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

In the matter of an Appeal made under 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 Case No.

CA/HCC/0254/2020

Kankanam Gamage Buddhika

Yasantha Kumara

High Court of Colombo

Case No. HC/8017/2015

ACCUSED-APPELLANT

vs.

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

COMPLAINANT-RESPONDENT

BEFORE : **Sampath B.Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Chamara Nanayakkarawasam for the
Appellant.**
**Maheshika Silva, DSG for the
Respondent.**

ARGUED ON : **28/10/2022**

DECIDED ON : **02/12/2022**

JUDGMENT

P. Kumararatnam. J,

The above-named Accused-Appellant (hereinafter referred to as the Appellant) was indicted for committing murder of Bulathwattage Nirmala Manel Nandakeerthi on 06/03/2010 which is an offence punishable under Section 296 of the Penal Code.

After a non-jury trial, the Learned High Court Judge has found the Appellant guilty of the charge and sentenced him to death on 19/08/2020. The prosecution had called seven witnesses and marked productions P1-15 at the trial. The Appellant had made a dock statement.

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

The Learned Counsel for the Appellant informed this court that the Appellant has given consent to argue this matter in his absence due to the Covid 19 pandemic. Also, at the time of argument the Appellant was connected via zoom platform from prison.

Background of the Case

According to PW1, he is a small-scale businessman who sells coconuts for his living. He lives closer to the Pannipitiya Railway Station. Every day, before he commences his business, as a practice he plucks flowers from a tree closer to the Pannipitiya railway gate to worship God. On the date of incident at about 7.00 a.m. when he was plucking flowers, suddenly heard a sound like cutting of a wood. When he turned his back had seen a person holding a girl by her hair and dealt a blow on her neck with machete knife. Having terrified after witnessing this gruesome incident he quickly rushed up to the duos who were unknown him to prevent the person dealing second blow on the girl. When he shouted at the person to put down the knife, the person left the girl who had fallen on the ground facing upwards. As the person had threatened him not to come closer to him, the witness had run towards a shop nearby due to fear. In few minutes later when he returned to the place of incident had seen the deceased was lying on the ground and blood was oozing from her body. He had also seen the machete knife fallen on the ground within 03-meter distance from the body. When he looked for the Appellant, he had witnessed that he was leaving the place through another road. He had caught the Appellant after a chase. When he was caught, he drank some red coloured liquid from a bottle in his possession which the Appellant pretended to be poison. Upon realising that, the witness had brought the Appellant to the place of incident and the people gathered had tied him to a lamp post until he was handed over to the police. This witness had recovered the national identity card of the Appellant and handed over it to the police. He had identified the knife, the identity card, the clothes of the deceased and the Appellant at the trial.

According to PW9, Dr. Mahesan, the death has occurred due to haemorrhagic shock following cut injury of the neck vessels with a sharp cutting weapon.

The Counsel for the Appellant raising only one ground of appeal contended that the Learned High Court Judge who continued and wrote the judgment had not adopted the proceeding as required by Section 48 of Judicature (Amended) Act No.27 of 1999.

Section 48 of the Judicature Act as amended states:

“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 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, proceedings 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 witnesses be resummoned and reheard”.

When this case was resumed before the High Court Judge who wrote the judgment, an application was made by the defence Counsel to re-summon PW1 for further cross-examination. The reason adduced by the Counsel was to clear the name discrepancies of PW1. The Application was made under Section 48 of the Judicature (Amended) Act.

The Learned State Counsel in reply to the application made by the defence Counsel stated that the defence was trying to delay the smooth function of the trial by making this application and also submitted to the Court that the defence was trying to capitalize on the typographical error occasioned in citing the name of the PW1 in the proceedings. Further, the State Counsel

had also submitted that the eye witness PW1 had been subjected to a lengthy cross-examination by the defence.

The Learned Trial Judge in his Order dated 21/11/2018, after considering the evidence given by PW1 held that re-calling PW1 for further cross-examination is not necessary as the defence Counsel had cross examined the witness regarding his identity adequately.

The Learned High Court Judge had very correctly considered the defence's application under Section 48 of the Judicature (Amended) Act and refused the said application and continued the trial.

Section 436 of Criminal Procedure Code No: 15 of 1979 states as follows:

“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 or irregularity in the complaint, summons, warrants, 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,
- c) Unless such error, omission, irregularity, or want has occasioned 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 restitution in integrum, of all cases, suits, actions, prosecutions, matters and things of which such High Court of First Instance, Tribunal or other institution may have taken cognizance;

Provided that no judgment, decree, or order of any court shall be revised or varied on account of any error, defect or irregularity, which has not prejudiced the substantial right of the parties or occasioned a failure of justice”.

As the refusal of the application of the defence is very well within the law and not prejudiced of substantial rights or occasioned a failure of justice, the argument advanced by the Counsel of the Appellant has no merit.

The Counsel for the Appellant further argued that the Learned Trial Judge who continued and delivered the judgment have not adopted the proceedings as required by Section 48 of the Judicature Act.

It was held in the case of Herath **Mudiyanselage Aruyaratna v. Republic of Sri Lanka CA/307/2006** decided on 17/07/2013 that:

“Transfer of a judge to another station covers 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”.

This Court already held in Case No. **CA/HCC/0168/2015 decided on 24/02/2022** that:

“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.

..... 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”.

Considering above mentioned Judgments and following the same principle, I conclude that the appeal ground advanced by the Appellant has no merit.

Therefore, the appeal is dismissed.

The Registrar of this Court is directed to send a copy of this judgment to High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

Sampath B. Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL