

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

In the matter of an Appeal in terms of
Article 138 read with Article 154 P
(6) of the Constitution of the
Democratic Socialist Republic of Sri
Lanka.

**CA (PHC) No. 46/2005
Provincial HC of Sabaragamuwa
(Holden in Rathnapura) HCRA 12/2005
MC Pelmadulla: 5356**

Officer in Charge,
Police Station,
Kahawatte.

Complainant

VS.

1. Ebert Dodamgoda,
2. Pushpa Kumara Chandimala
Dodamgoda,
3. Nishantha Udaya Kumara Dodamgoda,
4. Mohittege Sunil,
5. Mohittege Jagath Premasiri.

All of Navinikanda,
Nabuluwa, Atakalanpanna.

Accused

AND BETWEEN

1. Ebert Dodamgoda,

2. Pushpa Kumara Chandimala
Dodamgoda,
3. Nishantha Udaya Kumara Dodamgoda,
4. Mohittege Sunil,
5. Mohittege Jagath Premasiri.

All of Navinikanda,
Nabuluwa, Atakalanpanna.

Accused-Petitioners

VS.

Officer in Charge,
Police Station,
Kahawatte.

Complainant – Respondent.

AND NOW BETWEEN

1. Ebert Dodamgoda,
2. Pushpa Kumara Chandimala
Dodamgoda,
3. Nishantha Udaya Kumara Dodamgoda,
4. Mohittege Sunil,
5. Mohittege Jagath Premasiri.

All of Navinikanda,
Nabuluwa, Atakalanpanna.

Accused-Petitioners-Appellants

VS.

1. Officer in Charge,
Police Station,
Kahawatte.

Complainant-Respondent – Respondent

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent- Respondent

**BEFORE: W.M.M. Malinie Gunaratne, J. and
 P.R. Walgama, J.**

**COUNSEL: Dr.Ranjit Fernando with Samanthie Rajapaksha
 for the Appellants.
 Anoop de Silva, SSC
 for the Respondents**

Argued on : 16.06.2014.

Written submissions filed by Respondents on the 01.09.2015.

Appellents written submissions filed on 03. 11.2015.

Decided on: 20.11.2015

Malinie Gunaratne, J.

In this application Accused – Appellants (hereinafter referred to as the Appellants) seek to set aside the Order of the learned High Court Judge of Ratnapura, dated 16.02.2005.

In accordance with the Petition of Appeal filed by the Appellants in this Court the case for the Appellants briefly is that, the Appellants were first charged in Magistrate's Court of Pelmadulla, in Case No. 51821 on the 24th of January 2000, by the Complainant-Respondent (hereinafter referred to as the Respondent) with committing the offences punishable under Section 140 and 317 of the Penal Code. The Appellants pleaded not guilty to the charges and the case was fixed for trial.

On the ground that the principle witnesses of the prosecution were not present on the trial date, the Appellants had been discharged by the learned Magistrate on the 15th of September 2003.

Thereafter, charges alleging the same offences had been framed against the Appellants on the 13th of October 2003, in Case No. 5356 of the same Court. The Appellants pleaded not guilty and the case was fixed for trial.

The trial was commenced on 21.06.2004 and after conclusion of the evidence of prosecution witnesses No.1 and No.2, the Counsel for the Appellants urged a plea of "*autrefois acquittal*" on the premise that the case has been constituted contrary to the Section 188 (2) and (3) (a) of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 15 of 1989, and therefore that the case cannot be maintained.

Having heard the submissions of both parties, the learned Magistrate dismissed the said application and re-fixed the case for further trial.

Being aggrieved by the said Order of the learned Magistrate made on 18.01.2005, the Appellants invoked the revisionary jurisdiction of the Provincial High Court of Ratnapura. The learned High Court Judge

dismissed the Appellants' petition and affirmed the learned Magistrate's Order on 16.02.2005.

Thereafter, the Appellants have invoked the appellate jurisdiction of this Court to intervene by setting aside the Order of the learned High Court Judge dated 16.02.2005.

When considering the merits of the case the central issue to be decided is whether the learned Magistrate is lawfully entitled to proceed with the trial on the 2nd Plaint filed by the Respondent without setting aside the earlier order of discharge.

However, the Appellants have urged to interpret the word "re-open" in the Section 188(3) (a) and (b) of the Code of Criminal Procedure Act No. 15 of 1989 (as amended) since the learned High Court Judge had decided that the meaning of "re-open" is not the previous case to be opened, but institute a fresh action under a different case number on the same charges. Section 188 (3) (a) and (b) reads as follows:

- (3) The order of discharge referred to in subsection (2) shall operate as an acquittal where either:-
 - (a) it is not set aside and the case against the accused is not **reopened** within a period of one year from the date of such order;
 - (b) the case has been duly **re-opened** and

It is relevant to note, that there is no provision of law set out in the Code of Criminal Procedure Act, which prevents the prosecution from opting to file a fresh action.

At this stage it is important to consider the authorities cited before this Court by Counsel of both sides with regard to the main issue. It is to be noted, a clear principle emerges from those authorities, that is, in all the cases a fresh action had been filed by the prosecution to re-open the case.

However, my considered view is if the prosecution wishes to re-open the previous (same) case by filing a fresh action there is no bar to follow the said procedure.

Accordingly, the prosecution has two options:

- (i) Re-open the previous case;
- (ii) File a fresh case.

In the matter in hand the prosecution opted to file a fresh action under a different number, of course within one year. It is viewed from the case record, the subsequent action was filed before another Magistrate. Therefore, it is not practically possible, for the Magistrate to know of an earlier action filed against the same accused, was discharged. Hence the question of setting aside the earlier order of discharge will not arise where the present action is concerned.

In the above setting I am of the view that the Appellants' argument is devoid of merits and should stand dismissed.

JUDGE OF THE COURT OF APPEAL

P.R. Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Appeal dismissed