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

In the matter of an application for revision under and in terms of inter-alia, Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Hon. Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Court of Appeal Application No: **CA/ CPA/0124/18**

High Court of Colombo No: **HC/57/2018**

1. Chandana Palpita
2. Galapitiya Gedara Piyal Abeysekara
3. Sarath Kumara Gunarathne
4. Upul Chaminda Perera Kumarasinghe
5. Upali Liyanage
6. Gallage Sarda Lakmina Munidasa

Accused

And now between

Upali Liyanage
15, Weerasekara Mawatha,
Thalawathugoda.

5th Accused - Petitioner

Vs.

Hon. Attorney General of the Democratic Socialist Republic of Sri Lanka

Complainant - Respondent

1. Chandana Palpita
2. Galapitiya Gedara Piyal Abeysekara
3. Sarath Kumara Gunarathne
4. Upul Chaminda Perera Kumarasinghe
6. Gallage Sarda Lakmina Munidasa

1st to 4th and 6th Accused - Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Sanjeewa Jayawardana PC with R. C. Meepage for the Petitioner Sudharshana De Silva DSG for the Respondent
Argued on	:	14.03.2022, 15.03.2022
Written Submissions on	:	25.07.2019, 22.03.2022
Decided on	:	31.03.2022

Iddawala – J

This is a revision application filed on 12.11.2018 by the 5th accused petitioner (*hereinafter the petitioner*) named in the indictment dated 24.01.2018 filed by the complainant-respondent in the High Court of Colombo in case bearing No. HC/57/2018. The instant application impugns an order dated 23.07.2018 delivered by the High Court of Colombo which relates to an objection raised by the petitioner under and

in terms of the Evidence (Special) Provisions Act No. 14 of 1995 (*hereinafter the Act*).

The background facts of the case are as follows. The petitioner along with 5 other accused were indicted for conspiracy to commit criminal misappropriation of Rs. 1,090,000/- out of the funds belonging to the Fisheries Harbour Corporation which constitute offences under the Penal Code and Offences Against Public Property Act No 12 of 1982 (as amended). The petitioner was the Chairman of the Corporation at the time of the said misappropriation and allegations have been levelled that he was involved in ordering and purchasing of 2000 Diaries violating the tender procedure which ought to be followed in such procurement. The indictment was preferred upon an investigation conducted by the Criminal Investigation Department in pursuance to an investigation and inquiry held by the Commission of Inquiry to Investigate and Inquire into Serious Acts, Fraud, Corruption, Abuse of Power, State Resources and Privileges appointed by His Excellency the President in 2015.

As such, proceedings in High Court case bearing No. HC/57/2018 began on 12.06.2018 with the serving of indictment upon the petitioner and the five accused respondents. On that day itself 12.06.2018, the respondent proposed to tender computer evidence and issued notice to the petitioner of such proposal under Section 7 (1) (a) of the Act. On 18.06.2018, the petitioner applied to be permitted to access the proposed computer evidence as per the stipulations of Section 7(1)(b) of the Act. At this juncture, this Court would pause the narration of facts and refer to the provisions of Section 7(1)(a) and 7(1)(b) of the Act. Section 7(1)(a) of the Act is reproduced below:

> *"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;"* (Emphasis added)

By virtue of invoking Section 7(1)(a) of the Act on 12.06.2018, the complainant-respondent has set in motion a legal process by which the petitioner is granted an opportunity to inspect the nature of the computer evidence sought to be produced by the prosecution against the accused and prepare accordingly prior to the date fixed for inquiry or trial. This is akin to the recent introduction of 'Pretrial Conference' by Section 3 of Code of Criminal Procedure (Amendment) Act, No. 2 of 2022 by which Section 195A was inserted to the principal enactment. As such, the legal process set in motion by the invocation of Section 7(1)(a) aims at facilitating the inspection of computer evidence that is proposed to be produced during trial, prior to the beginning of such trial. As such, the Section makes it mandatory for the proposing party to tender notice of such computer evidence to the opposing party 45 days prior to the trial date. It is the intention of the legislature that within the confines of such 45 days, the necessary and meaningful access is facilitated to the opposing party to access and otherwise inspect the proposed computer evidence. When evaluating the facts of the instant case, notice of such proposed computer evidence was given to the petitioner's lawyer and it is the considered view of this Court that such notice sufficiently fulfills the requirements of Section 7(1)(a) of the Act.

Then comes Section 7(1)(b) of the Act which stipulates the following:

> *"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, may be, used to produce the evidence;

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

As such, the opposing party **may,** if they so choose, apply by way of a notice to be permitted to access the computer evidence proposed to be produced within 15 days of the receipt of notice under Section 7(1)(a) of the Act. After the fulfillment of Section 7(1)(b) requirement, Section 7(1)(c) stipulates that within reasonable time but not later than 15 days, the proposing party must grant such access:

"(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;"*

As such, the combined effect of Sections 7(1)(a), 7(1)(b) and 7(1)(c) is to ensure that the proposing party grants access to the opposing party to inspect the proposed computer evidence 15 days before a date is fixed for trial. However, the legislature in its wisdom as provided the following as in Section 7(1)(d) as well:

"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****."* (Emphasis added)

Hence, the legislature has provided an avenue for further facilitation in the event the proposing part is unable to comply or does not comply with the application for access under Section 7(1)(c) or even independent to Section 7(1)(c), when the parties are facing an obstacle to arrive at a consensus as to the modalities of inspection, the Court is granted the discretion to issue a suitable directive in the interest of justice. This is the only meaningful interpretation of Section 7(1)(a), 7 (1)(b), 7(1)(c) and 7(1)(d). While it is mandatory for the proposing party to give notices of the intended production of computer evidence when the trial begins, the timelines stipulated by the legislature act as a guideline to intimate when and upon which conditions the other party may approach the court with their requests for the meaningful facilitation of access to the proposed computer evidence.

Prior to examining the relevant facts of the instant case in relation to the application of the Sections thus far adduced, a brief reference to whether the stipulations of Section 7(1)(c) are 'mandatory' or 'directory', must be had. Though neither party canvassed this contention beyond the written submissions, it is the considered view of this Court that despite the use of "shall" in Section 7(1)(c) of the Act, the legislature intended the provisions to have only have 'directive' effect. As Lord Campbell pointed out **in *Liverpool Borough Bank v. Turner*** (1860) 2 De G. F. & F. 502;30 L.J. Ch. 379 "*No universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed".* (See also Mohommed v Jayarathne (2002) 3 SLR

181, Abeygunewardena v Samoon (2007) 1 SLR 276, Wickremasinghe v. de Silva (1979) 2 SLR 65, Visuvalingam And Others V. Liyanage And Others (1983) 1 SLR 203, Thilanga Sumathipala v Inspector General of Police and Others (2004) 1 SLR 210, Sumanadasa and 205 Others v Attorney General (2006) 3 SLR 202), See also Maxwell Interpretation of Statutes, 10th Edition, Page 47 and Page 58.) It is an elementary rule that construction is to be made of all the parts together, and not of one part only by itself. It is clearly resolved in **Canada Sugar Refining Co, Ltd vs R** [1898] A.C.735 '*Every clause of a statue is to be construed with reference to the context and other clauses of the Act, so as, as far as possible, to make a consistent of the whole statute'*. Further in, **Midland Bank vs Conway B.C**. [1965] 1 W.L.R. 1165 states *'a case in which the principle that word should be read in their context prevailed over argument based on the literal wording of the Act and the purpose of the provision in question*.

Now to the facts. As referred to above, the respondent invoked the provisions of Section 7(1)(a) by giving notice to the petitioner on 12.06.2018. The petitioner, relying on Section 7(1)(b) issued notices to the respondent on 18.06.2018. On 09.07.2018, as evinced by Page 38 of the Brief, the petitioner raised an objection to prevent the leading of computer evidence as proposed by the respondent, stating that by virtue of the respondent's non-compliance to the time period stipulated in Section 7(1)(c) of the Act, the respondent can no longer rely on such computer evidence when the trial begins. This objection was premised on the basis that by virtue of noncompliance, the respondent has violated the mandatory requirement of the stipulated 15 days, reasonable time period as provided for in Section 7 (1) (c) of the Act, thus frustrating the law and negating the intention of the legislature. Thereafter the impugned order dated 23.07.2018 was delivered by the learned High Court Judge, overruling the said objection and directing the parties to come into an agreement in order to facilitate access to the proposed computer evidence.

In the impugned order dated 23.07.2018, the learned High Court Judge rejects the contention that in the event access has not been granted by the expiration of 15 days since Section 7(1)(b) notice, the proposing party under Section 7 (1) (a) is estopped from leading the special evidence. The said order refers to stipulation of 'reasonable time period' within Section 7 of the Act as recognition of the practical difficulties in implementing the provision by the legislature. The learned High Court judge refuses to employ a strict interpretation of the time bar envisioned in Section 7 (1) (c) of the Act and opines that if the converse is expected, the petitioner should have specified the modalities of the access requested. The learned High Court Judge in conclusion pronounced the following and ordered the matter to be called on 29.08.2018.

> "ඒ අනුව මෙම විරෝධතාවයට පදනමක් නොමැති බව තීරණය කරමින් විරෝධතාවය ප්‍රතික්ෂේප කරමි. පැමිණිල්ල සමග සාකච්ඡා කොට නීතිඥ මහතුන්ටද සුදුසු සහ අදාල පරිගණක භාරයේ පවතින ආයතනයට සුදුසු දිනයක් සම්බන්ධව එකඟතත්වයකට එලඹ ඒ සඳහා ප්‍රවේශය ලබා ගත යුතු බවට පාර්ශවයන්ට දැනුම් දෙමි. එසේ ප්‍රවේශය ලබා ගැනීම් සඳහා යම් බාධාවන් පවතින්නේ නම්, අධිකරණය වෙත ඉල්ලීමක් කොට ඒ සඳහා වන නියෝග අධිකරණය වෙතින් පැමිණිල්ල ලබා ගත යුතු බවටද දැනුම් දෙමි." (Page 31 of the appeal brief)

It is the considered view of this Court that the impugned order dated 23.07.2018 is an instance where the learned High Court Judge has issued a directive under

Section 7(1)(d) of the Act to facilitate access of inspection to the petitioner with regard the proposed computer evidence by the respondent. The learned High Court Judge has utilised his discretion as envisioned by the legislature when enacting the provisions of the Act. However, such discretion must be employed in a manner that does not frustrate the due administration of justice. The President's Counsel appearing on behalf of

the petitioner vigorously asserted that the learned High Court Judge, by failing to demarcate specific deadlines by which the proposing party ought to comply with the request for access in the impugned order, the meaningful operation of the law has been thwarted.

At this juncture, it is pertinent to refer to proceedings dated 29.09.2018 where the respondent has offered the opportunity for the petitioner to inspect the proposed computer evidence. However, the brief notes that the petitioner has refused the offer by relying on their previous objection that by virtue of non-compliance of Section 7(1)(c) of the Act, any attempt by the respondent to permit access has been rendered nugatory. It appears that the petitioner was not even to willing entertain the idea of inspecting the proposed computer evidence prior to the beginning of the trial.

In this regard, the submissions by the learned Deputy Solicitor General (DSG) appearing on behalf of the respondent is of value. It was the DSG's contention that the respondent is attempting to completely shut out the proposed computer evidence and thereby necessarily quashing the indictment against the petitioner since the sustainability of the very prosecution depends on the proposed documents. DSG then went on to refer to the specificities of the proposed computer evidence sought to be produced and stated that they were printouts of documents in the nature of quotations involved in the alleged conspiracy for criminal misappropriation. Reference was also made to the signatures placed on such documents and how the same documents were available to the petitioner during the Commission of Inquiry and by virtue of such access, no prejudice has been caused to the petitioner. Thereafter the learned DSG referred to the practical challenges the respondent faced in issuing notices under Section 7(1)(a) of the

Act to all 6 accused (including the petitioner) of the case and the manner in which they were awaiting the response from each such accused. It was further contended that the admissibility of evidence is a trial matter and

that by raising the instant objection, the petitioner is attempting to shut out evidence.

During his submissions, the President's Counsel for the petitioner stated that the present issue was a pure question of law. However, this Court cannot ignore the factual background and the effect of the objection raised for that would necessarily have an impact on the overall administration of justice. Facts cannot be completely divorced of the law or vice versa. Especially at an instance where the discretion of a judge is being questioned which would necessarily have the effect of shutting out evidence even prior to the beginning of the trial. At this instance, this Court would like to reproduce a quote by Riddel J in **R v Barnes** 60 Dominion Law Reports 623 at 628 which was cited in the Supreme Court Judgment of Abeysekera v Attorney General 2008 [BLR] 81:

> *"the administration of our laws 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"*

In such a context, this Court will refer to Section 7(2) of the Act which stipulates the following:

> *"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"*

It is the considered view of this Court that the circumstances of this instant case do not warrant the invocation of Section 7(2) of the Act. As determined by the learned High Court Judge in his impugned order dated

23.07.2018, the computer evidence proposed to be led by a party in a criminal trial under the Evidence (Special) Provisions Act No. 14 of 1995, cannot be shut out on an objection based on non-compliance of Section 7(1)(c) of the Act, in an instant where the High Court has delivered a directive to facilitate access to the proposed evidence. The lack of a specific deadline or a period of compliance ought not vitiate the entire process of justice as crimes of this nature has grave impact on the public interest.

The vagueness in the time period within which the directive ought to be satisfied should not render nugatory the administration of justice. Nevertheless, in exercise of the revisionary jurisdiction of this Court, the learned High Court Judge is hereby directed to clearly stipulate a timeframe within which access for inspection of the proposed computer evidence should be facilitated under the Act by the meaningful application of Section 7(1)(d) of the Act, before commencement of the trial.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL