

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

In the matter of an Appeal made under
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.

Court of Appeal No:
CA/HCC/0144/2022

The Attorney General

Complainant-Appellant

High Court of Colombo
Case No: HC/7845/2015

Vs.

1. Kandiah Thaneshwaram
2. Antony Wasantha Kumara Uma
Maheshwaram

Accused-Respondents

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **Azard Navavi, SDSCG for the Appellant.**
Sanjith Senanayake for the Respondents.

ARGUED ON : **25/06/2024**

DECIDED ON : **08/08/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named 1st Accused-Respondent was indicted by the Attorney General in the High Court of Colombo under Sections 54(A) (b) and 54(A) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for Possession and Trafficking of 59.88 grams of Heroin (diacetylmorphine) on 09th January 2013.

The 2nd Accused-Respondent was indicted for adding and abetting 1st Accused-Respondent for possession of 59.88 grams of Heroin (diacetylmorphine) under Section 54(A) (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

The case was called on 16.06.2015 to service of the indictment. The Respondents were present and duly represented by their Counsel. Indictments were served and the Respondents were released on fresh bail. The case was fixed for trial on 26.10.2016.

On 26.10.2016 PW1 IP/Rangajeeva was absent as he was summoned by High Court of Panadura to give evidence in a partly heard matter. Therefore, the trial was re-fixed for 08.02.2017.

On 08.02.2017 PW1 was absent and the trial was re-fixed for 05.05.2017. On that day although PW1 and PW2 were present, the trial could not be commenced due to non-availability of Police Information Books. As such, the case was re-fixed for trial on 20.07.2017.

On 20.07.2017 it was reported that PW1 was hospitalized and receiving treatment. Hence, the trial was re-fixed for 12.09.2017. On that day the Counsel for the Respondent moved for a date due to his ill-health. Therefore, the trial was re-fixed for 17.11.2017.

On 17.11.2017 a date was moved due to ill-health of PW1 and the trial was re-fixed for 25.06.2018. On that day it was reported that the PW1 was in remand and notice was issued through the prison. Hence the trial was again re-fixed for 03.10.2018. On that day too PW1 was absent and summons issued to PW1 and PW3 returnable on 16.01.2019.

On 16.01.2019 the State Counsel brought to the notice of the Court that PW1 was not stable due to gunshot injuries he had received. Therefore, an application was made to call for a medical report of PW1 through Judicial Medical Officer of Colombo. The Court allowed the application and re-fixed the trial on 24.05.2019.

On 25.05.2019 neither PW1 nor his MLR was produced in Court. As such, a warrant was issued against PW1 and a notice was issued against the Officer-in-Charge of the Police Narcotics Bureau and the trial was re-fixed for 10.09.2019.

On 10.09.2019 the State Counsel confirmed that PW1 had undergone a medical check and requested the Court to issue an order to get the MLR of PW1 directly to the High Court. Order was made accordingly and the trial was re-fixed for 17.01.2020. On that day as the Learned High Court Judge was on an official duty, trial was postponed for 10.06.2020 and PW1 and PW3 were warned to appear on the next day.

On 10.06.2020 the trial was postponed to 23.09.2020 as the Respondent were absent to Court. On the next date of the trial the Learned State Counsel informed Court that PW1 had undergone a heart surgery and was convalescing at the Police Hospital. Therefore, move for summons and the trial re-fixed for 15.02.2021.

Due to Covid pandemic the case was called several times as per the Judicial Service Commission Circular No.JSC/SEC/COR 12 in absence of the parties. Thereafter the case was fixed for trial on 31.08.2022.

On 31.08.2022 the trial was taken up and the indictment was read to the Respondents who pleaded not guilty. After the opening address, the Learned State Counsel informed Court that although the Police Narcotics Bureau had informed him that PW1 is coming to the Colombo High Court No.04, the witness was not present. Hence, he moved another date to start the trial.

The Learned High Court Judge considering the situation, ordered that the case has come to an end technically. Therefore, he moved to discharge both the Respondents from the case. The order of the Learned High Court Judge is re-produced below:

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වේලාව මධ්‍යහන 12.00 යි. මෙම නඩුවේ සාක්ෂිකරු අංක 4 අධිකරණයේ නඩුවක් සඳහා පෙනී සිටින බවට දැනුම් දීම මත දැනට විනාඩි පහකට පෙර අංක 4 අධිකරණයට මෙම අධිකරණයේ ආරච්චි යවා පරීක්ෂා කරන ලද අතර මෙම නඩුවේ සාක්ෂිකරු අංක 4 අධිකරණයේ නැති බව දැනුම් දෙන ලදී.

පැමිණිල්ලේ පළමු සාක්ෂිකරුගේ නහතර අනුව ඔහු වගකිව යුතු නිලධාරියෙකි. මෙම නඩුවේ පැමිණිල්ලේ පළමු සාක්ෂිකරු සම්බන්ධයෙන් ජාතික මානසික සෞඛ්‍ය විද්‍යායතනය මගින් ඉදිරිපත් කර ඇති 2022.06.18 වෙනි දිනැති ලිපිය ද පරීක්ෂා කිරීමේ දී ඔහුට අධිකරණයේ සාක්ෂි දීමට ඇති හැකියාවක් නොමැති බව පෙනී යයි. අවවාද කර ඇති සාක්ෂිකරුවෙකු අධිකරණය ඉදිරියේ

විභාග සඳහා පෙනී සිටිය යුතු ය. ඔහු අද දින මෙම අධිකරණයට පැමිණ නැතුවාක් මෙන් ම මෙම නඩුව විභාගයට ගන්නා අවස්ථාව වන විට අංක 4 අධිකරණයේ ද නැත.

මේ අවස්ථාවේ දී මහාධිකරණයට ඇති අභිමතානුසාරී බලය පාවිච්චි කිරීමට සිදු වේ. පැමිණිල්ලේ පළමු සාක්ෂිකරු නොමැතිවීමෙන් පැමිණිල්ලට අද දින මෙම නඩුව ආරම්භ කිරීමට නොහැකිය. සාක්ෂිකරු නොමැති වීමෙන් තාක්ෂණික වශයේ මෙම නඩුවේ නඩු විභාගය අවසන් ය. එසේ අවසන් කරමි.

ඒ අනුව නඩු විභාගය අවසන් කර පළමු වූදින 1 සහ 2 අධි චෝදනාවන්ගෙන් ද දෙවන වූදින 3 වන අධි චෝදනාවෙන් ද නිදහස් කරමි.

Commenting on the above order, The Learned Senior Deputy Solicitor General submitted that the order of the Learned High Court Judge is manifestly illegal and erroneous and without any legal basis, as the case on an indictment before the High Court could not have been brought to a conclusion in such an abrupt manner. He further submitted that there is no provision under the Code of Criminal Procedure Act No. 15 of 1979 to discharge an accused at that stage of the trial. In this case the Respondent were discharged by the Learned High Court without calling any witnesses.

In **Attorney General v Gunawardena** [1996] 2 SLR 149, the Court held that:

“..it is important that a Judge should not, by a premature and erroneous order that there is no case to go to the Jury, preclude the Jury from performing its proper function of determining the credibility of witnesses, the weighing of evidence, and the drawing of justifiable inference from the proved facts and thereby arriving at a verdict”.

In this case several dates have been passed between the service of the indictment to the Respondents and the date of discharge.

PW1 was the chief investigation officer attached to the Police Narcotics Bureau. When this case was fixed for trial, PW1 was summoned by other

High Courts of the province to give evidence in similar matters. As such he could not attend Court regularly. Further several intervention circumstances, which are beyond the control of PW1, also prevented him attending the Court. I think it is quite pertinent and important to mention those circumstances in this judgment.

On 20.07.2017, it was informed to Court that PW1 was hospitalized and was receiving treatment. On 25.06.2018 it was brought the notice of the Court that PW1 was arrested for another case and was remanded. On 16.01.2019 the State Counsel informed the Court that as PW1 sustained gun shot injuries few months before, he has developed some medical complications including forgetfulness and difficulty in reading. As such, the State Counsel requested an order to produced PW1 before the JMO Colombo and calling a Report, if necessary, a Psychiatric Report directly to the High Court. In the meantime, PW1 had undergone a heart surgery too.

According to the Psychiatric Report issued by Dr.C.T.K Fernando, Forensic Psychiatric, which had been file of record, PW1 had sustained firearm injury to his head in 2017. Due to that he has problem with remembering names, dates etc. Further he is having difficulty in calculating, writing, and reading. Also claims that he lost his capabilities in proper planning of events.

According to the assessment of the Forensic Psychiatric, PW1 was treated for mental illness (PTSD & Depression) at the University Psychiatric Unit of Sri Jayawardenapura and at the Prison Hospital, Welikada. Evidence of traumatic brain injury also detected.

It is quite clear that PW1 had suffered gunshot injuries in the year 2017. Hence, his absence commencing from 26.10.2016 need to be considered in conjunction with his medical condition and practical difficulties he had to face during the trial. The Learned High Court Judge should have considered these factors when the State Counsel requested for another chance to call PW1 who's evidence is very critical to this case.

A judge has the power to adjourn a matter on the day of hearing. This decision is wholly within the discretion of the judge. An appellate court will only interfere with such a decision if the judge has erred in exercising that discretion or not exercised his/her discretion at all.

In **DPP v Gursel Ozakca & Anor** [2006] NSWSC 1425 it was held that:

“ the failure to grant an adjournment meant the prosecutor was denied natural justice. This meant that the magistrate had “constructively failed” to exercise his jurisdiction”.

In **Attorney General v Manjula Prasanna Kumara Perera** CA/CPA/163/22 decided on 04.12.2023 Sapath Abayakoon,J. held that:

“.....I find no justification to discharge the Respondent from the High Court proceedings on the basis that the prosecution has failed to serve summons on PW1 as there is no such procedure available to discharge an accused person on that basis”.

In this case the Learned High Court Judge appears to have been acted in misconception and miscomprehension of the powers vested in a High Court in terms of the provisions of the Code of Criminal Procedure Act No.15 of 1979. He failed to considering the circumstances under which PW1 failed to appear before the High Court.

Therefore, I set aside the order dated 31.08.2022 of the Learned High Court Judge of Colombo and order that case shall be revert back to the case role of the Court.

The Learned High Court Judge is directed to issue notice on the Respondents and fix the matter for trial and to proceed therefrom in accordance with the law.

Accordingly, the appeal is allowed.

The Registrar of this Court is directed to send this judgment to the High Court of Colombo along with the original case record.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL