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## THE ROLE OF JURORS IN THE CONTEXT OF SOCIAL MEDIA

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### ABSTRACT

*Serving as a juror is a prestigious position and considered a 'liability' of citizen and therefore jurors should avoid improper dealings with the accused in person or over the phone or internet including social media as such communication could impact upon their independence. Jurors who communicate with the parties upon the subject of the trial would be guilty of contempt of Court. In other words, comments made by jurors in respect of pending legal proceedings in which they are a part of, constitute an offence. Once an American juror was found guilty of contempt of Court for posting the following comment on Facebook.*

**KEYWORDS:** juror, Court, criminal trials, Facebook, Tribunal

### INTRODUCTION

Serving as a juror is a prestigious position and considered a 'liability' of citizen and therefore jurors should avoid improper dealings with the accused in person or over the phone or internet including social media as such communication could impact upon their independence. Jurors who communicate with the parties upon the subject of the trial would be guilty of contempt of Court. In other words, comments made by jurors in respect of pending legal proceedings in which they are a part of, constitute an offence. Once an American juror was found guilty of contempt of Court for posting the following comment on Facebook,

*"Actually excited for jury duty tomorrow...it's gonna be fun to tell the defendant they're guilty....: P?"<sup>1</sup>*

<sup>1</sup> Martha Neil, 'Oops. Juror Calls Defendant Guilty on Facebook, Before Verdict' American Bar Association Journal (Sept. 2, 2010) <[http://www.abajournal.com/news/article/oops.\\_juror\\_calls\\_defendant\\_guilty\\_on\\_facebook\\_though\\_verdict\\_isnt\\_in](http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in)> accessed 23 August 2018.

Jurors should be more concerned of their behaviour in social media. If jurors were found guilty for contempt of Court committed by improper communication via social media upon the subject of the trial, they could be served with a custodial sentence and their service as a juror would be terminated. Jurors should keep in minds that if they were to suffer a term of imprisonment more than one month, they would never be able to serve as jurors forever.<sup>2</sup> According to a research, 62% of the jurors were not aware of recent prosecutions of jurors. In other words, only 38% of jurors were aware of news and stories about jurors acting improperly.<sup>3</sup>

### OFFENCE DEFINED

In case where the jury is permitted to separate during the course of any trial, Court has to assure that the jurors may be first sworn in or affirmed not to communicate with any person other than a fellow juror upon the subject of the trial during such separation.<sup>4</sup> According to Section 227 (3) of the

<sup>2</sup> Code of Criminal Procedure Act No. 15 of 1979 of Sri Lanka, s 245 (k).

<sup>3</sup> Cheryl Thomas, 'Avoiding the Perfect Storm of Juror Contempt' [2013] 6 Crim. L.R. 483,490.

<sup>4</sup> ibid s 227 (2).

Code of Criminal Procedure Act No.15 of 1979 of Sri Lanka,

“If any such juror shall hold any such communication with any person other than a fellow juror or if any person other than a fellow juror shall hold any such communication with any such juror, such juror or person as the case may be deemed to be guilty of a contempt of Court and shall be punishable accordingly”.<sup>5</sup>

Not only the jurors but also any other person or entity has no unfettered right to publish judicial proceedings.<sup>6</sup>

### RECENT SENTENCING OF JURORS

Many jurors around the world are being sentenced due to improper communication of criminal matters they are involved in as jurors. The reason for such sentencing is the substantial risk of prejudice bearing upon the case.

In *Attorney-General v Joanne Frail*,<sup>7</sup> the British Court sentenced a juror to eight months imprisonment after being found guilty of contempt of Court as she had communicated with a defendant through Facebook. In 2017, the Attorney General of UK Jeremy Wright QC had requested Judges, solicitors and victims’ groups to submit evidence about the impact of social media on criminal trials. In *Attorney General v. Stephen James Pardon*,<sup>8</sup> a juror was sentenced to a period of four months’ imprisonment for disclosing juries’ deliberations to a defendant.<sup>9</sup>

Even obtaining information about a defendant’s previous conviction from the internet could create a potential risk of being prejudiced in respect of such defendant.<sup>10</sup> In *Attorney General v. Theodora Dallas*,<sup>11</sup> a juror was jailed for six months for contempt of Court as she had conducted a research on the accused over the internet and found information regarding a previous conviction of the accused and then disclosed them to other jury members. Misuse of the internet by a juror is always a serious irregularity and an effective custodial sentence is virtually inevitable to ensure that the integrity of the process of trial by jury is sustained.

In *Regina v. Adem Karakaya*,<sup>12</sup> Court held that the material obtained by the juror from the internet after the jury had retired, contravened the principles which prohibit the use of information, potentially relevant to the outcome of the case, privately obtained out of Court by a juror, as well as the reception of further material after the jury’s retirement.

### THE IMPOSITION OF PENALTIES UPON THEM

In view of the Judicature Act No. 02 of 1978 of Sri Lanka, every High Court shall have the power and authority to take cognizance of and try in a summary manner any offence of contempt committed against or in disrespect of its authority, and on conviction, to commit the offender to jail for a period not exceeding five years or a fine not exceeding five thousand rupees or both such imprisonment and fine.<sup>13</sup>

In addition to the High Court, Article 105 (3) of the Constitution has conferred powers to the Court of Appeal to punish for contempt of any Court, Tribunal or Institution a term of imprisonment or a fine or both as the Court may deem fit.<sup>14</sup> The said Article shall not prejudice or affect the rights vested by any law in such other Court, Tribunal or Institution to punish for contempt itself.<sup>15</sup>

### THE REMOVAL OF ERRANT JURORS

If the accused or prosecution notices that a juror’s conduct was improper, they could immediately report it to Court. In terms of Section 211 of the Code of Criminal Procedure Act No.15 of 1979, parties could object the appointment or continuation of a juror *inter alia* if there is some presumed or actual partiality in the juror,<sup>16</sup> or if the juror was convicted of any offence which in the opinion of the judge renders him unfit to serve on the panel of jurors<sup>17</sup> or any other circumstances which in the opinion of the judge renders him unfit as a juror.<sup>18</sup> For instance, in the aforesaid matter of *Attorney-General v. Joanne Frail*,<sup>19</sup> the defendant Sewart informed Court through her solicitor about the Facebook communication between her and the juror Frail.

<sup>5</sup> Code of Criminal Procedure Act No. 15 of 1979 of Sri Lanka, s 227 (3).

<sup>6</sup> *Hewamanne v De Silva* [1983] 1 Sri.L.R. 1, 68 (Wanasundera J).

<sup>7</sup> *Attorney General v Joanne Frail, Jamie Sewart* [2011] EWHC 1629 (Admin), [2011] 2 Cr. App. R. 21, para [54]- [57] (Lord Judge CJ).

<sup>8</sup> [2012] EWHC 3402 (Admin).

<sup>9</sup> *ibid* [20] (Lord CJ).

<sup>10</sup> *Ketan Thakrar, Rizwan Yusoof v Regina* [2008] EWCA Crim 2359 [17] (Hooper LJ).

<sup>11</sup> [2012] EWHC 156 (Admin); [2012] 1 W.L.R. 991; [2012] 1 Cr. App. R. 32; [2012] A.C.D. 21.; para [40]-[47] (Lord CJ).

<sup>12</sup> [2005] EWCA Crim 346, [2005] 2 Cr. App. R. 5 [27] (Judge LJ).

<sup>13</sup> Judicature Act No. 02 of 1978 of Sri Lanka, s 18.

<sup>14</sup> The 1978 Constitution of Sri Lanka (as amended in 2015), art 105 (3).

<sup>15</sup> *ibid* 105 (3) Proviso.

<sup>16</sup> Code of Criminal Procedure Act No.15 of 1979, s 211 (a).

<sup>17</sup> *ibid*, s 211 (d).

<sup>18</sup> Code of Criminal Procedure Act No.15 of 1979 of Sri Lanka, s 211 (f).

<sup>19</sup> *Attorney General v Joanne Frail, Jamie Sewart*, [2011] EWHC 1629 (Admin), [2011] 2 Cr. App. R. 21.

Every objection raised against a juror shall be decided by the Judge and such decision shall be recorded and be final.<sup>20</sup> If the objection is allowed, then the place of such juror shall be substituted by any other juror.<sup>21</sup> If in the course of a trial by jury at any time before the return of the verdict, any juror from any sufficient cause is prevented from attending throughout the trial, the Judge may either order a new juror be added or discharge the jury and order for a new jury to be selected.<sup>22</sup> Consequently, if a juror was to deliberately avoid attending proceedings after having communications with the accused upon the subject of the trial or being unduly influenced by such communication, then he or she could be removed by Court with immediate effect.

### **PROOF OF COMMUNICATION WITH THE ACCUSED**

Jurors' contempt of Court by communicating with the accused upon the subject of the trial could now be easily proved as digital evidence is admissible in our Courts. According to Section 5 (1) of the Evidence (Special Provisions) Act No. 14 of 1995 of Sri Lanka, in any proceeding where direct oral evidence of fact would be admissible, any information contained in any statement produced by a computer and tending to establish that fact shall be admissible as evidence of that fact.<sup>23</sup> Hence, messages or chat history between jurors and the accused found on the Facebook, Twitter, LinkedIn, WhatsApp, Skype, Viber or any other communication platform could be used against jurors if such conversations were made upon the subject of the trial. Although not particular in the realm of juror contempt, it was held in many cases that digital evidence could be admitted in Sri Lanka.<sup>24</sup>

According to Section 4 (1) of the said Act, in any proceeding where direct oral evidence of a fact would be admissible, any contemporaneous recording reproduction thereof, tending to establish that fact shall admissible as evidence of that fact. In *Abeyagunawardane v. Samoon and Others*,<sup>25</sup> it was held by the Court of Appeal, that admission of video recordings was governed solely under the Evidence (Special Provisions) Act No. 14 of 1995.

<sup>20</sup> *ibid* s 212 (1).

<sup>21</sup> Code of Criminal Procedure Act No.15 of 1979 of Sri Lanka, s 212 (2).

<sup>22</sup> *ibid* s 215.

<sup>23</sup> Evidence (Special Provisions) Act No. 14 of 1995, s 5 (1).

<sup>24</sup> *Marine Star (Pvt) Ltd v Amanda Foods Lanka (Pvt) Ltd*, [H.C. (Civil) 181/2007/MR] (K.T. Chithrasiri, HCJ); *Millennium Information Technologies Limited v DPJ Holdings (Private) Limited* [HC (Civil) 257/2009/MR]; and *People's Leasing Company Limited v Muthuthantrige Iran Fernando and Others*, [H.C. (Civil) 201/2008/MR] (Ruwan Fernando HCJ).

<sup>25</sup> [2007] 1 Sri. L.R. 276, 287 (Imam J).

Additionally, even audio itself has been admitted by Courts. In *Abu Bakr v. Queen*,<sup>26</sup> it was held that contemporaneous recording of speeches could be admitted as evidence. In the matter of *In re S.A. Wickramasinghe 1954*, Court held that an electrical recording of speech made on a tape recorder could be admitted as evidence.<sup>27</sup>

### **FREEDOM OF SPEECH ENJOYED BY JURORS AND ITS LIMITS**

According to Article 14 (1) (a) of the Constitution of Sri Lanka, every citizen is entitled to the freedom of speech and expression including publication.<sup>28</sup> Article 19 of the Universal Declaration of Human Rights says: 'everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers'.<sup>29</sup> Hence, jurors could exercise the said right to freedom of expression without interference.

However, exercise and operation of the right to free speech is subject to restrictions mentioned in Article 15 (2) of the Constitution. Accordingly,

'The exercise and operation of the fundamental right declared and recognized by Article 14(1)(a) shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, **contempt of Court**, defamation or incitement to an offence'.<sup>30</sup>

The consequence is, that the juror concerned loses his freedom of expression laid down in Article 14 (1) (a) of the Constitution, if he is found guilty of contempt of Court which is a restriction imposed upon him by Article 15 (2). Therefore, the jurors' Facebook posts regarding judicial proceedings should be fair.

### **'ACTIVE' AND 'PASSIVE' AWARENESS OF THE CASE**

There is a distinction between the active searching and the passive awareness of a case. Professor Cheryl Thomas has defined the former as jurors actually seeking for case-related information, while the latter as jurors seeking information concerning their case online during trial.<sup>31</sup> In addition to the Facebook and internet, jurors could be actively or passively aware of the stories related to their case in newspapers, television and radio. On

<sup>26</sup> (1953) 54 NLR 566 (Gunasekara J).

<sup>27</sup> (1954) 55 NLR 511 (Gunasekara J).

<sup>28</sup> The Constitution of Sri Lanka, art 14 (1) (a).

<sup>29</sup> Universal Declaration of Human Rights 1948, art 19.

<sup>30</sup> The Constitution of Sri Lanka, art 15 (2).

<sup>31</sup> Cheryl Thomas, 'Avoiding the Perfect Storm of Juror Contempt' [2013] 6 Crim. L.R. 483, 492.

many occasions jurors were questioned even for the use of their mobile phones during deliberations.<sup>32</sup>

When it comes to the internet, not only the Facebook but also other social networking systems such as Twitter, LinkedIn, WhatsApp, Skype and Viber could provide facilities where juror could be either actively or passively aware of the case and of the accused. If a juror is personally aware of any relevant fact, it is his duty to inform the Court regarding that and in such a case he may be sworn and examined in the same manner as any other witness.<sup>33</sup>

The main responsibility of the Jurors is to decide as to which view of the facts is true and then to return the verdict.<sup>34</sup> In other words, their role is to determine all questions of facts pertaining to the case.<sup>35</sup> Generally speaking, in a criminal proceeding, the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character.<sup>36</sup> In *Roshan v. The Attorney General*,<sup>37</sup> it was held that evidence concerning the bad character of the accused is extremely prejudicial to the interests of the accused and would adversely affect the right of an accused to a fair trial.<sup>38</sup>

However, if a juror becomes aware of the bad character of an accused via social networking, it might affect the impartiality of the juror when determining the questions of fact as to whether the accused may be guilty of the crime. Hence, a juror's active involvement of personal research on the bad character of the accused may leave reason for the accused to object the appointment or the continuation of the said juror through the proceedings.

In contrast, an argument could be advanced by a juror that although he was engaged in active research about the accused, the outcome of research had not been disclosed to fellow jurors. In other words, a juror could defend himself by proving that there would be no improper disclosure of information to other members of the jury or third parties. Such a defence may sometimes mitigate the seriousness of the offence of contempt of Court if there is no miscarriage of justice. In *Regina v Jay Marshall and Robert Crump*,<sup>39</sup> it was held that, in order to convict a juror for contempt of Court, there should be a real possibility that the jurors or any of them may have been influenced improperly by the online materials.

<sup>32</sup> *R. v Kevin McCluskey* (1994) 98 Cr. App. R. 216.

<sup>33</sup> Code of Criminal Procedure Act No. 15 of 1979, s 225.

<sup>34</sup> s 232 (a).

<sup>35</sup> s 232 (c).

<sup>36</sup> Evidence Ordinance 14 of 1895 (as amended in 1999), s 54.

<sup>37</sup> [2011] 1 Sri. L.R. 364.

<sup>38</sup> *ibid*, 379 (Sarath de Abrew J).

<sup>39</sup> [2007] EWCA Crim 35, [12] (Hughes).

## PREVENTING JUROR CONTEMPT

The contempt of Court by Jurors could be prevented by providing more information to jurors what they should do and what they should not do during jury service. According to the Criminal Procedure, the jury should be guided and directed by the Judge.<sup>40</sup> Especially where the jury is allowed to separate during the course of trial, in addition to the advice to avoid holding improper communication upon the subject of the trial, the Judge could advise not to engage in active research on the aforesaid subject and not to disclose the outcomes of such research to fellow jurors or third parties. Such an advice would essentially support the jurors to be aware of their limits in the realm of social media.

Furthermore, the Judge could specifically guide the jury on which active searches are prohibited, and which are permissible. For instance, jurors could look for information about the aspects of their jury service, Court locations and transport services.<sup>41</sup> The Judge has to advise the jury to refrain from the active searches such as inquiring about the Judge, prosecuting and defence counsel, legal terms and aspects of the case because such a type of active searches could have an impact upon the jurors' impartiality.

Additionally, guiding booklets could be provided to the jury which would direct them to avoid carrying any mobile phones, laptops, iPods or any such device with the capability of connecting the internet to the jury room.<sup>42</sup> For instance, the UK Jury Service Booklet mentions that,

*"The judge will tell you that you do not discuss the evidence with anyone outside of your jury either face to face, over the telephone or over the internet via social networking sites such as Facebook, Twitter or Myspace. If you do this, you risk disclosing information, which is confidential to the jury".*<sup>43</sup>

Not only inside the Court room, but also when the Jurors are away from Court, they should not discuss the case with anyone either face to face or over the telephone or over the internet via chat lines such as the Facebook, etc.

In addition to guiding booklets, online information could be used to warn Jurors to avoid improper communication upon the subject of the trial. For example, the UK Government Information Portal contains a separate section for Jury Service which includes explanations on adverse consequence of discussing matters pertaining to the trial with anyone other than fellow jurors. It says:

<sup>40</sup> ss 229, 220 (1), 217, 224 (1), 231, 235(2).

<sup>41</sup> Cheryl Thomas, 'Avoiding the Perfect Storm of Juror Contempt' [2013] 6 Crim. L.R. 483,493.

<sup>42</sup> HM Courts and Tribunals Service UK, *Your Guide to Jury Service* (HMCTS 2011) page 6,

<<https://formfinder.hmctsformfinder.justice.gov.uk/5222-eng.pdf>>accessed on 17 September 2018.

<sup>43</sup> *ibid* page 4.

“Don’t discuss the trial with anyone until it’s finished, except with other jury members in the deliberation room. After the trial you mustn’t talk about what happened in the deliberation room, even with family members. You can talk about what happened in the Courtroom. Don’t post comments about the trial on social media websites like Facebook or Twitter - even after the trial’s finished. This is contempt of Court and you can be fined or sent to prison”.<sup>44</sup>

If a juror was to obtain information from some outside source such as the Google, Facebook, Twitter, or from any traditional source such as books that would not be fair to the defendant or to the public to whom he represents. It would not in other words be a fair trial.<sup>45</sup> Due to curiosity or bad faith, jurors in certain occasions, ignore the instructions given by the Judges.<sup>46</sup> Therefore, in the prevention of juror contempt, jurors should have a higher degree of self-control as well.

**CONCLUSION**

Serving on a Jury does not mean jurors are completely prohibited from using any communication devices while doing jury service. It would be unreasonable if social media is not accessible to jurors, simply because they are serving on a jury. Therefore, Jurors could use any communication facilities like phones and internet including social media as long as they are not discussing the subject matter of the trial with any person other than a fellow juror.

Jurors should ensure that there is no miscarriage of justice which resulted by their personal communication with the accused or any person other than a fellow juror upon the subject of the trial. They should exercise self-restraint in respect of communication including social media. Court could prevent this issue by providing specific guidelines to jurors to avoid being involved in improper communication and in active research upon the subject of the trial during the pendency of the action.

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