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

In the matter of an application to revise the Conviction, Sentence and Compensation Order made by M.C. Monaragala No. 85352 in terms of Rule 3 of the S.C. Rules C.A. (Appellate Procedure) Rules of 1990 read with Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Revision

Application No:

CPA/0026/24

P.H.C. Monaragala Appeal

Case No: 03/2020

Magistrate's Court Monaragala

Case No: 85352

Officer-In-Charge,

Miscellaneous Complaints Division,

Monaragala Police Station,

Monaragala.

PLAINTIFF

Vs.

Don Gamage Rupasinghe,

Ekamuthupura Road, Nakkala,

Monaragala.

ACCUSED

AND BETWEEN

Don Gamage Rupasinghe,

Ekamuthupura Road,

Nakkala,

Monaragala.

ACCUSED-APPELLANT

Vs.

1. Officer-In-Charge,

Miscellaneous Complaints Division,

Monaragala Police Station,

Monaragala.

PLAINTIFF-RESPONDENT

2. The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

Don Gamage Rupasinghe,

Ekamuthupura Road, Nakkala,

Monaragala.

ACCUSED-APPELLANT-

PETITIONER

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: Amal Ranaraja, J.

Counsel : Vijaya Niranjan Perera, P.C. instructed by Jeevani Perera for the Accused-Appellant-Petitioner.

: Jayalakshi de Silva, S.S.C. for the State.

Argued on : 04-10-2024

Decided on : 12-12-2024

Sampath B. Abayakoon, J.

This is an application by the accused-appellant-petitioner (hereinafter referred to as the petitioner) seeking to invoke the revisionary jurisdiction granted to this Court in terms of Article 138 of The Constitution.

The petitioner has been charged before the Magistrate's Court of Monaragala under Case No. 85352 for criminal trespass, punishable in terms of section 433 of the Penal Code, and also for causing mischief by setting fire to several goods valued at Rs. 13,590/-, and thereby committing an offence punishable in terms of section 418 of the Penal Code.

The said offences have allegedly been committed on 12-01-2018 at a place called Ekamuthupura Road, Nakkala, Monaragala.

After trial, the learned Magistrate of Monaragala has found the petitioner guilty of the judgment dated 12-05-2020.

The petitioner has preferred an appeal against the conviction before he was sentenced, which has resulted in the case brief being forwarded to the Provincial High Court of the Uva Province Holden in Monaragala.

When this was brought to the notice of the learned High Court Judge at the hearing of the appeal, the case record has been referred back to the Magistrate's Court of Monaragala for the learned Magistrate to pronounce a sentence on the petitioner.

This has resulted in the successor Judge of the Magistrate's Court of Monaragala sentencing the petitioner, since both the parties had agreed for the sentence being pronounced by the successor Magistrate of Monaragala, instead of the learned Magistrate who pronounced the judgment.

Accordingly, the petitioner has been sentenced to a fine of Rs. 100/- with a default sentence of 1-month simple imprisonment in relation to the 1st count, and for a period of 6 months rigorous imprisonment suspended for a period of

5 years, and to a fine of Rs. 1500/- with a default sentence of 2 months simple imprisonment in relation to the 2nd count preferred against him.

Being aggrieved by the said conviction and the sentence, the petitioner has preferred an appeal in terms of Article 154P of The Constitution to the Provincial High Court of the Uva Province Holden in Monaragala.

After hearing the appeal, the learned High Court Judge of Monaragala has dismissed the same on the basis that the appeal has no merit. However, at the same time, the learned High Court Judge has decided to enhance the punishment imposed upon the petitioner on the basis that the punishment imposed by the learned Magistrate of Monaragala was inadequate.

Accordingly, the sentence against the petitioner has been enhanced in the following manner.

> **On count 1 -** a fine of Rs. 100/- with a default sentence of one-month simple imprisonment and a rigorous imprisonment of 3 months suspended for a period of 5 years.
>
> **On count 2 -** a fine of Rs. 1500/- with a default sentence of six months rigorous imprisonment, and in addition, 2 years rigorous imprisonment suspended for a period of 5 years.

In addition to the above sentence, the petitioner has been ordered to pay Rs. 15,000/- as compensation to PW-01 of the case in terms of section 17(7) of the Code of Criminal Procedure Act, and in default, he has been sentenced for a period of 6 months simple imprisonment.

Although the statutorily available remedy for a person dissatisfied of an appellate judgment pronounced by a High Court of the Province in terms of Article 154P of The Constitution would be to seek Leave to Appeal to the Supreme Court from the said High Court itself, or seek Special Leave to Appeal

from the Supreme Court, the petitioner has preferred this application in revision before this Court.

When this matter was supported for notice, after having considered the facts and the circumstances, this Court decided to issue notice to the respondents, which included the Hon. Attorney General.

The respondents were allowed to file objections in relation to the application before the Court. However, the Hon. Attorney General did not file objections. At the hearing of this revision application, the learned Senior State Counsel who represented the Hon. Attorney General and the complainant-respondent-respondent, informed the Court that after having considered the charges preferred against the petitioner and the unsatisfactory nature of the evidence placed before the Magistrate's Court in order to prove the charges, the Hon. Attorney General has decided not to object to the application filed in revision by the petitioner.

Accordingly, the learned Senior State Counsel invited this Court to pronounce a suitable judgment in that regard.

This is a matter where the PW-01 has not seen the incident, where some items of movable property belonging to her had allegedly been set on fire, but heard about it from several other sources. It was the son of PW-01 and one of his friends who had given evidence at the trial as eyewitnesses. According to their version of events, this incident has occurred at around 8.00 p.m. on the day of the incident.

It appears from the evidence that the petitioner, who was also a worker attached to the Sub-Post Office where PW-01 was the Post Mistress, had an animosity between them due to him being suspended from work. It also appears that the Sub-Post Office was situated in the land adjacent to the land where the petitioner lived. The setting of fire to goods as alleged by the witnesses had taken place on the land belonging to the petitioner.

Although PW-01 has claimed several things that were outside of the Post Office had been set on fire, and given a value to them, the evidence was not clear as to the goods that were set on fire and their actual value. Although it has been claimed that one of the witnesses video recorded the incident, no such evidence has been produced at the trial. It has also been alleged that the son of PW-01, who claimed to have seen the incident, has replaced the petitioner as an Assistant of the Sub-Post Office.

Under this background, it is apparent that the Hon. Attorney General has decided not to challenge the revision application filed by the petitioner due to the nature of the evidence placed before the Court and the omissions and contradictions highlighted during the trial in that regard.

When the conviction and the sentence of the learned Magistrate of Monaragala was appealed against to the Provincial High Court of the Uva Province Holden in Monaragala, the learned High Court Judge has decided to uphold the conviction.

However, it is clear from the judgment that, other than stating he finds no reason to interfere with the conviction and the sentence, the learned High Court Judge has not analyzed the evidence placed before the Magistrate's Court to come to a finding that the learned Magistrate was correct in convicting the petitioner.

In pronouncing the appellate judgment, the learned High Court Judge of Monaragala has decided to enhance the punishment imposed upon the petitioner on the basis that it was inadequate.

In terms of section 336 of the Code of Criminal Procedure Act, when pronouncing an appellate judgment on appeal, a Judge of a Provincial High Court is entitled to vary or enhance a sentence imposed upon by a Court of first instance.

The relevant section 336, which is also applicable to an appeal preferred in terms of Article 154P of The Constitution to a High Court of a Province reads as follows.

> **336. On an appeal against the sentence whether passed after trial by jury or without a jury, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence, and pass other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed and in any other case shall dismiss the appeal.**

However, when enhancing a sentence, which amounts to varying the sentence upon which the accused person came before the appellate forum, it becomes necessary for the appellate Court to give an opportunity to the accused-appellant to show cause as to why the sentence against him should not be enhanced.

This procedure was followed in the case of **Bandara Vs. Republic of Sri Lanka (2002) 2 SLR 277,** where it was stated by **Gamini Amaratunga, J.,**

> *"We, therefore, called upon the accused-appellant to show cause why his sentence should not be enhanced and we gave him time to show cause. The learned Counsel appearing for the accused-appellant submitted that the accused-appellant is the father of an infant child; that he is the sole breadwinner of the family and that his incarceration will have an adverse impact on his family.*
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> *We have carefully considered this submission, but we wish to state that we have also considered plight of the families of those 14 persons who perished in the accident due to the rash and negligent conduct of the accused-appellant. Therefore, we cannot give any relief to the accused-appellant on the basis of the submissions made on his behalf."*

The procedure upon which a sentence already entered can be enhanced upon an appeal was well considered by **Shiran Gooneratne, J.** in **SC Appeal No. 115-2019 decided on 04-04-2022**.

> This was a case where the accused-appellant-petitioner was charged for negligent driving, failure to avoid an accident, failure to report an accident in terms of the Motor Traffic Act, and also for reckless and negligent driving, an offence punishable in terms of section 329 of the Penal Code.
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> After trial, the learned Magistrate found the said accused-appellant guilty for the 1st, 2nd and 4th counts and sentenced him, where the learned Magistrate imposed a simple imprisonment period of 3 months which was suspended for a period of 5 years in relation to the 4th count, in addition to the fine imposed on the said count. On the 1st and the 2nd count, he was imposed a fine only.
>
> After hearing an appeal filed by the accused-appellant challenging the said conviction and the sentence, the relevant Provincial High Court affirmed the conviction on all counts but converted the suspended sentence into an active sentence of 3 months simple imprisonment.

After having considered the procedure followed to enhance a sentence in **Bandara Vs. Republic of Sri Lanka (supra)**, His Lordship cited the judgment pronounced by the Supreme Court in **SC/SPL/LA No. 201/2006** where it was held that;

> *"It is a cardinal principle that the accused person ought to be given an opportunity to present to Court he might have against the enhancement of the sentence."*

Held further;

"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 safeguards 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. (**Dharmadasa Vs. Piyadasa (2008) BLR 208**)"*

It is clear from the appellate judgment of the learned Provincial High Court Judge of the Uva Province Holden in Monaragala dated 02-11-2023, that no opportunity has been given to the petitioner to show cause as to why the sentence imposed on him by the learned Magistrate of Monaragala should not be enhanced.

I find that the reasons given by the learned High Court Judge are not reasons based after providing an opportunity to the petitioner to show cause in that regard.

Therefore, I am of the view that this procedural irregularity has caused a miscarriage of justice towards him as well, which amounts to a sufficient exceptional circumstance requiring the intervention of this Court under the revisionary jurisdiction granted to this Court in terms of Article 138 of The Constitution.

For the reasons as considered above, I hereby set aside the conviction dated 12-05-2020 and the sentence dated 14-12-2021 pronounced by the learned Magistrate of Monaragala, and also the judgment dated 02-11-2023 of the

learned High Court Judge of the Provincial High Court of the Uva Province Holden in Monaragala, as both cannot be allowed to stand. Accordingly, the petitioner is acquitted from the charges preferred against him.

The Registrar of the Court is directed to communicate this judgment to the Provincial High Court of the Uva Province Holden in Monaragala, and also to the Magistrate's Court of Monaragala for compliance and necessary procedural steps.

Judge of the Court of Appeal

Amal Ranaraja, J.

I agree.

Judge of the Court of Appeal