

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

*In the matter of Contempt of Court in terms
of Article 105(3) of the constitution of the
Democratic Socialist Republic of Sri Lanka
Court of Appeal*

Court of Appeal No:

CA/COC/0005/2017

1. Prof. Sarath Wijesuriya
No. 461/A. N.T. Perera Mw.,
Mulleriyawa.

2. Neil Gamini Viyangoda
No.883/9, Flower Rd., Ethul Kotte

COMPLAINANTS

Vs.

Dr. Anuruddha Padeniya
President,
Government Medical Officers
Association (GMOA),
Professional Center,
No 275/75,
Prof. Stanly Wijesundara Mw.,
Colombo 07.

DEFENDANT

Before : K Priyantha Fernando, J. (P.C/A.)

: Sampath B Abayakoon, J.

Counsel :Upul Jayasuriya, P.C. with Sandamal Rajapakse, L.Senaratne and Sampath Wijewardena for the Complainants.

:Gamini Marapana, P.C. with Navin Marapana, P.C., with Uchitha Wickramasinghe and Nandana Kumara instructed by R. Dabare for the Defendant.

Written Submissions : 21.10.2021 (By the Defendant)

: 08.11.2021 (By the Complainants)

Order on : 23.11.2021

Sampath B Abayakoon, J.

Order on the objection as to the admission of contemporaneous recordings and computer evidence as evidence

This is an action instituted by the complainants against the defendant above named, seeking this Court's indulgence to punish the defendant for the offence of Contempt of Court in terms of Article 105 (3) of the Constitution of the Republic.

Upon summons being issued on the defendant, he has appeared before the Court and has pleaded not guilty to the charges leveled against him. As a result, the trial has commenced against the defendant on 4.09.2019. On that day the second complainant, namely Loku Ralalage Neil Gamini has given his evidence

in chief and the trial for the leading of his further evidence has been adjourned for 26.11.2019.

When leading his evidence in chief, the Learned President's Counsel for the complainants has marked several documents said to have been obtained from a website through the internet. When they were marked, the Learned President's Counsel for the defendant has objected to the marking of the same. Furthermore, when a compact disk was also marked as P5 the same objection has been taken. However, there is no record in the proceedings of that day, under which provision of law the Learned President's Counsel for the defendant is objecting to the said marking of the productions.

Although the further trial has been adjourned for 26-11-2019 no further evidence has been led. When the matter was taken up for further trial on 03-03-2021 the learned President's Counsel for the defendant has raised the same objection on the basis that the documents marked P2A to P2F, P4 and P5 are documents downloaded from the internet and that since the notice required to be given under Section 07 of the Evidence (Special Provisions) Act No. 14 of 1995. (The Act) was not given, the complainants are not entitled to produce them as evidence.

Since this was a matter that has to be decided before any further evidence can permit to be led, this Court allowed both the learned President's Counsel to file written submissions as to their respective stands.

Reiterating his objection perused, it was the position of the learned President's Counsel for the defendant that the petitioners have clearly failed to comply with the mandatory requirements of Section 07 of the Act. Hence, it was his contention that the said documents should be rejected and should not be allowed in evidence.

In his written submissions, the learned President's Counsel for the complainants has admitted that the notice under Section 07 has been given only on the 22nd of November 2019. However, it was his contention that since all the

contentious documents and the compact disk have been annexed to the petition and affidavit filed in 2017 and has been served to the defendant, he was well aware of the complainant's intention to lead them as evidence. It was his position that since the defendant has taken up this objection some years after the institution of this action, he is guilty of laches, hence, the objection should stand dismissed. He has also taken up the position that the date fixed for the inquiry or trial mentioned in Section 07 need not be the first date of trial and therefore, the notice given on 22-11-2019 should be accepted as a valid notice.

The Evidence (Special Provisions) Act No. 14 of 1995 has been enacted for the purpose of providing for the admissibility of audio visual, recordings and of information contained in statements produced by computers in civil and criminal proceedings and to provide for matters connected therewith or incidental thereto. It is very much clear that the compact disk and the documents objected are matters that fall within the ambit of contemporaneous recordings and computer evidence in terms of Section 04 and 05 of the Act.

Section 07 of the Act, which provides for the notice, access and inspection reads as follows:

(1) The following provisions shall apply where any party to a proceeding proposes to tender any evidence under section 4 or 5, in such proceeding-

(a) the party proposing to tender such evidence shall, not later than forty-five days before the date fixed for inquiry or trial file, or cause to be filed, in Court, after notice to the opposing party, a list of such evidence as is proposed to be tendered by that party, together with a copy of such evidence or such particulars thereof as is sufficient to enable the party to understand the nature of the evidence;

(b) any party to whom a notice has been given under the preceding provision may, within fifteen days of the receipt or

such notice apply to the party giving such notice, to be permitted access to, and to

(i) the evidence ought to be produced;

(ii) the machine, device or computer, as the case may be, used to produce the evidence;

(iii) any records relating to the production of the evidence or the system used in such production;

(c) upon receipt of the application to be permitted access to, and to inspect such evidence, machine, device, computer, records or system, the party proposing to tender such evidence shall, within reasonable time, but not later than fifteen days after the receipt of the application, comply with the request and provide a reasonable opportunity to the party applying or his agents or nominees, to have access to, and inspect, such evidence, machine, device, computer, records or systems, as is mentioned in the application;

(d) Where the party proposing to tender such evidence is unable to comply, or does not comply with, the application for access and inspection, or where the parties are unable to agree on any matter relating to the notice or the application for access and inspection or the manner and extent of the inspection, the Court may on application made by either party, make such order or give such direction, as the interests of justice may require.

(2) Save as provided for in sections 8 and 9 where any party proposing to tender any evidence under the provisions of this Act, fails to give notice as aforesaid, or upon application being made for access and inspection, fails to provide a reasonable opportunity therefor, or fails to comply with any order or direction given, by Court under paragraph (a), such party shall not be permitted to tender such evidence in respect of which the failure was occasioned.”

I am in no position to agree with the contention of the Learned President's Counsel that the date fixed for inquiry or trial as mentioned in Section 07 of the Act means any date fixed for the trial or further trial for that matter. It is clear that the trial in this action has commenced on 04-09-2019. Admittedly, by that time the complainants have failed to give the required notice under Section 07 of the Act. Giving the said notice on 22-11-2019, just four days before the matter was next fixed for further trial cannot be considered as compliance with Section 07 of the Act.

I am unable to agree that there were lapses on the part of the defendant to raise the objection as such an objection can only be taken when a witness who intends to rely on such documents or productions sought to produce them as evidence. In this action when the relevant documents and the compact disk was sought to be produced, the defence has duly objected to the same, although it was only on 03-03-2021 the objection has been taken into consideration and fixed for an order by the Court.

It appears that the complainants have annexed these documents and the compact disk as matters relied on by them along with their petition filed in this Court. However, it does not mean compliance with Section 07 of the Act.

Therefore, agreeing with the objection of the learned President's Counsel for the defendant and acting under Section 7(2) of the Act, I refuse permission to tender the documents objected to and the compact disk sought to be produced as evidence in this action.

Objection upheld.

Judge of the Court of Appeal

K Priyantha Fernando, J. (P.C./A.)

I agree.

President of the Court of Appeal