

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

*In the matter of an application for
Revision made under Section 138 of the
Constitution read with Section 364 of the
Code of Criminal Procedure Act No 15 of
1979*

Court of Appeal Application
No: **CA/PHC/APN/70/17**

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

High Court of Anuradhapura
No: **RA 39/2015**

Vs.

Complainant

Magistrate's Court of
Anuradhapura
No: **51459**

Herath Mudiyansele Amal Prasad
Buddhika
Karambawa,
Galkadawala

Accused

And now

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

Complainant-Petitioner

Vs.

Herath Mudiyansele Amal Prasad
Buddhika
Karambawa,
Galkadawala

Accused-Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Maheshika Silva DSG for the Petitioner
Sarath P. Walgamage with Himesha
Chathuri the Respondent.

Argued on : 27.07.2022

Written Submissions on : By Accused Respondent on 09.08.2022

Decided on : 14.09.2022

Iddawala – J

This is a revision application filed by the State canvassing an order dated 27.06.2016 delivered by the High Court of Anuradhapura in Case No RA 39/2015, which set aside a conviction and sentence delivered under the Antiquities Act No 09 of 1940 as amended Act No 24 of 1998 (*hereinafter the Ordinance*) in the Magistrate’s Court of Anuradhapura. Proceedings of the matter commenced in 2017, and on 27.07.2022, the case came up for argument before this Court. On the day, a Deputy Solicitor General was present on behalf of the petitioner while the respondent was unrepresented. A perusal of the Journal Entries notes that the respondent was previously represented on several occasions, and a Statement of Objections was filed on 04.04.2022. Hence, this Court reserved its judgment, allowing both parties to file written submissions

before 10.08.2022. The respondent filed their written submissions on 09.10.2022

The factual background of the instant application is as follows. The 3rd accused respondent (*hereinafter the respondent*) and four others were arrested and charged before the Magistrate's Court of Anuradhapura in Case No 51459, under Section 15(1)(a) of the Ordinance. The respondent, a labourer of the Department of Archeology, and four others were found carrying out an unauthorized excavation close to the bund of the ancient tank named 'Karambawewa' situated in Katukeliyana, Anuradhapura. All except the respondent has fled the site upon detection. The information reported to the Magistrate details that the excavation was carried out targeting a rock that had emerged from within the tank. Tent material has been used to conceal the excavation site from passersby. The facts reported by the police list the items recovered from the site, which included several crowbars weighing between 2 – 8 pounds, multiple pickaxes and other similar tools. A report has been issued by the Department of Archeology pertaining to the excavated site, which records, *inter alia*, the following:

“07. ස්ථීර මාර්ගය හේතුවෙන් දෙකඩ වී ඇති වැවෙහි දකුණු පස පිටවන කොටස වැව් බැම්මට යාබදව දිග, පළල හා ගැඹුර මීටර් 7 x 7 x 6 වන සේ පාංශු ස්ථරය ඉවත් කරමින් සිදු කර ඇති කැණීම මගින් පුරාවස්තු විනාශයක් සිදු වී නොමැත. කැණීමෙහි හෝ ඒ අවට භූමිය මතුපිට පුරා සාධක කිසිවක් අනාවරණය නොවේ.

08. එසේ වුවත් මෙම අනවසර කැණීම සිදු කර ඇති ආකාරය හා ස්ථානයේ ස්වභාවය අනුව පුරාවස්තු සෙවීමේ අරමුණින් සිදු කළ බවට ප්‍රමාණවත් සාක්ෂි තිබේ නම් මෙම සිද්ධියට සම්බන්ධ සැකකරුවන්ට එරෙහිව 1940 අංක 09 දරන පුරාවස්තු ආඥා පනතේ 06 වන

වගන්තියට අනුව නීතිය මගින් ක්‍රියාකරන මෙන් කාරුණිකව දැනුම් දෙමි”.

The respondent and 1st and 4th accused pleaded guilty to charges of conducting an excavation without an authorized permit with the intention of finding antiquities near the bund of the Karambewewa tank, which constitutes offences under Sections 6 read with Section 15(1)(a) of the Ordinance and Increase of Fines Act No 12 of 2005. Accordingly, a sentence of 1-year imprisonment suspended for ten years and a fine of Rs. 50,000/- were imposed (vide page 38 of the Brief). The respondent paid off the fine in instalments and made the final payment on 15.12.2014 (vide page 40 of the Brief).

Aggrieved by the sentence, the respondent filed a revision application to the High Court. In the said petition, the respondent avers that he has lost his employment as a government servant due to the fine imposed upon conviction (Vide Page 7 of the Brief). In the petition filed before the High Court, the respondent avers that the Charge Sheet filed before the Magistrate is illegal (Vide Page 7 of the Brief). In support of the said submission, the respondent has averred that as no antiquities were found near the excavation site and neither were any antiquities harmed during the excavation process, charges cannot be framed under Section 15(1)(a) of the Ordinance. During oral submissions, the counsel for the respondent has contended that the plea of guilty by the respondent cannot be justified due to the defective Charge Sheet (vide page 47 of the Brief).

On 27.06.2016, the learned High Court judge acquitted the respondent from all charges. In the said order, the learned High Court judge notes that the State Counsel representing the complainant (*hereinafter the petitioner*) has not objected to the relief prayed for by the respondent and

assents to the revision of the conviction and sentence by the Magistrate dated 15.12.2014. The impugned order refers to the Archeology Report and notes that no antiquities were found near the site and that no antiquities were harmed due to the excavation (vide Page 56 of the Brief). The learned High Court judge observes the following vide Page 56 of the Brief:

"ඒ අනුව බැඳූ බැලීමට ඉදිරිපත් කර ඇති චෝදනාව පවත්වාගෙන යා නොහැකි බැවින් සහ ඒ බව රජයේ අධිකාරියේ මහත්මිය පිළිගන්නා බැවින් අනුරාධපුර මහේස්ත්‍රාත් අධිකරණ නඩු අංක 51459 දරන නඩුවට අදාළව 2014.02.17 වන දින කර ඇති වරදකරු කිරීම සහ දඩුවම් නියම කිරීම සම්බන්ධයෙන් මෙම අධිකරණය සතු ප්‍රතිශෝධන බලය භාවිතා කරමින් එය ඉවත් කිරීමට මම තීරණය කරමි".

Aggrieved by the said order, the petitioner has filed the instant application seeking to revise the order dated 27.06.2016. The petitioner claims the impugned order to be illegal as the learned High Court judge has erred in law by insisting on the discovery of antiquities/ harm caused to antiquities as a requirement under Section 6 read with Section 15(1)(a) of the Ordinance. Petitioner relies on Section 6 of the Ordinance in support of this contention, stating that the only requirement under the Ordinance is the establishment that the excavation was done to discover antiquities. The counsel contended that the learned High Court judge has failed to make an independent assessment on the application of Section 15 of the Ordinance, as amended, and has acted in contravention of the law.

The Charge sheet filed against the respondent refers to Section 6 and Section 15(1)(a) of the Ordinance. Section 6 provides the following:

No excavation
except upon
licence from
Director-General
of Archaeology.

6. Subject as hereinafter provided, no person shall excavate for the purpose of discovering antiquities, whether on land belonging to himself or otherwise, except under the authority of a licence issued by the Director-General of Archaeology:

Provided that nothing in this section shall apply to any excavation carried out by or on behalf of the Director-General of Archaeology.

Section 15(1)(a) of the Ordinance (as amended by Increase of Fines Act No 12 of 2005) provides for offences relating to the discovery of antiquities and stipulates that “*every person who excavates in contravention of the provisions of Section 6; shall be guilty of an offence and shall on conviction after summary trial before a Magistrate be liable to a fine not less than fifty thousand rupees and not exceeding two hundred and fifty thousand rupees or to imprisonment of either description for a term not exceeding one year..*” A plain reading of the applicable law reveals that there is no requirement for the existence of antiquities as an element of the offence contained in Section 6 read with Section 15(1)(a) of the Ordinance. One cannot read into the law an element that the legislature did not envision. The *actus reus* stipulated in Section 6 is an unlicensed excavation, which has been undisputed in the instant case, and the *mens rea* is ‘the purpose of discovering antiquities’—the instant application pivots on the latter element. In the respondent’s written submissions, it is averred that as the excavated site is a ‘non-archaeological site’, the intention of the respondent to excavate cannot mature into a purpose of discovering antiquities (Vide Paragraph 2). However, the respondent in his written submissions does not provide any indication as to why the respondent deemed the site to be ‘non-archaeological’. This assessment seems to be based on the excavation findings after the fact. The unambiguous language utilised by the legislature in framing Section 6 of the Ordinance manifests that the existence of antiquities or the lack thereof is immaterial to constitute an offence under the Ordinance. Section

6 must be read in consonance with the rest of the Ordinance. Had the legislature intended to import the recognition as an 'archaeological site' within Section 6, the legislature would have referred to Sections 24 or 33 of the Ordinance. The former refers to prohibited areas in the vicinity of certain monuments designated by regulations, and the latter archaeological reserves as specified by Gazette notifications. Instead, a blanket recognition has been against unlicensed excavations, either on private land or otherwise, **for the purpose of discovering antiquities**. Hence, going by the precise, unambiguous wording of Section 6 of the Ordinance, the existence or otherwise of antiquities in the excavation site is immaterial for a conviction under Section 15(1)(a) of the Ordinance. No distinction has been made in Section 6 of the Ordinance between 'archaeological sites' and 'non-archaeological sites', but rather the legislature has focused on the mental element of the person conducting the excavation, i.e., purpose. In assessing what constitutes the 'purpose', one must note that the inability to achieve the result of the purpose does not vitiate the purpose itself. Hence, the question that needs to be answered is whether the respondent has excavated for the purpose of discovering antiquities.

