerable experience in the original civil Courts, should have acted in the manner he did in this case.

Application allowed.

Present : **G. P. A. Silva, J.**

THE QUEEN *vs.* WELATANTIRIGE SUMANADASA BOTEJU*

S.C. No. 6/1964—*M.C. Matara*, 10278.

Argued and decided on : 3rd April, 1964.

Evidence—Trial by Jury—Bad character of accused transpiring in course of his cross-examination —Admissibility—Extent to which such evidence may influence the decision—Effect depends on facts and circumstances of each case—Evidence Ordinance, section 54.

On a charge of murder, the accused gave evidence stating that he accepted responsibility for the injuries on the deceased, which were of a serious nature, but that the incident started as a result of an attack by the deceased on him with hands, the deceased being admittedly a man who was physically much better built than the accused.

Crown Counsel, while cross-examining the accused, asked the following questions :—

" *Q.* You have already admitted that the deceased was a very huge man—a strong man ? *A.* Yes.

Q. When he assaulted you you must have been injured ? *A.* Yes, I sustained an injury on my head.

Q. You must have made a complaint to the Police ? *A.* Yes.

Q. Was there a case against the deceased ? *A.* No.

Q. So, you must have been quite angry that the deceased man had not been punished ? *A.* I was charged in that case."

Held : (1) That the effect of the last answer is both that the accused made a false statement to the Police and that he was, in fact, charged with presumably an attack upon the deceased, and as such it amounted to evidence of bad character of the accused.

(2) That, in the circumstances of this case, where the question for the jury was whether the accused launched an attack without any provocation or whether he attacked the deceased when he was himself attacked by him, it would be impossible to say that the jury would not be influenced by this evidence in considering the defence of the accused.

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*For Sinhala translation, see Sinhala section, Vol. 9 Part 3, p. 9.

Cases referred to : *King* v. *Jayawardene*, 51 N.L.R. 25
King v. *Piloris Fernando*, 47 N.L.R. 97
Rex v. *Firth*, 26 Criminal Appeal Reports 148 ; (1938) 3 A.E.R. 783
King v. *Kotalawala*, 42 N.L.R. 265 ; XXIV C.L.W. 47
Maxwell v. *Director of Public Prosecutions* 103 L.J.K.B. 501 ; 1935 A.C. 409 ; 151 L.T. 477

T. M. K. U. Seneviratne, C.C., for the Attorney-General.

George Rajapakse with *M. Z. Akbar* (assigned), for the defence.

G.P.A. SILVA, J.

In the course of the evidence of the accused in this case last evening, Crown Counsel, cross-examining the accused, asked him certain questions. The following were the questions :—

"*Q.* You have already admitted that the deceased was a very huge man—a strong man ?
A. Yes.

Q. When he assaulted you you must have been injured ?
A. Yes, I sustained an injury on my head.

Q. You must have made a complaint to the police ?
A. Yes.

Q. Was there a case against the deceased ?
A. No.

Q. So, you must have been quite angry that the deceased man had not been punished ?
A. I was charged in that case."

Crown Counsel, of course, anticipated an answer entirely different from what the accused gave to the last question ; he probably expected the answer that the deceased was charged, but quite contrary to expectations he got this answer that the accused was charged in that case.

I had the benefit of looking at the typescript of the shorthand notes only this morning, and I, therefore, asked for the views of Counsel for the Crown and Counsel for the defence in regard to this evidence, and Counsel for the defence has objected to the trial proceeding in view of the possible prejudice that this evidence can cause to the accused.

Counsel for the Crown has sought to justify it on the ground that this evidence would constitute motive and state of mind and would, therefore, be admissible under sections 8 and 14 of the Evidence Ordinance, even though it would tend to offend against the provisions of section 54 relating to bad character.

Crown Counsel has cited the case of *King* v. *Jayawardena*, reported in 51 New Law Reports, page 25 where it was held that under section 8 of the Evidence Ordinance, evidence can be led by the prosecution to prove a motive for any fact in issue or relevant fact, that under section 14 evidence of even a previous conviction can be given that will throw light on the motive or state of mind of an accused person with immediate reference to the particular occasion or matter.

When the evidence, in fact, came out, no objection was raised by Counsel for the defence to further proceedings being taken, but when I drew his attention this morning to this evidence, he has raised objections on that ground.

In a criminal case, even if Counsel for the defence does not raise any objection to a particular item of evidence, the duty is cast on the Court to see that the trial is based on proper, admissible and relevant evidence. It may be that in a particular case Counsel for the accused, having failed to appreciate the significance of any particular item of evidence, may not, object or, even while appreciating the significance of the evidence, may express his view that the trial can proceed. But even that would not absolve the Court of its duty to see that there is no improper admission of evidence in the case.

In a case reported in 47 New Law Reports, page 97, *King* v. *Piloris Fernando*, it was held that where in a criminal trial before a Judge and Jury, a prosecution witness, while being cross-examined by an undefended accused, voluntereed the evidence that the accused had been previously convicted for perjury, the evidence was inadmissible under section 54 of the Evidence Ordinance, and it was the duty of the trial Judge to have informed the accused, as he was undefended, that he had the right to apply for a fresh trial. In that case, the late Chief Justice, Sir Arthur Wijewardene, cited the case of *Rex* v. *Firth*, reported in 26 Criminal Appeal Reports, 148, where no less distinguished a Judge than the Lord Chief Justice Hewart made the following pronouncement :—

"It is not very profitable or satisfactory to enter on the sphere of enquiries with regard to the precise effect which may be produced on the mind of a Juror—and still less on the minds of a collection of Jurors—by a piece of evidence but the principle laid down by the Court is that, where an irregularity manifestly takes place then there ought to be an end of the trial in that form. It seems to us in a high degree dangerous to permit the trial to continue to its end where such an irregularity has occurred as that which here was inadvertently permitted."

It is a dictum with which I would, with respect, entirely agree.

In the case of *King* v. *Kotalawala*, reported in 42 New Law Reports, at page 265, a case of the Court of Criminal Appeal, it was held by Mr. Justice Moseley, S.P.J., that where questions as to the bad character of an accused person are put to witnesses it is the duty of the Judge to stop such questions himself without waiting for any objection from the prisoner's counsel, and where such a question is put by mischance, it is equally the clear duty of the Judge to direct the Jury to disregard it and not to let it influence their minds, where as a result of such a question a statement prejudicial to the accused is made by a witness, an application for a fresh trial should be allowed even where the Judge has warned the Jury that the objectionable evidence should be disregarded.

In this case, too, there was a citation of a passage from the case of *Maxwell* v. *Director of Public Prosecutions*, reported in 103, Law Journal, Kings Bench, page 501, as follows : "The effect of such a statement on the minds of a jury might be overwhelming and it is impossible to say in this case that the reception of this evidence was not the deciding factor which made the jury give their verdict".

Having these decisions in mind, I shall proceed to consider the evidence that has crept into the present case. It is immaterial whether the evidence comes from a prosecution witness or a defence witness or an accused ; it is immaterial whether the answer comes in response to a direct question by counsel for the defence or by Crown Counsel, or by the Foreman or by the Court, or whether the answer is volunteered where it was least expected. Once the evidence comes in, the Court has to give its serious consideration to the question whether there is a likelihood of prejudice being caused to the accused. Questions such as these have to be decided in relation to the facts and circumstances of a particular case. In this case the accused has given evidence to say that he accepts responsibility for the injuries, which are of a very serious nature, but he says that the incident started as a result of an attack by the deceased on him with hands, the deceased being admittedly a man who was physically much better built than the accused.

The crux of the question then for the jury would be whether the accused launched an attack without any provocation upon the deceased, or whether as the accused says, he attacked the deceased when he was himself assaulted by him.

In these circumstances, the area of dispute between the Prosecution and the Defence would be very narrow, and when the jury have to consider whether it was started by the accused or the deceased, the fact that they already have in evidence the previous case, where, although the accused says in the box that he was assaulted by the deceased, the Police, in fact, charged the accused and not the deceased, would, in my opinion, be a factor which it will be virtually impossible for the jury to obliterate from their minds in considering the defence of the accused.

In the particular circumstances of the case, therefore, even if in some other case I may not have considered this item of evidence as influencing an impartial consideration of the defence, I hold that the reception of this evidence would be fatal to the continuance of the trial. It is not possible to say exactly whether a jury—which means seven gentlemen of the jury—could all keep this particular item of evidence in an entirely different compartment of their mind when they come to finally decide the case. This is a mental process which it would be difficult even for a well-trained lawyer, and I, therefore, do not cast any aspersions on the jury when I say that they may be influenced by the fact that on a previous occasion, the accused, who says he was assaulted by the deceased, was, after a complaint made to the Police, in fact, the accused in the Magistrate's Court. If that is the position, I think that the significance of that answer, which means both that the accused made a false statement to the Police, and secondly, that

he was, in fact, charged with presumably an attack upon the deceased, created a situation which produced a combination of circumstances, contemplated by both the cases I have cited above, in which a re-trial should be ordered.

In these circumstances, I find no other alternative except to discharge the present jury and to order that the accused be tried before a new jury.

Fresh trial ordered.

Present : **Sri Skanda Rajah, J., and Manicavasagar, J.**

EDWARD *vs.* DHARMASENA*

S.C. 258 *of* 1963—*D.C.* (*Final*) *Kandy, L.* 7024.

Argued and decided on : December 2, 1964.

Landlord and tenant—Tenancy governed by Rent Restriction Act commencing on first of month—Legal requirement of three months' notice—Notice received by tenant on 30th August, 1962, to quit on or before 30th November, 1962—Sufficiency of notice.

Where a tenancy commenced on the first of a month and a three months' notice as required by the Rent Restriction Act was received by the tenant on 30th August, 1962, requesting him to quit on or before 30th November, 1962.

Held : (1) That the notice was valid in law.

(2) That a calendar month's notice given and received by the tenant before the date on which the monthly tenancy commences, to quit on the last day of the following month on which the monthly tenancy ends, is sufficient in law.

Not followed : *Abeywickrema* v. *Karunaratne*, LXIII C.L.W. 23.

C. R. Gunaratne, for the defendant-appellant.

Vernon Jonklaas, for the plaintiff-respondent.

SRI SKANDA RAJAH, J.

In this case the tenancy commenced on the first of a month and notice was received by the tenant on the 30th August, 1962, to quit " on or before the 30th November, 1962 ". Under the law applicable at that time to premises to which the Rent Control Act applied three months' notice had to be given.

Reliance is placed by the appellant on my judgment in *Abeywickrema* v. *Karunaratne*, 63 C.L.W. 23, in which I had held that a notice given on the 13th day of October, 1959, to take delivery of possession of the premises on the 30th November, 1959, was not sufficient notice as the tenancy began on the 1st day of the month, and, therefore, the landlord would have been entitled to take delivery only on the 1st day of December, 1959. I had there taken too restricted a view of the law.

I would interpret the notice in the present case to mean that the tenant could quit " at the end of 30th November, 1962 " : it was open to him to quit even before the 30th November, 1962, but he had the right in law to stay on till the midnight of the 30th. I would hold that the notice in this case is sufficient notice. The law in our view is that a calendar month's notice is sufficient notice in a month to month tenancy ; a calendar month's notice given and received by the tenant before the date on which the monthly tenancy commences, to quit on the last day of the following month on which the monthly tenancy ends is sufficient notice.

I, therefore, dismiss the appeal with costs.

MANICAVASAGAR, J.

I agree.

Appeal dismissed.

* For Sinhala translation, see Sinhala section, Vol. 9 part 3, p. 12

Present : **T. S. Fernando, J.**

THE SOLICITOR-GENERAL *vs.* M. P. DHARMASENA

S.C. No. 718 *of* 1964—*M.C. Kurunegala, No.* 21137.

Argued on : 14th October, 1964.
Decided on : 28th October, 1964.

Excise Ordinance, section 18—*Sale of arrack without a licence—Proof of possession of licence—Burden of proof—Evidence Ordinance, section* 106.

Where an accused person is charged with selling arrack without a licence from the Government Agent in contravention of section 18 of the Excise Ordinance, and the prosecution has led evidence of the sale of the arrack—

Held : That under section 106 of the Evidence Ordinance, the burden is on the accused person to prove that he was in possession of a valid licence.

Cases referred to : *The Mudaliyar, Pitigal Korale North* v. *Kiri Banda,* (1909) 12 N.L.R. 304 ; 5 A.C.R. 80 ; 1 Current L.R. 213
R. v. *Oliver,* (1943) 2 A.E.R. 800 ; 170 L.T. 110 ; (1944) K.B. 68 ; 113 L.J.K.B. 119
John v. *Humphreys,* (1955) 1 A.E.R. 793 ; (1955) 1 W.L.R. 325

V. S. A. Pullenayagam, Crown Counsel, for the appellant.

No appearance for the accused-respondent.

T. S. FERNANDO, J.

The accused-respondent was charged in the Magistrate's Court with selling arrack without a licence from the Government Agent in contravention of section 18 of the Excise Ordinance. After taking the evidence tendered by the prosecution, the learned Magistrate, without calling upon the accused for a defence, made an order discharging him. In the course of that order, the Magistrate stated as follows :—

> "The accused is charged for selling arrack without a licence. Nowhere in the evidence of the witnesses is there any statement to show that the accused had no licence. If the accused had a licence then he would be entitled to an acquittal. The prosecution must depend on the strength of its own case.
>
> The failure to produce any evidence that the accused had no licence, therefore, casts no burden on the accused to prove that he had a licence.
>
> The prosecution has to prove every material point in the charge. The fact that the accused had no licence is the very basis of the prosecution."

It is clear from a persual of the proceedings including the Magistrate's own order that the prosecution had closed its case. In those circumstances the Magistrate must have intended to acquit the accused, and it is a matter for regard that he did not say so but stated that he was discharging the accused.

Turning, however, to the question of the correctness of the order of acquittal, it is apparent that the learned Magistrate has seriously misdirected himself on the question of the burden of proof. This question arises daily in a large number of cases that come up for disposal in Magistrates' Courts. Indeed, the point is now so well settled that it is a matter for surprise that an experienced Magistrate appears to be unaware of the correct position at law.

Chapter IX of our Evidence Ordinance itself provides the answer to the question that is raised on this appeal. Section 106 enacts that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. Illustration (*b*) to that section deals with a situation analogous to that in the case that came up for decision before this Magistrate. Where *A* is charged with travelling on a railway without a ticket, the Evidence Ordinance there indicates that the burden of proving that *A* had a ticket is on him.

A similar point was settled over fifty years ago in our Court by a Bench of three Judges in the case of *The Mudaliyar, Pitigal Korale North* v. *Kiri Banda*, (1909) 12 N.L.R. 304. It was held there that, on a prosecution under section 20 of the Forest Ordinance, the burden of proving that the forest in which the offence was alleged to have been committed is " not included in a reserved or village forest " lay upon the accused. The Bench of three Judges held that the words " not included in a reserved or village forest " are in the nature of an exception within the meaning of section 105 of the Evidence Ordinance. Hutchinson, C.J., stated that these words are merely another way of saying " unless it is included in a reserved or village forest ". Grenier, A.J., stated that " once the Crown proves that a person has broken up the soil, or cleared, or set fire to . . . any forest, the onus is clearly on that person to justify his act, and claim immunity from it by proof that the land is included in a reserved or village forest. If he can produce a permit, or if he can show that the land is his private property, there will be an end to the prosecution. Such positive proof is directly in his power to adduce, and he ought to be able to adduce it instead of calling upon the prosecution to establish a negative ; and I think the words of section 105 threw the burden of proof on the person charged to show the existence of circumstances which would exonerate him from the legal consequences of his act. "

While the question before me can be disposed of by a reference to our own Evidence Ordinance, it is of some interest to note that even under the English law of evidence where, generally speaking, the burden of proof of a criminal charge lies upon the prosecution, the position is that there are some facts so peculiarly within the knowledge of the accused that the prosecution is not required to give even *prima facie* evidence on the point. *R.* v. *Oliver*, (1943) 2 A.E.R. 800, dealt with the case of a person charged with having sold sugar as a wholesaler without the necessary licence, in contravention of a Sugar (Control) Order made in pursuance of powers conferred by the Defence (General) Regulations. The Court of Criminal Appeal of England there held that the prosecution was under no necessity of giving *prima facie* evidence of the non-existence of a licence. The case of *R.* v. *Oliver* (*supra*) was applied by the Queen's Bench Division in the case of *John* v. *Humphreys*, (1955) 1 A.E.R. 793, which held that, where a person was charged with a contravention of section 4 (1) of the Road Traffic Act of 1930 which enacts that a person shall not drive a motor vehicle on a road unless he is the holder of a licence, the burden of proof that the defendant had a licence lay on him because that fact was peculiarly within his own knowledge, and in the absence of proof on his part that he had a licence the justices ought to have convicted. Whether it be in England or in Ceylon, where a person is charged with driving a motor vehicle on a highway without being the holder of a certificate of competence, it would be an intolerable situation for the prosecution to have to call evidence from a number of sources, all potential grantors of certificates of competence. Numerous other illustrations could be furnished to show the unreasonableness of the view that appears to have been upheld by the Magistrate from whose decision the present appeal has been taken.

The appeal is allowed for the reasons I have given above, and the order of 8th April, 1964, acquitting the accused is hereby set aside. In ordinary circumstances the case could have been remitted for the trial to be continued before the same Magistrate so that he may now call upon the accused for his defence and thereafter proceed according to law. The Magistrate who made the order appealed from has, however, been transferred to another Court, and it is not, therefore, expedient to direct that he should continue with the trial. In the special circumstances, the convenient course now to take is to direct that the accused be re-tried before the present Kurunegala Magistrate, and I accordingly so direct.

Appeal allowed.

Present : **Sri Skanda Rajah, J., and Sirimane, J.**

LAKDAWALLA *vs.* MURUGIAH

S.C. 99/'62 (*Inty.*)—*D.C. Colombo, No.* 52707/*M.*

Argued and decided on : 29th May, 1964.

Pleadings—Amendment of plaint—Action to recover money lent and advanced—Denial in answer—Amendment sought to plead that money lent not to defendant alone but to defendant and his son and that defendant agreed to repay entire sum—Is such amendment permissible—Alteration of character of action—Civil Procedure Code, section 46.

The plaintiff filed plaint on the basis that he had lent and advanced a sum of Rs. 5,010/75 to the defendant at the latter's request. The defendant filed answer denying that he at any time borrowed such a sum from the plaintiff. Thereafter the plaintiff filed an amended plaint in which he pleaded *inter alia* that he had lent to the defendant and his son various sums of money, which after accounts were looked into totalled Rs. 5,010/75. The plaintiff further averred that thereafter it had been agreed between the plaintiff and defendant that the said amount should be treated as a loan given by the plaintiff to the defendant on the date of such agreement. The defendant objected to such amendment but it was allowed by the trial Judge. The defendant appealed.

Held : (1) That where a plaintiff bases his claim on a specific legal relation alleged to exist between him and the defendant he should not be allowed to amend the plaint so as to base it on a different legal relation. This was what the plaintiff sought to do in this case.

(2) That the proposed amendment should not be allowed as it would have the effect of converting an action of one character into action of another and inconsistent character, thereby violating the proviso to section 46 of the Civil Procedure Code.

C. Ranganathan with *K. N. Choksy*, for the defendant-appellant.

No appearance for the plaintiff-respondent.

SRI SKANDA RAJAH, J.

The plaintiff filed plaint on 25th April, 1961, on the basis that he " lent and advanced to the defendant at his request on or about 31st March, 1960, the sum of Rs. 5,010.75, which sum the defendant undertook to pay the plaintiff-appellant".

The defendant filed answer on 8th September, 1961, and in paragraph 2 he stated " . . . the defendant specially denies that he at any time borrowed or received from the plaintiff, or that the plaintiff lent or advanced to the defendant at defendant's request or otherwise, in March, 1960, or at any time, the sum of Rs. 5,010.75 or any sum whatever . . . ". Thereafter on 29th May, 1962, the plaintiff filed amended plaint. In it he repeated paragraphs 1, 2 and 3 of the original plaint and added as paragraphs 3 (*a*), " Prior to the dates material to this action the plaintiff had lent various sums of money to the defendant and defendant's son, one M. C. Lakdawala. In March, 1960, accounts were looked into and it was found that the defendant and his son, the said M. C. Lakdawala, owed the plaintiff a sum of Rs. 5,010.75, on account of moneys lent by the plaintiff to them " and 3 (*b*) " On or about the 31st of March, 1960, the defendant took over the debt due from the defendant and his son and it was agreed between the plaintiff and the defendant that the said sum of Rs. 5,010.75 should be treated as a loan given by the plaintiff to the defendant on the said date. The defendant acknowledged the said loan by a writing dated 31st March, 1960 . . . ". It would be seen that the original action was on the basis of money lent and advanced to the defendant alone.

Proviso to section 46 of the Civil Procedure Code reads as follows :—" . . . no amendment shall be allowed which would have the effect of converting an action of one character into an action of another and inconsistent character ".

In spite of the defendant's objection the learned Additional District Judge permitted the amendment holding that it " does not alter the character of the action ". The defendant has appealed from this order.

To put it shortly :—

In the original plaint the plaintiff said, " On 31st March, 1960, I lent the defendant Rs. 5,010.75 ",

In the amended plaint he says, " Prior to 31st March, 1960, I lent the defendant monies amounting in all to Rs. X and to his son monies amounting in all to Rs. Y. Accounts were looked into in March, 1960, and it was found that Rs. X+ Rs. Y=Rs. 5,010.75. On 31st March, 1960, the defendant undertook to pay me the Rs. X due from him and to indemnify me in respect of Rs. Y due from his son. Now I want to recover from the defendant Rs. X+Rs. Y".

Illustrated as above it is patent that there are two causes of action set out in the proposed amendment which are different from the one set out in the original plaint. It would have the effect of converting an action of one character into an action of another and inconsistent character.

Where a plaintiff bases his claim on a specific legal relation alleged to exist between him and the defendant he should not be allowed to amend the plaint so as to base it on a different legal relation. This is what the plaintiff in this case seeks to do.

For these reasons we would allow the appeal with costs both here and in the Court below.

SIRIMANE, J.
I agree.

Appeal allowed.

Present : **Sansoni, J., and H. N. G. Fernando, J.**

STEPHEN & OTHERS *vs.* THE QUEEN

S.C. No. 60-63—*D.C. (Crim.) Kandy, No.* 739.

Argued and decided on : 11th November, 1963.

Evidence—Death of witness whose name is on back of indictment and who had given evidence in non-summary proceedings—How may his deposition be proved at the trial ?

Held : That, where a witness who has given evidence before the inquiring magistrate and whose name is on the back of the indictment dies before the trial, the correct procedure to produce the deposition of such witness is by calling the Chief Clerk of the Magistrate's Court or any officer of the District Court connected with the custody of the record of the non-summary proceedings to produce it.
A certified copy of the deposition should also be produced by the witness.

Followed : *King* v. *Kadirgamar*, (1940) 41 N.L.R. 534 ; XVIII C.L.W. 41.

Colvin R. de Silva with *S. D. Jayawardene*, for the 1st accused-appellant.

No appearance for the 2nd accused-appellant.

3rd and 4th accused-appellants in person.

P. Colin-Thome, C.C., for the Attorney-General.

SANSONI, J.

Mr. de Silva has brought to our notice an irregularity which has taken place in the course of the trial. A witness, Abeyewardena, whose name was on the back of the indictment, had died before the trial began. The Crown Advocate who was prosecuting called evidence to prove the fact of death and then, according to the record, he moved to mark the deposition of the deceased witness, Abeywardena, as P 17 and to read it in evidence. He also moved to amend the indictment formally so as to include this deposition P 17 as item 23 on the back of the indictment in the list of productions. The trial Judge allowed these applications.

But no witness was called to produce the deposition of the deceased witness made before the inquiring Magistrate. The correct course was for the original record of the non-summary proceedings to have been produced in evidence by the Chief Clerk of the Magistrate's Court or any officer of the District Court connected with the custody of the record—See *The King* v. *Kadirgamar*, (1940) 41 N.L.R. 534. A certified copy of the deposition should also have been produced by the witness. As these essential steps were not taken, the deposition was not in evidence.

We formally set aside the convictions in this case and send the case back for a re-trial before another Judge.

H. N. G. FERNANDO, J.
I agree.

Set aside and sent back.

Present : **Sirimane, J., and Manicavasagar, J.**

BRITO-MUTTUNAYAGAM *vs.* RATNAYAKE

In the matter of an application for Conditional Leave to appeal to Her Majesty the Queen in Council under the Rules set out in the Schedule to the Appeals (Privy Council) Ordinance. Application, No. S.C. 57/64.

S.C. 164 (*F*), 1961—*D.C. Colombo*, 16766/*N.T.*

Argued and decided on : 12th November, 1964.

Privy Council—Application for leave to appeal thereto by one of two executors—Should other executor have been joined as a party to such application ?

The petitioner, one of two executors, applied for conditional leave to appeal to the Privy Council from a judgment of the Supreme Court. In his affidavit he had explained that the other executor had not been joined as he was now resident in England. An affidavit from the other executor authorising the petitioner to act on his behalf and acquiescing in the steps taken by the petitioner was also filed. Objection was taken to the application on the ground that the other executor should have been made a party to such application.

Held : That it was competent for one of several executors to make an application for leave to appeal to the Privy Council. Although all parties who may be affected by the judgment of the Privy Council should ordinarily be joined, this was unnecessary in the case of executors who are sued or sue in their representative capacity as they " are regarded in law as an individual and the act of one is deemed to be the act of all ".

Authorities cited : *Williams on Executors*, (14th Edition), p. 432

J. W. Subasinghe, for the petitioner.

S. Sharvananda, for the respondent.

SIRIMANE, J.

This is an application by one of two executors for conditional leave to appeal to the Privy Council from a judgment of this Court.

The co-executor is not a party to the application ; the petitioner has in his affidavit stated why the co-executor had not joined in the application ; the latter is now resident in England and he has in an affidavit (exhibit " A ") authorised the petitioner to act on his behalf, and has acquiesced in the steps taken by the petitioner.

Counsel for the respondent contends that it is not competent for the petitioner alone to make this application and that the co-executor should have joined the petitioner, or been made a party respondent. We do not agree with this submission. We are of the view that it is competent for one of several executors to make this application. There are no special provisions in the Privy Council Appeals Ordinance, (Vol. 4, Cap. 100), as to who should be made parties to an application of this nature. The ordinary rule is that all parties who may be affected by the judgment of the Privy Council should be made parties, but we think this is unnecessary in the case of executors who are sued or sue in their representative capacity, because " executors, however numerous, are regarded in law as an individual and the act of one is deemed to be the act of all ", (*Williams on Executors*, 14th Edn., Vol. I, at page 432). We do not think it necessary to refer to all the authorities cited by counsel for the petitioner where it has been held that one executor can act on behalf of all.

The application for conditional leave to appeal is allowed on the usual conditions.

The petitioner is entitled to costs of this application.

MANICAVASAGAR, J.

I agree.

Application allowed.

IN THE COURT OF CRIMINAL APPEAL

Present : **T. S. Fernando, J. (President), Sri Skanda Rajah, J., and G. P. A. Silva, J.**

K. DON YAHONIS SINGHO *vs.* THE QUEEN

C.C.A. Appeal No. 99 *of* 1964 (*with Application, No.* 103 *of* 1964).
S.C. Case, No. 41—*M.C. Panadura, No.* 81251.

Argued and decided on : 26th October, 1964.
Reasons delivered on : 9th November, 1964

Evidence—Burden of Proof—Alibi, defence of—Possibility of evidence led in support of alibi being neither accepted nor capable of rejection—Necessity of direction to jury on this point—Non-direction amounting to misdirection.

Evidence—Facts forming part of same transaction—Shouts of bystanders—Evidence Ordinance, section 6.

Where an accused person relies on the defence of an alibi, and leads evidence to support it—

Held : That the trial judge should direct the jury not only on the course they should follow if they accepted or rejected such evidence, but also as to what they were to do if they neither accepted such evidence as true nor rejected it as untrue.

Per T. S. FERNANDO, J.—" Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay on the prosecution. If Sirimane's evidence was neither accepted nor was capable of rejection, the resulting position would bave been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the alibi was a non-direction of the jury on a necessary point and thus constituted a misdirection. "

Where a witness testified that she had heard people going past her house shouting that the deceased had been stabbed by Yahonis (the accused).

Held : That these were not the shouts of bystanders and, therefore, did not come within the category of relevant facts admissible under section 6 or any other section of the Evidence Ordinance.

Colvin R. de Silva with *Manouri de Silva*, *Anil Obeysekera*, *T. Edirisuriya* and *L. V. P. Wetttasinghe* (assigned), for the accused-appellant.

V. S. A. Pullenayegum, *Crown Counsel*, for the Crown.

T. S. FERNANDO, J.

The appellant appealed against his conviction by a 6 to 1 majority verdict of the jury on a charge of murder of one Panditharatne and the sentence of death pronounced on him as a consequence of that verdict.

The point raised on his behalf at the hearing of his appeal was that in respect of the burden of proof in the case there was an inadequate direction of the jury by the trial judge. The defence relied on being that of an *alibi*, the point specifically urged on behalf of the appellant was that there was a failure on the part of the trial judge to direct the jury in regard to the impact of the evidence of the *alibi* on the case for the prosecution.

The prosecution led evidence of a direct nature, that of a son of the deceased, the witness, Amaradasa, in an effort to establish that the appellant stabbed the deceased. The appellant, who has a tea boutique about one-eighth of a mile from the place where the deceased was alleged to have been stabbed, called as his witness a man of the name of Sirimane who testified that the appellant was serving tea to his customers (including Sirimane himself) at the time cries were heard from the direction in which the stabbing of the deceased must have taken place. Sirimane went on to say that on hearing those cries he went in that direction and saw the deceased lying fallen on the edge of the road, and that he waited at that spot for about ten minutes before leaving for his home.

In regard to this evidence of an *alibi*, the learned trial judge directed the jury at two different stages of his charge. At the earlier of these two stages he stated :—

" I would like you at this stage to consider the evidence of Sirimane. Sirimane's evidence is that at the time he heard the cries of " *ammo* "—I believe in answer to you he said that the distance between the accused's boutique and the scene was about 1/8 of a mile—the accused was in his boutique serving customers. If you accept that evidence, it must straightaway throw doubt on the prosecution case and the accused is entitled to be acquitted."

At the later stage, he addressed the jury thus :—

" As I told you a while ago, if you accept his (Sirimane's) evidence it throws doubt at once on the prosecution story and the accused is entitled to an acquittal ; but, if you accept his story, it does not follow that the accused should be found guilty, because the burden is always on the Crown to prove beyond reasonable doubt that it was this accused who caused the fatal injury on the deceased. That burden is fully on the Crown, and you should ask yourself 'are we convinced, are we quite certain in our minds that the evidence of Amaradasa points to this accused having stabbed the deceased'."

While these directions to the jury were correct so far as they went, it was submitted on behalf of the appellant that they were inadequate and that the impact of an acceptance of Sirimane's evidence was even more favourable to the appellant than indicated by the learned judge. We thought the submission was well-founded. If the evidence of an *alibi* is accepted, such acceptance not only throws doubt on the case for the prosecution but, indeed, it does more ; it destroys the prosecution case and establishes its falsity. As the jury convicted the appellant, it must be assumed that they did not accept the evidence of Sirimane. The learned judge directed the jury, if we may say so with respect, correctly as to what course they should follow if they rejected the evidence of Sirimane. He, however, omitted altogether at both stages of his charge referred to above to give them any direction as to what they were to do if they neither accepted Sirimane's evidence as true nor rejected it as untrue. Jurors may well be in that position in regard to the evidence of any witness. There was in this case no question of a shifting of the burden of proof which throughout lay on the prosecution. If Sirimane's evidence was neither accepted nor was capable of rejection, the resulting position would have been that a reasonable doubt existed as to the truth of the prosecution evidence. We think the omission to direct the jury on what may be called this intermediate position where there was neither an acceptance nor a rejection of the *alibi* was a non-direction of the jury on a necessary point and thus constituted a misdirection.

Learned Counsel for the Crown submitted that in the circumstances of this particular case the directions to the jury were adequate to cover the case where they were both unable to accept and unable to reject the evidence of the *alibi*, and that no special direction on the lines we have indicated above was called for. He relied for this submission, in addition to the passages from the charge already reproduced above by me, on the following directions given by the learned judge. At the outset of his charge, he stated :—

" From that it follows that the Crown has got to prove its case beyond reasonable doubt. You must be convinced on the evidence which you have heard that this accused inflicted the injury which resulted in the death of Panditharatne. You must be quite sure of that in your minds, certain of it, to enable you to take the view that this accused had caused that injury. That is what is meant by proof beyond reasonable doubt. If you are not sure, if you are assailed by any reasonable doubt, then you will give the benefit of that doubt to the accused."

Next, he stated :—

" The Crown case is that it was this accused who stabbed Panditharatne and they have put before you the evidence of an eye-witness, namely, Amaradasa, a son of the deceased. He says he was present and saw this accused stab his father. You will have to ask yourselves whether you accept the evidence of Amaradasa or reject it, or whether his evidence is of such doubtful value that you must give the benefit of the doubt to the accused."

Then, finally, towards the close of his charge, he addresses the jury thus :—

" Has the Crown established beyond reasonable doubt that it was this accused who inflicted the vital injury on the deceased ? If as I told you more than once today, you have any reasonable doubt in regard to that, he is entitled to go out a free man ; but, if you are satisfied, having regard to the principles I have enunciated to you, that Amaradasa is a witness to truth, that you can accept his evidence with confidence, with certainty and sureness, then you will have to decide that other question (also a question of fact) ; What was the intention of the accused when he inflicted those injuries ? "

We felt unable to agree with the submission of Crown Counsel. While the passages he pointed to laid down the position correctly so far as it depended on Amaradasa's evidence, they did not relate specifically to the evidence relied on by the defence. If the evidence called by the defence, be it of the nature of an *alibi* or otherwise, was not capable of acceptance or rejection, the impact of the uncertainty on that point must surely be to raise a reasonable doubt as to the identity of the assailant, and we were, therefore, of opinion that it was imperative for a trial judge to give a jury a specific direction thereon.

For the reason we have expressed above, we allowed the appeal and quashed the conviction of the appellant. We did not think it fit to order a new trial in this case as the evidence of the only witness, Amaradasa, was of an unsatisfactory nature. He had to admit that while he waited by his injured father for about a quarter of an hour till a car was brought to take the latter to hospital he refrained from telling the witness, Nomis, who had come up to the spot the name of his father's assailant. He could give no satisfactory reason—to use the learned trial judge's own words—for this self-imposed silence. Amaradasa was proved to have stated at the Magisterial proceedings that his father had other enemies like Suwaris and Thepanis, although he stated at the trial that these two persons had died before the day his father was killed. We observed also that certain inadmissible evidence had been elicited at the trial through the witness, Ellen, that she heard people going past her house shouting that Panditharatne had been stabbed by Yahonis, which latter is the name of the appellant. These were by no means shouts of bystanders and, therefore, did not come within the category of relevant facts admissible under section 6 or any other section of the Evidence Ordinance.

Appeal allowed.

Present : **Sri Skanda Rajah, J., and Alles, J.**

HENRY FRANCISCO *vs.* DON SEBASTIAN AND OTHERS
DONA INFLORENA FRANCISCO *vs.* DON SEBASTIAN AND OTHERS*

S.C. 20-21/'61 (*Inty.*)—*D.C. Negombo, Case No.* 123/*P.*

Argued on : 1st and 8th October, 1964.
S.C. 20/'61 *decided on :* 1st October, 1964.
S.C. 21/'61 *decided on :* 8th October, 1964.
Reasons in S.C. 21/'61 *delivered on :* 4th November, 1964.

Minors—Donation to minors—Requirement of acceptance on behalf of minor—Donor not a parent—Validity of acceptance by person who is not a legal representative or natural guardian—Marriage Registration Ordinance, section 21.

Maria Perera was married to *S. R.* and they begot a son *E.* Thereafter Maria Perera eloped with *J.* and by that adulterine union they had a son, *G.* Maria Alwis, mother of *J.*, executed a gift by deed P 2 of 1922 in favour of *E.* and *G.* (minors), which was accepted on their behalf by *J.* At the date of the gift *S. R.* was alive.

Held : (1) That *G.*, being a child procreated in adultery, *J.* was for all time, prohibited from being his natural guardian. Therefore, he could not validly accept the gift on behalf of *G.* Maria Perera, his mother, was his only natural guardian.

(2) That as regards the gift to *E.*, his father, *S.R.*, was alive at that date, and hence his natural guardians were his father *S. R.*, and mother, Maria Perera. Only one of them could accept the gift to him.

(3) That, therefore, the deed P 2 conveyed no title to *E.* and *G.*

Per SRI SKANDA RAJAH, J.—" In the case of a donation to a minor the law requires acceptance by the natural or legal guardian of the minor, *Silva* v. *Silva*, (1908) 11 N.L.R. 161. This has been accepted as correct in later cases, including *Nagalingam* v. *Thanabalasingham*, (1952) 54 N.L.R. 121 (P.C.) and *Nagaratnam* v. *John*, (1958) 60 N.L.R. 113."

Cases referred to : *Silva* v. *Silva*, (1908) 11 N.L.R. 161.
Nagalingam v. *Thanabalasingham* (1952) 54 N.L.R. 121 ; XLVIII C.L.W. 1 (P.C.)
Nagaratnam v. *John*, (1958) 60 N.L.R. 113.
Abeyawardene v. *West*, (1957) 58 N.L.R. 313 ; LIV C.L.W. 33 (P.C.)
Francisco v. *Costa*, (1888) 8 S.C.C. 189.

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* For Sinhala translation, see Sinhala section, Vol. 9 part 4, p. 13

J. A. L. Cooray with *D. A. E. Theverapperuma*, for the 2nd defendant-appellant in S.C. 20/'61 and for the 2nd defendant-respondent in S.C. 21/'61.

T. P. P. Goonetilleke, for the 1st defendant-respondent in S.C. 20/'61 and for the 1st defendant-appellant in S.C. 21/'61.

V. Thillainathan with *A. J. F. Fonseka*, for the plaintiff-respondent.

SRI SKANDA RAJAH, J.

It behoves us to explain the delay in the disposal of these two interlocutory appeals. They were originally heard by Basnayake, C.J., and Herat, J., on 6th and 24th September, 1962, and judgment was reserved. About eighteen months later Herat, J., died and four months later Basnayake, C.J., retired. On the first day of hearing by us we dismissed appeal No. 20/'61 as there was no merit in it. Then we called upon Mr. Thillainathan. He was, however, not well enough to argue. Therefore, we heard him on 8th October, 1964, allowed appeal No. 21/'61 with costs reserving our reasons, which we set out hereunder.

The point of law involved is the validity of acceptance of gifts to minors.

By deed 15373 of 13th January, 1922 (P 2) one Maria Alwis gifted to Kotte Muhandiramge Emaliyanu Rodrigo and Ponweera Aratchige Don Gabriel, both minor children of one Maria Perera, who does not appear to have been related to the donor, Maria Alwis. Maria Perera was married to Stephen Rodrigo and they begot Emaliyanu. Maria Perera then eloped with Jusey, son of the donor, Maria Alwis, and by that adulterine union she had Gabriel. Stephen Rodrigo was alive, but, living in separation from Maria Perera, at the time of the gift on P 2—he died on 1st October, 1923 (*vide* death certificate 1 D 5). Jusey it was who accepted the gift on P 2, wherein he purported to accept on behalf of Gabriel, " a son of mine ", and on behalf Emaliyanu, " an adopted son of mine ".

In the case of a donation to a minor the law requires acceptance by the natural or legal guardian of the minor : *Silva* v. *Silva*, (1908) 11 N.L.R. 161. This has been accepted as correct in later cases, including *Nagalingam* v. *Thanabalasingham*, (1952) 54 N.L.R. 121 (P.C.) and *Nagaratnam* v. *John*, (1958) 60 N.L.R. 113.

Section 21 of the Marriage Registration Ordinance, Cap. 112, enacts :—

> "A legal marriage between any parties shall have the effect of rendering legitimate any children who have been procreated between the same parties before marriage, *unless such children shall have been procreated in adultery*."

At the date of P 2 Jusey was not Gabriel's natural guardian. In fact, he was for all time prohibited from becoming Gabriel's natural guardian. Therefore, he could not validly accept the gift on behalf of Gabriel. Only Maria Perera was competent to do so, because the mother is the natural guardian of a bastard.

As regards the gift to Emaliyanu, his father, Stephen Rodrigo, who was alive at that date, and Maria Perera were his natural guardians. Only one of them could validly accept a gift to him.

For these reasons, P 2 was invalid for want of acceptance and could, therefore, convey no title to Emaliyanu and Gabriel, through whom the plaintiff claims.

The argument that Maria Alwis had allowed acceptance by Jusey and, therefore, the acceptance was valid does not find favour with us. All the cases which can be called in aid of this argument are cases of gifts by parents to their minor children and they had either permitted or authorised acceptance by others for the obvious reason that they themselves could not accept the gifts on behalf of their minor donees. [*E.g.*, *Abeyawardene* v. *West*, (1957) 58 N.L.R. 313 (P.C.) ; *Nagaratnam* v. *John*, (1958) 60 N.L.R. 113 ; *Francisco* v. *Costa*, (1888) 8 S.C.C. 189.]

This being an action for partition the plaintiff's action will stand dismissed with costs payable to the first defendant-appellant both here and below. Though the first defendant's appeal is allowed he will not be entitled to a declaration of title in his favour in view of the nature of this action.

ALLES, J.

I agree with the views expressed by my brother, Sri Skanda Rajah, J., and the order proposed by him.

The plaintiffs claimed title through Deed of Gift, No. 15373 of 13th January, 1922 (P 2). By this Deed Maria Alwis, the donor, gifted certain shares to two minors, Emaliyanu Rodrigo and Ponweera Aratchige Don Gabriel. The gift was accepted by the donor's son, Jusey on behalf of Gabriel as a " son " and on behalf of Emaliyanu as an " adopted son ". The only question that arises in this appeal is the validity of the acceptance by Jusey on behalf of the two minors.

Emaliyanu Rodrigo was the son of Maria Perera and Stephen Rodrigo and both parents were alive at the time of the execution of P 2 and as the natural guardians of their son either of them could have accepted the gift on behalf of Emaliyanu. Gabriel was the offspring of the adulterine union between Jusey and Maria Perera. His natural guardian was his mother, Maria Perera, who was alive at the time of the execution of the Deed of Gift and could have accepted the gift on behalf of Gabriel. Jusey's acceptance of the gift was, therefore, bad and no title passed to the plaintiffs.

Appeal No. 20/'61 *dismissed.*

Appeal No. 21/'61 *allowed.*

Present : **T. S. Fernando, J.**

S. S. PONNUDURAI *vs.* M. DE S. RATNAWEERA, LABOUR OFFICER

S.C. No. 282/1963—*M.C. Colombo, Case No.* 15568/*A.*

Argued and decided on : September 29th, 1964.
Reasons delivered on : October 13th, 1964.

Evidence—Secondary evidence—Document compiled by witness after examination of books and records—Can such document be used for the purpose of refreshing witness' memory where secondary evidence of such books and records admissible—Evidence Ordinance, sections 66, 63 (5).

Employees' Provident Fund Act, No. 15 *of* 1958 , *sections* 15, 37—*Non-payment of contributions to Employees' Provident Fund—Jurisdiction to entertain complaint in regard to such offences—Effect of Regulation* 7 *made under section* 46 *of the Act.*

Held : (1) That once the notice required by section 66 has been given, a witness who has compiled an extract of the contents of books or records kept by a person at his place of business, is entitled, under section 63 (5) of the Evidence Ordinance to utilise such extract for the purpose of refreshing his memory.

(2) That in view of Regulation 7 of the regulations made under section 46 of the Employees' Provident Fund Act, which requires every employer who is liable under the Act to pay contributions to send such contributions to the Central Bank of Ceylon, the proper Court to entertain a complaint of non-payment is the Magistrate's Court of Colombo.

M. Tiruchelvam, Q.C., with *V. Kumaraswamy* and *Mark Fernando*, for the accused-appellant.

D. W. Abeyakoon, Crown Counsel, for the Attorney-General.

T. S. FERNANDO, J.

The accused-appellant was convicted in the Magistrate's Court of Colombo on three counts which alleged the commission by him of three offences in contravention of section 15 of the Employees' Provident Fund Act, No. 15 of 1958. and punishable under section 37 of the same Act, The three offences related to alleged failures on the part of the accused-appellant to pay to the Employees' Provident Fund his contribution for a specific month in respect of three specified employees.

Two questions of law were raised before me, one of these being a question of the want of jurisdiction in the Magistrate's Court of Colombo which was not raised in the Magistrate's Court and which has not been specified even in the petition of appeal. After hearing argument for both sides I dismissed the appeal but, in view of the technical nature of the questions, decided to set down later my reasons for the dismissal. Those reasons are shortly stated hereunder :—

In regard to the question of want of jurisdiction in the Magistrate's Court, it was argued that the

obligation cast by the Act on an employer was to pay to the Fund and that there is no indication where the Fund was located. In these circumstances, counsel contended, the offence was committed where the place of work of the employer and the employees was situated, viz., at Jaffna. I am indebted to Mr. Colvin R. de Silva, one of the senior counsel of this Court who was present in Court at the time of the argument, for drawing my attention to Regulation 7 of the Regulations made by the Minister by virtue of the powers vested in him by section 46 of the Act and published in *Gazette*, No. 11,573 of October 31, 1958, which disposes of the objection relating to absence of jurisdiction. Regulation 7 requires every employer who is liable under the Act to pay contributions to send them to the Central Bank of Ceylon. That Bank, it is well-known and not disputed, is situated in Colombo. The failure to pay at Colombo, therefore, constituted the offence, and the Magistrate's Court of Colombo was the proper Court to entertain the complaint.

The other question related to the admission in evidence of the document P 1, an extract made by a witness of part of the contents of certain books or records kept by the accused at his place of business. It was contended on the accused's behalf that an extract compiled by a witness after examination of books or records does not constitute secondary evidence of the contents of those books or records. As the notice mentioned in section 66 appears to have been given in this case, secondary evidence of the documents could have been led by the prosecution. Section 63 (5) of the Evidence Ordinance embraces within the definition of secondary evidence oral accounts of the contents of a document given by some person who has himself seen it. Although P 1 was admitted in evidence as a document, what happened in Court was substantially the giving by the witness of an oral account of the contents of the documents he had seen and examined at the place of work of the accused. P 1 was utilised by the witness for nothing more than refreshing his memory. The second question of law was also, therefore, of no avail against the order of conviction.

Appeal dismissed.

Present : **Basnayake, C.J., and Abeyesundere, J.**

TIKIRI BANDA *vs.* LOKU MENIKA AND OTHERS*

S.C. No. 190/'61 *(F)—D.C. Kandy, No. MR.* 7866.

Argued on : September 19 and 20, and October 18, 1963.
Decided on : October 18, 1963.

Civil Procedure Code, sections 121 *and* 175*—Evidence given by witness whose name not included in list of witnesses—Such witness permitted to give evidence because Court was wrongly made to believe that his name was on the list—Legality of such evidence.*

Where a witness, whose name was not in the list of witnesses filed in terms of section 121 of the Civil Procedure Code, was permitted to give evidence because the Court was wrongly made to believe that his name was in such list—

Held : That the admission of the evidence of such witness was illegal in view of section 175 of the Civil Procedure Code, and his evidence could not form the basis of the judgment in this case.

Held further: That the judgment should be set aside and the plaintiff's action dismissed as the learned trial judge had formed almost all his conclusions on the basis of this witness' evidence.

H. W. Jayewardene, Q.C., with *D. R. P. Goonatilleke*, for the defendant-appellant.

L. V. R. Fernando, for the plaintiffs-respondents.

*For Sinhala translation, see Sinhala section, Vol. 9 Part. 4, p. 15

BASNAYAKE, C.J.

In this action the plaintiffs, Totagodawatte Mudiyanselage Pallehagedera Loku Menike, Totagodawatte Mudiyanselage Pallehagedera Bandara Menika and Totagodawatte Mudiyanselage Pallehagedera Leelawathie Menike sued the defendant, Totagodawatte Mudiyanselage Pallehagedera Tikiri Banda and prayed judgment in a sum of Rs. 12,762/- being the mesne profits from the land described in the schedule to the plaint for a period of three years immediately preceding the date of action, namely, 27th October, 1959. The learned Judge entered judgment for the plaintiffs in a sum of Rs. 3,314/- and costs. This appeal is from that judgment.

The main submission of learned counsel for the appellant is that the evidence of Sakalasooriya Mudiyanselage Tikiri Banda of Yatigammana was illegally admitted as he was not a witness whose name was included in the list of witnesses filed in accordance with section 121 of the Civil Procedure Code.

The plaintiffs' Proctor filed a list of witnesses on 1st June, 1960, before the date of trial and the name of Sakalasooriya Mudiyanselage Tikiri Banda of Yatigammana does not appear therein. On 22nd June, 1960, a list described as an additional list of witnesses was filed in which there occurs the name of Tikiri Banda Totagodewatte of Pottepitiya. When the witness who described himself as Sakalasooriya Mudiyanselage Tikiri Banda was called into the witness box, counsel for the defendant objected to his giving evidence on the ground that his name did not appear in the list of witnesses. Counsel for the plaintiffs referred the Court to the list filed on 22nd June, 1960, in which there was the name of Tikiri Banda Totagodewatte of Pottepitiya, thereby making the Court to believe that witness, Sakalasooriya Mudiyanselage Tikiri Banda was the same person who was described as Tikiri Banda Totagodewatte. The learned District Judge asked the witness whether he was from Totagodawatte, and when he answered in the affirmative, he was allowed to give evidence. The learned Judge did so because he was made to believe that he was the witness who was described as Tikiri Banda Totagodewatte. In the course of the plaintiffs' case, when counsel for the plaintiffs moved the Court to call Tikiri Banda Totagodawatte, counsel for the defendant objected stating that he had already been called, and referred to the proceedings of 20th February, 1961. Counsel for the plaintiffs submitted that the person called on that date was Tikiri Banda Sakalasooriya of Totagodawatte and not Tikiri Banda Totagodawatte, but did not press his application to call Tikiri Banda Totagodawatte and reserved for consideration later whether he should be called and finally learned counsel closed his case without calling Tikiri Banda Totagodawatte. It is submitted that Sakalasooriya Mudiyanselage Tikiri Banda is not a person whose name appears in the list of witnesses and that if his evidence goes out of the case, the plaintiffs' case must fail as there is no other evidence to establish it. Section 175 of the Civil Procedure Code reads :

> " No witness shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in Court by such party as provided by section 121 : Provided, however, that the Court may in its discretion, if special circumstances appear to it to render such a course advisable in the interests of justice, permit a witness to be examined, although such witness may not have been included in such list aforesaid."

Now section 121 provides—

> " (1) The parties may, after the summons has been delivered for service on the defendant, obtain, on application to the Court or to such officer as the Court appoints in that behalf, before the day fixed for the hearing, summonses to persons whose attendance is required either to give evidence or to produce documents.
>
> (2) A list of witnesses shall be filed in Court by the party applying for such summonses, after notice to the other side, and within such time before the trial as the Judge shall consider reasonable, or at any time before the trial with the consent of the other side appearing on the face of such list."

In the instant case, Sakalasooriya Mudiyanselage Tikiri Banda was permitted to give evidence in the mistaken belief that his name appeared in the list of witnesses filed in terms of the Code whereas, in fact, as it later turned out, his name was not in the prescribed list of witnesses, and the calling of such a witness is barred by section 175 except where the Court in its discretion permits it where special circumstances render such a course advisable in the interests of justice. The learned District Judge was not invited to consider whether he should permit the witness, Sakalasooriya Mudiyanselage Tikiri Banda, whose name was not on the list of witnesses to give evidence in the interests of justice because he was wrongly made to believe that the witness' name was in the prescribed list. The evidence of Sakalasooriya Mudiyanselage Tikiri Banda has in the circumstances been illegally admitted, and his evidence cannot form the basis of the judgment in this case.

It would appear from the judgment of the learned District Judge that he had reached almost all his conclusions on the evidence of that witness. The defendant is, therefore, entitled to succeed in his appeal. We accordingly set aside the judgment and decree of the learned District Judge and order that the plaintiffs' action be dismissed.

We award costs both here and below to the appellant.

ABEYESUNDERE, J.
I agree.

Appeal allowed.

Privy Council Appeal, No. 18 *of* 1964.

Present : **Viscount Dilhorne, Lord Hodson, Lord Guest, Lord Upjohn, Lord Wilberforce.**

THE ATTORNEY-GENERAL OF CEYLON *vs.* ALLEN ELLINGTON REID

From
THE SUPREME COURT OF CEYLON

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

DELIVERED THE 15TH DECEMBER, 1964.

Penal Code, section 362 *B—Marriage Registration Ordinance, section* 18, 19 *and* 64*—Muslim Marriage and Divorce Act,* 1951.

Marriage—Person contracting a monogamous Christian marriage—Whether having become a convert to Islam during the subsistence of such marriage he can contract a second marriage valid by the law of his adopted faith—Is such person guilty of the offence of bigamy ?

In September, 1933, the respondent married a Christian lady according to Christian rites. In 1957 the respondent's wife left him and obtained a maintenance order against him. The respondent himself at the time of this marriage had been of the Christian faith and was married under the provisions of the Marriage Registration Ordinance which specifically excluded Muslims from its operation.

In June, 1959, the respondent and a divorced Christian lady by the name of Fatima Pansy were converted to the Muslim faith and on 16th July, 1959, they were duly married under the provisions of the Muslim Marriage and Divorce Act, which permits a Muslim to contract more than one marriage.

On 28th October, 1961, the respondent was indicted for the offence of bigamy under section 362 B of the Penal Code. He was thereafter convicted and sentenced to three months' rigorous imprisonment. He appealed against his conviction and the Supreme Court in appeal quashed it. Thereupon the Attorney-General appealed to the Privy Council.

The appeal before the Privy Council was argued upon the express admission of Counsel for the Attorney-General that the conversion of the respondent to the Muslim faith was sincere and genuine.

Held : (1) That the fact that the respondent contracted a monogamous Christian marriage did not prohibit him, during the subsistence of that marriage, from changing his faith and thereby becoming subject to a different personal law.

(2) That in a country like Ceylon where there were many races and creeds and a number of Marriage Ordinances, there was an inherent right in inhabitants domiciled there to change their religion and personal law and so to contract a polygamous marriage valid by the personal law of adoption, notwithstanding the subsistence of an earlier monogamous Christian marriage.

(3) That the Attorney-General had not established that the respondent's second marriage was void by the law of Ceylon and that, therefore, his appeal should be dismissed.

Cases referred to : *Hyde* v. *Hyde*, (1866) L.R. 1 P. & D. 130 ; 14 L.T. 188.
Sottomayor v. *De Barros*, (1879) 5 P.D. 94 ; 41 L.T. 281.
Niboyet v. *Niboyet*, (1878) 4 P.D. 1 ; 39 L.T. 486.
Baindail v. *Baindail*, (1946) P. 122 ; (1946) 1 A.E.R. 342 ; 174 L.T. 320 ; 62 T.L.R. 263.
R. v. *Hammersmith Registrar of Marriages*, (1917) 1 K.B. 634 ; 115 L.T. 882 ; 86 L.J.K.B. 210 ; 33 T.L.R. 78 ; (1916-17) A.E.R. Rep. 464
Skinner v. *Orde*, 14 Moo. Ind. App. 309.
Skinner v. *Skinner*, (1898) L.R. 25 Ind. App. 34.
(1866) 3 Mad. H.C. Reps. VII
Emperor v. *Lazar*, (1907) 30 I.L.R. (Mad.) 550.
Reg. v. *Allen*, 1 C.C.R. 367.
Emperor v. *Antony*, 33 I.L.R. (Mad.) 371.
Re Ram Kumari, 18 I.L.R. (Cal.) 264.
Datta v. *Sen*, (1939) I.L.R. 2 (Cal.) 12.
Khanum v. *Irani*, (1947) A.I.R. (Bom.) 272.
Cheni v. *Cheni*, (1963) 2 W.L.R. 17 ; (1962) 3 A.E.R. 873

Mark Littman, Q.C., with *Montague Solomon*, for the appellant.

E. F. N. Gratiaen, Q.C., with *T.O. Kellock*, for the respondent.

LORD UPJOHN

This is an appeal by the Attorney-General of Ceylon, by special leave, from a judgment of the Supreme Court of the Island of Ceylon, dated 11th July, 1963, whereby the respondent's appeal against his conviction on the 23rd November, 1961, by the District Court of Colombo of the offence of bigamy was allowed and the conviction was quashed.

The relevant facts are not in dispute. The respondent married Edna Margaret de Witt according to Christian rites at St. Mary's Church, Badulla, on 18th September, 1933. Both were Christians at the time and they lived together as man and wife until 1957. There were eight children of the marriage. In May, 1957, the wife left the respondent and obtained a Maintenance Order against him in the Magistrates' Court of Colombo.

On the 13th June, 1959, the respondent and a divorced lady of the name of Fatima Pansy were converted to the Muslim Faith. A month later on the 16th July, 1959, they were duly married in the District of Colombo by the Registrar of Muslim Marriages under the provisions of the Muslim Marriage and Divorce Act, 1951, notwithstanding that the earlier marriage was subsisting.

On the 28th October, 1961, the respondent was indicted at the instance of the appellant for the offence of bigamy under section 362 B of the Penal Code which so far as relevant is in these terms :—

> "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

He was duly convicted by Buultjens, A.D.J., and sentenced to three months' rigorous imprisonment from which judgment, as already mentioned, he successfully appealed.

As the first Christian marriage was under the Marriage Registration Ordinance some reference to that Ordinance is necessary. It contains the following relevant sections :—

> "18. No marriage shall be valid where either of the parties thereto shall have contracted a prior marriage which shall not have been legally dissolved or declared void.
>
> "19. (1) No marriage shall be dissolved during the lifetime of the parties except by judgment of divorce *a vinculo matrimonii* pronounced in some competent Court . . .
>
> "35.....
>
> (2) The registrar shall address the parties to the following effect :
>
> "BE IT KNOWN unto you, A., B., and C., D., that by the public reception of each other as man and wife in my presence, and the subsequent attestation thereof by signing your name to that effect in the registry book, you become legally married to each other, although no other rite of a civil or religious nature shall take place ; and know ye further that the marriage now intended to be contracted cannot be dissolved during your lifetime except by a valid judgment of divorce, and that if either of you before the death of the other shall contract another marriage before the former marriage is thus legally dissolved, you will be guilty of bigamy and be liable to the penalties attached to that offence."
>
> .....

64. In this Ordinance, unless the context otherwise requires—

.....

"marriage" means any marriage, save and except marriages contracted under and by virtue of the Kandyan Marriage Ordinance, 1870, or the Kandyan Marriage and Divorce Act, and except marriages contracted between persons professing Islam ; "

The Muslim Marriage and Divorce Act applies only to marriages and divorces and to ancillary matters of those inhabitants of Ceylon who are Muslims, but Their Lordships do not think it necessary to set out *in extenso* any of its provisions. It is sufficient to say that it makes full provision for a male Muslim inhabitant of Ceylon to contact more than one marriage provided certain notices are given by the Muslim to the Quazi of the District and by the Quazi to the existing wife or wives.

It is important to state at the outset that this appeal has been argued before Their Lordships upon the express admission of Counsel for the appellant on the footing that the conversion of the respondent to the Muslim faith on the 13th June, 1959, was sincere and genuine notwithstanding doubts expressed in the Courts below on this point.

Before dealing with the arguments and examining the authorities it will be convenient to state the matters which are not in controversy between the parties.

1. The respondent was at all material times and is domiciled and resident in Ceylon.

2. The respondent's first marriage remains valid and subsisting notwithstanding the second marriage for there has been no divorce under section 19 of the Marriage Registration Ordinance.

3. The first wife can if she so desires treat the second marriage as an adulterous association by her husband on which she can found a petition for divorce.

4. The second marriage ceremony was duly performed by a proper officer after all due notices had been given and was properly registered under the Muslim Marriage and Divorce Act.

5. Accordingly two of the three essential ingredients in the commission of an offence under section 362 B of the Penal Code are satisfied, namely, the respondent is a person "having a husband or wife living" who "marries".

The sole question, therefore, is whether the third ingredient, that is whether the second "marriage is void by reason of its taking place during the life of such husband or wife", is satisfied.

Mr. Littman in supporting the view accepted by the learned Acting District Judge does not rely on any statutory enactment which renders the second marriage void for he recognizes that having regard to section 64, section 18 of the Marriage Registration Ordinance does not apply to the second Muslim marriage.

Section 18, he concedes, is dealing only with a monogamous marriage but he submits that it reinforces his main argument for it is some indication of the view of the Legislature that the parties to a monogamous marriage are incapable of remarrying until it has been legally dissolved or declared void.

Mr. Littman's main argument was that a person who enters into a monogamous Christian marriage not only enters into a contract but acquires as a result a status, recognised throughout Christendom ; that it must be the voluntary union for life of one man and one woman to the exclusion of all others, and that status cannot be changed and no new marriage of any sort can be contracted by either spouse until the marriage is dissolved by a procedure recognised as applicable to monogamous marriages even if both parties change to the Muslim religion. He relied on such well-known cases as *Hyde* v. *Hyde*, L.R. 1 P. & D. 130 ; *Sottomayer* v. *De Barros*, 5 P.D. 94 ; and *Niboyet* v. *Niboyet*, 4 P.D. 1. Though a polygamous marriage may for some purposes be recognised as a marriage (see, for example, *Baindail* v. *Baindail*, [1946] P. 122) he argued with much force that there is no true analogy between a Christian monogamous marriage and a polygamous marriage (see *R.* v. *Hammersmith Registrar of Marriages*, [1917] 1 K.B. 634). So he submitted that a Marriage under the Marriage Registration Ordinance being admittedly monogamous precluded either party during its subsistence from validly entering into another marriage even on a change of faith of both. This argument is strengthened where the change of faith is unilateral on the part of the husband only.

Mr. Littman recognised that Ceylon is a country of many races who profess many creeds ; that there are three Acts dealing with marriage in the Island, the Marriages Registration Ordinance (whose long title is the Marriage General Regis-

tration Ordinance), The Kandyan Marriage and Divorce Act and the Muslim Marriage and Divorce Act ; each Act dealing with different forms, ceremonies and incidents of marriage. But he submitted that none of these Acts lays down any code, and general principles must be applied to see whether by the first marriage the parties acquired a status which rendered them incapable of validly marrying again until the first marriage should be validly dissolved. By the first marriage such a status, he submitted, was acquired which in the absence of dissolution of the first rendered the second marriage ceremony void.

Mr. Littman's argument may be summarised in the following passage of the judgment of the Acting District Judge :

> " Monogamy is an unalterable part of the status of every person who marries under the Marriages (General) Registration Ordinance and a change of religion cannot affect that status. Conversion to the Muslim Faith, even if genuine, cannot enable one who has married under the General Marriages Ordinance to contract a polygamous marriage ; such a marriage is void in the lifetime of a former wife."

Mr. Gratiaen's argument for the respondent was that the status arising out of a contract of marriage is one to which each country is entitled to attach its own conditions both as to its creation and duration. *Sottomayer* v. *De Barros* (*supra*), at 101. He submitted that the question is : what status does the law confer upon parties to a marriage under the Marriage Registration Ordinance ? That question, he argued, must be answered solely by reference to the relevant statute law. He submitted that if the marital rights of the first wife have been violated, as admittedly they have, then the Marriage Registration Ordinance provides a remedy in section 19, but there is nothing in any statute which renders the second marriage invalid and nothing in the general law of the country which precludes the husband from altering his personal law by changing his religion and subsequently marrying in accordance with that law, if it recognises polygamy, notwithstanding an earlier subsisting monogamous marriage.

Before examining these arguments Their Lordships propose to refer to the authorities on this important question. Curiously enough they are few.

In the Judicial Committee of the Privy Council the question seems only to have been answered once and then only in a most tentative way in the case of *Skinner* v. *Orde*, 14 Moo. Ind. App. 309, a case relating to the custody of an infant. The mother of the infant, then a widow, went through a marriage in Mohamedan form with a man already the husband in Christian marriage of a living Christian wife. James, L.J., delivering the judgment of the Board said : " The High Court expressed doubts of the legality of a subsequent Mahomedan marriage which Their Lordships think they were well warranted in entertaining ".

The subsequent case of *Skinner* v. *Skinner*, (1898) L.R. 25, Ind. App. 34, does not help.

Their Lordships have been informed that the question has never been considered in any reported case in Ceylon.

In India the question has been considered on a section substantially the same as in Ceylon. As long ago as 1866 in 3 M.H.C.R. VII, a Hindu was converted to the Roman Catholic faith and married in accordance with that faith but subsequently reverted to Hinduism, which at that time recognised polygamy, and married again. It was held he was not guilty of bigamy. Holloway, J., decided it on the short ground that as Hindu law recognised polygamy a second marriage according to Hindu rights would not be invalid, still less so by reason of the earlier marriage under the Roman Catholic faith which Hindu law would not have recognised.

Innes, J., put it on a broader ground. He examined the only relevant statute, 9 Geo. IV, C. 74, sec. 70, and pointed out that it only rendered void a second marriage between persons professing the Christian Religion at the time of the second marriage, which the accused did not, so that this statute did not operate. He continued :

> " If, in becoming a Christian, a man took upon himself the obligation of monogamy, *i.e.*, if the Christian Religion restricted him, on his embracing it, to one wife, then I should say that if such a person married while still a Christian he could not afterwards throw off his obligations by a mere change of profession. But I do not think that a profession of Christianity *ipso facto* imposes any such obligation although doubtless the tendency of Christianity is adverse to polygamy. Polygamy as an offence exists only by statute ; and there is no statute applicable . . . "

In *Emperor* v. *Lazar*, (1907) 30 I.L.R. (Mad.) 550, the Court relying on decisions where Hindu women had been found guilty of bigamy and on

the English case of *Reg.* v. *Allen*, 1 C.C.R. 367, declined to follow, 3 M.H.C.R. VII, and found the accused guilty of bigamy. It is important to note that the case is distinguishable from that before Their Lordships for after referring to the cases of bigamy by Hindu women the Court said : " We think the same principles must be applied to the present case which is even stronger as here the accused is stated not to have renounced the Christian religion. According to the above decisions it would make no difference if he had ".

Three years later in *Emperor* v. *Antony*, 33 I.L.R. (Mad.) 371, where the prosecution conceded that the accused had renounced Christianity before the second allegedly bigamous marriage, Abdur Rahim, J., followed 3 M.H.C.R. VII, in preference to *Lazar's* case, and without giving reasons, directed the jury to acquit the accused of bigamy.

Apart from the fact that it is distinguishable Their Lordships think that the reasoning of the Court in *Lazar's* case is open to some criticism. *Reg.* v. *Allen*, is not in point for both marriages in that case were monogamous and to follow the cases where Hindu women had been found guilty of bigamy was erroneous for the simple reason that Hindu law and Muslim law have never recognised the validity of a plurality of husbands by women. Therefore, Muslim women have been found guilty of bigamy in taking a second husband during the subsistence of a former marriage because by *the law of their faith* the second marriage was invalid (see *Re Ram Kumari*, 18 I.L.R. (Cal.) 264). Such cases support the argument of the respondent and not that of the appellant.

It appears to Their Lordships that as regards India the law is stated with complete accuracy in *Datta* v. *Sen*, (1939) I.L.R. 2 (Cal.) 12. That was a succession case but the question for decision was whether an Indian Christian who became converted to Mahomedanism could take a second wife. Henderson, J., said at p. 16 :

> " In connection with marriage the personal law must be applied. In the case of *Advocate-General of Bombay* v. *Jimababai*, (1915) I.L.R. 41, Bom. 181, 196, Beaman, J.,said this :—
>
> 'On conversion to Mahomedanism, converts, no matter what their previous religion may have been, must be taken at that moment to have renounced all their former religious and personal law in so far as the latter flowed from and was inextricably bound up with their religion and to have substituted for it the religion of Mahomed with so much of the personal law as necessarily flows from that religion.'
>
> After his conversion Dukhiram was governed by the Mahomedan law. There can be no question that under that law he was entitled to contract a valid marriage with Alfatanessa. It would, therefore, be a serious thing to say that such a union was a mere adulterous connection.
>
> In our view, as he was entitled to contract this marriage under the Mahomedan law, it must be held to be a valid marriage unless there is some statute which invalidates it. Mr. Sen was not able to put forward any such provision : nor can we find anything either in Act XV of 1872 or in the Indian Divorce Act which would expressly invalidate this marriage. The result is that, in our opinion, Dukhiram did contract a valid marriage with Alfatanessa."

Such authority is entitled to great weight particularly in questions of the validity of marriages celebrated in accordance with the laws of the country where it is celebrated, but does not bind Their Lordships, who have to consider this matter for the first time as a matter of decision.

Ceylon is a country of many races, many creeds and has a number of Marriage Ordinances and Acts. The position there, as it appears to Their Lordships, is similar to that in the former territories of British India where as was pointed out by Chagla, J., in *Khanum* v. *Irani*, (1947) A.I.R. 272, at p. 273,* " in matrimonial matters there is no one law which applies to persons domiciled in British India ; they are governed by their personal laws which differ from community to community ".

Their Lordships also note with interest the recent observations of Sir Jocelyn Simon, P., in *Cheni* v. *Cheni*, (1963) 2 W.L.R. 17, who said, at p. 22, " After all there are no marriages which are not potentially polygamous in the sense that they may be rendered so by a change of domicile and religion on the part of the spouses ", which recognises that the obligations assumed upon undertaking a Christian monogamous marriage may not in some circumstances be incapable of change.

Whatever may be the situation in a purely Christian country (as to which Their Lordships express no opinion) they cannot agree that in a country such as Ceylon a Christian monogamous marriage prohibits for all time during the subsistence of that marriage a change of faith and of personal law on the part of a husband resident and domiciled there. They agree with the observations of Innes, J., almost 100 years ago. In Their Lordships' view in such countries there must be an inherent right in the inhabitants domiciled there to change their religion and personal law and so to contract a valid polygamous

* This case is reported in the A.I.R. Bombay series. The word ' Bombay ' appears to have been left out of the text of the Privy Council judgment.—Ed., C.L. W.

marriage if recognised by the laws of the country notwithstanding an earlier marriage. If such inherent right is to be abrogated it must be done by statute. Admittedly there is none.

Their Lordships have not overlooked section 35 of the Marriage Registration Ordinance which tends to support Mr. Littman's argument, but the exhortation contained in the registrar's address is no more than a warning and though it may be apt to mislead the ordinary man or woman ignorant of the definition of marriage contained in section 64, it cannot successfully be prayed in aid when considering whether the offence of bigamy has been committed in terms of section 362 B of the Penal Code.

It follows that as the Attorney-General of Ceylon cannot establish that this second marriage was void by the law of Ceylon by reason of the earlier Christian monogamous marriage the appeal must fail.

For these reasons Their Lordships have humbly advised Her Majesty to dismiss the appeal.

Appeal dismissed.

Present : **T. S. Fernando, J.**

S. S. M. K. MANSOOR

vs.

1. THE MINISTER OF DEFENCE AND EXTERNAL AFFAIRS
2. THE PERMANENT SECRETARY TO THE MINISTER OF DEFENCE AND EXTERNAL AFFAIRS

In the matter of an Application for a Mandate in the nature of a Writ of Certiorari and a Writ of Mandamus under section 42 of the Courts Ordinance.
S.C. Application, No. 349/62.

Argued and decided on : 18th October, 1963.
Reasons delivered on : 22nd October, 1963.

Writ of Certiorari and/or Mandamus, application for—Procedure at hearing—Cross-examination of parties.

Held : That in an application for a Mandate in the nature of a Writ, before cross-examination in respect of the case for the respondent is permitted, the Court must be satisfied that the petitioner himself has made out a case calling for answer.

M. Tiruchelvam, Q.C., with *V. Kumaraswamy*, for the petitioner.

A. C. Alles, Solicitor-General, with *H. Deheragoda, Crown Counsel*, for the respondents.

T. S. FERNANDO, J.

At the conclusion of the hearing of this application I made order dismissing it with costs agreed upon at Rs. 105/-, but, in view of the importance of a point of procedure arising incidentally thereon, I stated that my reasons will be delivered later. I accordingly set out hereunder those reasons.

The basis of the application rested on the allegation that the application for citizenship made to the Minister was not placed before her but had at all times been dealt with by one Perera, an officer in the Ministry. This allegation was sought to be refuted on behalf of the respondents by means of an affidavit of Perera wherein he states that he duly submitted the application to the Minister.

When the present application to this Court came up for hearing before Sri Skanda Rajah, J., he made order on January 29, 1963, on a motion on behalf of the petitioner, permitting cross-examination of Perera on his affidavit above referred to. When the application thereafter came up for hearing before G. P. A. Silva, J., an order has been made on June 20, 1963, this time on a motion on behalf of the respondents, permitting cross-examination of the petitioner on his affidavit annexed to the application he made to

this Court for relief by way of certiorari and mandamus. The application came up for final determination before me, and counsel for both sides contended that I was bound by the earlier interlocutory orders made by Sri Skanda Rajah, J., and Silva, J. I agreed that in dealing with the present petition I was so bound ; indeed, any other view would have been fraught with much inconvenience to parties to the litigation. At the same time, I should for my own part like to observe, with much respect, that it seems to me that before cross-examination in respect of the case for the respondents is permitted, a Court must be satisfied that the petitioner himself has made out a case calling for answer.

In view of the interlocutory orders already made in this case I permitted the learned Solicitor-General to cross-examine the petitioner on his affidavit, and it became immediately apparent that the material allegation of the petitioner that formed the basis of this application was founded upon pure speculation. It was not founded even upon hearsay, although I must observe that an application in an affidavit which is based only on hearsay is itself valueless and calls for no refutation. The petitioner admitted that he did not know whether the application was or was not forwarded to the Minister. He admitted that he received a reply from the Minister that his application had been disallowed by her in terms of the Act. Indeed, this reply formed part of his application to this Court for the relief he sought. His cross-examination was concluded with his answer that he made application to this Court merely because he was dissatisfied with the refusal of his application for citizenship. Learned counsel for him intimated to me at the conclusion of the cross-examination that he was unable to maintain the application.

Application dismissed.

Present : **T. S. Fernando, J., and Sri Skanda Rajah, J.**

WIJESUNDERA *vs.* HERATH APPUHAMY & OTHERS

S.C. No. 58—*D.C. (Inty.) Colombo, No.* 6148/*P.*

Argued and decided on : 14th February, 1964.

Partition Act—Interlocutory decree—Accidental omission—Power of Court to amend such decree—Civil Procedure Code, section 189.

Held : An interlocutory decree in a partition action may be amended by the trial judge if it appears that the decree is not in conformity with the judgment and that it has been entered as a result of an *accidental omission* on his part.

Case referred to: *Dharmadasa* v. *Meraya*, (1948) 50 N.L.R. 197.

Per T. S. Fernando.—" It seems to us that the presence or absence of Counsel makes no difference to the duty of the learned trial judge to examine both oral and documentary evidence in a partition case to satisfy himself on the question of title. A statement of shares is a document—which, incidentally, finds no recognition in the Partition Ordinance—that is submitted by one or more of the parties or their proctors for the convenience of the judge in the entering of the partition decree. The submission of such a document cannot, in my opinion, make any difference to the duty of the judge to satisfy himself that the statement of shares is in conformity with the judgment already pronounced. "

J. A. L. Cooray, for the 52nd defendant-appellant.

D. R. Wijegoonewardene, for the 19th defendant-respondent.

T. S. Fernando, J.

This appeal raises the question of the correctness of an order made by the learned District Judge on the 16th of May, 1962, refusing an application to amend in terms of section 189 of the Civil Procedure Code, the interlocutory decree entered in this partition case. That application was made on the ground that the decree was not in conformity with the judgment and that it has been entered by an error arising from an accidental slip or omission on the part of the learned District Judge who heard the trial.

It was not disputed at the trial that the present appellant's predecessor-in-title, namely, the 23rd defendant, obtained title to certain interests in this land on a deed produced in evidence by the

plaintiff, who was the only party to testify at the trial. That deed, 22 D 12, conveyed to the 23rd defendant the interests which his father, the 19th defendant-respondent to this appeal, obtained on three transfers—22 D 3, 22 D 6 and 22 D 8. The learned trial judge in his judgment stated that he accepted the evidence of the plaintiff and found title to the land proved as stated by the plaintiff. There is no dispute that, if by 22 D 12 the 19th defendant transferred the interests he obtained on these three other deeds mentioned above, no further rights in this land remained with him. When the interlocutory decree came to be obtained, however, certain shares in the land were allotted to him, while certain other shares were allotted to the 23rd defendant who, as I have said already, had succeeded to all the rights of the 19th defendant. The 23rd defendant was allotted shares based on one of the three deeds mentioned in 22 D 12, namely, 22 D 8. The shares flowing from deeds 22 D 3 and 22 D 6 were allotted to the 19th defendant.

The contention of the parties who have been substituted in place of the 23rd defendant, who is now dead, was that it was the duty of the learned trial judge to have examined the documents referred to in the evidence of the plaintiff and, if he had so examined them, he would have seen that the interlocutory decree should have allotted to the 23rd defendant, in addition to the interests actually allotted, also the interests which came to be allotted to the 19th defendant. On the oral and documentary evidence accepted by the trial judge, the 19th defendant was not entitled to any share at all. Learned counsel for the appellant relies on the judgment in the case of *Dharmadasa* v. *Meraya*, 50 N.L.R., p. 197, wherein it is stated that in a partition action it is the duty of the trial judge to examine the evidence, oral as well as documentary.

We are satisfied that the interlocutory decree came to be entered in the way it was as a result of an accidental as opposed to a deliberate omission on the part of the learned trial judge. For that reason as well as for the purpose of bringing the interlocutory decree into conformity with the judgment it was necessary to amend it. We feel the less deterred in doing so now as we find that when the 23rd defendant was alive he moved the Court for an amendment of the interlocutory decree and was supported by the present 19th defendant, his father, who submitted an affidavit in the course of which he prayed that the rights he obtained by the three deeds, 22 D 3, 22 D 6 and 22 D 8 be vested in the 23rd defendant. In the face of his conduct in presenting this affidavit to support his son's motion for amendment of the decree it is difficult to appreciate his later opposition thereto after the substitution for his son of his daughter-in-law and his grand-children.

The learned District Judge from whose order the present appeal is taken sought to distinguish the case of *Dharmadasa* v. *Meraya* referred to above on the ground that in this case counsel appeared for the 23rd defendant at the trial and that he had notice of the statement of shares. It seems to us that the presence or absence of Counsel makes no difference to the duty of the learned trial judge to examine both oral and documentary evidence in a partition case to satisfy himself on the question of title. A statement of shares is a document—which, incidentally, finds no recognition in the Partition Ordinance—that is submitted by one or more of the parties or their proctors for the convenience of the judge in the entering of the partition decree. The submission of such a statement cannot, in my opinion, make any difference to the duty of the judge to satisfy himself that the statement of shares is in conformity with the judgment already pronounced.

The final decree has not been entered in this case as yet. We set aside the order appealed from and direct that the interlocutory decree be amended by granting the shares that have been allotted therein to the 19th defendant to the parties who have been substituted in place of the 23rd defendant, namely, the present appellant and her children, the 53rd to the 61st defendant-respondents.

The appellant is entitled to the costs of the proceedings in the District Court relevant to the order appealed from as well as the costs of this appeal to be paid by the 19th defendant-respondent.

SRI SKANDA RAJAH, J.

I agree.

Appeal allowed.

Present : **Alles, J.**

SEYED CADER MOHIDEEN *vs.* N. L. ABEYWEERA & ANOTHER

In the matter of an Application for an Injunction under section 20 *of the Courts Ordinance.*
S.C. Application, No. 318/64.

Argued and decided on : 9th October, 1964.
Reasons delivered on : 30th October, 1964.

Injunction—Courts Ordinance, section 20*—When may it be granted ?*

Application for injunction to restrain implementation of verdict at referendum taken not under any provision of law, but for purposes of public policy—Is injunction available in these circumstances ?

Action for declaration that such referendum was conducted illegally and, therefore, void—Could a decree be entered in these terms ?—Civil Procedure Code, section 217.

The petitioner, describing himself as a supervisor employed by a company (a Tally contractor belonging to the Tally Contractors' Association and working in the Port of Colombo), applied for an injunction under section 20 of the Courts Ordinance to restrain the respondents—the Commissioner of Labour and the Permanent Secretary of the Ministry concerned—and their subordinate officers from implementing the verdict at a referendum and altering the *status quo* in regard to Tally personnel and in regard to the petitioner in relation to the service.

The referendum referred to was one held by the 2nd respondent (the Permanent Secretary) before a Collective Agreement entered into under the Industrial Disputes Act, (Cap. 131), between the Colombo Tally Contractors' Association and certain Workers' Unions came into force, for the purpose of ascertaining whether the Tally personnel wished to continue the " contract system " or a new system of employment suggested by one of the unions and advising the Minister accordingly.

This referendum was not held under the provisions of any law or in pursuance of any legal obligation owed by the respondents to the petitioner. The main object of holding it was the preservation of industrial peace in the Port, involving a question of public policy, so that no act became illegal by the implementation of the verdict.

The petitioner had also under section 461 of the Civil Procedure Code given notice to the Attorney-General of an action for a declaration that the referendum in question was conducted illegally and was void and that the verdict was illegal.

The petitioner's affidavits stated—

(I) that the referendum was vitiated on the following grounds :—
  (*a*) ballot papers were printed only in English and Sinhala and that Tamil personnel were prejudiced thereby ;
  (*b*) that there were cases of impersonation ;
  (*c*) that members of a particular union indulged in acts of violence and thuggery which prevented the free exercise of the vote.

(II) that he feared that " the implementation of the verdict of the referendum would result in a modification of their terms of employment before matters in controversy could receive adjudication in the District Court " ;

(III) that the verdict of the referendum was to be of vital materiality in the formulation of the ensuing policy of the Minister.

Held : (1) That the material placed before the Court did not justify the inference that irremediable mischief is likely to ensue if the verdict of the referendum is implemented. Therefore, an injunction under section 20 of the Courts could not be granted.

(2) Further, that the action of which notice has been given by the petitioner to the Attorney-General, is one that does not fall within the ambit of section 217 of the Civil Procedure Code.

(3) That where the question involved is one of public policy the appropriate remedy is not by way of injunction.

Per ALLES, J.—" The act sought to be restrained must be a wrongful one, as for instance, when there is a complaint of a public nuisance, or a public officer in the purported exercise of his authority acts wrongfully or where a party to a contract asks for a restraining order where damages would not be an adequate remedy. "

Vide His Lordship's observations regarding joint-affidavits and the practice of filing counter-affidavits in inquiries under Chapter XXIV of the Civil Procedure Code.

Casses referred to : *Mahamado* v. *Ibrahim*, (1895) 2 N.L.R. 36
Bilston Corporation v. *Wolverhampton Corporation*, (1942) 2 A.E.R. 447; 167 L.T. 61; 111 L.J. Ch. 268.

Izadeen Mohamed with *M. S. M. Nazeem* and *S. C. Crossette Tambiah*, for the petitioner.

V. Tennekoon, Solicitor-General, with *H. L. de Silva, Crown Counsel*, and *I. F. B. Wickramanayake, Crown Counsel*, for the respondents.

ALLES, J.

At the conclusion of the argument in this case, I refused the application for an injunction with costs and stated that I would give my reasons later. I now set down the reasons for my refusal.

The petitioner, who described himself as a supervisor employed by Marine Services Co., a Tally Contractor belonging to the Tally Contractors' Association and working in the Port of Colombo applied for an injunction from this Court praying that the Court—

> " grant and issue an injunction restraining the respondents and their subordinate officers from implementing the verdict at a referendum . . . and altering the *status quo* in regard to Taliy personnel and in regard to the petitioner in relation to his service."

The power of granting an injunction under section 20 of the Courts Ordinance is a strictly limited one and can be exercised only on special grounds. The special circumstances in which the Supreme Court would issue an injunction have been laid down by Bonser, C.J., in the case of *Mahamado* v. *Ibrahim*, 2 N.L.R. 36. They are as follows :—

(1) that irremediable mischief would ensue from the act sought to be restrained ;

(2) that an action would lie for an injunction in some Court of original jurisdiction ; and

(3) that the plaintiff is prevented by some substantial cause from applying to that Court.

Applying these tests to the facts of the present application it would appear that the petitioner's case is without any merits whatsoever.

Briefly, the facts relevant to the present application are as follows :—

Under the Industrial Disputes Act, (Cap. 131), a Collective Agreement was entered in to on 1st September, 1964, between the Colombo Tally Contractors' Association, on the one hand, and the Industrial and Commercial Workers' Union and Port Clerical Minor Employees' Union, on the other, with regard to the employment, scales of salary, holidays, provident fund benefits, disciplinary control and resolution of industrial disputes. This agreement had not yet come into force under the provisions of section 7 of the Act and had not been published in the *Gazette* as required under the provisions of the Act. It is only after the agreement comes into force that it is binding on the parties and become implied terms of the contract of employment between the employers and workmen bound by the agreement, (*vide* section 8 of the Act). Before the agreement came into force, the 2nd respondent, who is the Permanent Secretary to the Ministry of Communications and Works, held a referendum for tally personnel employed in the Port in order to ascertain their views in regard to certain changes that were contemplated in regard to their system of employment in the interests of the administration of the Port and the preservation of industrial peace. The only question raised at the referendum was whether the tally personnel wished to continue the " contract " system or a new system of employment suggested by the Ceylon Mercantile Union. In holding the referendum, the 2nd respondent was only concerned with ascertaining the views of the employees. This was one of the matters he proposed to consider together with other interests and relevant facts before he made his recommendation to his Minister. Undoubtedly, a question of policy was involved in deciding whether effect should be given to the verdict taken at the referendum because the main object of the 2nd respondent was the preservation of industrial peace in the Port. The referendum was not held under the provisions of any law,

statutory or otherwise, or in pursuance of any legal obligation owed by the respondents to the petitioner. No act becomes illegal by the implementation of the verdict of the referendum. The learned Solicitor-General referred me to paragraph 9 of the second affidavit of the petitioner where the petitioner states the " the verdict of the referendum was to be of vital materiality in the formulation of the ensuing policy of the Minister." If the question involved is one of public policy, it is not a case in which the appropriate remedy is by way of injunction for, in the words of Simonds, J., in *Bilston Corporation* v. *Wolverhampton Corporation*, (1942) 2 A.E.R. 448, the Court ought not " to interfere by granting an injunction, since the questions of public policy involved are more suitable for determination by Parliament than by the Court. "

The referendum was held on 14th September, 1964, and it is in respect of the implementation of the verdict of the referendum that the present application is made. Since there was no legal duty which the respondents owed to the petitioner in the implementation of the verdict, the present application is without any merits. The act sought to be restrained must be a wrongful one, as for instance, when there is a complaint of a public nuisance, or a public officer in the purported exercise of his authority acts wrongfully or where a party to a contract asks for a restraining order where damages would not be an adequate remedy.

Although the 1st respondent, the Commissioner of Labour, sought the co-operation of the members of the Tally Contractors' Association to ensure that the voting at the referendum would be properly conducted, the petitioner in his affidavit has submitted that the referendum was vitiated on the following grounds :—

(*a*) The ballot papers were printed only in the English and Sinhala languages and the Tamil personnel were thereby prejudiced;

(*b*) The identity of the voters at the referendum was not sufficiently ensured and there were cases of impersonation ;

(*c*) The members of the Ceylon Mercantile Union indulged in acts of violence and thuggery which prevented the free exercise of the vote.

There is no evidence that any prejudice has been caused as a result of the ballot papers not being printed in the Tamil language nor is there any evidence of any acts of impersonation at the voting. The document P 6 is a letter to the Police, complaining of certain acts of violence by the members of the Ceylon Mercantile Union, but in the absence of complaints by the parties concerned themselves, it is not possible to place any reliance on the allegations contained therein. It is not even clear that the alleged acts of violence had anything to do with the referendum. The evidence does not disclose the existence of any mischief, leave alone irremediable mischief, which will be caused to the petitioner by the implementation of the verdict of the referendum. In paragraph 15 of his affidavit, the petitioner says that he " fears that the implementation of the verdict of the referendum will result in a modification of their terms of employment . . . before matters in controversy . . . can receive adjudication in the District Court ". The collective agreement between the parties has not yet the force of law and it is not known whether the 2nd respondent will take into account the verdict of the referendum in his recommendations to his Minister. The fears of the petitioner are, therefore, not only premature, but also groundless.

Quite apart from the absence of any material from which it can be reasonably inferred that irremediable mischief is likely to ensue if the verdict of the referendum is implemented, what is the act sought to be restrained in respect of which an action is available in Court ? The petitioner has given notice of action to the Attorney-General under section 461 of the Civil Procedure Code " for a declaration that the referendum was conducted illegally . . . and is void and that the verdict is illegal ". Would a decree in these terms be possible in the present case under the provisions of section 217 of the Civil Procedure Code ? The only declaration without substantial relief that can be obtained from the District Court is one under section 217 (G) of the Civil Procedure Code. There is, therefore, no action that would lie for an injunction in this case.

I am, therefore, of the view that not only is this not an appropriate case for the issue of an injunction but that the petitioner has failed to satisfy the Court that any special circumstances exist for the exercise of the extraordinary powers of this Court under section 20 of the Courts Ordinance.

Before I conclude, I wish to make some observations regarding the procedure of filing " counter affidavits " in applications of this nature. At the

argument before me learned Solicitor-General raised a preliminary objection to the " counter affidavit " of the petitioner and its annexure marked " X ". The annexure " X " purports to be a joint affidavit of seven persons who have affirmed that the ballot papers were in Sinhala and English only, which languages they say they do not understand as they only know the Tamil language. The law does not permit such an affidavit to be affirmed by seven persons jointly, but, quite apart from this irregularity, according to the jurat which has been affirmed before a Sinhalese gentleman, the affidavit which was in English has been read over and explained to the affirmants who, according to the jurat appeared to have understood the contents of the affidavit although they have signed in Tamil. The " counter affidavit " of the petitioner contained hearsay evidence and was only a repetition of the contents of the original affidavit. I, therefore, upheld the objection of the learned Solicitor-General and did not permit Counsel for the petitioner to use material in the counter affidavit for the purpose of his submissions.

The procedure that is adopted in applications of this nature is that laid down in Chapter XXIV of the Civil Procedure Code. Section 373 requires every application, by way of summary procedure, to be instituted upon a duly stamped written petition supported by affidavits (*vide* section 376) and section 374 refers to the matters which should be contained in the petition. Under section 377, if sufficient grounds are made out on the face of the petition an opportunity is given to the respondent to show cause on a certain fixed date. The procedure to be adopted when both parties appear is laid down in section 384. Sections 385 and 286 refer to cases where a right of reply is given to the petitioner and when additional evidence may be admitted. This procedure does not make any provision for the filing of " counter affidavits ". If the petitioner is permitted to file " counter affidavits " it necessarily follows that the respondent also should be given an opportunity of filing papers to counter any new material which is disclosed in the counter-affidavit. Such a procedure far from assisting in the expedition of the suit, will only tend to unduly lengthen the proceedings. Counsel for the petitioner was only able to support the regularity of this procedure by stating that this has been a long established practice of our Courts. If such a practice has been in existence it is certainly not one that is warranted by any provision of law. The law requires the petitioner to disclose all the material facts within his knowledge in his original petition supported by his affidavits, and his case will be met by the respondent by filing his affidavits and such documentary evidence as may be admissible. If at the hearing the petitioner desires to adduce any additional evidence, it must be with the leave of Court and in accordance with the procedure laid down in sections 385 and 386 of the Civil Procedure Code. In this case, the " counter-affidavit " apart from containing hearsay evidence and repeating what has already been said in the original petition does not " counter " any of the averments made by the 2nd respondent in his petition and affidavit.

Application refused.

Present : **Sri Skanda Rajah, J., and Manicavasagar, J.**

BABANISA & OTHERS *vs.* UKKU & OTHERS

S.C. 84/'62 (*Inty.*)—*D.C. Avissawella*, 8900/*P.*

Argued on 4th November, 1964.
Decided on : 13th January, 1965.

Kandyan Law—Woman given in " deega " marriage by her deceased mother's associated fathers with dowry provided by them—Living after marriage with husband for four or five years in her family " mulgedara "—Thereafter leaving for husband's home and continue to live there to date of action—Claim for " paraveni " property through deceased mother—Forfeiture of her rights—Test of forfeiture.

Kandyan Law Declaration Ordinance (*Cap.* 59), *section* 10—*Limitations imposed by Common Law applicable to Kandyans.*

The questions in issue were : (*a*) whether the plaintiff, who was a Kandyan woman, was married in *deega*, and thereby forfeited her rights to the family inheritance ; (*b*) whether she is an heir *ab intestato* to the estate of her maternal associated grandfathers, her mother having predeceased the grandfathers.

On the 1st question, her marriage registration certificate produced by the contesting defenadnts showed that she was married in *deega*. She was not able to prove that she regained her rights.

Her own evidence was that for four or five years she lived in the family *mulgedara* with her husband and thereafter went to her husband's home where she still continues to live.

Held : (1) That quite apart from the evidence provided by the marriage certificate, on the plaintiff's own evidence that she had left the family home and continued to live away from it, she had forfeited her rights to the family inheritance.

(2) That the test of forfeiture is the severance of the daughter from her family during the life of the parent to whose estate she claims to succeed, and this may occur at any time after marriage, *not necessarily on the day she is married.*

(3) That the plaintiff was precluded from claiming as heir to the estate of her maternal grandfathers as on the uncontradicted evidence in the case she was given in *deega*-marriage with a dowry provided by the grandfathers after the mother's death and as there were other descendants entitled to succeed to their estate on their death.

(4) That the general rule contained in the provisions of section 10 of the Kandyan Declaration Amendment Ordinance, (Cap. 59), which recognise a person as heir to his/her maternal grandfathers immovable property through the deceased mother is subject to limitations imposed by the common law applicable to the Kandyans.

Authorities cited : *Hayley—Sinhalese Laws and Customs, pp.* 375, 405, 463.
Menikhamy v. *Ransohamy*, (1930) 11 C.L. Rec. 31.
Punchi Menike v. *Appuhamy*, (1917) 19 N.L.R. 353
Kawwaumma v. *David Singho*, (1945) 46 N.L.R. 54

W. D. Gunasekera with *M. T. M. Sivardeen*, for the 6th to 12th defendants-appellants.

N. E. Weerasooriya, Q.C., with *Nimal Senanayake* and *Miss P. Abeyratne*, for the plaintiff-respondent.

MANICAVASAGAR, J.

In this action which is for the partition of a land called Kudumbikandahena and Watta, described in the schedule to the plaint, and depicted in plan P 1 filed in the record, the 1st and 5th defendants are entitled to an undivided 2/3 share ; there is no dispute about this ; of the balance 1/3, the 6th to 11th defendants are admittedly entitled to an undivided 1/6 ; the dispute is in regard to the remainder which the plaintiff claims as against the 6th to 11th defendants.

The 6th to 11th defendants are the children of Dinesa, whilst the plaintiff is a daughter of Rankiri ; Rankiri and Dinesa are the children of two brothers, Unga and Sitta, who had a common wife : Unga and Sitta were entitled to an undivided 1/3 from Lokupeduru Atchige Baba, one of the three original owners.

The questions which we have to decide are—

(1) Was the plaintiff married in *deega* ;

(2) Is she an heir *ab intestato* to the estate of her grand-fathers, Unga and Sitta ; and

(3) if (1) and (2) are answered in the affirmative has she forfeited her right of succession.

The plaintiff married Kudapedaru Atchige Sedirissa ; at the time of her marriage, her mother, Rankiri, was dead ; the plaintiff after her mother's death, lived with Unga and Sitta, and was maintained by them ; they gave her in marriage, and according to the evidence of Babanissa, the 6th defendant, which was not contradicted or challenged, she was given a dowry on her marriage. Plaintiff's marriage was registered (exhibit 6 D 1) and the document shows that she was married in *deega* ; this is sufficient to hold that she severed her connections with the family home and thereby forfeited her rights to the family inheritance ; it was, however, open to the plaintiff to prove that though the certificate shows a *deega* marriage, she did not forfeit her rights. The plaintiff's evidence is that for four or five years after her marriage she lived in the family *mulgedera* with her husband, and thereafter went to her husband's home where she still continues to live. The 6th defendant said that after the plaintiff's marriage she was conducted to her husband's home ; no issue was raised on this particular question of fact, and, therefore, there is no finding by the

learned District Judge ; nor does he say whether he accepts or rejects the evidence of the plaintiff or the 6th defendant on this question.

On the basis that the plaintiff left her family home four or five years after her marriage, Mr. Weerasooriya submits that this is sufficient to infer that she did not sever her connections with her *mulgedera* ; his argument was that the conducting of the bride to her husband's home is a part of the ceremony of the marriage, and if it was not done on the day of the marriage, a subsequent departure does not entail a forfeiture ; he cited no authority in support of this proposition. I consider the argument untenable for this reason : forfeiture to a share of the family property is the consequence of the severance of the daughter from her family, and her entry into that of her husband's home ; that is the essence of forfeiture ; the departure to the husband's home need not be on the day of the marriage ; it may be at any subsequent period of time but prior to her father's death. Hayley, at page 375, in his Sinhalese Laws and Customs, cites from the *Niti Nighanduwa* an instance of a *binna*-married daughter who leaves her parental home subsequently, and lives with her husband in his home ; she will not be entitled to a share in the father's lands on his death ; there are several instances in our case reports which serve to show that the test of forfeiture is the severance of the daughter from her family during the life of the parent to whose estate she claims to succeed, and this may occur at any time after marriage, and not necessarily on the day she is married. So that even adopting the plaintiff's evidence, though on an examination of it I observe such a conflict in her story on this question that I do not regard it as a firm foundation to proceed upon, her marriage was, in fact, in *deega*, for quite apart from the evidence provided by the marriage certificate, she had left the family home and continued to live away from it.

Mr. Weerasooriya submits that the plaintiff is entitled *through her mother*, *Rankiri*, to a share of this land which was her paraveni property, though she (Rankiri) had pre-deceased her associated fathers, Unga and Sitta : he relied on section 10(4) of the Kandyan Law Declaration and Amendment Ordinance [Cap. 59), Vol. 3, of the Legislative Enactments (Revised Edition), 1956] : by this provision maternal paraveni property is deemed to mean paraveni property derived *from or through* the mother: and paraveni property (or ancestral or inherited property) is immovable property to which a deceased person was entitled by successiou to any other person who has died intestate (*vide* section 10 (1*a*) of the same Ordinance). These provisions recognize a person as heir to his/her maternal grand-parents immovable property through the deceased mother ; so did the law prior to this legislation : the question here is whether a grand-daughter married in *deega* is an heir to her maternal grand-father's property ; my view is that the general rule is subject to certain limitations imposed by the common law applicable to the Kandyans. If the grand-daughter be the only child of her deceased mother she would be an heir, provided her mother did not go out in *deega* ; if the mother was not married in *deega*, her daughter will still have no claim as heir to the estate of her maternal grand-father, if he gave her in *deega* marriage and dowered her after the death of her mother, and there be other descendants entitled to succeed to his intestate. For this view I rely on the following passage which Hayley in his Treatise on the Laws and Customs of the Sinhalese (page 405) cites from the *Niti Nighanduwa*—

> "There is one modification of the right of a *deega*-married grand-daughter who is the only child of her father or *binna*-married mother, forming on exception which most pertinently illustrates the importance of the dowry in such matters. If the grand-daughter at the date of the death of the parent through whom she would claim, is not married, but is subsequently given away in *deega* by the grandfather himself, she has no further claim upon his estate, should he have other descendants to inherit. The reason for this is to be found in the fact that the grandfather would in such a case provide the dowry, thereby diminishing the property available for his other descendants. In other words, the grand-daughter gets an advancement of a portion equivalent to that which she would otherwise inherit on the grandfather's death."

The evidence in this case is that there are other descendants of Unga and Sitta entitled to inherit on their death.

The decision in the case of *Menikhamy and Ransohamy*, 11 C.L.R. 31, also lays down a similar principle in regard to a grand-daughter's claim to succeed to her paternal grand-father's estate. In this case the grand-daughter who was married in *deega* claimed a share of her grand-father's estate, her father having predeceased her grand-father. Garvin, A.C.J. (Lyall Grant, J., agreeing), said, "a daughter who by reason of a *deega* marriage was excluded from participating in her father's estate, is also excluded from participating in the estate or in the portion of the estate of her grand-father which would have come to her through her father". My opinion is that the plaintiff has no claim as heir to her maternal grandfather's

immovable property and is, therefore, not entitled to any share of the land in suit.

Some days after the argument was concluded in this case, Mr. Senanayake, the junior counsel for the respondent, submitted for our consideration the references reported in 19 N.L.R. 353, at 354, and 46 N.L.R. 54, at 55, as authority for the proposition that the rule of forfeiture applies only to succession to the estate of the father. These cases are no authority for the submission that the rule of forfeiture does not apply to succession to the mother's estate ; that is a submission which he invites us to adopt, inferentially. To say, without reserve, that a *deega*-married daughter is an heir to her mother's estate is not a proposition which I can accept, having regard to what is said by text-book writers on the subject ; Hayley, at page 463, cites two passages from Sawyers, and one from Armour which are against the adoption of the sbumission made by counsel as an inflexible rule. I do not consider it necessary to discuss this in detail as it is not relevant to the questions which we have to determine ; we are here not discussing a right of succession to the estate of a deceased mother, but succession to the maternal grand-father's estate through the deceased, and I have stated my opinion on this question. The appeal is allowed with costs both here, and in the Court of first instance, and the plaintiff's action is dismissed.

SRI SKANDA RAJAH, J.
I agree.

Appeal allowed.

Present : **Sirimane, J., and Manicavasagar, J.**

DHEERANANDA THERO *vs.* RATANASARA THERO

S.C. 622/'60 (*F*)—*D.C. Anuradhapura, No.* 5369.

Argued on : 10th, 11th, 12th, 13th, 16th, 17th, 18th and 23rd November, 1964.
Decided on : 21st December, 1964.

Buddhist Ecclesiastical Law—Claim to Incumbency—Action filed by plaintiff against disputant—Death of disputant pending action—Substitution of pupil (appellant) with latter's consent—Continuation of proceedings—Judgment for plaintiff—Appeal to Supreme Court—Appellant's success in a ppeal on ground that no cause of action survived against appellant—Writ of ejectment issued pending appeal—Appellant leaves temple—Later returns to temple after success in appeal—Plaintiff institutes present action more then three years after death of appellant's tutor—Is plaintiff's claim prescribed in law.

Abandonment—Need for intention to be clear and unambiguous—Buddhist Temporalities Ordinance, (Cap. 318), *section* 46*—Declaration under—How far is it " prima facie " evidence of facts stated therein* ?

Plaintiff's tutor, the admitted Viharadipathy of the temple in question, died on 22nd February, 1952. Plaintiff filed action, No. 3760, D.C. Anuradhapura, on 18th May, 1953, against *P.* praying for a declaration as Viharadhipathy of the temple and ejectment. *P.* died on 31st January, 1954, during the pendency of this action. Plaintiff did not file a fresh action, but moved to substitute *P's.* pupil, the appellant in the room of the deceased to which the latter consented. The dispute continued and decree was entered in plaintiff's favour from which an appeal was taken.

A Divisional Bench of the Supreme Court held that the plaintiff's right to sue the appellant did not survive against him, a decision resulting in the appellant's favour.

When the plaintiff, pending the appeal, D.C. 3760, sought to execute the order for ejectment, the appellant left the temple and as soon as he succeeded he returned to the temple on 19th February, 1958.

Thereupon the plaintiff instituted this action against the appellant on 14th July, 1958, and the appellant resisted his claim on three grounds :—

(*a*) that the plaintiff's claim, if any, was prescribed in law ;
(*b*) that the plaintiff could not claim this temple as his tutor had abandoned the incumbency ;
(*c*) that the plaintiff was not, in fact, a pupil of his tutor, through whom he claimed his right to the temple.

The learned District Judge held in favour of the plaintiff on all the points and on an appeal taken to the Supreme Court.

Held : (1) That the plaintiff's cause of action arose when *P.* died on 31st January, 1954, and not on 19th February, 1958, when the appellant returned to the temple after succeeding in his appeal. Therefore, as the present action was instituted on 14th July, 1958, *i.e.*, three years after the cause of action arose, the plaintiff's claim was prescribed in law.

(2) That the contention on behalf of the appellant that when the appellant left the temple, the plaintiff regained his full rights to the incumbency, and the earlier cause of action against the appellant was extinguished is untenable. For, the mere fact that the appellant left the temple premises in obedience to a decree of Court did not mean that he restored to the plaintiff the full exercise of control over the temporalities of the temple ; nor was the running of preseription arrested by this.

(3) That in a case of abandonment the intention to renounce one's rights must be clear and unambiguous and if there is any doubt, the inference drawn should be against an abandonment. A review of all the evidence showed that there is, at least, a great deal of doubt in the present case as to whether the plaintiff's tutor had abandoned his rights, and hence, the inference drawn must be against an abandonment.

(4) That the entries in a Declaration under section 41 of the Buddhist Temporalities Ordinance, (Cap. 318), are *prima facie* evidence of the facts contained therein for purposes of administering the law laid down by the Ordinance in all Courts and for all purposes.

Per SIRIMANE, J.—" One must bear in mind the distinction between abandonment or renunciation of one's rights, and a conveyance of those rights to another. When rights are abandoned they disappear, and cease to exist, and there is no person to whom those rights accrue. In the case of a conveyance, the transferor asserts his rights, and then transmits them to the transferee so that the rights continue in the transferee. It may turn out that the act of transfer is ineffective (as in this case) but then the rights of the transferor do not disappear (for he never renounced them) but continue to remain in him ".

Per MANICAVASAGAR, J.—" The respondent cannot be heard to complain; the decision of the Court was the result of the wrong procedural step he took ; the consequences of his own error must fall on him; ....I am fortified in the view I have taken by these words of Cairns, L.C., which were quoted with approval by Lord Carson in the judgment of the Privy Council referred to in the judgment of Sirimane, J. :

' One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors . . . '. "

Cases referred to : *Jai Berham & Others* v. *Marwari & Others*, (1922) A.I.R., P.C. 269
Jinaratana Thero v. *Dhammaratana Thero*, (1955) 57 N.L.R. 372 ; LIII C.L.W. 2
Kartar Singh v. *Bhagat Singh*, (1921) A.I.R. Lanore 70

H. W. Jayawardena, Q.C., with *V. Jonklaas* and *L. C. Seneviratne*, for the defendant-appellant.

H. V. Perera, Q.C., with *T. B. Dissanayake* and *D. C. Amerasinghe*, for the plaintiff-respondent.

SIRIMANE, J.

The plaintiff-respondent (hereinafter called the respondent) filed this action against the defendant-appellant (hereinafter called the appellant) on 14th July, 1958, for a declaration that he (respondent) was the Viharadhipathi of the temple known as Panikkankulama *alias* Manikkankulama Purana Raja Maha Vihare described in the schedule to the plaint. He also prayed that the appellant be ejected from the temple.

It was common ground that Rev. Sidhartha was the Viharadipathi of four temples of which the temple in dispute was one. He had two pupils Ratnapala and Piyadassi. By agreement there was a division of incumbencies between these two pupils, and admittedly Piyadassi became the Viharadipathi of the temple in dispute. The respondent claimed the incumbency as a pupil of Piyadassi, who had two other pupils, Daswatte Gunaratne, who disrobed in 1938 and died in 1942, and Ratnasara, who disrobed in 1939. It is also relevant to note that Ratnapala, the co-pupil of Piyadassi mentioned above, had three pupils, Sumangala (who in turn had three pupils, Seelananda, Gunaratana and another), Sumanatissa, who left no pupils, and Piyaratana, whose pupil is the appellant.

The appellant resisted the respondent's claim on three grounds, which, in the order they were urged at the hearing of this appeal were :—

(i) that the respondent's claim, if any, against the appellant was prescribed in law ;

(ii) that Piyadassi abandoned the incumbency of this temple so that his pupils (assuming that respondent was his pupil) could not claim through him ; and

(iii) that the respondent had failed to prove that he was, in fact, a pupil of Piyadassi.

The learned District Judge has found in favour of the respondent on all three points.

To deal with the question of prescription. It is conceded that a claim of this nature has to be brought into Court within three years of the cause of action arising. Piyadassi (the admitted Viharadhipathi) died on 22nd May, 1952. So that the respondent's right to claim the Viharadhipathiship against the then disputant (Piyaratane) arose on that day. He filed District Court, Anuradhapura, case No. 3760, against Piyaratane on 18th May, 1953, praying for a declaration as Viharadhipathi of this temple, and the ejectment of Piyaratane from its premises. Piyaratane died on 31st January, 1954, during the pendency of that action. The right to sue the appellant, who was also disputing his claims arose on that day ; and prescription started running against the respondent as from that day. It is true that the appellant could never have acquired a " right " to the incumbency by the mere efflux of time, but I do not think that that fact affects the position of the respondent who had to bring his claim properly before a Court of Law within three years of 31st January, 1954.

The respondent did not file action ; instead he moved to substitute the appellant in the room of the deceased, Piyaratane, in D.C. 3760. The appellant consented to the substitution, and continued the dispute. A Divisional Bench of this Court has held that the respondent's right to sue did not survive against the appellant. (*See Dheerananda Thero* v. *Ratnasara Thero*, 60 N.L.R. page 7). So that the cause of action against the appellant which arose on 31st January, 1954, was properly brought before Court only when the present action was filed, namely, on 14th July, 1958,—well after the period of three years had elapsed.

Now, D.C. 3760 was decided in favour of the respondent in the District Court. The decree is really in two parts, (*a*) a declaration that respondent was the incumbent, (*b*) an order for ejectment against the appellant on the ground that he was disobedient and disrespectful. (Ordinarily, being a priest he would have had a right of residence in the temple even though he claimed the Viharadhipathiship himself). *But the decree did not end the dispute*, for the appellant appealed against it. Pending the appeal the respondent sought execution of that part of the decree which was executable, and the appellant left the temple in obedience to the decree. But he continued to dispute the *entirety* of the defendant's claim by prosecuting his appeal, and as soon as he succeeded got himself placed in the temple premises again on 19th February, 1958. It is the respondent's case that his present cause of action arose only on that day, and it was argued on his behalf that when the appellant left the temple he (respondent) regained " his right, and the full enjoyment thereof ", and that his cause of action against the appellant was extinguished. I have carefully considered this argument but I do not think that it is tenable. The respondent's cause of action was the denial of his right as Viharadhipathi to exercise control, not only over the temple premises but over all its temporalities. (*See* para 10 of the plaint). There is the respondent's evidence that there are fields and highlands belonging to this temple. The mere fact that the appellant left the temple premises, did not restore to the respondent the " full enjoyment of his rights ". The denial of his rights continued, and, in my view, the running of prescription was not arrested merely because the appellant left the temple in obedience to a decree of Court. If the respondent's argument is to be accepted, the appellant, in order to conserve an advantage he had gained, should have resisted the decree before it was set aside in appeal. I think it is the duty of the Courts to see that no party is placed at a disadvantage by an act of Court (see *Jai Berham and others* v. *Marwari and others*, (1922) A.I.R., Privy Council, page 269). I am of the view that the appellant is entitled to succeed on the plea of prescription.

In view of this finding in favour of the appellant, it is unnecessary to decide the two other grounds urged on his behalf ; but, since these two grounds were also fully argued before us I would like to state my views. I am of opinion that the appellant must fail on both these grounds.

To deal with the question of abandonment. The basis of abandonment is the intention to renounce one's rights ; and this intention must be clear and unambiguous. If there is any doubt on this matter the inference drawn must be against an abandonment. (See *Jinaratane Thero* v. *Dhammaratana Thero*, 57 N.L.R. 372). The appellant relied very strongly on certain documents ; *e.g.*, P20, D16, D15, and in particular, the Notarial Deed P(*b*) which was later referred to in D7.

In 1933, Piyadassi went to reside in a temple at Aluwihare in the Matale District (the temple in

dispute is in the District of Anuradhapura) and before he left he obtained the writing P20 dated 8th September, 1933, from his pupil, Dawatte Gunaratana. On the face of it P20 is an agreement by which Gunaratana promises to " Safeguard " certain properties and to return them to Piyadassi " on his demand ". The translation reads, " Movable, immovable *and* personal properties ". It was pointed out by learned Counsel for the appellant that the word " and " does not appear in the original, but I do not think that the learned District Judge was misled thereby. The document entrusts the movable, immovable, personal property to Gunaratne (some of the movable property is enumerated in the document itself) to be looked after and handed back on demand to Piyadassi. One could hardly infer an abandonment from such a writing.

D16 is a letter written by Piyadassi to Gunaratane from Aluwihare about a month after P20, on matters not relevant to this case, in which Piyadassi describes himself as resident priest (Viharadivasi) of Aluwihare, but also as " Piyadassi Thero of Sandagalpaya, Manikkankulama " (that is the temple in question). It shows that Piyadassi was at that time living at Aluwihare, but it does not indicate that he had abandoned this temple.

D15 is a writing granted by Gunaratana (who had agreed to safeguard Piyadassi's property by P20) to Piyaratana by which he purports to transfer to Piyaratana all his right, title and interest in this temple which he inherited from Piyadassi. Piyadassi was still alive at that time but the most important fact about this document is that Piyadassi was not a party to it, and D15 is, therefore, of very little value as an indication of any intention on the part of Piyadassi to abandon this temple. P(*b*) is a deed in English, notarially executed, in 1936. It follows the general form adopted in conveyances of immovable property.

According to its terms Piyadassi, who describes himself as " Incumbent Priest " of this temple, appoints Seelananda Thero (referred to earlier) as the Incument and empowers him " To take, receive and collect rents, profits and advantages . . belonging to the said Vihare . . . ". It goes on to say, " I delegate unto him the full management and control of the said Vihare absolutely and for ever ". It was argued for the appellant that the deed shows a clear indication on Piyadassi's part to abandon his rights.

One must bear in mind the distinction between abandonment or renunciation of one's rights, and a conveyance of those rights to another. When rights are abandoned they disappear, and cease to exist, and there is no person to whom those rights accrue. In the case of a conveyance, the transferor asserts his rights, and then transmits them to the transferee so that the rights continue in the transferee. It may turn out that the act of transfer is ineffective (as in this case) but then the rights of the transferor do not disappear (for he never renounced them) but continue to remain in him.

Seelananda, as stated earlier, is the pupil of Sumangala who was the eldest pupil of Ratnapala, the co-pupil of Piyadassi. It was admitted that succession to the temple was governed by the rule of Sisyanu Sisya Paramparawa and since Seelananda was not a pupil of Piyadassi the deed would be ineffective as an agreement. Our Courts have held that a Viharadhipathiship cannot be transferred during a Bhikkhu's life-time but the deed which purports to do so may, in certain circumstances, be effective as an appointment of a successor. In fact, the deed P(*b*) is headed " Deed of Appointment ". One has also to remember that such deeds are revocable.

I have carefully examined the terms of the deed P(*b*) and I am unable to infer from them any intention on the part of Piyadassi to abandon his rights. On the contrary, his assertion in this deed of 1936 that he *is* the Viharadhipathi of the temple negatives the suggestion that he had abandoned this temple in 1933.

The oral evidence of Rev. Dammapala that Piyadassi, on his return from Aluwihare, went to his village, Malawa, and associated with laymen until Piyaratane called him to this temple, was relied on as favouring the inference of abandonment. I do not agree. Piyaratane, according to Piyadassi's complaints, *e.g.*, D3, was an influential priest, and Piyadassi would have found some difficulty in entering the temple immediately after his return. Perhaps Piyaratane later thought that it would be prudent to let Piyadassi occupy a part of the temple in the hope of keeping him satisfied. Piyadassi, therefore, was, in fact, in occupation of a part of the temple premises, and D3, D4 and P28 are complaints he had made in 1936 to the Sangha against Piyaratane alleging that he (Piyaratane) was usurping the complainant's rights. These documents are against the suggestion that there was an abandonment by Piyadassi.

The appellant also relied on the evidence of Rev. Revatha who had stated that when Piyadassi complained to him, he informed Piyadassi that he had already appointed Piyaratane as the Incumbent. The learned District Judge has not accepted this evidence, which the document P30 does not support. P30 is a letter written to Piyadassi by Rev. Revatha on 2nd October, 1946, in which he addresses Piyadassi as the Viharadhipathi of the temple in dispute.

On the other hand, there are a number of documents which support the respondent's contention that there was no abandonment of his rights by Piyadassi. Apart from D3, D4 and P28 referred to above there are, in chronological order, P9 of 1935 a deed of gift of certain lands (though subject to a life-interest) to Piyadassi as the Viharadhipathi of this temple ; D7 of 1938 in which Piyadassi refers to P(*b*) and informs the High Priest that he had appointed Seelananda to render him assistance and sign his correspondence as Viharadhipathi of this temple ; P17 of 1942 which Piyadassi signs as the Viharadhipathi of this temple complaining against Piyaratane.

P18 shows that Piyaratane, when summoned before the Chief Priest and a committee, obtained a date to show cause against the complaint (P17) but avoided attending meetings thereafter on one excuse or another. (P19 is one of them). P(*y*1) of 1951 is a census return in which Piyadassi still describes himself as the Viharadhipathi of the temple in dispute. There is also P16 of 1952 when Piyaratane wrote to the Government Agent to get his name entered on a list as the owner of certain paddy fields in order to obtain some benefits for purposes of cultivation. He describes the fields as those of Piyadassi and the fact that he made the application only after Piyadassi's death indicates that the latter possessed these fields during his life-time. It was suggested that the fields were the " Puthgalika property " of Piyadassi, but the only evidence on the point—that it was " Sangika " property was not contradicted.

On a review of all the evidence on this point there is, at least, a great deal of doubt as to whether Piyadassi abandoned his rights or not, and the learned District Judge was right in holding that there was no proof of abandonment.

The last point raised on behalf of the appellant was the question of pupilage. It was submitted that the District Judge was wrong in holding that the respondent had established that he was a pupil of Piyadassi. The respondent was robed as a pupil of Gunaratana in 1938 (Gunaratana being the second pupil of Seelananda the grantee on P(*b*). Admittedly the respondent was ordained on 11th June, 1946, and his robing tutor, Gunaratana, was one of his ordaining tutors. The only question is whether Piyadassi was the other.

Three witnesses, Rev. Gunaratana, Rev. Dammapala and Carolis Appuhamy, (who was Rev. Ratnasara before he disrobed), had given evidence to the effect that they were present at the ordination ceremony ; that Piyadassi, too, was present at the commencement of the ceremony but was taken ill when the ceremony was in progress and had left before it was completed. So that the " Declaration " under section 41 of the Buddhist Temporalities Ordinance (P3) was signed by Piyadassi on a later occasion at another temple.

There are certain discrepancies in the evidence of these witnesses which, in my view, is not surprising. When witnesses try to describe an incident which had taken place about eight years before they were called upon to testify, their recollection on every detail cannot be relied on. The learned District Judge has addressed his mind to these infirmities and has accepted their evidence. He has not said so, in so many words, but this is obvious from the reasoning in his judgment.

Apart from this evidence there is the document P1—The Upasampada Seettu. It is prepared in foil and counter-foil immediately after the ordination takes place and one part of it is issued to the Bhikkhu who has just been ordained. The serrated edge in P1 indicates that is the foil. In its body the robing tutors are set out as Gunaratana and Piyadassi.

According to the evidence of Rev. Amunugama Vipassi, the then Anunayake Priest, such an entry is possible only if Piyadassi was present, or if he had left earlier, on his signifying his assent (usually by a letter) to be named as the tutor. Rev. Gunaratane when questioned on this point had stated that he did write out a letter to the Maha Nayaka when Piyadassi left. It was pointed out that he had not said so when he gave evidence in D.C. 3760 ; but that is not a matter of importance ; probably he was not questioned on the point. There is also evidence to show that letters of that nature were not preserved at that time. P1, therefore, is a very strong bit of evidence which supports the respondent's claim to be the pupil of Piyadassi.

Then there is the form P3, already referred to, which on the face of it shows that Rev. Piyadassi is the respondent's tutor. The evidence of Rev. Dammapala relating to the circumstances in which Rev. Piyadassi signed it has been accepted by the learned District Judge. These forms are sent in duplicate to the Registrar-General who retains one copy (which forms his register) and forwards the other to the Mahanayake of the Nikaya.

It was submitted for the appellant that the learned District Judge had misdirected himself when he held that the entries in P3 were *prima facie* evidence of the facts contained therein. The relevant portion of section 41(6) of Cap. 318 reads as follows :—

> "Such registers kept by the Registrar-General shall for the purposes of this Ordinance be *prima facie* evidence of the facts contained therein in all Courts and for all purposes."

As pointed out by learned Counsel for the respondent the words " For purposes of this Ordinance " is not the same as " For proceedings under this Ordinance ", and I am in agreement with learned Counsel's submission that the registers provide *prima facie* evidence for purposes of administering the law laid down by the Ordinance, in all Courts and for all purposes. The respondent filed this action to establish a right to the performance of certain functions under this Ordinance. (*Vide* section 18).

I see no reason to disturb the learned District Judge's finding on the facts.

Since I am of the view that the respondent is the Viharadhipathi of this temple but that the appellant succeeds only because the action is time-barred, I am not disposed to cast the respondent in costs.

MANICAVASAGAR, J.

I have considered the relevant evidence on the issues of abandonment and pupillage, and I agree with the conclusion reached by Sirimane, J., on both matters. On the issue of prescription, too, I agree with his decision, but I desire to state my views.

The question for decision is whether the respondent's cause of action is the one which accrued to him on 1st February, 1954, that is the day following Piyaratane's death ; or, did a fresh cause of action accrue in June, 1958, when, by the order of the District Court the respondent was dispossessed and the appellant restored to possession.

An action for declaration to a status is barred unless it be brought within three years of the accrual of the cause of action ; if the cause of action was not extinguished the respondent's claim is undoubtedly barred by time running against him.

The facts are set out in the main judgment. The respondent was on 14th December, 1958, put in possession of the Vihare and enjoyed the rights pertaining to the office of Viharadhipathi to which he had been declared by the judgment of the District Court. His Counsel submitted that since he had the enjoyment of his rights, there was nothing more he need to do or ask as the wrong which he complained of was remedied to his satisfaction ; therefore, his cause of action was extinguished, and on the subsequent restoration of possession to the appellant, a fresh cause of action accrued to the respondent. He cited a judgment of the High Court of Lahore in *Kartar Singh* v. *Bhagat Singh*, A.I.R., (1921) Lahore 70 which, I think, does not help him. The facts of the Lahore case are briefly as follows: an agreement between the parties provided for arbitration ; the arbitrator made an award on 25th July, 1909 ; *on the application of the defendant* the award was made a decree of Court, and the defendant paid the decretal amount ; the decree *was completely satisfied.* The defendant in spite of his having set the Court in motion preferred an appeal to the Chief Court ; the decree was set aside, and the defendant obtained a refund of the money he had paid. The plaintiff then brought an action for the recovery of the money awarded to him by the arbitrator ; the defendant contended that the claim was time-barred, as the cause of action accrued on the date of the award, viz., 25th September, 1909 ; the argument to the contrary was that it accrued from the date on which the Chief Court set aside the decree, namely, 4th August, 1913 ; the High Court held *it was sufficient in equity* to say that the suit was within time, by holding that the earlier cause of action was extinguished and had given way to a fresh cause of action. It appears to me that the principle underlying this decision was that the consequence of an erroneous order should fall on the party to blame, and the defendant in the case was to blame ; for after adopting the award and satisfying the decree he proceeded to have it annulled ; the plaintiff therefore, should not be made to suffer.

In the present matter, counsel for the appellant contended that his client had perforce to obey the order of the District Court, and deliver possession to the respondent ; he submitted that the respondent cannot make use of a possession thus acquired to plead the extinguishment of the cause of action ; for *he had not the full enjoyment* of all his rights though he functioned as Viharadhipathi ; the appellant continued to deny the respondent's claim ; he had appealed from the judgment of the District Court ; the matter at the time he got possession had not been finally adjudicated upon. It is also a relevant fact that when the respondent took possession of the Vihare on 14th December, 1958, his right to sue on the cause of action which accrued on 1st February, 1954, was barred by lapse of time. I think there is considerable force in counsel's submission ; should the respondent be permitted to make use of a possession which he would not have had but for the erroneous decision of the District Court ? What should the Court do in such a situation ? Should it enable the respondent to utilise the advantage he had acquired, or, should the Court assist the appellant who was the victim of the wrong decision ? I think it is the inherent duty of the Court to be just, and the justice of this cause demands, in my view, a decision in favour of the appellant. We must bear in mind that but for the erroneous order of the original Court the appellant would have continued in possession. The respondent cannot be heard to complain ; the decision of the Court was a result of the wrong procedural step he took ; the consequences of his own error must fall on him ; had he been correctly advised he should have sued the respondent within three years of the death of Piyaratane. In my view, the appellant should not suffer. I am fortified in the view I have taken by these words of Cairns, L.C., which were quoted with approval by Lord Carson in the judgment of the Privy Council referred to in the judgment of Sirimane, J. :

> " One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors . . . "

The cause of action which began on Piyaratane's death was not, in my opinion, extinguished.

I agree that the appeal should be allowed without costs.

Appeal allowed.

Privy Council Appeal, No. 15 *of* 1964.

Present : **Viscount Dilhorne, Lord Morris of Borth-Y-Gest, Lord Pearce, Lord Upjohn, Lord Donovan.**

ABDUL AZEEZ & OTHERS *vs.* THE QUEEN

From
THE SUPREME COURT OF CEYLON.

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DELIVERED THE 8TH DECEMBER, 1964.

Penal Code, sections 32, 140, 146, 427 *and* 433—*Criminal trespass, being members of unlawful assembly—Permission to enter estate asked for by Trade Union officials for the purpose of persuading labourers on strike to give up " Satyagraha "—Refusal—Entering into estate despite refusal—Later proceeding on estate road in defiance of police—Arrest and prosecution—Conviction—Elements required to constitute offence of criminal trespass.*

The eight appellants were charged with and convicted of : (1) Being members of an unlawful assembly, the common object of which was to commit criminal trespass by entering into an estate to the annoyance of its superintendent, *R.*, who was in occupation thereof, and thereby committed an offence punishable under section 140 of the Penal Code; (2) committing criminal trespass as aforesaid in prosecution of the common object of the said assembly an offence punishable under section 433 read with section 146 of the Penal Code ; (3) committing criminal trespass as aforesaid in furtherance of the common intention of all, an offence punishable under section 433 read with section 32 of the Penal Code.

The relevant prosecution evidence was as follows :—

(*a*) that there had been a strike in the said estate since 24th December, 1958, and negotiations for its settlement were being conducted between the Employers' Federation and the Democratic Workers' Union, a trade union ;

(*b*) that *S.*, an official of the Trade Union and one of the appellants, was told by *R.*, that till negotiations were completed, no official of the union should enter the estate ;

(*c*) that on 1st February, *A.*, the President of the Trade Union (one of the appellants) spoke to *R.* on the telephone and said that he wished to enter the estate and go to where the workers were performing " *Satyagraha* " in order to persuade them to give it up and go to their rooms ;

(*d*) that later *R.* told *A.*, that he could not grant that request ;

(*e*) that on 4th February, 1959, two cars drove up to the main gate of the estate, ten people got out of it and entered the estate by a side entrance ;

(*f*) that the Police arrived in the estate and while proceeding along the road leading to the Factory with *R.* met the appellants and that *R.* was annoyed at their presence in the estate ;

(*g*) that on the Police Inspector informing *A.* that *R.* had protested at their entry, and at his request, some of the party turned back and left ; but *A.* asked for a few minutes to discuss the matter with his friends to which the Inspector replied saying that he was committing an offence. Thereupon, after a short discussion among themselves persisted in proceeding and the eight appellants (seven of whom were trade union officials) were arrested and taken to the Police Station ;

(*h*) that when the Inspector spoke to *A.*, the latter said that he wanted to meet the strikers ;

(*i*) that on the 20th February, *A.* accompanied by a Police Officer and a Labour Officer entered the estate with *R's.* permission to call off the strike .

A., the first appellant gave evidence that his purpose in going to the estate on 4th February, 1959, was to persuade the strikers to give up the hunger strike and return to their lines, as was said on 1st February, 1959, in the telephone conversation with *R.* and that he never imagined that his action would cause any embarrassment to the estate management.

The Magistrate in convicting the appellants stated : (*a*) that the claim put forward by the 1st appellant was merely a pretext for him to enter the estate against the wishes of the superintendent ; (*b*) that the appellants by deliberately defying the police and persisting in going to the estate not only constituted themselves into an unlawful assembly, the common object of which was to commit criminal trespass, but also in pursuance of the said common object, committed criminal trespass again.

Held : (1) That to constitute the offence of criminal trespass it must be established beyond reasonable doubt that the intent or object with which the trespass was committed was one of those specified in section 427 of the Penal Code. The evidence in the case did not suffice to establish beyond reasonable doubt that the object of trespassing on the estate was to annoy *R.*

(2) That the finding by the Magistrate that the claim of the 1st appellant was merely a pretext for entry did not exclude the possibility that the real object of the trade union officials in making this trespass was to meet the strikers.

(3) That as the charges framed were only in respect of committing criminal trespass by entering the estate and not in relation to their conduct when upon the estate, the appellants could not be guilty of committing criminal trespass again as referred to in the learned Magistrate's order.

Per THE JUDICIAL COMMITTEE :—" It may well be the case that the commission of civil trespass does cause annoyance in the majority of cases to the occupiers of the property trespassed upon, but to constitute the offence of criminal trespass, it must in the Lordships' view be established beyond reasonable doubt that the intent or object with which the trespass was committed was one of those specified in section 427 of the Penal Code, namely, to commit an offence or to intimidate, insult or annoy any person in occupation of the property ".

E. F. N. Gratiaen, Q.C. with *John A. Baker* and *H. Hannifa*, for the accused-appellant.

Mark Littman, Q.C., with *Mervyn Heald*, for the Crown-respondent.

VISCOUNT DILHORNE

The eight appellants were convicted on three counts in the Magistrates' Court at Balangoda on the 24th July, 1959. Their appeal to the Supreme Court of Ceylon was dismissed on the 28th October, 1963, and their appeal to the Judicial Committee was by special leave granted on the 26th March, 1964.

The accused were charged as follows :—

" You are hereby charged, that you did, . . . at Pettiagala Estate on the 4th February, 1959,

1. Being members of an unlawful assembly the common object of which was to commit criminal trespass to the annoyance of A. S. Rasanayagam, the Superintendent of Pettiagala Estate, Balangoda, by entering into the said estate in the occupation of the said A. S. Rasa-

nayagam and that you have thereby committed an offence punishable under section 140 of the Penal Code.

2. That at the same time and place aforesaid and in the course of the same transaction, you did, commit Criminal Trespass by entering into the said Pettiagala Estate, in the occupation of the said A. S. Rasanayagam, which offence was committed in the prosecution of the common object of the unlawful assembly or was such as the members of the said assembly knew to be likely to be committed in prosecution of the said object and you being the members of the said assembly at the time of the committing of the said offence, are thereby guilty of an offence punishable under section 433 read with section 146 of the Penal Code.

3. That at the same time and place aforesaid and in the course of the same transaction, you did, in furtherance of the common intention of you all commit criminal trespass by entering into the said Pettiagala Estate in the occupation of the said A. S. Rasanayagam, with intent to cause annoyance to the said A. S. Rasanayagam and thereby you have committed an offence punishable under section 433 read with section 32 of the Penal Code."

Criminal trespass is defined by section 427 of the Penal Code as follows :—

> " Whoever enters into or upon property in the occupation of another with intent to commit an offence, or to intimidate, insult, or annoy any person in occupation of such property, . . . or having lawfully entered into or upon such property unlawfully remains there with intent thereby to intimidate, insult, or annoy any such person, or with intent to commit an offence, is said to commit ' criminal trespass '."

The second and third counts both charge criminal trespass. The first count charged the appellants with being members of an unlawful assembly, the common object of which was to commit the criminal trespass they were charged with committing in the third count.

An unlawful assembly is defined by section 138 of the Penal Code, the material parts of which read as follows :—

> " An assembly of five or more persons is designated an ' unlawful assembly ' if the common object of the persons composing that assembly is—
>
> . . .
>
> " Thirdly—To commit any mischief or criminal trespass or other offence ; or
>
> . . ."

It is to be noted that the first count alleges that the object of the unlawful assembly was to commit criminal trespass " to the annoyance of A. S. Rasanayagam " and the third count alleges criminal trespass " with intent to cause annoyance to A. S. Rasanayagam ", but that the second count does not specify the intent with which the criminal trespass was alleged to have been committed.

It is not necessary for Their Lordships to decide whether in the absence of any allegation of the intent with which the criminal trespass was committed, the second count was a valid count. Proof of one or other of the intents specified in section 427 of the Penal Code is essential to justify conviction of the offence of criminal trespass. For the purposes of this judgment it will suffice to treat the second count as if it contained an allegation that the trespass was committed with intent to annoy Mr. A. S. Rasanayagam.

The first point taken on behalf of the appellants was that there was no evidence before the Magistrates' Court sufficient to justify the conclusion that the appellants had met together to trespass on the Pettiagala Estate with the intention of annoying Mr. Rasanayagam and no evidence to justify the conclusion that they trespassed with that intention. The appellants contended that consequently their conviction on the three counts was wrong and that the Supreme Court of Ceylon was wrong in dismissing their appeal.

At the trial evidence was given in support of the prosecution by the Superintendent, Mr. Rasanayagam, an Inspector of Police, S. G. Munasinghe, and by a conductor and a gatekeeper employed on the Pettiagala Estate The only witness called for the defence was the first appellant, Abdul Azeez.

Mr. Rasanayagam gave evidence that labourers on the Pettiagala Estate had been on strike since the 24th December, 1958, and that negotiations in relation to the dispute were being conducted between the Employers' Federation and the Democratic Workers' Congress, a trade union.

He said he had told the appellant, Suppiah, who was the District Representative of the Trade Union that till the negotiations were completed, no official of the Union should enter the estate.

He also said that on the 1st February the first appellant, Abdul Azeez, who was President of the Trade Union spoke to him on the telephone

and said that he wished to enter the estate and go to where the strikers were performing " *Sathyagraha* " in order to persuade them to give it up and go to their line rooms. Some time before this date some of the strikers had engaged in squatting in front of the factory and on occasions in front of the Superintendent's residence and some of them had gone on hunger strike. This is called *Sathyagraha.*

The Superintendent told Mr. Abdul Azeez that he could not give permission to him to enter the estate without first consulting the Employers' Federation. He undertook to consult the District Convenor of the Federation and let him have a reply. A few minutes later Mr. Rasanayagam telephoned to Mr. Abdul Azeez and told him that he was not able to contact the District Convenor and therefore he was sorry he could not grant his request.

On the 4th February two cars drove up to the main gates of the estate. According to the gatekeeper about ten people got out and entered the estate by a side entrance next to the main gate which is kept locked. The gatekeeper reported this to the conductor who in turn reported this by telephone to the Superintendent. Mr. Rasanayagam immediately telephoned the police. A few minutes after he had done so Inspector Munasinghe came to the Superintendent's bungalow in the course of a routine patrol. In consequence of what Mr. Rasanayagam said the Inspector went with other police to the road leading from the main gate to the Factory. Mr. Rasanayagam followed them He saw that the party approaching consisted of the first appellant, Abdul Azeez and nine or ten others He said that he was annoyed by the presence of the first appellant and his party on the estate and worried lest their presence would lead to trouble.

The Inspector told the first appellant that Mr. Rasanayagam had protested at their entry upon the estate and at his request some of those with the first appellant turned back and left. The first appellant asked for a few minutes to discuss the matter with his friends. The Inspector told them they were committing an offence. After a short discussion the first appellant said that they were going ahead along the road. The Inspector told them that he could not allow them to proceed further, and then as they persisted in trying to go further into the estate arrested them. The eight appellants then arrested were taken to the police station. The first seven are all officials of the trade union, the Democratic Workers' Congress. According to the first appellant the eighth appellant had not gone to the estate with them but had joined them on the estate.

The Inspector also testified that when he first spoke to the first appellant, the latter said that he wanted to meet the strikers. The Inspector could not remember whether Mr. Abdul Azeez had told him that he wanted to do so in order to persuade them to give up the hunger strike.

Mr. Rasanayagam also testified that on the 20th February the first appellant, accompanied by a police officer and a Labour officer with permission entered the estate to call off the strike.

On this evidence it is clear that the first seven appellants who were officials of the trade union trespassed when they entered the estate. The position with regard to the eighth appellant is not clear. There was no evidence that he was a trespasser on the estate when he joined the other appellants on the estate.

Mr. Abdul Azeez gave evidence that his purpose in going to the estate on the 4th February, was to persuade the strikers to give up the hunger strike and return to their lines, the same purpose as that he had stated when he telephoned asking permission to enter the estate on the 1st February. He said that he did not for a moment imagine that his action would cause any embarrassment to the estate management.

The learned magistrate in the course of his judgment said :

> " After careful examination of the evidence given by the first accused and the circumstances of this case, I am of the view that the claim put forward by the first accused was merely a pretext for the first accused " and the other trade union officials " to enter the estate against the wishes of the Superintendent of the estate who was in occupation ".

It is clear from this passage that the learned magistrate did not believe that the purpose of the appellants in trespassing upon the estate was to get the strikers to abandon *Sathyagraha.* His rejection of this evidence of Mr. Abdul Azeez does not establish that their trespass was committed with intent to annoy Mr. Rasanayagam.

Later in his judgment, the learned magistrate said :

> " Quite apart from the fact that there is direct evidence that the entry of these accused into the estate on the day in question did cause annoyance to Rasanayagam ; it is also quite clear that the natural consequences of the accused's act would be to cause annoyance to Rasanayagam. I am, therefore, satisfied that the real intention of the 1st to the 8th accused " (the 1st to 7th appellants, the 8th accused having died) " at the time they entered this estate was to cause annoyance to Rasanayagam, the person in occupation, and that they thereby committed the offence of criminal trespass. On the evidence before me I am also satisfied that the 1st to 8th accused " (the 1st to 7th appellants) " were also members of an unlawful assembly the common object of which was to commit criminal trespass by entering to the estate and that they did, in pursuance of the common object of the unlawful assembly, commit criminal trespass."

Counsel for the respondent before Their Lordships sought to sustain the convictions on a similar line of reasoning It was urged that the natural and probable consequence of their trespass was that annoyance would be caused to Mr. Rasanayagam and that in the absence of any evidence accepted by the magistrate pointing to any other intent, the Court was entitled to infer that that was their intent.

It may well be the case that the commission of civil trespass does cause annoyance in the majority of cases to the occupiers of the property trespassed upon, but to constitute the offence of criminal trespass, it must in the Lordships' view be established beyond reasonable doubt that the intent or object with which the trespass was committed was one of those specified in section 427 of the Penal Code, namely, to commit an offence or to intimidate, insult or annoy any person in occupation of the property.

In Their Lordships' view the evidence in this case did not suffice to establish either directly or by inference beyond reasonable doubt that the object of trespassing on the estate was to annoy Mr. Rasanayagam. While accepting the learned magistrate's conclusion that the expressed intention to get the strikers to abandon *Sathyagraha* was merely a pretext for entry, this finding by the learned magistrate does not exclude the possibility that the real object of the trade union officials in making this trespass was to meet the strikers, as Mr. Abdul Azeez said to the Inspector, and to discuss the strike with them.

Although a natural consequence of the trespass might be to cause annoyance to Mr. Rasanayagam, in the circumstances of this case it is, notwithstanding the learned magistrate's finding, not established with the degree of certainty required to justify conviction, that the trespass was effected with intent to annoy Mr. Rasanayagam.

For these reasons in Their Lordships' opinion the appeals of all the appellants should be allowed and their convictions quashed They have humbly advised Her Majesty accordingly.

The learned magistrate went on to say, immediately after the passage already cited :—

> " In any event there is not the slightest doubt that, when all these nine accused, after consultation among themselves, deliberately defied Inspector Munasingha and the Police party and persisted in going into the estate, they not only contributed (*sic*) themselves into an unlawful assembly, the common object of which was to commit criminal trespass, but also did, in pursuance of the common object of the said unlawful assembly, commit criminal trespass again."

In relation to this passage it suffices to point out that in the first count the appellants were charged with forming an unlawful assembly, the common object of which was to commit criminal trespass by entering the estate, and that in the second and third charges the criminal trespass related to entry into the estate. There was no charge preferred against the accused in relation to their conduct when upon the estate.

The appeals of the appellants to the Supreme Court of Ceylon were dismissed. In the course of his judgment, with which his brother judges agreed, Chief Justice Basnayake said :—

> " The entry of the accused after permission to enter had been asked for and not granted by the Superintendent in our opinion brings the accused within the ambit of section 427 of the Penal Code . . . The intent of the accused is one that has to be inferred from the circumstances of the case. In the instant case, the 1st accused asked for permission to enter the estate and was not granted permission. Despite that he and the others entered the estate clearly in defiance of the Superintendent whose permission they had sought."

Their Lordships do not take the view that every trespass comes within the ambit of section 427. They agree with the learned Chief Justice that the intent of the accused has in most cases to be inferred from the circumstances of the case, but the fact that the entry was in defiance of the Superintendent does not warrant the inference that the trespass was committed with intent to annoy him. If that was the case then every trespass committed after the occupier of the property had refused permission to enter would constitute the offence of criminal trespass.

Their Lordships having formed the opinion that by the evidence given in this case it was not established that the intent of the accused was to annoy the Superintendent, did not find it necessary to consider the other grounds put forward in support of the appeals.

Appeal allowed.

Present : **Tambiah, J., and Alles, J.**

SRI VIPASSI ANUNAYAKE THERO *vs.* TIKIRI DURAYA *

S.C. 8 (*Inty.*), 1963—*D.C. Kandy*, (*holden at Gampola*), *No.* 2560/*M.R.*

Argued and decided on : 9th February, 1965.

Pleadings—Amendment of plaint—Buddhist monk sued personally for money due for work and labour done—Later amendment of plaint sought to sue him as Viharadipathy—Futile nature of such amendment.

Plaintiff sued Rev. Amunugama Rajaguru Vipassi Anunayake Thero of Malwatte Vihare, Kandy, for recovery of money due for work and labour done at his instance. Later, the plaintiff sought to amend his plaint by adding to the said defendant's description the words " as Viharadipathy of the Lankatilaka Raja Maha Vihare ".

Held : That the amendment sought was a futile one, for when a person who functions as a Viharadipathy of a temple enters into a contract with another person for the supply of work and labour to the temple, he is personally liable, and the trust properties cannot be made liable.

Case referred to : *Hayley* v. *Nugawela*, 35 N.L.R. 157

Mark Fernando, for the defendant-appellant.

No appearance for the plaintiff-respondent.

TAMBIAH, J.

The plaintiff brought this action against Rev. Amunugama Rajaguru Vipassi Anunayake Thero of Malwatha Vihare, Kandy, for the recovery of a sum of Rs. 470.14 for work and labour done which he alleged he had performed at the instance of the defendant. This was a personal action brought against the defendant. Thereafter the plaintiff sought to amend the plaint by substituting instead of the defendant's name the following words, " Rev. Amunugama Rajaguru Siri Vipassi Annunayake Thero of Malwathu Vihara, Kandy, as Viharadipathi of the Lankathilaka Raja Maha Vihara ". The amendment was opposed on the ground that he was altering his cause of action and that prejudice was caused to the defendant. The defendant submitted that the defence of prescription would be taken away as a result of this amendment.

It is unnecessary for me to go into this question. In my view this amendment is a futile one. When a person who functions as a Viharadhipathi of a temple enters into a contract with another person for the supply of work and labour to the temple he is personally liable and the trusts properties cannot be made liable. For the recovery of any sum due on any judgment against a Viharadhipathi, the property of the Vihara cannot be seized or sold, vide *Hayley* v. *Nugawela*, 35 N.L.R., page 157, at 164. Therefore, the plaintiff in seeking the amendment was doing an act which is futile and the amendment should not have been allowed.

In view of my finding it is not necessary to consider the question whether the contract entered into falls within sections 7 or 8 of the Prescription Ordinance.

For these reasons I set aside the order of the learned District Judge allowing the amendment and order that the case should proceed on the original plaint. The appellant will be entitled to costs of appeal. The costs of inquiry will abide the event.

ALLES, J.

I agree.

Set aside.

* For Sinhala translation, see Sinhala section, Vol. 9 Part. 5, p. 20

Present : **Manicavasagar, J.**

FERNANDO & ANOTHER *vs.* DE SILVA (S. I. Police, Maradana).*

S.C. 957-958/64—*M.C. Colombo*, 44300/*A.*

Argued and decided on : 7th December, 1964.

Penal Code, sections 352 *and* 32—*Charge of kidnapping against two persons—One not present when the offence was committed—Can his conviction be sustained ?*

Held : That in order to sustain a charge against two persons based on common intention it is essential that both accused persons must be physically present at or about the scene of offence.

M. M. Kumarakulasingham with *D. R. P. Goonetillake*, for the 1st accused-appellant.

No appearance for the 2nd accused-appellant.

U. C. B. Ratnayake, Crown Counsel, for the Attorney-General.

MANICAVASAGAR, J.

The only question argued before me by Counsel for the 1st accused is whether on the proved facts in this case his client is guilty of kidnapping the boy, Sunil Premaratne, aged 11 years. The 1st accused was charged along with the 2nd accused and the basis of the charge was that they acted in furtherance of a common intention to kidnap this boy. The evidence which the magistrate has accepted is that the 2nd accused was the one who took the boy away at Maradana, from lawful guardianship ; the 1st accused was not present anywhere near the scene at the time the boy was taken by the 2nd accused. The 2nd accused handed the boy to the 1st accused at Negombo.

The submission is that in order to sustain the charge based on common intention it is essential that both the accused persons must have participated in the offence, in the sense that they must be physically present at or about the scene of offence. I agree with this submission. On the evidence as found by the magistrate, the offence was complete when the 2nd accused took the boy away ; the handing over of the boy to the 1st accused at Negombo does not make him liable to a charge of kidnapping read with section 32 of the Penal Code. Counsel for the Crown did not make any contrary submission.

I set aside the conviction of the 1st accused and enter instead an order of acquittal. The appeal of the 2nd accused-appellant is dismissed.

1st accused acquitted.

Present : **Manicavasagar, J.**

BELING & OTHERS *vs.* STEPHEN, (S. I. Police, Colombo Fort).**

S.C. 767-770/1964—*M.M.C. Colombo*, 91874.

Argued and decided on : 4th December, 1964.

Gaming Ordinance, section 5—*Search warrant—Magistrate's failure to find that the premises was a common gaming place—Legality of search warrant.*

Where in issuing a search warrant under section 5 of the Gaming Ordinance, a Magistrate failed to record his finding that the premises was kept as a common gaming place—

Held : That the issue of the search warrant was illegal and, therefore, the conviction and sentence should be set aside and the accused acquitted.

* For Sinhala translation, See Sinhala Section, Vol. 9, part 6, p. 22.
** For Sinhala traslation, See Sinhala Section, Vol. 9, part 6, p. 21.

M. M. Kumarakulasingham, for the 1st, 9th, 25th and 32nd accused-appellants.

Ranjit Dheeraratne, Crown Counsel, for the Attorney-General.

MANICAVASAGAR, J.

The accused-appellants were found guilty of unlawful gaming at premises No. 34 1/1, Baillie Street, Fort, Colombo. The premises was searched on a warrant issued by the Magistrate. The submission of Counsel for the appellant is that the warrant is not in conformity with the form contained in the Schedule A of the Ordinance. The application for a warrant is made under section 5 of the Gaming Ordinance It is essential that the Magistrate should have been satisfied on the evidence before him that the premises in question is being kept or used as a common gaming place, that is to say, the premises is kept or used for betting or the playing of games for stakes to which the public may have access with or without payment. The Magistrate did not find that the premises was kept as a common gaming place ; instead he stated that he is satisfied that unlawful gaming has been carried on in the premises. Unlawful gaming may be carried on in a premises which is not a common gaming place ; for instance, as set out in section 22 (3), betting or playing a game for stakes may occur in premises for which there is licence for the sale of intoxicating liquor. Such a place is not a common gaming place. It is only after the Magistrate is satisfied that the particular premises is used as a common gaming place that he should issue a warrant. On the finding of the Magistrate no such warrant could have been issued.

It must be borne in mind that an important consequence of the issue of a search warrant is a presumption of guilt of the persons found in a common gaming place unless there be proof to the contrary. The case for the prosecution rests on the search warrant. As the issue of the search warrant is illegal, I set aside the conviction and sentence of the applicants and acquit them. If they have paid their fines they should be returned to them and any money found on their persons in the course of the search should also be returned to them.

Accused acquitted.

Present : **Sri Skanda Rajah, J., and Alles, J.**

M. DON ANTHONY *vs.* S. S. J. GUNASEKERA AND OTHERS

S.C. Application, No. 222 *of* 1962.

Argued on : 22nd September, 1964.
Decided on : 2nd October, 1964.

Certiorari—Bribery Tribunal—Conviction and sentence to pay fine—Point taken that imposition of sentence " ultra vires " of Bribery Tribunal as it was not appointed by Judicial Service Commission—Sentence set aside in appeal following earlier decision, but conviction not quashed—Application for writ of certiorari to quash findings and order of Bribery Tribunal on the ground that it had no jurisdiction whatsoever—Ceylon (Constitution) Order-in-Council, 1946, *section* 55*—Can application be maintained* ?

A. was convicted by a Bribery Tribunal consisting of three members (not appointed by the Judicial Service Commission) and was sentenced to pay a fine of Rs. 1,000/-. On appeal, purporting to follow the decision in the case of *Senadhira* v. *The Bribery Commissioner*, (63 N.L.R. 133), the Supreme Court set aside the sentence,but did not quash the conviction as was done in that case. Their Lordships in the *Senadhira* case and in the case against *A.* did not hold that the Bribery Tribunal was an unconstitutional body in view of the same preliminary objection taken to both appeals.

Shortly after the setting aside of the sentence, *A.* filed this application for *certiorari* praying that the said findings and order of the Bribery Tribunal against him he quashed on the ground that it had no jurisdiction to hear the case, to make order on the charges framed, or to impose sentence.

Petitioner relied on a later case, viz., *Piyadasa* v. *The Bribery Commissioner*, 64 N.L.R. 385, in which the Supreme Court declared that all proceedings before the Bribery Tribunal, consisting of members not appointed by the Judicial Service Commission as required by section 55 of the Ceylon (Constitution) Order-in-Council, 1946, are null and void.

It was contended for the Crown-respondent :—(*a*) that the case of *Piyadasa* (*supra*) altered the law that stood at the time of the order against the petitioner; (*b*) that the petitioner could not now seek to quash the order made by the Supreme Court.

* For sinhala translation, see Sinhala section, Vol. 9 Part 5, p. 17

Held : (1) That it is not correct to state that the case of *Piyadasa* (*supra*) altered the law or that the petitioner was seeking to quash the order made by the Supreme Court in appeal.

(2) That the failure to declare, when the *Senadhira* case and the appeal of the present petitioner were decided, that the members of the said Tribunal were not vested with judicial power, because they were not appointed by the Judicial Service Commission, did not mean that that was not the law when those cases were decided, as section 55 of the Ceylon (Constitution)al Order-in-Council was in operation at that date.

Cases referred to : *Senadhira* v. *The Bribery Commissioner*, (1961) 63 N.L.R. 313 ; LX C.L.W. 65.
Don Anthony v. *The Bribery Commissioner*, (1962) LXI C.L.W. 100 ; 64 N.L.R. 93.
Piyadasa v. *The Bribery Commissioner*, (1962) LXII C.L.W. 73 ; 64 N.L.R. 385.
Ranasinghe v. *The Bribery Commissioner*, (1962) 64 N.L.R. 449.
The Bribery Commissioner v. *Ranasinghe*, (1964) LXVI C.L.W. 1 P.C.; 66 N.L.R.
Derrick v. *Williams*, (1939) 2 A.E.R. 559.

M. Tiruchelvam, Q.C., with *S. C. Crossette-Thambiah* and *K. Thevarajah*, for the petitioner.

R. S. Wanasundere, Crown Counsel, as *amicus curiae*.

SRI SKANDA RAJAH, J.

This application for a Writ of Certiorari came to be made under the following circumstances :—

The petitioner, Don Anthony, was prosecuted by the Bribery Commissioner before a Bribery Tribunal consisting of the first three respondents, who were not appointed by the Judicial Service Commission. The Bribery Tribunal recorded evidence on several dates, convictedp the etitioner of the two charges of bribery in respect of which he stood his trial and sentenced him to pay a fine of Rs. 1,000/-. He appealed and, on 5th April, 1962, this Court purporting to follow *Senadhira* v. *The Bribery Commissioner*, 63 N.L.R. 313, set aside the sentence of fine imposed on him, *Don Anthony* v. *The Bribery Commissioner*, 64 N.L.R. 93. Thereupon, on 17th May, 1962, the petitioner filed this application alleging that the Bribery Tribunal :—

" (i) had no jurisdiction whatsoever to hear the case against the petitioner to make an order on the charges framed against him and to impose a sentence on the petitioner ;
" (ii) that the proceedings before the said Tribunal are *coram non judice* ;
" (iii) that their findings are null and void and of no effect in law,"

and praying that the findings and order of the said Bribery Tribunal be quashed.

It is pertinent to examine the following decisions :—

(1) *Senadhira* v. *The Bribery Commissioner* (*supra*) ;
(2) *Don Anthony* v. *The Bribery Commissioner* (*supra*) ;
(3) *Piyadasa* v. *The Bribery Commissioner*, 64 N.L.R. 385 ;
(4) *Ranasinghe* v. *The Bribery Commissioner*, 64 N.L.R. 449 ; and
(5) *The Bribery Commissioner* v. *Ranasinghe*, 66 C.L.W. 1 (P.C.).

In both *Senadhira* (*supra*) and *Don Anthony* (*supra*), Crown Counsel took the same preliminary objection, which appears in the following passage in the judgment of Sansoni, J., at 314 of 63 N.L.R. :—

> "When the hearing of the appeal began, Mr. Pullenayegum raised a preliminary objection to the appeal being heard, apparently because he was under the impression that the appellants were challenging the validity of the entire Bribery Act. Basing his argument on the case of The King Emperor v. Benoari Lal Sarma (1945) A.C. 14 he submitted that where an Act is attacked as invalid, the right of appeal conferred by the Act cannot be exercised, and some remedy other than appeal should be sought. Mr, H. V Perera, in reply to this objection, said that he was not challenging the validity of the whole Act, nor was he even going to argue that a Bribery Tribunal is an unconstitutional body. His objection to the convictions, he said, was that they were bad in so far as the Bribeyr Tribunal purported to exercise the power of convicting, fining and imprisoning persons charged before it He claimed that section 69 A of the Act gave him a right of appeal which he was entitled to exercise by asking that the sentence of imprisonment and fine be set aside. With regard to the finding of guilt made against his client he did not attack that finding as unconstitutional, but he submitted that the finding could not stand in view of the objection of misjoinder taken by him."

It will be noticed that " in the *Senadhira* case, Counsel for the appellant contented himself in limiting his submission to the power of the Bribery Tribunal to pass sentence as being *ultra vires*. He indicated that he was not going to argue that the Bribery Tribunal was an unconstitutional body ", at 394 of 64 N.L.R. 385 (*supra*).

In *Senadhira* (*supra*) this Court made order " quashing the convictions and sentences ". In *Don Anthony* (*supra*), though this Court said, " . . . we would on this appeal apply the decision of this Court in *Senadhira's* case ", it made order only " setting aside the sentence of fine of Rs. 1,000/- imposed on him ". It did not quash the conviction as was done in *Senadhira*.

In *Piyadasa* (*supra*) this Court indicated that the preliminary objection raised in the above cases was untenable.

It is relevant to observe that, in view of the preliminary objection, this Court did not find itself called upon to declare the law in deciding *Senadhira* and *Don Anthony* (*supra*). It was only when dealing with *Piyadasa* (*supra*) that it felt called upon to do so and it declared that " all proceedings before it (*i.e.*, Bribery Tribunal) consisting of members not appointed by the Judicial Service Commission as required by section 55 of the Ceylon (Constitution) Order-in-Council, 1946, are null and void ", at 395 of 64 N.L.R. (*supra*).

It is correct to say that the state of the law from the moment that section 55 of the Ceylon (Constitution) Order-in-Council came into operation is that in order to vest judicial power in any tribunal the members of such tribunal had to be appointed by the Judicial Service Commission. The failure to so declare when *Senadhira* and *Don Anthony* (*supra*) were decided does not mean that that was not the law when those cases were decided. It would be incorrect to say that *Piyadasa* (*supra*) altered the law, as was submitted by Mr. Wanasundere. Therefore, *Derrick* v. *Williams*, (1939) 2 A.E.R. 559, on which he placed reliance has no application to the matter now before this Court. That case was decided on the basis that the law was subsequently altered.

Piyadasa (*supra*) was followed in *Ranasinghe* (*supra*), which was affirmed by the Privy Council when it dismissed the appeal of the Bribery Commissioner.

Mr. Wanasundere's next submission that the petitioner now seeks to quash the order made by this Court in appeal is not correct. What he seeks to do is to have the proceedings had before the Bribery Tribunal from the commencement up to and including the conviction quashed.

This Bribery Tribunal had no jurisdiction to hear and determine the case against the petitioner. Therefore, the application is allowed and the proceedings, including the conviction, are quashed. The petitioner is entitled to costs.

ALLES, J.
I agree.

Application allowed and proceedings quashed.

Present : **Abeyesundere, J., and Alles, J.**

THAHIB HADJIAR *vs.* RATNAVIRA & OTHERS

S.C. 30/'64 (*with Application*, 134/'64)—*D.C.* (*Criminal*), *Ratnapura*, 1821.

Argued and decided on : 22nd February, 1965.

Criminal Procedure Code, section 413—*Property recovered from third parties produced in Court in connection with an offence—Application for disposal after conviction of accused for dishonest misappropriation—What the Court has to determine—Sale of Goods Ordinance, sections* 24 (1) *and* (2).

One *F.*, superintendent of an estate had a gemming licence in respect of this estate. In the course of mining operations a blue sapphire was found by *S.*, one of the workmen who sold it to *H.*, for Rs. 27,000/- of which sum Rs. 18,000/- had been entrusted by *S.* to *T.* *H.* had cut the sapphire into several parts and disposed of them except one. The police prosecuted *S.* and produced the Rs. 18,000/- and the portion of the sapphire from *T.* and *H.*, respectively. After the conviction of *S.* for the dishonest misappropriation of the blue sapphire, an application was made under section 413 of the Criminal Procedure Code for the disposal of the property produced and the learned District Judge ordered the said Rs. 18,000/- and the portion of the blue sapphire to be delivered to *F.*

H. appealed from this order and also made an application in revision.

Held : (1) That as there is no right of appeal from an order under section 413 of the Criminal Procedure Code, the appeal must be dismissed.

Held in revision :

(2) That the conviction of *S.* being one for the offence of dishonest misappropriation, the property in the blue sapphire does not vest in *F.*, even if he were the owner, in terms of section 24 (2) of the sale of Goods Ordinance.

(3) That for the purpose of making an order section 413 of the Criminal Procedure Code in respect of any property, the Court has to determine not the person who had title to that property but the person who was entitled to possess that property immediately before it was produced in Court.

(4) That, therefore, the learned District Judge should have ordered the return of the said portion of the blue sapphire to *H.*

H. W. Jayewardane, Q.C., with *L. C. Seneviratne*, and *I. S. de Silva*, for petitioner and petitioner-appellant.

R. L. N. de Zoysa, for the first respondent.

J. W. Subasinghe, for the second respondent.

E. B. Wikramanayake, Q.C., with *Jayatissa Herat*, for the 3rd to 7th respondents.

ABEYESUNDERE, J.

The petitioner has preferred an appeal from the order made by the learned District Judge of Ratnapura under section 413 of the Criminal Procedure Code disposing of certain property produced in the District Court of Ratnapura regarding which an offence appeared to have been committed. There is no right of appeal from the order under section 413. The petition of appeal is, therefore, dismissed. The petitioner has also made an application to this Court for the revision of the aforesaid order.

The property produced in the District Court of Ratnapura consists of a sum of Rs. 18,000/- and a portion of a blue sapphire. The aforesaid order directs the delivery of the said sum of Rs. 18,000/- and the said portion of the blue sapphire to S. C. Fernando who is the superintendent of Paradise Estate in Kuruwita and is the second respondent. The said S. C. Fernando had a licence for carrying out mining operations in search of gems on Paradise Estate. In the course of such mining operations the said blue sapphire had been found by a person called Simion who was one of the workers engaged in mining operations. Simion had sold the blue sapphire to the petitioner, Thahib Hadjiar, for the sum of Rs. 27,000/-. Out of that sum Simion had entrusted Rs. 18,000/- to a person called Themis Alwis. The Police of Ratnapura had obtained the said sum of Rs. 18,000/- from Themis Alwis and produced it in the District Court of Ratnapura. Thahib Hadjiar had cut the blue sapphire into several parts and having retained one part had disposed of the other parts for an undisclosed sum. The Police of Ratnapura took charge of the portion of the blue sapphire retained by Thahib Hadjiar and produced it in the District Court of Ratnapura.

There is no evidence in this case that the blue sapphire was stolen, but there is evidence that the said Simion was convicted and sentenced by the District Court of Ratnapura on the charge of dishonest misappropriation of the blue sapphire. Sub-section (1) of section 24 of the Sale of Goods Ordinance provides that where any goods are stolen and the offender is prosecuted and convicted, the property in those goods revests in the person who was the owner thereof or his personal representative, notwithstanding any intermediate dealing with them. Sub-section (2) of that section provides that where any goods have been obtained by fraud or other wrongful means not amounting to theft, the property in such goods shall not revest in the person who was the owner thereof or his personal representative, by reason only of the conviction of the offender. Therefore, even if the said S. C. Fernando is considered to be the owner of the said blue sapphire, the property in that blue sapphire does not revest in him by reason of the conviction of Simion of the offence of dishonest misappropriation.

An order under section 413 of the Criminal Procedure Code may be made in respect of property produced in Court regarding which an offence appears to have been committed. The offence that appears to have been committed regarding the said blue sapphire is the offence of dishonest misappropriation of which the said Simion was convicted. The learned District Judge has misdirected himself in holding in his order that the offence that appears to have been com-

mitted in respect of the said blue sapphire is the offence of theft. For the purpose of making an order under the said section 413 in respect of any property, the Court has to determine not the person who had title to that property, but the person who was entitled to possess that property immediately before it was produced in Court. In the case before us the petitioner, Thahib Hadjiar, was in possession of the said portion of the blue sapphire immediately before it was produced in Court, and there is no evidence that Thahib Hadjiar was an offender or an alleged offender in respect of the property taken from his possession by the Police. The learned District Judge should, therefore, have ordered the return of the said portion of the blue sapphire to Thahib Hadjiar.

I set aside the order of the learned District Judge in so far as it directs the delivery of the said portion of the blue sapphire to the said S. C, Fernando and I direct that the said portion of the blue sapphire be returned to the petitioner. Thahib Hadjiar. The petitioner is entitled to the incurred costs of the proceedings in this Court and the first to seventh respondents shall be jointly liable to pay those costs.

ALLES, J.

I agree.

Set aside.

Present : **Sirimane, J.**

N. DINORIS SILVA & OTHERS *vs.* INSPECTOR OF POLICE, NEGOMBO

S.C. No. 220-223/1963—*M.C. Negombo, No.* 3625.

Argued and decided on : 2nd June, 1964.

Criminal Procedure Code, section 151 (2) *and* 187 (1)—*Meaning of "forthwith" in section* 151 (2).

Held : That the word "forthwith" in section 151 (2) of the Criminial Procedure Code does not mean that the person who brings the accused before Court should be examined on the same day. He can be examined within a reasonable time.

E. H. C. Jayetileke, for the accused-appellants.

K. Abhanayake, Crown Counsel, for the Attorney-General.

SIRIMANE, J.

The accused were charged with causing simple hurt under section 314 of the Penal Code. Mr. Jayetileke for them argued that the Magistrate had failed to comply with section 187 (1) of the Criminal Procedure Code as he did not forthwith examine on oath the person who produced the accused before Court as required by section 151 (2). I am of the view that the word "forthwith" in section 151 (2) does not mean that the person who brings the accused before Court should be examined on the same day. He can be examined within a reasonable time. One cannot fail to observe, however, that there has been some inordinate delay in this particular case. The accused were produced in Court on 20th May' 1963, and after several dates the examination took place only on 9th July, 1963. The delay, however, has not, in my opinion, occasioned any failure of justice and I do not wish to interfere with the conviction on this ground.

Mr. Jayetileke has also urged that the sentence is excessive. The accused are close relatives and there is some substance in the submission that it is obvious that they had acted impulsively. The virtual complainant had some very slight injuries, these being some scratches on the face and a contusion above the eye-brow. The learned Magistrate imposed a sentence of six months' simple imprisonment on each accused. One serious circumstances is the fact that the virtual complainant had been assaulted when he had come to Court to give evidence, but according to the Police Sergeant who gave evidence the incident did not take place close to the Court-house. Mr. Jayetileke has also urged that the accused are persons of good character.

Taking all the circumstances into consideration, I would reduce the sentence to one of six weeks' simple imprisonment.

Sentence reduced.

Present : **Sansoni, C.J., H. N. G. Fernando, S.P.J., T. S. Fernando, J., L. B. de Silva, J., and Tambiah, J.**

CELESTINA PERERA *vs.* THE SUB-INSPECTOR OF POLICE, KIRILLAPONA

S.C. No. 1156—*M.C. Colombo South* 50677/*B.*

Argued on : April 7, 1965.
Decided on : April 29, 1965.

Criminal Procedure Code, sections 148, 151 (1) *and* (2), 187 (1) *and* (3)—*Institution of proceedings under section* 148 (1) (*b*)—*Accused brought before Court in custody without process—Is it necessary for Magistrate to record any evidence before he charges the accused ?*

Held : That where proceedings in a Magistrate's Court are instituted on a written report under section 148 (1) (*b*) of the Criminal Procedure Code, and the accused is at the same time brought before the Court in custody without process, it is not necessary for the Magistrate to record any evidence before he charges the accused.

Per SANSONI, C.J.—" The particulars of the charge in such a case could be taken from the report itself, though the Magistrate may record evidence in order to obtain further particulars before framing the charge. "

Per TAMBIAH, J.—" I am of opinion that only in a case where proceedings are instituted under section 148 (1) *d* of the Criminal Procedure Code, a duty is cast on the Magistrate to examine a person who brought the accused or any other person before the action is proceeded with, but where proceedings are instituted under section 148 (1) *b* the procedure envisaged in section 151 (2) does not apply. "

Overruled : *Mohideen* v. *Inspector of Police, Pettah*, 59 N.L.R. 217 ; LV C.L.W. 12.

Cases referred to : *Cader* v. *Karunaratne*, (1943) 45 N.L.R. 23.
Ebert v. *Perera*, (1922) 23 N.L.R. 362 ; 4 C.L.Rec. 31 ; 1 Times of Ceylon L.R. 12
Lamanatissa de Silva v. *S.I. Police, Matara*, (1960) 62 N.L.R. 92.

M. M. Kumarakulasingham, with *W. G. Perera*, for the accused-appellant.

D. St. C. Budd Jansze, Q.C., Attorney-General, with *L. B. T. Premaratne, Senior Crown Counsel, V. S. A. Pullenayagam, Crown Counsel*, and *Wakeley Paul, Crown Counsel*, for the complainant-respondent.

SANSONI, C.J.

The question of law which we have to decide may be formulated thus :—" Where proceedings in a Magistrate's Court are instituted on a written report made under section 148 (1) (*b*) of the Criminal Procedure Code, and the accused is at the same time brought before the Court in custody without process, is it necessary for the Magistrate to record any evidence before he charges the accused ? "

Let me first consider the provisions of the Code itself, disregarding the numerous judgments which may have a bearing on the question.

Under section 148 (1), proceedings shall be instituted in one of six ways :—

(*a*) on a complaint made orally or in writing. If in writing, the complaint must be drawn and countersigned by the pleader and signed by the complainant ; or

(*b*) on a written report by certain specified classes of public officers ; or

(*c*) upon the knowledge or suspicion of a Magistrate ; or

(*d*) on any person being brought before a Magistrate in custody without process ; or

(*e*) upon a warrant under the hand of the Attorney-General ; or

(*f*) on a written complaint made by a Court under section 147.

Where the proceedings have been instituted under (*a*) or (*b*) or (*c*) or (*e*) or (*f*) mentioned above, section 151, sub-sections (1) and (3) provide for the issue of a summons or a warrant to procure

the attendance of the accused. Every summons or warrant must contain a statement of the particulars of the offence charged (section 151 A). Where proceedings have been instituted under (*d*) mentioned above, section 151 (2) requires the Magistrate forthwith to examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case.

When the accused appears before the Court, the next step is for the Magistrate to charge him ; and section 187 provides how that is to be done.

Where the accused appears on summons or warrant a charge need not be framed, because the statement of the particulars of the offence contained in the summons or warrant shall be deemed to be the charge (section 187 (2).

Where the accused is brought before the Court otherwise than on a summons or warrant, the Magistrate must frame a charge against the accused if he is of opinion that there is sufficient ground for proceeding against the accused [section 187 (1)].

Where a prosecution commenced under section 148 (1) (*b*) in respect of an offence punishable with not more than three months' imprisonment or a fine of Rs. 50/-, the report serves as a charge [section 187 (3)].

In each case the Magistrate must read the summons or warrant, or the charge, or the report, as the case may be, to the accused and ask him if he has any cause to show why he should not be convicted.

We now come to the question formulated at the beginning of this judgment. What is the position if proceedings were instituted on a written report under section 148 (1) (*b*) against an accused who was brought before the Court in custody without process ? It was argued for the accused-appellant that no charge should be framed in such a case until, at least, the evidence of the person who brought the accused before the Court has been recorded. It is sought to support this argument by section 187 (1) which reads :—

> " Where the accused is brought before the Court otherwise than on a summons or warrant the Magistrate shall after the examination directed by section 151 (2) if he is of opinion that there is sufficient ground for proceeding against the accused, frame a charge against the accused."

The argument is that there must be an examination as directed by section 151 (2) in such a case because the accused was brought before the Court without a summons or warrant.

But what does section 151 (2) say ? It reads :—

> " Where proceedings have been instituted under paragraph (*d*) of section 148 (1), the Magistrate shall forthwith examine on oath the person who has brought the accused before the Court and any other person who may be present in Court able to speak to the facts of the case."

It will be seen that section 151 (2) applies only to proceedings which have been instituted under section 148 (1) (*d*) and to no other ; consequently there is nothing in section 151 (2) to support the argument that there must be a preliminary examination in the case we are considering.

Some previous decisions appear to have been influenced by the failure to take into account the purpose of section 187. That purpose is to require a Magistrate, if he is of opinion that there is sufficient ground for proceeding against the accused, to read to the accused the charge against him. This the Magistrate must do, either from a charge framed by him or from a summons or warrant in which the charge was previously set out. No doubt section 187 (1) contains the phrase " after the examination directed by section 151 (2) ", but section 187 (1) does not for this reason have according to rules of Grammar the effect of requiring the examination to be held. That requirement is already imposed by section 151 (2), and need not have been and is not again imposed in the subsequent provision. The phrase is only a reference to the examination under section 151 (2), and since it is obvious that section 151 (2) has not in terms any application in the case we are considering, the two sections read together do not require such an examination in that case.

It has sometimes been argued that proceedings which have been instituted under section 148 (1) (*b*) on a written report become, in some way, proceedings instituted under section 148 (1) (*d*) merely because the accused wa brought before the Magistrate without process ? I think the only possible answer is that they do not. Proceedings which have been instituted in one of the six ways do not change their character merely because there is present some additional circumstance which might also be present in the case of proceedings instituted in another way.

Where proceedings have been instituted under section 148 (1) (*b*) the Code nowhere requires the examination of any person before a charge is framed, and it is open to a Magistrate to frame a charge in such a case without recording evidence. The particulars of the charge in such a case could be taken from the report itself, though the Magistrate may record evidence in order to obtain further particulars before framing the charge.

I do not think it is necessary to refer to the earlier decisions except the judgment of three Judges in *Mohideen* v. *Inspector of Police, Pettah*, (1957) 59 N.L.R. 217, which has taken the opposite view. It was held in that case that where an accused is brought before the Court in custody without process, and a report under section 148 (1) (*b*) is filed, the Magistrate must record evidence on oath as required by sections 151 (2) and 187 (1), before he frames a charge.

The main judgment in that case was delivered by K. D. de Silva, J., who held that section 187 (1) required that in every case where the accused is present otherwise than on summons or warrant, the Magistrate must hold the examination contemplated by section 151 (2). With respect, it seems to me that the learned Judge read into section 151 (2) (which refers to proceedings instituted under paragraph (*d*) of section 148 (1) and no other) words which are not there ; he has read into the sub-section a reference to paragraph (*b*). But as I have pointed out earlier, the only examination contemplated by section 187 (1) is the examination directed by section 151 (2) and section 151 (2) has no application where proceedings are instituted under section 148 (1) (*b*). Basnayake, C.J., agreed with K. D. de Silva, J., in a separate judgment. I prefer the views expressed in the dissenting judgment of Pulle, J., who said :—

> " Section 187 (1) speaks of an examination directed by section 151 (2). The latter provision is limited by its very terms to section 148 (1) (*d*) and cannot be extended to cover an institution of proceedings under section 148 (1) *b*)."

For the reasons I have set out I would answer the question formulated at the commencement of this judgment in the negative, and overrule the decision in *Mohideen* v. *Inspector of Police, Pettah.*

The appeal may now be listed before a single Judge for further argument on the facts.

H. N. G. Fernando, S.P.J.
I agree.

T. S. Fernando, J.
I agree.

L. B. de Silva, J.
I agree.

Tambiah, J.

I am in agreement with the view expressed by My Lord the Chief Justice. As this case is of some importance I wish to add a few comments. When this matter came up before me, I requested My Lord the Chief Justice to refer this case to a Bench of five Judges as I had doubts regarding the view taken by the majority of the judges who heard the case of *Mohideen* v. *Inspector of Police, Pettah*, (1957) 59 N.L.R. 217.

Section 148 (1) of the Criminal Procedure Code enacts that proceedings in a Magistrate's Court should be instituted in *one* of the following ways :

> " (*a*) On a complaint being made orally or in writing to a Magistrate of such Court that an offence has been committed which such Court has jurisdiction either to inquire into or try :
>
> Provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant ; or
>
> (*b*) on a written report to the like effect being made to a Magistrate of such Court by an inquirer under Chapter XII or by a peace officer or a public servant or a Municipal servant or a servant of an Urban Council or Town Council ; or
>
> (*c*) Upon the knowledge or suspicion of a Magistrate or such Court to the like effect :
>
> Provided that when proceedings are instituted under this paragraph the accused, or when there are several persons accused, any one of them, shall be entitled to require that the case shall not be tried by the Magistrate upon whose knowledge or suspicion the proceedings are instituted, but shall either be tried by another Magistrate or committed for trial ; or
>
> (*d*) on any person being brought before a Magistrate of such Court in custody without process, accused of having committed an offence which such Court has jurisdiction either to inquire into or try ; or
>
> (*e*) upon a warrant under the hand of the Attorney-General requiring a Magistrate of such Court to hold an inquiry in respect of an offence which such Court has jurisdiction to inquire into ; or
>
> (*f*) on a written complaint made by a Court under section 147."

If it is imperative for the Magistrate to comply with section 152 (2) of the Criminal Procedure Code when proceedings are instituted under section 148 (1) (*b*) when an accused is brought before him without process, then it follows that proceedings could be instituted in a particular case in more than one way under section 148 of the Criminal Procedure Code, since the proceedings would have been instituted under section 148 (1) (*d*) of the Criminal Procedure Code as well.

Section 187 (1) of the Criminal Procedure Code, on which much reliance had been placed by the majority of the judges who decided *Mohideen's case*, and the other paragraphs of section 187 deal with framing of charges. Section 187 (1) merely states that where an accused is brought otherwise than on summons or warrant the Magistrate shall, after examination directed by section 151 (2), if he is of opinion that there is sufficient ground for proceedings against the accused, frame charges against him. Under this section the Magistrate is empowered to examine a witness who is brought to Court only in a case where proceedings have been instituted under section 148 (1) (*d*) of the Criminal Procedure Code. Therefore, it follows that section 187 (1) of the Criminal Procedure Code is only applicable to a case instituted under section 148 (1) (*d*) and not to a case instituted under section 148 (1) (*b*) of the Criminal Procedure Code.

In a case instituted under section 148 (1)(*b*) of the Criminal Procedure Code, the officer concerned (usually a police officer), after inquiring into the case, would send a report. He would act with a due sense of responsibility after proper investigation if he is satisfied that there is a *prima facie* case. In most instances before filing his complaint under section 148 (1) *b*, the officer would have furnished the Magistrate with a report of the investigation under section 126 (A) or section 131 of the Criminal Procedure Code. In proceedings instituted under section 148 (1) (*a*) the Magistrate either hears evidence or acts on a written complaint which is countersigned by a pleader. In proceedings instituted under sections 148 (1) (*c*) and 148 (1) (*f*) of the Criminal Procedure Code, the proceedings are commenced at the instance of the Magistrate or a Court.

Proceedings could be instituted under section 148 (1) (*e*) upon the Attorney-General requiring a Magistrate of such Court to hold an inquiry in respect of an offence which such Court has jurisdiction to inquire into. In all the above cases the Magistrate has information before him that there are reasonable grounds for initiating proceedings in his Court.

When a person is brought before Court otherwise than on summons or warrant and before proceedings are instituted under section 148 (1) (*d*) of the Criminal Procedure Code, the Magistrate has no such information about it. It is provided by section 151 (2) of the Criminal Procedure Code that the Magistrate should examine the person who has brought the accused before the Court and any other person to speak to the facts of the case. The intention of the Legislature in enacting section 151 (2) of the Criminal Procedure Code is to enable a Magistrate to ascertain whether there are grounds for proceeding against a person brought up before him. It is not meant to furnish information to the accused, for, in whatever manner proceedings are instituted under section 148 of the Criminal Procedure Code, the nature and particulars of a charge *must always* be explained to an accused person before he can be called upon to plead. If it is realised that section 148 (1) of the Criminal Procedure Code only deals with the different ways in which proceedings could be instituted in the Magistrate's Court, the solution to this problem becomes simple.

For these reasons, I agree with the dissenting view expressed by Pulle, J., in *Mohideen's Case* and the views taken in *Cader* v. *Karunaratne*, (1943) 45 N.L.R. 23 ; *Ebert* v. *Perera*, (1922) 23 N.L.R. 362 ; and in *Lamanatissa de Silva* v. *S.I. Police, Matara*, (1960) 62 N.L.R. 92. I am of opinion that only in a case where proceedings are instituted under section 148 (1) *d* of the Criminal Procedure Code a duty is cast on the Magistrate to examine a person who brought the accused or any other person before the action is proceeded with, but where proceedings are instituted under section 148 (1) *b* the procedure envisaged in section 151 (2) does not apply.

Ordered to be listed before a single Judge for argument on the facts.

Privy Council Appeal, No. 31 *of* 1964.

Present : **Lord Reid, Lord Morris of Borth-Y-Gest, Lord Pearce, Lord Donovan, Lord Pearson.**

LILY HARRIET RAM ISWERA *vs.* THE COMMISSIONER OF INLAND REVENUE.

From
THE SUPREME COURT OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

DELIVERED THE 30TH MARCH, 1965

Income Tax Ordinance—Profit from trade or business—Adventure in the nature of a trade.

The appellant, being desirous of living close to the School where her children studied, discovered a building site of about 2 1/2 acres in extent at Alexandra Place. She tried to buy a part of it but the owner was only willing to sell the site as a whole.

The appellant agreed with the owner to buy the whole site, paying an advance of Rs. 45,000, and undertaking to pay the balance of Rs. 405,000 at a later date.

The appellant blocked up the land into lots and found purchasers for all but two of the lots which she kept for her own house. These purchasers obtained a direct conveyance of their respective lots from the owner. The prices paid by the purchasers amounted to Rs. 434,725, and out of this the balance of Rs. 405,000 was duly paid. The appellant thus had to find only Rs. 15,275 of her own money for the two lots which was to be the site of the house. The market value of this site was Rs. 87,040.

The Commissioner of Inland Revenue made an assessment on the appellant on the basis that the whole transaction was an adventure in the nature of a trade. The net profit accruing to the appellant from the acquisition of her site being Rs. 66,331. The appellant appealed to the Board of Review on the ground that this transaction was not an adventure in the nature of a trade.

The Board of Review on an analysis of the evidence took the view that although the appellant had a desire to live near the school for the sake of the education of her children, the dominant motive was not so much this desire, as a desire to block up the land and sell it at a profit in order to obtain her site for an amount which was much lower than its market value.

Held : (1) That if, in order to get what he wants the tax-payer has to embark on an adventure, which has all the characteristics of trading, his purpose or object alone cannot prevail over what he, in fact does.

(2) That the appellant's actions were suggestive of trading as regards the greater part of the site which she bought.

(3) That although the appellant's case was a borderline one, the Board of Review had found as a fact that the appellant's dominant motive was to make a profit ; and on the facts Their Lordships found it impossible to hold that they were not entitled to reach that conclusion.

Distinguished : *Commissioner of Inland Revenue* v. *Paul*, (1956) 3 S.A.R. 335.

E. F. N. Gratiaen, Q.C., with *Neil Elles* and *Sir Learie Constantine*, for the appellant.

H. H. Monroe with *R. K. Handoo*, for the Commissioner of Inland Revenue.

LORD REID :

This is an appeal from a judgment of the Supreme Court of Ceylon which answered in the affirmative the question in a case stated by the Board of Review under section 78 of the Income Tax Ordinance. The question was whether in the facts and circumstances proved in the case the inference that the transaction in question was an adventure or concern in the nature of trade was justified. The case arises out of assessments to income tax for the years 1950/51 and 1951/52 made on the late Mr. Ram Iswera in respect of profits made by his wife, the present appellant.

The facts are set out in the case stated and Their Lordships need only set out briefly those which are important. In and after 1950 the present appellant, her late husband and their five daughters were living at Hulftsdorf, Colombo. Four of their daughters were attending St. Bridget's Convent School in Alexandra Place, and the appellant wished to move to a house nearer the school. She found out that there was a building-site of about $2\frac{1}{2}$ acres for sale in Alexandra Place close to the school and tried to buy a part of it. But the owner was only willing to sell the site as a whole.

The appellant then entered into negotiations for the purchase of the whole site but she did not have large sums immediately available. She owned certain houses in Colombo but they could not be readily sold as she could not give vacant possession. But on 3rd March, 1951, she made an agreement with the owner of the site to buy it for Rs. 450,000. She had to pay immediately a deposit of Rs. 45,000 and to pay the balance of Rs. 405,000 on or before 20th April, 1951, and it was provided that, in the event of her failing so to pay the balance, the deposit of Rs. 45,000 should be forfeited to the vendor as liquidated damages. Under the agreement she was further bound to reconvey a site of 60 perches to the vendor and to make the necessary roads at her own expense.

The appellant borrowed the amount of the deposit by two loans and she then caused a plan of the site to be prepared. This showed twelve building lots as well as sites for the roads and she or her husband found purchasers for nine of these lots. She kept two lots for her own house and one for reconveyance to the vendor. It was arranged that each of the nine sub-purchasers would get a direct reconveyance of his lot from the vendor.

The prices paid by the nine sub-purchasers amounted in all to Rs. 434,725 and out of this the balance of Rs. 405,000 was duly paid, so the result was that the appellant only had to find Rs. 15,275 of her own money and that she got the site for her house. The market value of that site at the time was Rs. 87,040. The assessments under appeal are based on the view that the whole transaction was an adventure or concern in the nature of trade, and that the site purchased by the appellant for her house must be brought into the computation of profit from such adventure at its market value. A gross profit of Rs. 71,765 was thus brought out. It was agreed by the appellant without prejudice to the question of liability, that the profit was Rs. 66,331. The ground of appeal is that this transaction was not an adventure or concern in the nature of trade.

This was an isolated transaction and it is not disputed that in order to determine its nature it is necessary to have regard to all the relevant facts and circumstances. The case is unusual in that, on the one hand, there are here many of the ordinary characteristics of trading while, on the other hand, the result was that the appellant, in addition to making a profit, obtained what she had been seeking—an opportunity to reside near her daughters' school. There appears to be little authority dealing with a case of this kind and the appellant relied on the judgment of Centlivres, C.J., in *Commissioner of Inland Revenue* v. *Paul*, (1956) 3 S.A.R. 335. In that case the tax-payer had been looking for a small holding of 30 or 40 acres. He found a suitable place but the owner was not willing to sell less than 167 acres. In 1946 he bought and paid for this larger area. The Special Court for Income Tax Appeals in a case stated accepted the tax-payer's evidence that he intended to sell off the land which he did not want to best advantage—at a profit if he could. At various times during the next seven years he sold twelve lots and he was assessed to income tax on a profit of £758 in respect of three sales in 1953. The Special Court held :—" There seems no room for reasonable doubt that the appellant's intention in acquiring the property originally was what he stated in evidence, and, that being so, we are unanimously of the view that he intended to make a capital investment. We are also satisfied that at all relevant times his object was to sell the surplus over and above his own requirements and to do so at a profit if he could. It seems to us that, had he been in a position to sell the surplus in one block in a single transaction, such a transaction would probably not have attracted the notice of the Receiver of Revenue. But the fact that he has seen fit to divide the land and sell it off in parcels, and to various people, over a number of years not unnaturally gives rise to the notion that he is making a business of it. It seems to us, however, that this idea is sufficiently rebutted by his own evidence and also by . . . (facts which the Appellate Division held to be irrelevant) ".

Centlivres, C.J., said after citing these findings, " There is no evidence to show that when the respondent bought the 167 acres he did so because he had decided to embark upon the business of a

land-jobber . . . The real question in this case is whether no reasonable person could have arrived at the finding of the Special Court that the respondent " intended to make a capital investment " . . . there is no right of appeal from a Special Court on a question of fact. The question whether a person bought a property for a specific purpose is a question of fact and in no sense a question of law . . . The evidence read as a whole shows that the respondent bought the whole of the 167 acres because he wished to carve out of those acres a small holding for himself of about 30 to 40 acres and not because he had a speculative purpose of reselling the surplus land at a profit ".

Their Lordships do not doubt the correctness of that decision but it does not assist the present appellant. Clearly she did not buy the whole site as a capital investment. It was an essential part of her plan that the greater part of it should immediately be sold to sub-purchasers because without the money paid by them she could not have found the money to pay the balance due to the vendor. No doubt, she acquired the part of the site which she retained as a capital investment but in order to acquire it she had to buy, divide, and immediately re-sell the rest of the site.

The Board of Review, after setting out in their decision facts which they considered relevant, said, " in these circumstances, it seems necessary to determine the dominant motivation, and ascertain whether this motivation connotes an adventure in the nature of a trade ". Then they examined the facts from that point of view, and they concluded : " We, therefore, feel that although Mrs. Ram Iswera may have been motivated by a desire to leave her home at Hulftsdorf and reside in a house near St. Bridget's Convent, nevertheless the dominant motivation of the transaction which she ultimately undertook appears to us to be a blocking up of the premises and the selling of these blocks so as to make a profit on the transaction and obtaining a block for herself below the market value ".

The judgment of the Supreme Court was delilivered by Sri Skanda Rajah, J. Having said that it is the total effect of all relevant factors and circumstances that determines the character of the transaction, he said : " What is the ' total impression ' or ' picture ' that these facts would leave on the mind of any reasonable person ? Having considered all these matters in conjunction with the evidence that Mrs. Ram Iswera had a desire to live near St. Bridget's Convent for the sake of education of the four girls attending that institution, the Board of Review arrived at the conclusion that the dominant motive or intention was not this desire of hers and that the transaction presented a ' picture ' of an adventure in the nature of trade ". He then dealt with matters which do not appear to Their Lordships to be relevant and concluded that the order of the Board of Review indicated that they had applied the relevant legal principles correctly.

It may seem that too much emphasis has been put on motivation, but that is probably due to the nature of the argument submitted for the appellant. Before Their Lordships, Counsel for the appellant came near to submitting that, if it is a purpose of the tax-payer to acquire something for his own use and enjoyment, that is sufficient to show that the steps which he takes in order to acquire it cannot be an adventure in the nature of trade. In Their Lordships' judgment that is going much too far. If, in order to get what he wants, the tax-payer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he, in fact, does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances.

In the present case not only has it been held that the appellant's dominant motive was to make a profit, but her actions are suggestive of trading as regards the greater part of the site which she bought. She had to and did make arrangements for its sub-division and immediate sale to the nine sub-purchasers before she could carry out her contract with the vendor of the site. The case may be a borderline one in the sense that the Board of Review might have taken a different view of some of the evidence. But, on the facts as found by the Board, Their Lordships find it impossible to hold that in law they were not entitled to reach their conclusion.

Their Lordships will, therefore, humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Appeal dismissed.

Present : **T. S. Fernando, J., Tambiah, J., and Sri Skanda Rajah, J.**

THE QUEEN *vs.* H. M. D. BANDARA & TWO OTHERS

In the matter of a Rule under section 47 of the Courts Ordinance.

S.C. Application No. APN/GEN 65 of 1964.

Argued and decided on : 20th January, 1965.
Reasons delivered on 10th February 1965.

Contempt of Court—Judicial act of a Magistrate—Contempt "ex facie"—Courts Ordinance, section 47.

Where a Rule under section 47 of the Courts Ordinance was issued by the Supreme Court calling upon the respondents to show cause why they should not be punished for Contempt of Court in disrespect of the authority of the Magistrate's Court of Avissawella in that the following acts had been committed—

(1) The 1st respondent did place his arm on the right shoulder of the Magistrste, push him to a side at a time when he was engaged in eating his dinner and roughly enquire from the Magistrate : "Are you the Magistrate Moonemalle ?"

(2) The 1st respondent did address the said Magistrate and utter in the presence and hearing of other persons the following words, to wit, "You are a pathetic Magistrate to stay in the Resthouse".

(3) The 1st, 2nd and 3rd respondents did publicly abuse the said Magistrate.

(4) The 1st and 3rd respondents did force open the window of the room occupied by the said Magistrate and demand of him that he should telephone the Police and order the release of the 2nd respondent who had been arrested by the Police on the orders of the Magistrate as he was behaving in a drunk and disorderly manner in the presence of the Magistrate.

Held : (1) That the acts particularised in (1), (2) and (3) above did not render the respondents punishable for Contempt of Court as the Magistrate could not be said to have been acting judicially at the time those acts were committed and as the conduct of the respondents so particularised had no relation to a judicial act of the Magistrate.

(2) That the acts complained of in (4) above constituted a contemptuous interference in relation to a matter in which the Magistrate had been acting judicially.

Held further : That a contempt committed cannot be said to be *ex-facie* where it has relation to a Court which has ceased to act judicially, albeit temporarily.

The following dicta of Lord Esher, M.R., in *In re Johnson*, (1887 L.R. 20, Q.B.D., p. 71), was quoted with approval—

"It is not necessary to constitute a Contempt of Court that the contempt should be in Court or that it should be a contempt of a judge sitting in Court. All that is necessary is that it should be a contemptuous interference with judicial proceedings in which a judge is acting as a judicial officer."

C. S. Barr-Kumarakulasinghe with *S. C. Crossette-Thambiah* and *K. Ratnesar*, for the 1st respondent.

Siri Perera with *R. N. Hapugalle*, for the 2nd and 3rd respondents.

V. E. Tennekoon, S.G., with *R. S. Wanasundere Crown Counsel*, and *I. F. B. Wikramanayake, Crown Counsel*, as *amicus curiae*.

T. S. FERNANDO, J.

The Court came to issue this Rule on the respondents as a sequel to an incident which took place on the night of the 27th February, 1964, at the resthouse at Avissawella where the acting Magistrate of Avissawella happened to be staying during a short period when he had been appointed to act in place of the permanent Magistrate who had been granted leave from duty.

The relevant facts which, I must add, are not disputed by the respondents, are set out in a letter addressed by the acting Magistrate to the Secretary of the Judicial Service Commission. Briefly stated, they are as follows :—

The respondents are public servants in the employment of the Government. The 1st respondent had received orders for his transfer to another station at the end of February, 1964. Along with the other two respondents, the 1st respondent had been treated to alcoholic liquor by friends at whose houses they had called on the afternoon of the 27th February. The three respondents finally made their way to the resthouse for more alcoholic sustenance. There an argument appears to have arisen between them and a waiter of the resthouse over a bill tendered to them for supply of liquor that evening. As the argument was being carried on in a loud tone, another waiter drew the attention of the respondents to the presence of the Magistrate at the dining table where he was eating his dinner. The 1st respondent thereupon walked up to the Magistrate and questioned : " Are you the Magistrate ? " The Magistrate, observing that the 1st respondent was under the influence of liquor, ignored the question. The 1st respondent then put his arm on the right shoulder of the Magistrate and pushed him to a side in a rough manner inquiring : " Are you the Magistrate Moonemalle ? " (Mr. Moonemalle was the permanent Magistrate). The Magistrate requested the 1st respondent to leave him alone. The 1st respondent then became abusive and remarked :—" You are a pathetic Magistrate to stay in a resthouse ". The Magistrate thereupon got up from his chair and telephoned to the Police.

When a police constable arrived at the resthouse in response to the Magistrate's request, the Magistrate ordered the arrest of the three respondents on the ground that they were drunk and disorderly in a public place and directed that they be taken before a medical officer for examination in respect of their state of drunkenness. The respondents resisted arrest, but with the help of other constables who arrived later, the police succeeded in arresting the 2nd respondent and he was thereupon taken away to the police station by two of the constables. One police officer remained at the resthouse awaiting the arrival of reinforcements from the police station.

The Magistrate retired to his bed-room at the resthouse. While he was in his bed-room, the 1st and 3rd respondents came up to the door and knocked at it. They were ordered by the Magistrate to leave him alone and not to disturb him. Thereupon they went to a window of his bed-room, opened it forcibly and demanded that the Magistrate should immediately telephone the police and direct the release of the 2nd respondent. They continued to make this demand till police reinforcements arrived at the resthouse and removed them to the police station.

The three respondents were later examined by a doctor who reported that they had taken alcohol but were " not under its influence ".

I may add, for purposes of record, that the respondents were prosecuted by the Police in the Magistrate's Court of Avissawella (in case No. 64150) on charges of : (i) using criminal force on ; (ii) criminal intimidation of ; and (iii) intentional insult to the acting Magistrate, offences punishable under sections 343, 486 and 484, respectively, of the Penal Code. They were tried before the Additional Magistrate and were acquitted. We are not, of course, called upon to consider the correctness of any of the orders of acquittal, but the record of the proceedings in case No. 64150 is before us, and we cannot here refrain from expressing some surprise at least, at the acquittal of the 1st respondent on the charge of using criminal force.

In the rule which issued on the respondents at the instance of this Court, they were called upon to show cause why they should not be punished for contempt of Court in disrespect of the authority of the Magistrate's Court of Avissawella in that the following acts had been committed :—

(1) " the 1st respondent did place his arm on the right shoulder of the Magistrate, push him to a side at a time when he was engaged in eating his dinner and roughly enquire from the Magistrate, " Are you the Magistrate Moonemalle ? "

(2) " the 1st respondent did address the said Magistrate and utter in the presence and hearing of other persons the following words, to wit, ' You are a pathetic Magistrate to stay in the Resthouse ' " ;

(3) " the 1st, 2nd and 3rd respondents did publicly abuse the said Magistrate " ;

(4) " the 1st and 3rd respondents did force open the window of the room occupied by the said Magistrate and demand of him that he should telephone the Police and order the release of the 2nd respondent ".

which acts both singly and in combination were intended to touch the said Magistrate and were committed by them as identified above knowing him to be or in the belief that he was the Magistrate or a person discharging the duties of that office, or having reason so to believe, or knowing or believing him to be some other judge, and were calculated to bring a Court or judge into contempt or to lower his authority or to interfere with the due course of justice.

At the commencement of the hearing before us, the learned Solicitor-General who appeared as *amicus curiae* submitted that the acts particularised as (1), (2) and (3) above did not render the respondents punishable for contempt of Court as the Magistrate could not be said to have been acting judicially at the time those acts were committed and as the conduct of the respondents so particularised had no relation to a judicial act of the Magistrate. We agreed that this submission was correct and, therefore, called upon the 1st and 3rd respondents to show cause only in respect of the acts particularised as (4) above. We discharged the rule in so far as it affected the 2nd respondent.

On behalf of the 1st and 3rd respondents, Counsel raised, by way of a preliminary objection, a question of jurisdiction. They pointed to section 47 of the Courts Ordinance and contended that the contempt of Court alleged in paragraph (4) above being a contempt *ex facie*, the Magistrate's Court itself had jurisdiction to punish in respect of that contempt and, therefore, the Supreme Court had no jurisdiction to take cognizance of it. The view we took of the facts was that when the Magistrate ordered the arrest of the respondents as he was lawfully entitled to do—*vide* section 40 of the Criminal Procedure Code—he was acting judicially, and when he thereafter retired to his room he had ceased to act judicially. The position was no different to that arising in a case where a Magistrate makes an order judicially in Court and then returns to his residence. A contempt committed cannot be said to be *ex facie* where it has relation to a Court which has ceased to act judicially, albeit temporarily. In these circumstances we did not find it possible to uphold the preliminary objection to our taking congnizance of the alleged offence.

In regard to the contempt alleged, we were in no doubt that the acts complained of in the said paragraph (4) constituted a contemptuous interference in relation to a matter in which the Magistrate had been acting judicially. As was said by Lord Esher, M.R., in *In re Johnson*, ((1887) L.R. 20, Q.B.D., p. 71), " it is not necessary to constitute a contempt of Court that the contempt should be in Court or that it should be a contempt of a judge sitting in Court. All that is necessary is that it should be a contemptuous interference with judicial proceedings in which a judge is acting as a judicial officer ". It must be added that the 1st and 3rd respondents, indeed, did not seek to justify their conduct or to exculpate themselves altogether. Their counsel stressed their state of drunkenness and stated that the respondents deeply regretted their lapse and apologised humbly to the Court and personally to the Magistrate concerned.

We did not feel we could take a light view of the conduct of these two respondents. They are public officers, and the 1st respondent is a person who has had, by virtue of the office he holds, business with the Court. We acceded, however, to the submissions that unwise addiction by them to strong liquor had been largely responsible for this regrettable incident. Taking all the relevant circumstances into consideration, while convicting them of the offence of contempt of Court, we imposed on the 1st and 3rd respondents fines of Rs. 1,000/- and Rs. 500/-, respectively, with a sentence in the case of each of them of three months' rigorous imprisonment in default of payment of the fine.

TAMBIAH, J.
I agree.

SRI SKANDA RAJAH, J.
I agree.

Convicted and sentenced.

Present : **Sri Skanda Rajah, J.**

I. A. D. FRANCIS, INSPECTOR OF POLICE, CRIMES, MODERA*

vs.

ANTHONY PERERA *alias* TEETAS

Revision in Colombo M.C., Case No. 6094/*C.—APN/GEN*/18/65.

Argued and decided on : 19th May, 1965.

Criminal Law—Sentence—Principles of punishment—Court's duty to safeguard the interests of public.

Held : That the menace of demanding "*kappan*", *i.e.*, protection-money, is so widespread that it is the duty of the Courts to pass deterrent sentences in such cases in order to safeguard the interests of the public.

Per SRI SKANDA RAJAH, J.—(*a*)"The theory that punishment should fit the criminal appears to find favour with some persons, who shut their eyes to reality and adopt the following type of argument : : ' No criminal is absolutely normal ; some criminals are insane ; therefore, all criminals are to some degree insane '. This is a dangerous theory to act on. This theory may be equated with one already familiar to philosophers under the name of polar generalisation, as remarked by T. B. Hadden in an article entitled ' A Plea for Punishment ' in the *Cambridge Law Journal* of April, 1965. Only the criminals themselves and those who defend them are likely to have a good word for Magistrates and Judges who pass lenient sentences. The public at large, for safeguarding whose interests the Courts exist, have nothing but condemnation for such sentences. "

(*b*)" It was submitted on behalf of the accused that he is married and has children. That is not the only consideration that this Court should take into account in passing sentence. The public interest should over-ride it. "

Cases referred to: *The Attorney-General* v. *de Silva*, (1955) 57 N.L.R. 121
Gomes v. *Leelaratne*, (1964) 66 N.L.R. 233; LXVI C.L.W. 57

Ananda Wijesekera, for the accused-respondent.

Ranjit Dheeraratne, *Crown Counsel*, for the Attorney-General, as *amicus curiae*.

SRI SKANDA RAJAH, J.

It would appear that the accused had demanded "*kappan*", that is, protection money, from the injured person, Krishnan, two days before this incident. He appeared to have heard that Krishnan had complained to the police about it ; but Krishnan's position was that he did not complain to the police for fear of reprisal. That appears to be true. On this day the accused went armed with a sword, entered Krishnan's boutique, which is his place of residence, by the back door, and attacked him after questioning him whether he had complained to the police about the incident two days earlier.

Krishnan sustained, *inter alia*, four incised wounds, three of which had to be sutured—one was 2½ ins. long, another 2 in. long, and the third 1½ ins. long. The first of them was 3/4 in. wide. After the complainant's evidence, the accused pleaded guilty and the Magistrate, without giving any reason except that the accused had no previous conviction, sentenced him to imprisonment till the rising of Court and a fine of Rs. 50/-, in default two months' rigorous imprisonment.

It would appear that this injured man is an Indian, who is carrying on a boarding-house at Alutmawatta Road, where the accused happens to work as a watcher of a toddy tavern. The demanding of "*kappan*" or protection money is a wide-spread racket, not only prevalent in the City of Colombo, but in all towns and even in the countryside. Members of the public will not come forward to give evidence against people of this type.

This menace is so wide-spread that it is the duty of the Courts to pass a deterrent sentence—deterrent to the offender as well as to those of his ilk, whose name is Legion. The sentence in this case is manifestly inadequate. It fits neither the crime nor the criminal. The theory that punishment should fit the criminal appears to find favour with some persons, who shut their

* For Sinhala translation, see Sinhala section, Vol. 9 Part. 6, p. 23

eyes to reality and adopt the following type of argument : " No criminal is absolutely normal ; some criminals are insane ; therefore, all criminals are to some degree insane ". This is a dangerous theory to act on. This theory may be equated with one already familiar to philosophers under the name of polar generalisation, as remarked by T. B. Hadden in an article entitled " A Plea for Punishment " in the Cambridge Law Journal of April, 1965. Only the criminals themselves and those who defend them are likely to have a good word for Magistrates and Judges who pass lenient sentences. The public at large, for safeguarding whose interests the Courts exist, have nothing but condemnation for such sentences.

It was submitted on behalf of the accused that he is married and has children. That is not the only consideration that this Court should take into account in passing sentence. The public interest should over-ride it. As already remarked demanding " *kappan* " is so wide-spread that an adequate and deterrent sentence should be passed in this case. I set aside the sentence imposed by the Magistrate and sentence the accused to six months' rigorous imprisonment, though he has no previous conviction. It may be added that this sentence is in accord with the principles of punishment enunciated by this Court in the recent cases of *The Attorney-General* v. *H. N. de Silva*, (1955) 57 N.L.R. 121, a decision of two Judges ; and *Gomes* v. *Leelaratne*, (1964) 66 N.L.R. 233 ; 66 C.L.W. 57. Some lenient sentences may, perhaps, be attributed to inexperience.

Sentence enhanced.

Present : **T. S. Fernando, J.**

THE SOLICITOR-GENERAL *vs.* W. VICTORIA FERNANDO

S.C. No. 1360 *of* 1964—*M.C. Kanuwana*, 6018/*K.*

Argued on : March 9, 1965.

Decided on : March 17, 1965.

Excise Ordinance, sections 17, 46—*Charge of possession of an excisable article—Proof.*

Evidence Ordinance, section 45—*Opinion of " specially skilled person ".*

The respondent was charged under the Excise Ordinance with illegal possession of an excisable article, viz., fermented toddy. The liquid in question had not been forwarded to thd Government Analyst for examination and report. Instead the prosecution sought to rely on the evidence of an Excise Inspector who claimed to have had more than 10 years' experience in the detection of excise offences relating to fermented toddy and to possess, therefore, the practical knowledge that qualified him as an expert on the question on which the Magistrate had to form an opinion, viz., whether the liquid was fermented toddy.

Held : That the opinion of the Excise Inspector was relevant.

Per T. S. FERNANDO, J.—" ....not only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitled him to be regarded as a competent expert. So the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law. Analogously the training, practical knowledge and experience of a person who is not a professional analyst may be sufficient in certain cases to qualify him as a competent expert on a question of examination or analysis of a substance. "

Case referred to : *Said Ajami* v. *Comptroller of Customs*, (1954) 1 W.L.R. 1405.

Not followed : *Mitradasa Fernando* v. *Sub-Inspector of Police, Kalubovila*, (1961) 63 N.L.R. 422; LIX C.L.W. 93

V. S. A. Pullenayegum, Crown Counsel, in support of the appeal.

No appearance for the accused-respondent.

T. S. FERNANDO, J.

The respondent to this appeal was charged in the Magistrate's Court with the offence of possession of an excisable article, to wit, 1 gallon and 4 drams of fermented toddy, without a pass or permit from the proper authority, in contravention of section 17 of the Excise Ordinance and punishable under section 46 thereof.

The case did not proceed to the stage of trial. It was admitted before the learned Magistrate that the liquid in question had not been forwarded to the Government Analyst for examination and report. The prosecution apparently relied on other evidence to establish that the liquid claimed to have been found in the possession of the respondent was an excisable article, viz., fermented toddy. That other evidence was apparently the evidence of an Excise Inspector who claimed to have more than ten years' experience in the detection of excise offences relating to fermented toddy and to possess the practical knowledge that qualified him as an expert on the question as to which the Magistrate had to form an opinion, viz., whether the liquid claimed to have been found in the possession of the accused was fermented toddy. The learned Magistrate, considering himself bound by the decision of this Court in *Mitradasa Fernando* v. *Sub-Inspector of Police, Kalubovila*, (1961) 63 N.L.R. 422, although there were other decisions which had taken a contrary view, purported to acquit the respondent without taking the evidence of the prosecution.

In *Mitradasa Fernando's case* (*supra*) the charge was one of possession of unlawfully manufactured liquor, and the prosecution relied on the evidence of a Sub-Inspector of Police who claimed to be an expert who had undergone a special course of training in the Excise Department to identify excisable articles. Basnayake, C.J., held that the evidence of the Sub-Inspector was not relevant to the charge unless he came within the class of persons contemplated as experts in section 45 of the Evidence Ordinance. He went on to hold that the evidence did not show that the Sub-Inspector was specially skilled in any science or art which qualified him, as in the case of the Government Analyst, to express an opinion on the question whether the liquor seized was Government arrack or unlawfully manufactured arrack.

For several years the Excise Department, in establishing that particular liquor seized is an excisable article, has been relying on and the Courts have often accepted the evidence of officers, irrespective of the Department to which they belong, who have satisfied such Courts of their experience and capacity to distinguish between various kinds of liquor. I do not propose on this appeal to refer to the two cases cited to the learned Magistrate or to other cases decided by this Court where a view different to that formed by Basnayake, C.J., has been expressed on this very point. It is sufficient to observe that no previously decided case appears to have been brought to the notice of the learned Chief Justice. Instead, I think it is opportune to quote from a decision of the Privy Council (brought to my notice by Mr. Pullenayegam) in the West African case of *Said Ajami* v. *Comptroller of Customs*, (1954) 1 W.L.R. 1405. In that case Their Lordships of the Judicial Committee were called upon to consider whether a bank manager who had been engaged in banking business in Nigeria for 24 years and had in the course of his business kept in touch with current law and practice with regard to notes that were legal tender in French West Africa was a person "specially skilled" on a point of foreign law so as to render him an expert within the meaning of the Evidence Ordinance of Nigeria. (Section 56 of that Ordinance is in the material respects similar to section 45 of our Evidence Ordinance, Cap. 14). In tendering their advice to Her Majesty, Mr. L. M. D. de Silva stated in the report of the Board as follows :—

> "The Ordinance enacts that the evidence of a person 'specially skilled' on a point of foreign law is admissible as expert evidence. The knowledge which entitles a person to be deemed 'specially skilled' on some points of foreign law may, in Their Lordships' opinion, be gained in appropriate circumstances by a person whose profession is not that of the law."

According to Their Lordships, a principle which emerged from a consideration of relevant cases is that not only the general nature, but also the precise character of the question upon which expert evidence is required, have to be taken into account when deciding whether the qualifications of a person entitled him to be regarded as a competent expert. So the practical knowledge of a person who is not a lawyer may be sufficient in certain cases to qualify him as a competent expert on a question of foreign law. Analogously the training, practical knowledge and experience of a person who is not a professional analyst may be sufficient in certain cases to qualify him as a competent expert on the question of examination or analysis of a substance, a question of science

which, I take it, was the question in the case before the learned Magistrate here. I, therefore, think the Magistrate should not have refused to hear the evidence of the Excise Inspector and any other evidence that the prosecution proposed to lead before him.

The acquittal is set aside and, when the record is received back in the Magistrate's Court, the Magistrate will take the evidence for the prosecution and proceed thereafter according to law.

Acquittal set aside and case sent back.

Present : **T. S. Fernando, J.**

W. JAYASINGHE *vs.* ILEKUTTIGE MALANI*

S.C. No. 664 *of* 1964—*M.C. Kegalla*, 45046.

Argued on : September 29, 1964.
Decided on : October 13, 1964.

Maintenance—Order granting maintenance in respect of illegitimate child—Failure on the part of Magistrate to state where corroboration of applicant's evidence to be found—Conduct and false evidence of defendant sufficient corroboration.

This is an appeal from an order of maintenance in respect of an illegitimate child. The applicant (mother) who is a school-girl sixteen years of age, testified that the defendant was its father. The defendant was a sales-assistant at a store in the mother's village. The mother made a complaint to the Village Headman on 8th May, 1962. When the Headman sought to meet the defendant thereafter he learnt that the latter had already left the village. The defendant stated that he left the store only on 30th May, 1962, but the Magistrate chose not to accept his evidence on this point. He preferred the evidence of the Headman.

The Magistrate, in making the order for maintenance did not state in so many words where corroboration of the mother's evidence is to be found.

Held : That it was competent for the Magistrate to find the necessary statutory corroboration in the conduct of the defendant in suddenly leaving the store about the time the mother complained to the headman, and his lying in respect of this sudden departure.

Cases referred to : *Warawita* v. *Jane Nona*, (1954) 58 N.L.R. 111; LII C.L.W. 41.
Dharmadasa v. *Gunawathy*, (1957) 59 N.L.R. 501.

Colvin R. de Silva, with *E. B. Vannitamby* and *M. P. E. Mendis*, for the applicant-respondent.

Fritz Kodagoda, for the applicant-respondent.

T. S. FERNANDO, J.

Applications for an order of maintenance in respect of illegitimate children form a not inconsiderable part of the work of a Magistrate's Court. That being the case, this Court has every reason to expect Magistrates to be quite familiar with the mode of approach to a consideration of the crucial question which invariably arises upon such applications. That crucial question is that of corroboration in some material particular of the evidence of the mother of the child. The experience of this Court, however, is that the mode of approach to this familiar question is often unsatisfactory. The instant case is an illustration of that unsatisfactoriness.

The child in question was born on 30th June, 1962. The mother who is a school girl of sixteen years of age testified that the defendant was its father. The defendant was a sales-assistant at a store in the mother's village. The mother made a complaint to the Village Headman on 8th May, 1962. When the Village Headman sought to meet the defendant thereafter he learnt that the latter had already left the village. The defendant stated that he left the store only on 30th May, 1962, but the Magistrate chose not to accept his evidence on this point. He preferred the evidence of the Headman.

The learned Magistrate does not state in so many words where corroboration of the evidence of the child's mother is to be found. He refers to the evidence of the mother's mother (the child's

* For Sinhala translation, See Sinhala section, Vol. 9, part 6, p. 24.

grandmother) without stating anything in regard to an acceptance thereof. Even if the grandmother's evidence is examined on an assumption that the Magistrate probably accepted it, one fails to see in it any corroboration of the mother's evidence on a material particular. Part of that evidence, that part relating to the grandmother having seen her daughter and the defendant in the very act of sexual intercourse, is obviously false because there should then have been no reason for the grandmother to have questioned her daughter as to who the father of the child was. According to her, she questioned her daughter when the latter was two months in pregnancy, and thereafter immediately sent her off to see the defendant. The defendant then chased her out and left the village. According to the mother herself, she was chased off on or about 8th May, 1962, when she was seven or eight months in pregnancy. It is clear that the grandmother herself has not questioned the defendant. The evidence of the mother that the defendant promised to marry her when he was told of her pregnancy, therefore, stands uncorroborated. The grandmother, however, did state that the defendant was in the habit of visiting her house towards the end of 1961 and was observed moving about freely therein. The Magistrate does not say specifically whether he accepted this part of the evidence but, having regard to the order he made, it is not unreasonable to infer that he must have done so.

In the unhelpful state in which I find the learned Magistrate's judgment on the important question of corroboration, I have now to see whether the necessary corroboration is to be found in any independent evidence that has been accepted by the Magistrate. The Magistrate disbelieved the defendant when he stated that it was only on 30th May, 1962, that he left the store at which he had been employed. He believed the Headman when the latter stated that when he went over to inquire, upon receipt of the complaint of 8th May, 1962, the defendant had already left the store and the village. The actual date of inquiry is not in evidence, but the reasonable inference in all the circumstances was that the inquiry was made on 8th May, 1962, itself or very soon thereafter. I think it was competent for the Magistrate to find the necessary statutory corroboration in the conduct and the false evidence of the defendant, although it would have been more satisfactory if the Magistrate himself had expressly so stated in his judgment. The cases of *Warawita* v. *Jane Nona*, (1954) 58 N.L.R. 111, and *Dharmadasa* v. *Gunawathy*, (1957) 59 N.L.R. 501, lend support to the decision I am taking upon this appeal. If the defendant suddenly left his employment at the store about the time the mother was complaining to the headman and if the defendant has been proved to have lied in respect of this sudden departure an inference may reasonably be made that the mother's story is presumably true. It seems to me that is what the learned Magistrate himself intended to say.

The appeal is dismissed with costs.

Appeal dismissed.

IN THE COURT OF CRIMINAL APPEAL.

Present : **Basnayake, C.J. (President), Weerasooriya, J., and de Silva, J.**

THE QUEEN *vs.* K. A. SIRISENA *alias* HEEN BANDA

Appeal No. 81 *of* 1961 *with Application, No.* 84 *of* 1961—*S.C. No.* 25, *M.C. Kurunegala, No.* 2227.

Argued and decided on : July 31, 1961.
Reasons delivered on : March 12, 1962.

Court of Criminal Appeal—Misdirection—Statement of the deceased admitted under section 32, *Evidence Ordinance—Jury should be properly directed thereon.*

Held : That although the statement of a deceased person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in a case in which the cause of a person's death comes into question, is declared by section 32 of the Evidence Ordinance to be a relevant fact, the jury should be adequately and properly directed as to the weight that should be attached to it in the circumstances of a given case.

Colvin R. de Silva with *Prins Rajasooriya* and *Robert Silva* (*Assigned*), for the accused-appellant.

J. G. T. Weeraratne, Crown Counsel, for the Attorney-General.

BASNAYAKE, C.J.

The accused, a lad of sixteen years, was indicted on a charge of murder of one Rajaguru Mudiyanselage Ukku Banda, found guilty and sentenced to death.

Briefly the facts are as follows :—The deceased and Kalu Banda, the father of the accused were neighbours. To get to his house the deceased had to pass Kalu Banda's. On the day in question the deceased returned home at about 10.30 p.m About that time Mudalihamy, the deceased's younger brother, heard a loud exchange of words between the deceased and Kalu Banda from the direction of Kalu Banda's house. He heard Kalu Banda say that a torch had been flashed into his house. He heard him also state that the deceased was in the habit of flashing his torch into his house every night and disturbing his sleep. The deceased came home while Kalu Banda was still abusing him, deposited two pine-apples he had brought with him, and left for the headman's house. He was followed by Kalu Banda and his son, Heen Banda, the accused who stabbed him on the way.

The only eye-witness of the stabbing was Mudalihamy who said he followed the deceased when he left for the headman's house. The deceased was stabbed from behind. He turned round and tried to seize his assailant but failed. When Mudalihamy went up to him he said, " Heen Banda stabbed me. Go and fetch a car to the hospital ". When his sister, Ran Menika, also went up to him on hearing a cry of " Pihiyen Anno " and asked him what happened, he said, " Heen Banda stabbed me with a knife ". In cross-examination this witness said that the shout she heard was, " Heen Banda Pihiyen Anno ". Mudalihamy who went to fetch the headman stated in his complaint that it was Heen Banda who stabbed the deceased.

The only eye-witness being Mudalihamy whose evidence was challenged on the ground that it was false it was necessary that the jury should have been properly directed as to the manner in which they should approach the statement of the deceased. It is usual and this Court has so held that the jury should be remined of the infirmities of such a statement when it is not on oath and the accused has had no opportunity of cross-examining the person making it. The statement of a deceased person as to the cause of death or as to any of the circumstances of the transaction which resulted in his death in a case in which the cause of that person's death comes into question is declared by section 32 of the Evidence Ordinance to be a relevant fact. But the jury should be adequately and properly directed as to the weight that should be attached to that relevant fact in the circumstances of a given case. In the instant case the learned Commissioner has omitted to give a proper direction in that behalf. For that reason we quashed the conviction and directed that a new trial be held.

Re-trial ordered.

Present : **Sri Skanda Rajah, J.**

A. C. A. EDWARD *vs.* G. NATHERMAL & OTHERS*

S.C. Application, No. 790/1964.

Argued and decided on : January 15, 1965.

Habeas Corpus, Writ of—" Corpus " to be produced not in the Island and living abroad at date of hearing—Can the respondents prove their inability to comply with order and obtain discharge ?

Held : That in a return to a writ of *Habeas Corpus* the respondents could prove their inability to comply with the order, and if they did so they were entitled to be discharged.

Cases referred to : *Mohad Ikram Hussein* v. *State of Uttar Pradesh*, (1964) 2 Criminal Law Journal 590.

* For Sinhala translation, see Sinhala translation, Vol. 9 part 7, p 26

C. S. Barr Kumarakulasinghe, with *Miss Barr Kumarakulasinghe*, for the petitioner.

N. E. Weerasooriya, Jnr., for the 1st, 2nd, and 3rd respondents.

P. Navaratnarajah, with *T. Sunderalingam*, for the 4th respondent.

SRI SKANDA RAJAH, J.

This application came up before Manicavasagar, J., on the 4th January, 1965. The first to third respondents in whose unlawful custody the *corpus* was alleged to be appeared on that date. Counsel who appeared for the 4th respondent, the *corpus*, who is over 21 years of age, tendered an affidavit from the 4th respondent to the effect that on the 2nd January, 1965, she had left for Hong Kong, *i.e.*, after she received notice. My brother, in the course of his order, stated "Mr. Navaratnarajah to adduce evidence to prove that the 4th respondent had left the Island."

Today Mr. Navaratnarajah has produced the 4th respondent's letter dated 11th January, 1965, written from Hong Kong together with her Passport, "4 R 2", sent to her Proctor. In "4 R 2" there is the endorsement that she landed in Hong Kong on the 2nd January, 1965. She has also written from Hong Kong the letter, "4 R 3", dated 5th January, 1965, to her parents.

In the case of *Mohad Ikram Hussein* v. *State of Uttar Pradesh*, 1964 (2) Criminal Law Journal, 590, a decision of the Supreme Court of India, it was indicated that in a return to a Writ the respondents, (here respondents 1 to 3) could plead and prove their inability to comply with the order and if they do so they are entitled to be discharged.

In this case there is sufficient evidence to indicate that the *corpus* is not within the reach of this Court—she is in Hong Kong. She was not in the custody of the respondents 1-3 on the 4th January, 1965, on which date they were required to produce the *corpus*. Therefore, the *rule* is discharged. Return Passport, which I have examined.

Application refused.

Present : **Sansoni, J., and L. B. de Silva, J.**

A. B. C. DE SILVA & ANOTHER *vs.* S. GUNAWARDENA

S.C. 246-247/60—*D.C. Colombo*, 45853/*M*.

Decided on : May 6, 1963.

Delict—Collision between two motor cars—Negligence—Contributory negligence.

Car driven by person other than the owner—Presumption of liability from ownership—Whether such presumption affected by fact that driver was owner's minor child.

Held : (1) That a plaintiff's action for recovery of damages for negligence is not defeated by a plea of contributory negligence if the defendant's negligence was the decisive and effective cause of the collision.

(2) That the fact of ownership of a car is evidence against the owner that it was either driven by a servant in the course of his employment or by an agent within the scope of his authority. The owner is liable if he does not lead evidence to meet the *prima facie* case raised against him by the fact of ownership.

(3) That the liability of the owner is unaffected by the fact that the car is driven by a minor child of the owner.

In this case the plaintiff had suffered injuries which affected his work as a Surgeon and his power to earn was, to this extent, impaired. He had stated that he intended to retire from Government Service and start a private practice. This practice was bound to suffer because of his disability.

Held further : (4) That in all the circumstances of this case, a sum of Rs. 30,000/- would be adequate compensation.

Editorial Note.—It appears from this judgment that the rule of "the last opportunity" or the "last clear chance" has not been applied in this case. In *Swadling* v. *Cooper*, (1931) A.C. 1 (H.L.), which was also a case of a cross road collision, the House of Lords approved Humphreys, J's. direction to the jury not to consider who had the last opportunity. He asked them instead to answer the question whose negligence was it that substantially caused the injury. Voet, 9.2.17, says that when two persons are negligent at the same time, he is liable whose negligence is regarded as the greater. "In South Africa the Courts have simply adopted the English law of contributory negligence with its phraseology and ideas of proximate cause and last opportunity. The result has been obscurity similar to that existing in English Law", (1941) 58 S.A.L.J. 232, at 259, Causation and Legal Responsibility by Aquarius. "The last opportunity is like the last straw which breaks the camel's back only because of all other things that have been placed on it". *Per* Lord Wright, 13 *Modern Law Review*, page 2, at 5. In England and South Africa, the respective legislatures have provided for apportionment of loss between the parties in cases of combined negligence. For England, see the Law Reform (Contributory Negligence) Act of 1945. South Africa would appear to have expressly abolished "last opportunity" as a test of causation. *See* The Apportionment of Damages Act, 1956, section 1 (1) (*b*).

Cases referred to : *Barnard* v. *Sully*, (1931) 47 T.L.R. 557.
Hewitt v. *Bonvin*, (1940) 1 K.B. 188; 161 L.T. 360; 56 T.L.R. 43.
Conradi v. *Weihahn*, (1911) C.P.D. 704.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera* and *Sinha Basnayake*, for the 1st and 2nd defendants-appellants.

Colvin R. de Silva with *M. L. de Silva*, for the plaintiff-respondent.

SANSONI, J.

This is an action for damages filed by the plaintiff against the driver (the 1st defendant) and the owner (the 2nd defendant) of a motor car which collided with a car which was being driven by the plaintiff. The collision occurred at about 8.30 p.m. at the intersection of McCarthy Road and Gregory's Road. The plaintiff was driving his Vauxhall car, EY 4565, along McCarthy Road towards Buller's Road, while the 1st defendant (a minor at that time) was driving his father's, the 2nd defendant, Jaguar car, CY 3710, along Gregory's Road towards Maitland Crescent. The point of impact appears to have been a little on the Buller's Road side of the intersection and about 18 ft. 6 in. from where McCarthy Road meets Gregory's Road as one travels from Horton Place.

The learned trial Judge has held that the collision was due entirely to the negligence of the 1st defendant and that there was no contributory negligence on the part of the plaintiff. He awarded the plaintiff a sum of Rs. 50,000/- as damages. He has also held that the 1st defendant was at the time driving the Jaguar car as an agent of the 2nd defendant, and that both defendants were jointly and severally liable to pay the damages awarded.

It is common ground that where Gregory's Road meets McCarthy Road the word "Stop" was painted in large white letters on Gregory's Road, on either side of the intersection. Further, the plaintiff approached the intersection on the right hand side of the 1st defendant. As the learned Judge has held, it was the plain duty of the 1st defendant to have given way to the plaintiff, if necessary, by stopping his car on Gregory's Road. He should have made certain, before he entered the intersection, that there was no car entering it on his right hand side, because the plaintiff had the right of way. The 1st defendant, as found by the learned Judge, saw the plaintiff's car approaching the intersection. Under these circumstances the failure of the 1st defendant to stop and let the plaintiff's car proceed as it had the right of way constituted negligence on the part of the 1st defendant.

Mr. Jayewardene accepted the finding that the 1st defendant had been negligent. He submitted, however, that the learned Judge should have found the plaintiff guilty of contributory negligence which disentitled him to recover any damages. He relied most strongly on the plaintiff's admission that when he arrived at the point where McCarthy Road met Gregory's Road, he drove through the junction without looking to either side. The plaintiff's explanation seems to be that when he approached the junction he slowed down, tooted his horn but got no reply from any other horn, and then went straight on. He said that he was not aware of any other car approaching the junction nor did he see the 1st defendant's car until it collided with the rear of his car. The 1st defendant's version was that before he came to the "Stop" sign, he applied his brakes, tooted his horn and changed down to third gear. When he had almost reached the intersection he saw the plaintiff's car coming very fast. He braked

hard and swerved to the left, but could not avoid the collision.

The learned Judge, who was in the best position to assess the credibility of the respective parties, has made a finding which I quote verbatim. It is that " the 1st defendant came up Gregory's Road at such an excessive speed that even when he saw the plaintiff's car before he reached, the Stop signal, he was unable to stop his car in spite of applying brakes. The brake marks indicate that in spite of the application of brakes the car proceeded a distance of 24 feet and was impeded only by reason of its banging into the rear of the plaintiff's car, and even thereafter the car appears to have proceeded a further 2 feet before it came to a halt facing the lamp post. Obviously the plaintiff reached the intersection before the 1st defendant and he had proceeded a distance of 18 ft. 6 in. and almost crossed the intersection and got on to the McCarthy Road on the other side before the 1st defendant banged into him. This accident is due entirely to the 1st defendant not halting his car at the Stop signal as he should have done and not giving the plaintiff his right of way as he should have done. As I stated earlier, both these things took place on account of the excessive speed at which the 1st defendant was coming along Gregory's Road in his powerful Jaguar car ".

The learned Judge's finding just quoted by me is a finding that it was the 1st defendant's negligence in driving up to this junction at a speed which was excessive in the circumstances which was the decisive and only effective cause of the collision.

Let it be granted that the plaintiff should have looked to his left and to his right before he started crossing the intersection. If the 1st defendant had been driving at a reasonable speed at the time he approached the " Stop " sign, he would have been able, as soon as he saw the plaintiff's car coming along McCarthy Road, to stop his car or, at least, to slow down sufficiently to enable the plaintiff to cross the intersection before he himself had crossed it. Instead of doing that, it is clear that he came at a speed which was too high to permit him to stop his car or to slow down sufficiently to avoid colliding with the plaintiff's car. He braked and he swerved to his left, but he was going so fast that his right front mudguard and the right edge of his buffer hit the left rear wheel of the plaintiff's car and dented it inwards.

Many cases were cited to us on the question of negligence. I do not intend to refer to them because the circumstances of each case are peculiar to that case, but the principle to be extracted from the cases is clear enough. Even if the plaintiff has been guilty of some negligence, the 1st defendant's negligence was the decisive and effective cause of the collision and that is the case here. The plaintiff is, therefore, entitled to recover damages.

The next point raised by Mr. Jayewardene was the liability of the 2nd defendant. He was the owner of the car, and there was no evidence from either defendant or from the plaintiff as to whether the 1st defendant was driving the car as a servant or agent of the 2nd defendant. The 1st defendant gave evidence but said nothing on this point. The 2nd defendant gave no evidence, while the plaintiff did not claim to know anything about this aspect of the matter. In these circumstances the law is clear that the mere fact of ownership of the car is some evidence against the person who is the owner of the car that he permitted the car to be driven by his servant in the course of his employment or by his agent within the scope of his authority. It is a circumstance from which the Court may draw an inference if the owner does not furnish the Court with further explanation. The cases of *Barnard* v. *Sully*, (1931) 47 T.L.R. 557, and *Hewitt* v. *Bonvin*, (1940) 1 K.B. 188 refer to this presumption. Other cases on the point are referred to by Macintosh and Scoble in Negligence in Delict, (3rd Edn.), p. 90.

Mr. Jayewardene argued that the presumption cannot be applied to a case where the driver is a minor child of the owner and he cited among other authorities, *Conradi* v. *Weihahn*, (1911) C.P.D. 704. But even in such a case the rule set out in McKerron in the Law of Delict, 5th Edition, page 78, is that " a parent cannot be made liable for a wrongful act committed by his minor child, unless he expressly or impliedly authorised the act, or unless the child was acting as his servant or agent, or unless he was negligent in allowing or affording the child the opportunity of doing mischief ". In the absence of any facts from either defendant, each of whom was in the best position to say whether the 1st defendant was driving as the servant or agent or not of the 2nd defendant, I think this is a case to which the presumption arising from ownership should be applied.

Finally, there is the question of damages. As a result of the accident the plaintiff sustained the following injuries to his right hand, which have been referred to by the learned Judge in his judgment as follows :—

" (1) A fracture of the base of the 5th metacarpal bone ;
(2) A compound fracture of the base of the 4th metacarpal bone in the right hand ; and
(3) A fracture of the proximal phalanx of the middle finger.

As a result of the compound fracture of the base of the 4th metacarpal bone there was a shortening of this bone and a resulting depression of the 4th knuckle. This has resulted in the permanent disability to the middle finger, 4th finger and 5th finger of his right hand. He is unable to bring these three fingers up to the palm and there is a limitation of manent disability and he cannot do long and delicate operations with his right hand. Moreover, he will be unable to play tennis which appears to have been his recreation. "

The plaintiff is a doctor in Government service who has practised his profession from 1943, and was 39 years' old when this accident occurred. He has carried out different kinds of operations as a Surgeon, although he has not specialised in any branch. He stated in evidence that it was his intention to retire from Government Service and start a private practice in his home town of Kalutara. As a result of the permanent disability he now suffers from, he will be handicapped and his practice is bound to suffer, because his patients will know about his disability.

The only question is the quantum of damages that should be awarded. The learned Judge has awarded Rs. 50,000/-. Mr. Jayewardene submitted that this was grossly excessive, while Mr. de Silva said that there was no reason why we should interfere with the learned Judge's estimate.

I do not see why the plaintiff should not be compensated for the loss of his freedom to choose a new way of exercising his profession. He is handicapped to the extent that he cannot do all the work a Surgeon should be able to do. His power to earn is, to this extent, impaired. He is not bound to continue in Government Service ; if he had been, of course, the quantum of damages would be almost trivial. He has lost the right, which he formerly had, of earning his living in the best way possible.

After careful consideration of such other cases as have come to our notice, and the extent to which the plaintiff's practice of his profession will be affected, I consider that a sum of Rs. 30,000/- would be adequate compensation.

I would, therefore, vary the decree entered in this case by substituting Rs. 30,000/- for Rs. 50,000/- and with this variation dismiss the appeal with costs in both Courts.

L. B. DE SILVA, J.
I agree.

Decree varied.

Present : **Basnayake, C.J., and Abeyesundere, J.**

SARDIRIS PERERA & ANOTHER *vs.* DAVID PERERA & ANOTHER

S.C. No. 126/'61 (*Inty.*)—*D.C. Colombo, No.* 8143/P.

Argued and decided on : April 1, 1963.

Partition Act, sections 27 (2), 31 *and* 32—*Surveyor in his scheme of Partition introducing feature not authorised by the interlocutory decree or direction in the commission—Court's power to confirm such scheme—Surveyor's duty in submitting such a scheme.*

Where on a commission issued to a Surveyor to partition the land described in the commission in conformity with the interlocutory decree, with a direction to submit a plan of partition with a schedule of appraisement, summary of distribution and a report in terms of section 32 of the Partition Act, the Surveyor submitted a scheme of partition in which he provided two roads together with the values of the land covered thereby.

Held : That the surveyor had no authority to demarcate the roads in question, and the Court had no power to confirm the scheme and the plan as he had introduced into them features he was not authorised to put in.

G. T. Samarawickrema, for the defendants-appellants.

G. P. J. Kurukulasuriya, for the plaintiffs-respondents.

BASNAYAKE, C.J.

In this action under the Partition Act the interlocutory decree, after setting out the respective shares and interests of the parties, provided—

> "It is further ordered and decreed that the said land be partitioned among the said parties in proportion to the shares aforesaid in terms of the Partition Act, No. 16 of 1951."

Thereafter a commission was issued under section 27 (3) to the Commissioner named therein to partition the land described in the commission in conformity with the interlocutory decree, a true copy of which was annexed to the commission. It contained the direction that the Commissioner should submit a plan of partition with a schedule of appraisement, summary of distribution, and a report in terms of section 32. The surveyor submitted a scheme of partition in which he provided two roads, viz., Lots 13 and 14. He described Lot 13 as a common 10 foot road-access and gave the extent of the land as 6.5 perches and he valued it at Rs. 2,200/- an acre. He described Lot 14 as a common 10 foot road-access and gave the extent of the land as 14.68 perches which he valued at the same price per acre.

Now neither the interlocutory decree nor any special directions issued by the Court with the commission directed the Commissioner to provide for or demarcate any roads. In providing the two roads the Commissioner travelled outside his commission. In section 31 the duties of a surveyor are described as follows :—

> "The Surveyor shall, on the date or altered date fixed for partitioning the land, proceed to the land and prepare a scheme of partition in *conformity with the interlocutory decree and with any special directions contained in his commission* and demarcate the divided portions on the land by means of such boundary marks as are not easily removed or destroyed. He shall inform the parties present of the returnable date of his commission under section 27."

When the scheme of partition was finally returned to the Court under section 32, the Judge fixed a date for its consideration and on that date objection appears to have been taken to it by the 1st, 2nd, 3rd, 4th, 5th, 10th, 12th, 14th, 16th and 17th defendants on the ground that contrary to the evidence and the interlocutory decree the surveyor had altered the course of the road which had been in existence for over half a century. An alternative scheme of partition and a plan were submitted to the Court by the defendants and they asked that that scheme and plan be confirmed. The objection was overruled and the Commissioner's scheme was confirmed subject to the modification that the bend shown in his plan should be 15 feet wide, and the plaintiff was directed to construct the road and file a report from the Commissioner that it is in all respects as well constructed as the road now in existence. The entering of the final decree was deferred till the filing of that report. This appeal is from that order and decree.

The surveyor to whom a commission is issued under section 27 (2) must act within the ambit of the interlocutory decree and any special directions contained in his commission. Section 31 so enacts and he is not free to travel outside the authority given to him and arrogate to himself any functions or powers not contained in the decree or commission. The surveyor had, therefore, no authority to demarcate the roads in question, and the Court had no power to confirm the scheme and the plan as he had introduced into them features he was not authorised to put in. We, therefore, set aside the order of the District Judge confirming the scheme of partition and the plan subject to the modification indicated in the order and also the order directing the plaintiff to construct a road.

As it is common ground that there was a road which ran over the land and that that right of way should be preserved, it is necessary that a fresh commission should be issued for the preparation of a scheme of partition with directions as to the course along which the road should be provided. The road provided in the Commissioner's scheme of partition has absorbed 20.70 perches of land. If this extent of land is to come from the *corpus* to be partitioned, the Court should decide in what proportion each of the parties should contribute to this extent of land and also hear the parties and decide on the route that the road should take.

As the interlocutory decree is still in force and as the learned District Judge would have no power to issue a further commission for partition while it is in force, acting in revision, we set aside the interlocutory decree and direct the learned Judge, after hearing the parties, to enter an interlocutory decree in which provision is made for a roadway and to issue directions as to the route it should take.

No costs are allowed as the appellants are equally to blame for the omission to include in the commission a direction as to the demarcation of the road.

ABEYESUNDERE, J.

I agree.

Set aside.

Present : **Tambiah, J., and Sirimane, J.**

DHAMMINDA NAYAKE THERO *vs.* DIAS

S.C. No. 354/64—*D.C. Colombo, No.* 781/Z.

Argued and decided on : 5th April, 1965.

Civil Procedure Code, sections 298 *and* 308—*Application for warrant—Warrant issued for arrest of judgment-debtor after submissions of counsel and perusal of affidavit of petitioner, and also of affidavit filed earlier by judgment-debtor praying for stay of execution—Sufficiency of inquiry required before issue of warrant under section* 298.

Where the District Judge, in an application under section 298 of the Civil Procedure Code, heard the submissions of counsel for the petitioner in addition to his perusal not only of the affidavit filed in support, but also an affidavit filed by the judgment-debtor on an earlier occasion in asking for a stay of writ, before he issued the warrant —

Held : That the learned Judge had held a sufficient inquiry as required by section 298 of the Civil Procedure Code.

H. V. Perera, Q.C., with *Miss Maureen Seneviratne*, for the plaintiff-appellant.

C. Ranganathan, with *Bala Nadarajah*, for the defendant-respondent.

TAMBIAH, J.

The plaintiff-appellant made an application under section 298 of the Civil Procedure Code for the issue of a warrant on the defendant-respondent. He filed petition and affidavit and, after setting out the facts as alleged by him, in paragraph 15 the plaintiff-appellant stated that " the respondent has removed the property with intent to defraud him and with intent to obstruct him in the execution of the decree " This application was supported by Miss Maureen Seneviratne, who appeared as counsel for the plaintiff-appellant.

On 2nd August, 1963, the learned District Judge, having heard the submissions made by Miss Maureen Seneviratne, in addition to his perusal of the affidavits filed by the plaintiff as well as the defendant ; in the course of his order stated that he was satisfied that this is a case for the issue of warrant in terms of section 298 of the Civil Procedure Code He thereupon issued warrant on the defendant-respondent with bail endorsed in Rs. 5,000/5000 returnable on 30th August, 1963.

Thereafter, the defendant-respondent filed objections and the matter came up for inquiry under the provisions of section 308 of the Civil Procedure Code. At this inquiry a preliminary objection was taken on behalf of the defendant-respondent that no inquiry had been held as required by section 298 of the Civil Procedure Code before the warrant was issued. In support of his argument, Counsel who appeared for the defendant-respondent cited the case of *Gnanampirakar-Ammai* v. *Candiah*, (1941) 42 N.L.R. 285. In that case it was held that a mere perusal of the petition and affidavit filed by the judgment-creditor is not sufficient inquiry under the provisions of section 298 of the Civil Procedure Code, before issue of warrant. Keuneman, J. (with whom Howard, C.J., agreed) took the view that " the District Judge in that case thought that there was another occasion to satisfy himself before the issue of the warrant and, therefore, did not take the trouble to hold an inquiry before issuing notice ". The facts of that case are distinguishable from the present case. In making application for stay of writ on an earlier occasion, the defendant-respondent filed an affidavit in which he stated that movable property worth about Rs. 150,000/- was lying in the premises, which is the subject-matter of the suit.

The learned District Judge appears to have considered the affidavits of the parties as well as the submissions made by counsel for plaintiff-appellant before he was satisfied that warrant should issue.

The learned Judge, who held the inquiry under section 308 of the Civil Procedure Code, dismissed the plaintiff-appellant's application on the ground that no inquiry has been held before issue of warrant. We are of the view that the learned Judge has misdirected himself in taking this view.

For these reasons, we set aside the order of the learned District Judge dated 11th June, 1964, releasing the defendant-respondent from arrest and send the case back for inquiry under section 308 of the Civil Procedure Code before another Judge.

The defendant-respondent is entitled to stand out on the bail already ordered, if the bail bond is still subsisting. Otherwise, the defendant-respondent is entitled to be released on his furnishing bail in a sum of Rs. 5,000/5,000, pending inquiry.

The plaintiff-appellant is entitled to costs of appeal and costs of inquiry.

SIRIMANE, J.
I agree.

Set aside and sent back.

Present : **T. S. Fernando, J.**

NILOUFER MASHOOR *vs.* D. G. ALAHAKOON

S.C. No. 56 *of* 1963—*C.R. Colombo, No.* 83971.

Argued on : 3rd March, 1964.
Decided on : 21st April, 1964

Court of Requests—Right of a defendant to call evidence—Civil Procedure Code, section 163.

At a certain stage in a trial in the Court of Requests, the learned Commissioner made the following order :—

"Plaintiff's case closed reading in evidence P 1 to P 9. I call no defence. Mr. Fernando reads D 1 in evidence."

Held : That in view of section 163 of the Civil Procedure Code, the defendant is entitled to call evidence if he so desires.

Per T. S. FERNANDO, J.—"In the hearing of a civil suit, there is no step quite like the calling upon of an accused person for his defence in a criminal case. Section 163 of the Civil Procedure Code permits a party to lead his evidence if he so desires."

N. Senanayake, for the plaintiff-appellant.

S. Sharvananda, for the defendant-respondent.

T. S. FERNANDO, J.

The trial of this case which ended with the dismissal of the plaintiff's action cannot be said to have been satisfactory.

One of the issues raised in the case was whether the defendant was in any event entitled to relief under section 6 (1B) of the Rent Restriction Amendment Act, No. 10 of 1961. On the Court being satisfied that rent has been in arrears on account of the tenant's "illness or unemployment or other sufficient cause", that sub-section vests in the Court a discretion to make an order that a writ of ejectment shall not issue if the tenant pays to the Court the arrears of rent on a certain date or dates as may be specified. The issue referred to above was answered by the learned Commissioner in favour of the tenant although the issue in respect of the rent being in arrears has also been answered in favour of the tenant. The facts relative to the issue in respect of relief are set down by me in the following paragraph.

The plaintiff's proctor sent to the defendant-tenant a notice to quit (P 1) bearing date 24th September, 1962, stating that the notice was being sent on the instructions of Mrs. Niloufer Mashoor and intimating that rent at Rs. 39.45 per mensem was in arrears since April, 1962. The tenant by letter of 26th December, 1962, sent to the plaintiff's proctor a cheque for Rs. 236.70 in favour of one Mrs. A. L. M. Mashoor. This cheque was returned by the proctor with a letter of 2nd January, 1963, which informed the tenant that the former had no client of the name of Mrs. A. L. M.

Mashoor. There is evidence—(*vide* receipt D 1)—that the tenant was aware that the lady's name was Niloufer Mashoor, wife of E. L. M. Mashoor. The tenant thereupon by letter of 10th January, 1963, sent to the proctor a cheque in favour of the latter and crossed " a/c payee ". This cheque was also returned by the proctor who stated in his reply that he had no bank account. It is not disputed that the plaintiff's proctor had no bank account. The tenant then sent to the proctor a money-order for Rs. 236.70 with a letter dated 23rd January, 1963.

Upon the facts set out above, the learned Commissioner, holding that the conduct of the plaintiff's proctor was most unreasonable, has accepted a suggestion made on behalf of the tenant that the proctor was trying his best to make the defendant get into arrears. The discretion to grant relief was exercised in the circumstances adverted to above. It is manifest from this recital of the facts that, if rent was in arrears, neither illness nor unemployment of the tenant was responsible for the situation in which the tenant found himself. Did the circumstance that the tenant was in arrears in payment of rent result from " other sufficient cause " within the meaning of that expression in sub-section (1 B) of section 6 ? Without here attempting a judicial definition of that expression, I am satisfied that in the circumstances proved in this case the failure to send a cheque correctly made out in favour of his landlady was not due to any sufficient cause. It is permissible to say here, with due respect to the learned Commissioner, that, having reached a somewhat hasty evaluation in regard to the conduct of the proctor, he overlooked considering whether the proctor's action was well within his legal rights. The tenant was entirely to blame for the situation in which he found himself. He had been in arrears of payment of rent on an earlier occasion, had been sued in ejectment on that occasion and had been fortunate in settling the case on payment of all arrears up to 31st March, 1962, amounting to so large a sum as Rs. 650/-. He does not appear to have profited from that experience because from the very next month, viz., April, 1962, he began defaulting in payment of rent on the due dates, and notice to quit (P 1) referred to above shows that rent from April, 1962, onwards remained unpaid on 24th November, 1962. I am satisfied that the tenant was not entitled to an exercise of the Court's discretion under sub-section (1 B) in his favour.

It is not possible to dispose of the case upon this appeal because it is pointed out to me that the defendant did not call any evidence in view of the fact that the Commissioner decided that no defence was necessary. The record shows the following entries :—

> " Plaintiff's case closed reading in evidence P 1 to P 9. I call no defence. Mr. Fernando reads D 1 in evidence."

In the hearing of a civil suit, there is no step quite like the calling upon an accused person for his defence in a criminal case. Section 163 of the Civil Procedure Code permits a party to lead his evidence if he so desires. In view of what has happened in the instant case in the Court of Requests I cannot say that the defendant has not been prejudiced by the order " I call no defence ". He should have been given an opportunity to call evidence, if he so desired. At the same time, it is contended by counsel for the plaintiff-appellant that in any event the tenant was in arrears in payment of rent at the time of filing of this action. Without commenting here upon this contention, I think the interests of justice require that there should be a finding by a trial Court on this point as well. It was raised at the trial, but has not received attention in the judgment of the Court.

I set aside the judgment and decree dismissing the plaintiff's action, and remit the case to the Court of Requests for trial *de novo*. The plaintiff will be entitled to the costs of this appeal.

Set aside and sent back.

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1965.

පිටපත් ලබාගත හැක්කේ නො: 50/3, සිරිපා පාර, හැව්ලොක් ටවුම—කොළඹ 5,

පාර්ශවකාරයින්ගේ නාම

අපරාධ නඩු විධාන සංග්‍රහය

අපරාධ නඩු විධාන සංග්‍රහය, 434 වෙනි ඡේදය—පරිපොෂණ නඩුවක්—එහි සාක්ෂි දුන් අයගේ ප්‍රකාශ වල පිටපත් පාර්ශවකාරයින්ට නිකුත් කළ යුතු ද?

තීන්දුව : පරිපොෂණ නඩුවක දී වුවත් එය මහේස්ත්‍රාත් උසාවියේ විභාග වන නඩුවක් නිසා අපරාධ නඩු සංවිධාන සංග්‍රහයේ නියමයන්ට යටත් ය. එම නඩුවක සාක්ෂි දුන් අය ගේ ප්‍රකාශ වල පිටපත් නිකුත් කිරීම එම සංග්‍රහයේ 434 වෙනි ඡේදය අනුව කළ යුතු යි. එ හෙයින් නඩුව අවසාන වන තුරු ප්‍රකාශවල පිටපත් නඩුවේ පාර්ශවකාරයින්ට නිකුත් කළ යුතු නොවේ.

යාපා එ. මිසිනෝනා 6

"දඬුවම්"—යට ද බලන්න.

අල්ලස් පරීක්ෂක මණ්ඩලය

"සර්ටියෝරේරයි ආඥා"—යට බලන්න.

අපරාධ නීතිය

"දඬුවම්"—යට බලන්න.

ඉඩම් කිමි සහ බදුකරු

ඉඩම්හිමියා සහ බදුකරු—මාසේ පළමුවෙනි දින පටන්ගත් බද්දක්—1962.11.30 වෙනි දින පිටවී යාමට ඉඩම් හිමියා විසින් දුන් දැන්වීමක් බදුකාරයා විසින් 1962.8.30 දින ලැබීම—එම දැන්වීම නීත්‍යානුකූලව ප්‍රමාණ ද?

තීන්දුව: (1) මාසයේ පළමුවෙනි දිනක පටන්ගත් බද්දක් සම්බන්ධව ඉඩම්හිමියා 1962.11.30 වෙනි දිනට හෝ ඊට පෙර ඉඩමෙන් පිටවී යාමට යයි කියා දෙන ලද දැන්වීමක් 1962.8.30 වෙනි දින ඔහුගේ බදුකරුට ලැබීමෙන් එය නීත්‍යානුකූල පිටවීයාමේ කුන්මාසයක දැන්වීමක් වන්නේය.

(2) මාස්පතා වූ බද්දක් සම්බන්ධව ඒ ඒ මාසයේ බද්ද පටන්ගන්න දවසට පෙරාතුව එම ඉඩමෙන් ඊලඟ මාසයේ අන්තිම දවසේ පිටවී යාමට ලිත්මාසයක (calendar month) දැන්වීමක් දී එය බදුකරුට එසේම ඒ මාසයේ බද්ද පටන් ගන්නා දවසට පෙරාතුව ලැබුනු විට එම දැන්වීම නීත්‍යානුකූල සැහෙන්නක් වේ.•

එඩිවඩ් එ. ධම්සේන 12

ඔප්පු

ඔප්පු—ලිපිදෝෂයක් සහ වැරදීමක්වී යයි කියා දෙනුව නිදෙස් කිරීමේ ඔප්පුවක් ලියා අත්සන් කිරීම—එසේ වැරදීමක් ඇතිවී යයි සාක්ෂියෙන් ඔප්පු නොකිරීම—නිදෙස් කිරීමේ ඔප්පුව පලමු යටත්කර බලපාන් ද?

බෙදුම් ආඥා පණතේ 67 වෙනි ඡේදය—ඉඩම කට බෙදුම් නඩුවක් පවත්නා කාලයතුල ලියන ලද ඔප්පුවක බලශූන්‍යතාවය—එසේ බලශූන්‍ය වූ ඔප්පුවක් නිදෙස් කරන්ට කිසිසේත් ඉඩ නැති බව.

තීන්දුව : (1) නිදෙස් කිරීමේ ඔප්පුවක් ලියා අත්සන් කළ හැක්කේ එම ඔප්පුවේ සඳහන් දෙපාර්ශවය අතර අන්‍යොන්‍ය ප්‍රමාද දෝෂයක් ඇති වූ විටක පමණකි. ඒ අඳුමේ ප්‍රමාද දෝෂයක් නො මැතිව ලියන ලද නිදෙස් කිරීමේ ඔප්පුවකට පළමු ඔප්පුව යටපත් කර බලපාන්ට නොහැක.

(2) කෙසේ හෝ පළමු ඔප්පුව බෙදුම් පණතේ 67 වෙනි ඡේදය අනුව එම ඔප්පුවේ සඳහන් ඉඩමට බෙදුම් නඩුවක් පවතින්නා කාලය තුල ලියවූවක් නිසා බලශූන්‍ය වේ. එය නිදෙස් කිරීමට දෙවනු ඔප්පුවක් කිසිසේත් ලිවීමට ඉඩ නැත. නිදෙස් කළ හැක්කේ නීත්‍යානුකූලව වලංගු ඔප්පුවක් පමණකි.

ඊ. ඩී. ඒ. ජයසූරිය එ. ඒ. ඇස්. ජේ. සෙනෙවිරත්න 7

බාලවයස්කාරයින්ගේ නමින් දුන් නැගි ඔප්පුවක්—එය නීත්‍යානුකූල ලෙස පිළිගත හැක්කේ කෙසේ ද?

"බාලවයස්කාරයින්"—යට බලන්න 13

බාල වයස්කාරයින්

බාලවයස්කාරයින්ට දුන් නැගීමක්—නැගි දීමනාකරු ඔවුන්ගේ මව්-පිය කෙනෙක් නො වීම—නීත්‍යානුකූල හෝ සාධාරණ භාරකාරයෙකු විසින් ඔවුන් වෙනුවෙන් එය නො පිළිගැනීම නීත්‍යානුකූල ද?—විවාහ ලියා පදිංචි කිරීමේ පණත, 21 වෙනි ඡේදය.

මරියා පෙරේරා සහ ස්ටීවන් යන අය අතරේ සිදු වූ විවාහයෙන් එමලියානු නමින් පුතෙක් උපන්නේ ය. ඉන් පසු මරියා පෙරේරා ජුසේ නමැත්තෙකු සමග හොරෙන් පැන ගොස් ඒ අනියම සම්බන්ධතාවයෙන් ගේබ්රියල් යන නමින් පුතෙක් උපන. ජුසේගේ මව වන මරියා අල්විස් විසින් මේ බාලවයස්කාරයින් දෙදෙනාට 1922 දී "පි2" ලකුණු කරන ලද ඔප්පුවෙන් ඉඩමක් තැගි කරන ලදී. එය ලැබුම්කාරයින් වෙනුවෙන් ජුසේ විසින් එමලියානු තමා හදා ගත් පුත්‍රයා වශයෙනුත්, ගේබ්‍රියල් තමාගේ පුතා වශයෙනුත් අදහස් කර පිළිගන්නා ලදී. ස්ටීවන් එවකට ජීවතුන් අතර සිටියේ ය.

තීන්දුව : (1) ගේබ්රියෙල් අනාචාරයෙන් ලත් දරුවෙක් නිසා ජුසේට කිසි කලෙක ඔහුගේ පියා වශයෙන් සාධාරණික භාරකරුවෙක් වීමට නීතියෙන් ඉඩ නැත. එම නිසා ගේබ්රියෙල් වෙනුවෙන් ජුසේ පිළිගත් තැග්ග බලංගු නැත. මරියා පෙරේරා පමණක් ගේබ්රියෙල්ගේ සාධාරණික භාරකාරයා වන්නේ ය.

(2) එමලියානුට දුන් තැග්ග සම්බන්ධව ද, එමලියානුගේ පියා ස්ටීවන් සහ මව ජීවත් ව සිටින නිසා ඔවුහු ඔහුගේ සාධාරණික භාරකාරයෝ වන්නෝ ය. ඒ දෙදෙනාගෙන් කෙනෙකුට පමණක් එම තැග්ග භාර ගන්ට හැකි වේ.

(3) කරුණු මෙසේ නිසා (පි2) දරණ ඔප්පුවෙන් තැගි දෙන ලද දේපල වල හිමිකම ඒ බාලවයස්කාර දෙදෙනාට නො ලැබේ.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා විසින් :—"බාලවයස්කාරයෙකුට දෙන ලද තැග්ගක් ඔහුගේ සාධාරණික භාරකාරයෙකු විසින් හෝ නීත්‍යානුකූලව පත්කල භාරකාරයෙකු විසින් පිළිගත යුතු යි, සිල්වා එ. සිල්වා, 11 න.නී.වා. 161. මේ නියෝගය පසුව ඇති උන, නාගලිංගම් එ. තනබාලසිංහම්, (1952) 54 න.නී.වා. (පී.සී.) සහ නාගරත්නම් එ. ජෝන්, (1958) 60 න.නී.වා., 113, ආදී නඩු තීන්දු ද අනුගමනය කර තිබේ.

ප්‍රැන්සිස්කො එ. දෙන් සෙබැස්ටියන් සහ තවත් අය 13

බෙදුම් පණත

බෙදුම් ආඥා පණතේ 67 වෙනි ඡේදය—ඉඩමකට බෙදුම් නඩුවක් පවත්නා කාලය තුල ලියන ලද ඔප්පුවක බලගුන්‍යතාවය—එසේ බලගුන්‍ය වූ ඔප්පුවක් නිදෙස් කරන්ට කිසිසේත් ඉඩ නැතිබව.

ඊ. සී. ඒ. ජයසූරිය එ. ඒ. ඇස්. ජේ. සෙනෙවිරත්න 7

සර්ටියෝරේරයි ආඥා

සර්ටියෝරේරයි ආඥාවක්—අල්ලස් පරීක්ෂක මණ්ඩලය විසින් පෙත්සම්කරු වැරදිකරුවකු බවට තීන්දු කිරීම සහ දඩයක් ගැසීම—එම මණ්ඩලය අධිකරණ සේවා මණ්ඩලය මගින් පත් නො කරන ලද නිසා දඬුවම් දීමට බලයක් නැති බව තර්ක කිරීම—ඊට ප්‍රථමයෙන් තීන්දු කළ නඩුවක් අනුගමනය කරමින් දඬුවම ඉවත් කිරීම, නමුත් වරදකරු කිරීමේ නියෝගය ඉතුරුවීම—එම තීන්දුව සහ මුල විභාගය නිෂ්ප්‍රභා කිරීමට ඉල්ලා මෙම පෙත්සම ඉදිරිපත් කිරීම—ඊට කරුණු වශයෙන් අල්ලස් මණ්ඩලයට විභාග කිරීමටත් තීන්දුවක් දීමටවත් බලය නැති බව කිම—ලංකා පාලන ක්‍රම සංස්ථාවේ වගී(1946) 55 වෙනි ඡේදය—මෙම ඉල්ලීම සනාථ කළ හැකි ද?

අධිකරණ සේවා මණ්ඩලය මගින් පත් නො කරන ලද තුන්දෙනෙකුගෙන් සමන්විත අල්ලස් පරීක්ෂක මණ්ඩලයක් විසින් පෙත්සම්කරු වැරදිකරුවෙකු ලෙස තීන්දු කර රුපියල් දහක දඩයක් ගසන ලදී. ඉහතින් තීන්දු කර තිබුණු සේනාධීර එ. අල්ලස් කොමසාරිස්, 63 න.නී.වා., 313 පිට, යන නඩුව අනුගමනය කරමින් දඬුවම් ඉවත් කළ නමුත් ඒ නඩුවේ නියෝග කර ඇති අන්දමට වැරදිකරු බවට පත් කළ තීන්දුව ඇපෑලේ දී වෙනස් නො කළේ ය. සේනාධීර නඩුවේත් මේ පෙත්සම්කරු ගත් ඇපෑලේ තීන්දුවේදීත් අල්ලස් බලමණ්ඩලය පාලන ක්‍රම විරෝධී (unconstitutional) වූවක් වශයෙන් තීන්දු කර නැත. මක්නිසා ද ආණ්ඩුවෙන් ඇපෑල් පෙත්සමට මූලික විරුද්ධ කරුණක් ඉදිරිපත් කළ බැවින් විත්තිකරුවන් වෙනුවෙන් පෙනී සිටි නීතිඥයින් අල්ලස් බල මණ්ඩලයට දඬුවම් දීමට බලයක් නැති බව පමණක් කියා සිටි නිසා ය.

ඉහත කී ලෙස දඬුවම් පමණක් නිෂ්ප්‍රභා කළ ටික දිනකට පසු අල්ලස් බල මණ්ඩලය පෙත්සම්කරුට විරුද්ධව පැවරූ නඩුව විභාග කිරීමට වත්, එහි චෝදනා සම්බන්ධ නිසි නියෝගයක් කිරීමටවත්, දඬුවම් නියම කිරීමටවත් බලයක් නැත කියා එම නඩුවේ සියලු විභාගවල ප්‍රතිපලත් නියෝගත් නිෂ්ප්‍රභා කරනමෙන් ඉල්ලා මේ සර්ටියෝරේරයි පෙත්සම ඉදිරිපත් කරන ලදී.

පෙත්සම්කරු වෙනුවෙන් ඉහත කී තීන්දු වලට පසුව ඇති වූ පියදස එ. අල්ලස් කොමසාරිස්, 64 න.නි.වා., 385 පිට, යන නඩුවේ තීන්දුව උපයෝගි කර ගන්නා ලදී. එහි දී සුප්‍රීම් උසාවිය තීන්දු කර ඇත්තේ පාලන ක්‍රම සංස්ථාවේ 55 වෙනි ඡේදයේ සඳහන් පරිදි අධිකරණ සේවා මණ්ඩලය මගින් අල්ලස් පරීක්ෂණ මණ්ඩලය පත්කර නැති බැවින් එම අල්ලස් මණ්ඩලය විසින් පවත්වනු ලබන සියලු විභාග සහ නියෝග බල ශූන්‍ය ඒවා බව යි. වගඋත්තරකරු වූ ආණ්ඩුව වෙනුවෙන් ඉදිරිපත් කළ කරුණු මෙසේ යි :—

(ඒ) පෙත්සම්කරුගේ ඇපෑල තීන්දු වෙන අවධියේ තිබුන නීතිය පියදස එ. අල්ලස් කොමසාරිස් (ඉහතින් බලන්න) නඩුවෙන් වෙනස් විය ;

(බී) පෙත්සම්කරු මින් අදහස් කරන්නේ සුප්‍රීම් උසාවිය දී තිබෙන තීන්දුව නිෂ්ප්‍රභා කිරීමට ය යන්නයි.

තීන්දුව : (1) ඉහත කී පියදසගේ නඩුවෙන් ඊට ප්‍රථමයෙන් තිබුන නීතියක් වෙනස් කළා යයි කීම ද පෙත්සම්කරු සුප්‍රීම් උසාවිය විසින් ඔහුගේ ඇපෑල සම්බන්ධව දී තිබෙන තීන්දුව නිෂ්ප්‍රභා කිරීමට මේ පෙත්සම ඉදිරිපත් කර ඇතැයි කීම ද හරි නැත.

(2) ඉහත කී සේනාධිර නඩුවේදීත්, පෙත්සම්කරුගේ ඇපෑලේදීත් අල්ලස් බල මණ්ඩලයට අයත් සාමාජිකවරු පාලන ක්‍රම සංස්ථාවේ 55 වෙනි ඡේදය අනුව අධිකරණ සේවා මණ්ඩලය මගින් පත් නො කිරීම නිසා ඔවුන්ට අධිකරණ බල හිමි නැත යන්න තීන්දු නො කළ නමුත් යට කී 55 වෙනි ඡේදය ඒ නඩු වලට මත්තෙන් සිට බලපාන නීතියක් ව තිබුන හෙයින් එය ඒ වකවානුවේ දී බල නො පැවැත් වූ බවක් නො පෙනෙයි.

දෙන් ඇන්තනි එ. ඇස්. ඇස්. ජේ. ගුණසේකර සහ තවත් අය 17

සාක්ෂි පණත

සාක්ෂි පණත, 54 වෙනි ඡේදය—පුරිසභා නඩුවිභාගය—විත්තිකරුගෙන් කෝන්තර අසද්දී ඔහුගේ නරක චරිතය හෙළිවීම—ඒ සාක්ෂිය කොපමණ දුරට විත්තිකරුට විරුඬව ලැබුන තීන්දුව බලපැවැත්මක් සිදුවී ද—එය විනිශ්චයකර ගැනීමේ අපහසුකම—ඒ ඒ නඩුවේ කරුණු උඩ ම රඳා තිබීම.

මිනීමැරුම් චෝදනාවක නඩු විභාගයේදී විත්තිකරු සාක්ෂි දෙමින් මියගිය අය ලැබූ බරපතල තුවාල තමා අනිත් සිදුවූ බව පිළිගනිමින් කියා සිටියේ මිය ගිය අය තමාට වඩා ශක්තිසම්පන්න ශරීරයකින් යුත් කෙනෙකු බවත් ඔහු අත්වලින් තමාට පහර දීමෙදී සිදු උන බවත් ය. පැමිණිල්ල ද මිය ගිය අය විත්තිකරුට වඩා උසමහත ශරීරයක් ඇති බව පිළිගත්තේ ය.

ආණ්ඩුවේ නීතිඥතුමා විත්තිකරුගෙන් ඇසූ ප්‍රශ්න සහ ඊට ලැබුනු පිළිතුරු මෙසේ විය :—

ප්‍ර. මියගිය අය විශාල ශරීරයක් ඇති ශක්තිමත් පුරුෂයෙක් බව ඔබ පිළිගෙන තිබෙනවා නොවේ ද?

උ. ඔව්.

ප්‍ර. ඔහුගේ පහරදීමෙන් ඔබ තුවාල ලැබුවා නොවේ ද?

උ. ඔව්, මගේ හිසේ තුවාලයක් විය.

ප්‍ර. ඔබ පොලිසියට පැමිණිල්ලක් කරන්ට ඇති.

උ. ඔව්.

ප්‍ර. මියගිය අයට විරුඬව නඩුවක් ඇතිලනා ද?

උ. නැහැ.

ප්‍ර. එසේ නම්, මියගිය අයට දඬුවම් නො කළ නිසා ඔහු සමග ඔබ මහත් අමනාපයකින් සිටින්ට ඇති?

උ. ඒ ගැන මට විරුඬව පැමිණිල්ලක් ඉදිරිපත් වුනා.

තීන්දුව : (1) විත්තිකරුගේ අන්තිම උත්තරයෙන් වැටහෙන කරුණු දෙකක් ඇත. එනම් විත්තිකරු පොලිසියට අසත්‍ය පැමිණිල්ලක් කර ඇති බවත්, ඔහු මියගිය අයට පහරදුන් නිසා ඔහුට විරුඬව චෝදනාවක් ඉදිරිපත් කළා යයි සිතන්ට ඉඩ තිබෙන බවත් ය. එම නිසා මෙය විත්තිකරුගේ නරක චරිතය ප්‍රකාශ කෙරෙන සාක්ෂියක් ධිය හැකියි.

(2) මේ කරුණු උඩ ජූරි සභාවට විසඳීමට තිබුන ප්‍රශ්නය චිත්තිකරු කුපිත කරවීමක් (provocation) නොමැතිව මියගිය අයට පහර දෙන්ට පටන්ගත්තා ද, එසේ නැතුව මියගිය අය චිත්තිකරුට පහර දෙන විට ඔහු පහර දුන්නා දැයි යන්න බැවින් චිත්තිකරුගේ වාසියට ජූරිය විසින් කරුණු කල්පනා කිරීමේ දී මේ සාක්ෂිය කොපමණ දුරට බලපෑවත්වන්නේ ද යන්න කිව නො හැකි ය.

ජූරි සභාව විසුරුවා හැර නඩුව නැවත විභාගයට අණ දෙන ලදී.

රෂින එ. වෙලානන්තිරිගේ සුමනදස බොන්ජු... 9

සාක්ෂි

"නඩත්තු"—යට බලන්න.

"සාක්ෂි පණත"—යට බලන්න.

සිවිල් නඩු විධාන සංග්‍රහය

සිවිල් නඩු විධාන සංග්‍රහය, 217 (ජී) ඡේදය—අයිතියක් ප්‍රකාශ කරන ලෙස පමණක් කරන ලද ඉල්ලීම—පැමිණිලිකරුගේ අයිතිය පමණක් ප්‍රකාශ කරන නියෝගයක් යටතේ ඔහුට භුක්තිය භාරදීමේ ආඥුවකටත් හිමිකම් තිබේ ද?

ලිඳකින් වතුර ලබා ගැනීමේ අයිතිය ප්‍රකාශ කරන මෙන් ද, එම අයිතිය වැලැක්වීම නිසා සිදුවූ අලාභ ලබා දෙන මෙන් ද, පැමිණිලිකරුවන් විසින් නඩු පවරන ලද නමුත්, ඔවුහු වෙන යම් සහනයක් ඉල්ලා නො සිටියහ. නඩු තීන්දුව ලබා ගැනීමෙන් පසු ඔවුහු භුක්තිය භාරදීමේ ආඥුවක් ද ලබා ගැනීමට තැත් කළහ.

තීන්දුව : මේ නියෝගය සිවිල් නඩු විධාන සංග්‍රහයේ 217 (ජී) වැනි ඡේදයට යටත් වන හෙයින් පැමිණිලිකරුවන්ට භුක්තිය භාරදීමේ ආඥුවකට හිමිකමක් නොමැත.

පෙරේරා එ. පෙරේරා සහ තවත් අය 8

සිවිල් නඩු විධාන සංග්‍රහයේ 121 සහ 175 වන ඡේද—උසාවියට ඉදිරිපත් කළ යුතු සාක්ෂිකරුවන්ගේ ලේඛනයෙහි නම ඇතුලත් නො වූ කෙනෙක් සාක්ෂි දීම—ඔහුගේ නම සාක්ෂි නාම ලේඛනයෙහි ඇතුලත් ව තිබේ යයි වැරදි විශ්වාසයකින් යමෙකුට සාක්ෂි කීමට ඉඩදීම—මෙ වැනි සාක්ෂියක නීත්‍යානුකූලත්වය.

සිවිල් නඩු විධාන සංග්‍රහයේ 121 වන ඡේදයේ සඳහන් පරිදි උසාවියට ඉදිරිපත් කළ සාක්ෂිකරුවන්ගේ ලේඛනයෙහි නම ඇතුලත් නො වූ සාක්ෂිකරුවකු විසින් මේ නඩුවේ සාක්ෂියක් දෙන ලදී. මෙසේ කිරීමට උසාවියෙන් ඉඩ දෙන ලද්දේ මේ සාක්ෂිකරුවා උසාවියට ඉදිරිපත්කළ ලේඛනයෙහි නම වැටී ඇති වෙනත් කෙනෙක් යයි පැමිණිලිකරුගේ අධිනීතිඥවරයා උසාවියට වැරදි ලෙස චෝදනා ගැන්වූ නිසා ය. සිවිල් නඩු විධාන සංග්‍රහයේ 175 වන ඡේදයෙන් සාක්ෂිකරුවන්ගේ ලේඛනයක නම නොමැති කෙනෙකුගේ සාක්ෂිය, යම් විශේෂ අවස්ථාවන් වල දී හැර පිළිගත නො හැක.

තීන්දුව : සිවිල් නඩු විධාන සංග්‍රහයේ 175 වෙනි ඡේදයට පටහැනි වූ නිසා, මේ සාක්ෂිය නීතිවිරෝධී ලෙස ඇතුලත් වී තිබේ. එ බැවින් එම සාක්ෂිය පදනම් කොට දුන් මේ නඩු තීන්දුව ඉවත් කර පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කළ යුතුවේ.

ටිකිරිබණ්ඩා එ. ලොකුමැණිකා සහ තවත් අය ... 15

පැමිණිල්ල සංශෝධනයක්—නායක සභාමීන් වහන්සේට විරුඬව මුදල් ඉල්ලා ඉදිරිපත් කල නඩුවක්—පසුව උන්වහන්සේ විහාරාධිපතීන් වහන්සේ වශයෙනුත් විස්තර කර සඳහන් කිරීම සඳහා පැමිණිල්ල සංශෝධනයට ඉල්ලීම—දිස්ත්‍රික් නඩුකාරතුමා ඉඩදීම—එම තීන්දුවට විරුඬ ව ඇපැල.

තීන්දුව : විහාරාධිපතීන් වහන්සේ නමකට විරුඬඩ දෙන ලද නඩු තීන්දුවකට අයත් යම් කිසි මුදලක් ලබා ගැනීම සඳහා විහාරායත්ත දේපොල අල්වා විකිණිය නො හැක. එම නිසා පුද්ගලික ව හිමි නමකට ඉදිරිපත් කල මුදල් නඩුවක දී විහාරාධිපතීන් වහන්සේ යන්න චිත්තිකරුගේ නමට එකතු කර පැමිණිල්ල සංශෝධන කිරීමෙන් ඵලක් නැත.

ශ්‍රී විපස්සි අනුනායක ස්ථවිර එ. ටිකිරි දුරය ... 20

සුදු පණත

සුදු පණත, 5 වෙනි ඡේදය—එම ඡේදය යටතේ ඉල්ලුම් කල සෝදිසි වරෙන්තුවක්—එය නිකුත් කරන්ට අණ දීමට පෙර සෝදිසි කල යුතු ස්ථානය

පොදු සුදු පළක් යයි මහේස්ත්‍රාත්තුමා නිගමනය නොකිරීම—එසේ නිකුත් කළ සෝදිසි වරෙන්තුවක් නීතිවිරෝධී ද?

නීතුව : සුදු පණතේ 5 වෙනි ඡේදය යටතේ ඉල්ලුම් කල සෝදිසි වරෙන්තුවක් නිකුත් කිරීමට නියෝගය දෙන්ට පෙර සෝදිසි කිරීමට බලය ඉල්ලූ ස්ථානය පොදු සුදු පොළක් යයි මහේස්ත්‍රාත්තුමා විසින් නිගමනය කිරීම අත්‍යවශ්‍ය යයි. එසේ නො කිරීමෙන් සෝදිසි වරෙන්තුව නීති විරෝධී ඉල්ලූ ස්ථානය පොදු සුදු පොළක් යයි මහේස්ත්‍රාත්තුමා විසින් නිගමනය කිරීම අත්‍යවශ්‍ය යයි. එසේ නො කිරීමෙන් සෝදිසි වරෙන්තුව නීතිවිරෝධී වන නිසා එම බලය පිට අල්ලා චෝදනා ඉදිරිපත් කර වරදකරුවන් වූ අය දඩයෙන් ද මුදවා නිදහස් කළ යුතු යි.

බිලින් සහ තවත් අය එ. ස්ටීවන්, උප පොලිස් පරීක්ෂක, කොළඹ-කොටුව 21

ලංකා දණ්ඩනීතිය

ලංකා දණ්ඩ නීතිය, 32 සහ 352 ඡේද—දෙදෙනෙකුට විරුඩව වරද කිරීමට පොදු අදහසක් ඇතුව ලමයෙක් හොරකම් කර ගෙන ගියායයි චෝදනාවක්—එක අයෙක් වරද කරන අවස්ථාවේ එම ස්ථානයේ නො සිටීම—එසේ නො සිටි අයත් වරදකරුවෙක් කිරීම නීත්‍යානුකූල ද?

නීතුව : දෙදෙනෙකුට විරුඩව පොදු අදහසක් ඇතුව දණ්ඩ නීතියේ තිස්දෙවනි ඡේදය අනුව වරදක් කලේ යයි චෝදනාවක් කල විට ඉන් එක අයෙක් ඒ වරද කරන අවස්ථාවේ එම ස්ථානයේ ඉදිරිපත් ව නො සිටියොත්, එසේ නො සිටි අය වරදකරුවෙක් යයි තීරණය කිරීමට නුපුළුවන.

ප්‍රනාඳු සහ තවත් අයෙක් එ. ද සිල්වා, උපපොලිස් පරීක්ෂක, මරදන 22

ලංකා පාලන ක්‍රම සංස්ථාව

"සර්ටියෝරේරයි ආඥා"—යට බලන්න.

දඩුවම

අපරාධ නීතිය—දඩුවම් නියම කිරීමේ දී සැලකිය යුතු ප්‍රතිපත්ති—මහජනයාගේ ගුහසිඩිය ආරක්ෂා කිරීමට අධිකරණයට ඇති යුතුකම.

නීතුව: කප්පම් ඉල්ලීමේ ව්‍යවහාරය බොහෝ සෙයින් පැතිරී ගොස් තිබෙන බැවින් එය වැලැක්වීම පිණිස නිවර්තක (deterrent) දඩුවම් නියම කිරීමෙන් මහජනයා ආරක්ෂා කිරීම උසාවි වල යුතුකම් වේ.

(අ) ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා :—"ඇතැමුන් අතර ප්‍රිය වී ඇති න්‍යායයකි දඩුවම අපරාධකරුට අනුකූල විය යුතු බව. මෙය යථාර්ථයට අන්ධවීමකි. ඔවුන්ගේ තර්කය මෙ වැන්නකි: 'කිසියම් අපරාධකරුවෙක් පූර්ණ ප්‍රකෘති තත්ත්වයෙහි (absolutely normal) නො පවති. ඇතැම් අපරාධකරුවෝ උම්මත්තකයෝ ය. ඒ නිසා සෑම අපරාධකරුවෙක් ම එක්තරා ප්‍රමාණයකට උමතු ය'. මේ වනාහි අනුගමණය කිරීමට භයානක වූ න්‍යායයකි. 1965, කේම්බ්‍රජ් නීති සංග්‍රහයෙහි අප්‍රෙල් කලාපයෙහි, ටී. බී. හැඩන්, 'දඩුවම් සඳහා ආයාවනාවක්' යන මැයින් ලියූ ලිපියකින් දක්වා ඇති පරිදි අන්තවාදී පොදු න්‍යායවාදීන් යන නමින් හැඳින්වෙන දර්ශනිකයන් අතර ප්‍රචලිත දර්ශනයට ඉහත කී න්‍යායය සම කළ හැක. ලිහිල් දඩුවම් පනවන මහේස්ත්‍රාත්වරුන්ගේ හා විනිශ්චයකාරවරුන්ගේ ගුණ කියනුයේ අපරාධකරුවන් හා ඔවුන් වෙනුවෙන් පෙනී සිටින අයම පමණකි. උසාවි පවතින්නේ පොදු මහජනතාවගේ ගුහසිඩිය ආරක්ෂා කිරීම සඳහා ය. එසේ හෙයින් එ වැනි දඩුවම් පොදු මහජනයා විසින් මුළුමනින් ම හෙලා දකිනු ඇත ".

(ආ) "චිත්තිකරු වෙනුවෙන්, ඔහු අඹුදරුවන් ඇති විවාහකයකු බව සැලකර සිටින ලදී. දඩුවම් පැනවීමේ දී උසාවියෙහි සැලකිල්ලට භාජනය විය යුතු එකම කාරණය මෙය පමණක් නොවේ. මහජන ගුහසිඩිය මෙය අනිහවා යා යුතු වන්නේ ය."

අයි. ඒ. ඩී. ප්‍රැන්සිස්, පොලිස් පරීක්ෂක මෝදර එ. ඇන්තනි පෙරේරා නොහොත් ටිටාස් 23

නඩත්තු

දරුවන්ගේ නඩත්තු — අවජාතක දරුවකුගේ නඩත්තුව සඳහා දෙන ලද නියෝගයක්—ඉල්ලුම්කරුගේ සාක්ෂිය වෙනත් සාක්ෂිකරුවකුගේ සාක්ෂියක් සමග සැසඳිය හැකි ස්ථාන, මහේස්ත්‍රාත්තුමා සටහන් නො කිරීම—චිත්තිකරුගේ හැසිරීමත්, ඔහුගේ අසත්‍ය සාක්ෂියත් එසේ සැසඳීමට භාජන කළ හැක,

මෙය නීත්‍යානුකූල නොවන දරුවන්ගේ නඩත්-තුව සඳහා කරණ ලද නියෝගයකින් නැඟ එන ඇපැලකි. දහසය ඇවිරිදි පාසැල් ශිෂ්‍යාවක් වන මව සාක්ෂි දෙමින් විත්තිකරු තම දරුවාගේ පියා බව කියා සිටියා ය. විත්තිකරු මවගේ ගමෙනි බඩු ගබඩාවක බඩු විකිනීමේ යෙදී සිටින උප-සේවකයෙකි. වසී 1962 මැයි මස අටවෙනි දින මව ගම්මුලාදැනිතැනට පැමිණිල්ලක් කළා ය. ඉන් පසු ගම්මුලාදැනිතැන විත්තිකරු හමුවීමට උත්සාහ කළ විට ඔහු එ විටත් ගමින් පිට වී ගොස් තිබේ යයි දැනගන්ට ලැබින. 1962 මැයි මස 30 වැනි දින බඩු ගබඩාවෙන් ඉවත් ව ගිය බව විත්තිකරු කියා පෑ නමුත් මහේස්ත්‍රාත්තුමා එම සාක්ෂිය පිළිනොගෙන ගම්මුලාදැනිතැනගේ සාක්-ෂිය පිළිගත්තේ ය.

නඩත්තු කිරීමේ අනය සධහන් කරණ විට, මවගේ සාක්ෂිය අන් කවර සාක්ෂියකින් තහවුරු වී නිබේදැ යි මහේස්ත්‍රාත්තුමා සටහන් කර නැත.

නිගමනය : නීත්‍යානුකූල වූ අවශ්‍ය වූ මවගේ සාක්ෂිය තහවුරුවීම සඳහා විත්තිකරුගේ හැසි-රීමක්, එනම් මව ගම්මුලාදැනිතැනට පැමිණිලි කළ අවස්ථාවේ හදිසියෙන් ගමින් අස් වී යෑමක්, එසේ යෑමට හේතු වශයෙන් කී අසත්‍යත්, කොට ප්‍රමාණය යි මහේස්ත්‍රාත්වරයාට පිළිගත හැකිව තිබුණි.

ඩබලිව්. ජයසිංහ එ. ඉලිකුටිගේ මාලනි ... 24

විවාහ ලියා පදිංචි කිරීමේ පනත

එම පනතේ 21 වෙනි ඡේදය,

"බාල වයස්කාරයින්"—යට බලන්න.

"හේබියස් කෝපස්" ආඥා

"හේබියස් කෝපස්" ආඥාවක්—ශ්‍රේෂ්ඨාධිකර-ණයට ඉදිරිපත් කිරීමට නියෝග කළ පුද්ගලයා ලංකාවෙන් පිට වී යාම—එසේ පිට වී ගොස් පිට රටක ඉන්නා බවත් එම නිසා එම ආඥාව අනුව ඒ පුද්ගලයා ඉදිරිපත් කිරීමට නොහැකි බවත් ඔප්පු කිරීම—වගඋත්තරකරුවන් නියෝගයෙන් නිද-හස් කළ යුතු ද?

නිගමනය : " හේබියස් කෝපස් " ආඥාවක් ලැබ එහි සඳහන් පුද්ගලයා ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කිරීමට නියම දිනයේ දී වගඋත්තරකරුවන්ට එම පුද්ගලයා ඉදිරිපත් කිරීමට නුපුළුවන් කරුණු ඇත් නම් එය ඔප්පු කිරීමෙන් ඔවුන් එම නියෝගයෙන් නිදහස් වේ.

ඒ. සී. ඒ. එඩිවර්ඩ එ. නතර්මල් සහ තවත් අය... 26

ලංකා නීතිය සති පතා

මෙම නීති වාතාවේ සිංහල අංශය ආරම්භයේදී (1960) කළ ප්‍රකාශය අනුව මෙහි පහත පලවී ඇත්තේ හේම එච්. බස්නායක අග්‍ර විනිශ්චයකාරතුමා ශ්‍රේෂ්ඨාධිකරණයේ අග්‍ර විනිශ්චයකාර ධුරයෙන් විශ්‍රාම ගැනීම නිමිති කොට ගෙන 1964 ක් වූ අගෝස්තු මස 31 වෙනි දින ශ්‍රී ලංකාද්වීපයේ ශ්‍රේෂ්ඨාධිකරණයේදී පැවැත්වූ එතුමාට සුභ පැතීමේ උත්සව වාර්තාවයි.

ඇටෝර්නි ජනරාල්තුමාගේ කථාව

ගරු අග්‍රවිනිශ්චයකාරතුමාණනි,

අද දවස එක්තරා කාල පරිච්ඡේදයක අවසානය සනිටුහන් කරන දිනයකි. ගරු අග්‍රවිනිශ්චයකාරතුමන්ව සිටි ඔබතුමා පසුගිය අවුරුදු විස්ස තුළ නීති අංශයේ එක් අතකින් වේවා එසේ නැතහොත් වෙන අතකින් වේවා ප්‍රධානත්ත්වය ඉසිලූ නිසා ලබන වාරය ආරම්භ-වෙත්ම ඔබතුමාට සුපුරුදු මෙම විනිශ්චය ආසනයෙහි දක්නට නොලැබෙය යන්න අපට අවබෝධ කර ගැනීමට පවා අසිරු කරුණකි.

වසී 1955 දී අග්‍ර විනිශ්චයකාරතුමන් වශයෙන් පත් කරන ලද කාලයේ නවදෙනෙකුගෙන් යුත් විනිශ්චයකාර මණ්ඩලයෙහි අද ඇත්තේ ඔබ සමග එකට කටයුතු කළ සහකාර විනිශ්චයකාරවරුන්ගෙන් එක්කෙනෙක් පම ණකි. ඔබතුමාගේ සේවා කාලය තුළ විවිධ වෙනස්වීම් සහ යම් යම් කැළඹීම් ඇති වුව ද මෙම අංශයේ නොකඩවා ම ඔබ සේවය කිරීම නිසා සෑම දෙයක් ම යෝග්‍ය ලෙස පවතී ය යන විශ්වාසය අප කෙරෙහි තිබුණි. ඔබතුමා නීතිඥ මණ්ඩලයට ඇතුලත් කර ගත් කාලයේ අපෙන් ටික දෙනෙක් මෙහි කටයුතු කරමින් සිටි බව පවසනු කැමැත්තෙමි. එක් උසස් පදවියකින් තවත් එ බදු ම පදවියකට පා තබමින් ඔබේ අඛණ්ඩ අභිවෘඩිය සඳහා ඔබ ඉදිරියට යැම අපි බොහෝ දෙනෙක් ඉතා ම අගේ කොට සලකමින් නැරඹීමු. ඔබ ඉදිරියෙහි නීතිය විසඳීමට පෙනී සිටි අපි, එය ගෞරවයක් ලෙස සලකන අතර ඉතා ම ලයාත්විත කරුණාවක් සහ සාමකාමී බවක් ඔබතුමා අතින් ලද බව ද මෙහිලා සැලකර සිටිමු. එ බැවින් ඔබතුමා අපෙන් වෙන් වී යන මේ අවස්ථාවෙහි අපේ ශෝකය ගැන ප්‍රකාශයක් නොකර සිටීම අපට කළ නොහැක්කකි.

රජයේ සේවය වෙනුවෙන් මුළු කාලය ම වැය කළ විශිෂ්ඨ නීතිඥ අපදනයක් දෙස අනුස්මරණ පූර්වකව අපි අද මොහොතකට වුව ද ආපසු හැරී බලමු.

එම ශ්‍රේෂ්ඨ චරිතාපදනය, අපේ වෘත්තියට ඇතුලත් වී මුලින් ම තමන් වෙත නොඑළඹෙන යම් යම් පහසුකම් නොලබන, නවකයින්ට ධෛර්‍ය්‍ය ගෙන දීමට හා හැඟීම් ඇති කිරීමට සෑම අතින් ම පොහොසත් වූ වකි.

ඔබතුමා පළමුවෙන් කායර්‍ය්‍යාලීය කටයුතු ආරම්භ කළ ඇටෝර්නි-ජනරාල් කායර්‍ය්‍යාංශයේ ඔබ වෙහෙස මහන්සි වී වැඩ කිරීම සම්බන්ධයෙන් විශිෂ්ඨ කීර්තියක් අත් කර ගත්තෙහි ය. එහි දී ඔබතුමා ස්ථාපිත කළ තත්ත්වය අදත් අප අතර එසේ ම පවතින්නේ ය.

අවසානයේ දී ශ්‍රේෂ්ඨාධිකරණයේ විනිශ්චය ආසනය කරා එළඹීමේ භාග්‍ය ලැබූ රජයේ අධිනීතිඥවරු හැටියට තෝරා පත් කරන ලද කීපදෙනෙකු ගෙන් ඔබ ඉතා ම වයසින් බාලයා වී ය. එයින් ඇටෝර්නි-ජනරාල් තනතුරට සහ අග්‍රවිනිශ්චයකාර තනතුරට පත්වීමේ පරම භාග්‍ය ලද්දේ ඔබතුමා පමණකි. එම දෙපාර්ත-මේන්තුවේ ඔබගේ කටයුතු හා චරිතය අගේ කරන්නන් මේනාක් සිටින බව කියන මම මතුවට ද ඔබතුමා අප විසින් ආදරයෙන් මතක් කරනු ලබන බව අමුතුවෙන් කිය යුතු යැයි නොසිතමි. ක්‍රමයෙන් පුළුල් වේගෙන ගිය කායර්‍ය්‍යාංශයක අධිපති තැන වශයෙන් පත් වූ ඔබ ඉතා ම දක්ෂ පරිපාලකයෙක් හැටියට කටයුතු වලින් ස්ථුට කරමින් ඔබේ උප-නිලධාරින් ගේ විශ්වාසය හා ගෞරවය ඔබ දිනාගත්තෙහි ය.

තදනන්තරව අග්‍ර විනිශ්චයකාරතුමා වශයෙන් ඔබ පත් වූ අවධිය උදා විය. මෙම පදවියෙහි ඔබට කලින් සිටි හැම කෙනෙකුට ම වඩා දීර්ඝ කාලයක් සේවය කිරීමේ අවස්ථාව ඔබට ලැබිණි. නීතිය පසිඳීමෙහි ඔබෙන් ලැබුණු ක්‍රියාශීලී ප්‍රදානය පිළිබඳ ව අපේ නවනීති වාර්තා ග්‍රන්ථ රාශිය සාක්ෂි දරති. අවස්ථාව ළඟුණු කල්හි සහෝදර විනිශ්චයකාරවරුන් සමග පවා එකඟ නොවී සිටීමට මදකුදු සැක නොකළ ඔබ ඒ අංශයෙන් බලන විට අප අතර සිටි ඉතා ම ස්වාධීන විනිශ්චයකාර තුමා හැටියට පිළිගත යුතු ය.

ඔබ ආධිපත්‍ය ඉසිලූ අපරාධ ඇපැල් උසාවියේ මැත වසී කීපයක් තුල ඇති වූ ඉතා ම භාරදුර නඩු තීන්දු වල වගකිව යුත්තා ඔබම ය.

පුරා අවුරුදු 37 ක් තුල ඔබ ලබා ගත් ශ්‍රේෂ්ඨ අත්-සිඩිය පදනම් ව තිබුණේ ඔබතුමා තුළ සේවයට නිබූ විශේෂ දයාව, කායර්‍යසාධනයෙහි ඔබ තුළ තිබූ අසීමිත

ශක්තිය, ඔබගේ ක්‍රමානුකූල විධිමත් ජීවිතය සහ නියතාර්ථයට අනුව කළ යුතු දේ කිරීමට ඔබතුල තිබුණු සැලකිල්ල මත ය.

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ඔබතුමා ගේ අනුශාසනය, කායීකරණයෙහි ඔබ තුල තිබූ හැකියාව, සහ ඉතාම අගේ කොට සලකන ලද දක්ෂකම තවත් නොයෙක් අංශ වලට මින් පසු බරපතල අඩුපාඩුවක් ලෙස පෙනී යේ. මින් සමහරක් නම් විනිශ්චයසේවා කොමිසමේ රැස්වීම්, නීති අධ්‍යාපන සභාවේ සාකච්ඡා සහ නීති පුස්තකාලයේ කාරක සභික රැස්වීම් ය. සමහර විට යලින් අවශ්‍යතාවය පෙනී නීති ග්‍රන්ථ මාලාව මතු වාරයක සම්පාදනය කරන විට ඔබ නැතිකමේ පාඩුව විශේෂයෙන් විද්‍යමාන වේ යැයි කිව හැක.

ජීවිතයේ සාර්ථකත්වය පුද්ගලික ප්‍රීතිය අනුව මැනිය යුතු නම් ගරු විනිශ්චයකාර ඔබතුමාණන් ලැබූ ජීවිතය තරම් සාර්ථක ජීවිතයක් කිසිම මිනිසෙකු නො ලබන ලද බව සඳහන් කරමි. සාභිමානයෙනුත්, සන්තුෂ්ටියෙනුත් ඔබේ අතීත අපදනය දෙස බැලීමට ඔබට සෑම හේතුවක් ම තිබේ.

ඔබගේ ජීවිතය අවදනම් වූත් දිර්ඝ වූත් එමෙන් ම නිර්භීතව මුහුණ දෙන ලද්දවූත් ගමනක්වූ අතර විශ්වාසය උඩ අර්ථසිද්ධිය ඉෂ්ට කර ගත්තාවූ කරුණු වලින් පරිපෝෂිත ජීවිතයකි. ඔබගේ ජීවිතයේ මුල් වකවානුවේ දී පවා කරන ලද ආත්ම පරිත්‍යාගයෙහි වටිනාකම කොතරම්ද යන්න දන්නේ ඔබ පමණකි.

අවසාන වශයෙන්, මට අවසර ලැබේ නම්, මගේ පුද්ගලික සතුතිය ද මෙම කථාවට අමුණමි. එම ස්තුතිය ලැබෙන්නේ වෘත්තියෙන් ඔබට වඩා කණිෂ්ඨ වූ කෙනෙකුගෙන් වන අතරම ඔබ සමග ම අවුරුදු බොහෝ ගණනක් තුල ඉතා ම කිට්ටුවෙන් සම්බන්ධ ව කටයුතු කළ කෙනෙකුගෙනි. යම් කිසි දෙවයකින් ඒ තැනැත්තාට ම නීතිඥ මණ්ඩලය වෙනුවෙන් ඔබතුමාට සුභ පැතීමේ ගෞරවය හිමි වී තිබේ.

ඔබේ කාරුණික කටයුතු ගැන ද ධෛර්යවීමත් ප්‍රකාශ සහ කාලෝචිත අවවාද ගැන ද අප්‍රමාද ව ප්‍රදනය කළ ආධාරෝපකාර ගැන ද අපේ කෘතඥතාවය ප්‍රකාශ කිරීමට මම කැමැත්තෙමි.

අවසාන වශයෙන් ඔබේ නිලයෙන් ඔබ බැහැරව යන අවස්ථාවේ නියම යුතුකම් ඉටුකර ඇති ඔබට කණගාටු වීමට හෝ කනස්සලු වීමට ප්‍රස්තාවක් ඇති නොවේවා!

ඔබ අගය කර සලකන්නන් රාශියක් හා පැරණි මිත්‍රයන් සමූහයක් සහභාගි වී ඔබට සුභ පතන මෙම දිනය පිළිබඳ අනුස්මරණීය හැඟීම් මතුවට උදා වන දිනයන්හි ඔබේ සිත තුල ඉපිල පවතීවා යයි ප්‍රාර්ථනය කරමින් ගරු අග්‍ර විනිශ්චයකාර ඔබතුමාණන්ට මම හදපත්ලෙන් සුභ පතමි.

අග්‍ර විනිශ්චයකාරතුමාගේ පිළිතුරු කථාව

ඇටෝර්නි ජනරාල් (නීතිපති) මහතාණෙනි,

ඔබගේ කරුණාබර ලයාන්විත වචන වලට මගේ සිත තදින් ම ඇදී ගියේ ය. රජයේ නීතිය පිළිබඳ නිලධාරියෙකු ව මා සිටි කාලයේ මගේ ඉතාම විශ්වාස කටයුතු සහායක නිලධාරියෙකු ව සිටි කෙනෙකු ගෙන් මෙය ප්‍රකාශ වීම නිසා මම එය වඩාත් අගේකොට සලකමි. තමාගේ සගයෙකුගේ හොඳ හිත අභිමානයට හේතු වන කරුණක් වේ. එ මෙන් ම නීතිඥ මණ්ඩලය වෙනුවෙන් ප්‍රකාශිත කරුණාබර හැඟීම් ඇතුලත් වැකි ඇසීම සැනසිලිදායක ය.

මා අයිනිතිඥ තනතුරට ඇතුලත් කර ගන්නා ලද්දේ මීට අවුරුදු 37 කට පෙර ය. මෙයින් අවුරුදු 23 ක කාලයක් නීති අංශයේ කායීකාලීය නිලධාරියෙකු වශයෙන් මා විසින් ගත කරන ලදී. මේ වකවානුව තුල යටත් විජිත ආණ්ඩුක්‍රමයකින් මේ රට ඩොනමෝර් ආණ්ඩුක්‍රමයටත් එ තැනින් සෝල්බරි ආණ්ඩුක්‍රමයටත් පරිවර්තනය වීම මම අභ්‍යන්තරික නිලධාරියෙකු වශයෙන් ඉතාම ආසන්න ස්ථානයක සිට බලාගතිමි.

එ බඳු සංක්‍රමණ අවස්ථාවක පැවති එක් ස්ථාවර අංගයක් නම් ඒ කාලයේ විධායක මණ්ඩලයේ ඉතාම උච්චස්ථානයේ සිට පහත් ස්ථානය දක්වා නීතිය කෙරෙහි දැක් වූ හුදු ගෞරවය යි. රටේ අධිකරණ ශුද්ධ වස්තූන් මෙන් සලකන ලද මේ යුගයේ නීතියේ මහිමය (Rule of Law) අඛණ්ඩව පැවතිණි. ඇටෝර්නි ජනරාල් (නීතිපති) වරයාට රජයට අනුශාසනා කිරීම සහ සාමාන්‍ය ජනතාවගේ නිදහස ආරක්ෂා කිරීම යන කර්තව්‍ය දෙකක් ඉටුකිරීමට තිබිණි. දැනුදු ඔහුට අයත් කර්තව්‍ය

එසේම යැයි මම සලකා ගනිමි. යම් හෙයකින් කිසි දිනක ඔහු විසින් දෙවැනිව සඳහන් කළ කර්තව්‍ය පැහැර හරින ලද නම් ඒ දිනය රටට ශෝකජනක දිනයක් වනු ඇත.

මා පළමුවෙන් විනිශ්චයාසනාරූඪ වූයේ වෂී 1947 දී ය. වෂී 1955 දී යලින් ඇටෝර්නි ජනරාල්වරයා වශයෙන් නීති අංශයට ප්‍රතිසංක්‍රමණය වූ මම වෂී 1955 දී දැනට මා උසුලන ධුරයට පත්වීමි. විනිශ්චයකරුවකු වශයෙන් කටයුතු කළ 13 හවුරුදු කාලයේ නීතිඥ මණ්ඩලයෙන් මට ලැබුණු සහයෝගය මම කෘතගුණ පූර්වකව සිහි කරමි. එකී ආධාරය සහ සහයෝගය නො මැතිව විනිශ්චයකරුවෙකුට සඟකීය කටයුතු සතුටුදායක අන්දමින් අපේ රටේ සම්ප්‍රදය අනුව කිරීමට නො හැකි බව මට ප්‍රත්‍යක්ෂ වී තිබේ. නීතිඥ මණ්ඩලය සමග මා එකඟ නොවූ අවස්ථා සමහර විට උද්ගතවුණු බව සැබෑ ය. නමුත් එ වැනි එකඟ නො වීම්වල ප්‍රතිඵලය වූයේ දෙපක්ෂය අතර වඩා හොඳ අවබෝධයක් ඇති වීම යි.

විධායක මණ්ඩලයට ශ්‍රේෂ්ඨාධිකරණයේ පරිපාලන අංශයේ ඇති ප්‍රශ්න ගැන අවබෝධයක් ලබා ගැනීමට නුපුළුවන් වීම නිසා එම අංශයෙහි කටයුතු වලට අවහිර බොහෝ සෙයින් ඇති වූ බව කිව යුතු ය. අධිකරණයේ කාර්‍යක්ෂමතාවය සංවර්ධනය කිරීමට යෝජනා කරන ලද නොයෙක් පියවර ප්‍රතික්ෂේප කරන ලදී. ශ්‍රේෂ්ඨාධිකරණයට ලැබී ඇති බලය අනුව කෙටුම්පත් කළ යුතු ලිඛිත නීති ආශ්‍රිත ව්‍යවස්ථා කෙටුම්පත් කිරීමට කෙටුම්පත් සම්පාදකයෙක් අවශ්‍ය බව කියමින් කරන ලද ඉල්ලීම කවදාවත් ඉටු නොවී ය. මේ නිසා ලිඛිත පණත් පහළොවක පමණ ආශ්‍රයෙන් සම්පාදනය කළ යුතු ව්‍යවස්ථා සම්පාදනය වී නැත. මේ හැර තවත් පණත් 7 ක පමණ ආශ්‍රයෙන් පැන විය යුතු ව්‍යවස්ථා මේ තාක් නො පැණවී තිබේ.

ශ්‍රේෂ්ඨාධිකරණයේ නිලධාරි මණ්ඩලයේ සුහසිඩිය පිණිස ඉදිරිපත් කරන ලද යෝජනා ද නිෂ්ප්‍රභා විය. භාෂා පරිවර්තකයන් සහ ලඝු ලේඛකයන් අධිකරණය නැමති යන්ත්‍රයෙහි, විශේෂයෙන් ම අපරාධ නඩු පිළිබඳ ව සලකන කල, ඉතාම ප්‍රාණවත් කොටස් වුව ද ඔවුනට තමන් කොතරම් කාර්‍යශූර වුව ද අනාගතයෙහි දී බලාපොරොත්තු වීමට තරම් දෙයක් නො මැත.

ශ්‍රේෂ්ඨාධිකරණයේ අපරාධ අංශයෙහි දැනට රෙජිස්ට්‍රර්වරුන් කලින් කරන ලද වැඩ කටයුතු භාෂා පරිවර්තකයන් විසින් අපරාධ අධිකරණ ලේඛකයන් හැටියට කරන නමුත් ඒ අයට මෙම අතිරේක වගකීම සඳහා ලැබෙන අතිරේක පාරිතෝෂිකයක් නැත්තේ ය. එ මෙන් ම ඇපැල් උසාවි වල ලේඛකයන් මෙන් තම කටයුතු කරන ලඝුලේඛකයන්ට එ බදුම වගකීම් කර පිට තබා ගැනීමට සිදු වී ඇත්තේ ඔවුන්ට කිසි යම් ප්‍රතිලාභයක් අත් නෝ වෙන හැටියට ය. ඔවුන්ගේ වැඩ කටයුතු ඊට වඩා වැදගත් කමින් අඩු යයි කිසි ලෙසකින් සැලකිය හැකි නො වෙතත් ඔවුන්ට ලැබෙන පඩිය පාර්ලිමේන්තුවේ වාතීකරුවන්ගේ පඩියට බොහෝ සෙයින් අඩු ය. තමන්ගේ සහජ බුද්ධිය ගැන කිසිදු තැකීමක් නො ලබන මෙම නිලධාරීන් දෙවගීය ගැන විශේෂයෙන් ම මම කණගාටු වෙමි. රෙජිස්ට්‍රාර්වරයා සහ ඔහුගේ නියෝජ්‍ය නිලධාරීන් ද මීට වඩා භාග්‍ය සම්පන්න යැයි කිය නොහේ. ඔවුන්ගේ පාරිතෝෂිකයන් පවා පොදු රාජ්‍ය මණ්ඩලයේ අනිත් රටවල එම තත්ත්වයේ ම නිලධාරීන්ගේ වේතනයක් සමග සසඳා බලන විට එය ඔවුන්ගේ තෘප්තියට හේතු නො වන බැව් පෙනේ. පොදු රාජ්‍ය මණ්ඩලයේ අනික් රට වල පමණක් නොව මේ රටේ ම ඒ හා සමාන වගකීමක් ඇති වෙනත් නිලධාරීන්ගේ වැටුප සමග සසඳා බැලූ කල ද පෙනී යන්නේ මෙම තත්ත්වය ම ය. මේ හැම දෙනෙක් ම මුරණ්ඩු භාණ්ඩාගාරයක පාලනයට ගොදුරු වී සිටින්නෝ වෙති. ඔවුන්ගේ කාර්‍ය්‍ය ප්‍රවීණත්වයට සහ සේවයට ඇති ළෙන්ගතු කමට මගේ ප්‍රශංසාව පිරිනැමීමට මම මෙය අවස්ථාව කර ගනිමි.

ශ්‍රේෂ්ඨාධිකරණය සහ විධායක මණ්ඩලය අතර ඇති සම්බන්ධතාවය අවුරුදු සිය ගණනකට වැඩි කාලයක් තුළ උද්ගත වී ඇති යම් යම් චාරිත්‍ර විධීන් අනුව පාලනය වේ. මෙම කාලය තුළ මේ චාරිත්‍ර විධි සුපරීක්ෂාකාරී ව ක්‍රියාවෙහි යෙදී ඇතත් මැන අතීතයේ සිට එම සම්ප්‍රදායෙන් බාහිර ව කටයුතු කිරීමට පටන් ගෙන තිබේ.

ශ්‍රේෂ්ඨාධිකරණයට බල පවත්වන නීති-රීති විනිශ්චයකරුවන් සමග කලින් සාකච්ඡා නො කර පණවා තිබේ. මෙතෙක් පවත්නා චාරිත්‍ර විධිය අනුව කලින් සාකච්ඡා කළ යුත්තන් සමග සාකච්ඡා නො කොට ශ්‍රේෂ්ඨාධිකරණයට යම් යම් පත්වීම් කරන ලදී. ආරම්භයේ පටන් ම ශ්‍රේෂ්ඨාධිකරණය යටතේ තිබූ අධිකරණ රෙජිස්ට්‍රාර්තුමාගේ කාර්‍ය්‍යාංශය ඒ පිළිබඳ ව නීතියෙන් ලබන ලද සනාථභාවයක් නො මැති ව අධිකරණ ඇමතිතුමා යටතට පත් කොට තිබේ. මෙයින් සිදු වූයේ ශ්‍රේෂ්ඨාධිකරණයේ රෙජිස්ට්‍රාර්තැනගේ කාර්‍ය්‍යාංශයත් ඒ පිළිබඳ ව කෙරෙන පත්වීම් ආදියත් විධායක මණ්ඩලයේ බලය යටතට පත්වීම යි. කලකට පෙර කිසිම ආමාත්‍යාංශයක් යටතට පත්නොවී එයටම විශේෂ වූ ස්ථානයක තිබුණු, අගමැතිනියගේ මුදල් ශීර්ෂයට පමණක් දෙවැනි වූ, ශ්‍රේෂ්ඨාධිකරණයේ මුදල් ශීර්ෂය

අධිකරණ අමාත්‍යාංශය යටතට පත් කරන ලදී. ඕනෑම උසාවියක නඩු කොපියක් තමාගේ පරීක්ෂණය පිණිස අධිකරණ ඇමතිතුමාට ගෙන්වා ගත හැකි වන සේ අණපණත් (වෂී 1958, අංක 9) පණවන ලදී. ශ්‍රේෂ්ඨාධිකරණයේ නඩු කොපියක් නම් මෙම උපදේශය සථාවර ලේකම්වරයා විසින් අග්‍රවිනිශ්චයකාරතුමාට යවනු ලැබීම එහි ක්‍රියා පිළිවෙල යි. අනාගතයේ දී වඩා ප්‍රඥගෝචර අවවාද ලැබී මෙතෙක් සථාපිත වී ඇති චාරිත්‍ර විධි වලට නැවත වාරයක් මෙම ක්‍රියා සම්ප්‍රදය පරිවර්තනය වේය යනු මගේ විශ්වාස යයි.

අපේ නීතිසංසථා පටිපාටිය අනුව විනිශ්චය මණ්ඩලයත් නීතිඥ මණ්ඩලයත් එක ම ඒකකයක සංයුක්ත කොටස් දෙකකි. මේ නියායෙන් බලන කල එක් කොටසක අඩාල වීම නිසා අනිවාය්‍යයෙන් ම අනික් කොටස ද අඩාල වේ. එ බැවින් නීතිඥ මණ්ඩලයේ අයිතිවාසිකම් සහ වරප්‍රසාද පිළිගැනීම විනිශ්චය මණ්ඩලයේ යුතුකමකි. එ මෙන් ම නීතිඥ මණ්ඩලයේ යුතුකම වන්නේ විනිශ්චය ආසනයේ ගරුත්ත්වය හා සුපරිශුද්ධතාවය ආරක්ෂා කිරීම ය. නීතිඥ මණ්ඩලය සහ විනිශ්චය අංශය අතර මෙම අන්‍යොන්‍ය පරාධීනතාවය නොබෝද පැවත්වුණු සිදුවීම් වලින් එයට ලැබිය යුතු නියම සැලකිල්ල ලබානැති බව පෙනේ. මෙම අධිකරණය කෙරෙහි අහිතකර ලෙස බලපවත් වන යම් යම් පියවර ගෙන ඇති නමුත් එයට විරුද්ධව නීතිඥ මණ්ඩලයේ උද්ඝෝෂණයක් ඇති වී නැත. අනාගතයෙහි මීට වඩා පරීක්ෂාකාරී ලෙස මෙම කටයුතු බලාගනී යයි මම විශ්වාස කරමි. එ වැනි තත්ත්වයක් මහජනයා බලාපොරොත්තු වන අතරම අපේ රටට එය වුවමනා කෙරේ.

දැනට විනිශ්චය අංශය උසුලන සම්භාවනීයත්වය අවුරුදු 125 ක පමණ කාලයක් තුල ක්‍රමයෙන් පත් වූ විනිශ්චයකාරවරුන් විසින් ගොඩනගන ලදුව එතුමන් විසින් ම සුපරිශුද්ධ අසුමින් ආරක්ෂා කර ගත් මහඟු චාරිත්‍ර විධියෙන් බිහි වූ සම්පිණ්ඩණාත්මක ප්‍රතිඵලය වේ. එකී සම්භාවනීයත්වය සංවත්සරයන්ගේ ඇවෑමෙන් සංවර්ධනය විය. මෙය ඉතාම සුළු අසුමින් වුවත් හානියට පත් වන අයුරින් රජය කිසිදෙයක් නො කළ යුතු ය. රජයට විරුද්ධව දෙනු ලබන තීන්දු මිතුරුකමින් නොර කටයුතු යයි සිතා එයට පටහැනිව ව්‍යවසථා දයි වේවා පරිපාලනාත්මක වේවා ප්‍රතිවිරුද්ධ පියවර රජය විසින් නො ගත යුතු ය. උපරිම අධිකරණයෙහි තීරණය සෙසු අධිකරණගාමීන් මෙන් ම අනුගමනය කොට පිළිපැදීමට රජයත් එකඟ විය යුතු ය. රජයෙහි ඉතාම උසස් තත්ත්වය වර්ධනය කර ගැනීමේ සහ රජයෙහි අපීසිඩිය පිණිස ම රැක ගත යුතු වූ නො වරදින එකම මාර්ගය එය වේ.

ලැබිය හැකි වරප්‍රසාදයේ මායාවෙන් හෝ ලැබිය හැකි අප්‍රසාදයේ තර්ජනයෙන් හෝ ඉදිරිපත් වන බලපෑමෙන් තොරව නීතිය පසිඳීමට යුක්තිය ඉටු කරන අධිකරණයට ඉඩ නො මැති නම් විනිශ්චය අංශය සවාධීන විය නො හැක. තමාගේ සවාධීනත්ත්වය ආරක්ෂා කර ගැනීම විධායක මණ්ඩලයේ යුතුකම වේ. එම නිසා එ බඳු බලපෑමක් ක්‍රියාත්මක වී තිබේය යන හැඟීම් මාත්‍රය පවා ඇති වීමට අවකාශ නො තැබෙන සේ එය (විධායක මණ්ඩලය) ඉතා උද්‍යෝගිමත් ව වග බලා ගත යුතු ය.

එ මතු ද නොව විනිශ්චය අංශය විසින් දැනට උසුලනු ලබන සම්භාවනීයත්ත්වයෙන් ම එම විනිශ්චය අංශයෙහි හොඳ නම සහ ගෞරවය ආරක්ෂා කිරීම තමන් පිට පැවරී ඇති භාරදූර බැඳීමක් බව විනිශ්චයකාරවරුන් ද මතක තබා ගත යුතු ය. එ බැවින් අධිකරණයෙහි සහ ඉන් බාහිරට ද තමන්ට මහජන විශ්වාසය තව තවත් වැඩි වන අසුමට තමන්ගේ ආචාරය හා ගතිපැවතුම් ඔවුන් විසින් හසුරුවා ගත යුතු ය.

මහජනයාට කෘරපාලනයෙනුත්, සෛවරී පාලනයෙනුත් දුෂ්ට නිලධාරී පාලනයක නොමනා ක්‍රියාවන් ගෙනුත් මිදීමට ඇති එකම ආරක්ෂාව විනිශ්චය අංශය වේ. ඔවුනට රටවැසි නිදහස තහවුරු කර ගැනීමට ඇති ආයතනය එය වේ. ඔවුනට වෙනත් රටවැසියෙකුගෙන් වේවා නැතහොත් රජයෙන් වේවා සිදු වන යම් කිසි වරදකට සහනය ලබා ගත හැකි සථානය එය ම වේ. ඔවුනට සමාන සථානයක සිට රජයට අභියෝගයක් ඉදිරිපත් කළ හැකි තැන ද එය ම වේ. අධිකරණයෙහි සවාධීනත්ත්වය රැක බලා ගැනීමට රජය ගන්නා සෑම පියවරක් ම එහි රක්ෂාවරණයට තබන යොදන සෑම ක්‍රමයක් ම රජයේ ම මහඟුතාවය කෙරෙහි ම ප්‍රතිගමනය වේ. නියාලු විනිශ්චය අංශයක් ඇති කිසිම රටක් ආරක්ෂා සහිත නොවේ. එ බඳු විනිශ්චය මණ්ඩලයක් ඇතොත් එය එම රටේ අනාඥාකාරී පරිහානිය වනු ඇත. මෙයින් ජාතිය අප්‍රාණික වී එම ජාතියෙහි වැසියන් බියසුල්ලන් බවට පත් කරනු ඇත.

විනිශ්චය අංශය ගැන කරුණු මෙයින් සමාප්ත කොට නීතිඥ මණ්ඩලය ගැනද ප්‍රකාශයක් කිරීමට කැමැත්තෙමි. එක් කාලයක මහජන මතය කෙරෙහි බල පැවත් වීමට ගත් පුරෝගාමීත්ත්වය මැත කාලයේ නීතිඥ මණ්ඩලයෙන් තුරන් වී ඇති බව පෙනේ. නෂ්ට වූ එම සථානය යළිත් තම හස්තගත කර ගැනීමට නීතිඥ මණ්ඩලයට හැකි වේය යනු මගේ විශ්වාස යයි. එ පමණක් නොව බයාදු ආණ්ඩුවක් හදිසියේ ක්‍රියාත්මක කරන ක්‍රියාවන්ට විරුද්ධ ව නැවත වරක් නීතිඥ මණ්ඩලයේ උද්ඝෝෂණය

ඉදිරිපත් කිරීමට හැකි වේ යැයි ද මම විශ්වාස කරමි. යම් හෙයකින් අපි සුපරිශුද්ධ යැයි සලකන යම් යම් ප්‍රතිපත්තීන්ට විරුද්ධ ව තර්ජනයක් එල්ල වූ විට එම උද්ඝෝෂණයම යළිත් ගිහුම් දී ඇසේයැයි මම විශ්වාස කරමි. එසේ ම ලැබිය යුතු අයගේ වැදගත් අනුශාසනය හා මතය යථා කාලයෙහි දී ලැබීමෙන් හිතාමතා නො කරන අවිචාරවත් වැඩ කටයුතු වැලකේ යැයි ද මම විශ්වාස කරමි. ආඥාදායකත්වයකින් ලැබෙන පාලන සබුක්කු පහර සහ විප්ලවයකින් ලැබෙන සන්ත්‍රාසය වැලැක්වීමට ඉතාම නො වරදින සහතිකය නම් සුසාධීන විනිශ්චය අංශයත් නිදහස් අහිත නීතිඥ මණ්ඩලයත් එයට ම එකතු කිරීමට සැහෙන කරුණක් ලෙස මා සලකන නිදහස් ප්‍රවෘත්ති පත්‍රයත් එසේ ම ක්‍රියාශීලි මහජන මතයත් බව සිහියේ තබා ගැනීම වැදගත් ය.

තවත් එක් කරුණක් ගැන සඳහන් නො කර හැරීම මාගෙන් සිදු නො විය යුත්තකි. එ නම් දැනට ඇති අධිකරණ කටයුතු වලට යන විශාල වියදම යි. එය කලින් අපේක්ෂා කරන විට ද බොහෝ දෙනෙක් තැති ගනිති. අනිත් සෑම දෙයක් ම මෙන් මෙම වියදම ද ඉතාම ඉහළ නැග තිබේ. එමෙන් ම කෙනෙකුගේ අයිතිවාසිකම් තහවුරු කර ගැනීමේ වියදම ඉතාම අධික වී ඇති නිසා මෙම අධික වියදමේ හේතුවෙන් පුරවැසියෙකුට ශක්තියට හා වරදට හිස පහත් කිරීමට සිදුවී තිබේ. මේ ප්‍රශ්නයට පිළියමක් ඉතා ඉක්මණින් සොයා ගත යුතු ය. යමෙකුගේ නිදහස ආක්‍රමණය වී ඇති කල එය ආරක්ෂා කර ගැනීමට ඔහුගේ මුදල් හිඟය හරස් නො විය යුතු ය; යමෙකුගේ නිදහස ආරක්ෂා කිරීමට වැය වන ගාස්තුව ඉතා අධික නම් මුදල් හිඟය නිසා එම නිදහස පවා වැනසී යනු ඇත. මනුෂ්‍ය අයිතිවාසිකම්—ජීවන මූලික අයිතිවාසිකම්-ඒවා පරිසුද්ධ ලෙස නිදන් කොට ඇති අධිකාර පත්‍රයටත් පාලන සංස්ථාවේ ප්‍රඥප්තියටත් සීමා වී ඇත් නම් එයින් ලැබෙන සේවය අල්ප වේ.

මගේ කථාව නිමකිරීමට පෙර මට දුන් ආධාරය සහ සහයෝගය සම්බන්ධයෙන් නීතිඥ මණ්ඩලයට ස්තුති කිරීමට කැමැත්තෙමි. මා සමග දැනට කටයුතු කරන එසේ ම මෙම නව අවුරුදු කාලය තුල විනිශ්චය ආසනයෙන් ඉවත් ව ගිය මගේ සහකාර විනිශ්චයකාර මහතුන්ටද මම නයගැනියෙමි. ඒ මන්ද? ඔවුන්ගේ ආධාරය සහ සහයෝගය නො ලැබිණි නම් මා කළ යුතු කර්තව්‍යයන් අමාරු විය හැකි•ව තිබුණ නිසා ය. මගේ නිල සේවා කාලය තුල යම් යම් කටයුතු සාර්ථක කර ගැනීමට හැකි වී නම් එය බොහෝ අංගෝපාංගයන්ගේ සම්මිශ්‍රණයක් ලෙස සැලකිය හැක.

සාමාන්‍යයෙන් මෙ වැනි අවස්ථාවක ගත වන කාලයට වඩා දීර්ඝ කාලයක් ඔබ හැම මෙහි නතර කර ගැනීම ගැන මට සමාධිය භජනය කරන්න. මා එසේ කළේ දැනට විනිශ්චයාරූඪව සිටින මාගේ සහායක විනිශ්චයකාරවරුන් සහ නීතිඥ මණ්ඩලයේ අසුන් වල ඇති අය තම තමන්ගේ බලය ආක්‍රමණය වන්නා වූ අවස්ථාව ගැන අනාගතයේ දී වඩාත් විමසිලිවන් ව සිටින පරිදි මේ අවස්ථාවේ මෙය ප්‍රකාශ කිරීම මගේ යුක්තිය යි මට වැටහුණු නිසා ය.

ශත වසියකින් 1/3 න් පංගුවක් පමණ කාලයක් තුළ හක්තියෙන් යුක්ත ව මම මගේ රටට සේවය කෙළෙමි. මෙම තනතුරේ සලකුණු ලෙස ගැණෙන මගේ අධිකරණ ශීඝ්‍ර පළඳනාව සහ සාටක ඉදින් ඉවතින් තබමි. දැනට ගත වී ඇති අවුරුදු බොහෝ ගණනක් තුල කැප කිරීමට හැකි වූ කාලයට වඩා දීර්ඝ කාලයක් මිඩංගු කළ යුතු මගේ ආගමික, සමාජසේවක, සහ අධ්‍යාපනික කටයුතු දෙස මින් පසු හැරෙන්නෙමි. තනතුරෙහි බන්ධන වලින් මිදුණු පසු මට නොයෙක් නොයෙක් අංශ වලින් මහජනතාවගේ සේවය සඳහා මගේ ජීවිතය කැප කිරීමට නිදහස ලැබෙනු ඇත. මෙය මගේ ජීවිතයෙහි එක් අවධියක අවසාන යයි—එසේ ම එය මම බලාපොරොත්තු සහිත ව අපේක්ෂා කරන නවත් අවධියක ආරම්භය යි.

ඇටර්නි ජනරාල් මහතාණෙනි, මෙම ගොඩනැගිලි ශාලාවලින් අවුරුදු කිහිපයකට ඔබ්බෙහි ඉවත් ව ගොස් වෙනත් අංශ වල කටයුතු වල නිරත වී විශිෂ්ඨත්වයක් ලැබූ මගේ මිත්‍රයන් ගේ මුහුණු අද දක්නට ලැබීම මට ප්‍රීතියකි. අවසාන වශයෙන් මෙහි රැස්ව සිටීම ගැන වෙන් වෙන් වශයෙන් ඔබ එක්එක්කෙනාට මාගේ ස්තුතිය පුදකිරීමට කැමැත්තෙමි. නීතිඥ අංශයේත් විනිශ්චය අංශයේත් මා ගත කළ ජීවිත කාලය පිළිබඳ ව ඉතාම තුෂ්ටිජනක සිහිවිලි මගේ අනුස්මරණයට අනාගතයෙහි නැගෙනු ඇත.

ඔබ හැමට සුභ පතන මම මෙසේ ආයුබෝවන් කියමි.

මේ කථා දෙකේ ඉංග්‍රිසි පිටපත් ඉංග්‍රිසි අංශයේ 67 වෙනි කා., i සහ ii පිටු බලනු.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා ඉදිරිපිට

යාපා එ. මිසිනෝනා*

ශ්‍රේ: අංකය: 189/,64—දකුණු කොළඹ මහේස්ත්‍රාත් උසාවිය, අංකය: 27620-බී.

වාද කර තීන්දු කළ දිනය : 1964-6-22.

අපරාධ නඩු සංග්‍රහය, 434 වෙනි ඡේදය—පරිපොෂණ නඩුවක්—එහි සාක්ෂි දුන් අයගේ ප්‍රකාශ වල පිටපත් පාර්ශවකාරයින්ට නිකුත් කළ යුතු ද?

තීන්දුව:— පරිපොෂණ නඩුවක දී වුවත් එය මහේස්ත්‍රාත් උසාවියේ විභාග වන නඩුවක් නිසා අපරාධ නඩු සංවිධාන සංග්‍රහයේ නියමයන්ට යටත්ය. එම නඩුවක සාක්ෂි දුන් අය ගේ ප්‍රකාශ වල පිටපත් නිකුත් කිරීම එම සංග්‍රහයේ 434 වෙනි ඡේදය අනුව කල යුතු යි. ඒ හෙයින් නඩුව අවසාන වන තුරු ප්‍රකාශවල පිටපත් නඩුවේ පාර්ශවකාරයින්ට නිකුත් කල යුතු නොවේ.

නීතිඥවරු:— මෝරින් සෙනෙවිරත්න මෙනෙවිය, චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
කුමාර් අමරසේකර මහතා, වගඋත්තරකරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා,

මෙය දකුණු කොළඹ මහෙස්ත්‍රාත් උසාවියේ පරික්ෂණ නඩුවක තීන්දුවකින් ගත් ඇපැලකි. ඇපැල ගෙන තිබෙන්නේ නඩත්තු ඉල්ලුම්කාරීගේ අවජාත ළමයාගේ පියා තමා යයි මහෙස්ත්‍රාත්තුමා නියෝග කළ චිත්තිකරු විසින්ය

මෙම නඩුවල දී මට ගේ සාක්ෂිය තහවුරු කරන සාක්ෂි ද තිබිය යුතු යි. එසේ උවමනා සාක්ෂි තිබෙන නිසා මෙම තීන්දුව වෙනස් කිරීමට මට කරුණු නොපෙනෙන හෙයින් ඇපැල ගාස්තුත් සමග නිස්ප්‍රභා කරමි.

මේ නඩුව අවසාන කරන්ට පෙර පහත සඳහන් ප්‍රකාශයන් කිරීම මගේ කැමැත්ත වේ : මෙම ඉල්ලීම ඉදිරිපත් කළේ 1962-8-15 දිනයි, නමුත් තීන්දුව දී තිබෙන්නේ 1963-7-20 දින ය. එනම් මෙය ඉදිරිපත් කර අවුරුද්දක් පසු උනාට පසුව යි. මෙය විභාගයට පස් දිනකට අඩු නොවන දින වල නියම ව තිබී ඇත. පළමු දවසේ, එනම් 1963-1-30 දින, කාර්‍ය්‍ය සටහන මෙසේ යි : ''මෙය දීර්ඝ නඩුවකි, මේ කරුණ නිසා විභාගය 1963-4-3 වෙනි දිනට කල් තබන ලදී''. මේ දින මහේස්ත්‍රාත්තුමා නැවතත් මෙසේ සටහන් කර තිබේ. ''මම රක්ෂණ බන්ධනාගාරයේ (Remand) සිටින චිත්තිකරුවෙකුට විරුද්ධ ව පවරණ ලද නඩුවක ප්‍රාථමික පරීක්ෂණය කර ගෙන යමි. එ නිසා අද මේ නඩුව විභාග කිරීමට ඉඩ නැත''. ඊලඟ දිනයෙහි කොටසක් විභාග වී පසු දිනයක ද තව කොටසක් විභාග වී ඇත. 1963-6-22 දින විභාගය අවසාන වූ බව පෙනියතත් තීන්දුව දී ඇත්තේ 1963-7-20 දින ය—මහේස්ත්‍රාත් උසාවියේ මෙසේ නඩු කල් යෑම අභාග්‍යයකි —නඩත්තු නඩු මෙයේ පමා වීම වඩාත් අභාග්‍ය වේ.

මෙය මහේස්ත්‍රාත් උසාවියේ නඩුවක් බැවින් මගේ දැනුම අනුමට එහි කටයුතු වල වාර්තා කොපි නඩුවක පාර්ශවකාරයින් ගේ ප්‍රයෝජනය පිණිස ලබා ගත නොහැක. අපරාධ නඩු සංවිධාන සංග්‍රහයේ සාක්ෂි ප්‍රකාශ වල හෝ නඩු පොතේ කොටස් වල පිටපත් නිකුත් කිරීම පිළිබඳ ඇති එකම නියමය 434 වෙනි ඡේදයේ අඩංගු වේ. එහි මෙසේ සඳහන් වෙයි :

''අපරාධ නඩු උසාවියක තීන්දුවක හෝ අවසාන ආඥාවක බල පෑමකට යටත් වූ යම් කෙනෙකුට සාක්ෂි වල හෝ නඩුපොතෙහි වෙනයම් කොටසක් අඩංගු පිටපතක් ලබා ගැනීමට කැමැත්තක් වුනි නම් ඔහු එය ඉල්ලුම් කල විටක දී එය නොමිලයේ සැපයීමට සුදුසු බවට විශේෂ කරුණක් නොමැති යයි හැඟේ නම් වන එකසිය විස්සකින් යුත් පිටුවකට සත දෙළහකට වැඩි නොවෙන උසාවිය මගින් නියම කරන ලද සෑහෙන මුදලක් ගෙවූ විට එය සැපයිය යුතු වේ'' යන්න යි.

මහේස්ත්‍රාත් උසාවියේ කටයුතු වාර්තා (Proceedings) වල පිටපත් නඩුවල පාර්ශවකාරයින්ගේ ප්‍රයෝජනයට ලබා ගැනීමට පහසු කම් සලසා ඇති බව මහේස්ත්‍රාත්තුමා විසින් කරන ලද සටහනකින් පෙනී යයි. තීන්දු නැති නඩු වල පිටපත් නිකුත් කිරීමට නීතියෙන් අවසර නැතිවා පමණක් නොව එයින් අල්ලස් ගැනීමාදී දූෂණ වලට ද මං පෑදෙනවා ඇත. ඇත්ත වශයෙන් ම මහේස්ත්‍රාත් උසාවි වල නඩු පොත් එහි නිලධාරීන් හැර අන් අය අත නොගෑ යුතු යි. මෙය පරිපොෂණ නඩුවක් වුනේ වී නමුත් මහේස්ත්‍රාත් උසාවියේ නඩුවක් නිසා සාක්ෂිකරුවන් ගේ ප්‍රකාශ වල පිටපත් නිකුත් කල යුතු නොවේ. ඇපැල නිෂ්ප්‍රභා විය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 67 වෙනි කා., 16 වෙනි පිට බලනු.

ගරු ශ්‍රී ස්කන්ධ රාජා සහ අලස් විනිශ්චයකාරතුමන් ඉදිරිපිට

ජී. ඩී. ඒ. ජයසූරිය එ. ඒ. ඇස්. ජේ. සෙනෙවිරත්න*

ශ්‍රේ: අ: 403 (F)/'62—දි: උ: කළුතර, ඇල්. 595.

වාද කළේ සහ තීන්දු කළේ : 1964-9-25.
කරුණු ප්‍රකාශ කළේ : 1964-10-2.

ඔප්පු—ලිපිදෝෂයක් සහ වැරදීමක්වී යයි කියා දෙවනුව නිදෙස් කිරීමේ ඔප්පුවක් ලියා අත්සන් කිරීම—එසේ වැරදීමක් ඇතිවී යයි සාක්ෂියෙන් ඔප්පු නොකිරීම—නිදෙස් කිරීමේ ඔප්පුව පළමු ඔප්පුව යටත් කර බලපාත් ද?

බෙදුම් ආඥා පණතේ 67 වෙනි ඡේදය—ඉඩමකට බෙදුම් නඩුවක් පවත්නා කාලයතුල ලියන ලද ඔප්පුවක බලශූන්‍ය භාවය—එසේ බලශූන්‍ය වූ ඔප්පුවක් නිදෙස් කරන්ට කිසිසේත් ඉඩ නැති බව.

තීන්දුව:— (1) නිදෙස් කිරීමේ ඔප්පුවක් ලියා අත්සන් කල හැක්කේ එම ඔප්පුවේ සඳහන් දෙපාර්ශවය අතර අන්‍යොන්‍ය ප්‍රමාද දෝෂයක් ඇති වූ විටක පමණකි. ඒ අඳෙමේ ප්‍රමාද දෝෂයක් නො මැතිව ලියන ලද නිදෙස් කිරීමේ ඔප්පුවකට පලමු ඔප්පුව යටපත් කර බලපාන්ට නොහැක.

(2) කෙසේ හෝ පළමු ඔප්පුව බෙදුම් පණතේ 67 වෙනි ඡේදය අනුව එම ඔප්පුවේ සඳහන් ඉඩමට බෙදුම් නඩුවක් පවතිනා කාලය තුල ලියවූවක් නිසා බලශූන්‍ය වේ. එය නිදෙස් කිරීමට දෙවනු පමණකි.

නීතිඥවරු:— ජේ. ඒ. ඇල්. කුරේ මහතා, ඩී. ඒ. ඊ. තෙවරප්පෙරුමා මහතා සමග ඇපැල්කරුවෙනුවෙන්.

ඒ. සී. ගුණරත්න මහතා, ඇන්. ඇස්. ඒ. ගුණතිලක මහතා සමග වගඋත්තරකරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා,

1964-9-25 දින ඇපැලට ඉඩදෙමින් අප කළ තීන්දුව කුමන කරුණු උඩ දැයි දැන් ප්‍රකාශ කරමු.

1961-3-4 දින දරණ, අංක 64 (මේ නඩුවේ 'ඩී' 3 යයි ලකුණු කරන ලද) ඔප්පුවෙන් දෙන් පිලිප් ජයසූරිය අත්තුවාවත්ත යන ඉඩමෙන් ඔහුට අයිති කොටස විත්තිකරුට නැගි දෙන ලදී. 'ඩී' 3 වශයෙන් ලකුණු කරන ලද මේ ඔප්පුව 1961-3-6 දින ලියා පදිංචි කර ඇත. එසේ ලියා පදිංචි කරන අවස්ථාවේ පෙනී යාගුතු කරුණු නම් :—

(1) එම පත්තිරුවේ අන්තිමට ලියා පදිංචි කර තිබුණේ 'ඩී' 3 ලකුණු කල ඔප්පුවේ සඳහන් අයිතිය දක්වන ඔප්පුව ද;

(2) 1961-2-8 දින නැගි දීමනාකරු විසින් ම දැමූ බෙදුම් නඩුවක් විනිශ්චයට භාජනවී (lis pendens) ඇති බව ලියා පදිංචි කිරීම ද;

(3) එමනිසා 'ඩී' 3 බෙදුම් නඩුවක් පවත්නා කාලය තුලදී(pendency) ලියා අත්සන් කළ ඔප්පුවක් හෙයින් එය බලශූන්‍යබවත්, විත්තිකරුට ඉන් කිසි හිමිකමක් නො පැවරුනු බවත් ය (බෙදුම් පනතේ 67 වෙනි ඡේදය බලන්න—69 වෙනි පරිච්ඡේදය).

'ඩී' 1 ලකුණු කරන ලද අංක 65 දරණ ඔප්පුව 1961-3-6 වෙනි දිනම සහතිකකර තිබේ. එයින් හැඟවීමට උත්සාහ කර ඇත්තේ නැගි දීමනාකරු විසින් විත්තිකරුට දෙන්ට යෙදුන ඔප්පුවේ වැරදි හරිගැස්සීමක් වශයෙන්ය. 'ඩී' 1 ඔප්පුවේ තොරතුරු විස්තරකර ඇත්තේ 'ඩී' 3 දරණ ඔප්පුවෙහි උප ලේඛනයේ ලිපි දෝෂ (clerical error) හා වැරදීම් නිසා බෝගහවත්ත යන්න වෙනුවට අත්තුවාවත්ත සඳහන්වී තිබේ යන්නයි. මේ ඔප්පු දෙකේ උපලේඛන හාත්පසින්ම වෙනස්ය. නමින් සහ මායිම් වලින් පමණක් නොව. ඉඩමේ වරිපණම් අංකය ද, ප්‍රමාණය ද, අයිතිය ද සම්පූර්ණයෙන්ම වෙනස්ය.

1961-4-10 දින දරණ අංක 583 ('පී' 1) ඔප්පුවෙන් දෙන් පිලිප් ජයසූරිය ඉහතකී 'ඩී' 1 ඔප්පුවේ උප-ලේඛනයේ සඳහන් බෝගහවත්ත නමැති ඉඩමේ තමාට අයිති කොටස පැමිණිලිකරුට නැගි දුන්නේ ය.

උගත් දිස්ත්‍රික් නඩුකාරතුමාගේ තීරණය මෙසේ විය : " මේ නඩුවේ සාක්ෂි වලින් දක්වන්නේ 'ඩී' 3 ඔප්පුව ලියා අත්සන් කරණ අවස්ථාවේදී නැගිදීමනාකාර ජය-සූරිය නැගි කළේ අත්තුවාවත්ත මිස බෝගහවත්ත නොවේය යන්න විත්තිකාරයා දැන සිටියා පමණකුත් නොව නැගිදීමනාකාරයාත් තමා 'ඩී' 3 ඔප්පුවෙන් නැගි දුන්නේ අත්තුවාවත්ත මිස බෝගහවත්ත නොවෙන බව පැහැදිලිව තේරුම් ගෙන බවයි ".

මේ තීන්දුවෙන් 'ඩී' 1 නමැති ඔප්පුවේ තොරතුරු විස්තරයේ සඳහන් කළ මෙන් 'ඩී' 3 නමැති ඔප්පුවෙහි ලිපි දෝෂයක් හෝ වැරදීමක් හෝ නැති බව ප්‍රකාශවේ.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 67 වෙනි කා., 30 වෙනි පිට බලනු.

'ඩී' 1 ඔප්පුව ලියා අත්සන් කරන්ට හේතුවූයේ 'ඩී' 3 ඔප්පුව බෝගහවත්තට බෙදුම් නඩුවක් පවත්නා කාලය තුලදී සිදුවූවක් හෙයින් එය බලශූන්‍ය යයි දැනගත් නිසා යයි කෙනෙකුට තේරුම් ගැනීම අපහසු නොවේ.

නිදෙස් කිරීම යන්නෙන් වැටහෙන්නේ වරදක් ඇතිවී නිබෙන බවත් එය පහකළ යුතු බවත්ය. නමුත් 'ඩී' 3 ඔප්පුවේ හරිගැස්සීමට එහි කිසිදු වරදක් පෙනෙන්නේ නැත. නිදෙස් කරන්ට හැක්කේ අන්‍යෝන්‍ය (mutual) ප්‍රමාද දෝෂයක් ඇතිවූ විටය. 'ඩී' 3 නමැති ඔප්පුවේ එවැනි කිසිවක් සිදුවී නැත. එනිසා 'ඩී' 3 නිවැරදි කිරීමට 'ඩී' 1 ට බලපවත්වන්න නුපුළුවන.

ඉහතින් පෙන්වා දුන් පරිදි 'ඩී' 3 ඔප්පුව බලශූන්‍යවූවකි. බලශූන්‍යවූ ඔප්පුවක් නිදෙස් කිරීමේ ඔප්පුවකින් හරිගස්සන්ට නො හැක. එනිසා බෝගහවත්ත යන ඉඩමට හිමිකමක් 'ඩී' 1 න් නො පැවරෙන්නේ ය; මක්නිසාද ඊට සම්බන්ධ කල හැකි වෙන ඔප්පුවක් නැති හෙයිනි. නිදෙස් කිරීමට හැකි වන්නේ වලංගු ඔප්පුවක නිබෙන වරදක් පමණි.

එම නිසා ඇපැල් ගෙන නිබෙන මේ නඩු තීන්දුව සහ තීන්දු ප්‍රකාශය අවලංගු කර පැමිණිල්ල ඉල්ලා නිබෙනපරිදි පැමිණිලිකරුගේ වාසියට තීන්දුව ප්‍රකාශ කරනු ලැබේ. එහෙත් අලාභය පමණක් 1962-6-26 වෙනි දින සම්මත කරගත් ගණනට සීමාවේ. පැමිණිලිකරුට මේ උසාවියෙන්, පහල උසාවියෙන් ගාස්තු අය විය යුතු වේ.

ගරු අලස් විනිශ්චයකාරතුමා

මම එකහවෙමි.

ඇපැලට ඉඩ දෙන ලදි.

ගරු සිරිමාන්න සහ මානික්කවාසගර් විනිශ්චයකාරතුමන් ඉදිරිපිට

පෙරේරා එ. පෙරේරා සහ තවත් අය*

සු. උ. නො. 73/1963 (අන්තර)—දි. උ. මීගමුව, නො. 762/ඇම්.

වාද කළේ සහ තීන්දු කළේ: 1964 නොවැම්බර 20 වනද.

සිවිල් නඩු විධාන සංග්‍රහය, 217 (ජී) ඡේදය—අයිතියක් ප්‍රකාශ කරන ලෙස පමණක් කරන ලද ඉල්ලීම—පැමිණිලිකරුගේ අයිතිය පමණක් ප්‍රකාශ කරන නියෝගයක් යටතේ ඔහුට භුක්තිය භාරදීමේ ආඥුවකටත් හිමිකම් තිබේ ද?

ලිඳකින් වතුර ලබා ගැනීමේ අයිතිය ප්‍රකාශ කරන මෙන් ද, එම අයිතිය වැලැක්වීම නිසා සිදුවූ අලාභ ලබා දෙන මෙන් ද, පැමිණිලිකරුවන් විසින් නඩු පවරන ලද නමුත්, ඔවුහු වෙන යම් සහනයක් ඉල්ලා නො සිටියහ. නඩු තීන්දුව ලබා ගැනීමෙන් පසු ඔවුහු භුක්තිය භාරදීමේ ආඥුවක් ද ලබා ගැනීමට තැත් කළහ.

තීන්දුව:— මේ නියෝගය සිවිල් නඩු විධාන සංග්‍රහයේ 217 (ජී) වැනි ඡේදයට යටත් වන හෙයින් පැමිණිලිකරුවන්ට භුක්තිය භාරදීමේ ආඥුවකට හිමිකමක් නොමැත.

නීතිඥවරු:— ඇස්. සවිානඤ මහතා, වී. නානායක්කාර මහතා සමග, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

ජේ. ඒ. ඇල්. කුරේ මහතා, බාලා නඩරාජා මහතා සමග, පැමිණිලිකාර-වගඋත්තරකරුවන් වෙනුවෙන්.

ගරු සිරිමාන්න විනිශ්චයකාරතුමා

ලිඳකින් වතුර ලබා ගැනීමට ඔවුන්ට අයිතියක් තිබෙන බව ප්‍රකාශ කරන මෙන් ද එම අයිතිය වැලැක්වීමේ වරදට රුපියල් 250 ක් අලාභ ලබා දෙන මෙන් ද පැමිණිලිකාර-වගඋත්තරකරුවන් විසින් මේ නඩුව පවරනු ලැබී ය. මේ නඩුව අවසන් වන තුරු විත්තිකාර-ඇපැල්කරු විසින් ලිඳේ වතුර අපිරිසිදු කිරීම වලක්වන ලෙස ඉල්ලීමක් ද පැමිණිල්ලේ සඳහන් විය. උගත් දිස්ත්‍රික් නඩුකාරතුමන් විසින් මේ ඉල්ලීම ප්‍රතික්ෂේප කරනු ලැබිය. නඩුව විභාගයට පමුණුවනු ලැබූ අවස්ථාවේ දී වතුර ලබා ගැනීමේ අයිතිය ප්‍රකාශ කරන ලෙස ද රුපියල් 250 ක් අලාභ ලබා දෙන ලෙස ද ඉල්ලනු ලැබිය.

පැමිණිලිකාර-වගඋත්තරකරුවන් නඩු තීන්දුව ලබා ගැනීමෙන් පසුව භුක්තිය භාරදීමේ ආඥුවක් ඉල්ලා සිටි හෙයින් ඊට ඉඩ දෙන ලදී. මේ ඇපැල ඒ නියෝගය පිළිබඳව ය. පැමිණිලිකාර-වගඋත්තරකරුවන්ගේ නීතිඥවරුන් කියන අන්දමට වතුර ලබා ගැනීමේ අයිතියට අඩිපාරක් පාවිච්චි කිරීමේ අයිතිය ද සම්බන්ධ ය. එය සැබෑවිය හැක. කෙසේ වුව ද, දැන් නිරාකරණය කිරීමට තිබෙන ප්‍රශ්නය නම් පැමිණිලිකාර-වගඋත්තර කරුවන් ඔවුන්ගේ අයිතියට සහ අලාභ වලට වැඩිමනත් කිසිවක් ඉල්ලා සිටීම අතපසු කර දැන් ඔවුන්ට භුක්තිය භාරදීමේ ආඥුවක් ඉල්ලා සිටීමට පුළුවන් ද යනුයි.

මගේ හැඟීම අනුව මේ නඩුවේ නියෝගය සිවිල් නඩු විධාන සංග්‍රහයේ 217 (ජී) වැනි ඡේදයට යටත් වන හෙයින් පැමිණිලිකාර-වගඋත්තරකරුවන්ට භුක්තිය භාරදීමේ ආඥුවක් ඉල්ලා සිටීමට හිමිකමක් නොමැති බව ය.

ඇපැල ගාස්තු සහිතව ඉඩ දෙමි.

ගරු මානික්කවාසගර් විනිශ්චයකාරතුමා

මම එකහ වෙමි.

ඇපැලට ඉඩ දෙන ලදී.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා., 31 වෙනි පිට බලනු.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා ඉදිරිපිට

රැජින එ. වේලාඝත්තිරිගේ සුමනදාස බොතේජු*

සු: උ: නො: 6/1964—මාතර ම: උ: නො: 10278 (දකුණු වාරිකාව).

වාද කර තීන්දු කළ දිනය: 1964.4.3.

සාක්ෂි පණත, 54 වෙනි ඡේදය—ජූරිසභා නඩුවිභාගය—චිත්තිකරුගෙන් කෝන්තර අසද්දී ඔහුගේ නරක චරිතය හෙළිවීම—ඒ සාක්ෂිය කොපමණ දුරට චිත්තිකරුට විරුඬව ලැබුන තීන්දුවට බලපැවැත්මක් සිදුවී ද—එය විනිශ්චය කර ගැනීමේ අපහසුකම—ඒ ඒ නඩුවේ කරුණු උඩ ම රඳා තිබීම.

මිනීමැරුම් චෝදනාවක නඩු විභාගයේදී චිත්තිකරු සාක්ෂි දෙමින් මියගිය අය ලැබූ බරපතල තුවාල තමා අතින් සිදුවූ බව පිළිගනිමින් කියා සිටියේ මිය ගිය අය තමාට වඩා ශක්තිසම්පන්න ශරීරයකින් යුත් කෙනෙකු බවත් ඔහු අත්වලින් තමාට පහර දීමේදී සිදු උන බවත් ය. පැමිණිල්ල ද මිය ගිය අය චිත්තිකරුට වඩා උසමහත ශරීරයක් ඇති බව පිළිගත්තේ ය.

ආණ්ඩුවේ නීතිඥතුමා චිත්තිකරුගෙන් ඇසූ ප්‍රශ්න සහ ඊට ලැබුනු පිළිතුරු මෙසේ විය:—

ප්‍ර. මියගිය අය විශාල ශරීරයක් ඇති ශක්තිමත් පුරුෂයෙක් බව ඔබ පිළිගෙන තිබෙනවා නොවේ ද?
උ. ඔව්.

ප්‍ර. ඔහුගේ පහරදීමෙන් ඔබ තුවාල ලැබුවා නොවේද?
උ. ඔව්, මගේ හිසේ තුවාලයක් විය.

ප්‍ර. ඔබ පොලිසියට පැමිණිල්ලක් කරන්ට ඇති.
උ. ඔව්.

ප්‍ර. මියගිය අයට විරුඬව නඩුවක් ඇතිදනා ද?
උ. නැහැ.

ප්‍ර. එසේ නම්, මියගිය අයට දඩුවම් නො කළ නිසා ඔහු සමග ඔබ මහත් අමනාපයකින් සිටින්ට ඇති?
උ. ඒ ගැන මට විරුඬව පැමිණිල්ලක් ඉදිරිපත් වුනා.

නීඝුව: (1) චිත්තිකරුගේ අන්තිම උත්තරයෙන් වැටහෙන කරුණු දෙකක් ඇත. එනම් චිත්තිකරු පොලිසියට අසතා පැමිණිල්ලක් කර ඇති බවත්, ඔහු මියගිය අයට පහරදුන් නිසා ඔහුට විරුඬව චෝදනාවක් ඉදිරිපත් කළා යයි සිතන්ට ඉඩ තිබෙන බවත් ය. එම නිසා මෙය චිත්තිකරුගේ නරක චරිතය ප්‍රකාශ කෙරෙන සාක්ෂියක් විය හැකියි.

(2) මේ කරුණු උඩ ජූරි සභාවට විසඳීමට තිබුන ප්‍රශ්නය චිත්තිකරු කුපිත කරවීමත් (provocation) නොමැතිව මියගිය අයට පහර දෙන්ට පටන්ගත්තා ද, එසේ නැතුව මියගිය අය චිත්තිකරුට පහර දෙන විට ඔහු පහර දුන්නා දැයි යන්න බැවින් චිත්තිකරුගේ වාසියට ජූරිය විසින් කරුණු කල්පනා කිරීමේදී මේ සාක්ෂිය කොපමණ දුරට බලපවත්වන්නේ ද යන්න කිව නො හැකි ය.

ජූරි සභාව විසුරුවා හැර නඩුව නැවත විභාගයට අණ දෙන ලදී.

නීතිඥවරු:— ටී. එම්. කේ. යූ. සෙනෙවිරත්න මහතා, රජයේ අධිනීතිඥ, පැමිණිල්ල වෙනුවෙන්.

රිලියන් නානායක්කාර මහතාගේ උපදෙස් පිට, එම්. ඉසෙඩ්. අක්බාර් (උසාවියෙන් පත්කළ) මහතා සමග අධිනීතිඥ ජෝජ් රාජපක්ෂ මහතා, චිත්තිය වෙනුවෙන්.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 67 වෙනි කා., 41 වෙනි පිට බලනු.

ගරු ජී. පී. ඒ. සිල්වා විනිශ්චයකාරතුමා

ඊයේ සවස මෙම නඩුවේ විත්තිකරු සාක්ෂි දෙන අවස්ථාවේ රජයේ අධිනීතිඥ මහතා ඔහුගෙන් හරස් ප්‍රශ්න කිහිපයක් අසන්ට යෙදුනි. ඒ ප්‍රශ්න මෙසේ ය:—

ප්‍ර. ඔබ දැන් පිළිගෙන තිබෙනවා මියගිය තැනැත්තා ඉතා හැඩිදැඩි—එනම් ශක්ති සම්පන්න පුද්ගලයෙක් බව?

උ. ඔව්.

ප්‍ර. ඔහු ඔබට පහරදුන් අවස්ථාවේ දී ඔබට තුවාල වන්ට ඇති?

උ. ඔව්—මගේ හිස තුවාල වුනා.

ප්‍ර. ඔබ එම තුවාලය ගැන පොළිසියට පැමිණිළි කළා ද?

උ. ඔව්.

ප්‍ර. ඒ සම්බන්ධව මියගිය තැනැත්තාට විරුඬව යම් කිසි නඩුවක් තිබුනා ද?

උ. නැත.

ප්‍ර. මියගිය තැනැත්තා දඩුවම් නො ලද නිසා ඔබ ඔහු සමග ඉතා අමනාපයෙන් සිටින්ට ඇති?

උ. ඒ සිඩිය සම්බන්ධයෙන් මට විරුඬව නඩුවක් පවරා තිබුනා.

අසන ලද අවසාන ප්‍රශ්නයට ලැබුණු උත්තරයට හාත්පසින් ම විරුඬ උත්තරයක් රජයේ අධිනීතිඥ මහතා ඇත්ත වශයෙන් ම බලාපොරොත්තු විය. ඔහු සමහර විට බලාපොරොත්තුවූ උත්තරය නම් මියගිය තැනැත්තාට විරුඬව ඒ සම්බන්ධයෙන් නඩුවක් පවරා තිබුනාය යන්න විය හැක. නමුත් ඔහුගේ බලාපොරොත්තුවට සම්පූර්ණව පටහැනිව ඔහුට ලැබුණු උත්තරය නම් ඒ සම්බන්ධයෙන් විත්තිකරුට විරුඬව නඩුවක් පවරා තිබුනු බව ය.

ටයිප් ගසන ලද ලසුලේඛක සටහන් බැලීමට මට අවස්ථාව ලැබුණේ අද උදේ පමණක් බැවින් මම එම අවස්ථාවේ දී මේ සාක්ෂි කොටස සම්බන්ධයෙන් රජයේ අධිනීතිඥ මහතාගේ සහ විත්තියේ අධිනීතිඥ මහතාගේ ද අදහස් විමසීමි. සාක්ෂියෙන් මතු වූ මේ කාරණය නිසා විත්තිකරුට ඇති විය හැකි හානිය කරණකොට මෙම නඩුව තව දුරටත් ගෙනයාම ගැන විත්තියේ අධිනීතිඥ මහතා විරෝධය පළකළේ ය.

මෙම සාක්ෂි කොටස සාක්ෂි පණතේ 54 වෙනි ඡේදයට පටහැනිව යන්නක් වශයෙන් පෙනෙන්නට තුබුණ ද එය එම පණතේ 8 වැනි සහ 14 වැනි ඡේදයන්ට අනුකූලව විත්තිකරුගේ සිත ක්‍රියා කළ අයුරු සහ ඔහු (අපරාධය කිරීමට) පෙළඹුණු හේතුව (motive) පෙන්නීමට අදළ වන හෙයින් එම සාක්ෂිය (සාක්ෂියට) ඇතුළත් කරගත හැකි යයි රජයේ අධිනීතිඥ මහතා තර්ක කෙළේ ය.

සාක්ෂි පණතේ 8 වැනි ඡේදය යටතේ උද්ගත වන ප්‍රශ්නයක් හෝ ඊට අදළ කරුණක් පිළිබඳව ඇති පෙළඹවීමේ හේතුව පෙන්නීමට හැකි සාක්ෂි ඉදිරිපත් කිරීමට ද 14 වැනි ඡේදය යටතේ යම් කිසි අවස්ථාවක් හෝ කාරණයක් සම්බන්ධයෙන් විත්තිකරුගේ සිත ක්‍රියා කළ අයුරු හෝ සිත පෙළඹ වූ හේතුව ගැන අවබෝධයක් ඇති කිරීමට හැකි සාක්ෂි ඉදිරිපත් කිරීමට ද පුළුවන් බව දක්වෙන 51 වැනි න. නී. වා., 25 වැනි පිටුවේ සටහන් රජු එ. ජයවර්ධන නඩු තීන්දුව රජයේ අධිනීතිඥ මහතා විසින් ගෙනහැර දක්වන ලදී.

මෙම සාක්ෂි දුන් අවස්ථාවේ දී විත්තියේ අධිනීතිඥ මහතා මෙම නඩුව තවදුරටත් ගෙනයාම පිළිබඳව කිසි විරෝධයක් පළ නො කළමුත්, මෙම සාක්ෂි කොටස සම්බන්ධයෙන් අද උදේ මා ඔහුගේ අවධානය යොමු කළ අවස්ථාවේ දී, මෙම කාරණය උඩ නඩුව තවදුරටත් ගෙනයාම ගැන සිය විරෝධය පළ කළේ ය.

අපරාධ නඩුවක දී යම්කිසි සාක්ෂි කොටසක් ගැන විත්තියේ නීතිඥ මහතා විරුඬ නො වුව ද, නඩුවිභාගය නියම නීත්‍යානුකූලව ඇතුළත් කර ගත හැකි උචිත සාක්ෂි උඩ පමණක් ගෙන යාමට වගබලාගැනීම උසාවිය සතු යුතුකමකි. සමහර විට යම්කිසි සාක්ෂි කොටසක වැදගත්කම වටහා නො ගෙන හෝ එසේත් නැති නම් වැදගත්කම වටහා ගෙන සිටිය ද නඩුවිභාගය ගෙනයා හැකි යයි විත්තියේ නීතිඥ මහතා කියා සිටින්නට පුළුවන. එහෙත් වැරදි ලෙස සාක්ෂි ඇතුළත් කර නො ගැනීමට උසාවියට ඇති වගකීම අහෝසි නො වන්නේ ය.

නීතිඥ සහායක් නොමැතිව සිටි විත්තිකරුවකු විනිශ්චයකාරතුමෙකු සහ ජූරියක් ඉදිරියේ පැමිණිල්ලේ සාක්ෂිකරුවෙකුගෙන් හරස් ප්‍රශ්න ඇසූ අවස්ථාවක දී එම සාක්ෂිකරු මේ විත්තිකරු මීට ඉහත දී බොරු සාක්ෂි දීමට වැරැදිකරුවෙකු සිටි බව කියා සිටි අවස්ථාවේ දී එම සාක්ෂිය සාක්ෂි පණතේ 54 වැනි ඡේදයට පටහැනි බැවින් ඇතුළත් නො කර ගත යුතුව තිබුණ බව රජු එ. පිලෝරිස් ප්‍රනාන්දු, 47 වැනි න. නී. වා., 97 වැනි පිටුවේ නඩුතීන්දුවෙන් පෙනේ. එ වැනි අවස්ථාවක දී නීතිඥ සහායක් නො ලද විත්තිකරුට, නැවත විභාගයක් ඉල්ලීමට බලයක් ඇතැයි දන්වීම විනිශ්චයකාරතුමා බැඳී සිටින බව සඳහන් වේ.

හිටපු අග්‍රවිනිශ්චයකාර සර් ආතර් විජේවර්ධන මහතා විසින් රැජින එ. පෆ්ර්ත් (ක්‍රිමිනල් ඇපැල් වාර්තා 26, 148 වෙනි පිට) නඩු තීන්දුවේදී අග්‍ර විනිශ්චයකාර හිවාර්ට් සාමිවරයා විසින් කරන ලද පහත සඳහන් ප්‍රකාශය උපුටා දක්වන ලදි:—

"යම්කිසි සාක්ෂි කොටසක් සම්බන්ධයෙන් ජූරිසභිකයෙකුගේ සිත් ක්‍රියා කරන අන්දම ගැන—විශේෂයෙන් ජූරිසභිකයින් ගණනකගේ සිත් ක්‍රියා කරන අන්දම ගැන—පරීක්ෂා කිරීමට යෑම එතරම් ඵලදායි හෝ සතුටුදායක කරුණක් නො වේ. නමුත් යම් නීතිඋල්ලංඝණයක් සිදුවී යැයි අවධාරණයෙන් පෙනියයි නම් එම නඩුවිභාගය ඒ අයුරින් කරගෙන යාම වහාම නතර කළ යුතුය යනු පිළිගත් අධිකරණ ප්‍රතිපත්තියකි. නො දැනුවත්වම ඉඩ ලැබී ඇතිව සිදුවූ ඉහත සඳහන් උල්ලංඝනය තිබිය දී නඩුවිභාගය අවසානය දක්වා ගෙනයාමෙන් ඉතා භයානක ප්‍රතිඵල ඇතිවිය හැකි බව අපට පෙනේ."

ඉතා ගෞරවාන්විතවම මම ඉහත සඳහන් ප්‍රකාශය සමග එකඟ වෙමි.

විත්තිකරුවෙකුගේ නරක චරිතය සම්බන්ධයෙන් ප්‍රශ්න කළ අවස්ථාවක දී විත්තිකරුගේ නිතිඥතැන සිය විරෝධය පළ කරන තාක් බලා නො සිට, විනිශ්චයකාරතුමා විසින් ම එ වැනි ප්‍රශ්න නවතාලීම ඔහුගේ යුතුකම යැයි ද, යම් හෙයකින් එ වැනි ප්‍රශ්නයක් අත් වැරැද්දකින් හෝ අසන ලද නම්, එ වැන්නකින් සිත පෙළඹීමට ඉඩ නො තබන ලෙස ජූරියට කියා සිටීම විනිශ්චයකාරතුමාගේ යුතුකම යැයි ද, එ වැනි ප්‍රශ්නයකින් විත්තිකරුට හානි වන අන්දමේ පිළිතුරක් සාක්ෂිකරුවෙකු දුන් අවස්ථාවක දී, එ වැනි පිළිතුරක් නො සලකා හරින ලෙස විනිශ්චයකාරතුමා ජූරියට කියා ඇතත් නැවත විභාගයක් සඳහා කරන ඉල්ලීමකට ඉඩ දිය යුතු යයි ද රැජින එ. කොතලාවල, 52 වැනි න. නී. වාර්තාවේ 265 පිටුව, නඩුවේ දී ශ්‍රේෂ්ඨාධිකරණයේ ජ්‍යෙෂ්ඨ විනිශ්චයකාර මෝස්ලි විනිශ්චයකාරතුමා ප්‍රකාශ කර තිබේ

එම නඩු තීන්දුවේ මෙහි පහත සඳහන් මැක්ස්වෙල් එ. ප්‍රසිඩ පැමිණිලි අධ්‍යක්ෂක (103 ලෝ ජර්නල්, කේ. බී. 501 පිටුවේ) නඩු තීන්දුවෙන් පහත සඳහන් ප්‍රකාශය සඳහන් කර ඇත. "එ වැනි ප්‍රකාශයකින් ජූරියේ සිත්වල ඇති වන ඉමහත් විපාක නිසා, මෙම සාක්ෂි කොටස ජූරිසභාව ඇතුළත් කර ගැනීම නිසා එම තීන්දුවට හේතු නොවී යැයි කීමට නො හැකි ය".

එම නඩු තීන්දු සිත්හි ධාරණය කර ගෙන මෙම නඩුවට ඇතුළත් කර ගෙන ඇති සාක්ෂි සලකා බැලිය යුතු ය. එම සාක්ෂිය පැමිණිල්ලේ සාක්ෂිකරුවෙකුගෙන් හෝ විත්තියේ සාක්ෂිකරුවෙකුගෙන් හෝ විත්තිකරුවෙකුගෙන් ම විය හැකි ය. එයින් වෙනසක් නැත. එමෙන් ම එම සාක්ෂිය දී ඇත්තේ විත්තියේ හෝ පැමිණිල්ලේ නිතිඥතැනගේ හෝ ජූරිසභාවේ නායකයාගේ හෝ විනිශ්චයකාරතුමාගේ ප්‍රශ්නයට කෙළින්ම දුන් පිළිතුරක් හෝ කිසි බලාපොරොත්තුවක් නැතිව නිරායාසයෙන් ම සාක්ෂිකරුගෙන් කියැවුණ දෙයක් වුව ද එයින් වෙනසක් නැත. සාක්ෂිය ඇතුළත් වූවාට පසු, එම සාක්ෂියෙන් විත්තිකරුට එයින් හානියක් විය හැකි ද යන්න උසාවිය මගින් ඉතා කල්පනාකාරීව සලකා බැලිය යුතු ය. මෙ වැනි ප්‍රශ්න සලකා බැලිය යුත්තේ එක් එක් නඩුවකට සම්බන්ධ සිද්ධීන් සහ කරුණු ගැන සැලකිල්ලෙන් යුක්තව ය. මෙම නඩුවේදී විත්තිකරු සාක්ෂි දෙමින් කියා සිටියේ බරපතල තුවාළ සිදු කිරීම ගැන වගකීම තමා භාරගන්නා නමුත්, සිඩිය ඇතිවූයේ ඇත්ත වශයෙන් ම තමාට වඩා ශක්තිමත් වූ මියගිය තැනැත්තා විසින් තමාට මුලින් ම අතින් පහර දීම නිසා යැයි කියා සිටියේ ය.

ඒ අනුව ජූරියට විසඳීමට ඇති මූලික කරුණ නම් විත්තිකරු කිසිම පෙළඹීමක් නොමැතිව මියගිය තැනැත්තාට පහර දුන්නේ ද, එසේ නැත්නම් විත්තිකරු කියා සිටින අයුරු, මියගිය තැනැත්තා ඔහුට පහර දුන් විට ඔහු මියගිය තැනැත්තාට පහර දුන්නේ ද යන්නය.

පැමිණිල්ල සහ විත්තිය අතර ඇති පරතරය මෙ තරම් පටුවූ අවස්ථාවක දී, මීට ඉහත නඩුවක දී විත්තිකරු විසින් ඊට අදළ වකවානුවේ දී ඒ සිඩියෙන් මියගිය තැනැත්තා ඔහුට (විත්තිකරුට) පහර දුන් බව සාක්ෂියෙන් කියා සිටිය ද ඇත්ත වශයෙන් ම පොලිසිය විසින් මියගිය තැනැත්තාට නොව විත්තිකරුට විරුඬව ඒ සම්බන්ධයෙන් ද නඩු පැවරීම ගැන සඳහන් වෙන සාක්ෂිය විත්තිකරුගේ නිදහස ගැන සලකා බලන විට ජූරියට එ වැන්නක් තම සිත් වලින් අමතක කර දැමීම අමාරු කරුණකි.

වෙන නඩුවක දී මෙ වැනි සාක්ෂි කොටසක් විත්තිය ගැන අපක්ෂපාතව සලකා බැලීමට බාධකයක් වශයෙන් මා සමහර විට නො සිතීමට ඉඩ තුබුණ නමුත් මේ නඩුවට අදළ කරුණු ගැන සලකන විට, මෙම සාක්ෂි කොටස ඇතුළත් වීම නඩුව තව දුරටත් ගෙන යාමට ඇති බාධකයක් ලෙස සලකමි. මෙම නඩුවේ තීරණය ගන්නා අවස්ථාවේ දී ඉහත කී සාක්ෂි කොටස ජූරියට—එ නම් ජූරි සභාවේ මහතුන් සත්දෙනාට—සිය සිත් වලින් පැත්තකට දමා තබා ගැනීමට පිළිවන්වේ යැයි කිව නො හැකි ය. මෙය පළපුරුදු නිතිඥයෙකුට වුව ද අමතක කර දැමිය නො හැකි තරම් අපහසු කටයුත්තකි.

එම නිසා මීට ඉහත අවස්ථාවක දී මියගිය තැනැත්තා විසින් තමාට පහරදුන් බවට පොලිසියට පැමිණිල්ලක් කරන ලදුයි විත්තිකරු කියා සිටිය ද පොලිසිය ඔහුට විරුද්ධව නඩු පැවරීම නිසා ජූරිය එයින් පෙළඹීමට ඉඩ ඇතියයි මා කියා සිටිනවිට ජූරියට අපහාසයක් නොවෙනවා ඇත. තත්ත්වය මෙසේ නම්, එම පිළිතුරේ වැදගත්කම, එ නම් විත්තිකරු පොලිසියට අසත්‍ය ප්‍රකාශයක් කිරීම සහ දෙවනුව විත්තිකරුට පහර දීම සම්බන්ධයෙන් චෝදනා ලැබීම යන කරුණු එකරාශි වීමෙන් ඇති වෙන ප්‍රතිඵලය නම් ඉහතින් ම විසින් ගෙන හැර දක්වන ලද නඩු තීන්දු දෙකින්ම දක්නට ලද වැනි අවස්ථාවක් ඇති වීමයි. එම නිසා නැවත නඩු විභාගයක් ඇති විය යුතු ය.

මේ කරුණු නිසා, ජූරි සභාව විසුරුවා හැර අළුත් ජූරියක් ඉදිරියේ නඩු විභාගය පැවැත් වීමට නියම් කිරීම හැර අන් කිසිවක් කළ නොහැකි ය.

නැවත විභාගයට යවන ලදී.

අධිනීතිඥ ඩී. ඇස්. විජේසිංහ මහතා විසින් පරිවර්තනය කරන ලදී.

ගරු ශ්‍රී ස්කන්ධ රාජා සහ මානිකවාසගර් විනිශ්චයකාරතුමන් ඉදිරිපිට

එඩ්වඩ් එ. ධම්මසේන*

සු: උ: අංකය: 258/1963—දි: උ: (අවසාන) මහනුවර, ඇල් 7024.

වාද කළේ සහ තීන්දු කළේ : 1964.12.2.

ඉඩම්හිමියා සහ බදුකරු—මාසේ පළමුවෙනි දින පටන්ගත් බද්දක්—1962.11.30 වෙනි දින පිටවී යාමට ඉඩම් හිමියා විසින් දුන් දැන්වීමක් බදුකාරයා විසින් 1962.8.30 දින ලැබීම—එම දැන්වීම නීත්‍යානුකූලව ප්‍රමාණ ද?

තීන්දුව: (1) මාසයේ පළමුවෙනි දිනක පටන්ගත් බද්දක් සම්බන්ධව ඉඩම්හිමියා 1962.11.30 වෙනි දිනට හෝ ඊට පෙර ඉඩමෙන් පිටවී යාමට යයි කියා දෙන ලද දැන්වීමක් 1962.8.30 වෙනි දින ඔහුගේ බදුකරුට ලැබීමෙන් එය නීත්‍යානුකූල පිටවීයාමේ තුන්මාසයක දැන්වීමක් වන්නේ ය.

(2) මාස්පතා වූ බද්දක් සම්බන්ධව ඒ ඒ මාසයේ බද්ද පටන්ගන්න දවසට පෙරාතුව එම ඉඩමෙන් ඊලඟ මාසයේ අන්තිම දවසේ පිටවී යාමට ලිත්-මාසයක (calendar month) දැන්වීමක් දී එය බදුකරුට එසේම ඒ මාසයේ බද්ද පටන් ගන්නා දවසට පෙරාතුව ලැබුනු විට එම දැන්වීම නීත්‍යානුකූල සැහෙන්නක් වේ.

අනුගමනය නොකළ නඩු තීන්දු: අබේවික්‍රම එ. කරුණාරත්න, ස.ල.නි. 63 කා. 23 පිට.

නීතිඥවරු: සී. ආර්. ගුණරත්න, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
වර්නන් ජොන්ක්ලස්, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා

මේ නඩුවේ බද්ද පටන්ගත්තේ එක්තරා මාසයක මුල දවසේ යි. ඉඩමෙන් 1962.11.30 වෙනි දින පිටවී යාමට යයි එවූ දැන්වීම 1962.8.30 වෙනි දින බදුකරුට ලැබුනි. මේ ඉඩමට අදල ගෙවල් කුලි පාලන පණත අනුව තුන්මාසයක දැන්වීමක් දීමට නියමයි.

ඇපැල්කරු වෙනුවෙන් ලංකා සතිපතා නීති වාර්තාවේ 63 වෙනි කාණ්ඩයේ 23 වෙනි පිටේ පලවී ඇති අබේවික්‍රම එ. කරුණාරත්න යන මගේ තීන්දුවේ පිහිට සොයයි. එම නඩුවේ මම දුන් තීන්දුව නම් එම බද්ද මාසයේ පළමු වෙනි දින පටන්ගත් නිසා 1959.10.13 වෙනි දින 1959.11.30 වෙනි දින පිටවීමට දුන් දැන්වීම නීත්‍යානුකූල දැන්වීමක් නොවන නිසා ඉඩම් හිමියාට ඉඩම භාරගැනීමට බලය ඇත්තේ 1959.12.1 දින පමණක් ය කියා යි. එම නඩුවේ දී නීතිය ගැන මා ගෙන තිබෙන්නේ පටු අදහසකි.

මේ නඩුවේ දී තිබෙන දැන්වීම මා අර්ථ නිරූපනය කරන්ට කැමැති වන්නේ බදුකරු 1962.11.30 දින අවසන්වන අවස්ථාව වනතුරු සිට පිටවී යාහැකි බවටයි. ඔහුට 1962.11.30 දිනට මත්තෙන් හෝ එ දින මධ්‍යම රාත්‍රිය වන තුරු නැවතී සිටීමට හිමිකම තිබේ. මේ නඩුවේ දී තිබෙන පිටවී යාමේ දැන්වීමේ කාලය නීතිය අනුව ප්‍රමාණ යයි මම නිගමනය කරමි. මාස්පතා බද්දක් සම්බන්ධයෙන් ලිත්-මාසයක කාලසීමාවෙන් යුත් දැන්වීමක් මේ රට බල පවත් වන නීතිය අනුව සැහේයයි අපේ අදහසයි. මාස්පතා බද්දක් පටන් ගන්නා දිනයට පෙර දිනක ඊලඟ මාසයේ අන්තිම දින පිටවී යාමට බදුකරුට දුන් දැන්වීමක් ඔහුට ලැබුන විට එය සැහෙන්නකි.

එම නිසා මම ඇපැල ගාස්තුත් සමග නිෂ්ප්‍රභා කරමි.

ගරු මානිකවාසගර් විනිශ්චයකාරතුමා

මම එකඟවෙමි.

ඇපැල නිෂ්ප්‍රභා විය.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා., 44 වෙනි පිට බලනු.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා සහ අලස් විනිශ්චයකාරතුමා ඉදිරිපිට.

හැන්රි ප්‍රැන්සිස්කෝ එ. දෙන් සෙබැස්ටියන් සහ තවත් අය*

(සු. උ. අංක 20/61)

දෙන් ඉන්ප්ලොරීනා ප්‍රැන්සිස්කෝ එ. දෙන් සෙබැස්ටියන් සහ තවත් අය*

(සු. උ. අංක 21/60)

සු: උ: අංක: 20–21/61 (අතුරු)—මීගමු දිස්ත්‍රික් උසාවියේ අංක: 123/පී.

විවාද කළේ : 1964 ඔක්තෝබර් 1 වැනි හා 8 වැනි දිනයන්හි.
සු: උ: නො: 20/61 තීන්දු කළ දිනය: 1.10.64.
සු: උ: නො: 21/61 තීන්දු කළ දිනය: 8.10.64.
සු: උ: නො: 21/61 නඩුව වෙනුවෙන් හේතු ප්‍රකාශ කළ දිනය: 4.11.64.

බාලවයස්කාරයින්ට දුන් තැග්ගක්—තැගිදීමනාකරු ඔවුන්ගේ මව-පිය කෙනෙක් නො වීම—නීත්‍යානුකූල හෝ ස්වාභාවික භාරකාරයෙකු විසින් ඔවුන් වෙනුවෙන් එය නොපිළිගැනීම—එම පිළිගැනීම නීත්‍යානුකූල ද?—විවාහ ලියා පදිංචි කිරීමේ පණත, 21 වෙනි ඡේදය.

මරියා පෙරේරා සහ ස්ටිවන් යන අය අතරේ සිදු වූ විවාහයෙන් එමලියානු නමින් පුතෙක් උපන්නේ ය. ඉන් පසු මරියා පෙරේරා ජුසේ නමැත්තෙකු සමග හොරෙන් පැන ගොස් ඒ අනියම් සම්බන්ධතාවයෙන් ගේබ්‍රියල් යන නමින් පුතෙක් උපන. ජුසේගේ මව වන මරියා අල්විස් විසින් මේ බාලවයස්කාරයින් දෙදෙනාට 1922 දී "පී2" ලකුණු කරන ලද ඔප්පුවෙන් ඉඩමක් තෑගි කරන ලදී. එය ලැබුම්කාරයින් වෙනුවෙන් ජුසේ විසින් එමලියානු තමා හද ගත් පුත්‍රයා වශයෙනුත්, ගේබ්‍රියල් තමාගේ පුතා වශයෙනුත් අඳහස් කර පිළිගන්නා ලදී. ස්ටිවන් එවකට ජීවතුන් අතර සිටියේ ය.

තීන්දුව—: (1) ගේබ්‍රියෙල් අනාචාරයෙන් ලත් දරුවෙක් නිසා ජුසේට කිසි කලෙක ඔහුගේ පියා වශයෙන් ස්වාභාවික භාරකරුවෙක් වීමට නීතියෙන් ඉඩ නැත. එම නිසා ගේබ්‍රියෙල් වෙනුවෙන් ජුසේ පිළිගත් තැග්ග වලංගු නැත. මරියා පෙරේරා පමණක් ගේබ්‍රියල්ගේ ස්වාභාවික භාරකාරයා වන්නේ ය.

(2) එමලියානුට දුන් තැග්ග සම්බන්ධව ද, එමලියානුගේ පියා ස්ටිවන් සහ මව ජීවත් ව සිටින නිසා ඔවුහු ඔහුගේ ස්වාභාවික භාරකාරයෝ වන්නෝ ය. ඒ දෙදෙනාගෙන් කෙනෙකුට පමණක් එම තැග්ග භාර ගන්ට හැකි වේ.

(3) කරුණු මෙසේ නිසා (පී2) දරණ ඔප්පුවෙන් තැගි දෙන ලද දේපල වල හිමිකම ඒ බාලවයස්කාර දෙදෙනාට නො ලැබේ.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා විසින් :—"බාල වයස්කාරයෙකුට දෙන ලද තැග්ගක් ඔහුගේ ස්වාභාවික භාරකාරයෙකු විසින් හෝ නීත්‍යානුකූලව පත්කළ භාරකාරයෙකු විසින් පිළිගත යුතුයි, සිල්වා එ. සිල්වා, 11 න. නී. වා. 161. මේ නියෝගය පසුව ඇති උන, නාගලිංගම් එ. තනබාලසිංහම්, (1952) 54 න. නී. වා. (පී.සී.) සහ නාගරත්නම් එ. ජෝන්, (1958) 60 න. නී. වා, 113, ආදී නඩු තීන්දු ද අනුගමනය කර තිබේ.

නීතිඥවරු:— ජේ. ඒ. ඇල්. කුරේ සහ ඩී. ඒ. වී. තේවරප්පේරුම, සු: උ: අංක: 20/61 යේ දෙවැනි චිත්තිකාර-ඇපැල්කරු වෙනුවෙන් හා සු: උ: අංක: 21/61 යේ දෙවැනි චිත්තිකාර-වගඋත්තරකරු වෙනුවෙන්.

ටී. පී. පී. ගුණකිලක, සු: උ: නො: 20/61 යේ පළමුවැනි චිත්තිකාර-වගඋත්තරකරු වෙනුවෙන් හා සු: උ: නො: 21/61 යේ පළමුවැනි චිත්තිකාර-ඇපැල්කරු වෙනුවෙන්.

වී. තිල්ලෙයිනාදන් සහ ඒ. ජේ. ඇල්ප්. පොන්සේකා, පැමිණිලිකාර-වගඋත්තරකරු වෙනුවෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා

මෙම අන්තර ඇපැල් දෙක අවසාන කිරීමේ දී ඇති වූ පමාව පහද දීම අප සතුයි.

1962 ක් සැප්තැම්බර් 6 සහ 24 වන දිනයන්හි, ගරු බස්නායක අග්‍ර විනිශ්චයකාරතුමා හා හේරත් විනිශ්චය-කාරතුමා ඉදිරියේ, මුලින් අසන ලදුව, මේ ඇපැල් පිළිබඳ තීන්දුව දීම පසු දිනකට කල් තබන ලදී.

නමුත් මාස 18 ට පසු හේරත් විනිශ්චයකාරතුමාගේ මරණය සිදු විය. ඉක්බිති මාස 4 ට පසු බස්නායක අග්‍ර විනිශ්චයකාරතුමා විශ්‍රාම ගත්තේය. අප විසින් ඇසූ වාරයේ පළමු දිනයේදීම, අංක 20/61 දරන ඇපැල් සාරවත් කරුණු වලින් තොර වූයෙන් එය නිෂ්ප්‍රභා කෙළෙමු. එවිට අපි තිල්ලෙයිනාදන් මහතාට තර්ක කරන්නට ඇරයුම් කෙළෙමු. එහෙත් ඒ මහතාට තර්ක කිරීමට තරම් සනිපයක් තිබුනේ නැත.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 67 වෙනි කා., 52 වෙනි පිට බලනු.

ඒ හෙයින් 1964 ඔක්තොම්බර් මස 8 වැනි දින, ඔහුගේ තර්කයන් අසා, නෝ: 21/61 දරන ඇපෑලට ඉඩ දී ගාස්තු නියම කෙළෙමු. එකී තීන්දුවට තුඩුදුන් හේතූන් ප්‍රකාශනය කිරීම පසු දින වාරයකට කල් තබන ලදී.

ඒ හේතූන් දැන් මෙහි ලා සඳහන් කරමු. මෙහි හුදෙක් ම විසඳිය යුතු නීති ප්‍රශ්නය වී ඇත්තේ වයස් අසම්පූර්ණ වුවන්ට දෙන ලද ත්‍යාග ''හාර ගැනීම'' වලංගු දැයි යන්නයි.

13.1.1922 දින දරන නෝ: 15373 ඔප්පුවෙන් (පී2) මරියා අල්විස් තැනැත්තිය විසින් කෝට්ටේ මුහන්දිරම්ගේ එමලියානු රුද්‍රිගු සහ පොන්විර ආරච්චිගේ දෙන් ගාබ්රියල් යන අයට ත්‍යාගයක් දෙන ලදී. මේ දෙදෙන මරියා පෙරේරා නැමැත්තියගේ බාල වයස්කාර දරුවන් වන අතර, ''ත්‍යාගකරු'' වන මරියා අල්විස් මරියා පෙරේරා හා සමග ඥාති සම්බන්ධයක් තිබෙන බවක් නො පෙනේ.

මරියා පෙරේරා විවාහ වූයේ ස්ටීවන් රුද්‍රිගු සමග ය. එමලියානු ඔවුනට උපන් දරුවා ය. ඉක්බිති මරියා පෙරේරා ත්‍යාගකාරියගේ පුත් වන ජුසේ සමග රහසින් පැන ගියා ය. එම පරදුර සේවනයෙන් ලැබූ දරුවා ගාබ්රියල්ය. මේ ත්‍යාගය (පී2) පිරිනමන අවස්ථාවේදී ස්ටීවන් රුද්‍රිගු ජීවත්ව සිටියද, ඔහු ජීවත් වූයේ මරියා පෙරේරාගෙන් වෙන්වය. 1923 10. 1. දින දී ඔහු මිය ගියේ ය. [මරණ සහතික [1ඩී5] බලන්න.] පී2 දරන ත්‍යාගය භාරගත් ජුසේ ''මාගේ පුත්‍රයා'' යන හැඟීමෙන් ගාබ්රියෙල් වෙනුවෙන් ද, ''දරුවකු මෙන් හදාගත්'' යන හැඟීමෙන් එමලියානු වෙනුවෙන් ද, එම ත්‍යාගය භාරගත් බව පෙනේ.

වයස් බාලයන්ට කරන ත්‍යාග නීත්‍යානුකූල වන්නේ ඔවුන්ගේ ''ස්වාභාවික හෝ නීත්‍යානුකූල හෝ භාරකරුවන්'' විසින් එම ත්‍යාගය භාරගත් විට ය.

සිල්වා එ. සිල්වා, (1908) 11 න:නී:වා: 161, බලන්න. මෙම ප්‍රතිපත්තිය පසු නඩු තීන්දු වල දී ද පිළිගත් බව පෙනේ. එම තීන්දු සමහරක් නම් **නාගලිංගම් එ. තණබාලසිංහම්**, (1952) 54 න:නී:වා: 121 (ප්‍රිවි කවුන්සලේ) සහ **නාගරත්නම් එ. ජෝන්**, (1958) 60 න:නී:වා: 113.

විවාහ ලියාපදිංචි කිරීමේ ආඥා පණතේ 21 වැනි ඡේදයෙහි (112 ශීඝ්‍රය) මෙසේ පනවයි :—

> ''කිසියම් අයවලුන් අතර නීත්‍යානුකූල විවාහයක් සිදු වුවහොත්, එම විවාහයට පෙර ලැබූ අවජාතක දරුවන්, නීත්‍යානුකූල කිරීමේ බලයක් පවත්නේ ය. එසේ නො වන්නේ එම දරුවන් පරදුර සේවනයෙන් ජනිත වූවන් වුවහොත් පමණි.''

පී2 ලියන දිනයේ දී, ජුසේ ගාබ්‍රියල්ගේ ස්වභාවික භාරකරු නොවිය. සත්‍ය වශයෙන්ම සෑම කලකම ඔහු ගාබ්‍රියල්ගේ ස්වභාවික භාරකරු වීම, තහනම් කරනු ලැබ සිටියේ ය. එ බැවින් ගාබ්‍රියල් වෙනුවෙන් ඔහුට එම ත්‍යාගය නීත්‍යානුකූලව පිළිගත නො හැකි විය. අවජාතක දරුවකුගේ ස්වභාවික භාරකරුවා මව පමණක් හෙයින්, එසේ කළ හැකිව තිබුනේ මරියා පෙරේරාට පමණි.

එමලියානු වෙත පිරිනමන ලැබූ ත්‍යාගය පිළිබඳවැ කරුණු මෙසේ යි. එවකට සිටි ඔහුගේ පියා වන ස්ටීවන් රුද්‍රිගු සහ මරියා පෙරේරා, ඔහුගේ ස්වභාවික භාරකරුවන් හෙයින් මෙම දෙදෙනාගෙන් එකකුට පමණකි එම ත්‍යාගය නීත්‍යානුකූලවැ පිළිගැනීමට හැකි වූයේ.

මේ හේතූන් නිසා, පී2 දරන ත්‍යාගය භාර නො ගැනීම නිසා අවලංගු විය. එ බැවින්, එමලියානු සහ ගාබ්රියල් යන දෙපොලට හිමිකම් සතු කිරීමක් එයින් නො කෙරේ. මේ අයගේ අයිතිකම් උඩය, පැමිණිලිකරු අයිතිය ඉල්ලුම් කරන්නේ. මරියා අල්විස් විසින් ජුසේට එම ත්‍යාගය භාර ගැනීමට අවසර දී ඇති බව හා එම පිළිගැනීම නීත්‍යානුකූල බව පෙන්වන තර්ක අපගේ ප්‍රසාදයට ලක්නොවේ. මේ තර්කයට උපකාර වශයෙන් සඳහන් නඩු වාර්තා සියල්ල ම දෙමටුපියන් විසින් තම බාල වයස් දරුවන් වෙත දෙන ලද ත්‍යාගයන් පිළිබඳව ය. ත්‍යාග හිමි බාල වයස්කාර දරුවන්, වෙනුවෙන් දෙමවුපියනට එම ත්‍යාග භාර ගැනීම නො හැකි වීම නිසා ඔවුහු එම ත්‍යාගයන් භාර ගැනීමට අන්‍යයන්ට බලය හෝ අවසර දී තිබේ.

[**සාධක : අබේවර්ධන එ. වෙස්ට්**, (1957) 58 න:නී:වා: 313 (ප්‍රිවි කවුන්සල්), **නාගරත්නම් එ. ජෝන්**, (1958) 60 න:නී:වා: 113; **ප්‍රැන්සිස්කෝ එ. කොස්තා**, (1888) 8 සු:උ:ව: 189)].

මෙය බෙදුම් නඩුවක් හෙයින් පැමිණිලිකරුගේ නඩුව, මෙහි දී හා පහල උසාවියේ දී පළමුවෙනි විත්තිකාර-ඇපැල්කරුට අයවිය යුතු ගාස්තු වලට යටත් කොට, ඇපෑල නිෂ්ප්‍රභා කරනු ලැබේ. පළමුවැනි විත්තිකරුගේ ඇපෑලට ඉඩ දෙන ලද නමුත්, මේ නඩුවේ කරුණු අනුව ඔහු ද හිමිකම් සතුවීමේ ප්‍රකාශනයට සුදුසු නොවේ.

අලස් විනිශ්චයකාරතුමා

මාගේ සහෝදර ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා විසින් ප්‍රකාශ කරන ලද මත හා දෙන ලද නියෝග වලට මම එකඟ වෙමි.

පැමිණිලිකරු හිමිකම් සතු කිරීමේ බලය ඉල්ලුම් කළේ 13.1.22 දින දරන, අංක: 15373 ඇති ත්‍යාග ඔප්පුවේ (පී2) මාගියෙනි. මේ ඔප්පුවෙන්, ත්‍යාගකරු මරියා අල්විස්, ඇතැම් ඉඩම් කොටස් බාලවයස් කරුවන් වූ, එමලියානු රුද්‍රිගු හා පොන්විර ආරච්චිගේ දෙන් ගාබ්රියෙල්වෙත ත්‍යාග කරනලදී. පී2 දරන ත්‍යාගය භාර ගත් ජුසේ ''මාගේ පුත්‍රයකුය'' යන හැඟීමෙන් ගාබ්රියල් වෙනුවෙන්ද, ''දරුවකු මෙන් හදාගත්'' හැඟීමෙන් එමලියානු වෙනුවෙන්ද, ත්‍යාගය භාරගත් බව පෙනේ.

මේ ඇපෑලේ මතු වී ඇති එකම ප්‍රශ්නය නම්, ජුසේ විසින් බාලවයස්කාර දරුවන් දෙදෙනා වෙනුවෙන් ත්‍යාගය භාර ගැනීම වලංගු ද යන්නයි.

එමලියානු මරියා පෙරේරා සහ ස්ටීවන් රුද්‍රිගුගේ පුතෙකි. මේ දෙදෙන පී2 ත්‍යාගය සම්පා නය කළ

අවස්ථාවේ දී ජීවත් ව සිටියහ. එම නිසා මේ දෙදෙනා-ගෙන් එකකුට, එමලියානුගේ සවහාවික හාරකරු වීමයෙන්, න්‍යාගය හාර ගත හැකි විය. ජුසේ සහ මරියා පෙරේරාගේ පරදුර සම්බන්ධයෙන් ජාතක චූවකි ගාබ්‍රියල්. ඔහුගේ සවහාවික හාරකරුවා තම මව වන මරියා පෙරේරා න්‍යාග ඔප්පුව සම්පාදනය කළ කාලයේ දී ජීවත් ව සිටියෙන්, ගාබ්‍රියල් වෙනුවෙන් න්‍යාගය හාර ගැනීමට හැකි චූවා ය. එම නිසා ජුසේ විසින් න්‍යාගය හාර ගැනීම අයෝග්‍ය වන අතර අයිතිය සතු කිරීමේ බලය පැමිණිලිකරු වෙත නො පැවරේ.

1 වෙනි චිත්තිකාර-ඇපැල්කරුගේ ඇපෑලට ඉඩ දෙන ලදී.

2 වෙනි චිත්තිකාර-ඇපැල්කරුගේ ඇපෑල නිශ්ප්‍රභා විය.

(පරිවර්තනය:— ගැමුණු සෙනෙවිරත්න විසිනි.)

ගරු බස්නායක අග්‍රවිනිශ්චයකාරතුමා සහ අබේසුන්දර විනිශ්චයකාරතුමා ඉදිරිපිට

පිකිරිබණ්ඩා එ. ලොකුමැණිකා සහ තවිත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ අංකය: 190/61 (එෆ්ජ්)—මහනුවර දිස්ත්‍රික් උසාවිය, අංක: ඇම්. ආර්. 7866.

විවාද කළ දිනය : වෂී 1963 සැප්තැම්බර් 19 සහ 20, ඔක්තෝම්බර් 18.
තීන්දු කළ දිනය : වෂී 1963 ඔක්තෝම්බර් 18.

සිවිල් නඩු විධාන සංග්‍රහයේ 121 සහ 175 වන ඡේද—උසාවියට ඉදිරිපත් කළ යුතු සාක්ෂිකරුවන්ගේ ලේඛනයෙහි නම ඇතුලත් නො වූ කෙනෙක් සාක්ෂි දීම—ඔහුගේ නම ලේඛනයෙහි ඇතුලත් ව තිබේ යයි වැරදි විශ්වාසයකින් යමෙකුට සාක්ෂි කීමට ඉඩදීම—මෙ වැනි සාක්ෂියක නීත්‍යානුකූලත්වය.

සිවිල් නඩු විධාන සංග්‍රහයේ 121 වන ඡේදයේ සඳහන් පරිදි උසාවියට ඉදිරිපත් කළ සාක්ෂිකරුවන්ගේ ලේඛනයෙහි නම ඇතුලත් නො වූ සාක්ෂිකරුවකු විසින් මේ නඩුවේ සාක්ෂියක් දෙන ලදී. මෙසේ කිරීමට උසාවියෙන් ඉඩ දෙන ලද්දේ මේ සාක්ෂිකරුවා උසාවියට ඉදිරිපත් කළ ලේඛනයෙහි නම වැටී ඇති වෙනත් කෙනෙක් යයි පැමිණිලිකරුගේ අධිනීතිඥවරයා උසාවියට වැරදි ලෙස ඒත්තු ගැන්වූ නිසා ය. සිවිල් නඩු විධාන සංග්‍රහයේ 175 වන ඡේදයෙන් සාක්ෂිකරුවන්ගේ ලේඛනයක නම නොමැති කෙනෙකුගේ සාක්ෂිය, යම් විශේෂ අවස්ථාවන් වල දී හැර පිළිගත නො හැක.

තීන්දුව : සිවිල් නඩු විධාන සංග්‍රහයේ 175 වෙනි ඡේදයට පටහැනි වූ නිසා, මෙ සාක්ෂිය නීතිවිරෝධි ලෙස ඇතුලත් වී තිබේ. එ බැවින් එම සාක්ෂිය පදනම් කොට දුන් මෙ නඩු තීන්දුව ඉවත් කර පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කළ යුතුවේ.

නීතිඥවරු:— රාජනීතිඥ එච්. ඩබලිව්. ජයවර්ධන මහතා, ඩී. ආර්. පී. ගුණතිලක මහතා සමග, චිත්තිකාර-ඇපැලකරු වෙනුවෙන්.

ඇල්. වී. ආර්. ප්‍රනාණ්ඩු මහතා, පැමිණිලිකාර-වගඋත්තරකරුවන් වෙනුවෙන්.

ගරු බස්නායක අග්‍රවිනිශ්චයකාරතුමා

මෙම නඩුවෙහි පැමිණිලිකරුවන් වන තොටගොඩවත්ත මුදියන්සේලාගේ පල්ලෙහාගෙදර ලොකු මැණිකෙ, තොටගොඩවත්ත මුදියන්සෙලාගේ පල්ලෙහාගෙදර බණ්ඩාරමැණිකා සහ තොටගොඩවත්ත මුදියන්සෙලාගේ පල්ලෙහාගෙදර ලීලාවති මැණිකෙ යන අය විසින් මෙහි චිත්තිකරු වන තොටගොඩවත්ත මුදියන්සෙලාගේ පල්ලෙහාගෙදර ටිකිරිබණ්ඩා යන අයට විරුද්ධව ඉඩු පවරා රුපියල් 12,762/- අහිමි ලාභය වශයෙන් ඉල්වනලදී. මෙම අහිමි ලාභය (mesne profits) ඉල්ලන ලද්දේ පැමිණිල්ලේ උපලේඛනයේ සඳහන් වී එහි විස්තර කොට ඇති ඉඩමක් පිළිබඳව ය. අලාභය ඉල්ලා ඇත්තේ නඩු දැමීමට අවුරුදු 3 කට කලින් පටන්-ගැණෙන කාල සීමාවක් පිළිබඳව ය. එනම් වෂී 1959 ඔක්තෝම්බර් මස 27 දයින් පටන් ගෙන ඉකුත් වී ගිය අවුරුදු 3 කට ය. උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයා පැමිණිලිකරුවන්ට නඩු ගාස්තුව සහ රුපියල් 3,314/- ක මුදලක් අය කර ගත හැකි පරිදි නඩු තීන්දුව දුන්නේ ය. එයට පටහැනි ව මෙම අභියාචනය ඉදිරිපත් කෙරිණි.

පැමිණිලිකරුගේ නීතිවේදියා මෙහි දී ප්‍රධාන වශයෙන් සැලකර සිටියේ යටිගමමන සකලසූරිය මුදියන්සෙලාගේ ටිකිරිබණ්ඩා නැමැත්තෙකුගේ සාක්ෂිය නීත්‍යානුකූලව නඩුවට ඇතුලත් කළ නො හැකි බව ය. මෙයට හේතුව වශයෙන් ඔහු දැක්වූයේ එම සාක්ෂිකරුගේ නාමය සිවිල් නඩුවිධාන සංග්‍රහයේ 121 වන ඡේදයට අනුව ඉදිරිපත් කරන ලද සාක්ෂිකරුවන්ගේ ලේඛනයෙහි එම සාක්ෂිකරුවාගේ නම ඇතුලත් වී නො මැති බව ය.

වෂී 1960 ජුනි මස 1 දින මෙම නඩු දිනයට කලින් පැමිණිලිකරුගේ නීතිඥ මහතා විසින් ඉදිරිපත් කරන ලද සාක්ෂි ලේඛනයෙහි යටිගමමන පදිංචි සකලසූරිය මුදියන්සෙලාගේ ටිකිරිබණ්ඩාගේ නම ඇතුලත් වී නැත. වෂී 1960 ජුනි මස 22 වන දින ඉදිරිපත්

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කෘ.. [illegible] දැක්වෙනු.

කරන ලද අතිරේක ලේඛනයකැයි විස්තර කෙරෙන ලේඛනයක පොත්තපිටියේ පදිංචි ටිකිරිබණ්ඩා නොටගොඩවත්ත නැමැත්තෙකුගේ නමක් ඇතුලත් ව තිබේ. තමා සකලසූරිය මුදියන්සෙලාගේ ටිකිරිබණ්ඩා යයි කියූ සාක්ෂිකරු සාක්ෂිකූඩුවට කැඳ වූ විට චිත්තිකරුගේ අධිනීතිඥවරයා එම සාක්ෂිකරුගේ නම සාක්ෂිකරුවන්ගේ ලේඛනයෙහි නොමැති නිසා එම සාක්ෂිකරු සාක්ෂි දීම ගැන විරෝධය පළ කළේ ය. එවිට පැමිණිලිකරුගේ අධිනීතිඥවරයා වෂී 1960 ජූනි මස 22 වෙනි දින ඉදිරිපත් කරන ලද සාක්ෂිකරුවන්ගේ නාම ලේඛනය දෙස අධිකරණයෙහි අවධානය යොමු කොට සකලසූරිය මුදියන්සෙලාගේ ටිකිරිබණ්ඩා නැමති සාක්ෂිකරුවා ටිකිරි බණ්ඩා නොටගොඩවත්තෙ නැමති පුද්ගලයා යැයි උසාවිඝට ඒත්තු ගැන්වී ය. උගත් විනිශ්චයකරුගෙන් තමා නොටගොඩවත්තෙ කෙනෙකු දැයි ප්‍රශ්න කළ විට එය එසේ යයි පිළිතුරු ලද්දෙන් සාක්ෂිකරුට සාක්ෂි කීමට ඉඩ දී තිබේ. උගත් විනිසකරු මෙසේ කරන ලද්දේ ටිකිරිබණ්ඩා නොටගොඩවත්ත නමින් සඳහන් වූ සාක්ෂිකරුවා මෙම සාක්ෂිකරුවා යයි ඔහුට ඒත්තු ගැන් වූ නිසා ය. අනතුරුව පැමිණිලිකරුවන්ගේ නීතිඥවරයා ටිකිරිබණ්ඩා නොටගොඩවත්තෙ නමැත්තකු සාක්ෂියට කැඳවීමට අධිකරණය ඉදිරියෙහි ඉල්ලීමක් කළ පසු එම සාක්ෂිකරුවා දැනටම කැඳවා තිබේ යයි මෙයට ම විරුඬ වූ චිත්තිකරුගේ නීතිඥවරයා වෂී 1961 පෙබරවාරි මස 20 වෙනි දින නඩු විභාගයේ සටහන් වෙත ද උසාවියේ අවධානය යොමු කර විය. එ විට පැමිණිලිකරුවන්ගේ නීතිඥවරයා එකී දින කැඳවන ලද සාක්ෂිකරුවා නොටගොඩවත්තේ ටිකිරිබණ්ඩා සකලසූරිය යැයි කරුණු සැළ කළේ ය. නමුත් තමාගේ ඉල්ලීම ගැන ඔහු තරයේ කරුණු නො දක්වා ටිකිරිබණ්ඩා නොටගොඩවත්ත නැමැත්තා කැඳවීම අවශ්‍ය දැයි සලකා බැලීමට අවස්ථාවක් ලබා ගත්තේ ය. නමුත් එම ටිකිරිබණ්ඩා නොටගොඩවත්ත නැමත්තා නො කැඳවා උගත් නීතිඥවරයා තමාගේ නඩුව නිම කළේ ය. මේ අනුව සකලසූරිය මුදියන්සෙලාගේ ටිකිරිබණ්ඩා නැමත්තා නියම වශයෙන් නම සාක්ෂි ලේඛනයෙහි ඇතුලත් නො වන කෙනෙකැයි ද ඔහු විසින් කියන ලද සාක්ෂිය නඩුවෙන් ඉවත් කළ හොත් මෙම නඩුව සථාපිත කිරීමට අවශ්‍ය වෙනත් සාක්ෂි නැති නිසා එය අසාඪික විය යුතු යැයි ද සැල කරමින් අප ඉදිරියෙහි කරුණු දක්වන ලදි. සිවිල් නඩුවිධාන සංග්‍රහයෙහි 175 වන ඡේදයෙහි මෙසේ පැන වී තිබේ :—

> "121 වන ඡේදයෙහි සඳහන් පරිදි යම් කිසි පාර්ශවකරුවෙකු විසින් කලින් උසාවියට ඉදිරිපත් කරන ලද සාක්ෂිකරුවන්ගේ ලේඛනයෙහි ඇතුලත් නොවූ කිසිම සාක්ෂිකරුවෙකු කිසිම පාර්ශවකරුවෙකු විසින් කැඳවිය නො හැක. කෙසේ වෙතත් අධිකරණයට අවශ්‍ය නම් තම අභිමතය පරිදි එ බඳු ක්‍රියා මාර්ගයක් ගැනීම ප්‍රඥාගෝචර යයි සැලකෙන අයුරු විශේෂ කරුණු ඇති බව පෙනී ගියහොත් යුක්තිය ඉෂ්ට කිරීමේ අභිලාෂයෙන් ඉහත සඳහන් පරිදි එම ලේඛනයෙහි නම නො මැති සාක්ෂිකරුවෙකු වුවද කැඳවීමට අධිකරණයට බලය තිබේ."

දැන් 121 වන ඡේදය සලකා බලමු.

> " (1) චිත්තිකරුවෙකුට බාර දීමට සිතාසි නිකුත් කළ පසු උසාවියට හෝ මේ සඳහා උසාවිය මගින් පත් කරන ලද නිලධාරියෙකුට ඉල්ලීමක් ඉදිරිපත් කිරීමෙන් එම නඩුවේ සාක්ෂි දීමට හෝ එයට අදාළ ලිපි ලේඛනයක් ඉදිරිපත් කිරීමට හෝ අවශ්‍ය සිතාසි ලබා ගැනීමට පාර්ශවකරුවෙකුට පිළිවන.
>
> " (2) විනිශ්චයකරු සෑහේ යයි සිතන කාලසීමාවකට කලින්, විරුඬ පාර්ශවයට නිවේදනයක් යවා එ බඳු සිතාසි ඉල්ලා සිටින පාර්ශවකරුවා විසින් සාක්ෂිකරුවන්ගේ නාමලේඛනයක් උසාවියට ඉදිරිපත් කළ යුතු ය. අනිත් පාර්ශවකරුවන්ගේ කැමැත්ත සඳහන් වන ලේඛනයක් නඩු දිනට කලින් ඕනෑම විටක ඉදිරිපත් කළ හැක."

මෙම නඩුවේ සකලසූරිය මුදියන්සෙලාගේ ටිකිරිබණ්ඩා නැමැත්තාට සාක්ෂි කීමට ඉඩ දෙන ලද්දේ ඔහුගේ නම සිවිල් නඩුවිධාන සංග්‍රහයේ පැනවීම් වලට අනුකූලව ලේඛනයෙහි ඇතුලත්ව තිබේ ය යන වැරදි විශ්වාසයකින් බව පෙනේ. නමුත් ඇත්ත වශයෙන් පසුව අනාවරණය වූ පරිදි ඔහුගේ නම නියම සාක්ෂි ලේඛනයෙහි ඇතුලත් වී නො තිබිණි. එ බැවින් යුක්තිය පසඳීමෙහි අවශ්‍යතාවයක් පැනනැඟුණු විටක එසේ කිරීම ප්‍රඥාගෝචර යයි නැඟුණු කලක උසාවියට මෙ බදු පියවරක් ගැනීමට ඉඩ තිබෙනු විනා අන් කිසි විටක මෙවැනි සාක්ෂිකරුවෙකුට සාක්ෂි කීමට ඉඩදීම සිවිල් නඩුවිධාන සංග්‍රහයේ 175 වන ඡේදයෙන් වැලකී තිබේ. සකලසූරිය මුදියන්සෙලාගේ ටිකිරිබණ්ඩා නැමති සාක්ෂි ලේඛනයෙහි නො මැති සාක්ෂිකරුවා කැඳවීම යුක්තිය පසඳීමෙහි ලා මේ කරුණු අනුව අවශ්‍යය ද යන්න උගත් විනිසකරුට සලකා බැලීමට යයි ඉල්ලීමක් නො කරන ලද්දේ එම සාක්ෂිකරුවාගේ නම සාක්ෂි ලේඛනයෙහි තිබේ ය යන වැරදි විශ්වාසයක් විනිසකරුට ඇති කළ බැවිනි. මේ අනුව සලකන විට සකලසූරිය මුදියන්සෙලාගේ ටිකිරිබණ්ඩා නමැති සාක්ෂිකරුවාගේ සාක්ෂිය නීතිවිරෝධී ලෙස ඇතුලත් කොට තිබේ. එ බැවින් එම සාක්ෂිය පදනම් කොට මෙම නඩු තීන්දුව දිය නො හැක. නමුත් උගත් විනිශ්චයකරුගේ තීන්දුව අනුව ඔහු බැස තිබෙන සෑම නිගමනයක් ම මෙම සාක්ෂිය අනුව බැස තිබේ යයි කිව යුතු ය. එම නිසා මෙම අභියාචනයෙහි විත්තිකරු ජය ගත යුතු ය. මේ අනුව උගත් දිස්ත්‍රික් විනිශ්චයකාරවරයාගේ තීන්දුව හා තීන්දු ප්‍රකාශය ඉවත හෙළන අපි පැමිණිලිකරුගේ නඩුව නිෂ්ප්‍රභා කිරීමට මෙයින් නියෝග කරමු. මෙම නඩුවේ සහ පහළ උසාවියේ නඩුවේ ගාස්තුව ද ඇපැල්කරුට අය කර ගත හැක.

ගරු අබේසුන්දර විනිශ්චයකාරතුමා
මම එකඟවෙමි.

ඇපැලට ඉඩ දෙන ලදී.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා සහ අලස් විනිශ්චයකාරතුමා ඉදිරිපිටදී

දෙන් ඇන්තනි එ. ඇස්. ඇස්. ජේ. ගුණසේකර සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයේ ඉල්ලීම් නොා: 222/1962.

විවාද කළ දිනය : 22.9.64.
තීන්දු කළ දිනය : 2.10.64.

සර්ටියෝරේරයි ආඥුවක්—අල්ලස් පරීක්ෂක මණ්ඩලය විසින් පෙත්සම්කරු වැරදිකරුවකු බවට තීන්දු කිරීම සහ දඩයක් ගැසීම—එම මණ්ඩලය අධිකරණ සේවා මණ්ඩලය මගින් පත් නොා කරන ලද නිසා දඩුවම් දීමට බලයක් නැති බව තර්ක කිරීම—ඊට ප්‍රථමයෙන් තීන්දු කළ නඩුවක් අනුගමනය කරමින් දඩුවම ඉවත් කිරීම, නමුත් වරදකරු කිරීමේ නියෝගය ඉතුරුවීම—එම තීන්දුව සහ මුලු විභාගය නිෂ්ප්‍රභාකිරීමට ඉල්ලා මෙම පෙත්සම ඉදිරිපත්කිරීම—ඊට කරුණු වශයෙන් අල්ලස් මණ්ඩලයට විභාග කිරීමටවත් තීන්දුවක් දීමටවත් බලය නැති බව කීම—ලංකා පාලන ක්‍රම සංස්ථාවේ (වගී 1946) 55 වෙනි ඡේදය—මෙම ඉල්ලීම සනාථ කළ හැකි ද?

අධිකරණ සේවා මණ්ඩලය මගින් පත් නොා කරන ලද තුන්දෙනෙකුගෙන් සමන්විත අල්ලස් පරීක්ෂක මණ්ඩලයක් විසින් පෙත්සම්කරු වැරදිකරුවෙකු ලෙස තීන්දු කර රුපියල් දහක දඩයක් ගසන ලදී. ඉහතින් තීන්දුකර තිබුණු සේනාධිර එ. අල්ලස් කොමසාරිස්, 63 න.නී.වා., 313 පිට, යන නඩුව අනුගමනය කරමින් දඩුවම් ඉවත් කළ නමුත් ඒ නඩුවේ නියෝග කර ඇති අන්දමට වැරදිකරු බවට පත් කළ තීන්දුව ඇපෑලේදී වෙනස් නොා කළේ ය. සේනාධිර නඩුවේත් මේ පෙත්සම්කරු ගත් ඇපෑලේ තීන්දුවේදීත් අල්ලස් බලමණ්ඩය පාලන ක්‍රම විරෝධී (unconstitutional) වූවක් වශයෙන් තීන්දු කර නැත. මක්නිසාද ආණ්ඩුවෙන් ඇපැල් පෙත්සමට මූලික විරුඩ කරුණක් ඉදිරිපත් කළ බැවින් විත්තිකරුවන් වෙනුවෙන් පෙනී සිටි නීතිඥයින් අල්ලස් බල මණ්ඩලයට දඩුවම් දීමට බලයක් නැති බව පමණක් කියා සිටි නිසාය.

ඉහත කී ලෙස දඩුවම් පමණක් නිෂ්ප්‍රභා කළ ටික දිනකට පසු අල්ලස් බල මණ්ඩලය පෙත්සම්කරුට විරුඩව පැවරූ නඩුව විභාග කිරීමට වත්, එහි චෝදනා සම්බන්ධ නිසි නියෝගයක් කිරීමටවත්, දඩුවම් නියම කිරීමට වත් බලයක් නැත කියා එම නඩුවේ සියලු විභාගවල ප්‍රතිඵලත් නියෝගත් නිෂ්ප්‍රභා කරනමෙන් ඉල්ලා මේ සර්ටියෝරේරයි පෙත්සම ඉදිරිපත් කරන ලදී.

පෙත්සම්කරු වෙනුවෙන් ඉහත කී තීන්දුවලට පසුව ඇති වූ පියදස එ. අල්ලස් කොමසාරිස්, 64 න. නී. වා, 385 පිට, යන නඩුවේ තීන්දුව උපයෝගි කර ගන්නා ලදී. එහිදී සුප්‍රීම් උසාවිය තීන්දුකර ඇත්තේ පාලන ක්‍රම සංස්ථාවේ 55 වෙනි ඡේදයේ සඳහන් පරිදි අධිකරණ සේවා මණ්ඩලය මගින් අල්ලස් පරීක්ෂණ මණ්ඩලය පත්කර නැති බැවින් එම අල්ලස් මණ්ඩලය විසින් පවත්වනු ලබන සියලු විභාග සහ නියෝග බල ශූන්‍ය ඒවා බවයි.

වගඋත්තරකරු වූ ආණ්ඩුව වෙනුවෙන් ඉදිරිපත් කළ කරුණු මෙසේ යි :—

(ඒ) පෙත්සම්කරුගේ ඇපැල තීන්දු වෙන අවධියේ තිබුන නීතිය පියදස එ. අල්ලස් කොමසාරිස් (ඉහතින් බලන්න) නඩුවෙන් වෙනස් විය;

(බී) පෙත්සම්කරු මින් අදහස් කරන්නේ සුප්‍රීම් උසාවිය දී තිබෙන තීන්දුව නිෂ්ප්‍රභා කිරීමටය යන්නයි.

තීන්දුව:— (1) ඉහත කී පියදසගේ නඩුවෙන් ඊට ප්‍රථමයෙන් තිබුන නීතියක් වෙනස් කළායයි කීම ද පෙත්සම්කරු සුප්‍රීම් උසාවිය විසින් ඔහුගේ ඇපැල සම්බන්ධව දී තිබෙන තීන්දුව නිෂ්ප්‍රභා කිරීමට මේ පෙත්සම ඉදිරිපත් කර ඇතැයි කීම ද හරි නැත.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයේ 67 වෙනි කා., 84 වෙනි පිට බලනු.

(2) ඉහත කී සේනාධිරගේ නඩුවේදීත්, පෙත්සම්කරුගේ ඇපැලේදීත් අල්ලස් බල මණ්ඩලයට අයත් සාමාජිකවරු පාලන ක්‍රම සංස්ථාවේ 55 වෙනි ඡේදය අනුව අධිකරණ සේවා මණ්ඩලය මගින් පත් නොකිරීම නිසා ඔවුන්ට අධිකරණ බල හිමි නැත යන්න තීන්දු නොකළ නමුත් යට කී 55 වෙනි ඡේදය ඒ නඩුවලට මත්තෙන් සිට බලපාන නීතියක් ව තිබුන හෙයින් එය ඒ වකවානුවේ දී බල නොපැවැත් වූ බවක් නොපෙනෙයි.

නීතිඥවරු:— රාජනීතිඥ ඇම්. තිරුවෙල්ලම්, ඇස්. ඒ. ක්‍රොසට්-තම්බයියා සහ කේ. තේවරාජා සමග පෙත්සම්කරු වෙනුවෙන්.

ආර්. ඇස්. වනසුන්දර, රජයේ අධිනීතිඥ, අධිකරණ සහායක වශයෙන්.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා :

සර්ටියෝරේරයි ආඥාවක් ලබාගැනීම පිණිස පහත සඳහන් කරුණු අනුව මෙම ඉල්ලීම ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරන ලදී. අධිකරණ සේවා මණ්ඩලය මගින් පත් නොකරණ ලද මුල් වගඋත්තරකරුවන් තිදෙනා-ගෙන් සමන්විත අල්ලස් පරීක්ෂක මණ්ඩලයක් ඉදිරියේ දෙන් අන්තෝනි නැමති මෙම පෙත්සම්කරුට විරුඬව අල්ලස් කොමසාරිස්තුමා විසින් නඩු පවරන ලදී. දින කීපයක් සාක්ෂි සටහන් කරගත් පසු අල්ලස් පරීක්ෂක මණ්ඩලය පෙත්සම්කරුට විරුඬව අසන ලද නඩුවෙහි චෝදනා වලට ඔහු වැරදිකරු කරමින් ඔහුට රුපියල් 1,000/- ක දඩයක් ගැසී ය. මෙම තීන්දුවට විරුඬව ඇපැල් පෙත්සමක් ඉදිරිපත් කළ පසු මෙම අධිකරණය විසින් 63 නවනීති වාර්තා 313 වන පිටේ **සේනාධිරට විරුඬව අල්ලස් කොමසාරිස්** යන නඩුව සලකා බලා ඔහුගේ දඬුවම සහ දඩය ඉවත් කරන ලදී. **දෙන් අන්තෝනි එ. අල්ලස් කොමසාරිස්,** 64 න.නී.වා., 93 පිට. ඉන්පසු 17.5.1962 දරණ දින පහත සඳහන් කරුණු අනුව අල්ලස් පරීක්ෂක මණ්ඩලයට විරුඬව ඔහු පෙත්සමක් ඉදිරිපත් කළේ ය.

'' (1) පෙත්සම්කරුට විරුඬව මෙම නඩුව ඇසීමට හෝ එහි ඔහුට විරුඬව ඉදිරිපත් වුණු චෝදනා අනුව නියෝගයක් දීමට හෝ දඬුවමක් දීමට හෝ කොයි ලෙසකින්වත් අල්ලස් පරීක්ෂක මණ්ඩලයට බලයක් නොමැත ;

'' (2) අල්ලස් මණ්ඩලය ඉදිරියෙහි පැවැත් වුණු විභාගය අධිකරණ මහිමයෙන් සම්පූර්ණයෙන් තොර ය ;

'' (3) එ බැවින් එහි තීරණය බල ශූන්‍ය වන අතර ම එහි නීත්‍යානුකූල ක්‍රියාත්මක භාවයක් නැත.

මේ කරුණු උඩ අල්ලස් පරීක්ෂක මණ්ඩලයේ තීරණය සහ දෙන ලද නියෝග ඉවත් කරන ලෙස ඔහු යාඥා කර සිටියේ ය.

මේ පිළිබඳ ව පහත සඳහන් නඩු තීන්දු ගැන සළකා බැලීම යෝග්‍ය යැයි හැඟේ:—

(1) **සේනාධිර එ. අල්ලස් කොමසාරිස්** (ඉහත සඳහන්) ;

(2) **දෙන් අන්තෝනි එ. අල්ලස් කොමසාරිස්** (ඉහත සඳහන්) ;

(3) **පියදස එ. අල්ලස් කොමසාරිස්,** (64 න.නී.වා. 385) ;

(4) **රණසිංහ එ. අල්ලස් කොමසාරිස්,** (64 න.නී.වා. 449) ; සහ

(5) **අල්ලස් කොමසාරිස් එ. රණසිංහ,** (66 ලංකා සති පතා නීති සංග්‍රහය, 1)

(6) **අධිරාජයා එ. බෙනොආරි ලාල් සර්මා** (1945) ඒ.සී. 14, රාජාධිකරණය).

ඉහත සඳහන් සේනාධිරගේ සහ දෙන් අන්තෝනිගේ නඩු වල දී රජයේ අධිනීතිඥවරයා සන්සෝනි විනිශ්චයකාරතුමාගේ 63 න.නී.වා., 314 වන පිටේ සඳහන් ඡේදයෙහි ඇතුළත් වී ඇති මූලික විරොධය ඉදිරිපත් කළේ ය.

'' ඇපැල් නඩු විභාගය ආරම්භ වෙත් ම පුල්ලෙ-නායගම් මහතා එම විභාගය පැවැත්වීම ගැන මූලික විරෝධයක් දක්වා කරුණු සැළකළේ ය. එයට හේතුව ඔහුගේ හැඟීම වූයේ ඇපැල්කරුවන් මුළු අල්ලස් පණතෙහි ඇති නීත්‍යානුකූලතාවය අභියෝග කරන බවකි. **අධිරාජයා එ. බෙනෝආරි ලාල් සර්මා,** (1945) ඒ.සී. 14, යන නඩුවේ කරුණු අනුව තර්ක ඉදිරිපත් කළ ඔහු කියා සිටියේ යම් කිසි පණතක් නීත්‍යානුකූල නොවේ යයි සැලකරන කළෙක එම පණතින් ම ලැබෙන අභියාචන බලය (ඇපැල් පෙත්සම් ඉදිරිපත් කිරීමේ බලය) ක්‍රියාත්මක නොකළ හැකි බවයි. මීට පිළිතුරු දුන් එච්. වී. පෙරේරා මහතා තමා සම්පූර්ණ පනතේ නීත්‍යානුකූල බව අභියෝග නොකරනබව සහ අල්ලස් පරීක්ෂක මණ්ඩලය පාලන සම්ප්‍රදා ව්‍යවස්ථානුකූල නොවන බව ද තර්කයක් හැටියට

ඉදිරිපත් නොකරණ බව සඳහන් කළේය. එම නඩුවේ චිත්තිකරුවන් වැරදි කරුවන්බවට පත් වීම ගැන තමා දක්වන විරෝධය වූයේ අල්ලස් පරීක්ෂක මණ්ඩලය කෙනෙකු වැරදිකරුවෙකු බවට පත් කිරීමේ සහ තමන් ඉදිරියේ නඩු පවරන ලද කෙනෙකුට දඩ ගැසීමේ හෝ ඔවුන් සිරකිරීමේ හෝ බලය එම අල්ලස් පරීක්ෂක මණ්ඩලය විසින් ක්‍රියාවෙහි යෙදවීම ගැනය. එම බලය එසේ ක්‍රියාවට යෙදීම වැරදි බව ඔහු පෙන්වා දුනි. 69ඒ දරණ ඡේදයෙන් එම පණතින් ඔහුට ඇපැල් පෙත්සමක් ඉදිරිපත් කිරීමේ බලයක් ලැබී ඇති බව සැල කර සිටි ඔහු ඒ අනුව සිර කිරීමේ සහ දඩ ගැසීමේ තීන්දුව ඉවතලන ලෙස ඉල්ලීමට තමාට අයිතිය තිබේ යයි කියා සිටියේය. තමාගේ සේවා ලාභියාට (client) විරුද්ධව ඔහු වරදකරු බවට පත් කරමින් දුන් තීරණය පාලන ව්‍යවස්ථා විරෝධී යයි තර්ක නොකළ ඔහු තමා විසින් ඉදිරිපත් කළ පරිදි මෙම කරුණු දෙක එකට ඇඳා තිබීම නිසා එම තීරණය එසේ තිබෙන්නට ඉඩ හැරීම සදෙස් බව පෙන්වී ය.''

නමුත් සේනාධිරගේ නඩුවෙහි ඇපැල්කරුගේ නීතිවේදියා අල්ලස් පරීක්ෂක මණ්ඩලය දඩුවමක් දීම නීති විරෝධී යැයි කීමට පමණක් තමාගේ කරුණු ඉදිරිපත් කිරීම සීමා කර ගත් බව පෙනී යනු ඇත. අල්ලස් පරීක්ෂක මණ්ඩලය පාලන ව්‍යවස්ථාවිරෝධී බව කියමින් තර්ක ඉදිරිපත් නොකරන බව ඔහු පෙන්වා දුන්නේ ය. 64 න.නී.වා. 385-394 පිට බලන්න (මෙම නඩුව ඉහත සඳහන් වේ).

සේනාධිරගේ නඩුවෙහි දී (ඉහත සඳහන්) මෙම උසාවිය එම තීන්දුව සහ දඩුවම නිෂ්ප්‍රභා කිරීමට නියෝග කළේ ය. ඉහත සඳහන් දෙන් අන්තෝනිගේ නඩුවෙහි මෙම උසාවිය '' සේනාධිරගේ නඩුවෙහි මෙම උසාවිය දෙන ලද තීරණය අනුව යෑම සුදුසු යයි '' කී නමුත් නියෝගය දී ඇත්තේ '' ඔහු වෙත පවරන ලද රුපියල් 1,000/- හේ දඩය පමණක් ඉවත් කරමිනි. නමුත් සේනාධිරගේ නඩුවෙහි නියෝග කලාක් මෙන් චිත්තිකරු වරදට පත් කිරීම මෙහි දී ඉවත්කර නැත.

පියදසගේ නඩුවෙහි දී ඉහත සඳහන් නඩු වල දී ඉදිරිපත් කරන ලද මූලික විරෝධය යුක්ති යුක්ත නොවන බව මෙම උසාවිය පෙන්වා දී තිබේ.

එම මූලික විරෝධය අනුව කරුණු සැලකූ මෙම උසාවිය සේනාධිරගේ නඩුව සහ දෙන් අන්තෝනි පෙරේරාගේ නඩුවත් තීන්දු කිරීමෙහි උපයෝගී කර ගත් නීතිය ගැන ප්‍රකාශයක් කිරීම තමන් පිට පැවරී ඇතැයි නොසිතූ සේ පෙනෙන බව මෙහි ලා කිව යුතු ය. ඉහත සඳහන් පියදසගේ නඩුවෙහි පමණක් එම බලය තමා පිට පැවරී ඇතැයි සැලකූ නිසා මෙම අධිකරණය ''ලංකා පාලන සංස්ථාවේ (වෂී 1946) 55 වන ඡේදයට අනුව අධිකරණ සේවා මණ්ඩලය විසින් පත් කරන ලද සාමාජිකයන් ගෙන් යුත් අල්ලස් පරීක්ෂක මණ්ඩලයක් ඉදිරියේ කෙරෙන නඩු විභාග බල ශූන්‍ය, ක්‍රියා විරහිත දේ බව තීන්දු කළේ ය. 64 න.නී.වා.. 395 (ඉහත සඳහන්) ලංකා පාලන සංස්ථාවේ 55 වන ඡේදය ක්‍රියාත්මක වූ අවස්ථාවේ සිටම යම් කිසි විනිශ්චය මණ්ඩලයකට අධිකරණ බලය ලැබීමට එහි සාමාජිකයන් අධිකරණ සේවා කොමිෂන් මණ්ඩලයෙන් පත් විය යුතු බව නීතියේ තත්වය යයි කීම නිවැරදි ය. මේ බව සේනාධිරගේ නඩුව සහ දෙන් අන්තෝනිගේ නඩුව තීන්දු කළ විට ප්‍රකාශ නොකිරීම නිසා එය නීතිය යයි කිසිසේත් කිව නොහැක. වනසුන්දර මහතා කරුණු සැලකළ පරිදි ඉහත සඳහන් පියදසගේ නඩුව නීතිය වෙනස් කොට ඇති බව කීම වැරදි ය. එම නිසා දැනට මෙම උසාවිය ඉදිරියේ ඇති කරුණු සම්බන්ධයෙන් ඔහු විශ්වාසය තැබූ **ඩෙරික් එ. විලියම්ස්,** (1939) 2 ඒ.ඊ.ආර්. 559 යන නඩුව මීට අදාළ නොවේ. එම නඩුව තීන්දු කරණ ලද්දේ පැවතුණු නීතිය පසු අවස්ථාවක වෙනස් කරන ලද ය යන පදනම මත ය.

ඉහත සඳහන් පියදසගේ නඩුවට අනුව ම ඉහත සඳහන් රණසිංහගේ නඩුව ද තීන්දු කර තිබේ. මෙම නඩු තීන්දුව අල්ලස් කොමසාරිස්වරයාගේ ඇපැල ඉවතලමින් රාජාධිකරණය විසින් ද අනුමත කොට තිබේ.

පෙත්සම්කරු මෙම උසාවිය ඇපැලේදී දුන් තීන්දුව වෙනස් කිරීමට පරිශ්‍රමයක් මෙයින් දරන බවට ඊළඟට වනසුන්දර මහතා විසින් කරන ලද කරුණු දැක්වීම ද වැරදි ය. ඔහු පරිශ්‍රමයක් දරන්නේ අල්ලස් පරීක්ෂක මණ්ඩලය ඉදිරියෙහි දී පැවතුණු විභාගයෙහි දී සමාරම්භයේ සිට ම ඔහු වැරදිකරු කිරීම දක්වා එයත් ඇතුළුව ඇති සෑම පියවරක් ම නිෂ්ප්‍රභා කිරීමට ය.

මෙම පෙත්සම්කරුට විරුද්ධව නඩුව ඇසීමට හෝ තීන්දු කිරීමට අල්ලස් කොමසාරිස්වරයාට බලයක් නැත. එම නිසා පෙත්සම්කරුගේ ඉල්ලීමට මම ඉඩ දෙමින් මෙසේ ඔහු වරදකරු බවට පත්කිරීම ඇතුළුව මෙම නඩු විභාගය නිෂ්ප්‍රභා කරමි. තමාගේ ගාස්තුව ලබා ගැනීමට පෙත්සම්කරුට බලය තිබේ.

ගරු අලස් විනිශ්චයකාරතුමා :

මම එකඟ වෙමි.

ඉල්ලීමට ඉඩදෙන ලදී.

ගරු තම්බයියා සහ අලස් විනිශ්චයකාරතුමන් ඉදිරිපිටදී

ශ්‍රී විපස්සි අනුනායක සථවිර එ. ටිකිරි දූරය*

සු. උ. අංකය: 8 (අතුරු), 1963—දි. උ. මහනුවර (ගම්පලදී විභාග කල), අංකය: 2560/ඇම්. ආර්.)

විවාද කොට තීන්දු කළ දිනය : වෂී 1965, පෙබ්‍රවාරි 9.

පැමිණිල්ල සංශෝධනයක්—නායක සාමීන් වහන්සේට විරුධව මුදල් ඉල්ලා ඉදිරිපත් කල නඩුවක්—පසුව උන්වහන්සේ විහාරාධිපතීන් වහන්සේ වශයෙනුත් විස්තර කර සඳහන් කිරීම සඳහා පැමිණිල්ල සංශෝධනයට ඉල්ලීම—දිස්ත්‍රික් නඩුකාරතුමා ඉඩදීම—එම තීන්දුවට විරුධව ඇපෑල.

තීන්දුව :—විහාරාධිපතීන් වහන්සේ නමකට විරුධව දෙන ලද නඩු තීන්දුවකට අයත් යම් කිසි මුදලක් ලබා ගැනීම සඳහා විහාරායතත දේපොළ අල්වා විකිණිය නො හැක. එම නිසා පුද්ගලික ව හිමිනමකට ඉදිරිපත් කල මුදල් නඩුවක දී විහාරාධිපතීන් වහන්සේ යන්න විත්තිකරුගේ නමට එකතු කර පැමිණිල්ල සංශෝධන කිරීමෙන් ඵලක් නැත.

නීතිඥවරු:— මාක් ප්‍රනාන්දු මහතා, විත්තිකාර-ඇපැල්කරු වෙනුවෙන්.
පැමිණිලිකාර-ඇපැල්කරු වෙනුවෙන් නීතිඥයෙක් පෙනී නො සිටියේ ය.

ගරු තම්බයියා විනිශ්චයකාරතුමා

මේ නඩුවේ විත්තිකරු වන මහනුවර මල්වතු විහාරයේ ගෞරවාර්හ රාජගුරු විපස්සි අනුනායක සාමිපාදයන් වහන්සේගේ මෙහෙයවීමෙන් තමන් විසින් කරණ ලද වැඩ කටයුතු සඳහා රු: 470/14 ක මුදලක් ලබා ගැනීම පිණිස පැමිණිලිකරු විසින් මෙම නඩුව දමා තිබේ. මෙය වනාහී විත්තිකරුට විරුධව පුද්ගලික ව ගෙනෙන ලද නඩුවකි. ඉන් පසු විත්තිකරුගේ නම වෙනුවට පහත සඳහන් වචන යෙදීම පිණිස පැමිණිල්ල සංශෝධනය කිරීමට පැමිණිලිකරුවා උත්සාහයක් දැරී ය. ඇතුළත් කිරීමට දිරි දුරු වචන නම් : '' මහනුවර මල්වතු විහාරයේ අනුනායක ගෞරවාර්හ අමුණුගම රාජගුරු විපස්සි සාමිපාදයන් වහන්සේ ලංකාතිලක රජමහා විහාරයේ විහාරාධිපති වශයෙන් '' යනු ය. මෙම සංශෝධනය පැමිණිලිකරුගේ නඩු නිමිත්ත වෙනස් කරන්නකැයි ද එයින් විත්තිකරුට හානියක් වීමට හේතුවේයයි ද මෙම සංශෝධනයට විරෝධය දක්වා ඇත. මෙම සංශෝධනයේ ප්‍රතිඵලයක් වශයෙන් මෙම නඩුව කාල සීමාතික්‍රාන්ත වූ නඩුවක් බව තමාගේ නිදහසට කීමට ඇති අවසථාව වැළකේ යයි විත්තිකරු කරුණු සැලකර සිටියේ ය.

මා විසින් මේ ප්‍රශ්නය විසඳීම අනවශ්‍ය ය. මෙම සංශෝධනය නිෂ්ඵල දෙයකැයි මම කල්පනා කරමි. යම් කිසි පන්සලක විහාරාධිපති වශයෙන් කටයුතු කරණ පුද්ගලයෙකු තවත් කෙණෙකු සමග විහාරයේ වැඩකටයුතු කරවා ගැනීමට කොන්ත්‍රාත්තුවකට ඇතුලත් වූවොත් එයින් ඔහු පුද්ගලික බැඳීමකට යටත් වනු විනා ඔහුගේ භාරයේ ඇති වස්තු සම්භාරය බැඳීමකට යටත් කළ නොහේ. විහාරාධිපතීන් වහන්සේ නමකට විරුධව දෙන ලද නඩු තීන්දුවකට අයත් යම් කිසි මුදලක් ලබා ගැනීම සඳහා විහාරායතත දේපොළ අල්වා විකිණිය නොහැක. **හේලි එ. නුගවෙල,** නව නී. වා. 157, 164 වන පිටුව බලන්න. එම නිසා පැමිණිලිකරු මෙම සංශෝධනය ඇතුළත් කිරීමට උත්සාහ කිරීමෙන් කරණ ලද්දේ නිෂ්ඵල ක්‍රියාවක් නිසා එයට ඉඩ නො දී තිබීම යෝග්‍ය ය.

මා විසින් බැසගත් මේ නිගමනය අනුව සලකන විට දෙපක්ෂය ඇතුළත් වී ඇති කොන්ත්‍රාත්තුව කාලසීමා ආඥ පණතේ 7 වන හෝ 8 වන ඡෙදයට අනුව සිදු වී ඇද්ද යන ප්‍රශ්නය ගැන සැලකීම අවශ්‍ය නොවේ.

ඉහත සඳහන් කරුණු අනුව මෙම සංශෝධනයට ඉඩ දෙමින් දිස්ත්‍රික් විනිශ්චයකාරවරයා විසින් දෙන ලද නියෝගය ඉවත් කරණ මම මුලින් ඉදිරිපත් කළ පැමිණිල්ලට අනුව නඩුව විභාග කිරීමට යයි ද නියම කරමි. මෙම ඇපැල් පෙත්සමේ ගාස්තුව ඇපැල්කරුට අය කර ගත හැකිවේ. නඩු විභාගයේ ගාස්තුව නඩුවේ ප්‍රතිඵලය මත රදා පවතිනු ඇත.

ගරු අලස් විනිශ්චයකාරතුමා

මම එකඟ වෙමි.

ඇපැලට ඉඩ දී
විභාගයට නියම කරන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා.. 82 වෙනි පිට බලනු.

ගරු මානිකවාසගර් විනිශ්චයකාරතුමා ඉදිරියේ

බිලින් සහ තවත් අය එ. ස්ටීවන්, උප පොලිස් පරීක්ෂක, කොළඹ කොටුව*

සු: උ: නෙ: 767–770/1964—ම: උ: කොළඹ, නෙ: 91874.

වාද කොට තීරණය කළේ : 4–12–64.

සූදු පණත, 5 වෙනි ඡේදය—එම ඡේදය යටතේ ඉල්ලුම් කල සෝදිසි වරෙන්තුවක්—එය නිකුත් කරන්ට අණ දීමට පෙර සෝදිසි කල යුතු ස්ථානය පොදු සූදු පළක් යයි මහේස්ත්‍රාත්තුමා නිගමනය නො කිරීම—එසේ නිකුත් කළ සෝදිසි වරෙන්තුවක් නීතිවිරෝධි ද?

තීන්දුව:— සූදු පණතේ 5 වෙනි ඡේදය යටතේ ඉල්ලුම් කල සෝදිසි වරෙන්තුවක් නිකුත් කිරීමට නියෝගය දෙන්ට පෙර සෝදිසි කිරීමට බලය ඉල්ලූ ස්ථානය පොදු සූදු පොළක් යයි මහේස්ත්‍රාත්තුමා විසින් නිගමනය කිරීම අත්‍යවශ්‍යයයි. එසේ නො කිරීමෙන් සෝදිසි වරෙන්තුව නීතිවිරෝධි වන නිසා එම බලය පිට අල්ලා චෝදනා ඉදිරිපත් කර වරදකරුවන් වූ අය දඩයෙන් ද මුදවා නිදහස් කළ යුතු යි.

නීතිඥවරු:— ඇම්. ඇම්. කුමාරකුලසිංහම් මහතා, 1 වැනි, 9 වැනි, 25 වැනි සහ 32 වැනි වරදකාර-ඇපැල්කරුවන් වෙනුවෙන්.
රංජිත් ධිරරත්න මහතා, රාජනීතිඥ නීතිපති වෙනුවෙන්.

ගරු මානිකවාසගර් විනිශ්චයකාරතුමා

චිත්තිකාර-ඇපැල්කරුවන්, කොළඹ කොටුවේ බේලි වීථියේ අංක 34 1/1 දරන ස්ථානයේ නීතිවිරෝධීවැ, සූදු කෙළීමේ චෝදනාවට වැරදිකාරයින් වූහ. මෙම ස්ථානය, මහේස්ත්‍රාත්තුමා විසින් නිකුත් කළ වරෙන්තුවක් උඩ සෝදිසි කරන ලදී. ඇපැල්කරුවන් වෙනුවෙන් පෙනී සිටි නීතිඥයා කරුණු ඉදිරිපත් කරමින්, නිකුත් කරන ලද වරෙන්තුව ව්‍යවස්ථාවේ අඩංගු '' ඒ '' දරන උපලේඛනය දක්වන ලද ආකාරයට අනුකූල නොමැති බව කියා සිටියේ ය.

වරෙන්තුවක් ඉල්ලුම් කරන ලද්දේ සූදු කෙළීමේ ව්‍යවස්ථාවේ පස්වැනි ඡේදය යටතෙයි. අත්‍යවශ්‍යයෙන් ම, මහේස්ත්‍රාත්තුමා සෑහීමකට පත් විය යුත්තේ තමන් ඉදිරියේ ඇති සාක්ෂි උඩ සඳහන් කළ ස්ථානය, පොදු සූදු පොළක් ලෙස පවත්නේ ද? නැතහොත් එවැන්නකට පාවිච්චි කරනු ලබන්නේද යන්නයි. එනම්, එම ස්ථානය තබා හෝ යොදවා ඇත්තේ මහජනයාට ගෙවීමක් ඇතිවැ හෝ නැතිවැ පැමිණ, ඔට්ටු ඇල්ලීම හෝ සූදු කෙළීමට යෙදීම සඳහා ය.

මෙම ස්ථානය පොදු සූදු පොළක් ව පවත්නා බවක් මහේස්ත්‍රාත්තුමා නිගමනය කර නැත. ඒ වෙනුවට ඔහු කියා ඇත්තේ එකී ස්ථානයේ නීතිවිරෝධී සූදු කෙළීමක් පවත්වා ගෙන යන බවට තමා සෑහීමකට පත් වී ඇති බව ය. පොදු සූදු පොළක් නො වන තැනක නීතිවිරෝධී සූදු කෙළීම කළ හැකි ය. උදාහරණයක් වශයෙන්, 22 වැනි වගන්තියේ 3 වැනි ඡේදය අනුව, ඔට්ටු ඇල්ලීම හෝ සූදු කෙළීම මද්‍යපාන විකිණීමට බලපත්‍ර ලත් ස්ථාන වල සිදු විය හැක. එ වැනි ස්ථාන පොදු සූදු පොළක් නො වන්නේ ය. එම නිසා යම් කිසි ස්ථානයක් පොදු සූදු පොළක් වශයෙන් පාවිච්චි වන්නේ යයි, මහේස්ත්‍රාත්තුමා සෑහීමකට පත්වූවායින් පසු ය, ඔහු විසින් වරෙන්තුවක් නිකුත් කළ යුත්තේ මහේස්ත්‍රාත්තුමාගේ නිගමනය උඩ එ වැනි වරෙන්තුවක් නිකුත් කළ නො හැකි ව තිබුනේ ය.

සෝදිසි වරෙන්තුවක් නිකුත් කිරීමේ දී අප විසින් සිතේ තබා ගත යුතු වැදගත් කරුණක් නම් පොදු සූදු පොළක සිටින පුද්ගලයින් වරදකරුවන් වන බවට පූර්ව නිගමනය වීමයි. එසේ නො වන්නේ, ඊට විරුද්ධ ව කරුණු ඔප්පු කිරීමෙන් පමණි. තව ද පැමිණිලි පක්ෂයේ නඩුව රඳා පවත්නේ සෝදිසි වරෙන්තුව උඩ ය.

නිකුත් කර ඇති සෝදිසි වරෙන්තුව නීතිවිරෝධි නිසා ඉල්ලුම්කරුවන් කෙරෙහි පමුණුවා ඇති වරද සහ දඩුවම අස්කර, නිදෙස් කරමි.

ඔව්හු දඩ ගෙවා ඇත්නම් ඒවා ආපසු දිය යුතු අතර, සෝදිසි කරන අවස්ථාවේ සොයාගත් ඔවුන් වෙත තිබූ යම් කිසි මුදලක් වේ නම් එය ඔවුනට භාර දිය යුතුයි.

ඇපැල්කරුවන් නිදහස් කරන ලදී.

පරිවර්තනය: **ගැමුණු සෙනෙවිරත්න විසිනි.**

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා., 83 වෙනි පිට බලනු.

ගරු මානිකවාසගර් විනිශ්චයකාරතුමා ඉදිරියේ

ප්‍රනාන්දු සහ තවත් අයෙක් එ. ද සිල්වා, උප පොලිස් පරීක්ෂක-මරදන*

සු: උ: නො: 957–958/64—ම: උ: කොළඹ, 44300/ඒ.

වාද කොට තීරණය කළේ: 7–12–64.

ලංකා දණ්ඩ නීතිය, 32 සහ 352 ඡේද—දෙදෙනෙකුට විරුඬව වරද කිරීමට පොදු අදහසක් ඇතුව ලමයෙක් හොරකම් කරගෙන ගියා යයි චෝදනාවක්—එක අයෙක් වරද කරන අවස්ථාවේ එම ස්ථානයේ නො සිටීම—එසේ නො සිටි අයත් වරදකරුවෙක් කිරීම නීත්‍යානුකූල ද?

තීන්දුව:— දෙදෙනෙකුට විරුඬව පොදු අදහසක් ඇතුව දණ්ඩ නීතියේ 32 වෙනි ඡේදය අනුව වරදක් කළේ යයි චෝදනාවක් ඉදිරිපත් කල විට ඉන් එක අයෙක් ඒ වරද කරන අවස්ථාවේ එම ස්ථානයේ ඉදිරිපත් ව නො සිටියොත්, එසේ නො සිටි අය වරද කරුවෙක් යයි තීරණය කිරීමට නුපුළුවන.

නීතිඥවරු:— ඇම්. ඇම්. කුමාරකුලසිංහම් මහතා, ඩී. ආර්. පී. ගුණතිලක මහතා සමග 1 වැනි වරදකරු-ඇපැල්කරු වෙනුවෙන්.

2 වැනි වරදකාර-ඇපැල්කරු වෙනුවෙන් නීතිඥවරයෙක් නො පෙනුනේ ය.

නීතිපති වෙනුවෙන් රාජනීතිඥ යූ. සී. බී. රත්නායක මහතා.

ගරු මානිකවාසගර් විනිශ්චයකාරතුමා

මා ඉදිරියේ, 1 වැනි විත්තිකරුගේ නීතිඥතැන විසින් තර්ක කරන්නට යෙදුන එකම ප්‍රශ්නය වූයේ, ඔප්පු වී ඇති සාධක උඩ, තම අනුග්‍රායකයා (client) 11 හැවිරිදි සුනිල් ප්‍රේමරත්න ලමයා බලයෙන් පැහැර ගෙන යාමේ චෝදනාවට වරදකරු ද යන්නයි. 1 වැනි වරදකරු චෝදනා කරනු ලැබුවේ, දෙවැනි වරදකරුත් සමග ය. ඒ චෝදනාවට මුල් වූයේ පොදු චේතනාවක් ක්‍රියාත්මක කිරීමේ දී ඔවුන් දෙදෙන මෙකී බාලයා, බලයෙන් පැහැර ගෙන යෑමයි. මෙහි දී මහේස්ත්‍රාත්තුමා පිළිගත් සාක්ෂි වූයේ, 2 වැනි වරදකරු මරදනේ දී එකී ලමයා නීත්‍යානුකූල භාරකාරත්වයෙන් ගෙන යනු ලැබුවේ ඔහු විසින් බව හා මේ සිඩිය වූ මොහොතේ දී මොනම ස්ථානයකදී වත්, 1 වැනි වරදකරු නො සිටි බවත් ය. දෙවැනි වරදකරු පැහැර ගත් ලමයා පළමු වැනි වරද-කරුට භාර කළේ මීගමුවේ දීයැ.

මෙහි දී මා වෙත සැල කරන ලද්දේ පොදු චේතනාවක් උඩ මුල් වශයෙන්, චෝදනාවක් තහවුරු වීමට නම් වරදකරුවන් දෙදෙනාම අත්‍යවශ්‍යයෙන් ම හවුල් ව ක්‍රියා කර යුතු බවයි. එනම් එක් විධියකින් කියතොත් වරද කළ ස්ථානයේ හෝ ඊට නුදුරු වැ, වරදකරුවන් කයින් පෙනී සිටීමයි. මෙයට මම එකඟ වෙමි. මහේස්-ත්‍රාත්තුමා විසින් පිළිගත් සාක්ෂි උඩ, ''වරද'' සම්පූර්ණ වූයේ, දෙවැනි විත්තිකරු ලමයා පැහැර ගෙන ගිය විට ය. එහෙත් තමා 1 වැනි විත්තිකරුට බාලයා මීගමුවේ දී භාරදීම දණ්ඩ නීති සංග්‍රහයේ 32 වැනි වගන්තිය සමග ගත් කල පැහැර ගෙන යාමේ චෝදනාවට 1 වෙනි විත්තිකරු යටත් නොවන්නේ ය. මෙයට ප්‍රතිවිරුඬවැ, රජය වෙනුවෙන් පෙනී සිටි නීතිඥයා කරුණු ඉදිරිපත් කිරීමක් නො කළේ ය.

පළමු වැනි වරදකරුට නියම කළ දඩුවම අස් කර ඔහු නිදෙස් කිරීමට නියෝග කරමි. දෙවැනි වරදකරු-ඇපැල්-කරුගේ ඇපැලය නිෂ්ප්‍රභා කරමි.

පළමුවෙනි ඇපැල්කරු නිදහස් කරන ලදී.

පරිවර්තනය: **ගැමුණු සෙනෙවිරත්න විසිනි.**

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා., 83 වෙනි පිට බලනු.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමන් ඉදිරියේදී

අයි. ඒ. ඩී. ප්‍රැන්සිස්, පොලිස් පරීක්ෂක (අපරාධ) මෝදර,

එ.

ඇන්තනි පෙරේරා නොහොන් පිටාස්*

කොළඹ මහේස්ත්‍රාත් උසාවිය, නො: 6094/සී නඩුවේ පුනරීක්ෂණ—APN/GEN/18/65.

විවාද කොට නිම්දුව දෙනු ලැබුවේ : 1965 මැයි මස 19 වෙනි දින දිය.

අපරාධ නීතිය—දඩුවම් නියම කිරීමේ දී සැලකියයුතු ප්‍රතිපත්ති—මහජනයාගේ ශුභසිද්ධිය ආරක්ෂා කිරීමට අධිකරණයට ඇති යුතුකම.

නිම්දුව:— කප්පම් ඉල්ලීමේ ව්‍යාපාරය බොහෝ සෙයින් පැතිරී ගොස් තිබෙන බැවින් එය වැලැක්වීම පිණිස නිදර්ශක (deterrent) දඩුවම් නියම කිරීමෙන් මහජනයා ආරක්ෂා කිරීම උසාවි වල යුතුකම වේ.

(අ) ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා: "ඇතැමුන් අතර ප්‍රිය වී ඇති න්‍යායයකි දඩුවම අපරාධකරුට අනුකූල විය යුතු බව. මෙය යථාර්ථයට අන්ධවීමකි. ඔවුන්ගේ තර්කය මෙ වැන්නකි: " කිසිම අපරාධකරුවෙක් පූර්ණ ප්‍රකෘති තත්ත්වයෙහි (absolutely normal) නො පවතී. ඇතැම් අපරාධකරුවෝ උම්මත්තකයෝ ය. එ නිසා සෑම අපරාධකරුවෙක් ම එක්තරා ප්‍රමාණයකට උමතු ය". මේ වනාහී අනුගමණය කිරීමට භයානක වූ න්‍යායයකි. 1965, කේම්බ්‍රජ් නීති සංග්‍රහයෙහි අප්‍රෙල් කලාපයෙහි, ටී. බී. හැඩන්, "දඩුවම් සඳහා ආයාචනාවක් " යන මැයින් ලියූ ලිපියකින් දක්වා ඇති පරිදි අන්තවාදී පොදු න්‍යායවාදීන් යන නමින් හැඳින්වෙන දර්ශනිකයන් අතර ප්‍රචලිත දර්ශනයට ඉහත කී න්‍යායය සම කළ හැක. ලිහිල් දඩුවම් පනවන මහේස්ත්‍රාත්වරුන්ගේ හා විනිශ්චයකාරවරුන්ගේ ගුණ කියනුයේ අපරාධකරුවන් හා ඔවුන් වෙනුවෙන් පෙනී සිටින අයම පමණකි. උසාවි පවතින්නේ පොදු මහජනතාවගේ ශුභසිද්ධිය ආරක්ෂා කිරීම සඳහා ය. එසේ හෙයින් එ වැනි දඩුවම් පොදු මහජනයා විසින් මුළුමනින් ම හෙළා දකිනු ඇත ".

(ආ) "චිත්තිකරු වෙනුවෙන්, ඔහු අඹුදරුවන් ඇති විවාහකයකු බව සැලකර සිටින ලදී. දඩුවම් පැනවීමේ දී උසාවියෙහි සැලකිල්ලට භාජනය විය යුතු එකම කාරණය මෙය පමණක් නොවේ. මහජන ශුභසිද්ධිය මෙය අභිභවා යා යුතු වන්නේ ය."

නීතිවේදීහු:— ආනන්ද විජේසේකර මහතා, චිත්තිකාර-වගඋත්තරකරු වෙනුවෙන්
රජයේ අධිනීතිඥ රංජිත් ධිරරත්න මහතා, අධිකරණ මණ්ඩලීය සහයෝගියෙකු වශයෙන්.

ගරු ශ්‍රී ස්කන්ධරාජා විනිශ්චයකාරතුමා

කුවාල ලත් තැනැත්තා වන ක්‍රිෂ්ණන්ගෙන්, මේ සිද්ධිය සිදු වීමට දින දෙකකට පෙර, චිත්තිකරු විසින්, කප්පම් නොහොත් පිළිසරණ ගාස්තු වශයෙන් මුදලක් ඉල්ලා ඇති බව පෙනේ. මෙය සම්බන්ධයෙන් ක්‍රිෂ්ණන් පොලිසියට පැමිණිල්ලක් කළ බවක් චිත්තිකරුට දැනගන්නට ලැබී ඇති බව හැඟේ. එහෙත් ක්‍රිෂ්ණන්ගේ කරුණු පැහැදිළි කිරීමට අනුව පැමිණිලි කිරීමෙන් ඇති විය හැකි ප්‍රතිවිපාකයන්ට බියෙන් පොලිසියට පැමිණිලි නො කරන ලදී. නියම තත්ත්වය මෙය විය හැක. මෙ දින කඩුවක් අතින් ගත් චිත්තිකරු ක්‍රිෂ්ණන් පදිංචි වී සිටි ඔහුගේ ම කඩයට පැලඳෙරින් ඇතුලු වී, මීට දින දෙකකට කලින් සිදු වූ සිද්ධිය සම්බන්ධයෙන් පොලිසියට පැමිණිලි කළේ දැයි විමසීමෙන් ඉක්බිති ඔහුට පහර දී තිබේ.

ක්‍රිෂ්ණන් ලත් තුවාල අතර, කැපීමෙන් ඇති වූ තුවාල තුනකි. මැසුම් දැමීමට සිදු වූ තුවාල තුනෙන් එකක් අඟල් 2 1/2 ක් ද අනික අඟල් 2 ක් ද තෙවැන්න අඟල් 1 1/2 ක් ද දිග ය. මින් පළමු වන තුවාලය පළලින් අඟලෙන් හතරෙන් තුනකි. පැමිණිලිකරුගේ සාක්ෂිය ඇසීමෙන් පසු, චිත්තිකරු වරදකරු බව පිළිගැනීමෙන් පසු, ඔහු කලින් වරදකරුවකු වශයෙන් නිම්දු නො ලැබීම හැර වෙනත් කිසිදු හේතුවක් නො පෙන්වා එ දින උසාවිය විසිරී යනතුරු සිර අඩස්සියේ පසු විය යුතු යයි ද, රුපියල් 50/- ක දඩ මුදලක් හා එය ගෙවීමට නො හැකි වුවහොත් බරපතල වැඩ ඇතුව මාස දෙකකට බන්ධනාගාරගත විය යුතු යයි ද මහේස්ත්‍රාත්තැන දඩුවම් නියම කළේ ය.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා., 99 වෙනි පිට බලනු.

තුවාල ලැබූ තැනැත්තා අවත්මාවත පාරේ නේවාසිකාගාරයක් පවත්වා ගෙන යමින් සිටින ඉන්දියානුකාරයෙකු බව පෙනේ. විත්තිකරු ද ඒම මාර්ගයෙහි ම ඇති රා තැබෑරුමක මුරකරුවකු වශයෙන් කටයුතු කරන්නෙකු වී ඇත. කොළඹ නගරයෙහි පමණක් නොව, අන් සෑම නගරයක හා ගම්බද පලාත් වල පවා පැතිරී ඇති කුඩා ව්‍යාපාරයකි කප්පම් ගැනීම. මෙ වැනි පුද්ගලයන්ට විරුද්ධ ව සාක්ෂි දීමට පොදු මහජනයා ඉදිරිපත් නො වනු ඇත. ඒ නිසා වරදකරු පමණක් නොව ඔහුගේ මාදිලියේ අපමණ උදවිය විසින් මේ වසංගත ව්‍යාපාරය තවත් දුරට පවත්වා ගෙන යාම වැලැක් වීමට නිවාරණික (deterrent) දඬුවමක් පැනවීම උසාවියේ යුතුකමකි. මේ නඩුවේ දී ඇති දඬුවම ප්‍රමාණවත් නො වන බව ඉතා පැහැදිලි ය. එය අපරාධයට හෝ අපරාධකරුට හෝ අනුකූල නොවේ. ඇතැමුන් අතර ප්‍රිය වී ඇති න්‍යායයකි දඬුවම අපරාධකරුට අනුකූල විය යුතු බව. මෙය යථාර්ථයට අන්ධවිමකි. ඔවුන්ගේ තර්කය මෙ වැන්නකි : ''කිසිම අපරාධකරුවෙක් පූර්ණ ප්‍රකෘති තත්ත්වයෙහි (absolutely normal) නො පවතී. ඇතැම් අපරාධකරුවෝ උම්මත්තයෝ ය. ඒ නිසා සෑම අපරාධකරුවෙක් ම එක්තරා ප්‍රමාණයකට උමතු ය''. මේ වනාහී අනුගමනය කිරීමට භයානක වූ න්‍යායයකි. 1965, කේම්බ්‍රිජ් නීති සංග්‍රහයෙහි, අප්‍රෙල් කලාපයෙහි, ටී. බී. හැඩන්, ''දඬුවම් සඳහා ආයාවනාවක්'' යන මැයින් ලියූ ලිපියකින් දක්වා ඇති පරිදි අන්තවාදී පොදු න්‍යායවාදීන් යන නමින් හැඳින්වෙන දර්ශනිකයන් අතර ප්‍රචලිත දර්ශනයට ඉහත කී න්‍යායය සම කළ හැක. ලිහිල් දඬුවම් පනවන මහේස්ත්‍රාත්වරුන්ගේ හා විනිශ්චයකාරවරුන්ගේ ගුණ කියනුයේ අපරාධකරුවන් හා ඔවුන් වෙනුවෙන් පෙනී සිටින අයම පමණකි. උසාවි පවතින්නේ පොදු මහජනතාවගේ සුභසිද්ධිය ආරක්ෂා කිරීම සඳහා ය. එසේ හෙයින් ඒ පැනි දඬුවම් පොදු මහජනයා විසින් මුළුමනින් ම හෙළා දකිනු ඇත.

විත්තිකරු වෙනුවෙන්, ඔහු අඹුදරුවන් ඇති විවාහකයකු බව සැලකර සිටින ලදී. දඬුවම පැනවීමේ දී උසාවියෙහි සැලකිල්ලට භාජනය විය යුතු එකම කාරණය මෙය පමණක් නොවේ. මහජන සුබසිද්ධිය මෙය අබිබවා යා යුතු වන්නේ ය. කලින් කී පරිදි කප්පම් ගැනීම කොතරම් පැතිරී ඇත් ද කිවහොත් ප්‍රමාණවත් වුද, අනාගතයේ දී මේ වරද වැලැක්වීමට තුඩු දෙන්නාවූ ද දඬුවමක් මෙම නඩුවේ දී පැනවිය යුතුයි. මහේස්ත්‍රාත්තුමා විසින් පනවන ලද දඬුවම ඉවත් කොට, විත්තිකරු මීට කලින් නීතියෙන් වරදකරුවකු නොවී සිටිය ද බරපතල වැඩ ඇති ව හය මසක සිර දඬුවමක්ම නියම කරමි. **එච්. එන්. ද සිල්වා එ. ඇටෝනිජෙනරාල්තැන,** යන (1955) 57 වැනි නව නීති වාර්තාවෙහි, 121 පිටෙහි, විනිශ්චයකරුවන් දෙදෙනකුගේ තීන්දුව, 66 වැනි නව නීති වාර්තාවෙහි, 233 වැනි පිටේ, සහ (1964) 66 වැනි ලංකා නීති සත්පතා වාර්තාවෙහි 57 වැනි පිටුවෙහි ඇති **ගෝමස් එ. ලීලාරත්න** නඩු තීන්දුව, වැනි නූතන නඩු තීන්දුවලදී උසාවිය විසින් ප්‍රකාශ කොට ඇති දණ්ඩ සිද්ධාන්තයන්ට මා විසින් මේ පනවන ලද දඬුවම අනුකූල වෙයි. ඇතැම් විට පළපුරුදු බව අඩු වීම ඇතැම් ලිහිල් දඬුවම් පැනවීමට හේතුවක් විය හැක.

දඬුවම වැඩි කරණ ලදී.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා ඉදිරිපිට

ඩබ්ලිව්. ජයසිංහ එ. ඉලිකුට්ගේ මාලනී*

ශ්‍රේෂ්ඨාධිකරණයේ නොම්මරය: 664, 1964 දිය—කෑගල්ලේ මහේස්ත්‍රාත් උසාවියේ අංක: 45046.

විවාද කළ දිනය : සැප්තැම්බර් 29, 1964.
තීන්දු කළ දිනය : ඔක්තෝම්බර් 13, 1964.

දරුවන්ගේ නඩත්තු—අවජාතක දරුවකුගේ නඩත්තුව සඳහා දෙන ලද නියෝගයක්—ඉල්ලුම්කරුගේ සාක්ෂිය වෙනත් සාක්ෂිකරුවකුගේ සාක්ෂියක් සමග සැසඳිය හැකි ස්ථාන, මහේස්ත්‍රාත්තුමා සටහන් නො කිරීම—විත්තිකරුගේ හැසිරීමත්, ඔහුගේ අසත්‍ය සාක්ෂියත් එසේ සැසඳීමකට භාජන කළ හැක.

මෙය නීත්‍යානුකූල නොවන දරුවන්ගේ නඩත්තුව සඳහා කරණ ලද නියෝගයකින් නැඟ එන ඇපැලකි. දහසය ඇවිරිදි පාසැල් ශිෂ්‍යාවක් වන මව සාක්ෂි දෙමින් විත්තිකරු තම දරුවාගේ පියා බව කියා සිටියා ය. විත්තිකරු මවගේ ගමෙහි බඩු ගබඩාවක බඩු විකිණීමේ යෙදී සිටින උප-සේවකයෙකි. වෂී 1962 මැයි මස අටවෙනි දින මව ගම්මුලාදෑනිතැනට පැමිණිල්ලක් කළා ය. ඉන් පසු ගම්මුලාදෑනිතැන විත්තිකරු හමුවීමට උත්සාහ කළ විට ඔහු එ විටත් ගමින් පිට වී ගොස් තිබේ යයි දැනගන්ට ලැබින. 1962 මැයි මස 30 වැනි දින බඩු ගබඩාවෙන් ඉවත් ව ගිය බව විත්තිකරු කියා පෑ නමුත් මහේස්ත්‍රාත්තුමා එම සාක්ෂිය පිළිනොගෙන ගම්මුලාදෑනිතැනගේ සාක්ෂිය පිළිගත්තේ ය.

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* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා., 102 වෙනි පිට බලනු.

නඩත්තු කිරීමේ අනය සටහන් කරණ විට, මවගේ සාක්ෂිය අන් කවර සාක්ෂියකින් තහවුරුවී තිබේදැ යි මහේස්ත්‍රාත්තුමා සටහන් කර නැත.

තීන්දුව:— නීත්‍යානුකූල වූ අවශ්‍ය වූ මවගේ සාක්ෂිය තහවුරුවීම සඳහා විත්තිකරුගේ හැසිරීමක්, එනම් මව ගම්මුලාදැනිතැනට පැමිණිලි කළ අවස්ථාවේ හදිසියෙන් ගමින් අස් වී යෑමත්, එසේ යෑමට හේතු වශයෙන් කී අසත්‍යත්, කොට ප්‍රමාණය යි මහේස්ත්‍රාත්වරයාට පිළිගත හැකිව තිබුණි.

නීතිඥවරු:— කොල්වින් ආර්. ද සිල්වා, ඊ. බී. වන්නිතම්බි සහ ඇම්. පී. ඊ. මැන්ඩිස් යන මහතුන් සමග, විත්තිකරු වෙනුවෙන්.

ප්‍රිටිස් කෝදගොඩ, වගඋත්තරකාර-ඉල්ලුම්කරු වෙනුවෙන්.

ගරු ටී. ඇස්. ප්‍රනාන්දු විනිශ්චයකාරතුමා

මහේස්ත්‍රාත් උසාවියක කටයුතු අතර සැලකිය යුතු කොටසක් හැටියට ගැනෙන්නේ නීත්‍යානුකූල නො වන දරුවන්ගේ නඩත්තුව සඳහා වියදම් ඉල්ලන ඉල්ලුම් පත්‍ර වෙති. මේ නියාගෙන් සළකන කළ එ බඳු ඉල්ලීම් වල දී අනිවාර්‍යයෙන් ම උද්ගත වන ප්‍රධාන ප්‍රශ්නය විසඳීමෙහි ලා ගත යුතු මාර්ගය මහේස්ත්‍රාත්වරුන්ට ඉතාම පළපුරුදු යයි මෙම අධිකරණයට බලාපොරොත්තුවීමට සියළු හේතු සාධක තිබේ. එම ප්‍රධාන ප්‍රශ්නය නම් ඒ දරුවාගේ මවගේ සාක්ෂියේ වැදගත් කරුණක් වෙනත් සාක්ෂියකින් තහවුරුවිය යුතු බව ය. නමුත් මෙම සැලකිය යුතු සුපුරුදු ප්‍රශ්නය පිළිබඳ ව ගැනෙන ක්‍රියා මාර්ගය බොහෝ විට අසතුටුදායක බව මෙම අධිකරණයට පළපුරුද්දෙන් පෙනී ගොස් තිබේ. මෙහි කියැවෙන නඩුව එම අසතුටුදායකත්වය හෙළිකරන විස්තරයකි.

ප්‍රශ්නයට භාජන ව ඇති දරුවා බිහි වී ඇත්තේ වෂී 1962 ජූනි මස 30 වෙනි දින දීය. දහසය හැවිරිදි පාසැල් ශිෂ්‍යාවක් වන මව සාක්ෂි දෙමින් විත්තිකරු දරුවාගේ පියා බව කියා සිටියා ය. විත්තිකරු මවගේ ගමෙහි බඩු ගබඩාවක බඩු විකිණීමෙහි යෙදී සිටින උප-සේවකයෙකි. වෂී 1962 මැයි මස 8 වෙනි දින මව ගම්පතිතැනට මේ පිළිබඳ ව පැමිණිල්ලක් කළා ය. ඉන් පසු ගම්පතිතැන විත්තිකරු හමු වීමට දරණ ලද පරිශ්‍රමයේ දී ඔහු එවිටත් ගමින් බැහැර ගොස් සිටි බව අනාවරණය විය. එහෙත් විත්තිකරු කියා සිටියේ තමා බඩු ගබඩාවෙන් ඉවත් ව ගියේ වෂී 1962 මැයි මස 30 වෙනි දින දී බව ය. කෙසේ වුව ද මහේස්ත්‍රාත්වරයා මේ කරුණු පිළිබඳ ව ඔහු කී සාක්ෂිය විශ්වාස නො කිරීමට ඉටා ගත්තේ ය. මේ පිළිබඳ ව ඔහු විශ්වාස කළේ ගම්පතිතැනගේ සාක්ෂි යයි.

දරුවාගේ මවගේ සාක්ෂිය අන් සාක්ෂියකින් තහවුරුවී පෙනෙන්නේ කොතනකින් දැයි යනු උගත් මහේස්ත්‍රාත්වරයා සවිස්තරව කියා නැත. සාක්ෂිය පිළිගන්නා බවක් ගැන කිසිවක් සඳහන් නො කොට මවගේ මැණියන්ගේ (දරුවාගේ මුත්තණියන්ගේ) සාක්ෂිය ගැන ඔහු සඳහන් කර තිබේ. මුත්තණියගේ මෙම සාක්ෂිය මහේස්ත්‍රාත්වරයා විසින් පිළිගන්නා ලදැයි යන හැඟීම උඩ එම සාක්ෂිය පරීක්ෂා කළහොත් එහි වැදගත් කරුණක් පිළිබඳ ව දරුවාගේ මවගේ සාක්ෂිය තහවුරු වන බවක් කෙනෙකුට නො පෙනේ. එම සාක්ෂියේ එක් කොටසක්, එනම් දරුවාගේ මුත්තණිය තමාගේ දියණිය සහ විත්තිකරු සංවාසයෙහි යෙදීමේ ක්‍රියාව කරමින් සිටිනු දුටුවා යැයි කියා තිබීම අසත්‍යයක් බව පැහැදිළි ව පෙනේ. මෙයට හේතුව එසේ නම් පසු කලෙක මුත්තණියට තම දියණියගෙන් දරුවාගේ සවාමිපුරුෂයා කවු ද යන්න ප්‍රශ්න කිරීමට උවමනා නැත. මුත්තණියගේ සාක්ෂිය අනුව තම දියණිය හැඟගෙන දෙමසක් ඉකුත්වූවාට පසු ඇ දියණිය ගෙන් මේ ගැන ප්‍රශ්න කර තිබේ. විමසීමෙන් පසු සැණෙකින් ම ඇ විත්තිකරු හමු වීමට දියණිය යැවී ය. එහි ගිය ඇ ඵලවාදමා විත්තිකරු ගමෙන් පිට විය. නමුත් දරුවාගේ මවගේ සාක්ෂිය අනුව විත්තිකරු විසින් ඇ ඵලවන ලද්දේ ගැබ්ගෙන මාස හතක් හෝ අටක් ගත වූ පසු වෂී 1962 මැයි මස 8 වන දින දී ය. මේ නිසා දරුවාගේ මුත්තණිය විත්තිකරුගෙන් ප්‍රශ්න නො කළ බව පැහැදිළි ව පෙනේ. තමා ගැබ්ගත් බැව් දන් වූ විට විත්තිකරු තමා ආවාහ කර ගැනීමට පොරොන්දු වී යයි දරුවාගේ මව කී සාක්ෂිය තවත් සාක්ෂියකින් තහවුරු නොවී තිබේ. ඒ එසේ වුවත් වෂී 1961 අග හරියේ දී සිරිත් වශයෙන් විත්තිකරු ඇයගේ නිවසට පැමිණීමට පුරුදු ව සිටි බවත් ගෙයි ඉතා නිදහස් ලෙස හැසුරුණ බවත් දරුවාගේ මුත්තණිය කියා සිටියා ය. ඇගේ සාක්ෂියෙහි මෙම කොටස පිළිගත්තාද නැද්ද යන්න මහේස්ත්‍රාත්වරයා විශේෂයෙන් සඳහන් කර නැති නමුත් ඔහු විසින් දෙන ලද නියෝගය සලකා බැලීමේ දී ඔහු ඒ කොටස පිළිගෙන තිබේ යයි සැලකීම තර්කානුකූල නො වේ යයි සිතාගත නො හැක.

මෙවැනි නඩුවක සාක්ෂිය තහවුරු කිරීම පිළිබඳව උද්ගතවන ගරුක ප්‍රශ්නයේදී උගත් මහේස්ත්‍රාත්වරයාගේ නඩු තීන්දුවෙන් පිළිසරණක් නො ලබන මම මහේස්-ත්‍රාත්වරයා විසින් පිළිගන්නා ලද අන් කිසියම් සාධාරණ සාක්ෂියක මෙම අවශ්‍ය තහවුරුව තිබේදැ යි බැලිය යුතු වෙමි. තමා බඩු ගබඩාවෙන් අස්වී ගියේ වෂී 1962 මැයි මස 30 වන දින යයි විත්තිකරු කළ ප්‍රකාශය මහේස්ත්‍රාත්වරයා අවිශ්වාස කොට තිබේ. වෂී 1962 මැයි මස 8 වෙනි දින මේ පිළිබඳ ව පැමිණිල්ලක් ලත් පසු ඒ සඳහා පරීක්ෂණයට ගිය ගම්පතිතැනට විත්තිකරු ගමිනුත් බඩු ගබඩාවෙනුත් දෙකෙන් ම බැහැර වී ගොස් ඇති බව දැනගන්නට ලැබිණැයි ගම්පති කී සාක්ෂිය මහේස්ත්‍රාත්වරයා විශ්වාස කළේ ය. මෙම පරීක්ෂණය පැවැත්වුණු දිනය කවද දැයි සාක්ෂි වල ගැබ් වී නැත. නමුත් සියළු කරුණු පරීක්ෂා කිරීමේ දී බැස ගත යුතු යුක්තියුක්ත නිගමනය මෙම පරීක්ෂණය වෂී 1962 මැයි මස 8 වන දින හෝ ඉන් පසු ව ඊට ඉතාම ආසන්න දිනයක කරන ලද බවයි. මෙම කරුණෙහි දී අවශ්‍ය

නීති ගත නහවුරුව මහේස්ත්‍රාත්වරයාට විත්තිකරුගේ එම හැසිරීමෙන් සහ ඔහු විසින් දෙන ලද අසත්‍ය සාක්ෂියෙන් ලබා ගැනීමට සුදුසු තත්ත්වයක මහේස්ත්‍රාත්වරයා සිටිය බව මගේ අදහසයි. කෙසේ වෙතත් මහේස්ත්‍රාත්වරයා තම නඩු තීන්දුවෙහි මෙය විශේෂයෙන් ගැබ් කළේ නම් එය වඩාත් සතුටුදායක වේ. **වරාවිට** එ. **ජේන් නෝනා,** (1954) 58 න.නී.වා. 111, සහ **ධම්දස** එ. **ගුණවති,** (1957) 59 න.නී.වා. 501, යන නඩු මෙම නඩුවෙහි දී මා බසින තීරණයට පිටුවහල දෙති. දරුවාගේ මව ගම්පතිතැනට පැමිණිලි කරන අවධියේ විත්තිකරු සැණෙකින් බඩු ගබඩාවේ තම රැකියාවෙන් අස් වී ගියේ නම් එමෙන් ම මෙම හදිසි නික්මීම පිළිබඳ ව ඔහු අසත්‍ය ප්‍රකාශයක් කොට තිබේ නම් දරුවාගේ මවගේ සාක්ෂිය සත්‍ය යයි යුක්තියුක්ත ලෙස සලකා ගත හැක. උගත් මහේස්ත්‍රාත්වරයා කිමට අදහස් කෙළේ මෙයම යයි මට හැඟී යයි. ගාස්තුවටත් යටත් කොට ඇපැල නිෂ්ප්‍රභා කරමි.

ඇපැල නිෂ්ප්‍රභා විය.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමන් ඉදිරිපිට

ඒ. සී. ඒ. එඩ්වර්ඩ් එ. නතර්මල් සහ තවත් අය*

ශ්‍රේෂ්ඨාධිකරණයෙහි ඉල්වීමේ අඩිකය : 790/1964.

වාද කර නිඟු කළ දිනය : 1965.1.15.

"හේබියස් කොපස්" ආඥුවක්—ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කිරීමට නියෝග කළ පුද්ගලයා ලංකාවෙන් පිට වී යාම—එසේ පිට වී ගොස් පිට රටක ඉන්නා බවත් එම නිසා එම ආඥුව අනුව ඒ පුද්ගලයා ඉදිරිපත් කිරීමට නො හැකි බවත් ඔප්පු කිරීම—වගඋත්තරකරුවන් නියෝගයෙන් නිදහස් කල යුතු ද?

නිඟුව:— *"හේබියස් කොපස්" ආඥුවක් ලැබ එහි සඳහන් පුද්ගලයා ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කිරීමට නියම දිනයේ දී වගඋත්තරකරුවන්ට එම පුද්ගලයා ඉදිරිපත් කිරීමට නුපුළුවන් කරුණු ඇත් නම් එය ඔප්පු කිරීමෙන් ඔවුන් එම නියෝගයෙන් නිදහස් වේ.*

අධිනිතිඥවරු:— ඒ. එස්. බාර් කුමාරකුලසිංහ, බාර් කුමාරකුලසිංහ මෙනෙවිය සමග පෙත්සම්කරු වෙනුවට.
එන්. ඊ. වීරසූරිය (කණිෂ්ඨ), 1, 2 සහ 3 වගඋත්තරකරුවන් වෙනුවට.
පී. නවරත්නරාජා, ටී. සුඳුරලිංගම් සමග 4 වන වගඋත්තරකාරී වෙනුවට.

ගරු ශ්‍රී ස්කන්ධ රාජා විනිශ්චයකාරතුමා

1965–1–4 දින මනිකවසාගර් විනිශ්චයකාරතුමන් ඉදිරිපිට මේ ඉල්ලීම ගෙනෙන ලදී. පුද්ගලයකු නීති–විරෝධී ව රඳවා ගන්නා ලද්දේ යයි චෝදනා ලැබ සිටි 1, 2, 3 වගඋත්තරකරුවෝ එ දින පැමිණ සිටියෝය. අවුරුදු 21 ට වැඩි 4 වෙනි වගඋත්තරකාරී වෙනුවෙන් පෙනී සිටි අධිනිතිඥතුමා දන්වීම ලැබුනාසින් පසු 1965–1–2 ද 4 වෙනි වගඋත්තරකාර හොංකොං (නුවර) බලා ගියා යයි සඳහන් වන ඇගේ දිවුරුම් පෙත්සමක් ඔප්පු කළේ ය. "4 වෙනි වගඋත්තරකාරී දිවයින අත් හැර ගිය බව ඔප්පු කිරීමට නවරත්නරාජා මහතා සාක්ෂි ඉදිරිපත් කළ යුතු ය" යි මා සහෝදරයාණන් ගේ නියමයෙහි (විධානයෙහි) සඳහන් වී ඇත.

අද නවරත්නරාජා මහතා 4 වෙනි වගඋත්තරකාරී විසින් 1965–1–11 දින හොංකොං නුවරින් ලියන ලද ලිපිය ද ඇ විසින් තම නීතිඥවරයා වෙත එවන ලද 4 R 2 ලකුණ දරණ "පාස්පෝට්" නැමති පිටරට යෑමට දෙන අවසර පත්‍රය ද ඉදිරිපත් කරයි. 4 R 2 ලකුණු දරණ අවසර පත්‍රයෙහි 1965–1–2 ද "අද හොංකොං නුවරට ගොඩබැස්සා ය" යි සටහන් කර තිබේ. තව ද 1965–1–5 ද හොංකොං නුවර සිට ඇගේ දෙමාපියන්ට 4 R 3 ලකුණු දරන ලියුම ද ලියා ඇත.

1964 (2) ක්‍රිමිනල් ලෝ ජර්නල් නීති සංග්‍රහයෙහි 590 පිට පෙණෙන **මොහෙඩ් ඉක්රම් හුසේයින්** එ. **උත්තර ප්‍රදේශී රාජ්‍ය** නඩුවේ දී ඉන්දියාවේ ශ්‍රේෂ්ඨාධිකරණ තීරණයක පෙන්වා තිබෙන පරිදි ආඥු පත්‍රයකට (Writ) වගඋත්තර කියමින් (මෙහි 1 වෙනි වගඋත්තරකරු සිට 3 වෙනි වගඋත්තරකරුවන්) ආඥුවේ නියෝගය ඉටු කරන්ට නුපුළුවන් බව කියා සිටීමට ද, එම අපහසුකම් ඔප්පු කරන්නට ද අවකාශ ඇති බවත් එසේ කලොත් ඔවුන් නිදහස් කරනු ලැබීමට අයිතියක් ද ඇත්තේය.

මේ නඩුව ගැන කල්පනා කරන විට ශ්‍රේෂ්ඨාධිකරණයට ඉදිරිපත් කරන්න නියෝග කල පුද්ගල තෙම මෙම අධිකරණයෙහි අනසක ඉක්මවා ගිය බවට සැහෙන තරම් සාක්ෂි තිබේ. ඇ සිටින්නේ හොංකොං නගරයෙහි ය. ඇ 1965–1–4 ද 1, 2, 3 වගඋත්තරකරුවන් භාරයෙහි නො සිටියා ය; ඒ දිනය ඇ මෙම උසාවියට ගෙනෙන්ට නියම වූ දිනය වේ. එම නිසා අධිකරණය විසින් නිකුත් කල ආඥුව අහෝසි කරමි. මා පරීක්ෂා කළ පිටරට යෑමටදී තිබෙන අවසර පත්‍රය ආපසු දියයුතුය.

ආඥුව අහෝසි කරන ලදී.

* ඉංග්‍රීසි පිටපත ඉංග්‍රීසි අංශයෙහි 67 වෙනි කා., 104 වෙනි පිට බලනු.