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

In the matter of an Appeal in terms of Article 154P (6) of the Constitution read with the High Court of the Provinces (Special Provisions) Act No 19 of 1990.

Officer-in-Charge,
Special Crimes Investigation Unit,
Vahara,
Kurunegala.

Complainant

C.A. Case No: **CA (PHC) 106/2015**

H.C. Kurunegala Case No:
HCR 114/2012

M.C. Wariyapola Case No: **82704**

Vs.

Senanayake Arachchilage Sanjaya Senanayake,
Pahala Abalaya, Monnakulam,
Nikawaratiya.

Accused

AND BETWEEN

Senanayake Arachchilage Sanjaya Senanayake,
Pahala Abalaya, Monnakulam,
Nikawaratiya.

Accused-Petitioner

Vs.

1. Officer-in-Charge,
Special Crimes Investigation Unit,

Vahara,
Kurunegala.
Complainant-Respondent

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

Respondent

AND NOW BETWEEN

Senanayake Arachchilage Sanjaya Senanayake,
Pahala Abalaya, Monnakulam,
Nikawaratiya.

Accused-Petitioner-Appellant

Vs.

1. Officer-in-Charge,
Special Crimes Investigation Unit,
Vahara,
Kurunegala.

Complainant-Respondent-Respondent

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

Respondent-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	AAL D.D.P. Dassanayake for the Accused-Petitioner-Appellant Nayomi Wickremasekara, SSC for the Respondent-Respondents
WRITTEN SUBMISSIONS	:	The Accused-Petitioner-Appellant – On 29.04.2019 The Respondents-Respondents – On 08.05.2019
DECIDED ON	:	28.05.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner-Appellant has filed this appeal seeking to set aside the order of the Learned High Court Judge of Provincial High Court of North Western province holden in Kurunegala dated 26.06.2015 in case No. HCR 114/2012 and seeking to revise the sentencing order of the Learned Magistrate of Wariyapola dated 19.07.2011 in Case No. 82704. At the stage of argument, on 01.03.2019, both parties agreed to file written submissions and to abide by the same.

Facts of the case:

The accused-petitioner-appellant (hereinafter referred to as the 'appellant') was charged in the Magistrate's Court of Wariyapola under 04 counts for cheating a sum of Rs. 1,050,000/= by using a forged deed. The appellant pleaded not guilty on 01.03.2011 and accordingly the case was fixed for trial. However on the first date of the trial, namely on 14.06.2011, the appellant revised his plea and pleaded guilty to the charges. The appellant agreed to pay a sum of Rs. 100,000/= per

month from January 2012 to the aggrieved party. The Learned Magistrate convicted the appellant and imposed a term of 06 months rigorous imprisonment and a fine of Rs.1000/= with a default term of 03 months simple imprisonment for each charge. Accordingly the aggregated term of imprisonment with default sentence was 03 years.

Being aggrieved by the said order, the appellant preferred an appeal to the Provincial High Court of North Western province holden in Kurunegala under case No. HCA 32/2011. The appellant was not present when the case was taken up in the High Court on three occasions and therefore the Learned High Court Judge dismissed the said appeal due to lack of interest of the appellant. Thereafter the appellant made a revision application to the Provincial High Court under case No. HCR/114/2012. The respondent-respondent (hereinafter referred to as the 'respondent') raised a preliminary objection that the appellant had not attached material documents and failed to obtain permission of High Court to submit them at a later stage. The Learned High Court Judge dismissed the said revision application on 26.06.2015.

Being aggrieved by the said dismissal, the appellant preferred this appeal.

The Learned Counsel for the appellant submitted following grounds of appeal;

1. The Learned High Court Judge failed to consider the merits of the case.
2. The appellant is unable to pay a sum of Rs. 100,000/= monthly to the aggrieved party since a jail term has been imposed.
3. The sentence imposed on the appellant is excessive.
4. The appellant is an unmarried person and takes care of his mother who is suffering from high blood pressure.

I observe that the respondent, in the High Court, has raised a preliminary objection in terms of section 3(1) (a) of Appellate Court Rules. Accordingly it was contended that even though the appellant averred in the petition that the entire case record of case No.82704 was attached as 'X", the documents marked as 'X" was the case record of Case No. HCA 32/2011 which was filed in the High Court of Kurunegala. Further it was submitted that a case record bearing No. 86017 was attached and it has no relevance to the instant case.

The Learned Counsel for the appellant in his written submissions sought permission of the High Court to submit a copy of the said case record bearing No. 82704. It was further submitted that the appellant failed to submit the Magistrate's Court case record since it was sent back to the Magistrate's Court of Wariyapola from the High Court of Kurunegala after the appeal bearing No. HCA 32/2011 was dismissed. This question was addressed by the Learned High Court Judge as follows;

> "කෙසේ වෙතත් මෙම කරුණු කිසිවක් ප්‍රතිශෝධන පෙත්සමෙහි අන්තර්ගත කර නැත.
>
> මෙලෙස හේතු ඉදිරිපත් කර සිටින්නේ වග උත්තරකාර පාර්ශවය විසින් මූලික විරෝධතාවයක් ඉදිරිපත් කිරීමෙන් පසුව බව පෙනීයයි...
>
> එබැවින් වග උත්තරකාර පාර්ශවය කියා සිටින පරිදි අභියාචනාධිකරණ රීති 3(1)a කෙරෙහි අවධානය යොමු කිරීමේදී පෙත්සම සමඟ අදාල නඩුවේ පිටපත් ගොනුකර නොතිබීම හා එය පසුව ගොනු කිරීමට හෝ අවසර ලබා නොතිබීම යන කරුණු සැලකීමේදී මෙම ප්‍රතිශෝධන පෙත්සම මුල් අවස්ථාවේදීම ප්‍රතික්ෂේප කළයුතුව තිබී ඇති එකක් බව පැහැදිලිය..." (Page 36 of the brief)

However it is noteworthy that the Learned High Court Judge has considered merits of the application as follows;

"...පෙත්සම්කරු තමාට එරෙහිව තිබූ චෝදනා වලට ස්වේච්ඡාවෙන් වරද පිළිගැනීමෙන් පසුව දඩුවම් නියම කර ඇති අතර, එම දඩුවම් මහේස්ත්‍රාත්වරයෙකුට එවැනි චෝදනාවලට නියම කළහැකි අධිකරණ බලතල තුලට වැටෙන ඒවා බව පිළිගත හැක. එබැවින් ප්‍රතිශෝධන ඉල්ලීමේදී සලකා බැලීමට තරම් සුවිශේෂී යුක්ති අපගමනයක් සිදුවී ඇති බවක්ද නොපෙනේ." (Page 37 of the brief)

It appears that the Learned High Court Judge did not dismiss the application merely on a technical error but on principles applicable to a revision application.

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..."

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..."

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 light of above it is understood that revisionary powers of this Court shall not be exercised unless there are any exceptional circumstances. It is mandatory to distinguish the purpose of an appeal and a revision application. It has been constantly held that the purpose of revisionary powers is not to relieve grievances of a party but to correct any errors, irregularities or illegalities in lower court orders. Therefore the Learned High Court Judge was correct in not considering grievances of the appellant such as medical condition of the appellant's mother under the revision application.

The Learned SSC for the respondent contended that sentencing the appellant for a term of 06 months for count 1, 2 and 3 each is not excessive since the relevant sections in the Penal Code allow imposing a term of imprisonment which may extend to seven years. It was further submitted that the sentence for the count No.4 is not excessive since section 386 of the Penal Code allows imposing a term of imprisonment which may extend to two years. Therefore I am of the view that this Court is not inclined to interfere with an order made by the Learned Magistrate exercising the discretion vested on him/her unless there had been a miscarriage of justice as mentioned above.

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..."*

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..."*

I observe that the appellant had pleaded guilty to the charges and the Learned Magistrate convicted him accordingly. Further it is observed that the Learned Magistrate was mindful of the fact that the appellant had one previous conviction as well.

Considering above, I am of the view that the Learned High Court Judge was correct in refusing to interfere with the order made by the Learned Magistrate exercising judicial discretion. Therefore I affirm both orders of the Learned High Court Judge of Kurunegala and the Learned Magistrate of Wariyapola .

Accordingly the appeal is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL