

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

**In the matter of an Application under Section
46 of the Judicature Act No. 2 of 1978.**

The Democratic Socialist Republic of Sri Lanka

CA/TR/93/2015

COMPLINANT

HC Embilipitiya No. HCE /74/2014

Vs,

MC Embilipitiya No. BR 1178/07

Palawinna Kularathna Muthukumarana

ACCUSED

AND BETWEEN

Palawinna Kularathna Muthukumarana,
Temple Road,
Yudaganawa,
Peelawela,
Buttala.

ACCUSED-PETITIONER

Vs,

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

COMPLINANT-RESPONDENT

**Before: Vijith K. Malalgoda PC J (P/CA) &
 H.C.J. Madawala J**

Counsel: Darshana Weraduwaage for the Petitioner,
Himali Jayaneththi SC, for the Respondent,

Argued on: 23.09.2015, 03.11.2015

Written Submissions on: 19.01.2016, 26.01.2016

Order on: 29.04.2016

Order

Vijith K. Malalgoda PC J

The Accused-Petitioner to the present application had come before this court seeking an order to transfer the High Court case No. HCE/ 74/2014 from the High Court of Embilipitiya to High Court of Colombo or any other High Court which this court may deem fit.

The Accused-Petitioner who was the productions clerk attached to the Magistrate's Court of Embilipitiya during the time relevant to this application was indicted by the Hon. Attorney General on a count of Criminal Breach of Trust of a Production namely a Sculptured Lotus Bud with a value which cannot be estimated, which was entrusted to him, an offence punishable under section 385 of the Penal Code read with section 5 (1) of the Offences Against Public Property Act No. 12 of 1982.

According to the petitioner he was attached to the Magistrate's Court of Embilipitiya as the productions clerk during the time relevant to this case and, during this period two Sculptured Lotus Buds said to have stolen from "Maduwanwala Walawwa" was handed over to the court as a production of a case pending in the said court. Since each Sculpture was over 50kg in weight, the two Sculptures were kept outside the court in the court premises but the said productions were under the control of the accused-petitioner.

It was transpired during the arguments before this court that one such production had gone missing and the Accused-Petitioner has observed this when he returned to his office after completing the Presidential Election duties in November 2005.

Even though the Accused-Petitioner has questioned the employees responsible for the security of the premises and other minor employees under him, but neither taken any steps to inform this to his immediate supervising officer, the Registrar of the Magistrate's Court or the Learned Magistrate of this incident, nor he lodged a complaint at the Police Station of Embilipitiya.

This matter was not come into light until the Site Manager of Maduwanwala Walawwa went before the Magistrate Court in August 2007 claiming the said productions. A complaint was made at the CID with regard to the loss of the said production in the year 2007 and an investigation was commenced by the CID with regard to the loss of the Sculptured Lotus Bud from the Magistrate's Court.

During the said investigation CID had arrested the Accused-Petitioner and conducted an investigation. The said investigation notes were forwarded before the Attorney General by the CID and thereafter the present indictment was forwarded to the High Court of Embilipitiya by the Hon. Attorney General.

The Accused-Petitioner has come before this court seeking an order under section 46 of the Judicature Act to transfer the said case from the High Court of Embilipitiya to Colombo High Court or any other High Court which this court deem fit. The main grievance of the Accused-Petitioner before this court was that, out of the witnesses listed in the Indictment, 03 witnesses are security guards attached to the High Court of Embilipitiya at present, and another witness is working as a driver in the Magistrate's Court.

During the argument before us the Learned Counsel for the Accused-Petitioner complained against the manner in which the investigations conducted by CID and alleged that there was pressure brought

to the investigations to fix the Accused-Petitioner to the lost of the production, instead of finding the real culprits who had in fact stolen the production.

However in this regard the court observes that, the accused-appellant being the person in charge of the said production, had lodged a prompt complaint with the authorities immediately after he realized that the production has gone missing, the persons who are responsible for the theft could have arrested but due to the laps from his part, he cannot now blame the CID or the Security Guards for their lapses.

As observed by this court, the charge against the accused-appellant is one under section 388 of the Penal Code read with section 5 (1) of the Offences Against Public Property Act No. 12 of 1982 for Criminal Breach of Trust of a production entrusted to him as the productions clerk attached to the Magistrate's Court and therefore the evidence of the Security Guards attached to the said court will be of no use to establish the ingredients of the said charge.

This court further observes that the present trial is now pending before the High Court of Embilipitiya and not before the Magistrate's Court of Embilipitiya. The Learned Counsel for the accused-appellant had failed to place any material before us to establish that the Learned High Court Judge of Embilipitiya was bias against the accused-appellant and the fact that few minor employees including some security guards and a driver is working in Embilipitiya Courts Complex is not sufficient for this court to conclude that the said witnesses can influence the Learned High Court Judge in this case.

In the case of *Daya Wettasinghe V. Mala Ranawaka [1989] 1 Sri L R 86* the court of Appeal has held,

“A party seeking to establish bias undertakes a heavy burden of proof. Mere reasonable suspicion is not enough. A Judicial Officer is a person with a legally trained mind and court will, not lightly entertain an allegation of bias the Petitioner had failed to establish bias.”

During the submissions before this court the Learned Counsel for the Accused-Petitioner had further relied on the ground that the Accused-Petitioner is now facing a difficulty in retaining an Attorney –at –Law to appear for him in the High Court of Embilipitiya.

In support of his argument before this court, the Learned Counsel relied on the Court of Appeal decision in *Ratnayake Menike V. Dayananda and Others* [2003] 3 Sri L R 57; where the court has considered the following ground in granting relief, to the Petitioner in the said case.

“In the Petition and affidavit of the Petitioner it is stated that no Lawyer from Kuliyaipitiya and Kurunegala Bars would appear for the Plaintiff-Petitioner as the 7th Defendant-Respondent is a Lawyer practicing in Kuliyaipitiya and Kurunegala Courts.

It is further stated in the Petition and Affidavit of the Petitioner that they retained a Lawyer from Marawila Court’s and he too having initially accepted the brief later on the morning of the trial date, i.e. 4th October 2002 returned the brief stating that he could not appear in the case as the 7th Defendant-Respondent was an Attorney-at –Law practicing in that court.”

However when perusing the journal entries of the High Court case we observe that the accused-appellant had not complained this fact to the Learned High Court Judge up to the time the case in hand was taken up for argument but was represented by one of the leading counsel from the local bar until 11.03.2015 on which date the said counsel had handed over the papers to him since he is not appearing in the case. The counsel had neither given any reasons for the said decision nor an application was made from courts to assign a counsel to appear for the Accused-Petitioner. Since then, the case pending in the High Court had gone down for dates on the application of Accused-Petitioner since the transfer application (present application) is pending in the Court of Appeal.

The Learned State Counsel questioned the genuineness of the said application, in the absence of any valid reasons given by the Senior Counsel for his resignation from the case pending before the High

Court and submitted that the said decision was taken in support of the case in hand, in the absence of a valid ground to pursue the application.

When considering the above conduct of the Accused-Petitioner, specially the failure by the Accused-Petitioner to inform the Learned High Court Judge of his difficulty in retaining a counsel from the local Bar, and making an application for the assistance of an assign counsel, and the timing of the said resignation we see no reason to reject the argument raised by the Learned State Counsel before this court.

In the case of *Sivasubramaniam V. Sivasubramaniam* [1980] 2 Sri LR 88 the court of appeal has held;

“A party who seeks a transfer of a pending action in court must adduce sufficient grounds to satisfy the Court of Appeal that it is expedient to make order for its transfer and in the context the word expedient would mean fit or proper. A transfer would not be ordered on light grounds and on a consideration of all the material placed before court in the present application, the Petitioner had failed to adduce sufficient grounds for a transfer of this action.”

As discussed above, I see no merit in the case in hand. The Accused-Petitioner has failed to establish before us any reasonable ground for this court to make order to transfer this case. Therefore we dismiss this application.

Application for transfer is dismissed. No cost is ordered.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala J

I agree,

JUDGE OF THE COURT OF APPEAL