

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

In the matter of an Appeal in terms
of Article 154 P (6) of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

Court of Appeal Case No.

CA (PHC) 242/2005

HC Awissawella Revision APN:

HCRA 2/03

MC Kaduwela : 18418

Officer-In-Charge (Crimes)

Police Station

Nowagamuwa.

Complainant

Hendha Hewa Sumanasiri,
127C, New Kandy Road,
Kotalawala,
Kaduwela.

Virtual - Complainant

Vs.

1. Rambuggala Nahalle Arachchige
Don Sumeth Perera,
127C, New Kandy Road,
Kotalawala,
Kaduwela.

2. Wijesinghe Vithanage,
27D, New Kandy Road,
Kotalawala,
Kaduwela.

Accused

Hendha Hewa Sumanasiri,
127C, New Kandy Road,
Kotalawala,
Kaduwela.

Virtual - Complainant
- Petitioner

Vs.

1. Hon. Attorney general
The Attorney general's
Department.
2. Rambuggala Nahalle Arachchige
Don Sumeth Perera,
127C, New Kandy Road,
Kotalawala,
Kaduwela.
3. Wijesinghe Vithanage,
27D, New Kandy Road,
Kotalawala,
Kaduwela.

4. Officer-In-Charge (Crimes)

Police Station

Nawagamuwa.

Respondents

Hendha Hewa Sumanasiri,

127C, New Kandy Road,

Kotalawala,

Kaduwela.

Virtual - Complainant

- Petitioner - Appellant

Vs.

1. Hon. Attorney general

The Attorney general's

Department.

2. Rambuggala Nahalle Arachchige

Don Sumeth Perera,

127C, New Kandy Road,

Kotalawala,

Kaduwela.

3. Wijesinghe Vithanage,

27D, New Kandy Road,

Kotalawala,

Kaduwela.

4. Officer-In-Charge (Crimes)
Police Station
Nawagamuwa.

Respondent - Respondents

Before : W.M.M.Malanie Gunarathne, J

: P.R.Walgama, J

**Counsel : B.A. Jayathilaka for the Virtual - Complainant
- Petitioner - appellant.**

: D.S. Saman De Silva for 2nd & 3rd Respondent.

: Anoop De Silva, SSC for the 1st & 4th Respondent.

Argued on : 04.03.2015

Decided on : 07.08.2015

CASE- NO- CA (PHC)-242/2005- JUDGMENT- 07.08.2015

P.R.Walgama, J

The Petitioner- Appellant lodged the instant appeal, against the acquittal of the Accused by the Learned Magistrate in the case bearing No.18418 of the Magistrate Court Kaduwela, which

order was upheld by the Learned High Court, Judge of Provincial High Court of Avissawella in the case bearing No. 2/2003.

The shortly stated facts as stated by the Appellant are as follows;

The Officer in Charge of Nawagamuwa Police has instituted action in the Magistrate Court against the 2nd and the 3rd Accused- Respondents on a complaint made by the Virtual- Complainant-Appellant, for having committed, the offence of being members of an unlawful assembly to commit mischief to the Appellant and thereby committing an offence punishable under Section 147 of the Penal Code. In addition the Accused - Respondents were charged for having committed an offence punishable under Section 433, and 410 of the Penal Code.

Section 433

“Whoever commits criminal trespass shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both”

Section 410

“Whoever commits mischief and thereby causes loss or damage to the amount of fifty rupees or upwards shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or both.”

The Accused- Respondents had pleaded not guilty to the afore said charges, and after trial the Learned Magistrate has acquitted and discharged the Accused -Respondents.

Being aggrieved by the said order dated 09.12.2002, of the Learned Magistrate, the Petitioner -Appellant has made an application by way of Revision to the High Court of Avissawella to have the said order set aside. The Learned High Court Judge after the inquiry in the Revision Application made order up holding the order of the Learned Magistrate and dismissed the application of the Petitioner accordingly.

The Petitioner- Appellant had impugned the said order of the Learned High Court Judge and preferred the instant appeal to this Court to have said order of the High Court Judge set aside in terms of 154(p)(6) of the Constitution.

In the said inquiry in to the Revision application of the Petitioner- Appellant, the stance of the 1st Respondent was (Attorney General) that the Appellant cannot in terms of Section 318 of the Criminal Procedure Code, lodge an appeal against an acquittal without the sanction of the Attorney General.

Section 318

“An appeal shall not lie from an acquittal by a Magistrate’s Court except at the instance or with the written sanction of the Attorney-General.”

It is said that the Appellant should have appealed against the said acquittal after 28 days with the permission of Attorney General. In the instant matter the Appellant without first exercising the right of appeal had invoked the Revisionary jurisdiction of the Provincial High Court, for which the Respondent has assailed.

The Learned High Court Judge has categorically stated that the Petitioner has not averred special reasons to invoke the Revisionary jurisdiction of the High Court, and besides has not established that grave injustice has been caused to the Petitioner.

In considering the judgment of the Learned Magistrate dated 09.12.2002 the Learned High Court Judge has adverted to the fact that the manner in which the witnesses had adduced evidence at the trial. In deed it is crystal clear that there are discrepancies in the testimony of the witnesses, for the prosecution. In that it is stated that the Appellant has made a complaint rather delay, and had failed to mentioned the fact an inmate of the house was subject to an assault. Therefore the Police had not recorded any statement from the victim.

Further it is salient to note, that none of the witnesses ~~had~~ indentified the accused as the assailants. The learned Magistrate has specifically dealt with the testimony of the witnesses who testified as to the alleged incident and was of the view that they lack in testimonial trustworthiness and had arrived at irresistible conclusion that the prosecution has failed to prove the charges against the Accused- Respondents, beyond reasonable doubt.

It is further alleged by the Appellant that the Learned Magistrate has not dealt with the damages that was caused to the roof of the house of the Appellant. But it is apparent that the witness No. 5 the police officer who investigated in to the alleged incident had visited the scene and his testimony was that he saw the damage to the roof of the house only one

month after the incident, as there was a subsequent complaint regarding the said damage.

It is quite apparent that the Learned Magistrate in dealing with the damages caused to the Appellant's house, has observed the fact that in the original plaint the damage was estimated at Rs. 4500/ but in the amended plaint it is stated as Rs. 12,400/, therefore the Learned Magistrate was of the view that the Appellant's version is not trust worthy and had rejected the same.

In addition, although it transpired that one Aruna Wasantha Jagoda, was assaulted, in the alleged incident, was never called by the prosecution to establish the alleged incident. In the above setting the Learned Magistrate was compelled to acquit and discharged the Accused-Respondents accordingly.

Being aggrieved by the said impugned judgment the Appellant, made an application by way of revision to the Provincial High Court of Avissawella to have the said judgment set aside or be vacated.

The Learned High Court Judge, inquiring in to the said Revision Application of the Petitioner - Appellant has basically adverted to the Section 318 of the Criminal Procedure Code.

In the said order the Learned High Court Judge has made reference to the case of WICKREMESINGHE .VS. FAY- 44. NLR- 368, which has stated thus;

“A heavy onus rests upon an applicant who moves to revise a case, when the Attorney General has refused to sanction an appeal. It is incumbent upon him to make out a strong case amounting to positive miscarriage of justice in regard to either the law or the Judge’s appreciation of the facts.”

Further in the case of OSSEN .VS. EXERCISE INSPECTOR PONNIAH- 34 NLR- 50 has stated thus;

“Where the Attorney-General has refused to sanction an appeal, the Supreme Court will hear the case in revision, if the applicant makes out a strong case, amounting to a positive miscarriage of justice, in regard to either the law or the Judges appreciation of facts”.

At the very outset the Respondent has raised as a preliminary issue whether the Appellant could maintain this revision application without the sanction of the Attorney General, and moved for a dismissal in limine. The Learned High Court Judge

by his order dated 31.05.2004 has over ruled the preliminary objections, and had fixed the matter for order on the merits.

Although the Learned High Court Judge made the said order, I am of the view that the Appellant has not made out a strong case of positive miscarriage of justice, as the Appellant has failed to prove the charges against the Accused beyond reasonable doubt. In addition the Appellant has not sought the permission of Attorney General, to appeal against the said acquittal of the Accused by the Learned Magistrate.

In the above setting it is crystal clear that the Appellant has not made out a strong case against the Accused either in law or in exposition of facts.

In the instant appeal the Appellant sought to set aside the order dated 28.09.2005 made by the successor of the Learned High Court Judge who made the order refusing the preliminary objection.

The Learned High Court Judge by his order dated 28.09.2005 had made the following observations, to wit;

That the Appellant has, without exercising the right of appeal by obtaining the sanction from the Attorney General, has directly made the application by way of revision to have the said order set aside, without establishing special circumstances to invoke the Revisionary Jurisdiction of the Provincial High Court. Further it is apparent that the Appellant has not asserted the fact that a miscarriage of justice has occurred in the circumstances, as stated above.

In addition the Learned High Court Judge was of the view that the Learned Magistrate has arrived at a correct finding, by evaluating the material placed before him, and had affirmed the order of the Learned Magistrate as stated above.

Being aggrieved by the said order of the Learned High Court Judge the Appellant has preferred the instant appeal seeking to vacate the same. For the reasons as stated above I am of the view that the Learned Magistrate's order is in accordance with the accepted law and the exposition of the facts stated above, which has not proved the guilt of the Accused. As a result the Learned Magistrate was compelled to acquit and discharged them from all charges.

The Learned High Court Judge being satisfied with the determination of the Learned Magistrate and the Appellant's

failure to establish exceptional circumstances, in the application in revision has dismissed the application of the Petitioner - Appellant.

In the said backdrop I see no reason to interfere with the findings of the Learned Magistrate and the Learned High Court Judge, thus I dismiss the Appeal, subject to a cost of Rs. 10,000/

Accordingly appeal is dismissed.

P. R. Walgama
JUDGE OF THE COURT OF APPEAL

W.M.M.Malanie Gunarathne, J

I agree,

JUDGE OF THE COURT OF APPEAL