

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA.**

In the matter of an Application for Revision in terms of Article 138 of the Constitution read with Sec. 364 of the Code of Criminal Procedure Act No. 15 of 1979.

Officer in Charge,

Police Station,

Kagalle.

Court of Appeal Revision Application

No: **CA (PHC) APN 118/2014**

**Complainant**

High Court of Kegalle Case No: **1339/**

**Appeal.**

Vs.

1. Kanchana Thusantha,

Detawala,

Karandapana,

Kegalle.

Magistrate Court of Kegalle Case No:

**54103 /99**

**Accused**

**AND BETWEEN**

1. Kanchana Thusantha,

Detawala,

Karandapana,

Kegalle.

**Accused – Appellant**

Vs.

1. Officer in Charge

Police Station

Kegalle.

2. Hon. Attorney General,

Attorney General's Department,

Colombo 12.

**Respondent**

**AND NOW BETWEEN**

1. Kanchana Thusantha,

Detawala,

Karandapana,

Kegalle.

**Accused – Appellant – Petitioner.**

**Vs.**

1. Officer in Charge

Police Station

Kegalle.

**Complainant – Respondent –  
Respondent**

2. Hon. Attorney General

Attorney General's Department

Colombo 12.

**Respondent – Respondent**

Before – Menaka Wijesundera J.

Neil Iddawala J.

Counsel – Rienzie Arsecularatne, PC with Punsri Gamage for petitioner.

Chathuranga Bandara, SC for State.

Argued On – 26.01.2022

Decided On – 07.03.2022

**MENAKA WIJESUNDERA J.**

The instant application for revision has been filed to revise the order **of the learned High Court Judge of Kegalle dated 16.2.2005 and the judgment of the Magistrate dated 11.7.2001.**

In the instant matter accused appellant petitioner (hereinafter referred to as the petitioner) was charged in the Magistrates Court for being in possession of illicit liquor.

Upon the conclusion of the trial the Magistrate has convicted him and the petitioner had lodged an appeal in the High Court and the High Court Judge had affirmed the order of the Magistrate.

Being aggrieved by the said order the petitioner had initially lodged an appeal to this Court and the said appeal had been dismissed due to lack of jurisdiction in 2012.

Thereafter in 2014 the instant application for revision has been filed.

**The main contention of the Counsel for the petitioner is that the,**

**1) Charge in the Magistrate Court has not been signed by the Magistrate,**

**2) The charge had not been read over to the petitioner.**

At this point this Court notes that the petitioner had been represented by a Counsel in the Magistrates Court and the petitioner had in fact had made a statement from the dock as his defense. Therefore the petitioner being ignorant of the charge is very difficult to understand.

Nevertheless the Counsel for the petitioner cited a judgment by his Lordship Justice Aluvihare , **SC APPEAL 115/2014**, where his Lordship has held that noncompliance of section 182 of the Criminal Procedure Code in the Magistrate Court is fatale especially in view of the fact that an accused being represented by an attorney at law is not mandatory, and his Lordship has gone to add that it should be considered in the light of the proviso to article 138 (1) of the constitution to see whether substantial miscarriage of justice has taken place.

In the instant matter as stated above this Court notes that the petitioner had been represented by a counsel in the Magistrates Court and trial had gone on from 1999 to 2001 from the date the petitioner had pleaded not guilty to the charge, and on any of the days the objection to the charge had not been taken up.

Therefore as stated by His Lordship in the above mentioned case when considering in view of the proviso to article 138 (1) of the Constitution this Court has to seriously consider whether the petitioner had been prejudiced by a charge which had not been signed by the magistrate and which had not been read over to the petitioner.

But this Court notes that the said objection although taken up at this stage had not been taken up in the Magistrates Court neither in the High Court although the services of an attorney at law had been obtained by the petitioner at each level.

Therefore it is the observation of this Court that the petitioner being prejudiced by the charge in the instant case, is unacceptable because he had been represented by an attorney at law right through out and the trial had gone for nearly three years during which time the petitioner had ample time to understand that there is a defect in the charge.

**Therefore even if there is a violation of section 182 of the Criminal Procedure Code as submitted by the petitioner, it is the opinion of this Court that the rights of the petitioner had not been violated as per the proviso to article 138 of the constitution as stated by His Lordship in the above mentioned case especially in view of the fact that the petitioner had been represented by a Counsel.**

The Counsel for the respondents contended that there is a delay of nine years since the initial judgment by the Magistrates Court and such delay is fatal in an application of this nature.

We do see that there is a very long delay in this matter, which the petitioner had attributed to be the lapse on the part of the legal assistance he has sought, but this Court notes that even after obtaining proper legal advice as stated by the petitioner there is a lapse of two years to which his explanation to this Court is not very plausible. Delay has been considered to be fatal and it has been discussed in many of our cases and one such is **Rajapakse vs. The state (2001)2 SLR 161**, in which it was decided that **‘if Court were to act in revision the party must come before Court without unreasonable delay’**. The same had been held in the case of **Camillus Ignatius vs. OIC of Uhana Police station (Rev) CA 907/89** where it was

**said that mere delay of 4 months in filling revision was fatal. This Bench too had held similarly in the case of CA/PHC/APN 78/2021.**

The Counsel for the respondents further submitted that the objection to the charge has been taken up for the first time before this Court and that it is a belated position, and went on to cite a judgment of Her Ladyship Justice Wickremesinghe in the case of **CA (PHC) 180/2014** in which it had been held that an objection to a charge should be taken up at the very first instance.

Therefore we note that the petitioner had filed the instant application after a lapse of time period which has not been explained by the petitioner in a satisfactory manner and further more this Court also note that the objection to the charge in the Magistrates Court had not be taken up either in the High Court nor at the Magistrates Court, hence that too is belated.

Therefore for the reasons set out above this Court sees no exceptional reason to allow the instant application for revision and such it is hereby dismissed.

**Judge of the Court of Appeal.**

**I agree.**

**Neil Iddawala J.**

**Judge of the Court of Appeal.**