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

In the matter of revision under Article 145 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Sections 361 and 362 of the Code of Criminal Procedure Act.

C.A. Cases No: CA/MC/Rev/06/2016
CA/MC/Rev/07/2016
CA/MC/Rev/04/2016
CA/MC/Rev/10/2016

Decided on : 24.07.2018

A.H.M.D. Nawaz, J.

Upon communications received by His Lordship the President of the Court of Appeal both from the Deputy Secretary of the Judicial Service Commission and Magistrates in respect of the following cases namely MC Maligakanda 34395/11, MC Chilaw 86841, MC Chilaw 36259 and MC Gampaha 6911/13, the references were converted into revisionary cases as CA/MC/Rev/04/2016, CA/MC/Rev/06/2016, CA/MC/Rv/07/2016 and CA/MC/Rev/10/2016 respectively and as these matters involve identical issues and questions of law, at the direction of His Lordship the Chief Justice, the assistance of the Honourable Attorney General was sought in these cases and Mr. D.S. Soosaithas, Senior State Counsel appeared as amicus curiae and ably assisted this Court.

The identical question before Court is that in the cases referred to above, convictions and reasons have been entered but sentences were not pronounced owing to various supervening circumstances such as retirement or release from service of the Magistrate who had entered the conviction. In some cases there has been a long lapse of time from the

dates of the relevant offences. The question arises whether a succeeding Magistrate or the Magistrate currently serving in the respective Magistrate's Court can proceed to pronounce the sentence or what should be the proper orders that must be made when there have been irregularities in proceedings and a long time has elapsed from the date of the offences.

I am in agreement with the learned Senior State Counsel that Article 145 of the Constitution read with Sections 361 and 362 of the Code of Criminal Procedure Act empowers this Court to entertain these references either from Magistrates of the respective Magistrates' Court or the Secretary of the Judicial Service Commission. I would deliver in these cases a composite judgment making references to the respective cases.

CASE NO: CA/MC/RV/06/2016

Magistrate's Court-Chilaw: 86841

Accused : Mustigae Saman Priyantha Silva

FACTS:

The accused was charged under Section 443 of the Penal Code for breaking into a shop at night. He was also charged under 369 of the Penal Code for stealing Rs.22,750/- worth of provisions at the shop. The date of offences is said to be between the 1st and 2nd January 2004. The Prosecution closed its case on 23.04.2010. The judgment was reserved on 18.05.2010 and the verdict was pronounced on 13.11.2012. The verdict was written by the learned Magistrate who heard the case. However, it was pronounced by his successor. There is no date in the verdict. It must be noted that initially on 10.08.2012 a succeeding Magistrate had indeed acquitted the accused. Then the accused was summoned again and a verdict of guilt was pronounced. As per the verdict the accused was convicted on both counts. However, there was no order made for taking the finger print of the accused. Thereafter until 2015 the case had been called on a number of occasions to ensure that the Magistrate who had written the judgment would turn up to impose the sentence but this did not happen. Eventually the learned Magistrate informed the Secretary, Judicial Service

Commission, by letter dated 04.11.2015, that she is now retired and blamed the succeeding Magistrate for the lapse.

Regrettably there has been a long lapse of time from the date of the offence. Sixteen years and three months have already been passed from the date of offence. In this case verdict was reserved on 18.05.2010. But it was pronounced only on 13.11.2012. It took nearly 30 months for the pronouncement of the verdict. In the case of ***Kulatunga v. Samarasinghe***[1], it was held that a judgment delivered two years and four months after the tender of written submission cannot stand. The case depended on the oral testimonies of witnesses. The impression created by the witnesses on the judge is bound to have faded away after such a long delay. The learned Judge was bound to have lost the advantage of the impression created by the witnesses who he saw and heard and his recollection of the fine points in the case would have faded from his memory by the time he becomes to write the judgment. This judgment refers to Basanayake C.J.'s Judgment in ***Mohato v. Sarana***[2].

After observing this impasse, on the instruction of the Judicial Service Commission this case was referred to the President of Court of Appeal by letter dated 01.02.2016.

1. JURISDICTION OF THE COURT OF APPEAL:

The Court of Appeal has the power to hear the case under Section 361 and make determination under Section 362 of the Code of Criminal Procedure Act.

Further article 145 of the Constitution of the Democratic Socialist Republic of Sri Lanka empowers the Court of Appeal to examine the record of any Court of first instance[3].

The power vested in the above said article, empowered the court to set aside the conviction and acquitted he convicted accused from the charges. The circumstance of this case warranted this end. Further, Section 185 of the Code of Criminal Procedure Act insists that the verdict should be delivered forthwith.

However, if the verdict would have been pronounced forthwith then following justifications are there to pass sentence. But it is not certainly so in this case.

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[1] 1990 (1) Sri L.R 244
[2] 67 CLW 3
[3] *W.H. Thulyananda Senananda v. OIC, SCIB, Police Station, Mirihana* C.A. (PHC) APN 28/2014: Decided on 07.07.2014.

2. NON APPLICABILITY OF FOLLOWING SECTIONS:

The term judgment includes the conviction and sentence. The issue before the Court is that part of the judgment was pronounced and the rest of it remains unpronounced. In other words the conviction and reasons were pronounced, but the sentence is yet to be pronounced.

This circumstance does not come under the purview of Section 48 of the Judicature Act. The said section covers only the pending action, prosecution, proceeding or inquiry[4].

Likewise Sections 267 and 268 of the Code of Criminal Procedure Act will do not applicable in this context[5].

3. PRAGMATIC APPROACH REGARDING THE WORD FORTHWITH:

Section 185 of the Code of Criminal Procedure Act requires forthwith record a verdict of guilty and pass sentence. However, the word forthwith is limited to verdict. It does not cover the words of passing sentence. Practically it is not possible to impose the sentence forthwith since prior to impose the sentence prevention of crimes ordinance should be followed. According to the requirement of the Prevention of Crimes Ordinance that the sentence has to be passed after perusing the finger print report. In other words prior to pass the sentence the law requires a consideration of the antecedents of the accused.

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[4]Section 48:In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before who 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, proceeding or matter (except on an inquiry preliminary to committed for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be re-summoned and reheard.

[5]Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in any inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercise Jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor or partly recorded by his predecessor and partly recorded by himself or he may re-summon the witnesses and re-commence the inquiry or trial.

Provided that in any trial the accused may when the second Magistrate commences his proceedings demand that the witnesses or any of them be re-summoned and re-heard.
Section: 268.....

Therefore, it is practically impossible to enter the conviction and impose the sentence together.

At this juncture it is appropriate to consider Section 3(1) of the Prevention of Crimes Ordinance. It states as follows:-

> *"Where, after summary trial of any person accused of a crime, a Magistrate finds him guilty thereof or without proceeding to conviction proposes to deal with him under section 306(1) of the Code of Criminal Procedure Act, the Magistrate shall not withstanding anything in section 185 of the Code of Criminal Procedure Act cause the finger prints of such person to be taken and forwarded in the manner provided in subsection (1) of section 2, and the Registrar shall issue a certificate as required by subsection (2) of the that section."*

Section 18 of the same ordinance states as follows:-

> *"Crime" shall mean a breach of any one the sections of Penal Code included in the schedule.*

At this stage it is appropriate to consider the position under the Administration of Justice Law, No.44 of 1973. It is very apt to pay attention on Sections 169, 170 and 149(7) which will give a clear understanding to cover this issue.

Section: 169:

(1) If the Magistrate, after taking the evidence for the prosecution and defence and such further evidence (if any) as he may of his own motion cause to be produced, finds the accused not guilty, he shall forthwith record a verdict of acquittal. If he find the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and shall record such sentence. *(emphasis is mine)*

(2) The verdict shall be recorded not later than twenty-four hours after the conclusion of the taking of evidence, and the reasons for the verdict shall be recorded not later than fourteen days after recording the verdict.

(3) The sentence, if any, shall subject to the other provisions of this law, be recorded at the time of recording of the verdict.

Though it is evident that the word forthwith does not include the passing of sentence, it is appropriate to analyse what is the meaning of it in the light of judicial pronouncements.

Vethanayagam v. Inspector of Police, Kankesanthurai.[6] It was held that: "A Magistrate should record his verdict immediately after taking the evidence in terms of section 190 of the Criminal Procedure Code. The failure to do this is an irregularity and not therefore curable under section 425".

However, this proposition was overruled in ***Banda v. David*** (S.I. Police)[7]

Section 190 of the Criminal Procedure Code does not require a Magistrate who convicts an accused person to record his verdict, immediately after he had concluded the taking of the evidence.

Per Gunasekera, J. at page 377

> *".....the question was expressly considered in the case of Samsudeen v. Suthoris*[8] *and Dalton, J. held that what the section requires is that the verdict should be recorded, not forthwith after the taking of evidence but forthwith after the finding of the verdict. This decision was followed for the next twenty two years until it was dissented from in the judgment of Basanayake, J. in Vethanyagam v. Inspector of Police, Kankesanthurai*[9]*. Basanayake, J. considers that Dalton J's interpretation is an impractical view of the section. It seems, to me, however, that that interpretation is in accordance with the plain meaning of the words of the section, which are by no means ambiguous. I should say, with all respect that there seems to be nothing impractical in a requirement that if the Magistrate find the accused not guilty he shall record a verdict of acquittal forthwith after he finds him not guilty and that if he finds him guilty he shall record a verdict of guilty forthwith after he finds him guilty.....I do not see anything in the view taken by Dalton J. that is inconsistent with this view: it is one thing to say that it is "most desirable" that a Magistrate should state his finding immediately at the conclusion of the trial and quite another to say that there is an imperative statutory*

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[6] 50 N.L.R 185
[7] (1949) 50 N.L.R 375
[8] 29 N.L.R 10 (1949)
[9] 1949. 50 N.L.R 375

requirement that he should do so.....The view taken by Dalton J. does not, as I understand it suggest that a Magistrate may wait until the impression made by the conduct and demeanour of the witness has faded from his mind to arrive at his verdict."

4. ABSENCE OF PROVISION IN THE CODE OF CRIMINAL PROCEDURE AND AN EXACT PROVISION IN THE AJL

The Criminal Procedure does not have a provision to deal with the exact problem referred to this court. However, the Administration of Justice Law has a provision to deal with the exact identical situation. Section 149(7) of AJL states that: *"Where a case has been adjourned under the preceding subsection, the accused may be sentenced or otherwise dealt with by any other Judge at the same court, so however that such Judge shall inquire into the circumstance of the case before sentencing or otherwise dealing with him".*

As correctly submitted by the learned State Counsel, it should be borne in mind that the said section imposes the condition that the judge shall inquire into the circumstance of the case before sentencing or otherwise dealing with him.

5. PURPOSIVE INTERPRETATION TO FULLFILL THE GAP

In a recent case[10] Hon. Vijith K. Malalgoda PCJ has stated that ".....If the judge who recorded the conviction is not available due to some incapacity, in such situation it is the duty of the court to give a purposive interpretation to the legislature.

In the case of ***Wickramarathne v. Samarawickrama***[11], S.N. Silva, J. (as His Lordship then was) observed that: "The basic rule of interpretation is that the legislative objective should be advanced and the provisions be interpreted in keeping with the purpose of the legislature, interpretation should not have the effect of defeating the objective of the legislature and of detracting from its purpose".

In the absence of any specific provision in Section 203 or in any other provision in the Criminal Procedure Code preventing the incumbent judge to pronounce the sentence, or

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[10] *Kanagaratnam Pirabaharan v. Attorney-General*, CA/58/2010, Judgment on 24.06.2016.
[11] (1995) 2 Sri LR 2

any other provision in contrary, this court is of the view that there is no restriction imposed by the provision of Section 203 or any other provision in chapter XVIII of the Criminal Procedure Code for the incumbent Judge to pronounce the sentence."[12]

6. PROHIBITION CANNOT BE PRESUMED:

Though Administration of the Justice Law has the provision to deal with the question that arises in this case; the Code of Criminal Procedure Act does not have a provision to this effect. Even though there is no such provision, it does not mean that such a course is prohibited. In other words prohibition cannot be presumed. In the case of ***Narasingh Das v. Mangal Dubey***,[13] Justice Mahmood has stated as follows. *"Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibitions cannot be presumed"*. This maxim was followed in number of cases. [14]

7. APPLICABILITY OF SECTION 7 OF THE CODE OF CRIMINAL PROCEDURE ACT

Substantive Law cannot be created by the judicial interpretation. However, procedural Law can be created by the judicial interpretation which will give life to the substantive law. There is always of doctrine of necessity which permits such interpretation[15]. This position is buttressed by the following judicial pronouncement.

> "It has been the practice for a considerable length of time to accept a plea of guilty to a lesser offence when tendered in the course of a trial even after the accused has been placed in charge of the Jury, the procedure adopted being that prescribed in section 221(2) with modifications-to-suit a trial by Jury. Our practice is the same as the English practice and section 6 of our Criminal Procedure Code affords sufficient

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[12] *Kanagaratnam Pirabaharan v. Attorney-General*, CA/58/2010, Judgment on 24.06.2016.
[13] (1883) 5 Alahabad 163 at p. 172
[14] *C.N. Hewavitharana v. S. Themis de Silva* 63 N.L.R 68 at 72; *Tudor v. Anulawathie and others* (1999) 3 Sri LR 235 at 252; *Fernando v. De Silva and others* (2000) 3 Sri LR 29 at 48; *Aryaratne v. Laksiri Fernando* (2004) 1 Sri LR page 184; *Peiris and another v. Perera and another* (2002) 2 Sri LR 128 at 131.
[15] *Police Vidanae v. Kanthan* 22 N.L.R 349

authority for the adoption of that practice which is not in conflict or inconsistent, with the provisions of our Code".[16]

"boni judicis est ampliare jurisdictionem" which means that is the part (or duty) of a good judge to enlarge or use liberally his remedial authority or jurisdiction.....When laws imposed by the state or enacted by the Parliament fail or are silent we must act by the nature of law. I suppose, law of nature means the principles for guidelines of human conduct, which independently of enacted law, might be discovered by the rational intelligence of man,.....[17]

> "As regards matters of Criminal procedure for which special provisions may not have been by this Code or by any other law for the time being in force such procedure as the justice of the case may require and as is not inconsistent with this Code may be followed.[18]"

Justice Soza in the case of ***Leechman & Company v. Rangalla Consolidated Ltd***[19] cited the words of Woodroffe. J, made with regard to procedural law. These observations have been cited with approval and repeated by Honourable judges in many a case. In the case of ***Victor de Silva v. Jinadasa de Silva***[20], Justice Manikavasagar has stated as follows:-

> *"...our Code is not exhaustive on all matters; one cannot except a Code to provide for every situation and contingency; if there is no provision, it is the duty of the Judge, and it lies within its inherent power to make such order as the justice of the case requires."*

The words of Woodroffe, J. go as follows:-

> ".....the Civil Procedure Code binds all courts so far as it goes but it is not exhaustive. The Legislature cannot anticipate and make provision to cover all possible contingencies. Te power and duty of the Court in case where no specific rule exists to act according to equity, justice and good conscience remain

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[16] ***Regina v. Dias Appuhamy*** et al. 58 N.L.R 49 at 56
[17] ***Fernando v. De Silva and others*** (2000) 3 Sri LR 29 at 47
[18] Section 7 of the Code of Criminal Procedure Act, No. 15 of 1979
[19] 1981 (2) Sri LR373 at 389
[20] 68 N.L.R 45

unaffected. In the exercise of its inherent powers the Court must be careful to see that its decision is based on sound general principles and is not in conflict or inconsistent with them or the intentions of the legislature."

In fact the learned Senior State Counsel agreed with this Court in the course of the submissions that in terms of section 7 of the Code of Criminal Procedure Act, there is no impediment to impose the sentence in an appropriate case.

However, the Judge shall inquire into the circumstance of the case before sentencing.

Mr. Soosaithas, Senior State Counsel urged Court that the accused must be acquitted in view of the irregularities that have occurred in this case and I am in agreement with this submission. The Registrar of this Court shall take steps to inform the Magistrate and the Secretary of the Judicial Service Commission that a verdict of acquittal be entered in this case after having noticed the accused.

CASE NO: CA/MC/RV/07/2016

Magistrate's Court-Chilaw: 36259

Accused : 1. M.K.A. Raymond Christy
2. A. Primal Norbert Silva
3. M. Kingsley George Fernando
4. L.D. Dammika Sarath Chandra
5. A. Susan Priyanjith

FACTS:

The accused were charged under Section 146 of the Penal Code read with 316 of the same. The date of offence is 09.03.1998. The Prosecution closed its case on 30.04.2010. The judgment was reserved for 11.05. 2010. In terms of the verdict that was pronounced on 25.10.2011, all five accused were convicted for the above charges. However, there was no order for taking finger print. Thereafter till 2015 this case was called for the purpose of imposing the sentence. But it would appear that the learned Magistrate who had written

the judgment did not turn up to pronounce the sentence. Finally she informed the Secretary, Judicial Service Commission, by letter dated 04.11.2015 that she was now retired and blamed the succeeding Magistrate for the lapse.

Admittedly there has been a long lapse of time from the date of the offence and the learned Senior State Counsel as *amicus* made similar submissions as above on the propriety of a succeeding judge or judges to impose the sentence when a judge who pronounced the judgment becomes disabled to perform the function of sentencing owing to external impediments.

