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.

Democratic Socialist Republic of Sri Lanka

Complainant

C.A. Revision Application No:
CA (PHC) APN 54/2018

Vs.

H.C. Negambo Case No: **HC 717/1988**

Chandra Devi Thavarasa,
(Presently at Welikada prison complex)

Accused

AND NOW BETWEEN

Chandra Devi Thavarasa,
(Presently at Welikada prison complex)

Accused-Petitioner

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	Nalin Ladduwahetty, PC with AAL Hafeel Fariz, AAL Lakni Silva and AAL Buddika Chandrasekera for the Accused-Petitioner Nayomi Wickremasekara, SSC for the Complainant-Respondent
ARGUED ON	:	23.01.2019, 01.03.2019, 01.04.2019, 24.06.2019
WRITTEN SUBMISSIONS	:	The Accused-Petitioner – On 23.05.2019 The Complainant-Respondent – did not file
DECIDED ON	:	26.11.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner has filed this revision application seeking to revise and set aside the order of the Learned High Court Judge of Negambo dated 12.12.2017 in case No. HC 717/1988. The Learned SSC for the complainant-respondent informed that she would not file written submissions since a comprehensive statement of objections had been filed.

Facts of the case:

The Accused-Petitioner (hereinafter referred to as the 'petitioner') was arrested upon a warrant and produced before the Learned Magistrate of Point Pedro and thereafter, transferred to be produced before the Learned High Court Judge of Negombo on 17.06.2015 under case No. 717/88. When the petitioner was produced before the Learned High Court Judge of Negombo, she was informed that she had

been convicted and sentenced to life imprisonment for possession of 240.01g Heroin. The petitioner submitted that there was no case record available to ascertain any further facts pertaining to the service of summons, trial in absentia, judgment and sentence of the said case other than a Case Number which was revealed to be HC 717/1988. Thereafter, the petitioner was remanded pending an inquiry into the missing case record.

An inquiry was held before the Learned High Court Judge of Negombo, and the evidence of the OIC of Police Narcotic Bureau and the Registrar of the Negambo High Court were led. At the conclusion of the said inquiry, the Learned High Court Judge by order dated 12.12.2017, pronounced a sentence of life imprisonment on the petitioner, since such sentence had been earlier imposed on the petitioner under case No. HC 717/1988.

Being aggrieved by the said order, the petitioner filed this revision application. The Learned President's Counsel for the petitioner contended that the order of the Learned High Court Judge dated 12.12.2017 is illegal, misdirected and contrary to legal precedent on the following grounds;

1. There is no judgment as statutorily required in Section 283 of the Criminal Procedure Code, against the petitioner
2. The petitioner was denied of the Right of Appeal as there is no judgment placed before court as statutorily conditioned
3. A purported sentence has been imposed on the petitioner based on an unidentified and unproven note entered into by the Police Narcotics Bureau which has no evidentiary value
4. The said sentence has been imposed on vague, inaccurate and suspicious entries

5. The petitioner had not been served summons nor is there a single record of an attempt to serve summons and/or any other judicial notice or evidence to that effect.
6. There is no judicial record of proceedings nor does the purported judgment marked as 'P 4' refer to judicial proceedings except the notes entered into by the said officers which at best are entries made for their own purposes.

The Learned President's Counsel for the petitioner submitted that the main contention, which this Court is called upon to decide, is whether a Court can act on any document other than a court record or a duly certified copy of a court record when acting upon any judicial proceeding, especially when making an order of incarceration of an individual which affects his liberty.

As it was revealed, the petitioner, who was a resident of Velvettithurai, was arrested along with another, at the Bandaranaike International Airport on or about 14.08.1986 for being in possession of heroin. The petitioner was kept in remand for some time and granted bail in November, 1987. The Registrar of the High Court gave evidence that, as per a record maintained by the High Court, the High Court had received an indictment against the petitioner on 05.02.1988 and the Officer in Charge of Police Narcotics Bureau (PNB) produced a file maintained by the Narcotics bureau, in which it was stated that the petitioner had been sentenced to life imprisonment. The Registrar of High Court further stated that as per records, the productions relevant to the case against the petitioner had been destroyed in front of the Learned High Court Judge after publishing the said destruction on Gazette (Page 143 of the brief).

The Learned SSC for the complainant-respondent raised (hereinafter referred to as the 'respondent') following preliminary objections;

1. The petitioner is guilty of contumacious conduct
2. There are no exceptional circumstances to invoke the revisionary jurisdiction of this Court
3. Undue delay in filing the revision application
4. The petitioner has filed an incomplete case record

The Learned SSC for the respondent submitted that the petitioner admitted she was on bail which confirms she was aware of the pending case and the petitioner has, in her evidence, stated that one bail condition was to report to the PNB every Sunday. It was further submitted that the petitioner had stated untruth that she reported to the PNB once whereas she had never reported to the PNB after getting bail. The Learned SSC argued that even though the petitioner stated that she could not come to Court since her village was under siege, she was able to retain a President's counsel to get her personal belongings released from the Police on 21.12.1986. Accordingly, it was contended that this evidence and the behaviour of the petitioner amply demonstrated that the absence of the petitioner was mala fide.

The Learned President's Counsel for the petitioner answered to the above contention that the aspect of contumacious behaviour arises only when the accused knows of the case before him/her and willfully stays away. It was submitted that the petitioner had no freedom of movement as she was living in a war-torn area with no access to communication facilities and if the State could not execute a warrant against the petitioner, then it is extremely unfair to expect the petitioner to travel from a place where the State had not guaranteed freedom of movement. Accordingly, the Learned President's Counsel for the petitioner contended that there is no record whatsoever that the petitioner was willfully absconding.

Upon considering the period, through which the trial was purported to be held, it is quite clear that the residence of the petitioner was situated in an area which was heavily affected by the War between the LTTE and the Government of Sri Lanka. An affidavit was submitted by the OIC of PNB along with documents marked from 'L 01 to L 24' which included notes made by the officers of the PNB with regard to the instant case.

It is apparent that even the authorities were not in a position to execute the warrant against the petitioner prior to 2009, owing to the ongoing War at that time. It is noteworthy that there is no proof of summons being served on the petitioner as well (Page 133, 134 and 148 of the brief). Therefore, I am of the view that this Court is not in a position to merely assume that the petitioner was in fact absconding given that there is no case record to prove that the petitioner was absconding intentionally and accordingly, it cannot be said that the petitioner is guilty of contumacious conduct.

Considering the facts of the case, I am of the view that there is a question of law to be decided by this Court, in the instant case and therefore, I decide to go to the merits of the case after overruling the preliminary objections raised by the Learned SSC for the respondent.

As I have already mentioned, the Learned President's Counsel for the petitioner invited this Court to decide whether a Court can act on any document other than a court record or a duly certified copy of a court record when acting upon any judicial proceeding.

Upon perusal of the order dated 12.12.2017, it is evident that the Learned High Court Judge based his conclusion mainly relying on a file maintained by the PNB with regard to the petitioner's case and a record book maintained by the High

Court with regard to the receiving of indictments. Further, the Learned High Court Judge had considered notes made by the officers of the PNB about the trial against the petitioner.

There is a single line of entry, in the document marked as 'L 23', stating that the petitioner had been sentenced to life imprisonment on 14.12.1989. However, the OIC of the PNB who produced the said document in the High Court was not able to reveal the name of the officer who made the said entry or was not able to identify the signature on it (Page 131 of the brief). On the contrary to 'L 23', the document marked as 'L 24' states that the conviction is dated 10.12.1984. The Registrar of the Court specifically stated that there was no record of a judgment and/or s sentence against the Petitioner (Page 139 and Page 147 of the brief). The Registrar further testified that, two cases prior to and subsequent to the instant case, namely 716/88 and 718/88, are still available in the High Court.

In the case of **S. Kumaresan V. The State (Madras High Court) [Crl.O.P.No.6788 of 2003 and Crl.O.P.No.24026 of 2003-delivered on 21.08.2018]**, it was held that,

> *"There is not an iota of material to show that the petitioner was responsible for the missing records. This Court cannot proceed on the basis of mere suspicion or surmises against the petitioner and make him responsible for the missing records. The fact that neither police nor the Court really bothered to fix the person responsible for the missing of records for the last 30 years, makes it difficult for this Court to order for an enquiry on the missing records, at this length of time. Such an enquiry will become an empty formality since 30 years have passed"*

In the case of **The Queen V. W. Frances [67 NLR 432]** it was held that,

"In this case it would appear that after the accused was convicted, he appealed. Since then the record is said to have been lost. In these circumstances, I would follow the case in the matter of an application in respect of the loss of record in P. C. Panadure case No. 14,141, 7 Time of Ceylon Law Reports, page 43 and quash the previous proceedings with liberty to the complainant to bring a fresh charge"

In the case of **Hettiarachchige Chandana Hettiarachi V. Attorney General [CA 130/2005 – decided 13.07.2012]**, it was held that,

"In this regard I have to be guided by the case record and whatever the entries found in the Record cannot be lightly disregarded. The Record is the sole guide to what actually transpired in court and the Record cannot be impeached or supplemented without a substantial reason..."

Another important judgment in this regard is found in the case of **Jayasooriya and others V. Attorney General [2009] 1 Sri L.R. 101**. In the said case, the issue was whether the Trial Judge offered the accused of the option to be tried by a Jury. The offer of the jury option was not recorded anywhere in the Court proceedings. The State contended that the entry made in the official file maintained by the prosecuting State Counsel as to a 'non-jury trial' is relevant to determine whether the jury option was given. However, the Court rejected said contention and held that,

"Every trial judge has, an obligation and responsibility to maintain a proper and accurate record of what transpires before him in every trial ..... the appellate Court should always be guided by what transpires in the case record and not on some extrinsic material of which the trial judge had no control whatsoever."

Therefore, it is understood that any other extraneous material cannot perform the duty of the original case record and there is a serious danger in relying on such documents which lack the originality and authenticity unlike a case record. I find that most of the documents relied on, by the Learned High Court Judge lack genuineness since the PNB was clearly an interested party in this case.

Further, **Article 13(4) of our Constitution** guarantees a Fundamental Right that, *"No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law..."* and **Section 283 (5) of the Code of Criminal Procedure Act** reads that, *"The judgment shall be explained to the accused affected thereby and a copy thereof shall be given to him without delay if he applies for it."*

Therefore, I am of the view that every accused is entitled to have a copy of the judgment which is pronounced for or against him/her and non-availability of such judgment clearly affects the Fundamental rights of the accused as well. The 'procedure established by law' would not necessarily be completed unless mandatory provisions of the Criminal Procedure Code are complied. In the instant case, even the right of the appeal of the petitioner is taken away since there is no evidence about the existence of a valid judgment. Therefore, I am of the view that Learned High Court Judge of Negombo clearly erred in law by enforcing a life imprisonment against the petitioner, relying on third-party documents other than an original case record or at least a certified copy of the judgment pronounced against the petitioner. In any event, the petitioner cannot be expected suffer for the loss of a case record and it was the duty of the officials in the High Court to protect each and every case record with similar importance.

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, I am of the view that the order of the Learned High Court Judge dated 12.12.2017 is irregular, arbitrary and contrary to law which warrants the invocation of the revisionary powers of this Court. I set aside the order of the Learned High Court Judge dated 12.12.2017 and order to discharge the petitioner.

The revision application is hereby allowed.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. S. Kumaresan V. The State (Madras High Court) [Crl.O.P.No.6788 of 2003 and Crl.O.P.No.24026 of 2003]
2. The Queen V. W. Frances [67 NLR 432]
3. Hettiarachchige Chandana Hettiarachi V. Attorney General [CA 130/2005]
4. Jayasooriya and others V. Attorney General [2009] 1 Sri L.R. 101
5. Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284