

IN THE COURT OF APPEAL OF THE DEMOCRATIC
SOCIALIST REPUBLIC OF SRI LANKA

Polpagoda Gamage Thilina
Sajotha Vincent also known as
Thilina Gamage
4th Accused-Petitioner

CASE NO: CA/0001/2020/TRF

HC CASE NO: HC/555/2019 (Colombo HC)

Vs.

Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

1. Mahadisanayaka Bandarage
Chandrarathne Bandara Yatawara
2. Hettipathiranalage Priyanka
Sanjeevani
3. Pasqual Fonsekalage Upali
Padmasiri

Accused-Respondents

Before: Mahinda Samayawardhena, J.
K. Priyantha Fernando, J.

Counsel: Nalin Ladduwahetty, P.C., with Hafeel Fariz
for the Petitioner.

Thusith Mudalige, D.S.G., with Chethiya
Gunasekare, D.S.G., for the Complainant-
Respondent.

Argued on: 29.01.2020

Decided on: 05.02.2020

Mahinda Samayawardhena, J.

This is an application filed by the 4th accused as the petitioner, naming the Attorney General and 1st-3rd accused as respondents, under section 46 of the Judicature Act, No.2 of 1978, as amended, seeking a transfer of the Colombo High Court Case No. HC/555/2019 from High Court No.3 to any other High Court in Colombo.

Section 46(1) of the Judicature Act, insofar as relevant to this application, reads as follows:

Whenever it appears to the Court of Appeal—

- (a) that a fair and impartial trial cannot be had in any particular court or place; or*
- (b) that some questions of law of unusual difficulties are likely to arise; or*
- (c) that a view of the place in or near which any offence is alleged to have been committed may be*

required for the satisfactory inquiry into or trial of the same; or

(d) that it is so expedient on any other ground,

the court may order upon such terms as to the payment of costs or otherwise as the said court thinks fit, for the transfer of any action, prosecution, proceeding or matter pending before any court to any other court.

Paragraphs 28-30 of the petition demonstrate the broader basis for this application for transfer:

28. In the circumstances described above, the Petitioner states that he verily apprehends and is of the belief that and is advised that a fair and impartial trial cannot be held before the incumbent Judge of the High Court of Colombo in as much as pleaded hereinabove on successive dates of Trial and the Learned High Court Judge's refusal and/or unwillingness and/or reluctance to ensure the right of the Accused to fair trial as pleaded above indicate that the Learned Judge has prejudiced the case and/or is biased and/or prejudiced against one or more of the Accused including the Petitioner and/or is otherwise inclined on account of collateral reasons to deprive one or more of the Accused including the Petitioner of a fair and impartial trial.

29. The Petitioner states that the Petitioner's decision to make this application before Your Lordship's Court was not made lightly, and was made eventually after several confirmations of the Petitioner's initial and growing apprehension that he would not be afforded a fair and

impartial trial before the incumbent Judge of the High Court of Colombo.

30. The Petitioner states in any event that it is expedient in the interests of justice to transfer the case to another court and/or before a Judge other than the incumbent [Judge].

It is seen from the above that the main contention of the petitioner is that a fair and impartial trial cannot be had before the said learned High Court Judge, in view of the conduct of the Judge so far witnessed during the course of the trial as morefully described in the petition.

Notwithstanding the petitioner has set out in the petition in chronological order the instances where the conduct of the Judge, according to the petitioner, is prejudicial to the rights of the accused, learned President's Counsel for the petitioner in his submission before this Court drew the attention of the Court primarily to two days' proceedings, in order to substantiate his complaint.

The proceedings in question relate to the Judge's questioning of witness No.2 on 25.11.2019 and witness No.8 on 14.01.2020.

Before I refer to the evidence, let me state the following.

The petitioner is only one accused, to be exact the 4th accused, in the case. There are three more who have been indicted with him. This is not a joint application by all four seeking a transfer. The other three, the 1st-3rd accused, who have been made respondents to this application, have neither been noticed nor have affidavits been obtained from them consenting to the

application of the petitioner. We do not know whether they, similar to the 1st respondent Attorney General, oppose the transfer. The petitioner cannot say that the other three accused will also be denied an impartial and fair trial before the relevant Judge. The petitioner can only speak for himself.

In pursuit of “the attainment of truth and justice”, a Judge is statutorily given the power to question a witness as he pleases.

Insofar as criminal trials are concerned, section 439 of the Code of Criminal Procedure Act provides as follows:

Any court may at any stage of an inquiry, trial, or other proceeding under this Code summon any person as a witness or examine any person in attendance though not summoned as a witness or recall and re-examine any person already examined; and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

In civil trials, sections 164 and 165 of the Civil Procedure Code, are to a similar effect.

164. The court may at any time, whether before or after the examination of a witness by the respective parties or during such examination, put and interpose such questions as it may consider conducive to the attainment of truth and justice. And the answers to such questions shall be made to appear on the face of the record as having been given to the court.

165. The court may also in its discretion recall any witness, whose testimony has been taken, for further examination or cross-examination, whenever in the course of the trial it thinks it necessary for the ends of justice to do so.

The Evidence Ordinance is applicable in both criminal and civil trials. Section 165 of the Evidence Ordinance gives a Judge the discretion to question witnesses and order production of real evidence, free from inhibitions. This section reads thus:

The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved;

Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document, which such witness would be entitled to refuse to answer or produce under sections 121 to 131 both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall

he dispense with primary evidence of any document, excepting the cases herein before excepted.

In *Wijeratne Banda v. State* [1998] 3 Sri LR 86 at 92, Kulathilake J. stated:

It is necessary to stress the powers given to a trial Judge to put questions to a witness in terms of section 165 of the Evidence Ordinance. The trial Judge in order to discover or to obtain proper proof of relevant facts may ask any question at any time of any witness or of any person about any fact relevant or irrelevant.

The proceedings of 25.11.2019 reveal that notwithstanding witness No.2 had been subjected to cross-examination on behalf of the 1st-3rd accused, no cross-examination had been done on behalf of the petitioner. Following re-examination of the said witness, the Judge commenced his own questioning of the witness.

The petitioner in paragraph 16 of the petition states that the Judge took it upon himself to conduct the role of the prosecutor, violating all norms of the Evidence Ordinance and the Code of Criminal Procedure Act, and the said questioning was:

- a) Motivated by extraneous purposes
- b) Inclined against the case of the defence
- c) Specifically pre-determined
- d) Intended to cover up the faults of the prosecution case
- e) Intimidatory of the prosecution witness.

Having read the evidence of witness No.2, I am afraid I am unable to subscribe to this view. The Judge did not take upon himself the role of the prosecutor.

The accused have been indicted for allegedly cheating State officials in the registration and licensing of an elephant—considered public property—by tendering forged documents. Witness No.2 appears to be the key witness for the prosecution. It is he who finally approved the said registration and issuance of licence.

The witness had given extensive evidence, which runs from pages 66-169 of the Brief—more than 100 pages. After examination-in-chief, cross-examination and re-examination, the Judge had put questions to the witness, which run into only six pages—from pages 169-174 of the Brief. Prior to these questions, the Judge had asked only eight questions from the witness, in between counsel's questioning.

However, after questioning the witness, the Judge had given counsel the opportunity to examine the witness on matters arising from his questioning, if any. Counsel for the prosecution had questioned the witness. This is recorded in the Brief under the misleading sub-heading "further re-examination". As seen from page 183 of the Brief, counsel for the 2nd, 3rd and 4th accused had informed the Court that they had no questions. Counsel for the 1st accused had sought permission to ask questions if any on the next day after perusal of the proceedings. The following day, no application had been made by counsel for the 1st accused to examine the said witness. This means, no

prejudice had been caused to any of the accused including the petitioner by the questioning of the witness by the Judge, thereby denying the accused a fair trial, as the petitioner now complains. If the answers given by the witness to the questions put by the Judge were false, misleading and detrimental to the accused, I am certain counsel for the accused would not have allowed the witness to leave without clarification. Insofar as witness No.2 is concerned, in my view, the petitioner has no ground to grouse.

Referring to the evidence of this witness, the petitioner in paragraph 17 of the petition states that there is no provision in law permitting the prosecution to recommence re-examination after questioning by the Judge. As I said earlier, the term “re-examination” in this context is misleading. A Judge’s questioning is not “cross-examination”. It is a healthy practice to grant leave to both parties to question the witness after examination of the witness by the Judge, as the Judge’s questioning can destroy or strengthen the case of either party.

The next complaint of the petitioner relates to leading evidence of witness No.8 on 14.01.2020. Following evidence-in-chief of this witness, learned counsel for all the accused including the petitioner had stated that there were no questions by way of cross-examination. Thereafter, the Judge had questioned the witness.

This case, as I said earlier, revolves around the alleged deceitful registration of an elephant. The procedure for registering an elephant is not a familiar topic—in fact, it is altogether new.

According to the evidence-in-chief of witness No.8, the elephant had been handed over at night to this witness at the Wildlife Department in Battaramulla by a person clad in a police uniform. The witness, a veterinary doctor, is an Assistant Director of the Wildlife Department. He had discharged an official duty in taking over the elephant. In examination-in-chief, the witness had stated that he does not know the details of either the person who appeared to be a police officer or the person who accompanied the police officer, the latter having fled the scene soon after unloading the elephant from the lorry. The evidence of this witness is vague.

In the course of evidence-in-chief, this witness had spoken of a document handed over to him by the said police officer to be returned with an endorsement/signature of the witness acknowledging acceptance of the elephant. But such document had not been produced in evidence-in-chief, nor had counsel for the prosecution or defence probed it further.

It is in this context that the Judge had questioned the witness on the correct procedure to be followed when an elephant is handed over, the actual procedure followed in this instance, and the document the witness spoke of during evidence-in-chief.

In my view, this questioning was neither unusual nor unwarranted. Any right-minded Judge who is alert on the Bench would have asked questions on the procedure adopted, as it was unclear in the mind of the Judge, after the evidence of the witness was concluded. We must remember that the

conclusion of evidence does not conclude the task of the Judge. He shall write the Judgment.

According to the proceedings, the Judge had not attempted to mark any document, but had questioned the witness on the document allegedly handed over by the witness to the police officer.

Upon conclusion of his questioning, the Judge had, as seen from page 326 of the Brief, inquired from counsel for both parties whether there were any questions for the witness arising from his questioning.

It is at this stage that counsel for the prosecution had sought permission from the Court to mark, supposedly, a photocopy of the document referred to by the witness.

This had been objected to by learned President's Counsel on behalf of all the accused. This objection was not, in my view, a frivolous one, at least on three grounds: firstly, the said document was a photocopy; secondly, it was an unlisted document; thirdly, it had been with the opposing counsel and not with the witness.

Thereafter, the matter had been left open without a ruling, and further trial was postponed.

We are not convinced, as the petitioner in paragraphs 16, 23, 28 contends, that the Judge is biased, that he has prejudged the case and inclined against the defence and in favour of the prosecution "motivated by extraneous purposes", and that he

has acted in such a way for “collateral reasons”, depriving the accused of a fair and impartial trial.

According to the submission of learned President’s Counsel for the petitioner, this is not the first occasion on which this particular Judge has behaved in this manner in Court. Counsel referred to several instances where parties have come before this Court seeking transfers on similar grounds. This submission establishes that the general behaviour of this Judge in Court is such, and the behaviour complained of here is not exceptional or confined to this particular case.

The Judge may have exceeded his authority or discretion. He may have led irrelevant evidence in the course of his questioning. In fact, for instance, as seen from pages 182-183 of the Brief, some questions were clearly irrelevant, asked with a touch of sarcasm, not “in order to discover or to obtain proper proof of relevant facts” as permitted by section 165 of the Evidence Ordinance. We do not condone or approve of such line of questioning. But that does not mean or establish that the Judge is biased against the accused and acted in such a way for collateral reasons, and that no fair and impartial trial can be had before him.

The petitioner has listed in the petition: (a) hearing the case when there was torrential rain outside the court; (b) sometimes till 5.30 p.m.; (c) stating that “He wants to finish this trial”, as indicative of the fact that “the learned High Court Judge had taken a personal interest in the case before him”. The petitioner has taken these grounds to discredit the Judge. In my view,

they have the converse effect. These are good qualities of a dedicated Judge. These acts on the part of the Judge shall be appreciated and admired, not frowned upon and despised.

The petitioner on more than one occasion has stated in the petition that what happened in open Court is not reflected in the proceedings, and given his own account of what took place. This is unsatisfactory and unacceptable. A party, without first making a complaint in this regard to the relevant Court before which proceedings were had, cannot for the first time controvert the contents of a case record in the Appellate Court.

In *Shell Gas Company v. All Ceylon Commercial and Industrial Workers' Union* [1998] 1 Sri LR 118 at 120 Jayasuriya J. stated:

Our courts have constantly drawn the attention of learned counsel that it is not open to a petitioner to file a convenient and self-serving affidavit for the first time before the Court of Appeal and thereby seek to contradict a judicial or a quasi-judicial record and that if a litigant wishes to contradict the record, he ought to file the necessary papers before the court or tribunal of first instance, initiate an inquiry before such authority, obtain an order from the deciding authority of first instance and thereafter raise the matter in appropriate proceedings before the Appeal Court so that the appellate court would be in a position on the material before it to make an appropriate adjudication with the benefit of the order of the deciding authority in the first instance. Vide Jayaweera v. Assistant Commissioner, Agrarian Services, Ratnapura [1996] 2 SLR 79; Vannakar v.

Urhuma Lebbe [1996] 2 SLR 73; *King v. Jayawardena* 48 NLR 489 at 503; *Gunawardena v. Kelaart* 48 NLR 522.

It is irregular and improper for a petitioner to file a convenient and self-serving affidavit in the Court of Appeal seeking to add to the record and to amplify the record or to contradict the record. Justice Dias in King v. Jayawardena (supra) after a review of a series of decisions, held that no party ought to be permitted to file a self-serving and convenient affidavits to contradict or to vary the record. In Vannakar's case, (supra) the Court of Appeal Judge observed: "If the party had taken such steps to file papers before the presiding officer of the court of first instance, then an inquiry would be held by him and the self-serving statements and averments would be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the Court of Appeal would have the benefit of the recorded evidence which has been subjected to cross-examination and the benefit of the findings of the judge of the court of first instance. When such a procedure is not adopted Justice Dias ruled that the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavit to contradict or vary the record".

Vide also Shell Gas Company v. All Ceylon Commercial and Industrial Workers' Union [2000] 3 Sri LR 170 at 176-177, *Chaminda v. Republic of Sri Lanka* [2009] 1 Sri LR 144 at 148, *Andradie v. Jayasekera Perera* [1985] 2 Sri LR 204 at 208.

When a transfer application is filed on an allegation of bias, it is unfortunate that, although the allegation is personal in nature, the Judge is not a party to the application to respond directly.

It is a serious indictment against a Judge to say that he is biased. It is easy to say but hard for the Judge to stomach, if he is innocent, honest and dedicated to his work. Hence this Court shall act with the utmost caution when deciding a transfer application on the ground of bias.

This Court shall not entertain and endorse such allegations unless and until the Court is fully satisfied that the allegation is well-founded.

There is a strong presumption that Judges are unbiased and unprejudiced. Conjectures and surmises are not sufficient to rebut this presumption. A party seeking transfer of a case from one Judge to another on the basis of bias undertakes a heavy burden of proof to discharge.

Bias is two-fold: reasonable suspicion of bias and real likelihood of bias. When an allegation of bias is against a Judge, although the application is made on reasonable suspicion of bias, the Court expects the applicant to prove real likelihood of bias.

The test is objective as opposed to subjective. This means, a petitioner's belief or opinion that a Judge is biased is not sufficient. There must be circumstances where a reasonable person would think there is a real likelihood that the Judge would unfairly favour one party at the expense of the other.

Vide the Divisional Bench decision of this Court in *Marcus v. The Attorney-General, Vol.II, Srikantha's LR 131, Shell Gas Lanka Ltd. v. All Ceylon Commercial & Industrial Workers Union [1998] 1 Sri LR 118, Shell Gas Lanka Ltd. v. All Ceylon Commercial & Industrial Workers Union [2000] 3 Sri LR 170.*

In the facts and circumstances of the instant case, we are not convinced that the petitioner discharged the said burden to the satisfaction of this Court.

Daya Weththasinghe v. Mala Ranawaka [1989] 1 Sri LR 86 is a rent and ejectment case where the main dispute was whether the premises let were residential or business premises, and whether they were excepted premises. After the commencement of the trial, the Judge made an inspection of the premises in order to amicably settle the case. The Judge noted on inspection *inter alia* that it was incontrovertible that the premises were not being used as a residence by the defendant. The settlement did not materialise. The defendant applied for a transfer of the case to another Judge on the ground that a fair and impartial trial could not be had before the same Judge in view of the conclusions he arrived at after the inspection. The Court did not find favour with this submission. Wijetunga J., with S.N. Silva J. (later C.J.) agreeing, had this to say at pages 91-92:

This brings me to the main question viz. whether the facts and circumstances of this case warrant its transfer. Can it be said that in view of the observations recorded by the judge, a fair and impartial trial cannot be had before him?

No doubt the observations are in the nature of very strong findings of fact and have been termed by the judge as incontrovertible. Yet, would this result in bias on the part of the judge? Even though no impropriety is alleged, the onus of establishing bias lies heavily on the petitioner.

In Perera v. Hasheeb, Sriskantha's LR, Vol.1, p.133, 145, G.P.S. de Silva, J. made the observation that it must be remembered that a judicial officer is one with a trained legal mind, that it is a serious matter to allege bias against a judicial officer and that this court would not lightly entertain such an allegation.

In Simon v. The Commissioner of National Housing 75 NLR 471, it has been held that the inquiring officer must be disinterested and unbiased, but a decision of his is not liable to be quashed on the ground merely of the reasonable suspicion of the party aggrieved unless it is proved that there was a real likelihood that the inquiring officer was biased against the party aggrieved.

Again, in Re Ratnagopal, 70 NLR 409, the court held that the proper test to be applied is an objective one and formulated it as follows: Would a reasonable man, in all the circumstances of the case, believe that there was a real likelihood of the Commissioner being biased against him?

These authorities are indicative of the heavy burden that lies on the petitioner to establish bias. Where the person concerned is a trained judicial officer, the onus, to my mind is even greater. On a careful consideration of the facts and

circumstances of this case, I am unable to say that the defendant-petitioner has discharged this burden. His application for transfer of this case on the ground that a fair and impartial trial cannot be had in the particular court must, therefore, fail.

The case was thereafter transferred on a different basis.

A Judge during the course of the trial may make adverse interlocutory orders against the accused. These orders may be *ex facie* wrong. But they can in no way be regarded to have been motivated by bias against the accused, unless there are compelling reasons to believe the contrary.

In *Dr. Karunaratne v. Attorney General* [1995] 2 Sri LR 298, an application was made to transfer the case from one High Court of Colombo to another, on the basis that a fair and impartial trial could not be had before the trial Judge. The main contention of counsel for the petitioner was that in view of allegations of bias filed against the Judge by counsel in another case, the petitioner was reasonably apprehensive that he would be deprived of a fair trial. This was not accepted as a reasonable ground for transfer.

Counsel for the petitioner in the abovementioned case had submitted that “*the Judge’s gestures, the tone of his voice and orders made by him refusing applications made by his counsel and the Judge’s conduct in permitting interruptions during his counsel’s cross examination of witnesses were in marked contrast to the treatment meted out to other counsel appearing in the same court*”.

Referring to the test of real likelihood of bias and reasonable suspicion of bias, Gunasekera J. at pages 302-303 stated:

In regard to the application of the test of reasonable suspicion of bias it must be shown that the suspicion is based on reasonable grounds which would appeal to the reasonable right thinking man. It can never be based on conjecture or on flimsy, insubstantial grounds. There must be material which shows a tendency to favour one side unfairly at the expense of the other. It was submitted by learned counsel for the petitioner that the learned trial Judge has made certain orders during the course of the proceedings permitting the prosecuting counsel to call certain witnesses who were listed on the indictment after having overruled the objection raised by learned counsel for the petitioner and also permitted the prosecuting counsel to produce certain documents such as a photocopy of a bed-head ticket on an undertaking given by the prosecuting counsel to produce the original thereof at a later stage of the trial. The orders made by the trial Judge which were adverse to the petitioner can in no way, in our opinion be considered to have been made as the Judge was biased against the petitioner. We have carefully considered the documents P5D (a), (b), P5G(a), G(b), P5H, P5I, P5K, P5L, and P7 which are relied upon by the petitioner to substantiate his claim that the trial Judge was biased against him, but are unable to agree with this contention.

Having considered the submissions of learned counsel for the petitioner, and the material placed before us we are of

the view that the petitioner has failed to establish both the test of real likelihood of bias and the test of reasonable suspicion of bias as against the learned trial Judge. Therefore, we are of the view that the first ground urged that a fair and impartial trial cannot be had before the learned trial Judge is not tenable.

Learned President's Counsel for the petitioner in his submission laid much emphasis on the following dicta of Lord Hewart C.J. in *Rex v. Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259:

It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

This quotation is too often misused to give the impression that the appearance of justice is more important than real justice. The latter in my view is more important than the former. What is the purpose of justice seen to be done but not done? If both cannot subsist simultaneously, it is in the best interest of justice that the latter takes precedence.

In *R. v. Camborne Justices, ex parte Pearce* [1954] 2 AER 850 at 855, Slade J. made the following pertinent observation in this regard.

The frequency with which allegations of bias have come before the courts in recent times seems to indicate that the reminder of Lord Hewart, C.J. in R v. Sussex JJ ex parte Mc Carthy [1924] 1 KB 259 that

it is “of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done” is being urged as a warrant for quashing convictions or invalidating orders on quite unsubstantial grounds and, indeed, in some cases, on the flimsiest pretexts of bias. While indorsing and fully maintaining the integrity of the principle reasserted by Lord Hewart, C.J., this court feels that the continued citation of it in cases to which it is not applicable may lead to the erroneous impression that it is more important that justice should appear to be done than that it should in fact be done. In the present case, this court is of the opinion that there was no real likelihood of bias and it was for this reason that the court dismissed the application”.

This was quoted by Gunasekera J. in *Dr. Karunaratne v. Attorney General* [1995] 2 Sri LR 298 at 302, in refusing an application for transfer.

In *Kumarasena v. Data Management Systems Ltd* [1987] 2 Sri LR 190, whilst refusing an application for transfer, Gunewardena J. at page 202 remarked:

Any other order it must also be observed could open the flood gates to a multitude of similar applications by parties dissatisfied with some incidental order made by a Judge or otherwise unhappy with the case continuing before him and

anxious to take it elsewhere, although that is far from being what impels me to make this order.

In *Queen v. David Perera* (1962) 66 NLR 553, a Judgment heavily relied on by learned President's Counsel for the petitioner, the charge was possessing a forged or counterfeit currency note. It was a trial by jury. The Judge's questioning was manifestly excessive in that out of 713 questions, 293 were from the Judge. The answers of the accused to certain vital questions were inadmissible and clearly prejudicial to the accused. The jury was not directed to disregard irrelevant evidence.

On appeal, acquitting the accused, Basnayaka C.J. at page 558 stated:

In the instant case it is difficult to escape the conclusion that the fact that there were limits to the power of a Judge to ask questions had escaped the attention of the learned Judge. Out of a total of 713 questions appearing in the transcript 293 are attributed to him. Not all those questions appear to be questions designed "to discover or to obtain proper proof of relevant facts". Some of them were questions asked from the accused-appellant who gave evidence on his own behalf on matters of record in another proceeding against the accused-appellant's father-in-law without due proof of those matters. The accused was required to furnish an explanation for his conduct in not obtaining from his father-in-law the details about the cases against him for forgery or possession of counterfeit currency notes. The line of questioning followed by the learned Judge

tended to show the accused-appellant in an unfavourable light and it is not unlikely that the jury inferred, from the fact that his father-in-law was involved in cases of forgery and possession of forged or counterfeit currency notes that the accused knew or had reason to believe that the notes which were in his possession were forged or counterfeit.

The facts in the instant case are clearly distinguishable.

In the course of his Judgment in the abovementioned case, Basnayaka C.J. particularly quoted two English Judgments: *Yuill v. Yuill* [1945] 1 All ER 183 and *Jones v. National Coal Board* [1957] 2 All ER 155.

In *Yuill's* case, the Judge had put more questions to the witnesses than all counsel did, and in effect took upon himself the trial.

Lord Greene M.R. at page 185 stated:

It is, of course, always proper for a judge—and it is his duty—to put questions with a view to elucidating an obscure answer or when he thinks that the witness has misunderstood a question put to him by counsel. If there are matters which the judge considers have not been sufficiently cleared up or questions which he himself thinks ought to have been put, he can, of course, take steps to see that deficiency is made good. It is, I think, generally more convenient to do this when counsel has finished his questions or is passing to a new subject.

The Judge in the instant case, as I have already expressed, did not take over the trial from counsel. The Judge put his own questions to the two witnesses after the evidence-in-chief, cross-examination and re-examination was over (only briefly interjecting during). The Judge's conduct in this regard is in consonance with the above dicta of Lord Greene M.R.

Although we often highlight the Judgment of Basnayake C.J. in *Queen v. David Perera (supra)*, we do not give the same prominence to the Judgment of the same Justice in *The Queen v. Nimalasena De Zoysa (1958) 60 NLR 97*. In the latter, Basnayake C.J. at pages 101-102 emphasised that the number of questions a Judge puts to witnesses is not decisive. What is decisive is whether it results in a miscarriage of justice.

Section 165 of the Evidence Ordinance empowers a Judge to ask any question he pleases. The material portion reads—

“The Judge may in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing: and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:

Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved;”

It would appear from the transcript of the proceedings that the learned trial Judge has asked a very large number of questions. Learned counsel for the appellant stated from the bar that the trial Judge had asked as many as 282 questions while counsel for the prosecution and the defence had asked 218 and 286 questions respectively.

The section quoted above gives the Judge a wide power. In order to discover or to obtain proper proof of relevant facts he may ask any question he pleases in any form, at any time, about any fact whether relevant or irrelevant. This power extensive though it be has limits, but those limits cannot be precisely defined. The trial Judge himself is the best arbiter of how and when he may exercise it. In its exercise a Judge should be careful not to usurp the functions of the prosecution or the defence. He should also so regulate his interpositions as not to hamper the conduct of the case by counsel for the prosecution or the defence. The fact that neither the parties nor their agents are entitled to make any objection to any question by the Judge or to cross-examine any witness upon any answer given in reply to his questions is a matter which calls for caution in the exercise of this power.

*In the instant case there is no complaint that the learned Judge usurped the functions of the prosecution or of the defence or that his interpositions hampered the examination and cross-examination of witnesses. **The mere fact that the trial Judge has put a large number of questions to a witness, even if the number is greater than that***

put by the prosecution or the defence, is not a ground for quashing a conviction. The appellant must satisfy us that the fact that the Judge put so many questions resulted in a miscarriage of justice. In the instant case the Court is not satisfied that the multiplicity of the questions asked by the trial Judge resulted in a miscarriage of justice.

We are not satisfied, in the instant case, that the Judge's questioning resulted in failure of justice.

In *Rex v. Wijedasa Perera* (1950) 52 NLR 29, it was held that where an accused, after he had been examined in-chief, cross-examined and re-examined, was put a series of questions by the trial Judge, the procedure adopted by the Judge was lawful under section 165 of the Evidence Ordinance if it caused no prejudice to the accused.

Dias S.P.J. at 42 declared:

Mr. Jayawickrema who appeared for the 5th accused submitted that the learned trial Judge after his client had given evidence subjected him to a series of questions after what counsel characterised "as the ineffective cross-examination of the 5th accused by the Crown". He submits that this act of the learned trial Judge caused his client prejudice. We are unable to agree with this contention. Section 165 of the Evidence Ordinance clearly entitles a trial judge to put such questions. Obviously the trial judge must not put questions so as to afford grounds for the legitimate criticism that the accused had not had the benefit of a fair

trial. R. v. Namasivayam (1948) 49 NLR 289. Furthermore, it was held in R. v. Dharmasena (1949) 50 NLR 505 that unfair or hostile cross-examination of the accused by the trial judge might amount to a miscarriage of justice. Neither of these cases has any application to the facts of the present case. A trial judge must be allowed the utmost freedom to ask questions, provided it is done fairly; and we have neither the power nor the inclination to ignore either the letter or the spirit of section 165 of the Evidence Ordinance.

It is true that the system of justice which prevails in our country is adversarial as opposed to inquisitorial. But this does not mean that the Judge shall be a silent spectator at the battle fought by the two rival parties. His task does not end by patiently watching the battle. He has the arduous task thereafter of writing the Judgment and delivering it. This shall be based on true facts devoid of distortion or falsity, for otherwise the interests of justice will suffer. In this endeavour, the Judge cannot be found fault with for questioning a witness to ascertain the truth, as long as he does so within limits. No hard and fast rules can be laid down to demarcate such limits. It shall depend on the facts and circumstances of each individual case.

In *Sunderam Pulle v. Kathirasepulle (1924) 65 CLW 1* at 2 Bertram C.J. stated:

It is a great pity I think that Judges, when they see two sides fencing with one another and manoeuvring for

position, should conceive themselves merely as umpires in a game of strategy and should not themselves determine that the truth must be ascertained and themselves call witnesses, who for strategic reasons or through misconception are withheld by either party.

This dictum was followed with approval in *Sathasivam v. Manickaratnam* (1962) 66 NLR 355 and *Sumithra Premaratne v. Republic of Sri Lanka* [1998] 3 Sri LR 341.

In *Sanipala v. Bamunusinghe* [1995] 2 Sri LR 208, at 210-211 Weerasekera J. declared:

Though I would not go so far as to subscribe to the view that where there are two sides facing one another and manoeuvring for position and who for strategic reasons or through misconception or default fail to call witnesses or produce documents or by investigative cross-examination reveal the truth the judge should enter the arena of conflict. Trial Judges should concern themselves not merely to be umpires in a friendly game of shadow strategy but should themselves investigate by means of questions and incisive and in depth inquiry on the facts presented by evidence and attempt to determine and thereby ascertain the truth so that they may be in a position to evaluate judicially the evidence presented.

As the Supreme Court of Canada in *Rex v. Barnes* [1921] 36 CCC 40 at 56 observed:

The administration of our law is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety, the interest of the public generally.

This was referred to with approval by a five Judge Bench of the Supreme Court in *Rupasinghe v. Attorney General* [1986] 2 Sri LR 329 at 345, and by Justice Amaratunga in the Supreme Court case of *Abeysekera v. Attorney General* [2012] 1 Sri LR 60 at 68.

What I have stated in the foregoing shall not be understood to mean that Judges are above the law, or that Judges can do anything they think right, come what may.

Although section 439 of the Criminal Procedure Code, section 164-165 of the Civil Procedure Code, and section 165 of the Evidence Ordinance, seemingly give unfettered discretion to the trial Judge to question a witness, this is not so. A Judge has not been given the freedom of the wild ass by these sections. These provisions are intended to be used by Judges sparingly and cautiously, not as a rule but as an exception, for limited purposes only, with the ultimate objective of ascertainment of the truth and not to fill in the gaps of the case of either the prosecution or defence.

In *Senanayake v. De Silva* (1972) 75 NLR 409 at 432 it was held that “*While the widest powers in regard to examination of witnesses are undoubtedly conferred on the Court by section 165 of the Evidence Ordinance, these powers are not without certain limitations.*”

As Mark Fernando J. stated in *Mrs. Sirimavo Bandaranaike v. Times of Ceylon Limited* [1995] 1 Sri LR 22 at 37, “there is in a democracy no unfettered, absolute, or arbitrary power, even in the judiciary”—let me add, even in the name of justice.

In the case of *The Queen v. Mendis Appu* (1960) 60 CLW 11 at 15 Basnayake C.J. held:

The powers conferred by section 429 of the Criminal Procedure Code [which corresponds to section 439 of the present Code of Criminal Procedure Act] should be used with caution. In a trial by jury the functions of the prosecution, the defence and the Judge are laid down in the Code and the Court should take care not to leave room for any impression that the Court is using its powers under section 429 to help the prosecution to discharge the burden that rests on it. The powers conferred by section 165 are limited and are not meant to be used for the purpose of discrediting a witness or an accused person. For, to do so would not be “to discover or to obtain proper proof of relevant facts.”

G.P.S. de Silva C.J. in *Beebi Johara v. Warusavithana* [1998] 3 Sri LR 227 at 231 had this to say:

Section 134 of the Civil Procedure Code no doubt confers on the District Court the power of its own motion to summon any person as a witness to give evidence or to produce any document in his possession. Section 165 of the Evidence Ordinance confers inter alia the power on the Judge to order the production of any document or thing. These are

enabling provisions intended to be cautiously and sparingly used in the interests of justice. Neither section 134 of the Civil Procedure Code nor section 165 of the Evidence Ordinance was meant to fill in the gaps in the presentation of its case by a party to the action.

Sisilinona v. Balasuriya [2002] 1 Sri LR 404 is a civil case where the Judge after inquiry refused to vacate the *ex parte* Judgment entered against the defendant. After evidence-in-chief, cross-examination and re-examination, the Judge had questioned the defendant not with the apparent intention of ascertaining the truth but to obtain contradictions, which he did. The Court of Appeal took the view that the line of questioning by the Judge had been in the spirit of beating the witness down or encouraging the witness to accept the position advanced by the Judge. The Judgment was set aside. Somawansa J. at pages 406-407 stated:

A Judge is certainly vested with wide powers to question a witness.

Section 164 of the Civil Procedure Code provides that the court may question a witness at any time as it may consider conducive to the attainment of truth and justice and again by section 165 of the Evidence Ordinance a Judge is vested with power to put questions to a witness in order to discover or to obtain proper proof of relevant facts. While the widest powers in regard to examination of witness are undoubtedly conferred on the court by section 165 of the Evidence Ordinance and section 164 of the Civil

Procedure Code, these powers are not without certain limitations. Discussing the aspect of power vested with a Judge to examine a witness, Monir in his book on Evidence, 4th edition, vol. II, p. 949 says: One of the well-recognised limitations of the powers of the court under section 165 of the Evidence Ordinance is that the court must not question the witness in the spirit of beating him down or encouraging him to give an answer. One must also not forget the fact that even witnesses who are able to stand their ground in the face of the severest cross-examination at the hands of opposing counsel are in view of the deference with which they treat the court inclined to treat with greatest regard suggestions when they come from court and are couched in compelling language and it is a rare witness who will steadily maintain his version in the face of such questioning by court.

In Yuill v. Yuil (1944) 29 CLW 97 at 102 it was observed that "A judge who observes the demeanour of the witnesses while they are being examined by counsel has from his detached position a much more favourable opportunity of forming a just appreciation than a Judge who himself conducts the examination. If he takes the latter course he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of the conflict. Unconsciously, he deprives himself of the advantage of calm and dispassionate observation. It is further to be remarked as everyone who had experience of these matters knows that the demeanour of witness is apt to vary when he is being questioned by the Judge particularly when the Judge's

examination is, as it was in the present case, prolonged and covers practically the whole of the crucial matters which are in issue”.

In *Narthupana Tea and Rubber Estates Ltd. v. Perera* (1962) 66 NLR 135 at 138 Sansoni J cautioned:

Chief Justice Stone of the Supreme Court of America once said: “Precisely because judicial power is unfettered, judicial responsibility should be discharged with finer conscience and humility than that of any other agency of Government.” The ampler the power, the greater the care with which it should be exercised. And the very circumstance that absolute privilege attaches to judicial pronouncements imposes a correspondingly high obligation on a judge to be guarded and restrained in his comments, and to refrain from needless invective.

When the rival parties are represented by eminent counsel, in my view, the Judge shall be more cautious, and shall not, unless there are compelling reasons for doing so, unnecessarily intrude into the arena reserved for counsel and “have his vision clouded by the dust of the conflict.”

Whether a criminal or civil matter, the accused or defendant shall know the case of the prosecutor or the plaintiff which he has to meet at the trial. It is for this reason that pleadings are placed on the record prior to the commencement of the trial proper. A party is not entitled to present at the trial a case materially different to what was pleaded in his pleadings. A

Judge is no exception. He cannot upset the apple cart, so to speak, and do injustice in the name of justice.

A Judge need not, as a matter of course or routine, question each and every witness. He shall not ask questions in order to unfairly favour one party at the expense of another, but only to clear up any point that has been overlooked or left obscure, in order to find out the truth and do justice according to the law.

Lord Denning in *Jones v. National Coal Board* [1957] 2 All ER 156 at 159 stated:

The Judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well. Lord Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal."

The atmosphere of any Court at a trial shall not resemble a brawl in the street. Judges must inculcate judicial temperament and reject judicial obstinacy. Patience is an integral part of

justice. A Judge need not be a terror in Court. He shall be “*as sober as a Judge.*”

Before I part with this Order, let me state the following in passing.

Despite a party being unsuccessful in his application for transfer, prudence might prod a Judge to recuse himself for further hearing of a case.

Whilst refusing the application for transfer, in *Kumarasena v. Data Management Systems Ltd* [1987] 2 Sri LR 190 at 202 Gunewardena J. added:

It is however open to the District Judge, if he thinks it prudent to do so having regard to the lack of confidence in his impartiality expressed by one of the parties, to disqualify himself and direct that further proceedings be had before another, taking also into account that if he were to hold against the party so complaining at the conclusion of the trial, he could lay himself open to a further charge of prejudice against such party consequent upon such allegation being made.

However, false allegations of bias, as a means of “Judge Shopping” or “Forum Shopping”, to select favourable Judges shall never be tolerated.

In the Australian case of *Re JRL ex parte CJL* (1986) 161 CLR 342 at 352 Mason J. warned:

Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide the case in their favour.

Let the Judge, if he so desires, consult his own mind and decide the best course of action.

We have already manifested our decision.

Notice refused. Application for transfer is dismissed. No costs.

Judge of the Court of Appeal

K. Priyantha Fernando, J.

I agree.

Judge of the Court of Appeal