

**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 128 of the Constitution
of the Democratic Socialist Republic of Sri Lanka

Supreme Court Case Nos.
SC SPL.LA.125/2014
SC SPL.LA: 126/2014
Court of Appeal Case No;
95/2011 A, B, C
High Court Avissawella
Case No.58/2006

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

Complainant

-Vs-

1. Singappuli Arachchilaege Rumesh
Sameera Dasanayake alias
Gaminige Kolla
2. Baduwala Wahumpurage
Podinona
3. Kalanchidevage Suresh Nandana

Accused.

AND BETWEEN

1. Singappuli Arachchilage Rumesh
Sameera Dasanayake alias
Gaminige Kolla
2. Baduwala Wahumpurage
Podinona
3. Kalanchidevage Suresh Nandana

Accused-Appellants

-VS-

The Honourable Attorney General
Attorney Generals' department,
Colombo – 12

Complainant-Respondent

AND NOW BETWEEN

1. Singappuli Arachchilage Rumesh
Sameera Dassanayake alias
Gaminige Kolla
2. Baduwala Wahumpurage
Podinona
Accused-Appellant-Petitioners
(SC SPL LA 126/2014)

Kalanchidevage Suresh Nandana
3rd Accused-Appellant-Petitioner
(SC SPL LA 125/2014)

-Vs-

The Honourable Attorney General
Attorney Generals' department,
Colombo – 12

**Complainant-Respondent-
Respondent**

BEFORE: BUWANEKA ALUWIHARE, PC, J,
PRIYANTHA JAYAWARDENA, P.C. J &
NALIN PERERA, J.

COUNSEL: Anil Silva, PC for Petitioner in SC SPL. LA No.125/14
Shanaka Ranasinghe, PC for Petitioners in SC SPL.LA No.126/14
Dappula De Livera P.C, ASG for AG.

ARGUED ON: 12.10.2016

DECIDED ON: 27-03-2018

ALUWIHARE P.C.J,

Both, SC/SPL/LA 125/2014 and SC/SPL/LA126/2014 are applications, seeking special leave to appeal from the Supreme Court. The Petitioner in SC/SPL/LA 125/2014 was the 3rd accused appellant in the Court of Appeal case

No.95/2011 while the Petitioners in application No SC/SPL/LA126/2014 were the 1st and 2nd Accused Appellants in the same case.

The present applications before this court relate to a matter where the petitioner in SC SPL LA 125/2014 and the Petitioners in SC SPL 126/2014 have been convicted for the offence of murder and visited with the capital punishment. The Court of Appeal did not think it fit to interfere with the findings of the High Court.

Aggrieved by the judgment delivered by the Court of Appeal dismissing the appeal of the petitioners in the said case, they had sought special leave under the case numbers referred to above. When these two applications were taken up for support, the learned Additional Solicitor General raised a preliminary objection based on noncompliance with Rule 3 of the Supreme Court Rules of 1990 on the ground that Rule 3 requires the petition to contain a plain and concise statement of all such facts and matters as are necessary to enable the Supreme Court to determine whether special leave to appeal should be granted and that the petition in the present application is bereft of any such facts.

He further contended that the averments of the petition contain only the offences on which the petitioner was indicted, the fact that the Petitioner was convicted by the High Court, the fact that he appealed against the said judgement to the Court of Appeal and that the Court of Appeal dismissed his appeal. As such, the learned ASG argued that this application should be dismissed *in limine* due to non-compliance of Rule 3 aforesaid by a single judge in terms of Rule 10 (1) of the said Rules. The learned ASG drew the attention of this court to Rule 10 of the Supreme Court Rules in terms of which a single judge sitting in chambers can refuse to entertain such application, among other reasons, for non-compliance with the Rules.

Although the petition, *prima facie*, appears to be defective to the extent that it does not carry a concise statement of facts as required by Rule 3, the Petition, however, does states the grounds on which special leave to appeal is sought and

the questions of law for the consideration of the Court in relation to this application, and those averments are contained in paragraphs 11 and 12 of the said Petition.

The main grounds of appeal referred to in paragraph 11 are;

Learned Judges of the Court of Appeal failed to appreciate that the entirety of the evidence led at the trial in the High Court does not justify the conviction of the Petitioners of the charges in the indictment; and

The failure on the part of the court of Appeal to consider the items of evidence in favour of the Petitioners which negative his participation in the incidents.

It is also urged that the Court of Appeal misdirected itself in holding that the conviction of the Petitioners in respect of the murders of Hettiarachchige Susantha and Hettiarachchige Swarna is correct, although there is no direct or circumstantial evidence to connect the Petitioners with the said murders.

The questions of law arising from the grounds referred to above are contained in paragraph 12 of the petition.

Rule 6 provides that where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document. In the instant application the Petitioners have filed affidavits which, however, are mere repetitions of the same matters referred to in the Petitions.

The question that arises for determination in the context of the preliminary objection is whether the Petitions, seeking special leave to appeal against the impugned judgment, are in compliance with the Rules and whether such compliance is mandatory. Rule 3 is a cardinal principle in drafting the documents which should be complied. This rule is necessary to ensure that the

petitioner places sufficient facts that would facilitate the court to determine the issues raised at the threshold stage of considering granting of special leave to appeal.

In the instant application, it is evident that the petitions in themselves do not contain sufficient material for the court to deliberate on the facts nor the questions of law.

Furthermore, Rule 6 provides that where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document. In the instant application the Petitioners have filed affidavits which, however, are mere repetitions of the same matters referred to in the Petitions.

In response to the preliminary objection raised, both learned president's counsel for the petitioners in their respective submissions contended that the petitioners had, along with the petitions, filed a copy of the entire case record of the High Court inclusive of the copies of the documentary evidence produced at the trial and as such the Supreme Court has been provided with sufficient material and is not deprived to ascertain the facts and matters that would be necessary to determine the issues. Mr. Anil Silva P.C also contended that the age-old practice in the Supreme court in applications of this nature is to file the entire case record of the original court, without elaborating on facts in the petition unless a particular set of facts are directly connected to the question of law raised.

The instant applications, Mr. Anil Silva P.C submitted, is mainly based on the ground of "insufficiency of evidence to establish the charges" which the learned president's counsel submitted can only be ascertained upon consideration of the evidence led at the trial.

It is to be seen that the judgment of the Court of Appeal is annexed and pleaded as part of the appeal. With regard to the compliance of Rule 6, the entirety of the High Court case record has been annexed as a part of the petition.

As the final court of review, the petitioners are now canvassing the legality of the conviction before this court, as the last resort.

In the case of **Kiriwanthe and another v Navaratne** 1990 2 SLR page 293 the Supreme Court considering the non-compliance of Rule 46 of the then Supreme Court Rules, (Rules of 1978) held that

“the requirements of Rule 46 must be complied with normally at the time of filing the application, but strict or absolute compliance is not essential. It is sufficient if there is compliance, which is substantial - this being judged in the light of the object and purpose of the Rule. It is not to be mechanically applied. The Court should first have determined whether the default had been satisfactorily explained, or cured subsequently without unreasonable delay, and then have exercised a judicial discretion either to excuse the non-compliance, or to impose a sanction. Dismissal was not the only sanction. That discretion should have been exercised primarily by reference to the purpose of the Rules, and not as a means of punishing the defaulter. The discretion should be exercised judicially.

In the same case his lordship justice Kulatunga, observed that:

"In exercising its discretion the Court will bear in mind the need to keep the channel of procedure open for justice to flow freely and smoothly and the need to maintain the discipline of the law. At the same time the court will not permit mere technicalities to stand in the way of the Court doing Justice"

His lordship justice Mark Fernando, in the case cited remarked that;

"The weight of authority thus favours the view that while all these Rules (Rules 46, 47, 49, 35) must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default. The consequence of noncompliance (by reason of impossibility or for any other reason) is a matter falling within the discretion of the Court, to be exercised after considering the nature of the default, as well as the excuse or explanation therefor, in the context of the object of the particular Rule"

His lordship went on to observe (*Ibid*) that *"in the event an applicant, fails to strictly, but manages to substantially comply with a Rule, and in so doing causes no prejudice to the respondent, this Court could examine the circumstances surrounding such default and adopt a reasonable view of the matter, in order to prevent an automatic dismissal of the application."*

In the case of **Nanayakkara v Kyoko Kyuma and two others S.C. (Spl.) L.A. No. 115/2008** (S.C minutes on 01.10.2009), the Court observed that;

"Supreme Court Rules" too should be interpreted in a comparable manner, wherever it permits, in order to avoid the said Rules too becoming a juggernaut car on the fast tract, that would leave a litigant maimed and broken on the road which leads to justice."

It is to be noted that in the cases cited, the Supreme Court did not consider the effect of non-compliance with Rule 3 of the SC Rules, but non-compliance with certain other Rules. The rationale of those decisions, however, in my view is relevant to the alleged non-compliance in the present case before us.

I am of the view that the assertion made on behalf of the Petitioners, that by producing the entire case record, the Petitioners could be said to have substantially met the requirements, in the context of the Rule 3, is not acceptable and cannot be condoned.

Considering the decisions of this court referred to above coupled with the facts and circumstances peculiar to this case, I am, however, of the view that the discretion of the court in this instance should be exercised in favour of the Petitioners and accordingly I overrule the preliminary objection raised by the State.

This decision is applicable to both SC/SPL/LA 125/2014 and SC/SPL/LA 126/2014

JUDGE OF THE SUPREME COURT

JUSTICE PRIYANTHA JAYAWARDENA PC

I agree

JUDGE OF THE SUPREME COURT

JUSTICE NALIN PERERA

I agree

JUDGE OF THE SUPREME COURT

