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

In the matter of an appeal made in terms of Section 331 of the Code of Criminal Procedure Act No. 15 of 1979.

Assistant Superintendent of Police,

Kurunegala.

Complainant

C.A. Case No: **CA (PHC) 220/2015**

P.H.C. Kurunegala Case No: **HCR 50/2015**

M.C. Case No: **90541**

Vs.

1. R.S. Kumara
2. R.A. Ranasinghe
3. H. Chandana
4. W.G.M.M. Chandrasiri
5. R.P. Harischandra
6. M.M.C.L. Bandara
7. D.M. Karunarathna
8. M.M. Jayathilaka
9. Upali Jayawickrama

Accused

AND BETWEEN

R.P. Harischandra
5th accused-Petitioner

Vs.

1. Assistant Superintendent of Police,
   Kurunegala.
   Complainant-Respondent

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

Respondent

AND NOW BETWEEN

R.P. Harischandra

5th Accused-Petitioner-Appellant

Vs.

1. Assistant Superintendent of Police,
Kurunegala.
Complainant-Respondent-Respondent

2. The Attorney General,
Attorney General's Department,
Colombo 12.
Respondent-Respondent

BEFORE	:	K. K. Wickremasinghe, J. K. Priyantha Fernando, J.
COUNSEL	:	AAL Ruwan S. Jayawardena for the 5th Accused-Petitioner-Appellant Nayomi Wickremasekara, SSC for the Respondent-Respondents
ARGUED ON	:	08.05.2019
WRITTEN SUBMISSIONS	:	The 5th Accused-Petitioner-Appellant – On 01.07.2019

The Respondent-Respondents – On 21.06.2019

DECIDED ON : 18.07.2019

K.K.WICKREMASINGHE,J.

The 5th accused-petitioner-appellant filed this appeal seeking to set aside the order of the Learned High Court Judge of the Provincial High Court of North Western Province holden in Kurunegala dated 07.12.2015 in Case No. HCR 50/2015 and seeking to set aside the judgment of the Learned Magistrate of Galgamuwa dated 09.05.2014 in Case No. 90541.

Facts of the case:

The 5th accused-petitioner-appellant (hereinafter referred to as the 'appellant') with eight other accused persons was charged before the Learned Magistrate of Galgamuwa for committing offences punishable under section 113B, section 102 of the Penal Code to be read with section 6 and section 15B of the Antiquities Ordinance No. 09 of 1940 as amended by the Act No. 24 of 1998. The 1st, 2nd and 3rd accused pleaded guilty and the remaining accused namely 4th, 5th, 6th, 7th and 8th accused pleaded not guilty and opted for a trial whereas the 9th accused was absconding. At the conclusion of the trial, the Learned Magistrate acquitted all accused persons for charge one. The Learned Magistrate convicted the 4th accused for 4th charge, 5th accused for 5th charge, 8th accused for 8th charge and the 9th accused for 02nd charge. The 6th and 7th accused were acquitted from their charges. Accordingly the appellant was convicted of charge No. 5 and was imposed a term of 2 years rigorous imprisonment and a fine of Rs. 150,000/= with a default sentence of 10 months simple imprisonment. (Page 889 of the brief)

Being aggrieved by the said order, the appellant preferred a revision application to the Provincial High Court of Kurunegala.

The Learned High Court Judge affirmed the order of the Learned Magistrate and dismissed the revision application since there was an inordinate delay.

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

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

1. The Order of the Learned High Court Judge upholding the preliminary objection that the said revision application was filed after a lapse of one year is contrary to law
2. Dismissing the revision application without considering the exceptional circumstances is contrary to law
3. The Learned High Court Judge failed to consider that the Court has discretion to consider a revision application on merits even after lapse of considerable time
4. The Learned High Court Judge has considered facts relating to the full case even without hearing the full case at the stage of making an order relating to a preliminary objection.

It is observed that the appellant, 4th and 8th accused filed an appeal against the order of the Learned Magistrate dated 09.05.2014 in the Provincial High Court of Kurunegala and due to the inability of maintaining the case, the appellant had withdrawn his appeal. The appellant had stated his inability to find Rs.52, 000/= as cost of the brief and accordingly has withdrawn the appeal. The other two accused proceeded with their appeals and were acquitted from their convictions by the Learned High Court Judge of Kurunegala under case No. HCA 64/2014. Thereafter the appellant filed an application for revision against the order of the Learned

Magistrate to the High Court of Kurunegala. However a preliminary objection was raised by the Learned State Counsel for the Complainant-Respondent-Respondent (hereinafter referred to as the 'respondent') that the revision application was prescribed in law since it was filed after more than one year from the date of the judgment of the Learned Magistrate. The Learned High Court Judge upheld the preliminary objection and dismissed the said application (Page 33 of the brief). Thereafter the appellant filed an appeal to this Court.

The Learned Counsel for the appellant contended that the Learned High Court Judge failed to consider that the Court has discretion to consider a revision application on merits even after lapse of considerable time and therefore the said order is contrary to law. It was submitted that the superior Courts, in several instances, held that delay in filing revision applications cannot be accounted for reasons to dismiss without considering its merits. The Learned Counsel submitted following two cases to support his contention;

1. **Don Chandra Maximus Illangakoon V. Officer-In-Charge of Police Station, Anuradhapura and the Attorney General [CA (PHC) 28/2009 decided on 21.11.2014]**
2. **Mallika De Silva V. Gamini De Silva (1999) 1 Sri L.R. 85**

The Learned Counsel for the appellant brought to the attention of this Court that only evidence led by the prosecution against the 4th accused and the appellant is the evidence of PW 02. However the 4th accused was acquitted by the Learned High Court Judge of Kurunegala under case no. HCA 64/2014 stating that the evidence of the PW 02 was not related to the incident in question. The Learned High Court Judge, upon evaluating the evidence of PW 02, was of the view that his evidence cannot be used to prove the essence of section 100 of the Penal Code beyond reasonable doubt. Therefore the Learned Counsel for the appellant argued that the

same position should be applicable to the appellant since he was a low ranking officer than the 4th accused. I observe that this argument raises a serious question as to whether there had been a prejudice caused to the appellant due to this application being dismissed without considering merits of the case.

In the case of **Don Chandra Maximus Illangakoon** (supra) it was held that,

> *Moreover, it is trite law that the delay in coming to Court is not the sole criteria to dismiss a revision application if the petitioner is in a position to explain the delay. In this instance, the delay is due to the failure to file the appeal at the appropriate stage in the original action. Therefore, it is clear that the petitioner has successfully explained the delay in filing the revision application.*

In the case of **Leslie Silva V. Perera (2005) 2 Sri L.R 184,** it was held that,

> *"In this respect I would say it is settled law and our Courts time and again has held that the revisionary jurisdiction of this court is wide enough to be exercised to avert any miscarriage of justice irrespective of availability of alternative remedy or inordinate delay"*

In **Read V. Samsudin [1 N.L.R 292]** it was held as follows:

> *"It is not the duty of a judge to throw technical difficulties in the way of the administration of justice, but where he sees that he is prevented from receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of way upon proper terms as costs and otherwise..."*

In light of above, it is understood that a person should not be deprived of a hearing solely on a technical ground especially when it appears that there is a *prima facie*

case to be considered. Since the 4th and 8th accused persons who were charged on identical charges as the appellant were acquitted on a different appeal, I am of the view that the appellant should have been afforded an opportunity to be heard by the Learned High Court Judge regardless of the delay in filing the revision application. Since the purpose of revisionary jurisdiction is due administration of justice, it shall not be fettered by a single technical objection. In the case of **Fernando v. Sybil Fernando and others (1997) 3 Sri L.R 01** it was held that,

> *"Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly."*

Therefore I am of the view that a judge should not apply rigid procedural rules to deny justice in an oppressive manner.

The Learned SSC for the respondent argued that the Learned High Court Judge in fact considered the merits of the case and thereafter dismissed the application. I am unable to agree with that argument. Upon perusal of the order dated 07.12.2015, it is manifested that the main reason for the High Court Judge to dismiss the application was inordinate delay on the part of the appellant. At page 11 of the order, the Learned High Court Judge held as follows;

> ඒ අනුව මෙම ප්‍රතිශෝධන ඉල්ලීම තීන්දුව දුන් දිනට වසරක පමණ කාලයක් ප්‍රමාද වී ඉදිරිපත් කර ඇති බැවින්, මූලික විරෝධතාවය කෙරෙහි අවධානය යොමු කොට ප්‍රතිශෝධන ඉල්ලීම නිශ්ප්‍රභ කිරීමට මා තීරණය කරමි. (Page 33 of the brief)

This portion amply demonstrates that the Learned High Court Judge decided to uphold the preliminary objection. Further I am of the view that if the Learned High Court Judge in fact went into the merits of the case, he would have realized the evidence of PW 02 was not relevant to the main incident as he found in the case

bearing No. HCA 64/2014. Therefore, I am of the view that the appellant's case should be considered on merits. Since sending this case back to the High Court for a fresh hearing on merits would consume more time, I wish to consider the merits at this stage.

The appellant was charged for aiding and abetting the 1st, 3rd and 9th accused persons to commit the charge no. 02 namely for excavating an ancient archeological site. The appellant was serving as a Gramarakshaka Niladhari under the direction of the 4th accused who was the Officer in charge of Anti Vice Squad Unit of Police Station, Galgamuwa. The PW 01 and PW 02 testified that on the date of incident, the appellant was seen at the archeological site along with other accused persons. The PW 02 further testified that he knew the appellant was working in the Police. Upon perusal of the evidence led in the Magistrate's Court it is observed that the evidence of the PW 02 was related to the incidents occurred after the main incident in question. The Learned Counsel for the appellant submitted that the Learned High Court Judge failed to consider that the appellant was only a Gramarakshaka Niladhari and not a Police officer and therefore he did not have powers to arrest a person other than on the power vested under a private person as per section 35 of the Code of Criminal Procedure Act.

The Learned Counsel for the appellant contended that even though the Learned High Court Judge in his order dated 07.12.2015 stated that the judgment of the Learned Magistrate was made within law, the same High Court Judge in the judgment under case no. HCA 64/2014 stated that the Learned Magistrate erred in admitting the evidence of PW 06, who was an accomplice, and the evidence of PW 02 to convict some of the accused persons. Accordingly it was argued that this Court has sufficient grounds to interfere with the order of the Learned High Court Judge and the order of the Learned Magistrate.

I peruse the evidence and it is quite impossible to find that the appellant aided and abetted as per section 100 of the Penal Code. The 4th accused had stated that he asked the appellant to inquire about an incident of excavation on 17.09.2010 and the appellant had examined the place of incident. Thereafter he returned to the Police Station and informed the 4th accused that there was an excavation. Therefore the 4th appellant with his team left to examine the place of incident and however unable to proceed since there was a public outrage. It is observed that the evidence of the PW 02 mainly relevant to these subsequent incidents. The evidence of PW 02 was not corroborated sufficiently to prove beyond reasonable doubt that the appellant was in fact aiding and abetting the 1st, 3rd and 9th appellant to commit the offence in charge No.02. After evaluating the evidence available and considering the fact that the 4th accused who was a superior officer with a higher responsibility is already acquitted for the identical charge, I think that it is neither safe nor justifiable to affirm the conviction of the appellant. I wish to state that the appellant is not entitled to be acquitted solely because of the acquittal of the 4th and 8th accused persons but because of the evidence against the appellant is not strong enough to prove his guilt beyond reasonable doubt.

In the case of **Jaharlal Das V. State of Orissa [1991 SC 1388],** it was held that,

> *"...the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused..."*

In **Sumanasena V. Attorney General (1999) 3 Sri L.R 137,** it was held that,

> *"Evidence must not be counted but weighed and the evidence of a single solitary witness if cogent and impressive could be acted upon by a Court of law..."*

It is observed that an accused should not be convicted unless there is strong evidence to clearly establish the guilt of such accused. As I have already mentioned, the Learned Magistrate erred in convicting the appellant without credible evidence and the Learned High Court Judge erred in dismissing the revision application solely on the delay in filing the application. Accordingly I set aside the order of the Learned High Court Judge dated 07.12.2015. I further set aside the conviction dated 09.05.2014 and the sentence imposed on the appellant by the Learned Magistrate of Galgamuwa dated 27.05.2014.

Accordingly the appeal is allowed.

JUDGE OF THE COURT OF APPEAL

K. Priyantha Fernando, J.

I agree,

JUDGE OF THE COURT OF APPEAL