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

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

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Rajapaksha Pathiranalage Maithripala,

Accused

C.A. Revision Application No: **CA (PHC) APN 10/2018**

H.C. Gampaha Case No. **HC 74/2010**

AND NOW BETWEEN

Rajapaksha Pathiranalage Maithripala,

(Currently in Welikada prison)

Accused-Petitioner

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	AAL Chathura Amaratunga with AAL Chulari Hettiarachchi for the Accused-Petitioner Jayalakshi De Silva, SC for the Complainant-Respondent
ARGUED ON	:	21.09.2018
WRITTEN SUBMISSIONS	:	The Accused-Petitioner – On 22.10.2018 The Respondents – On 04.09.2018
DECIDED ON	:	10.01.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner has filed this revision application seeking to set aside the order of the Learned High Court Judge of Gampaha dated 26.10.2016 and seeking to impose the default sentence in the judgment dated 23.03.2016 under case No. HC 74/2010.

Facts of the case:

The accused-petitioner (hereinafter referred to as the 'petitioner') was indicted in the High Court of Gampaha as follows;

1) The accused committed Grave Sexual Abuse, by oral penetration, on a boy who was under 16 years of age and thereby committed an offence punishable under section 365B (2) (b) of the Penal Code (as amended)

2) The accused committed Grave Sexual Abuse, by anal penetration, on a boy who was under 16 years of age and thereby committed an offence punishable under section 365B (2) (b) of the Penal Code (as amended).

On 23.03.2016, the petitioner had pleaded guilty to the said charges and the Learned High Court Judge of Gampaha had convicted the petitioner. Accordingly the Learned High Court Judge had imposed following sentences for two charges;

Charge 01:

i) A term of 24 months rigorous imprisonment that was suspended for 10 years,

ii) A fine of Rs.5000/= and if default a term of 4 months simple imprisonment,

iii) A compensation of Rs.30, 000/= to be paid to the victim and if default a term of 10 months rigorous imprisonment.

Charge 02:

i) A term of 24 months rigorous imprisonment that was suspended for 10 years,

ii) A fine of Rs.5000/= and if default a term of 4 months simple imprisonment,

iii) A compensation of Rs.20, 000/= to be paid to the victim and if default a term of 10 months rigorous imprisonment.

The Learned High Court Judge had further directed that the imprisonment of charge 01 and charge 02 to run concurrently. Thereafter the case was called on 17.05.2016 and 21.06.2016 for the purpose of paying the compensation to the victim. The petitioner had moved further time to pay the compensation and

however was absent on the next date i.e. 26.09.2016. Therefore a warrant was issued on the petitioner and he was arrested and produced before the succeeding Learned High Court Judge of Gampaha on 26.10.2016. The petitioner had informed Court that he was unable to pay the compensation on that day as well. Thereafter the Learned High Court Judge had set aside and varied the judgment dated 23.03.2016 by imposing the following sentences;

i) A term of 07 years rigorous imprisonment for the 1st charge,

ii) A term of 07 years rigorous imprisonment for the 2nd charge,

iii) A compensation of Rs. 50,000/= to be paid to the victim and if default a term of 6 months simple imprisonment.

The Learned High Court Judge had further directed the terms of imprisonment to run consecutively.

Being aggrieved by the said order dated 26.10.2016 the petitioner preferred a revision application to this Court.

The Learned Counsel for the petitioner has submitted following two grounds of revision;

1) The judgment dated 23.03.2016 was not illegal,
2) *Per incuriam* rule was not applicable to the judgment dated 23.03.2016 and therefore the succeeding High Court Judge was not empowered to vary the said judgment.

The Learned State Counsel for the complainant-respondent (hereinafter referred to as the 'respondent') contended that both judgments dated 23.03.2016 and 26.10.2016 are infact illegal. Accordingly the Learned State Counsel seeks to set aside both sentences and to impose a legal sentence on the petitioner.

We observe that section 365B (2) (b) of the Penal Code carries a minimum mandatory sentence of a term of 07 years. However the Supreme Court, in cases of **S.C reference No. 03/2008-H.C. Anuradhapura 334/2004** and **Ambagala Mudiyanselage Samantha Sampath V. Attorney General [S.C. Appeal No. 17/2013],** was of the view that Court can impose a sentence below the minimum mandatory sentence depending on the circumstances of each case.

In the case of **Ambagala Mudiyanselage Samantha Sampath (supra),** it was held that,

> *"In the present case, we must look at the big picture with the victim of rape the Appellant, the father of the child born, and the 10 year- old girl child who was born into this world as a result of the victim having been raped. The victim of rape never complained to the Police until after a pregnancy of 5 months when Police on its own came to the victim in search of her when an outsider informed the Police of her missing from home. There was no chance for the victim to give evidence as the Appellant pleaded guilty to the charge of statutory rape of the victim. There is a bar for the victim and the Appellant to enter into a marriage as the Appellant is already legally married to the victim's sister who is living abroad. The child is being looked after by the Appellant father in the eyes of the society, and the child is dependent on the income earned by the Appellant...*
>
> *I agree with the decision of the Supreme Court in S.C. Reference 03/2008 and uphold the conclusion of that case that the minimum mandatory sentence in Section 364(2) (e) is in conflict with Articles 4(c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence..."*

In the case of **Hirimuthugoda Sanjeewa Shantha alias Ran Mama V. Attorney General (C.A. 150/2010),** Justice A. Gooneratne observed as follows;

"In S.C 03/2008 the Accused and the complainant though under age had a love affair, and both parties had eloped and had sexual intercourse. Thereafter the respective parents intervened and brought the complainant back home. To arrive at a decision the Supreme Court considered numerous authorities and decisions inclusive of Article 4 (c), 11 & 12(1) of the Constitution. What is paramount is the nature of the offence/age and the judicial discretions that need to be exercised by a court of law, in the circumstances and the context of the case before court and I think the decision in S.C. 03/2008 cannot bind any other court where the offence is of a very serious nature as in that judgment (S.C. 03/2008) court emphasis the fact of the nature of the offence and judges' discretion. It could be used in an appropriate case to impose a sentence below the minimum mandatory sentence, but not in each and every case of grave sexual offence. I would refer to the following excerpts from the judgment in S.C. 03/2008...

'However there may well be exceptional cases in which an offence may be so serious in nature that irrespective of the circumstances a Court may never exercise judicial discretion in favour of a punishment that is less than an appropriate minimum mandatory punishment. The reasoning in Re: Prevention of Organized Crime Bill (supra) relates to such an exceptional case. The Supreme Court in Re: Prevention of Organized Crime Bill (supra) in fact contrasted the serious nature of the offences in Re: Prevention of Organized Crime Bill (supra) with far lesser serious offences in Re: Prohibition of Ragging and Other Forms of Violence in Educational Institutions Bill

(supra). A minimum mandatory punishment of appropriate severity for such serious offences would not be inconsistent with Articles 4(c), 11 and 12(1)."

In light of the above decisions, it is understood that Court has discretion to impose an appropriate sentence, even if it is below a minimum mandatory sentence, considering the facts of each case. We observe section 303 of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No. 47 of 1999 which stipulates that;

303. (1) *Subject to the provisions of this section, on sentencing an offender to a term of imprisonment, a court may make an order suspending the whole or part of the sentence if it is satisfied,* ***for reasons to be stated in writing****, that it is appropriate to do so in the circumstances, having regard to –*

(a) the maximum penalty prescribed for the offence in respect of which the sentence is imposed ;

(b) the nature and gravity of the offence;

(d) the offender's previous character;

(h) the need to deter the offender or other persons from committing offences of the same or of a similar character;

(j) the need to protect the victim or the community from the offender;

(2) 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; *or*

(b) the offender is serving, or is yet to serve, a term of imprisonment that has not been suspended; or... " (Emphasis added)

Since section 365B (2) (b) carries a minimum mandatory sentence we are of the view that, in the instant case, the Learned High Court Judge should have imposed a custodial sentence. We observe that when the Learned High Court judge was imposing the sentence, he had considered the age of the petitioner, the fact that the petitioner had no previous convictions, and the fact that the petitioner pleaded guilty to the offence at first instance thereby saving the valuable time of Court. However upon perusal of the proceedings we observe that the indictment was handed over to the petitioner on 28.10.2010 and the petitioner was ordered to be released on bail. On next date i.e. 13.12.2010 the petitioner was absent and a warrant was issued on him. Accordingly he was arrested and produced before Court on 12.05.2011. On 17.06.2011 the case was called in order to consider granting bail and the Learned State Counsel had objected to the same. On 01.07.2011 the Learned High Court Judge of Gampaha had cancelled previous bail conditions and had imposed heavy bail conditions (Page 39 of the brief).

On 25.10.2011 the Learned High Court Judge had fixed the trial for 11.05.2012. On that day the indictment was served in open Court and a Counsel was assigned for the petitioner by the Government. Thereafter the trial was fixed for 30.07.2012 and the witnesses were summoned as well. However we observe that the trial was not commenced on that day. On 28.08.2013 and 15.11.2013 the Learned Counsel for the petitioner who appeared in High Court had moved for further time since he had not received instructions from the petitioner.

Relevant proceedings are reproduced (extract) as follows;

"දිනය 2013.08.28

පැ.සා. 1, 2, 3 සිටී.

විත්තියේ නීතිඥ මහතා උපදෙස් ගොමැති නිසා දින පතයි. අවසන් වශයෙන් දිනයක් දෙමි.

<u>දිනය 2013.11.15</u>

පැ.සා 1 සිට 4 දක්වා සිටී.

විත්තියේ නීතිඥ මහතාට විත්තිකරුගෙන් නිසි උපදෙස් නොලැබුණු බව කියා සිටිමින් නඩු විභාගය සඳහා වෙනත් දිනයක් අයැද සිටියි.

ඉල්ලීමට ඉඩ දෙමි.

විත්තිකරුට, විත්තියේ නීතිඥ මහතාට උපදෙස් ලබාදෙන ලෙසට අවවාද කරමි." (Page 46 and 47 of the brief)

Thereafter on 23.03.2016 the petitioner had informed his willingness to adopt a shortcut and the petitioner had pleaded guilty to the amended indictment. We observe that on every occasion the witnesses and the victim were present in Court. The petitioner had decided to plead guilty only after moving dates for a period of almost 05 years. Therefore we are unable to agree with the reasoning of the Learned High Court Judge that the petitioner saved valuable time of Court by pleading guilty at first instance.

In the case of **Attorney General V. Mayagodage Sanath Dharmadiri Perera [CA (PHC) APN 147/2012],** it was held that,

> *"On the other hand this is not a fit case to order suspended sentence. The nature and the gravity of the offence have to be considered before ordering a suspended sentence. The victim is distant relation of the accused. She has referred to the accused as "Sanath Mama" which means uncle. A person in that position is expected to protect a person like the victim who was a school*

going child at the time of the incident. Instead of protecting her, he has committed a sexual offence, rape, on her. At that time also he was a married person with two children. These factors necessitate the imposition of a custodial long term punishment, not a suspended sentence.

The counsel for the Accused submitted that the accused had pleaded guilty and it has to be considered as a mitigating factor in sentencing. There is no doubt that it is. It has shortened the trial and it helps to clear the backlog of cases in Court. But as per the submissions of the learned Counsel for the Accused in the High Court, he had pleaded guilty only for the purpose of preventing the wastage of the precious time of Court. He has not pleaded guilty on admitting the crime that he has committed and on being regretful of what he has done. Pleading guilty can be considered under section 303 (1) (k) only if he is sincerely and truly repentant of what he has done. The sec section reads thus;

> *(k) the fact that the person accused of the offence pleaded guilty to the offence and such person is sincerely and truly repentant; or*

The time of Court is precious, but utilizing that precious time for dispensing justice is not wastage. Therefore, the Accused will get only a minor discount for pleading guilty to prevent the wastage of Court's time."

We observe that the victim in the instant case was a boy of 13 years at the time of offence and the petitioner was a 39 years old married person. The victim was subject to grave sexual abuse when he was flying kites in the evening and the petitioner had threatened the victim after abusing him. The Medico-Legal report (at page 07 of the brief) reveals that the findings were compatible with recent anal penetration.

It was held in the case of **Attorney General V. Jinak Sri Uluwaduge and another [1995] 1 Sri L.R 157** that;

> *"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. Incidence of crimes of the nature of which the offender has been found guilty and the difficulty of detection are also matters which should receive due consideration. The Judge should also take into account the nature of the loss to the victim and the profit that may accrue to the culprit in the event of non-detection..."*

In the case of **The Attorney General V. H.N. de Silva [57 NLR 121**, it was held that,

> *"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. He should also regard the effect of the punishment as a deterrent and consider to what extent it will be effective..."*

In the case of **Hirimuthugoda Sanjeewa Shantha alias Ran Mama (supra)** it was further held that,

> *"The damage caused to the victim mentally and physically cannot be compensated by payment of money alone. It is the mental trauma that could shape or destroy or weaken the life of the victim in the subsequent year of victim's life..."*

After considering the gravity of the offence and the physical and mental damage caused to the child, we are of the view that only paying compensation to the victim will not be sufficient and a perpetrator with such a mentality should be confined for a certain time as well.

The Learned Counsel for the petitioner contended that *per incuriam* rule was not applicable to the judgment dated 23.03.2016 and therefore the Learned succeeding High Court Judge was not empowered to vary the said judgment.

We observe that dates were granted for the petitioner to pay the fine and the compensation but he had failed to do so. The case was postponed on three occasions and the victim was present in Court to collect the compensation on all three days. On 26.09.2016 the Learned High Court Judge of Gampaha had issued a warrant on the petitioner and accordingly he was arrested and produced before Court on 26.10.2016. After considering the gravity of the offence and the behaviour of the petitioner, the Learned High Court Judge had set aside the order dated 23.03.2016 and had imposed a term of 7 years imprisonment for each charge (which is the minimum mandatory sentence) and directed the terms of imprisonment to run consecutively. Additionally a compensation of Rs. 50,000/= was ordered to be paid to the victim.

In the case of **Hettiarachchi V. Seneviratne, Deputy Bribery Commissioner and others (No.02) [1994] 3 Sri L.R. 293,** it was held that,

> *"It is a well-established rule in general a Court cannot re-hear, review, alter or vary its own judgment once delivered. The rationale of that rule is that there must be finality to litigation...it may, of course, have a limited power to clarify its judgment and to correct accidental slips or omissions..."*

In the case of **Jeyaraj Fernandopulle V. Premachandra De Silva and others [1996] 1 Sri L.R 70**, it was held that,

> *"As a general rule, no Court has power to rehear, review, alter or vary any judgment or order made by it after it has been entered...However all Courts have inherent power in certain circumstances to revise an order made by them such as –*
>
> *(i) An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion exercised judicially and not capriciously.*
>
> *(ii) When a person invokes the exercise of inherent powers of the Court, two questions must be asked by the Court.*
>
> > *(a) Is it a case which comes within the scope of the inherent powers of court?*
> >
> > *(b) Is it one in which those powers should be exercised?*
>
> *(iii) A clerical mistake in a judgment or order or some error arising in a judgment or order from an accidental slip or omission may be corrected.*

(iv) A Court has power to vary its own orders in such a way-as to carry out its own meaning and where the language is doubtful, to make it plain or to amend it where a party has been wrongly named or described but not if it would change the substance of the judgment..."

In the case of **Senarath V. Chandraratne, Commissioner of Excise and others [1995] 1 Sri L.R. 209**, it was held that,

"In general the Court cannot re-hear, review, alter or vary such decision. However the Court has limited power to clarify its judgment and to correct accidental slips or omissions..."

In light of the above it is understood that Court has a very limited power to clarify its own judgments other than given in *per incuriam*. The Learned succeeding High Court Judge should have either imposed the default sentence or imposed the custodial sentence or should have done both. Therefore we are of the view that the Learned succeeding High Court Judge was not empowered to set aside the judgment delivered by the preceding High Court Judge.

In the case of **W.M.F.G. Fernando V. Rev Sr. Marie Bernard and others [C.A.1108/99 (F)],** it was held that,

*"It is trite law that the purpose of revisionary jurisdiction is supervisory in nature, and that the object is the proper administration of justice. In **Attorney General v Gunawardena (1996) 2 SLR 149** it was held that: "Revision, like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is the due administration of justice and not, primarily or solely, the relieving of grievances of a party. An appeal is a remedy, which a party who is entitled to it, may claim to have as*

of right, and its object is the grant of relief to a party aggrieved by an order of court which is tainted by error. .. "

In the case of **Mariam Beebee V. Seyed Mohamed [68 NLR 36]** it was held that,

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this court. Its object is the due administration of justice and the correction of errors, sometimes committed by this court itself, in order to avoid a miscarriage of justice..."

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284,** it was held that;

"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."

Considering above, we are of the view that there had been a miscarriage of justice which warrants this Court to invoke the revisionary jurisdiction. Therefore we decide to set aside both judgments dated 23.03.2016 and 26.10.2016 in case No. HC 74/2010.

We impose the following sentences on the petitioner;

Charge 01 – A term of 7 years rigorous imprisonment

Charge 02 – A term of 7 years rigorous imprisonment

Fine of Rs. 5000/= for each charge with a default sentence of 6 months simple imprisonment.

We order the terms of imprisonment to run concurrently. Additionally we order the petitioner to pay compensation of Rs. 50,000/= to the victim on each charge and if default a term of 12 months rigorous imprisonment on each charge.
Subject to above variation of the sentence, the revision application is allowed.

Registrar is directed to send this order to the relevant High Court of Gampaha to take immediate steps to apprehend the accused-petitioner.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL

1. Ambagala Mudiyanselage Samantha Sampath V. Attorney General [S.C. Appeal No. 17/2013]
2. Hirimuthugoda Sanjeewa Shantha alias Ran Mama V. Attorney General (C.A. 150/2010)
3. Attorney General V. Mayagodage Sanath Dharmadiri Perera [CA (PHC) APN 147/2012]
4. Attorney General V. Jinak Sri Uluwaduge and another [1995] 1 Sri L.R 157
5. The Attorney General V. H.N. de Silva [57 NLR 121
6. Hettiarachchi V. Seneviratne, Deputy Bribery Commissioner and others [1994] 3 Sri L.R. 293
7. Jeyaraj Fernandopulle V. Premachandra De Silva and others [1996] 1 Sri L.R 70
8. Senarath V. Chandraratne, Commissioner of Excise and others [1995] 1 Sri L.R. 209
9. W.M.F.G. Fernando V. Rev Sr. Marie Bernard and others [C.A.1108/99 (F)]
10. Mariam Beebee V. Seyed Mohamed [68 NLR 36]
11. Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284