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 and 154P of The Constitution read with sections 364 and 365 of the Code of Criminal Procedure Act No. 15 of 1979 and High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (as amended)

Court of Appeal

CA/CPA/0002/23

High Court Embilipitiya

Case No: HCE/140/2006

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Kithulamulla Gamage Saman Kumara alias Puncha

ACCUSED

AND NOW BETWEEN

Kithulamulla Gamage Saman

Kumara alias Puncha,

No. 111B, Kimbolpitiya,

Welmilla,

Bandaragama.

Presently at,

Angunakolapelessa Prison,

Ranna Embilipitiya Road,

Angunakolapelessa.

ACCUSED-PETITIONER

Vs.

The Attorney General

Attorney General's Department

Colombo 12

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anil Silva, P.C. for the petitioner

Supported on : 08-09-2023

Order on : 05-12-2023

Sampath B. Abayakoon, J.

This is an application by the by the accused-petitioner (hereinafter referred to as the petitioner), who stood indicted before the High Court of Embilipitiya Case No. HCE/140/2006, invoking the revisionary jurisdiction of this Court.

This matter was supported before this Court by the learned President's Counsel who represented the petitioner seeking notice of this revision application, and this order is pronounced after considering whether there is merit in issuing notice in this regard to the complainant-respondent named in the petition.

It appears from the prayer of the petition that by filing this revision application, the petitioner is seeking to set aside the conviction and the sentence of him dated 02-09-2010 by the learned High Court Judge of Embilipitiya imposed in the above-mentioned High Court case.

In the alternative, the petitioner is seeking this Court to convict him for the offence of culpable homicide not amounting to murder.

Apart from the earlier mentioned alternative remedies he is seeking, in the event of the mentioned reliefs not granted, the petitioner wants this Court to revise and set aside the order of the learned High Court Judge of Embilipitiya dated 22-11-2022 pronounced in High Court Embilipitiya case No- HCE/140/2006, wherein, the application made in terms of section 241(3) of the Penal Code by the petitioner was dismissed by the learned High Court Judge.

At the very outset, it needs to be noted that the two contrasting reliefs sought by the petitioner are reliefs that cannot be considered in the one and the same revision application filed before this Court. If the petitioner is seeking to revise and set aside the conviction and the sentence where he was convicted for murder, the relevant facts and the law that has to be considered are very much different to the facts and the circumstances that a trial Court will consider in an application made under section 241(3) of the Code of Criminal Procedure Act.

Be that as it may, I will now consider whether there is any basis for this Court to issue notice of this application as urged before this Court.

The petitioner has been indicted initially before the High Court of Ratnapura for causing the death of a person at Sooriyawewa on 14-02-1995, and thereby committing the offence of murder punishable under section 296 of the Penal Code.

The petitioner has never appeared before the High Court of Ratnapura when he was noticed to appear before the Court for the service of the indictment. The learned High Court Judge of Ratnapura having taken the necessary steps under section 241 of the Code of Criminal Procedure Act (The Act) has decided to proceed with the trial in the absence of the petitioner on the basis that he is absconding the Court.

With the establishment of the new High Court of Embilipitiya, the case has been transferred to the High Court of Embilipitiya and the learned High Court Judge of Embilipitiya, after hearing evidence of the matter has convicted the petitioner of his Judgement dated 02-09-2010, and had sentenced him to death accordingly.

The petitioner has been arrested and produced before the High Court of Embilipitiya on 19-08-2020, some 10 years after the conviction and the sentence.

Subsequent to the arrest, an application has been made in terms of section 241(3) of the Act.

At the inquiry held in that regard, the petitioner has called several witnesses and the prosecution has also called witnesses to counter the evidence led on behalf of the petitioner.

The learned High Court Judge, after having considered the evidence and the submissions made by the parties in that regard has delivered his order on 22-11-2022, where the application made by the petitioner was refused.

The relevant section 241(3) of the Code of Criminal Procedure Act reads as follows.

> **241.(3) Where in the course of or after the conclusion of the trial of an accused person under sub-paragraph (i) of paragraph (a) of subsection (1) or under paragraph (b) of that subsection he appears before court and satisfies the court that his absence from the whole or part of the trial was bona fide then-**
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> > **(a) where the trial has not been concluded, the evidence led against the accused up to the time of his appearance before court shall be read to him and an opportunity afforded to him to cross-examine the witnesses who gave such evidence, and :**
> >
> > **(b) where the trial has been concluded, the court shall set aside the conviction and sentence, if any, and order that the accused be tried de novo.**

The primary requirement that an accused person has to establish before the Court in an inquiry of this nature is that to satisfy the Court that his absence from whole or part of the trial was *bona fide*. If the accused person satisfies the Court to that effect only, the provisions of subsection (a) or (b) can take effect.

Although the petitioner has claimed that he was unaware of the case against him and he was in hiding to escape another rival family who was looking to assassinate him, I do not find any basis to conclude that his absence from the Court was for *bona fide* reasons. It appears that the claim by the petitioner was more fantasy than anything else. The learned High Court Judge has well considered whether there exists any basis to allow the section 241(3) application of the petitioner. In that process, the learned High Court Judge has considered the initial section 241(1) order made by the High Court as well.

Although in the petition before this Court, the petitioner has contended that only one police officer was called at the section 241(1) inquiry, and there was no material for the learned High Court Judge to decide to proceed with the trial against him in his absence, I find no basis for such a contention.

The evidence led before the Court in the section 241(3) inquiry clearly suggests that the petitioner has evaded the Court knowing very well that the case against him being taken up before the High Court. The learned High Court Judge has well considered the evidence available in that regard and has come to a finding that the absence from the Court by the petitioner was not due to *bona fide* reasons.

I do not find any reason to satisfy that the learned High Court Judge was misdirected as to the relevant facts and the law when the section 241(3) application by the petitioner was refused.

The next matter that needs attention of the Court is whether the conviction of the petitioner in relation to the charge preferred against him was ex facie wrong and the conviction should have been in terms of section 297 of the Penal Code on the basis of culpable homicide not amounting to murder.

Since the petitioner was absent and unrepresented at the trial, no such position has been taken before the trial Court when the evidence was led by the prosecution. However, it is settled law that even if an exception in terms of section 294 has not been taken, it is the duty of the trial Judge to consider

whether there exists evidence to convict a person in terms of section 297 under culpable homicide not amounting to murder rather than under section 296.

In the case of **King Vs. Belana Withanage Eddin 41 NLR 345** Court of Criminal Appeal held;

> *"In a charge of murder, it is the duty of the judge to put to the jury, the alternative of finding the accused guilty of culpable homicide not amounting to murder when there is any basis for such a finding in the evidence of record, although such defence was not raised nor relied upon by the accused."*

In **King Vs. Vidanalage Lanty 42 NLR 317** the Court of Criminal Appeal observed the following;

> *There was evidence in this case upon which it was open to the jury to say that it came within exception 04 of section 294 of the Penal Code and that the appellant was guilty of culpable homicide not amounting to murder. No such plea, however, was put forward on his behalf. In the course of his address the presiding judge referred to this evidence as part of the defence story, but not as evidence upon which a lessor verdict might possibly be based.*
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> **Held:**
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> > *"It was the duty of the presiding judge to have so directed the jury and that in the circumstances, the appellant was entitled to have the benefit of a lesser offence."*

It is also settled law that a trial Judge is not expected to go on a voyage of discovery in that regard, but has to look at the evidence led in a particular case to find whether it provides a basis for such a conviction, and only if a trial Judge can be satisfied that the evidence led before the Court provides a basis for a conviction under section 297, a conviction can be entered upon.

When it comes to the evidence placed before the trial Court, it is clear that all the witnesses who spoke about the incident were members of the same family. The deceased had been the brother of the petitioner's mother. Although the witnesses have spoken about an incident happened between the deceased and the petitioner some time before the incident, there had been no evidence placed on record as to what happened at the time the petitioner is supposed to have stabbed the deceased, other than the evidence to establish that it was the petitioner who stabbed the deceased.

Under the circumstances. It is my considered view that there was no evidence on record to establish a conviction in terms of section 297 of the Penal Code as urged on behalf of the petitioner.

Accordingly, I find no basis to issue notice on the complainant-respondent on any of the two distinct and separate grounds contended on behalf of the petitioner.

The application for revision is dismissed without the notice being issued.

The Registrar of the Court is directed to communicate this order to the High Court of Embilipitiya for information purposes only.

The proceedings terminated.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal