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

In the matter of an application for Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

C.A. Case No: **CA (PHC) APN 44/2016**

H.C. Monaragala Case No: **HC 49/2010**

Herath Mudiyanselage Ratnasiri alias Nilame

Accused

AND NOW BETWEEN

Herath Mudiyanselage Ratnasiri alias Nilame

(Currently at Monaragala Prison)

Accused-Petitioner

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	AAL Tenny Fernando with AAL J. Sinharage for the Accused-Petitioner Nayomi Wickremasekara, SSC for the Complainant-Respondent
ARGUED ON	:	07.02.2019
WRITTEN SUBMISSIONS	:	The Accused-Petitioner – On 16.10.2018 The Complainant-Respondent– On 25.10.2018
DECIDED ON	:	15.10.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner has filed this appeal seeking to set aside the judgment of the Learned High Court Judge of Monaragala dated 19.12.2012 or seeking to set aside the order dated 28.08.2013 and allow the petitioner to stand for trial.

Facts of the case:

The Accused-Petitioner (hereinafter referred to as the 'petitioner') was indicted in the High Court of Monaragala for committing Rape on one Thushari Mangalika, on or about 08.03.2007, an offence punishable under section 364 (2) (e) of the Penal Code (as amended).

As per journal entries, the High Court of Monaragala had received the indictment on 19.08.2010 and the petitioner was summoned to appear on 10.01.2011, in the High Court. The journal entry on 10.01.2011, mentioned that the petitioner had left the area of residence. Accordingly, the Learned High Court Judge had ordered an

inquiry under section 241 of the Code of Criminal Procedure Act (Page 23 and 24 of the brief).

Thereafter, on 27.07.2011, the Learned High Court Judge concluded that the petitioner was absconding and had ordered a trial in absentia.

At the conclusion of the trial, the Learned High Court Judge convicted the petitioner by judgment dated 19.12.2012. The Learned High Court Judge imposed a term of 15 years Rigorous imprisonment and a fine of Rs.25, 000/- with a default term of 5 years Rigorous imprisonment, on the petitioner. Furthermore, the petitioner was ordered to pay compensation of Rs. 300,000/= to the victim. The Learned High Court Judge issued an open warrant against the petitioner. Subsequently, on 28.08.2013 the petitioner was arrested and produced before the Learned High Court Judge. An inquiry under section 241(3) of the criminal procedure Act no 15 of 1979 was done on the same day (28.03.2013) and the Learned High Court Judge refused to grant relief since the petitioner had not submitted any bona fide reason for his absence during the trial. The sentence dated 19.12.2012 was ordered to be operative from 28.08.2013.

The petitioner preferred this revision application against the conviction and sentence dated 19.12.2012 and the order dated 28.08.2013.

The Learned Counsel for the petitioner contended that the petitioner had not been given a fair opportunity as its required by law to substantiate his side of the story and the Learned High Court Judge hurried to implement his decision preventing the petitioner from satisfying the court of his absence.

The Learned SSC for the complainant-respondent (hereinafter referred to as the 'respondent') has taken up following preliminary objections;

1. The accused is guilty of contumacious conduct and is not entitled to invoke revisionary jurisdiction of this Court
2. The delay in filing the application

3. Non-existence of exceptional circumstances

The Learned SSC for the respondent submitted that the petitioner was given bail by the Learned Magistrate on 03.05.2007, and thereafter, he never attended the Court. It was submitted that he had absconded court even before the non-summery inquiry stage. Grama Sevaka of the area, a neigbour of the petitioner and a police officer (who tried to execute a warrant against petitioner) testified at the inquiry held in terms of section 241 of the Code of Criminal Procedure Act (Page 24 – 35 of brief). The petitioner had changed the place of residence without informing anyone, the Court, neighbours or Grama Sewaka of the area. When the petitioner was arrested and brought before Court, it was submitted that he did not receive summons since he was in Colombo to get medical treatment for one of his children.

The Learned High Court Judge made the following observation,

> "...ඊට අමතරව විත්තිකරුත් ඇප මත සිටින අවස්ථාවකදී ඔහුගේ ලිපිනය වෙනස් වන්නේ නම් ඒ බව අධිකරණයට දැනුම් දීම ඔහුගේ වගකීම හා යුතුකම වේ...විත්තිකරු අධිකරණයට නොපැමිණීම සත්භාවයෙන් කටයුතු කළ බවට කිසිදු ගම්‍ය වන කරුණක් ඉදිරිපත් වී නැත..." (Page 144 & 145 of the brief).

As per Section 241 (3) of the Code of Criminal Procedure Act, after the conclusion of the trial of an accused in his absence, appears before Court and satisfies the Court that his absence at the trial was bona fide, the Court shall set aside the conviction and sentence and order that the accused to be tried de novo. The Learned High Court Judge was of the view that the absence of the petitioner during the trial did not appear to be bona fide. Therefore, the petitioner's application was refused.

