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 article 138 of the Constitution read together with section 365 of the code of criminal procedure Act No. 15 of 1975 against the order dated 11/03/2022 of the High Court of Colombo.

Court of Appeal Case No: **CPA / 62 / 2022**

High Court of Colombo Case No: **HC/ 2281 / 2005**

The Democratic Socialist Republic of Sri Lanka.

Plaintiff

Vs.

Sudath Kumara Perera

Accused

AND NOW BETWEEN

Sudath Kumara Perera

Accused – Appellant – Petitioner

Vs.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

Respondent

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Muditha Perera with Nihal Weerasinghe for the Accused – Appellant – Petitioner

Lakmini Girihagama, DSG for the Respondent.

Argued on: 09.08.2022

Decided on: 06.09.2022

MENAKA WIJESUNDERA J

The instant application of revision has been filed to revise the order dated 11.03.2022 of the High Court of Colombo. The Counsel for the accused appellant petitioner (hereinafter referred to as the petitioner) stated that the petitioner had been indicted under **Section 364** and **345** of the **Penal Code**.

Trial against the petitioner had been concluded and he had been convicted with a sentence of 15 years rigorous imprisonment, compensation and a default sentence. The petitioner had lodged an appeal against the conviction and the Court of Appeal has set aside the sentence and conviction on the basis that the petitioner has not been given a fair trial because the learned High Court Judge had misdirected herself by commenting on the Appellants failure to give evidence. Therefore, the Court of Appeal had ordered a re-trial.

Once the re-trial has commenced Witness No.1 who is the victim in the instant matter had been abroad and Witness No.2 had been dead. Therefore the prosecution has made an application under **Section 33** of the **Evidence Ordinance** to adopt the evidence led in

the initial trial. The petitioner had objected but nevertheless, the learned High Court Judge had allowed the application. The said Order is currently on review.

The Counsel appearing for the respondent vehemently objected for notices being issued in this matter on the basis that the Court of Appeal in ordering a re-trial had based the judgment on the fact that the learned Trial Judge had chosen the right of the petitioner to make a Dock Statement instead of giving evidence is a misconception of the law relating to the rights of the accused. The Counsel for the respondents strenuously argued that the Court of Appeal had not evaluated the evidence but has only relied on the principle of a fair trial stemming from the Learned High Court Judge's comment with regards to the petitioner's Dock Statement and had not commented on the evidence led at the trial. Therefore, she further commented and stated that the Witnesses No. 1 and 2 have been led in evidence and have been very lengthily cross examined in the high court during the initial trial and as such falls within the meaning of **Section 33** of the **Evidence Ordinance**. As such she commented the learned High Court Judges impugned order is not illegal or capricious on the face of it.

Having considered the submissions of both parties we note that, at this juncture what this Court has to consider is whether there is a case to be reviewed on the face of the record, as per the latest judgment, by **Arjuna Obesekara J. of the Supreme Court in SC Appeal No.59 of 2021** where it was held that "***Appellant must establish a prima facie case of an illegality which warrants full investigation with the participation of all parties ….".***The same judgment has further said that ***"the power of revision is an extraordinary power. A person invoking the revisionary jurisdiction of the Court of Appeal must inter alia (a) demonstrate the error or illegality on the face of the record which would occasion a failure of justice and (b) plead and establish exceptional circumstances warranting the exercise of revisionary powers in order to succeed with his or her application. The presence of exceptional circumstance is the process by***

which the Court selects the cases where the extra ordinary power of revision should be exercised" .Therefore what this Court must decide at this juncture is whether there is a prima facie error or irregularity established in the order in review to issue notice on the respondents.

Keeping the principles laid down in the above case, this Court draws its attention to another judgment of the **Supreme Court SC Appeal 7/2004** by **Justice Marsoof** where **Section 33** of the **Evidence Ordinance** has been extensively analyzed. In the same judgment their Lordships have quoted **ERSR Kumaraswamy**, **The Law of Evidence, Vol 1 (pages 492 to 493)** where it has been stated, ***"the Court has to exercise the power given in Section 33 with great caution and must insist on strict proof before holding that the witness is dead or cannot be found or has become incapable of giving evidence or has been kept out of the way by the adverse party or his presence cannot be secured without an unreasonable amount of delay and expense. But once any of the first four conditions of death, not being found, incapacity to give evidence, or being kept out of the way by the adverse party has been proved , the Court has no discretion and must admit the deposition , since Section 33 declares such deposition to be relevant and therefore admissible".*** The judgment further says that, ***"Kumaraswamy concedes that a Court of law does have the discretion with respect to the last condition in Section 33 relating to a witness whose presence in court cannot be obtained without an amount of delay or expense which the Court decides to be unreasonable. The present case does not arise from such a situation and there is no such a way for a dead witness to give evidence."***

In the instant matter the respondents have taken steps to satisfy the Learned High Court judge that Witness No. 1 and 2 cannot be brought to Court without unreasonable delay. Therefore, the High Court Judge has held that the said steps taken by the respondents fall within the ambit of the **Section 33** of the **Evidence Ordinance.**

Hence, on the face of the record the impugned Order cited by the petitioner does not envisage a situation which is irrational, illegal and capricious under the law which amounts to be exceptional to invoke the powers of revision as stated by the Supreme Court in the above quoted cases.

This court also notes that the Court of Appeal in the Appeal lodged by the petitioner against the conviction and the sentence have based the judgment on the petitioner of not having a fair trial is purely on the comment by the trial judge with regards to the petitioner not giving evidence from the dock and adopting to make a dock statement. In fact, this Court is of the view that the Court of Appeal has ordered a re-trial for the reason that there was evidence to be considered given by the Witnesses. Therefore, in ordering to adopt the evidence of PW 1 and PW 2 by the learned High Court Judge is not exceptional enough to issue notices on the respondents to act in review. As such, notices on the respondents are refused and the application is dismissed.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court Of Appeal.