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

Herath Mudiyanselage Ariyarathne
Accused-Appellant

Vs
The Democratic Socialist Republic of Sri Lanka
Complainant Respondent

CA 307/2006
HC Kurunegala HC 57/2002

Before : Sisira. J. de Abrew J &
PWDC JayathilakeJ
Counsel : Anil Silva PC with Manoj Nanayakkara for the appellant
Roshantha Abeysuriya DSG for the Respondent

Argued on : 9th, 13th, 21st, 22nd of May 2013
Decided on : 17.7.2013

Sisira. J. de Abrew J.

The accused appellant in this case was convicted of the murder of a woman named Pichchimuththuge Nandawathi and was sentenced to death. Being aggrieved by the said conviction and the sentence he has appealed to this court.

The trial against the accused commenced before the High Court Judge (HCJ) without a jury on 27.10.2005 and after recording the evidence of alleged eye witness Sgarika it was put off for 24.2.2006. The learned HCJ, on 24.2.2006, after recording the evidence of two witnesses put off the case for 21.6.2006. The learned HCJ who heard the case could not take up the case on 21.6.2006 as she had been transferred. On 21.6.2006 succeeding HCJ put off the case for 2.11.2006 on which date too the case was put off for 15.11.2006. On 15.11.2006 succeeding HCJ took

up case and after postponing the case on several occasions convicted the accused appellant on 13.12.2006. It is therefore seen that the HCJ who heard the evidence of three witnesses did not continue to hear the case. It was her successor who ultimately convicted the accused appellant. Learned PC for the accused appellant contended that in the High Court succeeding HCJ has no power to adopt the proceedings taken up before his predecessor. He further contended that although under section 267 of the Code of Criminal Procedure Act No.15 of 1979 (CPC) the Magistrate has power to continue with the evidence recorded by his predecessor, such power is not given to the HCJ under this section. He contended that if section 48 of the Judicature Act covers transfers then there was no necessity to enact section 267 of the CPC. Section 267 of the CPC reads as follows:

"Whenever any Magistrate after having heard and recorded whole or any part of the evidence in any inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself or he may re-summon the witnesses and re-commence the inquiry or trial:

Provided that in any trial the accused may when the second Magistrate commences his proceedings demand that the witnesses or any of them be re-summoned and re-heard."

Learned PC contended that it is a principle recognized in our law that the Judge who heard the evidence must deliver the judgment. In support of this contention he cited the judgment of the Supreme Court in the case of Ganegodawilage Thilak Premalal Vs OIC Criminal Investigation Department- CA 53/2008 decided on 19.9.2008. In the said case the accused appellant being aggrieved by the judgment of the Magistrate appealed to the High Court. The learned HCJ who reserved the judgment after hearing the submissions of both

parties could not deliver the judgment as he had been transferred before the date of the judgment. The succeeding HCJ without even inquiring from the parties whether they have any objection to his delivering the judgment delivered the judgment. The learned HCJ who delivered the judgment never heard any submission of the parties. His Lordship Justice Raja Fernnado observing the principle that the Judge who heard the case must deliver the judgment, set aside the judgment of the HCJ and sent the case for rehearing. It has to be noted that in the said case it was an appeal and the HCJ who heard the arguments of both counsel did not deliver the judgment. But in the present case, part of the evidence and submissions of both parties were heard by the HCJ who delivered the judgment. Therefore the facts of the said case are different from the facts of the present case. Learned PC advancing his contention cited the following passage of the book titled 'Penumbre of Natural Justice'. "Personal hearing enables the authority concerned to watch the demeanour of the party charged and also of the witnesses appearing and clear up its doubts during the course of arguments, and party appearing to persuade the authority by personal argument to accept his point of view. That is why the cardinal principle of a judicial system is that a case should be decided by the authority hearing the argument and that a successor cannot decide a case, on the basis of the arguments already advanced before his predecessor who left the case undecided, without hearing the arguments afresh." In fact it is a good principle to observe by all courts that the Judge who heard the case must deliver the judgment. But I must be mindful of the fact whether it can always be observed.

Learned PC citing Section 48 of the Judicature Act No.2 of 1978 as amended by Act No. 27 of 1999 contended that in criminal trials in High Courts, succeeding Judge cannot continue with the proceedings recorded before his predecessor. Section 48 of the Judicature Act reads as follows: "In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other

disability of any judge before whom any action, prosecution, proceeding or matter, whether on an inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh:

Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such Judge, the accused may demand that the witnesses be re-summoned and reheard."

Learned PC contended that other disability in Section 48 of the Judicature Act should be given a restricted meaning in view of the preceding words (death, sickness, resignation, removal from office, absence from Sri Lanka). 'Other disability' in the said section, according to his construction should be given the meaning of permanent disability. I now advert to this contention. The words death resignation and removal from office in Section 48 of the Judicature Act are of permanent nature. But can it be said that the words 'sickness' and 'absence from Sri Lanka' are of permanent nature. If a judge suddenly becomes partly paralyzed and is unable to work for some time, should the parties suffer the agony of commencing the trial afresh? I think not. In such a situation succeeding judge should be able to continue with the evidence already recorded before his predecessor under Section 48 of the Judicature Act. Thus the word 'sickness' in Section 48 of the Judicature Act is not a permanent sickness.

I will next consider the words 'absence from Sri Lanka'. If a judge goes to a foreign country to follow a one year course, should the parties go through the agony of commencing the trial afresh? I think not. In such a situation, the

succeeding judge under section 48 of the Judicature Act should be able to continue with the case. When I consider all these matters, I am unable to agree with the contention that words 'other disability' should be interpreted to say a 'permanent disability'

I now again turn to the contention that succeeding HCJ in a criminal trial cannot, under Section 48 of the Judicature Act, continue with the proceedings recorded before his predecessor. When a HCJ is transferred from his station he ceases to exercise his jurisdiction in his area and thereby he suffers from disability to function as the HCJ of the area. Thus, in my view, transfer of a HCJ from a station is covered by the words 'other disability' in Section 48 of the Judicature Act.

Maxwell on 'The interpretation of Statutes' 12th edition at page 203 says thus: "Not only are unreasonable or artificial or anomalous constructions to be avoided: it appears to be an assumption (often unspoken) of the courts that where two possible constructions present themselves, the more reasonable one is to be chosen." The construction advanced by learned PC is that the trial must be commenced afresh when a HCJ is transferred. The construction advanced by the DSG is that trial must continue with the evidence already recorded by his predecessor. Of these two constructions what is more reasonable? Under the proviso to Section 48 of the Judicature Act, the accused can demand re-summoning of witnesses who had already given evidence before the previous judge when his trial is continued before the new judge. If such a demand has not been made by the accused is it reasonable to commence the trial afresh? I think not. If such a demand has not been made by the accused, it can be contended that he himself has admitted that continuation of the trial before new HCJ with the evidence already recorded to be reasonable. Thus in the absence of an application by the accused under the proviso to Section 48 of the Judicature Act, is it correct to conclude that

commencing the trial a fresh is reasonable? I think not. Thus in the absence of an application by the accused under the proviso to Section 48 of the Judicature Act, of the two constructions advanced by both counsel, what is the more reasonable construction that should be adopted? It is the construction advanced by the DSG. However if the succeeding judge feels that he should record the evidence of a witness who had already given he is empowered to do so under Section 48 of the Judicature Act.

Considering all these matters I hold that when a HCJ is transferred the succeeding HCJ can, under Section 48 of the Judicature Act, continue with the evidence already recorded by his predecessor. This view is supported by the judicial decision in Wilma Dissanayake and others Vs Leslie Dharmarathne [2008] 2 SLR page 184 wherein Lord Chief Justice SN Silva interpreting Section 48 of the Judicature Act held thus:

1. It is necessary for a succeeding judge to continue proceedings since there are change of judges holding office in a particular court due to transfers, promotions and the like. It is in these circumstances that Section 48 was amended giving discretion to judge to continue with the proceedings.
2. The exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witnesses recorded by the Judge who previously heard the case.

Learned PC submitted that if the succeeding Judge, acting under Section 48 of the Act, decides to continue with the case, he must, before doing so, make an order giving his reasons for his decision. He urged this ground without prejudice to his first ground. I now advert to this contention. Section 48 of the Judicature Act does not state that if the succeeding Judge decides to continue with the case he should give his reasons. Assuming without conceding that he should give reasons for his decision what are the matters that he should discuss. He has to necessarily

comment on the credibility of the witnesses. If he expresses an opinion about the credibility of the witnesses who had already given evidence an objection can be raised to the effect that he had decided the credibility of witnesses before hearing the full case. When I consider all these matters, I am of the opinion that there is no necessity for the succeeding judge to make an order giving his reasons for his decision to continue with the evidence already recorded. For these reasons, I am unable to agree with the submission of learned PC.

Learned PC next contended that the learned HCJ who convicted the accused appellant has not adequately considered the contradictions marked by the defence. He drawing the attention of Court to the contradictions marked V2 and V3 submitted that when Sgarika who claimed to be an eye witness was making her statement to the police officer her statement had been coloured by him to give more weight to her testimony. He therefore contended that such contradictions should have been considered by the judge on the basis that they were vital contradictions. Sagarika, in her examination chief, stated that when the accused appellant was coming to attack her mother with a club which had been lifted by the accused appellant, she ran to her aunt's house. According to V2, she had told the police that she was near the door at the time of the incident. According to V3 she had told the police that she saw the accused attacking her mother with an iron rod. She denied both statements being made to the police. Question that had to be asked is even if the police officer added these two portions to her statement, did she give evidence in accordance with the said two portions. The answer is no. The defence counsel was able to mark the said contradictions because she denied the said portions of her statement. This shows that Sagarika is a reliable witness. Thus failure to give adequate consideration to the contradictions has not caused any prejudice to the accused appellant. The learned trial judge had stated in his judgment that he observed the demeanour of the witness Sgarika. But she could not

have observed the demeanour of Sagarika as she did not give evidence before him. It was a misdirection committed by the learned trial judge. But is this misdirection sufficient to vitiate the conviction? I have earlier held that Sagarika was a reliable witness. Sagarika who was a ten year old girl at the time of the incident ran to her aunt's house soon after the incident and went to the police station with her aunt's son. She made a statement to the police without delay. I have considered the evidence led at the trial and I am of the opinion that the prosecution has proved the case beyond reasonable doubt.

For the above reasons, I affirm the conviction and death sentence and dismiss the appeal.

Appeal dismissed.

Judge of the Court of Appeal.

PWDC Jayathilake J

I agree.

Judge of the Court of Appeal.