

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

In the matter of an application for
Revision in terms of Article 138 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka.

**CA (PHC)APN 125/2015
HC Kalutara Case No- 691/06**

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

Complainant

Vs.

1. Don Ariyaratna Wijenayake
2. Don Susantha Wijenayake
3. Dapiligoda Vithanage
Chanrathilaka
of Welikada Prison

And Between

Don Susantha Wijenayake

2nd Accused-Petitioner

Vs.

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

Complainant-Respondent

Before : **H.C.J. Madawala , J**
&
L.T.B. Dehideniya, J

Counsel : Saman Galappatti for the Petitioner
Varunika Hettige DSG for the Respondent

Written Submissions On : 23 /08 /2016

Decided on : 20 / 01 /2017

H. C. J. Madawala , J

The 2nd Accused-Petitioner filed this Revision Application dated 15/2/2016 to revise and mitigate the sentence of the Accused-Petitioner by making an order substituting an appropriate sentence according to law.

The Petitioner was indicted in the High Court of Kalutara for having committed the murder of Withanage David Singho on the 30th January 1999 along with the two other Accused the mother and father of the Petitioner. On or about 7th May 2014 at the end of the trial the Petitioner along with the other two Accused pleaded to the lesser offence of culpable homicide not amounting to murder punishable under section 297 of the Penal Code on the basis of a sudden fight. They were convicted and sentenced to a term of 10 years rigorous imprisonment and fine of Rs.50,000/= each with a default sentence of six month rigorous imprisonment.

Being aggrieved by the said order imposing a term of 10 years rigorous imprisonment the Petitioner moved that this court be pleased to exercise the

revisionary powers and to set aside and mitigate aforesaid sentence on the following grounds of exceptional circumstances;

- a) That the Petitioner was only 17 years old with absolutely no previous convictions and a student preparing for G.C.E. A/L (Advanced Level) examinations.
- b) That on the day after incident 30th January 1999, the son of the deceased David Singhno has set fire to the house of his parents- that is 1st and 3rd Accused in which the Petitioner was living.

It was submitted that the Learned High Court Judge has failed to take these facts in to consideration before imposing the aforesaid sentence. The Petitioner also submitted that due to lack of financial resources he delayed in filling of this application.

On the perusal of this record we find that the Petitioner who was a student of 17 years old was preparing for his G.C.E. A/L examination. (A certified copy of the birth certificate marked P3 has been attached) On the evidence led we find that on the day of incident 30th of January 1999 the son of the deceased David Singhno set fire to the house that the Petitioner's parents were living. However when considering the delay in filing this revision application the explanation that has been given was that due to lack of financial resources the petitioners delayed in filling this revision application. 1st and foremost the Petitioner should have appealed against the judgment dated 7/4/2014.

According Section 331, of the Criminal Procedure Code Act No 15 of 1979 is read as follows,

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.”*

Accordingly the 2nd Accused Petitioner had the opportunity to appeal against the conviction and the sentence of the Learned High Court Judge if he has informed the jailer of the prison in which he is for the time being confined declared his desire to appeal he would have prepared the petition of appeal as it is duty of such jailer to prepare a petition of appeal and lodge with the High Court where the conviction sentence or order sought to be appeal against was pronounced. Accordingly we find the 2nd Accused Petitioner has failed to comply with section 331 of the Criminal Procedure Code Act No 15 of 1979. As such we find that when he had a legal remedy available to him he has not acted to obtain such relief by way of appeal.

When considering the delay of the 2nd Accused-Petitioner has taken to file this revision application is more than two years the reasoning given is that due to lack of financial resources he was unable to appeal cannot be accepted by this

court. The 2nd Accused-Petitioner and the other two Accused has pleaded guilty not in the 1st instance, but after lengthy trial. Although there are the exceptional circumstances pleaded by the 2nd Accused-Petitioner which could have been considered by the court the inordinate delay in filing this revision application is a bar to such consideration.

In the case of **CA(PHC) 28/2009 HC Rev 26/08 Don Chandra Maximus Illangakoon Vs. Officer-In-Charge of Police Station of Anuradhapura** his Lordship Justice K.T.Chithrasiri, decided to look in to the merits of this case despite the delay in filing the revision application. Particularly whether there is a serious miscarriage of justice had been caused to the 2nd Accused-Petitioner due to the conviction and sentence imposed on him.

In the present case 1,2, and 3 Defendant-Appellants has pleaded guilty and accordingly the High Court Judge has convicted and the sentenced the Defendant Appellants. It is against the sentence that this revision application has been filed. As such we do not have to consider the merits of this case. The sentence of the Learned High Court Judge on the Petitioner has been under section 297 of the Penal Code for sudden fight is as follows,

“Punishment for culpable homicide not amounting to murder

Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death; or

with imprisonment of either description for a term which may extend to ten years,
or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death.”

The 2nd Accused-Petitioner had pleaded the substitution of a lesser sentence. However in mitigating the sentence he has stated that he was a student who was preparing for the G.C.E. A/L examination and does not have any previous convictions. That his parent's residence was burnt by the deceased and has made a plea of sudden fight before the Learned High Court Judge.

In a case of sudden fight it is immaterial which party committed the offence the provocation and committed the initial assault. However we find that according to postmortem report that there had been 17 injuries of which several has been caused to the neck and head of the deceased.

According to the evidence led in case No HC Kalutara 691/06. The Petitioner has been a party to the act and there has been direct evidence that they injured the deceased.

The Learned High Court Judge has observed that in accordance with the postmortem report that there had been 17 injuries on the deceased several of them on the neck and the head of the deceased. We find that the 2nd Accused-Petitioner can continue his studies in the prison itself on making suitable arrangements with the Prison Authorities. As such we are of the view that the sentence imposed on the 2nd Petitioner-Appellant is not excessive and

accordance with the law. The Petitioner has delayed in submitting this revision application. We see no reason as to why we should interfere with the said order of the Learned High Court Judge as there is no miscarriage of justice met to the 2nd Petitioner-Appellant.

Accordingly we dismiss this Revision Application with cost of Rs.5000/-.

Judge of the Court of Appeal

L.T.B.Dehiddeniya, J

I agree.

Judge of the Court of Appeal