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

In the matter of an application for Revision in terms of section 364 of the Code of Criminal Procedure Act No. 15 of 1979, Article 138(1) of the Constitution and section 16(3) of the Judicature Act.

C.A. Case No: **CA (PHC) APN 12/2007**

H.C. Gampaha Case No: **12/2003**

M.C. Gampaha Case No: **33/97**

Ranjith Luckshman De Silva,
No. 29/2, Gampaha Road,
Weliweriya.

Petitioner

Vs.

Geekiyanage Asoka Kumarasiri Jayatunga,
No. 428/A, Mahahiyawatte Road,
Daggona.

Accused-Respondent

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

Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	Saliya Pieris,PC with AAL Waruna De Seram, AAL Supun Ranasinghe, AAL Dhanushka Rahubadda and AAL Geeth Karunarathna for the Petitioner AAL Terrance Wickremasinghe with AAL Kithsiri Weerasuriya and AAL Nimal Wijayarathna for the Accused-Respondent ASG Rohantha Abeysuriya,PC for the Respondent
ARGUED ON	:	23.02.2018, 19.06.2018, 06.07.2018, 18.07.2018, 23.10.2018, 30.11.2018, 02.04.2019
WRITTEN SUBMISSIONS	:	The Petitioner – On 24.04.2019 The Accused-Respondent– On 22.04.2019 The Respondent – On 20.06.2019
DECIDED ON	:	01.10.2019

K.K.WICKREMASINGHE, J.

The Petitioner has filed this revision application seeking to set aside the judgment of the Learned High Court Judge of Gampaha dated 29.11.2006 in case No. 12/2003. The petitioner further seeks the case to be sent for a fresh trial before a different High Court Judge.

Facts of the case:

The accused-respondent (hereinafter referred to as the 'accused') was indicted in the High Court of Gampaha under section 296 of the Penal Code, for committing Murder of his wife, Shiromi Renuka De Silva, between 13.12.1995 and 19.01.1996. At the conclusion of the trial, the Learned High Court Judge acquitted the accused, by the judgment dated 29.11.2006.

Being aggrieved by the said judgment, the petitioner preferred this application for revision.

The incident relevant to the case is as follows;

The petitioner is the father of the deceased in the instant case. The accused was married to the daughter of the petitioner on a marriage proposal.

As per the evidence of the petitioner (PW 01), the deceased and the accused got married in May, 1995. After about a month of the marriage of the accused and the deceased, the petitioner and his wife had visited the couple at the accused's house. On that occasion, the deceased had shown the petitioner few photographs of the accused lying with another woman in a compromising position. The petitioner had tried to keep those pictures with him, but failed to do so since the accused threatened that he would suicide if the pictures were not given to him. However, the petitioner had kept three negative copies of the pictures which were later produced in the Magistrate's Court. The petitioner had informed about this incident to the parents of the accused, and subsequently, the accused had apologized to the petitioner and the wife of the petitioner (mother of the deceased).

The petitioner further testified that on 13.12.1995, the accused had brought and given the deceased a packet of murukku which the petitioner had seen deceased consuming and only the deceased had consumed said murukku. Subsequently, the

deceased was taken to a doctor, Dr. H.B. Perera, since she had started to feel a stomach pain and vomited. The said doctor had advised them to admit the deceased to a hospital to do further examination. Accordingly, she was admitted to a co-operative hospital where she was examined by Dr. Heen Nilame (PW 13) and the deceased remained in hospital for 3 days. The deceased returned home from the hospital on 15.12.1995 (P 16 – Page 59 to 61).

The deceased had again fallen ill and admitted to the hospital for the second time on 20.12.1995 (after 05 days from returning home). On that occasion, she had left for office and petitioner was informed later at 9.30am that the deceased was admitted to Gampaha Hospital. The deceased was unconscious and was transferred to General Hospital, where she was in hospital for about 18 days till 08.01.1996.

Again on 14.01.1996, she was hospitalized for the third time on which occasion she passed away. On this day, the deceased and the accused were in the house of the petitioner. Additionally, a son of the petitioner's younger brother, wife of the petitioner's younger brother and a house maid named Nalani were also at home. The said son of the petitioner's younger brother is Mewan Sampath who testified in the Magistrate's Court. Evidence of Mewan sampath was led in terms of section 33 of the Evidence Ordinance at the High Court trial since he was not available at that time. As per evidence of Mewan Sampath, on the fateful day, prior to taking breakfast at around 8.10 am, he had gone to the room of the deceased to take a water jug. Mewan Sampath witnessed the accused giving some medicine to the deceased and the accused tried to hide that medicine in his hands as Mewan entered the room. Thereafter, Mewan had seen the deceased swallowing few tablets. Subsequently, the deceased had fallen ill about 30 minutes after taking medicine and 10 minutes after having breakfast. On the same day (14.01.1996), the deceased was admitted to Gampaha hospital and she passed away on 19.01.1996.

One W. Violet Warnakulasuriya (PW 22) who was the wife of the petitioner's younger brother, testified at the trial. PW 22 had gone to the mortuary in the Hospital Colombo with another relative, after the deceased passed away and they had inquired about a necklace of the deceased. The accused had stated that the said necklace was taken back since it was given to the deceased by his mother. Thereafter, the accused had threatened to kill the petitioner and his wife if he had been remanded for even one day in connection with the death of the deceased (P 13 - Page 13).

The prosecution led evidence of the house maid named Nalani. The said Nalani testified that once the accused asked her to make a cup of tea for the deceased in order to mix some medicine to be given to the deceased. Nalani had questioned the accused as to why the medicine needed to be mixed in tea and not taken with water. The accused had threatened her since she refused to make a cup of tea (P 14 - Page 236 & 237). It was further revealed that the accused promised to give a lot of land to Nalani if she made a cup of tea. She had written a letter to her husband informing the same, in her own handwriting.

As per evidence of Dr. L.B.L. De Alwis (PW 15), the death of the deceased was due to Barbiturate poisoning. Dr. Alwis was the Judicial Medical Officer, Colombo who issued the post mortem report dated 16.05.1997. In the said report, Dr. Alwis has specifically mentioned that stomach contents, blood, liver, kidneys, bile and hair of the deceased were sent to the Government Analyst for toxicological analysis and the said analysis had revealed that Barbiturate had been identified in all the specimens except for the hair which was not analyzed. Dr. Alwis testified that based on the analysis of the Government Analyst's report, the clinical findings and the post mortem examinations, he was 100% certain that the death of the deceased was caused by Barbiturate poisoning (P 05 - Page 383).

As per the evidence of Dr. Heen Nilame (PW 13), the only way a barbiturate can enter a human body is through human intervention (P 11- Page 223). According to him, the barbiturate is a colorless, odorless and tasteless substance which can easily be dissolved in water. Under cross-examination, Dr. Heen nilame was questioned as to whether birth control pills contained Barbiturate, to which the Doctor had answered in negative (P 11 – page 241). Upon perusal of the evidence of the expert witnesses i.e. Dr. Alwis, Assistant Government Analyst and Dr. Heen Nilame, it is understood that a little amount of barbiturate can put a person to sleep for couple of days, about 600mg of barbiturate can cause unconsciousness and 1800mg of barbiturate can cause death.

It is imperative to note that Dr. Alwis had testified that as per blood reports obtained from the deceased when she was last admitted to Gampaha Hospital, it was revealed that there was Barbiturate in her blood. It was observed that even after 4 days of treatments, there were still barbiturates in her organs.

The Learned President's Counsel for the petitioner contended that the outset that the judgment of the Learned High Court Judge is totally irrational, unreasonable and explains away the various items of evidence adduced in court, which demonstrates the approach of the Learned High Court Judge was not with an open mind but with a set of acquitting the accused. It was argued that the cause of death of the deceased was established and however, the Learned High Court Judge was of the opinion that the same has not been established since the prosecution failed to call a pharmacist to give evidence.

The Learned Counsel for the accused argued that it is unfair to draw attention of this Court only to JMO's evidence in examination-in-chief since his evidence under cross-examination was different and inconsistent. It was further contended that the Government Analyst's report and evidence of the Assistant Government Analyst

are also inconclusive due to its failure to disclose the quantity of barbiturate found in the deceased's body.

However, it is observed that even though the said witnesses were cross-examined in a lengthy manner, the cause of death was not disputed. Other possibilities such as the effect of birth control pills were ruled out.

In the case of **Mohomed Uvais alias Paraniam Suresh V. The Republic [2014 BASL LR 514]**, it was held that,

> *"In the light of the above judicial decisions, I hold that whenever evidence given by a witness on a material point is not challenged in cross-examination, it has to be concluded that such evidence is not disputed and is accepted by the opponent subject of course to the qualification that the witness is a reliable witness..."*

Even though the Learned Counsel for the accused argued that the Assistant Government Analyst's incompetency of drugs and on barbiturate and their toxic effect was evident from her evidence, it is noteworthy that the Counsel for the accused in the High Court had admitted the qualifications of the Assistant Government Analyst at the beginning of her evidence. Further, I observe that even though Dr. Alwis and the Assistant Government Analyst were cross-examined on the quantity of Barbiturate found in the body, the fact that it was found in certain parts of the deceased's body was not disputed. Therefore, I am of the view that the Learned High Court Judge should not have required the prosecution to call further witnesses to establish something which had already been established.

The Learned President's Counsel for the petitioner pointed out certain portions in the judgment of the Learned High Court Judge being irrational and unreasonable.

It was argued that the evidence in relation to the behaviour of the accused when the accused cleaned the deceased's toes and rubbed her head had been taken out of context. The Learned High Court Judge had not taken into consideration the fact that the petitioner stated that the accused was acting under a pretense. It was further submitted by the President's Counsel that the Learned High Court Judge explained away the position of the prosecution that the accused had adulterated the murukku with Barbiturate on the grounds that the accused was not such an advanced person to carry out such a thing.

The Learned Counsel for the accused, in answering the above contention, submitted that even though the prosecution endeavored to draw an inference that the relationship between the accused and the deceased was a pretense, the prosecution failed to do so.

I observe that the Learned High Court Judge was easily convinced that there was a loving relationship between the accused and the deceased. However, I observe that the version of the accused on the incident related to the photographs with another woman was full of inconsistency. Surprisingly, the Learned High Court Judge was very convinced that the relationship with the other woman had ceased after the marriage even in the absence of any evidence to prove so. The Learned High Court Judge made the following observation;

> '....පැරණි පෙම්වතිය සමග සරාගී අන්දමට ගත් ඡායාරූප පෙන්නුම් කර ඇති අතර ඇය සමග මෙම විවාහයෙන් පසුවද ප්‍රේම සම්බන්ධතාවය තිබුණු බවට පෙන්නුම් කරන්නේ නැත..." (P 02 – Page 13 of the brief)

The Learned Counsel for the accused submitted that the Learned High Court Judge concluded that an inference of a strained and dexterously manipulated relationship

where the accused had a hidden motive with a need to get rid of the deceased could not be drawn legitimately. However, it is noteworthy that the accused was married to that woman in the said photographs, subsequent to the death of the deceased.

The Learned Counsel for the petitioner submitted that the Learned High Court Judge failed to analyze evidence of Mewan Sampath correctly. The Learned Counsel for the accused submitted that it is justified that evidence of Mewan Sampath was rejected since the prejudicial effect of his evidence against the accused is out proportion to its probative value.

The Learned High Court Judge made the following observation;

"...මෙවන් සම්පත් නැමැති පිටස්තර බාල වයස්කාර තැනැත්තා..."

However, I observe that the petitioner was the uncle of Mewan Sampath and he was 19 years of age at the time of incident. He was 23 years when he gave evidence at the non-summary proceedings. I am of the view that the Learned High Court Judge erred in rejecting the evidence of Mewan since his evidence was consistent and was not contradicted in any manner. The decision of the Learned High Court Judge to reject his evidence was not justifiably explained as well.

The Learned High Court Judge decided to reject the evidence of house maid, Nalani since it is inconceivable that the accused would ask a domestic aid who had been with the family for less than a month to make a cup of tea in order to mix some medicine to be given to the deceased.

> "...මාසයකට අඩු කාලයකදී නිවසට පැමිණි ගෘහ සේවිකාවක් කෙරෙහි විශ්වාසය තබා තමාගේ ආදරණීය බිරිඳ සම්බන්ධයෙන් සැලකූ තැනැත්තියගේ ජීවිතය හානි කිරීමේ සඳහා විෂ රසායන ද්‍රව්‍යයක් තේ එකකට දමා දෙන ලෙස චිත්තිකරු විසින් ගෘහ සේවිකාවගෙන් ඉල්ලාසිටි බව සාමාන්‍ය මනුෂ්‍යයෙකුට පිළිගත නොහැක..." (P 02 – Page 15)

Nalani in her letter written to the husband had mentioned that she would receive a lot of land if he continued to stay with the deceased. While testifying, she had stated that the accused promised to give her a land of 10 perches if she made a cup of tea to be given to the deceased. The Learned High Court Judge was of the view that evidence of said Nalani was unreliable since aforesaid portion of evidence amounted to a major contradiction. Upon perusal of the proceedings, I find it difficult to agree with the above conclusion of the Learned High Court Judge.

In the case of **The AG V. Potta Naufer and others (2007) 2 Sri L.R. 144,** it was observed that,

> *"When faced with contradictions in a witness's testimonial, the court must bear in mind the nature and significance of the contradictions, viwed in light of the whole of the evidence given by the witness. The court must also come to a determination regarding whether this contradiction was an honest mistake on the part of the witness or whether it was a deliberate attempt to mislead court..."*

In the case of **Dharmasiri V. Republic of Sri Lanka (2010) 2 Sri LR 241,** it was held that,

> *"Credibility of a witness is mainly a matter for the trial Judge. Court of appeal will not lightly disturb the findings of trial Judge with regard to the credibility of a witness unless such findings are manifestly wrong. This is because the trial Judge has the advantage of seeing the demeanour and deportment of the witness..."*

In the case of **State of UP V. Anthony [AIR 1985 SC 48],** it was held that,

> *"While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, draw-backs and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hyper-technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the : root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details..."*

In light of above, it is understood that undue importance cannot be attached to minor contradictions and discrepancies. I observe that the Learned High Court Judge had attached such undue importance to unnecessary portions of evidence in the prosecution case. I am of the view that the Learned High Court Judge clearly erred in rejecting the evidence of Nalani in the absence of any material

contradiction and clearly her evidence created a ring of truth when taken as a whole.

Further, I observe that Violet Warnakulasuriya, testified that the accused had threatened to kill the petitioner and his wife if he had been remanded for even one day in connection with the death of the deceased (P13 - Page 13). The Learned High Court Judge rejected this too, on the basis that such statement could be made by a person who has been 'angered' due to the death of his wife. It is shocking to have such a comment by the Learned Trial Judge. At that time, it was not even suspected that the deceased was murdered. I find it quite unreasonable that the Learned High Court Judge proceeded to reject evidence of prosecution, including expert witnesses, without proper reasoning.

The Learned President's Counsel for the petitioner contended that the Learned High Court Judge interrupted the cross-examination of the accused in an extensive manner, and thereby his line of questions was disturbed.

The Learned Counsel for the accused, in reply to the above contention, submitted that intervention of the Learned High Court Judge did not cause a miscarriage of justice. The Learned Counsel for the accused submitted the cases of **The Queen V. A. Nimalasena de Zoysa [60 NLR 97] and Rex V. Wijedasa Perera [52 NLR 29]** in support of his submission.

As per **section 165 of the Evidence Ordinance**,

> *"The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant, and may order the production of any document or thing and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor,*

without the leave of the court, to cross examine any witness upon any answer given in reply to any such question.

Provided that the judgment must be based upon facts declared by this Ordinance to be relevant and duly proved..."

The Learned Counsel for the accused submitted the case of **The Queen V. A. Nimalasena de Zoysa [60 NLR 97]**, in which it was held that,

"...that the mere fact that the trial Judge has, by availing himself of the power vested in him by section 165 of the Evidence Ordinance, put a large number of questions to a witness is not a ground for quashing a conviction, even if the number of questions is greater than that put by the prosecution or the defence. To quash the conviction the Court of Criminal Appeal must be satisfied that the multiplicity of the questions asked by the trial Judge resulted in a miscarriage of justice..."

In the case of **The Queen V. Abeyratne (1962) CLW 69,** it was held,

"section 165 of the Evidence Ordinance undoubtedly empowers a Judge, in order to discover or to obtain proper proof or relevant facts, to ask any question he pleases in any form, at any time, of any witness, or of the parties about any fact relevant or irrelevant; but in the instant case some of the questions put by the Learned Commissioner do not seem to fall within the ambit of that section, which wide as it is, has its limitation in the words "in order to discover or to obtain proper proof or relevant facts"..."

In the case of **E.L. Senanayake V. G.B. de Silva and 2 others (1972) 75 NLR 409**, it was held,

"that the power conferred on the Court by section 165 of the Evidence Ordinance to put questions to a witness is subject to inherent limitations..."

In the case of **The Queen V. M.L.P. Mendis Appu and another [60 CLW 11],** it was held that,

"The powers conferred by section 429 of the Criminal Procedure Code should be used with caution. In a trial by jury the functions of the prosecution, the defence and the Judge are laid down in the Code and the Court should take care not to leave room for any impression that the court is using its power under section 429 to help the prosecution to discharge the burden that rests on it. ***The powers conferred by section 165 are limited and are not meant to be used for the purpose of discrediting a witness or an accused person. For, to do so would not be 'to discover or to obtain proper proof of relevant facts'."*** (Emphasis added)

In light of above, I am of the view that even though a Judge is empowered to question a witness in certain circumstances, he is not empowered to go on a voyage of discovery. I observe that in the instant case, the Learned High Court Judge had interfered with the cross-examining of the accused, sometimes even asking questions on facts like previous romantic relationships of the deceased. I find most of these questions to be irrelevant and prejudicial.

The Learned Counsel for the accused submitted that the petitioner has failed to prove any complaint against the judgment of the Learned High Court Judge which falls within exceptional circumstances.

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

"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. ***Ameen v. Rasheed 3 CLW 8, Rastom v. Hapangama [19787-79] 2 Sri L R 225, Cader (on behalf of Rashid Kahan) V s Officer - In - Charge Narcotics Bureau, [2006]3 Sri LR 74, Colombo Apothecaries Ltd. and others V. Commissioner of Labour [1998] 3 SriLR 320*** *are some of the authorities where it has been emphasized that unless the existences of the exceptional circumstances are been established in cases where an alternative remedy is available, revisionary jurisdiction cannot be invoked..."*(Emphasis added)

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 the case of **Mariam Beebee V. Seyed Mohamed [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..."

After a careful consideration of all the facts mentioned above, I am of the view that there had been a miscarriage of justice due to the failure of the Learned High Court Judge to evaluate evidence of the prosecution with a judicial mind. Most of the

incriminating evidence were unreasonably rejected whereas unnecessary evidence were admired out of context. I am of the view that these circumstances do in fact amount to exceptional circumstances in order to invoke the revisionary powers of this Court.

Considering above, I set aside the judgment of acquitting the accused-respondent by the Learned High Court Judge of Gampaha dated 29.11.2006, and order the case to be sent for re-trial before a different High Court Judge.

The Learned High Court Judge is directed to hear and determine the case expeditiously.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Mohomed Uvais alias Paraniam Suresh V. The Republic [2014 BASL LR 514]
2. The AG V. Potta Naufer and others (2007) 2 Sri L.R. 144
3. Dharmasiri V. Republic of Sri Lanka (2010) 2 Sri LR 241
4. State of UP V. Anthony [AIR 1985 SC 48]
5. The Queen V. A. Nimalasena de Zoysa [60 NLR 97]
6. The Queen V. Abeyratne (1962) CLW 69
7. E.L. Senanayake V. G.B. de Silva and 2 others (1972) 75 NLR 409
8. The Queen V. M.L.P. Mendis Appu and another [60 CLW 11]
9. M.Roshan Dilruk Fernando V. AG [CA (PHC) 03/2016]
10. Bank of Ceylon V. Kaleel and others (2004) 1 Sri L R 284
11. Mariam Beebee V. Seyed Mohamed [68 NLR 36]