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

1. Kurundukarage Hemachandra
2. Udangalage Mohan Rajasinghe alias Wasantha

Accused

C.A. Revision Application No:
CA (PHC) APN 14/2015

H.C. Kalutara Case No: **411/2004**

AND NOW BETWEEN

1. Kurundukarage Hemachandra
2. Udangalage Mohan Rajasinghe alias Wasantha

Accused-Petitioners

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	Shanaka Ranasinghe, PC with AAL Niroshan Mihindukulasuriya, AAL Sandamali Peiris and AAL Nisith Abeysuriya for the Accused-Petitioners Nayomi Wickremasekara, SSC for the Complainant-Respondent
ARGUED ON	:	13.11.2018
WRITTEN SUBMISSIONS	:	The Accused-Petitioners – On 25.10.2018
DECIDED ON	:	26.03.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner has filed this revision application seeking to set aside the judgment of the Learned High Court Judge of Kalutara dated 26.01.2015 in case No. HC 411/2004. After concluding the argument, the Learned SSC for the AG informed that no written submissions would be filed on behalf of the respondent since a comprehensive statement of objections has been already filed.

Facts of the case:

The 1st accused-petitioner (hereinafter referred to as the '1st petitioner') and the 2nd accused-petitioner (hereinafter referred to as the 2nd petitioner') were indicted in the High Court of Kalutara for committing an offence punishable under section 296 read together with section 32 of the Penal Code. After concluding the case for prosecution, the 1st petitioner gave evidence on 26.11.2013 and 02.06.2014. Whilst

the 1st petitioner was testifying, his Counsel who appeared in the High Court informed Court that both petitioners were willing to tender a plea of guilt to a lesser culpability in terms of section 297 of the penal code.

The indictment was amended to an offence of Culpable Homicide not amounting to Murder, punishable in terms of section 297 and it was read out to the petitioners on 10.12.2014. Accordingly both petitioners pleaded guilty to the amended indictment. Thereafter the Learned High Court Judge imposed 10 year rigorous imprisonment and a fine of Rs.50, 000/= with a default term of 6 months simple imprisonment on each petitioner.

Being aggrieved by the said judgment, the petitioner preferred this revision application.

The petitioners have averred following grounds in the petition as exceptional circumstances;

1. The order of the Learned High Court Judge imposing a sentence of 10 years rigorous imprisonment on petitioners is bad in law
2. The Learned High Court Judge failed to consider whether petitioners have acted on cumulative provocation and alleged incident was a result of a sudden fight as testified by the 1st petitioner
3. The Learned High Court Judge failed to consider principles of sentencing followed by this Court
4. The Learned High Court Judge failed to consider the fact that the alleged incident had taken place 13 years prior to the imposing of the said sentence
5. The Learned High Court Judge failed to consider that the petitioners did not have any previous convictions or had not committed any offence during the trial
6. The sentences imposed on the petitioners are excessive in any event

The Learned SSC for the respondent raised a preliminary objection that the petitioners have not explained any reason for this Court to exercise revisionary powers when a right of appeal against the same order was available. The petitioners, in their petition, stated that they had instructed their relatives to obtain certified copies of the entire case record to lodge an appeal but the prescribed appealable period lapsed when their relatives obtained the said certified case record. According to paragraph 13 of the petition, the petitioners had requested the Prison Authorities to lodge an appeal and however they were informed by the Prison Authorities that the petitioners could not appeal due to the fact that they had pleaded guilty.

In the case of **Attorney General V. Ranasinghe and others [1993] 2 Sri L.R. 81,** it was held that,

> *"...It is clear on a perusal of the judgment, that this Court refused to exercise revisionary jurisdiction primarily on the basis that the petitioner had not availed himself of the leave to appeal procedure set out in the Civil Procedure Code... We have to observe that this consideration does not apply in relation to a criminal case where the jurisdiction is exercised in terms of section 364 of the Code of Criminal Procedure. Furthermore we are inclined to agree with the submission of the learned SSC that the decisions of the Supreme Court in the cases of the Attorney-General vs. H. N. de Silva (2) and Gomes vs Leelaratne (3) firmly establish the principle that in considering the propriety of a sentence that has been passed, this Court has a wide power of review, in revision. This jurisdiction is not fettered by the fact that Hon. Attorney-General has not availed of the right of appeal..."*

It was held in the case of **Seylan Bank V. Thangaveil [2004] 2 Sri L.R 101,** that,

> *"In this application in revision the petitioner seeks to set aside the orders dated 7.3.2002 and 10.01.2003 made by the learned District Judge. The petitioner has filed this application on 17.7.2003. It appears that there is a delay of one year and four months in respect of the order dated 7.3.2002 and a delay of seven months from the order dated 10.01.2003. The petitioner has not explained the delay. Unexplained and unreasonable delay in seeking relief by way of revision, which is a discretionary remedy, is a factor which will disentitle the petitioner to it. An application for judicial review should be made promptly unless there are good reasons for the delay. The failure on the part of the petitioner to explain the delay satisfactorily is by itself fatal to the application..."*

It is manifestly clear that the revisionary power is not fettered merely because the petitioner has not availed his right of appeal. We observe that this revision application was filed on 19.02.2015 whereas the impugned judgment was delivered on 26.01.2015. There had not been an unreasonable delay since the petitioners have filed this revision application as soon as possible within another week.

The Learned SSC for the respondent further contended that the petitioners have failed to tender a copy of the post mortem report of the deceased along with the instant revision application. Further the petitioners have failed to state the reason for such inability and failed to seek leave of this Court to furnish the said report later in the petition.

The Learned President's Counsel for the petitioners pointed out that the Learned High Court Judge in his judgment stated that there were 6 injuries in the deceased's body while medical evidence revealed that there were only 4 injuries.

Accordingly it was argued that it demonstrated that the Learned High Court Judge has not analyzed the evidence as required by law.

The Learned SSC for the respondent submitted that the post mortem report makes reference to 06 injuries out of which 04 injuries were external injuries whilst 02 were corresponding internal injuries.

However we are unable to consider this position without perusing the post mortem report which is in fact a material document. Therefore we will not consider this ground since the said report was not submitted by the petitioners.

The incident pertaining to the instant application is summarized as follows;

The deceased was the brother in law of the 1st petitioner. The 1st petitioner was the father in law of the 2nd petitioner.

According to PW 01, the sister of the 1st petitioner and the wife of the deceased, she and her husband were seated with a distance of 6 feet from each other in their house. Both petitioners had been seen running towards deceased's house in the morning on 11.01.2002. The 1st petitioner was armed with a keththa (කැත්ත) whilst the 2nd petitioner was armed with a knife. The 1st petitioner had jumped towards the direction of the deceased and given a blow to the deceased with the keththa. The PW 01 has seen, the said blow striking the chest of deceased. The 2nd petitioner had also jumped in the direction of the deceased aiming the knife. Thereafter PW 01 had immediately escaped from the scene and the 1st petitioner had chased her to 77 feet away. PW 01 had run to Gunarathne's house (PW 05) and had crept under a bed where she remained for about 15 minutes. After PW 01 had narrated the incident to PW 05 – Gunarathne, he had left for the deceased's house. PW 05 had returned with Police around 12noon. Thereafter PW 01 had gone back to home where she had seen the deceased lying on his face with blood.

According to the evidence of the JMO, the first injury had been located next to the left nipple of the deceased's body. The injury had thus been caused on the side in which the heart was located. The 1st injury had been identified as having been capable of causing death of the deceased immediately after the receipt of the injury. (Page 128 of the brief)

The 2nd injury was on the left side of the abdomen of the deceased. The said injury had been identified as 3 ½ inches long and ½ inch wide. (Page 130 of the brief)

The 3rd injury was on the upper right side of the abdomen of the deceased. The said injury was 2 inches long and 2 inches wide. A corresponding internal injury was to the liver. (Page 130 of the brief)

The 4th injury was on the right side (lower) of abdomen which was 2 inches in length and ½ an inch in width and ½ inches in depth.

The cause of death was identified as "the failure in heart and respiratory track coupled with excessive bleeding" owing to the injuries caused. The JMO was given an opportunity to examine a knife, which was recovered as a 27 recovery, by PW 08, as stated by the 1st petitioner. Accordingly the JMO was of the opinion that "it was possible for the 4 injuries to be caused by the said knife". (Page 134 of the brief)

The Learned High Court Judge of Kalutara had considered the number of injuries that were inflicted on the deceased as per the testimony of PW 01 and the fact that the said testimony was corroborated by the evidence of the Judicial Medical Officer.

The Learned President's Counsel contended that the Learned High Court Judge failed to consider the harm caused to the 1st petitioner by the deceased. It was

submitted that according to the evidence of the police officer, the deceased had a knife in his sarong. Accordingly it was contended that the deceased had no reason to be armed with a knife on a day in which he did not attend to work. However we observe that according to the evidence of PW 01, the deceased was helping her with cutting 'gotu kola' in their house. It is imperative to note that the PW 08, who found the said knife in deceased's waist, has also noticed that the knife was inside another cover (Kolapath). Therefore it appears that even though the deceased had a knife he had no time to use it against the petitioners as they attacked him suddenly. Further the PW08 has testified that there were no blood stains on the said knife. Therefore we are unable to agree with the contention of the petitioners that the alleged incident which resulted in the death of Neposingho was a sudden fight.

Further the Learned President's Counsel for the petitioners contended that the Learned High Court Judge failed to consider whether petitioners have acted on cumulative provocation. We observe that the evidence of the PW 01 and the 1st petitioner demonstrated that the deceased and the petitioners had quarrels regarding a land. The 1st petitioner, in his evidence, has stated that the deceased's family broke the 2nd petitioner's newly built house and set fire on it. The 1st petitioner further testified that he was hospitalized due to an acid attack. However he did not mention who threw acid on him. Further we observe that the Learned Counsel who represented the petitioners in the High Court had informed Court that an eye of the 1st petitioner was injured due to acid was thrown on him by the two sons of the deceased. All these evidence taken together amply demonstrate that both parties were holding grudges against each other.

We observe that the Learned High Court Judge came to the following conclusion;

> "ඉදිරිපත් වී ඇති කරුණු සමස්ථයක් ලෙස සලකා බැලීමේදී පෙනී යන්නේ දණ්ඩ නීති සංග්‍රහයේ **297** වගන්තිය යටතේ දඬුවම් ලැබිය යුතු චෝදනාවකට චූදිතයන්

වරදකරුවන් කිරීම කළ හැකි වන්නේ ඔවුන් මෙම ක්‍රියාව සමුච්චිත ප්‍රකෝප කිරීම හේතුවෙන් සිදුකර ඇති බවට වූ පදනම මතය..." (Page 186 of the brief)

In the **Criminal Law by Smith & Hogan**[1] provocation is defined as follows;

"The common law rule was stated by Devlin J in what the Court of Criminal Appeal described as a 'classic direction', as follows:

"Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind" [Duffy (1949) 1 All ER at 932n]..."

In the case of **Kattadige Amarasena V. The Democratic Socialist Republic of Sri Lanka [SC. Appeal 34/2015 – decided on 13.12.2017]**, it was observed that,

"...Our Penal Code more particularly Sec 294 Exception (1) of the Code Contemplates (a) offender deprived of self-control (b) By grave and sudden provocation, and cause the death of the person who provoked the offender. Penal Code does not refer to cumulative provocation. But our courts seem to have dealt with the question of 'cumulative provocation in some decided cases. One such case is Premalal Vs. A.G. This could be look at as a development in law in that area..."

In the case of **Somalatha Kulasinghe and another V. The Attorney General [C.A. No. 130-131/09 decided on 17.07.2017]** it was held that,

"...The Judicial Medical Officer has observed 17 cut injuries and two stab injuries on the dead body. Therefore, the retaliation is so brutal as to show that it proceeded from a murderous intention. Therefore, the plea of

[1] (8th Edition, Butterworths, 1996, pg. 361)

cumulative provocation would not be successful. The basis is that the extreme brutality of the retaliation act leads to the inference of precedent malice. (See; R V Holloway, 1628, Cro Car 131, All ER 1979 at page 131.)"

Considering above we are of the view that the Learned High Court Judge was correct in coming to the aforesaid conclusion. Therefore we do not see any failure on the part of the Learned High Court Judge as contended by the Learned President's Counsel for the petitioners.

The Learned President's Counsel for the petitioners contended that there was no eye witness who saw the 2nd petitioner committing the alleged act. We are of the view that the participation of the 2nd petitioner cannot be excluded since the evidence shows that both the petitioners entered the scene of crime together, armed with weapons. Therefore the 2nd petitioner clearly entertained a common murderous intention with the 1st petitioner to cause the death of the deceased. Furthermore we are of the view that an accused who pleaded guilty to the charge at the stage of trial is not entitled to deny his participation, of the said charge, at the stage of appeal.

We observe that the Learned High Court Judge has correctly considered the testimony of PW 01 with regard to the acts committed by the petitioners, the testimony of the JMO in relation to the injuries and the fact that the testimony of PW 01 was corroborated by the JMO's evidence before imposing the sentence.

In the case of **Attorney General V. Jinak Sri Uluwaduge and another [1995] 1 Sri L.R 157** it was held 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. Mendis [1995] 1 Sri L.R. 138** it was held that,

"In our view once an accused is found guilty and convicted on his own plea, or after trial, the Trial Judge has a difficult function to perform. That is to decide what sentence is to be imposed on the accused who has been convicted. In doing so he has to consider the point of view of the accused on the one hand and the interest of society on the other. In doing so the Judge must necessarily consider the nature of the offence committed, the manner in which it has been committed the machinations and the manipulations resorted to by the accused to commit the offence, the effect of committing such a crime insofar as the institution or organisation in respect of which it has been committed, the persons who are affected by such crime, the ingenuity with which it has been committed and the involvement of others in committing the crime. The Trial Judge who has the sole discretion in imposing a sentence which is appropriate having regard to the criteria set out above should in our view not to surrender this sacred right and duty to any other person, be it counsel or accused or any other person..."

In the case of **Sevaka Perumal etc. V. State of Tamil Nadu [AIR 1991 S.C. 1463],**

> *"...Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of order should meet the challenges confronting the society... Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the court did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc..."*

In light of above it is understood that a trial Judge should consider the matter before him from the point of view of the offender as well as the victim and the society.

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..."

These decisions emphasize that a Judge should be mindful to strike a balance between the gravity of an offence and the sentence imposed. Indeed there should be proportionality.

In the case of **Asan Mohamed Rizwan V. Attorney General [CA (PHC) APN 141/2013 – decided on 25.03.2015],** Justice Chithrasiri has made an observation with regard to section 297 of the Penal Code in the following manner;

"In order to apply the law referred to above, it is necessary to ascertain whether the offender had the intention of causing death or whether he/she had only the knowledge in committing the said offence. Intention, as opposed to the knowledge of a person, can be determined only upon considering the circumstances of each case. ***If the circumstances of a particular incident show that there had been intention to kill, then the sentence extends up to 20 years of imprisonment, while the punishment is restricted to ten years of imprisonment if the offender had only the knowledge as to the consequences of the wrongful act of the accused.*** *Then the issue is to determine whether or not the accused had the intention of causing the death or he had only the knowledge as to the consequences. This can be ascertained basically by looking at the prior conduct of the offender as well as the other circumstances of the case..."*(Emphasis added)

We observe that the punishment extends up to 20 years of Rigorous Imprisonment since the instant case falls within the limb 01 of section 297 of the Penal Code.
In the aforesaid case of **Asan Mohamed** it was further held that**,**

"Sentencing is an important aspect in the administration of criminal justice system. A sentence ranges from death penalty to the mere censure in the form of good behavior bond or probation. There are multiple considerations relevant to the determination of a sentence. The most important consideration is the seriousness of the crime. Jurisprudentially, this position is persuasive despite pragmatic difficulties associated with matching the harshness of the sanction to the severity of the crime.(San Diego Law Review Vol.51 No.2 Spring 2014 page 343 - Article by Mirko Bagaric Dean & Professor of Law Deaking University, Melbourne)

The judges are to pass lawful and appropriate sentence upon the accused being convicted. In doing so, judges are to address their minds to the objective of sentencing particularly when exercising the discretion given to them under the law. Then only a correct sentence could be passed upon a convicted accused. If not, criticism on lack of uniformity, consistency and transparency in imposing sentences are bound to surface. Therefore, it is necessary for the judges to keep in mind the objectives of sentencing and also the sentencing guidelines, in order to arrive at the correct and appropriate decision..."

Thereafter Justice Chithrasiri has listed down several objectives of sentencing such as to punish offenders to an extent and in a manner which is just in all the circumstances, to protect the community from offender and to deter offenders or other persons from committing offences of the same or similar nature.

The Learned President's Counsel for the petitioners, in his written submissions, submitted that the accused's request to plead guilty at the outset before trial was rejected by the prosecution since the prosecution wished to proceed to trial by leading evidence. However we do not see such request either in the journal entries or the proceedings. Therefore the Learned High Court Judge was correct in

considering that the petitioners waited until the prosecution case to be concluded in order to plead guilty to a lesser offence.

Further it was contended for the petitioners that the alleged incident took place in the year 2002 and 13 years had passed by the time the Learned Trial Judge made his judgment. It is pertinent to note that the time period of a trial cannot be considered as a mitigatory factor in imposing sentence on an accused since trials in our Courts take a considerable time period.

Considering above we are of the view that the sentence imposed by the Learned High Court Judge is not excessive and it is well within law. Therefore we affirm the judgment dated 26.01.2015.

Accordingly the revision application is hereby dismissed.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL