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

In the matter of an application for Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal Application
No. C A (PHC) APN 13/2013
High Court Case No. 3529/2006

Hon. Attorney General
of the Democratic Socialist Republic of Sri Lanka.

VS

Satharasinghe Aratchchige Don
Sarath Wimalaweera.(Presently detailed at the Welikada Prison, Welikada.)

Accused

AND NOW BETWEEN

Satharasinghe Arachchige Don
Sarath Wimalaweera.(Presently detained at the Welikada Prison, Welikada.)

Accused-Petitioner

VS

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

Respondent

BEFORE : **K.T. Chitrasiri, J**
W.M.M. Malinie Gunaratne, J.

COUNSEL : **Asthika Devendra with Lilan Warsuvithane**
for the Petitioner

Shanil Kularatne, SSC for the Respondent

Argued on : 12.11.2014

Decided on : 07.05.2015

Malinie Gunaratne, J.

The Accused-Petitioner has filed this case and another three cases bearing numbers C A (PHC) 14/2013, C A (PHC) 15/2013 and C A (PHC) 16/2013, seeking to set aside the sentences dated 01.09.2008 imposed by the learned High Court Judge of Colombo. In the alternative, to impose lesser sentences or an order on the imprisonment imposed on each charge on the Petitioner to run concurrently with effect from 01.09.2008.

When this matter came up for hearing before this Court on 12.11.2014, since the applications in all the above mentioned cases are similar to this application, both parties agreed to take all the cases together.

The Accused-Petitioner was indicted by the Honourable Attorney General alleging that the Accused-Petitioner had hired some vehicles from a company called Mal-Key Car Rental Company on different occasions, (within a period of 12 months) by fraudulently obtaining the possession of several vehicles posing him as a police officer attached to the Attorney General's Department, thereby committing the offence of cheating punishable under Section 403 of the Penal Code.

In view of the provisions of Section 174 of the Code of Criminal Procedure Act, the Respondent had filed separate indictments in the High Court of Colombo. The said indictments were filed in different divisions of that Court under the case numbers 3527/2006, 3528/2006, 3529/2006 and 3530/2006 (High Court No. 3, 4, 5 and 7).

Upon reading over the respective indictments, the Accused- Petitioner pleaded not guilty for all the charges. When the case bearing No. H C

3530/2006 was called in Court No.3, the learned Counsel who appeared for the Accused-Petitioner had made an application to take up all the cases in

Court No.03 of the High Court of Colombo in order to tender a plea of guilt, in all the cases. The application was allowed by the learned High Court Judge (Court No.03) and thereafter the said 04 cases were called on 29.08.2009 in Court No. 03 of the High Court of Colombo. The Accused-Petitioner tendered a plea of guilt with regard to all the counts listed under separate indictments in all the cases.

Upon the Accused-Petitioner pleading guilty, the learned State Counsel and the Defence Counsel made comprehensive submissions as to the facts and circumstances of the cases. The learned State Counsel invited the Court to impose appropriate sentences considering the serious nature of the offences. The learned Defence Counsel also made submissions in mitigation of sentences.

The learned High Court Judge having considered the submissions made by both parties and also considering the previous convictions of the Accused-Petitioner, (he has 06 previous convictions in the Magistrate's Court), the Accused - Petitioner was sentenced to 02 years rigorous imprisonment per each count listed in the respective indictments.

The Accused-Petitioner being aggrieved by the aforesaid sentence moved to revise and mitigate the sentence having served 4½ years imprisonment, depending on the circumstances mentioned in paragraph (25) of the Petition.

When this matter came up for hearing before this Court, the learned Senior State Counsel submitted, that the Accused -Petitioner is not entitled to invoke the revisionary jurisdiction as the Accused-Petitioner had an alternative

remedy namely right of appeal which he has 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 that are necessary for the invocation of the revisionary jurisdiction of this Court, which is a discretionary remedy. He further submitted that the Accused- Petitioner has failed to explain the reasons for the delay of 4 ½ years when filing this application.

Firstly, I will consider the preliminary objections raised by the Respondent. As set out before, the first objection is that the Petitioner has failed to exercise the right of appeal and he has not given any plausible or justifiable reason, either for his failure to exercise the right of appeal available to him by law. The learned Counsel for the Accused- Petitioner submitted that since the Accused- Petitioner was not in a position to obtain proper legal advice since he has no relative or family member to help him to obtain legal advice.

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

In Perera vs. Silva (1908) 4 ACR 79, the Applicant had another remedy and the Court specifically refused to grant the remedies available in a revision application.

In Ameen vs. Rasheed (1936) 6 NCLW, 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 SLR 151, the Court dismissed an application for revision on the basis that there was an alternative remedy specified by statute.

It was held in the case of Selliah Marimuttu vs. Sivapakkiam (1986) 1 CALR 264, that an application for revision is available where the failure to exercise the right of appeal is explained to the satisfaction of Court.

In the case of Halwan and Others vs. Kaleelna Rahuman (2000) 3 SLR 50 S.N. Silva J. 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 appellant 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 appellant jurisdiction. Such excuse should be pleaded in the Petition seeking judicial review and be supported by affidavits and necessary documents....."*.

In Carolis vs. Dharmarathne Thero and Others (2006) 2 SLR 321 and in Kumarasinghe and Another vs. Rajapaksha (2007) 1 SLR 359, similar opinion had been expressed.

On examining the Petition filed by the Accused-Petitioner, it is important to note that the reasons set out in Paragraph (26) of the Petition, cannot be considered as an excuse for his failure to exercise the right of appeal.

Therefore, I am of the view that the Accused-Petitioner is not entitled to invoke the revisionary jurisdiction as the Accused-Petitioner had an alternative remedy.

I will now consider the next objection namely, failure to show exceptional circumstances when filing this revision application. When the law has granted a remedy to an aggrieved party and if he failed to resort to the remedy given by the law, the Court of Appeal would not entertain a revision application, unless there are exceptional circumstances.

It is settled law that even if the decision is appealable, the Court has a jurisdiction to entertain a revisionary application and to make order when exceptional circumstances are pleaded.

The learned Senior State Counsel contented that the Petitioner in his Petition has not pleaded any material that could be considered as exceptional circumstances and that the facts mentioned in paragraphs 24, 25 and 26 of the Petition does not constitute exceptional circumstances. The Counsel for the Accused -Petitioner has submitted, in paragraphs 24, 25 and 26 of the Petition, that the Accused-Petitioner has pleaded exceptional grounds, circumstances and reasons. To support his submission attention was drawn to the decisions in –

- Seelawathie vs. Agosthinu Appuhamy 2008 BLR 251 and
- Attygala Vidanalage Upali Jayasekara vs. Weerakkodige Nandani Weerakkodi CA (Revision) 2570/2004.

It was held in Seelawathi's case, that the Court will exercise its revisionary powers if there are exceptional circumstances such as, something illegal about the order made or when the application discloses circumstances which shock the conscience of the Court. In the second case, it was held, that the revisionary jurisdiction is to remedy a miscarriage of justice. It means that this Court will exercise its revisionary powers if there are exceptional circumstances such as, there was something **illegal** about the order made by the Trial Judge or when the application discloses circumstances which **shock the conscience of the Court.**

In the second case, it was held, that the revisionary jurisdiction is to remedy a **miscarriage of justice.** It means that this Court will exercise its revisionary powers if there are exceptional circumstances such as illegality in order made by the Trial Judge or when the application discloses circumstances which shock the conscience of the Court.

The learned Counsel for the Accused-Petitioner has not complained that the order made by the learned Trial Judge is illegal or the judge has improperly exercised the discretion vested in him. He had only submitted that the sentence is excessive.

In the case of the King Vs. Rankira 32 NLR 145, it was held, that the Court of Appeal will not interfere with the judicial discretion of a Trial Judge in passing a sentence unless that discretion has been exercised on a wrong principle. Similar opinion had been expressed in the King vs. E.M.D de Saram as well.

The learned Senior State Counsel contended that even though the High Court Judge could have imposed a sentence of seven (07) years imprisonment per each count, he had proceeded to impose a sentence of imprisonment for two (2) years per each count only despite the fact that the learned Trial Judge has addressed his mind to the serious nature of the charges. I do agree with the submissions of the learned Senior State Counsel. Accordingly, I am of the view that the Trial Judge has not exceeded his power when imposing sentences on the Accused-Petitioner.

In the submissions of the learned Counsel for the Accused- Petitioner, he has stressed the point, that imposing 22 years imprisonment without considering that the total amount relating to all the charges was Rs.263,207.50 itself create exceptional circumstances to invoke the revisionary jurisdiction of

this Court and the said sentence is too excessive. He further submitted that the sentence imposed upon the Petitioner is unreasonable and will cause grave miscarriage of justice if the same is allowed to operate.

Before addressing my mind to the above matter, it is pertinent to refer briefly to the facts of this case. During the period relevant to the offences, the Accused- Petitioner has functioned as a Peon attached to the Attorney General's Department and during the investigations it was revealed that the Accused- Petitioner had made use of an official letter head of the Attorney General, to convince the Manager of the car rental company, to release the vehicles on the belief that the vehicles were required to be used for official purposes of the Attorney General's Department.

The Senior State Counsel submitted that since the alleged offences were committed by using the name of the Attorney General's Department, the sentence imposed by the learned High Court Judge was reasonable.

The Accused-Petitioner's Counsel contended that all criminal offences are considered as committed against the State and the law does not recognize separate criminal offences in respect of the State departments. Further contended that using the name of the Attorney General's Department by the Petitioner, could only be considered as a single act to determine the gravity of the offences.

I do not agree with the submissions of the learned Counsel. In the case of Attorney General vs. Mendis (1995) 1 SLR 138, it was held, 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.

