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

In the matter of an Application for Bail under and in terms of Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929 as amended by Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

The Officer-in-Charge,

Fraud Bureau, Unit 03,

Colombo.

Court of Appeal Case No.

CA/CPA/0116/2024 **Complainant**

High Court of Colombo **Vs.**

Case No. HCMCA 108/16

1. Ayyaswamy Shanmugam Raja.
2. John Sebastian Anthony Thawaraja Reagan.

Accused

AND

1. Ayyaswamy Shanmugam Raja.
2. John Sebastian Anthony Thawaraja Reagan.

Accused-Appellants

1. Officer -in -Charge,

Fraud Bureau, Unit 03,
Colombo.

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondents

AND NOW BETWEEN

John Sebastian Anthony Thawaraja Reagan,
No. 207B,
Nakeththaathalliya,
Norochcholei.

Accused-Appellant-Petitioner

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents-Respondents

BEFORE : **P. KUMARARATNAM, J**
K.M.G.H. KULATUNGA, J

COUNSEL: Tenny Fernando for the Accused-Appellant-Petitioner.
Oswald Perera, SC for the Respondents.

INQUIRY ON: 28.01.2025

DECIDED ON: 25.02.2025

K.M.G.H. KULATUNGA, J.

ORDER

1. Mr. Tenny Fernando for the accused-appellant-petitioner supported this revision application for notice on the respondents. The petitioner, by this application, is seeking to revise and set aside the *judgement* dated 14.12.2017 of the learned Provincial High Court Judge of the Western Province holden at Colombo. The learned High Court Judge by the said impugned order marked X-8, has refused and rejected an appeal preferred by the accused-appellant-petitioner (hereinafter also referred to as the petitioner) by which the petitioner sought to set aside the judgment dated 27.08.2010 of the learned Magistrate.

2. The sequence of events that culminated in this application needs to be set out to comprehend the nature of this application. The petitioner along with another were charged in the Magistrate's Court of Colombo, Case No. 15419/03/2007, with a count of cheating as well as that of misappropriation of a sum of Rs. 800,000/-. As the petitioner absconded the learned Magistrate had proceeded *in absentia* as provided for by Section 192(1) of the Code of Criminal Procedure Act. Upon a trial the 1st Accused and this petitioner (*in absentia*) were convicted and then sentenced on 27.08.2010. Thereafter, an open warrant had been issued on the petitioner.

3. The petitioner upon the lapse of almost 6 years had preferred an appeal dated 07.09.2016 to the Provincial High Court of the Western Province holden at Colombo. As per the caption, the said appeal appears to have been preferred under and by virtue of the provisions of "*Section 2 of the ICCPR Act No. 56 of 2007 read with chapter XXVIII of the Code of Criminal Procedure Act.*" [*section 2* therein appears to be erroneous and should read as *Section 4(2)*].

4. The Provincial High Court Judge by the impugned Judgement dated 14.12.2017 rejected the appeal on the basis that it is out of time as the provisions of the Code of Criminal Procedure Act pertaining to appeals are applicable. It was also held that when a final determination is made *in absentia* proceeding under Section 192(1), Section 192(2) makes specific provision to have the said determination vacated. Accordingly, the learned Provincial High Court Judge held that the appellant cannot have and maintain the said appeal and dismissed the same. This application for revision is now preferred against the said Judgment dated14.12.2017 marked X-08.

5. According to the Mr. Tenny Fernando, the learned Judge of the Provincial High Court was not entitled to dismiss this application as the same had been preferred under Section 02 (*it should be Section 4(2)*) of the International Covenant on Civil and Political Rights (ICCPR) Act. His argument seems to be that there is no time limit or an appealable period prescribed under the ICCPR Act. However, he concedes that the petitioner has preferred the appeal after the lapse of almost six years.

6. It was also submitted that the 1st accused had been afforded with the opportunity of paying half of the sum alleged to have been misappropriated to the virtual complainant and the operation of his one-year sentence was suspended for five years. Mr. Fernando submitted that he is seeking that this Court be pleased to order that the same benefit and concession be afforded to the petitioner.

7. The State Counsel Mr. Oswald Perera present in Court having had some intimation or notice of this application appeared on behalf of the Attorney General and submitted that they are objecting to the issuance of notice, as the petitioner is guilty of laches in the extreme and no plausible explanation is forthcoming either. He also submitted that the petitioner had continued

to abscond and he has not come to this Court with clean hands. The State Counsel is thus resisting the issuance of notice.

8. Revisionary jurisdiction is a discretionary remedy as opposed to the Appellate Jurisdiction. To have notice issued in a revision application the petitioner should satisfy Court of exceptional circumstances. As to what circumstances are exceptional depended on the facts of each case. In ***Dharmaratne and Another v Palm Paradise Cabanas Ltd. and Others*** (2003) 3 SLR 24 at 30, it was held;

> *"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'."*

Then, in ***Wijesinghe vs. Tharmaratnam*** Sri Skantha's Law Reports Vol. IV 47 at 49, it was opined that;

> "*Revision is a discretionary remedy and will not be available unless the application discloses circumstances which 'shocks the conscience of the court'.*"

9. The term 'exceptional circumstances' is not defined, but courts have time and again interpreted the term 'exceptional circumstances'. In ***Attorney General vs. Podisingho*** 51 NLR 385 at 390 it was held;

> "*In my view such exceptional circumstances would be (a) where there has been a miscarriage of justice, (b) where a strong case for the interference of this Court has been made out by the petitioner, or (c) where the applicant was unaware of the orders made by the Court of trial.*"

10. Then, it may also be said that if the impugned order is patently illegal, the courts have the power to treat the said patent illegality as an 'exceptional circumstance' and interfere with the judgment of a lower court by

exercising the revisionary jurisdiction. Hence, it is necessary for the petitioner to establish 'exceptional circumstances' by pleading such grounds in their Revision Application, in order to invoke the discretion of court to entertain a Revision Application.

11. In the present application, the petitioner submitted that he did pursued a wrong remedy. It is now settled law that pursuing a wrong remedy is not a valid excuse for laches in an application for revision. In ***Tirimanne vs. the Commissioner of Income Tax*** 59 NLR 304, Weerasooriya J opined as follows:

> "*I do not see how any party who deliberately elects to adopt a remedy which repeatedly has been held not to be the correct one can, when the question of delay arises as a relevant consideration, ask to be excused for not having in the first instance availed himself of the proper remedy*."

12. The impugned Judgment marked 'X' is a Judgment made upon considering an appeal preferred against a conviction and sentence made by the Magistrate of the Magistrate's Court of Colombo. This appeal has been rejected on the basis that it is out of time. The impugned order had been made on 27.10.2010. The appeal to the Provincial High Court has been preferred on 03.01.2016. Therefore, the appeal had been made after six years. The argument advanced before the Provincial High Court is that this appeal has been preferred under Section 2 (*should be Section 4(2)*) of ICCPR Act No. 56 of 2017 and it appears that the appellant in that Court has taken up the position that no time frame is fixed by the ICCPR Act No. 56 of 2017 and that he is thus entitled to file an appeal at any point of time. The Provincial High Court Judge has held that Act No. 56 of 2017 is subject to the Provisions of the Code of Criminal Procedure Act. Accordingly, the time limits as specified in the general law is applicable to all appeals. This pronouncement of law to my mind is clearly sound and correct. The appeal is thus out of time by many years. There is no provision to entertain or

accept a criminal appeal notwithstanding the lapse of time and any appeal filed out of time cannot be accepted and considered as such Court would not have jurisdiction. His Lordship Justice Surasena in ***Ekanayake Mudiyanselage Upali Herath vs. Aluthge Wijedasa*** [CA (PHC)/163/2002] stated as follows:

> "*When the law has provided for a right of appeal along with a time period within which that right is required to be exercised, that clearly means that such right of appeal is subject to a condition. The said condition is that any party desirous of exercising such right of appeal is required to exercise it within the given time period. This means that no such right of appeal exists after the lapse of the specified period. When such right of appeal does not exist due to the lapse of the provided appealable period, a party is not permitted to lodge an appeal in Court. Therefore, the Court to which a party wrongfully attempts to tender any such appeal, after the appealable period granted by law has lapsed, is duty bound to reject it without accepting.*"

13. The learned High Court judge has rejected the appeal as the same was out of time. In view of the aforesaid dicta, adhering to the said appealable period is a necessary prerequisite to have and persue the appeal. With the lapse of the appealable period so prescribed, there will exist no right of appeal, and as such, the appellate court will have no option or discretion but to reject the said purported appeal. This is exactly what the learned High Court judge had ordered by the impugned judgement. Therefore, there is no basis in law or otherwise, to disturb or review the said decision.

14. It is also relevant to note that there had not been any application made to the Provincial High Court to act in revision either. In these circumstances, this Court cannot act in revision against the Judgment dated 27.08.2010 of the Magistrate of the Magistrate's Court of Colombo.

15. As to the delay on the face of the pleadings, the impugned order had been made on 14.12.2017. The appeal had been preferred on 03.09.2024 which is almost six years and ten months after the impugned order. I see no acceptable reason or explanation for such delay.

16. Now to consider the effect and import of Section 4 (2) of the ICCPR Act No. 56 of 2007. Section 4(2) reads thus:

> "*Every person convicted of a criminal offence under any written law, shall have the right to appeal to a higher court against such conviction and any sentence imposed.*"

17. Even if Section 4(2) of ICCPR Act has conferred a right of appeal, unless it specifically and expressly provides for a different appealable period, the general law Section 320 of the Code of Criminal Procedure Act will apply and determine the appealable time.

18. The right of appeal of a person convicted and sentenced by a Magistrate as provided for by Section 320 of the Code of Criminal Procedure Act is as follows:

> "*320. (1) Subject to the provisions of sections 317, 318 and 319 any person who shall be dissatisfied with any judgment or final order pronounced by any Magistrate's Court in a criminal case or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in law, or in fact –*
>
> *(a) by lodging within fourteen days from the time of such judgment or order being passed or made, with such Magistrate's Court a petition of appeal addressed to the Court of Appeal, or*
>
> *(b) ……"*

19. Correspondingly, the right of appeal to the High Court of the Province is conferred by Section 4 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990. As for the procedure applicable, would be the existing provisions applicable to the appeals to the Court of Appeal from the Magistrate's Courts [*vide* Section 5 of the High Court of the Provinces (Special Provisions) Act].

20. In the above circumstances, when an appeal is out of time, the Appellate Court will not have any discretion to accept such an appeal notwithstanding such lapse of time, and will not have jurisdiction to entertain such an appeal. It is just that such court lacks jurisdiction to entertain or consider such an appeal. Accordingly, there is no lawful basis to interfere with the impugned judgement marked X-8.

21. In these circumstances, there is no legal basis to issue notice as prayed for, and this application for the issuance of notice is refused and the petition is accordingly dismissed *in limine*.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J

I agree.

JUDGE OF THE COURT OF APPEAL