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

In the matter of an application for Judicial Review under Article 138 and 139 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA Revision Application No.
CA/PHC/APN/95/2018
HC Embilipitiya No.19/2006

Rathnayake Wasala Mohottilage Rathnasiri
alias Ralahamy presently at Walikada
Prisons, Colombo 09.

ACCUSED-PETITIONER

Vs.

The Attorney General
Attorney General's Department
Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Nagitha Wijesekara for the Accused-Petitioner.

: Chathurangi Mahawaduge, S.C. for the Respondent.

Argued on : 19-01-2023

Decided on : 24-02-2023

Sampath B. Abayakoon, J.

This is an application by the accused petitioner namely, Rathnayake Wasala Mohottilage Rathnasiri *alias* Ralahamy (hereinafter referred to as the petitioner) invoking the extraordinary revisionary jurisdiction of this Court in order to challenge his conviction and the sentence in the High Court of Embilipitiya Case No.19/2006.

This is a case where the petitioner was indicted before the High Court for causing the death of one Handunneththige Piyadasa De Silva on 24-11-1991, and thereby committing the offence of murder, punishable in terms of section 296 of the Penal Code.

The indictment has been served on the petitioner on 02-08-2002 and the trial has been fixed for 28-12-2002. After his initial appearance before the High Court, the petitioner has absconded the Court and as a result, procedure in terms of section 241 of the Code of Criminal Procedure Act has been followed, and the trial has taken place in his absence on the basis that he is willfully absconding the Court.

Although the indictment has been filed before the High Court of Rathnapura and the trial in absentia has also been fixed against the petitioner by the same Court, since the establishment of a new High Court in Embilipitiya, this case has been transferred to the High Court of Embilipitiya and the trial has been proceeded before the said Court.

At the conclusion of the trial, learned High Court Judge of Embilipitiya pronouncing her judgement on 17-11-2008 has found the petitioner guilty as indicted and he has been sentenced to death in his absentia.

An open warrant has also been issued against the petitioner.

Subsequently, the petitioner had been arrested and produced before the learned High Court Judge of Embilipitiya on 30-07-2013. The petitioner has claimed that he is not the person mentioned in the indictment, namely Rathnayake Wasala Mohottilage Rathnasiri *alias* Ralahamy, but his name is Handunneththige Somasiri. This has prompted the learned High Court Judge of Embilipitiya to call for a fingerprint report of him and to initiate an inquiry in order to find out whether this is the same person mentioned in the indictment and convicted in absentia. On a subsequent day, after finding that his deception has not worked, the petitioner has admitted that he is the person mentioned in the indictment.

Subsequently, the petitioner has been allowed to make an application in terms of section 241 (3) of the Code of Criminal Procedure Act, allowing him to satisfy the Court that his absence from the trial was due to *bona fide* reasons.

The learned High Court Judge, by his Order dated 06-05-2014 had found that the reasons given by the petitioner cannot be accepted and had rejected his application. Accordingly, the learned High Court Judge of Embilipitiya has ordered that the sentence be carried out against the petitioner.

Thereafter, the petitioner has filed an appeal challenging his conviction and the sentence, however, he has withdrawn his appeal as an objection has been raised that the said appeal has been filed after the lapse of the statutory time period provided to a person aggrieved by a conviction and a sentence to prefer an appeal to the Court of Appeal.

It is after the said withdrawal, the petitioner has filed this application in revision challenging his conviction and the sentence.

Revision is a discretionary remedy vested with the Court of Appeal, which can be exercised only upon exceptional grounds.

It was held in the case of **Hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd. (1987) 1 SLR 05** that;

> *"It is settled law that the exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In the case of **Wijesinghe Vs. Thamaratnam, (Srikantha Law Reports Vol-IV page 47)** it was held that;

> *"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the Court."*

In the case of **Vanik Incorporation Ltd. Vs. Jayasekare (1997) 2 SLR 365** it was held thus;

> *"Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

In his petition before this Court, the petitioner has averred the following grounds as exceptional grounds for him to invoke the revisionary jurisdiction of this Court.

1. The evidence adduced in the case ex facie is insufficient to justify a charge of murder.
2. The judgement of the learned Trial Judge is completely contrary to the evidence available in the case.
3. The learned Trial Judge has totally disregarded the basic principle of right to private defence.

4. The man who is entitled to be acquitted currently facing a death penalty without any legal justification.
5. A grave injustice and prejudice have been caused to the accused-petitioner.
6. There arises a situation where a delay can be excused.
7. The learned Trial Judge has totally disregarded evidence recorded which warrants justification of culpable homicide not amounting to murder (exception 4 of Section 294 of the Penal Code).
8. The entire facts and the circumstances are sufficient to shock the conscience of the Court.
9. The judgement of the learned Trial Judge marked P-13 and the sentence marked P-14 and P-14a is erroneous and defective.
10. A failure of justice will definitely occasion to the petitioner provided Your Lordship's Court does not intervene to rectify errors of the said judgement and sentence.

Objecting to the said application on behalf of the respondent, the Hon. Attorney General, it has been pointed out that since this is invoking the discretionary remedy of revision of this Court, it was incumbent upon the petitioner to provide exceptional grounds to the Court. It was the position of the respondent that the grounds averred by the petitioner are grounds that cannot be considered as exceptional.

Furthermore, it was the contention of the respondent that the accused is guilty of contumacious conduct and hence not entitled to invoke the revisionary jurisdiction of the Court of Appeal and the petitioner has failed to properly explain the inordinate delay in filing this revision application before the Court of Appeal.

When this matter was argued before this Court, it was the contention of the learned Counsel for the petitioner that the facts of this matter as revealed before the learned High Court Judge points to a conviction in terms of section 297 of

the Penal Code on the basis of culpable homicide not amounting to murder and the learned High Court Judge has failed to properly analyze the evidence in that regard. It was his position that a conviction for murder even though the petitioner has failed to appear before the Court cannot be justified and hence the conviction should not be allowed to stand.

The learned State Counsel for the respondent was of the view that this is a matter where the petitioner has gone in search of the deceased and caused fatal injuries to him by using a knife carried by him. It was her position that there was no evidence placed before the trial Court that this was a result of a sudden fight or a provocation by the deceased.

It was her view that the learned High Court Judge has well considered the facts and the circumstances and pronounced her judgement with sound reasoning, which need not be disturbed as there are no material to conclude that the conviction and the sentence would shock the conscience of the Court.

As pointed out correctly by the learned State Counsel this being a revision application, the petitioner needs to establish exceptional grounds for him to invoke the extraordinary discretionary remedy of revision which exclusively vests with this Court.

Although the petitioner has claimed that his delay in filing this application can be excused, I do not find any reasons for such a conclusion. The petitioner has evaded his trial and has failed to prefer an appeal against his conviction and the sentence within the time stipulated by law. He has appeared before the Court only after he was arrested, and even then, he has claimed that he is not the person mentioned in the indictment. He has failed to give sufficient reasons to the learned High Court Judge of Embilipitiya to establish that his failure to appear before the Trial Court was due to *bona fide* reasons.

He has only filed this application in revision after his appeal against the conviction and the sentence was withdrawn by him when the respondent took

up a legal objection to it. A person who conducts himself in such a manner cannot claim that his delay should be excused.

In the case of **Sudharman De Silva Vs. The Attorney General (1986) 1 SLR 9**, it was held that the right of appeal is a statutory right and even a person who absconds the trial has a right to prefer an appeal against the conviction and a sentence in terms of section 14 of the Judicature Act.

However, it was held that in an application to the Court of Appeal where the exercise of its discretion is invoked, contumacious conduct on the part of the appellant is a relevant consideration as in the instant application before the Court.

Be that as it may, when it comes to the facts that had been elicited by way of evidence before the trial Court and the judgement pronounced by the learned High Court Judge of Embilipitiya is concerned, I am not in a position to agree with the learned Counsel's contention that the conviction should have been in terms of section 297 of the Penal Code. I find that the learned High Court Judge has well considered whether there was any evidence to bring the charge of murder down to that of a culpable homicide not amounting to murder. She has found that the petitioner has come looking for the deceased armed with a knife and had attacked the deceased. Considering the evidence placed before the Court, the learned High Court Judge has determined that this was an intentional act which would not fall under the exceptions of section 294 of the Penal Code. The learned High Court Judge has also considered the petitioner's failure to give a reasonable explanation as to the highly incriminating evidence placed before the Court against him which shows that the offence committed by the petitioner was murder and nothing else.

Although the petitioner has stated right to private defence as one of his exceptional grounds, there was no material before the trial Court to consider the facts and circumstances in such a manner.

I do not find any reason to conclude that the conviction and the sentence shocks the conscience of the Court. On the contrary, I am of the view that the learned High Court Judge, after considering all the evidence placed before the Court has come to a correct finding and convicted the petitioner for the offence of murder.

For the reasons mentioned as above, I find no reasons to interfere with the conviction and the sentence of the petitioner by exercising the discretionary remedy of revision vested with this Court.

The application of the petitioner is hereby dismissed for want of any merit.

The conviction and the sentence dated 17-11-2008 is affirmed.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal