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

In the matter of an Appeal under Article 154 P (6) read with section 11(1) of the Act No. 19 0f 1990 and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Officer in Charge

Police Station,

Wennappuwa.

Complainant

Vs

Raj Newton Kingsley Vadivel,

Robinhood Studio,

Bolawatta,

Waikkala.

Accused

C. A. (PHC)APN 136/04

Provincial HC Chilaw Case No. : 29/03

And Now between

Raj Newton Kingsley Vadivel,

Robinhood Studio,

Bolawatta,

Waikkala.

Accused-Appellant

Vs

(1) Officer in Charge

Police Station,

Wennappuwa.

(2) The Hon. Attorney General

Attorney General's

Department,

Colombo 12.

Respondents

BEFORE **:K. K. Wickremasinghe, J**

:P.P. PadmanSurasena, J

COUNSEL **:AAL Shyamala A.Collure for the 2nd Accused Appellant Appellant**

SSC Anoopa De Silva for the Respondents.

WRITTEN SUBMISSIONS OF APPELLANT :15/08/2017

DECIDEDON: 17/11/2017

JUDGMENT

K. K. WICKREMASINGHE, J.

This case was argued before Late Justice C. Madawala and Justice L.T.B.Dehideniya. The Judgement was reserved by justice Madawala. Since she passed away this matter came up before the present bench, hence the Appellant filed written submission and he agreed to abide by the same. Counsel for the Respondent informed court that she will not file written submission on behalf of the respondent and abide by the order of the court.

The Accused Appellant (herein after referred to as the Appellant) was charged in the Magistrate Court of Marawila in case bearing No. 71446 together with another for possession of 365 video cassettes and 319 compact discs containing obscene scenes for sale at a shop named Robin Hood Centre. The charge is for contravening section 2 of the Obscene Publications Ord. and thereby committed an offence punishable under section 2(1) of the said ordinance. When the charge was read over to both the Accused they had pleaded 'guilty' to the aforesaid charge and accordingly the learned Magistrate has convicted for same and imposed a sentence of 6 months RI and to pay a fine of Rs.2000 with a default sentence of 6 months Simple Imprisonment on each of the Accused .

Aggrieved by the said custodial sentence imposed by the Learned Magistrate the Accused Appellant and the other accused preferred an appeal to the Provincial High Court of Chillaw.

The learned High Court upholding the preliminary objection raised by the Respondent on the ground that no appeal lies to the Provincial High Court as the said ordinance does not provide for an Appeal dismissed the appeal in respect of the Appellant and set aside the sentence imposed on the other Accused.

Being aggrieved by the Judgement ,dated 10.06.2004, given by the Learned High Court Judge the Appellant preferred his case to the Court of Appeal against the same. Same objection was raised by the senior State Counsel who appeared for the Respondent in this case. However the Learned Counsel for the Appellant submitted court to consider this appeal as an application in revision *ex memo motu*; in the interest of the justice, as the learned High Court Judge has treated part of the appeal as an application in revision *ex memo motu* when setting aside the Sentence imposed on the other accused.

However upon the oral submission submitted by both parties regarding the preliminary objection the Court of appeal dismissed the Appellant's appeal, holding that the Court of Appeal does not hold jurisdiction to hear and determine the appeal in view of the decision given in **WickramasekaraVs Officer In Charge, Police station, Ampara(2004 1 SLR 257)**

Being aggrieved by the Judgement given by the Court of Appeal dated 03.12.2015, the Appellant was compelled to invoke the jurisdiction of the Supreme Court in terms of Article 128(2) of the Constitution. The Supreme Court set aside the Order dated 03.12.2015 on 10.112016 and sent back to the Court of Appeal to reconsider the submission made on behalf of the Appellant.

It has been submitted by the Learned Counsel of the Appellant that the Learned High Court Judge of the Provincial High Court in setting aside the custodial sentence imposed against the other Accused has exercise the revisionary powers vested on the Provincial High Court in the interest of the justice; *ex memo motu*, and has considered the facts that;

(a)The accused was a minor

(b) Impact of the custodial sentence has on the accused

(c) Accused was a first offender

(d) The Sec.2 of the Obscene Publication Ordinance draws a distinction between the punishment in respect of a first offender and subsequent offender

(e) The Learned Magistrate had imposed the punishment that should have been imposed in a subsequent offender

(e) The Learned Magistrate had failed to take into consideration the Sec.303 of the Code of Criminal Procedure Act.

It was submitted by the Appellant that, all the other grounds therein referred to are applicable to the Appellant except for the ground (a) mentioned above. Thus the Appellant was in fact a first offender and had not previous convictions or pending cases against him.

According to the Sec.2 of the Obscene Publication Ordinance draws a clear distinction between the punishments of a first offender and the subsequent offender.:-

Sec. 2 : It shall be an offence against this ordinance punishable on a conviction by a Magistrate-

(1) For the first offence, with a fine not exceeding Two Thousand Rupees or imprisonment of either description for a term not exceeding six months , or with both such fine and imprisonment; and

(2) For a subsequent offence committed after a conviction for the first offence, imprisonment of either description for a term not exceeding six months and in addition with a fine not exceeding Two Thousand Rupees.

It was submitted by the Appellant that, despite the Appellant being a first offender the Learned Magistrate has imposed the former maximum punishment that can be imposed under sec.2(2) of the ordinance in respect of the subsequent offence.

In the case of **Rauf and others Vs the Range Forrest Officer Puttalam**(1998) 1 SLR 176; held;

"That the accused were first offenders, a jail term was not justified; and a fine would be sufficient."

In **Somindra Vs Surasena and Others** (2000) 3 SLR 159; it had been cited with the approval; **Fernando Vs Fernando** ;

"Where the accused was granted relief although the petition of appeal was defective because in the circumstances of that case, His Lordship Justice Sampayo considered that imprisonment was not quite the suitable punishment."

It was further submitted by the Appellant that according to Sec.303 (1) of the Code of Criminal Procedure Act (As Amended by Act No.47) the court may make an order suspending the sentence having regard to the offender's culpability and degree of Responsibility of the offence, the offender's previous character, the presence of any mitigating factors regarding the offender, the need to punish the offender to an extent and in a manner, the fact that the person pleaded guilty to the offence and that person is sincerely and truly repentant ect.

It is submitted that the appellant was mere an employee of the Robin Hood Video Centre and that no action was taken against the proprietor of the video centre, that the appellant had no previous convictions or pending cases against him. He pleaded guilty to the offence

Kumara Vs The Attorney General (2003) 1 SLR 139; The Court of Appeal, that in substituting a suspended sentence for a sentence of imprisonment, observed (at 142) that , having regard to the circumstances set out therein, a custodial jail term was not warranted.

WickramasekaraVs Officer In Charge, Police station, Ampara(2004 1 SLR 257) does not apply in this instance since if the Obscene Publication Ordinance does not provide for an appeal against the order of conviction imposed by the Learned Magistrate for an offence created thereby, it cannot be maintained in law that the Appellant has already exercised his right of appeal in the provincial High

Court. Thus, the Sec.9 (a) of the High Court of Provinces (special provisions) Act No.19 of 1990 is not applicable in respect of the Judgement delivered by the High Court as the same has not been delivered in exercising the appellate jurisdiction vested in such court by Article 154 (3) (a) of the Constitution.

In this instance the Learned High Court Judge has treated the appeal as an application in revision *ex memo motu* the Court of Appeal has the jurisdiction to entertain this appeal.

In the case of **Somindra Vs Surasena and Others CALA 211/96** the Court of Appeal has exercised revisionary jurisdiction in an application for leave to appeal which had been lodged instead of a direct appeal.

C.A. 952/98 (Sunil Abeyratne Vs O.I.C, Police Station, Hanwella-(1998) decided on 18-09-1998, Court of Appeal treated an application for bail as an application in revision.

Thus the Appellant submitted that this appeal too can be treated as an application in revision in the interest of justice; exercising inherent powers of the court, taking in to account that the severity of the punishment.

Mariam Beebee Vs Seyed MohomadSC 03/08 (68 NLR 36),

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of the court. It is the due administration of justice and the correction of errors in order to avoid miscarriage of justice".

This power is available even where there is no right of appeal. Accordingly it was submitted by the Appellant that Provincial High Court , in effect, exercised this inherent power of the court *ex memo motu* , in setting aside the conviction of the other accused of the case.

The present appeal is preferred to the Court of Appeal under and in terms of Article 154(P) (6) read with Sec.11(1) of the High Court of provinces (special provinces) Act.No.19 of 1990 and Article 138 of the constitution. Article 154 P (6) of the constitution states that " subject to the provisions of the constitution and any law , any person aggrieved by the final order, judgment or sentence of any such court, in the exercise of its jurisdiction under paragraphs (3) (b) or (3) (c) or

(4), may appeal there from to the court of appeal in accordance with Article 138. Sec 11 (1) of the High Court of the High Court of the Provinces (Special Provisions) Act of No.19 of 1990 provides, inter alia, that the Court of Appeal shall have sole and exclusive jurisdiction by way of appeal, revision and *restitution in intergram* of all causes, suits, actions, prosecutions, maters, and things of which a provincial high court may have cognizance. Thus the court of Appeal can treat this application in revision.

Therefore considering the mitigating factors of this case, this court is of the view that the sentence of six months imposed by the learned High Court Judge on the Accused Appellant should be suspended for five years. Subject to the above mentioned variation, the appeal is dismissed.

JUDGE OF THE COURT OF APPEAL

P.Padman Surasena J

I agree,

JUDGE OF THE COURT OF APPEAL