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

In the matter of an application for a Revision and Restitutio-in-Integrum under Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/RII/55/2023
M.C. Colombo Case No: 3153/02/23

Ranjan Malien Dedigama,
No.239, High-level Road,
Maharagama.

Petitioner-Petitioner

-Vs-

1. The Officer in Charge
   Borella Police Station,
   Borella.

2. The Officer in Charge
   Divisional Crime Investigations Bureau,
   Colombo South Division,
   Bambalapitiya.

Respondent- Respondents

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

Respondent

Before: Hon. D.N. Samarakoon, J.

Counsel: Mr. Mahinda Nanayakkara instructed by Mr. Niluka Dissanayake for the Petitioner-Petitioner.
Ms. Suharshi Herath, D.S.G., for the Respondents.

Supported on: 09.01.2024

Synopsis tendered on: 16.01.2024 by the Petitioner-Petitioner.
18.01.2024 by the Respondent-Respondents.

Decided on: 26.01.2024

D. N. Samarakoon J.,

Order on Preliminary Objections and Notice

(A) How this case originated in this Court and was heard:

This application by Ranjan Malien Dedigama, the petitioner was filed in this Court on 07th December 2023. The petitioner requested 11.12.2023, 14.11.2023 and 15.12.2023 to support this matter. It has come before me on 12.12.2023 at 4.20 p.m. and I have given 14.12.2023 for support. When it came up for support on 14.12.2023 the learned counsel for the petitioner has appeared in Court. However since the copy of the docket of the other Judge who sat with me then, Justice Neil Iddawala had not come to Court and also the learned counsel moved to amend papers and support the next date given was 19.12.2023.

The learned President of the Court of Appeal had directed me to sit as Single Judge from 18.12.2023 due to the resignation of Justice Iddawala which made the vacancies in the Court of Appeal three and the circumstances pertaining to that were morefully stated in my order dated 22.12.2023 in Writ 810/2023. Several matters were heard and in certain of them orders were given during the week from 18th December to 22nd December as directed by me where the application arose in my Court (like this case) and in certain other matters which were sent by the learned President despite it being the period of the "Suspension of Sittings of the Open Court[1]".

This matter was taken up for support on 19.12.2023 at 11.35 a.m. But at 11.55 a.m. during the course of supporting this matter, the Court noted, that, the Attorney General has not been made a party respondent. The relevant part of that day's journal entry says,

"Time is 11.55 a.m. and in the course of Mr. Nanayakkara supporting this matter the Court observed as there are two respondents who are Officers in Charge of Police Stations, the Petitioner should make the Attorney General also a party.

Since there is an urgency in this matter according to Mr. Nanayakkara, the Court allows him to amend papers and support this matter with direct notice to the present respondents and also to the Attorney General on Friday, 22.12.2023 at 10.00 a.m. before this Court".

On 22.12.2023, this matter came up for support at 10.55 a.m. according to that day's journal entry. The petitioner and the 03rd respondent Attorney General were represented, the latter by learned Senior State Counsel Mr. S. Wickrema. Mr. Wickrema said that he received notice only on that day and he does not have instructions from the 01st and 02nd respondents who are Officers in Charge of Police Stations. The learned counsel for the petitioner moved to support the

[1] The above case, C. A. Writ 810/2023 in its order dated 22.12.2023 morefully discusses also about the period popularly but colloquially known as the "Court Vacation" and its origin.

matter as an urgent matter under Rule 2(1)(a) of Court of Appeal, Appellate Procedure, Rules of 1990. But the Court indicated, that, since direct notices were issued by the petitioner at least twice and as the Attorney General is already represented in Court, recourse cannot be had to that Rule. The Court also indicated, that, as the period this Court sat during the period of the Suspension of the Open Sittings of the Court ended on that day, the earliest date that could be given, is 09th of January 2024, on which date the First Term of the Court in that year commenced. The learned Senior State Counsel indicated, that, even during the week that followed immediately, (commenced from 26th December 2023) he could appear. But the matter was fixed for support for 09.01.2024.

On 09.01.2024 the matter was taken up for support at 11.05 a.m. and Ms. Suharshi Herath, Deputy Solicitor General who appeared for the respondents, including the Attorney General wanted to raise certain preliminary objections.

The preliminary objections are,

(01) Invocation of the jurisdiction of restitutio in integrum is bad in law as it is available only in respect of civil cases,

(02) Restitutio in Integrum is available for judgments of original courts entered consequent to misrepresentation of facts or fraud due to which the party seeking relief has suffered damages: Several cases from **Perera vs. Wijewickrama 15 NLR 411 to Kusumawathie vs. Wijesinghe 2001 (03) SLR 238** are cited,

(03) In criminal cases if the state has committed a wrongful act the remedy available is writ jurisdiction or the Fundamental Rights jurisdiction: The case of Johnston Xaviour Fernando vs. C. D. Wikremaratne, Inspector General of Police and others 2022 C. A. Writ 200/2022 is cited,

(04) An application for anticipatory bail cannot be made once the learned Magistrate had made an order to arrest the petitioner,

(05) This matter cannot be converted into Revision as the facts do not “shock the conscience of court”,

(06) This Court is not the forum for a revision application under the proviso of Article 154(p) of the Constitution read with the provisions of Act No. 19 of 1990,

(07) The remedy for the petitioner is an appeal or revision under Chapter XXVIII of the Criminal Procedure Code read with Article 154(p) of the Constitution and the provisions of the Act No. 19 of 1990,

(B) The Consideration of Preliminary Objections:

The preliminary objection in (02) will be considered ahead of that in (01) above.

(02) Restitutio in Integrum is available for judgments of original courts entered consequent to misrepresentation of facts or fraud due to which the party seeking relief has suffered damages: Several cases from **Perera vs. Wijewickrama 15 NLR 411** to **Kusumawathie vs. Wijesinghe 2001 (03) SLR 238** are cited:

It is said at page 08 of the Synopsis of the respondents, that, "the definition of restitutio in integrum was held in the case of Perera vs. Wijewickreme as far back as in 15 NLR 411".

This is a case decided in 1912 and reported in 15 NLR 411 by the Supreme Court of Ceylon. It contains the principal judgment by Pereira J. and another judgment by Ennis J.

It has been submitted, that, the said 1912 judgment has been followed in many judgments and the latest is D. A. S. K. Dissanayake vs. M. R. Prema Lal de Charles decided by the Court of Appeal on 17.03.2009.

As the respondents give lots of importance to this judgment, even submitting that it gave the definition of Restitutio in Integrum and it has been followed throughout, it is appropriate to reproduce the entire judgment of Pereira J., which on the law report is printed in two pages.

"The applicants describe themselves as " the heirs at law of one Liyanage Aron Perera, who died intestate on or about January 5, 1911. " They

complain that the first respondent, who is the widow and administratrix of the estate of Aron Perera, in fraudulent collusion with the second respondent, allowed, in case No. 37,559 of the District Court of Colombo, judgment to go in favour of the second respondent against her (the first respondent) as administratrix of the estate of the deceased Aron; and the applicants pray that they may be allowed to intervene in the action referred to above, and that, after the necessary proceedings, the parties to the action be restored to their rights existing prior to the decree in it. In other words, their prayer, as they themselves state in the heading of their application, is for the well-known remedy under the Roman-Dutch law of restitutio in integrum. This was an extraordinary remedy, even under the Roman-Dutch law, allowed for good grounds, which, in the case of contracts, were limited to fear, violence, fraud, minority, absence, excusable error, and prejudice in above half the value of a thing alienated, and to such equitable grounds as justified the reduction of cancellation of the contract (Voet 4, 1, 26; V. d. L. 1, 18, 10). It was also allowed in the case of certain incidents of a suit, as, for instance, when circumstances showed that the applicant should be permitted a fresh opportunity of proof or to bring new facts to the notice of the Court (Voet 4, 1, 34), and it was not granted unless no other remedy was available to the applicant or unless restitution was the more effectual remedy (Voet 4, 1, 13, 14). The remedy was nearly the same as rescission in English law. It has been held that direct application may be made to the Supreme Court for this remedy, and that it is within the power of the Supreme Court to grant it, and, to enable it to do so, to refer applications to the lower courts for inquiry and report. **I am not sure that this remedy has not been impliedly abrogated by the Civil Procedure Code, which allows a regular action to be brought in the proper Court in respect of almost every conceivable act or omission resulting, inter alia, in the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty,**

or the infliction of an affirmative injury; and, moreover section 753 of the Civil Procedure Code gives the Supreme Court the most extensive powers of revision by, either mero motu suo or otherwise, calling for, examining, and dealing with, as in appeal, the record of any case in any Court at any stage.

Assuming, however, that the Supreme Court has still the power to allow the remedy of restitutio in integrum, it is a power which, in my opinion, should be most cautiously and sparingly exercised, **considering especially that our information is very limited as to the exact procedure to be adopted in investigations necessary to give effect to it.** Anyway, as shown above, this antiquated remedy is not to be allowed where there is a remedy equally effectual open to the applicants. In the present case the applicants complain that they have been, or are likely to be, damnified owing to fraudulently collusive action on the part of the administratrix and the second respondent. If so, it is manifest that the applicant has a most effectual remedy by regular action in the District Court.

I am further of opinion that the remedy of restitutio in integrum can only be availed of by one who is actually a party to the contract or legal proceeding in respect of which restitution is desired. I asked Mr. Jayewardene whether he could cite authority to show that the remedy was available to one who was no party to the contract or legal proceeding, but who, possibly, might only be injured by it. Since the argument in Court he has invited my attention in chambers to a passage in Voet's Commentaries (4, 1, 9). In that passage it is no doubt laid down: "All who have been injured or prejudiced and have a just cause of restitution can claim; it, " non constat that they may be strangers to the contract or legal proceeding in respect of which restitution is claimed. From what Voet says earlier (4, 1, 3), it appears to me that when restitution is sought in respect of a legal

proceeding, the applicant should be somebody who already has had direct connection with that proceeding. For the reasons given above, I would disallow the present application with costs."

The present respondents themselves say, that, Restitutio in Integrum is available when there is fraud.

The initial few sentences of Pereira J.'s judgment suggests, that, the main thing alleged by the applicant in that case was fraud. His lordship did not go into an examination of facts to see whether there was an act of fraud. He disallowed the application on the matters of law itself. It is not clear as to why he disallowed the remedy. The second paragraph shows, that, his lordship was of the view, that, the power of restitutio in integrum should be exercised most cautiously and sparingly. The judgment contains no authority for this proposition. His lordship's own words were,

"Assuming, however, that the Supreme Court has still the power to allow the remedy of restitutio in integrum, it is a power which, in my opinion, should be most cautiously and sparingly exercised, considering especially that our information is very limited as to the exact procedure to be adopted in investigations necessary to give effect to it."

Therefore, his lordship was not certain whether the Supreme Court of Ceylon had the power of Restitutio in Integrum. Today, after 111 years from that judgment, no one doubts, that, the Supreme Court of Ceylon not only had that power, but also exercised that power when necessary. The judgment of **Menchinahamy vs. Muniweera 1951** decided by the same court where the judgment was written by Dias S. P. J., one of the finest judges this country had, which would be discussed in due course at length, decided that the court can set aside its own judgment in a fit case using this power.

Therefore Justice Pereira has based his lordship's exposition of law relating to Restitutio in Integrum on a misconception because he was not certain whether

the court had that power. It was because that court had and exercised the power of Restitutio in Integrum as a remedy in Roman Dutch common law, that, the second Republican Constitution promulgated on 07th September 1978 had it and conferred it upon the Court of Appeal.

As already said, whereas there is no legal basis for the statement of Pereira J., that, the remedy should be exercised most cautiously and sparingly, his lordship based it upon his opinion (which has no legal authority) and especially on his lordship's limited information on the subject which he admitted frankly.

The respondents refer to Article 138(1) of the Constitution by which the power of Restitutio in Integrum is conferred on the Court of Appeal. Several misconceptions have been submitted at page 07 of respondent's Synopsis. One is that prior to 1978 Constitution there was no recognition of a forum jurisdiction for Restitutio in Integrum. The Supreme Court of Ceylon, in **Menchinahamy vs. Muniweera 1951** and several other cases recognized and exercised the power of the then Supreme Court to grant this remedy.

The respondents at the end of page 07 reproducing a part of Article 138(1), that, "the Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law…" at the beginning of page 08 say that the term "any law" includes not only the written law but also the jurisprudence developed through the decisions of the Superior courts of this country. This is the cursus curiae of the Supreme Court of Ceylon and the present Supreme Court and the Court of Appeal. But the respondents have forgotten an important factor here. The term "any law" should include written law before it includes the cursus curiea.

According to Article 170 of the Constitution, the term "law" is defined as,

> ""law" means any Act of Parliament and any law enacted by any legislature at any time prior to the commencement of the Constitution and includes an Order in Council;…"

In enacting a new Constitution in 1978 the People of this country in their wisdom acting through their elected representatives in Article 138(1) did not define Restitutio in Integrum. Therefore, it was incorrect for the respondents to say that it was defined in Perera vs. Wijewickreme. Justice Pereira did not attempt to define it either expressly or impliedly. How could his lordship have defined it when he himself admitted his limited information about the remedy?

Furthermore it is for the advantage of the application of the remedy as well as for the Rule of Law (about which the respondents aver that will be referred to in due course) that no futile attempt may be made to define it than what the ancient Roman law upon which not only the Roman Dutch common law but even the Civil Law in the European continent are based did.

What the Irish Supreme Court said in ***Merck Sharp & Dohme Corp v Clonmel Healthcare Ltd*** **[2019] IESC 65** on interlocutory injunctions would apply that such remedies should not be defined.

> "In allowing the appeal, the Supreme Court emphasised that an interlocutory injunction has always been a flexible remedy. Reasserting the flexibility of the remedy was in fact the theme of *American Cyanamid* and that judgment should not be approached as though it were the laying down of strict mechanical rules. The approach applied in *American Cyanamid* remains a valuable guide to help avoid injustice though, if not applied with a degree of flexibility and sensitivity, can have a distorting effect[2]."

The same thing was said by Denning L. J., in **Hubbard vs. Vosper** in 1972 in the English Court of Appeal.

Restitutio in Integrum is a remedy that evolved in the ancient Roman Law and entered into this country through the Roman Dutch common law which was recognized by the then new British colonial administration through the

[2] Tipping the Balance: Interlocutory Injunctions in Ireland Refreshed - Lexology

Proclamation of 1799. A common law is not static. It develops with time. So is Restitutio in Integrum.

Despite Pereira J., having misgivings as to whether Restitutio in Integrum would apply even in cases of fraud the next case referred to by the respondents at page 08 of the Synopsis **Dember vs. Abdul Hafeel 49 NLR 63** is a judgment by Canekeratne J., in the Supreme Court of Ceylon which accepted the fact that it is definitely available in cases of fraud. I followed the judgment in Dember in C. A. RII 03 2017 in which the judgment was given on 18.01.2024. This has also been said in Kusumawathie vs. Wijesinghe 2001 (03) SLR 238 which has also been referred to by the respondents with regard to this preliminary objection.

In regard to the extent of the remedy of Restitutio in Integrum it is pertinent to refer to what Parinda Ranasinghe J., (later Chief Justice) said in **Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983.**

Ranasinghe J., despite being in the minority of the 07 Judge bench judgment referred to a case decided by Dias S.P.J. in 1950 which was on restitutio in integrum and said,

> "The real basis upon which relief is given and the precise nature of the relief so given by the Supreme Court upon an application made to it for relief against an earlier Order made by the Supreme Court itself was very lucidly and very effectively expressed by Dias S.P.J. way back in the year 1951 in the case of Menchinahamy v. Muniweera. In that case, about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court, on 23.3.1949, " for revision or in the alternative for restitutio-in-integrum" by the heirs of a party defendant, who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. It was contended on behalf of the respondents: that there was

no merit in the application: that if the relief sought is granted then the Supreme Court would in effect be sitting in judgment on a two-Judge decision of the Supreme Court which had passed the Seal of the Court that the Supreme Court cannot interfere with the orders of the Supreme Court itself. In rejecting these objections, Dias S.P.J., placed this matter in its proper setting quite convincingly in the following words:

> "In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. "

Although what was in question in that case is a violation of the principles of natural justice, the remedy as it would be said under the preliminary objection in (01) (which will be discussed next) is not limited to such instances. The case of **Menchinahamy** was referred to show that when the Supreme Court of Ceylon exercised this power in a suitable case it even set aside its own judgment.

It is pertinent at this stage to consider the preliminary objection in (01) above.

(01) Invocation of the jurisdiction of restitutio in integrum is bad in law as it is available only in respect of civil cases:

In the article "**Two unusual appellate remedies: revision and restitutio in integrum in the law of Sri Lanka**" **Jerold Taitz**[3] Senior Lecturer Faculty of Law University of Cape Town and Attorney of the Supreme Court of South Africa says that

> "Restitutio in Integrum originated in Roman law through the imperium (supreme judicial powers) delegated to the praetors after the expulsion of the

[3] https://journals.co.za/doi/pdf/10.10520/AJA00104051_856

kings. **It has been described as the judicial termination of the inequitable situation** (created by the law per se) and the restoration of the status quo…"

"Restitutio in Integrum was used as a form of appeal against a valid judgment or magisterial order made in terms of the law and which caused inequitable loss or injury to a party. Cicero refers to the rescission of a number of judgments originally granted by Verres as governor of Sicily. The judgments were rescinded by his successor Metullus on account of there having been founded initially on incorrect premises of law. A further ground was that no proper trial had taken place as the court had not been properly constituted. The following example of restitutio in integrum being used as an appellate remedy is given by Engelsman. The praetor set aside a decision on account of an error in the formula. It would appear that although the formula was framed correctly in terms of the contentions of the parties it contained an error which could have led only to a wrong decision. An aggrieved party had locus standi and could apply directly to the praetor for relief. The intercession of an official was unnecessary in regard to restitutio in integrum. The remedy was wide and could be invoked in a number of situations. For example it could be granted to creditors who suffered loss resulting from the debtor undergoing capitis diminutio minima. This form of legal disability extinguished all the contractual debts of the affected party. By virtue of the remedy the praetor restored the rights of action to creditors. The power to grant restitutio in integrum was also held by the emperor. He used the remedy inter alia to set aside administrative decisions eg. To pardon Roman citizens who had been deported (deportio in insulam). As a result of the pardon the citizen was restored to his patria potestas and was said to be restitutus in integrum."

Therefore at the commencement it was never a remedy available only in regard to civil disputes. It is "**the judicial termination of the inequitable situation (created by the law per se)**." **Inequitable situations created by law are not limited to civil law.**

This remedy like all other remedies of this country should apply in a setting of Rule of Law because the Constitution according to its Preamble refers to EQUALITY, JUSTICE and the INDEPENDENCE OF THE JUDICIARY which are nothing but the Rule of Law. In the case respondents rely on for their preliminary objection in (03) above **Johnston Xaviour Fernando vs. C. D. Wickramaratne Inspector General of Police and others C. A. Writ 200/2022** decided on 21. 06.2022 Sobitha Rajakaruna J. said

> "Although there are classifications as civil law jurisdiction and the criminal law jurisdiction etc. when it comes to the concept of [the] "Rule of Law" there should be only one jurisdiction."

It is pertinent at this stage to consider the preliminary objection in (03) above.

(03) In criminal cases if the state has committed a wrongful act the remedy available is writ jurisdiction or the Fundamental Rights jurisdiction: The case of Johnston Xaviour Fernando vs. C. D. Wikremaratne, Inspector General of Police and others 2022 C. A. Writ 200/2022 is cited:

Writ jurisdiction as widely accepted is a remedy that question the decision making process but not the rightness of the decision. Sobitha Rajakaruna J. has also said this in the above judgment. Fundamental Rights jurisdiction is a right based approach.

The respondents in their Synopsis at page 07 says that Restitutio in Integrum is an inherent judicial review power. It is not only an inherent (that is in common law through Article 138(1)) judicial review power but also a merits review power in order to restore the affected party to its original position in law in property or status.

Jerold Taitz in his valuable research says about the remedy of Restitutio in Integrum in South Africa, that,

"It would appear that the remedy is available only in cases of voidable contracts."

He also says, under the sub heading "The features of the remedy," that,

"In Sri Lanka restitutio in integrum is available in respect of civil cases only. **The reason for it not being available in regard to criminal cases is not altogether clear. It may be related to the fact that until 1940 no right of appeal existed in respect of a conviction by the supreme court of Ceylon.** Although an accused could petition the Judicial Committee of the Privy Council for leave to appeal for it. This however does not explain the reason for the remedy not being available in the lower (criminal) courts. In Roman Dutch law the remedy was available in respect of both civil and criminal cases."

While accepting the fact, that, in South African law there is no definitive judgment in regard to the full extent of the remedy, Taitz says, that,

"**Reverting to the remedy in the law of Sri Lanka, it would appear that the scope of restitutio in integrum is wider than in South Africa.** As indicated above, it may be granted by the court of appeal in respect of both the decision of a lower court or in respect of its own decision. Further it may be granted by the court a quo."

From the above discussion the following propositions could be deduced,

(i) In ancient Rome the remedy of Restitutio in Integrum was issued either by the praetor or in some instances by the emperor and there was no distinction in regard to the question being civil or criminal or public law in nature. It is a power originated in the imperium (supreme judicial powers) and delegated to the praetors,

(ii) There is no definitive judgment in South African law in regard to the full extent of the remedy. Hence its boundaries are not defined,

(iii) **The statement that it is available in Sri Lanka only in respect of civil cases is as true as the statement, that, the reason for that proposition is not altogether clear.** One reason could be that until 1940 in Ceylon there was no right of appeal existed in respect of a conviction by the Supreme Court although an accused could petition the Judicial Committee of the Privy Council,

(iv) The scope of the remedy in Sri Lanka is wider than that in South Africa.

Having said above, the writer Taitz refers to the Constitutional setting of the remedy in Sri Lanka. He says,

> "As will have been observed above, the constitution specifically confers the power on the court of appeal "…to affirm, reverse, correct or modify any order, judgment, decree or sentence…or it may give instructions to the court of first instance, tribunal or institution…or order a new trial or further hearing…" when entertaining inter alia an application for restitutio in integrum.…**The seemingly wide powers enjoyed by the court when considering this remedy would appear to be limited by <u>existing</u> judicial practice".**

This power, the power of Restitutio in Integrum and Revision, which was exercised prior to 1978 by the then Supreme Court is now vested in the Court of Appeal by Article 138(1) of the Constitution. This was said by the present Supreme Court in a judgment written by L. T. B. Dehideniya J., (with whom Justices A. L. S. Gooneratne and Arjuna Obeysekera agreed) in **S. C. Revision 02 2019** dated 25.03.2022.

That judgment at page 04 referred to section 11 of the Administration of Justice Law No. 44 of 1973, by which these powers were vested in the then Supreme Court. It said,

"Section 11

> "The Supreme Court shall be the only superior court of record and shall have, subject to the provisions of this Law, jurisdiction for the correction of all errors in fact or in law committed by any subordinate court, and sole and exclusive cognizance by way of appeal, revision and restitutio-in-integrum of all actions, proceedings and matters of which such subordinate court may have taken cognizance, and such other jurisdiction as may be vested in the Supreme Court by law. In the exercise of its jurisdiction, the Supreme Court may, in accordance with law, affirm, reverse or vary any judgment or order, or give directions to such subordinate court, or order a new trial or a further hearing. It may, if necessary, receive and admit new evidence additional to, or supplementary of, the evidence already taken in such subordinate court: Provided that no judgment or order pronounced by any subordinate court shall on appeal or revision be reversed or varied on account of any error, defect or irregularity in the proceedings which shall not have prejudiced the substantial rights of either party or occasioned a failure of justice." [Emphasis added]

As that Court said at page 05, that Supreme Court ceased to exist with the promulgation of the Second Republican Constitution of 1978. It was said,

> "Article 169(2) provides that;
>
> "the Supreme Court established by the Administration of Justice Law, No.44 of 1973, shall, on the commencement of the Constitution, cease to exist and accordingly the provisions of that Law relating to the establishment of the said Supreme Court, shall be deemed to have been repealed. Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal."

It was further referred to Article 169(3) which said, that,

"(3) all appellate proceedings including proceedings by way of revision, case stated and restitutio in integrum pending in the Supreme Court established under the provisions relating to judiciary Administration of Justice Law, No. 44 of 1973, on the day preceding the commencement of the Constitution, shall stand removed to the Court of Appeal and the Court of Appeal shall have jurisdiction to take cognizance of and to hear and determine the same; **and the judgements and orders of the Supreme Court aforesaid delivered or made before the commencement of the Constitution in appellate proceedings shall have the same force and effect as if they had been delivered or made by the Court of Appeal;..."**

Therefore, not only the pending matters on Restitutio in Integrum and Revision stood removed to the Court of Appeal, but also the judgments pronounced by the Supreme Court that existed prior to 07th September 1978 were regarded as having the force and effect of judgments of the Court of Appeal. This includes the judgments of the Supreme Court of Ceylon too.

Whereas the main question arisen in that case No. **S. C. Revision 02 2019** being whether the present Supreme Court can exercise the power of revision, it was decided, that, as there is no law that vests that power in the Supreme Court, such power could not be exercised by the Supreme Court. However, it appears, that, the Supreme Court in that case did not totally reject a possibility of the exercise of a power of revision for the correction of errors as inherent or residuary power if the circumstances so require. But for the purpose of this order, what is material from that judgment of the present Supreme Court is, that,

(a) The power of Restitutio in Integrum and revision now vests in the Court of Appeal and, that,
(b) The judgments of the Supreme Court that existed from its inception in 1801 up to 1978 have the force and effect of judgments of the present Court of Appeal

Therefore, Perera vs. Wijewickreme upon which the respondents relied so much also is having the force and effect of a judgment of the Court of Appeal in addition to the inherent weaknesses of that judgment referred to above.

Pereira J., only referred to the learned counsel for the applicants as Mr. Jayewardene. At that period of time there were three counsel practicing before the supreme court by that name. They were, A. St. V. Jayewardene, H. A. Jayewardene and E. W. Jayewardene. According to the appearance marked in Perera vs. Wijewickreme, it was A. St. V. Jayewardene who appeared for the applicants.

John Adrian St. Valentine Jayewardene[4] later became a Judge of the Supreme Court and as this Court sees, in one of His Lordship's most illuminative passages, said this,

> "This seems to be in consonance with what Lord Denman C. J. said in the celebrated case of O' Connel vs Regina (1844) 11 Cl & F. (H. L.) 155 at 372, where referring to a dictum of Lord Mansfield in another case, he said:-
>
> > "I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for laws falls within the description of "law taken for granted." If a statistical table of legal propositions shown be drawn out and the first column headed "Law of Statute" and the second "Law of Decision;" a third column, under the heading of "law taken for granted," would comprise as much matter as both the others combine. **But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain and has often been proved by recent experience**

[4] John Adrian St. Valentine Jayewardene Puisne Justice of the Supreme Court of Ceylon Personal details Born 1877 Died 1927 Nationality Ceylonese (Sri Lankan) Residence(s) Chateau Jubilee, Ward Place, Colombo Alma mater Royal College Colombo.

> **that the mere statement and restatement of a doctrine** – the mere repetition of the cantilena of lawyers – **cannot make it law, unless it can be traced to some competent authority and if it be irreconcilable to some clear legal principle." (Samed vs. Segutamby, 1924, 25 NLR 481 at page 495 and 496)**

Taitz said as referred to above, that, there was no clear basis of the proposition, that Restitutio in Integrum is not available in criminal proceedings and assumed, that, it could have been a result of a person convicted by the Supreme Court of Ceylon not having a right of appeal, except a petition to the Judicial Committee of the Privy Council for leave to appeal, until 1940. The actual reason, as it appears to this Court, is a taken for granted view, that resulted not only due to above, but also due to the admitted lack of information (as said in Perera vs. Wijewickreme) and lack of precedence.

It is bad enough if judges make them slaves to precedence (when the precedence are apparently illogical or based on lopsided logic). But it will be worse if they do not decide for themselves (which is the function for which they are appointed) when there is no precedence.

As **Lord Alfred Thompson Denning** said in His Lordship's modified version of **William Cowper's poem,** which he appended to the end of his judgment in "**The Siskina[5]" [1979] A. C. 10,**

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[5] The Siskina, raised a problem which was particularly acute for London as a world centre for international trade. Could one obtain a Mareva injunction to restrain the disbursement of insurance moneys where the potential judgment creditor had a cause of action not in England, but abroad? Here The Siskina had sunk in somewhat mysterious circumstances in Greek waters and the London insurers had paid out a large sum by way of compensation. Denning, reversing a strong judgment of Kerr J in the High Court, was robust in his belief that the court had such a jurisdiction to grant such an injunction:

[1979] AC 210, 228. Denning closed his judgment in classic-late Denning style ([1979] AC 210 at 236: 'To the timorous souls I would say in the words of William Cowper: 'Ye fearful saints, fresh courage take, The clouds ye so much dread Are big with mercy, and shall break In blessings on your head.' Instead of 'saints' read 'judges'. Instead of 'mercy' read 'justice.' And you will find a good way to law reform."

ALFRED THOMPSON DENNING: A 20TH CENTURY ENGLISH LEGAL ICON RE EXAMINED by Gerard Hogan, Judge of the Supreme Court of Ireland. 7. Alfred Thomson Denning GH.pdf (ijsj.ie)

'Ye fearful judges,

fresh courage take,

The clouds ye so much dread Are big with justice,

and shall break In blessings on your head[6].'

There are three reasons, at least, to decide, that, Restitutio in Integrum is available for criminal as well as civil cases. They are,

Number One: The availability of the remedy of restitutio in integrum in Rome in its origin as a facet of the imperium (supreme judicial powers) which has been described as the judicial termination of the inequitable situation; the inequitable situations are not confined to civil law; if so there will be no meaning for the concept of the Rule of Law,

Number Two: The scope of restitutio in integrum being wider in scope in Sri Lanka than in South Africa; and

Number Three (and the most important): Article 138 (1) of the Constitution.

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[6] In one of his most celebrated dissents on the Court of Appeals of England, the legendary common law jurist Lord Denning suggested a binary classification of judges: "On the one side there were timorous souls who were fearful of allowing a new cause of action. On the other side there were bold spirits who were ready to allow it if justice so required." The progressive development of the law, according to Denning, is to be credited to the judicial creativity and courage of bold spirits; timorous souls showed blind allegiance to existing rules and precedent - the 'dead hand of the past' - and, in so doing, served a sterile, not a constructive, role in the law.2 If "[t]he powerful still abuse their powers without restraint," it is thanks to the dominant influence of timorous souls; bold spirits will not let stand "any . rule of law which impairs the doing of justice - they will do all they "legitimately can to avoid that rule - or even to change it - so as to do justice in the instant case before [them]."4 Denning saw law - and for that matter, judicial office - as an instrument for doing instant justice.

Lord Denning practiced what he preached. As a judge, he exemplified the bold spirit par excellence.5 In his thirty-eight years on the English bench, Denning blazed many new trails in the common law, frequently upsetting the doctrinal status quo in the process. In time, many of his dissenting judgments, including the famous "timorous soulsV'bold spirits" dissent in Candler v, Crane, Christmas & Co ., became the law of the land - not only in England but in the larger common law world.

Neither "timorous souls" nor "bold spirits": Courts and the politics of judicial review in post-colonial Africa

by Professor of Law, Seton Hall University Law School, Newark, New Jersey, U.S.A. Neither "timorous souls" nor "bold spirits": Courts and the politics of judicial review in post-colonial Africa on JSTOR

It says,

> "138. (1) **The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law**, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [committed by the High Court, in the exercise of its appellate or original jurisdiction **or by any Court of First Instance**], tribunal or other institution **and sole and exclusive cognizance, by way of** appeal, **revision and restitutio in integrum, <u>of all causes</u>, suits, actions, <u>prosecutions</u>, matters and things** [of which such High Court, Court of First Instance], tribunal or other institution may have taken cognizance:…"

Therefore, restitutio in integrum is available in regard to "any Court of First Instance"; for "all causes" and "prosecutions". It is definitely after the reference in that Article to "restitutio in integrum" the term "prosecutions" occur. These are prosecutions under the criminal law.

This does include without any doubt the criminal courts and questions and matters determined or should have been determined by them too.

In addition, this is not only an application for restitutio in integrum, the petitioner also invokes the power of revision vested in this court also by the same Article of the Constitution.

In this regard it is pertinent to examine the preliminary objection at (05).

> (05) **This matter cannot be converted into Revision as the facts do not "shock the conscience of court":**

The question of "converting" this matter into revision does not arise because the petitioner has invoked revisionary powers too from the beginning.

The use of the phrase "**shocks the conscience of court**" in relation to revisionary jurisdiction too is a taken for granted law. This phrase arose in United State especially in the case of **Rochin v. California 342 U.S. 165 (1952)**

(1953) and in Canada in regard to **Canada v. Schmidt [1987] 1 S.C.R. 500 (1987).**

In **Rochin vs. The People of California** it was said in the United States Supreme Court that,

> "Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities[7]."

In **Canada v. Schmidt** which is an extradition case the Supreme Court of Canada said that,

> "I have no doubt either that in some circumstances the manner in which the foreign state will deal with the fugitive on surrender, whether that course of conduct is justifiable or not under the law of that country, may be such that it would violate the principles of fundamental justice to surrender an accused under those circumstances. To make the point, I need only refer to a case that arose before the European Commission on Human Rights, Altun v. Germany (1983), 5 E.H.R.R. 611, where it was established that prosecution in the requesting country might involve the infliction of torture. Situations falling far short of this may well arise where the nature of the criminal procedures or penalties in a foreign country sufficiently shocks the conscience as to make a decision to surrender a fugitive for trial there one that breaches the principles of fundamental justice enshrined in s. 7[8]".

Therefore a phrase arose outside the context of revision by usage employed as a limitation on that jurisdiction is not correct. The standard of review in revision is not so high as to amount to something similar to the forcible opening of a

[7] ROCHIN v. PEOPLE OF CALIFORNIA. | Supreme Court | US Law | LII / Legal Information Institute (cornell.edu)
[8] Canada v. Schmidt - SCC Cases (lexum.com)

mouth of a person to remove what was there or to forcibly extract his stomach's content.

Whether revisionary power of this Court should be invoked in regard to the grievance of the petitioner will be considered with the facts of this case.

Since certain preliminary objections invariably have a bearing on the facts, both counsel were informed by the court at the oral hearing that they can refer to facts too when required and to the extent it is required, which they did.

It is pertinent to examine the preliminary objection in (06) above.

> (06) **This Court is not the forum for a revision application under the proviso of Article 154(p) of the Constitution read with the provisions of Act No. 19 of 1990:**

Mahinda Samayawardhena J. in his lordship's judgment in **CA/RI/20/2017 dated 24.10.2019** (with Justice A. L. S. Gooneratne) decided that

> "As far as revisionary jurisdiction is concerned, both the Court of Appeal and the Provincial High Court of Civil Appeal have concurrent or parallel jurisdiction. The petitioners can come either before this Court or before the Provincial High Court of Civil Appeal by way of revision."

On analogy this is applicable to a Provincial High Court exercising criminal appellate and revisionary power in regard to a Magistrates Court too.

It is pertinent to refer to the preliminary objection in (07) above.

> (07) **The remedy for the petitioner is an appeal or revision under Chapter XXVIII of the Criminal Procedure Code read with Article 154(p) of the Constitution and the provisions of the Act No. 19 of 1990:**

The availability of a regular appeal or appeal with leave had and obtained is no bar for the exercise of revisionary powers.

It was held in **MARIAM BEEBEE, Petitioner, and SEYED MOHAMED, Respondent (1965) 68 N. L. R. 36**, by Melanie Claude Sansoni, C. J., that,

> ' The power of revision is an extraordinary power **which is <u>quite independent</u> of and distinct from the appellate jurisdiction** of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, ..'

If revision is "quite independent" from appeal, the question whether an appeal was made or not does not arise.

Furthermore, as far as this case is considered, as decided above the petitioner in law has the standing to seek the remedy of restitutio in integrum under what is said in Number One to Number Three.

Therefore the above preliminary objections are overruled.

(C) Facts of the case:

As aforesaid, in oral submissions with regard to preliminary objections both parties were allowed to refer to facts too as far as they are material at this stage.

There are two B reports bearing Nos. 98183/02/2023 and 97959/02/2023 in the Magistrates Court of Colombo.

The virtual complainant is Sudasingha Pradeepa Darshani. In the former B report it has been claimed by her that she is residing at premises bearing No. 1038/22 Maradana Road Borella with her husband a police officer and her children. She is running a hotel in that premises. The said premises either caught fire or set on fire on 05.08.2023 around 1.00 a.m. The fire was doused but the damage according to her is about Rs. 700,000/- On the previous day one

Raguvanan Sandanam (senior manager or the property manager of the group of companies in which the petitioner is the chairman) had reportedly asked the complainant to stop the operations of the hotel. Therefore and also because a property belonging to Dedigama Group is situated opposite the above premises she suspects that the incident of arson, if it were the cause of the fire, was instigated by the people of Dedigama Group. The suspects in regard to the first B report are Mohammed Ashrop Fathima Rilvana and Pitakandage Thilakarathna. The complainant then say that she renovated the hotel and recommenced its operations on 17.08.2023 at 10.53 a.m. But a group of ten persons had come in a van and assaulted the head of her husband also causing substantial damage to the hotel. According to the petitioner although the complainant said in the first B report that she is residing in the premises of the hotel for 17 years in the second B report she had said that it was three years and she had been given permission to possess the property by the owner of the Dedigama Company.

