JUDGMENTS

ENVIRONMENTAL LAW / CRIMINAL PROCEDURE CODE

COURT OF APPEAL

Premasiri Weerasekera & Four Others v Keangnam Enterprises Limited
Court of Appeal Case No. CA (PHC) APN 40/2004
HC Ratnapura No. HCRA 56/2002
MC Balangoda No. 73896

Decided on: 26/05/2009

Sathya Hettige PC (P/CA) and Anil Goonarathna J

Code of Criminal Procedure Act No. 15 of 1979, Section 98(1) and 104 - National Environmental Act No. 47 of 1980 as amended, Section 23A (2), 23B, 29. Environmental Protection Licence (EPL) - Jurisdiction of Magistrate - Inconsistency between the provisions of the Code of Criminal Procedure Act on public nuisance and the provisions of the National Environmental Act.

The Respondent - Petitioner-Respondent Company had established a metal quarry, a metal crusher and an asphalt plant at a site in Damahana, Balangoda for the purpose of developing and rehabilitating the Kandy - Balangoda road. Informant-Respondent-Petitioner complained of a Public Nuisance caused by the activities of the Respondent-Petitioner-Respondent Company. The Learned Magistrate, having considered the submissions of parties and also having given his mind to the case of Keangnam v Abeysinghe 1994 (2) SLR 271, over-ruled the preliminary objection and ruled that the licence does not deny the Magistrate's Court jurisdiction in respect of a public nuisance. The Respondent-Petitioner-Respondent Company thereupon moved the High Court in revision. The High Court issued a stay order staying the operation of the learned Magistrate's Order and subsequently quashed the Order of the learned Magistrate. The Informant-Respondent-Petitioners moved the Court of Appeal in revision against the Order of the High Court.

Held:

1. The only way in which the jurisdiction of the Magistrate could be ousted is to include clear, specific provisions to oust such jurisdiction. One cannot by reading Section 29 of the National Environmental Act conclude that the Magistrate's jurisdiction has been ousted.

2. There is no inconsistency or repugnancy between the provisions of the Code of Criminal Procedure pertaining to nuisance and of the National Environmental Act. The Code is geared to remove the abate nuisances whereas the National Environmental Act seeks to control pollution and noise.

3. The Court of Appeal has wide reversionary powers. The reversionary jurisdiction vested in the Court cannot be fettered by the fact that the right of appeal has not been exercised. Whilst the Court could exercise its reversionary jurisdiction to satisfy itself of the legality of the High Court Order, it should be used sparingly and in exceptional circumstances.

Revision Application Allowed. 01/02/2010

WRIT OF CERTIORARI AND MANDAMUS

COURT OF APPEAL

Nandasena v Pathirana and Six Others
Court of Appeal Writ Application No. 2071/2003

Decided On: 23/09/2008

S. Sriskandarajah J

Transfer of lease in a Local Authority property - Clause 7 of the Circular No. 1980/46 dated 31/12/1980 - Chapter XXX of the Establishment Code - Public Officer being a Lessee of a Local Authority property - Writ of Certiorari and Mandamus.

The 1st to 4th Respondents were the Lessees of four stores in the Manning Market. 5th, 6th and 7th Respondents are the Municipal Commissioner, Municipal Veterinary Surgeon and the Municipal Council of Colombo respectively. The father of the 1st and 2nd Respondents had transferred the lease in 1987 and 1992 to the respective Respondents. The Petitioner contended that the 1st and 2nd Respondents are employed as a teacher in a government school and a private bank respectively and are not engaged in business in the Manning Market and therefore, not

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eligible to be lease holders of the Colombo Municipal Council. Clause 7 of Circular No. 1980/46 dated 31/12/1980 sets out the transfers of lease and also contemplates the grounds of invalidating the lease agreement.

The Petitioner argued that Clause 1:2 of Chapter XXX of the Establishment Code prohibits any public servant from engaging in any commercial or business undertaking and the 1st Respondent being a government school teacher had violated the said provision of the Establishment Code and sought a Writ of Certiorari to quash the decision of the 7th Respondent to grant the stalls to the 1st and 2nd Respondents and a Writ of Mandamus to transfer the said stalls to the Petitioner.

Held:

1. Clause 1:2 of the Establishment Code had to be read with Clause 1:4 and 1:6, where it is left to the employer of the 1st Respondent to take steps if he is of the opinion that the 1st Respondent has violated any provision of the Establishment Code. Even then the 1st Respondent can decide whether to retain the market stall or to resign from the public service.

2. Clause 7 of the Circular No. 1980/46 dated 31/12/1980 allows the transfer of lease to the spouse or child upon a request of the lessee or upon the death of the lessee.

3. Clause 7 of the Circular No. 1980/46 dated 31/12/1980 does not specify that accepting a public office is a disqualification in having a market stall obtained on lease from the Local Government.

Application Dismissed. 02/02/2010

BAIL ACT

COURT OF APPEAL

Wickramasinghe v Attorney General
Court of Appeal No. CA (PHC) APN : 39/2009
High Court Negombo Case No. HCBA 490/2006

Decided On: 04/03/2010
Sisira de Abrew J, Upali Abeyrathna J,
D.S.C. Lecamwasam J

Bail Act Section 14, 16 and 17 - Remanding is not a punishment - Jayawathi v Attorney General - Remanding a suspect/accused for a period exceeding 24 months. The accused in this case was arrested on 28/09/2006 with a charge of murder. The learned High Court judge has by his order dated 30/03/2009 refused to grant bail. The accused has been on remand for over a period of three years and five months.

In the revision application filed before the Court of Appeal the Counsel for the Petitioner contended that in view of sections 16 and 17 of the Bail Act No: 30 of 1997 the accused cannot be kept on remand for a period exceeding 24 months.

The learned DSG appearing for the Attorney General cited Jayawathi v Attorney General CA 189/2004 (Decided On: 27/04/2006) contended that the suspect could be kept on remand for a period exceeding 24 months.

Held:

1. When the legislature enacted the Bail Act, as for section 3 it was not the intention of the legislature to release each and every suspect who has been remanded for a period exceeding 24 months. Thus the legislature when enacting the Bail Act did not intend to keep each and every suspect on remand for an indefinite time.

2. One purpose of remanding a suspect/ accused is to ensure his appearance in Court on each and every day that the case is called in Court. If the Court feels that he would appear in Court after his release on bail, Court should enlarge him on bail. Court should not remand a suspect/ accused to punish him.

3. Section 16 and 17 of the Bail Act are not subject to the provisions of Section 14.

4. When Section 16 of the Bail Act is considered any suspect/ accused to whom the Bail Act applyies cannot be kept in remand for a period exceeding 24 months. The period of 24 months is considered only if the Attorney General acts under Section 17, and if there is no such application the maximum period that a suspect/ accused to whom the Bail Act applies can be kept in remand is one year.

5. Jayawathi v Attorney General overruled.

Revision Application Allowed. 03/02/2010

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CRIMINAL LAW
COURT OF APPEAL

K.T. Siripala v Attorney General
Court of Appeal No. CA 260-261/2006
Hugh Court Negombo Case No. 295/2003

Decided On: 23/03/2010

Ranjith Silva J and D.S.C. Lecamwasam J

Section 455 and 113(b) of the Penal Code - Evidence in rebuttal - Failing to mark the portion of evidence under section 27(1)

The 1st and 2nd accused-appellants were charged under section 455 and 113(b) read with section 455 of the Penal Code, for conspiracy to forge a document and forge a record of the Court.

Statement made by the 1st accused appellant was not marked at the trial. Therefore the only evidence against the 1st accused-appellant was that he was arrested and the particular production was found on a statement made by him.

With regard to the 2nd accused appellant evidence had been led as to the circumstances under which she was arrested along with the forged documents. Prosecution had failed to lead evidence as how the production was found and also failed to mark the relevant portion of the statement under section 27(1) of the Evidence Ordinance. After the dock statement of the 1st accused appellant, the prosecution with the permission of the Court led the evidence of the police officer who recovered the production by way of evidence in rebuttal.

After the trial the learned High Court Judge convicted the accused-appellants.

In the appeal the counsel for the accused-appellants contended three grounds of appeal;

(a) The learned High Court Judge misdirected himself by convicting the accused-appellants on evidence led in rebuttal,
(b) That the statement made under Section 27 of the Evidence Ordinance had not been marked in evidence,
(c) Learned trial Judge allowed leading character evidence of the accused.

Held:

1. The failure of the prosecution to lead material evidence before they close the case and leading the said evidence by way of evidence in rebuttal cannot be allowed.

2. The failure of the prosecution to mark the relevant portion of the statement under section 27(1) of the Evidence Ordinance was fatal.

Appeal Allowed. 04/02/2010

OBITUARIES

Mr. G. Kulathilaka	-	Polgahawela
Mr. Jinapriya Peduruhewa	-	Moratuwa
Mr. Rupert Samarasekera	-	Bulathsinhala
Mr. D.W.M. Wijetunge	-	Negombo
Mr. Amarawansa Ladduwahethy	-	Kalurata
Mr. Nihal K.M. Perera	-	Colombo

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