

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

Court of Appeal Case No.
CA (PHC) APN 66/2014
High Court of Gampaha Case No.
244/2006

M.S. Thusitha Perera,
Welikada Prison, [Prison No. R 48506]
Colombo.

1st Accused - Petitioner

Vs.

Hon. Attorney General,
Attorney General's Department,
Colombo 12

Complainant - Respondent

Before : Malinie Gunarathne J.
L.T.B. Dehideniya J.

Counsel : Darshane Kuruppu with Chinthaka Udadeniya for the 1st Accused
Petitioner
Himali Jayanetti SC for the Complainant Respondent

Argued on : 21.01.2016

Decided on : 03.06.2016

L.T.B. Dehideniya J.

This is a revision application against an order of the High Court of Gampaha. The 1st Accused Petitioner (the Petitioner) with the 2nd accused was indicted in the High Court of Gampaha on a charge of murder punishable under section 296 of the Penal Code. After trial, the Learned

High Court Judge convicted the Petitioner for a lesser offence of culpable homicide not amounting to murder punishable under section 297 of the Penal Code. Being aggrieved by the said conviction, the Petitioner presented this revision application. The Petitioner pleaded that the Learned High Court Judge did not explain to him that he had a right to be heard by a jury or by a judge and thereby he was denied a fair trial which constitute exceptional circumstances warranting the intervention of this Court by way of revision. He further pleaded that he was unaware that he had a right to appeal within 14 days of the conviction. He states that he was committed to prison after the pronouncement of the conviction and therefore he was unable to obtain legal advice and his parents obtained legal advice and it was too late to file an appeal and the only way to seek remedy is to move in revision.

The Complainant Respondent (the Respondent) filed objections and denied the existences of any exceptional circumstances and moved to dismiss the application.

Before considering the merits of the application, I will consider whether the Petitioner can maintain this revision application. The Petitioner had the right of appeal against the order of the Learned High Court Judge. He failed to exercise that right because he was unaware of his right of appeal. (Paragraph 13 of the petition dated 30th May 2014) He pleads his financial difficulty as an additional reason. The ignorance of law is not an excuse. Therefore his position that he was unaware of his right to appeal cannot be considered as a valid reason for not exercising the right given to him by the law. The other reason he pleads is the financial difficulty. He has undergone a full scale trial in the High Court and had been defended by a Counsel throughout the trial. He was able to obtain services of the Legal Aid Service to file this revision application. I

do not see any reason why he could not file an appeal in time, at least, why he could not file a revision application without delaying for five and half months.

It is a well established rule that the existence of exceptional circumstances to exercise the revisionary jurisdiction of this Court is a basic requirement. Gamini Amarathunga J. after considering several authorities, held in the case of *Dharmaratne and another v Palm Paradise Cabanas Ltd and others* [2003] 3 Sri L R 24 at page 29 that;

The requirement of exceptional circumstances for the exercise of revisionary jurisdiction is not a requirement statutorily laid down anywhere. As Gunawardana J, himself has referred to, Abrahams CJ. in Ameen v Rashid (supra) has explained the rationale for insisting on the existence of exceptional circumstances for the exercise of revisionary jurisdiction. According to Abrahams CJ. revision of an appealable order is an exceptional proceeding and a person seeking this method of rectification must show why this extra-ordinary method is sought rather than the ordinary method of appeal. As Hutchinson CJ. has stated in Perera v Silva (supra) it is not possible to contend that the power ought to be exercised or that the legislature could have intended that it should be exercised so as to give the right of appeal practically in every case. Thus the existence of exceptional circumstances is the process by which the Court selects the cases in respect of which this extra-ordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this Court will become a gateway for 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 right of appeal.

The practice of Court to insist on the existence 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. The words used by the legislature do not indicate that it ever intended to interfere with this 'rule of practice'.

In the instant case, the Petitioner complains that he was denied a fair trial by not explaining him that he has a right to choose a jury trial or a non jury trial. He rests his case on the journal entries dated 02.08.2007 (marked as P1E) and 07.03.2011(marked as P1F). The indictment served on the accused for the first time on 02.08.2007 and the case was fixed for trial. P1E reads in relation to the service of the indictment that *“indictment served with the documents. Vide proceedings”* The Petitioner failed to submit the proceedings of that date. The Court cannot come to any conclusion as to what has been transpired on that day. The indictment was amended subsequently and the amended indictment was served on 07.03.2011. The case proceeded on the amended indictment. As such, the real service of the indictment is to be considered as the service of the amended indictment on 07.03.2011. The P1F reads as *“Appearance recorded. Indictment amended. The charges contained in the indictment was read over to the Complainants (This seems to be a mistake. It must be accused.) Pleadings recorded. On the application of the defence case is fixed for trial without jury.....Vide proceedings”* The proceedings of that day is included from page 19 onwards in the document marked P1, the certified copy of the case record. The Petitioner has not given a separate marking to the proceeding of that day. In that proceeding it is clearly recorded that *“The amended charge in the indictment read over to the accused separately and they separately*

pleaded not guilty to the charge. The case is fixed for trial. On the application of the accused case is fixed for trial without a jury.”

Though the journal entry says that the case was fixed for a non jury trial on the application of the defence, it is clearly recorded that the application was by the accused. Unless the accused is given the opportunity to choose, there is no way for the accused to make an application to try the case without a jury. Therefore the allegation of the Petitioner that he was not explained of his right to choose a jury trial or a non jury trial cannot stand.

The Petitioner has failed to establish exceptional circumstances to exercise the revisionary jurisdiction of this Court.

Accordingly, the application is dismissed without costs.

Judge of the Court of Appeal

Malinie Gunarathne J.

I agree.

Judge of the Court of Appeal