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

An application made under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka for the Revision of an order of the Provincial High Court of Kurunegala.

HC Case No. 203/2006
CA (PHC) APN No. 56/2014

Hon. Attorney General
Attorney General's Department
Colombo 12

Complainant

Vs.

1. P.H.L. Wijerathne
   Anuradhapura Prison
   (Prison No. 36289)

Accused- Petitioner

Vs.

1. Hon. Attorney General
   Attorney General's Department
   Colombo 12
   Complainant – Respondent

2. P.H.L. Wijerathne

Accused – Respondent

BEFORE **K.T. Chitrasiri, J**

W.M.M. Malinie Gunaratne, J.

COUNSEL: **Sharon Serasinghe for Petitioner**

H. Jayanetti, SC for Respondent

Argued on : 20th of November 2014

Decided on : 19th of February 2014

Malinie Gunaratne, J.

The Accused – Petitioner in this case had been indicted in the High Court of Kurunegala for causing the death of N.H. Sarath Kumara Ranatunga, on or about 30th July 2004, which is an offence punishable under Section 296 of the Penal Code.

This case was taken for trial and at the end of the trial the Accused – Petitioner was convicted for culpable homicide not amounting to murder punishable under section 297 of the Penal Code by the learned High Court Judge of Kurunegala on 2nd October 2013.

The learned State Counsel and the Defence Counsel had made submissions as to the facts and circumstances of the case, before sentencing

the Accused-Petitioner. The State Counsel had invited the Court to impose an appropriate sentence considering the gravity of the offence leveled against the Accused-Petitioner, while the learned Defence Counsel had made submissions in mitigation of sentences. Thereupon, the learned High Court Judge of Kurunegala imposed a sentence of 12 years imprisonment and a fine of Rs.25000/- carrying a default sentence of 06 months simple imprisonment.

The Accused-Petitioner being aggrieved by the aforesaid sentence moved to revise and mitigate the sentence, on the circumstances mentioned in the Paragraph (6) of the Petition. It is relevant to note that the Petitioner had challenged only the sentence imposed by the learned High Court Judge.

When this matter came up for hearing before this Court, the learned State Counsel submitted, that the Accused -Petitioner is not entitled to invoke the Revisionary jurisdiction as the Accused -Petitioner had an alternative remedy namely a right of appeal available to him which he failed to exercise. He further submitted that this Court has no jurisdiction to hear and determine this application, as the Accused -Petitioner has failed to plead exceptional circumstances necessary for the invocation of the Revisionary Jurisdiction of this Court, which is a discretionary remedy.

On examining the Petition filed by the Accused -Petitioner it is relevant to note, that the Accused-Petitioner had not been given any justifiable reason to support his failure to exercise the right of appeal available to him by law.

In Ameen vs. Rasheed (1936) 6 NCLW it was held that the Court refused to exercise their discretion and entertain a revision application where an appeal was available to the aggrieved party who has filed a revision application.

In the case of Letchumi vs. Perera and Another (2000) 3 S LR 151, the Court dismissed an application for revision on the basis that there was an alternative remedy specified by statute.

It is settled law that even if the decision is appealable, the Court has a discretion to entertain a revision application to make order when exceptional circumstances are pleaded. If there are no exceptional circumstances, this Court will not exercise its revisionary powers specially when the right of appeal is available.

In Athukorale vs.Saminathan 41 NLR 165 Soertsz J. stated that the right of the Court to revise any order made by an original Court will be exercised only in exceptional circumstances. In Caderamanpulle vs. Ceylon

Paper Sacks (2001) 3 SLR 172, the Court has held, the existence of exceptional circumstances is a pre condition for the exercise of the powers of revision and the absence of such circumstances in any given situation results in refusal of granting remedies. The same decisions have been followed in the below mentioned cases. Ameen vs. Rasid (Supra), Perera vs. Silva (Supra).

Having referred to the authorities above and to the facts and circumstances of this case, it is my view that the Petitioner has failed to disclose exceptional circumstances in order to invoke the revisionary jurisdiction of this Court. Therefore I am of the opinion that the Accused - Petitioner has failed to establish exceptional circumstances to have and maintain this application.

Without prejudice to the above view, now I consider the submissions made by both parties regarding the main issue of this application.

The main contention of the learned Counsel for the Accused – Petitioner was that the learned High Court Judge has failed to consider any of the mitigatory factors mentioned in Paragraph (6) of the Petition.

The Counsel for the Petitioner relied on the following mitigatory factors in order to have a lesser punishment.

(a) The Accused-Petitioner has gone through extreme trauma and therefore lost his balance when he committed this offence.

(b) The Accused-Petitioner was provoked by the deceased.

(c) The Accused-Petitioner is 38 years old and his wife has left him after 6 years of marriage.

(d) He has one child aged 16 years and had no income to survive.

(e) He has undergone a surgery and therefore he is unable to do any hard work.

(f) He was a farmer and the sole breadwinner of his family.

(g) He has no pending cases or previous convictions.

Very briefly the prosecution case is that over an argument between the deceased and the accused, the Accused – Petitioner stabbed the deceased with a knife. The case of the prosecution is supported by sound evidence. The version of the main witness is corroborated by medical evidence. When I consider the entirety of evidence placed before the trial judge, it is relevant to note that the incident has occurred due to an argument between the deceased and the accused.

At the hearing of this petition it was submitted by the Accused - Petitioner's Counsel that the accused had been provoked by the deceased. This court on perusal of the proceedings and the views of the Learned High Court Judge finds that all suggestions put on behalf of the Accused-Petitioner had been rejected by the main witness. The Accused-Petitioner

had chosen to make a dock statement and it was the version of the accused that he exercised his right of private defence. When the learned Defence Counsel was making submissions in mitigation of sentence, he submitted that prior to the incident in question the deceased had involved in an altercation with the accused and as a result this incident occurred. Hence, it is relevant to note that no specific or definite defence has been forwarded on behalf of the accused.

Learned State Counsel submitted to Court that there is no material to decide that the deceased had provoked the Accused - Petitioner. He further submitted that according to the evidence the Accused-Petitioner had an argument with the deceased prior to the incident and he had gone home and had come back around 15 minutes later and then stabbed the deceased with a knife. He argued, stating that it appears that the Accused – Petitioner had come to meet the deceased having it preplanned. He further argued, that the evidence that transpired in the Court does not suggest any kind of provocation. I am inclined to accept the submission of the learned State Counsel.

When the matter came up for hearing before this Court, the main contention of the learned Counsel for the Accused -Petitioner was that the Learned High Court Judge has failed to consider any of the mitigatory factors mentioned in paragraph (6) of the Petition. It is relevant to note that when making submissions in mitigation in the High Court, he has relied on only two factors. Those are mentioned in paragraph (6), sub paragraphs (d) and (g) in the Petition.

Having read the Accused-Petitioner's petition and affidavit it is relevant to note that it does not state the sentence imposed by the learned High Court Judge is excessive, illegal, wrongful and contrary to the law / or unreasonable. The Accused-Petitioner has prayed to revise the sentence only on the mitigatory factors mentioned in para (6) of the Petition.

I have carefully considered the submissions made by the Accused - Petitioner's Counsel and the State Counsel and the material before us.

Learned State Counsel submitted that plain reading of the order of the learned High Court Judge clearly indicates that he was mindful of the matters submitted by the learned Counsel in mitigation. He further submitted that in determining the proper sentence, the judge has considered the point of view of the Accused-Petitioner on the one hand and the interest of the society on the other.

A judge should first consider the gravity of the offence and the manner and the circumstances in which it was committed, previous convictions, if any, of the offender, the possibility that the punishment may act as a deterrent to others, protection of society. Though the reformation of the criminal is an important consideration, the public interest or the welfare of the State also must be looked at.

I will now refer to the relevant authorities in this regard.

It is appropriate to cite an observation made by His Lordship Basnayake, A.C.J., in the case of Attorney General vs. H.N. de Silva 57 NLR 121, with regard to the sentence to be imposed for an offence. "..... whilst the reformation of the criminal, though no doubt is an important consideration in assessing the punishment that should be passed on the offender, where the public interest or the welfare of the state outweighs the previous good character, antecedence and age of the offender that public interest must prevail".

It was held in the case of Attorney General vs. Mendis (1995) 1 SLR 138, to decide what sentence is to be enforced on the accused, the Judge has to consider the point of view of the accused on the one hand and the interest of the society on the other. Having referred to the authorities above, it is clear that the Appellate Courts have laid down guidelines that are to be taken into consideration when deciding the sentence that is to be imposed on an accused.

The learned State Counsel submitted, that the learned High Court Judge was correct in law in imposing a deterrent sentence having considered the serious nature of the offence.

The Counsel for the Accused – Petitioner moved to revise and mitigate the sentence on the circumstances mentioned in paragraph (06) of the Petition.

I will now turn to consider the mitigation factors relied on by the Petitioner's counsel in order to have a lesser punishment.

The Counsel for the Accused-Petitioner submitted that the Accused-Petitioner has undergone a surgery and therefore he is unable to do any hard work. The submissions of the Defence Counsel made in the High Court does not reveal it. In order to support his argument, no document relevant to those have been filed in the High Court.

He further submitted that the Accused-Petitioner is 38 years old and is married and his wife has left him 6 years ago. Further submitted that being the sole breadwinner of his family and owing to his incarceration they have no other income. In Rex vs. Bazely (1969) C.L.R. held that because of criminal stupidity when a person loses his family life, that it is not a ground for not imposing a severe sentence.

The Counsel for the Petitioner further submitted that the Petitioner has no previous convictions. In Solicitor General vs. Krishnasamy it was held, that it is not an inflexible rule that the first offender should not be sent to prison when crimes of violence are concerned.

I am of the view that the Accused-Petitioner had been the perpetrator of a serious crime which had been committed with much deliberation. On perusal of the Order of the High Court Judge, it clearly indicates that he was mindful of the matters submitted by the Counsel for the Accused-Petitioner

in mitigation. He has looked at the matters from the point of view of the public and of the offender as well, when sentencing the Accused.

Having regard to the serious nature and the manner in which the offence has been committed by the Accused – Petitioner I am of the view, that this is not a fit case where the sentence imposed on the Accused-Petitioner should be revised, having regard to the gravity of the offence. This Court should not lightly interfere with the sentence imposed by the learned High Court Judge unless the sentence imposed by the Trial Judge is ex facie, illegal and not in accordance with the law.

In the above circumstances, I have no reason to question the legality of the sentence imposed on the Accused-Petitioner and therefore I decide that it is a proper and justifiable sentence.

For the foregoing reasons this application is dismissed.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

I agree

JUDGE OF THE COURT OF APPEAL