IN THE COURT OF APPEAL OF THE DEMOCRETIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal in terms of section 331 (1) of the Code of Criminal Procedure Act No- 15 of 1979, read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:

CA/HCC/0168/2015

High Court of Galle Case No:

HC/3265/2009

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Alawaththage Gnanasena *alias* Banda

ACCUSED

AND NOW BETWEEN

Alawaththage Gnanasena *alias* Banda

ACCUSED-APPELLANT

Vs.

The Attorney General

Attorney General's Department

Colombo 12

RESPONDENT

Before	: Sampath B Abayakoon, J.
	: P. Kumararatnam, J.
Counsel	: Indica Mallawaratchi for Accused-Appellant
	: Wasantha Perera SSC for the Respondent
Argued on	: 25-01-2022
Written Submissions	: 30-03-2018 (By the Accused-Appellant)
	: 25-07-2018 (By the Respondent)
Decided on	: 24-02-2022

Sampath B Abayakoon, J.

This is an appeal by the accused appellant (hereinafter referred to as the appellant) on being aggrieved by the conviction and the sentence of him by the learned High Court Judge of Galle, where he was sentenced to death.

The appellant was indicted before the High Court of Galle for causing the death of one Prabath Priyankara on 14th of April 2004, an offence punishable in terms of section 296 of the Penal Code.

After trial without a jury, the learned High Court Judge of Galle found the appellant guilty as charged, and sentenced him accordingly.

At the hearing of the appeal the learned Counsel for the appellant pursued only one ground of appeal, that the learned trial judge who pronounced the judgment has failed to formally adopt the evidence led before his predecessor as required in terms of section 48 of the Judicature Act, hence, the said non-compliance is an illegality warranting a trial de novo.

In her submissions before this Court the learned Counsel relied on the judgments of **Singharam Thiyagarajah Vs. The Attorney General C.A.-**

216/2010 decided on 10-10-2014 and **Ratnayake Vs. A.G. (2004) 1 SLR 390,** which are judgments pronounced previously by this Court.

In both the above mentioned judgments their lordships of the Court of Appeal held that failure to formally adopt the proceedings led before the predecessor by the trial judge amounts to a violation of a fundamental procedural requirement which justifies a re-trial in the interest of justice.

However, with all due respect to their lordships' views on the relevant question of law, I wish to disagree.

Section 48 of the **Judicature Act No-02 of 1978** was repealed and substituted by the **Judicature (Amendment) Act No 27 of 1999**.

The section 48 of the Judicature Act as amended, reads as follows;

> *Section 48- 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, matter may be continued before the successor of such judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or,* ***if he thinks fit*** *to re-summon 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 may re-summoned and reheard.* (The emphasis is mine)
>
> The official text of the proviso of section 48 as amended by Amendment Act No 27 of 1999 which is the Sinhala text, reads as follows:

"එසේ වුවද , (නඩු විභාගය ඉහළඅධිකරණයට තැබීමට පෙර වූ යම් පරීක්ෂණයක දී හැර) යම් අපරාධ නඩුවක්, නඩු කටයුත්තක් හෝ කාරණයක්, එවැනි යම් විනිශ්චයකාරවරුයකුගේ අනුප්‍රාප්තිකයා ඉදිරියේ දිගට ම පවත්වා ගෙන යනු ලබන අවස්ථාවක දී, සාක්ෂිකරුවන් නැවත කැඳවා ඔවුන්ගෙන් නැවත සාක්ෂි විභාග කරන ලෙස චූදිතයා විසින් ඉල්ලා සිටිනු ලැබිය හැකිය."

The intention of the legislature in repealing and substituting of the original proviso of the Judicature Act by the Amendment was considered by **Abdul Salam,J.** (as he was then) in the case of **Kaluwahum Purage Somapala Vs. The Commission to Investigate Bribery and Corruption CA(PHC)APN37/09 decided on 03-02-2010.**

Comparing the previous proviso that existed before the amendment and the new proviso, he commented on the reasons behind the amendment in the following manner.

> *"It is common knowledge that the proviso to section 48 worked tremendous hardship to the parties both in criminal and civil matters whenever a party to a case (prosecutor, accused, plaintiff, defendant, intervenient, added party or any other party) improperly or unreasonably invoked the proviso. This has resulted in the Judicial Service Commission having to reappoint judges to avoid trials being heard de novo. Being conscious of the unsatisfactory state which resulted in judges at times having to travel long distances to hear partly heard cases at the expense of severe hardship being caused to the litigants at their permanent stations, the legislature repealed the proviso to section 48 and substituted thereof,…"*

Considering the literal meaning of the word 'demand' as stated in the amended proviso and the Sinhala word used, which is the official text, it was stated by him that;

