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

In the matter of an appeal under the provision of the Code of Criminal Procedure read with section 9 and 11 of the High Court (Special Provisions) Act No. 19 of 1990

OIC Meerigama Police Station

Complainant

Vs.

Court of Appeal Application
No :**CA/ PHC/186/16**

High Court of Gampaha
No : **HCRA/38/2015**

Magistrate's Court of
Attanagalla
No : **49502**

1. K.A. Samson Harischandra of 2/142. Hiriwalamulla, Kaleliya (now deceased)
2. M.M. Parakrama if No. 21/5, Hirawala, Kaleliya (now deceased)
3. Ravindra Rathnasekara of Hiriwala, Kaleliya

Accused

And between

A Pushpa Sriyani Ranatunge of No. 27, Veherahena watta, Hieiwala, Kaleliya

Aggrieved party- Petitioner

Vs.

1. Hon. Attorney General

2. OIC Meerigama

Complainant-Respondents

1. K.A. Samson Harischandra of 2/142.
   Hiriwalamulla, Kaleliya
   (now deceased)

2. M.M. Parakrama if No. 21/5,
   Hirawala, Kaleliya
   (now deceased)

3. Ravindra Rathnasekara of Hiriwala,
   Kaleliya

Accused-Respondents

And now between

1. K.A. Samson Harischandra of 2/142.
   Hiriwalamulla, Kaleliya
   (now deceased)

2. M.M. Parakrama if No. 21/5,
   Hirawala, Kaleliya
   (now deceased)

3. Ravindra Rathnasekara of Hiriwala,
   Kaleliya

Accused-Respondents-Appellants

Vs

A Pushpa Sriyani Ranatunge of No. 27,
Veherahena watta, Hieiwala, Kaleliya

Aggrieved party-Petitioner-Respondent

Vs

1. Hon. Attorney General

2. OIC Meerigama

Complainant-Respondents-Respondents

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Kamal S. Perera for the Appellant Gamunu Chandrasekara on the instructions of Piyumi Kumari for the Respondent. Chathurangi Mahawaduge SC for the state.
Argued on	:	23.03.2022
Decided on	:	25.05.2022

Iddawala – J

This is an appeal filed on 11.11.2016 against the High Court order dated 01.11.2016 in case No. HCRA/38/2015. By the said impugned order, the High Court directed a retrial in Magistrate Court Case No 49502, which was concluded on 30.12.2014, whereby the accused-respondent-appellants (*hereinafter the appellant*) were acquitted. Two of the three accused in Case No. 49502 are now

deceased, and the instant appeal is sustained by the remaining accused, who has invoked the appellate jurisdiction of this Court to set aside the impugned High Court order.

The appellant was charged in the Magistrate Court for causing mischief under Section 410 of the Penal Code. At the conclusion of the trial, the learned Magistrate acquitted the appellant on 30.12.2014. On 31.03.2015, the Magistrate directed the virtual complainant (*hereinafter the respondent*) to pay compensation of Rs. 10,000/- to each of the accused. This order was made under Section 17 of the Code of Criminal Procedure Act, No.15 of 1979 (*hereinafter the CPC*) whereby the Magistrate Court found the respondent to be guilty of making a frivolous and vexatious complaint against the appellant. Aggrieved by such an order, the respondent filed a revision application to the High Court to canvass the order of compensation. It is pertinent to note that the said revision application did not canvass the appellant's acquittal by order dated 30.12.2014. During the support stage of the said revision application, the appellant raised an objection based on the maintainability of the action. Thereafter, both parties made submissions on this jurisdictional issue, and the High Court reserved the order on the same point. Nevertheless, on 01.11.2016, the learned High Court judge delivered a final order directing a retrial. Hence, the appellant has come before this Court on the following grounds:

i. The petitioner in the High Court did not challenge the acquittal order dated 30.12.2014, but only the order dated 31.03.2015 regarding compensation, yet the High Court ordered a re-trial.

ii. The learned High Court failed to appreciate that Hon. Attorney General has not filed an appeal against the acquittal in the Magistrate Court

iii. The learned High Court Judge failed to appreciate that parties only made submissions with regard to jurisdiction, but not about merits of the revision

iv. The learned High Court Judge failed to appreciate that the order dated 2016/11/1 should have been only on whether the petitioner has rights to file a revision or not.

At the outset it is pertinent to highlight the nature of the revisionary jurisdiction exercised by the High Court which is concurrent to that of the Court of Appeal. (**Ramalingam v Parameswary and Others** (2000) 2 SLR 33). As such, the revisionary jurisdiction vested on the High Court is wide enough to allow relief that the Court deems fit. However, such an inherent power must be utilised only in the appropriate case. If the fact of the case shocks the conscience of the Court, an appropriate order must be delivered in furtherance of the administration of justice.

During the argument stage, the counsel for the appellant submitted that the High Court had made a premature order. It was contended that the submissions of parties before the High Court were on a preliminary matter pertaining to the maintainability of the revision application of the respondent. Hence, the parties limited their submissions to the jurisdictional matter. The counsel for the appellant argued that instead of delivering an order on the maintainability of the revision application, the learned High Court judge had ordered a retrial by way of a final order. In the written submissions, the appellant contended that the High Court did not explicitly set aside the Magistrate Court judgment or the order dated 31.3.2015 but ordered a retrial, which was not prayed for by the respondent. The appellant cited **King v Fernando** 48 NLR 249, **Queen v Jayasinghe** 69 NLR 314 to support the contention that order of retrial is warranted under exceptional circumstances considering the time taken for the case since the alleged offence.

The respondent's counsel primarily focused on how the trial progressed in the Magistrate Court. As such, the counsel for the respondent contended that the Magistrate had prejudiced the respondent by considering extraneous material that violates evidentiary principles. As such, the respondent contended that the Magistrate had entertained statements by third parties who were not named as witnesses to the trial, which were later used to incriminate the respondent unjustly. It was also submitted that the Magistrate has acted outside the ambit of his jurisdiction and determined the respondent to be of unsound mind and then imposed a fine for the respondent's deeds.

The State Counsel appearing on behalf of the Attorney General agreed with the submissions of the respondent, stating that the process adopted by the Magistrate in concluding the trial was highly irregular. Nevertheless, the State Counsel conceded that the revision application filed by the respondent in the High Court did not challenge the acquittal of the appellant in the Magistrate Court.

In the impugned order of the High Court, the learned judge has condemned the actions of the Magistrate, stating that the sanity of the respondent and the question of whether she was a public nuisance to the community was a matter extraneous to the charge of mischief levelled against the appellant. The learned High Court Judge sympathised with the respondent and observed that the Magistrate ought to have directed the respondent to be dealt with under civil law without finding her guilty under Section 17 of CPC. The learned High Court Judge has ordered to conduct disciplinary action against the police officers for not conducting a proper investigation into the respondent's complaint.

In entertaining the instant application, the Court of Appeal will exercise its appellate jurisdiction only for the purpose of correcting all errors in fact or in law where the Court deems that the impugned order has prejudiced the substantial rights of the parties or occasioned a failure of justice.

Here is a case where the High Court has ordered a retrial. In doing so, the learned High Court Judge has failed to set aside the acquittal of the appellant dated 30.12.2014. Hence, the determination before this Court pivots on the issue of whether such a retrial is warranted given the circumstances of the case. This Court is precluded from examining matters of fact that were not challenged before the learned High Court judge.

The offence was committed on 14.11.2009 and the trial in the Magistrate Court was concluded on 30.12.2014. Two of the accused in the case have already passed away, and it has been more than half a decade since the closure of the Magistrate Court's trial. Moreover, the case pertained to a charge of mischief whereby the respondent has alleged the appellant had damaged 12 roof tiles belonging to the respondent by hurling rocks at the roof of the respondent's

house. The chances of a conviction of the remaining accused (appellant) in the event of a fresh trial are, in this Court's opinion, remote. A retrial at this point in time is not practical given the long delay. Ordering a retrial would require considerable resources as well. Given the nature of the alleged offence of mischief (which is compoundable), ordering a retrial appears to be a futile measure. In any event, the respondent did not challenge the acquittal of the appellant in the High Court. Instead, she canvassed the order to pay compensation.

In **E. M. Gamini Edirisuriya & Others v Attorney General** C.A. 228-230/2005 CA Minute dated 18.06.205, His Lordship Justice H. N. J. Perera observed the following:

> *"In a long line of case law authorities, our courts have consistently refused to exercise the discretion to order a re-trial where time duration is substantial.*
>
> *In Peter Singho V. Werapitiya 55 N.L.R 157, Gratien, J. refused to consider a retrial where time duration was over four years. In Queen V. Jayasinghe 69 N.L.R 314, Sansoni, J. refused to order re- trial where the time duration was over three years. Shoni 19th Edition VOL V1 page 4133 states: "An order of re-trial of a criminal case is made in exceptional cases and not unless the Appellate Court is satisfied that the court trying the proceeding had no jurisdiction to try it or that trial was vitiated by serious illegalities or irregularities proceedings and on that account in substance there had been no real trial or that the prosecutor or an accused was, for reasons over which he had no control prevented from leading or tendering evidence material to the charge and in the interest of justice, Appellate Court deems it appropriate having regard to the circumstances of the case, that the accused should be put on his trial again, an order of re-trial wipes out from the record the earlier proceedings and exposes the person accused to another trial. In addition to this, a re-trial should not be ordered when the court finds that it would be superfluous for the reason that the evidence relied on by the prosecution will never be able to prove the charges beyond reasonable doubt and the like especially when the court is of the opinion that the prosecution will be, put*

at an advantage by allowing them to provide the gaps or what is wanting that resulted due to their own lapses."

Under the circumstances, it is the considered view of this Court that the instant application is not a fit and proper case to order a retrial. For the foregoing reasons, this Court allows the appeal and sets aside the order of the High Court dated 01.11.2016 and the Magistrate Court order dated 31.03.2015, made under Section 17 of the CPC.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL