

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

D.M.Lionel Senevirathna

Ukwatta, Marapana.

Kegalle.

**Accused – Petitioner –
Appellant**

Case No. CA (PHC) 04 / 2017

Vs.

1. Officer In Charge,

MO Branch,

Kegalle.

**Complainant – Respondent –
Respondent**

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

2nd Respondent – Respondent

Before – Menaka Wijesundera J.

Neil Iddawala J.

Counsel – Sunil Abeyrathne for the accused petitioner.

SC Mr. Shamindra Wickrama for the respondent.

Argued On - 30.03.2021

Decided On – 05.05.2021

MENAKA WIJESUNDERA J.

The instant appeal has been lodged to set aside the order dated 2.2.2017 of the learned High Court Judge of Kegalle.

The accused respondent (hereinafter referred to as the respondent) has been initially charged in the Magistrate Court of Kegalle for selling a packet of sugar which had expired and he has appeared as the owner of the shop. But when the respondent pleaded guilty to the charge sheet when he was to be sentenced the respondent had confessed that he was not the owner. Then the magistrate had directed the police to commence investigations against the suspect for impersonation and a new charge sheet had been filed for impersonation under the penal code. Evidence had been led and upon conclusion of the prosecution case the respondent counsel had made an application under section 186 of the Code Criminal Procedure Code to discharge the respondent, but instead the magistrate has amended the charge by merely deleting a name in the charge.

The position of the appellant is that at the end of the prosecution case when the magistrate is requested to act under section 186 of the CPC amending the charge is illegal and deletion of a name is not a proper amendment under section 167(3) of the CPC. The petitioner further says that the learned High Court Judge also has erred by upholding the same order.

The learned Counsel appearing for the Attorney General had raised the following grounds,

- 1) The petition of appeal not properly drafted on the basis that it is not clear whether it is an application of revision or appeal, and if it is a revision application no exceptional grounds have been urged in the oral submissions of the petitioner,
- 2) Grounds of appeal also not properly stated in the petition of appeal,
- 3) The instant application being a frivolous one in nature and costs to be considered upon dismissal.

Upon perusal of the petition of appeal this court also observes that the caption has stated the application to be a revision application in nature, and the body of the petition and the prayer has stated it to be an appeal, and the grounds of appeal has been stated as to be illegal but the grounds of illegality has not been identified. It is well accepted and trite law that a petition of appeal shall state the grounds of appeal and if it is on a point of law the petition must identify as to what the point of law is. Furthermore this court also observes that the petition of appeal does not highlight any of the documents that had been referred to in the petition of appeal. Procedure regarding appeals from the Magistrates Court to the Court of Appeal and

appeals from the High Court to the Court of Appeal had been laid down in the CPC. The same had been laid down in the Supreme Court rules as well.

But upon perusing the instant petition of appeal this court observes that the provisions of the CPC in drafting a petition of appeal has been grossly violated.

Therefore the observations of this court are, as with regard to the first ground of objection by the counsel for the Attorney General is well founded and the appeal brief is a violation of the appellate court rules and provisions of the CPC.

But in the case of **Kiriwanthi vs. Navaratne 1990(2) Sri. L.R.393 Fernando J** has stated that “The weight of Authority thus favors the view that while these rules must be complied with, the law does not require or permit automatic dismissal of application.....The consequence of non-compliance is a matter falling within the discretion of court, to be exercised after considering the nature of the default, as well as the excuse or explanation’.

Further to the above the counsel appearing for the Attorney General stated that although the appellant made oral submissions with regard to the illegality in the order of the learned Magistrate and the High Court Judge he has not been specific in pointing as to what the illegality in the said orders are.

This court observes that under section 167(1) of the CPC a charge or indictment can be amended at any time of the trial till the time of the judgment but section 167(3) of the CPC defines exactly as to what an alteration is, and it reads as “The substitution of one charge to another in an indictment or the addition of a new charge to an indictment and in the

Magistrates Court the substitution of one charge to another or the addition of a new charge shall be deemed to be an alteration of such indictment or charge.....within the meaning of this section.

In the instant case the position of the petitioner is that the, amendment by the learned magistrate in the charge is one of deletion of a name, and under section 167 (3) of the CPC it does not amount to an alteration and if that is so the accused should have been acquitted.

Therefore although the instant petition of appeal has been shoddily drafted and the appeal brief has been carelessly prepared the point of law taken up by the petitioner is justified in view of the provisions of the CPC. Therefore as stated in the decided case law cited above," mere technicalities in procedure should not hamper the due administration of justice".

Therefore it is the considered view of this court that in view of Magistrate failing to follow the provisions of the CPC the Magistrates order dated 27.6.14 is illegal and therefore it is hereby set aside and the learned High Court Judges order too, which upheld the order of the Magistrates dated 2.2.17 is hereby set aside and the instant application for revision is allowed.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court of Appeal.

