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

In the matter of an application for revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

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

Complainant

CA (PHC) APN : 35/2018

Vs.

High Court of Colombo
Case No: HC 8377/16

01.Tiran P.C Alles

02.Anthony Emil Lakshmi Kanthan

03.Rohan Saliya Abeysinghe Wickramasuriya

04.Jayantha Dias Samarasinghe

Accused

And Now Between

Tiran P.C Alles
345/33 Kuruppu Lane, Colombo08
1st Accused Petitioner

Vs.

The Hon. Attorney General
Attorney General's department,
Colombo12
Complainant Respondent

Anthony Emil Lakshmi Kanthan
5/2, Bandaranayake Mawatha,
Mt. Lavinia
2nd Accused- Respondent

Rohan Saliya Abeysinghe Wickramasuriya
No.18 Charlis Avenue
Colombo 03
3rd Accused Respondent

Jayantha Dias Samarasinghe
256/16, 6th Lane
Temple Road
Thalpathpitiya
Nugegoda
4th Accused Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	Romesh de Silva PC. With Sugath caldera Niran Ankitell for the 1st Accused Petitioner Janaka Bandara SSC for the Complainant Respondent AG
ARGUED ON	:	09.10.2019
WRITTEN SUBMISSIONS	:	Accused Petitioner on 18.07.2018 Complainant Respondent on 14.08.2018
DECIDED	:	14.01.2020

K.K.WICKREMASINGHE, J.

1. The Accused Petitioner has filed this revision application seeking to set aside the order of the Learned High Court Judge of Colombo bearing case no: HC 8377/16 dated 21.02.2018

allowing the prosecution to lead evidence by overruling the preliminary objection taken up by the Counsel for the 1st Accused –Petitioner.

Facts of the case:

2. The Accused-Petitioner (hereinafter referred as the Petitioner) and three others have been indicted before the High Court of Colombo in the case bearing no HC 8377/16 for offences under Public Property Act No.12 of 1982. The said indictment was served on the Petitioner on the 2nd of November 2016 along with the list of witnesses and the documents.

3. The Prosecution has tendered the notice of computer generated evidence that the prosecution intended to lead evidence on material under and in terms of Evidence (Special Provisions Act) No 14 of 1995 to all the accused on 02.11.2016.

4. On the 10.11. 2016 the Petitioner while complying Section 7(1) (b) of the Evidence (Special Provisions Act) No 14 of 1995 sought permission to access and inspect.

5. The prosecution has been unable to respond the said request made by the Petitioner, within the stipulated time period of 15 days in terms of section 7 (1) (c) of the Evidence (Special Provisions Act) No 14 of 1995. The prosecution has made an application only after 15 days permitting access to and to inspect the computer evidence. At that point of time the learned Counsel appearing for the 1st Accused –Petitioner has taken up a preliminary objection for the inspection, on the basis that the prosecution has failed to comply with section 7(1) (c) of the said Act by providing access and inspection within a reasonable time (within 15 days). Therefore the Counsel for the Petitioner argued that since the application was not made within the permitted time as stipulated in section 7 (1)(c) of the Act, the prosecution is prohibited from tendering the evidence.

6. For the purpose of determining whether the High Court judge has erred in law and this application should be allowed, the attention should be drawn to the applicable statutory provisions.

Section 7 of the Evidence (Special Provisions) Act (No. 14 of 1995) states as follows.

(1)(b) any party to whom a notice has been given under the preceding provision may, ***within fifteen days*** *of the receipt or such notice apply to the party giving such notice, to be* ***permitted access to,*** *and* ***to inspect:***

(i) the evidence ought to be produced;

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

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

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

(d) ...

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

7. The matter to have been determined by the learned High Court Judge was that whether he should have permitted the prosecution to allow to lead computer evidence, even though the prosecution has failed to comply with Section 7(1) (c) of the Act.

8. It is pertinent to note that even though the prosecution was unable to respond the said request in terms of section 7(1) (c) within the time period of 15 days as stipulated in the Evidence (Special Provisions) Act, the prosecution had expressed its willingness to provide the opportunity for the inspection of the computer network by letter dated 03.01.2017 and the Petitioner has admitted that he had received the said letter on 05.01.2017.

9. Hence, it should be noted that whether there was in fact a failure of the prosecution in complying with section 7(1) (c).

10. The Petitioner has submitted an array of cases namely Silinona v Dayalal Silva (1992 1SLR 195), Fernando v Sybil Fernando (1997 3SLR 1), Perera v.Perera (1981 2SLR 41) Silva v. Sankaram (2002 2 SLR 209), Wickramasinghe v de Silva (1978/79 2SLR 65) Illangaratne v. Kandy Municipal Council (1995 BALJ Vol 6), Edirisuriya v. Nawaratnam (1985 1SLR 100) etc. I am of the view that none of these cases cited by petitioner have dealt with a matter in relation to the Evidence (Special Provisions) Act (No. 14 of 1995), which is the applicable law in this case. The cases referred by the Petitioner are in fact related to the rules of the Court of Appeal and sections under other statutes but not the Evidence (Special Provisions) Act (No. 14 of 1995)

11. The Learned High Court Judge in the judgement dated 21.02.2018 has pointed out the inapplicability of the Supreme Court Judgement 65/2003 mentioned by the learned PC on behalf of the petitioner and has observed as follows:

"මේ අනුව එකී ශ්‍රේෂ්ඨාධිකරණ නඩුවේ පනතේ 7 වෙනි වගන්තියට අදාලව තීරණය කර ඇති කරුණු මෙම නඩුවේ කරුණු වලට වඩා වෙනස් වේ. එහිදී අභියාවක විසින් සාක්ෂි උත්පාදන යන්ත්‍රයට ප්‍රවේශ වීම සඳහා සහ පරීක්ෂා කිරීම සඳහා ඉල්ලීමක් කර නැත. මෙම නඩුවේ තත්වය ඊට වෙනස් වන්නේ මෙම නඩුවේ වන විත්තිකරු සාක්ෂි උත්පාදන යන්ත්‍රයට ප්‍රවේශ වීම සඳහා ඉල්ලීමක් කර ඇති බැවිනි. කෙසේ වුවද මෙම ශ්‍රේෂ්ඨාධිකරණ නඩු තීන්දුව 01 විත්තිකරු වෙනුවෙන් ඉදිරිපත් කරන මූලික විරෝධතාවය තීරණය කිරීම සඳහා අදාලත්වයක් නැත."

12. The Petitioner has cited to the case of **Silva v. Sankaram (2002 2 SLR 209)** where it was contended that, the appeal is out of time and it has been held that:

"*(1) A strict compliance is imperative and non-compliance is fatal to the appeal.*

(2) The words 'within 60 days' in section 755 (3) restrict the right of the appellant to file the petition of appeal beyond the time frame of 60 days"

13. The above matter is in relation to the computation of 60 days with regard to the Civil Procedure Code and the decision of the above case does not have any bearing to this case. Similarly the cases referred by the petitioner, where adhering to the time limits have been mandatory do not have any bearing to this case.

14. For the purpose of determining whether the prosecution is debarred from leading computer evidence should be considered after scrutinizing section 7 (1) (d) stipulated as follows:-

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

15. The phrase "***the court may on application made by either party, make such order or give such direction, as the interests of justice may require***" emphasises on the fact that section itself states that when there is a noncompliance or disagreement by the parties relating to the notice of the application for inspection, the court may make an order or give directions in the interest of justice. This section has been analyzed by the Learned High Court Judge for the purpose of establishing the fact that merely noncompliance by the prosecution with section 7(1)(c) by providing access and inspection within a reasonable time, but not later than fifteen days, should not result in the prosecution being prohibited from tendering the evidence in respect of which the failure was occasioned.

16. Hence it is evident that the intention of legislature is to provide the judge with a discretionary power in the interest of justice by adopting a more liberal view to accomplish the objectives of the said act though the learned President's Counsel submitted otherwise. However the state counsel would have acted in a diligent manner. It is clear that Section 7(1) (d) of the Act provides the Judge to direct the party to inspect the computer evidence upon an application being made for access and inspection to dispense justice. Therefore the legislature is very clear that when there is a delay in making an application to Court in order to inspect or to have access to computer evidence, the Judge has a discretion to permit the applicant to lead such evidence as the interests of justice may require. In this present case it is very clear that it was a mistake.

17. Therefore I am of the view that no prejudice has been caused to the Petitioner by allowing such application, especially when there is a statutory provision provided as mentioned above, the learned High Court Judge need not go on a voyage of discovery in searching for more provisions or reasons for allowing the admissible on such evidence.

18. Moreover it is pertinent to note that with the development of the law during the course of time, the courts have adopted a more liberal view on limitations of time periods. None of the jurisdictions (Australia, India and United Kingdom) where the legislative provisions are very much advance with regard to the procedure in combating cybercrime have laid down any time frame to lead computer evidence. That itself proves that laying down many time frames, create resistance to dispense justice.

19. Furthermore, it is of my view, where the party proposing to tender such evidence is unable to comply or does not comply with, the petitioner could have made an application for access and inspection in terms of section 7(1) (d) of the act. Thereby, I agree the observation of the Learned High Court Judge as follows:
"දින 15ක කාල සීමාව තුළදී පැමිණිල්ල විසින් පලවන විත්තිකරුම ප්‍රවේශය ලබා නොදුන්නේ නම් කල යුතුව තිබුනේ පනතේ 7(1) ඇ වගන්තිය ප්‍රකාරව ප්‍රවේශයක් ලබා පරික්ෂ කල ඉල්ලීමට අනුකුලව පැමිණිල්ල කටයුතු නොකරන බව අධිකරණයට දැනුම් දීමයි. එසේ ඉල්ලීමක් නොකර ප්‍රවේශය සඳහා ඉල්ලීමට අනුකුලව පැමිණිල්ල විසින් 05.01.2017 දින සියලු කටයුතු සම්පාදනය කරන තෙක් නිහඬව සිට 05.01.2017 දින සිට ප්‍රවේශවීමට සියලු අවස්ථාවන් තිබියදී එම සාක්ෂි ඉදිරිපත් කිරීමට අවසර නොදිය යුතු බව මේ අවස්ථාවේදී 01 වන විත්තිකරුට විරෝධතාවයක් ඉදිරිපත් කල නොහැකිය."

20. In the case of **Bank of Ceylon v. Kaleel and Others (C.A No. 500/2000)** it has been stated that
"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."

21. In conclusion, I observe that in the present case there had been no miscarriage of justice, irregularity or injustice in the order of the Learned High Court Judge and therefore the revisionary powers of this Court shall not be exercised.

22. In the light of the abovementioned factual and legal background I find that the order of the learned High Court Judge is in accordance with the law and thereby affirm the order of the Learned High Court Judge dated 21.02.2018.

23. The revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FERNANDO, J.

1. I had the privilege of reading the Judgment in draft of Her Ladyship Justice K.K. Wickremasinghe, and in principle I am in agreement with the conclusion reached by Her Ladyship, however, I wish to state my own reasons for so doing.

2. The sole question that must be decided in this case is, whether the 15 days (Not later than 15 days) referred to in Section 7(1)(c) of the Evidence (Special Provisions) Act No. 14 of 1995 (herein after also referred to as the Act) is mandatory.

3. It is an admitted fact that the Respondent has given the required 45 days' notice on the evidence they proposed to tender, in terms of Section 7(1)(a) of the Act. It is also not disputed that the Petitioner has applied to have permission to access and to inspect the device within the 15 days' time period stipulated in Section 7(1)(b). It is also not in dispute that the Respondent failed to provide a reasonable opportunity to the Petitioner to have access within time period stipulated in section 7(1)(c), which is 15 days. However, the Respondent expressed the willingness to provide an opportunity for inspection by letter dated 03.01.2017. It was nearly 55 days after the 'application for permission to access' was made.

4. Petitioner opted not to avail itself of the given opportunity to access the device, and on 22.01.2018 the learned President's Counsel for the Petitioner raised a preliminary objection on the basis that in terms of section 7(2) of the Act, the Respondent should not be permitted to tender such evidence as the Respondent has failed to provide a reasonable opportunity to access as stipulated in terms of the provisions of the Act. Simply, the Petitioner objected to have the proposed evidence admitted as the Respondent had failed to comply with the statutory provisions of the Act which are required to be adhered to, before such evidence is admitted.

5. Learned High Court Judge after hearing both parties made order on 21.02.2018 overruling the Petitioner's objection.

6. Learned President's Counsel for the Petitioner argued that the language of the statute makes it clear that the 15 days' time limit provided in section 7(1)(c) is mandatory.

7. For the Court to arrive at a right conclusion it is pertinent to be mindful of the objectives of the Act. The intention of the legislature, when enacting the law must be taken into consideration when interpreting the provisions of the act.

8. The Evidence (Special Provisions) Act No. 14 of 1995 was enacted to provide for the admissibility of audio-visual recordings, information contained in statements produced by computers and to provide for matters connected therewith. With the development of the field of information technology, as there was no provision to admit the above evidence, this law was enacted to make such evidence admissible. Hence, Court is duty bound to give effect to the legislative intent.

9. In terms of section 7(1)(c) of the Act, reasonable opportunity of access must be given to the party who applies for such access within a reasonable time, but not later than 15 days of receiving such application for permission to access. If the party proposing to tender the evidence fails to provide a reasonable opportunity to access to inspection upon an application being made in that regard, or fails to comply with any order or direction by Court under sub paragraph (d), by virtue of Section 7(2) of the Act, such party shall not be permitted to tender such evidence.

10. It is the contention of the learned President's Counsel for the Petitioner that section 7 (1)(d) has no application to this case.

11. Paragraph (d) of Subsection (1) of Section 7 of the Act, however, provides for some flexibility as to the time stipulations. It is clear from the wording of paragraph (d) that the legislature envisaged practical difficulties that might ensue in the compliance of these provisions and has empowered the court to "make such order or give such direction, as the interest of justice may require." Therefore, the prohibition under section 7(2) operates subject to any order or direction made by Court in terms of section 7(1)(d).

12. Although it does not appear to be relevant to determine the issue in this case, as reference is made to section 3 of the Act in the written submissions of the Respondent, for the sake of completeness I consider section 3 as well. Section 3 of the Act provides for the determination of any matter not provided for in the Act, in the interest of justice. However, in the instant issue there is specific provision in the Act under section 7. Section 7 provides not only for notice to have access to inspect the devises, but also the consequences of non-compliance. Section 7(d) provides for applications by either party where parties are unable to agree on any matter relating to access and inspection. Therefore, as the Act provides for the instant issue, I am of the considered view that section 3 has no application to this case.

13. In the instant case, Respondent has failed to take the procedural step of giving reasonable access within the 15 days' time period. When the law provides for the consequence of failure to take a procedural step, it is not for the Court to use its discretion contrary to the law. In case of ***Seal V. Chief Constable of South Wales Police [2005] 1 WLR 3183,*** it was said that there is no doubt that in the present day the Courts will strive anxiously to interpret the procedural provisions flexibly where that furthers the interests of justice, but that where parliament has made it absolutely clear what the consequences are of a failure to take a particular step, it is not for the Courts to import a discretion or flexibility that are not there. (*Archbold Criminal Pleading Evidence and Practice 2019 at page 109*)

14. However, on applying of the Courts' intellect on deciding whether a provision is mandatory or directory, F.A.R. Bennion in "Statutory Interpretation: A Code" Third Edition at page 31 reads;

"Where a requirement arises under a statute, the Court, charged with the task of enforcing the statute, needs to decide what consequence Parliament intended should follow from failure to implement the requirement. This is an area where legislative drafting has been markedly deficient. Drafters find it easy to use the language of command. They say that a thing 'Shall' be done. Too often they fail to consider the consequence when it is not done. What is not thought of by the drafter is not expressed in the statute. Yet the Courts are forced to reach a decision. It would be draconian to hold that in every case failure to comply with the relevant requirement invalidates the thing done. So, the Courts' answer has been to devise a distinction between mandatory and directory duties."

15. Lord Campbell in ***Liverpool Borough Bank V. Turner [1861] 30 LJ Ch. 319 at 380***, said on the question, 'What is the effect of non-compliance with procedural requirements even if the terms 'directory' or 'mandatory' is not used?', is "*to try to get the real intention of the legislature by carefully attending to the whole scope of the statute to be construed.*"

16. As a matter of general principle, Court should consider what the legislator has intended to be the consequence of non-compliance of a procedural requirement. In this instance the consequence of non-compliance is prohibition under section 7(2). Therefore, it seems the time limit is mandatory. However, it is subject to any order or directive made by Court and non-compliance of that directive in terms of S. 7(1)(d). Therefore, the requirement of the time limit appears to be directory because, although it lays down a time limit, the Court is also vested with an express power under Section 7(1)(d) to vary the time limits for compliance, the manner and extent of the inspection upon an application by either party. In deciding on the directive to be made in terms of section 7(1)(d) Court must give effect to the intention of the legislature, objectives of the Act, that includes providing for the admissibility of information contained in statements produced by computers in civil and

criminal proceedings. Therefore, Court should not shut out available admissible evidence unreasonably unless it can be shown that the non-compliance has prejudiced the substantial rights of the Petitioner or it has occasioned a failure of justice.

17. It is pertinent to note that although the willingness to give access and to inspect was conveyed to the Petitioner after the stipulated time period, the preliminary objection was not raised immediately after the lapse of the time limit, but on 09.01.2018. Petitioner has not even made use of section 7(1)(d) to get a directive from Court although it is not incumbent upon him to do so. It was the Petitioner who made the application for access in terms of section 7 (1)(b), although he opted not to have access thereafter with the intention of making use of section 7(2) to shut the evidence the prosecution intends to adduce out.

18. Petitioner would have expected to have access to the computers within the stipulated time period. Obviously, the prosecution had not been vigilant or had been negligent to take necessary steps to give access within the prescribed period, or at least to make an application in terms of section 7(1)(d). It is possible that the resultant situation might have caused some inconvenience to the Petitioner, for which the prosecution is responsible and there is a need for the prosecution to respect these provisions and ensure compliance. When the prosecution indicated that they intend presenting evidence which would attract the provisions of the Act, the prosecution also must be alive to the fact that there is a possibility of an application for access being made by the Petitioner and be ready to meet such application if so made. The prosecution cannot go into a slumber and deprive an opportunity afforded to an accused under the statute. However, upon considering the sequence of events and the facts and circumstances relating to the matter before us, I see no substantial prejudice caused to the Petitioner by the delay of 40 days in having access to the devices in terms of section 7(1)(c) of the Act. It is incumbent upon the Court to act in the interest of Justice and to give effect to the intention of the legislature. I see no

miscarriage of justice occasioned by the order of the learned High Court Judge. Hence, I see no reason to interfere with the order of the learned High Court Judge.

JUDGE OF THE COURT OF APPEAL