

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

In the matter of an Application for
Revision under Article 138 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

CA (PHC) APN: 163/2016

HC Kegalle HC Case No: 3229/13

Democratic Socialist Republic of Sri
Lanka

Complainant

Vs

Mohamed Caseem Abdul Sukur

Accused

AND NOW

Mohamed Caseem Abdul Sukur

Accused-Petitioner

Vs

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Complainant-Respondent

BEFORE: P. Padman Surasena, J. (P/CA)

K.K.Wickremasinghe, J.

COUNSEL: AAL Rushdie Habeeb for the Accused-Petitioner

DSG Varunika Hettige for the Complainant-Respondent

ARGUED ON: 03/10/2017

WRITTEN SUBMISSIONS OF THE PETITIONER ON: 26/10/2017

WRITTEN SUBMISSIONS OF THE RESPONDENT ON: 07/11/2017

DECIDED ON: 01/02/2018

JUDGEMENT

K.K.Wickremasinghe, J.

The Accused-Petitioner (hereinafter referred to as 'Petitioner') in this Revision Application had been indicted in the High Court of Kegalle for committing the murder of Fathima Dulpika Gawus (the wife of the petitioner) on or around the 7th of April 2011 at Thalduwa, an offence punishable under Section 296 of the Penal Code. The Petitioner pleaded not guilty and the case proceeded to trial.

At the trial, the evidence of the following witnesses were led on behalf of the prosecution;

1. Uwaise Mohamed
2. Harankahawatta Widanalage Pradeep Kumara
3. Hettiyawatta Gamaralalage Sadheera Prabath Somaratne
4. Dangallage Rajeewa Jagath Jayawardhana
5. Balasuriya Dissanayakalage Rajapaksha
6. Dr. Hadun Pathirenehelage Wijewardhana
7. Illangathilaka Mudiyanseleage Jagath Kumara

After the conclusion of the evidence, the Defence counsel submitted to the court that his client was willing to withdraw the plea of not guilty and plead guilty to the lesser offence punishable under Section 297 of the Penal Code. The Learned State Counsel agreed to accept the plea of guilty to an offence punishable under Section 297 of the Penal Code on the basis of knowledge and the indictment was amended accordingly. When the indictment was read over to the petitioner, he pleaded guilty to the amended charge of culpable homicide not amounting to murder punishable under Section 297 of the Penal Code.

The Learned High Court Judge convicted the petitioner for the amended charge and sentenced him to 7 years rigorous imprisonment and a fine of a sum of Rs. 10,000/- was also imposed carrying a default sentence of 12 months rigorous imprisonment. In addition, a sum of Rs. 150,000/- was ordered to be paid to the aggrieved party as compensation carrying a default sentence of 12 months rigorous imprisonment.

Being aggrieved by the said sentence dated 09.11.2015, the petitioner has filed this revision application in this court.

Facts of the case

The petitioner was the husband of the deceased and they had two daughters together. The eyewitness (Prosecution Witness No.1), who was the step son of the petitioner, states that the petitioner dragged the deceased by the hair, flung her down on the ground and assaulted the deceased twice on the head with a bottle and the bottle had broken and a strong smell of acid had been smelt. The witness too was injured during the incident.

The Judicial Medical Officer, in his evidence, stated that the deceased had succumbed to the injuries on the same day. However, it had been stated that the inhaling of the aspiration of the said acid had in all probability caused the death of the deceased causing damage to the lungs.

It is submitted by the Learned Counsel for the petitioner that the petitioner had been abroad and upon his return to Sri Lanka, had discovered that his wife had been involved in an illegal affair and that the deceased had made some complaints against the petitioner to avoid being blamed in that regard. It has been submitted that the petitioner had no intention of going through with the murder and the act was a result of sudden provocation that arose as a result of his knowledge of his wife's illegal affair.

Therefore, being aggrieved by the aforementioned sentence of the Learned Trial Judge, the petitioner prefers this revision application to this court. He has not appealed against the said order but seeks to invoke the Revisionary Jurisdiction of this court.

