

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an application for Revision under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

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

Court of Appeal Case No:
CA (PHC) APN 135 /16

Complainant

High Court of Kandy Case No:
HC/ 28 /2014

Vs.

Rajapakshalage Sunil Shantha
Jayasooriya,

No. 304/23/03, Rukmal Mawatha,
Pinnagolla,
Nittabuwa.

Accused

AND NOW BETWEEN

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

Complainant – Petitioner

Vs.

Rajakshalage Sunil Shantha
Jayasooriya,

No. 304/23/03, Rukmal Mawatha,

Pinnagolla,

Nittabuwa.

(Presently in Welikada Prison)

Accused – Respondent

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Wasantha Perera, SSC for the Complainant – Appellant.

Nalinda Indatissa, PC with Nuwan D' Alwis instructed by Charith Thuduwege

for the Accused – Respondent.

Argued on: 08.03.2022

Decided on: 05.04.2022

MENAKA WIJESUNDERA J.

The instant application for revision has been filed by the Complainant petitioner (hereinafter referred to as the petitioner) to set aside the order dated 14.12.2015 of the High Court of Kandy.

The accused respondent (hereinafter referred to as the respondent) raised a preliminary objection on the basis that,

- 1) The petitioner has failed to file an affidavit along with the petition in violation of Court of Appeal rules,**
- 2) The delay in filling the revision application of 10 months has not been sufficiently explained in the petition.**

It is the contention of the respondents that according to CA rules 3(1) (a) “every application made to the Court of Appeal for the powers vested in CA by articles 140 and 141 of the Constitution shall be by way of petition together with an affidavit in support of then averments therein.....”, therefore the Counsel for the respondents contended that filling of the affidavit is mandatory even to the Attorney General.

At this juncture the Counsel for the petitioner submitted that as it is on a question of law there is no requirement of an affidavit. **But this Court notes that the rule cited above does not distinguish applications based on questions of law or applications based on facts. Furthermore this Court draws its attention to the cases of,**

- 1) Kiriwanthi and another 1990 1 Sri.L.R 2 where it was held that noncompliance of Supreme Court rule 46 is fatal and rule 46 of the Supreme Court is filling of an affidavit in support of the petition in revision applications. It has also held that “while I am against mere technicalities standing in the way of this Court doing justice, it must be admitted there are rules and rules .Sometimes Courts are expressly vested with powers to mitigate hardships. But most often we are**

called upon to decide which rules are merely directory and which are mandatory, carrying certain adverse consequences for noncompliance. Many types of rules have been enacted in the interest of due administration of justice, irrespective of whether or not a non-compliance cause's prejudice to the opposite party. It is in this context that judges have stressed on the mandatory nature of the rules, and the need to keep channels of procedure open for justice to flow freely and smoothly. The position would be worse if the non-compliance causes prejudice to the other party"

It has further held that "the rules of procedure have been devised to eliminate delay and to facilitate due administration of justice".

2) *Attorney General vs. Wilson Silva* 1992 1 Sri L R 44 it was held that "even the Attorney General must comply with rule 46 ", which is as we are all aware is the need to file an affidavit along with the petition in applications under article 140 and 141 of the Constitution.

In the instant matter the purpose of filling the instant application is to revise the order of the High Court in which the petitioner has claimed that the sentence imposed by the learned High Court Judge is inadequate and he substantiates the position with the facts of the case and the nature of the offence with which the respondent was indicted.

Therefore it is very obvious that the petitioner is relying on the facts of the case which is more the reason why the petition should have been accompanied with an affidavit although the rule does not makes a specification for issues of law and facts. Furthermore as stated above for the due administration of justice and to avoid delay, following the rules by all parties is important.

Therefore in view of the rule quoted by the respondents and the decided cases cited above it is very clear that following rule 3 (1) (a) is mandatory in applications filed under article 138 of the Constitution.

The next point raised by the respondent is that the petition had been filed after 10 months of the impugned order. It is a well-established principle that if a party files a revision application the party filling the same must do so without any delay. Delay has been considered to be fatal if it is not explained by the

petitioner to the satisfaction of Court, and it has been held so in the case of CA/PHC/APN78/2021 by this bench and in many other cases.

In the instant matter the delay has not been explained in the petition but the Counsel appearing for the petitioner has stated that the delay was due to the obtaining of proceedings from the High Court. But this Court notes that this is not substantiated by an affidavit along with the petition.

Therefore this Court observes with disapproval that the petitioner had violated the Court of Appeal rules and furthermore the petitioner has not explained the delay in filling the petition in an acceptable manner.

As such the preliminary objection of the respondent is upheld and the instant matter for revision is dismissed in limine.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court of Appeal.