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

Democratic Socialist Republic of
Sri Lanka
Complainant

SC APPEAL NO: SC/APPEAL/139/2019
COURT OF APPEAL CASE NO: CA/266/2017
HCCA NO: WP/HCCA/NEG/11/2018

Vs.

Chandana Sri Lal Gurusinghe
Accused

AND BETWEEN

Chandana Sri Lal Gurusinghe
Accused-Appellant

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent

AND NOW BETWEEN

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

Complainant-Respondent-
Appellant

Vs.

Chandana Sri Lal Gurusinghe
Accused-Appellant-Respondent

OIC, Yakkala Police Station.
Complainant

SC APPEAL NO: SC/APPEAL/2/2022
HCCA NO: WP/HCCA/GPH/AP/32/2019
MC GAMPAHA NO: 61021/18

Vs.

Hettiarachchilage Wasantha
Rathna,
No. 120, Dhambuwa Watta,
Yakkala.
Accused

AND BETWEEN

Hettiarachchilage Wasantha
Rathna,
No. 120, Dhambuwa Watta,
Yakkala.
Accused-Appellant

Vs.

1. OIC, Yakkala Police Station.
2. The Hon. Attorney General,
   Attorney General's Department,

Colombo 12.
Complainant-Respondents

AND NOW BETWEEN

Hettiarachchilage Wasantha Rathna,
No. 120, Dhambuwa Watta,
Yakkala.
Accused-Appellant-Appellant

Vs.

1. OIC, Yakkala Police Station.
2. The Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.
   Complainant-Respondent-Respondents

Democratic Socialist Republic of Sri Lanka
Complainant

SC SPL LA NO: SC/SPL/LA/267/2018
COURT OF APPEAL CASE NO: CA/13/2016
HCCA NO: CP/HCCA/KANDY/12/2001

Vs.

Rajapakse Gedara Nandasena *alias* Kirikolla
Accused

AND NOW

Rajapakse Gedara Nandasena *alias* Kirikolla
Accused-Appellant

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent

AND NOW BETWEEN

Rajapakse Gedara Nandasena *alias* Kirikolla.
Accused-Appellant-Petitioner

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.
Complainant-Respondent-Respondent

Before: Hon. Justice Murdu N.B. Fernando, P.C.
Hon. Justice Kumudini Wickremasinghe
Hon. Justice Mahinda Samayawardhena

Counsel: Azard Navavi, Senior D.S.G. for the Complainant-Respondent-Appellant in SC/APPEAL/139/2019, Complainant-Respondent-Respondent in SC/APPEAL/2/2022 and SC/SPL/LA/267/2018.

Dr. Ranjith Fernando for the Accused-Appellant-Respondent in SC/APPEAL/139/2019.

Kamal Suneth Perera for the Accused-Appellant-Appellant in SC/APPEAL/2/2022.

Amila Palliyage for the Accused-Appellant-Petitioner in SC/SPL/LA/267/2018.

Argued on: 12.12.2023

Decided on: 05.04.2024

Samayawardhena, J.

Background

The appellant in SC/APPEAL/139/2019, Chandana Sri Lal Gurusinghe, was indicted before the High Court of Negombo for murder. Evidence of five prosecuting witnesses was led before two High Court Judges. Evidence of one witness was led before the third High Court Judge. After the prosecution case was closed, the appellant made a dock statement. This was followed by closing submissions from learned counsel for both parties. The third High Court Judge delivered the judgment convicting the accused of the offence. On appeal, learned counsel for the appellant took up the position for the first time that the judgment was delivered by the third High Court Judge without any "entry of adoption of proceedings" and therefore, it vitiates the conviction. The Court of Appeal accepted that argument and set aside the judgment of the High Court and ordered trial *de novo* without going into the merits of the appeal. The Attorney General appealed against this judgment.

There were several appeals/leave to appeal applications pending before this Court where this point (presence of an entry of adoption of proceedings) had been raised. Together with SC/APPEAL/139/2019,

another appeal namely, SC/APPEAL/2/2022 was argued. Learned counsel for the appellant-petitioner in SC/SPL/LA/267/2018 agreed to abide by the judgment in SC/APPEAL/139/2019.

In SC/APPEAL/139/2019, this Court granted leave to appeal on two questions of law:

(a) Does a Court of first instance require the fact of adopting evidence by the succeeding judge to be recorded in order to comply with section 48 of the Judicature Act, as amended, when there was no demand by an accused person to resummon and rehear the witnesses?
(b) Would the Court of Appeal be correct in law in holding that the absence of a record of adoption of evidence in the above circumstances vitiates the proceedings, without considering the matter before it?

The substantive rights of the accused and failure of justice

There is no dispute in the instant case (SC/APPEAL/139/2019) that both parties agreed for the third High Court Judge to adopt the evidence already led and proceed with the trial. The learned High Court Judge expressly stated this at pages 3 and 10 of the judgment; "පූර්වගාමී විනිසුරුතුමා ඉදිරියේ මෙහෙයවා ඇති සාක්ෂි පිලිගෙන නඩුවේ වැඩිදුර විභාගය මා ඉදිරියේ පවත්වා ගෙන යාමට දෙපාර්ශවය එකඟ වූ බැවින් මා ඉදිරියේ උප පොලිස් පරීක්ෂක ජයතිලක යන අයගේ සාක්ෂිය මෙහෙයවා අවසන් කොට ඇති අතර, ඉන් පසුව මෙම අධිකරණයේ සේවය කරන භාෂා පරිවර්ථක මගින් විත්තිකරුගේ ව්‍යවස්ථාපිත ප්‍රකාශය පැ.2 ලෙස ලකුණු කරමින් පැමිණිල්ලේ නඩුව අවසන් කොට ඇත." The only issue in this appeal is the failure of the learned High Court Judge to record it in the proceedings. In that backdrop, there is no justification whatsoever for the Court of Appeal to set aside the judgment of the High Court and order a trial *de novo* as the omission or irregularity, if any, "*has not prejudiced the substantial rights*

of the parties or occasioned a failure of justice" as the proviso to Article 138(1) of the Constitution dictates.

Article 138(1) of the Constitution which delineates the jurisdiction of the Court of Appeal reads as follows:

> *The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all causes, suits, actions, prosecutions, matters and things of which such High Court, Court of First Instance, tribunal or other institution may have taken cognizance:*
>
> *Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.*

The Constitution is the supreme law of the land, and all other laws must be interpreted consistently with the Constitution. The language of the proviso to Article 138(1) of the Constitution makes it mandatory for the Court of Appeal not to reverse or vary the judgments, decrees or orders of the original Courts on any error, defect, or irregularity unless such error, defect, or irregularity has prejudiced the substantial rights of the parties or occasioned a failure of justice.

All statutory laws also conform to this, perhaps reiterating it for overemphasis.

Section 334(1) of the Code of Criminal Procedure Act, No. 15 of 1979, as amended, reads as follows:

> *The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal:*
>
> *Provided that the court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.*

Section 436 of the Code of Criminal Procedure Act reads as follows:

> *Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account –*
>
> *(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or*
> *(b) of the want of any sanction required by section 135,*
>
> *unless such error, omission, irregularity, or want has occasioned a failure of justice.*

Section 456A of the Code of Criminal Procedure Act reads as follows:

The failure to comply with any provision of this Code shall not affect or be deemed to have affected the validity of any complaint, committal or indictment or the admissibility of any evidence unless such failure has occasioned a substantial miscarriage of justice.

Section 5A of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 reads as follows:

5A(1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be.

(2) The provisions of sections 23 to 27 of the Judicature Act, No. 2 of 1978 and sections 753 to 760 and sections 765 to 777 of the Civil Procedure Code (Chapter 101) and of any written law applicable to the exercise of the jurisdiction referred to in subsection (1) by the Court of Appeal, shall be read and construed as including a reference to a High Court established by Article 154P of the Constitution for a Province and any person aggrieved by any judgment, decree or order of a District Court or a Family Court, as the case may be, within a Province, may invoke the jurisdiction referred to in that subsection, in the High Court established for that Province:

Provided that no judgment or decree of a District Court or of a Family Court, as the case may be, shall be reversed or varied by the High Court on account of any error, defect or irregularity, which has not

> *prejudiced the substantial rights of the parties or occasioned a failure of justice.*

In *Kiri Mahaththaya and Another v. Attorney General* [2020] 1 Sri LR 10, the Supreme Court was called upon to decide whether non-compliance with section 196 of the Code of Criminal Procedure Act, which mandates the High Court to read and explain the indictment to the accused and ask whether he pleads guilty or not guilty of the offence charged (arraignment of accused), vitiates the conviction. There were several previous decisions which held that it does. The Supreme Court confirmed that the absence of the words "indictment read and explained" in the record, along with the failure to record the plea of guilty or not guilty, amounts to non-compliance with section 196. Nevertheless, the Supreme Court did not adopt a mechanical approach to this issue. Instead, the Court concluded that non-compliance with section 196 by itself would not automatically invalidate the conviction. The Supreme Court firmly held that if the conviction is to be vitiated, the appellant must satisfy the Court that such non-compliance has caused prejudice to the substantial rights of the accused or has occasioned a failure of justice, as stipulated in the proviso to Article 138(1) of the Constitution. Aluwihare J. (with the agreement of Jayawardena J. and Murdu Fernando J.) emphasised this at pages 18-19:

> *With the promulgation of the 1978 Constitution, if relief is to be obtained in an appeal, a party must satisfy the threshold requirement laid down in the proviso to Article 138(1), which is placed under the heading 'The Court of Appeal'. The proviso to the said Article of the Constitution lays down that "Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced*

the substantial rights of the parties or occasioned a failure of justice."

The proviso aforesaid is couched in mandatory terms and the burden is on the party seeking relief to satisfy the court that the impugned error, defect or irregularity has either prejudiced the substantial rights of the parties or has occasioned a failure of justice. It must be observed that no such Constitutional provision is to be found either in the 1948 Soulbury Constitution or the First Republican Constitution of 1972.

The Constitutional provision embodied in Article 138(1) cannot be overlooked and must be given effect to. None of the decisions (made after 1978) relied upon by the Appellants with regard to the issue that this court is now called upon to decide, appear to have considered the constitutional provision in the proviso to Article 138(1). It is a well-established canon of interpretation, that the Constitution overrides a statute as the grundnorm. All statutes must be construed in line with the highest law. Judges from time immemorial have in their limited capacity, essayed to fill the gaps whenever it occurred to them, in keeping with the contemporary times, in statutes which do not align with the Constitution. However, such interpretations are not words etched in stone.

As the respected American jurist, Justice Benjamin N. Cardozo said, "The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered" (The Nature of the Judicial Process, 1921).

> *The learned counsel on behalf of the Accused-Appellants had heavily relied on a number of decisions handed down by this court as well as by the Court of Appeal, in support of the proposition that the trial should be declared a nullity in view of the non-compliance with Section 196 of the Code of Criminal Procedure Act. However, I am of the view that these decisions need to be revisited in light of the Constitutional provision referred to above.*

Having regard to the facts of that case, the Supreme Court dismissed the appeal on the basis that the omission of a formal arraignment had neither prejudiced the substantial rights of the accused nor occasioned a failure of justice.

Given the facts of the instant appeal, I have no option but to set aside the impugned judgment of the Court of Appeal on the basis that the lack of entry in the case record has not caused prejudice to the substantial rights of the accused nor occasioned a failure of justice.

Section 48 of the Judicature Act

However, the question of law raised in the instant appeal is of general applicability as there are several appeals pending in this Court on the same question of law. Learned counsel in those cases have agreed to abide by this judgment on the question of adoption of evidence under section 48 of the Judicature Act. Therefore, further consideration of the matter is necessary.

It is common ground that the question of adoption of proceedings is mainly governed by section 48 of the Judicature Act, No. 2 of 1978, as amended by the Judicature (Amendment) Act, No. 27 of 1999.

Section 48 of the Judicature Act as it stood before the amendment read as follows:

> *In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter, whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor, or partly recorded by his predecessor and partly recorded by him or, if he thinks fit, to re-summon the witness and commence the proceedings afresh:*
>
> *Provided that in any such case, except on an inquiry preliminary to committal for trial, either party may demand that the witnesses be re-summoned and re-heard, in which case the trial shall commence afresh.*

It must first be clarified that the principal part of this section applies to the judge, while the proviso applies to the parties to the action. The section as a whole encompasses both civil and criminal proceedings.

Under section 48 (without the proviso), the succeeding judge has the power to act on the evidence already recorded by his predecessor or, if deemed appropriate, to resummon the witnesses and commence proceedings afresh. The judge has the discretion. However, I must hasten to add that there is no unfettered, untrammeled and unbridged discretion. The judge must exercise the discretion judiciously and not capriciously. As Lord Wrenbury in the celebrated House of Lords decision in *Roberts v. Hopwood* [1925] AC 578 at 613 articulated "*he must in the exercise of his discretion do not what he likes but what he ought. In other words, he must, by the use of his reason, ascertain and follow the course which reason directs. He must act reasonably.*"

The resummoning of witnesses and commencing proceedings *de novo* is the exception, not the rule. This was explained by S.N. Silva C.J. in *Vilma Dissanayake v. Leslie Dharmaratne* [2008] 2 Sri LR 184 at 185:

> *It is necessary for a succeeding Judge to continue proceedings since there are changes of Judges holding office in a particular Court due to transfers, promotions and the like. It is in these circumstances that Section 48 was amended giving a discretion to a Judge to continue with the proceedings. Hence the exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witness recorded by the Judge who previously heard the case.*

In *Krishnakumar v. Attorney General* [2021] 2 Sri LR 454 at 458, Abayakoon J. stated:

> *I find that the plain reading of section 48 of the Judicature Act, as amended by Act No. 27 of 1999 is very much clearer as to the intention of the legislature. The intention has been to provide for the conclusion, as expeditiously as possible, a trial commenced before another judge without causing prejudice to an accused person. The legislature in its wisdom has provided for the trial judge to continue with the trial by acting on the evidence previously recorded by his predecessor, but by the proviso of the section has provided an opportunity for an accused in a criminal prosecution to demand that the witness may be re-summoned and reheard ensuring the right of an accused for a fair trial.*

In *Central Finance Company PLC v. Chandrasekera* [2020] 1 Sri LR 161, the trial was concluded before one judge in the Commercial High Court and the judgment was reserved. Before the judge could prepare and deliver the judgment, he was elevated to the Court of Appeal. The

succeeding judge, presumably acting under section 48 of the Judicature Act, without informing the parties, dismissed the plaintiff's action on the basis that the affidavit evidence of the main witness of the plaintiff is not in the case record. On appeal, the Supreme Court set aside the judgment. Prasanna Jayawardena J. at page 178 held:

> *In my view, in instances where a succeeding judge is called upon to deliver judgment in a case where the evidence has been concluded before his predecessor, the requirement that the discretion vested by section 48 of the Judicature Act in the succeeding judge must be exercised reasonably, places a duty on the succeeding judge to have the case called in open court and notify the parties that he (the succeeding judge) is required to deliver judgment since his predecessor is unavailable. At that time, the succeeding judge should give the parties an opportunity to be heard with regard to which course of action outlined in section 48 should be followed. Having considered the submissions made by the parties on that question, the succeeding judge is entitled to make Order as to the manner in which he decides to exercise the discretion vested in him by section 48.*

It should be borne in mind that in the above case, no evidence was led before the judge who dismissed the action; all the evidence was led before his predecessor. It is in that context Jayawardena J. stated that where a succeeding judge is called upon to deliver the judgment in a case where no evidence had been led before him, it is obligatory on the succeeding judge to have the case called in open Court and notify the parties that he is required to deliver the judgment since his predecessor is unavailable and decide which of the three lines of actions referred to in the principal part of section 48 should be followed, i.e. (a) to act on the evidence already recorded by his predecessor, or (b) partly recorded by his predecessor and

partly recorded by him or, (c) if he thinks fit, to re-summon the witness and commence the proceedings afresh.

Under the proviso (before the amendment), any party to the action, whether civil or criminal, could demand that the witnesses be resummoned and reheard. In such cases, the Court was bound to commence the trial afresh ("*the trial shall commence afresh*").

The proviso was abused by some parties to prolong the trial in furtherance of their ulterior motives, thereby significantly contributing to the perennial problem of law's delays. Hence, the legislature, by the Judicature (Amendment) Act, No. 27 of 1999, repealed the proviso and substituted it with the following:

> *Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such judge, the accused may demand that the witnesses be resummoned and reheard.*

This was explained by Salam J. in *Somapala v. The Commission to Investigate Bribery and Corruption* (CA (PHC) APN 37/2009, CA Minutes of 03.02.2010) in this manner:

> *It is common knowledge that the proviso to section 48 worked tremendous hardship to the parties both in criminal and civil matters whenever a party to a case (prosecutor, accused, plaintiff, defendant, intervenient, added party or any other party) improperly or unreasonably invoked the proviso. This has resulted in the Judicial Service Commission having to reappoint judges to avoid trials being heard de novo. Being conscious of the unsatisfactory state which resulted in judges at times having to travel long distances to hear partly heard cases at the expense of severe hardship being caused to the litigants at their permanent stations,*

> *the legislature repealed the proviso to section 48 and substituted thereof, of the following proviso by Judicature (Amendment) Act, No. 27 of 1999.*

This amendment removed the right of the parties to civil actions to demand the resummoning and rehearing of witnesses. Following the amendment, this right is now confined only to accused persons in criminal cases.

This amendment also restricted the accused's rights, which he previously enjoyed. After the amendment, there is no compulsion on the part of the Court to resummon and rehear witnesses and commence the trial afresh when an application is made by the accused; the part "*in which case the trial shall commence afresh*" found in the original proviso was removed.

By removing that portion, the legislature granted the Court the discretion to decide whether to allow the accused's application to resummon and rehear witnesses, based on the facts and circumstances of each individual case. The use of the term "demand" in the proviso does not mean that the Court has no discretion but to comply. According to the Sinhala version of the proviso, "demand" means that the accused can make an application to the Court (ඉල්ලා සිටීම).

> එසේ වුවද, (නඩු විභාගය ඉහළ අධිකරණයට තැබීමට පෙර වූ යම් පරීක්ෂණයක දී හැර) යම් අපරාධ නඩුවක්, නඩු කටයුත්තක් හෝ කාරණයක්, එවැනි යම් විනිශ්චයකාරවරයකුගේ අනුප්‍රාප්තිකයා ඉදිරියේ දිගටම පවත්වාගෙන යනු ලබන අවස්ථාවක දී, සාක්ෂිකරුවන් නැවත කැඳවා ඔවුන්ගෙන් නැවත සාක්ෂි විභාග කරන ලෙස චූදිතයා විසින් ඉල්ලා සිටිනු ලැබිය හැකි ය.

Black's Law Dictionary (11th Edition) provides the definition of the verb "demand" as follows:

demand, vb. 1. To claim as one's due; to require; to seek relief. 2. To summon; to call into court

The above analysis was lucidly explained by Salam J. in *Somapala v. The Commission to Investigate Bribery and Corruption* (*supra*):

The expression "demand" as used in the proviso to section 48 has been often misunderstood and misapplied in the course of legal proceedings. By the reason of this misunderstanding at times it is argued that by the use of the expression "demand" the Legislature intended or conferred no discretion in the hands of the Judge. The fact that the Legislature has purposely omitted the phrase "in which case the trial shall commence afresh" from the original proviso sheds enough light on the necessary construction of the amended proviso. This would necessarily mean that the intention of the legislature is to do away with the concept of "de novo trial" even when a demand is made under the proviso.

Even in the event of a demand being made by the accused as contemplated by the proviso, yet the court is not bound to comply with such a demand as if it is mandatory. The ordinary Oxford dictionary meaning assigned to the word "demand" is an urgent or peremptory or authoritative request and nothing more. Quite interestingly the authoritative version of Act No 27 of 1999 being Sinhala, in introducing the new proviso uses the expression "චුදිතයා විසින් ඉල්ලා සිටිනු ලැබිය හැකිය" as corresponding to the words "the accused may demand". This provides a firm proof that the new proviso is not only has done away with the requirement of having to commence proceedings afresh but even the "request" (ඉල්ලීම) to recall a witness is also placed within the exclusive discretion of the judge. As such when section 48 is carefully looked at, no difficulty needs to be encountered in arriving at the conclusion that the trial de novo

is allowed under the present law only when the Judge makes up his mind on his own if he thinks fit, to re-summon the witnesses and commence the proceedings afresh, under the main provision of section 48.

Failure to record the fact of adoption of evidence

Section 48 does not mandate the judge to formally record the fact of the adoption of proceedings. Consequently, the failure to record the fact of adoption of previous proceedings cannot invalidate or vitiate the proceedings, including the judgment.

For instance, section 93(2) of the Civil Procedure Code mandates that "*On or after the day first fixed for pre-trial conference of the action and before final judgement, no application for the amendment of any pleadings shall be allowed unless the Court is satisfied, for reasons to be recorded by the Court, that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches.*" There is no similar expression in section 48 of the Judicature Act.

This view was also upheld by W.L.R. Silva J. in *Daniel v. The Attorney General* (CA/164/2007, CA Minutes of 21.07.2010) and Jayasuriya J. in *Chaminda Bandara v. The Attorney General* (CA/263/2021, CA Minutes of 12.01.2018).

In the recent case of *Alawaththage Gnanasena alias Banda v. The Attorney General* (CA/HCC/168/2015, CA Minutes of 24.02.2022), Abayakoon J. also expressed the opinion that entry in the case record regarding the adoption of evidence is not mandated by the section, and the norm is for the continuation of the trial:

The argument of the learned Counsel for the appellant is that the learned High Court Judge has failed to adopt the evidence. However, I find no provision in that regard in section 48 of the judicature Act as the very purpose of the section is to provide for the continuation of a trial to avoid undue delay under given circumstances.

It was held in the case of Herath Mudiyanselage Ariyratne Vs. Republic of Sri Lanka (CA 307/2006 decided on 17-07-2013) that a transfer of a judge to another station covers by the words 'other disability' as stated in section 48 of the Judicature Act, hence the succeeding judge has no disability to continue with a trial.

As discussed earlier, the main part of section 48 provides for a succeeding judge to re-summon a witness and commence the proceedings afresh if the judge thinks fit, which is applicable to either civil or criminal matters at the discretion of the judge.

In the case under consideration, it is clear from the proceedings that the succeeding High Court Judge has decided to continue with the case by calling the remaining witnesses as formally adopting the evidence previously recorded was not a matter that needed the attention of the Learned High Court Judge, as there was no such requirement and the provision is for the continuation of the trial.

Even assuming without conceding that the recording of the fact of adoption of evidence is mandatory, if the accused cannot satisfy the Court of Appeal that such failure prejudiced the substantive rights of the accused or occasioned a failure of justice, the Court of Appeal cannot set aside the judgment in view of the proviso to section 138(1) of the Constitution.

Failure to invoke the proviso to section 48

As I have already stated, whether or not the accused is represented by a lawyer, under the principal part of section 48, the judge decides whether or not to resummon the witnesses and commence the proceedings afresh. In the High Court trials on indictments, the accused is necessarily represented by a lawyer. For the judge to act upon the proviso to section 48, there must be an application by the accused. The failure to make an application by the accused cannot be attributed to the judge and quash the entire proceedings, including the judgment pronounced after a protracted trial.

The process of resummoning witnesses and commencing the trial afresh might place the accused at a disadvantageous position. When an accused is represented by a lawyer, the judge should not unnecessarily intrude into the arena reserved for the lawyer and potentially undermine his strategy, which could result in injustice rather than justice.

In *Ariyaratne v. The Democratic Socialist Republic of Sri Lanka* (CA/307/2006, CA Minutes of 17.07.2013), De Abrew J. emphasised that the Court's invocation of the proviso to section 48 is contingent upon the accused making an application to resummon and rehear witnesses.

In *Krishnakumar v. Attorney General* (*supra*) at 459, Abayakoon J. stated:

> *I am of the view that if it was the intention of the accused to re-summon witnesses, it was up to the accused appellant to make such a demand, which he has failed to do. In the instant action, the appellant has not demanded the re-summoning of the witnesses before the successor of the original trial judge who heard most of the witnesses including the evidence of PW-01. Without making use of his right to demand before the successor of the original trial judge, and after agreeing for the continuation of the trial, before the judge*

who ultimately concluded the trial, the appellant has no basis to argue that he was denied of a fair trial, hence, the ground of appeal urged has no merit.

In *Alawaththage Gnanasena alias Banda v. The Attorney General* (*supra*), all the evidence except that of prosecution witness No. 1 was led before the High Court Judge who delivered the judgment convicting the accused for murder. The accused's lawyer remained the same but no application was made to the succeeding judge to resummon witness No. 1. On appeal, it was argued that absence of formal adoption of evidence warrants quashing the conviction and ordering a retrial. Abayakoon J. rejected this argument:

As provided in the proviso of section 48 of the Judicature Act, as amended, which is applicable only for criminal prosecutions, if any demand was made to re-summon PW-01 with acceptable reasoning, the learned trial judge could have considered the request and an appropriate order would have been made at his discretion. I find that no such application has been made.

I am of the view that without making use of the available provision before the correct forum, which amounts to a waiver of such right, the appellant is now precluded from arguing at the appeal stage that the learned succeeding High Court Judge failed to adopt the previous proceedings and hence, the matter should be sent for a trial de novo.

I find that this is an argument which has the effect of reviving the section 48 of the Judicature Act to the level before it was amended by the amendment Act No 27 of 1999, if allowed. This was not the intention of the legislature in bringing in the amendment to the Act, as discussed before.

The concept of a "fair trial" should not be viewed purely as an abstract or theoretical concept. Prof. C.G. Weeramantry, *An Invitation to the Law*, (1982), under the topic 'The law in the field and the law in the book' states at page 136:

> *The traditional attitudes of lawyers, in the application of their legal knowledge, has been to confine their attention to the black letter rules or principles appearing between the covers of their law books. Deeply learned in the contents of these books, they would research the legal principles involved with the utmost thoroughness, and apply them to the facts before them. That task accomplished, their interest in the matter would cease. They would not follow through into its social impacts the decision they had thus applied, and they would go on to half a hundred similar cases, applying their book knowledge to them without any feedback from the field. Indeed many a modern court still does just that.*

In the pursuit of justice, it is imperative to recognise that legal proceedings are not a mere game of strategy, but rather a sincere endeavor by society to ensure public safety and uncover the truth. In *Rex v. Barnes* [1921] 61 Dominion Law Reports 623, Riddell J. in the Appellate Division of the Supreme Court of Ontario declared at 638:

> *The administration of our law is not a game in which the cleverer and more astute is to win, but a serious proceeding by a people in earnest to discover the actual facts for the sake of public safety, the interest of the public generally.*

This was referred to with approval by a five Judge Bench of the Supreme Court in *Rupasinghe v. Attorney General* [1986] 2 Sri LR 329 at 345, and by Amaratunga J. in the Supreme Court case of *Abeysekera v. Attorney General* [2012] 1 Sri LR 60 at 68.

Undefended accused

Although in the High Court, the accused is typically provided with legal representation, in the Magistrate's Court, this may not always be the case. When the accused is undefended, it becomes the responsibility of the judge to explain to the accused his right to make an application under the proviso to section 48 of the Judicature Act to ensure a fair trial. However, it is ultimately the judge's discretion to decide whether to allow or disallow that application based on the unique facts and circumstances of the case.

As the Supreme Court held in *Kiri Mahaththaya's* case (*supra*), failure on the part of the judge to do so itself will not vitiate the conviction unless it can be demonstrated that such failure caused prejudice to the substantial rights of the accused or resulted in a failure of justice.

In SC/APPEAL/2/2022, the appellant, Hettiarachchilage Wasantha Rathna, was undefended when the second Magistrate took over the trial. The appellant did not make an application to the succeeding Magistrate in terms of the proviso to section 48 of the Judicature Act to resummon and rehear witness No. 1 whose evidence had already been led, nor did the learned Magistrate explain it to the appellant. The learned Magistrate proceeded with the trial without recording the fact of adoption of evidence. After trial, the appellant was convicted for the charge (section 345 of the Penal Code) and the High Court affirmed it.

According to Article 13(3) of the Constitution, the right to a fair trial is a fundamental right.

> *13(3). Any person charged with an offence shall be entitled to be heard, in person or by an attorney-at-law, at a fair trial by a competent court.*

The concept of the fair trial encompasses the right of the accused to be informed of his rights.

However, learned counsel for the appellant in SC/APPEAL/2/2022 did not make submissions on how such failure on the part of the learned Magistrate "caused prejudice to the substantial rights of the accused or resulted in a failure of justice". On the facts and circumstances of the case, I cannot conclude that it caused prejudice to the substantial rights of the accused or resulted in a failure of justice as the demeanour and deportment of witness No.1 who gave evidence before the first Magistrate was never in issue.

Conclusion

For the aforesaid reasons, I answer the two questions of law on which leave to appeal was granted in SC/APPEAL/139/2019 in the negative. The judgment of the Court of Appeal dated 13.07.2018 is set aside and the appeal in SC/APPEAL/139/2019 is allowed. The case is remitted to the Court of Appeal to decide the appeal of the accused-appellant on the merits.

In SC/APPEAL/2/2022 the only question of law leave to appeal has been sought from and granted by the High Court is "*Is formal adoption of proceedings in criminal trials necessary in view of section 48 of the Judicature Act?*" This question has already been answered in the negative. In addition, the position of the undefended accused was also considered in the judgment. Hence, the appeal in SC/APPEAL/2/2022 is dismissed.

In SC/SPL/LA/267/2018 (accused Rajapakse Gedara Nandasena *alias* Kirikolla), the two questions of law on which leave has been sought are the identical two questions of law accepted by this Court in SC/APPEAL/139/2019. At the argument, learned counsel for the

accused-appellant-petitioner informed this Court that he is agreeable to abide by the judgment in SC/APPEAL/139/2019. Hence in SC/SPL/LA/267/2018, special leave to appeal from the judgment of the Court of Appeal dated 13.07.2018 is refused and the application is dismissed.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., J.
I agree.

Judge of the Supreme Court

Kumudini Wickremasinghe, J.
I agree.

Judge of the Supreme Court