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

C.A. Case No: **CA (PHC) 139/09**

H.C. Negambo Revision Application No: **HCRA 151/2009**

M.C. Minuwangoda Case No: **64228**

In the matter of an Appeal in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer-in-Charge,
Police Station,
Katunayake.

Complainant

Vs.

Imiyagamage Gnanawathi,
194C,
Kovinna,
Adiambalama.

Accused

AND BETWEEN

Imiyagamage Gnanawathi,
194C,
Kovinna,
Adiambalama.

Accused-Petitioner

Vs.

Officer-in-Charge,
Police Station,
Katunayake.

Complainant-Respondent

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

Respondent

AND NOW BETWEEN

Imiyagamage Gnanawathi,
194C,
Kovinna,
Adiambalama.

Accused-Petitioner-Appellant

Vs.

Officer-in-Charge,
Police Station,
Katunayake.

Complainant-Respondent-Respondent

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

Respondent-Respondent

BEFORE	:	K. K. Wickremasinghe, J.
		Janak De Silva, J.
COUNSEL	:	Shanaka Ranasinghe, PC with AAL Sandamali Peiris for the Accused-Petitioner-Appellant
		Nayomi Wickremasekara, SSC for the Respondents
ARGUED ON	:	13.06.2018
WRITTEN SUBMISSIONS	:	Respondent-Respondent – On 24.08.2018

Accused-Petitioner-Appellant – On 28.08.2018

DECIDED ON : 09.10.2018

K.K. WICKREMASINGHE, J.

The Accused-Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of the Western Province holden in Negambo dated 20.10.2009 in case of HCRA/151/2009 and seeking to set aside the order of the Learned Additional Magistrate of Minuwangoda in the case No. 64228.

Facts of the Case:

The Accused- Petitioner-Appellant (hereinafter referred to as the "Appellant") was charged before the Magistrate's Court of Minuwangoda under the Case No. 64228 for an offence of 'assault or criminal force with intent to dishonour police officers otherwise than on grave and sudden provocation' an offence punishable under section 346 of the Penal Code. The Appellant had pleaded guilty to the charge when it was read in open court and the Learned Magistrate had convicted the Appellant. Accordingly the Learned Magistrate had imposed a sentence of one year rigorous imprisonment and a fine of Rs.5000.00.

Being aggrieved by the order of the Learned Magistrate, appellant had preferred an appeal to the High Court of Negambo which was later withdrawn. Thereafter, the appellant had filed a revision application in the High Court under case No. HCRA 151/2009.

Since this is an appeal of the revision application made to the High Court, we are inclined to consider whether the Appellant had demonstrated exceptional circumstances to the satisfaction of High Court.

In the case of **Rustom V. Hapangama (1978-79) 2 SLLR 225**, it was stated that,

> *"The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise these powers in revision. If the existence of special circumstances does not exist then this court will not exercise its powers in revision... "*

In the case of **Rasheed Ali V. Mohamed Ali (1981) 2 SLR 29** it was held that,

> *"The powers of revision conferred on the Court of Appeal are very wide and the Court has discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the court..."*

We observe that the Appellant has failed to mention any reason for the withdrawal of her appeal made to the High Court. Therefore it was mandatory to demonstrate exceptional circumstances before the Learned High Court Judge of Negambo since the Appellant did not avail her right of appeal.

The Appellant had averred in the petition of appeal that the Complainant-Respondent-Respondent (hereinafter referred to as the 1st Respondent) had produced the Appellant before the Magistrate's Court of Minuwangoda on

17.02.2007 for allegedly committing the offence of possession of illicit liquor, under the case No. 3742. On 26.05.2008. the case was called for the purpose of framing charges and the 1st Respondent had filed a charge sheet for committing an offence punishable under section 346 of the Penal Code. Therefore the Appellant has averred that she pleaded guilty to the said charge by mistake on the belief that she was pleading guilty to the charge of possession of illicit liquor.

However, upon perusal of the case records we find that two different cases were filed under two different numbers. Accordingly we find that police had filed a report against the Appellant for an 'assault or criminal force with intent to dishonour police officers otherwise than on grave and sudden provocation' an offence punishable under section 346 of the Penal Code under case No. 64228 on 17.02.2007 and on 17.03.2008. Police had filed the report on the charge of possession of illicit liquor on 12.01.2009 under case No. E 3742.

The Learned President's Counsel for the Appellant submitted that the charge sheet for which the Appellant had pleaded guilty was not signed by the Learned Magistrate and accordingly the said charge sheet was not framed under section 182(1) of the Code of Criminal Procedure Act. Therefore the conviction was bad in law and it was a denial of her Fundamental Rights guaranteed under Article 13(4) and 13(5) of the Constitution.

It was further submitted that in terms of the cases of **Abdul Sameem V. The Bribery Commissioner (1991) 1 Sri L.R. 76** and **David Perera V. The Attorney General (1997) 1 Sri L.R. 390**, convicting an accused on a charge which was not legally framed, would vitiate the conviction.

In the case of **Abdul Sameem**, it was held that,

> *"...the failure to frame a charge, as required under section 182(1) is a violation of a fundamental principle of criminal procedure, and is not a defect curable under section 436 of the Code of Criminal Procedure Act No. 15 of 1979."*

However we find these two cases to be different from the instant appeal. In the case of Abdul Sameem, a written report was filed by the Bribery Commissioner to the Learned Magistrate that the accused had committed two offences under the Bribery Act and the Magistrate had adopted the said report by placing a seal. In the case of David Perera, there was no separate charge sheet and the Learned Magistrate had simply adopted the 'amended plaint'.

The Learned President's Counsel has submitted the case of **Godage and others V. OIC, Kahawatte Police (1992) 1 SLR 54**, in which it was held that,

> *"it is an imperative duty of the Magistrate to frame a charge and read it out to the accused. Failure to do so is fatal to the conviction."*

In this case it was submitted that no charge had been framed or read out at all either from a charge sheet or on the basis of the plaint or the amended plaint and therefore no charge sheet at all. Therefore we find that above three cases are not relevant to the circumstances of the instant appeal.

The Learned President's Counsel has submitted the case of **Abubackerge V. OIC, Anti-Vice Unit, Police Station, Anuradhapura and others [CA (PHC) 108/2010],** stating that the attending circumstances were identical to the instant case. However in the said case no charge sheet was found in the original record or in the docket maintained by the High Court and only the rubberstamp was placed on the reverse of the Plaint. Accordingly it was held that,

"The judgments cited above clearly points to the total absence of a written charge (as is the case in the instant appeal), ought not to be treated as a mere irregularity. The right to know the charge is a fundamental requirement. It is a magisterial duty which cannot be delegated to the police. Whether there is sufficient ground to proceed against the suspect is in the hands of a judidal officer who is expected to address his mind judiciously. If the duty of framing the charge is to be entrusted to others the purposive approach to Section 182 will be rendered nugatory..."

However we observe that, in the instant appeal, the Learned Magistrate of Minuwangoda had framed and filed a separate charge sheet (Page 35 of the brief).

In the case of **D.R.M. Pandithakoralge V. V.K. Selvanayagam (56 NLR 143),** it was held that,

"There can be no doubt that the accused was in no way misled by the mistake as regards the date in the plaint. In the case of William Edward James (17 CAR 116) it was held that a mistaken date in an indictment, unless the date is of the essence of the offence or the accused is prejudiced, need not be formally amended..."

In the case of **H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola [SC Appeal 149/2017]**, it was held that,

"The question that must be decided is whether any prejudice was caused to the accused-appellant as a result of the said defect in the charge sheet or whether he was misled by the said defect. It has to be noted here that the accused-appellant, at the trial, had not taken up an objection to the charge sheet on the basis of the said defect. In this connection judicial decision in the case of Wickramasinghe Vs Chandradasa 67 NLR 550 is important."

According to section 164(4) and section 165 of the Code of Criminal Procedure Act, the primary object of a charge sheet can be construed as to give notice to the accused of the offence he/she is charged with.

In the case of **Cooray V. James Appu [22 New Law Report 206]** it was held that,

> *"The Legislature, deliberately departing from the previous practice, had declared that in every summary trial, when once the Court has decided to undertake it, there shall be from the commencement a definite written charge, which should be read to the accused, specifying precisely what he has to meet. This charge may be the subject of reference at any point in the trial, and must be the basis of any ultimate consideration of the case by the Court of Appeal. Such a provision may well be regarded as of so fundamental and all-pervading a character, that its non-observance ought not to be treated as a mere irregularity. No doubt there may be cases in which the facts may be so simple, the issues so plain, and the charge so inevitable that it cannot make the smallest difference to the accused whether a written charge is read to him or not. Nevertheless, it is easy to see that some provisions may in the intention of the Legislature be of the very essence of the proceedings, while others may be in the nature of formalities. The existence of a deliberately framed written charge is obviously a condition which may well be so regarded, whatever the circumstances of the particular case..."*

In the instant appeal, the Learned Magistrate of Minuwangoda had duly framed the charge by mentioning the place, date, nature of the offence and relevant section under which the appellant could be punished. Accordingly we are of the view that such particulars were reasonably sufficient to give the accused (appellant) notice of

the matter with which she was charged and in fact satisfied the requisites under Code of Criminal Procedure Act.

Further we observe that the Learned High Court Judge of Negambo affirming the conviction has held as follows;

> "එසේම නඩු වාර්තාවටද ගොනුකර ඇති මෙකී චෝදනා පත්‍රය අවසානයේ මහේස්ත්‍රාත්, මිනුවන්ගොඩ වශයෙන් සටහන් වී ඇති අතර, එම ස්ථානයේ උගත් මහේස්ත්‍රාත්වරිය විසින් සිය අත්සන තබා නොමැති වීම හේතුවෙන් චිත්තිකාරියට කිසිදු අගතියක් හෝ කිසිදු යුක්ති අවගමනයක් හෝ සිදුවී නොමැති බවට තීරණය කරමි." (Page 82 of the brief)

The Learned President's Counsel for the appellant submitted that the Learned High Court Judge had misdirected and erred in law since the validity of the charge sheet does not depend on the fact whether a prejudice caused or not. It is imperative to consider section **436 of the Code of Criminal Procedure Act** (which is equivalent to section 425 of the previous Code) in this regard, which reads;

> "Subject to the provisions herein before 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, 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 the case of **R.T. Wilbert and 3 others V. Newman (75 NLR 138),** it was held that,

> *"However, a charge which is bad for duplicity is not necessarily fatal to the conviction if it has not caused prejudice to the accused and is curable under section 425 of the Criminal Procedure Code..."*

We further observe that the Learned Magistrate of Minuwangoda had placed the seal and entered the signature in the end of journal entries. Accordingly we agree with the findings of the Learned High Court Judge of Negambo and reject the contention of the Learned President's Counsel.

Therefore we see no reason to interfere with the findings of the Learned High Court Judge of Negambo.

Accordingly the Appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Rustom V. Hapangama (1978-79) 2 SLLR 225
2. Rasheed Ali V. Mohamed Ali (1981) 2 SLR 29
3. Abdul Sameem V. The Bribery Commissioner (1991) 1 Sri L.R. 76
4. David Perera V. The Attorney General (1997) 1 Sri L.R. 390
5. Godage and others V. OIC, Kahawatte Police (1992) 1 SLR 54
6. Abubackerge V. OIC, Anti-Vice Unit, Police Station, Anuradhapura and others [CA (PHC) 108/2010]
7. D.R.M. Pandithakoralge V. V.K. Selvanayagam
8. H.P.D. Nimal Ranasinghe V. OIC, Police Hettipola [SC Appeal 149/2017]
9. Cooray V. James Appu [22 New Law Report 206]
10. R.T. Wilbert and 3 others V. Newman (75 NLR 138)