

**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

Court of Appeal case no. CA/PHC/APN 17/2016

H.C. Colombo case no. HC/3904/2007

Attorney General,
Attorney General's Department, Colombo 12

Complainant

Vs.

1. Midin Benedict Croos alais Babu
2. Subramaniam Surendran alais Suresh
3. Thambyah Sivskumar
4. Mohamed Sharook Mohamed Meheran
5. Pradeep Mangala Anilas alais Lokka
6. Mohamed Niyas Mohamed Safras
7. Amrasinghe Arachige Rukmal Sanjeeewa Kumar

Accused

And Now Between

Thambayah Sivakumar,
C-21, Sri Saddarma Mawatha,
Maligawatta, Colombo 10.
Presently at Welikada Prison,
Prison No. N 27978 YO Special
3rd Accused Petitioner

Vs.

Attorney General,

Attorney General's Department, Colombo 12.

Complainant Respondent

Before : H.C.J.Madawala J.

: L.T.B. Dehideniya J.

Counsel : Mohamed Nazar instructed by N. Dilham for the 3rd Accused
Petitioner.

: W. Jayasundara DSG for the Complainant Respondent.

Argued on : 31.10.2016

Written submissions filed on : 15.02.2015

Decided on : 29.03.2017

L.T.B. Dehideniya J.

This is a revision application filed by the 3rd Accused Petitioner (hereinafter sometimes called and referred to as the Petitioner) seeking to set aside or vary the sentence imposed on him. The Petitioner with six other accused were indicted before the High Court of Colombo on several charges punishable under sections 140, 435 read with 146, 435 read with 32, 380 read with 146, 380 read with 32 and 383 of the Penal Code. After trial the Accused were found guilty and were convicted. On 18.12.2009 the Petitioner was sentenced as follows;

1st count 6 months RI

2nd count 10 years RI and Rs. 10,000/- fine in default 6 months RI

The Petitioner, after more than 6 years, on 19th February 2016, presented this revision application (the petition dated 29th December 2015

but was filed in court only on 19th February 2016) to set aside or vary the sentence.

The learned DSG raised several preliminary objections on the maintainability of this application such as the delay and the absences of the exceptional circumstances.

The Petitioner's explanation for the delay is that he was in prison serving the sentence and there was no way for him to communicate with the family to get the legal assistances. The exceptional circumstance he pleads is that he was in remand custody during the pendency of the trial and it prevented him obtaining proper legal assistances. He further submits that the Court has recorded the facts submitted in mitigation incorrectly.

The revisionary jurisdiction of this Court is a discretionary remedy and no party can invoke the said jurisdiction as of a right. A party seeking involvement of a superior Court in exercising the revisionary jurisdiction has to establish that he has exceptional circumstances warranting the involvement.

Dharmaratne and another V Palm Paradise Cabanas Ltd and others [2003] 3 Sri L R 24

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."

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'.

Cadiragamapulle vs. Ceylon Paper Sacs Ltd. [2001] 3 Sri L R 112

(ii) No exceptional circumstances are disclosed why his application for revisionary relief should be entertained after the lapse of nearly two years.

(iii)

(iv) The existence of exceptional circumstances is a pre condition for the exercise of the powers of Revision.

In the present case the only exceptional circumstance pleaded is that he was in remand prison prior to conviction and was serving the term of imprisonment thereafter and was unable to obtain legal assistances. I do not agree with this submission. Firstly, the Petitioner was defended by an Attorney At Law at the trial and on his behalf submissions were made in mitigation. Secondly, the Petitioner would have communicated with the family while in the prison. The prisoners are allowed to communicate with outsiders by using the postal service. The Petitioner without utilizing that facility now cannot be heard to say that he was unable to communicate with the family. The reason given by the Petitioner cannot be considered as an exceptional circumstance which warrants the invoking the extra ordinary jurisdiction of revision.

The sentence was imposed on 18.12.2009 and the revision application was presented on 19.02.2016, which is with a delay of more than 6 years. As I pointed out, the failure to communicate with the family is not acceptable. There is no other explanation given for the delay. A party

seeking to invoke the discretionary jurisdiction of revision has to act promptly. The undue delay defeats the remedy.

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 case of **Urban Development Authority Vs Wejayaluxmi** [2006] 3 Sri L R 62 it was held that;

(4) When there is a satisfactory explanation with regard to the delay and the period of delay is not excessive and if it appears that the impugned order is manifestly erroneous application should not be dismissed simply on the grounds of delay.

In the present case the delay is more than 6 years and it is clearly excessive. The reason given for the delay is also unacceptable. The Petitioner was convicted after trial and was sentenced. Before passing the sentence, the learned High Court Judge has afforded the opportunity to mitigate. The Petitioner submits that the mitigation was recorded incorrectly, but has not tendered any supporting document such as an affidavit from the Attorney At Law who appeared for him or any other similar evidence to substantiate the litigation. The file of record maintained in the Court is presumed to be correct. Section 114(d) of the Evidence Ordinance provides that the judicial and official acts have been regularly performed. Therefore, without adequate proof, the file of record maintained in Court cannot be disproved. Under these circumstances, the allegation that the mitigation was recorded incorrectly is not acceptable. There is no significant error in passing the sentence. Therefore the case of Urban Development Authority Vs Wejayaluxmi (supra) cannot be applied to the present case.

Gnanapandithen and another v. Balanayagam and another [1998]

1 Sri L R 391 is a case where the Court has failed to investigate the title in a partition action. The Court held in that case that;

*On a consideration of the proceedings in this case, I hold that there has been a miscarriage of justice. The object of the power of revision as stated by Sansoni CJ. in *Mariam Beebee v. Seyed Mohamed*⁽⁴⁾ “is the due administration of justice....” In the words of Soza, J. in *Somawathie v. Madawala and others*⁽⁵⁾. “The court will not hesitate to use its revisionary powers to give relief where a miscarriage of justice has occurred . . . **Indeed the facts of this case cry aloud for the intervention of this court to prevent what otherwise would be a miscarriage of justice.**” The words underlined above are equally applicable to the present case. I am accordingly of the view that the Court of Appeal was in serious error when it declined to exercise its revisionary powers having regard to the very special and exceptional circumstances of this partition case.*

As I pointed out earlier, there was no miscarriage of justice in the present case. Therefore the long delay of more than 6 years matters.

Under these circumstances, I uphold the preliminary objection and dismiss the revision application.

Judge of the Court of Appeal

H.C.J.Madawala J.

I agree.

Judge of the Court of Appeal