

**IN THE COURT OF APPEAL OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Application made  
under section 331 of the Code of Criminal  
Procedure Act No. 15 of 1979.

G.M. Chaminda Bandara

**APPELLANT**

**CA Case No. 263/2012**

**HC. (Batticaloa) Case No. 2333/05**

**Vs**

The Attorney General  
Attorney General's Department  
Colombo 12

**RESPONDENT**

**BEFORE**

: Deepali Wijesundera J.

: L.U. Jayasuriya J.

**COUNSEL**

: Indika Malawarachchi for the  
Accused – Appellant

Ayesha Jinasena S.D.S.G. with

S. Soosaitas S.C. for the

Attorney - General

**ARGUED ON**

: 13<sup>th</sup> December, 2017

**DECIDED ON**

: 12<sup>th</sup> January, 2018

**L. Jayasuriya J.**

The accused appellant was indicted in the High Court of Batticaloa under section 296 of the Penal Code for the murder of two persons named Suneth Prasanna Subasinghe and Rohana Ekanayake respectively. After trial the appellant was convicted and sentenced to death. This appeal is from the said sentence and the conviction.

When the case was taken up for argument the learned counsel for the appellant raised a preliminary objection to the effect that there was non-compliance of section 48 of the Judicature Act on the formal adoption of proceedings.

The learned counsel for the appellant relied on the finding of the **S.C. Special L.A. 03/2015**. In that case the Supreme Court held that *"the court is of the view that the court of appeal had set aside the order made by the learned High Court Judge based on the irregularity with regard to adoption of proceedings. The court is also of the view, under the circumstances the proper order would have been to have the matter sent back for retrial as the Court of Appeal has not decided, the guilt or otherwise, of the Accused - Appellant - Respondent"*.

On a perusal of the above judgment it appears that the High Court case bearing No. 1645/2006 was sent back for retrial with the consent of the parties and therefore one can say that the Supreme Court judgment is a consent judgment. Therefore with great respect we are of the view that we are not bound to follow the above mentioned judgment. In the

instant case it appears from the proceedings that the succeeding Judge has not formally adopted the proceedings.

*Section 43 of the Judicature Act provides that any action, prosecution, proceeding, matter on any inquiry preliminary to the committal for trial or otherwise has been instituted or is pending can be continued before a successor of the Judge, in the case of death, sickness, resignation, removal from office, absence from the Sri Lanka or other disability of the Judge who heard the case or inquiry.*

The powers of the succeeding Judge under section 48 are to Act on the evidence already recorded by his predecessor or to Act on the evidence partly recorded by the predecessor and partly recorded by him or if he thinks fit, to re summon the witnesses and commence the proceedings afresh. It is evident from the above section that it has not imposed any condition either expressly or impliedly that the successor should adopt the already lead evidence. The adoption is automatic.

**Section 89 of the Ordinance No. 1 of 1889 provides thus,**

*"In case of the death, sickness, resignation, removal from office, absence from the Island, or other disability of any Judge before whom any case, suit, action, prosecution, or matter, whether on an inquiry preliminary to committal for trial or otherwise, has been instituted or is pending, such case, suit, action, prosecution, or matter may be continued before the successor of such Judge, who shall have power to act on the evidence already recorded by such first-named Judge of partly recorded by such first-named Judge and partly recorded by*

***himself, or, if he think fit, to re-summon the witnesses and commence afresh. Provided that in any such case, except on an inquiry preliminary to committal for trial, either party may demand that the witnesses shall be re-summoned and re-heard, in which case the trial shall be commenced afresh”.***

In the above section the legislature directs the succeeding Judge to adopt the proceedings and continue with the case. There is no necessity for the recording of formal adoption of proceedings when a successor resumes.

It shows that the formal adoption has been only a practice. Section 48 has been analysed at length in the following cases.

1. **Vilma Dissanayake vs Lesly Dharmarathna 2008 2 SLR 184.** It was held in the case that,

i. *It is necessary for a succeeding Judge to continue proceedings since there are change 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 discretion to a Judge to continue with the proceedings.*

ii. *The exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanor of any witnesses recorded by the Judge who previously heard the case.*

2. In **Herath Mudiyanseelage Ariyaratna vs The Republic CA 307/2006** decided on 17.07.2013 it was held *"that the succeeding Judge should continue with the case without giving reasons"*.

3. In **Millaniya Ranmunige Daniel vs AG CA 164/2007** decided on 27.07.2010 it was held that;

*"under section 48 of the Judicature Act the succeeding Judge has the power to act on the evidence already recorded and thus the rule laid down in section 48 is in favour of an adoption of the proceedings by the succeeding Judge. Even in the absence of a positive record of the fact of the adoption of the evidence, the fact that the succeeding Judge had continued with the proceedings without any objection from either party would tantamount to an adoption of proceedings within the meaning of Section 48 of the Judicature Act"*.

4. In **Kaluwahumpurage Somapala vs the Commission to Investigate into Bribery or Corruption CA(PHC) APN 37/2009** it was held that *"when the successor uses his discretion on whether witnesses should be re-summoned as provided by section 48 of Judicature Act. The succeeding Judge should take such a decision judicially and reasonably."*

The above mentioned judgments further strengthens the position that a succeeding Judge should not formally record the adoption of proceedings. If one party has any objections, that party should take up

the objection when the case is resumed by the succeeding Judge. If there is no objection the adoption of proceeding takes place automatically.

For the forgoing reasons we decide to reject the preliminary objection taken up by the appellant.

**JUDGE OF THE COURT OF APPEAL**

**Deepali Wijesundera J.**

I Agree.

**JUDGE OF THE COURT OF APPEAL**