IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Appeal in terms of Article 138(1) of the Constitution read together with Section 331 of the Code of Criminal Procedure Act No.15/1979 .

C.A.No.145-148/2016

H.C. Jaffna No.1906/15

01. Thambirasa Rajanikanth
02. Paramu Thineskumar
03. Sivalai Kanagarathnam
04. Nagarasa Rahunathan

Accused-Appellants

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12

Complainant-Respondent

****

BEFORE	:	**DEEPALI WIJESUNDERA, J.** **ACHALA WENGAPPULI J.**
COUNSEL	:	Dr. Ranjit Fernando with S. Pnachardsaran for the Accused-Appellants. Azard Navavi S.S.C. for the respondent
ARGUED ON	:	26th October, 2018
DECIDED ON	:	08th February, 2019

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ACHALA WENGAPPULI J.

The four Accused-Appellants (hereinafter referred to as the "Appellants") were indicted before the High Court of Jaffna for committing gang rape on *Naguleswaran Jonista* on 21st July 2009, an offence punishable under Section 364(2)(g) of the Penal Code as amended.

At the conclusion of their trial without a jury, the Appellants were convicted by the High Court as charged and were accordingly sentenced each of them to serve a fifteen-year term of imprisonment. They were also fined a sum of Rs. 25,000.00 with a default sentence of 2 years.

Being aggrieved by the said conviction and sentence, the Appellants have challenged its validity on the basis that;

a. there has been a noncompliance of the mandatory statutory provisions relating to matters which are triable before the High Court as set out in Sections 150, 151 and 152 read with Section 199(3) of the Code of Criminal Procedure Act No. 15 of 1979,

b. there is no record whatsoever of any Court Official giving evidence at the trial to confirm due compliance of the relevant mandatory provisions,

c. the trial Court has failed to attach any material significance to this omission at any stage of the trial or in its judgment.

Learned Counsel for the Appellants contended that the noncompliance of the mandatory statutory provisions would necessarily vitiate the conviction and sentence imposed on the Appellants.

In response to the ground of appeal and the submissions in support of it, learned Senior State Counsel for the Respondent, conceded to "... *the fact that aforesaid statements have neither been recorded during the NS proceedings nor being adduced in evidence during the trial in the High Court*". However, the Respondent contended that such failure had not caused any prejudice or occasioned a substantial miscarriage of justice to the Appellants in the instant appeal.

Learned Senior State Counsel relied upon the Article 138 of the Constitution, Section 456A of the Code of Criminal Procedure Act No. 15 of 1979 in support of his contention and also relied upon the unreported judgment of ***Ibrahim v Attorney General*** in CA 115/2014 decided on

29.05.2017 where it had been held that the failure to adduce the statutory statement before the High Court by the prosecution *"had not caused any prejudice to the appellant or miscarriage of justice"*.

In order to strengthen the claim that the failure to comply with the mandatory provisions contained in Sections 150, 151, 152, 154 and 199(3) caused no miscarriage of justice to the Appellants, learned Senior State Counsel relied on the definition of the said term as provided in the *Black's Law Dictionary* and with the amendments effected by the Criminal Procedure Code (Special Provisions) Act No. 15 of 2005 where the purpose of the "statutory statement" is to establish the consistency of the accused's willingness to plead guilty to a lesser offence.

Since the Appellants of the instant appeal were indicted before the High Court for committing the offence of "gang rape", the Respondent submitted that their willingness to accept liability to lesser culpability does not arise at all.

The Respondent has also relied on the judgments of ***Atapattu v Punchi Banda*** 40 N.L.R. 169, ***Jayantha v Officer-in-Charge, Panadura Police Station*** (1986) 1 Sri L.R. 334, ***Banwari v State of Uttar Pradesh*** AIR 1962 SC 1 198 and ***Sing v State of Bihar*** AIR 2004 SC 4421 to impress upon this Court to the situations where the irregularities that were complained of by the respective appellants in those appeals were considered as irregularities that have not occasioned a failure of justice.

Since the Respondent conceded that the mandatory provisions of the Code of Criminal Procedure Act contained in Sections 150, 151, 152 and Section 199(3), were not complied with, at the Magistrate's Court as well as

at the High Court and therefore moves this Court to act under the proviso to Article 138 of the Constitution and Section 436 of Act No. 15 of 1979, it is appropriate that this Court considers the submissions of the parties in the light of the judicial precedents to decide whether this is a fit case to apply said provisions of law, despite the admitted noncompliance of mandatory statutory provisions.

Author *Reginald Dias*, in his Commentary on the Ceylon Criminal Procedure Code quotes (at Vol. 1 p. 628) the judgments of ***Punchirala v Punchibanda*** 3 N.L.R. 38 and ***Hamiappu v Babaappu*** 1 S.C.R. 120, where it has been held *"... in criminal cases unlike a civil suit, the rules of procedure cannot be departed from even with the consent of the parties."*

Before this Court ventures to consider the legal submissions of the parties on the applicability of the proviso to Article 138 and Section 436 of the Code of Criminal Procedure Act No. 15 of 1979, it is prudent to examine the extent of noncompliance, which is in fact the fundamental issue before us.

The Appellants were charged before the Magistrate's Court of *Chavakachcheri* under Sections 357 and 364(2)(g) of the Penal Code as amended by Act No. 22 of 1995 upon advice by the Hon. Attorney General and the inquiry commenced on 26.06.2014 after the charge was read over to them as per page 511 of the original case record.

On 24.04.2015, the Magistrate's Court made the following order (as per the translated brief at p. 532);

> *"Based on the evidence led and the productions marked during the trial of this case, prima facie case has been proved*

against the accused and Registrar to act according to the provisions of Section 159 of the Criminal Procedure Code. ..."

Journal entry of 24.04.2015 contains, among other entries, an entry made in English to the effect that " C/s committed to H/C" .

Thus, it is clear that the case against the Appellants were committed before the High Court by the learned Magistrate who held the preliminary inquiry under the provisions of the Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013 and he clearly did not intend to act under the provisions of Section 153 of the Code of Criminal Procedure Act No. 15 of 1979. He has then directed the Registrar to explain the charge against the Appellants.

It could well be that the Registrar may have acted upon the direction of Court and since there was no statement made by any of the Appellants, no record of that fact was made. However, that is not the only inference one could draw under these circumstances. The resultant position is that there are no further proceedings available in the case record to denote compliance with the directive of the learned Magistrate on the Registrar to comply with Section 159.

At the close of the prosecution case before the High Court of Jaffna, learned State Counsel tendered the oral evidence and documents marked as P1 to P6 in support. No statutory statement of any accused was marked by the prosecution at that time.

All four Appellants gave evidence under oath and some of them have called witnesses on their behalf. They denied the allegation of rape and claimed that all they knew was that the prosecutrix went missing that night and was later found in a building nearby.

Therefore, it is incumbent for this Court to consider the all-important issues whether the substantial rights of the Appellants were prejudiced or whether there was a failure of justice resulted in due to the noncompliance of the mandatory provisions contained in Sections 149,150,151 and 152 and 199(3) by the prosecution?

The first ground of appeal of the Appellants is that the prosecution has acted in violation of the mandatory provisions contained in Section 199(3) of the Code of Criminal Procedure Code Act No. 15 of 1979, which imposes a requirement that " *All statements of the accused recorded in the course of the inquiry in the Magistrate's Court, if there had been one,* ***shall*** *be put in and read in evidence before the close of the case for the prosecution.*" (emphasis added)

The presence of the word "shall" no doubt, generally, means that the provisions are imperative in nature and therefore its compliance is mandatory.

Section 233 of the Criminal Procedure Code of 1898, which was later replaced by Administration of Justice Law No. 44 of 1973, imposes a duty on the prosecution to tender the statutory statement of the accused before close of its case before the High Court, as it states as follows:-

"All statements of the accused recorded in the course of the inquiry in the Magistrate's Court shall be put in and read in evidence before the close of the case for the prosecution."

The Administration of Justice Law No. 44 of 1973 which is the immediate predecessor to the Code of Criminal Procedure Act No. 15 of 1979 had no such provision to conduct non-summary inquiries before the Magistrate's Courts and in fact it had abolished the conduct of such inquiries with the operation of the proviso to its Section 53(4).

Dias, states (at Vol. 2 p. 777) that "*... the trial subsequent to the inquiry at which the accused gave his answers is concerned, such answers must be put in as part of the case for prosecution , whether such evidence inculpates or exculpates the accused.*"

He traces the origin of this requirement to the old English Criminal Procedure Code under which the practice of interrogation of prisoners continued, but was discarded after the "famous trial of *Eugene Aram* held in 1759."

In view of the statutory provisions contained in Section 199(3) all statements of the accused recorded during the non-summary inquiry "shall be" put in and read in evidence before close of the prosecution. Plain reading of the said Section reveals that the wordings are clear as it had clearly imposed a mandatory obligation on the prosecution to present "all statements" recorded of the accused to be put in and read in evidence. This duty is a continuation from Section 233 of the Criminal Procedure Code.

However, in delivering the judgment of the Court of Criminal Appeal, in ***Regina v Arthur Perera*** 57 N.L.R. 313, Basnayake A.C.J. (as he was then), with the agreement of Pulle and Weerasooriya JJ, has stated that " ... *we are of the opinion that the expression "all statements" in section 233 of the Code means all statements of an accused, other than his evidence recorded under section 161, for the recording of which express provision is contained in Chapter XVI.*" (emphasis added). Section 152 of the Act No . 15 of 1979 is identical with Section 161 of the Criminal Procedure Code. This view was in fact endorsed and acted upon by the Supreme Court in ***Sheela Sinharage v The Attorney General*** (1985) 1 Sri L.R. 1 at p.18.

Section 199 of the Code of Criminal Procedure Act No. 15 of 1979 is identical to Section 233 of the Criminal Procedure Code, except for the phrase "if there had been one" and therefore the reasoning in ***Regina v Arthur Perera*** is applicable. The additional phrase "if there had been one" refers to a preliminary inquiry and this could well be due to the fact that there were no such inquiries during the operation of Administration of Justice Law, which governed the criminal Courts prior to the enactment of Code of Criminal Procedure Act No. 15 of 1979.

In reply to this ground of appeal of the Appellant, the Respondent relied on the judgment of ***Ibrahim Janap v The Attorney General*** (C.A. 115/2014 - decided on 29th May 2017) where it was held that "... *the appellants have not suffered any prejudice due to non-marking of statutory statement during high court trial ... the appellant failed to satisfy court that he was prejudiced by this omission and thereby caused a failure of justice ...*".

Returning to appeal before us, we hold that even if there is a statement recorded under Section 152(2) of the Code of Criminal Procedure Act, the judgment of ***Regina v Arthur Perera*** prevents the prosecution from tendering such statement during its case before the High Court. Under these circumstances whether there is a statutory statement in existence or not that fact would not make any difference in this regard.

In view of this clear pronouncement by the divisional bench of the Court of Criminal Appeal, the first ground of appeal of the Appellants fails.

At this juncture, we turn our attention to consider the second ground of appeal raised by the Appellants in the light of the submissions of the learned Senior State Counsel since it is necessary to decide whether the failure to comply with the mandatory statutory provisions contained in Sections 150, 151 and 152 has occasioned a failure of justice in relation to the Appellants.

In this regard, it is prudent to trace back the Legislative history of this particular set of provisions in order to have a clear appreciation of its intended purpose in preliminary inquiries.

Section 150 of the Code of Criminal Procedure Act also imposes a duty on the inquiring Magistrate to read out the charge to the accused and to explain that he has the right to call and give evidence on his behalf. Section 151 has spelt out the caution that should be administered on the accused that whatever he says will be taken down and put in his trial as evidence. Section 152 lays down the manner in which the evidence for the

accused is recorded if the accused elects to give evidence and or calls witnesses on his behalf.

It is to be noted at this stage that the procedure of conducting preliminary inquiries by the Magistrate remained almost the same even under Code of Criminal Procedure Act No. 15 of 1979. However, recognising the practical realities and the negative factors that had adversely affected the due administration of criminal justice system, the Legislature thought it is opportune to intervene to bring about some remedial measures to address the problems faced by the accused, witnesses and the Courts.

With the enactment of Code of Criminal Procedure (Special Provisions) Act No. 15 of 2005, the Legislature has introduced a new procedural laws governing the conduct of preliminary inquiries by introducing substantial changes which are more progressive in nature. In the preamble to the said Act it is declared that *inter alia* "... FOR DISPENSING WITH THE CONDUCT OF THE NON SUMMARY INQUIRY IN CERTAIN CASES,". The Act, in its Section 3(1) has conferred authority on the Attorney General to forward indictments directly to the High Court in respect of offences that are specified in the second schedule to the Judicature Act No. 2 of 1978 if there are "aggravating circumstances" or " circumstances that give rise to public disquiet" thereby bypassing the procedure contained in Chapter XV of the Code of Criminal Procedure Act.

Section 6(14) of the said Act contained statutory provisions that are in effect similar to the provisions of Section 150 of the Code of Criminal

Procedure Act, in imposing a duty on the Magistrate to readout the charge and explain to the accused that he has a right to call witnesses and if he so desires to give evidence on his behalf.

In addition, the said Act, in Section 15 it is stated that "The provisions of Chapter XV of the Code of Criminal Procedure Act No. 15 of 1979 shall *mutatis mutandis* apply to any preliminary inquiry held under the provisions of this Act."

The Code of Criminal Procedure (Special Provisions) Act No. 15 of 2005 was initially enacted for a limited period of two years and was replaced by Code of Criminal Procedure (Special Provisions) Act No. 42 of 2007 and thereafter by Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013.

Considering the Legislative history and the collective scheme of the relevant provisions of the Code of Criminal Procedure Act and the Code of Criminal Procedure (Special Provisions) Act it appears that these provisions facilitated an accused to present his version of events to the offence he was charged with by offering evidence by himself or calling witnesses. There are specific provisions contained in Section 151 of the Code of Criminal Procedure Act, to safeguard the accused's interests since his evidence " ... *will be taken down in writing and put in evidence*" at his trial.

Dias (Vol.2 p.805) identified four sets of circumstances under which an accused may make statements in a non-summery inquiry. He lists them as follows:-

i. at the commencement of the investigation under Section 155(1)

ii. at the close of the prosecution case under Section 295

iii. at any stage under Section 295(1)

iv. if the accused volunteers any further statement at any stage under Section 302.

The purpose of recording a statement under Section 295 was considered by the full bench of the then Supreme Court, in its decision of ***The King v Sittambaram*** 20 N.L.R. 257, where Bertram C.J. has held that:-

> *"It is open to the Attorney-General, if he thinks such a course appropriate, to instruct the Police Magistrate before committing a case for trial to explain to the accused the nature of any offence on which he contemplates indicting him, and to afford him an opportunity of making any statement under section 155, or of cross-examining any witnesses on the depositions already taken, or of tendering new witnesses on his own account.*
>
> *Even though the Magistrate may not think it necessary formally to explain to the accused any fresh offence which may incidentally be disclosed in the course of the inquiry, and in respect of which it is possible that a specific charge may ultimately be preferred, yet it is open to him, and in appropriate cases he ought, if the facts constituting the alleged offence were not before the accused when he made his statement under section 155, to interrogate him under section 295 with reference to these facts, and thus afford him*

an opportunity of giving any explanation with regard to them. This interrogation of the accused under section 295 is obligatory upon the Magistrate (see section 155 (3)), and should be administered, not with the object of investigating the facts, but in the interests of the accused. It is not an ordeal through which the accused must pass, but a privilege to which he is entitled. One of the things which the Magistrate may well bear in mind in the course of this interrogation is the fact that allegations have been made against the accused in the course of the inquiry which may conceivably be made the subject of a count in the indictment. He. may well say to the accused: " Do you wish to make any statement as to this or that point? "(emphasis added)

In the judgment of ***Regina v Perera et al (Supra)***, the Court of Criminal Appeal considered the relevancy and admissibility of the evidence of the 2nd Appellant before that Court, who apparently made a confession and later in the inquiry denied his complicity to the offence to which he is accused of.

Basnayake A.C.J. (as he was then) has considered this question and concludes thus;

"It was contended by Counsel for the second appellant that the disallowance of this application was wrong and that even if the deposition. was not admissible under section 233 of the

Code it was admissible in order to prove the fact that the statement P38, which the prosecution had already put in as a confession of the second appellant, had been retracted by him in his evidence at the non-summary inquiry. When asked to state under which section he sought to have the statement admitted he referred us to section 9 of the Evidence Ordinance.

Evidence given by a witness in a previous judicial proceeding, even though it be that of an accused person, cannot be admitted in evidence-in a subsequent proceeding except in accordance with the provisions of the Evidence Ordinance or the Criminal Procedure Code. Learned Counsel for the second appellant did not seek to come under any provision of the Criminal Procedure Code. A previous deposition may be proved if relevant under sections 32, 33, 155 (c) and 157 of the Evidence Ordinance. It was not argued before us, however, that any of these provisions-permitted the use of the second appellant's evidence in the manner in which it was sought to be put in at the trial. While the evidence in question would be an admission as defined in section 17(1) of the Evidence Ordinance, it does not appear to be one which could have been proved on behalf of the second appellant under either of the paragraphs (a) or (b) of section 21 of that Ordinance. With regard to paragraph (c) of section 21, as stated above, section 9 was the only provision of the Evidence Ordinance under which Counsel

urged that the evidence was relevant, otherwise than as an admission. That section declares as relevant, inter alia, facts " which rebut an inference suggested by a fact in issue or relevant fact ". In so far as the evidence of the second appellant at the inquiry may have been relevant under this section to rebut any inference that the Jury may have drawn against him from the alleged confession of his which had been put in evidence by the prosecution, its relevancy could have arisen only on the basis that the facts deposed to in that evidence were true, and not otherwise."

The above judgments, quoted at length, could be cited as instances where the Superior Courts have expressed its views on the applicable considerations to the evidence of an accused given at the preliminary inquiry, emphasising its utility value in relation to the accused whilst laying emphasis on safeguards that should be complied with in the interests of the accused.

Our view that these provisions which facilitated an accused to present his version of events to the offence he was charged with by offering evidence either by himself or calling witnesses on his behalf is further strengthened since the Legislature itself recognised the purpose of recording the evidence of the accused and provided for the manner in which the evidence of the accused should be considered by a High Court with new legislative provisions.

Section 126 of the Code of Criminal Procedure Act was amended by Code of Criminal Procedure (Amendment) Act No. 14 of 2005 by which the amended Section 126A(1)(b) provided for an accused to state that he wishes to adduce evidence in support of the defence of an *alibi*. Simultaneously another important amendment was also made to Section 154 of the Code of Criminal Procedure Act by adding subsection (2) which read as *"upon committal of the accused for the trial before the High Court, the accused may state that he is willing to plead guilty to a lesser offence…"*.

If he indicates his willingness to plead guilty to a lesser offence, the accused is placed at the advantage of having the High Court Judge duty bound to consider his progressive approach as the amended Section 154 (2) reads *"… shall, in sentencing the accused, have regard"* to that fact.

Professor G.L. Peiris, in Appendix 1 of his book ***Criminal Procedure in Sri Lanka under the Administration of Justice Law*** included an article titled *Abolition of Non Summary Proceedings*. In the said article he identifies the benefits that are accrued to an accused by holding such an inquiry. He noted that it acts as a "judicial sieve" preventing "speculative prosecution" and also provided prior notice of the case against the accused so that he would not be surprised at his trial. It is interesting to note that the importance of recording the evidence of the accused or his witnesses did not feature in the said article in any way for the obvious reason that it is not the primary intention of holding of a non-summary inquiry.

The version of the accused becomes vital if he is accused of a murder since the law expected him to establish that he is entitled to the benefit of lesser culpability on the proof of any of the general exceptions. Similarly, if

he wishes to plead to a lesser offence or takes up a defence of alibi, such course of action will have some tangible benefit if he declares his intentions at the inquiry. If he takes up the position of a total denial of the allegation at the inquiry before the Magistrate, it has no bearing whatsoever in the High Court since, irrespective of the fact that whether he said it to the Police or to the inquiring Magistrate, that would not support, enhance or diminish the value of his claim of denial. He could place his claim of denial to the High Court, without any prejudice attached to it since he is protected by the presumption of innocence as a Constitutional right.

Sections 150, 151 and 152 of the Code of Criminal Procedure Act contained the word "shall", a term generally understood as meaning mandatory. **Bindra** in **Interpretation of Statutes** (9th Ed) observed (at p.953) that "*A statutory requirement relating to a matter of practice or procedure in the Court should be interpreted as mandatory if it confers upon a litigant a substantial right, the violation of which will injure him or prejudice his case. On the other hand, a statutory provision regulating a matter of practice or procedure will generally be read as directory when the disregard of it or the failure to follow it exactly will not materially prejudice a litigant's case or deprive him of a substantial right.*"

It is in this backdrop that we must consider whether the noncompliance of these mandatory provisions occasioned any failure of justice.

The Proviso to Article 138 of the Constitution states that;

" ... no judgment, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."

Section 436 of the Code of Criminal Procedure Act reads as follows:-

"Subject to the provisions hereinbefore contained any judgment passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account –

(a) Of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgement, summing up, or other proceedings before or during trial or in any inquiry of other proceedings under this Code; or

(b) Of the want of any sanction required by section 135, unless such error, omission, irregularity, or want has occasioned a failure of justice."

The effect of the applicability of these two statutory provisions is that any error, defect or irregularity of the procedure adopted by a Court exercising criminal jurisdiction or of the proceedings before it or the

judgment of that Court; to be reversed, altered or varied by an appellate Court as a strictly enforced rule.

The judicial precedents that will be referred to in the following segment of this judgment indicate that only the errors, defects or irregularities that results in a "failure of justice" or has "prejudiced the substantial rights of parties" qualify to be reversed, altered or varied by an appellate Court. In view of this qualification, the errors, defects or irregularities could be grouped into two categories.

One such category would be the procedural irregularities that are committed by the trial Courts while the irregularities in relation to other laws forms the other. Even among the procedural irregularities the Courts have treated some as "fatal" to the conviction while some other procedural irregularities were treated as the ones which could be "cured".

In relation to the "fatal" irregularities, it is seen from the judicial precedents that when the complained irregularity of procedure affected the jurisdiction of the trial Court, the appellate Courts showed no hesitation in nullifying the proceedings.

The judgment of this Court in ***Sarathchandra v Attorney General*** (2008) 2 Sri L.R. 35 is one such example. The trial Court has failed to comply with the provisions of Sections 196, 197 and 198 of the Code of Criminal Procedure Act No. 15 of 1979, by not reading out the charge in the indictment to the accused and not recording his plea. It was held that *"... the use of the word shall in Section 196 of the Code, to my mind, is not merely directory but mandatory, and confers jurisdiction to try the accused only after compliance of this mandatory provision."*

In ***Abdulsameem v The Bribery Commissioner*** (1991) 1 Sri L.R. 76, this Court refused to act under Section 436 when there was a failure to frame a charge before the Magistrate's Court as it has been held that *"... the omission to frame a charge is a breach of a fundamental principle of criminal procedure and that such failure is fatal to a conviction."*

Similarly, in the judgment of ***Attorney General v Segulebbe Lateef and Another*** (2008) 1 Sri L.R. 225, the Supreme Court determined that *"... section 195 (ee) imposing a duty on the trial judge to inquire from the accused at the time of serving the indictment whether or not the accused elects to be tried by a jury. This is in recognition of the basic right of an accused to be tried by his peers. It is left to the discretion of the accused to decide as to who should try him"* and refused to act under the proviso to Article 138.

The judgment of ***Karunadasa v The Attorney General*** (1985) 2 Sri L.R. 22, the complaint was that a plea of guilty to a lesser offence was recorded by the trial Court, without putting the issue whether to accept a plea to the jury. This Court, having noted that *"... it is fundamental that a trial must be held according to law and that in a trial by jury where an accused has been given into the charge of the jury the verdict must be that of the jury"* rejected the Hon. Attorney General's application to act under Section 436.

However, there seems to be divergent views that had been expressed in relation to other procedural irregularities over the applicability of the provisions contained in Section 436 of the C and Section 425 of the Criminal Procedure Code.

In *Mohideen v Inspector of Police* 59 NLR 2117 Basnayake CJ was of the strict view that;

"In my opinion section 425 was not designed to apply to a complete disregard of the imperative requirements of the Code. It seems to me to have been designed to apply to errors, omissions or irregularities other than disregard of the imperative provisions of the Code. Failure to observe provisions which are intended for the benefit of the citizen and are in the interests of justice, especially in criminal statutes, must be presumed to occasion a failure of justice. It is not necessary for the party seeking relief to establish that the failure to observe an imperative requirement of the Code has occasioned a failure of justice. As in the case of a trial to which the Court of Criminal Appeal Ordinance applies, a wrong decision of law is a sufficient ground for setting aside a conviction unless the prosecution is in a position to establish that no substantial miscarriage of justice has actually occurred."

A more accommodative view is strongly expressed by Sansoni J in ***Caldera v Wijewardene, Inspector of Police*** 65 N.L.R. 210,

"But I shall assume that there was an omission, as I wish to base my decision on another ground as well, and that is on section 425 of the Code. That provision cannot be overlooked, and it has in fact been applied in cases very similar to the present one by Howard, C.J. in Assen v. Maradana Police [(1944) 45 N. L. R. 263.] following earlier cases, and by Wijeyewardene, J. in Thomas v. Inspector of Police, Kottawa [(1945) 47 N. L. R. 42.]. A contrary view appears to have been taken by Soertsz, J. In Vargheese v. Perera [(1942) 43 N. L. R.

564.]. In deciding which view I should follow I take into account that section 425 provides that " no judgment passed by a court of competent jurisdiction shall be reversed or altered on appeal or revision on account (a), of any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial . . . . unless such error, omission, irregularity . . . . has occasioned a failure of justice." There was a time when it was thought that the positive requirements of the Code were all essential, and that any breach of such a requirement constituted an illegality. The supporters of this view generally rely on the case of Subramania Iyer v. King Emperor[(1902) 25 N. L. R. 61.], decided by the Privy Council. But if this is the only possible view, section 425 will be of little use, for it is in just those cases where an express provision of the Code has been violated that the section 425 can serve any purpose.

The Privy Council itself has held in later cases that not all infringements of the Code render the proceedings illegal or void. Thus, in Abdul Raman v. Emperor[A. I. R. (1927) P. C. 44.] it was held that a violation of the section corresponding to our section 299 which requires the deposition of each witness to be read over to him in the presence of the accused or his pleader was not fatal. In Pulukuri Kotayya v. Emperor[A. I. R. (1947) P. C. 67.] the Privy Council deprecated the taking of too narrow a view of the operation of section 537 of the Indian Code which corresponds to our section 425. Sir John Beaumont there said : " When a trial is conducted in a manner different from that prescribed by the Code (as in Subramania Aiyar,

case) the trial is bad and no question of curing an irregularity arises ; but if the trial is conducted substantially in the manner prescribed by the Code but some irregularity occurs in the course of such conduct, the irregularity can be cured under section 537 and none the less so because the irregularity involves, as must nearly always be the case, a breach of one or more of the very comprehensive provisions of the Code. The distinction drawn in many of the cases in India between an illegality and an irregularity is one of degree rather than of kind."

There is also a recent decision of the Supreme Court of India in which the operation of section 537 was considered, see Slaney v. State of Madhya Pradesk [A. I. R. (1956) S. C. 116.]. Bose, J. expressed the view that the trend of the more recent decisions of the Privy Council, and indeed all later-day criminal jurisprudence in England as well as in India, has been away from technicality, to regard the substance rather than the shadow, and to see whether even where there has been a non-compliance with the provisions of the Code there has actually been a failure of justice. Chandrasekhera Aiyar, J. pointed out in that case that the gravity of the defect will have to be considered-whether it is a mere unimportant mistake in procedure or whether it is substantial and vital. He said : " If it is so grave that prejudice will necessarily be implied or imported, it may be described as an illegality. If the seriousness of the omission is of a lesser degree it will be an irregularity, and prejudice by way of failure of justice will have to be established." As instances of illegality he mentioned " lack of competency of jurisdiction, absence

of a complaint by the proper person or authority specified, want of sanction prescribed as a condition precedent for a prosecution, in short, defects that strike at the very root of jurisdiction."

Having referred to the judgment of ***Mohideen v Inspector of Police,*** of Basnayake A.C.J., Sansoni J has stated;

"I might also refer to the case of Mohideen v. Inspector of Police, Petta [(1957) 59 N. L. R. 217.], where Basnayake, C.J. and K. D. de Silva, J. (Pulle, J. dissenting) decided that where an accused is brought before the court in custody without process, evidence should be recorded before a charge is framed. In the later case of de Silva v. Sub-Inspector of Police, Matara [(1960) 62 N. L. R. 92.], Basnayake, C.J. has held that where proceedings are instituted under section 148 (1) (b) of the Code, the evidence of the person who brought the accused before the court need not be recorded. The learned Chief Justice would appear to have confined the application of section 151 (2), so far as it requires the evidence of the person who brought the accuse d before the court to be recorded, to cases where no report is filed under section 148 (1) (b). If that be the correct view, then there was no irregularity in the case I am now deciding.

This distinction has clearly been spelt out in an English case decided in 2002. The Court of Appeal of England and Wales, in its judgment of ***R v Hanratty*** [2002] Cr. App. R 30, quoted the following statement of the Lord Chief Justice Cars well;

"It seems to us that it is now possible to formulate two propositions in respect of irregularities at trial ...

1. *If there was a material irregularity the conviction may be set aside even if the evidence of the appellant's guilt is clear,*

2. *Not every irregularity will cause a conviction to be set aside. There is room for the application of a test similar in effect to that of the former provision, viz. whether the irregularity was so serious that a miscarriage of justice has actually occurred."*

The Privy Council, in its decision of ***Randall v R*** [2002] UK PC 19, provided clear guidance and direction to distinguish between procedural flaws which are technical and those which are not on following terms;

"While reference has been made above to some of the rules which should be observed in a well conducted trial to safeguard the fairness of the proceedings, its not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things a done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate,

they are the subject of clear judicial direction. It would emasculate the trial process and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate Court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

Interestingly a similar view was expressed in 1911. ***Manuel v Kanapanickan*** 14 N.L.R. 186, where the complaint before Wood Renton J was that the Magistrate's Court had admitted part of an unsworn evidence by the complainant, which the complainant had interjected during examination of another witness. This interjection had formed the part of the proceedings which later utilised by the trial Court to convict the accused.

Having observed that *"Mistakes are made there. Sometimes one feels in hearing appeals that mistakes have been made which ought to have been avoided"* his Lordship thereafter proceeded to dismiss the appeal after the following observation:-

"If the Supreme Court were not merely to be (as it ought to be) careful to mark what seems amiss in the criminal proceedings that come before it in appeal, but to punish the Magistrate and, be it added, the Colony for formal errors, in cases where substantial justice has been done, the practice would be productive of results which I am afraid that those who address to us arguments of the sort that I am considering imperfectly realize. It would make an administration of criminal justice a mere lottery, an offer to people who delight already to gamble with litigation an irresistible temptation to gamble also with crime. Here, as in India, the Legislature has foreseen these points, and has expressly provided that irregularities in criminal proceedings shall be no ground for the reversal or alteration of sentences on appeal, unless there has been a "failure of justice", and that no new trial or reversal of any decision shall be allowed in any case on the ground of the improper admission of evidence if it appears that independently of the so admitted there are sufficient materials to justify the conclusion at which the trial judge arrived. In Ceylon the rule above stated as to irregularities which existed under the old Code of Criminal Procedure, 1883, has been reproduced in the present Code. The rule as to the improper admission of evidence is embodies in the Evidence Ordinance. We have no power, even if we had the will, to ignore either the letter or the spirit of these statutory provisions. There are, of course, irregularities the mere presence of which imports prejudice,

such as the trial of a man for a number of different offences at the same time, or the failure of the Courts to give accused person a chance of defending themselves before exercising summery powers of punishment for contempt."

It appears that the Legislature, in its wisdom thought it fit to give recognition of this line of thinking by enacting section 456A with the amendment it brought to Code of Criminal Procedure Act within a year from its enactment by Act No. 52 of 1980.

As correctly relied upon by the learned Senior State Counsel, the newly added Section 456A of the said Act reads thus;

"The failure to comply with any provision of this Code shall not affect or be deemed to have affected the validity of any complaint, committal or indictment or of the admissibility of any evidence unless such failure has occasioned a substantial miscarriage of justice."

There was no claim of consent raised by any of the Appellants nor did they take up the defence of alibi. The Appellant's collective response to the allegation of rape is a total denial. They claim they were not involved with this incident whatsoever. Now the question is whether the failure to present their claim of total denial before the Magistrate under Section 154(2) prevented them of taking said defence before the High Court and thereby depriving them of a fair trial. In our view there was no legal or other impediment for the Appellant's in claiming a total denial before the

High Court, upon the fact that there is no record available which is indicative of their stance before the Magistrate's Court.

In assessing credibility of the Appellant's evidence in taking up the position of total denial, the High Court could not have assessed it differently even if they failed to take up at the non-summary inquiry. On the other hand, even if they stated that they did commit rape in their statutory statement, the Appellants are entitled to plead not guilty before the High Court and contest the prosecution case on its merits. They could retract the contents of their statutory statement without any prejudice to their rights. There is no lesser culpability involved in a charge of rape, unless the facts reveal commission of some other offence and not rape.

In the judgment of ***Attorney General v Segulebbe Lateef and Another*** (supra) the Supreme Court listed out several considerations in ensuring the right of an accused to a fair trial. One such consideration relevant to the present situation is "*... the right of an accused to examine or have examined the witnesses against him and to obtain the evidence examination of witnesses on his behalf under the same conditions as witnesses against him*".

We see no violation of this principle in the appeal before us, with the failure of the inquiring Magistrate to comply with Section 150 to 152 of the Act No. 15 of 1979. The Appellants offered evidence before the High Court individually and through their witnesses.

Since the days of the Criminal Procedure Code of 1883 to the current Code of Criminal Procedure (Special Provisions) Act No. 2 of 2013, the provisions concerning the evidence of an accused have not changed in any significant manner. However, we note from the judgments reported during the early part of the nineteenth century to modern times, the attitude of the accused and the legal practitioners who represented them towards utilising the statutory opportunity to present their case before the inquiring Magistrate has undergone radical changes. In the early days, there was the tendency to place evidence before the Magistrate that would tend to reduce the culpability of the accused. Implementation of the death penalty may have contributed to this attitude. Of late, the practice of leading evidence of the accused and his witnesses during the preliminary inquiry has significantly dwindled into almost a redundant state.

This could well be the reason, the Legislature, in passing legislation in the form of the Criminal Procedure (Special Provisions) Act No. 15 of 2005 and its successive enactments, through Section 15, provided a window of opportunity for adaptability to accommodate current practices when it stated "The provisions of Chapter XV of the Code of Criminal Procedure Act No. 15 of 1979 shall *mutatis mutandis* apply to any preliminary inquiry held under the provisions of this Act."

As it has already been decided in ***Regina v Arthur Perera*** (supra) that the prosecution is not bound to put in and read such evidence by the accused, the failure to record his statutory statement could not in any way affect his entitlement to a fair trial nor to prejudice his rights.

In view of these considerations, we are of the firm view that the failure of the prosecution to put the statutory statement before the close of the prosecution case at the High Court of Jaffna and the failure to record their statutory statement when the Magistrate decided not to act under Section 153 of the Code of Criminal Procedure Act has not violated substantial rights of the Appellant nor has it resulted in a failure of justice.

Therefore, we answer the issue; whether the substantial rights of the Appellants were prejudiced or whether there was a failure of justice resulted in due to the noncompliance of the mandatory provisions contained in Sections150, 151 and 152 and 199(3) by the prosecution, in the negative.

The conviction and sentence imposed on the Appellants is affirmed by this Court and their appeal is accordingly dismissed.

JUDGE OF THE COURT OF APPEAL

DEEPALI WIJESUNDERA, J.

I agree.

JUDGE OF THE COURT OF APPEAL