

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

*In the matter of an application in terms of
Article 138 of the Constitution read with
Section 11 (1) of the High Court of the
Provinces (Special Provisions) Act No. 19 of
1990.*

C.A. Revision Application No:

CA (PHC) APN 59/23

High Court of Kurunegala

No. HC/288/19

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Warnakulasooriya Sumith Fernando,

No. 70/1, Narampola,

Thorayaya.

ACCUSED

AND NOW BETWEEN

Warnakulasooriya Sumith Fernando,

No. 70/1, Narampola,

Thorayaya.

1ST ACCUSED-PETITIONER

Vs.

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

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Ramalingam Ranjan for the Accused-Petitioner
Supported on : 16-06-2023
Order on : 29-08-2023

Sampath B. Abayakoon, J.

This is an application by the 1st accused-petitioner (hereinafter referred to as the petitioner) seeking to invoke the revisionary jurisdiction of this Court granted in terms of Article 138 of The Constitution.

The learned Counsel for the petitioner supported this matter seeking notice to the complainant-respondent named, and this Order is pronounced after considering whether the petitioner has satisfied this Court that he has a basis to get the notices issued in regard to this application to the complainant-respondent, and for this Court to consider the application in its merit.

The petitioner was the 1st accused indicted along with two other accused before the High Court of Kurunegala in the Case Number HC/288/19. The petitioner and the other two accused named in the High Court indictment was indicted for having committed the following offences.

Count 1 : At or about 09-11-2010 at a place called Kobeygane, the accused with the intention of criminal intimidation of one Yapa Mudisanselage Bandaranayake threatened him by firing a gunshot, an offence punishable in terms of section 486 of the Penal Code.

Count 2: At the same time and at the same transaction, causing hurt to the earlier mentioned Bandaranayake, and thereby committing an offence punishable in terms of section 314 of the Penal Code.

Count 3: At the same time and at the same transaction, the 1st accused (petitioner in this application) for having possessed a firearm, namely a pistol without a valid permit, and thereby committing an offence punishable in terms of section 22 (3) read with section 22 (1) of the Firearms Ordinance No. 33 of 1916 as amended by Amendment Act No. 22 of 1996.

Count 4: At the same time and at the same transaction, the 1st accused (petitioner in this application) for having in his possession 5 live bullets without a valid permit, and thereby committing an offence punishable in terms of section 27 (1) of the Explosive Act No. 21 of 1956 as amended by Amendment Act No. 33 of 1969 and 18 of 2005.

Count 5: At the same time and at the same transaction, the 2nd accused for having in his possession an offensive weapon, namely a hand grenade, and thereby committing an offence punishable in terms of section 2 (1) (b) of the Offensive Weapons Act No. 18 of 1966.

Count 6: At the same time and at the same transaction, the 3rd accused for having in his possession an offensive weapon, namely a hand grenade, and thereby committing an offence punishable in terms of section 2 (1) (b) of the Offensive Weapons Act No. 18 of 1966.

When the indictment was read over to the petitioner and the other two accused on 16-12-2022, all of them have pleaded guilty to the charges and they had been represented by their Counsel when they pleaded guilty.

After having considered the submissions made by the learned State Counsel who prosecuted, and the submissions of the learned President's Counsel who represented the petitioner as well as the other 2 accused in mitigation, the learned High Court Judge of Kurunegala had imposed the following sentences on the petitioner who was found guilty to the 1st four counts in the indictment.

On the 1st count, Rs. 5000/= fine, in default 6 months rigorous imprisonment.

On the 2nd count, Rs.1000/= fine, in default 6 months rigorous imprisonment.

On the 3rd count, Rs.10000/= fine, in default 6 months rigorous imprisonment.

On the 4th count, 2 years rigorous imprisonment suspended for 10 years.
In addition, Rs.10000/= fine, in default 6 months rigorous imprisonment.

In addition to the above, the petitioner was ordered to pay Rs. 100000/= as compensation to PW-01 and in default, it has been ordered to recover it as a fine with a default sentence of 6 months rigorous imprisonment.

On 10-03-2023, this matter has been mentioned before the High Court of Kurunegala by way of a motion filed on behalf of the petitioner, and on that day, the learned Counsel who represented the petitioner has made submissions before the Court stating that the petitioner was an army soldier who has suffered injuries in battle, and was due to retire from army service on 23-02-2023.

It had been the application of the Counsel that the imposition of a fine on the petitioner would mean that he would have to face drastic consequences on his entitlement to a pension from the army. It has been urged that the Court may consider converting the fines imposed on the petitioner to state cost in terms of the Code of Criminal Procedure Act.

The learned High Court Judge after hearing both the parties in that regard had pronounced the order in that regard on 28-04-2023, where the learned High Court Judge has refused to vary the sentencing order after having considered whether a sentence imposed can be varied in the manner requested on behalf of the petitioner.

It is on the basis that the petitioner is aggrieved by the said Order, this application seeing to invoke the revisionary jurisdiction of this Court has been initiated.

It is settled law that a person who is seeking the extraordinary discretionary remedy of revision by this Court must provide sufficient exceptional grounds in his petition before the Court, for this Court to consider granting the relief as claimed.

The petitioner has averred that the matters stated in paragraphs 10 to 15 of the petition constitutes sufficient exceptional grounds for this Court to intervene into the Order of the learned High Court Judge.

In the said paragraphs, the petitioner has claimed that the learned High Court Judge was misconceived and misdirected himself on the questions of law and facts in relation to the application of the petitioner, and also has claimed that the learned High Court Judge was misconceived as to the sentencing policy in the Criminal Justice System and also the fundamentals of Natural Justice.

The petitioner has also claimed that he has been a serving army soldier since the year 2000, who served in frontline battlefields and a person who had a clear track record in the army with no disciplinary actions or interdictions.

He has claimed that he rendered a great service in the battlefield during his tenure of 22 years of service.

He has also stated that he is a married person with 2 young schooling children who are active in studies and other extracurricular activities, and he is the sole breadwinner of the family and his family fully depends on the financial and moral care of the petitioner.

While making submissions for notice, the learned Counsel for the petitioner submitting the above grounds, urged the Court to issue notice on humanitarian grounds.

I will now proceed to consider whether the facts mentioned in the petition, the affidavit, the relevant documents attached along with the petition, and the submissions made on behalf of the petitioner by his Counsel before this Court, constitutes sufficient basis to issue notice to the complainant-respondent.

It is abundantly clear from the indictment filed against the petitioner that he has been indicted for having committed serious offences along with two other accused mentioned in the indictment.

The B-report filed by the Officer-in-Charge of the Kobeygane police on 10-11-2010 when the petitioner and two others were produced before the learned Magistrate of Nikewaratiya under case number B/663/2010 indicates that the petitioner and the other accused had been arrested by the villagers when they were attempting to commit robbery at night by threatening, assaulting, and firing at the PW-01 mentioned in the charge sheet, namely Bandaranayake, in front of his house.

When the said Bandaranayake resisted their attempts and when the members of his household got alerted to the attempted robbery, they have raised their cries which have resulted in the follow villagers being alerted of what was happening. After realizing that their attempt had failed, the would-be robbers have fled the scene of the crime but had been apprehended by the villagers and later arrested by the police, which has led to the indictment against them.

I am of the view that the application before this Court, and the application to convert the fines imposed against the petitioner has to be considered in that context. Although the petitioner claims that he is a person who had a distinguished record in the army, the very fact that he was found guilty to the 4 charges against him shows that it was not so.

It appears from the sentencing order by the learned High Court Judge, the mitigatory circumstances pleaded on behalf of the petitioner has been well considered when the learned High Court Judge imposed only fines rather than imprisonment on the petitioner.

For the 1st count preferred against the petitioner, the possible sentence would have been an imprisonment period of either description for a term which may extend to 2 years or with fine or with both. The learned High Court Judge has chosen only to impose a fine on the petitioner.

For the 2nd count, which was the offence of causing voluntarily hurt, the possible sentence that could have been imposed was an imprisonment period of either description for a term which may extend to 1 year or with fine which may extend to Rs. 10000/= or with both. The learned High Court Judge has chosen to impose a fine only on the petitioner.

For the 3rd count, which was a count in terms of the Firearms Ordinance, the sentence that would have been imposed on the petitioner on the basis that he was a first offender would have been a fine not exceeding Rs.

10000/= or with rigorous imprisonment with a period of not exceeding 5 years or with both such fine and imprisonment.

I find that the learned High Court Judge was too lenient when considering the facts and the circumstances of the petitioner's action, although he has pleaded guilty at the 1st instance, when it was decided to impose a fine only on the petitioner.

For the 4th count, the possible sentence would have been a fine of up to Rs. 25000/= an imprisonment period either description of up to 5 years. The learned High Court Judge has imposed a fine of Rs. 10000/= and a rigorous imprisonment of 2 years which has been suspended for a period of 10 years.

For a person who is found guilty, in terms of the explosive ordinance it is mandatory impose a fine as well as a jail term in terms of section 27 (1) of the Explosives Act. It clearly appears that the learned High Court Judge has imposed the minimum sentence that can be imposed when it was decided to suspend the jail term imposed upon the petitioner.

The petitioner being an army soldier, he should have known the consequences of committing offences of this nature. After committing offences of this nature using firearms and hand grenades along with others, he cannot expect any sentence lesser than the sentence imposed by the learned High Court Judge on him upon him being found guilty. It is the view of this Court that there was no basis for the petitioner to have any grievance on the sentences imposed upon him. If he was a responsible person serving Sri Lanka the Army at that time, and a person with a family, he should have thought about the consequences of his actions before he committed this type of an offence. It is the view of this Court that after having committed these offences, petitioner is not entitled to claim that the minimum possible punishment imposed should be varied in the manner now he is claiming. I find that the learned High Court Judge has pronounced his

order after well considering the relevant facts, the circumstances, and the relevant law, when it was decided that he finds no basis to convert the fines imposed upon the petitioner into state cost.

Accordingly, the application to issue notice to the complainant-respondent is hereby refused, as I find no merit in the application preferred to this Court by the petitioner.

The Registrar of the Court is directed to communicate this Order to the High Court of Kurunegala for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal