IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

CA(PHC)APN 37/2014
HC Colombo 9429/1998

Savarimuttu Loganathan
(Presently incarcerated/serving sentence).
Accused Petitioner

(Through his mother)
Savarimuttu Tavamani
No.28A, 1st Cross Street,
Parathipuram North, Kilinochchi.

Vs.

The Hon. Attoeney General
Respondent.

Before : Malinie Gunarathne J.

: L.T.B. Dehideniya J.

Counsel :Dr. Ranjith Fernando with Samanthi Rajapakse for the Petitioner

: H.Jayanetti SC for the Respondent.

Argued on : 17.12.2015

Decided on : 01.03.2016

L.T.B. Dehideniya J.

This is a revision application filed against a sentence imposed by the High Court of Colombo. Several accused were indicted before High Court of Colombo in connection with the bomb explosion of a railway train at Dehiwala. The Indictment contained 1708 counts. The 1st, 2nd and 3rd accused pleaded guilty for the 1st and 2nd counts. Consequently, the State withdrew all the other counts against the 1st, 2nd and 3rd accused. After hearing the submissions, learned High Court Judge convicted the said accused on their own admission and sentenced the 1st and 2nd accused for a total of 10 years RI and the 3rd accused, the wife of the 1st accused, for a total of 5 years RI.

The mother of the 2nd accused filed this revision application on behalf of the 2nd accused, after 9 months of passing the sentence, stating that there is a disparity in sentencing. The 2nd accused has not appealed against the sentence. The reason given by the mother is that the 2nd accused was wrongly advised that there is no appeal against a sentence.

At the hearing the State Counsel raised two preliminary objections with regard to the maintainability of this application, namely that the petitioner, the mother of the 2nd accused, has on *locus standi* and that there is no exceptional circumstances.

Firstly I will consider the locus standi of the mother of the 2nd accused. In the petition she states that she files this application on behalf her son the 2nd accused, but there is no any documentary proof that her son has given her any authority to file this application. The proxy is signed by the mother. The affidavit also signed by her. Under these circumstances, at any time the 2nd accused can come forward and deny that he has given any authority to his mother to act on his behalf.

The reason averred in the petition for not filing an appeal is that he was erroneously advised that there is no appeal. This is a fact wholly

within the knowledge of the 2nd accused. She does not say that she was advised as such. The mother cannot swear to a fact which is within the knowledge of her son. It becomes hearsay. It has been held in the case of Kumarasiri and another v. Rajapakse [2006] 1 Sri L R 359 that that *"it is to be seen that it is the flesh and blood of the affidavit which gives life to the skeleton in the petition"*. If the affidavit contains the hearsay evidence, it cannot give life to the petition.

It is the mother of the 2nd accused who filed this application. The Attorney At Law who filed this petition said in the petition that "The Accused Petitioner above named appearing by his Attorney....." But the proxy was signed by the mother. In the proxy she says that she was authorized by her son to appear on his behalf. No any documentary proof submitted to substantiate that fact. Therefore this application has to be considered as an application filed by the mother of the 2nd accused and not by the 2nd accused himself. It was held in the case of Senathileke v. Attorney General and another [1998] 3 Sri L R 290 that the father of the accused has no locus standi to maintain a revision application. It has been held that;

> *Upon this application filed seeking a revision of the orders, judgment, findings, conviction and sentence imposed by the High Court Judge of Balapitiya, the accused's father has preferred this application and the accused who was convicted and sentenced has neither appealed against the aforesaid judgment nor moved this court in revision of the said orders and sentence. The first issue that arises is whether the father of the accused has a locus standi to maintain the said revision application. In the recent decision in Albert v. Wedamulla (1) at 418, the issue of locus standi was considered by me and I held that the petitioner in that case did not have a locus standi to maintain that particular application before*

the Magistrate's Court. My judgment in regard to the concept of locus standi has been affirmed in the Supreme Court. Could a father of a convicted accused allege that he is aggrieved by the judgment and sentence imposed on his son by the High Court Judge of Balapitiya. Can the father legitimately in such circumstances assert that he has a genuine grievance because a judgment and sentence has been pronounced which prejudicially affects his own interests - A.G. of Gambia v. N' Jie(2) at 634. Vide S. M. THIO'S monograph on locus standi and Judicial Review. On the question of locus standi and the problem of discretion, see De Smith Judicial Review of Administrative Act 1987 impression of the 4th edition - at pages 409 to 421. We hold that the petitioner, who is the father of the accused, has no locus standi to maintain the said revision application and we are fortified in that view by the judgments pronounced by Justice Sharvananda in the Ceylon Mercantile Union v. The Insurance Corporation of Sri Lanka(3) and in Sudharman de Silva v. The Attorney-General(4) at 14 and at 15. In the Ceylon Mercantile Union case, Justice Sharvananda held that the plaintiff a registered trade union, has no locus standi or standing to institute a civil action on behalf of its members against the defendant corporation for a declaration that according to contracts entered into between its members and the defendant certain revised rates of allowances were payable to them.

Under these circumstances I hold that the mother of the accused has no locus standi to institute this revision application.

Without prejudice to the above, I will consider whether the petitioner can have and maintain this revision application.

The 2nd accused would have appealed against the sentence as of a right. The Criminal Procedure Code provides for that. Section 331

provides for a convicted accused who is in prison custody to file an appeal. The section reads thus;

> *331. (1) An appeal under this Chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced :*
>
> *Provided that a person in prison may lodge an appeal by stating within the time aforesaid to the jailer of the prison in which he is for the time being confined his desire to appeal and the grounds therefor and it shall thereupon be the duty of such jailer to prepare a petition of appeal and lodge it with the High Court where the conviction, sentence or order sought to be appealed against was pronounced.*

He is only prevented from appealing against the conviction for the reason that he was convicted on his own admission of guilt, but he is not prevented from appealing against sentence.

> *336. On an appeal against the sentence whether passed after trial by jury or without a jury, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence, and pass other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed and in any other case shall dismiss the appeal.*

The accused has been represented by an Attorney At Law on the date he pleaded guilty for the offence and submissions were also made on his behalf by the said Attorney. Therefore, the statement that he was wrongly advised is not acceptable. (As I pointed out earlier, authenticity of this statement is questionable.)

Revision is a discretionary remedy and one cannot have it as of a right. Especially when there is an alternative remedy such as a right of appeal and that right is not exercised, exceptional circumstances have to be pleaded and established to invoke the revisionary jurisdiction.

A. R. G. Fernando, v. W. S. C. Fernando, 72 NLR 549

Where a right of appeal lies, an application in revision will not be entertained unless there are exceptional circumstances which require the intervention of the Court by way of revision.

Inspector of Police, Avissawella V. Fernando. 30 NLR 482

Where an accused person is warned and discharged, the remedy open to the complainant is by way of appeal.

Where the proper remedy is by way of appeal, an application for revision will not be entertained save in exceptional circumstances.

After considering several authorities, Nanayakkara, J. held in the case of Caderamanpulle v. Ceylon Paper Sacks Ltd [2001]3 Sri L R 112 at 116 that

When the decided cases cited before us are carefully examined, it becomes evident in almost all the cases cited, that powers of revision have been exercised only in a limited category of situations. The existence of exceptional circumstances is a precondition for the exercise of the powers of revision and the absence of exceptional circumstances in any given situation results in refusal of remedies. It is evident that revisionary powers being a discretionary remedy, the court has exercised that right where there are exceptional circumstances warranting the intervention of Court,

It was held in the case of Dharmaratne and another v Palm Paradise Cabanas Ltd and others [2003]3 Sri L R 24 that;

1. Legal submissions in the Petition do not indicate reasons why the Court of Appeal should exercise revisionary powers.

Per Amaratunga, J.

"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted, if such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision Application or to make an appeal in situations where the legislature has not given a right of appeal."

2. The practice of Court is to insist in the exercise of exceptional circumstances for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed.

In the present case this revision application is filed without exercising the right of appeal. Therefore, it has become necessary to consider whether there are any exceptional circumstances to interfere with the High Court Judge's order. The only reason pleaded by the mother of the 2nd accused is that there is a disparity in the sentence. It has been submitted to the learned High Court Judge that the 1st and the 3rd accused are husband and wife. The wife, the 3rd accused has given birth to a child in the prisons when she was in remand custody. The mother and the child were separated for nearly 18 years and the child has reached the age of sitting for the O/L Exam. Therefore, the difference in the sentences passed on the 1st and 2nd accused and the 3rd accused cannot be said that is without a reason. If one co-accused receives a more severe sentence than the other when there is no good reason for the difference, may be a reason for an appeal.

H.N.J.Perera J. considering the issue of disparity in the case of Rathnasiri Silva Kaluperuma v. The State C.A.Case No:-248/13 held that;

> *Dealing with the subject disparity of sentence as a ground of appeal Archbold recognizes that there are "a number of forms of disparity and it can occur in a number of different ways.(Archbold 2012, 5 - 159, p.608.)*
>
> *"Where an offender has received a sentence which is not open to criticism when considered in isolation, but which is significantly more severe than has been imposed on his accomplice, and there is no reason for the differentiation, the court of appeal may reduce the sentence, but only if the disparity is serious. It has been said that the court would interfere where "right-thinking members of the public, with full knowledge of the relevant facts and circumstances (would) consider that something had gone wrong with the administration of justice."(per Lawton I .J. in R. V. Fawcett 5Cr.App. R.(s) 15 CA.*

In the present case the accused were charged for a bomb explosion destroying property and causing death to people. Once the gravity of the offence is considered, it is obvious that they must be dealt with severely. H.N.J.Perera J. in the case of Rathnasiric Silva Kaluperuma (supra) cited an Indian authority with approval and held that;

> *Primarily the punishment for crime is for the good of the state and the safety of society. Rex V. Dash (1948) 91 Can c.c. 187. It is also intended to be a deterrent to others for committing similar crimes.*
>
> *In Rajive V. State of Rajastan (1996)2 sec 175 it was held that the Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual but also against the society to which the criminal belong.*

In State of M.P V. Bablu Natt (2009) 2 sec 272 it was held that -

"The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with. Socio economic status, religion, race, caste or creed of the accused and the victim although may not be wholly irrelevant, should be eschewed in a case of this nature, particularly when parliament itself had laid down minimum sentence."

Learned High Court Judge considered the fact that the mother was separated from the child for nearly two decades and only she was sentenced leniently by imposing the minimum mandatory term of imprisonment and the two male persons involved were punished severely. The differentiation was with a reason.

There are no exceptional circumstances in the instant case to invoke the revisionary jurisdiction.

I uphold the preliminary objections and dismiss the application.

I order no costs.

Judge of the Court of Appeal

Malinie Gunarathne J.

I agree.

Judge of the Court of Appeal