Hence, it is my considered view that using the name of the Attorney General's Department fraudulently, cannot be considered as a single act to determine the gravity of the offence. As to the matters of assessing sentence, in the case of Attorney General vs. H.N.de Silva (Supra) Basnayake Acting Chief Justice observed that 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.

It was held in the case of Attorney General vs. Mendis, 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.

In the case of Attorney General Vs. Janak Sri Uluwaduge and Another (1995) 1 SLR 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 Don Percy Nanayakkara vs. The Republic of Sri Lanka (1993) 1 SLR 71, that in assessing punishment the Court has to consider the matter from the point of both the offender and the public.

It has been held in Santa Singh vs. State of Punjab AIR (1976) SC 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 SCC 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". It was further held that "the Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the criminal and victim belong".

In Dhananjay Chatterjee vs. State of W.B. (1994) 2 SCC 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 Mahesh vs. State of M.P (1987) 2 SCR 710 : AIR 1987 SC. 1346), while refusing to reduce the sentence observed thus: "It will be a mockery of justice

to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicising system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon".

A sentence is a judgment on conviction of a crime. It is being resorted to only after a person is convicted of the offence. It is the ultimate goal of any justice – delivery system. (State of Punjab vs. Prem Sagar SCC).553, Paras 5 – 8.) Accordingly, it is the duty of every Court to impose proper sentence having regard to the nature of the offence and the manner in which it was committed.

The offences for which the Accused- Petitioner has pleaded guilty in this case are of a serious nature and those had been committed deliberately after having it planned. The Accused-Petitioner has failed to satisfy this Court that there has been a miscarriage of justice or to aver any exceptional circumstances requiring this Court to exercise its revisionary jurisdiction to interfere with the order of the learned High Court Judge.

In these circumstances I do not agree with the submissions of the learned Counsel for the Accused-Petitioner, that the averments in paragraph (25) of the Petition by which exceptional circumstances are set out is factually and legally not supportable.

The existence of 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 guise of a revision application to make an appeal in situations where the legislature has not given the right of appeal.

Furthermore, in Dharmaratne and Another vs. Palm Paradise Cabana Ltd. (2003) 3 SLR 24, Gamini Amaratunga J. stated that the practice of Court to insist on the existence of exceptional circumstances 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.

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. I do not agree that the matters referred to in the Petition amount to exceptional circumstances, as required by law. Having referred to the authorities above and to the facts and circumstances of this case, it is my view that the Accused-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 mere fact that the sentence is excessive is not a ground for the exercise of the revisionary powers and I am of the opinion that the Petitioner has failed to establish exceptional circumstances to have and maintain this application. In such circumstances, I uphold the preliminary objections raised by the learned Senior State Counsel.

Another point urged by the learned Counsel for the Accused- Petitioner was that, instead of indicting the Accused- Petitioner under a single indictment the Respondent indicted under 4 indictments which consisted of 11 counts. The learned Senior State Counsel contended that the Petitioner has made an attempt to mislead this Court by submitting, that a sentence of 22 years had

been imposed with regard to a case where charges had been in respect of offences that had taken place in the course of one transaction. He further contended that the learned Trial Judge has imposed the sentences separately in respect of 14 separate charges which had been listed under 4 different indictments and has filed the said indictments in different cases. The learned Senior State Counsel's contention was that the Respondent had no option but to file several counts of cheating, since the Accused -Petitioner has removed several vehicles that were in the custody of the Manager of the Mal-Key Car Rental Company on separate instances by fraudulently posing as an Inspector of Police attached to the Attorney General's Department. Having taking into consideration the provisions of the Code of Criminal Procedure Act, the Respondent has filed separate charges and therefore, I am of the view that there is no merit in that argument.

When a person commits a crime, he is punished with imprisonment, fine or any other mode of punishment which is prescribed in law. A 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 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.

In this case the learned High Court Judge was within his power to impose a sentence of 7 years imprisonment per each count. Although the Accused-Petitioner has 6 previous convictions the learned High Court Judge has imposed a lenient sentence of 2 years with regard to each count despite the serious nature of the charges that were filed against the Accused-Petitioner.

The Accused-Petitioner had been the perpetrator of a very serious crime which had been committed with much deliberation and planning. Having regard to the serious nature and the manner in which these offences have been committed by the Accused-Petitioner, I am of the view that the sentence imposed in this case is neither excessive nor illegal. The learned High Court Judge has considered the matters submitted by the Counsel for the 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-Petitioner.

The Accused-Petitioner has not satisfied Court, that the sentence imposed on him was illegal or that the Judge has exceeded his power in imposing the sentence. The quantum of sentence is a matter for the discretion of the Trial Judge and this Court should not interfere, unless it appears that the Trial Judge proceeded upon a wrong principle. I am of the view that an Appellate Court will interfere when a sentence appears to err in principle or when the subordinate Court has either failed to exercise its discretion or has exercised it improperly or wrongly.

The Accused-Petitioner has not satisfied Court that the sentence imposed on him was illegal or that the Judge has exceeded the power in imposing the sentence. Therefore, I am of the view, that this is not a fit case, where the sentence should be set aside or varied.

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