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

C.A. Revision Application No:
CA (PHC) APN 23/2018

H.C. Negambo Case No: **HC 287/2006**

Vs.

1. Hadapangodage Jagath Raveendra
2. Jayakodi Arachchige Thissa
3. Herath Mudiyanselage Kade Gedara Shanaka Bandula
4. Varshapperuma Arachchige Dinesh Priyankara
5. Handapangodage Pradeep Priyadarshana
6. Varshapperuma Arachchige Premasiri
7. Handapangodage Kumarasiri
8. Handapangodage Pathmasiri
9. Handapangodage Wijesiri

Accused

AND NOW BETWEEN

04. Varshapperuma Arachchige Dinesh priyankara

06. Varshapperuma Arachchige Premasiri

08. Hadapangodage Pathmasiri

Accused- Petitioners

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	Prashantha Lal De Alwis, PC with AAL Chamara Wannisekara for the Accused-Petitioners Nayomi Wickremasekara, SSC for the Complainant-Respondent
ARGUED ON	:	**11.02.2019**
WRITTEN SUBMISSIONS	:	The Accused-Petitioners – On 05.03.2019 The Complainant-Respondent – On 15.10.2019
DECIDED ON	:	12.12.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioners filed this revision application seeking to revise and set aside the sentencing order of the Learned High Court Judge of dated 17.10.2017 in case No. HC 287/2006.

Facts of the case:

The accused-petitioners (hereinafter referred to as the 'petitioners') with 06 others were indicted in the High Court of Negambo under 05 charges, which were punishable under sections 140, 296 and 300 read with section 146 and 32 of the Penal Code. The petitioners pleaded not guilty for the charges and stood for trial.

At the conclusion of the trial, the Learned High Court judge found that the 01st, 03rd, 04th, 05th, 06th, 07th and 08th accused persons were guilty for lessor culpability of Culpable homicide not amounting to Murder, an offence punishable under section 297 of the penal code.

Thereafter, the following sentences were imposed on the said petitioners;

- For the 01st charge (**Section 140 of the Penal Code**) – One year rigorous imprisonment and a fine of Rs.2500/= with a default sentence of 3 months simple imprisonment
- For the 2nd charge (**Section 296 read with 146 of the Penal Code**) - 07 years rigorous imprisonment and a fine of Rs.5000/= with a default sentence of 6 months simple imprisonment. Further, a sum of Rs.10,000/= was ordered to be paid as compensation to the wife of the deceased with a default sentence of 01 year simple imprisonment.
- For the 3rd charge (**Section 300 read with 146 of the Penal Code**) – One year rigorous imprisonment and a fine of Rs.2500/= with a default sentence

of 3 months simple imprisonment. Further, a sum of Rs. 2500/= was ordered to be paid to the PW 02 with a default sentence of 3 months simple imprisonment.

The Learned High Court Judge directed the said sentences to run concurrently.

Being aggrieved by the said order, the 04th, 06th and 08th accused-petitioners preferred this revision application.

The Learned President's Counsel for the petitioners submitted that since the petitioners were committed to prison custody immediately after the conviction, they could not instruct either their Counsel or members of the family to file petitions of appeal against the sentencing order and therefore, they filed this revision application challenging the sentencing order.

The Learned SSC for the complainant-respondent (hereinafter referred to as the 'respondent') raised preliminary objections including the delay in filing the application. It was submitted that there is a delay of 3 months.

However, since I observe that there is a question of law that needs to be addressed, I decide to go to the merits of the case after overruling the preliminary objections raised by the Learned SSC.

The incident in question can be summarized as follows;

The deceased person (Nimal Wijesiri) and the injured person, Ranjith Premalal (PW 02) were two brothers. As per the prosecution evidence, there had been quarrels between the victimized party and the petitioners. On the date of the incident, the petitioners had come to the deceased's house and attacked the deceased and his brother with clubs. The 1st accused had stabbed the deceased. The prosecution led evidence of eye witnesses and medical evidence.

The Learned President's Counsel for the petitioners, mainly raised two questions in the written submissions;

1. Whether the sentence imposed on the petitioners for charge 01 is legal.
2. Whether sentencing all the convicted accused including petitioners for 07 years rigorous imprisonment for 2nd charge is excessive and/or irrational.

It was submitted that the sentence imposed for the first count is illegal and excessive since **section 140 of the Penal Code** prescribes that *"Whoever is a member of an unlawful assembly shall be punished with imprisonment of either description for a term which may extend to six months or with fine, or with both."*

I observe that the Learned High Court Judge has imposed a term of one-year rigorous imprisonment on the petitioners, for the charge No. 01. However, as the Learned President's Counsel for the petitioners pointed out, section 140 only allows imposing a term of imprisonment which may be extended to six months.

Therefore, it is manifestly clear that the Learned High Court Judge erred by imposing a term of one year imprisonment for the charge 01, which is contrary to section 140 of the Penal Code. Therefore, I answer the first question of law in affirmative.

In the second question, it was argued that petitioners' acts and/or participation is different from other accused persons and therefore, their liability would have been considered in a different manner. The Learned President's Counsel for the petitioners brought to the attention of this Court about the difference as to sentencing in Murder and Culpable homicide not amounting to murder. Further, the differences on Common Intention and Unlawful Assembly with implication on sentencing were submitted. The Learned President's Counsel submitted that in order to find liability under section 32, intention must be shared and all the accused

persons must have not only a guilty mind, but must actively take part with its presence. Accordingly, it was submitted that *Mens Rea* of Unlawful assembly is lesser than the mindset of Common intention.

The Learned President's Counsel for the petitioners further contended that all the petitioners have been punished with the same sentence even when the evidence clearly shows it was the 01st accused who stabbed with a dangerous weapon. It was submitted that the petitioners never used a "dangerous weapon".

As per the judgement, the Learned High Court Judge found the petitioners guilty of committing an offence punishable under section 297, while being members of an unlawful assembly.

Section 146 reads that;

> *"If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly is guilty of that offence."*

In the case of **Vithanalage Anura Thushara De Mel and 03 others V. The Attorney General [SC/TAB/2A – D/2017 – decided on 11.10.2018]**, it was held that,

> *"The first requisite for imposing liability under section 146 of the Penal Code is that the person sought to be held liable for the act of another should have been at the time of the commission of the offence a member of the unlawful assembly. The liability will extend not only to offence committed in prosecution of the common object but also to offences which the members of the assembly knew to be likely committed in prosecution of that object..."*

Therefore, if an accused knew common object is likely to be happened, then such person shall be liable under section 146 of the Penal Code. As stipulated in section 146, if an offence is committed by any member of an unlawful assembly in prosecution of the common object of the assembly, every person of the same assembly is guilty of the offence.

It is observed that as per charge 01 to 03, the common object of the instant case was to cause injury to Nimal Wijesiri (the deceased), and to Ranjith Premalal (PW 02). Since the accused-persons had acted and conducted themselves in furtherance of achieving the common object of the assembly, I am of the view that the fact that these three petitioners did not use a dangerous weapon is irrelevant. Therefore, I answer the above contention of the Learned President's Counsel in negative.

The Learned SSC for the respondent submitted that the Learned High Court Judge rightfully analyzed the evidence and having considered all aggravating factors and migratory factors, has imposed the rightful sentence on the petitioners. It was further argued that the petitioners have committed the offence of culpable homicide not amounting to murder and the circumstances transpire that the petitioners had committed the offence of criminal trespass and offences of this nature should not be considered lightly.

I observe that the Learned High Court Judge in her judgment has mentioned that the petitioners were convicted under section 297 of the Penal Code considering the 4th exception to section 294 of the Penal Code. Section 297 of the Penal Code which deals with the punishment of Culpable homicide states that "*Whoever commits culpable homicide not amounting to murder shall be punished with imprisonment of either description for a term which may extend to twenty years, and shall also be liable to fine, if the act by which the death is caused is done with*

the intention of causing death, or of causing such bodily injury as is likely to cause death ;

or with imprisonment of either description for a term which may extend to ten years, or with fine, or with both, if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death."

The mentioned section 297 gives a wider discretion to the judge to impose a sentence which is either extends to twenty years or ten years, depending on the culpability of the accused.

Even the Learned President's Counsel for the petitioners submitted that in both situations of culpable homicide not amounting murder, the Learned Trial Judge has a wider discretion of sentence of imprisonment from even a single day extending to 10 or 20 years.

The Learned President's Counsel for the petitioners further submitted that the petitioners took part to commit the offence described in charge 03 (not murder) and therefore, their sentence should be focused on 3rd charge than on the 2nd charge.

However, since the petitioners had only challenged the sentence imposed, I am inclined to consider whether the Learned High Court Judge had imposed a lawful sentence.

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... "

The purpose of revisionary power is to correct errors committed by lower Courts and such power shall be invoked only upon demonstration of exceptional circumstances like miscarriage of justice. Therefore, this Court shall not interfere with an order of lower Court unless there had been an illegality or irregularity and revisionary powers cannot be invoked to relieve grievances of parties. The revisionary powers cannot be exercised in a similar manner like in an appeal and therefore, I wish to consider only the legality of the sentence imposed by the Learned High Court Judge in the instant case.

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 **Pitiduwa Gamage Sumith Rohana V. Hon. Attorney General and two others [CALA 06/2013 – decided on 25.01.2016]**, it was observed that,

"Some of the aggravating and mitigatory factors identified by our courts in the cases referred to above can be summarized as follows,

Aggravating factors,

a) Use of violence when committing crime

b) Use of weapons when committing crime

c) Drug related offences

d) Member of an organized gang

e) Repeating acts of similar offence

f) Previous convictions or pending cases of the similar type

g) Effect upon victims physical or mental condition

h) Obstruction of justice

i) Commission of an offence while on bail

j) Willful damage to state or private property

k) Disruption of governmental functions

l) Commits the offence in order to conceal another offence

m) Using high office to commit the offence

Mitigatory factors,

a) First offender

b) Good character

c) Determination to quit the criminal life

d) Serious medical condition

e) Victims conduct

f) Lesser harm (crime committed to avoid greater harm)

g) Coercion and/or duress

h) Voluntary disclosure of offence"

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

"...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 after convicting an accused, the Trial Judge has a duty of imposing a proportionate sentence on the convicted person, keeping in mind about the aggravating and mitigatory factors.

In the instant case, the petitioners had initially committed criminal trespass by entering into the property of another with common objective of causing injury to the deceased and his brother. Upon perusal of the evidence and the judgment, I am of the view that the instant case has more aggravating factors than mitigatory factors. The Learned High Court Judge has mentioned that she proceeded to impose the sentence, after considering the fact that a 40-year-old person, who was a father of 04 children had lost his life due to the acts of the petitioners. The Learned High Court Judge was empowered to impose a term which may be extended to 10 years or to 20 years and she had accordingly imposed a term of 07 years rigorous imprisonment on the petitioners. The said sentence is clearly within law.

Therefore, I am of the view that revisionary powers should not be invoked to interfere with the decision of the Learned High Court Judge where she had judicially exercised the discretionary powers vested on her.

The Learned SSC for the respondent invited this Court to consider enhancing the sentences imposed on the petitioners. However, I am of the view that the Learned High Court Judge has imposed adequate sentences on the petitioners. Therefore, I do not wish to make any order on that point.

As I have mentioned under the first question of law raised on behalf of the petitioners, I order to bring down the one-year rigorous imprisonment to a term of

06 months rigorous imprisonment, for charge No. 01. Sentences on the other two charges are affirmed.

Subject to the above variation, 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. Vithanalage Anura Thushara De Mel and 03 others V. The Attorney General [SC/TAB/2A – D/2017]
2. W.M.F.G. Fernando V. Rev Sr. Marie Bernard and others [C.A.1108/99 (F)]
3. Attorney General V. Jinak Sri Uluwaduge and another [1995] 1 Sri L.R 157
4. The Attorney General V. H.N. de Silva [57 NLR 121]
5. Pitiduwa Gamage Sumith Rohana V. Hon. Attorney General and two others [CALA 06/2013]
6. Sevaka Perumal etc. V. State of Tamil Nadu [AIR 1991 S.C. 1463]