

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

In the matter of an appeal under and in
terms of Article 138 of the Constitution
of the Democratic Socialist Republic of Sri
Lanka

**Court of Appeal Case
No. CA/PHC/120/2013
H.C. Colombo Case No.
HCRA/64/2013
M.C.Colombo Case No.
45611/1**

Officer-in-Charge,
Minor Offence Branch,
Cinnamon Gardens Police Station,
Colombo 07.

Complainant

Vs.

Liyanage Justin Perera,
No. 68, Sri Vihara Road, Wellawatte,
Colombo 06.

Accused

Between

Liyanage Justin Perera,
No. 68, Sri Vihara Road, Wellawatte,
Colombo 06.

Accused-Petitioner

Vs

Officer-in-Charge,
Minor Offence Branch,
Cinnamon Gardens Police
Station, Colombo 07.

Complainant- Respondent

The Hon. Attorney General,
Department of the Attorney
General, Colombo 12.

02nd Respondent

AND NOW BETWEEN

Liyanage Justin Perera,
No. 68, Sri Vihara Road, Wellawatte,
Colombo 06.

Accused-Petitioner-Appellant

Vs

Officer-in-Charge,
Minor Offence Branch,
Cinnamon Gardens Police
Station, Colombo 07.

**Complainant- Respondent-
Respondent**

The Hon. Attorney General,
Department of the Attorney
General, Colombo 12.

02nd Respondent-Respondent

Before : P.R.Walgama J.

: L.T.B. Dehideniya J.

Counsel : for the Respondent Respondent Appellant.

: for the Petitioner Petitioner Respondent.

Argued on : 21.03.2016

Written submissions filed on: 02nd and 07th June 2016

Decided on : 02.12.2016

L.T.B. Dehideniya J.

This is an appeal from an order of the High Court of Colombo refusing notice in a revision application. The facts are briefly as follows.

The Accused Petitioner Appellant (hereinafter called and referred as to the Appellant) was charged in the Magistrate Court of Colombo on an offence of cheating the complainant punishable under section 400 of the Penal Code by taking Rs. 80,000.00 on the promise of securing a foreign employment but has not kept to the promise. The second charge was an alternative charge of misappropriation. The Appellant pleaded guilty to the charge on 18.01.2010 and moved time to pay the money. The Court has given time till 01.03.2010 to pay the money but has not being paid, imposed one year RI and ordered to pay Rs. 80,000.00 as compensation with a default term of one year imprisonment. The second count being an alternative charge, no sentence was imposed.

The Appellant had 10 other cases of the similar nature, cheating people on the promise of securing foreign employment and collecting

money without sending them for foreign employment, has pleaded guilty. He was given the same punishment in those ten cases too, aggregating 11 years RI and another 11 years imprisonment in default of payment of compensation.

The Petitioner after 3 years, on 03.04.2013 filed a revision application in the High Court of Western Province seeking an order to run the sentences concurrently. The learned High Court Judge dismissed the application without issuing summons. This appeal is from the said order.

The revision is a discretionary remedy granted by the Court on exceptional circumstances. It is settled law that the extraordinary jurisdiction of revision can be invoked only on establishing the exceptional circumstances. The requirement of exceptional circumstances has been held in a series of authorities. *Ameen v. Rasheed* 3 CLW 8, *Rastom v. Hapangama* [19787-79] 2 Sri L R 225, *Cader* (on behalf of Rashid Kahan) Vs Officer - In - Charge Narcotics Bureau, [2006] 3 Sri L R 74, *Colombo Apothecaries Ltd. and others V. Commissioner of Labour* [1998] 3 Sri L R 320 are some of the authorities where it has been emphasized that unless the existences of the exceptional circumstances are been established in cases where an alternative remedy is available, revisionary jurisdiction cannot be invoked.

His lordship Justice Gamini Amarathunga expressed the reason for the necessity to establish the exceptional circumstances in the case of *Dharmarathne v. Palm Paradise Cabanas Ltd.* [2003] 3 Sri L R 24 at page 29 held:

The requirement of exceptional circumstances for the exercise of revisionary jurisdiction is not a requirement statutorily laid down anywhere. As Gunawardana J, himself has referred to, Abrahams CJ. in Ameen v Rashid (supra) has explained the rationale for

insisting on the existence of exceptional circumstances for the exercise of revisionary jurisdiction. According to Abrahams CJ. revision of an appealable order is an exceptional proceeding and a person seeking this method of rectification must show why this extra-ordinary method is sought rather than the ordinary method of appeal. As Hutchinson CJ. has stated in Perera v Silva (supra) it is not possible to contend that the power ought to be exercised or that the legislature could have intended that it should be exercised so as to give the right of appeal practically in every case. Thus the existence of exceptional circumstances is the process by which the Court selects the cases in respect of which this extra-ordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this Court will become a gateway for 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 right of appeal.

The practice of Court to insist on the existence of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed. The words used by the legislature do not indicate that it ever intended to interfere with this 'rule of practice'.

The exceptional circumstances are explained in the case of Vanic Incorporation Ltd v. Jayasekara [1997] 2 Sri L R 365 where it was held;

In the case of Attorney-General v. Podi Singho (supra) Dias, J. held that even though the revisionary powers should not be exercised in cases when there is an appeal and was not taken, the revisionary powers should be exercised only in exceptional circumstances such as (a) miscarriage of justice (b) where a strong

case for interference by the Supreme Court is made out or (c) where the applicant was unaware of the order. Dias, J. also observed that the Supreme Court in exercising its powers of revision is not hampered by technical rules of pleading and procedure.

The appellant has failed to plead and establish exceptional circumstances in the application presented to the High Court. Therefore, the learned High Court Judge's finding that no exceptional circumstances to entertain the revision application; need not be interfered with.

The appellant moved the High Court in revision after three of the conviction and sentence. No any explanation offered for this remarkable delay.

The Appellant's application is for an order to run the sentences concurrently. The law does not provide to order the sentences in different cases to run concurrently. If the conviction is in the same trial only, the sentences can be ordered to run concurrently. In cases where there is a previous conviction and serving a term, the next sentence starts to run on the expiration of the earlier sentence. The section 300 reads thus;

300. When a person actually undergoing imprisonment is sentenced to imprisonment such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced.

When the Appellant was convicted and sentenced to imprisonment in the first case, his term of imprisonment starts and therefore, the subsequent term of imprisonment in the next case start on the expiration of the previous term of imprisonment. His Lordship Justice Gamini Amarathunga explained the law in the case of *Weerawarnakula v. The*

Republic Of Sri Lanka [2002] 3 Sri L.R. 213. His Lordship observed in a similar case that;

The learned counsel for the accused-appellant contended that the learned High Court Judge should have ordered the sentences of imprisonment imposed on the accused-appellant in case No. 998/93 concurrent with the sentences of imprisonment ordered in case No. 997/93 by him on the same day. Section 300 of the Code of Criminal Procedure Act, No. 15 of 1979, provides as follows:

"When a person actually undergoing imprisonment is sentenced to imprisonment such imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced."

At the time the accused-appellant was sentenced in case No. 997/93, he was serving the imprisonment ordered in case No. 996/93 and in view of the provisions of section 300 quoted above the sentence imposed in case No. 997/93 takes effect only at the expiration of the sentence ordered in No. 996/93. The learned counsel argued that when the accused-appellant was sentenced in case No. 997/93 on the same day, he was not "actually undergoing imprisonment" ordered in case No. 997/93. He contended that a person is actually undergoing imprisonment only when he is admitted to and accepted by the prison as a prisoner. The learned counsel accordingly submitted that the learned High Court Judge should have ordered the sentences imposed in case No. 99.8/93 to run concurrently with the sentences he has imposed in case No. 997/93.

A direction that a sentence of imprisonment should run concurrently with another sentence is strictly speaking not a part of the sentence but a direction with regard to the execution of the

sentence. The general principle regarding sentences is that the sentence takes effect from the time it is pronounced. In Shanmugam v. Sinnappari (1) Middleton, J. stated that a sentence would run from the time it is pronounced unless otherwise ordered. Sections 16 and 300 of the Code of Criminal 70 Procedure Act provide exceptions to this general rule. Section 16 provides for a situation where a person at one trial is convicted of any two or more distinct offences. Then the Court may in its discretion sentence such person for such offences to the several punishments prescribed therefor. Such punishments when consisting of imprisonment to commence, unless the court orders them to run concurrently, the one after the expiration of the other in such order as the court may direct. According to this section, the court has a discretion to direct that the separate sentences of imprisonment shall run cencurrently.

Section 300 is applicable to a different situation than that contemplated by section 16 of the Code. It applies to a situation where a person actually undergoing imprisonment is in some other case again sentenced to imprisonment. According to the section the latter imprisonment shall commence to operate at the expiration of the imprisonment to which he has been previously sentenced. This is an exception to the general rule that a sentence begins to operate from the time it is pronounced. Section 300 is couched in imperative terms and in view of the wording of the section no court has the power or discretion to order that a sentence of imprisonment ordered by it shall run concurrently with a sentence of imprisonment ordered in a previous case which the accused is serving when he is sentenced in the 2nd case. In Godagama v. Mathea (2) Wood Renton, J. stressing the imperative nature of

section 321 of the Criminal Procedure Code of 1898 (which was identical with present section 300 of the Code of Criminal Procedure Act) said that "[I]t is not competent for a Magistrate to order that a sentence passed on an offender who is already sentenced for another offence shall run concurrently with the previous sentence."

The Indian counterpart of section 300 was section 397 of the Indian Criminal Procedure Code of 1898 and presently it is section 427 of the Code of Criminal Procedure Act, No. 2 of 1974. The present Indian section is similar to section 397 of the earlier Code. Under section 397 no discretion was available to court to make the later sentence of imprisonment concurrent with a previous sentence of imprisonment ordered in an earlier case. Emperor v. Bhikki and Others (3) . By an amendment to the Indian Criminal Procedure Code in 1923 the words "unless the court directs that the subsequent sentence shall run concurrently with the previous sentence" were added to section 397 and in view of this the courts now have a discretion to order that a subsequent sentence of imprisonment shall run concurrently with a previous sentence of imprisonment. But, there are no similar words in section 300 of our law.

The learned Counsel submitted that since the charges are in similar nature and committed on the same day, three charges would have included in one case. If it was done so the Appellant would have made an application for an order to run the sentences concurrently. I do not understand the rationale of this submission. The Appellant was convicted on his own admission in 11 cases for cheating 11 persons on the premise of securing foreign employment. He deserves heavy punishment. I do not

see any exceptional circumstance for the learned High Court Judge to act in revision.

Under these circumstances, there is no reason to interfere with the findings of the learned High Court Judge.

The appeal is dismissed.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the ~~Court~~ of Appeal

This judgment should apply to the cases bearing Nos. CA (PHC) 121/2013 to CA (PHC) 130/2013. The Registrar is directed to file copies to the relevant files.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the ~~Court~~ of Appeal