

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

*In the matter of an appeal against an
order of the High Court under Sec. 331
of the Code of Criminal Procedure Act
No. 15 of 1979.*

HC N/E: 41/2009

Arumugam Kanagarathnam

(Appellant)

CA No. 73/2013

Vs.

The Hon. Attorney General
Attorney General's Department
Colombo 12.

(Respondent)

**Before : P.R. Walgama, J
: K.K. Wickremasinghe, J**

**Counsel : Indika Mallawarachchi for the Accused –
Appellant.**

: Chetiya Gunasekare DSG for the A.G.

Argued on : 18.11.2016

Decided on : 17.03.2017

P.R. Walgama, J

This appeal projects a challenge to the judgment dated 17.05.2013, rendered by the Learned High Court Judge, by which judgment the Accused – Appellant was sentenced to death for the murder of his wife by setting fire to her body.

At this juncture this Court is called upon to answer one issue viz a -viz whether the Learned High Court Judge had jurisdiction to proceed with the criminal trial which was partly heard, by the predecessor, of course after adopting the proceedings. The crisp issue under consideration is that the failure of the Learned High Court Judge to adhere to the Section 48 of the Judicature Act.

Therefore it is contended by the counsel for the Accused – Appellant that as per above Section 48, since this case was transferred from the High Court of Kandy to High

Court of Nuwaraeliya the case should have been started afresh.

It is viewed from the proceedings of the record of the original court that on 02.09.2008, the indictment served and read out in the High Court of Kandy. The evidence of witness No.1 was led and after cross examination the evidence of the said witness was concluded.

After the establishment of the Provincial High Court of Nuweraeliya this case was transferred to the said High Court, as this case came under the Jurisdiction of Nuwaraeliya.

It is alleged by the counsel for the Accused – Appellant, that the Learned High Court Judge has failed to adopt the proceedings recorded at the High Court of Kandy. Nevertheless it is observed from the proceedings dated 18.06.2012, the Learned High Court Judge had formally adopted the proceedings recorded by his predecessor and had proceeded to trial.

It is also contended by the counsel for the Accused – Appellant, that there is no statutory provision to adopt

the proceedings that had been recorded in the High Court of Kandy, and subsequently in the High Court of Nuwaraeliya with or without the concurrence of the parties.

The adoption of proceedings in a existing trial is recognized in section 48 of the Judicature Act No. 2 of 1978 as amended by Act No. 27 of 1999 which states thus;

“ 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 any 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 the power to act on the evidence already recorded by the predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit to resummon 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 witness be resummoned and reheard.”

Further it is submitted by the counsel for the Accused - Appellant, that in the absence of any statutory provision to adopt the proceedings when the jurisdiction of a Court is changed it is incumbent on the Trial Judge to have ordered a trial de novo, thus the Learned Trial Judge has flawed by adopting a procedure inimical to the same.

It is apposite to mention that the Legislature has not contemplated of a situation of this nature before and the current issue has not been anticipated by the Legislature even to lay down a procedure. This situation has arisen due the expansion of the Court structure. In the above setting it is the duty of court to be mindful and observe the rules of a fair trial and afford an opportunity to the Accused to be heard.

The original case record bears testimony to the effect that the Learned High Court Judge who concluded the trial had adopted the proceedings, of course with the consent of the parties. It is been noted that the Accused - Appellant was given an opportunity either to consent to adopt the proceedings and continue with the trial or to make an application to start the case de novo. Therefore it is intensely relevant to note that the Learned High Court Judge has followed the 'cardinal rule' of affording a fair trial to the Accused.

For the reasons stated herein before, the preliminary objection raised by the counsel for the Accused - Appellant has no merit and thus it is over ruled.

JUDGE OF THE COURT OF APPEAL

K.K. Wickremasinghe, J

I agree,

JUDGE OF THE COURT OF APPEAL