IN THE COURT OF APPEAL OF THE DEMOCRATIC 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.

The Democratic Socialist Republic of Sri Lanka.

Complainant

CA - HCC 23-25/2020

High Court of Kalutara
Case No: HC 766/06

Vs.

1) Wickramaarchchige Gamini Thilakasiri
2) Wickramaarchchige Neel Chandika Wickramaarchchi
3) Dhammika Nilantha Walakuluarachchi
4) Madawala Maddumage Surendra

Accused

And Now Between

1) Wickramaarchchige Gamini Thilakasiri
2) Wickramaarchchige Neel Chandika Wickramaarchchi
3) Dhammika Nilantha Walakuluarachchi

Accused-Appellant

Vs.

The Honourable Attorney General,
Attorney General's Department,
Colombo 12

Complainant-Respondent

BEFORE : N. Bandula Karunarathna, J.

: R. Gurusinghe, J.

COUNSEL : Anil Silva, PC

for the 1st Accused-Appellant

Faiz Musthapa, PC with K. Tilekaratne

for the 2nd Accused-Appellant

Saliya Pieris, PC with Thanuka Nandasiri

For the 3rd Accused - Appellant

Sudharshana De Silva, DSG

for the Respondent

ARGUED ON : 22/09/2022

ORDER ON : 14/10/2022

R. Gurusinghe, J.

The appellants were indicted in the High Court of Kalutara for having committed the murder of one Sarath Chandrasekera, an offence punishable in terms of Section 296 read with section 32 of the Penal Code.

After trial, the appellants were convicted as charged and sentenced to death. The appellants preferred this appeal against the said conviction and the sentence.

When this matter was taken up for hearing, Counsel for the appellants submitted that the name of the deceased in the indictment is Sarath Chandrasekera. However, as per the post-mortem report, the deceased person's name is Pothupitiyage Don Sarath Chandrasena and the doctor giving evidence stated that the deceased's name was Pothupitiyage Sarath Chandrasiri Fernando. Counsel for the appellants submitted that this discrepancy in the deceased's name is sufficient ground for the court to send this case back for a re-trial.

Now, I consider whether this error in the indictment itself is sufficient to send this matter for a re-trial without considering the other grounds of appeal. Regarding a material error in the charge or indictment, section 172 of the Code of Criminal Procedure Act provides as follows:

172. (1) If the Supreme Court or the Court of Appeal, in the exercise of its powers of appeal or revision, is of opinion that any person convicted of an offence was misled in his defence by an error in the indictment or charge, it shall direct a new trial to be had upon a charge or indictment framed in whatever manner it thinks fit or make such other order as the justice of the case may require.

(2) If such court is of opinion that the facts of the case are such that any valid charge cannot be preferred against the accused in respect of the facts proved or where the circumstances so warrant, it shall quash the conviction.

The Supreme Court considered the effect of an error in the indictment in the case of Hiniduma Dahanayakage Siripala Alias Kiri Mahathaya and three others vs Attorney General SC Appeal No. 115/2014, decided on 22nd January 2020. In that case, his Lordship Justice Aluvihare PC stated as follows:

"21. With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the proviso to Article 138(1), which is placed under the heading "The Court of Appeal". The proviso to the said Article of the Constitution lays down that;

> *"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". (Emphasis is mine.)*

22. The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned error, defect or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice. It must be observed that no such Constitutional provision is to be found either in the '1948 Soulbury Constitution' or the 'First Republican Constitution of 1972'.

23. The Constitutional provision embodied in Article 138(1) cannot be overlooked and must be given effect to. None of the decisions (made after 1978) relied upon by the Appellants with regard to the issue that this court is now called upon to decide, appear to have considered the constitutional provision in the proviso to Article 138(1). It is a well-established canon of interpretation, that the Constitution overrides a statute as the grundnorm. All statutes must be construed in line with the highest law. Judges from time immemorial have in their limited capacity, essayed to fill the gaps whenever it occurred to them, in keeping with the contemporary times, in statutes which do not align with the Constitution. However, such interpretations are not words etched in stone."

Accordingly, the test is whether the error or defect has prejudiced the substantial rights of the parties or occasioned a failure of justice.

In the case of Rex vs Amarasekera, Lyall Grant J. stated that "the principle is that the accused must not be prejudiced either by total lack of formal charge, or by an error, or omission in charge."

Without going into the merits of the appeal, it is not possible for us to decide whether the error in the indictment has misled the appellant to the extent that it has prejudiced the substantial rights of the appellants or occasioned a failure of justice.

Therefore, I decided that the issue raised by the Counsel for the appellants cannot be tried as a preliminary issue. It should be considered, along with the other grounds of appeal, when the matter is taken up for argument.

Judge of the Court of Appeal

N. Bandula Karunarathna, J.

I agree.

Judge of the Court of Appeal