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 of the Democratic Socialist Republic of Sri Lanka read with section 364 of the Criminal Procedure Act No. 15 of 1979.

Court of Appeal Revision Application No: **CA (PHC) (APN) 135/2017**

High Court of Embilipitiya Case No: **HCE 84/2008**

Magistrate's Court of Embilipitiya Case No: **BR 1395 /2005**

The Attorney General,

The Attorney General Department,

Colombo 12.

Vs.

1.Weerasinghe Pathirage Priyantha Gunasekara.

2.Rathnayaka Pathiranage Dayarathna.

3.Kukulkorala Gamage Chaminda.

4.Rathnasiri Rathnayake.

5.Kalaotuwage Amarasena.

6.Kukulkorala Gamage Sarath Kumara.

Accused

The Attorney General,

The Attorney General's Department,

Colombo 12.

Complainant – Petitioner

Vs.

1.Weerasinghe Pathirage Priyantha Gunasekara.

2.Rathnayaka Pathiranage Dayarathna.

3.Kukulkorala Gamage Chaminda.

4.Rathnasiri Rathnayake.

5.Kalaotuwage Amarasena.

6.Kukulkorala Gamage Sarath Kumara.

Accused – Respondents

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Suharshi Herath, DSG for the Petitioner.

Chandana Sri Nissanka for the 01st and 2nd Accused – Respondents.

Dimuthu Senarath Bandara with Keheliya Alahakoon and Buddhika Karunathilaka for the 4th Accused – Respondent.

Gamini Hettiarchchi for the 5th Accused – Respondent.

Argued on: 05.05.2022

Decided on: 02.06.2022

MENAKA WIJESUNDERA J.

The instant application for revision has been filed to set aside the order dated 2.12.2016 of the High Court of Ebilipitiya.

In the instant matter the accused respondents (hereinafter referred to as the respondents) were indicted in the High Court under Sections 140, 146/296 and 146/300 of the Penal Code.

According to the submissions of the petitioner, in the High Court evidence of the prosecution and the defense had been concluded and the learned High Court Judge had directed the State Counsel to accept a plea for an offence under Section 297 of the Penal Code which the State Counsel had refused.

But the High Court Judge had accepted the plea for a lesser offence and had proceeded to convict the respondents.

Being aggrieved by the said actions of the High Court Judge the petitioner had filed the instant application.

The main grievance of the petitioner is that the High Court Judge had accepted a plea without the consent of the State Counsel. The Counsel for the petitioner further submitted that the High Court Judge is not bound by law to act in such a manner, and it is a violation of Section 197 of the Criminal Procedure Code. (Hereinafter referred to as the CPC). The Counsel for the petitioner further stated that the said illegal decision of the High Court Judge is the exceptional circumstance in the instant matter to consider the instant application as a revision application.

The Counsel appearing for the respondents stated that the,

1. The High Court Judge has not given an illegal order,
2. The provisions of Section 197 of the CPC envisage a situation before the trial has commenced and not afterwards. They also cited Section 207 of the CPC as similar section.

In view of the submissions of both parties what this Court has to decide is whether the High Court Judge erred in law by not obtaining the sanction of the Attorney General when recording the plea of guilt of the respondents.

The instant matter had been tried in the High Court without a jury and the relevant Chapter of the CPC is chapter XV111 B commencing from Section 196 of the CPC.

If one may go through the above mentioned sections, it refers to procedure to be adopted before the commencement of the trial (before the judge) and it says very

clearly that if the accused puts forward a plea of guilt for a lesser offence the Judge and the Attorney General both has to be satisfied with the plea of the accused but if the accused does not plead to a lesser offence the trial must commence and proceed which means that it is at the very beginning and not when the trial has commenced that the sanction of the Attorney General is required, the proceeding sections are very clear on this.(Section 198 and 199(1)). At this point this Court thinks it's most fit to quote Maxwell on Interpretation of Statutes at page 47 where it has been stated that "a statute is to be read as a whole….to make a consistent enactment of the whole statute". Therefore, instead of an isolated reading of Section 197 of the CPC, one must read the Section from 195 and onwards to understand the meaning of Section 197 of the CPC.

Further to above in cases where it is a before jury also it has been said that at the very commencement of the trial when the accused is brought before Court at very commencement of the trial as per Section 205 of the CPC that "if the accused pleads guilty to the indictment or a lesser offence …. the provision of the Section 197 of the CPC shall apply".

Therefore, according to the provisions set out in the CPC commencing from Section 195 onwards up to Section 207 or so, it is at the very commencement of the trial that the sanction of the Attorney General is needed for Court to accept a plea.

Another argument taken up by the Counsel for the petitioner is that, in the instant matter the respondents have been charged with murder and if the respondents were to plead for a lesser offence the indictment needs to be amended, which has to be done by the Attorney General.

The provisions pertaining to amendment of indictment is at Section 167 of the CPC, which reads as *"Any Court may alter any indictment or charge at any time before judgment is pronounced …..,", which does not speak of a sanction of the Attorney General to amend the charge, the proceeding Sections are very clear that if Court thinks it is fit to charge and convict the accused for an offence other than for what he has been indicted for Court may do so at any time before the judgment is pronounced subject to the provisions of sections 168 to 171 of the CPC..*

Therefore, this Court is unable to agree with the above two contentions of the petitioner.

In the written submissions filed by the Counsel for the petitioner it has cited the case of CA(APN)105/14, where it has been stated that in the interest of justice that the Court can override the discretion of the State Counsel and amend the indictment ex mere motto.

Hence it is to be construed from the submission of the petitioner that the High Court Judge has acted in the best interests of justice in accepting the plea for a lesser offence sans the sanction of the Attorney General.

Gunasekara J in ***Attorney General vs Mendi's (1995) 1 Sri L.R 138*** was of the opinion that "*once an accused is found guilty and convicted on his own plea, or after trial, the Trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other. In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime in so far as the institution or organization in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime.* ***The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not to surrender this sacred right and duty to any other person, be it counsel or accused or any other person. Further he went on to state that whilst plea bargaining is permissible in our view, sentence bargaining should not be encouraged at all and must be frowned upon".*** It is safe to say that this view still remains as a fundamental aspect of this court and sentence bargaining is still something that is to be frowned upon.

The Counsel for the petitioner further submitted that if one may go through the facts of the case the sentence imposed on the respondents are grossly inadequate. But this Court notes that the High Court Judge has heard the entirety of the evidence against both parties and had considered the submissions of both parties in sentencing the respondents. Therefore this Court is unable to agree with the contention regarding the inadequacy of the sentence.

But this Court is in agreement with the submissions of the petitioner that the High Court Judge has not stated on what basis he is accepting the plea of guilt for a lesser offence, which this Court asserts is an illegality in the conclusion of the High Court Judge, and this Court has to consider whether it has caused any prejudice to either party.

In the instant matter the High Court Judge had acquitted the 3rd respondent considering the evidence against him which of only participatory nature and him being below 15 years of age at the time of the offence.

The 1st, 2nd, 4th, 5th, and the 6th respondents had been sentenced according to the culpability of each one of them but had failed state the basis upon which the plea had been entered. But this Court notes that that the High Court Judge had heard the evidence led against both parties in its entirety and had considered the submissions of both parties oral and written both and has proceeded to sentence without mentioning the basis upon which the charged had been amended. As such this Court is of the opinion that it has not caused any prejudice to either party.

It has been held in the case of *Lional vs. OIC Meetiyagoda Police Station 1987 (1) SLR 210* and in the case of *Edwin Singno vs. Jayasinghe 48 NLR 349* that if there is no failure of justice, minor irregularities are curable under provisions of the CPC. The chapter which deals with the irregularities in the proceedings in COC is in chapter XXX1X and section 436 specifically deals with error omission and irregularity in proceedings.

As such in view of the cases cited above this Court is of the opinion that the failure on the part of the High Court Judge to mention the basis upon which he has accepted the basis under Section 297 of the Penal Code, it has not caused any prejudice to either party as per circumstances mentioned above.

As such this Court sees no exceptional reason to set aside the order of the High Court, hence the instant application for revision is hereby dismissed.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court of Appeal.