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 to revise an order made by the High Court of Ratnapura, in the exercise of its Appellate powers.

C.A.(PHC) APN No. CPA 28/2020
H.C. Ratnapura No. APL 30/98
M.C.Balangoda No.34352

D.S.K. Wanniarachchi,
Rohana Vidyalaya
Kalthota, Balangoda.
Accused-Appellant-Petitioner.

Vs.

Officer-in-Charge,
Police Station,
Balangoda
Complainant-Respondent-Respondent.

The Hon. Attorney General
Attorney General's Department
Colombo 12.
Respondent-Respondent

BEFORE	:	**ACHALA WENGAPPULI, J.** **K. PRIYANTHA FERNANDO, J.**
COUNSEL	:	Himalee Kularatne for the Accused – Appellant-Petitioner. Thusith Mudalige D.S.G. for the Complainant-Respondent-Respondent & Respondent-Respondent.
SUPPORTED ON	:	12th June, 2020
WRITTEN SUBMISSIONS TENDERED ON	:	26th June, 2020(by both parties)
ORDER ON	:	31st July, 2020

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ACHALA WENGAPPULI, J.

This is a petition, addressed to this Court by the Petitioner invoking its revisionary jurisdiction conferred under Article 138 of the Constitution, by which he seeks to set aside the orders of the Provincial High Court of *Sabaragamuwa* Province holden in *Ratnapura* in Appeal No. APL 30/98 dated 30.01.2000 and also of the Magistrate's Court of *Balangoda* in case No. 34352 dated 08.10.1998.

It is stated that the Petitioner was charged before the Magistrate's Court of *Balangoda* under Section 345 of the Penal Code as amended by Act No. 22 of 1995. The alleged victim is a school girl of 14 years who studied

in *Rohana* College of *Kaltota,* where the Petitioner functioned as the school principal.

At the conclusion of his trial, during which the Petitioner and his witnesses also have given evidence, he was found guilty as charged by the Magistrate's Court and was sentenced to two year term of imprisonment suspended for a period of ten years with a fine of Rs. 1500.00, which carried a default term of imprisonment of twelve months. He was also ordered to pay Rs. 2000.00 to the virtual complainant as compensation with a default term of three-months of imprisonment.

The Petitioner then preferred an appeal to the Provincial High Court invoking its appellate jurisdiction to have his conviction and sentence set aside in appeal No. APL 30/98. The Provincial High Court, having heard the parties on merits by its judgment dated 30.01.2003 dismissed the Petitioner's appeal, whilst affirming the conviction and sentence. The High Court was not inclined to grant the Petitioner's plea for a lenient sentence. It also rejected the Respondent's application to consider an enhanced punishment.

Thereafter, the Petitioner sought to challenge the said judgment of the Provincial High Court, by preferring an appeal to this Court, registered under appeal No. CA PHC 85/2003. This Court, dismissed his appeal on 07.10.2014, since the Petitioner was absent and unrepresented. His application to relist, which was supported by way of a motion also refused by this Court on 24.10.2014. However, the certified proceedings tendered by the Petitioner indicated that this Court, by its judgment dated 07.10.2014 again dismissed the Petitioner's appeal on the basis that "this

Court has no jurisdiction to entertain this appeal since the High Court Judge has exercised appellate powers vested in him." The certified copy does not contain the relevant journal entries leading up to the delivery of the judgment of dismissal on 07.10.2014.

Subsequent to the pronouncement of the judgment by this Court dismissing his appeal, the Petitioner had preferred an application to the Supreme Court in SC Spl LA 221/2014, which he describes as " ... an application for Special Leave to Appeal notwithstanding lapse of time against the judgment dated 30/01/2003 of the High Court of *Ratnapura* and the Court of Appeal judgment dated 07/10/2914 in terms of Article 128 of the Constitution." The application to Special Leave to Appeal was tendered to the Registry of the Supreme Court on 12.02.2015 and was supported on 27.03.2019. Having heard the Counsel, the Supreme Court refused grant of Special Leave on the same date.

The instant application, invoking revisionary jurisdiction of this Court is filed by the Petitioner on 12.05.2020 and was to be supported on 27.05.2020. Since the Petitioner sought interim relief, he had served notice of this application on the Respondent who was presented in Court on that day. This Court, invited submissions on the parties as to the question of its jurisdiction by posing the query whether this Court has residual revisionary powers over this matter. In addition the Petitioner must satisfy this Court that there exists a *prima facie* matter to be considered by this Court for the issuance of formal notice on the Respondents.

On 12.06.2020, learned Counsel for the Petitioner and learned Deputy Solicitor General for the Respondents have made their

submissions in support of their respective positions. They have also tendered written submissions along with the authorities they relied on, in making submissions.

