

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

In the matter of an application for Special Leave to Appeal from the Judgment of the High Court of the Provinces holden in Panadura in terms of Article 154 P (3) read together with Section 9(1) of the High Court of the Provinces (Special Provisions) Act.

SC Appeal No. 115/2019
SC SPL No. 188/2019
High Court Panadura Case
No. HCMCA 17/2017
Horana Magistrate Court Case
No. 29028

Officer-in-Charge,
Horana Police Station,
Horana.

Complainant

Vs.

Sirimanna Hettige Jayasena,
45, Srimaha Vihara Mawatha,
Kalubowila,
Dehiwala.

Accused

And Between

Sirimanna Hettige Jayasena,
45, Srimaha Vihara Mawatha,
Kalubowila,
Dehiwala.

Accused-Appellant

Vs.

Officer-in-Charge,
Horana Police Station,
Horana.

Complainant-Respondent

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent

And Now Between

Sirimanna Hettige Jayasena,
45, Srimaha Vihara Mawatha,
Kalubowila,
Dehiwala.

Accused-Appellant-Petitioner

Vs.

Officer-in-Charge,
Horana Police Station,
Horana.

Complainant-Respondent-

Respondent

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent-Respondent

Before: **Murdu N.B. Fernando, PC, J.**
 A.L. Shiran Gooneratne, J.
 Arjuna Obeyesekere, J.

Counsel: Saliya Pieris, PC with Varuna de Seram **for the Accused-Appellant-Petitioner.**

G. Wakishta Arachchi, SSC **for the Complainant-Respondent-Respondent.**

Argued on: 11/01/2022

Decided on: **04/04/2022**

A.L. Shiran Gooneratne J.

The Accused-Appellant-Petitioner (hereinafter sometimes referred to as “the Petitioner”), was charged before the Magistrates Court of Horana, in Case Bearing No. 29028, for committing the following offences on or about 05/05/2007, whilst driving Vehicle Bearing No. WP-HI-2390.

1. Negligent driving - an offence punishable under Section 214(1)(a) of the Motor Traffic Act read with Section 151(3) and Section 217(2) as amended, of the said Act.
2. Failure to avoid an accident - an offence punishable in terms of Section 149(1) read with Section 224 of the said Act.
3. Failure to report an accident - an offence punishable in terms of Section 161(1) read with Section 224 of the said Act.

4. Causing grievous injuries to an individual by reckless or negligent driving - an offence punishable under Section 329 of the Penal Code.

At the conclusion of the trial, the learned Magistrate by Judgment dated 23/01/2017, convicted the Petitioner on counts 1, 2 and 4, stated above, and by Order dated 27/02/2017, sentenced the Petitioner to pay a fine of Rs. 5,000/- and Rs. 2000/- on counts 1 and 2 respectively, and on count 4, a fine of Rs. 1500/- and 3 months Simple Imprisonment suspended for 5 years.

Being aggrieved, by the said Judgment and the said Order made by the learned Magistrate, the Petitioner, made an application dated 13/03/2017, to the Provincial High Court of Panadura in Case Bearing No. HCMCA 17/2017, to have the said Judgment and the Order set aside. At the conclusion of hearing, the learned High Court Judge, by Order dated 30/04/2019, affirmed the said conviction and the sentence imposed on counts 1 and 2. On count 4, the fine imposed was affirmed, however, the sentence of 3 months Simple Imprisonment suspended for 5 years was varied to be an active sentence of 3 months Simple Imprisonment.

By application dated 12/05/2019, the Petitioner sought Special Leave to Appeal from this Court, *inter alia*, to set aside and/ or vary the said Order made by the Provincial High Court of Panadura and the Judgment and the sentencing order made by the Magistrates Court of Horana.

Having heard submissions of both Counsel, this Court was inclined to grant Special Leave to Appeal on the following question of law;

“Did the High Court give an opportunity to the parties to address the enhancement of the sentence before the sentence was enhanced.”

The learned Magistrate, prior to imposing the said discretionary sentence, has made reference to the consideration of mitigatory circumstances. The prosecution did not object to such consideration nor did it seek an enhancement in sentence imposed on the

Petitioner. Similarly, when this matter was taken up in appeal in the Provincial High Court, there was no application by the State for enhancement of sentence placed before the Court to be heard and decided.

In the circumstances, the position of the Petitioner is that no opportunity was afforded to him to show cause as to why the said variation of sentence should not be carried out.

The learned Senor State Counsel appearing for the Respondent contends that both parties have been heard and the learned High Court Judge addressed his mind to the mitigatory and the aggravating factors before varying the sentence. However, the learned Counsel concedes that the Respondent has not sought an enhancement of sentence in proceedings before the High Court.

In the said Order, the learned High Court Judge states that when considering the circumstances of this case the sentence imposed is not adequate and accordingly, has proceeded to vary the sentence imposed on count 4. The learned Judge did not state reasons for his decision when varying the relevant part of the sentence.

The learned President's Counsel for the Petitioner has cited the case of *Bandara vs. Republic of Sri Lanka (2002) 2 SLR 277*. In the said case the Counsel appearing for the Hon. Attorney General invited the attention of Court to Section 336 of the Code of Criminal Procedure Act No. 15 of 1979, on the basis that the sentence imposed by the learned Magistrate was manifestly inadequate. In this case, prior to considering a variation in sentence, Gamini Amaratunga, J. at page 279, held that;

“We, therefore, called upon the accused-appellant to show cause why his sentence should not be enhanced and we give him time to show cause”.

In this case, the learned Magistrate having stated reasons for his decision, convicted and sentenced the Petitioner on counts 1, 2 and 4. On count 4, apart from the fine, a sentence of 3 months Simple Imprisonment was imposed and was suspended for 5

years. By the said variation of sentence, the 3 months Simple Imprisonment was made operational.

The learned President's Counsel has also drawn the attention of Court to Case Bearing No. **SC/SPL/LA 39/2018**. In the said case no opportunity was given to the accused to show cause before the sentence was enhanced by the learned High Court Judge who revised the sentence in appeal. The Supreme Court cited with approval the Judgment in case **SC/SPL/LA No. 201/2006**, where it was held that;

“it is a cardinal Principal that the accused person ought to be given an opportunity to present to court any argument that he might have against the enhancement of the sentence”

The question of law raised by the Petitioner is based upon a failure of natural justice by not affording an opportunity to the Petitioner to be heard, prior to the said variation in sentence. A basic principle of procedural safeguard is that a man's defence must be heard fairly. *“An omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure, but is a far more fundamental matter in that it is contrary to the rule of natural justice embodied in the maxim audi alteram partem”* (**Darmadasa vs. Piyadasa 2008 B.L.R 208**)

It is observed that, the conviction and sentence imposed by the learned Magistrate is not irregular and is sanctioned by law. The learned High Court Judge affirmed the conviction for reasons stated in the said Order, however, failed to give reasons for varying the sentence. When the High Court Judge interfered with an exercise of judicial judgment, the necessary factors leading to such interference should be stated. Also, when the Judge is inclined to a variation of sentence, the Judge should permit the Counsel to address Court as to the appropriateness of the varied sentence and to what extent should it be varied. I observe that the High Court Judge has failed to afford an opportunity to the Petitioner to be heard and to give reasons. A bald statement, as in this case, to justify a variation in sentence, does not suffice.

Accordingly, the question of law raised by the Accused-Appellant-Petitioner is answered in the negative.

Therefore, I affirm the conviction on count 1, 2, and 4 and also affirm the sentence imposed on count 1 and 2, made in Order dated 30/04/2019, made by the Provincial High Court of Panadura. The sentence on count 4 is varied to read as follows;

A fine of Rs. 1,500/- and 3 months Simple Imprisonment suspended for 5 years.

The Judgment dated 23/01/2017, and the Order dated 27/02/2017, made by the learned Magistrate is affirmed.

Appeal allowed.

Judge of the Supreme Court

Murdu Fernando PC. J.

I agree

Judge of the Supreme Court

Arjuna Obeyesekere J.

I agree

Judge of the Supreme Court