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

In the matter of an appeal to the Supreme Court in terms of section 9 (a) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990

Office-in-Charge,
Police station,
Buttala.

Complainant

SC Appeal 220/2014

H.C. Monaragala/ Case No.52/2012
M.C Wellawaya Case No. 56461

Vs,

Kotuwila Kankanamalage Premalal Leonard Perera,
No. 02, Kuda Gammanaya,
Pelwatta Sugar Company,
Buttala.

Accused

And between

Kotuwila Kankanamalage Premalal Leonard Perera,
No. 02, Kuda Gammanaya,
Pelwatta Sugar Company,
Buttala.

Accused- Appellant

Vs,

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

2. Office-in-Charge,
   Police station,
   Buttala.

Defendant-Respondents

And now between

Kotuwila Kankanamalage Premalal Leonard Perera,
No. 02, Kuda Gammanaya,
Pelwatta Sugar Company,
Buttala.

Accused- Appellant-Petitioner-Appellant

Vs,

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

2. Office-in-Charge,
   Police station,
   Buttala.

Complainant-Respondents-Respondents-Respondents

Before: **Nalin Perera CJ**

S.E. Wanasundera PC J

Vijith K. Malalgoda PC J

Counsel: Kumar Arulanandan PC, with Ms. Devika Panagoda and N. Wijerathne

for the Accused-Appellant-Petitioner-Appellant

Malik Azeez SC, for the Complainant-Respondent-Respondent-Respondents

Argued on: **29.08.2018**
Decided on: **09.11.2018**

Vijith K. Malalgoda PC J

The Accused-Appellant-Petitioner-Appellant Kotuwila Kanakanamage Premalal Leonard Perera had preferred the present appeal against the Judgment of the learned Provincial High Court Judge of Monaragala dated 04.09.2014 with leave obtained from the Provincial High Court of Monaragala under *section 9 (a)* of the High Court of Provinces (Special Provisions) Act No 19 of 1990 (as amended) read with *Article 154 (P) (3b)* of the Constitution, on the following questions of law;

a) Is the decision taken by the Provincial High Court Judge, that the learned Magistrate is correct in acting on the evidence of the complainant as true and correct is legal?

b) Is the decision taken by the Provincial High Court Judge that the amount of compensation ordered by the learned Magistrate is insufficient and the decision to enhance the amount of compensation to Rs. 80,000/- a defective and a wrong order?

When this matter was taken up for argument before this court, the learned State Counsel who appeared for the 1st and the 2nd Respondents-Respondents-Respondents (hereinafter referred to as the 1st and the 2nd Respondents) had raised a preliminary objection for the maintainability of the 1st question of Law referred to above.

However the learned President's Counsel who represented the Accused-Appellant-Petitioner-Appellant (hereinafter referred to as Accused-Appellant) refrained from responding to the above preliminary objection, and rested his case on the question whether the Accused-Appellant was denied of a fair trial by the learned Trial Judge.

At the outset, it must be noted that, this was not a ground of appeal on which leave was granted by the leaned High Court Judge. There is no proof before this court of at least raising this ground as a ground of appeal before the High Court or the counsel who represented the Accused-Appellant in the High Court of Provinces inviting the court to consider granting leave on this issue, if it was the position of the Accused-Appellant that, he was denied of a fair trial by the learned Trial Judge.

This court needs to take cognizance of the fact that the Respondents are required to meet the questions raised at the time the leave was granted and not the questions of Law that are totally alien to the questions of Law on which the leave was granted.

The Accused-Appellant was charged before the Magistrate's Court of Wellawaya on two counts for the commission of offences of causing mischief and criminal intimidation, offences punishable under sections 418 and 486 of the Penal Code.

As revealed before us, the prosecution had relied on the evidence of the Virtual Complainant, A.K. Dayapala and two Police Officers who assisted the investigation at the trial before the Magistrate's Court. At the conclusion of both the prosecution and the defence cases, the learned Magistrate delivered the judgment convicting the Accused-Appellant of the first count whilst acquitting him of the 2nd count.

When convicting the Accused-Appellant on count one, the learned Magistrate had acted upon the evidence of the single lay witness, A.K. Dayapala, whilst concluding him as a credible witness. When affirming the above conviction the learned High Court Judge too had concluded that the above decision of the learned Trial Judge, that witness Dayapala is a credible witness is correct.

The 1st question of Law on which the leave was granted, referred to the credibility of the above witness. The learned State Counsel whilst challenging the maintainability of the said question of Law had submitted that the credibility of a lay witness does not amount to a question of law but amounts to a question of fact.

Granting of leave by the High Court of Provinces is referred to in *section 9 (a)* of the High Court of Provinces (Special Provisions) Act No 19 of 1990 (as amended) as follows;

"Section 9;

(a) A final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (*b*) of Article 154P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a **substantial question of law**, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings:

Provided that the Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence made by

> such High Court, in the exercise of the appellate jurisdiction vested in it by paragraph (3) (*b*) of Article 154P of the Constitution or section 3 of this Act, or any other law where such High Court has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:
>
> Provided further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance;" (emphasis added)

As referred to in *Section 9 (a)* of the High Court of Provinces (Special Provisions) Act No 19 of 1990, it is the duty of the learned High Court Judge to satisfy that, there is a "substantial question of Law" to be considered by the Supreme Court, when granting leave to appeal on an appeal argued before him.

As observed by this court, out of the two questions of law, the leave was granted, the 1st question refers to "acting on the evidence of the complainant by the learned Magistrate" and it is evident that a Magistrate will only act on the evidence of a witness, if the witness is a credible witness and the credibility is tested mainly on the demeanour or deportment of a witness after applying several tests such as, probability/ improbability , spontaneity, belatedness, consistency/ inconsistency, and/or interestedness/ dis interestedness.

The 1st question of law further refers to the decision reached by the learned High Court Judge with regard to the said acceptance of the evidence by the Magistrate, and the Appellate Courts have repeatedly held that the Appellate Courts will not disturb the finding of a trial court on its finding of the credibility of a witness.

I would like to refer to some of the decisions both by the Supreme Court as well as by the Court of Appeal, on these issues, relied in favour of the said objection.

The Privy Council in the case of ***Fradd V. Brown and Company Ltd 1919 (20) NLR 282*** held;

> "Where the controversy is about veracity of witnesses, immense importance attaches, not only to the demeanour of the witness, but also to the course of the trial, and the general impression left on the mind of the Judge of the first instance, who saw and noted everything

> that took place in regard to what was said by one or other witness. It is rare that a decision of a Judge of first instance upon a point of fact purely is over-ruled by a Court of Appeal."

In the case of ***the Attorney General V. Sandanam Pitchi Mary Theresa [2011] 2 Sri LR 292*** Supreme Court held;

> "Credibility is a question of fact and not law. Appellate Judges have repeatedly stressed the importance of Trial Judges' observation of the demeanour of witnesses in deciding questions of fact. Demeanour represents the Trial Judges' opportunity to observe the witness and his deportment."

In ***Ariyadasa V. Attorney General [2012] 1 Sri LR 84*** the Court of Appeal held that;

> "Court of Appeal will not lightly disturb a finding of a Judge with regard to the acceptance or rejection of a testimony of a witness, unless it is manifestly wrong, when the Trial Judge has taken such a decision after observing the demeanour and deportment of a witness……."

G.P.S. de. Silva (CJ) in the case of ***Alwis V. Piyasena Fernando [1993] 1 Sri LR 119*** held that;

> "The Court of Appeal should not have disturbed the findings of primary facts made by the District Judge based on credibility of witness."

In the Court of Appeal decision of ***Kumar de. Silva and 2 others V. Attorney General [2010] 2 Sri LR 169***, *Sarath de. Abrew J* had held that;

> "Credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the Trial Judge"

When considering the above decisions and the submissions placed before us, it appears that the learned High Court Judge is correct in holding that the learned Magistrate is correct in acting on the evidence of the complaint, but the learned High Court should not have considered the said decision of the High Court as a question of law when granting leave under section 9 (a) of the High Court of Provinces (Special Provisions) Act.

The learned President's Counsel who represented the accused-appellant before us, neither opposed the said preliminary objection nor made any submissions in support of any of the issues on which leave was granted by the High Court including the 2nd ground of appeal.

Whilst relying on the decision by the Supreme Court in ***Mallawarachchige Kanishka Gunawardena V. H.K. Sumanasena SC Appeal 201/2014*** SC minute dated 15.03.2018 the learned president's Counsel submitted that his client the accused-appellant was not awarded a fair trial by the learned Magistrate.

In support of the above contention, the learned President's Counsel relied on two main issues. He firstly submitted that there is no record of reading charges to the Accused-Appellant before the Magistrate's Court. Secondly he took up the position that there is no record of prosecution closing its case and the accused being explained his rights by the learned Magistrate.

In this regard this court is mindful of the provisions contained in *section 182 (1), (2) 183 (2) (a) (b) and 184* of the Code of Criminal Procedure Act No 15 of 1979 which reads as follows;

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

183 **(2)** if the accused does not make a statement or makes a statement which does not amount to an unqualified admission of guilt the Magistrate shall ask him if he is ready for trial and,

(**a**) If the accused replies that he is ready for trial shall proceed to try the case in manner hereinafter provided, but

(**b**) If the accused replies that he is not ready for trial by reason of the absence of witnesses or otherwise the Magistrate shall, subject to the provisions of subsection (3) of section 263, either postpone the trial to a day to be then fixed or proceed forthwith to try the case in manner hereinafter provided.

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.

184 **(1)** When the Magistrate proceeds to try the accused he shall take all such evidence as may be produced for the prosecution or defence respectively

(2) The accused shall be permitted to cross-examine all witnesses called for the prosecution and called or recalled by the Magistrate.

(3) The complainant and accused or their pleaders shall be entitled to open their respective cases, but the complainant or his pleader shall not be entitled to make any observations in reply upon the evidence given by or on behalf of the accused.

Even though the learned President's Counsel had taken up as his first issue, the failure by the trial judge to read out the charges to the accused, our attention was drawn by the learned State Counsel to the journal entry dated 29.09.2010 where the learned Magistrate had endosed as follows;

29.09.2010

a) Plaint had been filed

b) Charges explained

c) Pleaded not guilty

d) Issue summonds on P/W1

e) Fix for trial on 25.05.2011

The above journal entry which was properly signed by the leaned Magistrate is a clear indication of the learned Magistrate complying with *Section 182* of the Code of Criminal Procedure Act No 15 of 1979 referred to above.

The second issue the learned President's Counsel had raised refers to the provisions in *Section 184 (2) and (3)* of the Code of Criminal Procedure Act No 15 of 1979 but as observed by me, provisions

of the above subsections does not provide a specific procedure when the learned Magistrate had decided to call for the defence from an accused person.

In the Supreme Court decision in Mallawarachchige Kanishka Gunawardena Vs. H.K. Sumanasena referred to above, this court had considered the provisions in *Section 4 (2)* of the International Covenant on Civil and Political Rights (ICCPR) Act No 56 of 2007 in the absence of a right to appeal under the provisions of the Sir Lanka Bureau of Foreign Employment Act No 21 of 1985.

Even though the said decision by the Supreme Court had only referred to the provisions of section 4(2) of the said Act, their Lordships of the Supreme Court had observed the importance of the provisions of the International Covenant on Civil and Political Rights (ICCPR) Act as follows;

> "Sri Lanka is a state party to the International Covenant on Civil and Political Rights (ICCPR) where an inherent right of appeal is recognized against any conviction. The Covenant, which was adopted by the General Assembly of the United Nations on 16th of December, 1966, entered into force on 23rd March, 1976 Sri Lanka acceded to the aforesaid covenant in the year 1980.
>
> Sri Lanka being a dualist state, implementation of the ICCPR requires that it be incorporated into domestic law which was accomplished in 2007 with the passage of ICCPR Act. The goal of the covenant is to define international human rights standards and to require signatory states to adopt measures to enforce those rights. The rights provided by the ICCPR are regarded as the basic human rights that should be viewed as restrictions (against derogation) on the government of signatory states. The ICCPR is valid for its signatory states and every signatory government is obligated to observe its provisions."

Section 4 (1) of the ICCPR Act No 56 of 2007 referred to the entitlement of an alleged offender as follows:

> **Section 4 (1)** A person charged of a criminal offence under any written Law, shall be entitled-
>
> **a)** To be afforded an opportunity if being tried in his presence;

b) To defend himself in person or through legal assistance of his own choosing and where he does not have any such assistance, to be informed of that right;

c) To have legal assistance assigned to him in appropriate cases where the interest of justice so requires and without any payment by him, where he does not have sufficient means to pay for such assistance;

d) To examine or to have examined the witnesses against him and to obtain the attendance of witnesses on his behalf, under the same conditions as witnesses called against him;

e) To have the assistance of an interpreter where such person cannot understand or speak the language in which the trial is being conducted; and

f) Not to be compelled to testify against himself or to confess guilty

None of the provisions in the ICCPR Act or the Code of Criminal Procedure Act No. 15 of 1979 referred to above, speaks of a right of an accused person to be informed of his rights as raised by the learned President's Counsel, but however I observe that, what is required by Law is to afford a fair opportunity for an accused person to submit his defence during a criminal trial before a Court of Law.

When going through the proceeding of the Magistrate's Court, I observe that the case for the prosecution was concluded on 16.05.2012 and the learned Magistrate had fixed the defence case for 20.06.2012 and permitted the accused who was represented by an Attorney-at-Law to obtain copies of the proceeding for him to get ready with his case.

During the defence case the accused had given evidence and summoned three witnesses to give evidence on his behalf.

The above procedure adopted before the Magistrate's Court clearly indicates that the accused was afforded a fair trial during the trial before the learned Magistrate.

In the said circumstances, I see no merit in the argument placed before us by the learned President's Counsel who represented the Accused-Appellant.

For the reasons given in the judgment I allow the preliminary objection raised on behalf of the 1st and the 2nd Respondents on the 1st question of law and dismiss this appeal with cost. Answering the 2nd question on which the leave was granted does not arises for the reasons adduced in the Judgment.

There is reference to another appeal lodged by the Accused-Appellant bearing No. 195/2014 and at the commencement of the proceedings in the present appeal, the learned President's Counsel who appeared in the both cases had agreed to abide by the decision in the present case.

However when going through the docket of the present case I observe that the case referred to as SC Appeal 195/2014 is a matter which was not supported for leave before this court but was originally assigned the number as SC /SPL /LA 195/2014. Since there was a direct appeal from the High Court with leave obtained from the High Court, this matter was not supported for leave before this court. However at a later stage, the original number SC /SPL /LA 195/2014 had been recorded as SC Appeal 195/2014 erroneously.

In the said circumstances, I see no reason to refer to the said appeal in this Judgment.

I affirm the decision of the learned High Court Judge of Monaragala dated 4th September 2014.

Appeal dismissed with costs.

Judge of the Supreme Court

Nalin Perera
I agree,

Chief Justice

S.E. Wanasundera, PC
I agree,

Judge of the Supreme Court