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

In the matter of an Appeal in terms of section 331(1) of the Code of Criminal Procedure Act. No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

C.A. Case No: **CA 225/2014**

H.C. Colombo Case No: **HC 4258/2008**

1. Godaperu Pathirennehelage Wimalarathne Pathirana,
No. 25, 7/B Lane,
Regland Watta,
Kurunegala.

2. Indika Lakmini Pathirana,
No. 25, 7/B Lane,
Regland Watta,
Kurunegala.

Accused

AND BETWEEN

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

Appellant

Vs.

1. Godaperu Pathirennehelage
Wimalarathne Pathirana,
No. 25, 7/B Lane,
Regland Watta,
Kurunegala.

2. Indika Lakmini Pathirana,
No. 25, 7/B Lane,
Regland Watta,
Kurunegala.

Accused-Respondents

AND NOW BETWEEN

2. Indika Lakmini Pathirana,
No. 25, 7/B Lane,
Regland Watta,
Kurunegala.
(Presently at Welikada Prison)

2nd Accused-Respondent-Petitioner

Vs.

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

Appellant-Respondent

BEFORE : K. K. Wickremasinghe, J.

Janak De Silva, J

COUNSEL : AAL Asthika Devendra with AAL Kaneel Maddumage for the 2nd Accused-Respondent-Petitioner

		A. Jinasena, ASG for the Appellant-Respondent
ARGUED ON	:	03.04.2018
WRITTEN SUBMISSIONS	:	Both Parties – On 10.08.2018
DECIDED ON	:	02.10.2018

K.K.WICKREMASINGHE,J.

The 2nd Accused-Respondent-Petitioner (hereinafter referred to as the "Petitioner") and the 1st Accused were indicted in the Provincial High Court of Western province holden in Colombo under Case No: HC 4258/2008 on 6 counts. The Petitioner had pleaded guilty to 3 counts in the indictment, namely, Count No. 01, 05 and 06 while the 1st Accused had pleaded guilty to all 6 counts.

The counts 1, 5 and 6 are as follows;

Count No. 01

Both the Accused did between 26th August 2005 and 6th September 2005 cheat and thereby induce the Manager of Credit-Singer Finance to deliver Rs. 6,500,000/= to a third party and thereby committed an offence punishable under section 403 read with section 32 of the Penal Code.

Count No. 05

Both the Accused did on or about 30th November 2005 draw the cheque bearing No. 549435 for Rs. 332,450/= knowing that there were no sufficient funds in the account to honour such cheque thereby committed an offence

punishable under section 25(1)(a) of the Debt Recoveries (Special provisions) Act No. 02 of 1990 as amended by Act No. 09 of 1994.

Count No. 06

Both the Accused did on or about 24th September 2005 draw the cheque bearing No. 323908 for Rs. 197,820/= knowing that there were no sufficient funds in the account to honour such cheque thereby committed an offence punishable under section 25(1)(a) of the Debt Recoveries (Special provisions) Act No. 02 of 1990 as amended by Act No. 09 of 1994.

Accordingly the Learned High Court Judge of Colombo convicted the Petitioner and the 1st Accused on their own plea. By the judgment dated 28.08.2013, the Learned High Court Judge imposed sentence on both Accused in the following manner;

1st Accused-Respondent

i) A term of 1 year rigorous imprisonment for each charge of 1 to 6 that would run concurrently. That sentence was suspended for 10 years.

ii) A fine of Rs. 5000 for each charge with a default term of 1 month simple imprisonment,

iii) Compensation amounting to Rs. 800,000/= to be paid within 6 months to Singer Finance Lanka Company with a default sentence of 24 months simple imprisonment.

2nd Accused-Respondent (Petitioner)

i) A term of 1 year rigorous imprisonment for each charge of 1, 5 and 6 which would run concurrently. That sentence was suspended for 10 years.

ii) A fine of Rs.5000 for each charge with a default sentence of 1 month simple imprisonment.

Being aggrieved by the inadequate sentence imposed by the Learned High Court Judge, the Appellant-Respondent (Hon. AG) preferred an appeal to this court. The Appeal was partly allowed by the judgment dated 01.03.2017. However, upon realization of an oversight on the illegality of the sentence, this court pronounced an order dated 15.03.2017. Being aggrieved by the said order dated 15.03.2017, the Petitioner seeks to set aside the same on the basis of it being *per incuriam.*

The contention of the Learned Counsel for the Petitioner is that the functions of the Court of Appeal came to an end with the judgment dated 01.03.2017, therefore the order dated 15.03.2017 was bad in law.

In the case of **Morelle Ltd. V. Wakeling (1955) 1 All E.R. 708**, it was held that,

> "*As a general rule, the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some part of the decision, or some step in the reasoning on which it was based, is found, on that account, to be demonstrably wrong.* ***This definition is not necessarily exhaustive****, but cases not strictly within it which can properly be held to have been decided per incuriam must, in our judgment, consistently with the stare decisis rule which is an essential feature of our law, be, in the language of Lord Greene, M. R., of the rarest occurrence*""

In the case of **Alasuppillai V. Yavetpillai and another (1949) 39 CLW 107**, it was held that,

> *"A decision per incuriam is one given when a case or a statute has not been brought to the attention of the Court and it has given the decision in ignorance or forgetfulness of the existence of that case or that statute."*

The Learned Counsel for the Petitioner has submitted the case of **Hettiarachchi V. Seneviratne, Deputy Bribery Commissioner and others (1994) 3 Sri L.R. 293** in which it was held that,

> *"It is a well-established rule in general a Court cannot re-hear, review, alter or vary its own judgment once delivered. The rationale of that rule is that there must be finality to litigation...it may, of course, have a limited power to clarify its judgment and to correct accidental slips or omissions..."*

However in the case of **Jeyaraj Fernandopulle V. Premachandra Silva and others [1996] 1SLR 70**, it was held that,

> *"As a general rule, no Court has power to rehear, review, alter or vary any judgment or order made by it after it has been entered...However all Courts have inherent power in certain circumstances to revise an order made by them such as –*
>
> *(i) An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion exercised judicially and not capriciously.*
>
> *(ii) When a person invokes the exercise of inherent powers of the Court, two questions must be asked by the Court.*

(a) Is it a case which comes within the scope of the inherent powers of court?

(b) Is it one in which those powers should be exercised?

(iii) A clerical mistake in a judgment or order or some error arising in a judgment or order from an accidental slip or omission may be corrected. (iv) A Court has power to vary its own orders in such a way-as to carry out its own meaning and where the language is doubtful, to make it plain or to amend it where a party has been wrongly named or described but not if it would change the substance of the judgment..."

The Learned Counsel for the Petitioner has submitted that the order dated 15.03.2017 cannot be regarded as correcting an accidental slip but should be considered as a separate judgment.

The Learned Counsel submitted the case of **Senarath V. Chandraratne, Commissioner of Excise and others (1995) 1 Sri L.R. 209**, where it was held that,

"In general the Court cannot re-hear, review, alter or vary such decision. However the Court has limited power to clarify its judgment and to correct accidental slips or omissions..."

Accordingly we are inclined to consider whether the instant case had been re-heard or re-opened by the order dated 15.03.2017. The Court, in its judgment dated 01.03.2017, had first addressed the illegality and inadequacy of the sentence in view of the Debt Recovery Act since it carried a mandatory 10% of the value of cheque to be imposed as a fine.

In said order dated 01.03.2017, Court had held as follows;

> *"Further to have imposed a parole order or a suspended sentence for 6 counts is contrary to section 303(2) of the Criminal Procedure Code..."* (Page 9 of the Judgment)

However, it is evident that Court had overlooked the said observation.

Accordingly Court has observed in the order dated 15.03.2017 as follows;

> *"As per section stated above [303(2) of the Code of Criminal Procedure Act], it is mandatory that court shall impose a non-custodial or suspended sentence when the sentence imposed is only two years or less than two years.*
>
> *In the above setting it is so apparent that the above sentence imposed by the trial Judge cannot stand, as such should be set aside... "* (Page 3 & 4 of the Judgment)

Therefore it is understood that Court has not re-heard the case or had not introduced any fresh material to the case, but had simply completed what was overlooked in the judgment dated 01.03.2017.

The definition enunciated in the aforesaid case of **Morelle Ltd.** was followed in the case of **Billimoria V. Minister of Lands and Land Development & Mahaweli Development and 2 others (1978-79-80) 1 Sri L.R. 10**, in which it was held that,

> *"...While it was competent for one Bench to set aside on order made per incuriam by another bench of the same court, it has been the practice of parties or their Counsel to bring the error to the notice of the Judge or Judges who made the order so that he or they can correct the error..."*

In the case of **Cargills Agrifoods Ltd. V. Kalyani Dahanayake, Commissioner-General of Inland Revenue and 6 others [C.A. (Writ) Application No. 198/2012],** it was held that,

> *"However, the circumstances of this case do not show that there had been such an ignorance of the law by the Court in this instance. Nevertheless, the authorities cited by both the Counsel show that our Courts have extended the aforesaid rule per incuriam even to remedy an injury caused to a party when there had been a mistake on the part of the Court.*

The Learned Counsel for the Petitioner submitted that Court can only vary or alter its own judgment on the basis of *per incuriam* when the following two elements exist;

i) When a case or a statute has not been brought to the attention of the Court,

ii) The Court has given the decision in ignorance or forgetfulness of the existence of that case or that statute.

We observe that the Learned Counsel had persistently relied on the above contention throughout the submissions. However it is pertinent to note that the Learned Counsel has tried to prove Court that judgment dated 01.03.2017 was not *per incuriam* instead of proving Court the order dated 15.03.2017 was, in fact, *per incuriam.*

In the case of **Gunasena V. Bandaratilleke (2000) 1 Sr. L.R. 292**, it was held that a Court has inherent power to repair an injury caused to a party by its own mistake. In this case the judgment was delivered by the Court of Appeal and the record was returned to the District Court from the Court of Appeal with the judgment and the decree. The plaintiff has brought to the notice of the Court that there was an error

in the judgment where Court of Appeal had mistakenly thought that the Appeal was filed by the defendant from District Court case. Whereupon, after giving due notice to the parties and counsel, Court had the record of the action recalled and set aside its judgment on the ground that it had been delivered *per incuriam* and re-fixed the matter for argument. Thereafter Court delivered a second judgment. Aggrieved party preferred an appeal to the Supreme Court. The Counsel had made a similar contention as the Learned Counsel for Petitioner in the instant case before us, that the mistake made was not one which comes within the principles of *per incuriam* because it was not an order made in ignorance of or in forgetfulness of a statutory provision or a binding authority. It was held as follows;

> *"Dealing with the meaning of per incuriam, it was stated there at page 113 et seq. that "Earl Jowitt in his dictionary of English Law, (2nd Ed, 1977, Vol.2 p.1347) translates the phrase to mean 'through want of care'...Others, however have given the phrase a more restricted meaning. Lord chief justice Goddard in Huddersfiled Police Authority V. Watson [(1947) 2 ALL ER 193, 196] said 'what is meant by giving a decision 'per incuriam' is giving a decision when a case or statute has not been brought to the attention of the court and they have given the decision in ignorance or in forgetfulness of the existence of that case or statute. '...the definition of the phrase per incuriam in Lord Goddard's terms has been regarded as being too restrictive... There are several instances of the Court acknowledging that it had acted per incuriam in circumstances which might not have been accommodated within Lord Goddard's definition."*

Justice Wijetunga further held that,

"Having regard to the above definitions and the many instances where the Court has held that it has acted per incuriam in situations which do not come within Lord Goddard's definition, I think the facts and circumstances of the instant case may well be regarded as coming within the broader parameters of the concept of per incuriam. Even otherwise, as the earlier judgment contained a manifest error, the Court of Appeal had inherent power to correct the same, in order that a party did not suffer by reason of a lapse on the part of the Court. The procedure adopted by the Court of Appeal was what it considered most appropriate in the circumstances."

Aforesaid case of **Gunasena** was followed in the case of **Kariyawasam V. Priyadarshani (2004) 1 SLR 189** and it was held that,

"The per incurriam finding in the judgment of the matter before me presently has been made as a result of Justice Wigneswaran's attention not being drawn to the second page of the final decree in case No.34801/P where M.A.Girigoris Perera has been allotted the shares of the plaintiff, the 1st and 2nd defendants in that case.

Having regard to the above definition of "per incurriam" order and the many instances where the Courts have held that "per incurriam" orders have to be corrected, I think the facts and circumstances of the instant case warrant the exercise of inherent powers of this Court to rectify the mistake made in the judgment of Justice Wigneswaran, to prevent injustice to be caused to the plaintiff- appellant-petitioner.

I am also mindful of the oft quoted legal principle that no man shall be put in jeopardy by a mistake made by a Court..."

Recent judgments in local and international jurisdictions have held that *'per incuriam'* definition do not solely depend on said two elements as enunciated by Lord Goddard and could depend on the nature of the error to be rectified. Accordingly we answer that question of law raised by the Learned Counsel for Petitioner in negative.

Therefore we are of the view that the same bench clarifying its own judgment within 14 days of delivery was in accordance with law.

The Learned Counsel for the Petitioner further contended that, the Learned High Court Judge suspending the term of imprisonment was not obnoxious to section 303(2) of the Code of Criminal Procedure Act. Accordingly the Learned Counsel submitted that sentence imposed by the Learned High Court Judge did not come within the ambit of said section since the Learned High Court Judge had specifically ordered the sentence to run concurrently. Therefore the aggregated term of imprisonment on the Petitioner should be considered as 1 year, and not 3 years. Cases of **SC reference No. 03/2008** and **SC Appeal No.17/2013** have been submitted in support of said contention.

However, the Learned ASG for the Respondent submitted that the aggregate is to be taken only consequent to the imposition of the sentence and not after Court gives its direction on the operation of the different sentences in one trial.

In the case of **Weerawarnakula V. The Republic of Sri Lanka (2002) 3 SLR 213**, it was held that,

> *"A direction that a sentence of imprisonment should run concurrently with another sentence is strictly speaking not a part of the sentence but a direction with regard to the execution of the sentence. The general principle*

regarding sentences is that the sentence takes effect from the time it is pronounced."

Section 16(1) of the Code of Criminal Procedure Act stipulates as follows;

> (1) When a person is convicted at one trial of any two or more distinct offences the court may subject to section 301 sentence him for such offences to the several punishments prescribed therefor which such court is competent to inflict; such punishments when consisting of imprisonment to commence, unless the court orders them or any of them to run concurrently, the one after the expiration of the other in such order as the court may direct, even where the aggregate punishment for the several offences is in excess of the punishment which the court is competent to inflict on conviction of one single offence.

Accordingly the intention of the Legislature can be construed as firstly to convict an offender, secondly to impose the sentence, and finally to order the manner of implementation.

Taking a similar view we hold that the aggregate of the term of imprisonment ordered by the Learned High Court Judge on the Petitioner was 3 years.

The Learned ASG has brought to the attention of Court that the Petitioner had not moved to the Supreme Court against the judgment dated 15.03.2017, but rather made an application in this Court after a lapse of one year where this Court has become *functus officio* with the correction made on 15.03.2017. The Petitioner could have availed her right of appeal against the impugned order. Therefore we feel that the Petitioner had lodged this application in order to overcome the legal impediment encountered in terms of Rule 7 of Supreme Court Rules 1990.

Considering above, we are of the view that completing the omission in the judgment dated 01.03.2017 by the order dated 15.03.2017 was in accordance with law. The purpose of the order dated 15.03.2017 was to address an omission and there has been no reconsideration or re-hearing of the same case.

This application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL