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

In the matter of a Revision Application under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge,
Police Station,
Minor Offence Branch,
Kandy.

Complainant

Vs.

Court of Appeal Application
No : **CA/ PHC/APN/101/18**

High Court of Kandy
No **: 19/2016**

Magistrate's Court of Kandy
No : **12670**

1. Kosgollahene Sasika Prasad Wijesinhe
   No. 164,
   Peradenniya Road,
   Kandy.

2. Habaragala Ralalage Nimal Nishantha Peiris
   No.164,
   Peradeniya Road,
   Kandy.

Accused

And now between

1. Officer in Charge
   Police Station
   Minor Offence Branch
   Kandy.

Complainant-Appellant

2. The Honourable Attorney General
   Attorney General's Department
   Colombo 12

Appellant

Vs.

1. Kosgollahene Sasika Prasad Wijesinhe
   No. 164,
   Peradenniya Road,
   Kandy.

2. Habaragala Ralalage Nimal Nishantha
   Peiris
   No.164,
   Peradeniya Road,
   Kandy.

Accused-Respondents

And now between

1. Kosgollahene Sasika Prasad Wijesinhe
   No. 164,
   Peradenniya Road,
   Kandy.

2. Habaragala Ralalage Nimal Nishantha
   Peiris
   No.164,
   Peradeniya Road,
   Kandy.

Accused-Respondents-Petitioners

Vs.

Officer in Charge
Police Station
Minor Offence Branch
Kandy.

Complainant-Appellant-Respondent

1. The Honourable Attorney General
   Attorney General's Department
   Colombo 12

Appellant-Respondent

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Nalin Ladduwahetty PC with Thusitha Ranasinghe, Hafeel Fariz and Ms L Ubeysekera for the Petitioners Anoopa de Silva SSC for the Respondents.
Argued on	:	26.01.2022
Decided on	:	08.03.2022

Iddawala – J

This is a revision application filed on 03.10.2018 against an order of the High Court, Kandy dated 05.06.2018 which dismissed a preliminary objection raised by the Accused-Respondent-Petitioners *(hereinafter petitioners*) at the appeal stage.

The impugned order deals with an objection which contended that the appeal filed by the Attorney General against the order of the Magistrate Court dated 30.12.2015 in Case No 12670 was improperly constituted, praying for the same to be dismissed. In overruling the said objection, the impugned order of the High Court dated 05.06.2018 directs both parties to proceed with the appeal before High Court. Aggrieved by the said overruling, the present revision application has been filed.

Petitioners are 1st and 2nd accused in case No 12670 filed in Magistrate Court of Kandy under two separate charge sheets for fraudulently consuming electricity in violation of Section 67(C) of the Electricity Act No 19 of 1950. After the two charge sheets were read, the petitioners pleaded not guilty, and the learned Magistrate discharged the petitioners on 05.05.2014 due to the lackadaisical nature of the complainant.

The case was reopened on 27.10.2014. The trial proceeded *in absentia*, and the prosecution closed their case. However, the accused were later represented and pointed to an error in the charge sheet and requested that the accused be discharged under Sec 186 of Code of Criminal Procedure (*hereinafter CPC*). Ultimately, the learned Magistrate discharged both petitioners on 30.12.2015 on the basis that the charges against the accused could not be maintained. Against such discharge, State filed an appeal on 01.02.2016 in the High Court of Kandy, and an amended petition amending the caption was filed on 07.07.2016.

On 19.06.2017, the preliminary objection pertinent to the instant application was raised, which was subsequently overruled by the learned High Court Judge on 05.06.2018 by the impugned order.

Having listened to the submissions by both parties, the following issues will be analysed in order to ascertain whether the impugned order may be intervened with under the revisionary jurisdiction of this Court.

1. Is the order of the Magistrate Court dated 30.12.2015 a discharge or an acquittal?
2. Is the appeal filed against the said Magistrate Court order in the High Court on 01.02.2016 properly constituted?

