

**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.

Democratic Socialist Republic
of Sri Lanka.

Complainant

Vs

**CA (PHC) APN 11/2016
HC Kuliyaipitiya Case No: 114/2010**

Adikari Mudiyansele
Wimalasooriya
(Presently at Welikada Prison)

Accused

And Now between

Adikari Mudiyansele
Wimalasooriya
(Presently at Welikada Prison)
Accused-Petitioner

Vs

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

Respondent

BEFORE : K. K. Wickramasinghe, J &

P. Padman Surasena, J

COUNSEL : Tenny Fernando for the accused Petitioner

DSG Varunika Hettige for the Respondent

DECIDED ON : 25th October 2017

K. K. WICKRAMASINGHE, J.

The Accused Petitioner (herein after referred to as the Petitioner) in this Revision Application was indicted in the High Court of Kuliyaipitiya for committing an offence of grave sexual abuse on the victim who was under 16 years of age in terms of section 365 B (2) b of the Penal code as amended by Act No. 22 of 1995.

When the indictment was read over to the Accused Petitioner, he had pleaded 'not guilty' to the indictment and accordingly the trial was commenced before the learned High Court Judge. After trial the Petitioner was convicted for the Charge and accordingly he was sentenced to 10 years RI, ordered to pay a Fine of Rs. 25,000/= with a default sentence of 4 years and Compensation of Rs.100, 000/= was awarded to the victim with a default sentence of 4 years.

Being aggrieved with the above mentioned sentence, the aforementioned Accused Petitioner preferred this revision application to this court. He has not appealed against the said order but seeks to invoke the revisionary jurisdiction of this court.

Learned Counsel for the Accused Petitioner invited this court to consider the ground that the Learned High Court Judge has not afforded a fair trial, since the charge does not contain a date and instead a time period of one year has been inserted in violation of section 165 read with 174 of the Code of Criminal Procedure Act No. 15 of 1979. Thereby caused miscarriage of justice by denying a fair trial by disabling him for an equal opportunity to forward a formidable defence as follows:-

- (1) There is no possibility for the Accused to forward a plea of alibi since a date has not been specified in the Charge as it is seen a usual charges as on or about which indicates a proximity of the date of the alleged offence the accused is charged with
- (2) There is no possibility that a witness on behalf of the defence could be called to testify to establish that either the alleged incident did not occur or it occurred in a different way other than the version of the prosecution.

By submitting a judgement of Justice Sisira de Abrew (CA 172/2002 decided on 29/06/2007) mentioned that , *“According to section 165 of the Criminal Procedure Code, the charge must, inter alia, specify the time and place of offence with which the accused is charged.”* Anyway the facts of that particular case defers from this instant case. In that case there were discrepancies with regard to the date of offence and the date of the 1st complaint etc. In that particular case, the victim was only 3 1/2 years old and the credibility of the witness were also challenged.

The Learned Counsel for the Petitioner further submitted that the Learned High Court Judge has convicted the Accused Petitioner for a defective charge, which has caused immense prejudice to the Accused by proceeding to convict him in contravention to Article 13 (4) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

The Learned DSG took up a preliminary objection stating that there is a right of appeal to the Accused instead of invoking the revisionary jurisdiction of this Court

moved to dismiss the application with costs. Also the petitioner has not any point alleged that impugned Judgement is illegal, irregular, capricious or arbitrary in order to invoke the revisionary jurisdiction of this court.

She further submitted that the petitioner has not demonstrated any exceptional circumstances to invoke the revisionary jurisdiction of this court.

In the case of *Ameen Vs Rasheed* 3CLW 8 Abrahams, CJ observed that, "*It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have discretion to act in revision. It has been said in this court often enough that revision of an appealable order is an exceptional proceeding and in the petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal. I can see no reason why the petitioner should expect us to exercise our revisionary powers in his favour when he might have appealed and I would allow the preliminary objection and dismiss the application with costs.*"

In the case of *Rustom Vs Hapangama*, His Lordship Justice Ismail stated thus, "*The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available only if the existence of special circumstances are urged necessitating the indulgence of this court to exercise these powers in revision. If the existence of special circumstances does not exist then this court will not exercise its powers in revision.*"

The difference between revision and appeal was explained in **CA (PHC) APN 17/2006** decided by three judges of the Court of Appeal explained Revision and Appeal thus, "*Needless to state that in an application for revision, what is expected to be ascertained is whether there are real legal grounds for impugning the decision of the High Court in the field of law relating to revisionary powers and not whether the impugned decision is right or wrong. Hence, in such an application the question of a rehearing or the revaluation of evidence in order to arrive at the right decision does not arise.*"

In the case of **Bank of Ceylon Vs Kaleel and others (2004) 1 SLR 284** it was held that, "*to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which is beyond an*

*error or defect or irregularity that an ordinary person would instantly react to itthe order complained of is of such a nature which would have **shocked the conscience of the court.**"*

The Learned High Court Judge has considered the aggravated circumstances under which the offence was committed by the petitioner and also has given due consideration to all circumstances pointed out by the Learned Counsel for the Petitioner given reasons and has made a sound and comprehensive Judgment.

Thus we are of the view that the sentence imposed by the Learned High Court Judge is not at all excessive.

Considering above, we have no reason to interfere with the findings of the Learned

High Court Judge.

We affirm the Conviction and the Sentence imposed by the Learned High Court Judge.

Hereby the Revision Application is dismissed.

JUDGE OF THE COURT OF APPEAL

P.Padman Surasena J

I agree,

JUDGE OF THE COURT OF APPEAL