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 S.128(2) of the Constitution

SC Appeal No.71/2010
SC Spl LA No.289/09
HC Hambantota
Case No.HCA 14/2005
MC Tissamaharama
Case No.58385

Officer-in-Charge
Police Station
Tissamaharama

Complainant

Vs.

1. Poddana Priyankarage Ajith Indika
Nissnsala, Polgahawalan
Debarawewa
Tissamaharama

2. Hewa Thondilage Nissanka
Akkara 80, Uduwila
Tissamaharama

3. Palliyaguruge Premapala
Molakaputana
Tissamaharama

4. Landage Piyatissa
522/35 – Gangasiripura
Tissamaharama

5. Lokuyaddehige Niroshan

Seylan Bank Road
Deberawewa
Tissamaharama

6. Pelaketiyage Sunil Shantha
Molakeuthana
Polgahawalan
Tissamaharama

7. Yaddehi Guruge Damayanthi
403/5 – Molakeputhana Road
Debarawewa
Tissamaharama

8. Weligath Sethuge Indralatha
Lasanthi
Molakeputhana
Tissamaharama

9. Amarasinghe Kankanamge
Aruna Sampath
582/2A – Gangasiripura
Tissamaharama

10. Hewajuan Kankanamage
Ariyatilake
Wijerama
Molakeputhana Road
Polgahawalana
Deberawewa

11. Liyana Arahchige Milton
Mahindapura
Pannagamuwa
Tissamaharama

12. Balagodage Jinasena
Molakeputhana
Deberawewa
Tissamaharama

13. Landage Sanath
553/9 Gangasiripura
Tissamaharama

14. Visanthi Baduge Wimalaratne
Molakeputhana Road
Polgahawalane
Tissamaharama

15. Ananda Madawanarachchi
Molakeputhana Road
Polgahawalane
Tissamaharama

16. Susantha Gunasekera
Molakeputhana Road
Polgahawalane
Tissamaharama

Accused

And

1. Poddana Priyankarage Ajith Indika
Nissnsala, Polgahawalan
Debarawewa
Tissamaharama

2. Hewa Thondilage Nissanka
Akkara 80, Uduwila
Tissamaharama

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Tissamaharama

8. Weligath Sethuge Indralatha
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Molakeputhana
Tissamaharama

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Aruna Sampath
582/2A – Gangasiripura
Tissamaharama

10. Hewajuan Kankanamage
Ariyatilake
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Molakeputhana Road
Polgahawalana
Deberawewa

11. Liyana Arahchige Milton
Mahindapura
Pannagamuwa
Tissamaharama

12. Balagodage Jinasena

Molakeputhana
Deberawewa
Tissamaharama

13. Landage Sanath
553/9 Gangasiripura
Tissamaharama

14. Visanthi Baduge Wimalaratne
Molakeputhana Road
Polgahawalane
Tissamaharama

15. Ananda Madawanarachchi
Molakeputhana Road
Polgahawalane
Tissamaharama

16. Susantha Gunasekera
Molakeputhana Road
Polgahawalane
Tissamaharama

Accused-Appellants

Vs.

1. The Officer-in-Charge
Police Station
Tissamaharama

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

Respondents

And Now Between

1. Amarawansa Manawadu alias Sunil
"Punchi Bangalawa"

Halambagaswala
Tissamaharama

(Since deceased)

2. Dr. Gallage Udayapala de Silva (of)
No.51 Darbyshire Road
Mt. Waverly
Victoria 3149
Melbourne
Australia

(and also of)

No.2B – De Silva Road
Kalubowila
Dehiwala

Aggrieved Party-
Virtual Complainant-Petitioner

Vs.

1. Poddana Priyankarage Ajith Indika
Nissnsala, Polgahawalan
Debarawewa
Tissamaharama

2. Hewa Thondilage Nissanka
Akkara 80, Uduwila
Tissamaharama

3. Palliyaguruge Premapala
Molakaputana
Tissamaharama

4. Landage Piyatissa
522/35 – Gangasiripura

Tissamaharama

5. Lokuyaddehige Niroshan
Seylan Bank Road
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6. Pelaketiyage Sunil Shantha
Molakeuthana
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Tissamaharama

7. Yaddehi Guruge Damayanthi
403/5 – Molakeputhana Road
Debarawewa
Tissamaharama

8. Weligath Sethuge Indralatha
Lasanthi
Molakeputhana
Tissamaharama

9. Amarasinghe Kankanamge
Aruna Sampath
582/2A – Gangasiripura
Tissamaharama

10. Hewajuan Kankanamage
Ariyatilake
Wijerama
Molakeputhana Road
Polgahawalana
Deberawewa

11. Liyana Arahchige Milton
Mahindapura
Pannagamuwa
Tissamaharama

12. Balagodage Jinasena

Molakeputhana
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13. Landage Sanath
553/9 Gangasiripura
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Tissamaharama

15. Ananda Madawanarachchi
Molakeputhana Road
Polgahawalane
Tissamaharama

16. Susantha Gunasekera
Molakeputhana Road
Polgahawalane
Tissamaharama

Accused-Appellant-Respondents

1. The Officer-in-Charge
Police Station
Tissamaharama

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

Respondent-Respondents

Before : **Sisira J De Abrew J**
Upaly Abeyrathne J
Anil Gooneratne J

Counsel : Ranjan Mendis with B.S. Peterson and
Ms. A.C. Kandambi for the Aggrieved Party Virtual Complainant-Appellant

W. Dayaratne PC with Ms. R. Jayawardena for the Accused-Appellant-Respondents

A.R.H. Bary SC for the Respondent-Respondents

Argued on : 24.01.2017

Written Submissions
Tendered on : 21.03.2011 by the Accused-Appellant-Respondents
30.08.2010 by the Aggrieved Party Virtual Complainant-Appellant

Decided on : 30.6.2017

Sisira J De Abrew J

This is an appeal against the judgment of the High Court dated 04.11.2009 wherein he acquitted the accused-appellant-respondents (hereinafter referred to as the accused-respondents).

The accused-respondents were convicted by the learned Magistrate on Charge No.1 (a charge of trespass punishable under Section 433 read with Section 146 of the Penal Code), on Charge No.2 (a charge of mischief punishable under Section 409 read with Section146 and 408 of the Penal Code) and on Charge No.3 (a charge of being members of an unlawful assembly punishable under Section 140 read with Section 138 of the Penal Code). They were, on Charge No.1, ordered to pay a fine of Rs.1000/-. On Charge No.2 they were ordered to pay a fine of Rs.1000/-. On Charge No.3 they were sentenced to 6 months rigorous imprisonment suspended for 10 years.

Being aggrieved by the judgment of the learned Magistrate the accused-respondents appealed to the High Court. High Court, by its judgment dated 04.11.2009, set aside the conviction and the sentence. Being aggrieved by the said judgment of the High Court, the aggrieved party has appealed to this Court. This Court by its order dated 21.07.2010, granted leave to appeal on questions of law set out in paragraph 30(a) to 30(f) of the petition of appeal dated 14.02.2009 which are stated below-

a. Where the charge sheet in a Magistrate's Court contains a charge of unlawful assembly or being a member of an unlawful assembly (in terms of s.138 read with 140 etc) does it become a legal requirement for the prosecution to file a non-settlement certificate under the Mediation Boards Act No 72 of 1988 (as amended) in order to maintain their action?

b. In the course of a trial before the Magistrate's Court, if a charge against the accused is amended by the Magistrate on his own accord, is it

imperative that a fresh charge sheet with a fresh plaint should be annexed to the record?

c. In the course of a trial before the Magistrate's Court, if a charge against the accused is amended by the Magistrate on his own accord, is it imperative that the Magistrate shall order a fresh trial?

d. Did the charge sheet in the instant matter contain a charge where it was averred that an offense punishable under s.138 read with 140 of the Penal Code has been committed?

e. At all events, is it possible in law to convict an accused, even in a situation where the charge sheet mentions only the section which spells out the definition (without mentioning the punitive section)?

f. When there is a change of Magistrate midway in the course of a trial, in terms of the proviso to s.267 of the Criminal Procedure Code, is there a burden on the trial judge to offer the option of a fresh trial to the accused person or is it a right which the accused or his counsel could exercise by demanding a fresh trial?

This Court also allowed the following question of law raised by learned President's Counsel appearing for the accused-respondents.

> "Is the aggrieved party virtual complainant–petitioner entitled in law to seek appeal against the order of the learned Provincial High Court Judge made in the exercise of its appellate jurisdiction?"

I would first like to consider the question of law raised by the learned President's Counsel for the accused-respondents. In considering the said

question of law it is relevant to consider Section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 which reads as follows:-

9 *"Subject to the provisions of this Act or any other law, any person aggrieved by-*

(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; and

(b) a final order, judgment or sentence of a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction conferred on it by paragraph (3) (a), or (4) of Article 154P of the Constitution may appeal therefrom to the Court of Appeal."

Article 154P (3) (b) reads as follows:-

(3) *"Every such High Court shall –*

(b) notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts any Primary Courts within the Province;"

The impugned order of the High Court in the present case was made in the exercise of its appellate jurisdiction. Therefore, it is an order made after invoking the jurisdiction under Article 154P (3) (b) of the Constitution. When this Court granted leave to appeal, this Court had decided that this case was fit for review by the Supreme Court. When I consider the above legal literature I hold that an aggrieved party complainant-petitioner (hereinafter referred to as aggrieved party petitioner) is entitled to appeal to the Supreme Court against the impugned order. I answer the above question of law in the following language.

"The aggrieved party virtual complainant-petitioner is entitled in law to appeal to the Supreme Court against the order of the Provincial High Court made in the exercise of its appellate jurisdiction"

The charge sheet in this case was amended. The learned High Court Judge concluded that the amended charges were not read out to the accused by the learned Magistrate. Section 167 (1) and (2) of the Criminal Procedure Code reads as follows:-

> **167** (1) *Any court may alter any indictment or charge at any time before judgment is pronounced or, in the case of trials before the High Court by a jury, before the verdict of the jury is returned.*
>
> (2) *Every such alteration shall be read and explained to the accused.*

It is a requirement under the law when the charge sheet or indictment is amended, amended charge sheet or the indictment should be read and explained to the accused. Although the learned High Court Judge concluded that the amended charge sheet had not been read out to the accused-respondents, page 125 of the appeal brief reveals that the learned Magistrate had read out the amended charge sheet to the accused-respondents and they had pleaded not guilty to the charges. Therefore the learned High Court Judge, in my view, was in error when he reached the above conclusion.

The learned High Court Judge in his judgment concluded that the learned Magistrate under Section 167 of the Criminal Procedure Code cannot change a portion of the charge. Under Section 167 of the Criminal Procedure Code amendment of a charge or an indictment is permitted. Can an amendment of a charge be effected without changing a portion of a charge?

This question has been answered in the negative. The High Court Judge has fallen into error when he reached the above conclusion. What was the amendment effected in this case? The learned Magistrate deleted Section 32 of the Penal Code and inserted Section 146 of the Penal Code. Thus, this amendment cannot cause prejudice to the accused-respondents. In ***Doole v. Republic of Sri Lanka*** *(78-79) 2 SLR page 33* the Court of Appeal held –

> *''As a rule an amendment or an indictment should be allowed if it would have the effect of convicting the guilty or securing the acquittal of the innocent but it should not be allowed if it would cause substantial injustice or prejudice to the accused.''*

In my view the learned High Court Judge would not have fallen into the above error if he considered the principles enunciated in the above judicial decision. The learned High Court Judge concluded that failure to order a new trial under Section 169 of the Criminal Procedure Code by the learned Magistrate when the charge sheet was amended had caused prejudice to the accused-respondents. Section 169 of the Criminal Procedure Code reads as follows:-

> **169.** *"If the alteration made under section 167 is such that proceeding immediately with the trial is likely in the opinion of the court to prejudice the accused or the prosecutor as aforesaid, the court may either direct a new trial or adjourn the trial for such period as may be necessary."*

As I pointed out earlier amendment to the charge sheet had not caused prejudice to the accused-respondents. When amended charge sheet was read out to the accused, the lawyer appearing for the accused-respondents had not even asked for a new trial or an adjournment of the trial. Thus, what is the basis on which the learned High Court Judge came to the conclusion that the failure on the part of the Magistrate to order a fresh trial had caused prejudice to the accused-respondents? There is no basis. When I consider the above matters, I hold that the learned High Court Judge had fallen into grave error when he reached the above conclusion.

The learned High Court Judge came to the conclusion that the identity of the accused-respondents has not been proved by the prosecution. But Rathnayake Koralage Danny in his evidence had identified all the accused in Court. His evidence with regard to the identity of the accused was corroborated by Lunuhewage Sirisena. When I consider the above evidence I hold the view that the learned High Court Judge had fallen into grave error when he reached the above conclusion. The learned High Court Judge concluded that as the accused-respondents have been charged under Section 433 and 409 of the Penal Code the case should have been referred to the Mediation Board and a non-settlement certificate under Section 14 (A) and/ or 12 should have been produced before the Magistrate and that the Magistrate did not have jurisdiction to proceed with the case without the said non-

settlement certificate being filed in Court. I now advert to this contention. The second schedule of the Mediation Board Act No.72 of 1988 does not include offence under Section 140 of the Penal Code. The 3rd Charge leveled against the accused-respondents is a charge under Section 140 of the Penal Code. When one charge of a charge sheet comes within the schedule of the Mediation Board Act and the other charge does not come within the schedule of the Mediation Board Act, should such a case be referred to the Mediation Board? If this question is to be answered in the affirmative when an accused person is charged for robbery of a bank and for causing mischief (a charge under Section 409 of the Penal Code) the case should then be referred to the Mediation Board and a non-settlement certificate should be filed. Robbery of a bank cannot be settled by Mediation Board. If the accused is convicted for robbery of a bank the Magistrate or the High Court Judge as the case may be will have to impose a punishment. In a case of this nature, if Mediation Board Act procedure is adopted it will be a waste of time and would contribute to the laws delays in the country. In my view this is not what the legislature intended and the Mediation Board Act was enacted. Therefore the above question cannot be answered in the affirmative. Considering the above matters, I hold that when one charge of a charge sheet comes within the schedule of the Mediation Board Act and the other charge does not come within the said schedule, such a case need not be referred to the Mediation Board and a non-settlement certificate from the Mediation Board is not necessary. For the above reasons I hold that the learned High Court Judge had fallen into grave error when he reached the

above conclusion. For the aforementioned reasons I answer the questions of law raised in paragraphs 30(a) to 30(c) in the negative. The questions of law set out in paragraphs 30(d) to 30 (f) do not arise for consideration.

For the aforementioned reasons I hold that the judgment of the learned High Court Judge cannot be permitted to stand. I therefore set aside the judgment of the learned High Court Judge dated 04.11.2009 and affirm the judgment of the learned Magistrate dated 17.01.2005.

Judgment of the High Court Judge set aside.

Judgment of the Magistrate affirmed.

Judge of the Supreme Court

Upaly Abeyrathne J

I agree.

Judge of the Supreme Court

Anil Gooneratne J

I agree.

Judge of the Supreme Court