In the Case of **Rajapakse V. The State (2001) 2 Sri LR 161**, it was held that,

> *"...When considering this issue this Court must necessarily have regard to the contumacious conduct of the accused in jumping bail and thereafter conducted himself in such a manner to circumvent and subvert the process of the law and judicial institutions. In addition if this Court were to act in revision the party must come before Court without unreasonable delay. In the instant case there is a delay of 13 months..."*

In the case of **Sudarman De Silva V. Attorney General (1986) 1 Sri LR 09**, it was held that,

> *"Contumacious conduct on the part of the applicant is a relevant consideration when the exercise of discretion in his favour is involved, but not when he asserts his statutory right to appeal and is not asking for the favour of any permission..."*

The power of revision is not a right of a party but discretion of Court. Unlike in an appeal, the conduct of a petitioner is considered by Court, in exercising its revisionary powers. Our Courts have refused to act in revision when the petitioner is guilty of contumacious conduct.

The Learned SSC for the respondent submitted that the petitioner had filed this application after 3 years and 9 months from the judgment dated 19.12.2012. It was submitted that even after the order dated 28.08.2013, there is a delay of 2 years and 9 months. As per the case records, the petition was filed on 08.04.2016 and an amended petition was filed on 26.05.2016. Therefore, there is a delay of 3 years and 3 months in filing the revision application since the delivery of the judgment dated 19.12.2012.

The Learned Counsel for the petitioner submitted that the delay in filing the application won't arise since he proves continuation of seeking legal remedies. It was submitted that the petitioner filed an appeal dated 11.09.2013 against the

conviction and the sentence under case No. CA 325/2013 and the said appeal was dismissed on the basis that it had not been filed within 14 days from the date of conviction. In the paragraph 23 of the amended petition, it was averred that this Court was of the view that it is more appropriate to come by way of revision application and grant time to file a revision application before this Court.

However, the petitioner has not submitted any document to prove that such appeal was filed or this Court made such direction. Any record relevant to the said appeal numbered CA 325/2013 has not been filed.

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 **S.M.A.A. Priyantha Jayakody V. OIC, Police station, Mawarala and another [CA/PHC/119/2004]**, 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 light of above, it is understood that a petitioner who seeks a discretionary remedy should act promptly. It is trite law that inordinate and unexplained delay in seeking such relief would disentitle the petitioner to it. After perusing the documents submitted by the petitioner, I am of the view that the petitioner has not explained and proved his delay in filing the instant application, to the satisfaction of this Court.

In the case of **Rajapakse (Supra)**, it was further observed that,

"In this regard vide the judgment of F.N.D. Jayasuriya, J in Opatha Mudiyanselage Nimal Perera vs. Attorney-General(1). In that case too the trial against the accused was held in absentia and he had filed an application in revision after 3/4 years since the pronouncement of the judgment and the sentence. His Lordship remarked:

"These matters must be considered in limine before the Court decides to hear the accused-petitioner on the merits of his application. Before he could pass the gateway to relief his aforesaid contumacious

conduct and his unreasonable and undue delay in filing the application must be considered and determination made upon those matters before he is heard on the merits of the application."

In these circumstances we are not disposed to exercise our revisionary powers of this Court..."

This line of authorities amply demonstrates that a petitioner is not entitled to a discretionary remedy of Court when his contumacious conduct and undue delay in seeking such relief exist against his favour.

I perused the case record submitted by the petitioner and find that the judgment of the Learned High Court Judge dated 19.12.2012 to be a well-explained and well-reasoned judgment. It is observed that the Learned High Court Judge had referred to section 364 (2) (e) of the Penal Code (statutory rape), even though he had considered the mental condition of the victim in terms of section 364 (2) (f) in convicting the petitioner. Even the evidence of the prosecution shows that the victim was with a mental disability.

As per section 436 of the Code of Criminal Procedure Act,

"Subject to the provisions hereinbefore contained any judgment passed by a court of competent jurisdiction shall not be reversed or altered on appeal or revision on account –

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice."

Upon reading the judgment of the Learned High Court Judge, I am convinced that mentioning of section 364 (2) (e) instead of (f) was clearly a typographical error. Reasoning of the judgment manifest that the Learned High Court Judge was concentrating on section 364 (2) (f), when convicting the petitioner. Further the petitioner, in his petition, has stated that he was charged under section 364(2) (f) of the Penal Code (paragraph 02 of the petition). That demonstrates the knowledge of the petitioner about the section under which he was charged and convicted. Therefore, I am of the view that there had been no prejudice caused by the said error since it was not material.

Considering above, especially the contumacious conduct of the petitioner, I am of the view that the petitioner is not entitled to invoke the revisionary jurisdiction. I uphold the preliminary objections raised by the Learned SSC for the respondent. Accordingly, the revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Rajapakse V. The State (2001) 2 Sri LR 161
2. Sudarman De Silva V. Attorney General (1986) 1 Sri LR 09
3. Dahanayake and others V. Sri Lanka Insurance Corporation Ltd. and others (2005) 1 Sri L.R. 67
4. S.M.A.A. Priyantha Jayakody V. OIC, Police station, Mawarala and another [CA/PHC/119/2004]
5. Seylan Bank V. Thangaveil (2004) 2 Sri L.R. 101