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 and sections 364 and 365 of the Code of Criminal Procedure Act No. 15 of 1979.

Court of Appeal

Revision Application No:

CA/CPA/163/22

High Court Colombo

Case No: HC/1855/2020

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-PETITIONER

Vs.

Muttettuwage Manjula Prasanna Kumara Perera,

No. 123/1, Kadawatta Road,

Nedimala,

Dehiwala.

ACCUSED-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Dilan Rathnayake, S.D.S.G. for the petitioner

Argued on : 14-09-2023

Decided on : 04-12-2023

Sampath B. Abayakoon, J.

This is an application by the complainant-petitioner (hereinafter referred to as the petitioner) invoking the revisionary jurisdiction of this Court granted in terms of Article 138 of The Constitution.

The petitioner being the Attorney General of The Democratic Socialist Republic of Sri Lanka, is seeking to challenge the order made on 05-04-2022 by the learned High Court Judge of Colombo, wherein, the accused-respondent who was indicted before the High Court of Colombo in case No. HC/1855/20 was discharged.

When this matter came up for notice, this after having considered the petition, affidavit, the documents tendered and the submissions of the learned Senior Deputy Solicitor General (SDSG) decided to issue notice along with the relevant documents to the accused-respondent mentioned. The notices were issued for the 1st time under registered post article number 6820 on 21-04-2023 and again under registered post article number 8095 on 26-06-2023, giving notice of this application to the accused-respondent. None of the notices have been returned to the Court on the basis that it could not be served on the accused-respondent. The accused-respondent did not appear before the Court, and it was decided to hear the matter as it appeared clear to this Court that the accused-respondent is not interested in appearing before the Court.

At the hearing of this application, the learned SDSG submitted that there was no basis whatsoever for the learned High Court Judge to discharge the accused-

respondent (hereinafter referred to as the respondent) on the 1st day fixed for the summons returnable on the prosecution witness number 01 on the given basis of the order pronounced by the learned High Court Judge.

He contended that 05-04-2022 was the date 1st fixed for the trial, and the learned State Counsel who prosecuted informed the Court that the summons had not been served on PW-01, and despite the application before the learned High Court Judge to refix the matter and reissue the summons on PW-01, the learned High Court Judge proceeded to discharge the respondent by the impugned order.

He was of the view that knowing very well that there is no provision under the Code of Criminal Procedure Act to discharge an accused at that stage of the trial, the learned High Court Judge giving a wrong interpretation to the relevant statute and being misdirected as to the Judgements considered, to substantiate his order, discharged the respondent.

He cited the decided case of **Attorney General Vs. Sumathipala (2006) 2 SLR 126** to argue that the learned High Court Judge was not empowered to create laws that are not in existent, and moved that the revision application by the petitioner be allowed and the relief sought in the petition granted.

The facts which led to the impugned order by the learned High Court Judge of Colombo as revealed during the hearing of this application can be summarized as follows.

The petitioner being the Attorney General of the country has filed an indictment under case number HC/1855/2020 before the High Court of Colombo naming the respondent as the accused for committing the following offence.

1. **That between 01-01-2015 to 31-12-2015, the accused knowing that his service has been terminated as an employee of the Dehiwala-Mt. Lavinia Municipal Council misappropriated a sum of Rs. 362089/- and committed an offence punishable under section 386 of the Penal Code read with section 5(1) of the Offences**

Against Public Property Act No. 12 Of 1982 As Amended By Amendment Act No. 76 of 1988 and 28 of 1999.

The indictment has been served on the respondent on 27-04-2021 and the matter has gone down several dates for the parties to consider concluding the matter without going for a trial.

However, since it had not been materialized, on 05-11-2021, the case has been fixed for trial for 04-04-2022, and the summons had been issued to PW-01.

When the matter came up for trial on the mentioned day, PW-01 had been absent and the prosecuting State Counsel has moved for the postponement of the trial on the basis that the summons had not been served on the said witness.

For matters of clarity, I will now reproduce the entire order pronounced by the learned High Court Judge when the above application was made by the prosecuting state counsel, as this revision application is based on the entirety of the said order.

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මෙම නඩුවට අදාල කටයුතු පොලිස් ස්ථානය ගල්කිස්ස මගින් සිදුකරන ලදී. පැමිණිල්ලේ පළමු සාක්ෂිකරුගේ ලිපිනය තලාහේන, මාලබේ ලිපිනයකි. මෙම නඩුවේ පළමු සාක්ෂිකරුට සිතාසි නිකුත් කිරීම 2021-11-16 වන දින සිදුකර ඇත.

සිතාසි නොනීසි වාර්තා නඩුව කැඳවන දිනට දින තුනකට පෙර ඉදිරිපත් කලයුතු බවට වූ දැනුම්දීම පසුගිය වසරේ පළමු කාර්තුවේ සිටම සිදු කරන ලද්දකි.

මෙම නඩුවට අදාළ පැමිණිල්ලේ සිතාසි භාර දුන් බවට හෝ නොදුන් බවට වාර්තා නැත.

පැමිණිල්ලේ පළමු සාක්ෂිකරු නැත. පැමිණිල්ලේ පළමු සාක්ෂිකරු නොමැතිව මෙම නඩුව අද දින විභාගයට ගැනීමට නොහැක. සාක්ෂිකරු නොමැතිව පැමිණිල්ල සුදානම් නැත.

පැමිණිල්ල යම් නඩුවකට සුදානම් නොමැති අවස්තාවක චුදිතයෙකු නිදහස් කිරීමේ ප්‍රතිපාදන මහාධිකරණය හා සම්බන්දව අපරාධ නඩු විධාන සංග්‍රහයේ නැත.

මහේස්ත්‍රාත් අධිකරණයකදී නම් පැමිණිල්ල සුදානම් නොමැති අවස්තාවක එසේ චුදිතයෙකු නිදහස් කිරීමේ හැකියාව ඇත. මහාධිකරණයකට එවැනි ප්‍රතිපාදනයක් අපරාධ නඩු විධාන

සංග්‍රහය පනතෙන් සලසා නැත්තේ මහාධිකරණයක බලතල සීමා කිරීමට නොවේ. මහාධිකරණයක් ඉදිරියේ පැමිණිල්ලක් මෙහෙයවන්නන් ඉතාම වගකීමෙන් කටයුතු කරනු ඇතයි ව්‍යවස්ථාදායකය බලාපොරොත්තු වන හේතුව නිසාය. එහෙත් මෙම නඩුවේ එවැනි වගඋීමක් ඉටු වී ඇති බවට මෙම අධිකරණයට පෙනී යන්නේ නැත.

මහාධිකරණයක් ඉදිරියේ නඩු විභාගයක් පවත්වාගෙන යාමේදී පැමිණිල්ලේ නඩුව අවසන් කිරීමට පෙර නඩු විභාගය අතරමග නවතා චුදිතයෙකු නිදහස් කිරීමට හෝ මුදා හැරීමට ප්‍රතිපාදනයක් අපරාධ නඩු විධාන සංග්‍රහය පනතේ නැත. එවැනි ප්‍රතිපාදනයක් සලස්සා නැත්තේ මහාධිකරණයක බලතල සීමා කිරීමට නොවේ. ඒද නඩු මෙහෙයවන්නන් සිය නඩුව ඉදිරියට ගෙන යා හැකිද නැද්ද යන්න තීරණය කර එසේ කටයුතු කිරීමට පැමිණිල්ලට බලය ඇති නිසාය. ඊට ප්‍රතිපාදන ඇති නිසාය.

එහෙත් ඒ පිළිබඳව පසුකාලීනව නඩු තීන්දු නීතිය මත ප්‍රතිපාදන සැලසී ඇත. මෙහිදී පැමිණිල්ල නඩු කටයුතු අත්හිටුවීම සිදු නොකිරීම මත අධිකරණය මැදිහත්ව නඩු කටයුතු අත්හිටුවීම මේ වන විට නීතිය ඉදිරියේ පිළිගත් කරුණකි. මෙම තත්වය The Attorney General (2003) 1 SLR 340, The Attorney Vs. Gunawardena (1996) 2 SLR 149 නඩු තීන්දු මගින්ද පැහැදිලි වේ.

යුක්තිය ඉෂ්ට කිරීම සඳහා මහාධිකරණය කටයුතු කර ඇති එවැනි අවස්ථා නීතිය බවට මේ වන විට පත්ව ඇත. ඒ අනුව අපරාධ නඩු විධාන සංග්‍රහය ප්‍රතිපාදන නැති අවස්තාවක වුවද යුක්තිය ඉස්ට කිරීම සඳහා සුදුසු තීරණ ගැනීමේ බලය මහාධිකරණයට ඇත. එම බලතල අපරාධ නඩු විධාන සංග්‍රහයේ 7ත් වන වගන්තිය අනුවද පැහැදිලිය.

ඉහත කරුණු අනුව සාධාරණ හේතුවක් නොමැතිව පැමිණිල්ල සුදානම නැති අවස්ථාවකදී චුදිතයෙකු මුදා හැරීම හෝ නිදහස් කිරීම සම්බන්දව කටයුතු කිරීමට මහාධිකරණයට නීත්‍යානුකූලව හැකියාව ඇත.

මෙම නඩුවේ අධි චෝදනා චුදිතට භාර දී ඇතත් කියවා දී නැත. අද දින විභාගයට නියමිතව තිබියදී පැමිණිල්ලේ සාක්ෂි නොකැඳවීමට පියවර නොගැනීම හේතුවෙන් පැමිණිල්ල සුදානම් නැත. ඒ අනුව නඩුවේ අධි චෝදනාවෙන් චුදිත මුදා හැරීමට තීරණය කරමි.

Although it appears that in the last paragraph of the above order, the discharge of the respondent was on the basis that the prosecution has failed to not to call the witnesses (පැමිණිල්ලේ සාක්ෂි නොකැඳවීමට පියවර නොගැනීම), I would like to attribute that to a typographical error, as the reasoning for the discharge of the respondent is clearly the failure of the prosecution to summon the witness number 01 before the Court on the trial date.

It is settled law that the revisionary jurisdiction of the Court of Appeal is a discretionary remedy.

In the case of **Hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd. (1987) 1 SLR 5**, it was held;

> *"It is settled law that the exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In the case of **Wijesinghe Vs. Thaamararatnam (Sriskantha Law Report Vol. IV page 47)**, it was stated that;

> *"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the Court."*

It was held in the case of **Vanik Incorporation Ltd. Vs. Jayasekara (1997) 2 SLR 365** that,

> *"Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

In paragraph six of the petition filed before this Court, the petitioner has contended the following grounds as the exceptional grounds that require the intervention of this Court to set aside the impugned order pronounced by the learned High Court Judge.

a. The learned High Court Judge refused to accept the Summons Report of the OIC SCIB Mount Lavinia dated 04.04.2022 on the basis that it was not filed 3 days prior to the trial date.
b. The learned High Court Judge failed to consider the Summons Report of the OIC SCIB Mount Lavinia dated 04.04.2022 which

states that the summons could not be served on PW-01 as he is not in the given address.

c. The learned High Court Judge failed to appreciate the application made by the State Counsel that the summons has not been served on PW-01 even though the Summons Report was not filed.

d. There is no provision in the Code of Criminal Procedure Act No. 15 of 1979 which empowers the High Court to discharge/release an accused on the basis that the prosecution is not ready.

e. The learned High Court Judge has misapplied the dicta of **Attorney General Vs. Baranage (2003) 1 SLR 341** and **Attorney General Vs. Gunawardena (1996) 2 SLR 149.**

    i. In **Attorney General Vs. Baranage (2003) 1 SLR 341**, the accused-appellant was acquitted after the closure of the prosecution case due to lack of evidence.

    ii. In **Attorney General Vs. Gunawardena (1996) 2 SLR 149**, the learned High Court Judge directed the jury to return a verdict of not guilty after 4 out of 49 witnesses listed in the indictment gave evidence. The Supreme Court set aside all proceedings and a fresh trial was directed on the basis that the learned High Court Judge has failed to conform to section 212(2) as all material evidence has not been considered.

    iii. In the instant case, no evidence whatsoever has been led and therefore discharging the respondent without going into the merits of the case is illegal.

When it comes to the order of the learned High Court Judge, it is quite apparent that the impugned order has been made on the 1st day where the case was fixed for the trial, although several dates have been passed between the service of the indictment to the respondent and the date 1st fixed for the trial.

The impugned order has been pronounced even before the indictment was read over to the respondent and recording a plea from him. It needs to be noted that what would have been the result if the respondent chose to plead guilty to the charge, if it was read over to him, which would result in considering about serving summons on the PW-01 may not be necessary.

There is no doubt that the prosecution has not served summons on the PW-01 who was summoned to appear before the Court for the day. It appears from the application made by the learned State Counsel who prosecuted the matter that a postponement of the trial has been sought on the same basis.

Although the learned High Court Judge has decided that there was no report as to whether summons were served or not on PW-01, it appears from the same order that the said conclusion has been reached on the basis that the prosecution has failed to file the summons report 3 days before the case to be called before the Court as previously instructed.

The document marked P-2 before this Court shows that in fact the summons returnable report has been filed before the High Court by the Officer In Charge of the relevant police division on 04-04-2022 together with the police message received from Malabe police station regarding their inability to serve the summons on the said witness as he was not available in his house. The said report had been filed the day before the trial was to be taken up and not 3 days before as stated by the learned High Court Judge in his order.

It is quite apparent from the impugned order and as contended by the learned SDSG, that the learned High Court Judge was well aware that there is no provision in the Code of Criminal Procedure Act to discharge an accused person in a situation where the prosecution is not ready to conduct the trial. The learned High Court Judge appears to have taken guidance from the two decided cases considered by him to conclude that even there are no provisions to stop proceedings before a High Court and discharge an accused person while the trial

is ongoing, our Courts have acted under the inherent powers vested with the High Court to stop further proceedings of an action.

Apart from the above conclusion, the learned High Court Judge has considered section 7 of the Code of Criminal Procedure Act also as relevant in this instance. Section 7 of the Code of Criminal Procedure Act is the section which provides for cases not provided for in the Act.

The said section 7 reads as follows.

> **7. As regards matters of criminal procedure for which special provisions may not have been made 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.**

For better understanding of this Judgement, I would like to consider the two appellate Court Judgements cited by the learned High Court Judge in his order.

The case of **Attorney General Vs. Gunawardena (supra)** was a case where the accused in the case was charged for murder and after leading 4 out of the 49 witnesses listed, the learned Counsel for the accused applied to the Judge to direct the jury to return a verdict of not guilty, on the ground that the evidence led up to that point of time as well as the evidence that could be led through the other witnesses listed, did not disclose that the accused committed the offence. The learned trial Judge accepted this position and directed the jury accordingly, which resulted in the discharge of the accused. The Attorney General sought to revise the said order.

This was a matter considered in terms of section 212 of the then existed Administration of Justice Law in relation to criminal procedure. Section 200 is the present corresponding section in terms of the Code of Criminal Procedure Act No. 15 of 1979, which is the Act that replaced the Administration of Justice Law.

The relevant considered section 212(2) of the Administration of Justice Law provided :-

> **"When the case for the prosecution is closed, if the Judge considers that there is no evidence that the accused committed the offence, he shall direct the jury to return a verdict of not guilty."**

It was held: -

"Under this provision, the Judge can direct the jury to return a verdict of not guilty only at the close of the prosecution case. A practice appears to have developed in our Courts of Judges stopping a case even before that stage is reached. This matter is referred to in a Judgement of the Court of criminal appeal in Pauline de Croos Vs. The Queen 71 NLR 169.

The procedure actually adopted by the learned Judge in this case, is to our knowledge not frequently resorted to by Judges in this country when it becomes apparent to the Court and Counsel that to continue is to waste precious time and that there is no purpose of 'flogging a dead horse.' We ourselves have no desire, at this stage of the development of the practice of stopping trials at their virtual though not their technical end, to insist on technicality to the point of almost sanctifying it."

Held further;

"There is no reason to disagree with this dictum; if it is apparent to Court as well as to counsel that to continue is to waste time and to flog a dead horse, the case should of course be stopped. Again, if prosecuting Counsel concedes or is constrained to admit that all the evidence on which the prosecution case is based has been led and what remains to be led is formal evidence or other supporting evidence which will not take the case any further, then the virtual end of the prosecution case has been reached and a Court may fairly act under section 212(2). But if there is such other evidence still to be led on behalf of the prosecution which a Judge has to

reckon and give weight to in considering whether there is a case to go to the jury, it appears to us that a Judge will be acting contrary to section 212(2) in making a direction before he hears that evidence."

The other case the learned High Court Judge considered relevant was the case of the **Attorney General Vs. Baranage (2003) 1 SLR 341**.

After the prosecution closed its case against the accused, the trial Judge acting under section 200(1) of the Code of Criminal Procedure Act acquitted and discharged the accused without calling for his defence. The Attorney General appealed against the acquittal.

Per **Amaratunga, J.**;

"A practice has developed in our law to consider the submission of 'no evidence' at the virtual end of the prosecution case even though it has not reached its terminal end. This practice is applicable not only to trials before a jury but also to trials by a Judge without a jury."

It was held;

1. In a trial by a Judge without a jury, the Judge is the trier of facts and as such at the end of the prosecution case in order to decide whether he should call upon the accused for his defence he is entitled to consider such matters as the credibility of the witness, the probability of the prosecution case, the weight of evidence and the reasonable influences to be drawn from the proven facts.

   Having considered these matters, if the Judge comes to the conclusion that he cannot place any reliance on the prosecution evidence, then the resulting position is that the Judge has wholly discredited the evidence for the prosecution. In such a situation, the Judge shall enter a verdict of acquittal.
2. The true rule is that where the Judge concludes that the evidence, even if believed by the jury and the legitimate inferences therefrom do not

permit a conclusion of guilt beyond reasonable doubt to a reasonable jury-man, he must direct an acquittal.

Having considered the facts and the law in relation to the Judgements cited by the learned High Court Judge to justify his decision to discharge the respondent, I have no option but to agree with the submissions of the learned SDSG that the said cited Judgements have no direct bearing to the facts of the matter and the learned High Court Judge was misdirected in that regard.

I am of the view that the learned High Court Judge's reliance on the cited section 7 of the Code of Criminal Procedure Act to justify the discharge was also a clear misdirection.

The cited **Attorney General Vs. Gunawardane (Supra)** was a case where the accused person has pleaded not guilty to the charge and was acquitted after hearing part of the evidence relating to the charge on the basis that the charge cannot be maintained even if the remaining evidence were to be led.

The cited **Attorney General Vs. Baranage (Supra)** was a case where the accused was acquitted after the prosecution case was closed without calling a defence from the accused.

The said cases are very much different to the circumstances under which the learned High Court Judge decided to discharge the respondent in this case.

As pointed out correctly, 05-04-2022 was the date 1st fixed for the trial to be taken up. Since the prosecution witness number 01 summoned for that day was not served with the summons, the prosecuting State Counsel has sought an adjournment of the trial on that basis. Although the learned High Court Judge has concluded that the prosecution failed to file the summons report before 3 days of the date fixed for the trial, in fact it appears that the relevant summons report was available, but not within the considered 3 days before the date fixed for the trial.

I am of the view that there was no reason for the learned High Court Judge to consider that as a punitive measure to conclude that no summons report had been filed. I am of the view that even if there was no summons report, there was no justification for the learned High Court Judge to discharge the respondent since this was the 1st date fixed for the trial and the learned prosecuting State Counsel has given a valid reason as to why he is seeking a postponement of the trial.

The considered section seven of the Code of Criminal Procedure Act is the section where decisions can be taken when there are no special provisions as to the criminal procedure made by the Code or any other law for the time being in force.

However, such steps have to be taken as the justice of the case may require and not inconsistent with the Code of Criminal Procedure Act. I am of the view that the Justice refers to in this section has to be considered in relation to justice towards an accused person as well as the prosecution who took pain to file an indictment against an accused person requiring the Court to decide on the charge or charges against him based on the evidence placed before the Court. If the Court is to discharge such an accused even without reading the indictment over to him and requiring him to plead to the charge on the basis that the summons had not been served on PW-01, I do not see any reason to conclude that justice has been served.

It appears that the learned High Court Judge was well aware that no procedural steps have been mentioned in the Code of Criminal Procedure Act to discharge an accused person indicted before a High Court when the prosecution is not ready to prosecute the action. It is under that pretext that the learned High Court Judge has decided to consider the cited two Judgements and section 7 of the Code of Criminal Procedure Act as relevant to justify the discharge of the respondent.

As I have considered earlier, the cited two Judgements or section 7 of the Code of Criminal Procedure Act has no relevance to the facts and circumstances that led to the discharge of the respondent.

At this juncture, I think it is relevant to cite from the Judgement of the **Attorney General Vs. Sumathipala (supra)** cited by the learned SDSG in his submissions. This was a case, where their Lordships of the Supreme Court considered the views expressed by **Justice Dr. Amarasinghe** in his book 'Judicial Conduct, Ethics and Responsibilities' at page 284, which states thus;

> *"The function of a Judge is to give effect to the express intention of parliament. If legislation needs amendment, because it results in injustice, the democratic process must be used to bring about the change. It has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost 100 years."*

In **Government Agents, Superintendent of Police Vs. Suddana et al. 1905 Tambiah's Report 39, Chief Justice Layard** said, at the time when the privy council was the country's apex tribunal ;-

> *"If we wrongly construe the law the remedy is by appeal to His Majesty in council. If on the other hand we rightly construe the law and the law is unpalatable to any section of the community, the remedy of that section of the community is to endeavour, if possible to have the law amended. Such endeavours, however should be constitutional."*

For the reasons as considered above, I find no justification in learned High Court Judge's decision to discharge the respondent from the High Court proceedings on the basis that the prosecution has failed to serve summons on PW-01 as there is no such procedure available to discharge an accused person on that basis. I am of the view that the learned High Court Judge also had no basis to discharge the respondent even without reading the charge to him and requiring him to plead to the charge.

Under the circumstances, I find that the petitioner has established sufficient exceptional circumstances for this Court to intervene into the order of the learned High Court Judge.

Accordingly, I set aside the order dated 05-04-2022 by the learned High Court Judge of Colombo and order that the case shall be revert back to the case role of the Court.

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

The Registrar of the Court is directed to communicate this order to the High Court of Colombo for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal