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

In the matter of an Appeal made under
Section 331 of the Code of Criminal
Procedure Act No.15 of 1979

Court of Appeal No:

CA/HCC/0102-103/2020

High Court of Kuliypitiya

Case No. HC/39/2009

1.Basnayake Appuhamilage Sudath
Rohana Thissera
2.Madurawalage Janaka Pradeep
Kumara

Accused

AND NOW BETWEEN

1.Basnayake Appuhamilage Sudath
Rohana Thissera
2.Madurawalage Janaka Pradeep
Kumara

Accused- Appellants

vs.

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

Complainant-Respondent

BEFORE

: Sampath B. Abayakoon, J.

P. Kumararatnam, J.

COUNSEL : **Chamari Mahanayake for the 1st Accused-Appellant.**
Nalin Ladduwahetti, P.C. with Kavithri Ubeysekere for the 2nd Accused-Appellant.
Dilan Ratnayake, SDSG for the Respondent.

WRITTEN SUBMISSION

OF THE APPELLANT : **24/03/2022**

WRITTEN SUBMISSION

OF THE RESPONDENT : **04/05/2022**

DECIDED ON : **26/07/2022**

ORDER

P. Kumararatnam, J.

The above-named Accused-Appellants (hereinafter referred to as the Appellants) were indicted with some others unknown to the prosecution in the High Court of Kuliyaipitiya under Section 296 read with Section 32 of the Penal Code for committing the murder of Mohamed Anzarge Rumesh Imran on or about 17th April 2007.

After a non-jury trial, the Appellants were found guilty of the charge of murder and the Learned High Court Judge of Kuliyaipitiya has imposed a death sentence on them on 04th September, 2020.

Being aggrieved by the aforesaid conviction and sentence the Appellants preferred this appeal to this court.

At the hearing, the Learned President's Counsel who appeared for the 2nd Appellant sought the indulgence of this Court to make a preliminary objection with regard to the certified copy of the full proceedings of the High Court of Kuliyaipitiya obtained from the same Court as it contains matters different to the original case record and he informed court that he wishes to obtain a ruling from this Court with regard to the said objection before he would consider whether to pursue the merits of the appeal.

As the Learned Senior Deputy Solicitor General has no objection, this court allowed the application of the Learned President's Counsel on the preliminary question raised by him. Both parties agreed to dispose this preliminary objection by way of written submissions.

The Learned Counsel for the 2nd Appellant also informed this court that the 2nd Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. During the argument he was connected via Zoom from prison.

On behalf of the 2nd Appellant the following Grounds of Appeal were raised in his Petition of appeal.

1. That the Learned High Court Judge failed to evaluate the evidence of the main eye witness PW2 in terms of the law.
2. That the Learned High Court Judge failed to evaluate the vital omission which goes to the root of the case and apply the benefit to the accused.
3. That the Learned High Court Judge failed to evaluate the medico-legal evidence with that of the evidence of the eye witness and thereby judicially evaluate the evidence as a whole causing grave prejudice to the accused.

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4. That the Learned High Court Judge in his judgment has on several occasion failed to evaluate the credibility of witnesses judicially using the tests of credibility.
 5. That the Learned High Court Judge has based his judgment on conjecture, surmise and pre-conceived notion.

Background of the case

According to PW2, the mother of the deceased, four persons had come to her house on two motor bikes on the date of the incident and searched for her husband who was managing a foreign job agency. At that time the deceased was playing carrom with his friends in front of the house. The mother had identified the 1st accused and the Appellant at that instance as she had known them before. Having failed to apprehend her husband, the Appellant and the 1st accused had assaulted the deceased who ran out from the house for safety. After chasing the deceased, the Appellant had stabbed him in his abdomen with a knife and the 1st accused had pushed the deceased to the other side of the road after the stabbing. The deceased had been taken to the Sandalankawa Hospital but was pronounced dead on admission.

The investigation had been conducted by the Police in Pannala and they had arrested the 1st accused and the Appellant in connection with the murder.

The Counsel for the 2nd Appellant contends that the Court Record is the sole guide to judicial conclusions as was held by his Lordships in the case of **Hettiarachchige Chandana Hettiarachchi v. AG** CA/130/2005 decided on 13/07/2012 the Court held that:

“In this regard I have to be guided by the case record and whatever the entries found in the Record cannot be lightly disregarded. The Record is the sole guide to what actually transpired in court and the Record cannot be impeached or supplemented without a substantial reason”.

According to the counsel for the 2nd Appellant, he has obtained the first brief of the proceedings of this case from the High Court of Kuliypitiya on

23/09/2020 and he has received the 2nd brief from Court of Appeal on 10/02/2021 after filing the appeal.

The Counsel appearing for the 2nd Appellant has highlighted three instances of discrepancies in the brief which he obtained from the High Court of Kuliyaipitiya after comparing the same with the brief issued by the Court of Appeal. He has marked the discrepancies as A1, B1, and C1. The corresponding pages in the Court of Appeal brief are marked as A, B and C.

In the proceedings dated 21/02/2017, in the proceedings marked as A the presiding judge's name has been recorded as "M.C.B.S. Moraes". But in the proceedings marked as A1, its recorded as "K.M.G.H. Kulatunga". Apart from the discrepancy in the names of the presiding judges, the proceedings are otherwise accurate.

Likewise in the proceedings dated 11/03/2015, in the proceedings marked as B the presiding judge's name has been recorded as "R.M.P. Sunanda Kumara Ratnayake". But in proceedings marked as B1 it reads as "K.M.G.H. Kulatunga". Further in B1 the date given after the judge's signature is also inaccurately stated as "2016.01.13 when it should be "2015.03.11" as per B. Apart from these changes the other content of the proceedings are accurately stated.

In the proceedings dated 19/02/2010, marked as C the presiding judge's name has been recorded as "Manilal Waidyatilake". But in the proceedings marked as C1, it reads as "Manel Premaratne". This discrepancy is obviously a typographical error as the name of the stenographer who has taken notes on that day is "Manel Premeratne". Even both the proceedings C and C1 were signed by the said "Manilal Waidyatilake". Apart from the discrepancy in the names the rest of the proceedings are accurate.

Considering the discrepancies highlighted in A, B and C, it is apparent that only the names of the judges who presided and the date (in one instance) have been wrongly mentioned. The discrepancy marked as C1 of course is a

typographical error. But no discrepancies highlighted from the evidence recorded in this case. Hence, it is not correct to argue that some unauthorized person had accessed and changed the official record of the court. These are of course typographical errors made by the stenographers who recorded the proceedings.

Upon perusal of the original case record it becomes clear that when this case was called in the High Court of Kurunegala for the first time, the presiding High Court Judge was Hon. Manilal Waidyatilaka. (Page 78 of the brief).

This case was first called on 17/09/2014 in the Kuliyaipitiya High Court, following the establishment of the said court. At that time the presiding judge was Hon. R.M.P. Sunanda Kumara Ratnayake. (Page 87 of the brief)

As the 1st accused had absconded the court, an inquiry under Section 241 of the Code of Criminal Procedure Act No.15 of 1979 was held before Hon. K.M.G.H. Kulatunga who was the presiding judge at that time. (Page 99-130 of the brief)

The trial was commenced on 20/02/2017 before the judge of the High Court, Hon. M.C.B.S. Moraes. (Page 131 of the brief)

Hence, it is quite clear that the names of the High Court Judges mentioned in the High Court proceedings are the judges who had presided in the High Court of Kuliyaipitiya from time to time.

Section 436 of the Code of Criminal Procedure Act No.15 of 1979 reads:

“Subject to the provisions hereinbefore 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, of 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

In **Manuel v. Kanapanickan** 14 NLR 186 the court held that:

“Irregularities in criminal proceedings constitute no ground for the reversal or alteration of sentences on appeal, unless there has been a failure of justice”.

Article 138 of The Constitution of Democratic Republic of Sri Lanka states:

“The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any court of First Instance, Tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance;

Provided that no judgment, 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 Section 436 of the Code of Criminal Procedure Act No. 15 of 1979 clearly demonstrates that any failure to adhere to legal provisions can be

considered only if such failure proves prejudicial to the substantial rights of the parties or occasion a failure of justice.

In this case there is no apparent prejudice caused to the 2nd Appellant as the noted discrepancies are merely typographical errors, which certainly do not affect the integrity of the proceedings. The Learned SDSG has correctly pointed out that the content of the proceedings has in no way been affected even in the instances shown by the Appellant. The typographical errors made with regard to the names of the presiding judges in the proceedings had not caused any prejudice to the appellant or caused a miscarriage of justice.

In the case of **Elal Jayantha v. Officer-In-Charge, Police Station, Panadura** 1986(1) SLR 334 the Court of Appeal held that:

“Although the correct procedure had not been followed yet no substantial prejudice had been caused nor a failure of justice occasioned. Further four years had elapsed and sending the case back would cause hardship”

An error by a judge in the conduct of a trial that an appellate court find was not damaging enough to the appealing party’s right to a fair trial to justify reversing the judgment. Harmless errors include typographical and technical errors that have no bearing on the outcome of the trial. In general, the more overwhelming the evidence against the appealing party (appellant), the harder it will be to convince the appellate court that any errors were harmful. In such situations, courts rule that even in the absence of the errors, the appellant could not have won his appeal.

In accordance with the above-mentioned authorities, it is very clear that the 2nd appellant had not suffered any prejudice due to the existence of typographical errors in the court proceedings obtained from the High Court of Kuliyaipitiya. I conclude this has not caused a failure of justice.

Further, this court emphasize the fact that if the error in the court proceedings has not prejudiced, the rights of the parties or occasioned a failure of justice, no judgment, decree or order of any court shall be revised or varied.

Therefore, the 2nd Appellant's preliminary objection with regard to the discrepancies in the certified copy of the full proceedings of the High Court of Kuliyaipitiya is rejected and the case is fixed for argument.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL