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

In the matter of an Application for Revision under the Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the provision in Chaper XXIX of the Code of Criminal Procedure Act to revise the sentence imposed by the High Court of Moneragala.

Court of Appeal No.CA (PHC) APN 03/2015
Moneragala High Court No. 125/2014(Criminal)

Wimalasooriya Mudiyanselage
Nimal Premaratne
No. 651, Sarana Mawatha,
Kiriwewa,
Sewanagala
(Presently at Welikada Prison
having prisoner No.2 40754)

Accused – Petitioner

Vs.

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

Complainant-Respondent

BEFORE : W.M.M. Malinie Gunaratne, J.

P.R. Walgama, J.

COUNSEL: D.A.P. Weeraratne for the Accused - Petitioner

Himali Jayanetti, S.C. for the Respondent

Argued on: 08.07.2015

Written submissions filed on 13th July 2015 and 20th July 2015.

Decided on: 01.09.2015

Malinie Gunaratne, J.

The Respondent had indicted the Accused – Petitioner in the High Court of Moneragala on two counts for possession and trafficking of 22 kilos and 44 grams of Cannabis Sativa L, 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.

The Accused – Petitioner was served with the indictment on 04/11/2014 and thereafter when the case was called on 02/11/2014 the Accused – Petitioner pleaded guilty to the 1st and 2nd counts in the indictment, whereupon the learned High Court Judge had proceeded to convict the Accused – Petitioner on the plea so recorded.

Upon the Accused - Petitioner pleading guilty, learned State Counsel and the Defence Counsel made comprehensive submissions as to the facts and circumstances of the case. The learned State Counsel invited the Court to

impose appropriate sentences considering the serious nature of the offence, which should serve as a deterrent. The learned Defence Counsel also made submissions in mitigation of sentences.

Thereupon, the learned High Court Judge imposed a sentence of 30 months rigorous imprisonment on the first count and a fine of Rs.50,000/- with the default sentence of 01 year rigorous imprisonment for the second count.

Being aggrieved by the aforesaid sentence, the Accused – Petitioner has preferred this application to revise and mitigate the sentence depending on the following grounds and exceptional circumstances mentioned in Paragraph 6 of the Petition.

i)The learned High Court Judge has failed to appreciate the fact that the Accused – Petitioner pleaded guilty to the indictment at the first instance.

ii)The learned High Court Judge has failed to appreciate the fact that Accused – Petitioner had no previous convictions or pending cases.

iii)The learned High Court Judge has failed to appreciate the fact that by the date of conviction, the Accused - Petitioner has already served 08 months in remand prison.

iv)The learned High Court Judge, in deciding the sentence, has not considered the plea of mitigation made by the Defence Counsel.

v)The sentence imposed by the learned High Court Judge is contrary to sentencing norms and policies accepted by our Superior Courts.

vi)The learned High Court Judge has failed to appreciate and apply Section 303 (suspended sentence of imprisonment) of the Code of Criminal Procedure Act, in sentencing the Accused - Petitioner.

vii)In any event, the sentence imposed by the learned High Court Judge is excessive.

Nevertheless, in the written submission filed in this Court by the learned Counsel for the Accused - Petitioner, it was contended that the fine imposed by the learned High Court Judge has already been paid in respect of the second count and the Accused- Petitioner canvas only the 30 months imprisonment that had not been suspended by the learned High Court Judge. By this Petition the Accused - Petitioner, has sought to suspend the 30 months rigorous imprisonment imposed by the learned High Court Judge.

When this case was taken up for inquiry on 08/07/2015, the learned State Counsel raised the following two preliminary objections with regard to the maintainability of this application.

i)The Accused-Petitioner has failed to show any exceptional circumstances that are necessary for the invocation of the Revisionary Jurisdiction of this Court, which is a discretionary remedy.

ii)Since the Accused - Petitioner has pleaded guilty to the charges, if there is no error in the sentence, it cannot be challenged, except upon a question of law.

Now, I will consider the preliminary objections raised by the Respondent. As set out before, the first objection is that the Accused - Petitioner has failed to show any exceptional circumstances when filing this application.

In the oral and written submissions of the learned State Counsel, it was contended that the Accused - Petitioner in his petition has not pleaded any material that could be considered as exceptional circumstances and that the facts mentioned in Para 6 of the Petition does not constitute exceptional circumstances.

In Dharmarthne vs. Palm Paradise Cabanas Ltd., Gamini Amaratunga J. stated that the practice of court to insist on the existence of exceptional circumstanes for the exercise of revisionary powers has taken deep root in our law and has got hardened into a rule which should not be lightly disturbed.

Thus, the exceptional circumstances is a pre-condition for the exercise of the powers and the absence of such circumstances in any given situation results in refusal of granting remedies.

I will now turn to consider the authorities in this regard.

In Atukorale vs. Saminathan 41 N.L.R. 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 S.L.R. 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)
- Dharmarathne and Another vs. Palm Paradise Cabanas Ltd. (2003) 3 S.L.R. 24
- Seelawathie vs. Agosthinu Appuhamy 2008 B.L.R. 251.
- Attygala Vidanalage Upali Jayasekera vs. Weerakkodige Nandani Weerakkodi CA (Revision) 2570/2004

Having referred to the authorities above it is clear, the existence of exceptional circumstances is a process by which the method of rectification should be adopted.

As the learned State Counsel has contended, on examining the Petition filed by the Accused - Petitioner, it is important to note that the facts and circumstances set out in paragraph 6 of the Petition cannot be considered as exceptional circumstances.

It is relevant to note that the Counsel for the Petitioner has not addressed the aforesaid issue in the written submissions filed by him. However, it is my view that the Accused - Petitioner has failed to disclose exceptional circumstances in order to invoke the jurisdiction of this Court and therefore this is not a fit and proper case to invoke the discretionary revisionary powers of this Court.

Without prejudice to the above view I will now consider the next objection namely, the Accused - Petitioner cannot challenge the sentence except upon a question of law, since he had pleaded guilty to the charges.

In the oral and written submissions of the learned State Counsel it was contended that after pleading guilty to the indictments the sentence imposed by the learned High Court Judge is lawful, legal and justifiable when consider the seriousness of the offence committed by the Accused - Petitioner. Further it was contended if the sentence is not contrary to the law the Accused – Petitioner cannot challenge it.

The gist of the submissions of the Counsel for the Accused – Petitioner is, that, when imposing the sentence, the learned High Court Judge had perused and referred to the statement made by the accused to the police, and influenced by the contents in the said statement, had decided not to consider the plea of mitigation in entirety. (The order of the learned High Court Judge vide Page 22). The learned Counsel contended that this very fact is illegal as far as the procedure in criminal matters is concerned. Hence, the learned Counsel's contenti on was that the learned High Court Judge was influenced by illegal procedure of law when he imposed the sentence on the Accused -Petitioner and disregarded the vital procedure of considering the facts in mitigation.

I am agreeable with the contention of the learned Counsel for the Accused - Petitioner, that the learned High Court Judge had used the statement of the Accused - Petitioner, when imposing the sentence. But I am unable to agree with the contention of the learned Counsel, that the learned High Court Judge had disregarded the vital procedure of considering the facts in mitigation.

Hence, the main issue that has arisen for consideration is whether the learned High Court Judge had disregarded the vital procedure of considering the facts in mitigation, when he was imposing the sentence.

Before that, it is relevant to note, Section 13 of the code of Criminal Procedure Act No. 15 of 1979 stipulates that:-

"That the High Court may impose any sentence or other penalty prescribed by written law".

In the instant case the said sentence or penalty prescribed by written law is found in Section 54 (b) and 54 (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1994.

Section 54 (b) 5 and 54 (d) reads as follows:-

54(b) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a licence of the Director, trafficks in any dangerous drug set out in Column II of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part;

54(d) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a licence of the Director, possesses any dangerous drug set out in Column II of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court

without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part.

Nature of Offence	***Quantities***	***Penalty***
Traffics, possess, imports or exports.	***5 kilogrammes of cannabis and above.***	***Fine not less than twenty five thousand rupees and not exceeding fifty thousand rupees or imprisonment of either description for a period not less than two years and not exceeding five years.***

In order to have a lesser punishment the Counsel for the Appellant had submitted that the Appellant is 56 years old and a father of three children. Further he had 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 the criminal stupidity, when a person loses his family life, that it is not a ground for not imposing a severe sentence.

The Counsel had further submitted, that the Appellant 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 the gravity of offence is concerned.

According to the proceedings before the High Court, it had been disclosed, that the Accused-Petitioner, being the official driver of the Divisional Secretary of Thanamalvila, had used his official vehicle to

transport 22 kilos and 44 grams of Cannabis Sativa. The offence which the Accused – Petitioner had pleaded guilty is of a serious nature and had been committed with much planning and deliberation. The gravity of the offence and the circumstances in which it was committed, the degree of deliberation involved in it and the difficulty of detection of this kind of offence had been taken into consideration when he imposed the sentence on the Accused – Petitioner.

Accordingly, the learned High Court Judge had imposed a sentence of 30 months rigorous imprisonment on the first count and a fine of Rs.50,000/- with the default sentence of 01 year rigorous imprisonment on the 2nd count as prescribed by the Poisons, Opium and Dangerous Drugs Ordinance. Hence, I am of the view, the learned High Court Judge was within his power to impose the aforesaid sentence. It is important to note, although he had the power to impose another two years and 06 months imprisonment for the 1st count and 05 years rigorous imprisonment for the 2nd count also, had imposed only a fine despite the serious nature of the charges that were filed against the Accused – Petitioner.

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.

As to the matter of assessing sentence, in the case of Attorney General vs. H.N.De Silva (Supra), Basnayake Acting Chief Justice, 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 other 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".

Hence, I am of the view, considering all the matters in mitigation and the gravity of the offence and the circumstances in which it was committed, and specially the sentences prescribed in the poisons, opium and dangerous drugs ordinance, the learned high court judge had imposed the aforesaid sentences.

The learned Counsel for the Accused – Petitioner had urged to consider the unspent term of rigorous imprisonment to convert to a suspended sentence on a humanitarian perspective.

At this juncture it is relevant to note that the legislature has laid down guidelines which a Court must bear in mind, before such court decides not to suspend a sentence upon conviction. Section 303 (2) of the Code of Criminal Procedure Act No.15 of 1979 amended in 1999, reads thus:-

"A Court shall not make an order suspending a sentence of imprisonment if –

(a) A mandatory minimum sentence of imprisonment has been prescribed by law for the offence in respect of which the sentence is imposed;

Hence, it is important to note, following the aforesaid guidelines, the learned High Court Judge had imposed a 30 months rigorous imprisonment on the Accused – Petitioner and I am unable to accept the submissions of the learned Counsel for the Accused – Petitioner that the learned high court judge had disregarded the facts in mitigation.

The main contention of the learned Counsel for the Accused – Petitioner was that the learned High Court Judge had failed to consider any of the mitigatory factors when deciding the sentence as he had perused and referred to the statement made by the Accused - Petitioner, to the police and was influenced by the contents in the said statement and it is a grave legal error committed by the Trial Judge.

On examining the authorities which had been submitted in support of his contention, it is relevant to note that all those judgments are with regard to the convictions and not the sentences.

When I consider the order of the learned High Court Judge, I hold the view, when deciding the sentence, perusing the statement made by the accused to the police, has not occasioned a miscarriage of justice.

I am satisfied, having regard to the facts of this case and the relevant principles of law and criteria governing sentencing, there is no error committed by the learned High Court Judge. For the abovementioned reasons, I uphold the preliminary objections raised on behalf of the

Respondent and in the circumstances I affirm the sentence and dismiss the application.

Application dismissed.

JUDGE OF THE COURT OF APPEAL

P.R.Walgama, J.

I agree

JUDGE OF THE COURT OF APPEAL

Application is dismissed.