

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

Daminda Rubasinghe
No. 129/1, Polhena,
Madapatha, Piliyandala.

ACCUSED-PETITIONER-PETITIONER

C.A (PHC) APN 95/2010
Provincial H.C. Colombo No. 20//2008
M.C. 36614/7

Vs.

1. Officer In Charge
Cinnamon Gardens,
Police Station, Colombo 7.
2. The Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENTS-RESPONDENTS

BEFORE: Anil Gooneratne J. &
Malinie Gunaratne J.

COUNSEL: Saliya Peiris for the Accused-Petitioner-Petitioner

Anoopa de Silva S.S.C. for the Respondents-Respondents

ARGUED ON: 18.06.2014

DECIDED ON: 03.10.2014

GOONERATNE J.

This is a Revision Application to revise the Judgment of the learned High Court Judge of the Western Province dated 18.5.2010 (P14). This application was supported in this court on 16.07.2010, and court issued formal notice and also issued an interim order as per sub-para (b) of the prayer to the petition staying the implementation of the sentence imposed on the Accused-Petitioner dated 15.8.2006 by learned Magistrate, Colombo. The interim order had been extended by this court periodically. Para 1 of the petition dated 01.07.2010 filed in this court indicates that the Accused-Petitioner was charged in the Magistrate's Court, Colombo (36614/7) on five counts

described in the said para, and the several charges are contained in document X and marked as P1 & P1A. The first count is a charge of causing death by negligence (Section 298 of the Penal Code). Other counts (ii) to (v) pertains to charges under the Motor Traffic Act. Petitioner pleaded not guilty to the above charges, but after trial the Petitioner was convicted on 01.08.2006 of all five counts and sentenced to two years rigorous imprisonment and a fine of Rs. 1500/- on the first count and fine of Rs. 1000/- for each other count. (Nos. 2 – 4).

To state the facts very briefly, is that the deceased, motor cyclist came from the side of the Borella towards Bambalapitiya on the Baudhaloka Mawatha (just opposite C.J's official residence) and the motor cyclist tumbled and fell. When the deceased fell on the middle of the road a little while later a jeep driven by the Petitioner from the Bambalaptiya side hit the deceased motor cyclist already fallen. Deceased was run over by the jeep driven by the Petitioner.

It is pleaded that the Accused-Petitioner filed an appeal on 01.08.2006 against the conviction but same was filed prior to imposition of sentence (P10). However the appeal was dismissed by the learned High Court

Judge as the appeal had been filed prematurely prior to the sentence being imposed (para 10).

I would as a matter of interest at this stage of my Judgment refer to a Judgment of the Supreme Court reported in *Bar Association Law Reports. 2012 B.L.R pg. 215 Vol. XIX – part II Gunasekera vs. A.G. decided on 09.07.2012.*

Held:

- (a) The purpose and ambit of the Section 4 of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990 is to grant a party aggrieved by any conviction, sentence, and/or a substantive right to appeal therefrom.
- (b) The right of appeal is a fundamental human right enshrined by domestic and international law. Article 12 of the Universal Declaration of Human Rights has guaranteed the right to a fair trial, which includes the right for a review of that trial.
- (c) The international Covenant on Civil and Political Rights (ICPR) to which Sri Lanka acceded to on 11th June 1980 imposes an obligation on all States to ensure that the rights contained therein guaranteed to the individuals within the State. Article 2 of the ICPR imposes an obligation on the State Parties to ensure to all individuals within its territory are granted the rights recognized in the Covenant. Article 14 of the ICPR pertains to the Judicial Process enshrining the basic Civil Rights which an Accused should have.

(d) In terms of the International Law there is a right of appeal both after conviction as well as after sentence and when such cases came as two separate appeals, should be consolidated and heard and determined as one case.

Thereupon the Petitioner preferred a Revision Application (HC RA (Rev.) 20/2008) against the Judgment of the learned Magistrate ((Y) – P11 - P11A). para 12 of the petition refer to the grounds which were urged by the Petitioner in his Revision Application to the High Court (a to i). However the Petitioner states that the said revision application was dismissed as aforesaid by the learned High court Judge (P14).

When we examine the order P14 of the learned High Court Judge, he has dismissed the Revision Application preferred to the High Court mainly on two grounds.

- (1) Delay
- (2) Petitioner does not disclose exceptional circumstances.

I would prefer to incorporate the reasons for dismissal (P14) as stated in the order P14 as follows:

අභියාචනය නිෂ්ප්‍රභා වූ විට වෙනත් ප්‍රතිකර්ම ලබා ගැනීම සඳහා ප්‍රතිශෝධන ඉල්ලුම් පත්‍රයක් ඉදිරිපත් කිරීමෙන් වගඋත්තරකරුවන්ට යම් අගතියක් සිදුවිය

හැකිය. තමන් විසින් ඉදිරිපත් කලයුත්තේ අභියාචනයක්ද නැත්නම් ප්‍රතිශෝධන පෙත්සමක්ද යන්න තීරණය කිරීමට ලෙස සලකා බලා ඒ අනුව නිවැරදිව තම ඉල්ලීම විස්තීකරා විසින් කලයුතු වේ. තම අභියාචනයේ දුර්වලතා මත එම අභියාචනය නිශ්චය වූ අවස්ථාවේදී විකල්ප ප්‍රතිකර්ම ලබා ගැනීම සඳහා ප්‍රතිශෝධන පෙත්සමක් ඉදිරිපත් කිරීමෙන් වගඋත්තරකරුවන්ට යම් අගතියක් සිදු වියහැකිය. මෙ අභියාචනය නිශ්චය කිරීම මත ප්‍රතිශෝධන පෙත්සමක් ඉදිරිපත් කිරීමට කටයුතු කිරීම සුවිශේෂ කරුණක් ලෙස සැලකිය හොහැකිය. අභියාචනයක් නිවැරදිව ඉදිරිපත් කිරීම අභියාචකයේ කාර්යභාරයකි. එසේ අපොහොසත් වූ විට ඉතා දිරිස ප්‍රමාදයකින් පසුව වෙනත් විකල්ප සඳහා ප්‍රතිශෝධන ඉල්ලුම් පත්‍ර ඉදිරිපත් කිරීමෙන් වගඋත්තරකරුවන්ට හා අනතුරින් අගතියට පත් පාර්ශ්වයන්ගේ අයිතින්ට හානි දායක වියහැකිය.

The learned High Court Judge no doubt proceeded to dismiss the case by its judgment at P14, based mainly on grounds of delay and failure to plead exceptional circumstances in the Revision Application. Learned High Court Judge cannot be faulted for doing so. But this court when exercising revisionary jurisdiction vested in terms of Article 138 & 145 of the constitution would have the power to examine any record of any court of first instance and in the exercise of its revisionary powers may make any order in the interest of

justice. If the impugned orders inclusive of the Magistrate's order amounts to a miscarriage of justice or is ex facie wrong in exceptional circumstances and revision lies even though no right of appeal lies. *Ranasinghe Vs. Henry* (1896) 1NLR 303 or where right of appeal is not exercised. *Mallika Silva Vs. Gamini Silva* (1999) 1 SLR 85; (2005) 3 SLR 176. Exceptional circumstances would be:

(a) Where there has been a miscarriage of justice.

(b) A strong case of interference by this court is made out ... *A.G. Vs. Podisingho* 51 NLR 385, 390.

When I peruse the Judgment of the learned Magistrate, point that was urged by learned counsel for the Petitioner on the burden of proof seems, to go to the root of this case where the learned Magistrate has erred in law. It is an error for the Magistrate to direct herself that she must examine the tenability and truthfulness of the evidence of the defence in the light of the evidence led by the prosecution. At pg. 173 of P9 the learned Magistrate states as follows:

විත්තිකරු සහ ඔහු වෙනුවෙන් සාක්ෂි දුන් විමලා රණතුංගගේ සාක්ෂිය කියා සිටියේ ඔවුන් ඒ අවස්ථාවේ ධාවනය කරමින් සිටි පිස් රථයට මරණකරු යටවුයේ නැති

බවය. එහෙත් පැමිණිල්ල විසින් සාධාරණ සැකයෙන් තොරව විත්තිකරු විසින් පද්‍යන ලද පීප් රටියට මරණකරුගේ හිස යටවූ බව අධිකරණය වෙත සනාථ කොට ඇති බැවින් විත්තිකරුගේ සාක්ෂිය මා ප්‍රතික්ෂේප කරමි.

The learned Magistrate Court based on the prosecution evidence and version which is proved beyond reasonable doubt reject the evidence of the defence. What should be done is to consider whether the defence case creates a reasonable doubt in the prosecution case, and thereby consider whether the Accused is guilty or not This is a total misdirection.

James Silva Vs. The Public of Sri Lanka 1980 (2) SLR Pg. 167..

It has been held inter alia "... it is a grave error for trial judge to direct himself that he must examine the tenability and truthfulness of the evidence of the accused in the light of the evidence led by the prosecution. To examine the evidence of the accused in the light of the prosecution witness is to reverse the presumption of innocence."

Kamal Addararachhici v. State 2000 (3) SLR 393..

It has been held inter alia by their Lordships of the Court of Appeal that "it is a grave error for a trial judge to direct himself that he must examine the tenability and truthfulness of the evidence of the Accused in the light of the evidence led by the prosecution."

In all the above facts and circumstances and in the context of this case this is a fit case to exercise the powers of revision and as such we allow sub paras (c), (d) & (e) of the prayer to the Petition dated 01.07.2010. Application is allowed as above.

Application allowed. The decision in this application will bind CA(PHC) 168/2010.

JUDGE OF THE COURT OF APPEAL.

W.M.M. Malinie Gunaratne J.

I agree.

JUDGE OF THE COURT OF APPEAL