

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

In the matter of an Application for  
Revision in terms of Article 138 of the  
Constitution of the Democratic Socialist  
Republic of Sri Lanka, read with the  
provisions in chapter XXIX of the Code  
of Criminal Procedure Act No. 15 of  
1979.

C A (PHC) APN / 148 / 2016

High Court of Colombo

Case No. H C 6256 / 12

Assallage Sujith Rupasinghe,  
No. 30/6,  
Nadun Uyana,  
Katukurundugasyaya,  
Mirigama.

**ACCUSED PETITIONER**

-Vs-

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

**COMPLAINANT - RESPONDENT**

**Before:      K K Wickremasinghe J**

**P. Padman Surasena J**

Counsel      :      Shavindra Fernando PC for the Accused Petitioner.

Varunika Hettige DSG for the Attorney General.

Argued on:      2017-06-15.

Decided on:      2017 - 07 - 26

**JUDGMENT**

**P Padman Surasena J**

The Accused Petitioner (hereinafter sometimes referred to as the accused) in this case has been indicted by the Hon. Attorney General in the High Court under several counts.

He seeks in this application to revise an order made by the learned High Court Judge refusing an application made on his behalf to call a prosecution witness, who had already concluded his evidence in the course of the ongoing trial, as a defence witness also, after naming the said witness in the list of defence witnesses.

It is to be noted that the prosecution had closed its case and the learned High Court Judge had called upon the Accused to place his defence when the impugned application was made by the learned counsel for the Accused.

According to the material adduced before Court, it could be seen that the Accused had concluded his evidence on 2016-11-15<sup>1</sup>. He states that on 2016-10-16, he saw a death notice with the photograph of the man who claimed to be Cooray and sold him the property which is the subject matter of the charges framed in the indictment against him. Accordingly the

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<sup>1</sup> Paragraph 10 of the amended petition.

Accused claims to have gone to the address relevant to the displayed death notice, and found

- i. that the said Cooray's actual name is E S Thanthirige,
- ii. that the said person was a fraudster who had similar case against him namely case No. HC 3997/2007 in High Court of Colombo.

It is the submission of the learned President's Counsel for the Accused Petitioner,

- I. that in the light of the new circumstances arisen subsequently, it became necessary after 2016-10-16, to call on behalf of the defence, the Notary Public who had already given evidence for the prosecution by that time,
- II. that the order dated 2016-11-16 made by the learned High Court Judge in this regard is contrary to law.

Learned President's Counsel for the Accused Petitioner stated at the time of argument before this Court that in view of the fact that the Accused was subsequently enlarged on bail, he would only pursue the prayer (f) relating to the application to call some of the witnesses who had already given evidence for the prosecution. The said prayer (f) seeks a direction from this

Court on the learned High Court Judge to issue summonses to the witness Nos. 2,4 and 5 in the list of witnesses produced marked **P 3**. The relevant proceedings dated 2016-11-16 has also been produced marked **P 6**.<sup>2</sup>

It is the position of the Accused that the learned High Court Judge had refused the application by the defence seeking permission to call witnesses listed as 2<sup>nd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> in the list of witnesses filed on behalf of the Accused. The said witnesses have been mentioned in this list of witnesses (**P 3**) as follows;

2. Director, Criminal Investigations Department, Colombo 1, (to give evidence pertaining to the letter dated 2016-10-31 sent by R Ranjan Attorney at law and action taken with regard to that letter)

4. R P Mangala Deepal, Attorney at law and Notary Public, Colombo Road, Kotadeniyawa.

5. Deepthi Premalal, No. 108 B, Pinnakalewaththa, Divulapitiya. (to give evidence regarding the deed No. 894 attested by him and the documents which would be produced relating to the death of E S Thanthirige).

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<sup>2</sup> Paragraph 27 of the amended petition.

It is important to bear in mind that it was made amply clear by the learned President's Counsel, during his submissions before this Court, that the impugned application was not an application made under section 439 of the code of Criminal Procedure Act No. 15 of 1979. The learned counsel for the accused had maintained the same position before the High Court as well. This is manifest from the fact that the learned Counsel who appeared for the Accused before the High Court had conceded that there is no provision in law for such step<sup>3</sup> to be taken in the course of a trial.

It must be borne in mind that the purpose as to why the procedure for a trial has been stipulated by law is to facilitate the progress of a trial from its commencement to move forward until it reaches its conclusion. Thus, it should be to forward that a trial must proceed. Hence in the absence of any clear specific provisions in law it cannot and should not turn backward. If trials are allowed to move backwards no tangible result, one way or the other, could ever be achieved from a prosecution. Such a move would deny justice both to the prosecution as well as to the accused. Perhaps that is why a specific provision has been made in section 439 above referred to.

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<sup>3</sup> to call a prosecution witness, who had already concluded his evidence, as a defence also.

On the other hand this Court cannot think of any advantage that would accrue to the defence even if the Accused succeeds in establishing that it was late E S Thanthirige who deceived him, since what the indictment alleges is that the said person is a fictitious person. Indeed it is noteworthy that what the indictment has alleged is that the Accused had conspired with a person said to be Bulathsinhalage Gunasinghe Cooray or a person unknown to the prosecution.

The Accused has already testified in his evidence, the position taken up by him in this regard. The Notary Public who attested the alleged forged deed in his evidence has already stated that he does not know the alleged seller Gunasena Cooray. It is his position that he personally knew the Accused who introduced a person said to be Gunasena Cooray. Thus it is the view of this Court that the question whether the person said to be Gunasena Cooray is still alive or now dead, would not help either party in this case. It is the view of this Court that such fact would be neither a fact in issue nor relevant to any fact in issue in this case. One has to bear in mind that section 5 of the Evidence Ordinance only permits evidence relating to existence or nonexistence of a fact in issue and such other facts as are declared to be relevant to any fact in issue.

Since the impugned application is admittedly not one made under section 439 of the code of Criminal Procedure Act No. 15 of 1979, it would not be necessary for this Court to engage in a detailed discussion regarding that section. Nevertheless it would be relevant to note the following passage from the judgment of High Court of Andra Pradesh cited by the learned Deputy Solicitor General<sup>4</sup>.

".... In this connection, we would like to observe that when an application is filed by defence for recalling a witness under section 311 of the Code of Criminal Procedure, the Court has to satisfy itself with the reasons assigned for recalling the witness. The practice of recalling witnesses should be depreciated. In the prsenet case, PW 1 was recalled only to make her speak lie before the Court. Therefore, the learned judges have to be careful in allowing petitions for recalling witnesses. ..."

It is noteworthy that the said Court was called upon to consider, in that case, the application of section 311 of the Indian Code of Criminal Procedure the contents of which are similar to section 439 of our code. It would thus suffice for this Court to state that even an application to recall a witness, made under section 439 of the Code of Criminal Procedure Act No.

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<sup>4</sup> The Public Prosecutor, High Court of Andra Pradesh V Pendi Gopi 2001 Cri. L. J. 4367.



15 of 1979, also should be allowed only if the judge is satisfied that such a step would be inevitable for the due administration of justice.

In these circumstances this Court has no basis to interfere with the order dated 2016-11-16 made by the learned High Court Judge of Colombo.

Thus, this Court decides to refuse this application. It should therefore stand dismissed.

We make no order for costs.

Application is dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K K Wickremasinghe J**

I agree,

**JUDGE OF THE COURT OF APPEAL**