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 114/2015
HC Matara Case No: 86/2011

Kalabandanage Sumedha Lakmal

Accused

And Now between

Kalabandanage Sumedha Lakmal

Accused-Petitioner

Vs

Hon. Attorney General,

Attorney General's Department,

Colombo12.

Complainant-Respondent

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

K. K. Wickramasinghe, J

COUNSEL : AAL Amila Palliyage for the Accused Petitioner

DSG Varunika Hettige with SSC Nayomi Wickramasekera for the Complainant-Respondent

ARGUED ON: 26/07/2018

Written submission of the Petitioner: 13/09/2017

Written submissions of the Respondent: 13/07/2017

DECIDED ON : 27/2/2018

Order

K. K. WICKRAMASINGHE, J.

This is a case where the inquiry was taken up before late Justice H.C.J. Madawela and Justice L.T.B. Dehideniya. Both counsel are willing to dispose this matter by way of written submissions and to abide by the same.

The Accused Petitioner (herein after referred to as the 'Petitioner') was indicted in the High Court of Matara on two counts i.e. murder of two persons (double murder) namely Sumudu Prasad Jayawickrama (Count 01) and Andre Baduge Nimal Lal (Count 02) on or about 24/02/2003 which are punishable under section 296 of the Penal Code.

The petitioner pleaded guilty for the amended indictment where both the counts were brought down to a lessor culpability on the basis of grave and sudden provocation which is punishable under section 297 of the Penal Code aggravated by the fact that the petitioner and the two deceased were under influence of liquor at the time of the incident.

Accordingly, the Learned High Court Judge convicted the petitioner on his own plea for both amended counts and imposed a term of 20 years Rigorous Imprisonment for each count to run concurrently. In addition to the above said term of imprisonment a sum of Rs 15,000/- imposed as a fine for each count carrying a default term of 06 months simple imprisonment. A sum of Rs 100,000/- to be paid to the aggrieved parties on count 01 and 02, carrying a default sentence of 12 months simple imprisonment each.

Furthermore the Learned High Court Judge directed the prison authorities to reduce the period that the petitioner had been incarcerated before the conviction from the total term of imprisonment (20 years RI)

The learned counsel for the petitioner states that the Learned High Court Judge imposed the above mentioned sentence without considering the aggravating and extenuating facts placed before the Learned High Court Judge. Therefore, the court has not assigned any reasons for imposing the maximum sentence under section 297 of the Penal code.

However the Learned High Court Judge made order directing the prison authorities to implement the term of imprisonment after reducing the period that the petitioner had been incarcerated at the time of imprisonment.

The learned counsel for the petitioner states that the Learned High Court Judge should have intended to give some reduction to the total period of imprisonment by making such an order. However there is no such provision in the code of Criminal Procedure to reduce the remand period that the petitioner served prior to the conviction from the jail term. The learned counsel states that only in appeal the Court of Appeal can make such an order to implement the sentence from the date of the conviction and sentence. (Section 359 of the CPC)

Furthermore the learned counsel for the petitioner states that the Learned High Court Judge should have taken the above said facts into consideration when imposing a suitable sentence on the petitioner rather than directing the prison authorities to reduce the period of remand custody from the term of 20 years. It is also submitted that the learned Trial Judge has failed to assign reason to impose maximum sentence described under section 297 of the Penal code and therefore it is not possible to ascertain the range of sentencing based on the facts and circumstances of the case.

In addition, the Respondent has taken up the aforesaid delay of 2 years and 4months of filing this application as their preliminary objection. The contention of the respondent is that the instant application should be dismissed ***in limine*** on the above mentioned basis alone. While conceding to the fact that there had been a delay of 2 years and 4 months of filing this application the learned counsel for the petitioner states that if the order of the High Court is *ex facie* illegal and improper or arbitrary, the Court of Appeal would not reluctant to interfere with such an order exercising the revisionary powers vested in terms of Article 138 of the Constitution.

Therefore, the learned counsel for the petitioner is seeing to exercise revisionary powers and overrule the preliminary objection of delay and fix it for arguments on the main matter. The following cases have been cited in support of these arguments.

In the case of **R V R.E.M [2008] SCC 51 2nd Oct. 2008** it was held,

"that the trial judge's reasons serve three main functions:

1. *To explain the decisions to the parties*
2. *To provide public accountability, and;*
3. *To permit effective appellant review*

In the case of **Nissanka V State[2001] 3 SLR 78** the Court of Appeal identified the purpose of which the discretionary powers can be exercised. According to the legal principles laid down, it was held that;

1. *The power of revision can be exercised for any of the following purposes:*
   - i. *To satisfy the Appellant court as to the Legality of any sentence/order*
   - ii. *To satisfy the Appellant court as to the propriety of any sentence/order*
   - iii. *To satisfy the Appellant court as to the regularity of the proceedings of such Court.*

2. *Revisionary Jurisdiction is not fettered by the fact that the Accused-Appellant has not availed of the right of appeal within the specified time.*

In the case of **Leslie Silva V Perera[2005] 2SLR 184** the judgment states that:

"In this respect I would say it is settled and our courts time and again have held that the revisionary jurisdiction of this court is wide enough to be exercised to avert any miscarriage of justice irrespective of availability of alternative remedy or inordinate delay.

It is a well-known fact that the revision is a discretionary remedy. When the order complained of is a manifestly erroneous or without jurisdiction, the Court has to use its revisionary power to give relief. It has been held in the case of **Gnanapandithen and another V Balanayagam and another [1998] 1 Sri LR 391 at page 397** that;

"The question whether delay is fatal to an application [illegible] particular facts and circumstances of the case."

In the case of **Biso Menike V Cyril de Alwis** states that *"when the court has examined the record and is satisfied the order complained of is manifestly erroneous or without jurisdiction the court would be loath to allow the mischief of order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection".*

In the case of **Urban Development Authority V Wijayalaxmi [2006] 3 Sri LR 62** it was held:

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

In the light of the said legal principles the learned counsel for the petitioner states that the illegalities of the impugned order in the instant matter can be scrutinized as follows:

- The learned High court Judge erred the law by directing the prison authorities to implement the term of imprisonment after reducing the remand period is illegal as there is no procedure to do so.
- The learned High court Judge has failed to assign reasons for imposing the maximum period of imprisonment under section 297 of the Penal code. Moreover, extenuating factors placed before the learned High court Judge not given due consideration as per the impugned order of sentencing.

When considering the sentence imposed by the Learned High Court Judge it is apparent that the sentence is not illegal or manifestly erroneous.

In the case of **Liyanagamage Lahiru Kithsiri Kumara V Ag CA(PHC) APN 21/2015** it was held that a delay of 15 months was fatal to the maintenance of a revision application and thereby it was dismissed.

In the case of **S.M.A.A Priyantha Jayakody V OIC Marawila CA(PHC) 119/2014** it was held that a 7 month delay in invoking the revisionary jurisdiction failed. Therefore the learned counsel for the respondent states on ground of laches alone the application of the petitioner may be dismissed in limine.

The petitioner has failed to submit the B reports, Post mortem reports, finger print reports etc. This is a case of a double murder committed in the most brutal manner. However the imperative Post Mortem Reports have not been annexed to the revision application. According to the rule 3(1) (a) and (b) all copies of documents should be filed along with the application.

In the case of **Mary Nona V Francina CA 118/85** it was held that a copy of the proceedings containing so much of the record as would be necessary to understand the order sought to be revised.

The petitioner has not demonstrated any exceptional circumstances to invoke the revisionary jurisdiction. It is trite law that any person who is invoking the revisionary jurisdiction should demonstrate exceptional circumstances.

In the case of **Dharmaratne V Palm Paradise cabanas Ltd.[2003] volume 3 page no. 24** *"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"*

The learned High Court Judge has considered the circumstances under which the offences were committed by the petitioner and has also given due consideration to all circumstances pointed out by the learned counsel for the accused- petitioner given reasons and has made a sound and comprehensive judgment.

Thus this court is of the view that the sentence imposed by the learned High court Judge is not at all excessive. Therefore,

Considering the above, this court sees no reason to overrule the preliminary objection and proceed to hear the case. Thus, this court is hereby dismiss the revision application by allowing the preliminary objections of the respondent.

JUDGE OF THE COURT OF APPEAL

P. Padman Surasena J.

I agree,

PRESIDENT OF THE COURT OF APPEAL