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.

Panikka Ibrahim Janap,
No. 60/03
Wana Road, Puttalama.

Accused

C. A. Case No. : 115/2014

H. C. Putlam Case No. : 11 /2008

Vs

The Hon. Attorney General

Attorney General's Department,

Colombo 12.

Complainant

Panikka Ibrahim Janap,
Prisons,
Welikada.

Accused-Appellants

Vs

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

Complainant Respondent

BEFORE : **P.R. Walgama, J &**

K. K. Wickramasinghe, J

COUNSEL : AAL Amila Palliyage with Upul Dasanayake for the Accused-Appellant.

P. Kumararathnam DSG for the Attorney General.

ARGUED ON : 12th October 2016

DELIVERED ON : 29th May 2017

ORDER

K. K. WICKRAMASINGHE, J.

The accused appellant was indicted in the high court of Puttlam Colombo on the following two Counts:-

Count No.1:-

On or about 16th of September 2006 within the jurisdiction of this court in Puttlam, the accused did commit the death of one Siddiq Khan Mohamad Sahajan which amounts to an offence punishable under section 296 of the Penal Code.

Count No.2:-

That on the same transaction the accused attempted to commit murder of one Siddiq Mohamad Subeir an offence punishable under section 300 of the Penal Code.

After trial the learned high court Judge of Colombo found the accused appellant guilty of both counts levelled against them.

The accused appellant was sentenced to death on the 1st count and a term of 2 years imprisonment and a fine of Rs. 1000 along with a default term of 1 month imprisonment imposed on the 2nd count.

Being aggrieved by the aforesaid conviction and sentence imposed by the learned high court judge, the appellant lodged an appeal and moves this court to quash and set aside the same.

When this matter was taken up for hearing learned counsel for the appellant raised a preliminary objection stating that the statutory statement (complying section 150- 151 of the Criminal Procedure Act No. 15 of 1979) of the of the accused appellant had not been adduced in evidence before the learned high court judge who heard the case. Therefore this amount to a noncompliance of the provision stipulated under section 199(3) of the Criminal Procedure Act No. 15 of 1979, which is a Mandatory requirement as that the word **shall** is included in the said section. Thereby this amounts to a procedural irregularity which is sufficient to vitiate the conviction and the sentence.

The counsel for the appellant submitted CA Appeal No.169/2003 where his Lordship Justice Sarath de Abrew held thus "..... *section 436 of the Code of Criminal Procedure Act No. 15 of 1979 and the proviso to article 138 of the Constitution quoted above cannot be regarded as a panacea for all ills, especially where the fundamental mandatory provisions are bluntly disregarded which would occasion a failure of Justice*". The case cited by the counsel varies from the instant case. The cited case was a case where the indictment was not read over to the accused.

In **Queen Vs Aluthge Don Hemapala 64 NLR 01** citing Abdul **Rahaman Vs The King Emperor 4(7926- 27) I.A.96 at 104**, five Justices of the Supreme Court has held that, "*.....they wish to be understood that no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused"* It was further held thus, *"that it is a fundamental right of an accused person to be tried in accordance with the procedure prescribed in the Criminal Procedure Code and the practice established there under.It is illegal in a criminal trial to follow a procedure or warranted by the code or the practice there under. We recall the following words of* ***Lord Herschell*** *L.C. in* ***Sumrthwaite Vs Hannay 1 [1(1894) A.C.494 at 501]*** *"if unwarranted by any enactment or rule, it is my opinion, much more than an irregularity"*

In the case of **E.V.Neal 2 [2 (1949) 2 ALL E.R. 438** it was held that *"There is no doubt that to deprive as accused person of the protection given by essential steps in Criminal procedure amounts to a miscarriage of justice and leaves the court no option but to quash the conviction".*

According to section 435 of the Code of Criminal Procedure Act No. 15 of 1979 "If any court before which a deposition of a witness or a statement of an accused recorded under the provisions of this Code is tendered in evidence finds that the provisions of this Code have not been fully complied with by the Magistrate recording the evidence or statement, it may take evidence that such witness or accused duly gave the evidence or made the statement recorded; and notwithstanding section 91 of the Evidence Ordinance such evidence or statement shall be admitted if the error has not injured the accused as to his defence on the merits.

According to **section 436 of the Code of Criminal Procedure Act No. 15 of 1979** "*Subject to the provisions herein before contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account -*

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice."

According to section 456A of the Code of Criminal Procedure Act No. 15 of 1979 "*the failure to comply with any provision of this code shall not affect or be deemed to have affected the validity of any complaint, committal or indictment or the admissibility of any evidence unless such failure has occasioned a substantial miscarriage of justice ".*

In the case of **Banwari Vs. State of U.P., AIR 1962 SCl198,** it was held that "*omission to read over and explain the charges does not vitiate the trial if no prejudice is caused."*

According to the case of **Naval Kishore Singh Vs. State of Bihar, AIR 2004 SC 4421},** "the Indian Supreme Court refused to consider plea especially when the accused was not able to show that he was in any way prejudiced by such irregular procedure."

Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka states:

".....Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice".

The above mentioned provision of the Constitution and legal provisions clearly demonstrate that any failure to adhere legal provisions can be considered only if such failure prejudice the substantial rights of the Parties or occasion a failure of justice.

In this instant case, the appellant was properly charged before the Magistrate court and he was represented by a counsel, after non summary inquiry, the learned Magistrate had properly complied with statutory provisions of the Code of Criminal Procedure Act No. 15 of 1979 and committed the appellant to high court on the same charges. It is evident that merely not marking the statutory statement of the appellant before closing the prosecution had not caused any prejudice to the appellant or caused miscarriage of justice.

In the case of **Elal Jayantha Vs Officer-in-charge, Police station Panadura 1986, 1 SLR 334,** it was held that *"Although the correct procedure had not been followed yet no substantial prejudice had not been caused nor a failure of justice occasioned. Further four years had elapsed and sending the case back would cause hardship".*

In **Naval Kishore Singh Vs. State of Bihar AIR 2004 SC** 4421,The Supreme Court of India held that, *"In the instant case , the appellant had not raised any contention in the high court that he was seriously prejudiced by the way in which section 313 question was done. Supreme Court refused to consider plea especially when the appellant was not able to show that he was in anyway prejudiced by such irregular procedure".*

Considering the authorities mentioned above, it is very clear that the appellant had not suffered any prejudice due to non-marking of statutory provisions during high court trial. Further at any event the appellant failed to satisfy court that he was prejudiced by this omission and thereby caused a failure of justice and the counsel did not raise this preliminary objection at the outset.

The above mentioned cases amply demonstrated the fact that neither the rights of the appellant nor the omission has occasioned a failure of justice failure of justice.

Considering all above I am of the view that there is no merit in this preliminary objection.

Therefore preliminary objection is overruled and the case is fixed for argument.

Judge of the Court of Appeal

P.R. Walgama, J.

I Agree

Judge of the Court of Appeal