

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

In the matter of an application for a
Revision under and in terms of Section
11 (1) of the High Court of the Provinces
(Special Provisions) Act, No. 19 of 1990.

Court of Appeal Case No:
CA/PHC/APN/119/19

Officer – in – Charge,
Police Station,
Piliyandala.

Plaintiff

HC Homagama Case No:
HC/REV/37/2019

Vs.

MC Kesbewa Case No:
91561

Kitnan Rajendran,
Murutenna Watta,
Koththellena,
Hatton.

Accused

AND BETWEEN

Kitnan Rajendran,
Murutenna Watta,
Koththellena,
Hatton.

Accused – Petitioner

Vs.

Officer – in – Charge,
Police Station,
Piliyandala.

1st Respondent

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

2nd Respondent

AND NOW BETWEEN

Kitnan Rajendran,
Murutenna Watta,
Koththellena,
Hatton.

Accused – Petitioner – Petitioner

Vs.

Officer – in – Charge,
Police Station,
Piliyandala.

1st Respondent

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

2nd Respondent

BEFORE : K. K. Wickremasinghe, J.
Devika Abeyratne, J.

COUNSEL : Mr. Ashan Nanayakkara AAL and Ms. Subhani
Abeysekere AAL instructed by Mr. Anil
Bandara AAL for the Accused Petitioner

Ms. Maheshika Silva SSC for the Respondent

ARGUED ON : 12.06.2020

WRITTEN SUBMISSIONS : Due Date – 05.08. 2020
Date of File by Respondent – 14.08.2020 (not
filed on the due date)

DECIDED ON : 08.09.2020

K.K.WICKREMASINGHE, J.

The Accused-Petitioner-Petitioner (hereinafter referred to as the Petitioner) has filed this revision application seeking to revise the order of the Learned High Court Judge of Homagama dated 04.09.2019 in case No. HC/REV/37/2019 and also to revise the order of the Learned Magistrate of Kesbewa dated 29.07.2012, 02.07.2019 and 19.05.2019 in case No. 91561.

FACTS OF THE CASE

The Petitioner was the Accused of a motor accident that had taken place in Piliyandala – Colombo bus route (near Kesbewa traffic lights) on 07.06.2019. The said accident was a collision of a Lorry with a Motor Cycle and due to the accident the motor cyclist was severely injured and succumbed to his injuries while being taken to the hospital. The charge sheet in the Magistrate's Court contained 5 counts as follows:

1. Culpable Homicide not amounting to murder
2. Failure to avoid an accident
3. Reckless driving
4. Driving under the influence of liquor
5. Driving a vehicle which is not roadworthy

The Petitioner pleaded not guilty for each and every count and the case was fixed for trial. When the case was fixed for trial, the Attorney – at – Law on behalf of the Petitioner has pleaded guilty for aforementioned charges. The Petitioner alleged that the Attorney – at – Law for the Petitioner had pleaded guilty without the instructions of the Petitioner. Also the Petitioner submitted that the applicant is a native Tamil Language speaker and was unable to understand the discussion between the Learned Magistrate and the Attorney – at – Law. Soon after the particular incident the Petitioner has filed an Affidavit with the instructions of another Attorney – at – Law stating that the plea of guilty was without the knowledge of the Petitioner. However the Learned Additional Magistrate of Kesbewa rejected the application and proceeded to convict the Petitioner and sentenced by his order dated 29.07.2019 marked as P7. Being aggrieved by the said order of the Learned Additional Magistrate, the Petitioner filed a revision application in the Provincial High Court of Homagama and the Learned High Court Judge of Homagama refused to issue notice to the Respondents by his order dated 04.09.2019. Being aggrieved by the said order the Petitioner filed the instant revision application to invoke the revisionary jurisdiction of this court.

LEGAL ANALYSIS

The following grounds were submitted and urged as the exceptional circumstances to invoke the revisionary jurisdiction of this Court by the Learned Counsel for the Petitioner.

1. The Learned High Court Judge has failed to consider the fact that the death of the deceased was due to the accident.
2. The Learned High Court Judge has failed to consider Section 182 (1) of the Code of Criminal Procedure Act, No 15 of 1979 which stipulates that there should be sufficient grounds for proceeding against an accused.

3. The Learned High Court Judge has failed to consider that the Petitioner convicted for the 5th charge is a total fabrication of the story.
4. The Learned High Court Judge has failed to consider that the charge sheet been read out to the petitioner despite the lack of understanding of what the charges were.
5. The Learned High Court Judge has failed to consider that Section 182 (2) of the Code of Criminal Procedure Act, No 15 of 1979 and the *ratio decidendi* of the line of cases decided in Sri Lanka.
6. The Learned High Court Judge has failed to consider that the Petitioner is protected by the Language rights in Article 24(3) of the Constitution.
7. The Learned High Court Judge has failed to consider that the conviction was against the principle of “Unconditional Plea of Guilt”.
8. The Learned High Court Judge has failed to consider that the affidavit of the Petitioner dated 15.07.2019 itself is a gesture of unconditional plea of guilt.
9. The Learned High Court Judge has failed to consider that the Attorney – at – Law for the Petitioner.
10. The Learned High Court Judge has failed to consider that the Learned Additional Magistrate had failed to do any inquiry from the Petitioner at the point of convicting the Petitioner to such a grave offence as culpable homicide not amounting to murder.
11. The Learned High Court Judge has failed to consider that there is no such requirement that Petitioner must establish very strong evidence to dispute the plea of guilt inasmuch as the Petitioner has already filed an affidavit challenging the plea of guilt.
12. The Learned High Court Judge has failed to consider that the Petitioner has no other means of informing the Courts that the Attorney – at –Law has acted contrary to the instructions given since no Attorney at – Law will give evidence incriminating him.

I wish to analyze the two fundamental questions of Law before this Court as follows;

I. Adherence to Section 182 and 183 of the Code of Criminal Procedure Act, No. 15 of 1979.

In considering the said question of law, it is a requirement under the law that before the commencement of the trial the charge should be duly read over to the Accused as enumerated in Section 182 and 183 of the Code of Criminal Procedure Act, No. 15 of 1979. I wish to reproduce the aforesaid sections as follows;

Section 182

(1) Where the accused is brought or appears before the court the Magistrate shall if there is sufficient ground for proceeding against the accused, frame a charge against the accused.

(2) The Magistrate shall read such charge to the accused and ask him if he has any cause to show why he should not be convicted.

Section 183 stipulates that an unqualified admission is recorded and the procedure adopted therein;

If the accused upon being asked if he has any cause to show why he should not be convicted makes a statement which amounts to an unqualified admission that he is guilty of the offence of which he is accused, his statement shall be recorded as nearly as possible in the words used by him; and the Magistrate shall record a verdict of guilty and pass sentence upon him according to law and shall record such sentence: Provided that the accused may with the leave of the Magistrate withdraw his plea of guilt at any time before sentence is passed upon him, and in that event the Magistrate shall proceed to trial as if a conviction has not been entered.

But anything herein contained shall not prevent the Magistrate from taking in manner hereinafter provided the evidence of the prosecution and of such of the witnesses for the defence as may be present, and then, subject to the provisions of subsection (3) of section 263 for reasons to be recorded by him in writing adjourning the trial for a day to be fixed by him.

Under Section 182 (2) the Magistrate should read the Charge to the Accused and ask him whether he has any cause to show as to why he should not be convicted. In response to it, if the accused makes a statement which amounts to an unqualified admission that he is guilty of the offence which he is accused of, his statement shall be recorded then and there in the same words used by him. Thereafter, the Magistrate shall record a verdict of guilt and pass the sentence upon him according to law and shall record such sentence in light of Section 183.

When considering the above mentioned sections, it is evident that the Learned Magistrate should record what the accused had stated in his own words. Specially plea of guilt should come from the mouth of the accused person and not the Attorney – at – Law.

There should be proof to the satisfaction of the Court that the accused person has understood what the offence was and also the language. Further it has to be recorded. The above facts should be transpired from the case record.

At this juncture, I wish to draw my attention to the line of decided cases by the Courts of Sri Lanka that provides persuasive authority to the instant application. The development of the Law relating to framing of charges discussed at length by Bertram CJ in the celebrated judgment in *Cooray Vs James Appu* reported in **22 New Law Report 206**. The judgment at page 213, states as follows;

"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."

The intention of the legislature is well explained by the above mentioned case.

In ***Abdul Sameem V. The Bribery Commissioner*** 1991 1 SLR 76, the Court considered the consequences of the failure to frame a charge. The case of ***Abdul Sameem V. The Bribery Commissioner*** concerns the institution of proceedings under Section 136(1) (b) of the Code, on a written report by the Bribery Commissioner to the Magistrate that the accused committed certain offences under the Bribery Act. The accused appeared on summons. The Magistrate adopted the said report by placing a seal. It was held that that there was a failure to frame a charge by the Magistrate as required under Section 182(1) and read it to accused as contemplated under Section 182(2). **It was specifically 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.

In the case of *Godage and Others Vs. Officer-In-Charge, Police Station, Kahawatte* - Sri Lanka Law Reports- 1992 - Volume 1, at page 54, a similar question was considered by this Court which decided the duty of the Magistrate under Section 182 of the Code of Criminal Procedure Act as being imperative whilst endorsing the view expressed by Dr Asoka Gunawardena J in the case of *Abdul Sameem (supra)*. In *Godage(supra)* the learned Magistrate convicted the accused but there was no charge found in the case record. Following the authority in the case of *Abdul Sameem(supra)*, Ismail, J set aside the conviction in appeal after 11 years.

Therefore, I emphasize that it is important, that rights of the accused are safeguarded and that they are brought to trial according to accepted fundamental principles of criminal procedure. The Counsel for the Petitioner contended that the Learned Additional Magistrate of Kesbewa had failed to comply with the mandatory requirements of Section 182 of the Code of Criminal Procedure Act, by failing to read over the charge to the accused. On a perusal of the record of the instant case it would appear that the Magistrate has failed to duly read over the charge sheet to the Accused.

I wish to draw my attention to the Journal Entry dated 13.02.2019 and 19.05.2019 and it is reproduced as follows;

Journal Entry dated 13.02.2019

“විත්තිකරුට පැමිණිල්ලෙන් හා චෝදනා පත්‍රයෙන් චෝදනා කරමි. ඔහු වෙන් වෙන් වශයෙන් මම නිවැරදිකරු වෙමි යැයි කියයි.....”

Journal Entry dated 19.02.2019

“විත්තිකරුට සිතාසියෙන් චෝදනා පත්‍රයෙන් චෝදනා කරමි. ඔහු වෙන් වෙන් වශයෙන් මම නිවැරදිකරු වෙමි යැයි කියයි.....ඒ ප්රකාශය අනුව විත්තිකරු වැරදි කරුවන් බවට තීරණය කරමි”.

Accordingly, the said two journal entries have no specific reference to a statement where it is said that the Charge Sheet was read over and explained to the Accused. In the instant case the Accused person is a native Tamil Language Speaker. There is no reference to say that the charge sheet was translated to the accused. Therefore I find it more important to adhere to the Section 182 of the Code of Criminal Procedure Act. Therefore it is evident that the Learned Magistrate had framed the charge sheet but had failed to read over and explain the contents of the charge which is laid down in section 182(2) of the Code of Criminal Procedure Act No. 15 of 1979 and thereby caused an incurable defect in terms of the Code of Criminal Procedure Act.

II. Whether the Charge Sheet was defective

The Learned Counsel for the Petitioner contented that the Charge Number 05 of the Charge Sheet is defective. I wish to reproduce the Charge Number 5 as set out in the Charge Sheet (P2);

“මෝටර් වාහන අංක WP LC 0942 ලොරි රථයේ පැදිකරුව සිටිමින් ඉහත සඳහන් මහා මාර්ගයේ ධාවනය කරන අවස්ථාවේදී ධාවනයට නුසුදුසු තත්වයේ යතුරු පැදියක් පදවා මාර්ගයේ ගමන් ගත් පදිකයෙකු වන සේනානායක මුදියන්සේලාගේ හේමපාල යන අයට මරණය සිදු කිරීමෙන් ල. ද. නි. ස 203 වන අධිකාරියේ වූ මෝ.ව ප 214 (අ) වගන්තිය සමග කියවෙන 2009 අංක 08 දරන සංශෝධිත මෝ.ව ප 46 වගන්තියෙන් සංශෝධනය වූ ප්රධාන ප්රඥප්තියේ 145 වගන්තිය උල්ලංඝනය කිරීමෙන් එම පනතේ 145 (5) වන වගන්තිය යටතේ දඬුවම් ලැබිය හැකි වරදක් කල බව මෙයින් චෝදනා කරමි”.

The Petitioner submitted that name of the deceased as per Charge number 05 is wrong. Also both parties have accepted the fact that there was only one death taken place in light of the accident and the charge sheet comprises of two contradictory positions as to the effect that two names were mentioned in the Charge Sheet. Further, as per Charge number 01 the Accused is the Lorry Driver and as per Charge Number 05 the accused is a Motor Cyclist. Therefore the Learned Counsel for the Petitioner contented that the entire charge sheet is defective.

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....”

Therefore, I am of the view that when a wrong name is cited in the charge sheet against an Accused it has to be considered as a prejudice to the Accused. The submission of the State, at the stage of the Argument was that the entire charge sheet cannot be defective merely because the 5th charge is erroneous. However when considering Charge No.01 and Charge

no.05 there is a confusion whether it was a lorry or a bicycle. Therefore both charges become defective.

Also I wish to pay attention to the fact that the Petitioner on 01.10. 2019 soon after being aware that the Attorney – at – Law who previously appeared on behalf of him has pleaded guilty for all the charges in front of the Learned Magistrate of Kesbewa, the Petitioner promptly took actions to submit an affidavit stating that such plea of guilty is without his knowledge and instructions to the said Attorney – at – Law. Hence, I consider such affidavit as a barrier to interpret unqualified admission that he is guilty of the offence which is required under Section 183(1) of the Code of Criminal Procedure Act No. 15 of 1979. Therefore, depending on such unqualified plea of guilt and convicting on such a plea amounts to miscarriage of justice.

Accordingly, I am of the view that the learned High Court Judge has erred in refusing to entertain the Revision Application of the Petitioner. Therefore, for the above mentioned reasons I set aside orders of the Learned High Court Judge of Homagama dated 04. 09.2019 of the case bearing the Number 37/2019/RA and the Order of the Learned Additional Magistrate of Kesbewa dated 02.07.2019 of the case bearing the number 91561.

The Accused – Petitioner – Petitioner is discharged.

Registrar is directed to send copies of the orders to the relevant High Court and the Magistrate's Court with the case record.

Revision Application is allowed.

JUDGE OF THE COURT OF APPEAL

Devika Abeyratne, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. *H.P.D. Nimal Ranasinghe V. OIC, Police, Hettipola*, [SC Appeal 149/2017]
2. *Godage and Others Vs. Officer-In-Charge, Police Station, Kahawatte* - Sri Lanka Law Reports- 1992 - Volume 1
3. *Abdul Sameem V. The Bribery Commissioner*, 1991 1 SLR 76
4. *Cooray Vs James Appu* , 22 New Law Report 206