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

An application under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka to act in revision against an order of a High Court of the western province acting in the exercise of its appellate jurisdiction under section 4 of the High Court of the Province (Special Provisions) Act, No 19 of 1990 (as amended) read with Article 154P (3)(b) of the Constitution.

Officer in Charge,
Crime Investigation Unit,
Police Station,
Panadura South.

Complainant

Vs.

Court of Appeal Application No:
CA/ PHC/APN 72/20

High Court of Panadura No:
44/2018

Magistrate Court of Panadura No: **89219**

1. Diyagu Arachchige Deepal Udayange Karunaratne
2. Diyagu Arachchige Nihal Keerthiratne Silva
3. Diyagu Arachchige Suranga Kelum Silva

All at,

Migahakovila Road, Pinwatta,
Panadura

Accused

And

1. Diyagu Arachchige Deepal Udayange Karunaratne
2. Diyagu Arachchige Nihal Keerthiratne Silva
3. Diyagu Arachchige Suranga Kelum Silva

All at,

Migahakovila Road, Pinwatta,
Panadura

Accused – Appellants

Vs.

1. The Hon. Attorney General
Attorney General's Department
Colombo 02.

Respondent

2. Officer in Charge,
Criminal Investigation Division,
Police Station,
Panadura South

Complainant-Respondent

And now between,

4. Diyagu Arachchige Deepal Udayange Karunaratne
5. Diyagu Arachchige Nihal Keerthiratne Silva
6. Diyagu Arachchige Suranga Kelum Silva

All at,

Migahakovila Road, Pinwatta,
Panadura

Accused – Appellants-Petitioners

Vs.

3. The Hon. Attorney General
   Attorney General's Department
   Colombo 02.

4. Officer in Charge,
   Criminal Investigation Division,
   Police Station,
   Panadura South

Complainant-Respondent-Respondents

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Chinthaka Rankothge with Amith Rajapaksha for the Petitioner SC Chathurangi Mahawaduge for the respondents.
Argued on	:	18.01.2022
Decided on	:	08.02.2022

Iddawala – J

This is a revision application filed on 17.07.2020 impugning the judgment dated 23.07.2017 delivered by the Magistrate Court of Panadura in case No 89219 and order dated 14.01.2020 delivered by the High Court of Panadura, which reaffirmed the former in appeal. Aggrieved by both the judgement and the order, accused – appellants-petitioners (hereinafter referred to as petitioners) have invoked the revisionary jurisdiction of this Court to revise and set aside he same and acquit the petitioners from all charges.

At the outset, the nature and scope of the revisionary jurisdiction of this Court must be outlined. In this regard, reference to Article 138, Article 145 of the Constitution and Section 364 of the Criminal Procedure Code can be made. As per a plethora of cases, the Court of Appeal in exercising its discretion in revision, will not interfere with the impugned order unless exceptional circumstances are proven. As deduced by this Bench in CA (PHC) APN 134/20 CA Minute dated 20.07.2021, which exhaustively analysed precedent on the subject, if facts of a case reveal a miscarriage of justice, illegality, a gross misdirection of law, an irregularity in procedure or by its very nature shocks the conscience of the court, the Court of Appeal can use its discretion and intervene. In the event one or more of those grounds are proved to be in existence, the Court of Appeal will step in and deal with the said order in the appropriate manner.

Facts of the case

The petitioners were charged in the Magistrate Court of Panadura under two charges. The first charge was for committing robbery on the person named in the indictment, an offence punishable under section 380 of the Penal Code read with Section 32 of the said Code and for committing grievous hurt with a knife on the ear of the said person while committing robbery of a gold chain and thereby committing an offence punishable under Section 317 of the Penal Code read with Section 32 of the said Code.

At the trial, three witnesses gave evidence for the prosecution, namely

1. PW1 – Mahadura Sangeeth Thabrew – Virtual Complainant, Victim of the
2. PW3 – Police Constable 58801 Priyantha, Police Station, Wadduwa

3. PW4 – Inspector of Police Ruparatne, Police Station Panadura South

Petitioners pleaded not guilty, and the case proceeded to trial where the victim (PW1) was the sole lay witness produced by the prosecution. The petitioners gave evidence under oath from the witness box when the defence was called, and an independent witness was also called.

At the conclusion of the trial, the learned Magistrate convicted the petitioners for the second charge of causing grievous hurt and acquitted them on the first charge of robbery. The learned Magistrate imposed a term of 03 months rigorous imprisonment.

Being aggrieved by the said conviction and the sentence dated 23.07.2018 and 12.11.2018, respectively, the petitioners filed an appeal to the High Court Panadura, which was disallowed on 14.01.2020. Dissatisfied with the said order, the petitioners have preferred the present application invoking the revisionary jurisdiction of this Court.

Impugned High Court Order

In impugning the High Court order, the Counsel for the petitioners presented two main arguments which were contended as amounting to a gross misdirection of the law causing a miscarriage of justice and grave prejudice to the petitioners.

1. The treatment of the sworn testimonies of the petitioners as dock statements
2. Reliance upon the unamended version of a legal provision

With regard to the first point, the relevant portion of the impugned order is quoted as follows

> "එසේම පැමිණිල්ලෙන් චුදිතයින්ට එරෙහිව ඉදිරිපත් කර ඇති ඉහත කී ප්‍රබල සාක්ෂි හමුවේ චුදිතයින් විසින් ලබා දී ඇති විත්තිකූඩුවේ සිට කල පැහැදිලි කිරීම කිසි ලෙසකින් ප්‍රමාණවත් නොවන බවත්... උගත් මහේස්ත්‍රාත්තුමා තීරණය කර ඇත. මෙහිදී විත්තිකූඩුවේ සිට කල පැහැදිලි කිරීම හැමවිටම පැමිණිල්ලේ සාක්ෂි මත සාධාරණ සැකයක් ඇති කිරීම අනිවාර්යයෙන්ම කල යුතු අතර, හුදු කල්පිත සැකයක් (fanciful doubt) පමණක් ජනිත කිරීම ප්‍රමාණවත් නොවන බව තීන්දු වී ඇති නඩු තීන්දු වලින් තහවුරු වේ."
>
> (Page 5)

A careful perusal of the brief makes it abundantly clear that the petitioners have given evidence under oath from 2016.02.24 – 2017.06.28 and have subsequently been subjected to cross examination. As opposed to a dock statement, the evidence given by the petitioners in the present case was verified on oath and tested by cross-examination. Characterization of one as the other is unacceptable given that dock statements and sworn testimonies are *per se* different. The landmark judgment of Kularatne v The Queen 71 NLR 529 clearly distinguished the manner in which an unsworn statement from the dock must be treated in comparison to a sworn testimony holding *"that when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony."*

Judicial precedent has further elaborated on the threshold by which a dock statement should be relied upon or not, unlike in the case of sworn testimonies. Therefore, it is evident that the learned High Court Judge had misdirected himself when he regarded the sworn testimony of the petitioners as a dock statement, thereby relegating the degree of value that can be attached to the petitioner's evidence. It is the considered view of this Court that the treatment of evidence as a dock statement, as opposed to a sworn testimony, is a gross misdirection of the law and facts.

When examining the second contention of the Counsel for the petitioner that the learned High Court Judge has relied upon an unamended version of a legal provision, the relevant portion of the order is reproduced below:

> "මෙහිදී චූදිතයින් වෙනුවෙන් මාස 03 ක කාලයක් සක්‍රීය සිර දඩුවමක් දීමේ දී පෙර කී මොහොමඩ් නඩුවේ සඳහන් පරිදි අපරාධ නඩු විධාන සංග්‍රහයේ 302(2) වගන්තියේ විධිවිධාන අනුව අදාළ දඩුවම අත්හිටුවීමට හේතු නොදක්වා තිබීම කෙරෙහි අවධානය යොමු කර ඇත. නමුත් අපරාධ නඩු විධාන සංග්‍රහයේ 303(2) වගන්තිය යටතේ එහි "ආ" විධානය පරිදි සාහසික ක්‍රියාවක් කිරීම නොහොත් කරන බවට තර්ජනය කිරීම හෝ වැනි අපරාධ සම්බන්ධයෙන් මිස එහි 303(1) වගන්තිය යටතේ ආඥාවක් කළයුතු වේ...මෙහිදී පෙරකී 303(2)ආ නිදර්ශනය පරිදි චූදිතයින්ගේ හැසිරීම සාහසික ක්‍රියාවක් බැවින් එම තීරණය ගෙන ඇති බව තහවුරු වන අතර ඒ අනුව උගත් මහේස්ත්‍රාත් තුමා එය දඩුවම් නියම කිරීමේ දී හේතු දැක්වීම අවශ්‍ය නොවන බවද තීරණය කරමි." (Emphasis added) (Page 7)

Here, the learned High Court Judge affirms the decision of the Magistrate Court in imposing a term of 03-month rigorous imprisonment on the petitioners instead of a suspended sentence and deals with the petitioners' submission that the learned Magistrate has failed to give reasons as to why a suspended sentence was not imposed. In doing so, the learned High Court Judge refers to section 303(2)(b) of the Code of Criminal Procedure. Section 303(2)(b) of the Code of Criminal Procedure states, *"A Court shall not make an order suspending a sentence of imprisonment if- (a)…….. (b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended."* Section 303 of the Code of Criminal Procedure has been subjected to three amendments namely by Act No 20 of 1995, Act No 19 of 1997 and Act No 47 of 1999. However, the learned High Court Judge, in referring to the Section 303 seems to have relied on the section prior to its amendment in 1999. As such, Section 303(2)(b) has no relevance to the present case as none of the petitioners has previous convictions, let alone suspended sentences. The learned High Court Judge's reference to 'violence' (සාහසික) is erroneous and misdirected in law. Prior to the amendment of the section in 1999, Section 303 referred to "threat of violence, or the use or possession of a firearm, an explosive or an offensive weapon…". However, after the amendment in 1999, Section 303 does not refer to 'violence' as a ground when considering the suspension or otherwise of a sentence. '

In conclusion, there is an apparent distraction of law in the High Court order which warrants the intervention of this Court acting in revision. Hence this Court holds that the High Court Order has erred in law by relying on section 303(2)(b) when it held that the circumstances of the present case fell within the ambit of the said section.

Impugned Magistrate Court Judgment

The learned Magistrate has carefully analysed the evidence given by PW1 on the charge of robbery, deeming his narration of events as an impossibility. As such, the impugned judgment held that the prosecution failed to establish a strong *prima facie* case on the first charge. According to PW1's version, he was apprehended by three persons (whom he identified as the petitioners) who demanded the gold chain PW1 was wearing at the

time. PW1 states that he reacted against such demand and sustained injuries during the ensuing struggle. However, after scrutiny of the MLR and statements by officials, which pointed to the lack of any indication of corresponding marks that ought to be apparent subsequent to a struggle involving the snatching of a gold chain, the learned Magistrate has correctly disregarded such evidence. The impugned judgment holds the following on page 100 of the brief:

> "මෙම නඩුවේ පැමිණිලිකරු විසින් මෙම නඩුවේ විත්තිකරුවන් පොදු චේතනාවෙන් යුක්තව කටයුතු කරමින් ඔහුගේ ගෙල පැළඳි පවුම් තුනක බරැති රන් මාලයක් කොල්ලකනු ලැබූ බවට සඳහන් කළ ද එවැනි බරැති රන් මාලයක් කොල්ලකන අවස්ථාවකදී බෙල්ල ප්‍රදේශයේ කිසිදු සීරීමක් හෝ වෙනත් යම් ආකරයක තුවාලයක්, තැල්මක් හෝ සිදුනොවී කඩාගැනීමට හැකියාවක් නොමැති අතර එලෙස සිදු වී බවට ප්‍රකාශ කළද එය පිළිගත නොහැකි අභව්‍ය සාක්ෂියක් වන බවයි."

Although the learned Magistrate has refused to accept the evidence pertaining to the robbery, he refers to the injuries delineated in the MLR to hold that the version of events as narrated by PW1 regarding the subsequent assault is corroborated. To that end, the Learned Magistrate applied the doctrine of divisibility of evidence by referring to Francis Appuhamy v the Queen 68 NLR 437.

Francis Appuhamy (supra) was a case in which the witness in question misidentified the fifth accused while correctly identifying the rest in a charge of unlawful assembly. Therefore, the portion of evidence pertaining to the identification of the fifth accused was divested from the rest of her evidence. The Supreme Court rejected the idea that the entirety of the witness's evidence should be disregarded merely because of a single misidentification:

> *"We do not think this remark can be the foundation for a principle that the evidence of a witness must be accepted completely or not at all. Certainly, in this Country it is not an uncommon experience to find in criminal cases witnesses who, in addition to implicating a person actually seen by them committing a crime, seek to implicate others who are either members of the family of that person or enemies of such witnesses.... it is, in our opinion, not permissible to infer that the jury considered Irene's evidence in respect of her identification of the 5th accused to be false. The*

high probability is that they concluded she was merely mistaken in regard to the identity of the fifth man." (at page 443).

Hence, the circumstances of Francis Appuhamy (supra), in which a misidentification of an accused prompted the application of divisibility of evidence, are quite different from the present case's circumstances. The credibility of evidence that is in doubt presently refers to the main event on which the witness's complaint is based. PW1 uttered falsehood deliberately. Such utterance was not due to an error of memory, faulty observation, lack of skill in observation, exaggeration or mere embroidery or embellishment (Samaraweera v The Attorney General 1990 1 SLR 256), warranting the application of the doctrine of divisibility of evidence. The complaint of robbery is intrinsically linked with that of the subsequent assault, as PW1, in his statement, admitted that the assault was a result of him struggling against the demands made by the petitioners to hand over the gold chain. In such a context, divesting the false evidence given on a material point and accepting a portion of evidence on an ancillary event is a misapplication of the doctrine.

Thus, it is the considered view of this Court that the maxim *falsus in uno falsus in omnibus* (He who speaks falsely on one point will speak falsely upon all), ought to have been applied in the present case as *"it is not permissible, in a criminal case, to disbelieve a witness on a material point and, at the same time, believe him on other points without corroborative evidence"* - Kandaih vs. SI Police Norton Bridge - 66 NLR 424. While a line of judgments has emerged which held that the maxim cannot be applied in all instances where a witness has uttered falsehood, as held in Viraj Perera v Attorney General (2009) 20 SLR 251 "*the Judge in deciding whether or not he should apply the maxim must consider the entirety of the evidence of the witness and the entire evidence led at the trial."* (at page 257). Hence, it is the considered view of this Court that the circumstances of the present case do not warrant the application of the doctrine of divisibility of evidence.

The Counsel for the petitioners further submitted that the impugned judgment of the Magistrate Court has erroneously held that the version of the defence was not put forward as suggestions to the prosecution witness, thus amounting to a belated defence. For instance, on pages 106 – 107 of the Appeal Brief, the impugned judgment holds that

"එහෙත් පමිණිල්ලේ සාක්ෂි මෙහෙයවන අවස්ථාවේදී පළවන චුදිත විසින් එවැනි ස්ථාවාරයක් ගෙන නොමැති අතැර විත්ති සාක්ෂි අවස්ථාවේදී ප්‍රථම වරට අදාල ස්ථාවාරය ගෙන ඇත. පළවන විත්තිකරු විසින් අදාල විත්ති වාචකය වරින්වර වෙනස් කිරීම හේතුවෙන් අදාළ විත්ති වාචික යේ විශ්වාසනීයත්වය බිඳවැටී ඇති බව මෙම අධිකරණයේ නිගමනයයි."

As contended by the Counsel for the petitioners, this is an erroneous conclusion by the learned Magistrate who based such a conclusion on misdirection of facts. On page 58 of the brief, the Counsel for the defence has put forward two suggestions to PW1 with regard to the version of the defence.

"ප්‍ර: විත්තිය යෝජනා කරනවා 2009.11.28 වෙනි දින රාත්‍රී 7.30 ට පමණ තමන්ගේ කණ තුවාල වුනා, පිහියෙන් කෙටීමක් හෝ නොවේ පහර දීමක් හෝ නොවේ ගල් පහරක් වැදීමක් කියල කියන්නේ?

උ: නැහැ

ප්‍ර: විත්තිය තවදුරටත් යෝජනා කරනවා තමන් විසින් මාලයක් කඩා ගෙන යන කොට තමන්ට මේ අනතුර සිදු වුනා කියලා?

උ: පිළිගන්නේ නැහැ"

As such, it is evident that the version of the defence was put to PW1 as suggestions at the time the prosecution was leading evidence. The defence had suggested that the PW1 was injured as a result of him trying to commit robbery of a chain and whilst he was fleeing, he was attacked by bystanders and that he was lying under oath. These suggestions were consistent with the version presented by the petitioners from the witness box as well.

Therefore, when considering the entirety of the evidence led in trial, a reasonable doubt which goes beyond a 'fanciful doubt' has been created by the defence in the prosecution's case. As such the benefit of the doubt must rest with the petitioners, a conclusion the impugned Magistrate Court judgment has failed to arrive at. Hence, it is the considered view of this Court that the impugned judgment of the Magistrate Court contains a grave miscarriage of justice which warrants its revision.

Prior to conclusion, the issue of delay in filing revision application without exercising the petitioner's statutory right of appeal to the Supreme Court must be examined. The appeal against the High Court lie to the Supreme Court, and as such, the petitioner had 44 days to do the same. The impugned High Court Order was delivered on 14.01.2020, and the present application for revision was filed on 17.07.2020. The contention of the petitioner that the delay was due to the COVID pandemic cannot be accepted as the repercussions of the pandemic with regard to the filing of applications only manifested itself around March 2020. Even Coronavirus Disease (COVID-19) (Temporary Provisions) Act No. 17 of 2021 provides for relief in respect of inability to comply with prescribed time periods, only commencing from March 1, 2020. Petitioners had ample time to pursue an appeal to the Supreme Court. Nevertheless, in view of the grave prejudice caused to the petitioners by the impugned Orders, this Court, in exercising its discretion, will exercise its revisionary jurisdiction in furtherance of justice.

At this instance, it is pertinent to reiterate Article 145 of the Constitution, which provides that this Court may *ex mero motu* or on any application made, call for, inspect and examine any record of any court of First Instance and in the exercise of its revisionary powers may make any order thereon as the interest of justice may require.

Application allowed. Petitioners acquitted.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL