

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

In the matter of an Appeal in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 59/2021

SC Spl. LA 176/2021

CA Revision Application No:

CA (PHC) APN 50/2021

HC Colombo Case No: HC 6256/2012

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

Complainant

Vs.

Asselage Sujith Rupasinghe,
No. 30/6, Nadun Uyana,
Katukurundugasyaya,
Mirigama.

Accused

AND BETWEEN

Mrs. P.M. Ranasinghe,
21B, Alfred Place,
Colombo 3.

Aggrieved Party – Petitioner

Vs.

1. Asselage Sujith Rupasinghe,
No. 30/6, Nadun Uyana,
Katukurundugasyaya,
Mirigama.

Accused – Respondent

2. The Hon. Attorney General,
Attorney General’s Department,
Colombo 12.

Complainant – Respondent

AND NOW BETWEEN

Mrs. P.M. Ranasinghe,
21B, Alfred Place,
Colombo 3.

Aggrieved Party – Petitioner – Appellant

Vs.

1. Asselage Sujith Rupasinghe,
No. 30/6, Nadun Uyana,
Katukurundugasyaya,
Mirigama.

Accused – Respondent – Respondent

2. The Hon. Attorney General,
Attorney General’s Department,
Colombo 12.

Complainant – Respondent – Respondent

Before: S. Thurairaja, P.C., J
Achala Wengappuli, J
Arjuna Obeyesekere, J

Aggrieved Party – Petitioner – Appellant appeared in person

Counsel: Sajith Bandara, State Counsel for the Attorney General

Argued on: 15th February 2022

Written Submissions: Tendered on behalf of the Aggrieved Party – Petitioner – Appellant
on 18th February 2022

Tendered on behalf of the Attorney General on 9th March 2022

Decided on: 8th April 2022

Arjuna Obeyesekere, J

In this appeal, the Aggrieved Party – Petitioner – Appellant [*the Appellant*] is seeking to set aside an order delivered by the Court of Appeal on 28th April 2021, by which the Court of Appeal refused to issue notice on the Respondents in a revision application filed by the Appellant in respect of an order of the High Court of Colombo.

The facts of this appeal very briefly are as follows.

On 19th September 2012, the Attorney General forwarded indictment against Asselage Sujith Rupasinghe, the Accused – Respondent – Respondent [*the Accused*], to the High Court of Colombo on six charges. The gravamen of the said charges was that the Accused, together with Bulathsinalage Gunasinghe Cooray and others unknown to the prosecution had conspired to, and prepared, two forged deeds in respect of premises No. 21A, Alfred Place, Colombo 3 belonging to the Appellant.

The trial before the High Court commenced on 25th July 2016. The prosecution led the evidence of the Appellant and ten others, prior to closing its case. In his evidence, the Accused, who had served as a Reserve Police Officer for some time, denied the several charges against him and stated that he purchased the aforementioned property from the said Cooray, who had claimed that the said property belonged to him. It was the position of the Accused that he had been cheated by Cooray into believing that the said property was owned by Cooray.

The Accused had stated that on 16th October 2016, he had seen an obituary notice containing the photograph of a person by the name of E.S. Thanthrige who the Accused claimed was in fact the person who sold the said property to him – i.e., Cooray. The Accused claims that he brought this information to the notice of the investigating officer. He had stated further that he had gone to the address displayed on the obituary notice and found that Cooray's actual name was E.S. Thanthrige and that the said person was a fraudster who had a similar case against him. In cross examination, the Accused admitted that the alleged sighting of Cooray/E.S. Thanthrige had happened while the prosecution case was proceeding before the High Court.

After the evidence of the Accused was concluded on 15th November 2016, an application had been made to call *inter alia* the following persons on the list of witnesses filed on behalf of the Accused:

- a) The Director of the Criminal Investigation Department [CID] to give evidence with regard to a letter dated 31st October 2016 sent by the Accused wherein he had asked that an investigation be done in respect of E.S. Thanthrige [witness No. 2];
- b) Renuka Damayanthi to give evidence relating to the death of E.S. Thanthrige [witness No. 3];
- c) Mangala Deepal, Attorney-at-Law, who attested Deed No. 894 by which the Accused is said to have purchased the property from Cooray [witness No. 4];

- d) Deepthi Premalal to give evidence with regard to Deed No. 894 and the death of E.S. Thanthrige [witness No. 5].

The application to call witness No. 2, the Director of the CID, had been refused by the High Court on the basis that the evidence that the witness was required to give must relate to the period prior to the service of the indictment, which was not the case with regard to witness No. 2. The prosecution had also objected to witness Nos. 4 and 5 being called to give evidence as they had already been called by the prosecution and had been subjected to extensive cross-examination. The High Court had upheld the said objection and by its Order delivered on 16th November 2016, refused the application to call witness Nos. 4 and 5. The High Court had thereafter issued summons on witness Nos. 3 and 7-12 on the list of witnesses filed on behalf of the Accused, although the Attorney-at-Law for the Accused had informed that he would be filing an amended list omitting the names of witness Nos. 8, 9 and 10.

Aggrieved by the said Orders of the High Court refusing permission to summon witness Nos. 2, 4 and 5, the Accused had invoked the revisionary jurisdiction of the Court of Appeal in terms of Article 138 of the Constitution, seeking *inter alia* (a) to revise the aforementioned orders of the High Court, and (b) an order directing the High Court to issue summons on witness Nos. 2, 4 and 5. By its judgment delivered in CA/PHC Application No. 148/2016 on 26th July 2017, the said application had been refused by the Court of Appeal.

In the course of its judgment, the Court of Appeal had held as follows:

“This Court cannot think of any advantage that would accrue to the defence even if the Accused succeeds in establishing that it was late E S Thanthrige who deceived him, since what the indictment alleges is that the said person is a fictitious person. Indeed, it is noteworthy that what the indictment has alleged is that the Accused had conspired with a person said to be Bulathsinalage Gunasinghe Cooray or a person unknown to the prosecution.

The Accused has already testified in his evidence, the position taken by him in this regard. The Notary Public who attested the alleged forged deed in his evidence has already stated that he does not know the alleged seller Gunasinghe Cooray. It is his position that he personally knew the Accused who introduced a person said to be Gunasinghe Cooray. Thus, it is the view of this Court that the question whether the person said to be Gunasinghe Cooray is still alive or now dead, would not help either party in this case. It is the view of this Court that such fact would be neither a fact in issue nor relevant to any fact in issue. One has to bear in mind that Section 5 of the Evidence Ordinance only permits evidence relating to existence or non-existence of a fact in issue and such other facts as are declared relevant to any fact in issue."

The Accused thereafter sought Special leave to appeal against the said judgment from this Court – *vide* SC Spl. LA Application No. 197/2017 – on five questions of law, including the following: *"Did the Court of Appeal err in concluding that even if the defense were to prove that E.S. Thanthrige was not a fictitious person, there would be no advantage to the defence case?"*

The application for Special leave to appeal had been refused on 25th October 2017.

The trial before the High Court commenced on 2nd February 2021 for the resumption of the case for the defence. The Accused was present in Court. The Attorney-at-Law looking after the interests of the Appellant had moved that an order be made refusing the application to call the aforementioned witness No. 3, Renuka Damayanthi who, as noted above, had been listed to give evidence relating to the death of E.S. Thanthrige. The Senior State Counsel appearing for the prosecution had however stated that she had no objection to the evidence of the said witness being led. The above application of the Appellant had been rejected by the High Court on the following basis:

- a) The Court of Appeal had refused the application to call witness Nos. 4 and 5 on the basis that their evidence had already been led when they were called as witnesses for the prosecution;

- b) Witness No. 3 is not such a witness and one does not know what evidence is to be elicited from witness No. 3;
- c) While the right of an accused to a fair trial will be affected by the refusal to call a witness on his behalf, in this instance, no prejudice will be caused to the Appellant by the said witness being called.

Although the Appellant had made an application to revise the above order, the Court of Appeal, by its Order delivered on 28th April 2021 in CA/PHC Application No. 50/2021 had refused to issue notice on the Accused and the Attorney General on the basis that there was no *“exceptional illegality in the order of the learned High Court Judge which shocks the conscience of this Court.”*

Aggrieved by the said Order, the Appellant sought and obtained Special leave to appeal from this Court on the following question of law:

“Did the Court of Appeal err in law and fact in failing to consider that the Court of Appeal had in CA/PHC Application No. 148/2016 held that, whether Gunasinghe Cooray is dead or alive is neither a fact in issue nor a relevant fact in issue in this case?”

Notices had been dispatched to the Accused, on one occasion prior to this matter being supported and thrice thereafter. The Accused however was neither present nor represented before this Court, although he had been enlarged on bail by the High Court.

It was the submission of the Appellant who appeared before us in person that the High Court was correct when it held that the judgment of this Court in CA/PHC Application No. 148/2016 related to three witnesses who had already been called as witnesses for the prosecution. The Appellant, however, contended that the High Court had erred, when it failed to consider the following:

- a) The purpose of calling witness No. 3 had specifically been set out in the list of witnesses filed by the Accused – namely to produce documents relating to the death of E.S. Thanthrige and give evidence relating thereto – and therefore the reason for

calling the said witness was known;

- b) That part of the said judgment of the Court of Appeal, which held that whether Gunasinghe Cooray, whom the Accused now claims is E. S. Thantrige, is dead or alive would not help either party as such fact would be neither a fact in issue nor relevant to any fact in issue;
- c) That even though a question of law had been raised in that regard, Special leave to appeal had been refused by this Court;
- d) That there was no basis to call a witness whose evidence is not relevant.

She therefore submitted that the said Order of the High Court was illegal and that the Court of Appeal had misdirected itself when it held that it did not see any illegality in the order of the High Court.

The learned State Counsel, referring to the evidence of the Accused where he attempted to establish that the real name of Cooray was E.S. Thantrige, submitted that witness No. 3 is not a witness to the forged deed and is therefore unable to give any evidence regarding the complicity or the non-complicity of the Accused relating to the offences set out in the indictment. He submitted further that the death of E.S. Thantrige would not prove either the existence or non-existence of the facts in issue nor any other fact relevant to the charges in the indictment, and therefore the evidence of witness No. 3 has no relevance to the trial before the High Court. He drew the attention of this Court to Section 5 of the Evidence Ordinance, which provides that, *“Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant and of no others.”*

The learned State Counsel cited the judgment of Chief Justice Basnayake in **Queen v Sodige Singho Appu** [62 NLR 112], where it was held as follows:

“The Evidence Ordinance lays down strict limits within which evidence may be given in any suit or proceeding. Evidence may be given of the existence or non-existence of

every fact in issue and of such other facts as are declared by the Ordinance to be relevant and of no others (Section 5). Evidence admitted in disregard of Section 5 is evidence improperly admitted and a conviction is liable to be quashed if such evidence has resulted in a miscarriage of justice.”

The issue before us is limited to whether the Appellant had established an illegality in the order of the High Court which warranted the Court of Appeal to exercise its discretion and issue notice on the Respondents.

The power of revision is an extraordinary power. A person invoking the revisionary jurisdiction of the Court of Appeal must, *inter alia*, (a) demonstrate the error or illegality on the face of the record, which would occasion a failure of justice; and (b) plead and establish exceptional circumstances warranting the exercise of revisionary powers in order to succeed with his or her application. The presence of exceptional circumstances is the process by which the court selects the cases where the extraordinary power of revision should be exercised.

Rule 3(3) of the Court of Appeal (Appellate Procedure) Rules, 1990, read with Rule 3(4) thereof, requires that an application made under Article 138 must be supported in open Court, and that notice will be issued on respondents only thereafter.

In this instance, the Court of Appeal has refused to entertain the application of the Appellant at the threshold stage of issuing notice. In order to have notice issued on the Respondents, the burden cast on the Appellant was to establish a *prima facie* sustainable case and for the Court to be satisfied that there is a *prima facie* case to be looked into. In other words, the Court was only required to be satisfied that the application before it warrants a full investigation at a hearing with the participation of all parties.

Having carefully considered the submissions of the Appellant and the learned State Counsel, the aforementioned material placed by the Appellant before this Court and especially the fact that this Court has refused Special leave to appeal on the aforementioned question of law, it is clear that neither the High Court nor the Court of Appeal have considered that part of the judgment of the Court of Appeal in CA/PHC

Application No. 148/2016 with regard to the relevancy of evidence relating to E.S. Thanthrige.

In the said circumstances, I am satisfied that:

- a) The Appellant has established a *prima facie* case of an illegality which warrants full investigation with the participation of all parties; and
- b) This is a fit matter where the Court of Appeal should have issued notice on the Respondents.

I therefore answer the aforementioned question of law in the affirmative and direct the Court of Appeal to (a) issue notice of the revision application on all Respondents; and (b) expeditiously conclude the hearing of the said revision application since a period of over five years have lapsed since the Accused gave evidence before the High Court.

The appeal is therefore allowed, without costs.

JUDGE OF THE SUPREME COURT

S. Thurai Raja, P.C., J

I agree.

JUDGE OF THE SUPREME COURT

Achala Wengappuli, J

I agree.

JUDGE OF THE SUPREME COURT