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

In the matter of an Application for Revision under Article 138 of the Constitution.

Court of Appeal Case No:

CPA/0079/23

High Court of Galle

Case No: 1488/20

Magistrate's Court of Galle

Case No: 93084

Excise Inspector,

Excise Station,

Galle.

COMPLAINANT

Vs.

Gamini Guruge *alias* Lal Guruge,

No. 33, Sisila, Degalla,

Dodanduwa.

ACCUSED

AND NOW

Gamini Guruge *alias* Lal Guruge,

No. 33, Sisila, Degalla,

Dodanduwa.

ACCUSED-APPELLANT

Vs.

1. Officer-in-Charge,

Police station,

Hikkaduwa.

Appeared for the Excise Inspector, Galle.

COMPLAINANT-RESPONDENT

2. The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

Gamini Guruge *alias* Lal Guruge,

No. 33, Sisila, Degalla,

Dodanduwa.

ACCUSED-APPELLANT-PETITIONER

Vs.

1. Officer-in-Charge,

Police Station,

Hikkaduwa.

Appeared for the Excise Inspector, Galle.

COMPLAINANT-RESPONDENT-RESPONDENT

2. The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Jacob Joseph for the Accused-Appellant-Petitioner.

: Jehan Gunasekara, S.C. for the Respondents.

Argued on : 06-09-2024

Decided on : 11-12-2024

Sampath B. Abayakoon, J.

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

The petitioner has been charged before the Magistrate's Court of Galle for having in his possession 9750 milliliters of unlawfully manufactured liquor, and thereby committing an offence punishable in terms of the Excise Ordinance.

After trial, the learned Magistrate of Galle has found the petitioner guilty as charged of her judgment dated 16-11-2020. Having considered the previous conviction record of the petitioner, the learned Magistrate has sentenced him for a period of 6 months simple imprisonment and has fined him Rs. 50,000/- with a default sentence of 3 months simple imprisonment.

Being aggrieved of his conviction and the sentence, the petitioner has filed an appeal before the Provincial High Court of the Southern Province Holden in Galle in terms of Article 154P of The Constitution.

It is clear from the certified copy of the case record of the High Court of Galle that the petitioner has not diligently maintained his appeal. Although he has been given several dates to file his written submissions and get ready for the case, it has not been done. When the matter was finally taken up for argument, the petitioner has been absent from the Court, and there had been no legal representation for him as well.

It appears from the case record that the learned High Court Judge of the Provincial High Court of the Southern Province Holden in Galle, despite the appellant being absent and unrepresented, has considered the merits of the matter in pronouncing the appeal judgment dated 28-04-2023, wherein, the learned High Court Judge has decided to dismiss the appeal on the basis that it has no merit.

It is against this judgment, the petitioner has now filed the instant revision application. Although the judgment of the learned High Court Judge of Galle has been pronounced on 28-04-2023, the revision application before this Court has been filed on 11-07-2023.

When this matter was supported for notice and for a stay order, this Court, having considered the facts and the circumstances, decided to issue notice on the respondent-respondents mentioned, and also issued an order staying the proceedings before the Magistrate's Court of Galle Case No. 93084 until the final determination of this matter.

Accordingly, the respondent-respondents were allowed to file objections and the petitioner was also allowed to file counter-objections in this regard.

When this matter was taken up for argument, the learned State Counsel who represented the Hon. Attorney General and the complainant-respondent-

respondents raised several preliminary objections as to the maintainability of the application. However, this Court decided to consider the said preliminary objections together with the merits of the application before this Court.

The learned State Counsel submitted that this is a matter where the proper remedy available for the petitioner was to file an application for Leave to Appeal to the Supreme Court before the Provincial High Court itself, or to seek Special Leave to Appeal from the appellate judgment of the High Court from Their Lordships of the Supreme Court, which the petitioner has failed to do. It was his contention that if the petitioner chooses to file an application for revision against judgment of the Provincial High Court pronounced, exercising its appellate jurisdiction granted in terms of Article 154P of The Constitution, it is the duty of the petitioner to plead before this Court the reasons as to why he did not exercise his statutorily guaranteed remedy. The learned State Counsel submitted that since it has not been explained, the revision application should be dismissed on that ground itself.

He also submitted that the petitioner has even failed to provide exceptional grounds under which he can seek remedy of revision, and what he has stated as exceptional grounds in his petition, cannot be treated as so. It was his view that the said grounds should have been pleaded in a properly submitted Leave to Appeal application before the correct forum.

It was also pointed out that the petitioner has failed to explain his delay in filing this revision application, which is a matter that disentitles him from seeking the remedy of revision. It was also submitted by the learned State Counsel that the learned Magistrate of Galle, as well as the learned High Court Judge of the Provincial High Court of the Southern Province Holden in Galle, has decided the matter on its merit, and hence, there is no basis to consider this application based on exceptional circumstances.

Answering the preliminary objections, the learned Counsel for the petitioner took up the position that the Hon. Attorney General has failed to file his objections following the Appellate Court Procedure Rules.

He relied on the case of **Gita Fonseka Vs. The Monetary Board of The Central Bank of Sri Lanka (2004) 1 SLR 149** to argue that the preliminary objections should fail, as it has not been supported by an affidavit. He insisted that the petitioner has submitted sufficient exceptional grounds in his petition, which needs the intervention of this Court.

The learned Counsel explained the delay in filing this application stating that the COVID pandemic contributed to the delay. He also submitted several grounds challenging the conviction of the petitioner by the learned Magistrate and also the appellate judgment by the learned High Court Judge of the Provincial High Court of the Southern Province Holden in Galle, stressing that this is a fit and proper case for this Court to intervene and set aside the relevant judgments as justice demands. He also submitted that there was no fair trial towards the petitioner.

Before moving on any further, I would like to comment on the argument mooted by the learned Counsel for the petitioner that the respondents have failed to follow Appellate Court Procedure Rules when filing objections since the objections have not been accompanied by an affidavit.

I am of the view that the cited case of **Gita Fonseka Vs. The Monitory Board of The Central Bank of Sri Lanka (supra)** has no relevance to the above submission.

The cited case was a matter where the respondent has filed only an affidavit instead of a proper statement of objections in relation to an application before the Court of Appeal. It has been held that such procedure amounts to not following Rule 3(4)(b)(i) of the COURT OF APPEAL (APPELLATE RULES) 1990 and Rule 3(7), where it is necessary for a respondent to file a statement of objections,

and if such statement of objection contain any averment of facts, such facts shall be supported by an affidavit in support of such averments.

In the instant matter, the respondents have duly filed their statement of objections and since it does not mention any averments of facts, it is the view of this Court that no affidavit would be necessary. As submitted correctly by the learned State Counsel, if the appellate judgment of the learned High Court Judge of the Provincial High Court of the Southern Province Holden in Galle was pronounced without hearing the petitioner for no fault of him, the proper procedure would have been to go before the same Court seeking a relisting of the appeal. I find that the petitioner has failed to follow that course of action before filing this revision application.

Besides that, for a person aggrieved of an appellate judgment pronounced by a High Court of the Province exercising its appellate jurisdiction granted in terms of Article 154P of The Constitution, the statutory remedy available has been prescribed in section 9 of the High Court of the Provinces (Special Provisions) Act No.19 of 1990, which reads thus;

> **9. Subject to the provisions of this act or any other law, any person aggrieved by –**
>
> > **(a) A final order, a judgment, decree or a sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3)(b) of Article 154P of the Constitution or section 3 of this act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court *ex maro moto* or at the instance of any aggrieved party to such matter or proceedings:**
> >
> > **Provided that the Supreme Court may in its discretion, grant special leave to appeal to the Supreme Court from any final or**

interlocutory order, judgment, decree or sentence made by such High Court in the exercise of the appellate jurisdiction vested on it by paragraph (3)(b) of Article 154P of the Constitution or section 3 of this act or any other law where such High Court has refused to grant leave to appeal to the Supreme Court or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court :

Provided further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance...

It is an admitted fact that the petitioner has not availed the above-mentioned statutory right, but has come before this Court seeking to exercise the exceptional discretionary remedy of revision that can be exercised by this Court.

It is well settled law that even in a situation where a specific appellate right has been provided, yet a person can file an application for revision before the Court of Appeal.

In the case of **The Attorney General Vs. Podisingho 51 NLR 385**, it was held that,

"That the powers of revision of the Supreme Court are wide enough to embrace a case where an appeal lay but not taken. In such a case, however, an application in revision should not be entertained save in exceptional circumstances, such as,

(a) Where there has been a miscarriage of justice,
(b) Where a strong case for the interference of the Supreme Court has been made out by the petitioner, or
(c) Where the applicant was unaware of the order made by the Court of trial."

It is also my considered view that in such situations, the person who files the revision application must plead as to the reasons why he did not or could not avail himself of such statutorily available remedy.

As pointed out correctly by the learned State Counsel, the petitioner has failed to provide any reasons in that regard in his petition filed before this Court.

It is also settled law that any person who comes before this Court seeking the discretionary remedy of revision must establish sufficient exceptional grounds, which needs this Court's intervention.

In the case of **Caderamanpulle Vs. Ceylon Paper Sacks Ltd. (2001) 3 SLR 112**, it was held that,

> *"The existence of exceptional circumstances is a pre-condition for the exercise of the powers of revision."*
>
> ***Per Nanayakkara, J.***
>
> *"... when the decided cases cited before us are carefully examined it become evidence in almost all the cases cited that the powers of revision had been exercised only in a limited category of situations. The existence of exceptional circumstances is a pre-condition for the exercise of the powers of revision and absence of exception circumstances in any given situation results in refusal of remedies."*

What is termed as exceptional grounds in paragraph 16 of the petition are grounds that can be generally stated when filing an appeal challenging a judgment pronounced by a competent Court, and cannot be considered as exceptional grounds that requires the intervention of this Court exercising the Court's revisionary jurisdiction.

As required by law, the discretionary remedy should be sought as soon as possible by the aggrieved party. The petitioner has filed this application before

this Court on 13-07-2023, seeking to challenge an appellate judgment pronounced by the Provincial High Court on 28-04-2023. The petitioner has failed to explain such a delay in filing the petition before this Court. I am of the view that stating that the COVID pandemic prevented him from filing this application when this matter was raised before this Court would not be a sufficient explanation for such a delay, as the said pandemic was not prevalent at that time to a level which prevented a person from asserting his rights. Although the question of delay is a subjective thing, which may vary depending on the facts and the circumstances unique to each case, I do not find that sufficient explanation has been provided in the instant matter for the delay.

In the case of **Biso Menike Vs. C.R. de Alwis (1982) 1 SLR 368**, which was a case decided relating to an application for a Writ of Certiorari, a similar discretionary remedy, it was observed by **Sharvananda, J.** (as he was then),

> *"A Writ of Certiorari is issued at the discretion of the Court. It cannot be held to be a Writ of right or one issued as a matter of course. The exercise of this discretion by Court is governed by certain well-accepted principles. The Court is bound to issue it at the instance of a party aggrieved by the order of an inferior tribunal except in cases where he has disentitled himself to the discretionary relief by reason of his own conduct, submitting to jurisdiction, laches, undue delay or waiver….. The proposition that the application for Writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and the longer the injured person sleeps over his rights without any reasonable excuse the chance of his success in Writ application dwindles and the Court may reject a Writ Application on the ground of unexplained delay….An Application for a Writ of Certiorari should be filed within a reasonable time."*

For the reasons as considered above, I am of the view that the learned State Counsel has raised valid preliminary objections before this Court.

Apart from the above, I am of the view that the learned High Court Judge has acted correctly when the learned High Court Judge considered the merits of the appeal preferred before the Court, despite the appellant being absent from the Court.

I find that the learned High Court Judge has considered the facts before the Court in its correct perspective, which needs no interference from this Court.

Accordingly, the revision application is dismissed based on the preliminary objections, and this Court finds no merit in relation to the facts stated therein.

The Registrar of the Court is directed to communicate this judgment to the Provincial High Court of the Southern Province Holden in Galle for information, and to the Magistrate's Court of Galle for necessary procedural steps.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal