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

Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Petitioner-Appellant

SC/APPEAL/161/2023
CA (PHC) APN 135/2021
HC/TAB/2446/2021

Vs.

1. Perpetual Treasuries Limited,
   3rd Floor, Prince Alfred Tower,
   No. 93, Alfred House Gardens,
   Colombo 03.

2. Sandresh Ravindra Karunanayake,
   No. 1291/6, Rajamalwatte Road,
   Battaramulla.

3. Lakshman Arjuna Mahendran,
   No. 52/1, Flower Road, Colombo 03.

4. Arjun Joseph Aloysius,
   No. 52/1, Flower Road, Colombo 3.

5. P. Appuhamilage Don Kasun Oshadee Palisena,
   No. 21, Arthuesa Lane,
   Wellawatte, Colombo 06.

6. Geoffrey Joseph Aloysius,
   No. 07, Queens Road, Colombo 03.

7. Chitta Ranjan Hulugalla,
No. 45/D/1, Western Tower,
Galle Face Residencies, Colombo 02.

8. Muthurajah Surendran,
No. 88/3, Ellie House Road,
Colombo 15.

9. Ajahn Gardiye Punchihewa,
No. 23/2A, Independence Avenue,
Colombo 07.

10. Badugoda Hewa Indika Saman
Kumara, No. 1/1, Enderamulla Road,
Ambalangoda.
Accused-Respondent-Respondents.

Before: P. Padman Surasena, C.J.
A.L. Shiran Gooneratne, J.
Achala Wengappuli, J.
Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Janaka Bandara, D.S.G., with Oswald Perera, S.C., Sajith Bandara, S.C., and Tharaka Kodagoda, S.C., for the Complainant-Petitioner-Appellant.

Navin Marapana, P.C., with Uchitha Wickremasinghe and Saumya Hettiarachchi for the 1st, 4th and 5th Accused-Respondent-Respondents.

Faisz Musthapha, P.C., with Shavindra Fernando, P.C., Mrs. Faiza Marker, P.C., and Ms. Zainab Marker for the 2nd Accused-Respondent-Respondent.

Razik Zarook, P.C., with Rohana Deshapriya and Chanakya Liyanage for the 6th and 8th Accused-Respondent-Respondents.

Sahan Kulatunga for the 7th Accused-Respondent-Respondent.

Mahesh Senarathne with Neranjan Iriyagolla for the 9th Accused-Respondent-Respondent.

Manoj Bandara with Rushani Thiyagaraj for the 10th Accused-Respondent-Respondent.

Argued on: 27.01.2026

Post argument written submissions:

by the Complainant-Petitioner-Appellant, the 1st, 4th and 5th Accused-Respondent-Respondents and the 2nd Accused-Respondent-Respondent on 13.03.2026.

by the 6th and 8th Accused-Respondent-Respondents on 28.02.2026.

by the 7th Accused-Respondent-Respondent on 27.02.2026.

by the 9th Accused-Respondent-Respondent on 03.03.2026.

Decided on: 01.06.2026

Samayawardhena, J.

Introduction

This judgment relates to the much-publicised issuance of treasury bonds by the Central Bank of Sri Lanka between 01.02.2015 and 31.03.2016, in respect of which serious irregularities are alleged to have occurred, resulting in losses of billions of rupees to the State and having a significant adverse impact on the Sri Lankan economy. This is also widely regarded as one of the largest financial frauds reported in Sri Lanka.

Three cases have been filed before three Trials at Bar against the same accused persons with similar charges regarding bond auctions held on three different dates. These are high-profile cases where among others, the then Minister of Finance and the then Governor of the Central Bank have been named as the 2nd and 3rd accused. This appeal relates to an indictment filed before one High Court at Bar in respect of the bond auction held on 31.03.2016.

In the indictment relevant to this case, there are 10 accused and 22 charges under different laws. The 1st accused, Perpetual Treasuries Limited, a company incorporated under the Companies Act in Sri Lanka, was a primary dealer authorised to participate in the bond auction.

Broadly speaking, the 1st and 2nd counts in the indictment are against the 1st accused company, charging it with conspiracy and the commission of the substantive offence of criminal misappropriation of treasury bonds belonging to the Government of Sri Lanka, punishable under section 5(1) of the Offences Against Public Property Act, No. 12 of 1982, as amended, read with sections 113B, 102 and 386 of the Penal Code.

The 3rd to 11th counts in the indictment are against the 2nd to 10th accused, charging them with aiding and abetting the 1st accused in the commission of the said offence of criminal misappropriation of treasury bonds, punishable under section 5(1) of the Offences Against Public Property Act read with sections 102 and 386 of the Penal Code.

There is no need to outline the other charges for the purposes of this appeal.

Before the commencement of the trial proper, on 01.12.2021, a preliminary objection had been raised by learned President's Counsel for the 7th accused on the maintainability of the charges in the indictment on the premise that the 1st accused being an incorporated body and not a natural person cannot be charged under the Offences Against Public Property Act and in the result the charges against the 7th accused of

aiding and abetting the 1st accused to commit offences under the Public Property Act must also fail. Learned counsel for the other accused have associated themselves with this objection.

According to the material available in the brief, this objection, which goes to the root of the indictment, was raised without prior notice. Oral submissions on this issue together with some other objections were made on that day (01.12.2021) and on the following day (02.12.2021), and were recorded. No written submissions were filed. The Court thereafter fixed the matter for order and trial at 10.30 a.m. on 06.12.2021, and on that date delivered its order upholding the preliminary objection and discharging all the accused from count Nos. 1–11 of the indictment.

The objection so taken was not of a routine nature with which High Court Judges are ordinarily familiar. It raised questions requiring careful consideration and a proper understanding of the applicable law. Bearing that in mind, it must be emphasised that the administration of justice must be speedy, but not hasty, as undue haste may prove counterproductive, as occurred in the present case. More than four years have elapsed since that order was made, and the proceedings have remained stayed during this period.

Being dissatisfied with that order, the Attorney-General, on 31.12.2021, filed a revision application in the Court of Appeal. By judgment dated 07.04.2022, the Court of Appeal dismissed the application *in limine* on the basis that it lacked jurisdiction over judgments and orders pronounced by a High Court at Bar.

Thereafter, in terms of Article 128(2) of the Constitution, the Attorney-General filed this application for special leave to appeal against the said judgment of the Court of Appeal, which has now been converted into an appeal.

On 22.04.2022, a Three Judge Bench of this Court, presided over by Malalgoda J., issued an interim order staying further proceedings before the High Court at Bar.

On 30.05.2022, when the matter came up before another Three Judge Bench presided over by Aluwihare J., the Court made the following observation:

> *In this matter, the State is challenging an order made by their Lordships of the Court of Appeal in relation to an issue arising from an order made by a Trial at Bar. Considering the significance of the legal issue and the provisions embodied in Section 451(3) of the Code of Criminal Procedure Act No. 15 of 1979, as amended, the court is of the view that it would be prudent to refer this matter to His Lordship the Chief Justice for a nomination of a bench of five judges.*

Thereafter the Chief Justice constituted a Bench of Five Judges presided over by Murdu Fernando J. (as she then was) to hear this matter.

On 30.08.2022, learned President's Counsel for the 7th accused had raised preliminary objections on the maintainability of this special leave to appeal application. The Five Judge Bench had unanimously overruled those preliminary objections.

The Five Judge Bench heard all parties on the question of grant of special leave on 30.08.2022, 14.09.2022, 13.12.2022 and 31.10.2023, and finally by unanimous decision granted special leave to appeal on the questions of law as set out in paragraphs 76(i)-(vi) of the petition dated 20.04.2022. They are as follows:

(i) *Did the Court of Appeal err in law, in the exercise of its discretionary jurisdiction under Article 138 of the Constitution, by summarily dismissing the application without affording an opportunity of being heard when an important question of law*

pertaining to imputation of criminal liability on a company under the Offences against Public Property Act was raised?

(ii) Did the Court of Appeal err in law by ill-defining its own jurisdiction under Article 138 of the Constitution?

(iii) Did the Court of Appeal err in law in the process by wrongly assuming the exclusive jurisdiction of constitutional interpretation vested in Your Lordships' Court in terms of Article 125 of the Constitution?

(iv) Did the Court of Appeal err in law by holding that the Attorney-General had a right of appeal against an Order of Discharge contrary to Section 451(4) of the Code of Criminal Procedure Act (CCPA) read with Section 15(a)(i) of the Judicature Act?

(v) Did the Court of Appeal err in law by deciding that the Order of the High Court at Bar dated 06.12.2021 was made 'at a trial' contrary to the provisions of Section 451(3) read with Section 450(5)(a) of the CCPA?

(vi) Did the Court of Appeal err in law by abdicating its jurisdiction when an order of a High Court at Bar is subject to review by the Court of Appeal in the exercise of its jurisdiction in terms of Article 138 read with Article 146(2)(i)(a) of the Constitution?

The 1st, 4th, 5th, 6th and 8th accused had raised the following questions of law:

(vii) Do the words "at a trial under Section 450" as contained in Section 451 of the Code of Criminal Procedure Act refer to a 'type of trial' as opposed to a 'stage of trial'?

(viii) If the said reference is for a 'type of trial', should the Petitioner's appeal be dismissed?

The 2nd accused raised the following questions of law:

(ix) Is the impugned Order of the High Court appealable?

(x) If so, was it competent for the Petitioner to maintain this application in revision, in view of the averments in paragraph 40 of the Petition to the Court of Appeal dated 31.12.2021?

Due to various reasons, the matter had not been taken up for argument. Following the retirement of Murdu Fernando C.J., the appeal was taken up for hearing on 27.01.2026 before a Bench of Five Judges presided over by the incumbent Chief Justice. Upon hearing the parties on the questions of law already raised, and having regard, *inter alia*, to the public and general importance of the issues arising in this appeal, the Court, *suo motu*, raised the following two additional questions of law:

(xi) Is the Order made by the High Court at Bar on 06.12.2021 marked X1 a lawful Order?

(xii) In any case, can this Court review the said High Court Order dated 06.12.2021 in these proceedings?

Then the 1st, 2nd, 4th and 5th accused raised the following question of law:

(xiii) Is the Complainant-Petitioner-Appellant entitled to obtain relief not prayed for in the Petition?

In the two other connected cases (HC/TAB/2445/2021 and HC/PTB/1/5/2019), similar orders had been made by the High Court, and the parties in those cases will abide by the decision in this appeal.

High Courts and Trials at Bar

Following the 13th Amendment, the Constitution and the Judicature Act recognise two categories of High Courts, namely, the High Court of the Republic of Sri Lanka and the High Courts of the Provinces. This is notwithstanding the fact that the 11th Amendment replaced the expression "High Court of the Republic of Sri Lanka" with "High Court of Sri Lanka" in Article 111(1).

Article 154P of the Constitution, introduced by the 13th Amendment, provides for the establishment of a High Court for each Province, commonly referred to as the Provincial High Court, to exercise jurisdiction within the respective Province. In general terms, the Criminal High Courts, Commercial High Courts and Civil Appellate High Courts

are Provincial High Courts exercising jurisdiction within their respective Provinces. These three categories of Provincial High Courts are governed, *inter alia*, by the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, and the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006, respectively.

Further, certain High Courts, such as the Commercial High Court of the Western Province, exercise island-wide jurisdiction in specified subject areas, such as company law and intellectual property.

In terms of section 3 of the Judicature Act, the territorial jurisdiction of the High Courts is divided by judicial zones, whereas Article 154P of the Constitution divides territorial jurisdiction on a provincial basis. Under Article 154P, Judges of the Provincial High Courts are appointed from among the Judges of the High Court of Sri Lanka.

Section 2 of the Judicature Act, as amended by the Judicature (Amendment) Act No. 34 of 2022, designates both the High Court of the Republic of Sri Lanka and the High Courts of the Provinces as courts of first instance, although judges of the Provincial High Courts also exercise appellate jurisdiction.

It is also necessary to distinguish between a Trial at Bar, a High Court at Bar, and a Permanent High Court at Bar. While the present appeal concerns the right of appeal against orders and judgments of a High Court at Bar, reference will be made, where necessary, to the position relating to the Permanent High Court at Bar.

Section 12 of the Judicature Act provides for Trials at Bar. Judges of the High Court of Sri Lanka are appointed to constitute such Trials at Bar, with the relevant judicial zone being specified. Sections 450 and 451 of the Code of Criminal Procedure Act No. 15 of 1979, as amended, set out the procedure applicable to such trials.

It may also be noted that, while section 12 of the Judicature Act refers to Trials at Bar, sections 450 and 451 of the Code of Criminal Procedure Act refer to them as High Courts at Bar. The expressions Trial at Bar and High Court at Bar, though differently employed in the two enactments, refer in essence to the same judicial process. The former denotes the mode of trial, while the latter refers to the court constituted for the purpose of conducting that trial. The distinction is thus one of terminology rather than substance.

Permanent High Courts at Bar were established by the Judicature (Amendment) Act No. 9 of 2018, by introducing sections 12A to 12C into the Judicature Act. Although the procedure applicable to Permanent High Courts at Bar broadly resembles that applicable to High Courts at Bar, there are some differences. For instance, in terms of section 12B of the Judicature Act, an appeal from a judgment of a Permanent High Court at Bar must be filed in the Supreme Court within 28 days. By contrast, sections 451(3) and (4) of the Code of Criminal Procedure Act, read with section 331, require that an appeal from a judgment of a High Court at Bar be filed within 14 days.

As seen from section 12A of the Judicature Act, a Permanent High Court at Bar is also a Provincial High Court, and its judges are nominated by the Chief Justice from among judges of the High Court of the Republic of Sri Lanka. At present, a Permanent High Court at Bar has been established only for the Western Province. By contrast, a Trial at Bar constituted in terms of section 12 of the Judicature Act is not a Provincial High Court.

The present appeal arises from an order made by a Trial at Bar sitting in the Colombo judicial zone.

These observations, though not exhaustive, demonstrate that the constitutional and statutory framework governing the High Courts, as well as questions relating to their jurisdiction and appellate procedure, are not always straightforward.

I take this opportunity to correct an erroneous observation (*obiter dicta*) made by me while deciding the appeal in the Three Judge Bench decision in *Duro Pipe Industrial (Pvt) Ltd. v. Pradeep Silva* (SC/APPEAL/111/2022, SC Minutes of 02.12.2024), to the effect that a party cannot file an application for leave to appeal in the Supreme Court from an interlocutory order made by the High Court in the exercise of its appellate jurisdiction against an order of the Labour Tribunal. In so stating, I regret very much that I overlooked the proviso to section 9(a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990, which provides otherwise. This occurred due to the introduction of a parallel appellate procedure from orders of the High Court to the Supreme Court by the Industrial Disputes (Amendment) Act No. 32 of 1990. I humbly accept this error and stand corrected, respectfully echoing the words of H.N.G. Fernando J. (as he then was) in *Peiris v. Chairman, Village Committee of Medasiya Pattu Matale* (1960) 62 NLR 546 at 547: "*While it is disappointing to realize that my judgment was erroneous, I welcome the opportunity now given me to employ the language of Baron Bramwell in a similar situation: 'The matter does not appear to me now as it appears to have appeared to me before.'*"

Let me also take this opportunity to clarify another point. Section 74(2) of the Primary Courts' Procedure Act No. 44 of 1979 expressly provides that no appeal shall lie against any determination or order made under section 66 of that Act. Accordingly, a party aggrieved by such an order may invoke the revisionary jurisdiction of the Provincial High Court. Until the law is amended in the manner suggested by this Court in *Nilantha Fernando v. Nilanthi Perera* (SC/APPEAL/65/2025, SC Minutes of 10.10.2025 at pages 23–24), <u>where the law does not provide for an appeal and a party invokes the revisionary jurisdiction of the High Court</u>, as in section 66 matters, a party dissatisfied with the order of the High Court may invoke the appellate jurisdiction of the Court of Appeal, since, as the law presently stands, the Supreme Court has no jurisdiction over such orders.

Does the Court of Appeal have jurisdiction over orders and judgments of the Trials at Bar/High Court at Bar?

I shall reproduce section 12 of the Judicature Act and sections 450 and 451 of the Code of Criminal Procedure Act No. 15 of 1979, as amended, which provide for the establishment of, and the procedure applicable to, Trials at Bar/High Courts at Bar.

Section 12 of the Judicature Act reads as follows:

> *12(1) Notwithstanding anything to the contrary in this Act or any other written law, trials at Bar shall be held by the High Court in accordance with the law for the time being in force for offences punishable under the Penal Code and other laws.*
>
> *(2) The Chief Justice shall nominate a Bench of three Judges of the High Court naming one of them as the Chairman and also specifying the zone where such trial shall be held:*
>
> *Provided that the Chief Justice shall not by reason of the fact that he has made an order under this subsection be disqualified or precluded from hearing any appeal to the Supreme Court in any matter which is the subject of a direction made by him under this subsection.*

Sections 450 of the Code of Criminal Procedure Act read as follows:

> *450(1) Notwithstanding anything to the contrary in any other written law or any other provision of this Code, the trial of any person for any offence punishable under section 114, 115 or 116 of the Penal Code shall be held before the High Court at Bar by three Judges without a jury.*
>
> *(2) Where the Chief Justice is of the opinion that owing to the nature of the offence or the circumstances of and relating to the commission of the offence, in the interests of justice, a trial at Bar should be held, the Chief Justice may by order under his hand direct that the trial*

of any person for that offence shall be held before the High Court at Bar by three Judges without a jury.

(3) A trial before the High Court under this section may be held either upon indictment, or upon information exhibited by the Attorney-General.

(4) Notwithstanding anything to the contrary in this Code or any other law, the Attorney-General may exhibit to the High Court information in respect of any offence to be tried before the High Court at Bar by three Judges without a jury.

(5)(a) A trial before the High Court at Bar under this section shall be held as speedily as possible and shall proceed nearly as possible in the manner provided for trials before the High Court without a jury, subject to such modifications as may be ordered by the Court or as may be prescribed by rules made under this Code.

(b) A trial by the High Court at Bar shall, unless exceptional circumstances so warrant be heard from day to day to ensure the expeditious disposal of the same. The inability of a particular attorney-at-law to appear before the High Court at Bar on a particular date for personal reasons (including engagement to appear on that date in any other court or tribunal) shall not be a ground for postponing the date of commencement of the trial or be regarded as an exceptional circumstance warranting the postponement of the trial.

(c) The provisions of paragraph (b) of this subsection shall, mutatis mutandis, apply to the hearing and disposal of any appeal from any judgment, sentence or order pronounced at a trial held before the High Court at Bar under this section.

(d) Where any Judge of the High Court at Bar dies, or resigns, or requests to be discharged from hearing the whole or part of any trial, before or after its commencement, or refuses or becomes unable to act, the Chief Justice may nominate another Judge of

the High Court of Sri Lanka in his place, to hear whole or any part of such trial.

(e) Until such nomination is made the trial may be continued before the remaining Judge or Judges of the High Court at Bar and if no such nomination is made within one week of the death, resignation, discharge, refusal or inability to act referred to in paragraph (d), the trial shall be continued and concluded before the remaining Judge or Judges, of such High Court at Bar.

(f) Where a new Judge has been nominated under paragraph (d) it shall not be necessary for any evidence taken prior to such nomination to be retaken and the High Court at Bar shall be entitled to continue the trial from the stage at which it was immediately prior to such nomination.

(6) At any trial before the High Court at Bar under this section, the court or the presiding Judge thereof, may give directions for the summoning, arrest, custody or bail of all persons charged before the court on indictment or by information exhibited under this section:

Provided, however, that any such person shall not be admitted to bail except with the consent of the Attorney-General.

(7) Any person indicted or charged on an information before the High Court under this section may at least two weeks before the commencement of such trial, by application in writing to the High Court request that he be furnished with copies of the statements made by the witnesses whom the prosecution intends to produce at the trial and the court may direct that copies of all such statements or documents, or of only such statements and documents as the court in its discretion thinks fit, be given by the Attorney-General to such person.

(8) The trial of any person before the High Court under this section may commence or continue in the absence of such person if the court is satisfied that he is absconding or feigning illness, has left the

Island or is otherwise avoiding attendance before Court, or being present in court, obstructs or impedes the progress of the trial.

Section 451 of the Code of Criminal Procedure Act provides as follows:

451(1) In every case of a trial at Bar before the High Court under section 450, the relevant provisions of the Judicature Act shall apply on the question of the nomination of the Judges of the Court and the place where such trial shall be held.

(2) The Chief Justice may nominate more than one Bench of Judges to constitute High Courts at Bar to hear trials in the same zone or province, and the benches so nominated may commence and continue their hearings at the same time.

(3) Anything to the contrary in this Code or any other law notwithstanding an appeal shall lie from any judgement, sentence or order pronounced at a trial under section 450. Such appeal shall be to the Supreme Court and shall be heard by a Bench of not less than five Judges of that Court nominated by the Chief Justice. It shall be lawful for the Chief Justice to nominate himself to such Bench.

(4) The provisions in this Code and of any other written law governing appeals to the Court of Appeal from judgments, sentences and orders of the High Court in cases tried without a jury shall, mutatis mutandis, apply to appeals to the Supreme Court, under sub section (3) from judgments, sentences and orders pronounced at a trial held before the High Court at Bar under section 450.

It was by the Code of Criminal Procedure (Amendment) Act No. 21 of 1988 that appellate jurisdiction in respect of judgments, sentences and orders pronounced at a Trial at Bar was vested in the Supreme Court by an amendment to section 451 of the Code of Criminal Procedure Act. Prior to that amendment, such jurisdiction was exercised by the Court of Appeal by a Bench of Five Judges.

In the present case, the Attorney-General did not prefer an appeal against the impugned order dated 06.12.2021 to the Supreme Court, but instead filed a revision application in the Court of Appeal. As already noted, the Court of Appeal dismissed that application for want of jurisdiction, on the basis that, by virtue of the said amendment in 1988, appellate jurisdiction in respect of such matters had been transferred to the Supreme Court.

The contention advanced on behalf of the Attorney-General before this Court is that, in terms of section 451(3), which provides that "*an appeal shall lie from any judgment, sentence or order pronounced at a trial under section 450*" to the Supreme Court, the Attorney-General did not have a right of appeal, since the impugned order was not made "at a trial" but prior to the commencement of the trial.

Canons of interpretation

The primary rule of construction is the literal rule. The words of a statute are to be understood in their ordinary and grammatical sense, which is presumed to reflect the intention of the legislature. However, this primary rule is not without exceptions.

One such exception is the golden rule. The golden rule of statutory interpretation permits the Court to depart from the ordinary grammatical meaning of the words where such a construction would lead to an absurdity or inconsistency, and instead to adopt a construction that gives effect to the legislative intention.

Maxwell on Interpretation of Statutes (12th edition) at page 43 explains this rule in this manner:

> *The so-called "golden rule" is really a modification of the literal rule. It was stated in this way by Parke B.: "It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at*

> *variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further." (Becke v. Smith (1836) 2 M.&W. 191, at p.195) "If," said Brett L.J., "the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable, though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning." (R. v. Tonbridge Overseers (1884) 13 Q.B.D. 339, at p. 342)*

Bindra's Interpretation of Statutes, 13th edition, states at page 354:

> *The court can look behind the letter of the law in order to determine the true purpose and effect of an enactment when the language of the statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or some inconvenience, or absurdity, hardship or injustice, presumably not intended. In such cases, a construction modifying the meaning of the words and even the structure of a sentence is permissible, and in order to avoid absurdity or incongruity, even grammatical and ordinary sense of the words can in certain circumstances be avoided.*

Maxwell at page 199, citing Lord Reid's statement in the House of Lords case of *Luke v. Inland Revenue Commissioners* [1963] AC 557 at 577 states:

> *Where to apply words literally would "defeat the obvious intention of the legislation and produce a wholly unreasonable result" we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction.*

If the literal interpretation suggested by the Attorney-General of the words "at a trial" is accepted, so as to confine it to the stage of the trial proper where evidence is led after the charges are formally read, it would lead to an absurdity. By way of illustration, consider bail applications made before, during, and after the trial. On such an interpretation, an order could be canvassed before the Supreme Court only if it is made during the course of the trial, and parties would be compelled to go before a different forum if the order is made before or after the trial. Such a result would be wholly artificial, inconsistent, and leads to absurdity.

A phrase or passage of a statute should be read in the context of the section in which it appears and in the wider context of the relevant group of sections, bearing in mind the purpose, object and tenor of the enactment. *Maxwell* at page 58 states "*Individual words are not considered in isolation, but may have their meaning determined by other words in the section they occur.*"

In *Nokes v. Doncaster Amalgamated Collieries Ltd* [1940] AC 1014 at 1022, Viscount Simon L.C. stated:

> *Judges are not called upon to apply their opinions of sound policy so as to modify the plain meaning of statutory words, but where, in construing general words the meaning of which is not entirely plain there are adequate reasons for doubting whether the legislature could have been intending so wide an interpretation as would disregard fundamental principles, then we may be justified in adopting a narrower construction. At the same time, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result.*

Consider, for example, section 450(6), which provides that "*at any trial before the High Court at Bar under this section, the court or the presiding Judge thereof may give directions for the summoning, arrest, custody or bail of all persons charged before the court on indictment or by information exhibited under this section.*" The expression "*at any trial before the High Court at Bar under this section*" must be understood as encompassing the entirety of the proceedings under section 450, and not merely the stage of the trial proper. The matters contemplated in this subsection, namely summoning, arrest, custody and bail, necessarily arise prior to the commencement of the trial proper and may continue during and after the trial.

Accordingly, the contention advanced on behalf of the Attorney-General that the phrase "at a trial" in section 451(3) of the Code of Criminal Procedure Act is referable only to the trial proper, and therefore the Attorney-General had no right of appeal against the impugned order pronounced prior to the commencement of the trial, cannot be accepted.

When sections 450 and 451 of the Code of Criminal Procedure Act are read together, it is abundantly clear that the phrase "any judgment, sentence or order pronounced at a trial under section 450" refers to any judgment, sentence or order pronounced in the course of proceedings before a High Court at Bar constituted under section 450.

Appellate procedure

It is a well-established principle of statutory interpretation that the provisions of an Act must be construed as a cohesive whole, and not piecemeal. Accordingly, in order to understand the appellate procedure in a High Court at Bar, sections 451(3) and 451(4) must be read together, and not section 451(3) in isolation.

Let me repeat sections 451(3) and (4) of the Code of Criminal Procedure Act for convenience.

> *451(3) Anything to the contrary in this Code or any other law notwithstanding an appeal shall lie from any judgement, sentence or order pronounced at a trial under section 450. Such appeal shall be to the Supreme Court and shall be heard by a Bench of not less than five Judges of that Court nominated by the Chief Justice. It shall be lawful for the Chief Justice to nominate himself to such Bench.*
>
> *451(4) The provisions in this Code and of any other written law governing appeals to the Court of Appeal from judgments, sentences and orders of the High Court in cases tried without a jury shall, mutatis mutandis, apply to appeals to the Supreme Court, under sub section (3) from judgments, sentences and orders pronounced at a trial held before the High Court at Bar under section 450.*

Whilst section 451(3) defines the appellate jurisdiction of the Supreme Court in respect of judgments, sentences and orders of a High Court at Bar, section 451(4) governs the manner in which that jurisdiction is to be invoked. Accordingly, both subsections must be read together in order to properly understand the appellate procedure applicable to judgments, sentences and orders of a High Court at Bar.

Section 451(4) provides that the provisions of the Code of Criminal Procedure Act and of any other written law governing appeals to the Court of Appeal from judgments, sentences and orders of the High Court in cases tried without a jury shall, *mutatis mutandis*, apply to appeals to the Supreme Court.

As will be explained below, a proper analysis of section 451(3) reveals that the expression in that subsection, "an appeal shall lie from any… order pronounced at a trial under section 450", is to be understood as referring to a final order, and not to interlocutory orders made in the course of such proceedings.

This position finds support in the observations of S.N. Silva C.J. in *Anuruddha Ratwatte and Others v. Attorney-General* [2003] 2 Sri LR 39 at 43, where it was indirectly recognised that section 451(3) of the Code of Criminal Procedure Act contemplates appeals in respect of final orders and not interim orders.

It is significant to note that the procedure to be followed in the Supreme Court is, by virtue of section 451(4), the procedure applicable to appeals to the Court of Appeal from judgments, sentences and orders of the High Court, and not the procedure governing appeals to the Supreme Court from judgments, sentences and orders of the Court of Appeal.

It therefore becomes necessary to examine the provisions of the Code of Criminal Procedure Act and of any other written law governing appeals to the Court of Appeal from judgments, sentences and orders of the High Court, in order to ascertain the appellate procedure applicable to judgments, sentences and orders of a High Court at Bar. The reference to "any other written law" necessarily includes the Judicature Act.

I shall first consider the relevant provisions of the Judicature Act, as they are directly relevant to the issue arising in this appeal.

Judicature Act

Sections 14, 15 and 16 of the Judicature Act provide for appeals to the Court of Appeal from judgments and orders of the High Court at the instance of the accused, the Attorney-General and any aggrieved party.

As indicated by its long title, the Judicature Act provides for the establishment and constitution of courts of first instance and for defining their jurisdiction, including their appellate jurisdiction, and regulating procedure therein.

> *14. Any person who stands convicted of any offence by the High Court of the Republic of Sri Lanka or the High Court for the Province established*

by Article 154P of the Constitution may appeal therefrom to the Court of Appeal—

(a) in a case tried with a jury—

(i) against his conviction on any ground which involves a question of law alone; or

(ii) against his conviction on any ground which involves a question of fact alone, or a question of mixed law and fact; or

(iii) with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law;

(b) in a case tried without a jury, as of right, from any conviction or sentence except in the case where—

(i) the accused has pleaded guilty; or

(ii) the sentence is for a period of imprisonment of one month of whatsoever nature or a fine not exceeding one hundred rupees;

Provided that in every such case there shall be an appeal on a question of law or where the accused has pleaded guilty on the question of sentence only.

15. The Attorney-General may appeal to the Court of Appeal in the following cases:-

(a) from an order of acquittal by a High Court of the Republic of Sri Lanka or a High Court for the Province established by Article 154P of the Constitution—

(i) on a question of law alone in a trial with or without a jury;

(ii) on a question of fact alone or on a question of mixed law and fact with leave of the Court of Appeal first had and obtained in a trial without a jury;

(b) in all cases on the ground of inadequacy or illegality of the sentence imposed or illegality of any other order of the High Court of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution.

16(1) A person aggrieved by a judgment, order or sentence of the High Court of the Republic of Sri Lanka or the High Court for the Province established by Article 154P of the Constitution in criminal cases may appeal to the Court of Appeal with the leave of such court first had and obtained in all cases in which the Attorney-General has a right of appeal under this Chapter.

(2) In this section "a person aggrieved" shall mean any person whose person or property has been the subject of the alleged offence in respect of which the Attorney-General might have appealed under this Chapter and shall, if such person be dead, include his next of kin namely his surviving spouse, children, parents or further descendants or brothers or sisters.

(3) Nothing in this section shall in any way affect the power of the Court of Appeal to act by way of revision in an appropriate case.

Attorney-General's right of appeal

Section 15 of the Judicature Act sets out the right of appeal available to the Attorney-General.

In terms of section 15(a), the Attorney-General is entitled to prefer a direct appeal to the Court of Appeal against an order of acquittal made by the High Court of the Republic of Sri Lanka or a Provincial High Court, in a trial with or without a jury, on a question of law. In addition, the Attorney-General may, with leave, appeal against an acquittal on a question of fact or on a question of mixed law and fact in a trial before a judge sitting without a jury.

Section 15(b), however, is of wider import. It confers on the Attorney-General a right of appeal, as of right, in all cases on the ground of the inadequacy or illegality of the sentence imposed, or the illegality of any other order made by the High Court of the Republic of Sri Lanka or a Provincial High Court.

The contention advanced on behalf of the Attorney-General, based on section 15(a), that a right of appeal arises only in respect of an order of acquittal, and that no such right exists in the present case since the Trial at Bar merely discharged the accused, cannot be accepted and is clearly misleading. This argument conveniently overlooks section 15(b), which expressly enables the Attorney-General to prefer a direct appeal on the ground of illegality of any order made by the High Court at any stage of the proceedings.

In the present case, the Attorney-General did not prefer an appeal against the impugned order of the Trial at Bar to the Supreme Court in terms of sections 451(3) and (4) of the Code of Criminal Procedure Act, read together with section 15(b) of the Judicature Act and section 331 of the Code of Criminal Procedure Act, but instead invoked the revisionary jurisdiction of the Court of Appeal.

When section 451(3) confers appellate jurisdiction on the Supreme Court, notwithstanding anything to the contrary in any other law, in respect of any judgment, sentence or order pronounced at a Trial at Bar/High Court at Bar, it is not open to a party to invoke the appellate or revisionary jurisdiction of the Court of Appeal in respect of the same matter. Article 138 of the Constitution does not confer such jurisdiction on the Court of Appeal. It is an enabling provision, expressly made subject to the provisions of the Constitution and of any law.

As Wengappuli J. held in *Gotabhaya Rajapaksha v. The Attorney-General* [2019] 2 Sri LR 301 at 315:

> *It is not legally possible to create an artificial division of the appellate powers of appeal and revision over any Judgment, sentence or order made by the Permanent High Court at Bar by splitting them among the Supreme Court and Court of Appeal. When Section 12B of the Judicature (Amendment) Act No. 9 of 2018 specifically made provisions that an appeal against any Judgment, sentence or order of the Permanent High Court at Bar, should be made within the stipulated time frame to the Supreme Court, it is not possible even to consider the position that the Legislature had limited the apex Court's appellate jurisdiction only to entertain an appeal against such Judgment, sentence or order and thereby leaving the power of revision with the Court of Appeal under Article 138 as a residual jurisdiction.*

As this Court held in *Nilantha Fernando v. Nilanthi Perera* (SC/APPEAL/65/2025, SC Minutes of 10.10.2025), Article 138(1) expressly provides that the jurisdiction of the Court of Appeal, to be exercised "by way of appeal, revision and restitutio in integrum", is "subject to the provisions of the Constitution or of any law".

Where the legislature has vested appellate jurisdiction in the Supreme Court, whether by way of direct appeal or with leave obtained, the Court of Appeal cannot exercise concurrent jurisdiction over the same matter by way of appeal, an application for leave to appeal, revision, or *restitutio in integrum*. To permit such parallel recourse may, *inter alia*, result in conflicting determinations, thereby creating an anomalous situation which the legislature could not have contemplated. The legislative scheme, in providing for a direct appeal or an appeal with leave to the Supreme Court, is intended to ensure expedition and finality, and not to permit a multiplicity of proceedings resulting in delay and uncertainty.

For these reasons, I hold that the Court of Appeal was correct in rejecting the revision application filed against the impugned order of the High Court at Bar.

Right of appeal of the accused

Let me also clarify the accused's right of appeal against orders and judgments pronounced by a High Court at Bar.

According to sections 451(3) and 451(4) of the Code of Criminal Procedure Act, read with section 14(b) of the Judicature Act, an accused tried before a High Court at Bar has a right of appeal (by way of direct appeal) against any conviction or sentence, subject to certain qualifications:

(a) There must be a question of law to be decided on appeal; in the absence of such a question, the right of appeal is unavailable.
(b) Where the accused has pleaded guilty, there is no right of appeal against the conviction.
(c) Where the accused has pleaded guilty, a right of appeal lies only in respect of the sentence.
(d) Where the sentence imposed is imprisonment for a period not exceeding one month, of any description, or a fine not exceeding Rs. 100, no appeal lies.

In other words, section 14(b) of the Judicature Act does not permit an accused tried before a High Court at Bar to challenge, whether by way of direct appeal or with leave obtained from the Supreme Court, any order made prior to conviction.

However, the Judicature Act is not the sole source from which a right of appeal is conferred on an accused tried before a High Court at Bar.

It is to be recalled that section 451(4) of the Code of Criminal Procedure Act provides as follows:

> *The provisions in this Code and of any other written law governing appeals to the Court of Appeal from judgments, sentences and orders of the High Court in cases tried without a jury shall, mutatis mutandis, apply to appeals to the Supreme Court, under sub section*

> *(3) from judgments, sentences and orders pronounced at a trial held before the High Court at Bar under section 450.*

The reference therein to the provisions of "this Code and of any other written law" applying to appeals to the Supreme Court clearly indicates that the Code of Criminal Procedure Act is the principal enactment governing the appellate jurisdiction of the Supreme Court in respect of judgments, sentences, and orders pronounced by a High Court at Bar.

Let me now consider the provisions in the Code of Criminal Procedure Act governing appeals to the Court of Appeal from judgments, sentences and orders of the High Court.

Code of Criminal Procedure Act

Chapter XXVIII of the Code of Criminal Procedure Act, comprising sections 316-368, deals with "Appeal, Reference and Revision".

Sections 331-352 primarily deal with appeals from the High Court to the Court of Appeal and applications for leave to appeal.

Section 316 of the Code of Criminal Procedure Act provides as follows:

> *An appeal shall not lie from any judgment or order of a criminal court except as provided for by this Code or by any other law for the time being in force.*

If I may reiterate for emphasis, section 316 makes it clear that an appeal shall not lie except as provided by the Code of Criminal Procedure Act or by any other written law. This underscores that the right of appeal is a creature of statute, and that the Code of Criminal Procedure Act constitutes one of the primary sources governing the creation and exercise of appellate jurisdiction.

Section 331 of the Code of Criminal Procedure Act reads as follows:

> *331(1) An appeal under this Chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar*

of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced:

Provided that a person in prison may lodge an appeal by stating within the time aforesaid to the jailer of the prison in which he is for the time being confined his desire to appeal and the grounds therefor and it shall thereupon be the duty of such jailer to prepare a petition of appeal and lodge it with the High Court where the conviction, sentence or order sought to be appealed against was pronounced.

(2) In computing the time within which an appeal may be preferred, the day on which the judgment or final order appealed against was pronounced shall be included, but all public holidays shall be excluded.

(3) If the time for preferring a petition of appeal expires on a day on which the office of the court is closed the appeal shall be deemed to be in time if such petition be preferred on the first day next thereafter on which such office is open.

(4) The petition of appeal shall be distinctly written on good and suitable paper, signed by the appellant or his attorney-at-law and dated and shall contain the following particulars—

(a) the sessions of the High Court where the conviction, sentence or order appealed against was pronounced,

(b) the number of the case,

(c) the names and addresses of the appellant and the respondent,

(d) the address to the Court of Appeal,

(e) the date of pronouncement of the judgment or order as the case may be sought to be appealed against and the nature of such pronouncement,

(f) a plain and concise statement of the grounds of appeal,

(g) the relief claimed.

(5) Stamps to the value of five rupees shall be affixed by such appellant but where the appeal is by the Attorney-General or from a sentence of death a stamp fee is not required.

Although section 331(1) of the Code of Criminal Procedure Act, read in isolation, appears to permit the lodging of a direct appeal or an application for leave to appeal against any conviction, sentence or order of the High Court, a closer reading of the section as a whole indicates otherwise. Subsection (2) expressly refers to "the judgment or final order appealed against", thereby indicating the nature of the orders contemplated in subsection (1). Further, subsections (3) to (5) deal exclusively with the procedural requirements governing the filing of a petition of appeal, and not an application for leave to appeal. Accordingly, when section 331 is read as a whole, it follows that the reference to "order" in subsection (1) is confined to a final order.

In *Ravi Karunanayake v. The Attorney General* (CA (PHC) APN 66/2010, CA Minutes of 26.05.2010), after the indictment was read out, the accused raised a jurisdictional objection, which was overruled by the High Court. The accused thereafter preferred an appeal against that order and moved to stay the proceedings in the High Court. While the High Court forwarded the petition of appeal to the Court of Appeal, it refused to stay the proceedings on the basis that the impugned order was not a final order. On appeal, De Abrew J. upheld the view taken by the High Court, holding that an appeal lies only against a final order and not against every order.

[The counsel] further contended that where a party dissatisfied with an order of trial court files a petition of appeal against such order, High Court Judge is bound to stay the proceedings and forward the original case record to the Court of Appeal. If this argument is correct, whenever a party is dissatisfied with an order of the trial court whether it is a final order or not files a petition of appeal, the

> *proceedings of the trial court must be stayed. If this procedure is adopted it will lead to an absurd situation and the public faith in the judicial system of this country will start eroding. Adoption of the said procedure will undoubtedly frustrate the smooth functioning of the trial court. Therefore, if a party dissatisfied with an order of the High Court files a petition of appeal, the order appealed against, in my view, must be a final order. This contention is strengthened by provisions of Section 331(2) of the CPC which contemplates of a final order.*

In *Saunderaraj and Another v. Attorney General* (CA/10/2011, CA Minutes of 05.08.2016), the appellants were indicted before the High Court, and at the commencement of the trial the defence challenged the voluntariness of a confession made to the Magistrate. Following an inquiry, the High Court ruled that the confession was voluntary. Malalgoda J., as President of the Court of Appeal, held that the appeal filed against that order was misconceived in law, as the impugned order was not a final order.

I must state that section 331(1) is not free from difficulty. It provides that "*an appeal under this Chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced.*" A literal reading of this subsection suggests that either a petition of appeal or an application for leave to appeal can be lodged with the Registrar of the High Court against any conviction, sentence or order of the High Court. However, there can be no dispute that, where a judgment is delivered by the High Court after trial, a party dissatisfied with that judgment shall file a final appeal and not an application for leave to appeal. Further, it is equally well established that an application for leave to appeal shall be lodged with the Registrar of the Court of Appeal and not with the Registrar of the High Court.

In terms of section 333(1), upon an appeal being accepted, all further proceedings in the case shall be stayed, and the said appeal, together with the record of the case and eight copies thereof, and the notes of evidence taken by the Judge, shall be forwarded as speedily as possible to the Court of Appeal.

This provision makes it clear that a final appeal by way of a petition of appeal and a leave to appeal by way of an application for leave to appeal are distinct concepts. An application for leave to appeal is not an appeal, but merely a pathway to an appeal. The applicant may or may not succeed at the threshold stage.

In fact, sections 340-342 of the Code of Criminal Procedure Act deal with applications for leave to appeal. Section 340 provides as follows:

> *An application for leave to appeal may be lodged by presenting it to the Registrar of the Court of Appeal within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced and the provisions of the proviso to subsection (1) of section 331 and subsections (2), (3) and (4) of that section shall mutatis mutandis apply to such application.*

Section 340 correctly provides that an application for leave to appeal shall be lodged by presenting it to the Registrar of the Court of Appeal, and not to the Registrar of the High Court, as section 331(1) suggests. It further provides that subsections (1) to (4) of section 331 shall apply, *mutatis mutandis*, to such an application for leave to appeal.

Section 341 provides that, upon an application for leave to appeal, the Court of Appeal may either grant leave to appeal or refuse the application.

Section 342 provides that, upon leave to appeal being granted, the Registrar of the Court of Appeal shall notify the High Court, and thereafter the provisions of section 333 shall apply, *mutatis mutandis*, to such application.

A Bench of Five Judges of this Court in *Tennakoonwela v. Director General of Commission to Investigate Allegations of Bribery or Corruption* (SC/TAB/4/2023, SC Minutes of 07.10.2024) observed at page 22:

> *It was held in the landmark case of Martin v. Wijewardena [1989] 2 Sri LR 409 that Article 138(1) only defines the jurisdiction of the Court of Appeal and does not create or confer new rights of appeal to persons. It is now well-settled law across jurisdictions that the right of appeal is a creature of statute, not an inherent or common law right. Such a right must be explicitly and expressly conferred by statute, not implied or inferred. As observed in The People's Bank v. Camillus Perera [2003] 2 Sri LR 358 at 360, if there is no right of appeal, unless expressly provided for, there is no right to make an application for leave to appeal, as the granting of such leave would effectively make the application a final appeal. What cannot be achieved directly, cannot be achieved indirectly.*

In view of the foregoing, it is clear that neither section 331 nor section 340 expressly confers on an accused a right to file a final appeal or an application for leave to appeal against interlocutory orders made by the High Court.

Permanent High Court at Bar

The right of appeal against judgments, sentences and orders pronounced by a Permanent High Court at Bar is similar to, but not identical with, that applicable to a High Court at Bar.

Section 12B of the Judicature Act makes provision for appeals from judgments, sentences and orders of a Permanent High Court at Bar.

> *12B(1) An appeal from any judgment, sentence or order pronounced at a trial held by a Permanent High Court at Bar under section 12A shall be made within twenty eight days from the pronouncement of such judgment, sentence or order to the Supreme Court and shall be*

heard by a Bench of not less than five Judges of that Court nominated by the Chief Justice. It shall be lawful for the Chief Justice to nominate himself to such Bench.

(2) The provisions of the Code of Criminal Procedure Act, No. 15 of 1979 and the Commission to Investigate Allegations of Bribery or Corruption Act, No. 19 of 1994, or of any other written law governing appeals to the Court of Appeal from judgments, sentences or orders of the High Court in cases tried without a Jury shall, mutatis mutandis, apply to the appeals to the Supreme Court under subsection (1) from judgments, sentences or orders pronounced at a trial held before the Permanent High Court at Bar under section 12A.

(3) Any appeal made under this section shall be heard and disposed of expeditiously.

According to section 12B of the Judicature Act, the provisions of the Code of Criminal Procedure Act, the Commission to Investigate Allegations of Bribery or Corruption Act, or of any other written law governing appeals to the Court of Appeal from judgments, sentences or orders of the High Court in cases tried without a Jury shall, *mutatis mutandis*, apply to the appeals to the Supreme Court from judgments, sentences or orders pronounced by the Permanent High Court at Bar.

I had occasion to consider, in some detail, the appellate procedure in respect of orders and judgments of the Permanent High Court at Bar in the decision of a Bench of Five Judges of this Court in *Tennakoonwela v. Director General of Commission to Investigate Allegations of Bribery or Corruption* (SC/TAB/4/2023, SC Minutes of 07.10.2024). In that case, the accused preferred a final appeal against an interlocutory order made by the Permanent High Court at Bar. Upon an analysis of the relevant law, the Five Judge Bench held that a final appeal does not lie against an interlocutory order pronounced by the Permanent High Court at Bar.

The Court held at page 11:

> *Although section 12B(1) of the Judicature Act appears to confer a right of appeal from any judgment, sentence or order pronounced by a Permanent High Court at Bar to the Supreme Court, it is important to emphasize that, as section 12B(2) states, such a right must be understood in light of other written laws governing appeals to the Court of Appeal from judgments, sentences or orders of the High Court in cases tried without a Jury. This includes the provisions of the Judicature Act, the Commission to Investigate Allegations of Bribery or Corruption Act, the Code of Criminal Procedure Act and the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. When so considered, it is the view of this Court, unless there is an amendment to explicitly reflect the intention of the legislature, the term "order" in section 12B(1) shall be understood, insofar as an accused is concerned, as referring to a final order having the effect of a final judgment, but does not include an interlocutory order.*

The Court further held at pages 14-15:

> *Sections 14, 15 and 16 of the Judicature Act do not provide for a right of appeal to an accused, whether by direct appeal or by leave of the Court of Appeal first had and obtained, against orders made by the High Court prior to conviction.*

Tennakoonwela was followed by Obeyesekere J. in *Director General of Commission to Investigate Allegations of Bribery or Corruption v. Ravi Karunanayake* (SC/APPEAL/61/2024, SC Minutes of 30.05.2025), in an appeal filed by the Director General of the Commission to Investigate Allegations of Bribery or Corruption, against an interlocutory order made by a Provincial High Court exercising original criminal jurisdiction in respect of an indictment filed under the Bribery Act.

In *Sameer v. Attorney-General* (SC/TAB/1/2025, SC Minutes of 01.12.2025), a Bench of Five Judges of this Court, following *Tennakoonwela*, held that an accused cannot file a final appeal against an interlocutory order pronounced by a High Court at Bar. In that case,

the incumbent Chief Justice (with the concurrence of the other four Justices) held:

> *Having considered the material before us and the submissions made by Counsel, we are of the view that the order appealed against, is not a final order. We are of the view that the reasoning in the above judgment [Tennakoonwela v. Director General of Commission to Investigate Allegations of Bribery or Corruption] will apply to Section 451(3) of the Code of Criminal Procedure Act. Accordingly, the word "order" found in Section 451(3) must be understood to mean a final order and not any interlocutory order.*
>
> *The order that is impugned in this appeal is an order admitting a confession made by the 11th Accused to an ASP after a voir dire inquiry. That is merely an interlocutory order made in the course of the trial. The 11th Accused-Appellant is yet to be either convicted or acquitted. Therefore, we are of the view that this is not an order against which an appeal lies in terms of Section 451(3) of the Code of Criminal Procedure Act.*

Bribery Act

In terms of section 13(2) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994, the Director General is vested with a right of appeal against a judgment, order or sentence of the High Court, identical to that of the Attorney-General.

> *13(2) Where proceedings are instituted in the High Court by an indictment signed by the Director-General, such Director-General shall have the right to appeal against a judgment, order or sentence of such High Court in all cases in which the Attorney-General would have had the right to appeal against such judgment, order or sentence had an indictment for such offence been presented to such Court by the Attorney-General. An officer appointed to assist the Commission shall be entitled to appear in any Court in support of such appeal.*

It follows that, in proceedings instituted on an indictment signed by the Director General, the right of appeal is co-extensive with that of the Attorney-General and shall be exercised in accordance with the same statutory framework.

Right of appeal of an aggrieved party

According to section 16(1) of the Judicature Act, a person aggrieved by a judgment, order or sentence of the High Court of Sri Lanka or of a High Court of the Provinces established under Article 154P of the Constitution, in criminal cases, may appeal to the Court of Appeal with the leave of that Court first had and obtained, in all cases in which the Attorney-General has a right of appeal under section 15 of the Judicature Act. This indicates that an aggrieved party is placed on par with the Attorney-General, subject to the condition that such party may exercise that right only with the leave of the Court of Appeal first had and obtained.

Section 16(2) provides that, for the purposes of subsection (1), "a person aggrieved" means any person whose person or property has been the subject of the alleged offence in respect of which the Attorney-General might have appealed, and, if such person is deceased, includes his or her next of kin, namely the surviving spouse, children, parents, further descendants, or brothers and sisters.

Subsection (3) of section 16 further provides that nothing in that section shall affect the power of the Court of Appeal to act by way of revision in an appropriate case.

As held at page 14 in *Tennakoonwela* and reiterated at page 27 in *Director General of Commission to Investigate Allegations of Bribery or Corruption v. Ravi Karunanayake (supra)*, the expression "a person aggrieved" in section 16 does not include an accused or a convicted person, as their right of appeal is specifically governed by section 14 of the Judicature Act.

An accused in a High Court at Bar in a disadvantageous position

As explained earlier, the Attorney-General, the Director General of the Commission to Investigate Allegations of Bribery or Corruption, and an aggrieved party are entitled to challenge orders of the High Court, whether final or interlocutory, either as of right or with leave, as the case may be. In contrast, an accused does not have a corresponding avenue to challenge interlocutory orders made in the course of proceedings before the High Court. However, this imbalance does not appear to have received serious consideration, perhaps because, in the absence of a right of appeal, a party may invoke the revisionary jurisdiction of the Court of Appeal.

As observed by G.P.S. De Silva J. (as he then was) in the Supreme Court decision of *Bakmeewewa, Authorised Officer of People's Bank v. Konarage Raja* [1989] 1 Sri LR 231 at 238:

> *The fact that there is no right of appeal does not mean that an aggrieved party is left without a remedy, for revision is available.*

Similarly, in *Attorney-General v. Gunawardena* [1996] 2 Sri LR 149, a Bench of Five Judges of this Court stated at pages 154-155:

> *But by its nature revision involves the supervision by superior Court of the proceedings of a subordinate Court to ensure the due and orderly administration of Justice and, prima facie, its exercise is peculiarly called for in cases in which no other remedy, such as an appeal is available. In fact, in the past this Court has interfered by the exercise of its powers of revision in a large number of cases in which no appeal lay.*

Although *Attorney-General v. Gunawardena* was reported in the Sri Lanka Law Reports in 1996, the decision itself was delivered in 1976, when the Administration of Justice Law No. 44 of 1973 was in operation. The case arose from a jury trial in the High Court, in which the accused

had been indicted for murder. Midway through the prosecution case, the trial Judge decided to direct the jury to return a verdict of not guilty on the ground that the evidence led up to that stage, as well as the evidence that could have been led through the remaining witnesses, did not disclose the commission of the offence by the accused. Before a verdict was made and an order of acquittal entered in the indictment, the Attorney-General invoked the revisionary jurisdiction of the Supreme Court. Upon a consideration of the facts and circumstances of the case, the Supreme Court set aside that order in the exercise of its revisionary jurisdiction. However, the Bench of Five Judges cautioned, at page 158, as follows:

> *We are accordingly of the view that this Court has the power to act in revision in this matter, if it is satisfied that adequate grounds exist for the exercise of such powers. We are not unmindful of the fact that, as there is no appeal in this matter, the power of revision must not be exercised by us so as to admit, by a side wind, an appeal. We think that there must be shown such clear and manifest error and/or material irregularity as calls for the intervention of the Court or prevent or remedy the breach of a fundamental rule relating to a criminal trial or the failure of justice.*

Historically, the Supreme Court exercised revisionary jurisdiction under the Courts Ordinance of 1889 and the Administration of Justice Law No. 44 of 1973, as the law then expressly provided for it. However, under the Constitution of 1978, the Supreme Court no longer possesses revisionary jurisdiction. As explained in *Francis v. Cooray* (SC/REVISION/2/2019, SC Minutes of 25.03.2022), referring to *Peoples Merchant PLC v. Udaya Saman Subasinghe* (SC/CHC/APPEAL/14/2014, SC Minutes of 23.06.2021) and *Mahesh Agri Exim (Pvt) Ltd v. Gaurav Imports (Pvt) Ltd and Others* (SC/REVISION/2/2013, SC Minutes of 30.07.2019), the revisionary jurisdiction previously vested in the Supreme Court was transferred to the Court of Appeal by Article 169 of the Constitution. This position has been reiterated in *Ajith Dissanayake v. Sri Lanka Savings*

Bank Limited (SC/REVISION/10/2016, SC Minutes of 22.09.2023). In *Ganeshanantham v. Vivienne Goonewardene and Three Others* [1984] 1 Sri LR 319 at 328, Samarakoon C.J. stated that the "*Supreme Court has no jurisdiction to act in revision in cases decided by itself*."

As I have explained, an accused has no right of appeal, whether by way of direct appeal or with leave obtained, against interlocutory orders made by the High Court to the Court of Appeal. This does not preclude an accused from invoking the revisionary jurisdiction of the Court of Appeal.

In the context of Trials at Bar, however, the position is different. On the one hand, the Court of Appeal has no jurisdiction over judgments and orders of a Trial at Bar, and on the other, the Supreme Court does not possess revisionary jurisdiction. This results in a lacuna in the legal framework governing remedies against interlocutory orders in relation to the rights of an accused.

There may be instances where an interlocutory order goes to the root of the case and causes serious prejudice to the accused, resulting in a failure of justice. In such circumstances, a remedy ought to be available without requiring the accused to await the conclusion of the trial and seek relief by way of a final appeal.

While a complete prohibition on challenges to interlocutory orders may ensure expedition in trials, it may also prove counterproductive. In this regard, the observations of De Sampayo J. in *Arumugam v. Thampu* (1912) 15 NLR 253 at 255 are apposite:

> *No doubt interlocutory appeals in the course of a trial, having the effect of suspending the proceedings, are generally to be deprecated, when the matter of such appeals may well be brought up at the final appeal. But where, as in this case, the point is not a mere incidental matter, but goes to the root of the case, an interlocutory appeal is convenient, especially if it would prevent*

> *necessary evidence being shut out, and thus obviate a second trial for the reception of such evidence.*

In these circumstances, I strongly recommend that the legislature take appropriate steps to address this issue. In particular, consideration may be given to amending section 451(3) of the Code of Criminal Procedure Act by introducing the word "final" before the word "order" and by making provision for appeals against other orders with leave first had and obtained. Upon such amendment, section 451(3) may read as follows:

> *451(3) Anything to the contrary in this Code or any other law notwithstanding, an appeal shall lie from any judgement, sentence or final order pronounced at a trial under section 450, and against any other order with leave first had and obtained. Such appeal shall be to the Supreme Court and shall be heard by a Bench of not less than five Judges of that Court nominated by the Chief Justice. It shall be lawful for the Chief Justice to nominate himself to such Bench.* (added parts underlined)

Final order

A "final order" in criminal proceedings is one which conclusively determines the rights and liabilities of the parties in respect of the charge or matter before court and brings the proceedings to an end. An interlocutory order, by contrast, is one made in the course of proceedings which does not finally determine those rights and liabilities but relates to procedural or incidental matters. However, what is decisive is not the form or label of the order, but its substance and legal effect.

In the Seven Judge Bench decision in this Court in the case of *Priyanthi Senanayake v. Jayantha and Others* [2017] 1 Sri LR 368 at 385, Justice Dep (as he then was) with the agreement of the other six justices held as follows:

> *Therefore appeals could be filed in respect of Judgments or orders which are final. In respect of other orders leave has to be first obtained. Therefore it appears that it is the judgment or order that matters and not the name given as judgment or order.*
>
> *In AG v. Piyasena 63 NLR 489 at 501 dealing with orders of discharge and acquittal it was held that what is material is not the use of the language but the effect of the order. In a criminal case if a person is acquitted and if tried again, the accused could plead autrefois acquit similar to res judicata in civil case. The acquittal is made on the merits of the case unlike an order of discharge. Therefore one has to consider the nature and the effect of the judgment or order in determining whether it is a final order or a judgment. The issue is whether the judgment or order finally determined the rights and liabilities of the parties.*

In my view, an order granting or refusing bail is an interlocutory order and not a final order, and accordingly a final appeal does not lie from such an order.

With the greatest respect, I am unable to agree with certain observations in *Anuruddha Ratwatte and Others v. Attorney-General* [2003] 2 Sri LR 39. While accepting the proposition that there is no right of appeal, in terms of section 451(3) of the Code of Criminal Procedure Act, against interlocutory orders, the Court nevertheless held, at page 43, that (a) an order refusing bail is a final order from which a final appeal lies, and (b) once a petition of appeal addressed to a superior court is presented to a court of first instance, that court cannot reject it.

Once a petition of appeal is tendered to the original court, that court need not mechanically transmit the original case record together with the petition of appeal to the superior court. If the law does not provide for a right of appeal, the original court can refuse the appeal by giving reasons. See *Pannikkiya v. Sedarama and Others* [1998] BLR 32.

Orders relating to bail made in the course of a trial—whether granting, refusing, cancelling or varying the conditions of bail—are interlocutory in nature and cannot be regarded as final orders from which a final appeal lies.

Experience shows that High Courts at Bar are ordinarily constituted to try complex and high-profile cases involving multiple accused charged with serious offences. If a right of appeal were available against each and every interlocutory order made in the course of such trials—such as orders granting or refusing bail, or permitting an accused to travel overseas—at the instance of different accused at different stages of the proceedings, the conduct of the trial would be seriously disrupted, and its expeditious conclusion would be rendered difficult, if not impossible.

According to section 450(5) of the Code of Criminal Procedure Act and section 12A(5) of the Judicature Act, trials before a High Court at Bar and a Permanent High Court at Bar are required to be conducted from day to day and concluded expeditiously. That objective would be rendered illusory if courts were to permit final appeals against interlocutory orders.

Such an interpretation may also lead to an abuse of the process of court. In terms of section 333(1) of the Code of Criminal Procedure Act, once an appeal is accepted, all further proceedings in the case are stayed, and the appeal, together with the case record and eight copies thereof, must be transmitted to the Court of Appeal as expeditiously as possible.

Interlocutory orders

Courts have consistently discouraged applications for leave to appeal against interlocutory orders, save in exceptional circumstances where such orders go to the root of the case.

It is well established that every litigant is entitled, upon a final appeal, to invite the appellate court to review any interlocutory order alleged to

have been wrongly made against him, notwithstanding that such order was not challenged at the time it was made. (*Abubakker Lebbe v. Ismail Lebbe* (1908) 11 NLR 309 at 312-313, *Perera v. Battaglia* (1956) 58 NLR 447 at 449, *Mudiyanse v. Punchi Banda Ranaweera* (1975) 77 NLR 501 at 508-509, *Anushka Wethasinghe v. Nimal Weerakkody* [1981] 2 Sri LR 423 at 426, *Cornel & Company Ltd v. Mitsui and Company Ltd* [2000] 1 Sri LR 57 at 76, *Dominic v. Jeevan Kumaratunga* [2011] BLR 503 at 509)

As stated earlier, in terms of section 342 of the Code of Criminal Procedure Act, upon leave to appeal being granted, the Registrar of the Court of Appeal is required to notify the High Court, whereupon the provisions of section 333 become applicable, *mutatis mutandis*, to such application. This underscores the significant impact that the granting of leave to appeal has on the progress of the trial. Further, in terms of section 345 of the Code, once leave is granted, the application is elevated to the status of a final appeal.

As I have stated, under the repealed Administration of Justice Law, the Supreme Court was vested with revisionary jurisdiction. But a Five Judge Bench of this Court in *Attorney General v. Gunawardena* [1996] 2 Sri LR 149 at 164-165 emphasised that the Court will not entertain applications for revision that would interrupt a High Court trial.

> *We wish to state that this Court will not exercise its powers of revision in regard to proceedings of a High Court, save in very exceptional circumstances. In particular, this Court will not entertain an application which will have the effect of interrupting the proceedings of a trial in a High Court. For example, no application will be entertained by this Court at the instance of either the prosecution or the defence in respect of an order made by a High Court as to the admission or rejection of evidence. Generally, in respect of all matters which take place during the course of a trial, the parties should await the final verdict as an acquittal or a*

> *conviction, as the case may be, may render unnecessary an application for the intervention by this Court.*

In this regard, the observations of Lord Templeman in the House of Lords decision of *Ashmore v. Corporation of Lloyd's* [1992] 2 All ER 486 at 493 assume particular significance, as they caution against the raising of multiple unmeritorious arguments and emphasise that interlocutory orders of a trial judge ought not to be lightly disturbed on appeal.

> *The parties and particularly their legal advisers in any litigation are under a duty to co-operate with the court by chronological, brief and consistent pleadings which define the issues and leave the judge to draw his own conclusions about the merits when he hears the case. It is the duty of counsel to assist the judge by simplification and concentration and not to advance a multitude of ingenious arguments in the hope that out of ten bad points the judge will be capable of fashioning a winner. In nearly all cases the correct procedure works perfectly well. But there has been a tendency in some cases for legal advisers, pressed by their clients, to make every point conceivable and inconceivable without judgment or discrimination. In Banque Financiere de la Cite SA v. Westgate Insurance Co Ltd [1990] 2 All ER 947 at 959, [1991] 2 AC 249 at 280–281 I warned against proceedings in which all or some of the litigants indulge in over-elaboration causing difficulties to judges at all levels in the achievement of a just result. I also said that the appellate court should be reluctant to entertain complaints about a judge who controls the conduct of proceedings and limits the time and scope of evidence and argument. So too, where a judge, for reasons which are not plainly wrong, makes an interlocutory decision or makes a decision in the course of a trial the decision should be respected by the parties and if not respected should be upheld by an appellate court unless the judge was plainly wrong.*

Appeal before the Supreme Court

I have already stated that, from the judgment of the Court of Appeal, the Attorney-General preferred this application for special leave to appeal in terms of Article 128(2) of the Constitution. As noted at the outset of this judgment, this Court considered the application as a matter of public importance. The preliminary objections raised in respect of the maintainability of the application for special leave to appeal against the impugned judgment of the Court of Appeal were overruled.

Upon an extensive hearing, this Court granted leave to appeal on thirteen questions of law, including two questions raised by the Court itself at the conclusion of argument, after affording the parties an opportunity to address the Court thereon by way of post-argument written submissions, in compliance with the requirements of natural justice.

In the light of the matters discussed thus far, I now proceed to answer some of the questions of law. Although the questions of law have been set out at the commencement of this judgment, they are, for convenience, reproduced here together with the answers.

(i) Q. Did the Court of Appeal err in law, in the exercise of its discretionary jurisdiction under Article 138 of the Constitution, by summarily dismissing the application without affording an opportunity of being heard when an important question of law pertaining to imputation of criminal liability on a company under the Offences against the Public Property Act was raised?
A. No.

(ii) Q. Did the Court of Appeal err in law by ill-defining its own jurisdiction under Article 138 of the Constitution?
A. No.

(iii) Q. Did the Court of Appeal err in law in the process by wrongly assuming the exclusive jurisdiction of constitutional interpretation vested in Your Lordships' Court in terms of Article 125 of the Constitution?

A. No.

(iv) Q. Did the Court of Appeal err in law by holding that the Attorney-General had a right of appeal against an Order of Discharge contrary to Section 451(4) of the Code of Criminal Procedure Act (CCPA) read with Section 15(a)(i) of the Judicature Act?

A. No.

(v) Q. Did the Court of Appeal err in law by deciding that the Order of the High Court-at-Bar dated 06 December 2021 was made 'at a trial' contrary to the provisions of Section 451(3) read with Section 450(5)(a) of the CCPA?

A. No.

(vi) Q. Did the Court of Appeal err in law by abdicating its jurisdiction when an order of a High Court-at-Bar is subject to review by the Court of Appeal in the exercise of its jurisdiction in terms of Article 138 read with Article 146 (2) (i) (a) of the Constitution?

A. No.

(vii) Q. Do the words "at a trial under Section 450" as contained in Section 451 of the Code of Criminal Procedure refer to a 'type of trial' as opposed to a 'stage of trial'?

A. Yes.

(viii) Q. If the said reference is for a 'type of trial', should the Petitioner's appeal be dismissed?

A. No.

(ix) Q. Is the impugned Order of the High Court appealable?

A. Yes.

(x) Q. If so, was it competent for the Petitioner to maintain the application in revision, in view of the averments in paragraph 40 of the Petition to the Court of Appeal dated 31.12.2021?

A. No.

In the light of the answers given above, this appeal is liable to be dismissed, save in respect of question (viii).

However, there remain three further questions of law to be answered, namely questions (xi) and (xii), which were raised by the Court itself, and question (xiii), which was raised as a consequential issue raised by the accused.

(xi) Is the Order made by the High Court at bar on 06.12.2021 marked X1 a lawful Order?
(xii) In any case, can this Court review the said High Court Order dated 06.12.2021 in these proceedings?
(xiii) Is the Complainant-Petitioner-Appellant entitled to obtain relief not prayed for in the Petition?

I will consider those three questions separately, first question (xii), secondly question (xi), and thirdly question (xiii).

In order to answer question (xii), it is necessary to examine the appellate jurisdiction of this Court.

Appellate jurisdiction of the Supreme Court

According to Article 118(c) of the Constitution, the Supreme Court of the Republic of Sri Lanka shall be the highest and final superior Court of record in the Republic. In *Wadigamangawa and Others v. Wimalasuriya* [1981] 1 Sri LR 287 at 303, Wanasundera J. stated that the provisions relating to the exercise of appellate jurisdiction of the Supreme Court, "*namely the manner of appealing and the nature of the powers of the Supreme Court in regard to such appeals, are found in Articles 127 and 128 of the Constitution.*" Articles 127 and 128 of the Constitution are couched in broad terms granting "the plenitude of power" to the Supreme Court.

Article 127 of the Constitution delineates the scope of the appellate jurisdiction of the Supreme Court. In terms of Article 127(1), the

appellate jurisdiction of the Supreme Court extends, subject only to the Constitution, for the correction of all errors in fact or in law, whether civil or criminal, which shall be committed by any Court in the Republic, and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.

Article 127 reads as follows:

> *127(1) The Supreme Court shall, subject to the Constitution, be the final Court of civil and criminal appellate jurisdiction for and within the Republic of Sri Lanka for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance, tribunal or other institution and the judgments and orders of the Supreme Court shall in all cases be final and conclusive in all such matters.*
>
> *(2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree, or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court and it may affirm, reverse or vary any such order, judgement, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require and may also call for and admit fresh or additional evidence if the interests of justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance.*

Article 128 of the Constitution deals with the right of appeal to the Supreme Court. Article 128(1) and (2) read as follows:

> *128(1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to*

appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings.

(2) The Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree, or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided that the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance.

In terms of Article 128(1) and (2), an appeal does not lie directly to the Supreme Court without first obtaining leave to appeal.

However, in terms of Article 128(4), "*An appeal shall lie directly to the Supreme Court on any matter and in the manner specifically provided for by any other law passed by Parliament.*" For instance, in terms of section 5(1) of High Court of the Provinces (Special Provisions) Act No. 10 of 1996, a party dissatisfied with the judgment of the Commercial High Court in the exercise of its original jurisdiction can as of right file a direct appeal to the Supreme Court.

Avenues

There are several avenues to invoke the appellate jurisdiction of the Supreme Court.

The first avenue is through Article 128(1) of the Constitution. According to Article 128(1), leave can be obtained from the Court of Appeal against any final order, judgment, decree or sentence of the Court of Appeal. The Court of Appeal can grant leave to appeal *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings only if the question

is a substantive question of law. If the Court of Appeal decides to grant leave to appeal *ex mero motu*, it was held in *Mendis v. Abeysinghe* [1989] 2 Sri LR 262 at 265-266 that there is no necessity for the Court of Appeal to hear the parties on that point.

It is also noteworthy that leave to appeal may be sought by any aggrieved party, not only by a party to the action.

In *Mendis v. Dublin De Silva* [1990] 2 Sri LR 249, an objection was taken before the Supreme Court in an appeal against a partition judgment that the appellant was not an aggrieved person within the meaning of Article 128(1) of the Constitution. Dheeraratne J. at page 251, upheld the objection and cited with approval *In re Sidebottam* (1880) 14 Ch. Div. 458 at 465 where James L.J. stated:

> *A person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which wrongly deprived him of something, or wrongly affected his title to something.*

In *Bandaranaike v. Jagathsena* [1984] 2 Sri LR 397, Colin-Thome J. held at 406 that the wide discretion vested in the Supreme Court allows it to entertain appeals even from persons who were not parties to the proceedings before the Court of Appeal.

> *Under Article 128(2), the Supreme Court has a wide discretion to grant special leave to appeal to the Supreme Court from a judgment of the Court of Appeal where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court. Under Article 128(2) you do not have to be a party in the original case.*

The second avenue for invoking the appellate jurisdiction of the Supreme Court is articulated in Article 128(2) of the Constitution, which is couched in more liberal terms than Article 128(1), as evidenced by several key aspects.

The Court of Appeal can grant leave to appeal, but the Supreme Court can grant special leave to appeal.

The Court of Appeal can grant leave to appeal *inter alia* against any final order of the Court of Appeal, but the Supreme Court can grant special leave to appeal against any final or interlocutory order of the Court of Appeal.

The Court of Appeal can grant leave to appeal on a substantive question of law, but the jurisdiction of the Supreme Court is not so circumscribed.

The expressions "*any matter or proceedings, whether civil or criminal*" and "*the case or matter*" used in Article 128 are of wide amplitude and serve to enlarge the jurisdiction of the Supreme Court. They enable this Court, in an appropriate case, to look beyond the facts pleaded and the reliefs sought in the application for special leave to appeal. As Samarakoon C.J. observed in *Wadigamangawa* at page 294, "*these are of wider import than a civil suit or action,*" and further observed at page 301:

> *It is to be noted that Article 118 states that "the Supreme Court shall be the highest and final superior court of record and shall exercise final appellate jurisdiction." In my view, the Constitution intended the dichotomy of "civil and criminal jurisdiction" to be exhaustive and that between them embraced all proceedings of whatever nature.*

Gunawardena J. in *Kulatilake v. Karunaratne and Others* [1989] 1 Sri LR 303 at 305 stated that "*The words 'case' or 'matter', in my view enlarges the scope of the power of the Supreme Court to grant special leave to appeal even other than from a "final order, judgment, decree or sentence of the Court of Appeal."*

Article 128(2) comprises three parts:

(a) the first part of Article 128(2);
(b) the second part of Article 128(2); and
(c) the proviso.

Under Article 128(2), the Supreme Court can grant special leave to appeal:

(a) where the Court of Appeal has refused to grant leave to appeal to the Supreme Court;

or

(b) where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court.

The coordinating conjunction used is "or", and not "and", indicating that (a) and (b) set out above are distinct and independent grounds. Had it been intended that both conditions be satisfied cumulatively as part of a single process, the drafter would have employed the conjunction "and" instead of "or".

The term used in (b) above is "fit for review", which is different from "revision" or "revisionary jurisdiction" as used in other Articles including Article 138 of the Constitution. The Sinhala term for "review" as used in Article 128(2) is "සමාලෝචනය", as opposed to "ප්‍රතිශෝධනය" or "පරිශෝධනය", which means "revision".

The fact that "revision" is different from "review" is made clear by adverting to section 51(1) of the Courts Ordinance, No. 1 of 1889, which reads as follows:

> *It shall be lawful for the Chief Justice to make order in writing in respect of any case brought before the Supreme Court by way of appeal,* ***review or revision****, that it shall be heard by and before all the Judges of such Court or by and before any five or more of such Judges named in the order, but so that the Chief Justice shall always be one of such five or more Judges. The decision of such Judges when unanimous, or of the majority of them in case of any difference of opinion, shall in all cases be deemed and taken to be the judgment of the Supreme Court.*

As I have already stated, although the Supreme Court exercised revisionary jurisdiction under the Courts Ordinance of 1889 and the Administration of Justice Law No. 44 of 1973, under the present Constitution of 1978 the Supreme Court no longer possesses such jurisdiction. This position has been affirmed in subsequent decisions.

The third avenue to seek leave to appeal (not special leave to appeal) from the Supreme Court is embodied in the proviso to Article 128(2) of the Constitution, which provides that "*the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance*."

There is a notable difference between the language used in Article 128(2) and the proviso to Article 128(2) wherein the proviso is couched in peremptory terms whereas the main Article is not. Article 128(2) commences with "*The Supreme Court may, in its discretion, grant special leave to appeal....*" whereas the proviso states "*the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance*." According to the proviso, if the Supreme Court is satisfied that the question to be decided is of public or general importance, the Court has no discretion but to grant leave to appeal.

In *Attorney General v. Bandaranayake and Others* (SC/APPEAL/67/2013, SC Minutes of 28.06.2013 at page 12), Marsoof J. stated that "*the Supreme Court has a broad discretion to grant special leave to appeal where it considers the matter fit for review by it, except where as provided in the proviso to Article 128(2), it is satisfied that the matter is of public or general importance, in which event the Supreme Court is bound to grant leave to appeal.*"

In *Ranbanda v. People's Bank* (SC/SPL/LA/229/11, SC Minutes of 17.07.2014 at 8), Dep J. (as he then was) observed:

> *However it should be observed that there is a subtle difference between a leave to appeal and special leave to appeal application. High Court could grant leave to appeal if it involves a substantial question of law. On the other hand though granting of special leave to appeal by the Supreme Court is discretionary, it has a wide discretion. The criterion is that the matter or case in the opinion of the Supreme Court is fit for review by the Supreme Court. Further the Supreme Court shall grant leave in every matter of proceeding in which it is satisfied that the question to be decided is of public or general importance.*

However, the proviso has not always been treated as a distinct and independent avenue. There appears to be a tendency to subsume it within the second avenue by bringing it within the broader category of matters "fit for review". For example, in *Bandaranaike v. Jagathsena* (supra) at page 406, this Court held that where there are questions of law and fact to be decided which are of public or general importance, the matter would be regarded as one fit for review by the Supreme Court.

Scope and ambit

The scope and ambit of Article 128 have been the subject of several celebrated decisions. These decisions underscore the amplitude of the powers vested in the Supreme Court in the exercise of its appellate jurisdiction as the final Court in the Republic.

In *Chairman, Public Service Commission v. Wickramasinghe and Others* (SC/APPEAL/29/2022, SC Minutes of 23.02.2023), Surasena J. (as the incumbent Chief Justice then was) elucidated the scheme of Article 128, contrasting the restrictive scope of the Court of Appeal in granting leave to appeal with the expansive scope of the Supreme Court in that regard in the following manner:

> *Article 128(2) of the Constitution has also conferred jurisdiction on the Supreme Court to grant Special Leave to Appeal to the Supreme*

Court. Closer comparison of Article 128(1) with Article 128(2) of the Constitution clearly reveals that the jurisdiction conferred by the Constitution on the Court of Appeal to grant leave to appeal to the Supreme Court is a restricted jurisdiction than that conferred on the Supreme Court to grant Special Leave to Appeal to the Supreme Court. This is manifest from the sections themselves. Article 128(1) has only conferred Court of Appeal with jurisdiction to grant leave to appeal to the Supreme Court only from any final order of the Court of Appeal whereas Article 128(2) has conferred on the Supreme Court much wider jurisdiction to grant Special Leave to Appeal both from any final or interlocutory order of the Court of Appeal. The fact that Article 128(2) has included 'from any final or interlocutory order' and the fact that Article 128(1) has included only 'any final order' and had dropped 'or interlocutory order' is significant. This means that the Court of Appeal has jurisdiction to grant leave to appeal to the Supreme Court only in respect of any final order it has made as per Article 128(2). This also means that the Court of Appeal has no jurisdiction to grant leave to appeal to the Supreme Court from any interlocutory order it has made. It is only the Supreme Court which has jurisdiction to grant Special Leave to Appeal from any interlocutory order made by the Court of Appeal.

This position finds further support in *Kulatileke v. Karunaratne and Others* [1989] 1 Sri LR 303 at 305, where Gunawardena J. considered the scheme of Article 128 and clarified the wider ambit of the Supreme Court's jurisdiction under paragraph (2):

In Article 128(1) where provision is made for leave to appeal to the Supreme Court to be granted by the Court of Appeal the words used are, "final order, judgment, decree or sentence of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a substantial question of law." This in my view restricts the power of the Court of Appeal to grant leave to appeal only where substantial questions of law arise from such, "final order, judgment,

decree or sentence." This becomes clear when one examines Article 128(2) where the power of the Supreme Court to grant special leave is dealt with. The amplitude of the provisions there appears to be much wider. The said sub-section provides for special leave to appeal to be granted, "from any final or interlocutory order, judgment, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal." In addition, and importantly, the Supreme Court is vested with the power to grant such special leave "where in the opinion of the Supreme Court, a case or matter is fit for review by the Supreme Court." The words 'case' or 'matter', in my view enlarges the scope of the power of the Supreme Court to grant special leave to appeal even other than from a "final order, judgment, decree or sentence of the Court of Appeal." Furthermore, the proviso to the said article states that "the Supreme Court shall grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance." It is therefore seen that the power vested in the Supreme Court to grant special leave to appeal is more extensive than the power granted to the Court of Appeal to permit leave to appeal to the Supreme Court.

Guidance on the construction of Article 128 is found in *Attorney General v. Bandaranayake and Others* (SC/APPEAL/67/2013, SC Minutes of 28.06.2013 at 12), where Marsoof J. summarised the key features of Article 128 in the following terms:

Article 128(1) of the Constitution of Sri Lanka seeks to confer the power to the Court of Appeal to grant leave to appeal ex mero motu or at the instance of any aggrieved party to any matter or proceedings before it, from any final order, Judgment, decree or sentence of that Court in any matter civil or criminal, which involves a substantial question of law. It is manifest that Article 128(2) differs from 128(1) in many ways. Firstly, the Supreme Court may grant special leave to appeal in terms of 128(2) even where the Court of

> *Appeal has refused to grant leave to appeal or where regardless of whether the Court of Appeal has allowed or refused leave, the Supreme Court is of the opinion the matter is fit for review by the Supreme Court. Secondly, Article 128(2) contemplates the grant of special leave to appeal even against interlocutory orders of the Court of Appeal, which did not fall within the purview of Article 128(1). Thirdly, not only an "aggrieved party", but any person whomsoever who can satisfy Supreme Court that the matter is fit for review by it, may succeed in obtaining special leave to appeal under Article 128(2) of the Constitution. Fourthly, the Supreme Court has a broad discretion to grant special leave to appeal where it considers the matter fit for review by it, except where as provided in the proviso to Article 128(2), it is satisfied that the matter is of public or general importance, in which event the Supreme Court is bound to grant leave to appeal. In my view, the submission of learned Counsel for the 11th and 12th Respondents that Article 128(2) should be read in the light of Article 128(1) which confines the right to appeal to an "aggrieved party" is bereft of merit.*

The construction placed by Sharvananda J. (as he then was) in several judgments following the promulgation of the 1978 Constitution is both illuminating and instructive.

In *Sri Lanka Ports Authority v. Pieris* [1981] 1 Sri LR 101 at 108, Sharvananda J., while elaborating on the extensive scope of the Supreme Court's appellate jurisdiction, observed, *inter alia*, that leave to appeal is the key which unlocks the door to the Supreme Court and there is no prohibition inhibiting this Court from exercising its appellate jurisdiction once that jurisdiction is duly invoked:

> *Article 128(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka provides that an appeal shall lie to the Supreme Court from any final order or judgment of the Court of Appeal in any matter or proceedings, whether civil or criminal, which involves a*

substantial question of law if the Court of Appeal grants leave to the Supreme Court ex mero moto, or at the instance of any aggrieved party to such matter or proceeding. Article 128(2) provides for the Supreme Court granting special leave to appeal to this Court.

Article 127 spells the appellate jurisdiction of this Court. The appellate jurisdiction extends to the correction of all errors in fact and/or in law which shall be committed by the Court of Appeal or any court of first instance. There is no provision inhibiting this Court from exercising its appellate jurisdiction once that jurisdiction is invoked. On reading Articles 127 and 128 together, it would appear that once leave to appeal is granted by the Supreme Court or the Court of Appeal and this Court is seised of the appeal, the jurisdiction of this Court to correct all errors in fact or in law which had been committed by the Court of Appeal or court of first instance is not limited but is exhaustive. Leave to appeal is the key which unlocks the door into the Supreme Court, and once a litigant has passed through the door, he is free to invoke the appellate jurisdiction of this Court "for the correction of all errors in fact and/or in law which had been committed by the Court of Appeal or any court of first instance".

In *Albert v. Veeriahpillai* [1981] 1 Sri LR 110 at 113, Sharvananda J. (with the concurrence of Samarakoon C.J. and Wanasundera J.), while reaffirming the breadth of the Supreme Court's appellate jurisdiction, observed that "*the appellate jurisdiction of this Court is very wide in its amplitude, as it should be, it being the final Court of Appeal*", and further held that once leave is granted, "*it is competent for this Court to permit parties to bring to its notice errors of law or of fact and raise new contentions or new points of law, or suo motu to raise them if there is proper foundation for them in the record.*"

Articles 118 of the constitution provides that "the Supreme Court shall be the highest and final court of record in the Republic and

shall, subject to the provisions of the Constitution, exercise, inter alia, final appellate jurisdiction." Appellate jurisdiction may be exercised by way of appeal or revision. Article 128 of the Constitution prescribes how the appellate jurisdiction of this Court is invoked by way of appeal. The leave of this Court or of the Court of Appeal is a sine qua non for a party to come to this Court by way of appeal. But once leave is granted, on whatever ground it be, the appeal is before this court and this Court is seised of the appeal. Its appellate jurisdiction extends to the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance (vide Art. 127 of the Constitution). Therefore, it is competent for this Court to permit parties to bring to its notice errors of law or of fact and raise new contentions or new points of law, or suo motu to raise them if there is proper foundation for them in the record. Thus, this Court will allow an appellant to urge before it grounds of appeal not set out in the application for leave if the material on record warrants the determination of same. This Court is not hamstrung by the fact that the Court of Appeal had not granted leave to appeal on the ground urged before the Supreme Court. This Court however, doing justice between the parties, may not permit a party to raise a new point if the other party has had no proper notice of the new ground, or would suffer grave prejudice by the belated stage at which it is raised. The appellate jurisdiction of this Court is very wide in its amplitude, as it should be, it being the final Court of Appeal. The narrow construction contended for by Counsel erodes its width and usefulness. What I stated in Sri Lanka Ports Authority v. Peiris [1981] 1 Sri LR 101 is apposite in this context: "Leave to appeal is the key which unlocks the door to the Supreme Court, and once the litigant has passed through that door, he is free to invoke the appellate jurisdiction of this Court for the correction of all errors in fact and/or in law which have been committed by the Court of Appeal or any Court of First Instance. This

> *Court, however, has the discretion to impose reasonable limits to that freedom."*

Citing with approval the judgments of Sharvananda J. in *Sri Lanka Ports Authority v. Pieris*, *Albert v. Veeriahpillai*, and the powers conferred on the Supreme Court by Article 127 of the Constitution, Aluwihare J. in *Karunaratne v. Attorney General* [2020] 3 Sri LR 273 at 295 held:

> *Thus, it is evident that there are clear precedents for this court to act uninhibited suo motu in the interest of justice where the Court of Appeal or the court of first instance has clearly misdirected itself which has resulted in a serious miscarriage of justice, as in the present case.*

Identification of questions of law and Supreme Court Rules

At this juncture, it may be necessary to briefly refer to the procedure adopted by the Supreme Court in regulating the appellate procedure. Prior to the Supreme Court Rules of 1990 came into force, the practice and procedure relating to special leave to appeal and leave to appeal were governed by the Supreme Court Rules of 1978, published in the Gazette Extraordinary No. 9/10 of 08.11.1978, which were repealed later.

Under Article 136(1) of the Constitution, the Chief Justice, along with three Judges of the Supreme Court nominated by him, may make rules regulating the practice and procedure of the Supreme Court, subject to the Constitution and any law. These rules may include: (a) procedures for hearing appeals, terms for entertaining appeals to the Supreme Court and Court of Appeal, and provisions for dismissing appeals for non-compliance; and (b) procedures for matters brought before the Supreme Court and Court of Appeal, including time limits and dismissal for failure to comply with the rules.

It is pertinent to note that following the promulgation of the Supreme Court Rules of 1990, when leave is granted by either the Supreme Court

or the Court of Appeal, the questions of law must be specified in the order granting leave to appeal or special leave to appeal (see Rules 11 and 19 of the Supreme Court Rules of 1990). This new requirement, which did not exist previously, has streamlined and regulated the appellate procedure in the Supreme Court, as submissions of the counsel and the reasoning of the Court are now focused on the specific questions of law for which leave was granted.

The questions of law raised in the Supreme Court are similar to the issues raised in the trial Court. In the District Court, it is the duty of the judge to raise issues on which the right decision of the case appears to the Court to depend. The Court now does this at the pre-trial conference.

Section 149 of the Civil Procedure Code states that "*The court may, at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit.*" However, as this court stated in *Podimenike v. Sanjeewani* (SC/APPEAL/180/2011, SC Minutes of 21.11.2022), such discretion must be exercised with caution, particularly where the Judge, *ex mero motu*, raises an issue unknown to both parties at the stage of writing the judgment. The court further observed in that case that in such situation the Judge must give a hearing to the parties before deciding on the new issue.

Likewise, as the apex court of the country and the final arbiter of the rights of the people, once leave is granted, there is no prohibition on the Supreme Court identifying the crux of a matter and formulating it as a question of law at any stage of the proceedings, provided that the parties are afforded a reasonable opportunity to address the Court thereon, in order to assist in the due administration of justice.

Even if the Court anticipates that the question of law raised may be answered against the petitioner, it may still grant leave to appeal if it deems that the question is of significant importance and should be authoritatively resolved by the apex court. In *Wickremasinghe and Others*

v. Cornel Perera and Others [1996] 1 Sri LR 294, Mark Fernando J. observed at 299-300:

> *Leave to appeal to the Supreme Court can be granted either by the Court of Appeal under Article 128(1) or by this Court under Article 128(2). Counsel argued that when the Court of Appeal granted leave, it did so in the exercise of its appellate jurisdiction. But that seems misconceived. Under Article 138 the appellate jurisdiction of the Court of Appeal is to correct errors by inferior Courts. When it grants leave, it does not purport to correct errors either of inferior Courts or of its own. Obtaining leave is a condition precedent to invoking the appellate jurisdiction of this Court, and the grant of leave only involves considering whether the matter is fit for review. It is thus distinct from the appellate jurisdiction of the Court of Appeal. In the same way, when the Supreme Court grants leave under Article 128(2), it exercises a jurisdiction which is anterior to and distinct from its appellate jurisdiction. The proceedings in respect of leave are thus distinct from the appeal itself. In any event, even if in a broader sense they can loosely be regarded as being part of the appellate jurisdiction, yet it has two distinct stages, involving two distinct issues: the first is whether leave ought to be granted, and that depends on whether the question is important enough to merit adjudication by the highest Court, and the second is, at the appeal stage, to find the right answer to that question. Thus it may happen that even if this Court thinks that probably the question raised must be answered adversely to the petitioner, yet the Court may grant leave because it is in the public interest that that question should be finally and authoritatively decided by this Court.*

The Constitution is a living instrument

In general terms, the principles governing the interpretation of a Constitution differ from those applicable to ordinary statutes. A

Constitution is not to be construed in a narrow or technical manner, but in a broad and purposive spirit, consistent with its character as the supreme law. On this subject, Samarakoon C.J., in *Wadigamangawa*, observed at 293, echoing the words of Lord Wilberforce in *Minister of Home Affairs v. Fisher* (1973) 3 All ER 21 at 26, that a Constitution is a document *sui generis*, "*calling for principles of interpretation of its own, suitable to its character…, without necessary acceptance of all the presumptions that are relevant to legislation of private law*."

Authoritative commentary also emphasises this approach. N.S. Bindra in *Interpretation of Statutes*, 13th Edition (2023), at page 656, states that constitutional provisions must be understood in a purposive and object-oriented manner. A Constitution is not merely a formal legal instrument, but a living framework for the governance of the people, and its interpretation must take into account the context, purpose, and the underlying democratic values it seeks to advance. Accordingly, courts ought not to adopt an interpretation that hinders progress or impedes social integration.

Similarly, in *Union of India v. Naveen Jindal* (AIR 2004 SC 1559), the Supreme Court of India recognised that a Constitution is a "living organ" whose interpretation may evolve over time to meet changing societal conditions. The Court emphasised that constitutional interpretation must take into account experience, evolving norms, and the need for flexibility.

However, the characterisation of the Constitution as a "living instrument" does not mean that its interpretation is left to the subjective preferences or individual inclinations of judges. Judicial interpretation must remain anchored to the text, structure, and underlying principles of the Constitution. While the Constitution is dynamic and capable of growth, its interpretation must be principled, coherent, and consistent with the constitutional scheme, giving effect to its language and purpose while enabling it to operate effectively in changing circumstances.

Supreme Court does not have unfettered discretion or unlimited power

No power or discretion is unlimited, unbridled or unfettered. This is equally applicable to the Supreme Court as well. In the seminal case of *Roberts v. Hopwood* (1925) AC 578, Lord Wrenbury at 613 stated that "*A discretion does not empower a man to do what he likes merely because he is minded to do so—he must in the exercise of his discretion do not what he likes but what he ought.*" The Supreme Court has set limits to itself within which to exercise its wide power.

As William Shakespeare reminds us in *Measure for Measure*, "*it is excellent to have a giant's strength; but it is tyrannous to use it like a giant.*"

In *Narthupana Tea and Rubber Estates Ltd v. Perera* (1962) 66 NLR 135 at 138, what Sansoni J. (as he then was) observed in relation to the language employed by the trial judge in that case is equally apposite to judges of this Court.

> *Chief Justice Stone of the Supreme Court of America once said: "Precisely because judicial power is unfettered, judicial responsibility should be discharged with finer conscience and humility than that of any other agency of Government." The ampler the power, the greater the care with which it should be exercised. And the very circumstance that absolute privilege attaches to judicial pronouncements imposes a correspondingly high obligation on a judge to be guarded and restrained in his comments, and to refrain from needless invective.*

Article 136 of the Constitution of India stands as a striking illustration of the breadth of appellate jurisdiction that may be conferred on a superior court. It vests in the Supreme Court of India a plenary and residuary power of appeal over all courts and tribunals within the territory of India.

> *136(1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India.*

The amplitude of this jurisdiction was described in emphatic terms by the Supreme Court of India in *Durga Shankar Mehta v. Thakur Raghuraj Singh* (AIR 1954 SC 520), where the Court observed:

> *The powers given by Article 136 of the Constitution however are in the nature of special or residuary powers which are exercisable outside the purview of ordinary law, in cases where the needs of justice demand interference by the Supreme Court of the land. The article itself is worded in the widest terms possible. It vests in the Supreme Court a plenary jurisdiction in the matter of entertaining and hearing appeals, by granting of special leave, against any kind of judgment or order made by a Court or Tribunal in any cause or matter and the powers could be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. The Constitution for the best of reasons did not choose to fetter or circumscribe the powers exercisable under this article in any way.*

However, the width of the power has been tempered by judicial discipline. The Supreme Court of India has consistently emphasised that such jurisdiction, though plenary in its terms, is to be exercised with circumspection and restraint. In *Arunachalam v. Sadhanantham* (AIR 1979 SC 1284), the Court observed:

> *Before proceeding to discuss the evidence and the findings of the High Court we remind ourselves of the confines of our jurisdiction to deal with appeals by special leave against judgments of acquittal by the High Court. Article 136 of the Constitution of India invests the Supreme Court with a plentitude of plenary, appellate power over all Courts and Tribunals in India. <u>The power is plenary in the sense</u>*

> *that there are no words in Article 136 itself qualifying that power. But, the very nature of the power has led the Court for set limits to itself within which to exercise such power. It is now the well established practice of this Court to permit the invocation of the power under Article 136 only in very exceptional circumstances, as when a question of law of general public importance arises or a decision shocks the conscience of the Court. But, within the restrictions imposed by itself, this Court has the undoubted power to interfere even with findings of fact making no distinction between judgment of acquittal and conviction, if the High Court, in arriving at those findings, has acted "perversely or otherwise improperly".*

In *Sri Lanka Ports Authority v. Pieris* [1981] 1 Sri LR 101 at 108, Sharvananda J. emphasised that the amplitude of powers enjoyed by the Supreme Court must be exercised in accordance with sound principles of law, so as to uphold the broader tenets of justice.

> *This Court, however, has the discretion to impose reasonable limits to that freedom, such as refusing to entertain grounds of appeal which were not taken in the court below and raised for the first time before this Court. This Court in the exercise of its discretion will, however, look to the broad principles of justice and will take judicial notice of a point which is patent on the face of the proceedings and discourage mere technical objections.*

When questions of law are identified, this Court is guided by established legal principles. As a general principle, for instance, a party to an action cannot take up new positions, which are not pure questions of law, for the first time before the Supreme Court. In *Nevil Fernando and Others v. Sanath Fernando and Others* [2024/25] BLR 78 at 80-81 this Court held:

> *A party to an action is subject to specific constraints in presenting his case before Court. There must be consistency in how the case is presented from the original Court to the final Court. He cannot keep changing his position to suit the occasion. There must be an end to*

> *litigation. Firstly, a party cannot, by way of issues, present a case different from what was pleaded in his pleadings. Secondly, once issues are raised and accepted by Court, a party cannot present a different case at the trial from what was raised by way of issues. Thirdly, once the judgment is pronounced by Court, the losing party cannot present a different case before the appellate Court from what was presented in the Court below, unless the new ground is a pure question of law and not a question of fact or a mixed question of fact and law. However, a practice has developed in our Courts to entertain questions of fact for the first time on appeal subject to strict conditions.*

In general, the role of the Supreme Court is not to rehear appeals on the merits unless circumstances cry aloud for its intervention to prevent what would otherwise have been a grave miscarriage of justice.

In *Collettes Limited v. Bank of Ceylon* [1984] 2 Sri LR 253, Sharvananda J. (as he then was) stated at 264-265 that while this Court undeniably has the jurisdiction to revise concurrent findings of fact made by the lower courts in appropriate cases, it will generally refrain from interfering with the findings of fact unless special circumstances exist. Such circumstances include instances where relevant evidence has been overlooked, irrelevant matters have been considered, the conclusion is based on erroneous reasoning or the decision is not supported by sufficient evidence. Sharvananda J. stated that when the judgment of the lower Court is replete with such shortcomings, *"this court not only may but is under a duty to examine the supporting evidence and reverse the findings.*"

> *Article 127 of our Constitution spells out the appellate jurisdiction of this court. It provides that this court (Supreme Court) is a final court of civil and criminal appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any court of first instance, tribunal or other institution and*

that this court may, in the exercise of its appellate jurisdiction, affirm, or reverse or vary any judgment or decree of the Court of Appeal. It will thus be seen that the appellate jurisdiction of this court is all embracing and unfettered. On leave being granted under Article 128 to appeal to this court, this court is vested with the power, as a final Court of Appeal to consider the correctness of the decision appealed against on any ground, whether on questions of fact or law. This is a court of re-hearing. Silva v. Swaris (1904) 1 Bal 61, Sansoni, J. in Nawadun Korale Co-operative Stores Union Ltd. v. Premaratne (1954) 55 NLR 505. The leave granted under Article 128, though it is a precondition for the maintainability of an appeal to this court, cannot circumscribe the scope of the appeal Sri Lanka Ports Authority v. Pieris [1981] 1 Sri LR 101. Thus this court undoubtedly has the jurisdiction to revise the concurrent findings of fact reached by the lower court in appropriate cases. However, ordinarily it will not interfere with findings of fact based upon relevant evidence except in special circumstances, such as, for instance, where the judgment of the lower court shows that the relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or that the conclusion rests mainly on erroneous considerations or is not supported by sufficient evidence. When the judgment of the lower court exhibits such shortcomings, this court not only may but is under a duty to examine the supporting evidence and reverse the findings.

The view of Soza J. in the Supreme Court case of *Attorney General v. Seneviratne* [1982] 1 Sri LR 302 at 323-324 is no different:

When does an appeal lie in law to the Supreme Court from a decision or order of the Court of Appeal? The answer is found in Article 128:

1. If the Court of Appeal grants leave to appeal from a final order, judgment, decree or sentence made by it on any matter or

proceedings whether Civil or criminal, which involves a substantial question of law (subsection 1).

2. If the Supreme Court in its discretion grants special leave to appeal from any final or interlocutory order, judgment, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where

(i) the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or
(ii) in the opinion of the Supreme Court, the case or matter is fit for review by it (subsection 2).

The Supreme Court must grant leave to appeal in every matter or proceedings in which it is satisfied that the question to be decided is of public or general importance (proviso to subsection 2). It might be added that an appeal shall lie directly to the Supreme Court where it is specifically so provided by statute (subsection 4).

It will be seen that it is only when the Court of Appeal grants leave to appeal, that the appeal is confined to substantial questions of law. When the Supreme Court in its discretion grants special leave to appeal the scope of review is not limited to substantial questions of law. It must be remembered that the Supreme Court has jurisdiction to correct errors of fact or law committed by any Court. An occasion for the exercise of this jurisdiction is when it grants special leave to appeal. So when the Supreme Court grants special leave it is open to it to review the case so far as it is pertinent to the question to be decided. Accordingly I am of the view that in the instant case this Court should consider the matters complained of in the petition of appeal as well as matters raised at the hearing before it on behalf of the accused.

Can the Supreme Court review the order of the High Court at Bar dated 06.12.2021 in this appeal?

Learned counsel for the accused contend in their post-argument written submissions that this Court cannot review the order of the High Court at Bar dated 06.12.2021, as it falls outside the scope of the present appeal preferred by the Attorney-General.

I have already examined the manner in which this Court exercises its appellate jurisdiction when a party aggrieved by an order or judgment of the Court of Appeal invokes the jurisdiction of this Court in terms of Article 128(2) of the Constitution by way of an application for special leave to appeal. In such circumstances, and depending on the nature of the matter, the jurisdiction of this Court is not strictly confined to considering only whether the order or judgment of the Court of Appeal is lawful in a narrow sense.

As discussed earlier, where this Court forms the opinion that the matter is fit for review, *inter alia*, on the basis that the question to be decided is of public or general importance, the Court may, and indeed should, grant leave to appeal, even if the order or judgment of the Court of Appeal does not involve a substantial question of law in the narrow sense. As observed by Marsoof J. in *Attorney-General v. Bandaranayake and Others* (SC/APPEAL/67/2013, SC Minutes of 28.06.2013), in terms of the proviso to Article 128(2), once the Court is satisfied that the matter is of public or general importance, it is bound to grant leave to appeal.

What is the core issue in this case? The core issue is whether the High Court at Bar was correct in discharging the 1st accused company, Perpetual Treasuries Limited, from the offences of conspiracy and criminal misappropriation of Government Treasury Bonds under the Offences Against Public Property Act read with the Penal Code, and in discharging the other accused from charges of aiding and abetting the 1st accused in the commission of those offences, principally on the basis

that such charges cannot be maintained against Perpetual Treasuries Limited as a juristic person.

The core issue in the instant case is of great public and general importance and is eminently a matter fit for review, having regard to its magnitude and sensitivity, particularly as it involves a substantial amount of public funds. Further, as observed by Mark Fernando J. in *Wickremasinghe and Others v. Cornel Perera and Others* [1996] 1 Sri LR 294 at 300, it is in the larger public interest that this legal issue be finally and authoritatively determined by this Court.

As Sharvananda J. held in *Albert v. Veeriahpillai* [1981] 1 Sri LR 110 at 113, "*But once leave is granted, on whatever ground it be, the appeal is before this court and this Court is seised of the appeal. Its appellate jurisdiction extends to the correction of all errors in fact or in law which shall be committed by the Court of Appeal or any Court of First Instance (vide Art. 127 of the Constitution). Therefore, it is competent for this Court to permit parties to bring to its notice errors of law or of fact and raise new contentions or new points of law, or suo motu to raise them if there is proper foundation for them in the record.*"

Accordingly, once the Court of Appeal grants leave to appeal or this Court grants special leave to appeal, this Court may, *suo motu*, raise questions of law and invite the parties to assist the Court in addressing those questions. This is precisely what was done at the conclusion of the hearing, when the Court raised two questions of law and afforded the parties an opportunity to address them. There is no illegality, irregularity or impropriety in adopting such a course.

Mr. Faisz Mustapha, P.C. with his wealth of experience in the superior courts, has submitted in his post argument written submissions that "*the Supreme Court has jurisdiction to examine and review all errors of fact or law committed by the Court of Appeal or any Court of First Instance, irrespective of the questions of law on which leave to appeal has been granted, provided that such errors relate to the order which is the subject*

matter of the appeal pending before the Court." His argument is that the errors alleged to have been committed by the High Court at Bar do not relate to the order which is the subject matter of this appeal, as the Court of Appeal dismissed the appeal on a jurisdictional issue. Mr. Razik Zarook, P.C. and other learned counsel have echoed the same.

Mr. Navin Marapana, P.C., in his post-argument written submissions, strenuously submits that the Supreme Court "*is also bound by the limits imposed upon it by the Constitution and does not possess untrammelled power to go beyond the scope of the case presented by a litigant*", while reminding the Court that "*with great power comes an even greater responsibility*". He further contends that an inquiry into the legitimacy of the order of the High Court at Bar "*will cause a grave miscarriage of justice on a scale hitherto unseen*", and cautions that such an approach would "*open the floodgates of litigation.*" He also submits that the Supreme Court is a creature of statute and that its powers are statutory (vide page 20 of the post-argument written submissions dated 13.03.2026).

These concerns have already been addressed. We are mindful that great power carries with it great responsibility and that the Supreme Court does not possess unlimited powers. We are also conscious that the appellate jurisdiction of the Supreme Court is subject to the Constitution. The two questions of law were raised in the proper exercise of that jurisdiction, in accordance with Article 128(2) of the Constitution and the judicial precedents referred to earlier. The "floodgates" argument is unsustainable, as this Court does not act outside the Constitution, nor does it entertain applications or grant relief except upon a proper legal foundation.

It must be emphasised that, in order to meet situations hitherto unseen, the Supreme Court, as the guardian of the rights of the people, may, within the limits of its jurisdiction, be required to respond in a manner hitherto unseen.

It was by upholding a preliminary objection raised by the Attorney-General that the Court of Appeal, in *Gotabhaya Rajapakse v. The Attorney-General* [2019] 2 Sri LR 301, held that it had no revisionary jurisdiction over orders and judgments of the High Court at Bar, such jurisdiction being exclusively vested in the Supreme Court. In that context, would it be unreasonable to think that the wrong jurisdiction was deliberately invoked? In such circumstances, is the Supreme Court to remain silent and look on haplessly, on the footing that it must confine itself only to the reliefs expressly sought by the appellant? The answer is unequivocally in the negative.

The consequential question (xiii), raised after the Court formulated the two preceding questions, namely whether the Attorney-General is entitled to obtain relief not specifically prayed for in the petition, is misconceived both in law and in fact, as questions of law (xi) and (xii) were raised by the Court itself and not by the Attorney-General. The mere fact that the Attorney-General may derive a benefit from the consideration of those questions cannot constitute a valid ground for the apex Court to decline to exercise its jurisdiction within its lawful limits.

I answer questions of law (xii) and (xiii) as follows:

(xii) Q. In any case, can this Court review the said High Court Order dated 06.12.2021 in these proceedings?

A. Yes.

(xiii) Q. Is the Complainant-Petitioner-Appellant entitled to obtain relief not prayed for in the Petition?

A. The Court cannot refrain from exercising its jurisdiction within its powers merely because another party might benefit from it.

This leads me to consider the final question.

Is the Order of the High Court at Bar dated 06.12.2021 a lawful Order?

Upholding the preliminary objection raised on behalf of the 7th accused before the commencement of the trial proper, the High Court at Bar discharged all the accused from count Nos. 1-11 of the indictment on the ground that the 1st accused being an incorporated body and not a natural person cannot be charged under the Offences Against Public Property Act No. 12 of 1982 and in the result the charges against all the other accused of aiding and abetting the 1st accused to commit offences under the said Act are also unsustainable.

It is to be noted that none of the learned counsel for the accused addressed this question of law in their post-argument written submissions. The omission may well suggest the difficulty in defending the said order. Be that as it may, the absence of submissions on this issue does not absolve this Court of its duty to examine the legality of the order.

Corporate criminal liability

A corporation is a legal person recognised by law as having a separate identity from its members, and the term 'corporation' includes a company incorporated under statute, statutory corporations, and any other body corporate recognised by law.

The classic exposition of the principle of separate legal personality is found in *Salomon v. Salomon & Co Ltd* [1897] AC 22, where it was established that a company is a distinct legal entity, separate from its shareholders and directors.

To constitute a criminal offence, both the *actus reus* (the prohibited act) and the *mens rea* (the requisite mental element) must ordinarily be established. A body corporate, being an artificial legal person, is incapable of acting or forming an intention in the natural sense. For this

reason, at an earlier stage of the common law, corporations were considered incapable of committing offences requiring *mens rea* and were, in effect, excluded from the ambit of criminal liability. However, with the expansion of corporate activity and the increasing prevalence of serious financial and commercial offences of great magnitude committed through companies and other corporate entities, judicial thinking evolved to attribute the acts and state of mind of certain individuals to the corporation, thereby bringing bodies corporate within the reach of the criminal law.

The general parameters of corporate criminal liability are elucidated in several authoritative texts.

Halsbury's Laws of England, Vol. 24 (5th ed., 2010, LexisNexis) at pages 290–291 states:

> *482. Liability. A corporation may not be found guilty of criminal offences, such as treason or murder, for which imprisonment is the only penalty, nor may it be indicted for offences which cannot be vicariously committed, such as perjury or bigamy. Subject to these exceptions, a corporation may be indicted and convicted for the criminal acts of directors and managers who represent the directing mind and will of the corporation and control what it does. The acts and state of mind of such persons are, in law, the acts and state of mind of the corporation itself. A corporation may not be convicted for the criminal acts of its inferior employees or agents unless the offence is one for which an employer or principal may be vicariously liable.*
>
> *A corporation, other than a corporation sole, is guilty of the offence of corporate manslaughter if the way in which its activities are managed or organized causes a person's death and amounts to a gross breach of a relevant duty of care owed by the organization to the deceased; an organization that is guilty of corporate manslaughter is liable on conviction on indictment to a fine.*

> *Wherever a duty is imposed by statute in such a way that a breach of the duty amounts to a disobedience of the law, then, if there is nothing in the statute either expressly or impliedly to the contrary, a breach of the statute is an offence for which a corporation may be indicted, whether or not the statute refers in terms to corporations.*

Gower's Principles of Modern Company Law (10th edn., 2016, Sweet & Maxwell) at p. 181 recognises corporate criminal liability as follows:

> *…vicarious liability provides the bedrock upon which companies are held liable in tort. In criminal law, by contrast, vicarious liability is regarded with suspicion in relation to serious crimes involving mens rea. Consequently, criminal law has had to place greater reliance on the direct liability of the company. On this approach, the acts and state of mind of officers or employees are treated as those of the company. However, the criminal law has had great difficulty in determining the criteria for direct liability. If they are broadly set, there will be little difference from the company's point of view between vicarious and direct liability; if narrowly set, companies will often escape criminal punishment.*

The specific parameters of corporate criminal liability, on which the above propositions are based, may be gleaned from judicial precedent.

The foundations of the modern doctrine in this area can be traced to the celebrated dictum of Viscount Haldane in *Lennard's Carrying Co. v. Asiatic Petroleum Co. Ltd* [1915] AC 705 at 713-714:

> *A corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation… the fault or privity of somebody who is not merely a servant or agent for whom the company is liable upon*

> *the footing respondeat superior, but somebody for whom the company is liable because his action is the very action of the company itself.*

In that case, which arose in the context of delictual liability, the House of Lords attributed liability to the company on the basis that the individual concerned, namely Lennard, an active director, represented the directing mind and will of the company, thereby identifying his acts and state of mind with those of the company itself. The identification doctrine, also known as the "directing mind and will" doctrine, as recognised in this case has since continued to guide courts in assessing corporate fault in both civil and criminal contexts.

The early authorities which extended the reasoning in *Lennard* and contributed to the development of the modern doctrine of corporate criminal liability include *Director of Public Prosecutions v. Kent and Sussex Contractors Ltd* [1944] KB 146, *R v. ICR Haulage Ltd* [1944] KB 551, and *Moore v. I Bresler Ltd* [1944] 2 All ER 515, in which the courts attributed criminal liability to companies on the basis that the particular individuals who committed the crimes were the directing mind and will of the company.

In *R v. ICR Haulage Ltd* [1944] KB 551, it was held that a company may be convicted of the common law offence of conspiracy to defraud, thereby recognising that a corporate body is capable of possessing the requisite *mens rea* through its controlling officers. Even prior to that decision in England, the position had been recognised in Canada in *R v. Fane Robinson Ltd* [1941] 3 DLR 409, where it was held that a company could incur criminal liability for the offence of conspiracy to defraud on the basis of what later came to be described as the identification doctrine.

Attorney General's Reference No 2 of 1999 [2000] EWCA Crim 91 makes it clear that a company can even be convicted of gross negligence manslaughter, provided that the conduct of an identifiable individual,

amounting to gross criminal negligence, can be attributed to the company in accordance with the identification doctrine.

This principle was further elucidated by Lord Denning in *Bolton (Engineering) Co Ltd v. T.J. Graham & Sons Ltd* [1957] 1 QB 159 at 172:

> *A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.*

This analogy reinforces the principle that, where the law requires fault, whether in tort or in crime, the acts and mental state of those who constitute the directing mind and will of the company are attributable to the company itself.

Tesco Supermarkets Ltd v. Nattrass [1971] UKHL 1 stands as a leading authority on corporate criminal liability, arising from a prosecution under the Trade Descriptions Act 1968 in the United Kingdom, in which the House of Lords authoritatively clarified the scope and application of the identification doctrine. The case concerned a prosecution for misleading advertising, where a store manager failed to remove a promotional notice offering a discounted price on washing powder which was no longer applicable. The defence of the company was that the offence resulted from the default of the store manager and not from any act or omission of those who could be said to represent the controlling mind of the company.

In a passage of enduring significance, Lord Reid at page 3 articulated the conceptual foundation of corporate attribution in the following terms:

> *A living person has a mind which can have knowledge or intention or be negligent and he has hands to carry out his intentions. A corporation has none of these: it must act through living persons, though not always one or the same person. Then the person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company or, one could say, he hears and speaks through the persona of the company, within his appropriate sphere, and his mind is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.*

Elaborating further on the distinction between those who represent the company and those who merely act on its behalf, Lord Reid observed at page 4:

> *Normally the Board of Directors, the Managing Director and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the Board of Directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line but there are cases in which the line must be drawn.*

The House of Lords also emphasised that the inquiry is one of identifying those who are in actual control of the company's affairs. In this regard, Viscount Dilhorne stated at page 17:

> *...a person who is in actual control of the operations of a company or of part of them and who is not responsible to another person in the company for the manner in which he discharges his duties in the sense of being under his orders...*

Similarly, Lord Pearson at page 19 described the manager in the case at hand as occupying a relatively subordinate position and not one who was "*in the position of managing the affairs of the company*."

Approaching the matter from the perspective of the company's constitutional structure, Lord Diplock observed at page 26:

> *In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the Memorandum and Articles of Association or as a result of action taken by the directors, or by the company in general meeting pursuant to the Articles, are entrusted with the exercise of the powers of the company.*

On the facts and circumstances of that case, the House of Lords held that the store manager did not form part of the directing mind and will of the company. Accordingly, his acts and state of mind could not be attributed to the company, and the company was acquitted.

The identification of the directing mind and will of a company is not a matter of form but of substance, and is ultimately a question of fact to be resolved having regard to the actual control exercised over the affairs of the company. This decision reaffirmed that, for the purpose of criminal

liability, only those who represent the directing mind and will of the company, typically directors or senior officers exercising controlling authority, can render the company liable. It thus refined the identification doctrine earlier recognised in *Lennard* and continues to stand as a cornerstone in determining when corporate fault may properly be attributed to a company.

Echoing *Tesco*, the Court of Appeal in the United Kingdom, in *El Ajou v. Dollar Land Holdings plc* [1994] 2 All ER 685 at 695, observed as follows:

> *It is important to emphasise that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point. This was well put by Eveleigh J. in delivering the judgment of the Criminal Division of this court in R. v. Andrews Weatherfoil Ltd [1972] 1 All ER 65 at 70, [1972] 1 WLR 118 at 124: "It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the acts of the company so that the natural person is to be treated as the company itself."*

Meridian Global Funds Management (Asia) Ltd v. Securities Commission [1995] UKPC 5 is a landmark decision of the Judicial Committee of the Privy Council which marks another significant development in the law relating to corporate attribution. The case arose from the acquisition of shares in a New Zealand company by the appellant company through two of its employees, acting within the scope of their duties but without informing the board of directors. The acquisition rendered the company a substantial shareholder, thereby triggering a statutory obligation to give notice to the Securities Commission. The company failed to comply with that statutory obligation.

Section 20(3) and 20(4)(e) of the New Zealand Securities Amendment Act 1988 read as follows:

> *20(3). Every person who, after the commencement of this section, becomes a substantial security holder in a public issuer shall give notice that the person is a substantial security holder in the public issuer to—*
>
> *(a) The public issuer; and*
>
> *(b) Any stock exchange on which the securities of the public issuer are listed.*
>
> *20(4)(e). Every notice under subsection (3) of this section shall be given as soon as the person knows, or ought to know, that the person is a substantial security holder in the public issuer.*

The principal issue was whether the knowledge of the employees who effected the acquisition could be attributed to the company so as to render it liable for breach of the statutory disclosure requirement. The company contended that, in the absence of knowledge on the part of its board of directors or those constituting its "directing mind and will", such knowledge could not be imputed to it.

Rejecting that contention, Lord Hoffmann held that the rules of attribution are not confined to the traditional "directing mind and will" doctrine, but depend upon the proper construction of the relevant statutory provision, having regard to its language, purpose and policy.

According to *Meridian*, the rules of attribution may broadly be classified into three categories: first, the primary rules of attribution derived from the company's constitution, such as the acts of the board of directors or shareholders; secondly, the general principles of agency and vicarious liability, by which the acts of agents or employees acting within the scope of their authority or employment are attributed to the company; and thirdly, in appropriate cases, special rules of attribution fashioned by the court, having regard to the purpose and policy of the relevant statutory provision.

Elaborating the framework of attribution, Lord Hoffmann observed:

(8) The company's primary rules of attribution will generally be found in its constitution, typically the articles of association, and will say things such as "for the purpose of appointing members of the board, a majority vote of the shareholders shall be a decision of the company" or "the decisions of the board in managing the company's business shall be the decisions of the company". There are also primary rules of attribution which are not expressly stated in the articles but implied by company law, such as "the unanimous decision of all the shareholders in a solvent company about anything which the company under its memorandum of association has power to do shall be the decision of the company": see Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Ltd. [1983] Ch. 258.

(9) These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company. And having done so, it will also make itself subject to the general rules by which liability for the acts of others can be attributed to natural persons, such as estoppel or ostensible authority in contract and vicarious liability in tort.

(11) The company's primary rules of attribution together with the general principles of agency, vicarious liability and so forth are usually sufficient to enable one to determine its rights and obligations. In exceptional cases, however, they will not provide an answer. This will be the case when a rule of law, either expressly

or by implication, excludes attribution on the basis of the general principles of agency or vicarious liability. For example, a rule may be stated in language primarily applicable to a natural person and require some act or state of mind on the part of that person 'himself', as opposed to his servants or agents. This is generally true of rules of the criminal law, which ordinarily impose liability only for the actus reus and mens rea of the defendant himself. How is such a rule to be applied to a company?

(12) One possibility is that the court may come to the conclusion that the rule was not intended to apply to companies at all; for example, a law which created an offence for which the only penalty was community service. Another possibility is that the court might interpret the law as meaning that it could apply to a company only on the basis of its primary rules of attribution, i.e. if the act giving rise to liability was specifically authorised by a resolution of the board or a unanimous agreement of the shareholders. But there will be many cases in which neither of these solutions is satisfactory; in which the court considers that the law was intended to apply to companies and that, although it excludes ordinary vicarious liability, insistence on the primary rules of attribution would in practice defeat that intention. In such a case, the court must fashion a special rule of attribution for the particular substantive rule. This is always a matter of interpretation: given that it was intended to apply to a company, how was it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.

Applying that principle to the facts of the case, Lord Hoffmann made it clear that the attribution of knowledge to a company cannot be defeated by the fact that the individual concerned acted dishonestly or deliberately withheld information from the company. Where the individual was acting

within the scope of his authority, his knowledge is to be treated as that of the company, notwithstanding that he acted for a corrupt purpose or failed to inform his superiors. Lord Hoffmann explained this principle by reference to the statutory purpose in the following terms:

> *(22) The policy of section 20 of the Securities Amendment Act 1988 is to compel, in fast-moving markets, the immediate disclosure of the identity of persons who become substantial security holders in public issuers. Notice must be given as soon as that person knows that he has become a substantial security holder. In the case of a corporate security holder, what rule should be implied as to the person whose knowledge for this purpose is to count as the knowledge of the company? Surely the person who, with the authority of the company, acquired the relevant interest. Otherwise the policy of the Act would be defeated. Companies would be able to allow employees to acquire interests on their behalf which made them substantial security holders but would not have to report them until the board or someone else in senior management got to know about it. This would put a premium on the board paying as little attention as possible to what its investment managers were doing. Their Lordships would therefore hold that upon the true construction of section 20(4)(e), the company knows that it has become a substantial security holder when that is known to the person who had authority to do the deal. It is then obliged to give notice under section 20(3). The fact that Koo [the Chief Investment Officer of the company] did the deal for a corrupt purpose and did not give such notice because he did not want his employers to find out cannot in their Lordships' view affect the attribution of knowledge and the consequent duty to notify.*

Hence he stated that "*It was therefore not necessary in this case to inquire into whether Koo could have been described in some more general sense as the "directing mind and will" of the company.*"

However, Lord Hoffmann entered an important caution:

> *(23) But their Lordships would wish to guard themselves against being understood to mean that whenever a servant of a company has authority to do an act on its behalf, knowledge of that act will for all purposes be attributed to the company. It is a question of construction in each case as to whether the particular rule requires that the knowledge that an act has been done, or the state of mind with which it was done, should be attributed to the company. Sometimes, as in Ready Mixed Concrete and this case, it will be appropriate. Likewise in a case in which a company was required to make a return for revenue purposes and the statute made it an offence to make a false return with intent to deceive, the Divisional Court held that the mens rea of the servant authorised to discharge the duty to make the return should be attributed to the company: see Moore v. I. Bresler Ltd. [1944] 2 All E.R. 515. On the other hand, the fact that a company's employee is authorised to drive a lorry does not in itself lead to the conclusion that if he kills someone by reckless driving, the company will be guilty of manslaughter. There is no inconsistency. Each is an example of an attribution rule for a particular purpose, tailored as it always must be to the terms and policies of the substantive rule.*

On that basis, the knowledge of the employees who acquired the shares on behalf of the company was attributed to the company itself, as otherwise the statutory obligation could be easily evaded.

This decision thus recognises that, in an appropriate case, the court may adopt a purposive approach and attribute acts and knowledge to a company in a manner consistent with the object of the statute, thereby departing from a rigid application of the "directing mind and will" test.

However, the flexible approach suggested in *Meridian* is not without its frailties. It has been observed that such flexibility may itself give rise to uncertainty in its application. This concern is noted in *Gower's Principles*

of Modern Company Law (10th edn., 2016, Sweet & Maxwell) at pp. 183–184, which states:

> *Welcome and straightforward though the new approach is, it inevitably still leaves uncertainty as to who will be regarded as the relevant person within the corporate hierarchy for the purposes of the identification rule in any particular case. According to the statute this might range from almost any agent or employee of the company acting within the scope of his or her authority to only those holding senior management positions, perhaps in some cases only the board itself. Since, however, a precise answer to the question of whose acts and knowledge are to be attributed to the company depends ex hypothesi on an analysis of the context of the particular rule with which the court is dealing, it is doubtful whether more certainty can be provided at a general level.*

While *Meridian* illustrates a flexible, context-driven approach to attribution, later decisions such as *Attorney General's Reference No 2 of 1999* [2000] EWCA Crim 91 and *St Regis Paper Company Ltd v. The Crown* [2011] EWCA Crim 2527 demonstrate that, in the sphere of corporate criminal liability at common law, such flexibility is subject to important limitations, and that, in the absence of clear statutory intervention, the attribution of criminal liability to a corporation remains anchored to the identification doctrine.

In *Attorney General's Reference No 2 of 1999* [2000] EWCA Crim 91, the reference arose out of the Southall rail disaster of 1997 in England, in which a train operated by the defendant company collided with another train, resulting in multiple deaths and injuries. The company was indicted on several counts of gross negligence manslaughter. At the outset of the trial, the trial judge ruled that a company could not be convicted of such an offence unless the guilt of an identifiable individual could be established and attributed to the company. Following that ruling, the company pleaded guilty to an offence under the Health and

Safety at Work Act 1974, and the Attorney-General referred two questions of law to the Court of Appeal under section 36 of the Criminal Justice Act 1972.

The questions referred were whether a defendant could be convicted of gross negligence manslaughter in the absence of evidence as to state of mind, and whether a non-human defendant could be so convicted without proof of the guilt of an identified human individual. The Court held, first, that proof of state of mind is not a prerequisite to a conviction for gross negligence manslaughter, the test being essentially objective. However, in relation to corporate liability, Rose L.J. in the Court of Appeal (Criminal Division) reaffirmed that, at common law, such liability rests upon the identification doctrine, and that "*unless an identified individual's conduct, characterisable as gross criminal negligence, can be attributed to the company, the company is not, in the present state of the common law, liable for manslaughter*." The Court rejected attempts to found liability on the aggregation of failures within the company or on notions of personal corporate negligence divorced from individual culpability, and emphasised that, in the then state of the law, the identification principle remained the sole basis for corporate liability, and that any expansion of such liability is a matter for legislative intervention rather than judicial development.

The perceived limitations of this approach subsequently led to legislative reform in England by the enactment of the Corporate Manslaughter and Corporate Homicide Act 2007, which introduced a distinct statutory basis for corporate liability founded on management failure.

A similar emphasis on the principles governing the attribution of criminal liability to a company is seen in *St Regis Paper Company Ltd v. The Crown* [2011] EWCA Crim 2527, a decision of the Court of Appeal (Criminal Division) concerning the attribution of *mens rea* to a corporate body. The case arose from the prosecution of the appellant company for offences relating to environmental regulation. The company operated a paper

recycling plant, where its technical manager was responsible for preparing daily environmental reports concerning pollutants discharged into a nearby river. False readings were deliberately recorded and misleading reports submitted to the Environment Agency. The technical manager was convicted of intentionally falsifying the records. The company was also convicted of offences under Regulation 32(1) of the Pollution Prevention and Control (England and Wales) Regulations 2000.

Regulation 32 provides as follows:

> *It is an offence for a person—*
>
> *(a) to contravene regulation 9(1);*
> *(b) to fail to comply with or to contravene a condition of a permit;*
> *(c) to fail to comply with regulation 16(1);*
> *(d) to fail to comply with the requirements of an enforcement notice or a suspension notice;*
> *(e) to fail, without reasonable excuse, to comply with any requirement imposed by a notice under regulation 28(2);*
> *(f) to make a statement which he knows to be false or misleading in a material particular, or recklessly to make a statement which is false or misleading in a material particular, where the statement is made—*
> *(i) in purported compliance with a requirement to furnish any information imposed by or under any provision of these Regulations; or*
> *(ii) (ii) for the purpose of obtaining the grant of a permit to himself or any other person, or the variation, transfer or surrender of a permit;*
> *(g) intentionally to make a false entry in any record required to be kept under the condition of a permit;*
> *(h) with intent to deceive, to forge or use a document issued or authorised to be issued under a condition of a permit or required for any purpose under a condition of a permit or to make or have*

in his possession a document so closely resembling any such document as to be likely to deceive;

(i) to fail to comply with an order made by a court under regulation 35.

The structure of Regulation 32 is of particular significance, as it draws a clear distinction between offences of strict liability and those requiring proof of *mens rea*. While certain provisions, such as breaches of permit conditions, do not require proof of fault, others, including Regulation 32(1)(g), expressly require intention.

In considering whether the company could be held liable for the offence under Regulation 32(1)(g), the Court reviewed the earlier authorities, including *Tesco* and *Meridian*. It was contended that the intention of the technical manager could be attributed to the company, either on a purposive approach derived from *Meridian* or by reference to principles of delegation or vicarious liability.

Rejecting that contention, the Court of Appeal held that, in the case of offences requiring *mens rea*, criminal liability may be attributed to a company only where the individual concerned can properly be regarded as its "directing mind and will" within the meaning of *Tesco*. The Court emphasised that, although *Meridian* permits a purposive approach to attribution in appropriate cases, it does not displace the fundamental principle that, where a statute requires proof of intention, such intention must ordinarily be that of the directing mind of the company, unless the statute, properly construed, indicates otherwise.

On the facts and circumstances of that case, the Court of Appeal found that the technical manager, notwithstanding his managerial responsibilities, did not form part of the directing mind and will of the company. His role, though significant, did not place him at the level of those who could be said to control the affairs of the company. Accordingly, his intention could not be attributed to the company, and the convictions were quashed.

This decision thus illustrates that the application of the identification doctrine remains sensitive to the particular facts and corporate structure in question, and that the outcome ultimately depends upon whether the individual concerned can properly be regarded as the embodiment of the company for the purpose of the relevant offence.

Let me briefly refer to the distinctions between the identification doctrine, personal liability, vicarious liability, and strict liability, each of which operates on distinct principles.

The identification doctrine attributes to the company the acts and state of mind of those who constitute its directing mind and will, thereby treating the company itself as the principal offender.

Personal liability of the company refers to its liability as a principal offender arising from its own breach of a duty imposed directly upon it by law, rather than by attributing to it the acts and state of mind of an identifiable individual.

Strict liability, on the other hand, dispenses with the requirement of *mens rea* and imposes liability on the company upon proof of the prohibited act, irrespective of fault (see *Alphacell Ltd v. Woodward* [1972] AC 824).

Vicarious liability, by contrast, is derivative in nature and fastens liability on the company for the acts of its employees or agents performed within the scope of their authority or in the course of their employment (see *National Rivers Authority v. Alfred McAlpine Homes East Ltd* [1994] 4 All ER 286).

While the rules of agency in contract and vicarious liability in tort are ordinarily features of civil law and do not generally apply in criminal law, there is no absolute prohibition against the imposition of strict or vicarious criminal liability on a company. In some instances, statutes expressly provide for such liability. In other cases, strict liability may be

inferred from the nature and purpose of the statute. Although vicarious criminal liability may also arise in appropriate circumstances, the Court will exercise caution in attributing such liability in the absence of a clear statutory basis.

As stated in *Mayson, French & Ryan on Company Law* (2014–2015 edn., Oxford University Press) at pages 641–643, the courts tend to impose vicarious and strict liability on companies, particularly in relation to regulatory or public welfare legislation. This, however, does not mean that a company is without a defence in such instances. For example, certain statutes expressly provide for a due diligence defence.

While these doctrines are conceptually distinct, their application may, in appropriate contexts, intersect, depending on the nature of the offence, the statutory framework, and the facts and circumstances of the case.

There have been recent statutory developments in the United Kingdom addressing certain limitations inherent in the common law approach. In particular, the Economic Crime and Corporate Transparency Act 2023 has expanded the scope of corporate attribution in relation to specified economic offences by introducing a “senior manager” test. Under this formulation, a company may incur criminal liability where a senior manager, broadly defined as a person who plays a significant role in the making of decisions about, or the management or organisation of, the whole or a substantial part of the company’s activities, commits an offence while acting within the scope of his actual or apparent authority. This represents a marked departure from the narrower common law focus on the “directing mind and will” test. It reflects a legislative recognition of the practical difficulties in attributing criminal liability to large and complex corporate entities under the traditional doctrine. It is, however, to be noted that this reform does not displace the common law identification doctrine in its entirety, but rather constitutes a statutory extension of it in the field of economic crime.

In addition, the emergence and progressive extension of "failure to prevent" offences under the Bribery Act 2010 and the Criminal Finances Act 2017 in the United Kingdom represent a distinct model of liability. These provisions impose liability not on the basis of attributing *mens rea* to the directing mind of the company, but on the failure of the organisation to put in place adequate procedures to prevent wrongdoing.

Taken together, these developments demonstrate a clear evolution in the law of corporate criminal liability from rigidity to flexibility, and thereafter towards an expansive framework of liability.

The Order of the High Court at Bar

I have already discussed the evolution of corporate criminal liability and its application in the modern context, which makes it clear that corporate bodies may be convicted of criminal offences and that the requisite *mens rea* may, in appropriate circumstances, be established by attribution.

At the outset, it must be observed that it was not the submission of learned President's Counsel for the 7th accused before the High Court at Bar, with whose submissions learned counsel for the other accused associated themselves, that the 1st accused company could not, in law, be indicted under the Penal Code. The submission was of a narrower compass, namely, that the 1st accused company could not be indicted for offences under the Offences Against Public Property Act.

Section 10 of the Penal Code provides:

> *The word 'person' includes any company or association or body of persons, whether incorporated or not.*

Further, section 261 of the Code of Criminal Procedure Act No. 15 of 1979, makes express provision for the appearance of a corporation in criminal proceedings. It provides that a corporation may be represented by its managing director, secretary, or other authorised officer, and such representative is empowered to answer to the charge and exercise, on

behalf of the corporation, all the rights of an accused person. The section also contemplates the situation where a corporation fails to appear, in which event the court may proceed with and conclude the trial upon proof of service of summons on the corporation. These provisions leave no room for doubt that a corporation is recognised as a prosecutable entity within the framework of the criminal law.

To be more specific, the objection raised before the High Court at Bar was that the 1st accused company could not have been indicted, and that the remaining accused could not have been charged for aiding and abetting the 1st accused in the commission of criminal misappropriation of treasury bills, which constitute public property, under section 5(1) of the Offences Against Public Property Act read with section 386 of the Penal Code.

In the impugned order, the High Court at Bar upheld that objection on three principal grounds: firstly, that the Offences Against Public Property Act is a distinct enactment separate from the Penal Code; secondly, that the Act was intended to apply only to natural persons and that the term "person" therein does not include incorporated bodies; and thirdly, that since the Act prescribes a mandatory sentence of imprisonment and fine, and a company cannot be subjected to imprisonment, the 1st accused company could not be charged under that Act.

Let me first consider grounds (a) and (b), which may conveniently be dealt with together.

The High Court at Bar relied on certain passages from the Minister's speech in Parliament, as recorded in Hansard, in introducing the Bill, to conclude that the Offences Against Public Property Act was intended to apply only to natural persons who misuse, destroy or steal public property. It further held that juristic persons are not covered by the Act, on the basis that the Act creates offences distinct from those under the Penal Code, rendering the definition of "person" in the Penal Code

inapplicable, and that the Act itself does not define the term "person" so as to include corporations.

I am unable to agree with that approach.

The Offences Against Public Property Act was enacted, not as a self-contained enactment supplanting the Penal Code, but as a supplementary enactment intended to impose enhanced penal consequences in respect of offences involving public property.

It would be contrary to both principle and common sense to hold that the law intends to impose more severe punishment for such offences when committed by natural persons on a small scale, yet excludes from its ambit similar offences when committed by corporate bodies on a large scale. In contemporary conditions, harm to public property is not confined to acts of vandalism or destruction in public protests, but frequently arises from covert and complex financial frauds carried out through corporate structures, causing substantial loss to public property. To exclude such entities from the operation of the Act would be to render its protective purpose largely ineffective.

The statutory scheme itself reinforces this conclusion. Section 5(1) of the Act provides for the imposition of a fine which may extend to three times the value of the property in respect of which the offence was committed. Further, section 6 empowers the court, in default of payment of such fine, to order the forfeiture to the Republic of the property of the defaulter, movable or immovable, to the extent necessary to satisfy the amount of the fine. These provisions demonstrate that the Act contemplates effective pecuniary sanctions, which are capable of being applied to corporate bodies.

In *Dingiri Banda v. Attorney-General* [1986] 2 Sri LR 356 at 362, Goonewardena J. stated:

> *The Offences Against Public Property Act No. 12 of 1982 states its object to be "to make provision in respect of certain offences committed in relation to public property and for matters connected therewith or incidental thereto." "Public Property" is defined to mean the property of the Government, any department, statutory board, public corporation, bank, co-operative society or co-operative union (section 12). The Act provides for certain punishments with respect to certain offences as one of the principal matters dealt with, provides for forfeiture of property to recover the value of fines imposed and also provides for the remanding of the accused in certain cases pending trial and after trial pending appeal. Now the offences dealt with by this Act are all known to the Penal Code and the description of such offences have all adopted the definition contained in the Penal Code, by the use of the words "has the same meaning as in the Penal Code" (Vide section 12).*

The concern of the High Court at Bar appears to stem from the absence of an express provision in the Act stating that "criminal misappropriation" shall bear the same meaning as in the Penal Code, particularly when section 12 of the Act expressly provides that certain offences shall bear the same meaning as in the Penal Code. However, this concern is misplaced.

Section 386 of the Penal Code provides:

> *Whoever dishonestly misappropriates or converts to his own use any movable property shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.*

Section 5(1) of the Offences Against Public Property Act provides:

> *Any person who dishonestly misappropriates or converts to his own use any movable public property or commits the offence of criminal breach of trust of any movable public property shall be guilty of an*

offence and shall upon conviction be punished with imprisonment of either description for a term not less than one year but not exceeding twenty years, and with a fine of one thousand rupees or three times the value of the property in respect of which such offence was committed, whichever amount is higher.

A comparison of these provisions makes it clear that section 5(1) of the Act does not create a new offence; rather, it adopts the same operative elements found in section 386 of the Penal Code and imposes a more severe punishment where the property in question is public property.

Another concern appears to arise from the difference in terminology used in the Sinhala text, in that the expression "criminal misappropriation" in section 386 of the Penal Code has been translated as "සාපරාධී සාවද්‍ය පරිහරණය", whereas section 5(1) of the Offences Against Public Property Act employs the term "ව්‍යපහරණය". This variation in language does not, however, indicate the creation of a distinct offence. The substance of the provision in section 5(1) mirrors that of section 386 of the Penal Code, in that it employs the same operative elements, namely, dishonest misappropriation or conversion to one's own use of movable property, the only distinction being that the property in question is public property and that the punishment prescribed is more severe. The difference in the Sinhala terminology employed in the two provisions must therefore be understood as a matter of linguistic variation rather than a substantive departure in legal meaning. It must also be noted that the Penal Code of Sri Lanka was enacted in 1883 in English during the colonial period, and that the English text constitutes the original text of the Penal Code.

The absence of an express provision stating that "criminal misappropriation" shall bear the same meaning as in the Penal Code does not detract from this position, particularly since the Penal Code itself does not contain a separate definition of that offence, but defines the offence through its penal provision. In other words, both the

definition of the offence and the punishment are contained in section 386.

It is also pertinent to observe that the offences referred to in section 12 of the Act, such as cheating, criminal breach of trust, forgery, mischief, robbery and theft, are offences for which the Penal Code contains separate sections for the definition of the offence and for the prescription of punishment. The express reference to some offences in section 12 is therefore explicable in that context and does not justify an inference that the absence of a similar provision in respect of criminal misappropriation indicates an intention to create a distinct offence.

Although common sense may be uncommon, the wise words of Chief Justice Goddard in *Barns v. Jarvis* [1953] 1 All ER 1061 at 1063 are instructive: "*One has to apply a certain amount of common sense in construing statutes and to bear in mind the object of the Act*".

In these circumstances, the conclusion of the High Court at Bar that dishonest misappropriation of public property constitutes a wholly distinct offence from that found in the Penal Code, to which the definition of "person" in the Penal Code is inapplicable, cannot be sustained.

Let me also add that modern principles of statutory interpretation have moved beyond a narrow search for the intention of the legislature and instead emphasise giving effect to the purpose of the legislation.

In *R v. Secretary of State for Health, ex parte Quintavalle* [2003] UKHL 13, Lord Bingham observed:

> *The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty. Such an approach not only encourages immense prolixity in drafting, since the draftsman will feel obliged*

> *to provide expressly for every contingency which may possibly arise. It may also (under the banner of loyalty to the will of Parliament) lead to the frustration of that will, because undue concentration on the minutiae of the enactment may lead the court to neglect the purpose which Parliament intended to achieve when it enacted the statute. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.*

It is also relevant to note that the well-established rule in *Heydon's* Case (1584) 3 Co. Rep. 7a, commonly known as the mischief rule, requires the Court to consider the defect in the prior law and to adopt an interpretation that suppresses the mischief and advances the remedy.

In *Heydon's* case it was resolved by the Barons of the Exchequer at p.7b:

> *[T]he sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered:- (1st). What was the common law before the making of the Act. (2nd). What was the mischief and defect for which the common law did not provide. (3rd). what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth. And, (4th). The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico.*

Applying these principles to the present case, the mischief which the Offences Against Public Property Act seeks to address is the inadequate protection of public property under the general law, particularly in circumstances where such property is misused or dissipated in ways that warrant enhanced penal consequences. The remedy adopted by the legislature is the imposition of more severe sanctions in respect of such conduct. An interpretation which excludes corporate entities from the scope of the Act would frustrate that remedy and leave a significant category of offenders beyond its reach. Such a construction would neither suppress the mischief nor advance the remedy, but would instead perpetuate the very mischief which the Act was intended to remedy. The Act must therefore be construed in a manner which gives full effect to its object, including its application to corporate bodies.

Let me assume, for the sake of argument, that the definition of "person" in the Penal Code is inapplicable to the Offences Against Public Property Act. Even on that footing, the conclusion reached by the High Court at Bar cannot be sustained.

The High Court at Bar has not drawn attention to section 2 of the Interpretation Ordinance, which provides:

> *In this Ordinance and in every written law, whether made before or after the commencement of this Ordinance, unless there be something repugnant in the subject or context—*
> *(t) "person" includes any body of persons corporate or unincorporate;*

The Offences against Public Property Act is undoubtedly a written law enacted after the commencement of the Ordinance. The word "person" contained therein would, in terms of section 2(t) of the Interpretation Ordinance, therefore include a company.

This conclusion is reinforced by the long title of the Interpretation Ordinance, which provides:

> *AN ORDINANCE FOR DEFINING THE MEANING OF CERTAIN TERMS AND FOR SHORTENING THE LANGUAGE USED IN ENACTMENTS AND OTHER WRITTEN LAWS AND FOR OTHER PURPOSES*

The Ordinance exists precisely to supply definitions of general application, thereby avoiding unnecessary repetition in individual enactments. There is, therefore, no requirement for each statute to define the term "person" afresh. The use of the term in the Act must be understood in the light of the Interpretation Ordinance. The absence of a specific definition of "person" in the Offences Against Public Property Act cannot, therefore, be taken as indicating an intention to exclude corporate bodies from its scope.

This position also finds support in *Halsbury's Laws of England*, Vol. 24 (5th edn., 2010, LexisNexis) at page 248, which states:

> *426. 'Person' in statute usually includes corporation. The word 'person' in a public statute as a general rule includes a person in law, that is to say, a corporation, as well as a natural person; and, in every Act of Parliament passed on or after 1 January 1890, the expression 'person' unless the contrary intention appears, includes any body of persons corporate or unincorporate. A corporation is not included in the word 'person' when used in a statute if the statute contains expressions which are repugnant to that construction.*

In *Evans & Co v. London County Council* (1914) 3 KB 315 at pages 317–318, Avory J. observed as follows:

> *The question whether a company incorporated under the Companies Acts may be made liable under the provisions of a penal statute has been the subject of discussion in many cases in recent years, and the decision on that question turns in my opinion upon the application of s. 2 of the Interpretation Act, 1889, to the particular case. That section says that "In the construction of every enactment*

> *relating to an offence punishable on indictment or on summary conviction, whether contained in an Act passed before or after the commencement of this Act, the expression 'person' shall unless the contrary intention appears include a body corporate," and in every case which comes before the Court the question has to be determined whether the contrary intention appears in the statute under which the proceedings are taken.*

The question that then arises is whether the definition of "person" in the Interpretation Ordinance is rendered inapplicable on the ground that its application would be repugnant to the subject or context of section 5(1) of the Act. This is in view of section 2 of the Interpretation Ordinance, which provides that, in every written law, the term "person" includes any body of persons corporate or unincorporate, "*unless there is something repugnant in the subject or context*".

The High Court at Bar seems to have taken the view that such repugnancy arises on the basis that section 5(1) prescribes a mandatory sentence of imprisonment and fine, and that a corporation, being incapable of undergoing imprisonment, cannot be charged under that provision.

In support of this reasoning, the High Court at Bar relied on two decisions. The first is a judgment of the Court of Appeal in *Hariharan Selvanathan and Others v. Director General of Customs and Others* (CA 52/2008, CA Minutes of 18.06.2012), and the second is a judgment of the High Court of Bombay in *State of Maharashtra v. Messrs Syndicate Transport Company Private Limited* (1964) Cri LJ 276.

In *Hariharan Selvanathan and Others v. Director General of Customs and Others*, the Court of Appeal observed that:

> *Finally, crimes for which a corporation can be convicted are crimes which is punishable only by fine and if the offence is not one which is punishable by a fine, a corporation cannot be convicted.*

However, in view of the fact that the said judgment has since been set aside by this Court by judgment dated 16.12.2022 in SC/APPEAL/167/2012, the proposition laid down therein can no longer be regarded as representing the correct position of the law.

State of Maharashtra v. Messrs Syndicate Transport Company Private Limited is a decision of the Bombay High Court. In that case, a company, together with its Managing Director and other directors, was prosecuted under sections 420 (cheating and dishonestly inducing delivery of property), 406 (criminal breach of trust) and 403 (dishonest misappropriation of property) of the Indian Penal Code. A revision application was filed on behalf of the company to quash the charge under section 420 on the ground that the section prescribes a mandatory sentence of imprisonment, which cannot be imposed on a company, and that, therefore, such a charge is not maintainable against a corporate body.

In response, it was contended that sections 2 and 11 of the Indian Penal Code define a "person" to include a body corporate. The Bombay High Court observed that, although the definition of "person" is wide enough to include a company, it cannot be applied without limitation. Certain offences, by their very nature, can be committed only by natural persons, while others necessarily entail punishment by way of imprisonment, which cannot be imposed on a corporate body. To prosecute a company for such offences would result in the Court "*stultifying itself by embarking on a trial in which, if a verdict of guilty is returned, no effective order by way of sentence can be made*."

The Court accordingly held that the definition of "person" in the Penal Code must be read subject to the qualifying principle embodied in section 3(42) of the General Clauses Act [which is similar to section 2(t) of our Interpretation Ordinance], namely, "unless there is anything repugnant in the subject or context". Applying that principle, it was concluded that, notwithstanding the generality of the definition, a company is not

indictable for offences which can be committed only by a human individual or for offences which necessarily require the imposition of a sentence of imprisonment.

It is to be noted that the High Court at Bar has placed reliance on a decision of a Bombay High Court pronounced in 1964. The law relating to corporate criminal liability has, however, undergone significant development since then, and the issue must therefore be examined in the light of the subsequent judicial and statutory evolution in India.

In *Municipal Corporation of Delhi v. J.B. Bottling Company* (1975) Cri LJ 1148, a decision of the Delhi High Court, the question arose whether a company could be prosecuted under section 16(1) of the Prevention of Food Adulteration Act 1954, which prescribes a mandatory sentence of both imprisonment and fine. The Court held that the inability to impose a sentence of imprisonment on a company does not render the prosecution unsustainable. While acknowledging that imprisonment cannot be executed against a corporate body, the Court observed that the proper course is to impose the sentence to the extent that it is capable of execution, namely, by way of fine.

In that context, the Court stated that it would not "grant exemption from indictment" merely because a part of the prescribed sentence cannot be enforced, but would instead impose such punishment as is capable of being carried out.

In *Oswal Vanaspati & Allied Industries v. State of U.P.* (1993) 1 CLJ 172, a decision of the Allahabad High Court, the Court considered whether a company could be prosecuted under section 16 of the Prevention of Food Adulteration Act, which prescribes a sentence of imprisonment and fine. The Court held that, although a company, being a juristic person, cannot be subjected to imprisonment, this does not render the prosecution unsustainable. Where the statute prescribes a composite sentence of imprisonment and fine, the sentence of fine may nevertheless be imposed on the company, as that part of the punishment is capable of execution.

The Court further observed that, while a natural person must ordinarily be subjected to the full punishment prescribed by law, the imposition of only that part of the sentence which is executable, namely, fine, in the case of a company, cannot be regarded as illegal.

In *M.V. Javali v. Mahajan Borewell & Company & Ors.* (1997) 8 SCC 72, a decision of the Supreme Court of India, the Court reaffirmed that where a statute prescribes a sentence of imprisonment and fine, a company may nevertheless be sentenced to fine alone. In arriving at this conclusion, the Court relied on the 47th Report of the Law Commission of India in 1972 and observed that, although a company has no physical body and cannot suffer imprisonment, "the real penalty could be inflicted upon its respectability, that is, by way of a stigma", and that punishment by way of fine would sufficiently meet the ends of justice.

The Court thus recognised that, in the case of corporate offenders, the imposition of a sentence of fine in substitution for imprisonment provides a practical and effective means of enforcing criminal liability.

This line of reasoning was, however, not accepted in *Assistant Commissioner, Assessment-II, Bangalore v. Velliappa Textiles Ltd* (2003) 11 SCC 405, a decision of the Supreme Court of India. In that case, the Court, *inter alia*, considered the earlier decision in *State of Maharashtra v. Messrs Syndicate Transport Company Private Limited* and endorsed the view that, where a statute prescribes a mandatory sentence of imprisonment and fine, and imprisonment cannot be imposed on a company, the prosecution itself would not be maintainable. The Court declined to follow the contrary line of reasoning adopted in *Municipal Corporation of Delhi v. J.B. Bottling Company* and *Oswal Vanaspati & Allied Industries v. State of U.P.*, holding that those decisions did not reflect the correct legal position.

In that context, the Court observed:

> *Where the legislature has granted discretion to the court in the matter of sentencing, it is open to the court to use its discretion. Where, however, the legislature, for reasons of policy, has done away with this discretion, it is not open to the court to impose only a part of the sentence prescribed by the legislature, for that would amount to re-writing the provisions of the statute.*

The Court further held that *M.V. Javali v. Mahajan Borewell & Company & Ors.* had been incorrectly decided, observing that it is not open to the Court to depart from the plain language of the statute on the basis of perceived legislative gaps. It emphasised that the function of the Court is *jus dicere* and not *jus dare*, and that any lacuna in the law must be addressed by the legislature and not by judicial interpretation.

However, this restrictive approach did not find lasting acceptance, and the position was reconsidered by a fuller Bench shortly thereafter.

In *ANZ Grindlays Bank Ltd v. Directorate of Enforcement* (2004) 4 SCC 531, placing reliance on *Velliappa*, it was contended that no criminal proceedings could be initiated against a company where the statute prescribed a mandatory sentence of imprisonment. The Supreme Court expressed a provisional view that the issue required a purposive interpretation of the statute and referred the matter to a Constitution Bench to consider the correctness of *Velliappa*.

The question was conclusively settled in *Standard Chartered Bank v. Directorate of Enforcement* (2005) 4 SCC 530, where a Five Judge Constitution Bench, by a majority decision, reconsidered the correctness of *Velliappa*. In doing so, the Court observed:

> *It is sheer violence to commonsense that the legislature intended to punish the corporate bodies for minor and silly offences and extended immunity of prosecution to major and grave economic crimes.*

The Court further emphasised:

> *We do not think that there is a blanket immunity for any company from any prosecution for serious offences merely because the prosecution would ultimately entail a sentence of mandatory imprisonment.*

The Constitution Bench accordingly held that companies are not immune from prosecution merely because the statute prescribes a mandatory custodial sentence, and that, in such cases, the Court may impose the sentence of fine, being the punishment capable of execution. The majority decision thus overruled *Velliappa* on this point.

After the Constitution Bench decision in *Standard Chartered Bank v Directorate of Enforcement*, the Supreme Court of India had occasion, in *Iridium India Telecom Ltd v. Motorola Incorporated & Others* AIR 2011 SC 20, to consider the criminal liability of a company for offences involving *mens rea*, including cheating under section 420 of the Indian Penal Code. The principal contention advanced was that a company, being a juristic person, is incapable of possessing the requisite guilty mind and therefore cannot be prosecuted for offences requiring *mens rea*.

Rejecting that contention, the Court reaffirmed the applicability of the identification doctrine and held that a company is capable of forming the requisite *mens rea* through its directing mind and will. It was observed that the criminal intent of those who control the affairs of the company may be attributed to the company itself, and that there is no legal impediment to prosecuting a company for offences involving a mental element. The Court further clarified that the decision in *Standard Chartered Bank* had conclusively settled that a company may be prosecuted even where the statute prescribes a mandatory sentence of imprisonment, and extended that reasoning to offences under the Penal Code involving *mens rea*.

The Supreme Court observed at paragraph 38:

> *A corporation is virtually in the same position as any individual and may be convicted of common law as well as statutory offences including those requiring mens rea. The criminal liability of a corporation would arise when an offence is committed in relation to the business of the corporation by a person or body of persons in control of its affairs. In such circumstances, it would be necessary to ascertain that the degree of control of the person or body of persons is so intense that a corporation may be said to think and act through the person or the body of persons. The position of law on this issue in Canada is almost the same. Mens rea is attributed to corporations on the principle of 'alter ego' of the company.*

This decision places beyond doubt that a company may be prosecuted for offences involving *mens rea*, the requisite intention being attributed through those who constitute its directing mind and will. A corporation thus stands, in law, in a position analogous to that of a natural person and may be convicted of both common law and statutory offences, including those requiring a mental element. Where an offence is committed in the course of its business by those who exercise control over its affairs, the acts and state of mind of such persons may be attributed to the corporation, provided that the degree of control is such that the corporation may properly be said to think and act through them. It follows that the inability to impose a sentence of imprisonment does not operate as a bar to prosecution, the court being competent to impose such punishment as is capable of being enforced.

In Sri Lanka, this Court has recognised that the existence of a mandatory custodial sentence does not, by itself, preclude the prosecution of an accused where such sentence cannot be imposed. (see SC Reference No. 3/2008, SC Minutes of 15.10.2008, reported in [2008] BLR 160; *Rohana v. Attorney General* [2011] 2 Sri LR 174). These authorities affirm that, although the legislature has introduced mandatory minimum sentences of imprisonment for certain offences, the court is not bound to apply

them in all circumstances and retains the jurisdiction to impose such punishment as is capable of being enforced.

Applying these principles to the present case, there is no legal impediment to prosecuting the 1st accused company under section 5(1) of the Offences Against Public Property Act read with section 386 of the Penal Code. If found guilty, the court is competent to impose the fine prescribed therein. The fact that the section also provides for a mandatory term of imprisonment does not render the prosecution incompetent, nor does it give rise to any repugnancy in the subject or context so as to exclude the application of the definition of "person" in the Interpretation Ordinance. In these circumstances, the term "person" in section 5(1) must be construed to include a company.

It must, however, be emphasised that this Court is not concerned at this stage with the question whether the 1st accused or any other accused is in fact guilty of the offences charged. That is a matter to be determined by the High Court at Bar upon a consideration of the evidence. The impugned order proceeded solely on the footing that the 1st accused company cannot, in law, be indicted under section 5(1) of the Act, and it is that conclusion which is under review.

In the result, I answer the question of law whether the order of the High Court at Bar dated 06.12.2021 is a lawful order, in the negative.

The order of High Court at Bar dated 06.12.2021 is set aside and the appeal is allowed with costs.

Before I part with this judgment, and subject to the general observation I made at the beginning of this judgment that the administration of justice must be speedy, but not hasty, I wish to remind the Judges of the High Courts at Bar of the mandatory provisions contained in sections 450(5)(a) and (b) of the Code of Criminal Procedure Act, which provide as follows:

450(5)(a) A trial before the High Court at Bar under this section shall be held as speedily as possible and shall proceed nearly as possible in the manner provided for trials before the High Court without a jury, subject to such modifications as may be ordered by the Court or as may be prescribed by rules made under this Code.

(b) A trial by the High Court at Bar shall, unless exceptional circumstances so warrant, be heard from day to day to ensure the expeditious disposal of the same. The inability of a particular attorney-at-law to appear before the High Court at Bar on a particular date for personal reasons (including engagement to appear on that date in any other court or tribunal) shall not be a ground for postponing the date of commencement of the trial or be regarded as an exceptional circumstance warranting the postponement of the trial.

Judge of the Supreme Court

P. Padman Surasena, C.J.
I agree.

Chief Justice

A.L. Shiran Gooneratne, J.
I agree.

Judge of the Supreme Court

Achala Wengappuli, J.
I agree.

Judge of the Supreme Court

Arjuna Obeyesekere, J.
I agree.

Judge of the Supreme Court