VICTOR IVAN
v.
THE ATTORNEY-GENERAL

COURT OF APPEAL.
DR. A. DE Z. GUNAWARDENA, J.
HECTOR YAPA, J.
C.A. APPLICATION NO. 337/94.
H. C. COLOMBO CASE NO. 5454/93.
JUNE 20, 23 AND 24, 1994.

Criminal Defamation – Penal Code, section 480 – Code of Criminal Procedure Act, No. 15 of 1979, sections 420 and 436 – Admission by accused – Bias.

The question was whether an admission had been recorded during the High Court trial of the accused for criminal defamation (punishable under section 480 of the Penal Code) by a publication in the Ravaya edited by the accused.

The accused had accepted the publication of the alleged defamatory article and what was left to be proved by the prosecution was that by such a publication the accused-petitioner intended to harm the reputation of Indradasa Hettiarachchi, a Minister.

The admission was that Indradasa Hettiarachchi did not utilize the money for his personal use. In the indictment too no such allegation is mentioned.

Under Section 420 of the Code of Criminal Procedure Act when an admission is made by an accused person he must be represented by an attorney-at-law. When the accused made the so called admission he was not represented by an attorney-at-law. In fact there was no allegation that Indradasa Hettiarachchi had utilized the money for his personal use and it is difficult to conclude that the accused when he stated this made an admission. Even if it was an admission no prejudice had been caused. Further, on the direction of the Court the evidence relating to this fact had been properly led by the prosecution through a witness, when the accused was defended by Counsel. This is a procedural error curable under section 436 of the Code of Criminal Procedure Act.

In this case there were no grounds for a conclusion of bias or possibility of bias.

Cases referred to:

1. *Abdul Sameem v. The Bribery Commissioner* [1991] 1 Sri L.R. 76.
2. *Premaratne v. The Republic of Sri Lanka* 77 N.L.R. 522.
3. *The King v. Essen Justices (Sizer and Others) Ex parte Perkins* (1927) 2 KB 473.

4. *The King v. Sussex Justices Ex parte McCarthy* (1924) 1 KB 256.
5 *Metropolitan Properties Co. (F.G.C.) Ltd.v. Lannon and Others* [1969] 1 QB 577.
6. *R. v. Cambourne Justices Ex parte Pearce* [1955] 1 QB 41.

APPLICATION in Revision of the Order of the High Court of Colombo.

Ranjith Abeysuriya P.C. with *S. Hewamanna, P. Liyanage, J. C. Waliammuna* and *Wimal Jayasuriya* for accused.
Upawansa Yapa Additional S.G. with *Palitha Fernando S.S.C.* for A.G.

Cur. adv. vult.

August 29, 1994.
HECTOR YAPA, J.

The accused-petitioner in this case was indicted in the High Court of Colombo, with having committed criminal defamation, by publishing in the Ravaya newspaper of 07.06.92, an Article under the caption of "පොල් ඇමති ඉඩම් කොල්ලයක", and offence punishable under Section 480 of the Penal Code. The said publication states that the Horana Co-operative Housing Society, in which Indradasa Hettiarachchi, the Minister of Coconut Industry and Kalutara District M.P. is the President, was involved in some dubious land transactions and thereby made an imputation, that the said Indradasa Hettiarachchi, is a corrupt or a dishonest person, so as to harm his reputation.

The trial in the High Court commenced on 25.10.93 before a Judge without a Jury. On that day the accused-petitioner was represented by Counsel. The witness Indradasa Hettiarachchi gave evidence and he was cross-examined by the defence Counsel. Evidence of this witness was concluded, and the trial was adjourned to 28.10.93. On 28.10.93 when the proceedings commenced the Counsel who appeared for the accused, informed Court that he has not received instructions to appear on behalf of the accused that day, and therefore he would not be representing him in Court. Thereupon the learned High Court Judge recorded the submissions of the Counsel and permitted the application of the Counsel to withdraw from the case. At that stage another Counsel informed the Court, that

he was appearing for the accused. Thereafter the evidence of witness D. B. M. Abeysinghe was led. At the conclusion of the evidence in chief of the said witness, the Counsel for the accused informed Court, that the accused himself intends to cross-examine the witness, and therefore he wanted the permission of the Court, to withdraw from the case. The learned Judge inquired from the accused, and the accused confirmed that he wanted to cross-examine the witness, and the assistance of the Counsel was not necessary, and further that he was not opposed to the Counsel withdrawing from the case. Thereupon the Court permitted the defence Counsel to withdraw from the case, and the accused commenced the cross-examination of the witness. The cross-examination of the witness was not concluded on 28.10.93 and the case was postponed to 15.12.93. When the trial commenced on 15.12.93 the Assigned Counsel who appeared for the accused, stated to Court that since he had not received any instructions from the accused, and as the accused was conducting his own defence, the Counsel wanted his appearance as Assigned Counsel revoked. Thereafter the accused himself informed Court that he did not require the assistance of the Assigned Counsel, and accordingly the Court revoked the appointment of the Assigned Counsel.

Thereafter witness D. B. M. Abeysinghe was called and further cross-examined by the accused, and his evidence was concluded. Then the evidence of two other witnesses namely D. H. Athulathmudali and K. D. Perera was led by the prosecution, and their evidence was concluded. At this stage the State Counsel informed the Court, that he had later added the manager of the People's Bank Horana, as a witness, on the basis that he would be needed, to prove certain facts. But the accused had made a statement to say that he is not suggesting Indradasa Hettiarachchi had utilized the money for his personal use. At this stage when the Court questioned the accused, whether he was accepting the position that Hettiarachchi had not credited the money to one of his personal accounts, the accused stated that there was no such allegation. Thereafter it was recorded that the accused and the State

Counsel agreed, that the representative of the People's Bank, Horana, was not required as a witness and accordingly he was released from attending Court. Then the evidence of S. Samarasinghe of the C.I.D. was led, and the prosecution case was closed. When the defence was called from the accused, he informed the Court that he intends giving evidence and calling witnesses. The Court then fixed further trial for 26.01.94 and issued notice on the defence witnesses. When the case was taken up on 26.01.94 it has been recorded that since the Counsel appearing for the accused was sick, further trial was postponed to 21.02.94.

On 21.02.94 when the proceedings commenced, the Counsel for the accused made several submissions. The main submission he made was that, an admission had been obtained on 15.12.93 by the Counsel for the prosecution from the accused, who was undefended, in violation of Section 420 of the Code of Criminal Procedure Act. When this objection was raised the State Counsel moved for summons on the Manager of the People's Bank, Horana. This application was allowed by the Court. In view of the objection raised by the Counsel for the accused, further hearing of the case was postponed to 15.03.94. When the case was taken up on 15.03.94 the Counsel for the accused repeated his earlier submission that an admission had been obtained in violation of Section 420 of the Code of Criminal Procedure Act and thereby caused prejudice to the accused, so as to vitiate the proceedings. Therefore the learned Counsel moved that further proceedings be stopped, and the trial be held afresh before another Judge. Having heard the submissions of the defence Counsel, and the State Counsel, the learned High Court Judge made order, refusing the application to permit the case to be heard afresh before another Judge, as there was no valid reason for it. Further the learned Judge stated in her order, that in view of the submission made by the defence Counsel, the Court was directing the prosecution to lead evidence to prove the alleged admission, so that no prejudice would be caused to the accused. Therefore the State Counsel was permitted to lead the evidence of T. De Munidasa of the People's Bank, Horana, and the witness was cross-examined

by the defence Counsel. Thereafter the prosecution case was closed, and the Court called for a defence from the accused. Then the Counsel for the accused moved for a date to lead evidence and the Court directed notice on the defence witnesses for 30.03.94.

Thereafter the accused petitioner on 23.05.94 filed this application in revision, stating that the alleged admission obtained from him on 15.12.93 was in violation of the provisions of section 420 of the Code of Criminal Procedure Act, and also it violated an accused person's right to silence in a criminal trial. The application further stated that this violation has resulted in a miscarriage of justice and thereby vitiated the entire proceedings. Therefore the accused-petitioner in his application prayed for, to stay further proceedings in the case, to set aside the order of the learned High Court Judge to proceed with the trial, and to order a fresh trial before another Judge of the High Court.

At the hearing of this application it was submitted by the learned Counsel for the accused-petitioner, that the admission obtained in violation of section 420 of the Code of Criminal Procedure Act, has caused prejudice to the accused-petitioner, and further that this has resulted in the violation of the accused's right to silence, in a criminal trial. Therefore the learned Counsel contended that the entire proceedings are vitiated.

Section 420 of the Code of Criminal Procedure Act reads as follows:

> "It shall not be necessary in any summary prosecution or trial on indictment for either party to lead proof of any fact which is admitted by the opposite party or to prove any documents the authenticity and terms of which are not in dispute and copies of any documents may by agreement of the parties be accepted as equivalent to the originals.

Such admissions may be made before or during the trial. Such admissions shall be sufficient proof of the fact or facts admitted without other evidence;

Provided however that this section shall not apply unless the accused person was represented by an attorney-at-law at the time the admission was made;

Provided further that where such admissions have been made before the trial, they shall be in writing, signed by the accused and attested as to their accuracy and the identity and signature of the accused by an attorney-at-law."

The section has clearly provided that where an admission is made by an accused person he must be represented by an attorney-at-law. This requirement is a safeguard against obtaining an admission prejudicial to an accused person without legal advice. In the present case, it is necessary to see whether an admission in fact has been obtained in the first instance, and secondly what prejudice it has caused to the accused-petitioner. The alleged admission relates to the accused-petitioner's statement that he was not stating or suggesting that Indradasa Hettiarachchi did utilize the money for his personal use. When the Court questioned the accused-petitioner whether he was accepting the position that Hettiarachchi had not credited this money to any of his personal accounts, the answer he gave was that there was no such allegation. Thereafter it has been recorded that the accused-petitioner and the State Counsel agreed that the representative of the People's Bank Horana was not necessary as a witness. The crucial question here is whether in fact the accused-petitioner has made an admission prejudicial to him, when he was undefended by Counsel. The allegation made against the accused petitioner is that, he defamed Indradasa Hettiarachchi by making a publication in the Ravaya newspaper. When one examines the contents of the published article there is no allegation that the Minister of Coconut Industry, Indradasa Hettiarachchi utilized any money for his personal use, or credited any money to any of his

personal accounts. Further it is not a part of the allegation, as contained in the indictment. Therefore when the accused-petitioner was questioned by the Court, in the manner referred to above, his answer quite rightly, was that there was no such allegation. In the light of this answer, it is difficult to conclude that the accused-petitioner has made an admission, but on the contrary, what he has said was that, he had made no such allegation, in the article he has published.

Further as submitted by the learned Additional Solicitor-General, one has to find out what the value that can be attached to this statement, and what bearing it has on the case. As he pointed out it is to be noted that on 25.10.93 on the first trial date, when the accused petitioner was defended by Counsel, two admissions have been made and recorded under Section 420 of the Code of Criminal Procedure Act. First it was admitted that on 07.06.92, M. K. Victor Ivan (accused-petitioner) was the chief editor and the publisher of the Ravaya newspaper and secondly it was admitted that on the said date (07.06.92) there appeared the impugned article in the Ravaya newspaper under the caption of "පොල් ඇමති ඉඩම් කොල්ලයක". Therefore it is clear from the said two admissions that, the accused-petitioner has accepted the publication of the alleged defamatory article, and what was left to be proved by the prosecution was that by such a publication the accused-petitioner intended to harm the reputation of Indradasa Hettiarachchi. Thus having admitted the publication, it was only open to the accused petitioner to defend himself, by proving that his conduct fell within any of the excepted situations provided in section 479 of the Penal Code. Therefore when one examines this alleged admission, it appears that though the prosecution thought that there was an admission obtained from the accused-petitioner, as a matter of fact, it was not so. Further, even if one were to accept for the sake of argument, that there was in fact an admission obtained, it is clear that there has been no prejudice caused to the accused-petitioner. It is also to be noted that, on the direction of the Court, now the evidence relating to this fact has been properly led by the prosecution, through a witness, when the accused petitioner was defended by Counsel.

In the several cases cited by the learned Counsel, it must be observed that in those cases there have been violations of fundamental principles of Criminal Procedure, which were held to be fatal irregularities, vitiating the trials or the proceedings. As for example, in the case of *Abdul Sameem v. The Bribery Commissioner* [1] it was held that the failure to frame a charge as required by Section 182 (i) of the Code of Criminal Procedure Act, was a violation of a fundamental principle, and was not a defect curable under section 436 of the said Act. Also in the case of *Premaratne v. The Republic of Sri Lanka* [2] it was held that the failure to conform to the imperative provisions of section 296 (1) of the Criminal Procedure Code, of informing the undefended accused of the right to give evidence on his own behalf, and if the accused elects to give evidence, to refer him to the prosecution evidence, is a fatal irregularity which vitiated the trial. What is important in all the cases cited by the learned Counsel was that, there was a failure to adhere to a fundamental principle of Criminal Procedure, which was not curable. The facts in the present case, are different and the cases cited have no application.

It is to be noted that our law provides for admissions to be recorded from accused persons, which is an exception to the accused's right to silence. In the present case what appears to have happened is that the prosecution has overlooked the fact that, on that occasion, when the alleged admission was recorded, the accused-petitioner was not represented by an attorney-at-law. This in our view is a procedural error, which is curable under section 436 of the Code of Criminal Procedure Act No. 15 of 1979, and in any event no prejudice has been caused to the accused-petitioner.

Another submission made by the learned Counsel for the accused-petitioner was that, as the learned trial Judge has questioned and obtained the alleged admission from the accused-petitioner on 15.12.93 at the instance of the prosecution, it created a situation where by, the accused-petitioner would not have the confidence of a fair trial. In other words the learned Counsel was

raising the question of bias or the possibility of bias. In support of this submission, the learned Counsel cited several cases. One such case was *The King v. Essen Justices (Sizer and Others) Ex parte Perkins* [3] where the order of the Justices was set aside by holding, that the fact that the Justice's clerk, being formerly a solicitor for a party in dispute, would have created in the mind of the applicant, the reasonable impression that justice was not being done. Another case cited was *The King v. Sussex Justices Ex parte McCarthy* [4] where the conviction was quashed by holding that it was improper for the acting clerk, having regard to his firm's relation to the case, to be present with the justices when they were considering their decision.

In the two cases referred to above, and in the other cases cited by the learned Counsel, there were certain grounds or circumstances where there was a real likelihood of bias on the part of the Judge. As Lord Denning M.R. stated in *Metropolitan Properties Co. (F.G.C.) Ltd. v. Lannon and Others* [5]. "A man may be disqualified from sitting in a Judicial capacity if he has a direct pecuniary interest in the subject-matter or if he is biased in favour of one side or against the other".

A line however must be drawn between genuine and fanciful cases. The Court of Appeal in England has protested against the tendency to impeach judicial decisions, "Upon flimsiest pretexts of bias and against the erroneous impression that it is more important that justice should appear to be done than it should in fact be done", Slade, J. in *R. v. Cambourne/in reference Justices Ex parte Pearce* [6].

In this case we see no such grounds of bias or possibility of bias. It must also be noted that in this application for revision, the question of bias has not been taken up. Further more, the defence Counsel when making submissions before the learned High Court Judge on 15.03.94 in regard to the alleged admission complained of, stated

that, there was no doubt what so ever in regard to the impartiality of the learned trial Judge.

In view of the above reasons, we see no basis to interfere with the Order made by the learned High Court Judge on March 15, 1994, and accordingly the application is dismissed.

DR. A. DE Z. GUNAWARDANA, J. – I agree.