

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

Court of appeal case no. M.Roshan Dilruk Fernando,
CA/PHC 03/2016 Colombo Prison, Welikada.

H.C. Chilaw case no. **Accused Petitioner**

Vs.

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

Respondent.

Before : H.C.J.Madawala J.
: L.T.B. Dehideniya J.

Counsel : Tenny Fernando for the Accused Petitioner.
: Varunika Hettige SSC for the Respondent.

Argued on : 13.07.2016

Written submissions filed on 25.08.2016

Decided on : 11.11.2016

L.T.B. Dehideniya J.

This is a revision application from an order of the High Court of Chilaw. The Accused Petitioner (the Petitioner) was indicted before the High Court on two counts, that is, abduction punishable under section 354 of the Penal Code and rape of a girl under 16 years of age punishable under

section 364 (2) E of the Penal Code as amended by the Act Nos. 22 of 1995, 29 of 1998 and 16 of 2006. The Petitioner pleaded guilty to both charges and was sentenced 2 years RI and a fine of Rs. 2500.00 and 10 years RI and a fine of Rs. 5000.00 for the two charges respectively. Being aggrieved by the said order the Petitioner presented this revision application.

The learned State Counsel raised several objections to this application. She submitted that the Petitioner has not established exceptional circumstances and not explained the delay.

In the present case the Petitioner as of a right would have appealed against the sentence on a question of law.. Without exercising that right of appeal, he opted to move Court in revision. It is settled law that the extraordinary jurisdiction of revision can be invoked only on establishing the exceptional circumstances. The requirement of exceptional circumstances has been held in a series of authorities. Ameen v. Rasheed 3 CLW 8, Rastom v. Hapangama [19787-79] 2 Sri L R 225, Cader (on behalf of Rashid Kahan) Vs Officer - In - Charge Narcotics Bureau, [2006]3 Sri L R 74, Colombo Apothecaries Ltd. and others V. Commissioner of Labour [1998] 3 Sri L R 320 are some of the authorities where it has been emphasized that unless the existences of the exceptional circumstances are been established in cases where an alternative remedy is available, revisionary jurisdiction cannot be invoked.

Bank of Ceylon v. Kaleel and others [2004] 1 Sri L R 284 Wimalachandra, J. held that;

"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."

Mariyam Beebe v. Seyad Mohamad 68 NLR 36 it was held that;

The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised, injustice will result. The Partition Act has not, I conceive, made any change in this respect, and the power can still be exercised in respect of any order or decree of a lower Court.

In the case of Cader (on behalf of Rashid Kahan) Vs Officer - In - Charge Narcotics Bureau, (supra) Erik Basnayake J. held that;

"Revision like an appeal is directed towards the correction of errors, but it is supervisory in nature and its object is due administration of justice and not primarily or solely the relevancy of grievances of a party. Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice".

His lordship Justice Gamini Amarathunga expressed the reason for the necessity to establish the exceptional circumstances in the case of Dharmarathne v. Palm Paradise Cabanas Ltd. [2003] 3 Sri L R 24 at page 29 held:

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'.

The exceptional circumstances are explained in the case of Vanic Incorporation Ltd v. Jayasekara [1997] 2 Sri L R 365 where it was held;

In the case of Attorney-General v. Podi Singho (supra) Dias, J. held that even though the revisionary powers should not be exercised in cases when there is an appeal and was not taken, the revisionary powers should be exercised only in exceptional circumstances such as

(a) miscarriage of justice (b) where a strong case for interference by the Supreme Court is made out or (c) where the applicant was unaware of the order. Dias, J. also observed that the Supreme Court in exercising its powers of revision is not hampered by technical rules of pleading and procedure.

In the instance case the Petitioner's Counsel argues that the unreasonableness of the order itself constitutes the exceptional circumstances. I will consider the order later.

The State Counsel further argues that there is a long delay in presenting this revision application which warrants the dismissal of the application in limine. The sentence was passed on 20th June 2012. The revision application was tendered to Court on 12th of January 2016 with a 3 years and 7 months delay. The Petitioner does not explain the reason for delay. Paragraph 5 of the petition speaks about the failure to appeal against the order of the High Court. The paragraph 13 says that he has invoked the revisionary jurisdiction in two previous occasions but were withdrawn due to technical issues. The present application filed after 3 years and 7 months delay and the reasons for the delay is not explained.

It was held in the case of *Seylan Bank v. Thangaveil* [2004] 2 Sri L R 101 at 105 that;

In this application in revision the petitioner seeks to set aside the orders dated 7.3.2002 and 10.01.2002 made by the learned District Judge. The petitioner has filed this application on 17.7.2003. It appears that there is a delay of one year and four months in respect of the order dated 7.3.2002 and a delay of seven months from the order dated 10.01.2003. The petitioner has not explained the delay.

Unexplained and unreasonable delay in seeking relief by way of revision, which is a discretionary remedy, is a factor which will disentitle the petitioner to it. An application for judicial review should be made promptly unless there are good reasons for the delay. The failure on the part of the petitioner to explain the delay satisfactorily is by itself fatal to the application.

The Attorney-General v. Kunchihambu et al. 46 NLR 401 is a case where the sentence passed by the Magistrate on the second accused in convicting him and sentencing him has overlooked a provision of the Control of Prices Regulations, 1942 which made the imposition of a term of imprisonment imperative because this accused had a previous conviction. The sentence passed by the Magistrate was one of fine. It is perfectly clear that the sentence passed by the Magistrate was in contravention of the requirements in the Control of Prices Regulations. Soertsz A.C.J. held at page 402 that;

The sentence was passed in February, 1945, and this application was made on May 25, 1945, and now it is the end of July. In view of the delay that has occurred I do not think that I ought to exercise the discretion vested in me by section 357 (1) of the Criminal Procedure Code.

H. A. M. Cassim, V. Government Agent, Batticaloa 69 NLR 403

An application in revision must be made promptly if it is to be entertained by the Supreme Court. There must be finality in litigation, even if incorrect orders have to go unreversed.

In the present case there is an unexplained delay of 3 years and 7 months. It is fatal delay.

Now I will consider the merits of the application. The Petitioner has pleaded guilty for an offence of committing rape on a girl below 16 years of age. The Petitioner submits that he had a relationship with the prosecutrix and there is a child on this affair. He further says that he married the prosecutrix and now she is his legal wife. The learned Counsel submits that the Supreme Court has held in the case of S.C. Reference 03/2008 that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence. He further draws the attention of the Court to the more recent judgment of the Supreme Court in the case of Samantha Sampath v. A.G. S.C. Appeal 17/2013 S.C. minutes dated 12.03.15 where it has been held again that the Court has the power to order a lesser punishment. I have no doubt as to the authority of Court expressed in the said judgments. The issue is whether this is a proper case to exercise the said authority.

The Counsel submits that the Petitioner waited till the prosecutrix reach the age of majority to marry her. The Petitioner marrying the prosecutrix is a total smokescreen created to mislead the Court to get a lenient punishment. According to the indictment the Petitioner was charged for committing rape on 04.01.2007. He got married for the first time with a woman named Kaluwage Sarangi on 04.03.2008 as per the marriage certificate marked X5. If he wanted to marry the prosecutrix, he shouldn't have married that woman. The Petitioner has two children from that marriage. Without dissolving the first marriage, re married the prosecutrix on 29.04.2012. With the second marriage he has committed the criminal offence of bigamy and has become liable to be punished. He misled the Registrar of Marriages by giving false information that he is unmarried. The worst part of it is the second marriage executed with the prosecutrix is not a

valid marriage no rights will flow from it. The Petitioner knowing that his first marriage is not dissolved, he entered in to this second marriage to mislead the Court. My view is that a person of this nature shall not be considered for a lenient punishment.

The next question that I wish to consider is whether the Court can consider the fact that there is a child born due to this illicit affair. The child is not a party to the crime committed by the Petitioner. The child was a result of the crime. It is true that the child needs protection and the welfare of the child is supreme. My view is that a criminal cannot be leniently punished for his crime to facilitate the welfare of the child. He shall be punished for the offence he has committed. In the instance case the Petitioner must be punished more severely because he tried to mislead the Court by getting in to a invalid marriage.

Though the Counsel for the Petitioner has submitted that the facts of the case will constitute the exceptional circumstances; I do not see any exceptional circumstance to exercise the revisionary jurisdiction.

The application dismissed.

Judge of the Court of Appeal

H.C.J.Madawala J.

I agree.

Judge of the Court of Appeal