1949 *Present :* **Wijeyewardene C.J. and Pulle J.**

RATNAVIRA, Appellant, *and* SUPERINTENDENT OF POLICE (C. I. D.) *et al.*, Respondents

S. C. 251— D. C. Colombo, 16,840

Action against public officer—Filed before expiration of one month after notice of action—No evidence that defendant acted mala fide*—Failure of due notice of action—Fatal irregularity—Civil Procedure Code, Section 461.*

Defendants were public officers against whom plaintiff filed action before the expiration of one month after delivery of notice of institution of action. They were sued in respect of an act which was not shown to have been done *mala fide*.

Held, that a public officer is entitled to notice of action in terms of section 461 of the Civil Procedure Code if he is sued in respect of an act which he did *bona fide*, purporting to act in his official capacity, even though it is found that he had no reasonable cause for the belief on which he acted.

Obiter, per WIJEYEWARDENE C.J.—"I wish to place on record my opinion that *Appu Singho v. Don Aron (1906) 9 N. L. R. 138* and *Abaran Appu v. Banda (1913) 16 N. L. R. 49* have taken too restricted a view of the scope of section 461 when they laid down that the section did not apply to a public officer acting *mala fide*."

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *G. L. L. de Silva*, for the plaintiff appellant.

N. K. Choksy, K.C., with *M. M. Kumarakulasingham*, for the defendants respondents.

Cur. adv. vult.

October 31 1949. WIJEYEWARDENE C.J.—

The first defendant in this case is a Superintendent of Police and the second defendant, a Sub-Inspector. The plaintiff sued the defendants for the recovery of Rs. 10,000 as damages sustained by him by reason of certain acts alleged to have been committed by the second defendant acting on the directions of the first defendant. The plaintiff pleaded that the defendants purported to act in their official capacity and that their acts were wrongful, unlawful and malicious.

In his evidence the plaintiff stated that he was residing in Colpetty and having his place of business in the Fort. He was "on friendly terms with American Officers". About November 1945, he came to know one Captain Harry Long of the American Transport Corps, Ratmalana, who described himself as the Secretary of the Officers' Mess there. The "Club" had been closed about January 1945, and the "equipment and property belonging to the Club" were sold to the public. He himself bought some articles of furniture from time to time and also a refrigerator which was "one of the last items" to be purchased by him. The refrigerator was a large one, its capacity being about 22 cubic feet. The plaintiff's own expert witness stated in Court that

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in December 1945, "people who saw a need for it" would have paid Rs. 9,000 for it, and that it would have fetched about Rs. 6,000 in 1947, in spite of the damage alleged to have been done to it by the Police. Captain Long was, however, willing to sell this refrigerator to the plaintiff for Rs. 500 in December 1945, but desired that the payment should be made in cash. That payment was made at the plaintiff's place of business on December 14, 1945, and Captain Long, thereupon, typed "a receipt" P 3 on the plaintiff's typewriter and gave it to him. The refrigerator was delivered to the plaintiff a few days afterwards. Almost immediately after this transaction, Captain Long left the Island. The receipt P 3 reads as follows :—

A. T. C. Ratmalana,
14th December 1945.

This is to certify that I have sold one Ice Box to Mr. Sardha Ratnavira (plaintiff) of Pendennis Avenue, Colpetty.

(Sgd.) Harry S. Long,
American Transport Corps,
Ratmalana.

It will be noted that the receipt does not state what Captain Long received as purchase money for the sale of this large refrigerator referred to as an Ice Box in the receipt, and that it does not show that Captain Long was selling the property as the Secretary of the Officers' Mess. On the face of it, P3 appears to have been prepared at Ratmalana, though the plaintiff's own evidence is that it was typed in his own office in the Fort. This is not without some significance, in view of the evidence of the plaintiff that he would have got a proper receipt from Captain Long but for the fact that the latter came to his office when he was busy and passed on the receipt to him, typed on his own typewriter, and left his office a few minutes afterwards.

It is convenient at this point to refer to the evidence of Mr. J. O. Ebert, a witness called for the defence. Mr. Ebert is an Assistant Shipping Master, H. M. Customs. He stated that "sometime early in January 1946" he overheard "a certain conversation" when he was at Cargills, and he, thereupon, tried "to discover" whether the transfer of a refrigerator by an American Unit Station at Ratmalana had been reported to the Collector of Customs as required by section 23 of the Customs Ordinance which together with section 22 became applicable to articles imported for the use of any Mess of the Allied Forces, by the operation of certain Defence Regulations. Finding that there was no such report he "brought the matter" to the notice of the Criminal Investigation Department.

To continue the evidence given by the plaintiff, the second defendant telephoned to plaintiff at his office on January 15, 1946, and said that he had information that the plaintiff had "a stolen refrigerator supposed to be Army property". The second defendant added that he had orders from his superiors to seize the refrigerator and, therefore, required the plaintiff to come to the Police Station. The plaintiff went there, showed the receipt P3 to the second defendant and requested the second

defendant "to get in touch with the Americans at Ratmalana and inquire whether they have lost a refrigerator". Of course, at this time Captain Long who had described himself as the Secretary of the Officers' Mess was not in Ceylon. The second defendant "threatened to post guards around his (plaintiff's) house", if he did not allow the Police to remove the refrigerator. The plaintiff then consented to the Police removing the refrigerator to the Police Station and it was removed on January 16. It was returned ultimately to the plaintiff by the Police two months afterwards. On January 16, the plaintiff "got in touch" with a Captain Gray at Ratmalana who referred him to Colonel Seward, and the latter examined the refrigerator at the Police Station the same day at the request of the plaintiff.

Colonel Seward was Commanding Officer of the American Forces in Ceylon only from December 15, 1945, and that would be after the transaction between Captain Long and the plaintiff. Colonel Seward was examined *de bene esse* on April 11, 1946, for the plaintiff and he said in examination-in-chief, "I examined (the refrigerator) to determine whether or not it was United States Army property and I discovered it was not United States Army property. Nor do we have any records showing that it was United States Army property . . . . After inspection I was satisfied that it was not United States Army property. I also checked our records to find if we had any record of this refrigerator. We had no record". In cross-examination he said, "I am not producing any kind of written record in support of what I had told you. I personally did not examine the record. I asked my supply officer to check the records. He made a report to me. That was a verbal report. The name of that Supply Officer is Captain George Gray. He has left Ceylon. He left on March 31, 1946".

In this connection I would refer to the letter P2 written by Colonel Seward to the Customs authorities on February 12, 1946. It reads :—

"In reply to your No. P. 15/383, I must say that the records remaining under my custody do not provide any of the information you desire, but your questions will be answered to the best of my ability."

"Captain Long was a member of the 1310th Air Base Unit, which is no longer in existence, having been inactivated about December 15, 1945. That Unit was never a part of my command, but operated under the Army Air Force Headquarters, Calcutta. The records of the Unit may have been sent to that Headquarters or the U. S. Army Central Records Depot, Calcutta, when the unit was inactivated."

"I was told by a former member of the American Officers' Mess, Ratmalana, that the refrigerator now in Mr. S. Ratnaweera's possession, was formerly the property of that Mess. I am completely unable to inform you whether it was imported by U. S. Forces, or through civilian channels. That information should be included among the records of the 1310th Air Base Unit. Nor am I able to inform you of the possible date of importation or whether duty was paid on it. That type of refrigerator is unlike any other I have seen issued in Ceylon, for U. S. Army use, so it is possible it was purchased from a civilian agency or individual."

"May I suggest you address an inquiry to the Headquarters U. S. Army Air Forces, Calcutta, describing the refrigerator as former property of the 1310 Air Base Unit Officers' Mess, and requesting they furnish the information you desire ? "

It will thus be seen that most of the evidence given by Colonel Seward is hearsay. It is, to say the least, unfortunate that the plaintiff did not arrange to get Captain Gray to give evidence *de bene esse* before he left Ceylon.

The plaintiff gave notice of action under section 461 of the Civil Procedure Code to the defendants by letters sent by registered post. Those letters were posted at the Colombo Courts Post Office on February 21, 1945. Being registered letters, they could not have reached the defendants that day and the defendants pleaded in their answer that they received the letters only on February 22, 1945. The plaint in this case was filed on March 21, 1946.

In view of the question of law that has to be decided in this case it is important to note that the plaintiff did not allege in his evidence that the defendants were actuated by feelings of personal malice towards him or question the good faith of the defendants in respect of the acts done by them.

There was no evidence led by the plaintiff to show that the first defendant " caused or authorised " the second defendant to enter the plaintiff's residence or seize and remove the refrigerator. The District Judge's order dismissing the plaintiff's action against him must, therefore, stand.

As regards the second defendant, the District Judge found that he " purporting to act as a Police Officer maliciously, wrongfully, and unlawfully entered the plaintiff's residence and seized and removed the refrigerator without the plaintiff's consent ". He added, however, a note to show that he used the word " maliciously " to indicate that the second defendant " had no lawful and reasonable or probable cause " for acting as he did. He dismissed the plaintiff's action against the second defendant, as it was filed before the expiration of one month after the delivery of notice to the second defendant.

I experience some difficulty in accepting the finding of the learned Judge that the second defendant had " no reasonable and probable cause " for dealing with the property as stolen property. Having regard to the information given by the Customs authorities, the gross inadequacy of the price paid by the plaintiff, the fact of Captain Long insisting on payment in cash, the unsatisfactory nature of P3, the departure of Captain Long immediately after the sale,—could it be said that these facts did not entitle the second defendant to regard the refrigerator as property in respect of which there had been committed the offence of criminal breach of trust ? It should be remembered that the second defendant was acting as a Police Officer and not as a Judge trying an accused person charged with a criminal offence. It is, however, unnecessary for me to go further into this question and examine the evidence in detail, as the question of law could be decided on the assumption that the findings of the District Judge are correct.

It was argued in appeal that the defendants were not entitled to any notice under section 461 of the Civil Procedure Code and the appellant's Counsel relied on *Perera v. Hansard* [1], *Appu Singho v. Don Aron* [2], *Abaran Appu v. Banda* [3] and *Cook v. Leonar et al.* [4].

In considering cases decided under the Public Authorities Protection Act, 1893, and under our Police Ordinance it is necessary to bear in mind the difference in the language used in those statutory provisions and the language of section 461 of the Civil Procedure Code which corresponds to section 424 of the repealed Indian Code and section 80 of the Indian Code, 1908. Section 461 of our Code refers to actions against a public officer " in respect of an act purporting to be done by him in his official capacity " while section 83 of the Police Ordinance refers to " actions . . . . brought for anything done or intended to be done under the provisions of this Ordinance " and section 2 of the English Act refers to actions for any act " done in pursuance or execution, or intended execution of any Act of Parliament . . . . ".

The authorities cited by appellant's Counsel do not really help the appellant. *Perera v. Hansard (supra)* was an action for trespass against a Police Officer and the Court had to consider whether he was entitled to notice under the Police Ordinance. The legal position with regard to the need for notice was laid down by Burnside C.J. as follows :—

" Under the old class of cases which are referred to by Mr. Justice Willes in his judgment in the case of *Chamberlain v. King*, 40 L. J. C. P. 276, it was considered that to be entitled to notice the defendant must not only have acted with *bona fides* but he must have had reasonable cause for the belief on which he acted . . . . but since the cases of *Herman v. Seneschal*, 32 L. J. C. P. 43 . . . . it is sufficient if the defendant acted with *bona fides* honestly believing in the existence of those facts which if they had existed would have afforded a justification under the Ordinance. "

The Supreme Court found that there was very strong proof of *mala fides* on the part of the defendant and, therefore, held that the defendant was not entitled to notice of the action under the Police Ordinance.

Appu Singho v. Aron Appu (supra) was an action for damages against a Vidane Aratchi for unlawful seizure of timber. The Court found that the Vidane Aratchi " acted in bad faith and had no honest belief that the timber in question had been cut . . . . on Crown land ". Wood Renton J. stated,

" So far as I am aware, the term ' purporting ' has not been judicially defined, at least for the purposes of such a case as this, either in the English Courts or in any of the Courts of the Colony. But it seems to me that in the connection in which I have now to deal with it the word ' purporting ' is equivalent to ' in pursuance of ' and it has been held in England in a great variety of cases . . . . that the defendant in such an action as the present is only acting in pursuance of his statutory powers, if he honestly intended to put the law in force and believed that the plaintiff had committed the offence with which he was charged, although there was no reasonable ground for such belief ".

[1] *(1886) 8 Supreme Court Circular 1.*
[2] *(1906) 9 N. L. R. 138.*
[3] *(1913) 16 N. L. R. 49.*
[4] *(1827) 108 English Reports 481.*

Abaran Appu v. Banda (supra) was an action against a Vidane Aratchi for damages sustained by the plaintiff as a result of some criminal proceedings instituted against him by the Aratchi. The Court found that the defendant acted maliciously throughout those proceedings and, in fact, that the whole case against the plaintiff was a fabrication to the knowledge of the defendant. The Supreme Court followed the decision in *Appu Singho v. Don Aron (supra)* and held that no notice was necessary under section 461 of the Civil Procedure Code.

Cook v. Leonard et al. (supra) was a case instituted in 1827. The Court had to decide whether notice should have been served on the defendants in view of section 111 of 6 George iv which required such notice " in any action commenced against any person for anything done in execution of or under the authority of that Act ". The Court held that notice need not have been given as the defendants had no reasonable grounds for thinking that the Act of Parliament gave to them or to those under whose authority they acted any power to do the acts complained of ". It must, however, be observed that this case belongs to the period of the " old class of cases " referred to by Mr. Justice Willes in *Chamberlain v. King*[1] and mentioned in *Perera v. Hansard (supra)*.

After we reserved judgment my brother Pulle brought to my notice *G. Scammell and Nephew, Ltd. v. Hurley et al.*[2] which shows clearly the manner in which the English Courts construe the Public Authorities Protection Act. In the course of his judgment Scrutton L.J. said at page 427 :—

> " To require the application of the Public Authorities Protection Act, the acts must be acts not authorised by any statute or legal justification but acts intended to be done in pursuance or execution of some statute or legal power. It would appear, therefore, if illegal acts are really done from some motive other than an honest desire to execute the statutory or other legal duty and an honest belief that they are justified by statutory or other legal authority . . . . the Act is no defence . . . . for the acts complained of are not done in intended execution of a statute, but only in pretended execution thereof . . . . A default in executing the statute from no positive motive or intention, but from simple forgetfulness or ignorance, would not lose the protection of the statute ".

As stated earlier by me, there was not the slightest suggestion in this case that the defendants acted *male fide*. Of course in matters of this nature the burden of proving *mala fides* is on the party denying that the public officer concerned had a right to notice of the institution of the action. (Vide *G. Scammell and Nephew, Ltd. v. Hurley et al. (supra)*.) The authorities cited by the appellant's Counsel do not support his argument that in the circumstances of this case the defendants have lost their rights to a notice under section 461 of the Civil Procedure Code as they acted *bona fide* even though on the District Judge's finding, they had no reasonable cause for the belief on which they acted.

I wish to place on record my opinion that *Appu Singho v. Don Aron (supra)* and *Abaran Appu v. Banda (supra)* have taken too restricted

[1] 4 C. L. J. C. P. 276. [2] (1929) 1 King's Bench Division 419.

a view of the scope of section 461 when they laid down that the section did not apply to a Public Officer acting *mala fide*. The question of the scope of section 80 of the Indian Code 1908 was considered by the Full Bench of the Madras High Court in *Kotileddi v. Subbiah et al.*[1] and it was held there that a public officer was entitled to notice of the action under that section even though he had acted *mala fide* in the discharge of his duties. In the course of his judgment Wallis C.J. said,

"It is significant that the words 'purporting to be done' are wider than 'done or intended to be done under the provisions of this Act' in section 264 of the Public Health Act, which appear to be the most comprehensive words used in any of the corresponding statutory provisions in England, seeing that they also include 'acts intended to seem to be done in his official capacity'; and it is quite probable that they were chosen on that very ground and for the purpose of making the English decisions inapplicable".

According to Sadasiva Ayyar J. :—

"The verb 'purport' is defined in the Concise Oxford Dictionary as 'convey', 'state', 'profess', 'being intended to seem' . . . . I think that the expression 'any act purporting to be done by such public officer in his official capacity' . . . . means 'any act of a public officer which is intended by him to carry forth or convey to the minds of all persons who become aware of that act the impression that he did the act in his official capacity and not as an ordinary private individual and which has the effect of conveying such an impression by its seeming or appearance' . . . . an act done by a Public Officer would 'purport' to be an act done in his official capacity not only if it was properly and rightly done by him in such capacity and within his powers but also if it has such a reasonable resemblance (though a false or pretended resemblance) to a proper and right act that ordinary persons could reasonably conclude from the character of the act and from the nature of his official powers and duties that it was done in his official capacity. But if the act done is so outrageous and extraordinary that no reasonable man could detect in it any resemblance to any act which the powers of such an Officer could allow him to do on the facts as represented and declared by such Officer, his mere allegation that he did the act in his official capacity would not suffice . . . . I think the question of the good faith or the bad faith of the Public Officer either as regards his belief in the legality or propriety of his act or the limit of his powers or the existence of facts justifying the existence of such powers is irrelevant in the consideration of the question whether the Officer is entitled to notice under section 80".

Spencer J. said :—

"I think that the word 'purporting' covers a profession by act or by words or by appearance of what is true as well as of what is not true".

The latest decisions of all the High Courts are in favour of the view that notice is necessary even if the act is done *mala fide*.

[1] *(1918) Indian Law Reports, 41 Madras 792.*

In *Dakshina Ranjan Ghosh v. Omar Chand Oswal* [1] Sanderson C.J. said,—

"The decision of the learned Sub-ordinate Judge implies the importation of words into the section which cannot be found there. He would read the section as if it were ' in respect of any act purporting to be done by such public officer *bona fide* in his official capacity '. In my judgment it is not legitimate to construe the section by importing into the section words which do not appear in the section ".

In *Abdul Rahim v. Abdul Rahim* [2] there occurs the following passage in the judgment of Daniels and Neave JJ. :—

"The contention urged on behalf of the respondent in this Court is that which was adopted by the Court below, namely, that section 80 has no application unless the act complained of was done in good faith. On the language of this section the question seems to us to admit of no doubt. The section does not require that the act should have been done in good faith. It merely requires that it should purport to be done by the Officer in his official capacity. If the act was one such as is ordinarily done by the Officer in the course of his official duties and he considered himself to be acting as a Public Officer and desired other persons to consider that he was so acting, the act clearly purports to be done in his official capacity within the ordinary meaning of the term ' purport '. The motives with which the act was done do not enter into the question at all ".

These cases were followed in *Muhammad Sharif v. Nasir Ali* [3] which was an action for malicious prosecution.

For the reasons given by me earlier in the judgment I would dismiss the appeal with costs.

PULLE J.—I agree.

Appeal dismissed.

[COURT OF CRIMINAL APPEAL]

1949 *Present :* **Jayetileke S.P.J. (President), Canekeratne J. and Gunasekara J.**

THE KING *v.* G. W. FERNANDO

APPEAL 29 OF 1949 WITH APPLICATION 72

S. C. 4—M. C. Colombo, 21,960

Court of Criminal Appeal—Evidence—Deposition of absent witness—Admissibility—Discretion of trial Judge—Circumstances for reviewing it in appeal.

The discretion of the court, under section 33 of the Evidence Ordinance, to admit in evidence the deposition of an absent witness on the ground that the presence of the witness cannot be obtained without unreasonable delay and expense may be reviewed by the Court of Criminal Appeal when a manifest injustice is disclosed.

[1] (1923) *Indian Law Reports, 50 Calcutta 994.*
[2] (1924) *All India Reporter, 46 Allahabad 851.*
[3] (1930) *All India Reporter, 53 Allahabad 742.*