According to the version of the petitioner the premises of the hotel had been given to the complainant by Raguwan Sandanam the property manager of the petitioner's company without the knowledge or the consent or the approval of the petitioner. The amended petition contains an affidavit of Raguwan Sandanam dated 05.12.2023 as P.07.

According to this affidavit a person called Wasantha the husband of the complainant who was a police officer under interdiction finding it difficult to maintain his family of three children was introduced to Sandanam by a mutual friend called Anuradha. Then Sandanam had given certain contracts to be performed by Wasantha and had also given from time to time several premises mentioned in the affidavit; in one of them which is situated at Rawathawatte in Galle Road the said Wasantha resided in a part of it and operated a tea boutique in the other part. Sandanam says that for none of these he obtained the approval of the senior management. Wasantha's interdiction had been later removed. He

was attached to Armour Street Police Station. He requested for a premises closer to that to reside on the undertaking that he would vacate it no sooner he gets official quarters. Therefore premises bearing No. 1038/22 Maradana Road Borella was given to him. This was in 2020. Wasantha promised to vacate the premises by 31.12.2022 which he did not do. Therefore Sandanam says that he made complaints to police on 05.01.2023 10.01.2023 14.01.2023 and 22.01.2023.

Sandanam also says that one Devika a sister of the complainant threatened him saying that the premises would not be vacated. Later she asked for Rs. 35 lacks to vacate. A person called Dinesh was employed in March 2023 to clear the land on which the premises is situated and to renovate the fence. A quarrel arose between Wasantha and Dinesh. The Borella police called both parties and Wasantha demanded Rs. 75 lacks to vacate the premises. Sandanam says that as he had taken all steps to help Wasantha without informing the owner or the senior management he found himself in great trouble. Then according to Sandanam the person called Dinesh told him that if Dinesh is given Rs. 08 lacks he would see that Wasantha vacates the premises. Sandanam had thereafter taken steps to obtain Rs. 500,000/- from the Dedigama Company on the basis of renovating the parapet wall and further Rs. 300,000/- as a personal loan for him. In the meantime, Wasantha had started adjoining to the premises a rice boutique. Sandanam says that Wasantha was attached to in this period to Mulaithivu police station but he remained in the premises operating the rice boutique. Sandanam came to know that there were clashes between Dinesh and Wasantha as the latter having taken money did not vacate the premises. But Sandanam continued to act in league with Dinesh as Dinesh promised to get Wasantha out of the premises.

Can this affidavit be believed? In the case in which Mrs. Vivionne Gunawardana was arrested when she went in a procession at Kollupitiya without a permit in the Fundamental Rights application her position was that she was

arrested by Hector Perera Officer in Charge of that police station. But Perera filed an affidavit of another police officer Vinayagam Ganeshananthem stating that it was not him but Vinayagam Ganeshananthem who arrested Mrs. Gunawardana. Three Judges of the Supreme Court did not believe Mrs. Gunawardana but the said affidavit. The Court held that Vinayagam Ganeshananthem had violated the fundamental rights of Mrs. Gunawardana. Then Vinayagam Ganeshananthem petitioned the Court[9] on the basis that he was only a witness on an affidavit and before the imputation of blame on him he should have been heard. To hear this matter a 07 Judge Bench including the incumbent Chief Justice was appointed and the majority of the Judges refused to grant any relief to Vinayagam Ganeshananthem invoking inherent powers.

Therefore not only the highest court had believed and acted upon on an affidavit tendered by a person who is not before court but also imputed blame on him on the basis of that affidavit. Without stopping at that the court refused to grant that person any relief when he complained of audi alteram partem. Here this Court would not impute blame on Sandanam. But it appears to this Court that his affidavit which explains the incident that had taken place and contradicts the complainant's version could be considered. That also shows that as the petitioner says it could be that he was not involved in this quarrel.

The position of the petitioner taken up in his amended petition and affidavit is that as he is the Chairman of an umbrella organization of companies called Dedigama Group of Companies, he has been signing a number of vouchers daily in order to settle various commitments of the company and he has signed vouchers pertaining to allege expenses too (the money taken by Sandanam to pay a third party in order to evict the husband of the complainant) but the signing of vouchers does not amount to a criminal offence as alleged by the respondents.

[9] Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983.

The Synopsis filed by the respondents state, that, several items of evidence in respect of use of money of the company of the petitioner, giving details as to how it has been used for an incident at Borella is being briefed to the learned Magistrate. It is also stated, that, the further report dated 06.09.2023 marked as P.04 (f) reveals, that, the petitioner had left the country on the day of the incident (that is on 17.08.2023) and it sought an order under section 124 of the Criminal Procedure Code for a travel ban and an order of arrest (of the petitioner) at the Airport on (his) return.

The respondents allege that the petitioner is wanted in respect of an offence under section 300 of the Penal Code in view of injuries made to the complainant's husband particularly to his head.

The petitioner states at paragraph 23 of the amended petition, that, he believes that the said persons to whom Raguwan Sandanam had paid money to get the premises back have been named as the suspects in the two B reports above referred to.

The petitioner states that the respondents have misinterpreted the "travel ban" as an order to arrest the petitioner and refers to P.06. It is stated at page 223 of the brief (just prior to the document marked as P.06) which is a communication addressed by the learned Magistrate to the Controller General of Immigration and Emigration that if the petitioner comes to the AirPort to leave the country that fact should be informed to the O. I. C. of Colombo South Crime Division.

The position of the petitioner is that although he left the country on the day following the second incident that is on 18.08.2023 he had applied for visa very much prior to this date in July 2023 and he went to attend to the University admission of his son and to attend to certain other matters. In this regard at page 77 is a ticket obtained from Sri Lankan Airlines dated 25.07.2023 to leave Colombo Air Port on 18.08.2023 for London Heathrow airport. The alleged incident of arson had taken place on 05.08.2023. The ticket at page 77 also indicates that the petitioner intended to return to this country on 12.09.2023.

The aforesaid communication by the learned Magistrate to the Controller General of Immigration and Emigration informing the travel ban is dated 06.09.2023. It is the position of the petitioner, that, he did not return to this country as intended on 12.09.2023 in view of the fact that the learned Magistrate has issued the above order.

(D) The Application for Anticipatory Bail:

It was in these circumstances, that, the petitioner has made an anticipatory bail application to the learned Magistrate under section 21 of the Bail Act No. 30 of 1997.

The learned Magistrate by her order dated 14.11.2023 (marked as P.11) has refused this application on the basis, that, certain employees of the petitioner have been arrested in connection with the alleged crime, a travel ban has been issued against the petitioner and he is suspected of cognizable offences for which he could be arrested without a warrant.

The paragraph (b) of the prayer to the amended petition dated 21.12.2023 is to set aside this order by invoking the jurisdictions of restitutio in integrum and revision of this Court. The paragraph (d) prays for interim orders (i) preventing the petitioner being arrested until the hearing and final determination of this application and (ii) lifting the travel ban imposed on him in cases instituted by the above two B reports until the hearing and the final determination of this matter.

It is pertinent to examine the preliminary objection taken up for the respondent in respect of the maintainability of the anticipatory bail application.

(04) An application for anticipatory bail cannot be made once the learned Magistrate had made an order to arrest the petitioner:

It appears to this Court, that, what the learned Magistrate in imposing the travel ban and refusing the anticipatory bail application of the petitioner had said was,

that, he is suspected of a cognizable offence in respect of which he could be arrested without a warrant.

On the other hand, even if the learned Magistrate has issued a warrant for the arrest of the petitioner does it prevent the invocation by the petitioner of the provisions of section 21 of the Bail Act No. 30 of 1997 as submitted for the respondents?

The said section says,

"21.

(1) When any person has reason to believe that he may be arrested on account of his being suspected of having committed, or been concerned in committing, a non-bailable offence he may with notice to the officer in-charge of the police station of the area in which the offence is alleged to have been committed, apply to the Magistrate having jurisdiction over the area in which such offence is alleged to have been committed, for a direction that in the event of his arrest on the allegation that he is suspected of having committed, or been concerned in the commission of, such offence he shall be released on bail".

The operative words are "**when any person has reason to believe that he may be arrested on account of his being suspected of having committed, or been concerned in committing, a non-bailable offence**…" It does not say, that, if there is a warrant issued for his arrest, he cannot seek anticipatory bail. **In fact, it is more the reason for a person to believe that he may be arrested if there is a warrant issued against him.**

It has been said about the right to bail in India, that, it is based on Article 21 of the Indian Constitution which gives a fundamental right to life and personal liberty. Although there is no express provision in 1978 Constitution in respect of a "right to life or liberty" Article 13 (5) says, that, "Every person shall be presumed

innocent until he is proved guilty:…" The Supreme Court said in **Sriyani Silva v. Iddamalgoda, Officer-in-Charge, Police Station Paiyagala and Others, [2003] 02 SLR 06,** that, 'every right must have a remedy".

Section 02 of the Bail Act says, that,

> "Subject to the exceptions as hereinafter provided for in this Act, the guiding principle in the implementation of the provisions of this Act shall be, that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception."

To say that anticipatory bail cannot be given if a Magistrate has issued a warrant amounts to reading words into the provision, which could only be done by the legislature if it amends the relevant provision in its wisdom.

In the case of **Indian Drugs & Pharmaceuticals Ltd vs Workman, Indian Drugs & … on 16 November, 2006** Markandey Katju J., with S. B. Sinha J., in the Supreme Court of India said,

> "The courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain."

In an article dated 15.09.2015 Markandey Katju J., wrote after he ceased to become a Judge of the Supreme Court he said,

> "Classical positivist jurisprudence created by the 19th century English jurists Bentham and Austin, and developed in the 20th century by Hart, Kelsen and others, taught that law making is the task of the legislature, not the judiciary. The latter's job is only to interpret the law made by the legislature, and direct its enforcement.
>
> In England, this principle was strictly enforced because there was no written constitution, and parliament was supreme. Hence law making by judges would violate the principle of parliamentary supremacy. Thus, in **Magor and St Mellons RDC vs Newport Corporation,** the House of Lords

overruled the decision of Lord Denning in the Court of Appeals, holding it to be "a naked usurpation of legislative powers".

But sociological jurisprudence, created in Europe towards the end of the 19th century by Jhering, Geny, Duguit etc and developed in the United States by Roscoe Pound and others said that judges can, and in fact do, legislate. The 'realist school' in the US of Gray, Frank and Llewelyn went to an extreme, and said that the only real law was judge made law, while statutes by the legislature were only the raw material which a judge uses to make law[10]."

Whereas the jurisprudential aspect discussed in the above quotation from the article of Katju J., explains the philosophical difference between the two approaches, which is very significant, it also shows, that, the sanctity attached to the laws enacted by the supreme parliament in England would not be attached to those of the legislatures of other countries founded on written constitutions, which thus limits and defines its powers, a natural consequence of reducing something into writing.

In regard to the case of **Magor and St. Mellons Rural District Councils vs. The Newport Corporation** decided by the English Court of Appeal in 1950 (where Denning L. J., dissented with the majority) and the case with the same title decided by the House of Lords in 1951 (where Lord Radcliff made the principle speech and Viscount Simonds wrote a judgment, according to his lordship's own admission, only for the purpose of criticizing the dissenting opinion of Denning L. J., in the Court of Appeal because the latter said that it is the duty of the courts to fill the gaps in legislation), I have analysed at length in my judgment in C. A. Tax 27/2021 dated 15.12.2023, that, the criticism of Viscount Simonds was unwarranted. It is because, the legislation in question in that case was highly ambiguous and the facts (which I analysed in the above judgment of mine) demanded a decision by the court whether the amalgamation of the two rural

[10] Can Judges Legislate? The Supreme Court Sets the Record Straight. (thewire.in)

district councils of Magor and St. Mellons signified the death of their former individual states, or the "marriage" as Denning L. J., said, of the two. **But I am in humble agreement, that, when a law is clear and not ambiguous, a court can do nothing but applying it. Section 21 of the Bail Act is such.**

Therefore this court does not see that there is anything preventing a person from seeking relief under section 21 of the Bail Act, even if there is a warrant issued for his arrest, until he is actually arrested and produced before a magistrate.

The parliaments, congresses, lock sabhas, whatever the name may be, the legislatures everywhere enact enough and more laws to limit the natural liberty of the human being; and it is not the function of courts to create "invisible barriers" to make them even more rigorous.

Dale Carnegie[11], said in *Chapter XIII* of the book "*Public Speaking & Influencing Men in Business,"* as follows,

> "As a boy in the middle west, I used to amuse myself by holding a stick across a gateway that the sheep had to pass through. After the first few sheep had jumped over the stick, I took it away; but all the other sheep leaped through the gateway over an imaginary barrier. The only reason for their jumping was that those in front had jumped. The sheep is not the only animal with that tendency. Almost all of us are prone to do what others are doing, to believe what others are believing, to accept without question, the testimony of prominent men".

They are the "invisible" or "imaginary" barriers. Thus, unless and until the barrier is created by legislation itself the court must not imagine the same[12].

[11] an American writer and lecturer, and the developer of courses in self-improvement, salesmanship, corporate training, public speaking, and interpersonal skills

[12] Still in the subject of "sheep" and "legislation" Frederick Bastiat the French Economist and Philosopher in his 1850 book "The Law" says at page 63 – 64 that

The claims of these organizers of humanity raise another

The Bail Act is only subordinate to Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 (under its section 3(1)) and overrides in regard to the question of bail the Criminal Procedure Code Act No. 15 of 1979 (section 3(2)).

Under its section 25 the fact that an application made under section 21 is pending before any court does not affect the right of any police officer to interrogate the applicant with regard to any offences specified in that application or the right of the officer in charge of a police station to apply to that court or any other court having jurisdiction in the case for a warrant for the arrest of the applicant for any such offences or the power of any such court to make any order (including an order for detention) on any such application for a warrant.

Thus the legislature provided specific rules for the initiation of criminal proceedings when an application under section 21 is pending. **Why did not it provide for the vise versa; the initiation of section 21 proceedings when a criminal matter is pending; specifically when an order to arrest has been made? Because it did not have to, in view of the provisions of section 21 to which this court adverted to above which says "When any person has reason to believe that he may be arrested on account of his being suspected of having committed or been concerned in committing a non bailable offence..." The legislatures would not waste words.**

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question which I have often asked them and which, so far as I know, they have never answered: If the natural tendencies of mankind are so bad that it is not safe to permit people to be free, how is it that the tendencies of these organizers are always good? Do not the legislators and their appointed agents also belong to the human race? Or do they believe that they themselves are made of a finer clay than the rest of mankind? The organizers maintain that society, when left undirected, rushes headlong to its inevitable destruction because the instincts of the people are so perverse. The legislators claim to stop this suicidal course and to give it a saner direction. Apparently, then, the legislators and the organizers have received from Heaven an intelligence and virtue that place them beyond and above mankind; if so, let them show their titles to this superiority.

Section 27 of the Bail Act also provides, that, its provisions shall have effect notwithstanding anything to the contrary in the Criminal Procedure Code Act No. 15 of 1979 and in any other written law, other than the Release of Remand Prisoners Act No. 08 of 1991 and accordingly, in the event of any conflict or inconsistency between the provisions of the Bail Act and such other written law, other than the Release of Remand Prisoners Act No. 08 of 1991, the provisions of the Bail Act shall prevail.

(E) The current trends for "Pretrial Detention":

The Bail Act of 1997 although 26 years old, is a progressive piece of legislation which represents the current trends of criminal justice system, especially with regard to pretrial detention, which trends are more conducive to the concepts of the presumption of innocence and the rule of law.

It is observed by this Court, that, in the case of **Johnston Xaviour Fernando vs. C. D. Wickremarathne, Inspector General of Police and others, C. A. Writ 200/2022,** relied upon by the respondents, the Court of Appeal has said, that,

> "In a broader sense, Rule of Law means that Law is supreme and is above every individual; no individual whether if he is rich, poor, rulers or ruled etc., are above the law and they should obey it."

To this definition of the Concept of the Rule of Law, this Court wishes to add, that, it also includes, that no person, whether he is rich, poor, ruler or ruled should suffer due to an inequitable situation that requires its judicial termination. This is the original reason for restitutio in integrum as it was said above.

The **Policy Paper PACE (Police and Criminal Evidence Act) Code G 2012** issued by the Home Office of the Government of the United Kingdom dated 05th August 2022 says, that,

"2.4 The power of arrest is only exercisable if the constable has reasonable grounds for believing that it is necessary to arrest the person. The statutory criteria for what may constitute necessity are set out in paragraph 2.9 and it remains an operational decision at the discretion of the constable to decide:

which one or more of the necessity criteria (if any) applies to the individual; and

if any of the criteria do apply, whether to arrest, grant street bail after arrest, report for summons or for charging by post, issue a penalty notice or take any other action that is open to the officer.

2.5 In applying the criteria, the arresting officer has to be satisfied that at least one of the reasons supporting the need for arrest is satisfied[13]".

(F) **The origin and expansion of the Concept of the Presumption of Innocence:**

The origin of the presumption of innocence appears to be in natural justice.

The sixth-century Digest of Justinian (22.3.2) provided, that,

"Ei incumbit probatio qui dicit, non qui negat[14]" which means "Proof lies on him who asserts, not on him who denies".

According to the **Talmud**[15], "every man is innocent until proved guilty. Hence, the infliction of unusual rigours on the accused must be delayed until his innocence has been successfully challenged. Thus, in the early stages of the trial, arguments in his defence are as elaborate as with any other man on trial. Only

[13] PACE Code G 2012 (accessible) - GOV.UK (www.gov.uk)
[14] DOMINI NOSTRI SACRATISSIMI PRINCIPIS
IUSTINIANI
IURIS ENUCLEATI EX OMNI VETERE IURE COLLECTI
DIGESTORUM SEU PANDECTARUM http://webu2.upmf-grenoble.fr/Haiti/Cours/Ak/Corpus/d-22.htm
[15] the central text of Rabbinic Judaism and the primary source of Jewish religious law

when his guilt has become apparent were the solicitous provisions that had been made to protect defendants waived[16]".

In Islamic law the presumption of innocence is fundamental where the principle that the onus of proof is on the accuser or claimant is strongly held, based on a hadith documented by **Imam Nawawi**[17].

It was the English jurist **William Blackstone** in his seminal work, **Commentaries on the Laws of England,** published in the 1760s, said that:

> "It is better that ten guilty persons escape than that one innocent suffer[18]".

It is said that,

> ""Presumption of innocence" serves to emphasize that the prosecution has the obligation to prove each element of the offense beyond a reasonable doubt (or some other level of proof depending on the criminal justice system) and that the accused bears no burden of proof[19]. This is often expressed in the phrase "presumed innocent until proven guilty", coined by the British barrister Sir William Garrow (1760–1840)[20] during a 1791 trial at the Old Bailey. Garrow insisted that accusers be robustly tested in court. An objective observer in the position of the juror must reasonably conclude that the defendant almost certainly committed the crime[21]. In 1935, in its judgment of **Woolmington v Director of Public Prosecutions,** the English Court of Appeal would later describe this concept as being 'the golden thread' running through the web of English

[16] Aaron Kirschenbaum, Double Jeopardy and Entrapment in Jewish Law, 3 Israel Yearbook on Human Rights, Rts. 202 (1973), p. 211.
[17] Imam Nawawi. 1977. An-Nawawi's Forty Hadith (Second Edition English Translation by Ezzedin Ibrahim). Damascus: Holy Koran Pub. House, Hadith No. 33
[18] "Commentaries on the laws of England". J.B. Lippincott Co., Philadelphia, 1893.
[19] Mueller, Christopher B.; Laird C. Kirkpatrick (2009). Evidence; 4th ed. Aspen (Wolters Kluwer). ISBN 978-0-7355-7968-2. pp. 133–34.
[20] Moore, Christopher (1997). The Law Society of Upper Canada and Ontario's lawyers, 1797–1997. University of Toronto Press. ISBN 0-8020-4127-2.
[21] Rembar, Charles (1980). The Law of the Land. New York: Simon & Schuster. ISBN 9780671243227.

criminal law. Garrow's statement was the first formal articulation of this[22]."

Whereas, what is said in the first three sentences in the above passage are correct; and it is correct to say, that, the statement that the concept of the "presumption of innocence" was referred to as "the golden thread" running through the web of English criminal law was said in **Woolmington v Director of Public Prosecutions, 1935;** it is wrong to say, that, the said statement was made by the English Court of Appeal. That was done by the English House of Lords, the highest court that existed ever, not only in England but in the commonwealth.

The Latin maxim, **ex facto oritur jus** means, that, the law arises out of the facts. Therefore, it is important to refer to the facts of the case, **WOOLMINGTON APPELLANT; AND THE DIRECTOR OF PUBLIC PROSECUTIONS RESPONDENT, [1935] AC 462[23]** decided on 23rd May 1935 by the House in which the only speech was delivered by VISCOUNT SANKEY Lord Chancellor.

If authority for the importance of the facts to a decision is required, the following would be undoubtedly, the finest.

> "In the speech, " STARE DECISIS By Honorable Edward D. Re Chief Judge, United States Customs Court[24]", it was said,
>
> > "Of course, the issues raised in a case stem from the facts presented. The facts of the case, therefore, are of the utmost importance. The Latin maxim, **ex facto oritur jus**, tells us that **the law arises out of the facts**."

Reverting to the facts of the case in question, which not only created an opportunity for the House of Lords to pronounce those "golden" words, but also

[22] The Secret Barrister (2018). Stories of the Law and How It's Broken. London: Macmillan. p. 41.
[23] https://www.bailii.org/uk/cases/UKHL/1935/1.html
[24] Presented at a Seminar for Federal Appellate Judges Sponsored by the Federal Judicial Center May 13-16, 1975.

would be a guiding light for the determination of any criminal case, including the present case, be the punishment capital, or otherwise, they were as follows.

> "Reginald Woolmington is 21½ years old. His wife, who was killed, was 17½ years old last December. They had known each other for some time and upon August 25 they were married. Upon October 14 she gave birth to a child. Shortly after that there appears to have been some quarrelling between them and she left him upon November 22 and went to live with her mother. Woolmington apparently was anxious to get her to come back, but she did not come. The prosecution proved that at about 9.15 in the morning of the 10th Mrs. Daisy Brine was hanging out her washing at the back of her house at 25 Newtown, Milborne Port. While she was engaged in that occupation, she heard voices from the next door house, No. 24. She knew that in that house her niece, Reginald Woolmington's wife, was living. She heard and could recognize the voice of Reginald Woolmington saying something to the effect "are you going to come back home?" She could not hear the answer. Then the back door in No. 24 was slammed. She heard a voice in the kitchen but could not tell what it said. Then she heard the sound of a gun. Upon that she looked out of the front window and she saw Reginald Woolmington, whose voice she had heard just before speaking in the kitchen, go out and get upon his bicycle, which had been left or was standing against the wall of her house, No. 25. She called out to him but he gave no reply. He looked at her hard and then he rode away.
>
> According to Reginald Woolmington's own story, having brooded over and deliberated upon the position all through the night of December 9, he went on the morning of the 10th in the usual way to the milking at his employer's farm, and while milking conceived this idea that he would take the old gun which was in the barn and he would take it up that morning to his wife's mother's house where she was living, and that he would show her that gun and tell her that he was going to commit suicide if she did not come back. He would take the gun up for the purpose of frightening her into coming back to him by causing her to think that he was going to commit suicide. He finished his milking, went back to his father's house, had breakfast and then left, taking with him a hack saw. He returned to the farm, went into the barn, got the gun, which had been used for rook shooting, sawed off the barrels of it, then took the only two cartridges which were there and put them into the gun. He took the two pieces of the barrel which he had sawn off and the hack saw, crossed a field about 60 yards wide and dropped them into the brook. Having done that, he returned on his bicycle, with the gun in his overcoat pocket, to his father's house and changed his clothes. Then he got a piece of wire flex which he attached to the gun so that he could suspend it from his shoulder

underneath his coat, and so went off to the house where his wife was living. He knocked at the door, went into the kitchen and asked her: "Are you coming back?" She made no answer. She came into the parlour, and on his asking her whether she would come back she replied she was going into service. He then, so he says, threatened he would shoot himself, and went on to show her the gun and brought it across his waist, when it somehow went off and his wife fell down and he went out of the house. **He told the jury that it was an accident, that it was a pure accident; that whilst he was getting the gun from under his shoulder and was drawing it across his breast it accidentally went off and he was doing nothing unlawful, nothing wrong, and this was a pure accident.** There was considerable controversy as to whether a letter in which he set out his grievances was written before or after the above events. But when he was arrested at 7.30 on the evening of the 10th and charged with having committed murder he said: "I want to say nothing, except I done it, and they can do what they like with me. It was jealousy I suppose. Her mother enticed her away from me. I done all I could to get her back. That's all."

The leaned judge who presided at the trial summed up to the jury,

> "The Crown has got to satisfy you that this woman, Violet Woolmington, died at the prisoner's hands. If they must satisfy you of that beyond any reasonable doubt. If they satisfy you of that, then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing that it was a pure accident."

In the Court of Appeal both parties adduced a large number of authoritative texts and the court repeated the learned judge's words and said: "No doubt there is ample authority for that statement of the law"; and then relied, upon the proviso to s. 4 of the Criminal Appeal Act, 1907, and dismissed the appeal.

That proviso said,

> "the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss

the appeal if they consider that no substantial miscarriage of justice has actually occurred."

The analysis of the law, as to the burden of proof by Viscount Sankey was thorough and comprehensive. Authorities were examined from the time of the reign of King Canute (994–1035) which, anyway, the court did not think it is necessary for the purpose of this opinion. Referring to earlier authorities the House said,

> "First, it was not till 1907 that the Court of Criminal Appeal was set up. It is perfectly true that from time to time there have been famous occasions on which the Judges and Barons were called together to give their opinion upon the law bearing on murder. Examples of this will be found; in the year 1611, in the case of Mackalley 9 Co Rep 65b , all the Judges and Barons were moved to give their opinion; in 1706, in the case of Reg. v. Mawgridge (1706) Kelyng, 119; 17 St Tr 57 , which case was argued before all the Judges and all of them except Lord Chief Justice Trevor were of opinion that Mawgridge was guilty of murder; and in 1843 in the case of Reg. v. M'Naughton (1843) 4 St Tr (NS) 847 , where all the Judges gave answers to your Lordships' House upon the test of insanity".

Then the House said about Stephen's Digest of the Criminal Law, a more recent authority and said,

> "**The learned author of Stephen's Digest of the Criminal Law 7th Ed (1926), pp 461, 462 has an interesting note on the definition of murder and manslaughter. But his remarks are rather directed to the ingredients of the crime than to the proof of it.** None the less, the author does not hesitate to tread a path of very robust criticism of the previous authorities. He speaks of the "intricacy, confusion and uncertainty of this branch of the law." He refers to the definition of Coke (1552–1623) and says "**these passages, overloaded as Coke's manner is,**

with a quantity of loose, rambling gossip[25], form the essence of his account of murder." He describes Coke's chapter on manslaughter as "bewildering" and adds that Hale (1609–1676) treats manslaughter in a manner so meagre an yet so confused that no opinion of it can be obtained except by reading through chapters 38 to 40 and trying to make sense of them, and concludes by saying (p. 466) that Sir Michael Foster "to some extent mitigates the barbarous rule laid down by Coke as to unintentional personal violence."

Having examined more cases the House finally said,

> "If at any period of a trial it was permissible for the judge to rule that the prosecution had established its case and that the onus was shifted on the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution was entitled to succeed, it would be enabling the judge in such a case to say that the jury must in law find the prisoner guilty and so make the judge decide the case and not the jury, which is not the common law. It would be an entirely different case from those exceptional instances of special verdicts where a judge asks the jury to find certain facts and directs them that on such facts the prosecution is entitled to succeed. Indeed, a consideration of such special verdicts shows that it is not till the end of the evidence that a verdict can properly be found and that at the end of the evidence it is not for the prisoner to establish his innocence, but for the prosecution to establish his guilt. Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case, he is entitled to the benefit of the doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the

[25] In as much as Lord Carnwath in 2014 referred (in a speech made at the University of Hong Kong) to the Wednesbury judgment of Lord Greene M. R. in 1947 "a somewhat rambling judgment" Stephen in 1926 criticized the great chief justice of all time, Sir Edward Coke from the ages of Elizabeth I and James I, of having in Lord Coke's passages "loose rambling gossip". **So why not the judgments of lesser mortals!**

prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence.

This is the real result of the perplexing case of Rex v. Abramovitch (1914) 11 Cr App R 45 , which lays down the same proposition, although perhaps in somewhat involved language. Juries are always told that, if conviction there is to be, the prosecution must prove the case beyond reasonable doubt. **This statement cannot mean that in order to be acquitted the prisoner must "satisfy" the jury. This is the law as laid down in the Court of Criminal Appeal in Rex v. Davies 29 Times LR 350; 8 Cr App R 211 , the headnote of which correctly states that where intent is an ingredient of a crime there is no onus on the defendant to prove that the act alleged was accidental. Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception.** If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained. When dealing with a murder case the Crown must prove (a) death as the result of a voluntary act of the accused and (b) malice of the accused. It may prove malice either expressly or by implication. For malice may be implied where death occurs as the result of a voluntary act of the accused which is (i.) intentional and (ii.) unprovoked. When evidence of death and malice has been given (this is a question for the jury) the accused is entitled to show, by evidence or by examination of the circumstances adduced by the Crown that the act

on his part which caused death was either unintentional or provoked. If the jury are either satisfied with his explanation or, upon a review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted. It is not the law of England to say, as was said in the summing-up in the present case: "if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances to be found in the evidence which has been given from the witness-box in this case which alleviate the crime so that it is only manslaughter or which excuse the homicide altogether by showing it was a pure accident." If the proposition laid down by Sir Michael Foster Ante, p 474 or in the summing-up in Rex v. Greenacre 8 C & P 35, 42 means this, those authorities are wrong".

LORD HEWART C.J., LORD TOMLIN and LORD WRIGHT concurred. Lord Atkin, who could not be on that Bench that day as His Lordship presided at the Privy Council had requested Viscount Sankey to say that he concurs in the opinion which was delivered.

The presumption is now embodied in The Universal Declaration of Human Rights, article 11, The International Covenant on Civil and Political Rights, art. 14, The Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe art. 6.2, Human Rights Act 1998, of the United Kingdom section 06, American Convention on Human Rights, article 1(1) and Declaration of the Rights of Man and of the Citizen of 1789, article 09 to name a few.

(G)The situation of the Presumption of Innocence in practice:

In this backdrop, it is pertinent to examine the 269 paged report of the **Open Society Justice Initiative** in 2014 under the title "**Presumption of Guilt: The Global Overuse of Pretrial Detention".**

It says,

> "Perhaps most shocking is not the extent or cost of this particular form of rights abuse, or the fact that it persists despite clear prohibition. What is most shocking is how little attention it receives and how little is known about it. The writing of this report required years of research by a large team of people, since no single source provides a thorough picture. Indeed, information about pretrial detention, its scope, causes, and effects, is scattered across hundreds of NGO papers, UN reports, government databases, and witness accounts. This report represents the first effort to paint a comprehensive portrait of the problem." (page 174)

> "In countries as diverse as Azerbaijan, Ecuador, Equatorial Guinea, Georgia, Mauritania, South Africa, and Uzbekistan, torture, beating, burning with cigarettes, electric shock, and other physical abuse are reportedly most likely to occur during the first hours of detention, especially in police custody.94 In police custody, investigating authorities have direct control over suspects and an immediate interest in securing a confession. Suspects are often interrogated without the presence of a lawyer or any independent monitors, allowing officials ample opportunity to exert pressure through ill-treatment." (page 72)

In regard to the situation that was in India before the reforms the report said,

> "In India, a combination of corruption, court delays, and a striking propensity for lost case files has given rise to epic miscarriages of justice, with detainees spending 20, 30, even 50 years awaiting trial. **Sri lankan law, which sets a flat maximum of 12 months detention prior to trial regardless of the nature of the offense, has proven of little assistance to the 23 percent of pretrial detainees who had been incarcerated for more than a year as of 2009".** (page 124)

It continued to say,

"A UN mission to Honduras on the prevention of torture found that while police stations typically feature a register of detainees, the register is often incomplete, or has been altered by the police with impunity.60 meanwhile, police stations typically do not record complaints of ill-treatment by detainees.61 detainees are not routinely examined by medical personnel upon arrival, an important safeguard against abuse.62 even when detainees arrive injured at detention, police have discretion over whether the accused can see a doctor, which often precludes the documentation of abuse detainees have suffered during arrest.63 Of some 50 cases in Central Asia where detainees made official complaints about torture, virtually all also alleged that judicial and/or prosecutorial officials failed to investigate the allegations.64 Too often, judges systematically credit the denials of the police over the allegations of detainees".

"In a similar vein, the Italian criminal procedure code contains abundant language aimed at curbing excessive use of pretrial detention. It requires "serious circumstantial evidence of guilt," specific facts to support allegations that the accused might tamper with evidence, and requires authorities to name "specific conduct" or previous convictions to support an allegation of likely repeat offense. yet representatives of the Italian criminal bar association allege that Italian courts systematically violate the principle that pretrial detention remand must be a last resort. They added that the police use pretrial detention as an "investigative tool" to compel defendants to incriminate themselves and others in exchange for release or for the substitution of home arrest." (page 137)

The following is the position in India after the reforms,

"India has a stronger bar on mandatory pretrial detention. The law requires that a person charged with a bailable offense be granted bail by the police or the courts. If the defendant is unable to furnish any surety

within a week of arrest, the person is deemed "indigent" and released on a personal bond without sureties for his appearance." (page 134)

This makes it clear, that, despite the high flown theories of the "Presumption of Innocence" that exist for over a millennia from the time of the Babylonian Talmud in practice it is a "presumption of guilt" that reigns.

Two of the reasons the report identifies for this situation are,

(01) The pressure on judges to use preventive justice:

"The pressure on judges to use preventive justice compounds the already difficult task of translating the theory of the presumption of innocence into the reality of detention/release decisions. That complex process of making rights real often results in vague laws and the arbitrary application of pretrial detention." (page 97)

(02) The judicial deference to prosecution:

"The judiciary's role in upholding the law, including the principle of presumed innocence, might moderate prosecutorial zeal for pretrial detention. however, in many jurisdictions the judiciary slavishly follows the direction of the prosecution in respect of bail decisions." (page 105)

In the case of **Hattuwan Pedige Sugath Karunarathne vs. The Attorney General S. C. Appeal 32/2020** dated 20.10.2020 Justice Buwaneka Aluvihare P. C. J. said

"1. Although a judgement should restrict itself to the grounds urged in appeal, owing to the special circumstances, this court feels obliged to address another issue as well, namely the duty of a judge to ensure that an Accused is manifestly accorded a fair trial. This court notes with grave concern that in this fundamental duty, the learned High Court Judge has

lamentably failed and reasons for arriving at this conclusion will be specified in the course of this judgement.

2. The Indian Supreme Court in the case of Zahira Habibullah Sheikh and Others v. State of Gujarat [Appeal (crl.) 446-449 of 2004] held that:

> "Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. **The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public."**

.....

> "59. I am mindful of the fact that the judges in criminal courts are burdened with a heavy case load. That, however, does not excuse the trial judge to not follow the procedural steps stipulated by law or to disregard the need to ensure that the Accused is accorded a fair trial, guaranteed by the Constitutional provisions and other laws."

It is the decision of this Court on the basis of what was discussed above that the Concept of a "Fair Trial" includes the "pretrial detention" too.

Hence on the basis of what was said above in this order, it is the decision of this Court and the Court does hereby direct, that,

The "travel ban" on the petitioner is lifted to the extent, that, he should not be arrested or taken into custody on arrival at the Air Port or thereafter until the lapse of 48 hours from his arrival in Sri Lanka. The petitioner is directed to report to the relevant police station within that period. Having recorded a statement from the petitioner, the law should take its own course. The learned Magistrate shall make an order according to law. He will also take into his consideration, among other things, the observations made by this Court in this order in regard

to “pretrial detention” in particular; with those pertaining to the presumption of innocence and the Rule of Law. The Registrar of this Court is directed to send a copy of this order to the Registrar of the Magistrates Court of Colombo for the purpose of bringing its contents to the notice of the learned Magistrate. The Registrar is also directed to send copies of this order to the Controller General of Immigration and Emigration and to the AirPort Police. If the petitioner, after his arrival does not report to the relevant police station within the said 48 hours, in addition to the fact that he will not have the benefit of the directions made above he shall be liable for the contempt of this Court.

Therefore the interim order prayed for is issued having modified as above. The Court will make further interim orders if the necessity arises.

Formal notice is issued on all the respondents.

Judge of the Court of Appeal.