The Learned Counsel of the petitioner invites this court to revise and set aside the sentence imposed on the petitioner and to make the sentence into a non custodial sentence or reduce the sentence and compensation imposed on the petitioner for the following reasons;

1. The said sentence is excessive in the circumstances of the case
2. The Learned Trial Judge had failed to consider the facts and the circumstances under which the petitioner had committed the offence and had

therefore erred in law by failing to give due consideration to the submissions made by the Defence Counsel during mitigation.

3. The petitioner has two children who are under the custody of his elder sister who is unemployed.
4. The petitioner is a first offender who has no previous convictions and now shows his remorse with regard to the act e committed.

The Learned Counsel for the petitioner submits that the petitioner has two daughters aged 8 and 12 years respectively and who are presently studying at R/Eheliyagoda Primary School and KalEliya Muslim College. It is further submitted that the petitioner is the sole bread winner of the family and a long period of incarceration could badly affect his family.

The Learned Counsel submits that the Learned Trial judge had failed to consider the above mitigatory factors thereby error in law and that the order dated 09.11.2015 placed the petitioner in a position where it is hard for him to sustain his children and has caused irreparable damage to them. All of the above are submitted as extenuating circumstances to invoke the revisionary jurisdiction of this court.

It is submitted on behalf of the petitioner that the petitioner could not exercise his right of appeal within the given period since he had no possibility to follow up the case and his elder sister could not attend to it due to financial difficulties and because his children were under her custody.

The following judgment of the Supreme Court **SC Appeal No. 17/2013** has been submitted by the petitioner where Justice Eva Wanasundara held *“I believe that every judge who sits in a court and hears the case in the court first instance gets the opportunity not only to hear the case but also to see the case with the physical eye, to smell the case, to feel the case and to fathom the case with the present mind. The judge could hear the words of evidence and observe the body language of those who give evidence. The judge who has seen, felt and smelt the case should be given the discretion in sentencing, considering all the circumstances in the case, the consequences of the sentence, whether it serves as cruelty to the wrongdoer the victim or any other person affected by that sentence etc. sentencing is the most important part of a criminal case and I find that provision in any law with a*

minimum mandatory sentence goes against the judicial discretion to be exercised by the judge”.

The Learned DSG took up the preliminary objection that the petitioner is guilty of laches. The order challenged by the petitioner was delivered on 09.11.2015 but the petitioner had made the instant revision application on the 20.12.2016 with a delay of more than one year and therefore the application should be dismissed in limine.

In the case of **H.A.M. Cassim Vs GA Batticaloa (NLR Vol. 69 pg.403)**

It was held *“An application in revision must be made promptly if it is to be entertained by the SC. There must be finality in litigation, even if incorrect orders have to go un reversed.”*

It has also been submitted that the petitioner in this case had not exercised his right of appeal and he had also not demonstrated exceptional circumstances to invoke the revisionary jurisdiction of this court.

In **Ameen Vs Rasheed (6 CLW 8)**, Abrahams CJ observed;

“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 revisional powers in his favor when he might have appealed, and I would allow the preliminary objection and dismiss the application without costs”.

The above judgment of Abrahams CJ was cited with approval by his Lordship Justice Ismail in **Rustom Vs Hapangama (SLR 1978-79-80 Vol.1, Page No-352)** and 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”.*

Since the indictment was amended on the basis of knowledge, the term of imprisonment may extend to 10 years but before imposing the sentence, the Learned Trial Judge had considered all mitigatory factors of the petitioner. Applying his judicial mind and discretion, the Learned Trial Judge had only imposed a sentence of 7 years. Thus, the judgment being challenged is legal and the petitioner is not entitled to invoke the revisionary jurisdiction of this court.

By perusing the Brief, it is evident that the judgment of the Learned Trial Judge is not illegal, irregular and arbitrary and in the absence of such, the revision application would not lie. Considering above mentioned reasons, we are of the view that this Revision Application should be dismissed.

Accordingly, the Revision Application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

P.Padman Surasena J. (P/CA)

I agree,

PRESIDENT OF THE COURT OF APPEAL