The respondent in his written submissions has failed to provide any reasons as to why the respondent 'intended' to excavate the site in the first place, if not for the purpose of discovering antiquities. In any event, the purpose of the excavation can be ascertained from the facts and circumstances of the case. The respondent is a labourer at the Department of Archaeology. This is indicative of the respondent's knowledge of the gravity of conducting an unlicensed excavation for the purpose of discovering antiquities. Unlike an ordinary person, the respondent ought to know that antiquities cannot be restored once damaged or otherwise removed. The respondent has pleaded guilty to the charges levelled against him under the Ordinance, and it is hard to assume that he was unaware of the nature and gravity of the offence he has been charged with. Moreover, the respondent has paid off the fine imposed upon him by the Magistrate. Added to this knowledge, the location of the excavation, which is in close proximity to an ancient tank, the premeditation as

evinced by the list of tools utilised, and the absence of any other plausible reason for the excavation conducted point to the fact that the respondent has excavated for the sole purpose of discovering antiquities near or around the ancient tank. Being an employee of the Department of Archaeology, the respondent cannot plead ignorance or otherwise contend that he participated in an offence without knowledge. The respondent carries a duty of care to ensure that areas with a strong likelihood of carrying antiquities are protected. Thus, it is the considered view of this Court that the purpose for which the respondent has conducted the excavation is for the discovery of antiquities.

The learned High Court Judge has misdirected himself by insisting on the existence of antiquities when examining the offences, the respondent has been charged with. It appears that the learned High Court Judge has misdirected himself as to the applicable law by insisting on the existence of antiquities, weighed in the acquiescence of the State Counsel representing the petitioner to invoke the revisionary jurisdiction. This is a grave irregularity that cannot be condoned. The revisionary jurisdiction cannot be invoked by consent, and it can only be permitted in the event there is illegality, impropriety or irregularity in an order which has caused a miscarriage of justice. Hence, it is the duty of the judge acting in revision to examine the facts and law before him, independent of the consent or otherwise of the opposing party.

At this juncture, it is pertinent to comment on the role played by the State Counsel representing the petitioner before the High Court. The State Counsel has consented to the revision application; beyond that, the Case Brief records no other submissions supporting such consent. However, proceedings dated 09.09.2015 notes a brief submission by a State Counsel for the petitioner objecting to the revision application, noting that as the respondent is an employer of the Department of Archaeology, he carries a higher standard of duty under the Ordinance to abide by the law as opposed to a layperson. However, this line of argument has drastically changed as evinced by the impugned order whereby the learned High Court judge has stated that the State Counsel has consented to the revision application. A State Counsel cannot

mechanically consent to an application and expect their duty to end. Whilst a presiding judge must conduct a genuine evaluation of the matter before him, this does not alleviate the burden on a State Counsel to make an appraisal of the applicable law. In doing so, Legal Officers of the State foster public interest by acting in the interest of the State as opposed to any individual attachment. Hence, their role is not to defend errant public officials at any cost but rather to assist the judiciary in dispensing justice. Supreme Court (Conduct of and Etiquettes for Attorney-at Law) Rule 52 provides that it shall be the duty of an Attorney-at-Law appearing for the prosecution to bring to the notice of the court any matter which if withheld may lead to a miscarriage of justice. A State Counsel owes the same duty to the court, as indeed counsel appearing in all matters, to quote all relevant statutory provisions and cases whether for or against the prosecution. Even judges should administer justice according to the law of the land. Ultimately it is the sacred and utmost duty of a judge to follow this accepted norm when he/she administers the law.

Considering the above evaluation, this Court is of the opinion that the learned High Court Judge's order dated 27.06.2016 is irregular and contrary to law. Hence, this Court hereby revises and sets aside the order of acquittal imposed against the respondent by the learned High Court Judge of Anuradhapura in Case No. RA 39/2015 dated 27.06.2016.

Having set aside the impugned order, it is necessary to examine the order of conviction and sentence imposed by the Magistrate on 17.02.2014. Upon a guilty plea by the accused, the Magistrate passed a conviction on 17.02.2014 (Vide page 37 of the Brief). After that, the Magistrate imposed a fine of Rs. 50,000/- and a term of 1-year imprisonment suspended for ten years. This Court notes that Section 15(1)(a) of the Ordinance stipulates that upon conviction, a person will "*be liable to a fine not less than fifty thousand rupees and not exceeding two hundred and fifty thousand rupees **or** to imprisonment of either description for a term not exceeding one year.*". Therefore, this Court resolves that the Magistrate has erred in law by imposing both a fine and a term of imprisonment upon the accused, including the respondent. In consideration

of the said error, this Court hereby varies the sentence imposed by the Magistrate's Court of Anuradhapura in Case No 51459 dated 17.02.2014 and disposes of the term of imprisonment imposed. This Court notes that the respondent has already paid off the fine imposed.

Subject to the above variance, the conviction and sentence imposed by the learned Magistrate is affirmed.

Application allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL