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Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

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D I G E S T

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WANASINGHE V. HON. ATTORNEY GENERAL AND OTHERS

SUPREME COURT
G.AMARATUNGA, J.,
MARSOOF, J. AND
EKANAYAKE, J.
S.C. APPEAL NO. 35/2010
H.C. COLOMBO HCMCA 169/2007
M.C. COLOMBO 88222/1
SEPTEMBER 8TH, 2010

Code of Criminal Procedure Act - Section 110(1) - Provisions relating to the recording of statements in the course of an investigation - Section 110(3) - Statements to police officer or inquirer to be used in accordance with Evidence Ordinance - Bribery Act - Section 26 - When penalty to be imposed in addition to other punishment - Section 26 A - Additional fine to be imposed - Section 16 - Bribery of police officers, peace officers and other public officers - Evidence order Section 3.

At the trial before the learned Magistrate, the Complainant had stated that he pointed out to the A.S.P. the person who took money from him, but he could not say positively that it was the Accused (Appellant), who was present before Court, that was pointed out by him before the A.S.P. The main question before the Magistrate therefore was whether the person pointed out by the Complainant before the A.S.P. was the Appellant who was present in Court as the accused.

After trial the Accused was convicted by the learned Magistrate. The conviction was affirmed by the High Court in appeal. The Appellant appealed to the Supreme Court against the conviction and the sentence.

Held:

(1) Section 110(3) of the Code of Criminal Procedure Act prohibits the use of the written record of a statement recorded under and in term of Section 110(1) in the course of an investigation. Section 110(3) does not shut out direct evidence of a police officer of any thing done or said by a witness or an accused (except a confession of an accused) in his presence and seen or heard by such officer.

Per Gamini Amaratunga, J., -

> ". . . . Somathilake who was present at the time the complainant pointed out the appellant had seen the complainant pointing out the appellant as the person who took money from him. This is direct evidence given by Somathilake as to what the complainant did in his presence. Section 3 of the Evidence Ordinance provides that a "Fact" means and includes "any thing. . . capable of being perceived by senses." Somathilake had seen the complainant pointing out the appellant. This is evidence of fact (the act of the complainant pointing out the accused) seen by Somathilake (perceived by his senses)....."

(2) The witness remembered that on a previous occasion he had identified the relevant person, but could not remember at the time of the trial the exact person identified by him on that previous occasion. In such situation other evidence is admissible to show that the witness identified a particular person.

(3) In terms of Section 26 of the Bribery Act, where a Court convicts a person for an offence committed under Part II of the Bribery Act by accepting a sum of money, a sum which is equal to the gratification accepted shall be imposed as a penalty. The stipulation in Section 26 is mandatory.

Cases referred to:-

(1) King v. Hendrick 48 NLR 396

(2) Regina v. Osborne and Virtue (1973) QB 678

APPEAL from the judgment of the High Court (Colombo)

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

Thusith Mudalige, S.S.C., for Respondents

Asitha Anthony, Asst. Director (Legal), Commission to Investigate Allegations of Bribery or Corruption for the 2nd respondent.

Cur.adv.vult

July 21th 2011.

GAMINI AMARATUNGA, J.

This is an appeal, with leave granted by this Court, against the conviction and the sentence of the accused

appellant (the appellant) on charges framed under the provisions of the Bribery Act.

Before I set down the question of law on which leave to appeal was granted, it is pertinent to set out in brief the facts relevant to the case presented against the appellant. In the early hours of 01.11.2002 the Dambulla police detected the complainant Piyasoma driving a motor vehicle with a defective headlight. The police warned him to replace the defective headlight within fourteen days and show the vehicle to the police. His driving licence was taken by the police and he was given a temporary licence valid for fourteen days.

The complainant failed to replace the defective headlight within the stipulated time period. On 18.11.2002 he visited the Bambulla Police station to get his temporary licence extended. When he spoke to the Officer in Charge of the traffic branch, he was referred to another officer (the appellant) of the traffic branch, who was dressed in civilian clothes. That officer asked the complainant to wait out side. A little while later that officer came out and asked the complainant "How much money do you have?" When the complainant said that he had Rs. 300/-, that officer told him that in the event of a case being filed against him, the fine would be around Rs. 750/-. The appellant asked for Rs. 300/- to return the complainant's driving license. When the complainant said that he needed Rs. 100/- for his bus fare, the appellant asked for Rs. 200/- to return the licence. The complainant who had a currency note of Rs. 200/- denomination gave it to the appellant and got back his driving licence from the appellant. (It appears that at the time of this transaction currency notes of Rs. 200/- denomination were in circulation but had been withdrawn later by the Central Bank).

Having got his driving licence, the complainant walked into the A.S.P's Office which was in the premises adjoining

the police station and complained to the A.S.P. that money was taken from him by a police officer to return his driving licence without filing a case against him. The A.S.P. then telephoned the Dambulla police station and ordered all officers of the traffic branch to come to his office. Thereafter several police officers, led by the O.I.C., Traffic, appeared before the A.S.P. and the latter then explained the reason for summoning those officers to his office and requested that if any officer had taken money from the complainant such officer should come forward and own it. None came forward. Then the O.I.C., Traffic, suggested to ask the complainant to point out the person who took money from him. The complainant then pointed out the appellant. It is pertinent to note that according to the evidence led at the trial, there was no immediate protest of innocence by the appellant when he was pointed out by the complainant as the person who took money from him.

According to the evidence of I.P. Somatilaka, O.I.C., Traffic (against whom there was not even a suggestion at the trial that he was giving false evidence against the appellant) after the complainant pointed out the appellant, the A.S.P. told the appellant to hand over the money he had taken from the complainant and then, the appellant, in response to that request handed over a currency note of Rs. 200/- denomination to the A.S.P. This is an item of evidence relating to the conduct of the appellant, relevant and admissible under section 8(2) of the Evidence Ordinance. After the appellant handed over the currency note, he was searched by the O.I.C. (on the order of the A.S.P.) and the appellant had no money with him.

At the trial before the learned Magistrate, four years later, the complainant had stated that he pointed out to the A.S.P.

the person who took money from him, but he could not say for sure, that it was the accused (the appellant), who was present before Court, was the person pointed out by him before the A.S.P.

Thus this case presented a situation where the witness remembered that on a previous occasion he had identified the relevant person, but could not remember at the time of the trial the exact person identified by him on that previous occasion. In such a situation other evidence is admissible to show that the witness identified a particular person. This legal position was recognized in Sri Lanka in *King vs. Hendrick*[1]. Even in English Law the position is the same. *Regina vs. Osborne and Virtue*[2].

I.P. Somathilaka who was present when the complainant pointed out the appellant in the presence of the A.S.P. testified that it was the appellant who was the person pointed out by the complainant. This evidence established the identity of the appellant as the person picked up by the complainant in the presence of the A.S.P.

At the trial the appellant had made a dock statement denying the allegation made against him. He was convicted by the Magistrate on the evidence I have briefly set out above. The conviction was affirmed by the High Court in appeal.

> This Court had granted leave to appeal on the following question of law. "Did the High Court err in its failure to appreciate that the learned Magistrate has admitted and acted upon the evidence of A.S.P. Lal Kumara and I.P. Somathilake in contravention of section 110(3) of the Criminal Procedure Code, particularly in relation to the identification of the accused?"

Section 110 of the Code of Criminal Procedure Act No. 15 of 1979 makes provision relating to the recording of

statements in the course of an investigation commenced under section 109 of the Code regarding the commission of an offence.

Section 110(3) of the Code provides that "A statement made by any person to a police officer in the course of any investigation may be used in accordance with the provisions of the Evidence Ordinance except for the purpose of corroborating the testimony of such person in Court."

In the present case, according to the evidence of A.S.P. Lal Kumara, when the complainant informed him of the fact of taking Rs. 200/- by a police officer, he did not commence an investigation into the commission of an offence under the Bribery Act. He merely wanted to ascertain the identity of the police officer to take disciplinary action against him. That was the sole object of his endeavour to ascertain the identity of the culprit. According to the A.S.P. after he ascertained the identity of the officer who had taken money from the complainant, he submitted a report to his superior officer to take disciplinary action against him and the superior officer had referred the matter to the Bribery Commission.

According to the A.S.P.'s evidence no statement was recorded by him in terms of section 110 from the complainant before the latter picked up the appellant as the person who took money from him. At the trial, the complainant's evidence was that he pointed out the person who took money from him to the A.S.P. , but he could not say with certainty whether it was the appellant who was present at the trial as the accused. There was no question of corroboration arising from this evidence. The question that was before the Court at that stage was whether the person pointed out by the complainant before the A.S.P was the appellant who was present in Court as the accused. Evidence on this fact came from witness Somatilake who was present at the time the complainant

pointed out the appellant. Somatilake had seen the complainant pointing out the appellant as the person who took money from him. This is direct evidence given by Somathilake as to what the complainant did in his presence. Section 3 of the Evidence Ordinance provides that a "Fact" means and includes "any thing... capable of being perceived by senses." Somatilake had seen the complainant pointing out the appellant. This is evidence of a fact (the act of the complainant pointing out the accused) seen by Somatilake (perceived by his senses). This is direct evidence of Somatilake of an act done by the complainant in his presence and seen by him.

Section 110(3) of the Code of Criminal Procedure Act prohibits the use of the written record of a statement recorded under and in terms of section 110(1) in the course of an investigation. In this case there was no such statement in existence. Section 110(3) does not shut out direct evidence of a police officer of any thing done or said by a witness or an accused (except a confession of an accused) in his presence and seen or heard by such police officer.

For the reasons set out above. I answer the question of law on which leave to appeal was granted in the negative.

The learned counsel for the appellant, in his additional written submissions tendered after the hearing of the appeal has submitted that the evidence of identity alone was not sufficient to find the accused appellant guilty of the charges framed against him. He has submitted that the recovery of a Rs. 200/- note from the appellant is not an item of evidence supporting the charges against him as it is not unusual for a person to have a Rs. 200/- note in his possession as his own money. The substance of this submission is that the appellant's possession of a Rs. 200/- note is a mere

coincidence. If it was a mere coincidence, the appellant indeed is a very unfortunate man!

On the other hand, at no stage, either in the presence of the A.S.P. and I.P. Somatilake or at the trial before the learned Magistrate, the appellant had taken up the position that the Rs. 200/- note was his own money which he had in his possession. In his dock statement the appellant's position was that nothing was recovered from him! I therefore reject the submission made by the learned counsel. At the time the complainant first came before the A.S.P. the complainant had his driving licence with him which had been taken by the police two weeks prior to that date. There was no entry in the relevant books kept at the police station regarding the return of the licence to the complainant. The evidence of the O.I.C. traffic showed that the appellant had opportunity to have access to driving licences kept in the traffic branch. On the evidence led at the trial, the learned Magistrate had quite rightly convicted the appellant and the High Court was justified in dismissing the appeal. This appeal is accordingly dismissed.

In respect of charges 1 and 3 framed under section 16(b) of the Bribery Act, the appellant has been sentenced to eight months RI in respect of each count making the total period of imprisonment sixteen months. In addition a fine of Rs. 5,000/- has been imposed in respect of each count. In respect of counts 2 and 4 framed under section 19(c) of the Bribery Act, a fine of Rs. 5,000/- has been imposed for each count. The total amount of fines is Rs. 20,000/-. A default term of one month R.I. for each fine was also imposed making the total period of default term four months.

In terms of section 26 of the Bribery Act, where a court convicts a person for an offence committed under Part II of the Bribery act by accepting a sum of money as a gratification,

in addition to any other punishment imposed by Court, a sum of money equal to the gratification accepted shall be imposed as a penalty. The stipulation in section 26 is mandatory. The learned trial Judge has not imposed the mandatory penalty. I therefore, in addition to the punishments imposed by the learned trial Judge, impose a penalty of Rs. 200/- on the appellant and a default term of one month R. I. in respect of the penalty. Thus the total period of the default term is five months R.I.

The learned Chief Magistrate of Colombo is hereby directed to take steps to activate the sentence imposed on the accused appellant. This Court wishes to place on record the Court's appreciation of the prompt action taken by A.S.P. Lal Kumara to deal with an errant police officer who has brought the police service into disrepute.

MARSOOF, J. - I agree.

EKANAYAKE, J. - I agree.

Appeal dismissed.

Mandatory penalty imposed.

CHANDRASIRI V. ATTORNEY GENERAL

SUPREME COURT
SRIPAVAN, J.,
EKANAYAKE, J. AND
PRIYASATH DEP. J.
S.C. APPEAL NO. 100/2010
S.C. (SPL.) LA NO. 90/2010
H.C. NUWARAELIYA NO. 30/2009 (APPEAL)
M.C. NUWARAELIYA NO. 17340
SEPTEMBER 19TH 2011

Penal Code - Section 298 - Causing death by negligence - Death should have been the direct result of a rash or negligent act of the accused - Burden of Proof - Charge Sheet defective?

The Accused - Appellant was convicted in the Magistrate's Court for riding a motor cycle in a rash and/or negligent manner and causing the death of a person which is an offence punishable under Section 298 of the Penal Code. The Accused- Appellant appealed against the conviction and the sentence passed on him to the Provincial High Court of Kandy. His appeal was dismissed. He sought leave to appeal from the Supreme Court and was granted leave.

The main issue was whether the Accused rode the motor cycle in a rash and/or negligent manner, and caused the death of the person.

Held:

(1) It is for the prosecution to prove the case beyond reasonable doubt that the Accused acted in a rash or negligent manner. It is not for the Accused to prove that he did not act in a rash or negligent manner.

(2) The weakness of the defence case will not strengthen or bolster the otherwise weak prosecution case. The evidence must establish the guilt of the Accused, not his innocence. His innocence is presumed by the law and his guilt must be established beyond reasonable doubt.

Per Priyasath Dep, J.,-

> I find that the learned Magistrate and the learned High Court Judge failed to give due consideration to the subsequent conduct of the accused. The Accused after the accident did not flee from the scene and assisted in despatching the injured to the hospital and also returned to the scene to assist the investigating officer. The conduct of the accused is exemplary. Therefore his version should not be lightly disregarded... In the above circumstances it is necessary to consider whether the conduct of the accused amounts to criminal negligence.
>
> . . . In this case there is an absence of evidence regarding the manner in which the motor cycle was ridden at the time of the accident. The evidence given by the accused definitely raises reasonable doubt regarding the mental element of negligence. According to his evidence the deceased crossed the road suddenly. There is no evidence to controvert this fact."

(3) The conduct of the Accused does not amount to criminal negligence. The charge filed under Section 298 of the Penal Code is defective as it failed to enumerate the specific acts of rashness or negligence.

Cases referred to :-

(1) *Karunadasa v. Officer in Charge, Police Station Nittambuwa* - 1987 1 Sri L.R. 155

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

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

(4) *Andrews v. Director of Public Prosecutions* - 106 L.J.K.B. 370

(5) *R. v. Batman* - 96 L.J.K.B. 791

APPEAL from the Judgment of the High Court, Kandy.

Dr. Ranjith Fernando for the Accused - Appellant - Petitioner.
Shanaka Wijesinghe, S. S. C., for the Attorney-General

Cur.adv.vult

December 16th 2011

PRIYASATH DEP P.C, J.

The Accused Appellant was convicted in the Magistrate's Court of Nuwara Eliya for riding a motor cycle in a rash

and/or negligent manner and causing the death of Abosally Farook an offence punishable under Section 298 of the Penal Code. He was sentenced to 10 months rigorous imprisonment and was ordered to pay a fine of Rs. 1500/-. In view of this conviction the learned Magistrate acquitted the accused on two alternative charges filed under the Motor Traffic Act.

The Accused Appellant appealed against the said conviction and the sentence to the Provincial High Court of Kandy. His appeal was dismissed. He sought leave to appeal to the Supreme Court against the said Order of the High Court. The Supreme Court granted leave and the appeal was argued before us.

It is appropriate to deal with the facts of the case briefly. The main witness for the Prosecution is one Mohamed Illiyas who was working as a cashier in a shop. The accident had occurred on the 18th of September 1998 in Nuwara Eliya Town in a busy street near the Urban Council premises. The daily Pola was also located close by. The accident occurred between 12.00 – 1.00 pm and at that time people were busy rushing to a nearby mosque. Witness Mohomed Illiyas had seen the deceased been thrown and falling near his shop. He saw the Accused parking his motor cycle on the side of the road and approaching towards the injured (deceased) and assisting the others who were gathered there to dispatch the injured to the hospital. This witness did not observe any damage caused to the motor cycle. He says there was a pedestrian crossing nearby and he is unable to say whether the accident occurred on the pedestrian crossing or not.

The next witness was the Investigating officer, Sub Inspector Seneviratne. On receipt of information he came to

the scene and by that time the deceased was dispatched to the hospital. The Accused who came there pointed out the place of the accident to the Police Officer. He observed broken pieces of glass and pieces of signal lights near the place of the accident. This witness contradicts the earlier witness on this point. He is unable to say whether the place of impact was on or near the pedestrian crossing. He went to the extent to state that due to heavy showers in Nuwara Eliya the yellow lines of the pedestrian crossing could have faded. The evidence of this witness is rather vague and at times contradictory. He had failed to make proper observation notes of the scene.

The Prosecution called two other witnesses i.e. the wife and cousin of the deceased who identified the dead body of the deceased at the post mortem examination.

The Main witness for the prosecution Illiyas identified the Accused as the person who rode the motor cycle. This was made possible due to the fact that after the accident the accused halted the motor cycle and came to assist the injured to be taken to the hospital. S.I. Seneviratne was able to identify the accused because he came to the scene and pointed the place of the accident. Therefore, the Prosecution was able to establish the identity of the Accused beyond reasonable doubt.

The Post mortem examination Report was marked and produced in court. The Post mortem Report attributes the death to a head injury sustained by the deceased. It was established that the act of the Accused caused the death of the deceased.

The main issue that has to be considered is whether the Accused had acted in a rash and/or negligent manner. There

is no direct evidence to establish that the Accused rode the motor cycle in a rash or negligent manner. The Prosecution attempts to establish this ingredient by resorting to items of circumstantial evidence. It was emphasized that this accident occurred in a busy street in the heart of the town and during the rush hour. Therefore, the Accused should have exercised a high degree of care and also should have been concerned about the other users of the road. I find that these items it-self are not sufficient to establish criminal negligence. There is a serious infirmity in the Prosecution case. Although the accident occurred in a busy street there were no witnesses to testify as to the manner of riding the motor cycle and also how this accident occurred. If the Accused fled the scene without coming to the assistance of the injured and also did not return to the scene to assist the Investigating Officer, there could not have been any evidence to establish the identity of the Accused.

The Trial Judge and the Learned High Court Judge acted on the basis that Illiyas is an eye witness and his testimony was confirmed by S.I. Seneviratne.

The Accused gave evidence and denied that he rode the motor cycle at an excessive speed. He denied that he was negligent or acted in a rash manner. In his evidence he stated that the deceased suddenly crossed the road and he could not avert the accident. The Learned High Court Judge had remarked that the accused did not call evidence to corroborate his version and his evidence confirmed the prosecution case. I am of the view that the Trial Judge as well as the learned High Court Judge misdirected on the question of burden of proof. It is for the Prosecution to prove the case beyond reasonable doubt that the Accused acted in a rash or negligent manner. It is not for the Accused to prove that he did not act in a rash or negligent manner.

It is settled law that the weakness of the defence case will not strengthen the prosecution case or bolster the otherwise weak prosecution case. In *Karunadasa vs. Officer in Charge, Police Station Nittambuwa*[1] it was held that ' It is an imperative requirement that the prosecution must be convincing no matter how weak the defence is before the court can convict. The weakness of the defence must not be allowed to bolster up a weak case for the prosecution. The evidence must establish the guilt of the accused, not his innocence. His innocence is presumed by the law and his guilt must be established beyond reasonable doubt'

In this case there is an absence of evidence regarding the manner in which the motor cycle was ridden at the time of the accident. The evidence given by the accused definitely raises reasonable doubt regarding the mental element of negligence. According to his evidence the deceased crossed the road suddenly. There is no evidence to controvert this fact.

I find that the learned Magistrate and the learned High Court Judge failed to give due consideration to the subsequent conduct of the accused, The Accused after the accident did not flee from the scene and assisted in despatching the injured to the hospital and also returned to the scene to assist the Investigating Officer. The conduct of the accused is exemplary. Therefore his version should not be lightly disregarded.

In the above circumstances it is necessary to consider whether the conduct of the accused amounts to criminal negligence as opposed to civil negligence. It is appropriate to refer to case law on this point.

Sri Lankan cases including *Lourensz v. Vyramuttu*[2] and *The King vs. Leighton*[3] consistently followed a long line of

English decisions as regard to what constitute criminal negligence.

The House of Lords case of *Andrews v. Director of Public Prosecution*[4] is a case very often cited in the Sri Lankan judgments. In giving the judgment in that case Lord Atkin cited with approval the dictum of the Lord Chief Justice in *R. v. Bateman*[5].

"In explaining to juries the test they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, Judges have used many epithets, such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'complete'. But whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment."

After citing this dictim, Lord Atkin continued as follows:-

"The principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence. Simple lack of care such as will constitute civil liability is not enough; for purposes of the criminal law there are degrees of negligence and a very high degree of negligence is required to be proved before the felony is established. Probably of all the epithets that can be applied 'reckless' most nearly covers the case."

Having considered the facts and circumstances of this case and relevant English and Sri Lankan cases, I find that

the conduct of the accused does not amount to criminal negligence.

I also find that the charge filed under section 298 of the Penal Code is defective as it failed to enumerate the specific acts of rashness or negligence.

I therefore set aside the conviction and sentence imposed by the Magistrate and the judgment of the High Court affirming the said conviction and sentence.

SRIPAVAN J. - I agree

EKANAYAKE J. - I agree

Appeal allowed.

DANANJANIE DE ALWIS V. ANURA EDIRISINGHE (COMMISSIONER GENERAL OF EXAMINATIONS) AND 7 OTHERS (Z SCORE - CASE 1)

SUPREME COURT
DR. SHIRANI A. BANDARANAYAKE, C.J.,
IMAM, J. AND
SURESH CHANDRA, J.
S.C. APPLICATION (FR) NO. 578/2009
FEBRUARY 23TH 2011

Fundamental rights - Article 12(1) of the Constitution - Right to equality - Concept of legitimate expectation - Principle of equality - Principle of rational or reasonable classification - Z score - formula - Mean and standard deviation.

The Petitioner was a student of Kalutara Balika National School who sat for her G.C.E. (Advanced Level) for the second time in August 2008 and the results were released on 03.01.2009. According to the said results, the Petitioner had obtained a 'Z' score of 1.8887 with a District Rank of 49 from the Kalutara District.

The Petitioner had received a fresh sheet of results on 07.07.2009 which was backdated to 03.01.2009. According to the results she received on 07.07.2009, her Z score had been reduced to 1.8860 from the earlier score of 1.8887. The Z score given in July 2009 was not sufficient for her to enter into a Faculty of Medicine.

The Petitioner's grievance is based on the revision of the Z score and alleged that the Respondent had arbitrarily reduced and/or had amended her Z score without any basis for such reduction and without giving any explanation for such reduction and thereafter had released a revised schedule of the Advanced Level results and thereby had decided that the Petitioner has not been selected to a Faculty of Medicine. The Petitioner accordingly complained to the Supreme Court that her fundamental right to equal protection guaranteed in terms of Article 12(1) of the Constitution had been violated by the Respondents and relied on the concept of legitimate expectation.

Held:

(1) Considering the doctrine of legitimate expectation in terms of expectation to be consulted or heard, if a person relies on legitimate expectation, such a person would have to satisfy that he had been deprived of a past practice that had been withdrawn or changed suddenly without any notice or reason for such withdrawal or change.

In the present application there is no material to indicate that the past practice has been changed or withdrawn at the time the Petitioner had sat for the Advanced Level Examination or at the time the results were released. On the contrary the same system which was used in the previous year had been followed and the candidates were told that depending on the results of the re-scrutiny of papers, the Z score could change. Therefore it would not be correct for the Petitioner to state that the previous scheme had been changed without giving her an opportunity to express her views on the selection of candidates to universities.

(2) Considering the basis on which the Constitutional provision in Article 12(1) deals with the right to equality and the applicability of legitimate expectation on that basis, it is apparent that the expectation in question should have been founded upon a statement or an undertaking given by the authority in question, which would make it inconsistent or irrational with the general administration to deny such an opportunity a Petitioner has been claiming through his petition. Otherwise the Petitioner must show that there is the existence of a regular practice on which the Petitioner can reasonably rely upon to continue in his favour.

It is clear that the 1st or the 2nd Respondents had not given any promise or undertaking that the 'Z score' would be decided on the basis of the provisional results released on 03.01.2009. It was made to understand that the 'Z' scores would be finally determined and announced only after the re-scrutiny of the results are finalized and this had been the practice for several years.

(3) The steps that were taken by the Respondents, as alleged by the Petitioner, cannot be categorised as arbitrary and unlawful. The Petitioner has not been successful in establishing that her fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been infringed by the Respondents.

(4) The applicable final Z score and the District rankings would be available only after the rescrutiny marks are finalized.

Cases referred to :-

(1) *Schmidt v. Secretary of State for Home Affairs* - (1969) 1 All E.R. 904.
(2) *Breen v. Amalgamated Engineering Union* - (1971) 1 All E. R. 1148
(3) *Re Westminster City Council* - (1986) A. C. 668
(4) *Attorney General of Hong Kong v. Ng Tuen Shiu* - (1983) 2 All E.R. 346
(5) *Council of Civil Service Unions v. Minister for the Civil Service (The GCHQ Case)* - (1984) 3 All E.R. 935
(6) *Gauri Shankar v. Union of India* - AIR (1995) SC 55
(7) *Ashutosh Gupta v. State of Rajasthan* - (2002) 4 SCC 34
(8) *Western Uttar Pradesh Electric Power and Supply Co. Ltd. v. State of Uttar Pradesh* - AIR (1970) SC 21
(9) *R. K. Grag v. Union of India* - AIR (1981) SC 2138
(10) *Re: Special Courts Bill* - AIR (1979) SC 478
(11) *State of Uttar Pradesh v. Kamla Palace* - AIR (2000) SC 633

APPEAL for infringement of fundamental rights

Saliya Pieris with *Thanuka Nandasiri* for Petitioner.
Mahen Gopallawa, S. S. C., for the Respondents.

Cur.adv.vult

November 01st 2011

DR. SHIRANI A. BANDARANAYAKE, CJ

The petitioner was a student of Kalutara Balika National School, who sat for her General Certificate of Examination (Advanced Level), (hereinafter referred to as the Advanced Level Examination) for the second time in August 2008. She complained that, on the basis of her results at the said examination, she verily believed that she had attained a satisfactory Z score to follow the course of studies in Medicine. However, she had applied for her third attempt for the said Examination in 2009 prior to the release of the cut-off marks. The petitioner alleged that the respondents had arbitrarily

reduced and/or had amended her Z score without any basis for such reduction and without giving any explanation for such reduction and thereafter had released a revised schedule of the Advanced Level results and thereby had decided that the petitioner has not been selected to a Faculty of Medicine.

The Petitioner accordingly complained that her fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been violated by the respondents for which this Court had granted leave to proceed.

The facts of this application, as submitted by the petitioner, *albeit* brief are as follows.

The petitioner had sat for the Advanced Level Examination for the first time in August 2007 and had obtained two very good passes (B) for Biology and Physics and a Credit Pass (C) for Chemistry. Having received a Z score of 1.5567, on the basis of the said results, she had applied for University admission and had been selected to follow a course in Bio Science in the University of Sri Jayawardeanapura. Since the petitioner's ambition was to follow a course in Medicine and as the Z score she had obtained was insufficient for the said purpose, she had not taken steps to register at the said University, but decided to sit for the Advanced Level Examination for the second time.

The results of the Advanced Level Examination of August 2008 were released on 03.01.2009 and the said results were put on the school's Notice Board.

Accordingly she had obtained a Distinction (A) for Biology and two very good passes (B) for Chemistry and Physics. She had also obtained a Distinction for General English and 072 marks for the Common General Test.

According to the said results, the petitioner had obtained a Z score of 1.8887 with a District Rank of 49 from the Kalutara District.

The Petitioner stated that applications were called for admission to the Universities and accordingly she had sent her application for which she had received an acknowledgement.

The Petitioner submitted that although the results were released on 03.01.2009, the 2nd respondent had failed to release the cut off marks for University admissions until 03.07.2009. She further submitted that during previous years, the said marks were released within two to three months from the date of the release of the results, which had helped the students to decide whether they should re-sit the said Examination.

However, the petitioner did not pay much heed to the said delay as she had, in her view, obtained a Z score which was over and above the general requirement to enter a Faculty of Medicine, when compared with the Z scores of previous years.

The Petitioner had received a fresh sheet of results on 07.07.2009, which was backdated to 03.01.2009. According to the said document her Z score had been reduced to 1.8860 from the earlier Z score of 1.8887. On a comparison of the two sets of Z scores, the petitioner had realized that the Z score given in July 2009 was not sufficient for her to enter into a Faculty of Medicine.

Later on 10.07.2009, the petitioner had received a letter from the University Grants Commission that she has been selected to follow the course of study in Dental Surgery in the University of Peradeniya and had informed her to meet

the Registrar of the University of Colombo for the purpose of registration. The petitioner stated that she had registered with the Faculty of Dental Surgery at the said University although she verily believed that the reduction of her Z score was incorrect, arbitrary and discriminatory and had no legal basis.

The petitioner had appealed to the Commissioner General of Examinations to rectify the error with regard to her Z score and to allow her to follow a course of study in a Faculty of Medicine. She submitted that she had decided to register with the Faculty of Dental Surgery as she would be deprived of her chances to undergo higher studies.

The petitioner accordingly has complained that her fundamental rights to equal protection had been violated by the respondents and this allegation is based on the grounds that,

1. the respondents had arbitrarily reduced or amended the petitioner's Z score without any basis and without giving any reasons for such reduction;

2. the release of a revised schedule of the results of the Advanced Level Examination after the cut off mark for the University admissions were released; and

3. by causing a delay in the release of the results of the Advanced Level Examination and the cut off mark for the University Admissions.

The 1st respondent, being the Commissioner of Examinations, had averred that although the results of the Advanced Level Examination held in August 2008, were initially released on 03.01.2009 by the Department of Examinations, that they were subject to change and were

considered as provisional until confirmed by the official results issued by the Department of Examinations. The 1st respondent had further averred that all the principals of schools were informed of this situation by his letter dated 01.01.2009 (1R1). The reason for such change was based on the fact that time had to be granted for candidates who sat for the Advanced Level Examination to apply for re-scrutiny and the notice for such re-scrutiny was published on 09.01.2009.

The process of re-scrutiny had taken over 5 months and the final results including the revised Z scores had been issued to the University Grants Commission on 24.06.2009 and to the candidates on 29.06.2009. Accordingly, the petitioner had received a Z score of 1.8860, which was below the cut off point of 1.8864 that was necessary to be admitted to follow a course of study in Medicine.

The petitioner's grievance is based on the revision of her Z score. Admittedly along with her results released on 03.01.2009 it was stated that her Z score was 1.8887, which was over and above the cut-off point of 1.8864 from the Kalutara District to enter a Faculty of Medicine. This position clearly indicates that two sets of Z scores were issued to the petitioner on which the petitioner had stated that she had a legitimate expectation that she could enter a Faculty of Medicine without sitting for the Advanced Level Examination for a further time. The respondents had taken the position that the first sets of results were only provisional and not final and therefore there cannot be any legitimate expectation based on the original sets of results. A question therefore arises as to at which point the Z score could be finalized.

It is not disputed that since 2001 in Sri Lanka, the University admissions were based on the Z scores

obtained by the individual candidates at the Advanced Level Examination. This method was introduced by the University Grants Commission in order to avoid any unfairness in the process of selection. The said method, which was commonly known as the Z score, was a process of standardization, which was carried out using the statistics that were based on the marks obtained by the students. The Z score was calculated using the following formula.

$$Z = \frac{X - \bar{X}}{S}$$

The said formula of the Z score could be described as follows:

$$Z\text{ - score} = \frac{\text{Raw marks obtained by a student - Mean mark for the subject}}{\text{Standard deviation of marks for the subject}}$$

This clearly indicates that the mean mark for the relevant subject is necessary to arrive at the Z score. Such mean marks would have to be obtained, not at the time the original results are released, but only after the re-scrutiny results are finalized. Therefore although the provisional results may be released on an earlier date, such a release would not assist the students to decide as to which course of study that they would be able to follow. The reason for this process is that by its nature, the Z score would depend not only on the marks a particular student had obtained, but on the marks the others students had scored at that examination in a given subject.

Accordingly it is not correct for the petitioner to state that although the results were released on 03.01.2009, the cut-off marks were not released until 03.07.2009. Due to the very nature of the calculation of the Z score, it would not have

been possible to release the cut-off marks until the re-scrutiny results were finalized by the Department of Examination.

The petitioner's complaint as clearly stated earlier was that in terms of the results issued prior to the re-scrutiny results were released, she had a Z score which was over and above the cut-off point that was necessary to enter a Faculty of Medicine. Due to the said position, the petitioner had stated that she had a legitimate expectation that she could enter the Medical stream.

As stated earlier the introduction of the method of selecting students to Universities and their different Faculties on the basis of the Z score was to eliminate difficulties and distortions caused to candidates by varying standards of marking adopted in different subjects. However, since its inception in 2001, it was known that the Z score of a subject could always vary due to the re-scrutiny marks. This would occur even in situations where the candidate in question had not applied for re-scrutiny. The formula for the Z score, as shown earlier, is based on the Mean and the Standard Deviation in respect of subjects and whenever there is any change in the marks occur that would affect the Z score.

Referring to the said changes, the 1st respondent had averred that due to the changes in marks of the other candidates who had applied for re-scrutiny and due to the changes in their marks, there had been a downward revision of the petitioner's Z score from the original Z score of 1.8887 to 1.8860. Consequently, the petitioner's district ranking also got revised from 49 to 52. In support of his averment, the 1st respondent had tendered a document which contains the details of the manner in which the changes during re-scrutiny had affected the Z score of the petitioner (1R7).

On an examination of the documents which were placed by the petitioner as well as the respondents, it is quite clear that the applicable final Z score and the District Ranking of a candidate would be available only after the re-scrutiny marks are finalized.

It is not disputed that the final results of the re-scrutiny were released on 29.06.2009 and the cut-off points for the admission to universities and to their different Faculties were issued only on 02.07.2009 by the University Grants Commission. The petitioner had stated that she had received the final results on 07.07.2009. By 07.07.2009, the petitioner was well aware that the Z score she had obtained was not sufficient to enter into a Faculty of Medicine.

In such circumstances, could the petitioner rely on the concept of legitimate expectation?

Legitimate expectation is a concept which has been developed through the years since its introduction by Lord Denning in *Schmidt v. Secretary of State for Home Affairs*[1] mostly on the basis of procedural fairness and the removal of arbitrary decision. In **Schmidt** (supra), the Court, referring to a decision of the Government to reduce the period already allowed to an alien to enter and stay in England, had held that the said person had a legitimate expectation to stay in that country, which cannot be violated without following a reasonable procedure. The decision in **Schmidt** (supra) was followed soon after in *Breen v. Amalgamated Engineering Union*[2].

Legitimate expectation has been described as a concept which derives from an undertaking given by someone in authority. There is no compulsion for such an undertaking to be in written formula, but would be sufficient if that could be

known through the surrounding circumstances. Discussing this concept, David Foulkes (Administrative Law, 7th Edition, Butterworths, 1990, pg. 272) had expressed the view that a promise or an undertaking could give rise to a legitimate expectation. Discussing his position with regard to the concept Foulkes had stated that,

> "The right to a hearing, or to be consulted, or generally to put one's case, may also arise out of the action of the authority itself. This action may take one of two, or both forms; a *promise* (or a statement or undertaking) or a regular *procedure.* **Both the promise and the procedure are capable of giving rise to what is called a legitimate expectation, that is, an expectation of the kind which the Courts will enforce"** (emphasis added).

Prof. Galligan (Due Process and Fair Procedures, A Study of Administrative Procedures, Clarendon Press, Oxford, 1996, pg. 320) had described the concept of legitimate expectation to something equal to the idea of an interest raised due to an undertaking that had been given. Explaining his theory, Prof. Galligan had stated thus:

> "In one sense legitimate expectation is an extension of the idea of an interest. The duty of procedural fairness is owed, it has been said, when a person's rights, interests or legitimate expectations are in issue. **One might have no right or interest at stake, but because of something said or done by the authority, an expectation may be raised, which should not be disappointed without following certain procedures.** An example is an alien seeking an extension of a visa to stay in the United Kingdom. Under English Law he has no right or legitimate interest in being allowed to stay; but he might acquire a legitimate expectation from an undertaking or holding out that he will be allowed to stay" (emphasis added).