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

In the matter of an Application for Revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hon. Attorney General,

Attorney General's Department,

Colombo12.

Complainant

Vs

CA (PHC) APN 119/2016
HC Anuradhapura Case No: 244/2011

Jayakodyge Punchirathna Banda

No.48, 503 Sirikanduyaya, Kottapitiya, Bakamuna. (Presently at Anuradhapura Prison No. U 444)

Accused

And Now between

Jayakodyge Punchirathna Banda

No.48, 503 Sirikanduyaya, Kottapitiya, Bakamuna. (Presently at Anuradhapura Prison No. U 444)

Accused-Petitioner

Vs

Hon. Attorney General,

Attorney General's Department,

Colombo12.

Respondent

BEFORE : **K. K. Wickramasinghe, J &**

P.Padman Surasena, J

COUNSEL : AAL Jaliya Samarasinghe for the accused Petitioner

DSG Varunika Hettige for the Respondent

DECIDED ON : 01st November 2017

JUDGEMENT

K. K. WICKRAMASINGHE, J.

The Accused Petitioner (herein after referred to as the Petitioner) in this Revision Application was indicted in the High Court of Aunuradhapura on the following Charge:-

On or about 07th June 1997 at Polgasowita, within the jurisdiction of this court the accused committed rape on one Kappettimudunagedera Chandani Pushpakumari who was under the age of 16 years, which is an offence punishable under section 364 (2)(e) of the Penal Code as amended by Act No.22 of 1995.

The Accused Petitioner was absconded and the trial was held in absentia.

After trial the Petitioner was convicted for the Charge and he was sentenced to 10 years RI and ordered to pay Compensation of Rs. 50,000/= with a default sentence of 6 months.

On 28.02.2002 it was submitted to the High Court that the petitiioer was abroad. On 25.07.2002 there was an appearance on behalf of the Petitioner whereas the AAL who appeared has undertaken to produce the petitioner in court but the petitioner never appeared in court.

There after section 241 of the CPC inquiry was held and the Learned High Court judge decided to hear the case in absentia. Subsequant to the decision of Section 241 inquiry, again, AAL Mr. Piyadasa Chandrasekera appeared on behalf of the Petitioner. Since he had no written authorisation to appear on behalf of the Petitioner, he undertook to provide the same to court on the next date. On the next date 27.10.2003 the said AAL declined to appear for the petitioner and stated that,

upon the request of the wife of the petitioner he appeared yet the petitioner was absconding. The AAL again declined to appear and the indictment was handed back to court. On the same date on 27.10.2003, AAL Karunaratne Herath by letter intimated to court that he has been retained by the petitioner and that, as the AAL is unwell the matter to be refixed. However there after there was no appearance for the petitioner nor did the petitioner appear in High Court since then.

Therefor the trial was commenced in absentia before the learned High Court Judge. After a lengthy trial on 07.09.2007 Learned High Court Judge convicted the petitioner and accordingly sentenced him. Nine years later on 22.06. 2016 a submission was made by another counsel on behalf of the petitioner to have the case called on a date convenient to the petitioner. On 02.08.2016 the petitioner appeared with a counsel. In the body of the order dated 11.06.2016 it refers to a motion filed by the counsel of the petitioner on 29.05.2014 (but the above mentioned motion is not attached to the brief).

Being aggrieved with the above mentioned sentence, the aforementioned Accused Petitioner preferred this revision application to this court to set aside the Judgement of the Learned High Court Judge and sought **a trial de novo**. He has not appealed against the said order but seeks to invoke the revisionary jurisdiction of this court.

Learned Counsel for the accused petitioner invited this court to consider the ground that the Learned High Court Judge has not afforded a fair trial, since the Learned High Court Judge has not followed the proper procedure provided under section 241of the Code of Criminal Procedure Act No. 15 of 1979.Thereby the petitioner is entitled to revoke the revisionary jurisdiction of this court.

The Learned DSG took up a preliminary objection stating that there is a right of appeal to the Accused instead of invoking the revisionary jurisdiction of this Court

moved to dismiss the application with costs. Also the petitioner has not any point alleged that impugned Judgement is illegal, irregular, capricious or arbitrary in order to invoke the revisionary jurisdiction of this court.

She further submitted that the petitioner has not demonstrated any exceptional circumstances to invoke the revisionary jurisdiction of this court.

In the case of **Ameen Vs Rasheed 3CLW 8,** Abrahams CJ observed that, "*It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have discretion to act in revision. It has been said in this court often enough that revision of an appealable order is an exceptional proceeding and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal. I can see no reason why the petitioner should expect us to exercise our revisionary powers in his favour when he might have appealed and I would allow the preliminary objection and dismiss the application with costs.*"

In the case of **Rustom Vs Hapangama (1978 SLR Vol. 2 PAGE No. 225)** His Lordship Justice Ismail stated thus, "*The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise these powers in revision. If the existence of special circumstances does not exist then this court will not exercise its powers in revision.*"

In **Rasheed Ali Vs Mohamed Ali (1936, 6 CLW)** Soza J. remarked thus: "*The powers of revision conferred on the Court of Appeal are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However, this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the Court.*"

In the case of **Bank of Ceylon Vs Kaleel and others (2004) 1 SLR 284** it was held that, *"to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which is beyond an error or defect or irregularity that an ordinary person would instantly react to it .....the order complained of is of such a nature which would have* ***shocked the conscience of the court.***"

In the case of **Dharmaratne Vs Palm Paradise Cabanas Ltd.(2004) Vol.3 page No. 24 ,** it was held by His Lordship Justice G. Amaratunga that, *"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a revision application or to make an appeal in situations where the legislature has not given a right of appeal."*

The petitioner has not at any point alleged that the impugned judgement is illegal, irregular, capricious or arbitrary. In such an event where the petitioner fails to point out that the judgement that is being challenged to be illegal, the revisionary jurisdiction cannot be revoked.

The petitioner has failed to file an appeal, which was his statutory right, but filed this revision application without giving any reason.

The difference between revision and appeal was explained in **CA (PHC) APN 17/2006** decided by three judges of the Court of Appeal explained Revision and Appeal thus, *"Needless to state that in an application for revision, what is expected to be ascertained is whether there are real legal grounds for impugning the decision of the High Court in the field of law relating to revisionary powers and not whether the impugned decision is right or wrong.*

Hence, in such an application the question of a rehearing or the revaluation of evidence in order to arrive at the right decision does not arise."

Justice F.N.D.Jayasuriya, in the case of **Browns Engineering (pvt) Ltd.Vs Commissioner of Labour and others (1998- SLR Vol' 1 page No 88** held that, *"On an appeal the question is right or wrong? On review the question is lawful or unlawful"*

In **Nissanka Vs The State 2001 Vol. 3, page No. 78**, it was held,

The power of Revision can be exercised for any of the following purposes viz:

(1)to satisfy the Appellate Court as to the legality of any sentence/order,

(2) to satisfy the Appellate Court as to the propriety of nay sentence/order

(3) to satisfy the appellate Court as to the regularity of the proceedings of such Court

(4) Revisionary jurisdiction is not fettered by the fact that the accused appellant has not availed of the right of appeal within the specified time.

Per Kulatillake J."*if it appears that the trial judge has applied the law in arriving at his conclusions the Court of Appeal would not interfere with simply because he has failed to set out the law that he has applied in express terms."*

The learned counsel for the respondent has brought a preliminary objection of inordinate delay since the revision application had filed after 2 years and 4 months.

In **H.A.M. CassimVs GA Batticaloa (NLR Vol. 69 pg.403)**

It was held *"An application in revision must be made promptly if it is to be entertained by the SC. There must be finality in litigation, even if incorrect orders have to go un reversed."*

The petitioner relied upon the case No. **CA 307/2012** where the learned High Court judge failed to conduct a section 241 inquiry, no summons have been issued and no record to confirm the return of summons. In this present case, the Learned High Court Judge has called for evidence of PC 31246, Statements of Grama Sevaka, wife of the petitioner, sister in law and mother in law of the petitioner when conducting the inquiry. Therefor facts of this case are totally different to the case cited by the learned counsel for the petitioner.

Even other cases submitted by the learned counsel for the petitioner are not applicable to this case.

The learned counsel never mentioned that there were several Attorneys appeared before High Court representing the petitioner. It is pertinent to note that by submitting written authority to an Attorney proves that he was aware of the case. In the present case the petitioner failed to annex the motions filed on behalf of him at the trial court, which demonstrate his awareness of his case.

Contention of the learned counsel for the respondent is that the petitioner has violated rule 3(1)(a) and (b) of the Supreme Court rules as identical as Rule 46 of the Court of Appeal Rules.

In **Mary Nona Vs Francina (1998) 2 Sri L R 250**, Justice Ramanathan held "*Compliance with rule 46 of the Suprem Court Rules 1978 in an application for revision is mandatory. A copy of the proceedings containing so much of the record as would be necessary to understand the order sought to be revised and to place it in its proper context must be filed. Merely filing copies of three journal entries with no bearing on the matters raised in the petition is not a compliance with rule 46.*"

In **Navaratne Vs Arumugar (1980) 2 SLR 1** Soza J., observed thus: "*As the petitioner in the instant case had come into court only with a certified copy of the proceedings of 10th February, 1980 and the order delivered on 19th February 1980 and the orders canvassed by him could not be reviewed in the absence of the earlier proceedings, the evidence and original complaint which were procured subsequently, the petition should have been rejected for non-compliance with rule46.*"

The Learned High Court Judge has considered the aggravated circumstances under which the offence was committed by the petitioner (age of the victim, nature of offence etc.) and also has given due consideration to all circumstances pointed out by the learned counsel for the petitioner given reasons and has made a sound and comprehensive Judgment. The Learned High Court Judge has imposed the minimum sentence.

The learned counsel for the petitioner has not submitted exceptional circumstances to revoke the revisionary jurisdiction of this court.

Considering above, we have no reason to interfere with the findings of the Learned the Learned High Court Judge.

We affirm the Conviction and the Sentence imposed by the Learned High Court Judge.

Hereby the Revision Application is dismissed in limine.

JUDGE OF THE COURT OF APPEAL

P.Padman Surasena J

I agree,

JUDGE OF THE COURT OF APPEAL