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

C.A. (P.H.C) APN 28/2014

H.C. Colombo HCR 17/2014

MC KADUWELA B55620/ (55056)

In the matter of an application for exercise of the jurisdiction vested in the court of appeal under article 145 the constitution read together with 138.

W.H.THULYANANDA SENANANDA,
NO 181, Station Road,
Udahamulla, Nugegoda.

SUSPECT-PETITIONER-PETITIONER

OIC,
Special Crimes Investigation Bureau, Police Station Mirihana.

COMLAINANT-RESPONDENT-RESPONDENT

THE HON ATTORNEY GENERAL,
Colombo.

RESPONDENT

BEFORE : A.W.A. Salam, J (P/CA) & Sunil Rajapaksha, J.

COUSNEL : Amila Palliyage for the suspect-petitioner-petitioner and Rajendra Jayarathna SC for the Hon Attorney-General

DECIDED ON: 07.07.2014

JUDGMENT OF COURT

This is an application for the exercise of the supervisory jurisdiction of this Court vested under Article 145 of the Constitution of the Democratic Socialist Republic of Sri Lanka. In terms of the said Article, the Court of Appeal is empowered to call for, inspect and examine any record of any Court of First Instance and in the exercise of its revisionary powers make any order thereon as the interests of justice may require.

The application has been made by the suspect-petitioner-petitioner[1] and upon such application we called for the record from the relevant Magistrate's Court and heard the petitioner and the Hon. Attorney General on the impugned orders with a view to ascertain the degree of intervention required to mete out justice. We wish to place on record our gratitude to both counsel for the assistance rendered to arrive at a decision, particularly the learned State Counsel who did not oppose the application of the petitioner.

The facts that necessitated the application is required to be set out in some detail to assess the extent of the intervention required to make an order in the interests of justice under Article 145 of the Constitution.

It begins with one M/S Malkanthi making a complaint against the petitioner to the complainant-respondent-respondent alleging the commission of an offence of cheating (involving a sum of Rs.4 million) said to be punishable under Section 403

[1] Referred to in the rest of this judgment as the "petitioner"

of the Penal Code. Facts regarding the complaint was reported by the police to the Magistrate seeking an order on the bank to issue certain account details of the suspect. In the meantime the virtual complainant filed an affidavit alleging that the suspect was acting in collusion with the police and absconding to avoid court. The learned Magistrate without any inquiry promptly issued a warrant of arrest of the suspect.

Then the petitioner surrendered himself to the Magistrate's Court on 05.12.2013 and was remanded until 12.12.13 on unproven allegations that he had interfered with witnesses and absconded and evaded arrest with the connivance of the police. Implicit in the order to remand the suspect is that he was remanded because of the conduct alleged in the affidavit.

On 12.12.13 the learned Magistrate refused the application for bail acting under Section 14 (1) of the Bail Act and further remanded the suspect until 24.12.2013.

The petitioner while being on remand, caused a motion to be filed to have his case mentioned in his absence, on 19.12.2013 and moved for bail through his Lawyer. The Counsel who appeared for the petitioner acknowledged liability on behalf of his client and undertook to pay the virtual-complainant Rs.200,000/- on that day and the balance by 13 instalments consisting of Rs.300,000/- each and then moved for bail. Thereupon, the learned Magistrate disregarding the circumstances he referred to under Section 14 of the Bail Act, readily released the petitioner on bail carrying lenient conditions despite the allegation of having absconded and interfered with the prosecution witnesses. At the same time he ordered **the petitioner to file an affidavit, incorporating the**

undertaking (විත්ති එකඟත්වය) **purportedly acting under Section 420 of the Code of Criminal Procedure**. (Emphasis is to signify the crux of the issue)

The petitioner was in a quandary about how to respond to the said order, as he anticipated that noncompliance of it would end up in him being remanded once again, a habitual method adopted in certain courts in blatant disregard of the Law towards the indirect achievement of what cannot directly be achieved. As expected the petitioner ended up in remand custody for noncompliance of the directions. He states that he was unable secure his release from the remand prison and therefore compelled to tender the affidavit. The question that arises for consideration here is the legality of the order compelling to produce an affidavit and to what extent the alleged settlement or the admission as the Magistrate calls it, is enforceable in law particularly when no charge sheet has been filed.

The direction made by the learned Magistrate requiring the petitioner to tender an affidavit was challenged in the Provincial High Court and quite unfortunately, the learned High Court Judge failed to appreciate the obvious error committed by the Magistrate in directing the petitioner to tender an affidavit.

Against the judgment of the High Court, the petitioner invoked the revisionary jurisdiction of this Court in these proceedings and we refrained from issuing notice, as the petitioner had no basis to fear that he would be remanded, in the event of his failing to pay the instalments. We made this observation in our judgment and further made a detail guideline as to what the

Magistrate should not do than what he is expected to do. We thus terminated proceedings in the revision application, as we had the fullest confidence in the learned Magistrate that he would not resort to extra judicial methods to enforce the purported settlement or give effect to the purported admission. In our judgment, we categorically observed that the Magistrate would not make such an illegal order remanding the petitioner for non-payment of the instalment, as there is no settlement acceptable in Law and no valid affidavit is given under Section 420 of the Code of Criminal Procedure. We specifically mentioned in our judgment that the only course open to the prosecution, in the event of non-payment of the instalment, is to file an appropriate charge sheet and establish the guilt of the petitioner beyond reasonable doubt, to bring the culprit to the books.

However, when the case was mentioned for payment of the instalment, the learned Magistrate remanded the petitioner, although comprehensive guidelines were given by us, expecting reasonable adherence on his part. The petitioner states that he produced our judgment to learned Magistrate and to his utmost surprise, the learned Magistrate having read the guidelines, yet remanded him for non-payment of the instalment.

Quite surprisingly, the remanding order made by Court was not for a particular period but until the happening of an event, i.e. until the petitioner makes payment. In Sinhala the order is written as follows

> " 3/4/2014 දින මුදල් ගෙවීමට දින ලබා ඇති බැවින් රුපියල් ලක්ෂ 5 1/2 මුදල තැන්පත්කළ පසු මුදාහරින්න".

The order when translated means "Since time has been taken to make payment on 3/4/2014 release upon deposit of 5 ½ lacks"

Later on the same day the learned Magistrate has made another order directing that the 5 ½ Lacks be paid in cash to Mrs Sandya Thalduwa, Attorney-at-Law and the petitioner to be released upon making the payment. Despite the learned Magistrate's direction to hand over the cash to the attorney-at-law of the virtual complainant, the petitioner states that he had no alternative but to obey the first order of the learned Magistrate to get himself freed from custody. In the circumstances, he now complains of extra judicial method adopted by Court to recover the money and invites us to invoke Article 145.

We have anxiously perused the several orders made by the learned Magistrate. In our opinion, a charge of contempt against the authority of this court cannot be maintained against the learned Magistrate, as we have not given him any specific directions to follow, except that we made certain guidelines to be adhered to. However, we are of the opinion that the orders directing the petitioner to tender an affidavit and the detention of the petitioner until such time the instalment is paid warrant the intervention of this Court to put the record right and to undo the injustice meted out the petitioner.

The distinction between the expressions "Suspect" and "Accused" plays a vital role in the application of the Provisions of the Law to the present controversy.

The point to remember is that a person is still at the investigation stage when forwarded under custody to Court in terms of Section 116 (1). Forwarding the suspect to Court is incorrect to be deemed as an automatic institution of proceedings. Criminal proceedings are instituted under Chapter XIV, when the Magistrate takes cognisance of the accusation contained in the Police report or in a written complaint or upon the taking of evidence as the case may be in terms of Section 136 (1). It is to be noted that the language used in Section 136 (1) envisages a person accused of an offence and not a mere suspect.

A fundamental question that has to be discussed at this stage is the extent to which a Magistrate is permitted to record a statement of the suspect prior to the institution of criminal proceedings under Chapter XIV.

Under Section 127, prior to the commencement of a trial or inquiry, a Magistrate may record any statement. However, a Magistrate shall not record any such statement being a confession unless upon questioning the person making it that he has reason to believe that it was made voluntarily. Further, when he records any such statement he shall make a memorandum at the foot of such record to the effect that it was made voluntarily and taken in his presence and hearing and was read over by him to the person making it and admitted by maker of the statement to be correct, and it contains accurately the whole of the statement made by such person.

The statement said to have been made by the learned counsel of the suspect, undoubtedly suggests the inference that the suspect committed the offence. A statement made by a Lawyer

on behalf of his client which is of a confessional nature suggesting the inference that the suspect committed the offence is excluded, for such a statement clearly is not the act and deed of the suspect. Therefore, the statement made by the counsel admitting liability being a form of a confession cannot be acted upon by the Magistrate.

It was contended on behalf of the petitioner that there was a practice in the relevant Court to grant bail, in this type of prosecutions, if the liability is admitted. We are unable to ascertain the truth of this statement. Be that as it may, generally, if a suspect believes that he can find his way out of the remand prison, with an admission of guilt, a suspect will always be tempted to admit the wrong to even to end his agony for a short while. This temptation negates voluntariness. As Ulpian, a Roman Jurist of A D 200, described it in reference to torture "The strong will resist and the weak will say anything to end the pain."

Quite apart from the confessional statement having not directly originated from the suspect, there is no certificate to the effect either as to voluntariness of it or that it was taken in the presence of the Magistrate etc. Further as the suspect was then absent the Magistrate did not have the opportunity to question him as to the voluntariness. There was no certificate appended as contemplated under Section 127.Therefore, the statement said to have been made by the Counsel needs to be completely shut out.

The Magistrate appears to have recorded the statement of the Counsel, on the mistaken belief that it is an admission under Section 420. In such a situation whether it can be recorded

under Section 420 and whether the suspect can be directed to tender an affidavit are vital questions to be answered to resolve the issue regarding the admissibility of the affidavit.

A Magistrate has the power to record an admission, and to receive an affidavit under the proviso to section 420 only after the framing of the charges. The affidavit has not been tendered in this instance before the trial nor has it been forwarded in the course of the trial. As such, if the purported admission is to be given effect to, it must satisfy the requirement set out in the Proviso to Section 420. The Proviso reads as follows....

> 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. (Emphasis added)

The question as to the point of time an admission be recorded under section 420 of the Code of Criminal Procedure Act was considered in the case of Perera Vs A.G. (Court of Appeal) (1998) 1 SLR 378. Taking into consideration the purpose of an admission the bench took the view that an admission is recordable at any stage of the trial before the prosecution closes the case.

Further, it must be noted that an admission under Section 420 is referable only to an accused and not to a suspect. Section 420 mandates that the affidavit should be certified as to the identity and signature of the **accused** but not the suspect and it must be certified by an attorney-at-law. Quite interestingly, the petitioner was not an **accused** but only a suspect when he

had been directed to file the affidavit, as no charge sheet had been filed at that time.

Taking into consideration, the legal position discussed above, it is quite clear that there had been no admission made in this case by the petitioner. If the petitioner is desirous of making an admission, he can still do so, provided it is made at the right stage, namely before the commencement of the trial or in the course of the trial.

In terms of Section 420 of the Code of Criminal Procedure, admissions are limited to facts in issue and relevant facts. However, the Section specifically allows admissions to be made as to the identity of any person, matter or thing, the fact that an identification parade was held and that a particular witness identified a particular person at that parade, the fact that a particular matter or tiling was sealed in the presence of a particular person and forwarded to the Government Analyst for examination and analysis, the fact that a particular matter or thing sent to the Government Analyst for analysis and it was returned by him to Court, after such examination and analysis, the fact that a particular survey or sketch was made by a particular person.

It is important to note that the commission of the offence is not proved with the making of this purported admission. Once an admission is recorded according to law, the prosecution has to prove the other ingredients of the offence.

Can the Magistrate, direct to a suspect to tender an affidavit, incorporating certain purported admissions made before him orally? My considered view is that the Magistrate is not

empowered to do so for three reasons. Primarily, in such an event, the making of the admission is devoid of the elementary characteristic of it being voluntary. Secondly, the Law does not empower the Magistrate to order a **suspect** to tender an affidavit. Thirdly, an examination of Section 420 of the Code of Criminal Procedure reveals that an affidavit has to be affirmed by an **accused** and not by a **suspect**.

The other question remains to be addressed is the procedure to be followed when a person who has acknowledged liability to make certain payments later falls into arrears. In this case, there was no legally admissible admission, to call upon the petitioner to pay the money. However much the learned Magistrate may have been keen in recovering the money from the suspect, he had no power to remand the suspect as a punitive measure to compel the suspect to part with the money. When he does that he steps out of the permissible province of law and espouses a cause outside the Law.

Remanding a suspect for noncompliance of the purported settlement or going back on the admission, as the Magistrate calls it, would tantamount to cancellation of the bail. The bail act specifically provides the circumstances under which an order for cancelation of bail may be made.

Quite strikingly, the petitioner has not committed any acts warranting the cancellation of bail. Hence, undoubtedly the Magistrate had acted in excess of his power when he ordered the suspect to be detained until the payment is made. It is to be observed that the order to remand the suspect indefinitely, as was done by the learned Magistrate, until the payment is made, would have had the effect of a remand order which is

perpetual in nature. If the suspect did not pay the money, in terms of the illogical order to detain him until payment is made, the prison authorities may have had to keep him on remand until the payment is made irrespective of the time factor. If no payment was made, the petitioner would have to languish in remand for life. The absurdity of the learned Magistrate's order is evident from its illogicalness. When the orders made to remand the suspect by Magistrate from time to time are closely scrutinized, it is crystal clear that they been made as punitive measure and not to achieve the actual object of a remand order.

In the event of a fine imposed by court or any other payment recoverable as if it is a fine imposed, the methods in which it can be recovered are laid down in the law. The recognized method by which any payment legally due from an offender can be recovered includes issuing a warrant for the levy of the amount by distress and sale of any movable property belonging to the offender or the offender may be sentenced to undergo imprisonment in default of payment. In this context, it is noteworthy to place it on record that the law does not permit a person to be detained in remand in default of a payment which is due. In passing, we should state that an offender who is visited with a fine only, strictly speaking, cannot be detained even for a moment within the precincts of court, particularly inside a cell guarded by prison authorities, until he makes the payment. He must have the freedom to walk into the registry to pay the fine. His detention even for moment would be deprivation of his freedom of movement otherwise than in accordance with a procedure established by law. It is indeed a

indeed a matter for grave concern that the petitioner has been deprived of his liberty in an unusual manner.

This clearly shows that the Court was without authority to enforce the admission, in the manner it was sought to be enforced by the learned Magistrate in his endeavour to recover the money from the suspect. Needless to say that such a method to compel payment is unknown to our law.

It is appropriate at this stage to cite a passage from the decision in C.A (PHC) Application No. 58/2011, which deals with the purposes of cancellation of bail. In that case Sunil Rajapaksha, J dealing with the purposes of cancellation of bail stated as follows...

> The purpose of refusing bail or cancelling a subsisting bail order *inter alia* is to protect the community, reduce the likelihood of further offending and to ensure that the suspect attends Court throughout the trial and makes himself available to be sentenced.

In Jayawickrama Subasinghe Arachchilage Ariyapala, CA (PHC) APN No: 134/12 on the importance of bail, A. W. A. Salam, J held as follows....

> "The concept of bail is the recognition of the liberty of a person between the time of his arrest and verdict subject to the condition that he re-appears in Court for his trial until its conclusion or until he is sentenced. The Court is entitled to cancel a bail bond (after hearing the accused) for violating the bail conditions which include specific grounds such as

having threatened or influenced or tampered with evidence or interfered with the investigation or obstructed the judicial process or otherwise misused or abused the grant of bail". (Emphasis added)

The provisions relating to the remanding of the suspects concerned in the commission of an offence, being a restriction imposed on the liberty of the subject as guaranteed under the Constitution should be interpreted strictly in accordance with the letter of the Law and not in a slapdash manner.

There is another aspect to this issue. Even if the suspect completes the payment of 4 million, yet he has to be charged on the facts reported either for cheating or criminal misappropriation, as the purported admission *per-se* is no proof that he committed the offence, unlike an unconditional plea of guilt. Given the highest degree of benefit to the prosecution, the purported admission would mean nothing more than an acknowledgment of having received Rs 4 million from the virtual complainant.

The issue will be worse, if the petitioner after making payment of the money or part thereof, is acquitted on the charges at the end of the trial. In such an event the payment made by him will have to be returned to him.

The case of S M Nirmalene De Soyza -Vs- Officer-in-Charge, (Unit 2), Colombo CA.(PHC) APN. No. 101/2011, concerns a similar issue. Without the accused being charged a settlement was entered to the effect that the entire amount of Rs. 2 million would be paid by the accused by way of instalments within 01 year. For not honouring the undertaking he was sentenced to

02 years R I and the High Court did not set aside the sentence, but re-scheduled the scheme of payment with a default sentence re-introduced. Since, the learned Magistrate convicted the accused without him being found guilty or without a plea of guilt being tendered the Court of appeal set aside the proceedings and sent the case back for re-trial.

In this matter, quite regrettably the attorneys-at-Law and the learned Magistrate have failed to appreciate the real importance of the Constitutional Provisions, Code of Criminal Procedure and the Evidence Ordinance to decide the simple question of the petitioner's criminal liability. Instead of deciding the issue based on the legal provisions, motivated by the enthusiasm to grant relief summarily to the aggrieved party, the Magistrate appears to have had recourse to an extra-legal method to recover the money.

Assuming the learned Magistrate's attempt to compound the offence is permissible, yet there is no Provision for an offence to be compounded before the charge sheet is framed. Basically to compound an offence, the accused should be informed formally, the exact charge preferred against him. It is based on the charge one has to decide on the permissibility to compound a charge. Even to record an admission, one needs to know the charge to ascertain what the fact in issues are and what facts are relevant, to invoke Section 420.

On the other hand if the learned Magistrate was correct in compounding the offence, then in terms of Section 266 (4) (b) of the Code of Criminal Procedure, it shall have the effect of an acquittal of the accused. In such an event, the learned

Magistrate would have had no power to remand the petitioner for non-payment of the instalment.

The right to a fair trial which is of fundamental importance in a democratic society, occupies a central place under our Constitution. Judges must act strictly according to law and not deviate from the rules of evidence and the procedure laid down to find an accused guilty of the charge levelled against him.

The power conferred on a Judge to remand an accused is not meant to be exercised to put a suspect into unnecessary inconvenience, as and when the judge feels like remanding him. Judges must always act with reasonableness and according to law. Even the judicial discretion should be exercised not to accomplish a personal goal of a Judge but in harmony with the laws of the land upon reasonable grounds to achieve justice to both parties. The Judges must exercise the discretion vested in them as a trust entrusted and always conscious of the norm that a discretion does not empower them to do what they like merely because they are minded to do so. On the contrary they must in the exercise of the discretion do not what they like but what they ought. The impugned proceedings dated 19.12.2014 do not conform to such a standard.

In the course of the argument, it came to light that several Magistrate's Courts of different jurisdictions adopt the identical method to deliver hurried justice. To my mind, this is a cause for unpleasant surprise and under no circumstances can it be condoned. Such procedure which is unknown to the Law, if encouraged would destroy the entire fabric of justice

and a perpetual challenge to the implementation of the concept of presumption of innocence enshrined in the Constitution, evidentiary rule relating to burden proof enacted in the Evidence Ordinance, procedural mode of recording admissions authorized under the Code of Criminal Procedure and recording of confessions and statements pending investigation under Section 127 of the Code of Criminal Procedure and the scheme relating to compounding of offences under Section 266 of the Code of Criminal Procedure.

In construing the relevant legal provisions relating to conduct of prosecutions, we cannot throw into jeopardy the entire fabric of administration of law and justice and directly or indirectly encourage or condone extra judicial approaches to take precedence over the time tested Law and established procedures. Such innovative practices, if disregarded would lead to a disruption of the Rule of Law and the Administration of Justice which this Court and all other Courts including the Magistrate's Courts are committed to preserve.

In the circumstances, there being no admission of liability to pay the amount mentioned in the B report, in the eyes of the law, the order dated 19 December 2013 cannot be allowed to stand. As the learned Magistrate had no power or authority to order the petitioner to tender an affidavit under Section 420, the purported admission is expunged from the record and the order dated 19.12.2014 is set aside. In the result, the learned Magistrate shall now commence the summary trial against the accused and enter his findings and judgment in due course.

Whatever the deposits made by the petitioner under the purported admission shall be paid back to him.

The registrar is directed to dispatch the record in case No 55056 together with this judgment to the respective Magistrate's Court forthwith.

President
Court of Appeal

Sunil Rajapaksha, J
Judges of the Court of Appeal

NR/-