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

In the matter of an application for leave to appeal under section 15 (a) of the Judicature Act No. 2 of 1978 read with section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

CA-HCC/138/2024

HC of Colombo Case No: HC 2793/21

The Attorney General

Attorney General's Department,

Colombo 12.

Complainant

Vs.

Alugaha Gamage Thushara Dhammika

No. 185/28, Stase Road,

Colombo 14

Accused

AND NOW BETWEEN

The Attorney General

Attorney General's Department,

Colombo 12.

Complainant- Petitioner

Alugaha Gamage Thushara Dhammika

No. 185/28, Stase Road,

Colombo 14

Accused-Respondent

Before : **B. Sasi Mahendran, J.**
Amal Ranaraja, J

Counsel: Jayalakshi de Silva, SSC for the Complainant-Petitioner
Randunu Heellage for the For the Accused-Respondents.

Argued On: 14.05.2025

Written Submissions On: 20.09.2024 and 09.05.2025 (by the Accused-Appellant)

Judgment On: 13.06.2025

JUDGMENT

B. Sasi Mahendran, J.

The Petitioner, the Attorney General of the Democratic Socialist Republic of Sri Lanka, seeks to challenge the order issued on 17.11.2023 by the learned High Court Judge of Colombo. This order resulted in the acquittal of the accused-

respondent, who had been indicted before the High Court of Colombo in case No. HC 2793-21.

The Attorney General indicted the Accused-Respondent in the High Court of Colombo under Sections 54(A)(b) and 54(A)(d) of the Poisons, Opium, and Dangerous Drugs Ordinance, as amended by Act No. 13 of 1984. The charges pertained to the possession and trafficking of 14.28 grams of heroin (diacetylmorphine) on 21.05.2021

The offence in question occurred on December 20, 2019. According to the journal entries, the indictment was served on October 6, 2021. The trial commenced on August 10, 2023, during which PW01, identified as Pradeep Kumara Disanayakage Ranjan Athula Kumara Disanayaka, began giving evidence in the examination-in-chief. However, the court adjourned the proceedings and postponed the trial to November 17, 2023, directing the witness to appear on the next scheduled date. Notably, the learned high court judge did not provide any reason for the postponement.

On November 17, 2023, when the matter was taken up in court, the witness in question was absent. The learned state counsel informed the court that Witness Number 1 was engaged in a training session at the National Police Training College. As a result, the counsel requested a postponement and made an application to reissue the summons for PW01.

The Learned High Court Judge denied the request for postponement and proceeded with the trial, ultimately acquitting the accused. Upon determining that the explanation for PW01's absence was unsatisfactory, the Judge further emphasized that a witness may be excused from appearing in court only in cases involving national security or under special presidential operations. Consequently, the trial was concluded.

For the sake of clarity, it would be prudent to reproduce the entire order pronounced by the Learned High Court Judge.

<u>නියෝගය</u>

මෙම නඩුවේ පෙර දින පැමිණිල්ලේ පළමු සාක්ෂිකරුගේ සාක්ෂිය අඩක් මෙහෙයවා තිබියදී අද දිනට වැඩිදුර විභාගය ට නියම කර ඇති අතර, එදින පැමිණිල්ලේ පළමු සාක්ෂිකරුට අද දින පැමිණීමට අවවාද කර ඇත.
අද දින සාක්ෂිකරු වෙනුවෙන් දැනුම් දෙන්නේ එම අය පුහුණුවක් සඳහා ගොස් සිටින බැවින් නඩු විභාගයට පැමිණීමට නොහැකි බවයි.

අධිකරණයකට පැමිණීමට යම් පොලිස් සාක්ෂිකරුවෙකු ට අවවාද කිරීමෙන් හෝ සිතාසි නිකුත් කිරීමෙන් අනතුරුව ජාතික ආරක්ෂාව පිලිබඳ බරපතල ප්‍රශ්නයකදී හෝ ජනාධිපති විශේෂ රාජකාරි හැරුණු විට එම සාක්ෂිකරු අනිවාර්යෙන්ම අධිකරණයකට පැමිණිය යුතුය.

මහාධිකරණයක් ලබාදෙන නියෝගයට ඉහලින් වෙනත් නිලධාරීන්ට කටයුතු කල නොහැකිය.

මෙවැනි විවිධ හේතු ඉදිරිපත් කරමින් පොලිස් නිලධාරීන්ගේ නොකටයුතු නිසා නඩු විභාග කල්යාම ඉතා බහුලය. අධිකරණයක නඩු කටයුතු පැවැත්වීමේදී යම් පිළිවෙලක් සහ පදනමක් ඇතිව ඒවා පෙළගස්වයි. එසේ තිබියදී අධිකරණයේ අවසරයකින්ද තොරව සාක්ෂිකරුවන් මෙසේ නොපැමිණීම අඩු කටයුතු පවත්වාගෙන යාමට බාධාවකි.

එසේම අධිකරනයයෙන් ලබාදෙන නියෝගයකට එරෙහිව එකී නියෝගය වෙනත් අධිකරණයකින් වෙනස් කර ගන්නේ නැත්තේ නම් කටයුතු කිරීමට නිලධාරීන්ට නොහැකි ය.

යම් නිලධාරියෙක් පුහුණු සැසිවාරයකට සහභාගී වන්නේ නම් එහිදී අධිකරනාධිකරණ කටයුතු වලට බාධා නොවන පරිදි ඒවා සිදු කර ගැනීම දෙපාර්තමේන්තුවේ වගකීමකි.

දෙපාර්තමේන්තුවේ අභ්‍යන්තර කටයුතු මත නඩු කටයුතු කල් තැබිය නොහැකිය.

මෙම සාක්ෂිකරු අද දිනද පැමිණ නැත්තේ අධිකරණයේ කිසිදු අවසරකින් තොරවය.

පළමු සාක්ෂිකරුගේ වැඩිදුර මූලික සාක්ෂි සඳහා අද දිනට නියමිත ය. එහෙත් ඒ සඳහා අද දින පළමු සාක්ෂිකරු නැත. නොපමිනිමට ඉදිරිපත් කරන හේතුව සදාරණද නැත.

ඒ අනුව පටිපටිමය වශයෙන් සහ තාක්ෂණික වශයෙන් මෙම නඩුවේ නඩු විභාගය අවසන් වේ.
එසේ හෙයින් නඩුවේ චෝදනාවන්ගෙන් චුදිත නිදොස් කරමි."

The issue at hand is whether the Learned High Court Judge has adhered to the provisions of the Code of Criminal Procedure in acquitting the accused when the prosecution was unprepared to proceed with the trial due to the absence of the overnight witness.

The witness in question has provided testimony concerning the raid related to this offense, which involves the possession of heroin, a dangerous drug. It is acknowledged that the court issued a warning to this witness at the subsequent hearing. However, the prosecution asserts that the witness was engaged in training at the time.

It is relevant to examine the following legal provisions that address the discharge of an accused person in cases where the prosecution is not prepared to proceed with the trial in a case instituted in a Magistrate Court.

188. (1) If the summons has been issued on a complaint under section 136(1) (a) upon the day and hour appointed for the appearance of the accused or at anytime to which the hearing may be adjourned the complainant does not appear the Magistrate shall notwithstanding anything herein before contained acquit the accused unless for some reason he thinks proper to adjourn the hearing of the case to some other hour or day, and may in addition make an order for payment by the complainant of state costs as hereinafter provided.

Provided that if the complainant appears in reasonable time and satisfied the magistrate that his absence was due to sickness, accident or some other cause over which he had no control then the Magistrate shall cancel any order made under this subsection.

(2) If the summons has been issued a complainant under section 136 (1) (b) or (C) as the case may be and on the fixed for trial the prosecution is not ready the court may discharge the accused unless for some reasons the court thinks proper

to adjourn the hearing of the case to some other hour or day.

The aforementioned sections of the Code of Criminal Procedure Act as stated above empower the learned Magistrate to either discharge or acquit the accused.

Conversely, the subsequent sections outline the circumstances in which an application may be made for the learned High Court Judge to refix the matter and reissue the summons.

263. *(1) If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the court may from time to time order a postponement or adjournment on such terms as it thinks fit for such time as it considers reasonable and may remand the accused if in custody or may commit him to custody or take bail in his own recognizance or with sureties for his appearance,*

provided, however, that every trial in the High Court, with a jury or without a jury, shall as far as practicable, be held day to day."

Accordingly, the Code of Criminal Procedure does not provide for the learned High Court Judge to discharge or acquit the accused at the trial stage. I believe that the learned High Court Judge misdirected himself by denying an adjournment. Given the serious nature of the case before the learned High Court Judge, the main witness had partially testified regarding the arrest and the production. Notably, when the witness gave evidence on 10.08.2023, the learned High Court Judge postponed the matter without providing any reasons. Furthermore, there is no indication that the witness was absent on any prior date.

The Code of Criminal Procedure includes a provision that enables the learned High Court Judge to acquit the accused.

200. (1) when the case for the prosecution is closed, if the judge wholly discredits the evidence on the part of the prosecution or is of opinion that such evidence fails to establish the commission of the offence charged against the accused in the indictment or of any other offence of which he might be convicted on such indictment, he shall record a verdict of acquittal; if however the judge considers that there are grounds for proceeding with the trail he shall call upon the accused for his defence.

There is another section that addresses acquittal before the trial by jury.
220 (1) When the case for the prosecution is closed. If the judge considers that there is no evidence that the accused committed the offence he shall direct the jury to return a verdict of "not guilty."

In both sections, the Judge has the authority to acquit the accused if no evidence is presented before him or the jury. However, this decision can only be made by the learned High Court Judge only at the conclusion of the prosecution case.

But in the case of **Attorney General v. Gunawardhena, 1996 (2) SLR 149 at page 158,** court held that:
"Under this provision the Judge can direct the Jury to return a verdict of not guilty only at the close of the prosecution case. A practice appears to have developed in our Courts of Judges stopping a case even before that stage is reached. This matter is referred to in a judgment of the Court of Criminal Appeal in Pauline de Croos v. The Queen,.

"The procedure actually adopted by the learned Judge in this case, is to our knowledge, not infrequently resorted to by Judges in this country when it becomes apparent to the Court and counsel that to continue is to waste precious time and that there is no purpose of "flogging a dead horse". We ourselves have no desire,

at this stage of the development of the practice of stopping trials at their virtual though not their technical end, to insist on technicality to the point of almost sanctifying it."

There is no reason to disagree with this dictum; if it is apparent to Court as well as to counsel that to continue is to waste time and to flog a dead horse, the case should of course be stopped. Again, if prosecuting counsel concedes or is constrained to admit that all the evidence on which the prosecution case is based has been led and what remains to be led is formal evidence or other supporting evidence which will not take the case any further, then the virtual end of the prosecution case has been reached and a court may fairly act under Section 212(2). But if there is such other evidence still to be led on behalf of the prosecution which the Judge has to reckon and give weight to in considering whether there is a case to go to the Jury, it appears to us that a Judge will be acting contrary to S.212(2) in making a direction before he hears that evidence. It was mentioned at the argument that it is not unknown for a Judge to listen to prosecuting Counsel's opening address, ascertain from him that he had referred to all the evidence on which he relies and forthwith turning to the Jury to direct them to bring a verdict of not guilty. This procedure, if it was in fact actually adopted appears to us to take the practice, referred to in the dictum cited above, beyond all legitimate bounds and to be one that should not be followed by High Court Judges."

This dictum was followed by **Amaratunga J: in** The **Attorney General v. Baranage, 2003 (1) SLR 340 .** his Lordship has followed the following judgments to come to the finding.

R. V. Galbraith, 1981 (2) All ER page 1060, Lord Lane CJ held that;

"How then should the judge approach a submission of 'no case? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.

(a) Where the judge comes to the conclusion that the Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to stop the case. (b) Where however the Crown's evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence on which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury. It follows that we think the second of the two schools of thought is to be preferred.
There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

It is evident that the learned State Counsel requested a postponement of the trial, citing the absence of an overnight witness and seeking a reissuance of summons against him. However, the learned High Court Judge proceeded to acquit the accused-respondent by the said order.

We acknowledge that prosecution is an ongoing process. Consequently, the learned High Court Judge could not have formed the opinion that insufficient evidence was presented to justify acquitting the accused, especially considering that Witness Number 01 had not yet concluded his testimony.

In my considered view, the learned High Court Judge does not possess the authority to acquit the accused at this stage of the proceedings.

The present Criminal Procedure Code undeniably grants our courts both authority and jurisdiction. However, it lacks specific provisions regarding the High Court's power to discharge or acquit an accused during the trial stage. A comparable observation was made by Professor G.L. Peiris concerning the Supreme Court's authority over bail, as outlined in the Administration of Justice Law Act No. 44 of 1973. In *Criminal Procedure of Sri Lanka* (p. 152), he has noted that:

" Unlike the English courts which have jurisdiction under the common law to make orders for bail in all cases, the Supreme Court of Sri Lanka has no comparable

power. Its power and jurisdiction in this regard are conferred and regulated by statute- previously by the Courts Ordinance and the Criminal Procedure Code and today by the Administration of Justice Law. Thus, the expression "in any case" has been judicially construed as envisaging only cases referred to in statutory provisions applicable."

The above statement was referred to by Justice Shirani Bandaranayake (as she was then) in the case of Attorney General and Others v. Sumathipala, 2006 (2) SLR 126.

It is clear that the learned High Court Judge does not possess the authority to acquit or discharge an accused during the trial stage.

I acknowledge the considerations expressed in the following judgments concerning the appeal.

Attorney General v. Gunawardhena, 1996 (2) SLR 149, (at 156)

"An appeal is a remedy which a party who is entitled to it, may claim to have as of right, and his object is the grant of relief to a party aggrieved by an order of a court which is tainted by an error."

The impugned order was made on 17.11.2023 when the overnight witness was absent and the prosecution State Counsel sought an adjournment of the trial on that basis.

I am of the view that there was no justification for the learned High Court Judge to acquit the accused person since this was the second date fixed for the trial, learned counsel for the state had given a valid reason for postponement. According to the Section mentioned above, Section 263(1) Court may adjourn the trial.

For the reason stated above, I hold that the learned High Court judge no valid reason to acquit the accused. Therefore, the order is untenable.

Accordingly, I set aside the order dated 17.11.2023 by the learned High Court Judge of Colombo and order that the case shall be revert back to the case role of the court.

The learned High Court Judge is directed to issue notice on the respondent and fix the, matter for trial and to proceed therefrom in accordance with the law.

The registrar of the Court is directed to communicate this order to the High Court of Colombo for necessary compliance.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.
I AGREE

JUDGE OF THE COURT OF APPEAL