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

An Application for revision under Article 138 (1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

High Court of Gampaha
Case No: HC 119/11

The Democratic Socialist Republic of Sri lanka

Court of Appeal Case No:
CA (PHC) APN 012/2019

Complainant

Wijesundra Acharige Saman Nayana Wijendra

Accused

Vs

AND NOW BETWEEN

Wijendra Acharige Saman Nayana Wijendra
(Presently detained at the Mahara Remand Prison)

Accused-Petitioner

Vs

The Democratic Socialist Republic Of Sri Lanka

Complainant-Respondent

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

2nd Respondent

Before : **Achala Wengappuli,J**

Devika Abeyratne,J

Counsel : P.K Prince Perera for the Petitioner
Chathuri Wijesuriya SC for the Respondents

Written Submission On : 04th of October 2019 (by the Accused-Petitioner)
04th of November 2019 (by the Respondents)

Decided on : 21st of July 2020

Devika Abeyratne,J

The Accused Petitioner by this Revision Application is seeking to set aside the Sentence dated 18.06.2018 of the learned High Court Judge of *Gampaha*, where he has been sentenced to 6 years and six months rigorous imprisonment on pleading guilty to a charge under Section 22(3) read with Section 22(1) of the Fire Arms Ordinance Amended Act No 22 of 1996.

The background to the application albeit briefly is as follows;

The Petitioner pleaded not guilty to the aforesaid charge and trial commenced. After the evidence of the main prosecution witness was concluded and when the matter was fixed for further trial, the Petitioner has informed Court that he wishes to tender a plea of guilty to the

indictment. The learned trial Judge having being satisfied that the tendering of the plea is voluntary, has recorded the plea.

After considering the previous conviction report of the petitioner and the submission of both counsel, and having taken in to consideration that the petitioner has a previous conviction for a similar offence and the fact that the petitioner was in remand custody for 3 years and 6 months and that the offence has been committed 14 years before the date of conviction, the learned High Court Judge has imposed a 6 years and 6 months rigorous imprisonment on the Petitioner.

It is against this order that the Petitioner has preferred his revision application.

It is contended on behalf of the Respondent that the Application for Revision has been filed approximately 7 months later from the date of the order and no valid reason is provided for the undue delay in making the application and that the Petitioner is guilty of *laches* and on that ground alone that the application must be dismissed *in limine*.

It is further submitted that the Petitioner has failed to aver exceptional circumstances to invoke the revisionary jurisdiction from this Court. As contended by the Respondent, the petitioner has not provided any acceptable explanation for the delay in seeking relief.

It is noted that in paragraph 8 of the Revision application dated 06.02.2019, the petitioner has stated that he is "serving the sentence with effect from 18.6.2018" , but there is no explanation as to the delay of approximately seven months in seeking relief of the impugned order.

In ***Seylan Bank V Thangaveli*** 2004 (2) SLR 101 it is held that,

> *".....an unexplained and unreasonable delay in seeking relief by way of revision, which is a discretionary remedy, is a factor which will*

disentitle the petitioner to it. An application for judicial review should be made promptly unless there are good reasons for the delay. The failure on the part of the petitioner to explain the delay satisfactorily is by itself fatal to the application".

In ***H.A.M.Cassim Vs GA Batticaloa*** (NLR Vol.69 pg.403) It was held

" An application in revision must be made promptly if it is to be entertained by the Supreme Court. There must be finality in litigation, even if incorrect orders have to go unreversed."

The Petitioner who is invoking the revisionary jurisdiction of this court has failed to give a plausible explanation for the delay in seeking relief. It is not averred that there is a miscarriage of justice or the impugned order is illegal irregular, capricious or arbitrary.

Therefore, it is my considered view that on the ground of the unexplained delay alone, in view of the above quoted authorities the application for revision could be dismissed *in limine.*

However, in the written submissions of the respondent dated 3.11.2019 it is submitted that the respondent is not pursuing the preliminary objection on the maintainability of the action but only seeking an enhancement of the sentence.

I will now Consider the basis of the Revision Application. Some of the exceptional circumstances pleaded in paragraph 8 of the petition can be summarized as follows;

- *Imposition of 6 and a half year sentence is contrary to Article 4 (C), 11 and 12 (1) of the Constitution.*
- *The imposition of 6 years and six months sentence is contrary to the dicta in SC Reference 03/2008*

- *Mandatory minimum Sentence imposed by section 22(3) of the Fire Arms Amendment Act No 22 of 1996 is in conflict with Article 4 (C), 11 and 12 (1) of the Constitution.*
- *The learned High Court Judge is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the mandatory minimum sentence.*
- *The effect of imposition of 6 and half years sentence would amount to an erosion of judicial discretion in regard to sentencing. This will violate the principles of equal treatment and even amounts to cruel punishment.*

The Petitioner has been charged under the Firearms Ordinance.

Section 22(3) provides;

Any person contravening the provisions of this section shall be guilty of an offence against this Ordinance and shall on conviction be punishable-

*a) For the **first offence** with a fine not exceeding ten thousand rupees or with rigorous imprisonment for a period not exceeding five years or with both such fine and imprisonment;*

*(b) For the **second** or any **subsequent offence**, with rigorous imprisonment for a period of not less than ten years and not exceeding twenty years.*

Thus, it is apparent that as per Section 22(3) (b), the learned High Court Judge had to impose a minimum ten years rigorous imprisonment as the petitioner was convicted of a similar previous offence. However, it appears the trial judge has imposed 6 years and 6 months rigorous imprisonment sentence.

It is contended on behalf of the petitioner in page 6 of the written submissions dated 4. 10.2019, that the petitioner pleaded guilty with the prime intention of getting a non custodial sentence.

It is unclear how the petitioner envisaged a non custodial sentence as sentencing is in the hands of the trial judge, who has to consider several aspects when deciding on the sentence.

In ***Attorney General vs H.N.de Silva (Vol.57 NLR Pg 121)*** Basnayake A. CJ observed as follows;

> *".....in assessing the punishment that should be passed on an offender, a judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A judge should, in determining the proper sentence, first consider the gravity of the offence, as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other Statute under which the offender is charged. The reformation of the criminal, though no doubt an important consideration is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail."*

His Lordship Justice Chitrasiri in ***Asan Mohamad Rizwan v Hon. Attorney General***_C.A. Revision No.CA [PHC] APN 141/2013 (Decided on 25.03.2015) has stated that,

> *"Judges are to address their minds to the objective of sentencing particularly when exercising the discretion given to them under the law.....Objectives of sentencing include the following: (i) To punish offenders to an extent and in a manner, which is just in all the circumstances;* ***(ii) To protect the community from offender****; (iii) To deter offenders or other persons from committing offences of the same or similar nature; (iv) To establish conditions so that rehabilitation of offenders may be promoted or facilitated; (v) To signify that the court and the community denounce the commission of such offences; (vi) To maintain the required standards of societal*

expectations in making decisions; (vii) To prevent overcrowding prisons also could be considered as one such objective particularly when it comes to developing countries such as ours. Keeping those objectives in mind, it is the prime duty of the judges to pass the sentence in accordance with the law. Hence, it is necessary for the Court to first look at the particular punishment stipulated for the offence that was committed by the accused. ***Therefore, the judges must be mindful of the provisions of law for which the accused is convicted before passing the sentence. Otherwise, it will be an illegal order."***

It has been also observed by Justice *Gunasekera* in ***Attorney General vs Mendis*** (1995) 1 SLR pg 138 that,

"..... No trial judge should permit and encourage a situation where the accused attempts to dictate or indicate what sentence he should get or what sentence he expects...."

It is very surprising that having legal representation and with the knowledge that he was convicted and sentenced for a similar offence previously, that the petitioner was expecting to get a non custodial sentence and walk home. Therefore, the argument of the petitioner that he pleaded guilty with the intention of getting a non custodial sentence is not tenable.

With regard to the submission for the Petitioner that the mandatory minimum sentence imposed by section 22(3) of the Fire Arms Amendment Act No 22 of 1996 is in conflict with Article 4 C, 11 and 12 (1) of the Constitution, the counsel for the petitioner ought to realize, knowing the law, that the Court of Appeal has no jurisdiction to determine the constitutionality of section 22(3) of the Fire Arms Ordinance. Therefore, this Court cannot consider whether Section 22 (3) of the Fire Arms Amendment Act is in conflict with Article 4 C, 11 and 12 (1) of the Constitution.

Another exceptional ground that is pleaded in the application is that the imposition of the sentence is contrary to the decision in SC Reference 3/2008.The submissions of the counsel for the petitioner is that the Learned trial judge failed to follow the dicta in SC Ref 03/2008 and SC/APL 17/2013.

Both SC Reference 3/2008 and SC Appeal 17 of 2013 relate to a matter under section 364 (2) (e) of the Penal Code. The judgment of 3 of 2008 is referred to in the decision of *Eva Wanasundera J* in SC Appeal 17/2013 where her ladyship states ' " *.....any mandatory minimum sentence imposed by the provision of any ordinary law in my view is in conflict with Article 4(c) 1 , 11 and 12(1) of the Constitution in that it curtails the judicial discretion of the judge hearing the case'* .

It appears that the counsel for the petitioner considers the observations in 3/2008 and 17/2013, as authority giving sanction to Courts to impose a less than the mandatory minimum sentence in each and every case.

It is noted in the above quoted judgement in 17/2013 Her Ladyship has further stated that "..... *it is only in deciding on the punishment that the Court has a discretion. When a mandatory minimum sentence is written in the law, the Court loose its judicial discretion. That part of the law with the mandatory minimum sentence acts as a bar to judicial powers in sentencing or punishing the wrong doer.....Sentencing is the most important part of a criminal case and I find that provision in any law with a mandatory minimum sentence goes against the judicial discretion to be exercised by a judge.*"

In *SC 3 of 2008, his Lordship of the Supreme Court* has held that ,

> *"there may well be exceptional cases in which an offence may be so serious in nature that irrespective of the circumstances a court* ***may never exercise judicial discretion*** *in favour of a* ***punishment that is less than an appropriate mandatory minimum punishment".*** (emphasis added)

The Cases 3/2008 and 17/2013 have dealt with the offence in section 364 (2) (c) of the Penal Code.

In the instant case the Petitioner is charged under the amended Firearms Ordinance. The previous conviction is in relation to an offence committed on or before 10.6.2002. For that offence, the petitioner has been sentenced on 12.03.2009 under Section 22 (3) (a), where there is no mandatory sentence prescribed which allows the trial Judge to exercise his discretion and impose a suitable and appropriate sentence.

However when charged under sec 22 (3) (b), there is a minimum mandatory sentence prescribed.

The second offence has been committed on or about 21.06.2004, approximately 2 years and 10 days after the first offence. It is a fair assumption that the petitioner after committing the first offence, has not reformed or rehabilitated, to have repeated a similar offence within approximately two years.

There is no need to stress that offences under the Firearms Ordinance are serious offences. Then the question arises whether courts should exercise judicial discretion in favour of imposing a lesser sentence than the mandatory sentence. The petitioner being charged a second time for the same offence makes it more serious. It appears that the fact that the Petitioner being apprehended and charged for a fire arms offence has not deterred him from committing the same offence within a short period of time.

In view of the observation in SC 3 of 2008, where it states that in offences of serious nature, a ***Court may never exercise judicial discretion in favour of a punishment that is less than the mandatory minimum sentence,*** thus, the argument that the trial judge failed follow the dicta in SC 3 of 2008 necessarily fails.(emphasis added)

In the Supreme Court of Canada in **R v Nur** (2015) 1 SCR 773 is a matter where the accused were charged under a firearms offence and

the mandatory minimum sentence was given. The Majority Opinion of Supreme Court was of the opinion that the mandatory minimum sentences could threaten proportionality in sentencing because:

> "*They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blame-worthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality*".

Palekar J. has observed in **Jagmohan Singh v State of UP** 1973 SCR (2) 541 1973 AIR 946 *"the impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the judges with a very wide discretion in the matter of fixing the degree of punishment..... The exercise of Judicial discretion on well-recognized principles is, in the final analysis, the safest possible safeguard for the accused".*

In the instant case the Petitioner's argument is that the sentence is too severe and on the other hand, the respondent is seeking for an enhancement of the sentence.

At the outset it has to be stated that the respondent, until the Revision application was preferred by the petitioner has not made any application seeking an enhancement of the sentence. This fact by implication suggests that it was an acceptable sentence to the respondent at the time of sentencing. There is no explanation from the respondent the reason why an enhancement was not sought until the petitioner made the revision application.

The counsel for the respondent has submitted the authorities in

1. *Attorney general Vs H.N. de Silva (Supra)*
2. *Attorney General V Walgama Kodituwakku Ruksiri alias Sudu Malli CA 306/2012*
3. *Attorney General V Sampath (1997)3 SLLR 390*

in support of his contention. It is observed by the learned judges in the first two cited cases that a judge should, *' in determining a proper sentence, first consider the gravity of the offence and have regard to the punishment prescribed by law and that although the reformation of the criminal is an important consideration, the public interest or the welfare of the State also must be looked at'.*

It is needless to say that outside of law enforcement officers and licensed weapon holders, restricted firearms are usually found in the hands of criminals who use them for illegal activities. This would have been instrumental in recommending a mandatory minimum sentence by the legislature, for second or subsequent offenders, considering the severity of the offence.

Firearm related crimes are serious in nature. In the instant case it is stated that the firearm in issue was discovered from the residence of the petitioner, when the petitioner was the sole occupant. The search was on suspicion of committing a robbery of a Bank.

Admittedly, the facts of the case, other attended circumstances such as previous convictions, the stage in the proceedings when he pleaded guilty, the impact on the society of the offence, the possibility of the offence being used in more serious crimes, consideration of the antecedents of the petitioner have to be considered when an appropriate sentence is to be imposed.

It is the argument of the Respondent that the learned judge has erred in law by regarding the time spent in remand custody as part and parcel of the sentence and imposed a jail term after reducing the time spent in remand from the prescribed mandatory minimum sentence.

Counsel for the respondent has cited the authority in ***Attorney General Vs Sampath*** { 1997} 3 SLR 390 where it is stated that the trial judge could not have in law directed that the period spent in remand should be taken into consideration as a part of the period of sentence that he has served.

However, the facts in *Sampath's* case can be distinguished from the instant case. In *Sampath's* Case, these was no mandatory minimum sentence prescribed by law and it was open for the learned judge to have imposed a maximum sentence of 10 years rigorous imprisonment and a maximum sentence of Rs.10,000/= and in addition, whipping.

However in that case, the trial judge after imposing only a three year rigorous imprisonment , had taken the view that the sentence was covered by the period the accused had been in custody and directed the prison authorities to release the accused from custody. In the instant case a six and a half year rigorous imprisonment sentence has been imposed.

At this point it is important to consider the background which led up to the withdrawal of the plea of not guilty and the petitioner voluntarily pleading guilty to the indictment.

In the instant matter, the counsel on mitigation has referred to the three and a half years the petitioner has been in remand custody which the learned judge has considered when imposing the sentence.

The petitioner has been arrested on **20.06.2004**, indicted in the High Court of *Gampaha* **on 20.03.2012**. (8 years later) for being in possession of a self loaded revolver without a valid license ,pleaded not guilty and enlarged on bail. Trial was fixed for **5.7.2012,** and since that day, the trial has been postponed due to the non availability of the productions which was said to be in the High Court of *Colombo.* The fact the judicial system allowing almost 5 years for the case to get postponed on the non availability of a production is disheartening and cannot be considered lightly by any court of law.

Trial has commenced on **29.03.2017** and the evidence of one prosecution witness has been concluded and trial had adjourned to **9.6.2017 and 14.12.2017** but not taken up as the counsel for the Petitioner was indisposed. On **4.6.2018** when it was for further trial the Petitioner withdrew his earlier plea of not guilty and pleaded guilty to the indictment**,** and sentenced on **18.06.2018.**

Thus it is seen that since he was indicted on 20.3.2012, for almost 6 years, only the evidence of one witness has been led, and the system has allowed that to happen. The time that has been wasted is not only of the Petitioner but all the stakeholders that were involved in the particular case.

In the above background, the counsel for the Petitioner in mitigation, has brought to the notice of court that the Petitioner has been in remand custody for three years and six months.

It is correct that when a sentence is imposed, the seriousness of the crime, the objective of the punishment and the intention of the legislature have to be considered.

However, the trial judge has observed how the Court system has functioned in the instant case, and has been mindful of the provision of section 22(3) of the Act and has deliberated the mitigatory circumstances pleaded on behalf of the petitioner and exercising his discretion has imposed a six and a half year sentence of rigorous imprisonment.

It appears that the learned judge considering the provisions in section 22 (3) (b), has imposed six and a half years rigorous imprisonment which together with the three and a half years the accused was in remand amounts to the prescribed a mandatory minimum sentence. Considering all of the above facts, in the given circumstances of the instant case, it is my considered opinion that there is no necessity to interfere in the trial judge's sentencing.

Accordingly, the revision application is dismissed without costs and the application for enhancement of the Sentence is also refused.

JUDGE OF THE COUT OF APPEAL

ACHALA WENGAPPULI,J

I Agree

JUDGE OF THE COUT OF APPEL