> *"Even in the event of a demand being made by the accused as contemplated by the proviso, yet the court is not bound to comply with such a demand as if it is mandatory. The Oxford Dictionary meaning assigned to the word 'demand' is an urgent or peremptory or authoritative request and nothing more. Quite interestingly the authoritative version of the Act No 27 of 1999 being Sinhala in introducing the new proviso uses the expression "චුදිතයා විසින් ඉල්ලා සිටිනු ලැබිය හැකිය" as corresponding to the word "the accused may demand". This provides a firm proof that the new proviso is not only has done away with the requirement of having to commence proceedings afresh but even the request (ඉල්ලා) to recall a witness is also placed within the exclusive jurisdiction of the judge."*

As considered by Abdul Salam, J. in the above judgment, I would also like to reproduce the relevant part of the judgment by his lordship **W.L.R. Silva, J.** in the case of **Jeevan Thiyagaraja Vs. A.T. Shyama Fernando in C.A. (PHC) APN 26/2008,** which I find relevant.

> *"In the amended proviso to section 48 there is no duty, whether directory or mandatory cast on the judge, and the right to demand is only given to the accused. In the old provision it was mandatory for the court to order a trial de novo but there is a deliberate omission of such mandatory provision in the new proviso to section 48. Even under the old provision one could interpret the word "shall" to mean "may" and conclude that it was only directory and not mandatory. (Vide Ramalingam Vs. Thanagaraja (1982) 2 SLR at 693). The*

omission here cannot be regarded as unintentional omission because it is clear what the mischief is, the legislature intended to remedy. The mischief is the laws delay as a result of the judges being compelled to order trials de novo whenever either party to an action desired a fresh trial."

It is clear from the appeal under review that except for the evidence of PW-01, the rest of the evidence had been led before the learned High Court Judge who pronounced the judgment. When the matter was mentioned before him for further hearing of evidence on 24-12-2012, the appellant has been represented by the same Counsel who appeared for him previously. The case record bear testimony that no application has been made before the Court to recall the PW-01 who was the only witness who has given evidence before the predecessor of the learned High Court Judge. Which has resulted in the calling of the rest of the witnesses.

The argument of the learned Counsel for the appellant is that the learned High Court Judge has failed to adopt the evidence. However, I find no provision in that regard in section 48 of the judicature Act as the very purpose of the section is to provide for the continuation of a trial to avoid undue delay under given circumstances.

It was held in the case of **Herath Mudiyanselage Ariyratne Vs. Republic of Sri Lanka (CA 307/2006 decided on 17-07-2013** that a transfer of a judge to another station covers by the words 'other disability' as stated in section 48 of the Judicature Act, hence the succeeding judge has no disability to continue with a trial.

As discussed earlier, the main part of section 48 provides for a succeeding judge to re-summon a witness and commence the proceedings afresh if the judge thinks fit, which is applicable to either civil or criminal matters at the discretion of the judge.

In the case under consideration, it is clear from the proceedings that the succeeding High Court Judge has decided to continue with the case by calling the remaining witnesses as formally adopting the evidence previously recorded was not a matter that needed the attention of the Learned High Court Judge, as there was no such requirement and the provision is for the continuation of the trial.

As provided in the proviso of section 48 of the Judicature Act, as amended, which is applicable only for criminal prosecutions, if any demand was made to re-summon PW-01 with acceptable reasoning, the learned trial judge could have considered the request and an appropriate order would have been made at his discretion. I find that no such application has been made.

I am of the view that without making use of the available provision before the correct forum, which amounts to a waiver of such right, the appellant is now precluded from arguing at the appeal stage that the learned succeeding High Court Judge failed to adopt the previous proceedings and hence, the matter should be sent for a trial de novo.

I find that this as an argument which have the effect of reviving the section 48 of the Judicature Act to the level before it was amended by the amendment Act No 27 of 1999, if allowed. This was not the intention of the legislature in bringing in the amendment to the Act, as discussed before.

In the case of **Union of India Vs. Namit Sharma AIR 2014 SC 122, (2013) 10 SCC 359**, quoting **Union of India Vs. Dekoi Nandan Aggrawal, AIR 1992 SC 96, (1992) SCC (L&S)248** the Supreme Court of India reiterated that;

> *"It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the court. The court cannot*

add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court could not go into its aid to correct or makeup the deficiency. courts shall decide what the law is and not what it should be. court of course adopts a construction which will carry out the obvious intention of the legislature, but could not legislate itself. But to invoke judicial activism to set at naught legislative judgment is subversive of the Constitutional harmony and comity of instrumentalities."

(N. S. Bindra on Interpretation of Statutes- 12th Edition at page 38)

For the given reasons, I find that although it has been the long-standing practice of our judges to formally adopt the evidence led before their predecessors, it is not a mandatory requirement.

The appeal therefore is dismissed, as the ground of appeal perused is devoid of any merit.

The conviction and the sentence affirmed.

Judge of the Court of Appeal

P Kumararatnam, J.

I agree.

Judge of the Court of Appeal