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.

The Democratic Socialist Republic of Sri Lanka

Complainant

C.A. Revision application No:
CA (PHC) APN 46/2017

Vs.

Warnakulasuriya Alagappage Lesley Ranjith Fernando

H.C. Chilaw Case No: **05/2009**

Accused

NOW BETWEEN

Warnakulasuriya Alagappage Lesley Ranjith Fernando

(Presently in remand prison)

Accused-Petitioner

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	AAL Neranjan Jayasinghe with AAL Sachithra Harshana for the Accused-Petitioner Nayomi Wickremasekara, SSC for the Respondent
ARGUED ON	:	22.05.2018 & 28.09.2018
WRITTEN SUBMISSIONS	:	The Accused-Petitioner – On 31.10.2018 The Complainant-Respondent – On 03.12.2018
DECIDED ON	:	01.02.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner has filed this revision application seeking to revise the order of the Learned High Court Judge of Chilaw dated 04.08.2016 in case No. 05/2009.

Facts of the case:

The accused-petitioner (hereinafter referred to as the 'petitioner') was indicted in the High Court of Chilaw as follows;

i. The accused committed the Murder of Warnakulasuriya Jerad Lional Thamel and thereby committed an offence punishable under section 296 of the penal Code.

ii. The accused caused Hurt to Warnakulasuriya Rani Catherine Iroma Fernando and thereby committed an offence punishable under section 315 of the Penal code.

The trial was commenced on 09.12.2014 after reading over the indictment to the petitioner. On 04.08.2016, the first count of the indictment was amended to section 297 of the Penal Code, by the complainant-respondent (hereinafter referred to as the 'respondent'), on the basis of sudden fight and on the same day the accused-petitioner pleaded guilty to both counts. Accordingly the Learned High Court Judge had convicted the petitioner and imposed following sentences;

1. 1st Count – a term of 12 years rigorous imprisonment and a fine of Rs.7, 500/- with a default term of six months simple imprisonment.
2. 2nd count – a term of 2 years rigorous imprisonment and a fine of Rs. 7,500/- with a default term of 06 months simple imprisonment.

The Learned High Court Judge had further ordered both terms of imprisonment to run concurrently.

Being aggrieved by the said order, the petitioner has filed a revision application in this Court seeking to reduce the sentences imposed on him.

The Learned Counsel for the petitioner submitted that the Learned High Court Judge, when sentencing the petitioner, had failed to take into consideration that the petitioner was not with proper mental condition and he needed continuous treatment. The Learned Counsel further submitted that the sentence imposed is excessive and therefore it should be considered as an exceptional circumstance.

The Learned SSC for the respondent raised a preliminary objection that there has been a delay of 07 months in filing this revision application. The reason given for

the delay was that the petitioner was unable to give instructions due to his medical condition. The Learned SSC contended that said mental inability is not a reasonable ground since the accused was able to give instructions to take a plea for a lesser offence than what he was initially indicted.

We observe that the order challenged is dated 04.08.2016 and the petition submitted to this Court is dated 27.03.2017. The petitioner, without exercising the right of appeal, has filed a revision application in this court. We observe that there has been a considerable delay in filing this revision application. Our Courts have taken the view that the inordinate delay in seeking relief itself disentitles the petitioner to it since revisionary power is a discretionary remedy.

It was held in the case of **Seylan Bank V. Thangaveil [2004] 2 Sri L.R 101,** that;

> *"In this application in revision the petitioner seeks to set aside the orders dated 7.3.2002 and 10.01.2003 made by the learned District Judge. The petitioner has filed this application on 17.7.2003. It appears that there is a delay of one year and four months in respect of the order dated 7.3.2002 and a delay of seven months from the order dated 10.01.2003. The petitioner has not explained the delay. 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 **Attorney General V. Kunchihambu [46 NLR 401],** it was held that,

> *"...the sentence was passed in February, 1945 and this application was made on May 25, 1945, and now it is the end of July. In view of the delay that has occurred I do not think I ought to exercise the discretion vested in me by section 357(1) of the Criminal Procedure Code."*

In the case of **Paramalingam V. Sirisena and another [2001] 2 Sri L.R. 239**, it was held that,

> *"Laches means negligence or unreasonable delay in asserting or enforcing a right. There are two equitable principles which come into play when a statute refers to a party being guilty of laches. The first doctrine is delay defeats equities. The second is that equity aids the vigilant and not the indolent..."*

In light of the above it is understood that the party who seeks such relief should act promptly.

