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

In the matter of an appeal in terms of Article 131(1) of the Constitution and Section 11(1) of the High Court of Provinces (Special Provisions) Act No. 19 of 1990.

R.K. Alwis Karunarathna,
Food and Drug Inspector,
Office of the Deputy Director of Health Services,
Anuradhapura.

Complainant

CA Case No:
CA (PHC) 85/06

Vs.

HC Anuradhapura Case No:
124/09 (Revision)

MC Kekirawa Case No:
88148

M.F.M. Maharoof
Medical Centre,
Maradankadawala Road,
Kekirawa.

Accused

AND BETWEEN

Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Petitioner

Vs.

M.F.M. Maharoof
Medical Centre,
Maradankadawala Road,
Kekirawa.

Accused-Respondent

AND NOW BETWEEN

M.F.M. Maharoof

Medical Centre,

Maradankadawala Road,

Kekirawa.

Accused-Respondent-Appellant

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Petitioner-Respondent

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

K.K.Wickremasinghe, J.

COUNSEL : AAL Sumedha Mahawanniarachchi with AAL Indika Weerasinghe for the Accused-Respondent-Appellant

SSC Nayomi Wickramasekara for the Petitioner-Respondent

WRITTEN SUBMISSIONS: The Accused-Respondent-Appellant - On 14/05/2018

The Petitioner-Respondent - On 23/05/2018

ARGUED ON: 22/02/2018

DECIDED ON: 01/06/2018

K.K. Wickremasinghe, J.

The Accused-Respondent-Appellant (hereinafter referred to as the 'Appellant') was charged in the Magistrate's Court of Kekirawa for committing the offence of storing and being in possession of drugs without a valid permit contravening the provisions of the Cosmetics, Devices and Drugs Act No. 27 of 1984 punishable in terms of Section 26 of the Act. A preliminary objection was raised by the appellant before the commencement of the trial stating that in view of Circular No. 1819 dated 8th March 1994, the complainant had no authority to carry out an inspection of the said Ayurvedic dispensary as the supervision of Ayurvedic dispensaries came under the purview of the Ministry of Indigenous Medicine and should be dismissed in limine. By order dated 4th November 1998, the Learned Magistrate upheld the preliminary objection and discharged the appellant.

Aggrieved by the said order, the Attorney General filed a revision application in the High Court of Anuradhapura on the 1st July 1999. In order dated 12th December 2005, the Learned High Court Judge held with the respondent and ordered the case to be sent back to the Magistrate's Court for retrial. Aggrieved by the said order, the appellant has filed this appeal in this court.

The Learned Counsel for the appellant submitted that there were defects in the respondent's application to the High Court. It is submitted by the Learned State Counsel for the respondent that the imperative provisions of **Rule 46 of the Supreme Court Rules** do not apply to revision applications filed by the respondents (AG).

The absence of exceptional circumstances and delay of seven and a half months has also been submitted as defects by the Learned Counsel for the appellant. The State Counsel had made oral submissions to the effect that delay was due to the

fact that the Attorney General was made aware of the case only after a delay which delayed the filing of the revision application. With regard to the absence of exceptional circumstances and for the delay, the Learned State Counsel submitted the fact, that the matter was not referred to the Attorney General within the appealable period. However, the Counsel for the appellant submitted that no such explanation was given in the petition filed in the High Court.

The Counsel for the appellant has submitted the following judgments:-

1. Rustom V Hapangama and company [1978-79-80 (1) SLR 352] the Supreme Court held, "*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 its powers in revision*".

2. Brereton V Ratranhamy 42 NLR 149 the prosecution was sanctioned by the Tea Controller but not by the Attorney General as required by Ordinance No. 11 of 1933. It was held that the absence of the Attorney General's sanction was not curable under section 425 of the Criminal Procedure Code and rendered the trial a nullity.

3. A.Kanagarajah V The Queen 74 NLR 378 it was held that "*a conviction of an indictment of an offence punishable under section 76 C(1) of the Post Office Ordinance was invalid in the absence of a complaint made by order of or under authority from the postmaster-general. In such a case, the absence of the required complaint was a defect which could not be cured by the application of the provisions of section 425 of the Criminal Procedure Code either to the proceedings to the Magistrate's Court or to the proceedings of the District Court*".

The Learned Counsel for the appellant also submitted that there were defects in the order of the Learned High Court Judge as well. The Learned High Court Judge had not given reasons for not complying with the provisions of the Supreme Court Rules by the respondent.

With regard to the delay, the Learned High Court Judge has held that a delay of seven and a half months could be excused according to the judgement in the following case.

In the case of **Attorney General V Ransinghe and others 1993 2 SLR 81** it was held that *"(3) A delay of six months to make the application for revision of sentence will not be considered unreasonable in view of the circumstances of the case – see (6) below.*

(6) the aggravating circumstances in the case were removal of the prosecutrix when she was sleeping with her mother, the fact that she was very young (11 years old), below the age where she may consent to sexual intercourse, the degree of preplanning and the repeated commission of the offence for 2 days before the rescue by the police".

In the case of **Attorney General V Chandrasena (1991) 1 SLR 85**, it was held "*the absence of an affidavit by the Attorney General did not violate the provisions of Rule 46 of the Supreme Court Rules, as the Court was invited to decide only a question of law, and the relevant matters for that decision, have been admitted by the Accused-Respondent*".

In the present case, the respondent had filed a revision application in the High Court of Anuradhapura to revise the illegal order made by the Learned Magistrate. Filing a revision application against an order which is illegal and contrary to law itself become an exception which warrants the respondent to invoke the revisionary jurisdiction of the High Court. Therefore the Learned High Court Judge has called for the record from the Magistrate's Court under Section 364 of the Code of

Criminal Procedure according to law (under the provisions of the revisionary and appellate jurisdiction empowered to the Provincial High Courts by the 13th Amendment to the Constitution).

A circular does not prevail or override a legislation where it was not amended or repealed by the parliament by way of legislation as a fundamental principle of the Constitution. Therefore, the raid conducted by the Food and Drug Inspector was legal and was under his powers.

In the case of **Soysa V Silva 2000 2 SLR 235**, it was held that "*power given to a superior court by way of revision is wide enough to give it the right to revise any order made by an original court. Its object is the due administration of justice, and the correction of errors, sometimes committed by the court itself in order to avoid miscarriage of justice*".

Considering the above mentioned circumstances, the order of the Learned High Court Judge to refer the case to Kekirawa Magistrate's Court to commence trial against the appellant is legal and within the purview of the law.

Accordingly, the appeal is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

P. Padman Surasena, J.

I agree.

PRESIDENT OF THE COURT OF APPEAL