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 128 of the Constitution.

The Head Quarters Inspector,
Ratnapura Police Station,
Ratnapura.

COMPLAINANT

SC Appeal Case No:- 195/2011

SC SPL Apl 200/2011

CA (PHC) 182/2000

HC Avissawella HC (APN) 88/99

MC Avissawella 68396

V.

Galaudakanda Watukarage Siripala
Deheragoda, Ellawala.

ACCUSED

AND

Totapitiya Arachchige Abeypala,
Deheragoda, Ellawala.

PETITIONER

V.

1.The Head Quarter's Inspector,
Ratnapura Police Station,
Ratnapura.

COMPALINANT-RESPONDENT

2.Galaudakanda Watukarage
Siripala,
Deheragoda, Ellawala.

ACCUSED-RESPONDENT

3.The Hon. Attorney-General,
Attorney-General's Department,
Colombo.

RESPONDENT

AND BETWEEN

Galaudakanda Watukarage
Siripala.
Deheragoda, Ellawala.

ACCUSED-RESPONDENT-APPELLANT

v.

Totapitiya Arachchige Abeypala,
Deheragoda, Ellawala.

PETITIONER-RESPONDENT

AND NOW BETWEEN

Galaudakanda Watukarage

Siripala.

Deheragoda, Ellawala.

ACCUSED-RESPONDENT-APPELLANT-PETITIONER

v.

Totapitiya Arachchige Abeypala.

Deheragoda, Ellawala.

PETITIONER-RESPONDENT-RESPONDENT

BEFORE:-S.E.WANASUNDERA, PCJ.

UPALY ABEYRATHNE, J. &

H.N.J.PERERA, J.

COUNSEL:-Darshana Kuruppu with Mrs. Chandrasekera for the Accused-Respondent-Appellant-Petitioner

Ranjan Mendis with B.S Peterson & Asoka C.Kandambi For the Petitioner-Respondent-Respondent

ARGUED ON:-05.07.2016

DECIDED ON:-04.11.2016

H.N.J.PERERA, J.

The Petitioner was charged before the Magistrate Court of Avissawella for committing the following offences.

a. That the accused with persons unknown to prosecution on or about 29.05.1991 did voluntarily cause grievous hurt to Thotapitiya

Arachchige Abeypala by physically assaulting and thereby committed an offence punishable under section 316 of the Penal Code.

b. That the aforesaid person on or about 29.05.1991 did voluntarily cause grievous hurt to Lekamlage Dayananda Jayaweera by assaulting him with clubs and thereby committed an offence punishable under Section 314 of the Penal Code.

The Magistrate after trial delivered judgment on 25.09.1998 acquitting the Accused and being aggrieved by the said judgment the Respondent preferred a Revision Application to the High Court of Avissawella.

It was contended on behalf of the Petitioner that the judgment of the Learned Magistrate was illegal, contrary to law, and the Accused-Respondent should have been convicted at least on the principle of the common intention as charges were framed on that basis as there was evidence of police assault. It was further submitted that the Learned trial Judge had gravely misdirected himself on a very vital matter, when he stated that the Doctor's evidence corroborated with the defence position, when in fact in his evidence, though the Doctor has said, when it was suggested to the Doctor that the injuries could have resulted from a fall, he finally expressed the view that the injuries were most probably the result of an assault.

It was also the position of the Petitioner that the learned trial Judge has failed to consider the effect of a charge based on common intention, a vital omission which has necessarily resulted in miscarriage of justice in the light of the findings of the Judge.

The learned High Court Judge on 14.06.200 delivered his judgment ordering a re-trial. The learned High Court Judge in his judgment held that a substantial error of law has been committed and that the erroneous decision reached by the learned trial Judge could be

considered as exceptional circumstances. It was further held that the learned trial Judge has clearly failed to consider the evidence based on common intention and failed to consider the applicability of Section 32 of the Penal Code and that the failure of the Magistrate to consider the effect of the charges based on common intention amounts to a miscarriage of justice.

Aggrieved by the said judgment of the Learned High Court Judge, the Petitioner preferred an appeal to the Court of Appeal. The Court of Appeal delivered judgment on 06.10.2011 dismissing the Petitioner's appeal and affirming the High Court Judge's order of re-trial.

Aggrieved by the said Judgement of the Court of Appeal the Petitioner filed a special leave to appeal application stating that the facts and law have been erroneously applied to dismiss the Petitioner's appeal, resulting in a grave miscarriage of justice.