However the Learned Counsel for the petitioner contended that in terms of the powers given in section 364, the Court of Appeal has revisionary jurisdiction in respect of the legality or propriety of any sentence unlike in civil cases. Accordingly when the sentence is excessive or inadequate the Court of Appeal has jurisdiction to revise the sentence despite a delay or despite the fact that no appeal had been preferred. The Learned Counsel has submitted the case of **Attorney General V. Ranasinghe and others [1993] 2 Sri L.R. 81,** in which it was held that,

> *"...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... "

We observe that the Learned Counsel has explained the reasons for the delay in filing the revision application. Therefore we decide to overrule the preliminary objection since it is important to consider the merits of this case.

The Learned Counsel who appeared for the petitioner in the High Court requested to call a medical report on 04.05.2010 since the petitioner was suffering from a mental disorder. According to the report dated 28.02.2011 marked as "**X4**", Doctor Aruni Abeysinghe had examined the petitioner on 28.02.2011 and submitted that the petitioner was suffering from Schizophrenia. However the Learned High Court Judge had ordered for a further medical report since the said medical report was not sufficient. The Learned State Counsel on 20.10.2011 had informed Court that according to the new medical report the petitioner was unfit to plead and stand for trial. Thereafter the Learned High Court Judge ordered the petitioner to undergo treatments continuously and called for another medical report. Thereafter on 08.06.2012, the Learned High Court Judge had ordered the petitioner to be produced to the consultant psychiatrist Dr. Neil Fernando in the Mental Hospital (Teaching) Angoda. In the said report it was informed that the petitioner was fit to plead and stand trial.

The Learned Counsel for the petitioner submitted that according to the medical report of Dr. Neil Fernando, the petitioner was suffering from mental disorder from the age of 16 years (Medical report marked as 'X5' in the brief). Accordingly the Learned Counsel contended that the Leaned High Court Judge, when sentencing the petitioner, had failed to consider the mental condition of the petitioner.

The Learned SSC contended that the defence of insanity was never taken in this case and the evidence already led established that the accused was conscious of what he was doing.

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..."*

In the case of **M. Gomes (S.I. Police, Crimes) V. W.V.D. Leelaratna [66 NLR 233]**, it was held that,

> *"I would also indicate what factors should be taken into consideration by Judges on the matter of sentence. I proceed to quote from the case of The Attorney-General v. H. N. de Silva (1). At page 124 Basnayake, A.C.J., (as he then was) says this: "In assessing the punishment that should be passed on an offender the judge should consider the matter of sentence both from the point of view of the public and the offender..."*
>
> *To these I would respectfully add:*
>
> *(5) Nature of the loss to the victim. In this case the loss to him was irreparable, especially in view of the prohibition on the importation of cars into this country. The victim would have been put to a great deal of inconvenience if he had to use the public modes of transport.*
>
> *(6) Profit that may accrue to the culprit in the event of non-detection..."*

In the case of **The Attorney General V. Mendis [1995] 1 Sri L.R. 138** it was held that,

> *"In our view once an accused is found guilty and convicted on his own plea, or after trial, the Trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other. In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing*

such a crime insofar as the institution or organisation in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime. The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not to surrender this sacred right and duty to any other person, be it counsel or accused or any other person. Whilst plea bargaining is permissible in our view, sentence bargaining should not be encouraged at all and must be frowned upon..."

In the case of **Sevaka Perumal etc., V. State of Tamil Nadu [AIR 1991 S.C. 1463],**

"...Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of order should meet the challenges confronting the society... Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the court did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc..."

In light of above it is understood that the Judges should consider the matter of sentence from the point of view of the public as well.

The Learned Counsel for the petitioner has submitted the case of **Geoffrey Anthony Thilan Amarasekara V. The Attorney General [CA Case No. 149/2012]** and contended that the mental condition should be considered as a mitigatory factor when considering the question of sentence. However we observe that the facts of said case and the instant application are manifestly different. In that case the evidence was submitted to Court demonstrating insanity on the part of the accused-appellant and impelled the Court to reduce the term of imprisonment on compassionate grounds. It was further submitted about an attempt to commit suicide by hanging himself in his cell by the accused-appellant. In the case of Geoffrey Anthony (supra) it was observed that,

> *"With the kind of sustained derangement that the Accused-Appellant in this case has displayed we are the of view that it is a travesty to treat his case or even to actually treat it as if it were in the same degree of criminality as that of a professional assassin, or an armed robber who deliberately shoots a police officer or a security guard or a person who tortures, abuses and kills people for sadistic or sexual satisfaction.*
>
> *In my view, the contention that any murder, whatever the circumstances, should be regarded as uniquely heinous is also untenable legally.*
>
> *However the key argument of the Additional Solicitor General is entitled to much weight even though he did not stand in the way of compassion being shown to the Accused-Appellant by way of a discounted term of sentence. He argued that it is necessary to protect the public from an otherwise potentially dangerous person. Certainly it carries within it the contention that the likelihood of the risk that an offender of this nature may pose, if released, to kill again. It is axiomatic that the public should, so far as*

reasonably practicable, be protected against the risk of violence and if constant supervision of this Accused-Appellant is undertaken during the period of incarceration I should regard it as a necessary initial safeguard towards the reduction of the potential risk."

It is imperative to note that the said Geoffrey Anthony case was an appeal submitted to this Court while the instant matter is an application for revision. It is well settled law that the revisionary jurisdiction shall be invoked only upon demonstration of exceptional circumstances like miscarriage of justice. Therefore revisionary powers cannot be exercised to relieve the grievances of a party. This position was elaborated in the case of **Cader (On behalf of Rashid Khan) V. Officer-In-Charge Narcotics Bureau [2006] 3 SLR 74**, in which 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 due administration of justice and not primarily or solely the relevancy of grievances of a party. Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice..."

In the case of **Vanic Incorporation Ltd V. Jayasekara [1997] 2 Sri L.R 365**, it was held that,

"In the case of Attorney-General v. Podi Singho (supra) Dias, J. held that even though the revisionary powers should not be exercised in cases when there is an appeal and was not taken, the revisionary powers should be exercised only in exceptional circumstances such as (a) miscarriage of justice (b) where a strong case for interference by the Supreme Court is made out or (c) where the applicant was unaware of the order. Dias, J also

observed that the Supreme Court in exercising its powers of revision is not hampered by technical rules of pleading and procedure..."

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L.R. 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."

In light of above it is understood that this Court is empowered to invoke the revisionary jurisdiction only if there has been a mistake on the part of the lower court judgments and/or there has been a miscarriage of justice. Therefore this Court is not inclined to interfere with an order made by a Learned Judge exercising the discretion vested on him unless there is an error which warrants this Court to exercise revisionary powers. Further we are mindful of the fact that the Judge who observes the trial in the High Court gets a better opportunity to assess the facts and the accused.

As per the medical report of the Dr. Neil Fernando (marked as 'X5') the petitioner had been suffering from an episodic mental illness since the age of 16 years and the doctor had further instructed to undergo continuous medical treatments. However we observe that it is mentioned in the same report that the petitioner would have been of sound mind at the time of the alleged offence. Therefore it was not erroneous to consider the knowledge of the accused about the crime he committed. Further we are of the view that a person with improper mental health should be kept separated from the society since his behaviour can be a threat to the

society. There is no guarantee that the petitioner would undergo medical treatments continuously when he is released to the society.

Considering above, we do not wish to interfere with the sentence imposed by the Learned High Court Judge of Chilaw. Therefore we affirm the same.

Accordingly this revision application is dismissed without costs.

Registrar is directed to send this order to the relevant High Court of Chilaw.

We further direct the prison authorities to produce the petitioner to a consultant psychiatrist in the Mental Hospital (Teaching) Angoda periodically to assess the mental condition of the petitioner.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL