

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of an application for Special Leave to Appeal from the judgment of the Court of Appeal under and in terms of Article 128(2) of the Constitution.

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

Complainant

Supreme Court Case No:
SC(SPL) LA 184/2017

Vs.

Court of Appeal Case No:
CA/323/07

Punchiweddikarage Aruna Felix Perera
No. 21/7, Dharmarathna Mawatha,
Rawathawatte, Moratuwa.

HC Colombo Case No:
1044/2002

Accused

AND BETWEEN

Punchiweddikarage Aruna Felix Perera
No. 21/7, Dharmarathna Mawatha,
Rawathawatte, Moratuwa.

Accused-Appellant

Vs.

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

Complainant-Respondent

AND NOW BETWEEN

Punchiweddikarage Aruna Felix Perera
No. 21/7, Dharmarathna Mawatha,
Rawathawatte, Moratuwa.

Accused-Appellant-Petitioner

Vs.

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

Complainant-Respondent-Respondent

Before:

Buwaneka Aluwihare, PC. J.
L. T. B. Dehideniya, J.
P. Padman Surasena, J.

Counsel:

Faisz Musthapha PC with Ms. Thushani
Machado for the Accused-Appellant-
Petitioner.

Dilan Ratnayake, DSG for Complainant-
Respondent-Respondent.

Argued on:

11.06.2020

Judgement on:

26.06.2020

Aluwihare PC. J.,

In supporting this Special Leave to Appeal application, the learned President's Counsel on behalf of the Accused-Appellant-Petitioner (hereinafter the Petitioner) submitted to the court that among other matters, he is relying mainly on two issues;

- (1) Has the manner in which this matter was dealt with by the Court of Appeal created a reasonable doubt as to whether the Petitioner had had the benefit of the consideration of his appeal by one of the two judges who had heard the appeal, in as much as the judgement had been delivered without jurisdiction? (Cumulatively, questions of law raised in sub-paragraphs a. and b. of Paragraph 20 of the Petition.)
- (2) Did the Court of Appeal misdirect itself by not considering or by having overlooked, the version of the Petitioner placed before the court in arriving at its conclusions? (Cumulatively, questions of law raised in sub-paragraphs, c. d. and e. of paragraph 20 of the Petition of the petitioner.)

This court having considered the submissions made on behalf of the Petitioner, is of the view that there is merit in the matters urged before us. Accordingly, Special leave to appeal is granted on the questions of law (1) and (2) referred to above.

As the learned Counsel representing the parties have consented for the court to act under the proviso to Rule 16(1) of the Supreme Court Rules 1990, this court would proceed to determine the above two issues forthwith, dispensing with compliance with the provisions of the said Rules in regard to the steps preparatory to hearing of this appeal.

With regard to the first question of law referred to above, it was the contention of the learned President's Counsel that this matter was argued in the Court of Appeal before **Hon. Justices, K. K. Wickramasinghe and M. M. A. Gafoor** and the judgement was delivered on 07th June 2017. The judgement, however, had been delivered by **Hon. Justices P. R. Walgama and K. K. Wickramasinghe**. It was pointed out that this matter was **not argued before her ladyship Justice Walgama**. On the perusal of the Court of Appeal minutes, commencing from 23rd April 2012 up to 08th June 2016, it is quite evident that Hon. Justice Walgama had not presided over this matter. On 08th June 2016 the matter had been taken up for argument before Hon. Justices Wickramasinghe and Gafoor. The arguments had been re-fixed, to be resumed on 04th August 2016, on which date the arguments were concluded before the same bench referred to above, and the judgement was reserved by Hon. Justice Wickramasinghe. The court had ordered the parties to file written submissions. The day on which the written

submissions were tendered to the court, Hon. Justices Walgama and Wickramasinghe had presided.

Hon. Justice Wickramasinghe had delivered the judgement on the **07th June 2017**. Hon. Justice Walgama, concurring with Justice Wickramasinghe, had signed the said judgement (A6). Subsequently, however, this case had got listed again on the **17th July 2017** and had come up before Hon. Justice Wickramasinghe. On the said date, the court observing, that *‘there is a typographical error and a genuine mistake in the judgement’*, a fresh judgement of even date **signed by both Hon. Justices Wickramasinghe and Gafoor** had been pronounced, and in the same breath the **judgement delivered on the 07th June 2017 had been set aside** [Court of Appeal minutes of 17/07/2017].

The learned President’s Counsel pointed out that according to the Court of Appeal minutes aforementioned, it appears that the subsequent judgement had been referred to Hon. Justice Gafoor for his consideration only **after** the second judgement was signed by him and the same was delivered.

The last line of that minute (of 17th July 2017) reads as follows; *“After realizing that it should have been signed by H/L M. M. A Gafoor J, I send the judgement to for his consideration”*. [sic] (emphasis added)

What reflects from the above minute is that the judgement has been referred to Hon. Justice Gafoor **for his consideration, only after** it was delivered for the second time. The learned President’s Counsel submitted that if that be the case, the judgement cannot stand, as it had not been considered by one of the two judges who heard the case.

The Court of Appeal record does not disclose when the error was detected and whether any steps were taken consequent to the detection of the error. This court sought the assistance of both the learned President’s Counsel for the Petitioner and the learned Deputy Solicitor General in this regard. But neither Counsel could elucidate as to what transpired between the 07th June and the 17th July 2017.

Perusal of both judgements clearly shows that it is more than a typographical error. The caption of the judgement delivered on 07th June 2017 states that the matter was argued *“Before; P. R. Walgama, J & K. K. Wickramasinghe, J”* whereas the judgment delivered on 17th July states *“Before; M. M. A. Gafoor, J & K. K. Wickramasinghe, J.”*

It was also pointed out by the learned President’s Counsel that the Judgment delivered by Hon. Justices Walgama and Wickramasinghe is identical to the judgement purported to have been delivered by Hon. Justices, Gafoor and Wickramasinghe. It was contended on behalf of the Petitioner that substantial prejudice had been caused to him as there is a serious doubt as

to whether Hon. Justice Gafoor had had the opportunity to consider the judgement in draft, prepared by Hon. Justice Wickramasinghe and to offer his opinion, before it was pronounced.

Lord Chief Justice Hewart's remarks in the case **R v. Sussex Justices *ex parte* McCarthy** ([1924] 1 KB 256, [1923] All ER Rep 233) made almost 100 years ago, "***Justice should not only be done, but should manifestly and undoubtedly be seen to be done***" are now heard throughout the common law legal regimes. They sustain, in my view, not only an ethical requirement that judges cannot hear a case if, from the perspective of a reasonable and informed observer, their impartiality might reasonably appear to be compromised, but transcends to the requirement that judges must also observe procedures that are widely regarded as fair and transparent, especially in criminal cases.

Considering the aforesaid, I am of the view that, in the interest of justice, it would not be safe to sustain the impugned judgment.

The second matter raised before this court by the learned President's counsel was that the Hon. Judges of the Court of Appeal had not given any consideration whatsoever to the matters raised on behalf of the Accused-Appellant-Petitioner before the Court of Appeal. The learned President's Counsel submitted that the matters raised on behalf of the Petitioner, in the course of the oral arguments before the Court of Appeal, with regard to the three distinct counts on which the Petitioner was indicted, are referred to in pages 5, 6, 7 and 8 of the Petition of the Petitioner filed before this court. It was also submitted that a comprehensive written submission dated 11th November 2016, was also filed on behalf of the Petitioner. The learned President's Counsel contended that, from the judgement it appears that the Court of Appeal had not considered or given its mind to any of those matters. He also pointed out that, of the 7-page judgement where the court had dealt with the issues, 3 ½ pages are a verbatim reproduction of the written submissions filed on behalf of the Attorney General. Perusal of the documents shows that the submission of the learned President's Counsel is not without merit.

As referred to earlier in this judgement, on the first question of law raised on behalf of the Petitioner, this court is of the view that it would not be safe to sustain the judgements (dated 07th June 2017 and 17th July 2017) delivered by the Court of Appeal. As such we are of the view that it would not be necessary to consider and make a pronouncement on the second question of law on which Special Leave to Appeal was granted.

Accordingly, both judgments pronounced by the Court of Appeal (07th June 2017 and 17th July 2017) in this matter are hereby set aside. This court further directs the Court of Appeal to hear the arguments in this matter afresh before a bench which had not considered this case earlier.

Appeal partially allowed, Rehearing of the appeal by the Court of Appeal ordered.

JUDGE OF THE SUPREME COURT

JUSTICE L.T.B. DEHIDENIYA

I agree.

JUDGE OF THE SUPREME COURT

JUSTICE P. PADMAN SURASENA

I agree.

JUDGE OF THE SUPREME COURT