In this case too, the learned Senior State Counsel urged that this is a fit case in which all five accused must be acquitted and I am in complete agreement with that submission. In the circumstances, I direct the Registrar of this Court to communicate to the Magistrate and the Secretary, Judicial Service Commission that all five accused in this matter shall be acquitted after noticing the accused.

So in cases CA/MC/RV/06/2016 (MC Chilaw 86841) and CA/MC/RV/07/2016 (MC Chilaw 36251) the orders made by this Court are that having considered the circumstances and long lapse of time from the date of the offence and the submissions made thereon by the learned Senior State Counsel, the accused shall be acquitted after noticing them.

The cases CA/MC/RV/04/2016 (MC Maligakanda 34395/11) and CA/MC/RV/10/2016 (MC Gampaha 6911/13) remain to be considered.

CASE NO: CA/MC/RV/04/2016

Magistrate's Court-Maligakanda 34395/11

Accused : Umaru Lebbei Umaiz alias Faris

FACTS:

The accused in this case was convicted on 11.12.2012 for the offences under Sections 24(1) read with 64(b) of the Sri Lanka Bureau of Foreign Employment Act and Section 386 of

the Penal Code[21]. This case was called for the purpose of imposing the sentence on 05.02.2013. On that day the accused agreed to pay the total amount of 306,000/- in installments. He agreed to pay 15,000/- for each installment. The learned Magistrate postponed the sentence until the completion of the payment. During this period the learned Magistrate retired from services. When the present Magistrate assumed duties, on 05.01.2016 the Counsel for the convicted accused informed that his client is not in a position to pay the rest of the amount. In this backdrop the present learned Magistrate referred this matter to the Judicial Service Commission and sought advice whether he can impose sentence. The Deputy Secretary of the Judicial Service Commission by letter dated 09.02.2016 referred this matter to the President of the Court of Appeal.

In the backdrop of what I have discussed above there is no impediment to impose the sentence. It is true that after a passage of a long lapse of months from the date of conviction, this sentence is going to be imposed. But it has to be remembered that on 05.01.2016 only the convict refused to make the payment which he was obligated to do. It is not inequitable in the circumstances to order the accused to make the payment as the delay is occasioned by him.

Further, according to Section 64(b) of the said act, the learned Magistrate **shall,** in addition, order the offender to refund the fee or money which is the subject of the offence, to the person from whom the offender received such fee or money. Based on this rationale the learned Magistrate prior to passing the sentence made an attempt to collect the dues.

On the following premises which the learned Senior State Counsel has argued namely:-

- section 7 of the Criminal Procedure Code,
- Prohibition cannot be presumed,
- applying purposive interpretation

[21]Section: 64(b) Any person who not being a licensee, demands or receives or .....shall be guilty of an offence under this act and shall be liable on conviction .....The Magistrate shall, in addition, order the offender to refund the fee or money which is the subject of the offence, to the fee or money which is the subject of the offence, the person from whom the offender received such fee or money. (Relevant section is annexed)

I take the view that it is open to the learned Magistrate presiding over the Court to impose the sentence in this matter.

However, it is prudent that the Judge shall inquire into the circumstance of the case and take into account incriminating and extenuating circumstances as well before proceeding to sentence the accused.

In the circumstances the Registrar is directed to inform the decision to the learned Magistrate of *Maligakanda* and the Secretary to Judicial Service Commission.

CASE NO: CA/MC/RV/10/2016

Magistrate's Court-Gampaha 6911/13

FACTS:

The accused in this case was convicted on 12.11.2015 for the offence of theft which should be punishable under Section 367 of the Penal Code. The learned Magistrate adjourned the case to obtain the finger print certificate as per the requirement of the Prevention of Crimes Ordinance. According to the schedule of the section 18 of the foregoing ordinance, prior to imposing the sentence, it is the duty of the judge to find out the antecedents of the accused. For this purpose his finger print has to be sent to the Registrar for identification. During this period of adjournment, the learned Magistrate who convicted the person was released from the service. His successor referred this matter to the President of Court of Appeal by a letter dated 12.02.2016 and sought advice regarding this situation.

I adopt the same reasoning as in the previous case and section. On the premise of Section 7 of Code of Criminal Procedure Act, the principle that prohibition cannot be presumed and applying purposive interpretation there is no impediment to impose the sentence in this matter.

However, the Judge shall inquire into the circumstances of the case and take into account incriminating and extenuating circumstances as well before proceeding to sentence the

accused. The Registrar is directed to communicate this decision to the learned Magistrate of *Gampaha*.

JUDGE OF THE COURT OF APPEAL