With regard to the first issue, the following part of the order of the Magistrate Court is reproduced:

> "ඒ අනුව පැමිණිල්ල විසින්ම චෝදනාවේ සඳහන් කාර්යන් කවරෙකු විසින් සිදු කරන ලද්දේද යන්න අධිකරණයට පිළිගත හැකි සාක්ෂියක් ඉදිරිපත් කර නැති අතර, සිය නඩුව මගින් අදාල ක්‍රියාව සිදු කරන ලද්දේ අවම වශයෙන් 01 වන චුදිතද, 02 වන චුදිතද නොඑසේනම් ඒ දෙදෙනමද යන්න හෝ තහවුරු වන සාක්ෂී කිසිවක් ඉදිරිපත් කොට නැත. ඒ හේතුවෙන් සහ මා විසින් ඉහත සඳහන් කල සියළු හේතු කාරණා අනුව මෙම නඩුවේ චුදිතයින්ට එරෙහිව චෝදනා තවදුරටත් පවත්වාගෙන යාම තුලින් චුදිතයින් වරදකරුවන් කිරීමේ ප්‍රතිඵලයක් ඇති කල නොහැකි බව පෙනී යයි. ඒ හේතුවෙන් මා විසින් ඉහත වාර්තා ගත කරන හේතු අනුව ඉදිරිපත්ව ඇති චෝදනාවේ චුදිතයින් <u>නිදහස් කරමි</u>." (Page 476 of Appeal Brief)

Even though the learned Magistrate has used the terminology 'නිදහස් කරමි' (discharge), the words employed by the Magistrate are identical to the Sinhala text of the proviso to section 186 of the Code of Criminal Procedure (hereinafter CPC) which speak of acquittal:

> "එසේ වුව ද නඩුව සම්බන්ධයෙන් වැඩිදුර නඩු කටයුත්ය් පවත්වා ගෙන යාමෙන් චුදිතයා වරදකරු කිරීමේ ප්‍රතිඵලය ඇති නොවන බවට තමා විසින් වාර්තාගත කරනු ලැබිය යුතු හේතු මත මහේස්ත්‍රාත්වරයා සෑහීමකට පත් වන්නේ නම්, ඔහු විසින් චුදිතයා <u>නිදොස් කරනු ලැබිය යුතු ය</u>." (Emphasis added)

In the instant matter, the prosecution has closed their case, and the learned Magistrate has recorded reasons that further proceedings in the case will not result in the conviction of the accused. In doing so, the Magistrate has utiltised the discretion vested on him under the proviso to Section186 of the CPC where the learned Magistrate has referred to a 'discharge' when he has acquitted the accused.

In **Dyson v Khan** 31 NLR 136, it was held that: *Where in summary trial the Magistrate at the close of the case for the prosecution made order discharging the accused, as the evidence failed to establish the charge. Held that the order was tantamount to an acquittal under section 190 of the Criminal Procedure Code.*

Hence, in answering the first above, this Court holds that the order of the Magistrate dated 30.12.2015 is tantamount to an acquittal.

When considering the second issue, the primary submission of the President's Counsel for the petitioner was that the appeal filed on 01.02.2016 was improperly constituted as the Attorney General was not named as a party. While admitting that the complainant was represented by a State Counsel of the Attorney General's Department, the President's Counsel insisted that the Attorney General was not a party to the appeal. Thereafter, the President's Counsel referred to Section 318 of the CPC, contending that the appeal filed on 01.02.2016 was without 'written sanction' of the Attorney General as stipulated under the said section.

This argument was canvassed before the High Court as well, at which instance the learned High Court Judge rejected the application of Section 318 in the instant matter on the basis that the Magistrate order dated 30.12.2015 was a discharge and that Section 318 would only apply if the order was an acquittal. This Court cannot accept this reasoning. As previously examined, the said order dated 30.12.2015 is tantamount to an acquittal. Hence, this Court will now ascertain whether Section 318 of the CPC is applicable.

For this purpose, one must first refer to Section 320 of the CPC, which provides 'Right of Appeal'. The said section stipulates two instances. Subsection (1) provides for 'any person' to prefer an appeal against an order of Magistrate in a criminal matter, and Subsection (2) provides 'the Attorney General' may prefer an appeal from the same. It is only in instances falling under Subsection (1) which are subjected to Section 138 of the CPC:

> *"(1) Subject to the provisions of sections 317, 318 and 319 any person who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may*

prefer an appeal to the Court of Appeal against such judgment for any error in law, or in fact"

Subsection (2), where the Attorney General prefers an appeal, such applications are only subjected to Section 317 of the CPC:

"(2) Subject to the relevant provision of section 317 the Attorney-General may prefer an appeal to the Court of Appeal against any judgment or final order pronounced by a Magistrate's Court in any criminal case or matter, and where he so appeals, or where he sanctions an appeal, the time within which' the petition of appeal must be preferred shall be twenty-eight days."

As such, it is pertinent to glean whether the instant appeal falls under Section 320(1) or Section 320(2) of the CPC. For this purpose, this Court will examine whether the appeal filed on 01.02.2016 was filed by the Attorney General or by the complainant on their own accord. At this juncture, this Court will refer to the order of the learned High Court Judge dated 19.06.2017, which deals with the same issue. The said order embarks on an examination of Section 320(1) of the CPC in contrast to Section 320(2), to hold that the instant appeal was filed under the distinct powers vested with the Attorney General under Section 320(2) of the CPC. The order further holds that the appeal falls within the purview of Section 186 of the CPC, thereby entitling the Attorney General to file a petition of appeal under Section 320(2) provisions within 28 days. Regarding Section 320(1) the learned High Court Judge observes the following at Page 602 of the Appeal Brief:

"මෙම වගන්තියෙහි නීතිපතිවරයා හෝ නඩුවේ පාර්ශවකරුවකු නොවන අයෙකු හෝ යම් අපරාධ නඩුවකදී හෝ කාරණයකදී හෝ යම් මහෙස්ත්‍රාත් අධිකරණයක් විසින් ප්‍රකාශයට පත් කරන ලද යම් නඩු තීන්දුවකින් හෝ අවසාන ආඥාවකින් අතෘප්තියට පත්නොවන අයෙකු හෝ ඉදිරිපත් කරනු ලබන අභියාචනා පෙත්සමක් ගැන සඳහන් නොවේ."

Hence, the order discerns that the Attorney General has resorted to filing the appeal under Section 320(2), which empowers the Attorney General to file an appeal against a judgment/final order of the Magistrate, despite the Attorney General not being named as a party to the Magistrate Court action.

"නීතිපතිවරයා මහෙස්ත්‍රාත් අධිකරණ නඩුවෙහි පාර්ශවකරුවෙකු වුවද, නොවුවද, නිල බලය මත විශාල බලයක් ලබාදෙමින් ...අභියාචනාධිකරණයක් වෙත අභියාචනයක් ඉදිරිපත් කිරීමට හිමිකම ලබා දී ඇත." (Page 603 of the Appeal Brief)

In buttressing this observation, the learned High Court further refers to the State Counsel who made submissions on behalf of the Attorney General in the course of the appeal. As such, reference is made to the petition. The signature placed at the end of the petition does not contain the words 'Complainant-Appellant' but rather the name of the State Counsel appearing on behalf of the Attorney General.

This Court agrees with the analysis of the learned High Court Judge. The discretion vested on the Attorney General in advising or otherwise deciding on the institution of criminal proceedings is clearly set out in the CPC. In this regard, Sections 360, 393 (2), (4), 401, of the CPC and 114 (d) of Evidence Ordinance can be referred to. When a State Counsel appears in their official capacity as representatives of the Attorney General, it is a presumption that such person is acting under the direction of the Attorney General unless strong evidence to the contrary is presented. No such evidence was presented. The President's Counsel merely relied on the caption of the appeal, which the record shows, was amended subsequently on 07.07.2016 to include the Attorney General as a party. This amendment was done in open courts and no objections were raised by the petitioner.

The contention of the President's Counsel for the petitioner was that the respondents had filed a fresh appeal by such amendment, by which the action is time-barred. On this point, the analysis of the learned High Court Judge can be relied on. The learned High Court Judge examines whether the filing of an appeal is prescribed as falling outside the time bar of 28 days from the delivery of the Magistrate Court order dated 30.12.2015. Observing that the appeal petition was filed on 01.02.2016, the impugned order holds the petition was filed within 27 days and is thus not prescribed. In the order, the learned High Court Judge deals with the effect of the amended petition whereby the Attorney General was added as a party. It refers to the contention of the petitioner that the calculation of the prescription should begin at such date of amendment i.e., 07.07.2016 (6 months since the delivery of the Magistrate Court order). The learned High Court Judge

rejects this contention. In this regard the following portion of the order of the High Court is reproduced.

> "…. මෙ මගින් සංශෝධනය ට ලක් වී ඇත්තේ සිරස පමණකි.එසේ සිරස සංශෝධනය යෙදී නීතිපතිවරයව ඇතුලත් කර ඇත්තේ ඉහත කී පනතේ 320(2) උප වගන්තිය ප්‍රකාරව නීතිපතිවරයාට පැවාරි තිබූ බලතල මත සිදු කර තිබූ කාර්ය භාරය දැක්වීම සඳහා පමණකි. මුල් අභියාචනා පෙත්සමේ ද, තමන් අභියාචනා පෙත්සම ඉදිරිපත් කරනු ලබන්නේ ඉහත කී පනතේ 320(2) උප වගන්තිය ප්‍රකාරවය යැයි ද පැහැදිලිව සටහන් කර ඇති හෙයින් කාරුණු අතහැරීමක් හෝ සැඟවීමක් සිදු වී නැත. මෙකි සංශොධනය හේතුවෙන් නඩුවෙහි සිද්ධිමය කරුණු වලට කිසිදු බලපෑමක් සිදු වී නැත. එසේම මුල් අභියාචනා පෙත්සමේ පර්ශවකරුවන්ව නිවැරදිව හඳුන්වා දීමක් සිදු කර ඇති හෙයින් අනන්‍යතාවය හඳුනා ගෙන නොතිබූ බවට හෝ සලක බැලිය නොහැක. ඊට අදාල වගඋත්තරකරුවන්ගේ කිසිදු තර්කයක් ද නැත. එපමණක් ද නොව, මෙම සංශෝධනය හේතුවෙන් වගඋත්තරකරුවන්ට කිසියම් හෝ අගතියක් සිදු වූ බවට පෙන්වා දීමක්ද සිදු කර නැත. එසේම මුල් පෙත්සම මගින් මෙන්ම සංශෝධිත අභියාචනා පෙත්සම මගින් ද මෙම අධිකරණයෙන් නීතිපතිවරයා කිසිදු සහනයක්ද ඇයද නැත.
>
> ඉහතින් දක්වා ඇති සියළු කරුණු සලක බැලීමේදි මෙම නඩුවට ඉදිරිපත් කර ඇති සංශෝධිත පෙත්සම අභියාචනා කාලසීමාව ඉක්මවා ඉදිරිපත් කර තිබුනද, එම තත්වය පැමිණිලිකාර අභියාචකයාගේ ඉල්ලීම ඉවත දමමින් අභියාචනා පෙත්සම නිශ්ප්‍රභා කිරීමට තරම් ප්‍රමාණවත් වූ හේතුවක් නොවන බවට ද නිගමනය කරමි." (Pages 612 – 613 of the Appeal Brief)

We agree with this reasoning. For the purpose of reckoning the period of prescription, the appeal must be taken to have been instituted on the date of the original petition and not upon the amendment of the caption of the petition. The petitioner was not misled prior to the said amendment as he was well aware the appeal was lodged against an acquittal of the petitioners where the Ceylon Electricity Board has lodged a complaint for violations under the Electricity Act No 19 of 1950. Neither did the nature of the said appeal change by virtue of the amended caption. There was no doubt that the Attorney General was representing the interests of Ceylon Electricity Board as was evinced by the signature of the State Counsel and his physical appearance therein. Echoing the words of Chief Justice Abrahams in **Velupillai v Chairman U. C. Jaffna** 39 NLR 464, *this is a court of law and not an academy of law, and its operations should not be trammeled by technical and frivolous objections.*

Therefore, it is the considered view of this Court that the appeal filed against the order of the Magistrate dated 30.12.2015 has been properly constituted. Hence, we see no reason to interfere with the dismissal of the preliminary objection by the High Court in its order dated 05.06.2018. Therefore, this Court directs the expeditious conclusion of the inquiry pending before the High Court which has been put on hold due to this revision application.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL