

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an Application for Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka to be read with Section 364 of the Code of Criminal Procedure Act No. 15 of 1979 as amended.

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

Complainant – Petitioner

Court of Appeal Revision Application
Case No: **CA (PHC) APN 110/ 2017**

High Court of Avissawella Case No:
HC 57 /2009

Vs.

1. Gamage Ruwan,
No: 400, Kuduwatte Road,
Kiriwathtuduwa,
Kahathuduwa.

2. Don Prabu Kotalawala
No: 156, Magamma,
Homagama.

AND NOW IN BETWEEN

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

Complainant Petitioner

Vs.

1. Gamage Ruwan
2. Don Prabu Kotalawala

Accused – Respondent

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Suharshi Herath, DSG for Attorney General.

Neranjana Jayasinghe for 2nd Accused – Respondent.

Argued on: 07.06.2022

Decided on: 27.06.2022

MENAKA WIJESUNDERA J.

The instant revision application has been filed to revise the Order dated 05.01.2017 of High Court of Avissawella. In the instant matter the accused respondents were indicted in the High Court under Section 315 of the Penal Code.

In the High Court the victim had stated that he is not interested in pursuing the matter as it has taken seventeen years after the incident to reach the current

status. Therefore, both accused respondents have pleaded guilty, and they have been convicted with a fine of Rs. 10,000 and two years simple imprisonment. Thereafter, they have been ordered to pay Rs.30,000 as compensation to the victim, in default two years of imprisonment.

The first accused respondent who has had a previous conviction has been fined Rs.25,000 in default one year simple imprisonment for the case which had been at Kesbeewa Magistrate's Court.

The first accused respondent has had a another previous conviction from the Magistrate's Court of Rathnapura for which he had been once again fined Rs.25,000 and in default one year simple imprisonment.

The second accused respondent also has had a previous conviction and he had been also fined Rs.25,000 and in default one year simple imprisonment.

The main grievance of the counsel appearing for the petitioner is that the sentence imposed on the second accused respondent for the previous conviction is inadequate because at the time of sentencing, he had been convicted with a death sentence.

There was no appearance for the first accused respondent. But the counsel appearing for the Attorney General did not seriously canvass a case against him. But she vehemently objected to the sentence imposed for the previous conviction of the second accused respondent because according to her it's a death sentence and the High Court judge should have been more careful and stringent in imposing the sentence.

The counsel, who appeared for the second accused respondent, took up the position that the victim in the instant matter had not been interested in

pursuing the matter, because a long period of seventeen years has lapsed since the incident. The victim in open court had stated that he did not even want compensation but he was only interested in concluding the matter. It is actually this statement of the victim which had prompted the accused respondents to plead to the indictment.

But the counsel for the Attorney General stated that the statement of the victim does not take away the severity of the sentence imposed on the second accused respondent by the trial judge for the previous conviction and the High Court judge in the instant matter should have taken the matter more seriously and acted accordingly.

The counsel appearing for the second accused respondent further stated that the petitioner had not,

- 1) averred exceptional circumstances
- 2) has not exercised the right of appeal
- 3) had not complied with Rule 3(1)B of the Court of Appeal Rules 1990 and Rule 46 of the Supreme Court Rules , as such the instant application should be dismissed in limine.

On considering the submissions of both parties it is very settled law that when a party files a revision application, the party filing the same must plead the exceptional circumstances.

It is so said in *Darmarathne and another v Palm paradise Cabana Ltd and others 2003 3SLRpage 24* and in many other cases.

In the instant matter, this Court observes that counsel for the petitioner did not aver exceptional circumstances per say but she brought to the notice of this

Court the inadequacy of the sentence imposed by the High Court judge in respect of the previous conviction of the second accused respondent.

Therefore, this Court has to decide whether it is exceptional enough to shock the conscious of this Court. According to the submissions of both parties, the second accused respondent had been **sentenced to death but on appeal** and had been indicted in the High Court of Avissawella for a charge of Section 315 of the Penal Code which sets out a sentence of imprisonment of either description for a term which may extend to three years or with fine or with both. In the instant matter, the High Court judge had imposed an imprisonment and fine and it is a sentence which is entirely within the law. Thereafter he had proceeded to consider the previous convictions of the accused respondents and have acted under Section 303 (13) (iv) of the Criminal Procedure Code which says “ ***make no order with respect to the suspended sentence, and may in addition, impose a fine not exceeding twenty-five thousand rupees on such person***”.

But the sentence and the fine imposed for the previous conviction of the second accused respondent is within the framework of Section 303(13) (iv) of the Criminal Procedure Code. Therefore, there is no illegality in the said sentence, but of course there are certain guidelines which have been laid down under Section 303(1) (a) to (l) of the Code of Criminal Procedure Code which are not imperative on the judge but is discretionary. Therefore, as there is no illegality but only exercising the discretion laid down under Section 303(1) of the Criminal Procedure Code, this Court sees no exceptionality which amounts to an illegality to exercise the powers of revision of this Court.

This Court also takes into consideration the principles laid down in **AG v Walgama Kodithuwakkuge** decided on 05.08.2014 **CA 306/2012** in which

another division of this bench has decided that **“the Court has the discretion to impose a suspended sentence....., if a trial judge wishes to impose a suspended sentence reasons to be stated in writing”** and the judgment refers to a quote of his Lordship **BasnayakeA.C.J** which says **“in determining the proper sentence, a judge should look at both sides of the picture”**

In the case of ***Democratic Socialist Republic of Sri Lanka vSamantha Kumara Pandithase and others*** decided on 13.06.2016 **CA (PHC) APN 35/2015** which says **“Section 303 (1) of Code of Criminal Procedure Act No.15 of 1979 as amended by Act No.47 of 1999 requires the learned judges to record the reasons for proceeding to suspend the sentences imposed”**.

In the instant matter the trial judge has recorded his reasons for acting under Section 303 of the Code of Criminal Procedure.

Hence, this Court sees no exceptional reason to allow instant application for revision. As such the Order dated 05.01.2017 is affirmed and the instant application for revision is dismissed.

Judge of the Court of Appeal.

I agree

Neil Iddawala J.

Judge of the Court of Appeal.