This Court having heard the submissions of the Counsel for the Petitioner, granted special leave to appeal on the questions of law set out in paragraph 25 (1),(2),(3),(4),(5),(6), and (7) of the prayer to the Petition.

(I) Whether their Lordships of the Court of Appel has failed to consider, that the accused-Respondent-Appellant-Petitioner cannot be convicted under common intention, when in fact the Magistrate has not framed a charge sheet against the Accused-Respondent-Appellant-Petitioner whereas the trial was commenced on the plaint filed by the police.

(II) Whether their Lordships of the Court of Appeal has failed to consider, that the Petitioner-Respondent-Respondent has failed to comply with the Supreme Court Rules, when he filed the Revision Application at the High Court of Avissawella?

(III) Whether their Lordships of the Court of Appeal has failed to consider that the learned High Court Judge has misdirected himself on law by holding that a substantial error of law has being considered as an exceptional circumstance and erroneous decision reached by the trial Judge could be considered as exceptional circumstances.

(IV) Whether their Lordships of the Court of Appeal has failed to consider that the learned High Court Judge has misdirected himself on law by holding that the Magistrate had not considered the existence of common intention from the conduct of the assailants and participation in the commission of the offence by the Accused.

(V) Whether their Lordships of the Court of Appeal has failed to consider that the learned High Court Judge has misdirected himself on law by holding that the learned Magistrate should have considered the crucial test as to the applicability of constructive liability under Section 32 of the Penal Code, i.e the phrase "in furtherance of the common intention of all".

(VI) Whether their Lordships of the Court of Appeal has failed to consider that the learned High Court Judge has misdirected himself on law by holding that the failure of the Magistrate to consider the effect of the charges based on common intention amounts to miscarriage of justice.

(VII) Whether their Lordships of the Court of Appeal has failed to consider that Jayaweera's statement had not been marked by the prosecution and as such ordering a re-trial for an offence allegedly committed in 1991 violates the Petitioner's right to a fair trial.

The leave to appeal application was supported in this Court on 12.12.2011 and the Court granted special leave to appeal on the

questions of law set out in Paragraph 15 (1) to (7) in the prayer to the petition. When this matter came up for argument on 05.06.2012 the Counsel for the Respondent-Respondent raised the following preliminary objections as to the maintainability of this application.

(a)Has the jurisdiction of this Court been invoked contrary to the provisions of Section 360(1) of the Criminal Procedure Code Act, in so far as the Attorney-General is not made a party.

(b)In any event, in so far as the impugned order has been made in

Proceedings where the Attorney-General was a party, has the Petition of Appeal filed before the Supreme Court been filed in compliance with the Rules of this Court.

After granting leave the Court had stated that the said preliminary objections would be considered at the stage of hearing. I would now deal first with the preliminary objections taken by the Petitioner-Respondent-Respondent in this case.

The contention of the learned Counsel for the Respondents was that the Appellant had failed to name the Attorney-General, as a party respondent in the appeal to the Supreme Court. It was contended that the appellant had not complied with Rule 4, 28(1) and 28(5) of the Supreme Court Rules of 1990. Accordingly learned Counsel for the Respondent-Respondent moved that this appeal be dismissed *in limine*.

Chapter XIV of the Code of Criminal Procedure Act deals with the commencement of proceedings before the Magistrate's Courts and Section 136(1) a refers to the fact that proceedings in a Magistrate's Court shall be instituted on a complaint being made orally or in writing to a Magistrate of such Court that an offence has been committed which such Court has jurisdiction either to inquire into or try such complaint.

In Attorney-General V. Herath Singho (1948) 49 N.L.R 108, it was held that in Section 199 of the Criminal Procedure Code the word "complainant" must mean the person who makes the "complaint" to the Magistrate. The aggrieved person or persons or the police, who have been induced by the aggrieved person or persons, could take up the grievance before Court. It was further held by Dias, J. that if the aggrieved person or persons desire to be the 'Complainant', section 148 (1) (a) gives him or them the right to make a "complaint" orally or in writing provided that such "complaint" , if in writing, shall be drawn and countersigned by a pleader and signed by the complainant. If the aggrieved person or persons desire to be the 'complainant' the Code of Criminal Procedure Act would give him the right to make a 'complaint' making himself the 'complainant'. 'Complainant' means the person, who makes the complaint before Court. Considering the applicability of the word 'complainant' defined in Section 2 of the Code of Criminal Procedure Act in relation to other relevant sections of the Code ,Dias ,J was of the opinion that the 'Aggrieved person or persons, could take up the grievance before Court. On the other hand the aggrieved person or persons may, without exercising their right to make a complaint in terms of the Code of Criminal Procedure Act, state their grievances to the police, who after inquiry decides to take up the case and institute proceedings on their own, the said police would file their 'complaint' and is clear that the police officers, who instituted the proceedings would become the complainant. The aggrieved person would cease to be the 'complainant' in such situations.

In Nonis v. Appuhamy 27 NLR 430, too it was held that "…..for the institution of proceedings by complaint or written report, the person making the complaint or written report is regarded as the party instituting the proceedings against the accused person".

As stated earlier in terms of section 136(1) of the Code of Criminal Procedure Act, the proceedings before the Magistrate's Court would commence after the institution of a complaint being made to the Magistrate. Therefore it is quite clear that a person who makes such a complaint to the Magistrate would be regarded as a 'complainant'.

In the instant case it is not in dispute that on a complaint made by the Petitioner-Respondent-Respondent Thotapitiya Arachchige Abeypala on 29.05.1991 against the Accused-Respondent-Appellant and some other unknown persons about an assault to the Ratnapura police station, the Officer-in charge of the Criminal Investigation Department of the Ratnapura police station has investigated into the said complaint made by the Petitioner-Respondent-Respondent and have instituted action against the Accused-Respondent-Appellant for causing grievous hurt to the Petitioner-Respondent-Respondent and simple hurt to one C.L.Dayananda Jayaweera . The said case number is 68396. Therefore it is evident that the person who made the complaint to the Magistrate Ratnapura is the Officer-in-charge of the Criminal Investigation Division of the Ratnapura police station.

Section 360(1) of the Criminal Procedure Code Act enacts that the Attorney-General shall appear for the state in every appeal to the Court of Appeal under this Code to which the state or a public officer is a party and all such documents, exhibits and other things connected with the proceedings as the Attorney-General may require for the purpose of his duties under this section shall be transmitted to him by the registrar of the court having custody of such documents, exhibits and things. Section 360(2) enacts that the Solicitor-General or a state Counsel…….shall be entitled to appear for the state in place of the Attorney-General in such appeal.

It was submitted by the Counsel for the Petitioner-Respondent-Respondent that the Attorney-General has not even been cited in the (PHC) Appeal filed by the Accused-Appellant in the Court of Appeal and as such there is stark non-compliance with the provisions in section 360 of the Criminal Procedure Code Act.

It was the position of the Counsel for the Accused-Appellant that even though the Attorney-General had not been made as a party, Mr.Rohantha Abeysuriya, S.S.C has appeared for the Attorney-General and as such no whatsoever prejudice was caused to the Respondent.

It is not in dispute that the Attorney-General had not been made a party to this appeal. Therefore it is very clearly seen that the Accused-Appellant in this case has failed to make the 'complainant' to the Magistrate Ratnapura i.e O.I.C.Criminal Investigation Division Ratnapura police station or the Attorney General who represented the said "Complainant" in the High Court Avissawella as a party to this application. It is therefore evident that the Attorney-General has to be regarded as a necessary party to this case, and it is common ground that the Attorney-general has not been made a party to the application before the Supreme Court.

Rule 4 of the Supreme Court Rules 1990, which deals with the applications for Special Leave to Appeal refers to the necessity in naming as the respondents the necessary and relevant parties. The said Rule reads as follows:-

"In every such application, there shall be named as respondent, the party or parties (whether complainant or accused, in a criminal cause or matter, or whether plaintiff, petitioner, defendant, respondent, intervenient or otherwise, in a civil cause or matter), in whose favour the judgment or order complained against was delivered, or adversely to whom such application is preferred, or whose interest may be adversely

affected by the success of the appeal, and the names and present addresses of all such respondents shall be set out in full".

The rule indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the application.

In Ibrahim v. Nadarajah (1991) 1 Sri.L.R 131, where the Supreme court had to consider whether there was a violation of rules 4 and 28 of the Supreme Court Rules, considering the applicability of the Supreme Court Rules and taking the view that a failure to comply with the requirements of **Rules 4** and **28** is necessarily fatal, Dr. Amerasinghe, J further held that:-

"It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected."

Section 28 deals with other appeals, which come before the Supreme Court and the said Rule reads as follows:-

28(1) Save as otherwise specifically provided by or under any laws passed by parliament, the provisions of this Rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal."

28(5) In every such petition of appeal and notice of appeal, there shall be named as respondents, all parties in whose favour the judgment or order complained against was delivered, or adversely to whom such appeal is preferred or whose interests may be adversely affected by the success of the appeal, and the names and present addresses of the appellant and the respondents shall be set out in full."

As stated earlier it is common ground that the Attorney-General who was the 3rd Respondent and who represented the "complainant" the Head Quarter's Inspector, Ratnapura was not made a party to this appeal. It is evident that the Attorney-General, has to be regarded as the representative of the 'complainant' in such an application and therefore is a necessary party to this appeal. In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be adversely affected by the result of the appeal should be made parties.

It is thus apparent that the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules of 1990.

In the instant case the learned Magistrate after trial has proceeded to acquit the Accused-Appellant from the charges against him. Thereafter the Petitioner-Respondent-Respondent has sought permission to appeal against the said decision of the Magistrate from the Attorney General. No sanction to appeal had been granted by the Attorney-General. The Petitioner–Respondent-Respondent had therefore moved in revision against the said judgment of the learned Magistrate making the Attorney-General a party before the High Court of Avissawella. Accordingly it is clearly seen that the Petitioner-Respondent-Respondent has clearly taken steps to make the Attorney-General who represented the 'Complainant' a party to the said Revision Application made to the High Court of Avissawella.

The Accused-Appellant who proceeded to challenge the decision of the learned High Court Judge has clearly failed to make the Attorney-General a party to the said appeal before the Court of Appeal. It is submitted on behalf of the Accused-Appellant that although the Accused-Appellant has failed to name the Attorney-General and make him a party to the said appeal before the Court of Appeal, Mr. Rohantha Abeysuriya , S.S.C.

has appeared for the Attorney-general and as such no whatsoever prejudice was caused to the Respondent. It was submitted that even though Mr.Rohantha Abeysuriya appeared for the Attorney-General he has not made submissions on behalf of the Attorney-General. The very fact that R.Abeysuriya, S.S.C. has appeared for the Attorney General in the said appeal before the Court of Appeal, although the Attorney General was not made a party to the said appeal, clearly demonstrate the fact that the Attorney General was concerned or was interested of the outcome of the said appeal before the Court of Appeal. Anyhow there is nothing before this court to substantiate the fact that R.Abeysuriya S.S.C. in fact appeared before the Court of Appeal.

In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be adversely affected by the result of the appeal should be made parties.

As stated earlier, the "Complainant" in this case the Head Quarter's Inspector, police station, Ratnapura or the Attorney-General who represented the "complainant" in the High Court, Avissawella has not been made a party to this appeal. In the said Revision application before the High Court Avissawella the Attorney-General was a party to the said revision Application and a State Counsel represented the 2nd Complainant-Respondent.

In short the Accused-Appellant in his appeal to the Appeal Court and as well as the Special Leave to Appeal Application before the Supreme Court has clearly failed to make the 'complainant' in this case namely the Head Quarter's Inspector, police station Ratnapura and the Attorney General parties to the said appeals filed by him. The Accused-appellant has clearly failed to comply with the Supreme Court Rules 4 and 28 in presenting this Special Leave to Appeal Application before the Supreme Court.

In Kesara Senanayake V. Attorney General and Another [2010] 1 SRI.L.R 149, Dr. Shirani Bandaranayake, J., held that " The totality of Rules 4, 28(1) and 28(5) of the Supreme Court Rules 1990 indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the appeal. It was further held that:-

"In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be adversely affected by the result of the appeal should be made parties".

Accordingly in terms of the Supreme Court Rules, for the purpose of proper constitution of this appeal, it is vital that the Attorney-General should have been made a party to this appeal. The Accused-Appellant has very clearly failed to comply with the Rules 4 and 28 of the Supreme Court Rules of 1990.

For the reasons aforesaid, I uphold the preliminary objections raised by the learned Counsel for the Petitioner-Respondent-Respondent and dismiss this appeal for non-compliance with Supreme Court Rules.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PCJ.

I agree.

JUDGE OF THE SUPREME COURT

UPALY ABEYRATHNE, J.

I agree.

JUDGE OF THE SUPREME COURT