

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

In the matter of an appeal against the order
of the High Court of Colombo under the
Provision of the Code of Criminal Procedure
Act No. 15 of 1979

Court of Appeal Case No:
CA (PHC) 87/2015 (DEM)
HC Colombo Case No:
HC/RA/187/2012
MC Colombo Case No: **89491/5**

1. Kapila Ratne
2. P.A. Samanmali Senanayake

Accused-Respondents-Appellants

-Vs-

Public Health Inspector,
Town Council,
Peliyagoda.

Complainant-Petitioner-Respondent

Before : A.L. Shiran Gooneratne J.

&

Mahinda Samayawardhena J.

Counsel : Dr. Ranjith Fernando for the Appellants.

Jayantha Weerasinghe, PC with Sanjith Senanayake and
Upul Disanayake for the Respondent.

Written Submissions: By the Accused-Respondents-Appellants on 30/08/2019

By the Complainant-Petitioner-Respondent on
30/08/2019

Argued on : 02/07/2019

Judgment on : 30/09/2019

A.L. Shiran Gooneratne J.

The Accused-Respondents-Appellants (Appellants) were charged before the Magistrate's Court of Colombo for deviating from a construction plan approved by the Public Health Inspector Peliyagoda (Complainant-Appellant-Respondent), (Respondent), without a written approval, an offence punishable under Section 5 read with Section 13(1)(b) of the Housing and Town Improvement Ordinance, (Ordinance). At the conclusion of a protracted inquiry, the learned Magistrate by order dated 15/10/2012, found the Appellants not guilty and accordingly, the Appellants were acquitted from the said charge. Being aggrieved by the said order the Respondent invoked the revisionary jurisdiction of the High Court of the Western Province Holden in Colombo, where the learned High Court Judge by order dated 07/05/2015, set aside the said order and directed the learned Magistrate to hold a fresh inquiry on the basis that the learned Magistrate has

failed to evaluate the relevant evidence led in this case. The Appellants are before this Court to have the said Order of the learned High Court Judge set aside.

According to a complaint filed by the Respondent in terms of Section 136(1)(b) to be read with Section 5 of the Ordinance and an amendment to the said complaint in terms of Section 136(1)(b) to be read with Section 6 of the said Ordinance, the purported unauthorized construction is at premises bearing No. 163, Biyagama Road, Kelaniya. The officer from the Peliyagoda Urban Council in evidence stated that the said construction was not in conformity with the approved Plan No.63/84, marked V1, and the deviation is alleged to be in respect of Plan No. 78/97, marked V3, which is an extension to the approved plan marked V1. The width of the road of 10 feet from the purported building is in dispute. V1 and V3 are tendered to Court as approved plans by the Peliyagoda Urban Council.

Section 5 of the Ordinance states,

“No person shall erect or re-erect any building within the limits administered by a local authority, except in accordance with plans, drawings, and specifications approved in writing by the Chairman”.

Therefore, it is very clear that any building constructed deviating from any plan or specification without the required approval is a violation of Section 13(1)(b) of the Ordinance which states,

“(1) Any person who shall-

- a) *commence, continue or resume building operations in contravention of any provision of this Chapter;*
- b) *deviate from any plan or specification approved by the Chairman without his written permission;*
- c) ----

(2) In any case in which any person is convicted under this Section, the Magistrate may, on the application of the Chairman, make a mandatory order requiring such person, or the owner of the building, or both, within a time limited in the order, to demolish the building in question, or to alter it in such a way as to bring it into accordance with law, and in the event of such mandatory order not being complied with may authorize the Chairman to demolish, alter or otherwise deal with the building in such a manner as to secure compliance with the order, and to recover the expenses thereby incurred in the same manner and by the same process as a rate."

The Respondent in his evidence at page 356 of the Appeal brief states that the purported building has been constructed at an angle intersecting the roadway and therefore, the rear end of the building is 3 feet beyond the specifications approved by the Council which encroaches the roadway. However, the witness stated that since the approved plan marked V3 does not give the width of the road, he is unable to testify to any certainty of the extent of encroachment to the road.

According to evidence led in the Magistrates Court, plan V1 and V3 have been approved by the Chairman of the Local Authority. Plan V1 gives the width of

the road as 7.6 feet. Plan V3 does not mention the width of the road. Witness Palitha Ranaweera, Public Health Officer testifying in Court on behalf of the local authority states that, he is unable to give an exact width of the road. It is also observed that the said witness has given contradictory evidence in respect of this issue on more than one instance during his testimony. Therefore, there is no certainty to conclude of the existence of a 10 feet wide road prior to the construction of the building.

V1 and V3 are approved plans by the Peliyagoda Urban Council. Therefore the question to be answered is whether the Petitioners are guilty of constructing the purported building in contravention of the said approval. The evidence led in this case to prove such a contravention, as discussed above, is unassertive and contradictory and if adopted would cause prejudice to the Appellants.

In the circumstances, I set aside the judgment of the learned High Court Judge and uphold the judgment of the learned Magistrate dated 15/10/2012.

Application allowed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree.

JUDGE OF THE COURT OF APPEAL