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

In the matter of an application to revise the Order of the High Court of Kalutara relating to the sentence imposed in case HC 656/2013 under the Articles of the Constitution read together with the provisions of the Criminal Procedure Act No. 15 of 1979.

Liyanagamage Lahiru Kithsiri Kumara,
(Presently incaserated / serving sentence – Prisoner No. 37864 at Monaragala Prison)

Accused – Petitioner

CA (PHC) Rev.Appn No.21/2015

HC Kalutara 656/2013

VS.

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

Respondent

BEFORE	:	**W.M.M. Malini Gunaratne, J.and** **P.R. Walgama, J.**
COUNSEL :	:	Dr. Rajnith Fernando for the Petitioner Himali Jayanetti for the Respondent
Argued on	:	30.09.2015
Written Submissions filed on	:	14.12.2015 and 22.01.2016
Decided on	:	17.03.2016

Malinie Gunaratne, J

This is an application in revision filed on 01.03.2015 by the Accused – Petitioner (hereinafter referred to as the "Petitioner") to revise the sentencing order of the learned High Court Judge of Kalutara dated 17.12.2013.

Briefly, the facts relevant to this application are as follows:

The Respondent had indicted the Accused – Petitioner (hereinafter referred to as the Petitioner) together with another Accused in the High Court of Kalutara on two counts for possession and trafficking of two kilos and seven hundred and sixty two grams (2 kilos and 762 grams) of Canabis Sativa, offences punishable under Section 54 A (b) and 54 A (d) of the

Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

It is stated in his Petition on the 22nd October **2012** (year is not correct) the Petitioner pleaded guilty to the 1st and 2nd counts in the indictment, whereupon the learned High Court Judge had proceeded to convict the Petitioner on the plea so recorded. (It is to be noted that no document had been filed to support the contention). It is further stated after being found guilty, sentencing had been put off. However, when the matter was called in the open Court on 23.10.2013, for the purpose of passing sentence the Petitioner was absent and after inquiry under Section 241 of the Criminal Procedure Act, the Court proceeded to sentence the Petitioner in absentia, noting that the Petitioner was absconding after pleading guilty to the charges. It is further stated, on 17.12.2013 the High Court Judge sentenced the Petitioner to two years (02 years) rigorous imprisonment on each count to run consecutively. Further it is stated, subsequently, the Petitioner arrested on warrant and produced before the learned High Court Judge on 15.10.2014 and the sentence passed against him on 17.12.2013, was ordered to be implemented.

It is further stated in the Petition, since the 1st Accused had also pleaded guilty to the charges, on 13.02.2014 the learned High Court Judge proceeded to pass sentence on the 1st Accused, a fine of Rupees Twenty five thousand (Rs.25,000/-) in default six months (06 months) simple imprisonment on each count making a total fine of Rupees Fifty thousand (Rs.50,000/-) on both counts.

Being aggrieved by the sentence imposed on the Petitioner, this Revision Application is preferred seeking to revise and mitigate the sentence depending on the following grounds and exceptional circumstances mentioned in Paragraph (11) of the Petition.

(a) The Petitioner was the 2nd Accused on indictment who tendered a plea of guilt to the charges on the very first occasion when the matter was called in Court, which plea of guilt indicates possible regret and remorse on his part, apart from not wasting judicial time.

(b) The Accused – Petitioner was a first offender with no previous convictions and / any pending cases of any nature against him.

(c) The custodial / consecutive sentence totaling four years (04 years) rigorous imprisonment appears to have been imposed as punishment for not been present in Court at the time of sentencing. This appears to have been the basis or the reason for imposing a custodial sentence even when there is an option of imposing only a fine under the law.

(d) The same High Court had imposed only a fine to the 1st Accused in the case who had been charged with the Accused –Petitioner for jointly possessing / trafficking the prohibited substance on the same day, same time, in the same transaction, notwithstanding the fact or record that he had been produced before the High Court for sentencing whilst being in remand in connection with another case in Magistrate's Court, Bibile.

The Petitioner further avers the disparity in sentencing is grievously erroneous in law.

When the application was taken up for argument on 30.09.2015, the learned State Counsel raised the following preliminary objections with regard to the maintainability of this application.

(i) The Petitioner has made this application on 18.03.2015, fifteen months after the order dated 17.12.2013.

(ii) The Petitioner has not made any attempt to explain the delay.

(iii) The Petitioner has failed to exercise the statutory right of appeal against the Order dated 17.12.2013 and has failed to disclose the exceptional circumstances warranting the exercise of the revisionary jurisdiction of this Court.

(iv) The Petitioner has violated Rule (3) of the Court of Appeal Rules.

Now, I will consider the preliminary objections raised by the Respondent. As set out before, the first objection namely, is the delay of filing the application. The learned State Counsel contended that the Petitioner has filed this revision application after fifteen months from the order of the High Court and therefore he is not entitled to any relief due to laches.

In the case of Attorney General vs. Kunchihamby 46 N.L.R. 401, it was held the delay of three months, was disentitled the Petitioner for relief. In Camilus Ignatious vs. O.I.C. of Uhana Police Station (Rev) CA 907/89 M.C. Ampara 2587, held that, a mere delay of four months in filing a revision application was fatal to the prosecution of the Revision Application before the Court of Appeal.

Delay would normally be a ground upon which a revision application could be referred. Therefore, in every case where there is a delay the applicant should explain the reason for the delay. (Ghanapandithan vs. Balanayagam (1998) 1 S.L.R. 391). It is relevant to note that, the Petitioner has failed to account for the delay.

The Petitioner has preferred this application to this Court after fifteen months (15) months from the order of the learned High Court Judge.

The inordinate delay has not been explained by the Petitioner to the satisfaction of this Court. In Dissanayake vs. Fernando 71 N.L.R. 356, it was held, it is essential that the reason for the delay in seeking relief should be set out in the Petition. The Petitioner has failed to account for the delay. Hence, the long period of inaction and failure to seek relief on the part of the Petitioner was fatal to an application in revision.

I will consider the next objection namely, failure to exercise the statutory right of appeal. The learned State Counsel stressed that the Petitioner is not entitled to invoke the revisionary jurisdiction of this Court, specially as the Petitioner had an alternative remedy namely the right of appeal which he has failed to exercise.

In Ameen vs. Rasheed (1936) 6 N.C.L.W, the Court refused to exercise its discretion and entertain a revision application where the right of appeal was available to the aggrieved party. In the case of Letchumi vs. Perera and Another (2000) 3 S.L.R. 151, the Court dismissed an application for revision on the basis that there was an alternative remedy specified by statute.

In the case of Halwan and Others vs. Kaleelna Rahuman (2000) 3 S.L.R. 50, S.N. Silva J. (as he was then) has observed:

"A party dissatisfied with a judgment or order, where a right of appeal is given either directly or with leave obtained, has to invoke and pursue the appellate jurisdiction. When such a party seeks judicial review by way of an application for a writ, he has to establish an excuse for his failure to invoke and pursue the appellate jurisdiction. Such excuse should be pleaded in the petition seeking judicial review and be supported by affidavits and necessary documents. The same principle is applicable to instances where the law provides for a right of appeal from a decision or order of an institution or an officer, to a statutory tribunal. The reason is that such appellate procedure as established by law being the ordinary procedure should be availed of before recourse is had to the extraordinary jurisdiction by way of judicial review as provided in Article 140 of the Constitution".

It is to be noted, in Paragraph 9 of the Petition it is stated that no appeal was lodged by the Petitioner against the sentence imposed, as he had been erroneously advised that no right of appeal was available in view of the tendering of a plea of guilt to the charges. According to the facts of the case, it is not the reason that the Petitioner could not lodge an appeal.

At the time (on 17.12.2013) of imposing the sentence, the Petitioner was absconding. Subsequently he had been arrested on warrant and produced before the High Court on 15.10.2014. Hence, the time was barred to exercise the statutory right of appeal and that is the reason that the Petitioner could not lodge an appeal. However, the reason stated in the

Petition cannot be considered as an excuse, not to exercise the right of appeal.

It is relevant to note, although a right of appeal is available, the Petitioner is entitled to file a revision application, when exceptional circumstances are present. It is the contention of the Counsel for the Petitioner that, in Paragraph (11) of the Petition filed in this Court the Petitioner has pleaded exceptional circumstances.

I have examined the contents in Paragraph (11) of the Petition filed in this case and I do not agree that the matters referred to therein amount to exceptional circumstances as required by law. If there are no exceptional circumstances, this Court will not exercise its revisionary powers specially when the right of appeal is available.

Thus, the existence of the exceptional circumstances is a process by which the method of rectification should be adopted. In Perera vs. Silva (Supra) Hutchinson C.J. has stated that if such selection process is not available, then revisionary jurisdiction of the Court will become a gateway for every litigant to make a second appeal in the garb of a revision application to make an appeal in situations where the legislature has not given the right of appeal.

Revisionary powers will only be exercised when it appears that there will be injustice caused to the Petitioner unless the revisionary power is exercised by Court. Certain pre-requisites have to be fulfilled by a Petitioner to the satisfaction of this Court in order to successfully catalyse the exercise of such discretionary power. This is best illustrated in T. Varapragasam and Another vs. Emmanuel – C A (Rev.) 931/84 – CAM 24.07.91, where it was

held that the following tests have to be applied before the discretion of the Court of Appeal is exercised in favour of a party seeking the revisionary remedy.

(a) The aggrieved party should have no other remedy.

(b) If there was another remedy available to the aggrieved party then revision would be available if special circumstances could be shown to warrant.

(c) The aggrieved party must come to Court with clean hands and should not have contributed to the current situation.

(d) The aggrieved party should have complied with the law at that time.

The view of this Court is that the Petitioner has not fulfilled any of the pre-requisites aforesaid.

As the conduct of the Petitioner is intensely relevant to the granting of relief, such conduct should not be repellant to the attraction of exercise of revisionary power (W.K.M.B. Perera vs. The Peoples Bank – S.C. 141/94 – S.C.M. 12/05/95. In this case the conduct of the Petitioner in jumping bail and absconding up to the date that he was arrested clearly design to circumvent and subvert the law and the institution of the justice. Contumacious conduct on the part of the Petitioner is a relevant consideration when the exercise of a discretion in his favour is involved.

I am of the view, in the light of the above findings it is abundantly clear that the Petitioner has not pleaded any exceptional circumstances as required by law.

The next preliminary objection to be considered is whether the Petitioner has violated the Rule 3 (1) (a) and (b) of the Court of Appeal (Appellate Procedure) Rules of 1990. All copies of documents, material to the application has to be filed along with the Petition and Affidavit. The Petitioner had failed to file vital documents (proceedings, journal entries etc.) material to the application. Hence, I am of the view, it is a clear violation of Rule 3 (1) (a) and (b) of the Court of Appeal (Appellate Procedure) Rules of 1990. It has been held over and over again by this Court as well as the Supreme Court, non-compliance with the Court of Appeal (Appellate Procedure) Rules is fatal to the application.

For the reasons stated above this revision application should be dismissed *in limine.*

However, it is relevant to note, this revision application has been filed only on the basis of disparity of the sentence that had been imposed on the Petitioner. No where in the Petition it is stated that the sentence is not lawful and legal in law. However, if the Court seems the sentence is illegal and unlawful, intervention of this Court is necessary and justifiable to revise it and impose a legal and lawful sentence.

The learned High Court Judge has imposed on the Petitioner a sentence of two years (02 years) rigorous imprisonment on each count to run consecutively. But the sentence found in Section 54 (a) (b) and 54 (a) (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.13 of 1994 is a fine not exceeding Rupees Twenty five thousand (Rs.25,000/-) or imprisonment for a period not exceeding **One** year.

Therefore, I set aside the sentence imposed by the learned High Court Judge and substitute one year rigorous imprisonment on each count to run consecutively, totaling two years.

Taking into consideration the entirely of the submissions adduced by both parties, this Court upholds the preliminary objections raised by the Respondent and conclude that this is not a fit and proper case to invoke the discretionary revisionary powers of this Court. Accordingly, I dismiss the Petition.

Since the Court has dismissed the Petition for the above stated reasons, this Court is of the view that it is not necessary to go into the merits of the case.

JUDGE OF THE COURT OF APPEAL

I agree

JUDGE OF THE COURT OF APPEAL

Petition is dismissed.