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

A matter of an application under and in terms of Articles 154P (6) read with Article 154P (3) and 138 of the Constitution and the High Court of the provinces (Special Provisions0 Act No. 19 of 1990.

CA/PHC/47/2021

Provincial High Court of Hambanthota

Case No: 06/2021/RV

Officer In Charge

Special Crimes Investigation Bureau

Tangalle

Complainant

V.

Sanjeewa Pushpakumara samarasinghe

"Jayabim", No. 04, Sandagirigoda

Thissamaharamaya'

Accused

And Now between

Sanjeewa Pushpakumara samarasinghe

"Jayabim", No. 04, Sandagirigoda

Thissamaharamaya'

Accused- Petitioner

Vs.

1. Chaminda Mangala Kumara Munasinghe Dissanayake
   No. 03/09, Mulana
   Hungama

Virtual- Complainant- Respondent

2. Officer-in- Charge
   Special Crimes Investigation Bureau
   Tangalle

   Complainant-respondent

3. The Attorney General

   Attorney General's Department

   Colombo 12

Respondent – Respondent

AND NOW BETWEEN

Sanjeewa Pushpakumara samarasinghe

"Jayabima", No. 04, Sandagirigoda

Thissamaharamaya'

Accused- Petitioner –Appellant

V.

1. Chaminda Mangala Kumara Munasinghe Dissanayake
   No. 03/09, Mulana
   Hungama

Virtual- Complainant- Respondent- Respondent

2. Officer-in- Charge
   Special Crimes Investigation Bureau
   Tangalle

   Complainant-respondent- Respondent

3. The Attorney General

   Attorney general's Department

   Colombo 12

Respondent – Respondent- Respondent

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

Counsel: Udaya Bandara for the Accused- Petitioner- Appellant
Maheshika Silva, DSG DSG for the Respondents

Argued On : 07.03.2025

Order On: 04.04.2025

ORDER

B. Sasi Mahendran, J.

The Accused- Petitioner- Appellant (hereinafter referred to as the Appellant) instituted this appeal seeking to set aside the judgment and the conviction of the Learned Magistrate of Thissamaharama dated 10.09.2018 and the order of the Provincial High Court of Hambantota dated 26.03.2021.

According to the Appellant, the 1st and 2nd Respondents instituted an action bearing No. 11836 in the Magistrate Court of Thissamaharama on 19.10.2009 leveling 3 charges against the Appellant punishable under Sections 403, 386, and 389 of the Penal Code.

The Appellant states that the prosecution called 4 witnesses, but the Appellant could not call any because his Counsel namely Mr. Sunil R. de Silva was abroad without informing the Appellant. On 31.07.2017, the Appellant had to give a dock statement without any prior knowledge, consent, or awareness. After the trial, the Learned Magistrate by judgment dated 10.09.2018, convicted the Appellant on the 1st charge and sentenced a fine of Rs. 1500/- with a default sentence of 3 months simple imprisonment. Additionally, he was sentenced to one-year rigorous imprisonment suspended for 10 years and a compensation of Rs. One million to be

paid to the 1st Respondent with a default sentence of one-year of rigorous imprisonment.

Being aggrieved by the said judgment of the Learned Magistrate, the Appellant appealed to the Provincial High Court of Hambantota on 20.12.2020 which was dismissed on the basis of delay.

The Appellant states that thereafter, the Appellant filed a revision application bearing No. 06/2021/RV in the Southern Provincial High Court in Hambantota seeking to set aside the judgment and the sentence imposed by the Magistrate Court and further proceedings of the said Magistrate Court case bearing No. 11836.

The main ground urged by the Appellant in the said revision application was that the Learned Judges have failed to adopt the proceedings in accordance with Section 48 of the Judicature Act No. 2 of 1978. Accordingly, the right to a fair trial was denied to him. Further, the Appellant could not produce the original documents which were with his Counsel namely Mr. Sunil R. de Silva who appeared for the Appellant. Further, he has made the position that the Learned Magistrate falsely recorded the proceeding dated 31.07.2017 that the Appellant informed that he wanted to make a dock statement. In fact, he did not know what a dock statement was as he had not received any legal advice regarding making a dock statement.

The Appellant further states that when the said revision application was supported on 26.03.2021, the Learned Provincial High Court Judge dismissed the application on the basis that he had failed to show any exceptional circumstances.

Being aggrieved by the said judgment, the Appellant preferred the present appeal in this Court on the basis that the said judgment of the Learned High Court Judge is unjust and contrary to law. Further, the Appellant contends that the Learned High Court Judge has failed to consider that there was a series of incidents that resulted in a miscarriage of justice which could have warranted the acceptance of the revision application.

This Court has to consider whether the grounds urged by the Appellant warrant the Learned High Court Judge to invoke the revisionary jurisdiction.

The first ground urged by the Appellant was the failure to adopt the proceedings by Learned Magistrates.

By judgment, SC Appeal No: SC/APPEAL/139/2019 decided on 05.04.2024, as held by His Lordship Samayawardhena J that;

> "Section 48 does not mandate the judge to formally record the fact of the adoption of proceedings. Consequently, the failure to record the fact of adoption of previous proceedings cannot invalidate or vitiate the proceedings, including the judgment."

Now it is the settled law that failure to adopt the proceedings can not invalidate the proceedings of a court of first instance.

With regard to the second ground, our Courts have held that, to contradict the record, which has taken place in the court of first instance should not be allowed in the appeal. It should be done before such court. This concept was considered by His Lordship Jayasuriya, J in Vannakar and 6 Others v. Uthumalebbe, 1996 (2) SLR 73 at page 75,:

> "Justice Dias in *King* vs. *Jayawardene* (1) has considered the earlier line of decisions laying down the cursus curiae with regard to the legality of filing convenient and self-serving affidavits in appeal to vary and contradict the record or with a view to purge a default which had taken place before the Court of first instance. After a review of these decisions he held that no party ought to be permitted to file a belated self-serving and convenient affidavit to contradict the record, to vary the record or to purge a default where they have not taken proper steps to file such affidavits before the Judge or President of the Court of first instance or tribunal respectively. Vide also the judgment of Justice Canekeratne in *Gunewardena v Kelaart.* (2) If a party had taken such steps to file papers before the presiding officer of Court of first instance, then an inquiry would be held by him and the self-serving

statements and averments could be evaluated after cross-examination of the affirmant when he gives evidence at the inquiry. If such a procedure was adopted the Court of Appeal would have the benefit of the recorded evidence which has been subjected to cross examination, and the benefit of the findings of the judge of the Court of first instance. When such procedure is not adopted, Justice Dias ruled that the Court of Appeal could not take into consideration self-serving and convenient averments in the affidavits to contradict and vary the record or to purge a default committed before the Court of first instance."

The above dictum was followed by His Lordship Sisira de Abrew J in Chaminda v. Republic of Sri Lanka (2009) 1 Sri LR 144 on page 148 and held that;

> "In my view a litigant can't make a convenient statement in court and contradict a judicial record. In this regard I am guided by the following judicial decisions. *OIC Ampara Police Station vs. Bamunusinghe Arachchige Jayasinghe*, Jayasuriya J remarked: "A litigant is not entitled to impugn a judicial record by making a convenient statement before the Court of Appeal." In *Gunawardane vs. Kelart* Supreme Court held: "The Supreme Court will not admit affidavits which seek to contradict the record kept by the Magistrate."

On this basis, we are unable to consider the veracity of the Appellant's version.

For the above-mentioned reasons, we dismiss the application with state costs of Rs. 20,000/-.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL