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

In the matter of an application for revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

O.I.C,
Police Station,
Maradana.

Complainant

C.A. Revision Application No:
CA (PHC) APN 177/2017

H.C. Colombo Case No:
HCMCA 1242/06

M.C. Maligakanda Case No: **338/06/C**

Vs.

Haaji Mohommadu Fazal Mohommadu,
No. 05, School Road, Kalawewa,
Vijithapura.

Accused

AND NOW BETWEEN

Haaji Mohommadu Fazal Mohommadu,
No. 05, School Road, Kalawewa,
Vijithapura.

Accused-Petitioner

Vs.

1. O.I.C,
   Police Station,
   Maradana.

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

Complainant-Respondents

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	AAL Rushdie Habeeb with AAL Rizwan Uwais for the Accused-Respondent Nayomi Wickremasekara, SSC for the Complainant-Respondent
ARGUED ON	:	17.10.2018
WRITTEN SUBMISSIONS	:	The Accused-Petitioner – On 12.10.2018 The Respondents – On 17.10.2018
DECIDED ON	:	13.11.2018

K.K.WICKREMASINGHE, J.

The Accused-Petitioner has filed this revision application seeking to set aside the sentencing order of the Learned Magistrate of Maligakanda dated 17.11.2006 in Case No. 338/06/C.

Facts of the case:

The accused-petitioner (hereinafter referred to as the 'petitioner') was arrested by Maradana Police on a complaint made by his own bother and was charged in the Magistrate's Court of Maligakanda for committing lurking house-trespass by night and theft in dwelling house, offences punishable under sections 443 and 369 of the Penal Code. The petitioner had pleaded guilty to both charges and the Learned

Magistrate convicted the petitioner only for the first charge i.e. section 443 of the Penal Code. Accordingly the Learned Magistrate had imposed a term of 24 months simple imprisonment and converted the same to a period of rehabilitation on 17.11.2006.

Thereafter the petitioner had appealed to the High Court of Colombo against the order of the Learned Magistrate and the appeal was later withdrawn. The case was called on 27.10.2017 in the Magistrate Court of Maligakanda and the complainant has submitted a letter indicating his unwillingness of the punishment on the accused. The Learned Magistrate has affirmed the order and ordered to implement it from 27.10.2017.

Being aggrieved by the order of the Learned Magistrate dated 17.11.2006, the petitioner preferred a revision application to this Court.

The Learned Counsel for the petitioner submitted that the sentence imposed by the Learned Magistrate on 17.11.2006 was excessive, illegal and contrary to law for the following reasons;

a) The Learned Magistrate has failed to assign reasons to impose the maximum sentence of 24 months,

b) The sentence was excessive when considering the fact that the petitioner pleaded guilty to the both charges at the earliest possible instance,

c) The Learned Magistrate has failed to consider the facts and circumstances, under which the petitioner had committed the offence,

d) The Learned Magistrate has failed to consider that there would be a substantial miscarriage of justice to the petitioner in the event that the sentence imposed on him as a request made by the mother of the petitioner,

e) The Learned Magistrate has failed to consider that the petitioner was a first offender with no previous convictions and pending cases,

f) The petitioner is a married man and his wife is unemployed.

We observe that these grounds appear to be grounds of appeal rather than exceptional circumstances. It is well settled law that revisionary power of court shall be invoked only upon the demonstration of exceptional circumstances by the petitioner.

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..."*

In the case of **M. Roshan Dilruk Fernando V. AG [CA (PHC) 03/2016],** it was held that,

> *"In the present case the Petitioner as of a right would have appealed against the sentence on a question of law. Without exercising that right of appeal, he opted to move Court in revision. It is settled law that the extraordinary jurisdiction of revision can be invoked only on establishing the exceptional circumstances. The requirement of exceptional circumstances has been held in a series of authorities.*

Therefore it is mandatory to demonstrate exceptional circumstances. The revision power of court is directed towards the correction of errors and its object is the due administration of justice.

In the case of **W.M.F.G. Fernando 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 **Mariam Beebee V. Seyed Mohamed (1995) 68 NLR 36** it was held that,

> *"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this court. Its object is the due administration of justice and the correction of errors, sometimes committed by this court itself, in order to avoid a miscarriage of justice... "*

Therefore we are of the view that the revisionary jurisdiction cannot be invoked to solely relieve the grievances of a party.

The Learned Counsel for the petitioner has submitted that the appeal made to the High Court was withdrawn since there were no relatives to follow up with the case and the virtual complainant had forced the mother of the petitioner to withdraw the appeal. However we observe that the petitioner has not submitted relevant documents of the said appeal to this Court including petition of appeal and court

proceedings. Therefore we are unable to peruse any documents related to the said appeal.

In the case of **Dahanayake and others V. Sri Lanka Insurance Corporation Ltd. and others (2005) 1 Sri L.R. 67**, it was held that,

> *"If there is no full and truthful disclosure of material facts, the Court would not go into the merits of the application but will dismiss it without further examination..."*

In the case of **Lokugalappaththige Cyril & Others V. Attorney General [S.C (Spl.) L.A. No. 272/2013]** it was held that,

> *"In a brief manner a fair and full disclosure of all material facts would be essential and should be pleaded in applications to Superior Courts by parties aggrieved of orders and judgments of the lower courts. In the same manner a "plain and concise statements of all facts and material" would be mandatory for special leave to Appeal Applications to the Supreme Court..."*

In light of the above cases we are of the view that the documents related to the High Court appeal are material to the instant application and the petitioner has failed to submit the same. The Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules 1990 requires a petitioner to tender all the documents material to an application and in an event a petitioner fails to comply with such provisions, the Court may *ex mero motu* or at the instance of any party, dismiss such application. Accordingly the failure to submit the said High Court case records would amount to suppression of facts.

In the case of **Shanmugavadivu V. Kulathilake (2003) 1 Sri L.R. 215**, it was held that,

"According to Rule 3(1) (a) it is necessary for an application to be made by way of petition together with an affidavit is support of the averments and these should be accompanied by the originals of documents material to such application. Rule 3(b) specifically refers to the application made by way of revision or restitution in integrum and states that those too should be made in like manner referred to in Rule 3(1)(a) with copies of relevant proceedings including pleadings and documents produced in the Court of First Instance, tribunal or other institution to which such application relates..."

Therefore compliance of Rule 3 is imperative in a revision application.

Further we observe that this revision application was filed on 28.11.2017 whereas the order of sentence was imposed on 17.11.2006. Accordingly there has been a delay of more than 10 years and the petitioner has failed to give reasons for the delay. The Learned SSC for the respondent has contended that the failure on the part of the petitioner to explain the delay amounts to a dismissal of the revision application. We observe the case of **S.M.A.A. Priyantha Jayakody V. OIC, Police station, Mawarala and another [CA/PHC/119/2004]** in which A.W.A. Salam, J(P/CA) has cited following two cases;

"Camillus Ignatious vs OIC Uhana Police Station (Rev) CA 907/89, M.C.Ampara 2587. *It was held that a mere delay of 4 months in filing a Revision Application was fatal to the prosecution of the Revision Application.*

Opatha Mudiyanselage Nimal Perera vs A.G - CACRev) 532/97 -Kandy HC 1239/92, *where His Lordship Justice F.N.D. Jayasuriya stated that "These matters must be considered in limine before the court decides to hear*

Petitioner on the merit of his application before he could pass the gateway to relief his aforesaid contumacious conduct and his unreasonable and undue delay in filing application must be considered and determination made upon these matters before he is heard on the merit of the application. "

In the case of **Seylan Bank V. Thangaveil (2004) 2 Sri L.R. 101**, it was held that,

"Unexplained and unreasonable delay in seeking relief by way of revision, which is a discretionary remedy, is a factor which will disentitle the petitioner to it. An application for judicial review should be made promptly unless there are good reasons for the delay. The failure on the part of the petitioner to explain the delay satisfactorily is by itself fatal to' the application."

In the case of **M.M.P. Fernando V. S.M. Podimanike and others [CA (PHC) APN 113/2010]**, it was held that,

"It is well established principle that a party who has no alternative remedy can invoke revisionary jurisdiction of Court of Appeal only upon establishment of exceptional circumstances...Further I would also like to consider a judgment of Justice Udalagama in ***Devi Property Development (Pvt) ltd., and another vs Lanka Medical (Pvt) ltd., C.A.518/01 decided on 20.06.2001.*** *His Lordship in the said judgment observed thus: "Revision is an extraordinary jurisdiction vested in court to be exercised under exceptional circumstances, if no other remedies are available. Revision is not available until and unless other remedies available to the Petitioner are exhausted..."*

Therefore we are of the view that a petitioner who seeks a discretionary remedy should act promptly since an inordinate and unexplained delay in seeking such relief would disentitle the petitioner to it.

In the case of **Rustom V. Hapangama (1978-79) 2 SLLR 225**, it was 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... "*

Accordingly it is observed that the practice of Court is to exercise revisionary powers only upon existence of exceptional circumstances if there is an alternative remedy available. In the instant application, the petitioner could have availed his right of appeal against the order of the Learned Magistrate to the High Court and/or to the Court of Appeal. We observe that a warrant had been issued on the petitioner on 23.01.2008 and he was arrested and produced before the Learned Magistrate of Maligakanda on 14.09.2016. Therefore we think that the petitioner was absconding for 08 years instead of making an appeal to an Appellate Court. The petitioner seems to have filed a revision application as an alternative to the appeal since his period of appeal had expired by the time of the order of implementation.

In the case of **Attorney General V. P. Dharma Sri Wijerathna [CA (PHC) APN 246/2004]**, it was held that,

"Appeal being a statutory right the accused was entitled to appeal, provided he appealed in time. Even an accused who had absconded during the trial has a right to appeal provided he complies with the Supreme Court Rules and the other provisions of the law and makes the appeal in time... In ***Suddage Gamini Rajapakse V. The State (CA Appplication 30/98)*** *Kulathilaka, J held that; "An accused who had absconded has no right to invoke the revisionary jurisdiction of the court" he had further held that the discretionary remedy by way of revision will not be available to a person who was guilty of contumacious conduct..."*

Before he could pass the gate way to relief, his aforesaid contumacious conduct and undue delay in filing the application for revision must be considered and a determination made upon those matters before he is heard on the merits of the application"

In this **Dharma Sri** case the accused was tried in absentia as he was absconding. However in the instant application the petitioner did not appear in Court after he was convicted. Therefore we are of the view that the behavior of a convicted person should be considered in a stricter manner than of an accused or a suspect.

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24,** it was held that,

"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision application or to make an appeal in situations where the legislature has not given a right of appeal..."

It is noteworthy that the Learned Magistrate had ordered the term of simple imprisonment to be converted to a term of rehabilitation on request of the mother of the petitioner.

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.*

In the case of **The Attorney General V. H.N. de Silva 57 NLR 121**, it was held 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.

After considering the punishment prescribed in the Penal Code for the offence of lurking house-trespass by night i.e. a term of imprisonment which may extend to five years and a fine, we see no reason to interfere with the order of the Learned Magistrate dated 17.11.2006.

Considering above, we are of the view that this revision application should stand dismissed. Therefore we affirm the order of the Learned Magistrate dated 17.11.2006 and further we direct the said order to be implemented from today, namely 13.11.2018.

Accordingly the revision application is dismissed without costs.

Registrar is directed to send this order to the relevant Magistrate's Court of Maligakanda to take immediate steps to apprehend the accused-petitioner.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree.

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Rasheed Ali V. Mohamed Ali (1981) 2 SLR 29
2. M. Roshan Dilruk Fernando V. AG [CA (PHC) 03/2016]
3. W.M.F.G. Fernando V. Rev Sr. Marie Bernard and others [C.A.1108/99 (F)]
4. Mariam Beebee V. Seyed Mohamed (1995) 68 NLR 36
5. Dahanayake and others V. Sri Lanka Insurance Corporation Ltd. and others (2005) 1 Sri L.R. 67
6. Lokugalappaththige Cyril & Others V. Attorney General [S.C (Spl.) L.A. No. 272/2013]
7. Shanmugavadivu V. Kulathilake (2003) 1 Sri L.R. 215
8. S.M.A.A. Priyantha Jayakody V. OIC, Police station, Mawarala and another [CA/PHC/119/2004]
9. Seylan Bank V. Thangaveil (2004) 2 Sri L.R. 101
10. M.M.P. Fernando V. S.M. Podimanike and others [CA (PHC) APN 113/2010]
11. Rustom V. Hapangama (1978-79) 2 SLLR 225
12. Attorney General V. P. Dharma Sri Wijeratnna [CA (PHC) APN 246/2004]
13. Dharmaratne and another V. Palm Paradise Cabanas Ltd. (2003) 3 SLR 24
14. Attorney General V. Jinak Sri Uluwaduge and another [1995] 1 Sri L R 157
15. The Attorney General V. H.N. de Silva 57 NLR 121