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 of the Democratic Socialist Republic of Sri Lanka.

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

Complainant

C.A Revision Application No.
CA (PHC) APN 165/2016

H.C. Badulla Case No: **HC 93/14**

Vs.

Gangabada Liyanage Nalaka Hemantha Liyanage,
387/4, Hettigedara,
Maspotha.

Accused

AND NOW BETWEEN

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

Complainant-Petitioner

Vs.

Gangabada Liyanage Nalaka Hemantha Liyanage,
387/4, Hettigedara,
Maspotha.

Accused-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J.
COUNSEL	:	Nayomi Wickramasekara, SSC for the Complainant-Petitioner AAL J.P. Gamage with AAL Dushani Priyadarshani for the Accused-Respondent
ARGUED ON	:	22. 05.2018
WRITTEN SUBMISSIONS	:	Accused-Respondent – On 14.06.2018 Complainant-Petitioner – On 02.07.2018
DECIDED ON	:	24.07.2018

K.K. WICKREMASINGHE, J.

This revision application was filed by the Hon. Attorney General seeking to revise and set aside the order of the Learned High Court Judge of Badulla in Case No. 93/2014 dated 10.10.2016.

Facts of the Case:

The Accused-Respondent (hereinafter referred to as the Respondent) was indicted in the High Court of Badulla for committing the offence of Criminal Breach of Trust on or about 18.04.2014 by concealing 420 litres of Diesel Oil in a secret compartment in the oil bowser bearing No. NCLC 5842, being the driver of the said tank, without unloading the same to the Badulla district store of the Ceylon Petroleum Corporation and misappropriated a sum of Rs. 50,820/= thereby committing an offence punishable under section 389 of the Penal Code read with section 5(1) of the Offences Against Public Property Act No. 12 of 1982 as amended by Act No. 76 of 1988.

The indictment was read over to the Respondent on 09.12.2014 and the case was fixed for trial since the Respondent had pleaded not guilty to the said offence. On the first date of the trial, the Respondent had informed the court his willingness to plead guilty and had made a representation to the Hon. Attorney General (hereinafter referred to as the Petitioner) to consider amending the indictment to withdraw the charge framed against the Respondent under the Offences Against Public Property Act. However, the Petitioner had informed Court about the inability to amend the indictment and had informed that the Petitioner wished to proceed against the Respondent under the same indictment. Accordingly when the case was re fixed for trial on 14.06.2016, the Respondent had again informed the willingness to plead guilty to the indictment. Thereafter the Petitioner had amended the indictment to include the amount misappropriated by the Respondent and on 29.08.2016, the Respondent had pleaded guilty to the said amended indictment. Accordingly the Learned High Court Judge of Badulla had convicted the Respondent and had imposed the following sentences;

1) A term of 01 year simple imprisonment,

2) A fine of Rs. 152,460/=, if default a term of 12 months simple imprisonment.

Being aggrieved by the said sentence order of the Learned High Court Judge, the Petitioner has filed a revision application in this Court, seeking to revise the sentence imposed on the Respondent and substitute a lawful and appropriate sentence.

The Petitioner has submitted following grounds as exceptional circumstances which warrant the exercise of revisionary jurisdiction of this Court.

a) The Learned High Court Judge had failed to consider the loss for the Ceylon Petroleum Corporation,

b) The Sentence imposed is wholly disproportionate, unreasonable and grossly inadequate when considering the facts of the case,

c) The sentencing order is illegal, wrongful and contrary to law,

d) The sentence is contrary to sentencing policy set out in the judicial authorities.

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

> *"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court..."*

The Learned Counsel for the Respondent submitted that the Petitioner has not exercised the right of appeal available to him and therefore the Petitioner is not entitled to invoke the revisionary jurisdiction of this court. Accordingly the Learned Counsel has submitted following cases.

1) **Rustom v. Hapangama (1978-79) 2 SLLR 225**

2) **Selliyah Marimuttu v Sivapakkiyam (1986) 1 CALR 264.**

In the case of **Rustom v. Hapangama (1978-79) 2 SLLR 225,** it was held that,

> *"It is established that this Court can intervene by way of revision even where right of appeal exists if the failure to exercise such right is explained to the satisfaction of court..."*

The Learned State Counsel for the Petitioner submitted that the delay for the filing of the Petition was due to the administrative procedures that needed to be done in filing a revision. The Attorney General had not moved in appeal in this matter since the appeal time had lapsed.

In the case of **W.M. Francisca v. Rev Sr. Marie Bernard and others [C.A.1108/99 (F)],** it was held that,

> *"It is trite law that the purpose of revisionary jurisdiction is supervisory in nature, and that the object is the proper administration of justice. In* ***Attorney General v Gunawardena (1996) 2 SLR 149*** *it was held that: "Revision, like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is the due administration of justice and not, primarily or solely, the relieving of grievances of a party. An appeal is a remedy, which a party who is entitled to it, may claim to have as of right, and its object is the grant of relief to a party aggrieved by an order of court which is tainted by error. .. "*

In the case of **Gunaratne v. Thambinayagam and others (1993) 2 SLR 355,** it was stated that,

> *"These were cases in which the power of the former Supreme Court and this Court to set aside a decree nisi in a partition action by revision was considered. Much earlier in* ***Attorney- General v. Podisingho 51 NLR 385****(an application for the revision of the order of a Magistrate in a criminal case),* ***Dias J.*** *said that this power (which is discretion) is exercised "where there is a positive miscarriage of justice in regard either to the law or to the Judge's appreciation of the facts" (P 388). It was held that this power is not limited to cases where there is no appeal; and that" it is wide enough to*

embrace a case where an appeal lay but which for some reason was not taken" (P 390).

In the case of **AG v. Ranasinghe and others (1993) 2 Sri L.R. 81,** it was held that,

"Thus it is seen that revisionary jurisdiction in terms of section 364 of the Code of Criminal Procedure Act, No. 15 of 1979 is wide and is specially directed at vesting a jurisdiction in this Court to satisfy itself as to the legality or propriety of any sentence passed by the High Court or the Magistrate's Court. The judgment relied upon by learned Counsel in the case of Rustom vs. Hapangama (supra) relates to a civil proceeding where the matter of sentence does not arise. It is clear on a perusal of the judgment, that this Court refused to exercise revisionary jurisdiction primarily on the basis that the petitioner had not availed himself of the leave to appeal procedure set out in the Civil Procedure Code... We have to observe that this consideration does not apply in relation to a criminal case where the jurisdiction is exercised in terms of section 364 of the Code of Criminal Procedure. Furthermore we are inclined to agree with the submission of the learned SSC that the decisions of the Supreme Court in the cases of the Attorney-General vs. H. N. de Silva (2) and Gomes vs Leelaratne (3) firmly establish the principle that in considering the propriety of a sentence that has been passed, this Court has a wide power of review, in revision. This jurisdiction is not fettered by the fact that Hon. Attorney-General has not availed of the right of appeal."

In the case of **Buddhadasa Kaluarachchi V. Nilamani Wijewickrama and Another [1990] 1 Sri L R 262**, it was held that,

> *"The trend of recent decisions is that the Court of Appeal has the power to act in revision even though the procedure by way of appeal is available in appropriate cases. In Rustom v. Hapangama & Co.(4) it was held that the powers by way of revision conferred on the appellate court are very wide and can be exercised whether an appeal has been taken against an order of the original court or not. However such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptionable circumstances are, is dependent on the facts of each case. Vythialingam, J. stated in Rustom v. Hapangama & Co (supra) "where an order is palpably wrong and affects the rights of a party also, this court would exercise its powers of revision to set aside the wrong irrespective of whether an appeal was taken or was available... "*

In the case of **Rasheed Ali v. Mohamed Ali (1981) 2 SLR 29** it was held that,

> *"It is well established that the powers of revision conferred on this Court are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal where it lies has been taken or not. But this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the Court..."*

Accordingly taking a similar view, we hold that this revision needs to be allowed since we are inclined to ascertain the proportionality of the sentence imposed by the Learned High Court Judge.

Section 5(1) of the Offences against Public Property Act No.12 of 1982 as amended reads as follows;

> *"Any person who dishonestly misappropriates or converts to his own use any movable Public property or commits the offence of criminal breach of trust of any movable Public Property shall be guilty of an offence and shall upon conviction be punished with imprisonment of either description for a term not less than one year but not exceeding twenty years, and with a fine of one thousand rupees or three times the value of the property in respect of which such offence was committed, whichever amount is higher."*

The Senior State Counsel for the Petitioner submitted that there had been a secret compartment inside the oil bowser bearing No. NCLC 5842, which was covered with a mesh and that secret compartment was operated with the use of a tool called "Allen Key". This bowser was duly examined and officially measured before absorbing the vehicle to the Ceylon Petroleum Corporation for the purpose of transporting oil and this secret compartment was not detected at the time of said examination. It was further submitted that the officials were unaware of a time as to the creation of said secret compartment, but since the initial examination and the detection of the said compartment, the bowser was engaged in transporting oil for about 307 times.

It has been held in the case of **The Attorney General v. H.N. de Silva 57 NLR 121**, that,

> *"In assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A Judge should, in determining the*

proper sentence, first consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. If the offender held a position of trust or belonged to a service which enjoys the public confidence that must be taken into account in assessing the punishment. The incidence of crimes of the nature of which the offender has been found to be guilty 3[Rex v. Boyd (1908) 1 Cr. App. Rep. 64.] and the difficulty of detection are also matters which should receive due consideration. The reformation of the criminal, though no doubt an important consideration, is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail..."

It was held in the case of **Attorney General v. Jinak Sri Uluwaduge and another [1995] 1 Sri L R 157** that;

"In determining the proper sentence the Judge should consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration. The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non-detection. Another matter to be taken into account is that the offences were

planned crimes for wholesale profit. The Judge must consider the interests of the accused on the one hand and the interests of society on the other..."

It is our considered view that the Respondent had committed this crime with premeditation, pre-planning and much deliberation. Therefore we find that the sentence imposed by the Learned High Court Judge of Badulla is grossly inadequate and is out of proportion having regard to the magnitude of the crime that had been committed.

Considering above, we enhance the sentence imposed by the Learned High Court Judge from one year to three years. Since the Respondent has already served one year in prison he is ordered to serve another two more years.

Accordingly the revision application is allowed.

Registrar is directed to send a copy of the Judgment to the relevant High Court of Badulla in order to pronounce the Judgment and to take necessary steps to apprehend the Accused-Respondent.

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) Rustom v. Hapangama (1978-79) 2 SLLR 225
3) W.M. Francisca v. Rev Sr. Marie Bernard and others C.A.1108/99 (F)
4) Gunaratne v. Thambinayagam and others (1993) 2 SLR 355
5) AG v. Ranasinghe and others (1993) 2 Sri L.R. 81
6) B Kaluarachchi V. Nilamani Wijewickrama and another [1990] 1 Sri.LR 262
7) Rasheed Ali v. Mohamed Ali (1981) 2 SLR 29
8) The Attorney General v. H.N. de Silva 57 NLR 121
9) Attorney General v. Jinak Sri Uluwaduge and another [1995] 1 Sri LR 157