

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

In the matter of an application for Special Leave to Appeal in terms of Article 127 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. Spl. LA. No. 57/2017

CA. Appeal No. CA 25/2010

High Court of Gampaha Case
No. 302/2004

K. A. Shantha Udayalal

Accused-Appellant-Petitioner

Vs.

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

**Complainant-Respondent-
Respondent**

BEFORE : Sisira J. de Abrew, J.
Priyantha Jayawardena, PC, J. and
K. T. Chitrasiri, J.

COUNSEL : Indica Mallawaratchy for the Accused-
Appellant-Petitioner.

Shanaka Wijesinghe, DSG, for the Attorney
General.

ARGUED &
DECIDED ON : 30.01.2018

Sisira J. de Abrew, J.

Heard both Counsel in support of their respective cases.

We are inclined to grant leave in this case on questions of law set out in paragraph 9 (a) and (b) of the petition of appeal dated 16/03/2017 which are set out below:-

- (a). Have their Lordships erred by concluding that the trial judges are empowered to utilize the police statements of witnesses, inquest evidence and non-summary evidence not produced at the trial for the purpose of dissecting the case facts and evidence to ascertain the truth at the trial?
- (b). Have their Lordships erred by failing to consider that the trial judge had perused, relied upon and compared the police statement, inquest evidence and the non-summary evidence with that of the substantive evidence of the sole eye-witness at the time of writing the judgment?

We have perused the judgment of the trial Judge and we are of the opinion that the learned trial Judge has utilized the police statement of the alleged eye witness, non-summary evidence and inquest evidence which were not properly admitted in evidence. The question that must be considered is whether the learned trial Judge is permitted under the law to use the police statement, non-summary evidence and evidence led at the inquest at the time of writing the judgment when the said matters were not properly admitted in evidence.

In this connection it is relevant to consider certain judicial decisions of this Court. In Inspector of Police, Gampaha Vs. Perera 33 NLR page 69, the Court observed the following facts: “Where after examining the Complainant and his witnesses, the Magistrate cited the police to produce extracts from the Information Book for his perusal, before issuing process”. It was held that the use of the Information Book was irregular.

In Wickramasinghe Vs. Fernando 29 NLR page 403, the following facts were observed by Court. “Where a Magistrate referred to the Police Information Book for the purpose of testing the credibility of a witness by comparing his evidence with a statement made by him to the police”. Court held as follows: “The use of the Police Information Book was irregular”.

In Paulis Appu Vs. Don Davit 32 NLR page 335, the following facts were observed by Court. “Where at the close of a case, the Police Magistrate reserved judgment noting that he wished to

peruse the Information Book”. Court held as follows: “The use of Information Book for the purpose of arriving at a decision was irregular”. Considering the principles laid down in the above judicial decisions, we hold that the trial Judge has no power to utilize the statements made by the witness to the police, inquest evidence and non-summary evidence when they were not properly admitted in evidence.

In the present case, it is very clear that the learned High Court Judge has used the police statement, non-summary evidence and inquest evidence which were not properly admitted in evidence. I therefore hold that the decision of the learned trial Judge to peruse the said documents was wrong and contrary to law.

The learned Judges of the Court of Appeal have made the following observations in their judgment dated 15/02/2017. “However, the statement made to the police, inquest evidence and non-summary evidence can be utilized by the learned trial Judge for the purpose of guidance when dissecting the case facts and evidence to ascertain the truth during the course of the trial and not rely upon the above to form the judgment without considering the material facts”.

When I consider the above judicial decision, I am of the opinion that the observation by the Court of Appeal Judges is wrong.

I would like to refer to a judicial decision in *Punchimahaththaya Vs. The State* 76 NLR page 564 wherein the Court held as follows: “Court of Criminal Appeal (or the Supreme Court in appeal) has no authority to peruse statements of witnesses recorded by

the Police in the course of their investigation (i.e. statement in the Information Book) other than those properly admitted in evidence by way of contradiction or otherwise. Section 122(3) of the Criminal Procedure Code which enables such statements to be sent for to aid the Court is applicable only to Courts of inquiry or trial”.

The trial Judge when convicting the Accused has used the police statement made by the witness and the evidence of the witness given at the non-summary inquiry and the inquest proceedings. This decision of the trial Judge is also wrong and contrary to law.

Considering all the above judicial decisions, I hold that the decision of the learned trial Judge to peruse the said document was wrong and contrary to law. For the above reasons, I also hold that the judgment of the Court of Appeal is contrary to law.

Considering all these matters, we are unable to permit the judgment of the Court of Appeal and the High Court to stand. We therefore, set aside both judgments of the Court of Appeal and the High Court. In view of the conclusions reached above, we answer the above questions of law in the affirmative.

Having considered the evidence led at the trial, we order a re-trial.

Learned High Court Judge of Gampaha is directed to expeditiously conclude this case.

Registrar of this Court is directed to send a copy of this

judgment to the High Court and the Court of Appeal.

Registrar of the Court of Appeal is hereby directed to send the original case record to the High Court of Gampaha.

JUDGE OF THE SUPREME COURT

Priyantha Jayawardena, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

K. T. Chitrasiri, J.

I agree.

JUDGE OF THE SUPREME COURT

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