IN THE COURT OF APPEAL OF THE DEMOCRATIC

SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application to revise the order of the High Court of Kalutara relating to the sentence imposed.

Kaluperuma Kelum Dushmantha
De Silva,
Moragalla,
Beruwala.
Petitioner
(on behalf of his father)

Ratnasiri Silva Kaluperuma
ACCUSED-APPELLANT-PETITIONER

CA (PHC) Rev APN: 166/13

HC Kalutara: 384/11

Vs

The Hon. Attorney General,

The Attorney General's

Department,

Colombo 12.

RESPONDENT

Before : A.W.A. Salam, J. (P/CA) &

Malinie Gunarathne, J.

Counsel : Dr. Ranjit Fernando for the Petitioner and Anoopa de Silva, SSC for the Respondents.

Argued on : 26.03.2014

Decided on : 02.07.2014

A.W.A. Salam, J. (P/CA)

The petitioner has filed the present application in revision on behalf of his father who was sentenced on his plea to 7 years RI to run concurrently and a fine in respect of 3 separate counts in addition to his being directed to pay compensation to the virtual complainant aggregating to Rs 600,000/-.

When the revision application was taken up for argument, the learned Senior State Counsel raised a preliminary objection as to the *locus standi* of the petitioner to maintain the present application.

As regards the *locus standi* of a person other than the convict to maintain an application to vary the sentence passed on him, a divisional bench has now been appointed in CA PHC APN 101/2013 with a view to fully examine the legal position and clear any confusion that may have arisen in this field of the law.

In any event, *locus standi* had never been an issue in revision applications regarding bail and it is virtually hardened into a rule now that the suspect need not personally invoke the revisionary jurisdiction of this court to impugn a decision concerning his being refused bail pending his trial. There are many instances where this court has granted bail in the exercise of its original jurisdiction on the invitation of persons who are concerned with the welfare of suspects, pending the conclusion of their cases.

The question as to whether a person other than a convict could legitimately invite the Court to go into an issue as to the legality or propriety of a decision relating to bail pending appeal also remains unsettled. As the divisional bench appointed to go into this field of the law is expected to pronounce its decision, I do not propose to rule on the question relating to the locus of the petitioner to maintain this application.

Turning to the impugned decision, as is evident from proceedings dated 23 October 2013, prior to the

imposition of the sentence, the learned High Court Judge had inquired directly from the virtual complainant (although he was duly represented by a Lawyer) whether he expects the court to pass a severe sentence on the accused. To this question the virtual complainant, as any complainant would, promptly responded with an answer in the affirmative. Surprisingly, the learned High Court Judge sates in the impugned judgment that the virtual complainant had expressed his desire that the accused should be severely punished for the offence committed. The entire sentencing process adopted by the learned High Court Judge indicates that he had passed sentence on the accused not in the proper exercise of the judicial discretion, but according to the whims and fancies of the virtual complainant. This clearly shows that he had surrendered the exercise of judicial discretion entrusted to him, to a party in a case and in doing so he had acted unreasonably in respect of the accused. The sentencing method adopted by the learned Judge does not demonstrate that the judicial discretion has been exercised according to Law.

Further, the learned High Court Judge in passing the sentence on the accused had taken irrelevant consideration into account and omitted to take certain relevant matters into account.

It is elementary principle of law that justice should be meted out without being bias towards anyone. The correct approach to be adopted in this respect is to apply the oft-repeated saying of Lord Chief Justice Hewart in R v. Sussex Justices, ex parte McCarthy [1 (1924) 1 K. B. at 259.] that "It is not merely of some importance, but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done".

The learned High Court judge in the instant case has failed to demonstrate such a standard and the sentence passed on the accused *ex facie* appears to be arbitrary and illogical. In doing so the learned High Court Judge appears to have unconsciously favoured the virtual complainant by imposing the impugned sentence little realizing that judicial discretion/power vested in him is inalienable. In such circumstances, irrespective of the question relating to the *locus* of the petitioner, once the court is informed of an illegality or impropriety of a judgment, it is the duty of this court to call for the record so as to deal with it, as the interest of Justice may require.

In the circumstances, acting under article 145 of the Constitution of the democratic socialist Republic of Sri Lanka, I am reluctantly compelled to enter an order for

the inspection and an examination of the record of the original court to facilitate this court to ascertain the propriety and legality of the sentence passed on the accused.

President/Court of Appeal

Malinie Gunaratna, J

I agree

Judge of the Court of Appeal

NR/-