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

In the matter of an Application for Revision made under Article 138 of the Constitution read with section 364 of the Code of Criminal Procedure Act No. 15 of 1979

C.A Revision Application No.

CA(PHC) APN 50/2017

Avissawella High Court Case No:

HC 69/2010

The Attorney General

Attorney General's Department,

Colombo 12.

COMPLAINANT

Vs.

1. Balasuriya Mudiyanselage Ranjith Balasuriya,

Pannala, Wewalyaya,

Ibbagamuwa.

2. Balasuriya Mudiyanselage Sugath Bandara Balasuriya,

Pannala, Wewalyaya,

Ibbagamuwa.

ACCUSED

AND NOW

The Attorney General

Attorney General's Department,

Colombo 12.

PETITIONER

Vs.

1. Balasuriya Mudiyanselage Ranjith Balasuriya,

Pannala, Wewalyaya,

Ibbagamuwa.

2. Balasuriya Mudiyanselage Sugath Bandara Balasuriya,

Pannala, Wewalyaya,

Ibbagamuwa.

ACCUSED-RESPONDENTS

BEFORE	:	K. K. Wickremasinghe, J.
		Janak De Silva, J.
COUNSEL	:	A.R.H. Bary, SSC for the Petitioner
		Weerasena Ranahewa AAL and Achini Umayangani AAL for the Accused-Respondents
ARGUED ON	:	12. 02.2018
WRITTEN SUBMISSIONS	:	Accused-Respondents – On 20.03.2018
DECIDED ON	:	23.05.2018

K.K. WICKREMASINGHE, J.

The Petitioner had filed a Petition in this court seeking,

a) Notice to be issued to the 1st and 2nd Respondents

b) Call and examine the record of the High Court of Avissawella case No. HC 69/10

c) Set aside the sentence imposed against the 1st and 2nd Respondents by the Learned High Court Judge of Avissawella in case No.69/10 dated 2016/11/29 and substitute lawful and adequate sentence therefore according to law and the circumstances of the case.

Facts of the case:

The Accused-Respondents (hereinafter referred as Respondents) were indicted on 25.02.2011 upon two charges;

a) That on or around 15th January 2004, the 1st Respondent committed the offence of Procuration in making 'Indrani Malkanthi' a prostitute outside Sri Lanka, an offence punishable under section 360A(1) of the Penal Code (as amended)

b) That on the same place and during the same course of transaction, the 2nd Respondent committed the offence of Procuration in making 'Indrani Malkanthi' a prostitute outside Sri Lanka, an offence punishable under section 360A(1) of the Penal Code (as amended).

On 29.11.2016 the Respondents had pleaded guilty for the charges and the Respondents were convicted on their own plea and the Learned High Court Judge of Avissawella had imposed following sentences by the order dated 29.11.2016.

i) On the 1st Charge – 1 year Rigorous imprisonment and a fine of Rs.10, 000/- and a default term of 6 months simple imprisonment. Rs.70,000/- to be paid by the 1st Respondent to PW1 and if default, 5 years simple imprisonment.

ii) On the 2nd charge – 1 year Rigorous imprisonment and a fine of Rs.10, 000/- and a default term of 6 months simple imprisonment. Rs.70,000/- to be paid by the 2nd Respondent to PW1 and if default, 5 years simple imprisonment.

The Petitioner wishes to invoke the Revisionary Jurisdiction of this court upon the grounds that the sentences imposed by the Learned High Court Judge are manifestly inadequate and contrary to law. The petitioner also states that the delay in invoking the Revisionary jurisdiction was due to the internal procedure of the Attorney General's Department.

The Respondents have filed Statement of objections seeking to,

a) Dismiss the Revision application filed by the Petitioner by a petition dated 04.04.2017.

b) Affirm the sentences imposed against the 1st and 2nd Respondents by the Learned High Court Judge of Avissawella in case No. HC 69/2010 dated 29.11.2016.

c) Declare that the sentences imposed by the Learned High Court Judge of Avissawella in case no. HC 69/2010 dated 29.11.2016 is in accordance with the law and the circumstances of the case.

The Respondents further state that they opted to plead guilty since they were acknowledged that a lenient punishment would be imposed if they pleaded guilty at the first instance. The Respondents state that they had been indicted for an offence alleged to have been committed in 2004 and the indictment was issued only after expiration of 6 years of the alleged date of the offence, namely in 2011 and the sentence was imposed upon them after pleading guilty in 2016, which is about 12 years after the alleged incident took place. The sentence as per the order dated 29.11.2016 for a Rigorous imprisonment of 1 year commenced since 29.11.2016 and accordingly the Respondents were to be released on 09.08.2017. Petitioner had filed the Petition only after expiration of 4 months of the imprisonment and the notice to produce the Respondents to this court on 06.09.2017 was sent to the Welikada Prison only on 25.07.2017. The Respondents were to be released from the prison after serving their respective sentences by the time the said order was to be executed.

Respondents further states that the internal delays of the AG's Department could not be considers as a reasonable explanation for the delay of filing the revision application.

In the case of ***Bank of Ceylon v. Kaleel & Others (2004) 1 SLR 284*** it was held that,

"To exercise the 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 it... the order complained of is of such nature which would have shocked the conscience of the court..."*

It is well settled law that Revisionary jurisdiction could be invoked when exceptional circumstances are shown to exist. In the case of ***Rasheed Ali v. Mohamed Ali (1981) 2 SLR 29*** it was held that,

"The powers of revision conferred on the Court of Appeal are very wide and the Court has discretion to exercise them whether an appeal lies or not or whether an appeal had been taken or not. However this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the court..."

The petitioner had failed to exercise the right of appeal within the stipulated time period but had filed a revisionary application before this court after approximately 4 months of the High Court judgment dated 29.11.2016. However, the only reason given by the Petitioner for this delay in invoking the revisionary jurisdiction was the internal procedure of the Attorney General's Department.

In the case of ***Rustom v. Hapangama*** **(1978-79) 2 SLLR 225**, His Lordship Ismail stated that,

"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."

However, in the case of ***Jathika Sevaka Sangamaya v. Sri Lanka Ports Authority and another (2003) Sri. L.R 146,*** Honorable Shiranee Tilakawardena, J stated that,

"The purpose of raising preliminary objections is not to shut out or stifle legitimate adjudication. Preliminary objections are particularly unhelpful and are without basis in the context where facts and/or law is in dispute..."

In the same case it was held that,

"(i) A preliminary objection can be a pure question of law, it could be based on a mixed question of law and facts and even on a question of fact alone...

Per ***Shiranee Thilakawardena, J.***

"Preliminary points of law are too often treacherous short cuts the price of which can be delay anxiety and expense."

(ii) the purpose of raising preliminary objections is not to shut out or *stifle legitimate adjudication. Preliminary objections are particularly unhelpful and are without basis in the context where facts and/or law is in dispute*

(iii) Writ of Certiorari is available even to strangers because of the element of public interest.

"every citizen has standing to invite the court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddlesome busy body but as a public benefactor."

In light of the aforesaid judgment, this court is of the view that the petition should not be dismissed merely on the ground of delay in filing the petition since the irregularity of the Judgment of the Learned High Court Judge has shocked the conscience of this court. Accordingly this court finds that there is a question of law to be considered.

Section 360A (as amended by Act No.22 of 1995) of the Penal Code removes the judicial discretion when sentencing a person convicted for procuration by stating that "...shall on conviction be punished with imprisonment of either description for **a term not less than two years** and not exceeding ten years and may also be punished with a fine."

This court finds that the sentence imposed against the Respondents by the Learned High Court Judge is inadequate since the Statute limits the judicial discretion by specifically mentioning the mandatory minimum sentence with regard to a person convicted for procuration. Learned High Court Judge in his Judgment has stated that, pleading guilty of the Accused-Respondents at the outset of the trial was

specially taken into consideration while imposing the sentence of 1 year Rigorous imprisonment. However, this court is of the view that exercising the judicial discretion depending on the factual, mitigatory or aggravating circumstances is not unfettered and discretion should still be limited according to the statutory provision when the section specifically stipulates a mandatory minimum sentence.

It is important to draw attention to the decision of the Supreme Court **SC Reference No.03/2008**, in which the judicial discretion with regard to the Penal Code Amendment of 1995 has been evaluated thoroughly. In the judgment of the aforementioned case, it was stated that,

"However, there may well be exceptional cases in which an offence may be so serious in nature that irrespective of the circumstances a Court may never exercise judicial discretion in favor of a punishment less than an appropriate minimum mandatory punishment...a minimum mandatory punishment of appropriate severity for such serious offences would not be inconsistent with Articles 4(c), 11 and 12(1)."

Therefore considering above, we find that the sentences imposed by the Learned High court Judge of Avissawella are manifestly inadequate with regard to the nature and the severity of the offence and sentences are illegal since the appropriate mandatory minimum sentence is prescribed in the Statute.

Accordingly, we impose the mandatory minimum sentence of 2 years of Rigorous imprisonment against the Respondents to run from the date of conviction.

The revision application is hereby allowed.

Registrar is directed to send this order to the relevant High Court of Avissawella to take immediate steps to apprehend the Accused-Respondents.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Bank of Ceylon v. Kaleel & Others (2004) 1 SLR 284

2. Rasheed Ali v. Mohamed Ali (1981) 2 SLR 29

3. Rustom v. Hapangama (1978-79) 2 SLR 225

4. Jathika Sevaka Sangamaya v. Sri Lanka Ports Authority and another (2003) Sri. L.R 146

5. SC Reference No.03/2008