

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

Hon. Attorney General,

Attorney General's Department, Colombo 12

**Prosecution-Petitioner**

C.A.Application  
No. APN 105/14

**Vs.**

High Court of Balapitiya  
No. 576/03

1. Agampodi Jayantha Gamini Soyza,  
Boraluketya, Kosgoda.

2. Yakdaradura Nimal Prasanna Silva,  
Jashika, Nagathota, Kosgoda.

**Accused Respondents**

**Before** : P.R.Walgama J.

L.T.B. Dehideniya J.

**Counsel** : Dileepa Peiris SSC for the Appellant.

Daya Guruge for the Accused Respondents.

**Argued on** : 19.01.2016

**Decided on** : 28.04.2016

**L.T.B. Dehideniya J.**

This is a revision application filed by the state against the order of the Learned High Court Judge of Balapitiya. The State invite this Court to revise the order mainly on two issues, i.e. firstly the state argue that the decision of the Learned High Court Judge to call the prosecution witness no.3 as a "witness of Court" is bad in law and secondly that the decision to amend the indictment by the Judge even though the State Counsel objected to it, to enable the accused to plead guilty to a lesser offence.

In this case the Attorney General filed indictment in the High Court of Balapitiya charging the 1<sup>st</sup> and the 2<sup>nd</sup> accused for committing murder punishable under section 296 of the Penal Code. After leading evidence of the prosecution witnesses no. 2 & 1 the State Counsel has informed the Court that the State do not intend to call any other lay witnesses and moved permission to call official witnesses. At this stage, the defense counsel moved Court to call PW 3. The Learned High Court Judge allowed this application and called the witness as witness of Court.

The Attorney General is the prosecutor and the State Counsel on behalf of the AG prosecutes the case in court. The prosecutor has the right to decide what is necessary to prove his case, which witness/witnesses to be called and in what order to call them. The State Counsel knows the case better than the Judge. The AG, being the Public Prosecutor, the law expects him to act fairly. It is not necessary for the State Counsel to lead all the witnesses who are coming out with the same evidence, but if a witness's testimony is going to be different or is deviating from others, that evidence must be placed before Court, however bad impact it has on the prosecution case. If the State is not presenting that evidence before court, two paths are open for the Judge. He can form an adverse opinion on undisclosed evidence under section 114 of the Evidence Ordinance of make an order to call that witness to testify.

It has been held in the case of King v. Chalo Singho 42 NLR 269 that;

*Prosecuting Counsel is not bound to call all the witnesses named on the back of the indictment or tender them for cross-examination. In exceptional circumstances the presiding Judge may ask the*

*prosecuting Counsel to call such a witness or may call him as a witness of the Court.*

In the present case the Learned High Court Judge had reasons to call the witness to testify. This witness has given evidence in the Magistrate Court at the non summary inquiry. According to the evidence given by the 2<sup>nd</sup> witness, the incident had taken place at about 5.30 or 6.00 pm, but as per PW 3 the incident has happened at about 7.30 pm. It is for the trial judge to decide whether this contradiction has any effect to the credibility of the witnesses. Under these circumstances, the decision to call the witness no. 3 is within the law.

The next issue that has to be considered is that the decision of the Learned High Court Judge to amend the indictment by himself. The procedure in amending the indictment to enable the accused to plead guilty to a lesser offence has been discussed in the case of *Sittampalam V. The King* 52 NLR 374 and held that;

*The following is the correct procedure to be adopted when an accused person who had previously pleaded not guilty seeks, after his trial has commenced before a jury empanelled for the purpose, to retract his earlier plea and to tender an unqualified admission that he is guilty of some lesser offence on which a verdict against him may properly be recorded without an amendment to the indictment: -*

*(1) if the Crown is not prepared to accept the plea of guilt in respect of the lesser offence, the case against the accused should proceed on the whole indictment; we think that, in practice, there would be little likelihood of the necessity arising for the presiding*

*Judge to consider whether it would be proper for him to over ride the discretion of prosecuting counsel in this matter*

*(2) if, on the other hand, the Crown intimates its willingness to accept the plea the presiding Judge must himself decide whether, upon the evidence so far recorded and upon the depositions recorded by the committing Magistrate, it would be in the interests of justice for the Court to accept the plea;*

*(3) if the presiding Judge, notwithstanding the Crown's willingness to accept the plea, decides that it should not be accepted by the Court, the case against the accused must proceed on the whole indictment;*

*(4) if, on the other hand, the Judge considers that the plea may properly be accepted by the Court, he should invite the jury, in whose charge the accused has been given after they were empanelled to try the case, to state whether they would accept the plea; and the Judge, may inform the jury at this stage of the reasons why acceptance of the plea is recommended by him;*

*(5) if the jury state that they are willing to return a verdict on that basis, the unqualified admission of guilt of the accused should, if this has not been already done, be recorded in the presence of the Judge and jury; this admission becomes additional evidence on which the jury may act, and they should then be directed to pronounce a verdict accordingly.*

The Court has recognized the rights of the prosecuting counsel and held that the Court must continue to hear the case unless the State Counsel agrees to accept the plea of guilty on a lesser charge. In the

present case the State Counsel has objected to the application of the defence counsel to plead guilty to a lesser offence. The State was not in agreement to amend the indictment. The Learned High Court Judge has come to the conclusion that the State Counsel's consent is not necessary to amend the indictment after the trial commenced. The learned High Court Judge has decided to accept a plea of guilty for a lesser charge on the basis that there was a sudden fight between the accused and the deceased. The evidence of the first witness, PW2, is that the first accused held the deceased while the second hit him with a wooden pole. There was no evidence of a sudden fight. The second witness, PW1, is a corroborating witness. The witness of Court, PW3, was not among living and his testimony in the Magistrate Court was presented to Court by the registrar. In his evidence there was a contradiction on time but no evidence of a sudden fight.

The Learned High Court Judge in his order dated 23.07.2014, has drawn an inference that the accused will not hit the deceased unless there was a sudden fight. (Page 09 of the order) Thereafter, he considered the police statement of the 1<sup>st</sup> accused and came to the conclusion that there was a sudden fight. The Learned High Court Judge has considered the contradictions in the prosecution story. He can hold that the indictment was not proved if he holds that the prosecution witnesses are not credible witnesses, but he cannot draw an inference that the accused will not assault the deceased unless there was a sudden fight. Court cannot override the discretion of the prosecuting counsel on an inference drawn by the judge without proper evidence to establish a sudden fight. In the interest of justice, the Court can override the discretion of the State Counsel and amend the indictment *ex mero motu*. In the present case, there is no evidence to establish that unless the indictment is amended,

the interest of justice will not prevail. We are of the view that it is not proper for the court to amend the indictment without the consent of the State Counsel at this stage and the order of the Learned High Court Judge to amend the indictment and the acceptance of the plea of guilt to the lesser charge cannot stand.

I act in revision and set aside the order of the Learned High Court Judge dated 23.07.2014 and the conviction and the sentence. I order a fresh trial before another judge.

Judge of the Court of Appeal

**P.R.Walgama J.**

I agree.

Judge of the Court of Appeal