IN THE COURT OF APPEAL

OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

An appeal under and in terms of Articles 138 and 154(P) of the constitution of the Democratic Socialist Republic of Sri Lanka read with High Court of the Provinces (Special Provisions) Act No.19 of 1990.

Court of Appeal

Case No.CA PHC 89/2018

Kurunegala High Court No.HCR/86/16

Magistrate's Court Wariyapola

Case No.67510

Special Crime Investigation Unit

Vehera, Kurunegala.

Complainant

Vs.

Henneheka Mudiyanselage Sunil Bandaranayake

Bogammana, Ihalagama, Wariyapola.

Accused

AND BETWEEN

Hennehaka Mudiyanselage Sunil Bandaranayake,

Bogammana, Ihalagama, Wariyapola.

Accused-Petitioner

Vs.

Special Crime Investigation Unit

Vehera, Kurunegala.

Complainant-Respondent

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

Respondent

AND NOW BETWEEN

Hennehaka Mudiyanselage Sunil Bandaranayake,
Bogammana, Ihalagama, Wariyapola.

Accused-Petitioner-Appellant

Vs.

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

Respondent-Respondent

Before: **HON. PRASANTHA DE SILVA, J.**
HON. K.K.A.V. SWARNADHIPATHI, J.

Counsel: Anil Silva (P.C) with S. Neranga
For the Petitioner-Appellant

Jayalakshi De Silva (S.C)
For the Complainant-Respondent.

Date of argument: 17.02.2023

Date of Judgment: 04.04.2023

K.K.A.V. SWARNADHIPATHI, J.

JUDGEMENT

On the 22nd of November 2005, a charge sheet was read to the Accused. The Petitioner-Appellant [who will be referred to as the Appellant] in the Magistrate Court of Wariyapola on charges under Sections 454, 457 and 462. The Appellant along with two other Accused pleaded not guilty and the case was fixed for argument.

On the 28th of March 2006 the Complainant-Respondent [who will be referred to as the Respondent) sought permission from the court to amend the Plaint on the 13th of June 2006 a new Plaint was filed with the 1st Accused H.M. Sunil Bandaranayake [the Appellant] as the sole Accused and the other two were named as prosecution witnesses.

On the same day, the Appellant agreed to transfer the Deed in the name of witness number one. The Appellant and Prosecution witness number one, are brothers. Both parties were informed to sign the case record to come to a settlement. However, the case proceeded and the Accused was found guilty by the judgment dated 1st of June 2010.

The Appellant was found guilty on the 1st count and was acquitted from the 2nd count. The Magistrate had acted leniently towards the Appellant and delivered a suspended sentence even though he was serving a suspending sentence at the time of committing the present crime.

The sentence was passed on the 6th of July 2010 nearly one month after the Judgment. Aggrieved by the conviction and the sentence the Appellant filed an Appeal to the High Court of Kurunegala under Case No.HCA/76/2010. On the 31st of May 2013, the Appeal was dismissed.

The Appellant did not canvass the dismissal in a higher forum until he was discharged from service in August 2016. Filing revision papers before the High Court of Kurunegala on the 19th of October 2016 sought the court's permission to canvas the Magistrate court's order in case No.67510. The learned High Court Judge refused to grant permission to proceed in the revision matter on the ground that the Appeal had already been dismissed.

Aggrieved by the order of the High Court Judge of Kurunegala dated 29th of January 2018 the Appellant had filed this application. When the matter was taken up for argument on behalf of

the Appellant the counsel argued that prosecution witnesses were called before one Magistrate and the judgment was by another Magistrate. Therefore, at the time of writing the judgment, the Judge lost the opportunity to observe the demise of the witness. Thus, amounting to an unfair evaluation of evidence.

Even though the Plaint was amended in criminal cases there is no provision to do so. Once the Plaint is filed in court the Judge must frame charges. The charges can be amended but not the Plaint. At the time of framing charges, the Judge did so because he was satisfied that there was enough material to satisfy the judicial mind of the Judge to frame charges against the 2nd and 3rd Accused. If so, how was that satisfaction taken away on the second charge sheet?

For the above reasons argued by the Counsel, the Appellant had been deprived of a fair trial therefore his appeal should be allowed.

Furthermore, on behalf of the Appellant, it was argued that the Judge could not have come to conclusions about the witness who was earlier named as the accused. As the handwriting of the Appellant was not proved by expert evidence the question arises whether the case was proved beyond doubt.?

On behalf of the Respondents, it was argued that the Appellant had not given exceptional circumstances to satisfy the High Court Judge therefore the order refusing the revision by the High Court Judge should stand.

The Appellant knew his appeal before the High Court came to an end by refusing the appeal on the 31st of May 2013. He being a Police officer must know the consequences of such a refusal. He should have acted promptly and sought remedies. He may have been working in Trincomalee but Trincomalee is yet another town and transportation was not difficult in 2013. It could have been considered a difficult station while there was the war, but 2013 was not a time when there was any problem in the country. However, one must remember that a delay of nearly three years cannot be considered simple ground. For such a delay to be considered an exceptional ground, there should be more arguments to shock the conscience of the bench. The judicial mind should be touched to accept the reasons given warrants for consideration.

The only reason why the Appellant had kept quiet after the High Court order dated 31st of May 2013 was that he was able to continue with his service as a Police Officer. Only when he was informed that he had been dismissed from service he had to file the revision application.

This court must now decide whether the Appellant has a right to file revision papers in the High Court to a judgment where an appeal was filed and rejected.

Only after answering that question, this court can look into the points argued on behalf of the Appellant. After the judgment of the Magistrate court correctly an appeal was lodged. It was at that appeal the points argued on behalf of the Appellant should have been looked into. The accused had exercised his rights in that appeal and exhausted the right of appeal.

On the other hand, can the High Court Judge re-activate an order of dismissal pronounced by that same court? In the Civil Jurisdiction Judge has no power to vary his earlier order. This principle had been engraved in our legal systems may judgment was written such as *Finnegan Vs. Galadari Hotels (Lanka) Ltd.,*[1] This principle explains that once a judicial power is concluded there is no authority to exercise the same power again. The Judge becomes functus once the authority is exercised.

In *Sinnatangum Vs. Sinnen*[2] held that "where a Magistrate discharges a man in respect of an offence, the Magistrate is functus officio qua those proceedings and cannot later punish the man for that offence".

In *Hettiarachchi Vs. Senevirathna (N02)*[3] decided "where a High Court Judge had acted with proper jurisdiction where he made his order …. had no jurisdiction to reconsider the same matter over again and make two orders".

In *Jeyaraj Fernandopulle Vs. Premachandra De Silva*[4] had held "……. as a general role, no court has the power to re-hear, review, alter or vary any judgment or order made by it after it had been entered …… either in an application made in the original action or matter or in a

[1] *(1989) 2 SLR 272-281*
[2] *(1985) 1 NLR 220-221*
[3] *(1994) SLR 293-297*
[4] *(1996) 1 SLR 70-88*

fresh action brought to review the judgment or order. If it is suggested that a court has come to an erroneous decision either regarding fact or law, then amendment of the judgment or order cannot be sought, but recourse must be had to an appeal to the extent to which the appeal is available ……. the object of the rule is to bring litigation to finality."

There are instances a case can be heard setting aside the previous order on sufficient cause shown in civil actions such as when an order/judgment was delivered after an ex-parte hearing. Most of the cases cited are civil cases but the principal must apply to all courts. There should be a finality to litigation. Once an order or judgment is pronounced that court becomes functus.

The Appellant of this case had exercised his right to appeal and then waited without moving up. He therefore cannot invoke the jurisdiction of the High Court against the same judgment of the Magistrate Court. At the time the High Court Judge delivered the order dated 31.05.2013 the High Court Judge becomes functus as far as this case is concerned. He cannot on any ground re-consider or entertain any application regarding the Magistrate Court judgment dated 1st of June 2010 in case No.67510 delivered by the Magistrate Court of Wariyapola.

For the reasons discussed above we see no reason to disturb the order of the High Court Judge of Kurunegala dated 29th of January 2018.

The appeal is dismissed.

Judge of the Court of Appeal

PRASANTHA DE SILVA, J.

I agree.

Judge of the Court of Appeal