
SAMARAKOON BANDARA**Vs.****ATTORNEY GENERAL**

COURT OF APPEAL
WICKREMASINGHE, J.
FERNANDO, J.
CA/PHC/APN/127/18
PHC ANURADHAPURA 67/2006
MC/ANURADHAPURA/1117/03
MAY 16, 2019

Transfer of cases—Demeanour or deportment of witness—Judicature Act, No. 2 of 1978, section 48— Fair trial—Re—summoning a witness

The judge before whom evidence of several witnesses for the prosecution was led, was transferred to another court. The defence made an application before the succeeding judge to transfer the case to his predecessor which was refused.

Held:

1. Per section 48 of the Judicature Act, as amended, the succeeding judge has the discretion to continue with the case subject to the proviso of that section. The proviso which allows the accused to demand that witnesses be re-summoned and re-heard is to safeguard the right of the accused to a fair trial in a criminal case. It gives the opportunity to the succeeding judge to see the demeanour of the witnesses whose evidence has already been concluded.
2. It is up to the petitioner to make an application to resummon the witnesses if he so wishes in terms of the proviso to section 48.
3. When deciding to continue with the case as per section 48, the Judge need not give reasons for his decision.

Cases referred to:

1. Herath Mudiyansele Ariyaratne v. The Republic of Sri Lanka (CA/307/2006, CA Minutes of 17. 07. 2013)
2. Vilma Dissanayake and others v. Leslie Dharmaratne [2008] 2 Sri LR at 184

APPLICATION for Revision from the Judgment of the High Court of Anuradhapura.

Saliya Peiris, P. C., with Pulasthi Hewamanne for the Accused-Petitioner.

Nayomi Wickramasekara, S. S. C., for the Respondent.

cur. adv. vult.

July 2, 2019

P. FERNANDO, J.

The Petitioner and his wife were indicted in the High Court of Anuradhapura with 1st and 2nd counts on offences punishable under sections 308(a) 2 and 298 of the Penal Code respectively. Evidence of prosecution witnesses Nos. 01 and 02 had been led before the learned High Court Judge Mr. R. M. P. S. K. Ratnayake and thereafter witnesses Nos. 05, 06, 03, 24, 25, 26, 11, 14 were led before the learned High Court Judge Mr. Manjula Thilakaratne. When the matter was called for trial on 11. 06. 2018, it was the learned High Court Judge Mr. K. Weeraman who presided, as Mr. Thilakaratne had gone on transfer to another Court. On that day the case was re-fixed for 25. 09. 2018 for want of witnesses.

Thereafter, the case was called on 25. 09. 2018 for trial and the prosecution moved for summons on witness No. 24. According to the proceedings on record, the defence counsel has requested Court to send the case to be heard by Mr. Thilakaratne the learned High Court Judge, as evidence of more witnesses were recorded before him. At that stage, the learned High Court Judge has questioned the defence counsel as to whether Mr. Thilakaratne had recorded any demeanour or deportment of any witnesses, where the defence counsel answered in the negative. Hence, the learned High Court Judge refused the application by the defence to send the case back to his predecessor Mr. Thilakaratne. Being aggrieved by the said order, the Petitioner filed the instant application to get it revised.

I have taken into consideration, the petition with the documents filed including the proceedings in the High Court, oral submissions made by the counsel in support of the same and the written submissions filed on behalf of the Petitioner and the Respondent.

Counsel for the Petitioner submitted that the learned High Court Judge erred when he refused to send the case to his predecessor as Mr.

Thilakaratne HCJ has heard the evidence of main witnesses for the prosecution. It is further submitted that the Judge who heard the case should decide the case. The practice of the Court had been to send the case to His Lordship the Chief Justice to appoint the Judge who heard the case to hear and conclude, counsel submitted. The contention of the Petitioner is that the present High Court Judge could not observe the demeanour of the witnesses whose evidence was recorded before his predecessor. He moves notice on the Respondent.

Counsel for the Respondent submitted that section 48 of the Judicature Act provides for a situation where continuation of proceedings before a succeeding Judge who is empowered to act on the already recorded evidence. The succeeding Judge is also empowered to re-summon the witnesses who already testified. It is submitted that the existence of exceptional circumstances is a pre-condition for the exercise of powers of revision and that the Petitioner has failed to establish the existence of exceptional circumstances.

Section 48 of the Judicature Act as amended has made clear provision for continuing any case begun before a Judge becomes disabled. Section 48 provides:

48. In the case of death, sickness, resignation, removal from office, absence from Sri Lanka, or other disability of any Judge before whom any action, prosecution, proceeding or matter whether on any inquiry preliminary to committal for trial or otherwise, has been instituted or is pending such action, prosecution, proceeding or matter may be continued before the successor of such Judge who shall have power to act on the evidence already recorded by his predecessor and partly recorded by him or, if he thinks fit, to resubmit the witness and commence the proceedings afresh:

Provided that where any criminal prosecution, proceeding or matter (except on an inquiry preliminary to committal for trial) is continued before the successor of any such Judge, the accused may demand that the witnesses be re-summoned and reheard.

Application of section 48 when a Judge is transferred to another station was discussed by His Lordship Justice Sisira de Abrew in the case of *Herath Mudiyanselage Ariyaratne v. Republic of Sri Lanka* where it was said:

. . . I now again turn to the contention that succeeding HCJ in a criminal trial cannot, under Section 48 of the Judicature Act, continue with the proceedings recorded before his predecessor. When a HCJ is transferred from his station he ceases to exercise his jurisdiction in his area and thereby he suffers from disability to function as HCJ of the area. Thus, in my view, transfer of a HCJ from a station is covered by the words 'other disability' in Section 48 of the Judicature Act.

It is clear by plain reading of section 48, that the successor Judge has the discretion to continue with the case subject to the proviso. It is obvious that the proviso is to safeguard the right of accused to a fair trial in a criminal case, as the successor Judge would be able to see the demeanour of a witness already led, if necessary. For that purpose, the accused is given the opportunity to demand that the witness be re-summoned and reheard.

Counsel for the Petitioner made submissions on the practice of Court to forward the case to His Lordship the Chief Justice requesting him to nominate the predecessor Judge to hear the case. There had been instances where it had happened, but not as a practice. There had been instances where the High Court Judge had concluded the case before him, but transferred before he delivered the judgment. In instances like that it would be more practical and sensible to make such a request in the interest of justice. Situation in this case is different. Prosecution has not even closed its case.

In the case of *Vilma Dissanayake and Others v. Leslie Dharmaratne* 2 Court held;

It is necessary for a succeeding Judge to continue proceedings since there are change of Judges holding office in a particular Court due to transfers, promotions and the like. It is in these circumstances that Section 48 was amended giving discretion to a judge to continue with the proceedings.

The exercise of such discretion should not be disturbed unless there are serious issues with regard to the demeanour of any witness recorded by the Judge who previously heard the case.

The learned High Court Judge in this case, on 25. 09. 2018 had correctly inquired whether his predecessor Judge had recorded any demeanour or deportment of any witnesses, where the defence counsel had answered

in the negative. He has even referred to the case of *Vilma Dissanayake (supra)* when he decided to refuse the application to send the case to his predecessor.

When deciding to continue with the case acting in terms of Section 48, the Judge need not give reasons for his decision. This was discussed in *Herath Mudiyanseelage Ariyaratne v. Republic of Sri Lanka (supra)*. In that case it was said;

Learned PC submitted that if the succeeding Judge, acting under section 48 of the Act, decides to continue with the case, he must, before doing so, make an order giving reasons for his decision. He urged this ground without prejudice to his first ground. I now advert to this contention. Section 48 of the Judicature Act does not state that if the succeeding Judge decides to continue with the case, he should give his reasons. Assuming without conceding that he should give reasons for his decision what are the matters that he should discuss. He has to necessarily comment on the credibility of the witnesses. If he expresses an opinion about the credibility of the witnesses who had already given evidence an objection can be raised to the effect that he had decided the credibility of witnesses before hearing the full case. When I consider all these matters, I am of the opinion that there is no necessity for the succeeding Judge to make an order giving his reasons for his decision to continue with the evidence already recorded. For these reasons, I am unable to agree with the submission of the learned PC.

On the above premise, I am of the view that the learned High Court Judge correctly decided to continue with the case. It is up to the Petitioner to make an application if he so wishes in terms of the proviso to section 48.

As no prima facie case was established by the Petitioner, application for notice to the Respondent is refused.

WICKREMASINGHE, J. - *I agree.*

Application dismissed.

Judgment by: K. Priyantha Fernando, J.

This PDF was produced by paralegal.lk