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 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No:

CPA/0146/2023

Provincial High Court of Kurunegala

Case No: HCA/26/2022

Magistrate's Court of Pilassa

Case No: 89548

Officer-in-Charge,

Police Station,

Mawathagama.

COMPLAINANT

Vs.

M. Gamini Dissanayake,

Badabedda,

Ambakotte.

ACCUSED

AND NOW

M. Gamini Dissanayake,

Badabedda,

Ambakotte.

ACCUSED-APPELLANT

Vs.

1. Officer-in-Charge,

Police Station,

Mawathagama.

COMPLAINANT-RESPONDENT

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

M. Gamini Dissanayake,

Badabedda,

Ambakotte.

ACCUSED-APPELLANT-

PETITIONER

Vs.

1. Officer-in-Charge,

Police Station,

Mawathagama.

COMPLAINANT-RESPONDENT-

RESPONDENT

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: Amal Ranaraja, J.

Counsel : Isuru Jayawardana for the Petitioner.

: Oswold Perera, S.C. for the 2nd Respondent.

Argued on : 30-09-2024

Decided on : 27-11-2024

Sampath B. Abayakoon, J.

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

The Officer-in-Charge (OIC) of Mawathagama Police has charged the petitioner before the Magistrate's Court of Pilassa Case No. 89548 for possessing 11,250 milliliters of illicit liquor, and thereby committing an offence punishable in terms of section 47(1) of the Excise Ordinance.

The offence had allegedly been committed on 02-03-2020 at a place called Kongoda Bridge within the jurisdiction of the Magistrate's Court of Pilassa.

The petitioner has pleaded not guilty to the charge preferred against him, and after trial, the learned Magistrate of Pilassa, of the judgment dated 18-05-2022 has found the petitioner guilty as charged. Accordingly, he has been fined Rs. 25,000/-.

After sentencing the petitioner, the learned Magistrate of Pilassa has ordered the petitioner to show cause as to why the motorcycle bearing No- WP CQ-7037, which was allegedly used in the commission of the offence, should not be confiscated.

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 North Western Province holden in Kurunegala.

The learned High Court Judge of the Provincial High Court of the North Western Province holden in Kurunegala, after having heard the appeal, has dismissed the same by the judgment dated 12-10-2023, on the basis that there exists no reason to interfere with the conviction and the sentence of the petitioner by the learned Magistrate of Pilassa.

The petitioner has preferred this application in revision seeking to challenge the above-mentioned judgment of learned High Court Judge of the Provincial High Court of the North Western Province holden in Kurunegala, as well as the conviction of him by the learned Magistrate of Pilassa, on the basis that he has exceptional grounds to challenge the said judgments by invoking the revisionary jurisdiction of this Court.

The remedy for a person who is dissatisfied of a judgment pronounced by a Judge of the Provincial High Court exercising the appellate jurisdiction granted in terms of Article 154P of The Constitution has been statutorily provided in High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

If a person is dissatisfied by such a judgment, the proper remedy available for such a person would be to seek Leave to Appeal from the same High Court to appeal to the Supreme Court or seek Special Leave to Appeal from the Supreme Court itself to challenge the appellate judgment pronounced by the High Court of the Province.

The petitioner, without adhering to the statutory remedy available for him has filed this application in revision invoking the discretionary remedy of revision, which is a special jurisdiction granted to this Court by the Constitution.

It is well-settled law that even in a situation where the proper remedy would be filing an appeal, the Court of Appeal can exercise its revisionary jurisdiction in a fit case where exceptional circumstances exists that warrant the intervention of the Court.

In the case of **Thilagaratnam Vs. Edirisinghe (1982) 1 SLR 56**, it was held that,

> "*Though the appellate Court's powers to act in revision were wide and be exercised whether an appeal has been taken against the order of the original Court or not, such powers would be exercised only in exceptional circumstances*."

It was held in **Jonita Vs. Abeysekara (Sriskantha Law Report Vol IV Page 22)**,

> "*The Court of Appeal empowered with revisionary jurisdiction in exceptional circumstances even though the alternative remedies are provided*."

In the petition filed before this Court, the petitioner has mentioned several reasons as exceptional circumstances available for him to invoke the revisionary jurisdiction of the Court. He has also explained the reasons for the delay in filing this application before the Court.

When this matter was supported for notice, after having considered the facts and the circumstances relevant to this case, this Court decided to issue notice of the application to the complainant-respondent-respondent, as well as the respondent-respondent, namely, the Hon. Attorney General.

The complainant-respondent-respondent, the OIC of Mawathagama police was represented by the Hon. Attorney General and the respondents were allowed to file their objections in relation to the application before the Court.

When this matter was argued before the Court, this Court had the benefit of listening to the learned Counsel for the petitioner, as well as the learned State Counsel, who represented the respondent-respondents.

As I have stated before, this is a matter where the Court will interfere into the impugned decision of the learned High Court Judge, as well as that of the learned Magistrate, if this Court is satisfied that the petitioner has adduced sufficient exceptional circumstances for this Court to interfere with the said judgments.

What constitutes exceptional circumstances had been defined over time by our Superior Courts when pronouncing judgments in relation to the applications which requires the Court's intervention using its discretionary powers of revision.

It was held in the case of **Hotel Galaxy (Pvt) Ltd Vs. Mercantile Hotels Management Ltd (1987) 1 SLR 5** that,

> *"It is settled law that the exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In the case of **Wijesinghe Vs. Thamararatnam (Sriskantha Law Report Volume IV page 47)** it was stated that;

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

In the case of **Vanik Incorporation Ltd Vs. Jayasekare (1997) 2 SLR 365**, it was observed,

> *"Revisionary powers should be exercised where a miscarriage of justice has occasioned due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

I would also like to quote from the case of **Sadi Banda Vs. Officer In Charge of Norton Bridge Police Station (supra)** which I find relevant in the above context.

> *"The revisionary power of Court is a discretionary power. This is an extraordinary jurisdiction which is exercised by the Court and the grant of relief is entirely dependent of the Court. The grant of such relief is of course a matter entirely in the discretion of the Court, and always be dependent on the circumstances of each case. Existence of exceptional circumstances is the process by which the extraordinary power of revision should be adopted. The exceptional circumstances would vary from case to case and their degree of exceptionality must be correctly assessed and gauged by the Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked."*

At the hearing of this application, it was the contention of the learned Counsel for the petitioner, when the petitioner was arrested and produced before the Magistrate's Court of Pilassa by way of a B-Report, the police had thought it fit to give case numbers and fines imposed on the petitioner in relation to 34 cases of previous similar offences against him. When the plaint and the charge sheet was filed too, the police have attached same previous conviction report to the plaint as well.

It was the position of the learned Counsel that as a result of the said action by the police, when this matter was taken up for trial, the learned Magistrate was obviously prejudiced, and therefore, the petitioner was denied a fair trial.

It was also contended by the learned Counsel that when PW-01, the police officer who conducted the alleged raid where the petitioner was arrested gave evidence before the Court on 15-03-2022, he has given evidence referring to the bad character of the petitioner stating that the petitioner is a person who is engaged in illicit liquor trade and a person very difficult to catch while engaged in illicit liquor trade.

He was of the view that the evidence of PW-01 was contrary to the provisions of the Evidence Ordinance where character evidence cannot be led unless it is relevant. He submitted that this was a clear violation of the fair trial principle, which has caused prejudice to the petitioner.

Referring to the judgment, it was also submitted that the learned Magistrate has failed to consider the defence put forward by the petitioner in its correct perspective, and misdirected when it was determined that the accused has failed to break the strength of the prosecution case.

It was the position of the learned Counsel for the petitioner that the same legal matters were pointed out to the learned High Court Judge when this matter was argued before the Provincial High Court of the North Western Province holden in Kurunegala. However, it was his position that the learned High Court Judge was also misdirected when it was determined that what was stated as part of the B-Report as to the previous convictions had not influenced the mind of the learned Magistrate since she has not referred to previous convictions in pronouncing the judgment.

It was also submitted that the learned High Court Judge was misdirected when it was decided to disregard what was stated by PW-01 in his evidence as to the bad character of the petitioner on the basis that it was not a reason to interfere with the judgment of the learned Magistrate. It was pointed out that the learned High Court Judge was misdirected again when the manner in which the learned Magistrate has considered the defence of the petitioner was justified.

It was the submission of the learned State Counsel that although the previous conviction record of the petitioner has been submitted to Court before he was found guilty to the charge, since the learned Magistrate who heard the evidence had the judicial mind to disregard irrelevant evidence, that fact has not caused any prejudice towards the petitioner or has denied a fair trial towards him.

He was of the view that the application of the petitioner should fail as he has failed to establish sufficient exceptional circumstances that warrant the intervention of the Court.

It is very much clear from the proceedings before the Magistrate's Court of Pilassa that, when the relevant B-Report was filed after the arrest of the petitioner, the police has mentioned his previous conviction record in writing along with the B-Report. The police had done the same thing when the plaint and the charge sheet was preferred against the petitioner by attaching the previous conviction record of the petitioner to the plaint.

This goes on to show that when the petitioner was charged before the learned Magistrate of Pilassa, the petitioner's previous conviction record was before the Court, which was not something that is expected from a complainant when filing a charge of this nature against an accused.

It is the view of this Court that whatever may be said on the basis that such a procedure would not prejudice the accused person, informing the Court in writing the previous conviction history of an accused person would definitely have a detrimental effect towards an accused in deciding a case against him.

Apart from the above, when the OIC of Mawathagama Police was giving evidence, the trial Court has permitted evidence in relation to the bad character of the petitioner to go in as part of the evidence.

Section 54 of the Evidence Ordinance which refers to the previous bad character as to its irrelevance reads as follows.

> **54. In criminal proceedings the fact that the person accused is of a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.**
>
> **Explanation 1 – This section does not apply to cases in which the bad character of any person is itself a fact in issue.**

Explanation 2 – A previous conviction is relevant as evidence of bad character in such case.

E.R.S.R Coomaraswamay in his book the **Law of Evidence Volume 01** at page 684 referred to bad character in the following manner.

> "Section 54 lays down the general rule that in criminal proceedings, the fact that the accused has a bad character is irrelevant, except in the exceptional cases mentioned therein. Evidence may not be given of the accused's previous convictions or misconduct on other occasions for the purpose of supporting and argument that he is the kind of person who would commit the crime charged. As Wigmore puts it, "the rule, then, firmly and universally established in policy and tradition is that the prosecution may not initially attack the defendant's character".
>
> The desire for fair play and even indulgence has led to this rule. The principle underlying the rule is that hardship is possible, as evidence of bad character may lead the mind of the judge or jury away from the point to be decided, namely, the guilt or innocence of the accused person in regard to the particular offence which he is charged. The main ground is prejudice."

At page 486 Coomaraswamy discusses the duties of a trial judge in such a situation.

> "When evidence of bad character of an accused person has been led the duties of the trial judge are as follows:-
>
> (a) To stop such questions himself without waiting for any objection from the accused's counsel.
>
> (b) If the question has been put by mischance, to direct the jury to disregard it and not to let it influence their minds- to put it out of their minds entirely. But as stated in **R. vs. Norton, (1910) 2 K.B.**

500 "Whatever directions be given to the jury, it is almost impossible for them to dismiss such evidence entirely from their minds."

(c) If the position is realized and the counsel for the accused applies for a fresh trial before another jury, to begin the trial again.

(d) The judge can order a fresh trial if it is impossible to say that what conclusion the jury might arrive owing to the irregularity and it being impossible to dismiss the impression from their minds. The court of appeal would order a new trial if the statement is prejudicial to the accused even where the judge has warned the jury to disregard the questionable evidence."

Although the above mainly refers to the trials before a jury, I am of the view that same should be equally applicable to cases where a trial is before a judge without a jury, since it is a question of fair trial towards an accused.

I find that the learned Magistrate has avoided referring to the bad character evidence led before her, but has considered it in a different manner on the basis that it was a question put to PW-01 when he was cross-examined on behalf of the petitioner.

I am of the view that since the entire case has been commenced and concluded before the same Judge, it would also be the duty of the learned Magistrate to shut out any evidence relating to bad character when the prosecution attempts to lead evidence in that regard. I am of the view that when considering the bad character evidence, together with the previous conviction record made available to the Court at the very commencement of the case, it has contributed towards the probable denial of a fair trial towards the petitioner.

I am unable to agree with the contention of the learned State Counsel that since the learned trial Judge was a person of trained judicial mind, such prejudice may not have been caused towards the petitioner.

I am of the view that it is not only a judgment pronounced by a Court of Law , but it is also necessary to show that the proceeding before the Court was in accordance with the law.

The next matter that needs consideration is the manner the learned Magistrate has considered the defence put forward by the petitioner. It appears that the learned Magistrate has considered the defence on the basis that the petitioner has decided to make a dock statement when he was called upon for his defence in order to avoid being cross-examined. Because the prosecution was unable to cross-examine the petitioner on the position taken by him in his dock statement, the prosecution had no opportunity of examining him in order to test the truthfulness of his defence, and therefore, the strength of the prosecution case has not been diminished because of the mere statement by the petitioner.

It needs to be noted that this is not the manner in which a statement made by an accused person from the dock should be looked at by a trial Judge. It is trite law that an accused person is entitled to make a statement from the dock when he was called upon for a defence, and such a statement, although not made under oath or subjected to the test of cross-examination, has evidential value. If such a dock statement provides a reasonable explanation as to the evidence against him or creates a reasonable doubt as to the prosecution case, he is entitled to have that benefit of doubt in his favour.

The position in Sri Lanka as to the value that can be attached to a dock statement by an accused was considered in the case of **Queen Vs. Kularathne (1968) 71 NLR 529.**

The Court referred to **King Vs. Vellayan Sittambaram (1918) 20 NLR 257** and **Queen Vs. Buddharakkita Thero (1962) 63 NLR 433** and expressed their agreement with the view taken in the latter case that the unsworn statement must be treated as evidence subject to its infirmity referred to therein. The Court held that the Jury must be directed that:

a. The statement must be looked upon as evidence, subject to the infirmity that the accused had deliberately refrained from giving testimony, and therefore, was not subject to an oath or cross-examination;
b. If they believe the unsworn statement, it must be acted upon;
c. If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed; and that it should not be used against another accused.

I am of the view that the learned Magistrate was misdirected when the dock statement made by the petitioner was determined on a different footing, as I have stated before.

When the petitioner preferred the appeal against his conviction before the Provincial High Court of the North Western Province holden in Kurunegala, it appears that the learned High Court Judge too has decided to justify the conviction on the basis that it has not caused prejudice towards the petitioner.

However, I am of the view that by allowing the character evidence against the petitioner to be led, as well as allowing his previous conviction record to be known before he was found guilty, a clear violation of the fair trial principle has been occasioned towards the petitioner, which has not drawn the attention of the learned High Court Judge.

It is correct to argue when the learned High Court Judge determined that the learned Magistrate has considered the dock statement of the petitioner in the judgment. However, it is the view of this Court that it had been considered not in the manner it should have been considered, which makes the determination in that regard unacceptable.

For the reasons considered as above, I am of the view that the petitioner has established sufficient exceptional grounds for this Court to intervene into the judgment of the learned High Court Judge of the Provincial High Court of the North Western Province holden in Kurunegala and also that of the learned Magistrate of Pilassa, as both the said judgements cannot be allowed to stand.

Accordingly, I set aside the judgment dated 12-10-2023 pronounced by the learned High Court Judge of the Provincial High Court of the North Western Province holden in Kurunegala, and also the judgment dated 18-05-2022 pronounced by the learned Magistrate of Pilassa.

I do not find this as a matter fit to order a retrial against the petitioner since the relevant witnesses are police witnesses. Such witnesses, who will have the advantage of studying their notes in that regard will have the obvious advantage of correcting any previous shortcomings in the evidence, which will again give rise to the question of fair trial towards the petitioner.

Hence, the petitioner is acquitted of the charge preferred against him.

The Registrar of the Court is directed to communicate this judgment to the Provincial High Court of the North Western Province holden in Kurunegala and also to the Magistrate's Court of Pilassa for information and necessary compliance.

Judge of the Court of Appeal

Amal Ranaraja, J.

I agree.

Judge of the Court of Appeal