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 the Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Officer-in-Charge,
Police Station,
Thalangama.

Complainant

Vs.

Court of Appeal Application
No: **CA/PHC/APN/78/20**

High Court of Homagama
No: Appeal/66/2018

Magistrate's Court of
Kaduwela
No :**75121**

Meera Saheeb Mahir
No 1/10, Green Field Housing Scheme,
Kalmmunaikudy II, Kalmuniai.

Accused

And now

Meera Saheeb Mahir
No 1/10, Green Field Housing Scheme,
Kalmmunaikudy II, Kalmuniai.

Accused-Appellant

Vs.

1. Officer-In-Charge
   Police Station,
   Thalangama.

Complainant-Respondent

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

Respondent

And now between

Meera Saheeb Mahir
No 1/10, Green Field Housing Scheme,
Kalmmunaikudy II, Kalmuniai.

Accused-Appellant-Petitioner

Vs

1. Officer-In-Charge
Police Station,
Thalangama.

Complainant-Respondent-Respondent

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

Respondent-Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Aruna Pathirana Arachchi for the Petitioner

Chathurangi Mahawaduge SC for the Respondents.

Argued on : 30.03.2022

Decided on : 18.05.2022

Iddawala – J

This is a revision application filed on 02.07.2019 against an order of the High Court of Homagama dated 23.10.2019, which refused to set aside the conviction and sentence of the petitioner by Magistrate Court's order dated 04.09.2018 & 25.09.2018, respectively.

The background facts pertinent to the instant application are as follows. The petitioner was charged before the Magistrate Court of Kaduwela with cheating (Section 402 of Penal Code). Petitioner pleaded not guilty, and the case proceeded to trial, where the petitioner appeared in person and gave evidence under oath. The prosecution led the evidence of four witnesses. PW01, was the virtual complainant who claimed that a person named 'murali' obtained Rs 350,000/- by promising to secure her a teaching position. At the conclusion of the trial, the learned Magistrate convicted the petitioner and sentenced him to two years of rigorous imprisonment, a sum of Rs. 1,500/- (which carried a default sentence of 3 months simple imprisonment) and ordered the petitioner to pay Rs. 100,000/- as compensation to PWO1 who was the virtual complainant (which carried a default sentence of 6 months simple imprisonment). Aggrieved by such conviction, the petitioner preferred an application to the High Court, which affirmed the findings of the Magistrate Court. Hence, the petitioner has preferred the instant application to the Court of Appeal. The petitioner further submitted that he was unable to pursue an appeal against the High Court order dated 23.10.2019 as his application for leave to appeal (sent via the Prison Authority) has been rejected.

During oral submissions, the counsel for the petitioner contended that he would only be canvassing the sentencing order dated 25.09.2018 praying for a reduced sentence for the petitioner. The counsel for the petitioner submitted that the petitioner has been in remand custody for four years and that he is the father of four children.

The counsel appearing on behalf of the respondent objected to any variance of the sentence on the basis that the petitioner has been convicted and sentenced on a previous occasion for a similar offence and cited the relevant judgment of the Court of Appeal, which refused to vary the sentence imposed on the petitioner. As such, counsel for the respondent drew the Court's attention to **Meera Saheeb Mahir v OIC, Thalangama** CA(PHC)APN 64/2020 Court of Appeal Minute Dated 16.11.2020, which dealt with a revision application filed by the petitioner against an order of the High Court of Homagama. The respondent submitted that the said revision application dealt with the instant petitioner involving similar case facts of cheating. In CA(PHC)APN 64/2020, the petitioner has cheated another victim by introducing himself as 'muralidharan' and taking Rs. 350,000/- as payment to secure a teaching position for the victim. The counsel for the respondent further submitted that the petitioner has been named as an IRC and that a variation of sentence is not warranted when there are three convictions in similar cases, as was the case with the petitioner.

At the outset, I will set out the scope of the jurisdiction of the Court of Appeal to vary a sentence imposed by a lower court as it necessarily entails the Court of Appeal interfering with the discretion exercised by such judge. In **King Vs Rankira** 42 NLR 145, it was held: *"The Court of Appeal will not interfere with the judicial discretion of a Judge in passing sentence unless that discretion has been exercised on a wrong principle"* (*see also* **King Vs E. M. T. De Saram** 42 NLR 528). Similarly, in **The Attorney General v H. N. De Silva** 57 NLR 121, Basnayake A. C. J., speaking of the appellate jurisdiction and the power to interfere with the discretion of the trial judge, made the following observations:

> *"This Court has power in the exercise of its revisionary jurisdiction to increase or reduce a sentence, and it is not contrary to the rules which apply*

to appellate tribunals that it should exercise its independent judgment in a matter which is brought up before it in review and increase a sentence if it thinks it should be increased. Learned Counsel for the respondent urged that the quantum of sentence is a matter for the discretion of the trial Judge and that the Court of Appeal ought not to interfere, unless it appears that the trial Judge proceeded upon a wrong principle. He cited a number of cases which state the principles which should guide an appellate tribunal in altering a sentence passed by a Court of subordinate jurisdiction. Those cases quite properly lay down the rule that an appellate Court will interfere only when a sentence appears to err in principle or when the subordinate Court has either failed to exercise its discretion or has exercised it improperly or wrongly. It may not always appear as in this case how the Court below has reached its decision, but, if upon the facts the appellate Court may reasonably infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Court of first instance, the exercise of the discretion may be reviewed."

Hence, it is settled law that the Court of Appeal will not interfere with the judicial discretion vested with the trial judge by law unless such trial judge has operated on a wrong principle of law or has failed to exercise its discretion or has exercised it arbitrary, inappropriately or wrongly when imposing the sentence.

On a perusal of the order dated 04.09.2018, whereby the petitioner was convicted, it is evident that the learned Magistrate has carefully analysed all the evidence presented by the prosecution to hold that the ingredients of the offence of cheating have been established beyond a reasonable doubt. Furthermore, the learned Magistrate has carefully analysed the evidence given by the petitioner and has concluded that it amounted to a mere denial.

The petitioner in the instant application is canvassing the sentence praying for this Court to invoke its revisionary jurisdiction to impose a lesser sentence. However, the only grounds averred by the petitioner in support of this contention is his family condition.

At this juncture, it is pertinent to refer to Section 403 of the Penal Code which sets out the sentence when a person is convicted under the Section:

> *Whoever cheats and there by dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of a valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.* (Emphasis added)

On 25.09.2018, the learned Magistrate has imposed a sentence of two years rigorous imprisonment along with a fine and ordered compensation to be paid to the virtual complainant. The only mitigating factor averred by the petitioner for a sentence reduction is that he was the father of four young children and has been in prison for nearly four years. This contention would not warrant, in any way, an interference with the judicial discretion of the trial judge, which in the considered opinion of this Court has been properly utilised in the instant case. This Court sees no reason to interfere with the judgment of the High Court or the learned Magistrate.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL