

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

In the matter of an application for
revision under Article 138 read with
Article 154(6) of the Constitution of
the Democratic Socialist Republic of
Sri Lanka

OIC of Police Station,
Kandy.

Plaintiff

CA Revision Application No:

CA (PHC) APN 90/2016

H.C. Kandy Revision No: R... 28/2016

MC Kandy Case No: 9058

Vs.

Wijesinghe Arachchige Dharmasena
No.100/10,
Thennekumbura,
Kandy

Accused

BETWEEN

Wijesinghe Arachchige Dharmasena
No.100/10,
Thennekumbura,
Kandy

Accused-Petitioner

Vs.

1. OIC of Police Station,
Kandy.

Plaintiff-Respondent

2. The Attorney General
Attorney General's Department,
Colombo 12.

Respondent

AND NOW BETWEEN

Wijesinghe Arachchige Dharmasena
No.100/10,
Thennekumbura,
Kandy

Accused-Petitioner-
Petitioner

Vs.

1. OIC of Police Station,
Kandy.

Plaintiff-Respondent-
Respondent

2. The Attorney General
Attorney General's Department,
Colombo 12.

Respondent-Respondent

BEFORE : K.K. Wickremasinghe, J.
Janak De Silva, J
COUNSEL : Nimal Jayasinghe AAL for the Accused-Petitioner-Petitioner
H. Jayanetti, SC for the Respondent-Respondent
ARGUED ON : 06.03.2018
WRITTEN SUBMISSIONS: Respondent-Respondent –On 04.04.2018
Accused- Petitioner-Petitioner – On 18.05.2018
DECIDED ON : 12.06.2018

K.K. WICKREMASINGHE, J.

The Accused-Petitioner-Petitioner (hereinafter referred to as the Petitioner) has filed a revision application in this court seeking to revise the order of the Learned Magistrate of Kandy (Case No: 9058) dated 01.04.2016, cancelling the Petitioner's driving license and to set aside the Order of the Learned Judge of the Central Provincial High Court of Kandy (HC 28/2016) dated 28.04.2016.

Facts of the case:

The Petitioner was detected on 18.02.2016, by the Police, Kandy when he was driving a three wheeler at Thannekumbura Kandy after consuming liquor. Thereafter the Police instituted proceedings against the Petitioner in the Magistrate court of Kandy for driving a vehicle on the highway after consuming liquor, which is an offence under section 151(1) read with section 214A, punishable under section 216 of the Motor Traffic Act as amended. The Learned Magistrate of

Kandy convicted the Petitioner since the Petitioner pleaded guilty to the charge at the commencement of the proceedings and imposed a fine of Rs.7500/= and if default a 3 months of simple imprisonment. In addition to that, the Learned Magistrate cancelled the driving license of the Petitioner, acting under section **216B** of the Motor Traffic Act. Being aggrieved by the said order of the Learned Magistrate dated 01.04.2016, the Petitioner preferred a revision application to the Provincial High Court of Central Province holden in Kandy, which was dismissed by the Learned High Court Judge on the ground that absence of exceptional circumstances to invoke the revisionary jurisdiction of the Court. Thereafter the petitioner filed an application to invoke the revisionary jurisdiction of this court.

The counsel for the Petitioner submitted that the prosecution has to prove that the accused had a minimum concentration of .08 milligram of alcohol per 100 milliliters of his blood when a person is charged under section 151 of the Motor Traffic Act. The Learned counsel further submitted that Breathalyzer Test carried out by the Police is contrary to the relevant **Circular No. 697/87** dated 01.09.1987 issued by the Inspector General of Police and the Regulations made by the Minister under **section 151 of the Motor Traffic Act and published in the Gazette No.45 and dated 13.07.1979.**

However we observe that the Learned Magistrate has convicted the Petitioner on pleading guilty and has mentioned the same in the order dated 01.04.2016. Therefore we are of the view that it was not necessary for the prosecution to prove that the accused had a minimum concentration of .08 milligram of alcohol per 100 milliliters of his blood. Accordingly we are of the view that the Learned Magistrate was correct in mentioning only about the green colored crystals in the Breathalyzer Test tube (PR 1027/16) and it was needless to adhere to the Regulations aforementioned since the Petitioner had pleaded guilty.

However, we wish to consider the mitigatory factors put forth by the Learned Counsel for the petitioner, i.e. absence of previous convictions against the petitioner and pleading guilty at the first instance.

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 pertinent to note that the Petitioner was convicted under section 151(1) read with section 214A, punishable under section 216 of the Motor Traffic Act. **Section 151(1)** (as Amended) stipulates that,

“(1A) No person shall drive any omnibus or hiring car or any other vehicle intended for the carriage of persons for fee or reward on a highway after he has consumed alcohol or any drug.

(1B) Any person who drives a motor vehicle on a highway after he has consumed alcohol or any drug and thereby causes death or injury to any person, shall be guilty of an offence under this Act.”

Accordingly the Petitioner should have been convicted under **section 151 (1A)** of the Motor Traffic Act. Section 216B of the Act specifies the penalties to be

imposed on any person who is guilty of the offence of contravening the provisions of section 151.

Section 216A. *Any person who is guilty of the offence of contravening the provisions of subsection (1A) of section 151 shall, on conviction after summary trial before a Magistrate, be liable to a fine not less than three thousand rupees and to imprisonment of either description for term not exceeding six months and to the cancellation of his driving license.*

Section 216B. *Any person who is guilty of the offence of contravening the provisions of subsection (1B) of section 151 shall, on conviction after summary trial before a Magistrate, be liable*

(a) where he causes death to any person, to imprisonment of either description for a term not less than two years and not exceeding ten years and to the cancellation of his driving license;

(b) where he causes injury to any person, to a fine not less than five thousand rupees or to imprisonment of either description for a term not exceeding five years or to both such fine and imprisonment and to the cancellation of his driving license.

Though, the Learned Magistrate has the discretion to cancel the driving license of any person found guilty in accordance with the aforementioned section, we are of the view that, in the instant case, the Learned Magistrate has misdirected himself in cancelling the driving license of the Petitioner under **section 216B** since no evidence was produced to prove that Petitioner had caused any injury or death to any person. Therefore the appropriate section to cancel the driving license of the

Petitioner was under **section 216A** instead of **section 216B** of the Motor Traffic Act.

We are mindful of the fact that the Petitioner was employed as a driver and cancelling the driving license for life time deprives him of a source of income.

Considering the above, we uphold the conviction and vary the order of the Learned Magistrate of Kandy dated 01.04.2016 by cancelling the driving license of the Petitioner for a period of two years and six months from 01.04.2016. Accordingly the driving license can be released to the Petitioner on conditions after two years and six months from 01.04.2016.

We set aside the order of the High Court of Kandy dated 28.04.2016.

The revision application is hereby allowed.

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