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

In the matter of an appeal in terms of Article 127 of the Constitution to be read with Section 5(C) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal / 172/2012

SC/ HCCA/LA/ 271/2012

SP/HCCA/KAG/781A/2010(F)

DC Mawanella No/1143/MR

Kaluwalage Champika Kumari De Silva,
No 204, Vam Ivuru Yaya,
03, Mahawillachchiya,
Anuradhapura.

Plaintiff

Vs.

1. Kodithuwakku Arachchige Neville Kodithuwakku,
   No. 85, Nayapana Janapadaya,
   Gampola.
2. Commissioner General of Prisons,
   Department of Prisons,
   No. 50, Baseline Road,
   Colombo 09.
3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Defendants

AND

Kaluwalage Champika Kumari De Silva,
No 204, Vam Ivuru Yaya,
03, Mahawillachchiya,

Anuradhapura.

Plaintiff Appellant

Vs.

1. Kodithuwakku Arachchige Neville
   Kodithuwakku,
   No. 85, Nayapana Janapadaya,
   Gampola.
2. Commissioner General of Prisons,
   Department of Prisons,
   No. 50, Baseline Road,
   Colombo 09.
3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Defendant Respondents

AND NOW BETWEEN

Kaluwalage Champika Kumari De Silva,
No 204, Vam Ivuru Yaya,
03, Mahawillachchiya,
Anuradhapura.

Plaintiff Appellant-Appellant

Vs.

1. Kodithuwakku Arachchige Neville
   Kodithuwakku,
   No. 85, Nayapana Janapadaya,
   Gampola.
2. Commissioner General of Prisons,
   Department of Prisons,
   No. 50, Baseline Road,
   Colombo 09.
3. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Defendant Respondent-Respondents

BEFORE	:	B.P. ALUWIHARE, PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Sudarshany Cooray for the Plaintiff Appellant-Appellant Rajitha Perera SSC for the 2nd & 3rd Defendant Respondent- Respondents
WRITTEN SUBMISSION ON:		02.10.2012 & 25.08.2016 (Plaintiff Appellant-Appellant) 24.12.2012 & 25.08.2016 (Defendant Respondent-Respondents)
ARGUED ON	:	18.07.2016
DECIDED ON	:	24.01.2017

UPALY ABEYRATHNE, J.

The Plaintiff Appellant-Appellant (hereinafter referred to as the Appellant) has sought leave to appeal to this Court from the judgment of the Provincial High Court of Civil Appeal of the Sabaragamuwa Province holden at Kegalle dated 31.05.2012, and leave was granted on the following questions of law

set out in paragraph 13(a), (b), (c). (d) and (h) of the petition of appeal dated 08.07.2012.

13(a). Did the learned High Court Judges err in holding that the 1st Defendant in his own evidence has proved that the accident occurred outside the scope of his employment?

(b). Did the learned High Court Judges err in holding that the 2nd and 3rd Defendants are not liable vicariously since the 1st Defendant had not obtained permission from the chief jailer or the senior jailor although the 1st Defendant had been ordered to take such bus on such day?

(c). Did the learned High Court Judges err in holding that the 1st Defendant was not acting within the scope of his employment since he had not obtained specific permission to deviate from the designated route, whereas he was ordered to transport the prison officers to the wedding function?

(d). Did the learned High Court Judges err in holding that the 1st Defendant's act was one of an independent act?

(h). Did the learned High Court Judges err in not appreciating the fact that the evidence led in this case proved that the journey in question on which the 1st Defendant drove the bus was a journey ordered or required by the superior officers of the 1st Defendant for the benefit of the other officers of the 2nd Defendant and it was not a journey for a private purpose of the 1st Defendant?

According to the Appellant, on or about 22.05.2004, the Bus bearing No WP GD 6597 belonged to the Department of Prison, which was driven by the 1st Defendant Respondent-Respondent in the direction of Colombo, on Colombo Kandy road, had collided with the van bearing No 62-7523 which was driven by the husband of the Appellant. The Appellant's husband succumbed to injuries received at the said accident. The Appellant had instituted the said action against the 1st 2nd and 3rd Defendant Respondent-Respondents (hereinafter referred to as the 1st 2nd and 3rd Respondents) seeking to recover a sum of Rs. 1,500,000/= as damages caused to the Appellant due to loss of her husband, a sum of Rs. 200,000/= as damages caused to the said van No 62-7523 and a sum of Rs. 120,000/= for inability of using the said van bearing No 62-7523 for a period of 06 months due to the said accident. The Appellant had averred that the 2nd and 3rd Respondent were vicariously liable for the damages caused as a result of the accident since the accident had occurred within the scope of the employment of the 1st Respondent.

The 3rd Respondents had averred that at the time of the said accident the 1st Respondent was not acting within the scope his employment. Although the proceedings dated 07.02.2007 indicate an *ex-parte* trial against the 2nd Respondent, the issue No 15 has been raised by the 2nd and 3rd Respondents on the basis that no cause of action had arisen to the Appellant against the 2nd and 3rd Respondent. Hence it is apparent from the issues raised at the trial that an *inter parte* trial had been held against the 1st 2nd and 3rd Respondents before the District Court. The case proceeded to trial on 15 issues. After the trial, the learned District Judge had delivered the judgment in favour of the Appellant against the 1st Defendant Respondent and dismissed the action against the 2nd and 3rd Defendant Respondents. The Appellant and the 1st Defendant Respondent both had preferred

two appeals to the High Court of Civil Appeal of the Sabaragamuwa Province holden at Kegalle from the said judgment of learned District Judge dated 30.09.2010. After the hearing, the High Court of Civil Appeal, by judgment dated 31.05 2012, had dismissed the said two appeals. The 1st Defendant Respondent had not appealed to this court from the said judgment of the High Court.

The Plaintiff Appellant has narrated her cause of action in sub paragraphs (i) to (vi) of the paragraph 02 of the petition of appeal to this court dated 8th of July 2002 as averred in her plaint dated 07.04.2006. I reproduce the said paragraph below.

i. The Plaintiff (Appellant) is the lawful wife of Konara Mudiyanselage Piyatissa Gamini.
ii. On or around 22.05.2004 whilst Konara Mudiyanselage Piyatissa Gamini was driving vehicle No 62-7523, such vehicle collided with Bus bearing No PGD 6597 and as a result of the said accident Konara Mudiyanselage Piyatissa Gamini succumbed to injuries on 10.09.2004.
iii. The Bus bearing No PGD 6597 was driven by the 1st Defendant and it belonged to the 2nd Defendant.
iv. The 1st Defendant was driving the Bus bearing No PGD 6597 in the scope of his employment.
v. Accordingly, 2nd and 3rd Defendants are liable for the actions of the 1st Defendant.
vi. The damage caused to the Plaintiff by the death of her husband is calculated at Rs. 1,500,000/-.

The Appellant's position according to the said paragraph was that the alleged accident occurred due to the negligence of the1st Defendant Respondent-Respondent (hereinafter referred to as the 1st Respondent) and at the time of the accident the 1st Respondent was acting within the scope of his employment.

The1st Respondent had filed his answer denying the said position of the Appellant and had averred that the alleged accident occurred due to the negligence of the Appellant's husband. In his answer the 1st Respondent had denied the fact that at the time of the accident he was acting within the scope of his employment.

The 2nd and 3rd Defendant Respondent-Respondents (hereinafter referred to as the Respondents) too had filed their answers denying the position of the Appellant and had averred that at the time of the accident the 1st Respondent was not serving within the scope of his employment.

The evidence of the case demonstrates the exact nature of the journey of the 1st Respondent which ended up with the fatal accident in question. At the time of the accident, the 1st Respondent was acting in the capacity of a driver attached to the Bogambara Prison, Kandy. It was not in dispute that on the day in question, the 1st Respondent had driven the bus belonged to the Department of Prison bearing No PGD 6597 with certain employees attached to the Bogambara prison on board, towards Mawanella to facilitate the said employees to participate at a wedding ceremony. However, the said function was not an official function. According to evidence, the 1st Respondent had not obtained any specific authority or permission from his superior officers for the said journey to Mawanella, which is a fact admitted by the 1st Respondent.

The 2nd and 3rd Respondents took up the position that the 1st Respondent had engaged in an unauthorized journey and therefore they were not vicariously liable for the damage caused to the Appellant. They had led evidence to prove the fact that the employees of the 2nd Respondent's Department are subject to the control of circulars issued by the Commissioner General of Prison and the Superintendent Circulars issued by the Superintendent of the relevant Prison. Accordingly, since the 1st Respondent was attached to the Bogambara Prison he was subjected to the control of circulars issued by the Commissioner General of Prison and also the Superintendent Circulars issued by the Superintendent of the Bogambara Prison. The 1st Respondent had not denied the said circulars of the Prison.

The 2nd and 3rd Respondent produced the Superintendent Circular No 42/2003 marked 3V2 issued by the Superintendent of the Bogambara Prison with regard to the use of the vehicles belonged to the Bogambara Prison. It appears that the said circular had been issued having considered the instances where the prison vehicles had been taken out of the prison premises without obtaining any prior approval. According to the said Superintendent Circular 3V2 when vehicles need to be taken out of the premises of the Bogambara Prison, the reasons for taking the vehicle out of the premises should be stated in the relevant register and the vehicles should be taken out subject to approval of the Superintendent or an Assistant Superintendent of the Bogambara Prison.

The 1st Respondent, in his evidence, admitted that he had not followed the said procedure laid down in the said circular 3V2 and also, he had not obtained the approval of the Superintendent or an Assistant Superintendent of Bogambara Prison prior to the taking the said vehicle out of the Prison Premises. The 1st Respondent had stated that he was ordered by the Transport Section to take the

said bus to facilitate the officers of the Prison to participate at a wedding ceremony to be held at Mawanella. But he had not produced such an order given by the Transport Section. It is interesting to note that the witness Wickremage Mahesh Janakantha Rathnayake, who testified for the case of the 1st Respondent, had stated at page 146 of the brief that he with Several Officers met the Jailor of the Transport Section and obtained the permission to take the vehicle out of the prison premises. Said evidence clearly demonstrate that the 1st Respondent had failed to comply with the procedure laid down in the circular marked 3V2.

It is important to note that the Superintendent Circular marked 3V3 contained specific directions given to the Jailor of the transport section when vehicles are being taken out of the City limits. According to the said circular 3V3, special permission of the Superintendent or an Assistant Superintendent of Prison should be obtained when vehicles are to be taken outside the City limits. It is apparent from the said circular 3V3, in order to take a vehicle outside the City limits written approval of the Superintendent or an Assistant Superintendent of Prison should be obtained. Such application should contain;

- The name of the applicant or the section,
- The nature of the duty involved,
- The name of the driver and the vehicle to be used, and
- A certificate verifying whether any other vehicle of another prison is coming to the Bogambara prison for the same duty.

No such application had been made for the purpose of taking the said bus to Mawanella. Accordingly, totality of evidence clearly establish that the 1st Respondent had not complied with the requirements of circulars 3V2 and 3V3 before taking the alleged vehicle out of the prison premises and outside the City

limits. This is ample evidence to conclude that the alleged journey to Mawanella was an unauthorized journey. At such instances, should the master be liable vicariously for the acts of his servants?

Although in the general run of cases, the duty of both master and servant is the same, for a master to be liable he must owe a duty of care to the deceased. Such a duty of care would arise only if the act of the servant falls within the scope of servant's employment.

As stated by Lord Denning MR in *Young Vs. Edward Box & Co. Ltd. (1951) 1 TLR 789, 793* "In every case where it is sought to make the master liable for the conduct of his servant, the first question is to see whether the servant was liable. If the answer is 'Yes', the second question is to see whether the employer must shoulder the servant's liability."

In the case of *De Silva Vs. Dharmasena 59 C.L.W. 92* the plaintiff was injured while travelling in a car owned by the 1st Defendant and driven by the 2nd Defendant. The 2nd Defendant, who was employed as a driver by the 1st Defendant while travelling on the 1st Defendant's business, picked up several passengers of whom the Plaintiff was one. The 2nd Defendant had been expressly forbidden to take such passengers. It was held that "Inasmuch as the 2nd Defendant was acting outside the scope of his employment the 1st Defendant was not liable to the Plaintiff."

In *Twine vs. Beans Express Ltd., (1946) 1 All RE 202, (1946) 175 LT 131 CA.* where the employers had expressly instructed their drivers not to allow unauthorized persons to travel on their vehicles and affixed a notice to this effect on the driver's van. Despite this, the driver gave a lift to a person who was killed by reason of the driver's negligence. The Court of Appeal held that "he was acting

outside the scope of employment and accordingly his employers were not liable. The act of giving a lift to an unauthorized person is not merely a wrongful mode of performing an act of a class which the driver is employed to perform but the performance of an act of a class which he was not authorized to perform at all and hence he was acting outside the course or scope of his employment. Where a servant acts outside the course of employment he ceases *Pro hac vice* to be a servant; an act done solely for the servant's own interests and purposes, and outside his authority is not done in the course of his employment, even though it may have been done during his employment."

This principle of law was followed in *Conway vs. George Wimpey & Co. Ltd., (1951) 2 KB 266.* A number of contractors were employed in work at the Heathrow Airport. The defendant company had instituted a bus service for their own employees and the driver was prohibited by the defendant company from giving lifts to anyone other than their own employees. A non-employee of the company had travelled in the bus and due to the negligence of the driver had been injured. Asquith, LJ held that the act of the driver in giving a lift to the plaintiff was outside the scope of his employment. It was not merely a wrongful mode of performing an act of the class which the driver was employed to perform but was the performance of an act which he was not employed to perform.

In the case of *Sarath Kumara Perera vs. Winifred Keerthiwansa and Others [1993] 2 SLR 274 (SC)* G.P.S. De Silva, CJ, quoting Salmond Law of Torts, observed that "The fact that the car carried a red number plate is a crucial, undisputed fact in this case. The red number plate constituted a representation that it was a car authorized to carry passengers for a fee. The secret instructions given by the defendant to Sally were unknown to the public. There was no notice inside the car prohibiting the presence of unauthorized passengers. It is significant that

Sally stopped the car in front of the bus stand at Kurunegala and it was there that the deceased got into the car with the consent of Sally. He was carrying 03 passengers picked up at different places.

Referring to the distinction between implied and ostensible authority Salmond States; "There is a difference between implied authority and ostensible authority. The servant's act may be an authorized act for the purposes of vicarious liability even if it is done solely for his own purposes if in the circumstances the permission of the master can be implied. Ostensible authority is different; it may be held to exist if, whatever the true state of affairs, the stranger had been misled by appearances." (Salmond Law of Torts 19th Edition page 524).”

Authorities clearly demonstrate that the answer to the question whether the master is vicariously liable for the act of his servant depends on the facts and circumstances of each case. In the present case before me, the question before the court was whether the 1st Defendant Respondent was acting within the scope of his employment by taking the said bus outside the 2nd Respondent’s premises for the wedding function. Having regard to the above legal authorities and also bearing in mind the specific regulations stipulated in 3 R 2 and 3 R 3, is it possible to say that the 1st Defendant Respondent was acting under the implied authority or ostensible authority of the 2nd Defendant Respondent. My answer is ‘no’.

“Unless the wrong falls within the scope of the servant’s employment the employer is not liable at common law…. The focus is not so much on the wrong committed by the servant as upon the act he is doing when he commits the wrong. The act will be within the scope of the employment if it has been expressly or impliedly authorised by the employer or is sufficiently connected with the

employment that it can be regarded as an authorised manner of doing something which is authorised, or is necessarily incidental to something which the servant is employed to do." (Winfield & Jolowicz on Tort – Seventeenth Edition at page 892)

Having regard to the facts and circumstances relevant to the instant case enumerated above, in particular the specific instructions stipulated in 3 R 2 and 3 R 3, I conclude that taking the said bus to Mawanella in contrary to the Regulations stipulated in 3R2 and 3R3 was an unauthorized act. I accordingly hold that the 1st Defendant Respondent was not acting within the scope of his employment in taking the bus to Mawanella and the 2nd and 3rs Defendant Respondent are thus not vicariously liable for the alleged act of the 1st Defendant Respondent.

For the forgoing reasons, I answer the said questions of law in favour of the 2nd and 3rd Respondents and dismiss the appeal of the Appellant. I uphold the judgment of the Court of appeal dated 31.05.2012 and the judgment of the learned District Judge dated 30.09.2010. I make no order as to costs in all courts.

Appeal dismissed.

Judge of the Supreme Court

B.P. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court