In support of the Petitioner's application, learned Counsel submitted that this Court has revisionary jurisdiction to entertain the instant application. She relied on the recent judgment of the Supreme Court in SC Appeal Nos. 111,113,114/2015 decided on 27.05.2020 and also of the judgment of this Court in ***Illangakoon v Officer in Charge, Police Station, Anuradhapura*** (2014) 1 Sri L.R. 240.

On the merits of the Petitioner's application she contended that the Provincial High Court as well as the Magistrate's Court, have failed to reason out the basis on which the evidence of the Petitioner was rejected, in their respective judgments.

Learned Deputy Solicitor General resisted the Petitioner's application on the basis that it sought to violate the principle enshrined in Article 127(1) of the Constitution. He further contended that the conduct of the Petitioner is clearly indicative of his intention that to frustrate justice by abusing the litigation process. Their submissions will be considered by this Court as it proceeds along with the judgment making reference to them at the appropriate stages.

The Petitioner, being aggrieved by his conviction and sentence had preferred an appeal to the relevant Provincial High Court but was unsuccessful. He then preferred an appeal to this Court, which had been dismissed for want of jurisdiction. Thereafter, an application seeking Special Leave to Appeal against the said dismissal was made. The

Supreme Court refused to grant Special Leave to Appeal. Now the Petitioner invokes revisionary jurisdiction of this Court to canvass the judgments of the Provincial High Court as well as the Magistrate's Court in the instant application.

Learned Counsel, in her attempt to satisfy this Court of a prima facie matter, referred to the merits of the application. She submitted that none of the lower Courts have failed to provide any reasons in their respective judgments as to the reasons for rejection of the Petitioner's evidence, which had been given under oath, and also of his witnesses.

It is correct that the appeal of the Petitioner was dismissed by this Court without considering the said grievance but on the pure technical reason of want of jurisdiction. But the Petitioner, in challenging the said dismissal of his appeal by this Court, in his petition to the Supreme Court, stated that " the learned Judge of the Magistrate's Court has failed to address and properly evaluate any of the arguments raised on behalf of the Petitioner ... and ... learned Judge of the High Court too had acted purely on conjecture in upholding the conviction." Therefore, the Petitioner emphasised to the Supreme Court that " ... upholding the conviction on such manner without considering the legal arguments brought by the Defence Counsel and contradictions of the evidence given by the Prosecution witnesses are contrary to the well-established principles relating to the evaluation of evidence in a case based on law of evidence ...".

In the instant application, by invoking revisionary jurisdiction under Article 138, the Petitioner had raised the identical issue once again before

this Court, despite the fact that he had already invoked the jurisdiction of the Supreme Court by filing an application seeking special leave to appeal.

The Supreme Court, in refusing to grant special leave to appeal, has had the opportunity of hearing the Petitioner in support of his application, who adverted the said contention before their Lordships in seeking special leave to appeal since that had been the main ground of his challenge to the validity of the judgments of lower Courts. When Their Lordships have decided to refuse special leave to appeal, then that issue was finally decided by the Court of final appeal, the Supreme Court.

In ***Bandaranaike v Attorney General*** (1982) 2 Sri L.R. 786, the Supreme Court described the scope of its jurisdiction as follows;

> *"Articles 118 to 136 in Chap. XVI of the Constitution deal with the various kinds of jurisdiction of the Supreme Court and the manner of their exercise by the Supreme Court. Article 132(1) provides that the jurisdiction of the Supreme Court shall ordinarily be exercised at all time by not less than three Judges of the Supreme Court sitting together on, the Supreme Court. No distinction is made in this respect between, constitutional jurisdiction and appellate jurisdiction. Article 132(4) provides that "the Judgment of the Supreme Court shall, when it is not an unanimous decision, be the decision of the majority." In the scheme of the chapter, it is quite clear that the provisions of Article 132(4) applies equally to the "determination" referred to in Article 121, 122, 123, 125 and 126 and the "Judgment" referred to in Article 127 , "opinion" referred to in Article*

129(1) and "determination" under 129(2) and again to the "determination" under Article 130, all made by the Supreme Court in the exercise of its several jurisdiction. The petitioner tried to draw a distinction between "determination" and "judgment" and submitted that article 132(4) does not apply to the "determination" when it exercises original jurisdiction and pronounces "judgment" when it exercises appellate jurisdiction. That this distinction is untenable is demonstrated by Article 130 which provides that the Supreme Court shall have the power to hear and determine and make such orders as provided by law on any appeal from an order or judgment of the Court of Appeal in the case of an election petition. The descriptions 'determination', 'judgment', 'opinion', 'decision', conclusion' are different labels for the same concept."

Having laid the scope of its multiple jurisdiction as per the Articles of the Constitution, the Supreme Court, in its judgment of ***Fernandopulle v De Silva & Others*** (1996) 1 Sri L.R. 70, cited S. C. Application No. 20/83S – decided on 21.07.1983., in stating the effect of its pronouncements. Their Lordships have quoted *Samarakoon*, CJ. Where His Lordship had stated thus;

"...the fact that the use of the phrase "shall finally dispose of" in Article 126 (5), in dealing with the exercise of the court's powers in relation to fundamental rights and language rights petitions, and the phrase "final and

conclusive" in Article 127 in dealing with the Court's appellate jurisdiction, signified that once a matter was decided by the Supreme Court, the thing is over. There is nothing more that can be done. As far as the matters which are the subject of the decision are concerned, it is all over. There is an end to such litigation - as needs must be with all litigation. Public policy requires that there must be an end to litigation, for the sake of certainty and the maintenance of law and order, in the pacific settlement of disputes between the citizen and the State or between other persons; for the sake of preventing the vexation of persons by those who can afford to indulge in litigation; and for the conservation of the resources of the State. Interest rei publicaeut sit finis litium."

In addition to bringing a litigation to its finality, the Supreme Court, in determining a matter under its appellate jurisdiction, also made the dispute *res judicata* among the parties.

In view of the foregoing, it is clear that the instant application of the Petitioner clearly satisfies the two tests that are applicable in determining whether a particular matter has become *res judicata* among the parties as identified in the case of ***Rev Moragolle Sumangala v Rev Kiribamune Piyadassi*** 56 NLR 322, where it has been held;

"Two important tests must be applied whenever a plea of res judicata is raised (1) whether the judicial decision in the earlier litigation was, or at least involved, a determination of the same question as that sought to be controverted in the

later litigation in which the estoppel was raised, and if so (2) whether the parties to the later litigation were the parties or the privies of the parties to the earlier decision."

As noted above, the Supreme Court had already decided the identical issue relied upon by the Petitioner in the instant application for determination by this Court and he was privy to the earlier decision. Not only the Petitioner, even his Counsel was aware as to the outcome, even though she sought to convince this Court that it has jurisdiction to consider the identical issue.

In ***Potman v Inspector of Police, Dodangoda*** 74 NLR 115 *Weeramantry* J referred to the judgment of ***Ehambaram & Another v. Rajasuriya*** (1947) 34 C. L. W. 65, where *Nagalingam* J. held that in an instance where the object of an application in revision was in fact to re-argue a case already decided, the Court cannot and could not entertain such application. This principle obviously applies to the same Court which had decided the earlier identical matter. In this particular instance, it was the Supreme Court that had decided the identical issue in the earlier determination and that determination is obviously a binding authority on this Court.

The reliance placed by the Petitioner on the recent pronouncement by the Supreme Court, in interpreting Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 would not help him since the issue here is this is not a revision application over the Provincial High Court decision exercising its appellate powers conferred by the said

section, but a revision application agitating the identical issue that had been finally decided by the highest Court in the judicial hierarchy.

Learned Counsel for the Petitioner placed heavy reliance on the judgment of ***Illangakoon v Officer in Charge, Police Station, Anuradhapura*** (supra), in support of her submission and claimed that in this instance too, no Court had considered the merits of the Petitioner's complaint on the rejection of his evidence.

It is correct that this Court decided to consider the merits of an appeal, when the petitioner in that particular revision application had initially appealed against his conviction before he was sentenced by the Magistrate's Court. The appeal was dismissed by the Provincial High Court since it was preferred before the sentence was passed. His revision application before the same Court too was dismissed due to delay of four years. Then the said petitioner moved in revision of the said order of dismissal before this Court. That application for revision before this Court was also dismissed upon acceptance of the reasoning of the Provincial High Court. Then he sought special leave against the said dismissal and that too was refused by the Supreme Court.

Chirasiri J considered the 2nd revision application filed by the said petitioner against the order of the Provincial High Court, on the basis that *" ... all those decisions had been made on a pure question of law, therefore, the fact remains that no Court has considered the merits of his revision application ..."*.

The factual position adverted to above in ***Illangakoon v Officer in Charge, Police Station, Anuradhapura*** (supra) is clearly distinguishable from factual position of the instant application. Unlike the situation in the

said precedence, in this instance of course, his appeal against the conviction and sentence was considered on its merits by the Provincial High Court. His appeal against the said dismissal was dismissed by this Court initially for non-prosecution, and after allowing a re-listing application, it was re dismissed on application of law as it stood at that point of time, which the Petitioner attributes to "wrong legal advice".

The Petitioner then sought special leave to appeal before the Supreme Court, challenging the said dismissal on merits, as indicative from the portions of his petition that had been reproduced above. The judgement of the Supreme Court has no indication that the special leave to appeal had been refused on a mere technicality, but it did indicate that the parties were heard and special leave to appeal was refused, on its merits. Hence, the matter is clearly res judicata among parties. In view of the above, the contention of the Petitioner that none of the Courts considered merits of the Petitioner's complaint is a clearly without a valid basis and ought to be rejected.

In the course of his submissions, learned Deputy Solicitor General termed the course of action adopted by the Petitioner in filing invoking the revisionary jurisdiction of this Court as a clear instance of abuse of process. He invited this Court to consider enhancement of the quantum awarded by the Magistrate's Court to the virtual complainant in 1997, as she had been deprived of her entitlement to a speedy justice, by adopting delaying tactic by the Petitioner.

It is pertinent to note that in the English case of ***Attorney General v John Barker***[2000] EWHC 453, the Lord Chief Justice sought to describe a "vexatious" proceedings. His Lordship observed that;

> *"The hallmark of a vexatious proceeding is in my judgment that it has little or no basis in law (or at least no discernible basis); that whatever the intention of the proceedings may be, its effect is to subject the defendant to inconvenience, harassment and expenses out of all proportion to any gain likely to accrue to the claimant; and that it involves an abuse of the process of the Court, meaning by that use of the Court process for a purpose or in a way which is significantly different from the ordinary and proper use of the Court process."*

In ***Hunter v Chief Constable of the West Midlands Police & Others*** [1981] UKHL 13, Lord *Diplock,* referring to an instance where, despite a final determination by a competent Court was made in an earlier proceeding, if a litigant initiates another process of litigation and thereby indirectly challenged the validity of the already made determination, stated thus;

> *"Abuse of process which the instant case exemplifies is the initiation of proceedings in a Court of Justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another Court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the Court by which it was made."*

The instant application too is qualified to be termed as an attempt by the Petitioner to challenge the determination of a superior Court, by initiating a litigation in a subordinate Court since it is obvious that he was prompted by an ulterior motive to further delay the course of justice.

This Court notes that the repeated exercise by the Petitioner invoking appellate jurisdiction of each appellate Court until he had exercised his right of appeal to the Supreme Court could not be faulted, although he had sought relief from the Court of Appeal after the Provincial High Court dismissed his appeal, as the law stood at that point of time.

The process of criminal justice, that was initiated with the complaint of sexual abuse in March 1997 by the virtual complainant, finally ended when their Lordships of the Supreme Court have decided not to grant leave to the Petitioner's application No. SC Spl LA 22/2014 on 27.09.2019.

It is noted that the Petitioner thought to re agitate the identical issue that had been decided by the Supreme Court, by invocation of revisionary jurisdiction of this Court after a lapse of five and half months, solely for the purpose of delaying the conviction and sentence to take effect. This is an instance of clear abuse of process, to which this Court must express its unreserved condemnation.

The delay of more than five months since the judgment of the Supreme Court was sought to be explained by the Petitioner in his petition. He had tendered documents P10 and P10(a) which relates to

proceedings before this Court in his earlier application No. CA/PHC/APN/13/2020 invoking revisionary jurisdiction of this Court.

Those proceedings indicate that the Petitioner had filed a similar application invoking revisionary jurisdiction of this Court under that number. It was withdrawn on 14.02.2020 by his Counsel, in his presence. Strangely a different Counsel, on 10.03.2020, made application to this Court and submitted that the former Counsel who appeared for the Petitioner had withdrawn the said application without his instructions. Strangely, the instant application is supported by the same Counsel who acted without instructions of the Petitioner, in withdrawing his earlier application.

What is important to note is that this Court had observed at that stage, the Petitioner was summoned by the Magistrate's Court, in order to pronounce the judgment of the Provincial High Court, in dismissing his appeal. It appears that the Petitioner did not comply with the summons by attending Court, but allegedly produced a medical certificate by admitting himself to a hospital. The origins and the authenticity of the said medical certificate was questioned by this Court as per the journal of 10.03.2020.

Thus, the conduct of the Petitioner is clearly indicative of his intentions to avoid the pronouncement of the judgment of the Provincial High Court by resorting to delaying tactics, under the camouflage of seemingly legitimate exercise of invoking revisionary jurisdiction repeatedly.

It is the considered view of this Court that the conduct of the Petitioner satisfies the description of abuse of process as described by Lord

Diplock in ***Hunter v Chief Constable of the West Midlands Police & Others*** (supra) as a conduct that would "bring the administration of justice into disrepute among right thinking people".

Therefore, in view of the forgoing, this Court refuses to issue formal notice on the Respondents.

The petition of the Petitioner is dismissed with costs fixed at Rs. 250,000.00 payable to the 2nd Respondent.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL