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

An Application under Article 138 (1) of the Constitution to revise the Judgment dated 14.03.2014 made in Case No. HC 160/2000 in the Provincial High Court of the Central Province holden in Kandy.

Democratic Socialist Republic of Sri Lanka.

**VS.**

Court of Appeal Revision Application No. CA(PHC) APN 74/2014
Case No. Kandy High Court 160/2000

Kathaluwa Weligamage Amararathne,

**Accused**

**AND NOW BETWEEN**

Thisantha Mahendra
Vittachchi,,
No. 302/71,
Gangewatta, Mahara,
Gampola.

**Petitioner**

**VS.**

1. Kathaluwa Weligamage
   Amararathne.

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

**Respondents.**

**BEFORE** : **W.M.M. Malinie Gunaratne, J. and**
**P.R. Walgama J.**

COUNSEL : Dharmasiri Karunaratne
for the Petitioner

G. Kroon with J Kroon
for the 1st Respondent.

V. Hettige, SSC
for the 2nd Respondent

Argued on : 02.11.2015

Written submissions filed on : 30.11.2015, 07.12.2015 and 12.02.2016

Decided on : 11.03.2016

**Malinie Gunaratne, J.**

The Petitioner being an aggrieved party, has filed this application and moves,

(a) To revise the Judgment dated 14.03.2014 made in Case No. 160/2000 of the Provincial High Court of Kandy;

(b) order 2nd Respondent to frame charges against the accused for the injuries caused to the Petitioner;

(c) consider enhancement of sentence for the accused to the charge he pleaded guilty.

The 1st Accused – Respondent was indicted in the High Court of Kandy, for causing the death of Don Henry Peter Vittatchi, on or about 08.08.1997 and thereby committing an offence punishable under Section 296 of the Penal Code.

After evidence of five witnesses were led on behalf of the prosecution on 14.03.2014 the 1st Respondent pleaded guilty to the charge under Section 297 of the Penal Code; culpable homicide not amounting to murder on the basis the accused had acted under sudden provocation. It is to be noted that the 2nd

Respondent had taken time nearly Two and a half years (2 ½ years) to consider with regard to the plea for lesser offence.

The learned State Counsel and the Defence Counsel made submissions as to the facts and circumstances of the case. The learned State Counsel invited the Court to impose an appropriate sentence considering the serious nature of the offence, which should serve as a deterrent. The learned Defence Counsel also made submissions in mitigation of sentence.

Thereupon, the learned Trial Judge sentenced the 1st Respondent to a term of two years (02 years) rigorous imprisonment and suspended the same for fifteen years (15 years) and a fine of Rupees One thousand five hundred (Rs.1500/-) with a default sentence of six months (06 months) imprisonment.

The Petitioner who is a son of the deceased, being aggrieved by the said order has filed this application and has moved to set aside the said sentence imposed on the 1st Respondent on the basis that it is totally disproportionate having regard to the serious nature of the offence to which the 1st Respondent had pleaded guilty. It seems that it is the main relief that the Petitioner has sought by this application.

The 2nd relief of the prayer is, Order 2nd Respondent to frame charges against the 1st Respondent for the injuries caused to the Petitioner. It is the stance of the learned State Counsel that it is upon the opinion of the 2nd Respondent, indictment is to be dispatched or not. Further she has contended the 2nd Respondent has a statutory discretion. However, I am of the view when there is cogent and sufficient evidence against a person, the 2nd Respondent's duty is to file indictment against the person.

Even though at this juncture this Court has no power to make any order with regard to the 2nd relief, it is to be noted, on perusal of the evidence led in the Trial Court, the Judicial Medical Officer has given evidence and the prosecution, has marked a Medical Report through him 'P 5' (vide Page 148) as to Petitioner's injuries. The Judicial Medical Officer has stated, out of the injuries he had observed on the Petitioner the injury No.2 of the MLR was grievous injury. (Vide Page 150).

It is significant to note, even though the victim (Petitioner) had been listed as the 3rd witness in the list of witnesses and being an eye witness also, without having led his evidence, the Medical Report as to Petitioner's injuries has been produced through the Judicial Medical Officer. Even the learned Trial Judge also has not taken into consideration that fact. Accordingly, I am of the view a grave injustice has been caused to the Petitioner as the 2nd Respondent has failed to indict the 1st Respondent for attempted murder or at least for causing grievous hurt.

When considering the merits of the case, the central issue to be decided here is whether the sentence imposed by the learned Trial Judge is inadequate and inappropriate having regard to the serious nature of offence for which the 1st Respondent had been convicted.

Before addressing my mind to the above matter, it is pertinent to refer briefly to the facts of the case.

The deceased is the Petitioner's father and the 1st Respondent is the accused son-in-law. On 08.08.1997, while the deceased was having his dinner, the 1st Respondent who was drunk and shouting opposite the house of the deceased threatened to kill him uttering obscene and abusive language.

Then the deceased told him through the front window of his house "if you drank, go home without shouting". Thereafter the 1st Respondent left the place and returned armed with a weapon (Chisel). He broke the front door of the house of the deceased; entered the house and stabbed the decease on the chest to death. The Petitioner who is the son of the deceased bent to hold the deceased and to help him; and at that time the Petitioner was also stabbed on his back behind his chest. The Petitioner was hospitalized and had to undergo a surgery.

In the oral and written submissions of the Counsel for the Petitioner, it was contended that, the 75 year old person died instantly and his son nearly escaped death. He further contended if the stab went just another ¼ inch deep his heart would have got injured and he too would have died.

The learned Counsel further contended, the 1st Respondent had broken the closed door of the house into pieces and forcibly entered and committed the murder and stabbed the Petitioner also. His stance is the deceased was inside his house and never provoked the 1st Respondent.

Hence, it is the stance of the learned Counsel, that the sentence passed by the High Court of Kandy is illegal and inadequate, therefore it has to be enhanced to a custodial imprisonment and a sufficient compensation also has to be awarded to the Petitioner.

It is submitted by the learned Counsel for the 1st Respondent that it was revealed in evidence that the 1st Respondent also sustained injuries in the incident and was hospitalised. Further submitted, the 1st Respondent tendered a plea under Section 297 on the basis of sudden fight and grave and sudden provocation.

The State Counsel has contended on behalf of the 2nd Respondent that, there was evidence of the 1st Respondent also having sustained injuries. Both Counsel have contended that the Petitioner has suppressed that fact and therefore Petitioner's application ought to be dismissed *in limine.*

It is relevant to note, on perusal of the evidence given by the 1st and 2nd witnesses of the prosecution, it has not been suggested to them by the Defence Counsel that the injuries were caused by the witnesses or how the 1st Respondent sustained the injuries.

It is evident by the following questions put to the 1st witness and the 2nd witness of the prosecution:

To the 1st witness:

(ප්‍ර) මම විත්තිය වෙනුවෙන් යෝජනා කරන්නේ තමුන් හොඳින් මෙම සිද්ධියෙන් පසු දන්නවා මෙම විත්තිකරු තමුන්ගේ සීයායි, බාප්පයි අතර ලොකු ඝට්ටනයක් ඇති වී මෙම විත්තිකරුට තුවාලයක් වූ බව දන්නවා.

(උ) නැහැ.

To the 2nd witness:

(ප්‍ර) තමුන්ගේ සහෝදරයෝ අතර වෙච්ච ලොකු දබරයක් නිසා විත්තිකරුට තුවාල වෙලා තමුන්ගේ පියා නැතිවුනා කියලා මම යෝජනා කරනවා.

(උ) නැහැ.

Credibility of these witnesses has not been assailed throughout the cross-examination.

Hence, there is no clear evidence to show how the 1st Respondent sustained injuries. I am of the view it is the duty of the Defence Counsel to

convince the Court that the deceased party caused the injuries to the 1st Respondent as he has alleged.

Be that as it may it is evident, that the incident had taken inside the house of the deceased. There is overwhelming evidence to that effect. Evidence of P W 1, P W 2 and P W 6 (Police Officer who visited the scene) support it. The Defence Counsel also has conceded it. P W 1 constantly takes the position that the 1st Respondent was drunk and shouting opposite the house of the deceased; threatening to kill him. Then the deceased told him "if you drank go home without shouting". Then the 1st Respondent left the place and few minutes later came back with a weapon, broke the front door, came inside and stabbed the deceased. Credibility of this witness has not been assailed throughout the cross examination.

Also when the Defence Counsel made submissions in mitigation it has not been explained how the 1st Respondent had sustained injuries. He has submitted "එතැනදී දෙන්නා අතර කිසියම් දබරයක ස්වරූපයකින් සිද්ධිය ඇතිවෙලා තියෙනවා. චූදිත තුවාල ලබලා රෝහල් ගතකර සිටි බව සාක්ෂිවලින් අනාවරණය වී තිබෙනවා."

Accordingly, it is evident that the 1st Respondent intentionally has come to the house of the deceased with a weapon to harm him. However the learned Trial Judge and the 2nd Respondent have agreed to accept a plea under Section 297 on the basis the 1st Respondent had acted under sudden provocation, although such situation had not been established by any evidence.

Be that as it may, assuming that the 1st Respondent had acted under sudden provocation, it is to be considered whether the sentence that was imposed by the learned Trial Judge is adequate and appropriate.

When a person commits a crime by violating criminal law, he is punished by imprisonment, a fine or any other mode of punishment which is prescribed in criminal law. The criminal is to be punished simply because he has committed a crime. If punishment is not properly imposed, the aggrieved party may take the law into their hands and attempt to punish the offender.

The purpose of a criminal punishment may vary. Protection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purpose overlap and none of them can be considered in isolation from the other when determining what an appropriate sentence is, in a particular case.

The main objective of criminal justice is to protect society from criminals by punishing them under the existing penal system. The Court has to weigh all relevant factors in order to determine the blameworthiness of the offender.

The determination of the right measure of punishment is not an easy task, and no hard and fast rule can be laid down. The Court has always to bear in mind the necessity of balancing the offence, the offender and the punishment. In other words the Court should impose a balanced punishment taking into consideration the offence and the offender both.

As to the matter of assessing sentence in the case of Attorney General vs. H.N.G De Silva (Supra) Basnayake A.C.J. observed as follows:-

"..... in assessing the punishment that should be passed on an offender, a Judge should consider the matter of sentence both from the point of view of the public and the offender. Judges are too often prone to look at the question only from the angle of the offender. A judge should in determining the proper sentence, first consider the gravity of the offence, as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other Statute under which the offender is charged. The reformation of the criminal, though no doubt an important consideration is subordinate to the others I have mentioned. Where the public interest or the welfare of the State (which are synonymous) outweighs the previous good character, antecedents and age of the offender, public interest must prevail"

In the case of Attorney General vs. Mendis 1995 (1) SLR 138, it was held, to decide what sentence is to be imposed on the Accused, the judge has to consider the point of view of the Accused on the one hand and the interests of the society on the other. In deciding what sentence is to be imposed the judge must necessarily consider the nature of the offence committed, the gravity of the offence, the manner in which it has been committed, the machinations and manipulations resorted to by the Accused to commit the offence, the persons who are affected by such crime, the ingenuity in which it has been committed and the involvement of others in committing the crime.

It has been held in Santa Singh vs. State of Punjab AIR 1976 S.C. 2386, that, before imposing an appropriate degree of punishment a "hearing" directs the Court's attention to such matters as the nature of the offence, a prior criminal record, if any, of the offender, his age and record of employment, his background with reference to education and home life and the possibility of treatment of training. Also to the possibility that the punishment may act as a

deterrent to both the offender and others, and meets the current community needs, if any, for such deterrent in respect of that particular type of offence.

Ravji vs. State of Rajasthan (1996) 2 S C C 175, it was held "it is the nature and gravity of the crime and not the criminal which are germane for consideration of appropriate punishments in a criminal trial".

In Dhannajay Chatterjee vs. State of W.B. (1994) 2 S C C 220, it was held "The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment".

In the case of Attorney General vs. Janak Sri Uluwaduge and Another (1995) 1 S.L.R. 157, it was held in determining the proper sentence, the Judge should consider the gravity of the offence as it appears from the nature of the act itself and should have regard to the punishment provided in the Penal Code or other statute under which the offender is charged. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective.

It was held in Percy Nanayakkara vs. The Republic of Sri Lanka (1993) 1 S L R 71, that in assessing punishment the Court has to consider the matter from the point of both the offender and the Public.

The learned Counsel for the Petitioner contended that the offence for which the 1st Respondent has pleaded guilty is of a serious nature and has been committed with much deliberation and calls for the imposition of an immediate custod ial sentence.

When I perused the Order of the learned Trial Judge, it clearly indicates that he has looked at the question only from the angle of the offender. In his Order he has said

"චූදිතයගේ පවුල් පසුබිමද, අපරාධය සිදුවු අවස්ථාවේ අවස්ථානුගත කරුණු ද චූදිත වරදට පශ්චන්නාප වීමද, චූදිත පෙරවැරදිකරුවෙකු නොවීමේ කරුණු සැලකිල්ලට ගෙන පහත පරිදි දඩුවම් නියම කරමි."

It is clearly shown that the learned Trial Judge has looked at one side of the picture; the side of the 1st Respondent. He has failed to consider the gravity of the offence and the manner and the circumstances in which it was committed.

I am of the view that the 1st Respondent had been the perpetrator of a very serious crime which had been committed with much deliberation and planning. Had the learned Trial Judge considered the relevant factors or criteria referred to above in determining what the appropriate sentence should have been, the sentence imposed on the 1st Respondent may well have been different.

Having regard to the serious nature and the manner in which the offence has been committed by the 1st Respondent, I am of the view that the sentence imposed in his case is grossly inadequate. I cannot escape from the conclusion that the 1st Respondent has been too leniently treated by the learned Trial Judge. Such lenient treatment of an offender for such serious crime is bound to defeat the main object of punishment, which is the prevention of crimes.

In this case the learned Trial Judge has sentenced the 1st Respondent to a term of two years (02 years) rigorous imprisonment and suspended the same for fifteen years (15) years) and has imposed a fine of Rupees One thousand five hundred (Rs.1500/-) with a default sentence of six months imprisonment.

It is to be noted, even though the Court has a discretion to impose a suspended sentence, it should be taken giving due regard to the specific provision listed under Section 303 of the Criminal Procedure Act. Specific guide lines listed under Section 303 (1) (a) – (i). If a trial judge wishes to impose a suspended sentence of imprisonment he should address his mind to all the issues listed under Section 303 (1) (a) – (i) and also reasons to be stated in writing.

In this case the learned Trial Judge has not addressed his mind to these issues. Also he has not stated the reasons to impose a suspended sentence. Although it is an admitted fact that, the quantum of sentence is a matter for the discretion of the Trial Judge, an Appellate Court has the power to interfere if the Trial Judge has exercised its discretion improperly or wrongly.

On the material before this Court, I am satisfied that there has been a wrongful exercise of discretion in that, no weight, or no sufficient weight has been given to the relevant considerations enumerated above. Accordingly, the Order made by the learned Trial Judge in respect of the 1st Respondent, should be set aside.

It is seen, several aggravating circumstances are present in this case. I cannot escape from the conclusion that the 1st Respondent has been too leniently treated by the learned Trial Judge without any justifiable reason. The offence is far too grave to be dealt with a suspended imprisonment. There is

no doubt that the crime committed by the 1st Respondent is a heinous crime which requires a deterrent punishment.

On the whole I am of the view that public interest demand that a custodial sentence be imposed in this case, having taken into consideration the nature, gravity of the offence and the manner in which it has been committed, I set aside the Order of the learned Trial Judge, and the 1st Respondent is sentenced to six years (06 years) rigorous imprisonment and a fine of Rupees Ten Thousand (Rs.10,000/-) in default a sentence of six months (06 months) simple imprisonment.

The sentence imposed on the 1st Respondent shall be implemented from today.

**JUDGE OF THE COURT OF APPEAL**

I agree

**JUDGE OF THE COURT OF APPEAL**

Revision Application partly allowed.