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.

C.A.(PHC) APN No. 85/2019
H.C.Ratnapura No. HCR/125/15

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

Wijemanne Mohottige Sanath
Amitha Wijaya Kumara,

Accused

AND NOW BETWEEN

Wijemanne Mohottige Sanath
Amitha Wijaya Kumara,
(Presently at Welikada Prison)

Accused-Petitioner

Vs.

01. The Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondent

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BEFORE : **ACHALA WENGAPPULI, J.**
K. PRIYANTHA FERNANDO, J.

COUNSEL : Rushdhie Habeeb with Rizwan Uwais and Shahla Rafeek for the Accused-Petitioner.
Maheshika Silva S.S.C.for the A.G.

WRITTEN SUBMISSIONS
TENDERED ON : 20.01.2020 (by the Accused-Petitioner)
29.05.2020 (by the Respondent)

ARGUED ON : 19. 10. 2020

ORDER ON : 16 . 11. 2020

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ACHALA WENGAPPULI, J.

In this application, the accused-petitioner (hereinafter referred to as the Petitioner) has invoked the revisionary jurisdiction of this Court, seeking a variation of the sentence of his ten-year term of imprisonment, that had been imposed on him by the High Court of *Ratnapura*, upon his conviction for culpable homicide not amounting to murder at the conclusion of his trial. He was also imposed a fine of Rs. 15,000.00 with a default term of six-month imprisonment. In addition, he was ordered to pay Rs. 100,000.00 to each parent of the deceased and in default of payment of compensation, a term of one-year imprisonment was imposed.

The Petitioner was named as the 2nd accused along with his younger brother, the 1st accused, for committing murder of one *Illanganetti*

Seneviratne Mudiyanselage Thushara Sampath on or about 25.01.2012 at *Dodampitiya.*

It was revealed during trial, the incident occurred at about 7.30 or 8.00 p.m. near the house of one *Upul Kumara,* the PW1. The deceased had assaulted the 1st accused earlier in the same evening for having an affair with his sister. When the Petitioner was told of the repeated assaults on his younger brother, the 1st accused, by the deceased over this issue, he proceeded to *Upul Kumara's* house in order to meet up with one *DumindaAiya,* who were regarded by them as a mature elder brother, who could settle such disputes peacefully. The deceased had told *Upul Kumara* that he had in incident with the 1st accused a few minutes before. Then the Petitioner had arrived at *Upul Kumara* 's house. *Duminda* was not available as he had already left to attend some urgent matter.

The Petitioner and the deceased have talked to each other cordially at initial stages of the conversation, during which the Petitioner had told the deceased that he chould discipline his sister while he would discipline his brother, the 1st accused ("තුෂාර අයියෙ, ඔයාගෙ නංගි ඔයා හදාගන්න, අපේ මල්ලිව අපි හදාගන්නම්"). Then they started a heated argument and *Upul Kumara* had asked both of them to leave his house. Both had walked out but were continuing the exchange of words remaining in the compound. The witness had therefore sought the help of an aunt, who lived in the vicinity to intervene and diffuse the situation. At that point of time, the witness heard a thud and saw the deceased lie fallen while the Petitioner was standing near him, holding a piece of fire wood in his hand.

The deceased was thereafter rushed to *Pelmadulla* Hospital and transferred to *Ratnapura* General Hospital. He was then transferred to the National Hospital. The deceased was transferred back to *Ratnapura* by the National Hospital and after three days since his admission, had succumbed to his head injury.

The post mortem examination revealed that the deceased had a fracture in the skull which had caused damaged to brain tissues, which had in turn resulted in an oedematous condition in brain, causing his death.

In its judgment, the trial Court had correctly found the Petitioner guilty to culpable homicide not amounting to murder on the basis of knowledge as the evidence did not indicate the Petitioner had acted with a murderous intention in striking the deceased with a piece of fire wood, which he had spontaneously picked up from a pile, near the place of incident. The 1st accused was found not guilty.

The Petitioner does not challenge the conviction entered by the trial Court against him on culpable homicide not amounting to murder.

It is the contention of the learned Counsel for the Petitioner that the sentence imposed on him is tainted with an erroneous consideration, as the trial Court, having found that he had only knowledge and no intention to cause death, nonetheless, had proceeded to impose the 10-year term of imprisonment on the basis of attacking the deceased with an *"intention of causing death"*. It was submitted that Section 297 of the Penal Code provided that if the act is done with the knowledge that it is likely to cause death, or to cause such bodily injury as is likely to cause death, the

Petitioner should have been punished with a term of imprisonment which *"may extend to ten years"*. In relation to this particular instance, the learned Counsel's contention is that the trial Court had disproportionately imposed the maximum term of imprisonment as envisaged by the Legislature for the offence to which he was found guilty to, primarily due to the error in its approach that had already been referred to in the preceding paragraph of this judgment.

In this context, it is very relevant to examine the submissions on mitigation made before the trial Court, by the Petitioner.

Learned Counsel for the Petitioner invited attention of the trial Court to the fact that the Petitioner's age, his previous good conduct and type of the weapon used in the attack and the circumstances relied upon by the trial Court, in convicting him for the lesser offence, in determining the appropriate sentence.

It is also highlighted by the learned Counsel for the Petitioner before the trial Court that he was willing to accept a plea for lesser offence at the earliest opportunity, a fact that is indicative of remorse. Referring to the personal circumstances of the Petitioner, learned Counsel had submitted that he is a father of two young children and was employed as a labourer and therefore pleaded with the trial Court to consider imposing a lenient sentence on him.

The trial Court, in its five page order on sentence, indicated that it had guided itself with the principles enunciated in the judgments of ***Attorney General v Silva***57 NLR 121, ***Attorney General v Gunasena*** (CA(PHC) APN 110/12) and ***Attorney General v Mendis*** (1995) 1 Sri L.R.

138, and in consideration of the fact that the act of the Petitioner had resulted in deprivation of their son's protection to an elderly couple, the impact on society and the deterrent aspect of punishment, a ten year term of imprisonment coupled with compensation was considered as an appropriate sentence.

It is clearly stated in page four of the sentencing order, the Court was satisfied that the injury inflicted on the deceased was done with the intention of causing death, or of causing such bodily injury as is likely to cause death ("මරණකරුට සිදුකර ඇති තුවාල මරණය සිදුකිරීමේ අදහසින් හෝ මරණය සිදුවිය හැකි ශාරීරික පාඩුවක් කිරීමේ අදහසින් කරන ලද්දක් බව...").

Learned Senior State Counsel, in her submissions referred to the factual background under which the offence was committed and invitedthis Court to consider the appropriateness of the sentence in that context.

This is an application by the Petitioner, invoking revisionary jurisdiction of this Court in relation to the sentence imposed on him by the trial Court and in ***Perera v Wijetunga*** 76 NLR 173, a divisional bench of the then Court of Appeal has held that it would not grant leave to appeal against a sentence which is not illegal, unless the circumstances are *"very exceptional or extraordinary"*, a test consistently applied in such applications.

A similar view had already been expressed by *Howard* CJ in the judgment of the Court of Criminal Appeal in ***The King v Rankira***42 NLR 145, as his Lordship stated that *"like the Court of Criminal Appeal in England this Court is very reluctant to interfere with the judicial discretion of a Judge in passing sentence. That judicial discretion is one vested in him by law. This Court*

will only do so when it is apparent that discretion has been, exercised on a wrong principle."

In ***The King v De Saram***42 NLR 528, his Lordship has added another ground by stating that;

> *"With regard to the sentence, it has been laid down by this Court on several occasions that it is most reluctant to interfere with the discretion of the Judge in this matter. This Court will only interfere when it is obvious that that discretion has been exercised on a wrong principle or if the sentence is manifestly excessive."*

The applicability of the principle of proportionality even in consideration of the deterrent aspect of sentencing is evident from the wording of *Mosely* SPJ in 42 NLR 347, where it is stated *"whether it will be possible to reduce such crime by the infliction of severer sentences or not, it is not easy to say, but it is obvious that it would be impossible to reduce this sort of crime if sentences quite out of proportion in leniency to the offence are inflicted".*

Returning to the merits of the application before this Court, it must be observed that the erroneous consideration of the nature of the injuries to the detriment of the Petitioner, as rightly complained by him, satisfies the test that whether the *"discretion has been exercised on a wrong principle"*, in the imposition of the impugned sentence.

The King v Rankira (supra) had dealt with almost identical situation that had arisen for consideration by this Court, as in that instance, where the particular appellant was convicted by the Jury for the offence of attempted culpable homicide, and the trial Court had sentenced him for

the offence of attempted murder. The Court of Criminal Appeal, in altering the sentence imposed by the trial Court, clarified the basis of its decision to make an alteration in the sentence by stating that *"... if we had been trying this case, would have passed a less severe sentence. That in itself would not justify us in modifying the sentence. We think, however, that the Judge has passed this maximum sentence as the result of exercising his discretion on a wrong principle. We, therefore, substitute for the sentence of seven years' rigorous imprisonment one of four years' rigorous imprisonment."*

In the instant matter, even though the trial Court had proceeded to impose a ten-year term of imprisonment on the Petitioner on an erroneous consideration, it is clear that the submissions in mitigation of sentence on behalf of the Petitioner had not lost its effect on the imposition of the sentence, for the following reason.

The very basis on which the trial Court proceeded to impose a long custodial sentence (although erroneously), made it entitle to consider a sentence of imprisonment up to twenty years, but the Court had imposed only a ten-year term instead, a fact that indicative of its leniency in imposition of a term of imprisonment, in view of the presence of several obvious migratory factors.

Therefore, in applying the same migratory factors, to the proper application of the statutory provisions in relation to punishment for an

offence of culpable homicide not amounting to murder under Section 297 of the Penal Code, by an act done *"... with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death"* should be punished with an imprisonment of either description for a term which may extend to ten years, make him entitled to be punished with a term of imprisonment in the range of five years.

In addition to the mitigatory factors already referred to by the trial Court in its order of sentencing, it is relevant to consider another factor, ifit could be accepted and relied upon, in favour of the Petitioner, on the question of an appropriate sentence in the event of being convicted of the lesser offence of culpable homicide not amounting to murder.

The Petitioner states in his petition that he had informed the trial Court of his willingness to tender a plea for the lesser offence but the learned State Counsel was not ready to accept his proposition.

The only reference to an adoption of such a course of action is reflected from the proceedings of 07.02.2017 soon after the conclusion of the evidence of the sole eye witness. Contrary to the claim of the Petitioner, the proceedings indicated that the said proposal originated from the prosecutor but was not pursued on by the Petitioner.

The other reference to the fact of accepting liability to a lesser offence is found at the submissions in mitigation by the learned Counsel for the Petitioner to the trial Court. In his submissions learned Counsel for the Petitioner states that from the earliest opportunity the Petitioner was willing to accept liability to a lesser offence indicating his remorsefulness for his criminal act.

However, none of the proceedings or the journal entries support such a claim and therefore the Petitioner is not entitled to any concession in mitigation, upon that particular aspect of mitigation.

But this Court notes with concern of another fact referred to by the learned Counsel. He had submitted to the trial Court that the Petitioner's house was set on fire by certain individuals subsequent to the attack on the deceased. It is also claimed that a prosecution was initiated over that act of violence and the family of the Petitioner was forced to relocate as a result. Unfortunately, this fact had not been elicited from any of the witnesses and therefore remained unsubstantiated. If this could be relied upon, then it is clearly a disturbing feature. It is common knowledge that there is a current trend in the society of usurping the power of punishing offenders by unruly mobs. The Sri Lankans, as a community that respects rule of law, must arrest this unhealthy trend and the Courts should indicate their unreserved condemnation of this development. If a perpetrator of a crime to be punished, it is the Courts that must impose a punishment according tothe statute law that had criminalised his act which had also prescribes

the punishment such an offender deserves. The Constitutional guarantee of Article 11 ensures that no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, while Article 12 recognises his entitlement to the equal protection of the law. The undesirable delay in the criminal justice system in punishing offenders, is not at all an excuse for the members of the society to clothe themselves with power to punish offenders.

The resultant position is that if such an offender has been subjected to an extrajudicial punishment, trial Courts could consider that fact in the determination of the appropriate sentence by the trial Court.

In the circumstances, this Court is of the view that the ten-year term of imprisonment imposed on the Petitioner along with imposition of comparatively heavy compensation, is "*manifestly excessive*", in addition to the fact that it had been imposed on a "*wrong principle*" and as such, the Petitioner had satisfied the existence of exceptional circumstances, warranting interference by this Court with the impugned order of the sentence, in exercising its revisionary jurisdiction. Accordingly, the ten-year term of imprisonment imposed on the Petitioner is hereby set aside and a term of 30 months of imprisonment is substituted in its place. The fine and the compensation imposed on the Petitioner remain unaltered.

The 30-month long term of imprisonment imposed by this Court is to commence from the date of conviction of the Petitioner, i.e. 25.09.2018.

The application of the Petitioner is therefore allowed. No costs.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FRENANDO J.

I agree.

JUDGE OF THE COURT OF APPEAL