ELANGAKOON
v
OFFICER-IN-CHARGE, POLICE STATION, EPPAWALA AND ANOTHER

COURT OF APPEAL
IMAM, J.
SARATH DE ABREW, J.
CA (PHC) APN 99/2006
HC ANURADHAPURA 15/2004
MC THAMBUTTHEGAMA 24789
MARCH 6, 2006
FEBRUARY 23, 2007
MAY 5, 2007
JUNE 25, 2007
JULY 11, 2007

Penal Code Section 140, Section 419 – Code of Criminal Procedure Act Section 27, 179, 185, 279, 320(1) – Guilty – Appeal against conviction – Appeal is it after sentence? – Validity – Laches – Alternative remedies – Exceptional circumstances – Petition of appeal irregularly drawn – Presented to wrong Court – Fatal? – High Court of the Provinces (Sp. Pro) Act 19 of 1990 – Section 5(e), Section 9 – Constitution , Articles 138(1) and 154(6) – Document not filed – Fatal?

The petitioner was found guilty and convicted under section 419 of the Penal Code read with section 179 of the Criminal Procedure Code, and being aggrieved by the verdict of guilty without waiting for the sentence to be imposed on the 14th day after the conviction the petitioner preferred an appeal against the conviction to the

High Court in terms of section 320(1). On the following day the Magistrate imposed the sentence and sent up the record for hearing of the appeal to the High Court. On an objections being lodged that, the High Court lacked jurisdiction since the appeal had been lodged on a date before the imposition of punishment, the appeal was dismissed, for want of jurisdiction.

The petitioner moved in Revision to set aside the order of the High Court refusing to take cognizance of the petition of appeal.

Held:

(1) The petitioner has failed to file a copy of the petition of appeal filed in the High Court. It is fatal.

(2) The petition of appeal filed in the High Court is addressed to His Lordship the Chief Justice and their Lordships in the Supreme Court, though the caption states "In the Court of Appeal bearing a Court of Appeal number.

As the intention of the petitioner appears to be to invoke the revisionary jurisdiction of the Court of Appeal under Art 138 of the Constitution this is a fundamental defect as the purported petition and affidavit is not addressed to the Hon. President and the other Lordships of the Court of Appeal. The petitioner has not made any attempt even on a later date under Rule 3(8) to amend his pleadings – This is fatal.

(3) The pleadings (petition of appeal and affidavit in the High Court) are in total disarray and are ambiguous. In a revision application the pleadings should not be ambiguous and specific - the petition should be rejected on this ground alone.

(4) The Court of Appeal does not have appellate jurisdiction in terms of Art 138 (1) read under Art 154(6) in respect of decisions of the Provincial High Court made in the exercise of appellate jurisdiction and it is the Supreme Court that has jurisdiction in respect of appeals from the High Court – Section 9 High Court of the Provinces (Sp. Pro) Act 19 of 1990.

The petitioner should have appealed to the Supreme Court under section 9 of Act 19 of 1990 and not to the Court of Appeal.

(5) The petitioner has not pursued the alternative remedy available, by filing a legally tenable appeal before seeking to invoke the revisionary powers of the Court of Appeal.

Held further:

(6) The judgement or final order appealable under section 320(1) of the Code does not encompass an order of verdict of guilty as contemplated under section 185 of the Code. section 279 clearly stipulates that in a case of conviction, the judgment comprises of the verdict and sentence. Hence the appealable final order or judgment contemplated in section 320(1) would necessarily be after the passing of sentence.

Section 279 reads "The judgment ..... shall be pronounced in Open Court after the verdict is recorded or save as provided in section 203 at some *subsequent time* – therefore the petitioners claim that the fact that the judgment was not pronounced on the day the verdict was recorded was an illegality is clearly unfounded.

Held further

(7) It is also abundantly clear that the petitioner has not specifically or expressly pleaded such exceptional circumstances in the body of the petition other than the substantial questions of law.

Held further

(8) The impugned order is dated 16.3.2006 while the petition has been filed on 24.7.2006 entailing an unexplained delay of 4 months and 8 days – in the absence of an explanation to the contrary this delay be considered unreasonable.

APPLICATION in revision from an order of the High Court of Anuradhapura.

Cases referred to:-

1. *T. Varapragasam and another* v *S.A. Emmanuel* – CA (Rev.) – 931/84 – CAM 24.07.91.
2. CA (Rev) 149/86 – CAM 17.11.1998.
3. *M.A. Sirisena* v *C.D. Richard Arsala and others* CA 536/84 – CAM 24.10.90.
4. *W.K.M.B. Perera* v *People's Bank* – SC 141/94 – SCM 12.05.95.
5. *Dharmaratne and another* v *Palm Paradise, Colombo and others* – 2003 – 3 Sri LR 179.
6. *UDA* v *Ceylon Entertainments Ltd., and another* CA 1319/2001 – CAM 05.04.2002.
7. *Wickremasekera* v *Officer in Charge, Police Station, Ampara* – SC 1/2003 – SCM 30.03.2004.
8. *Camilus Ignetius* v *OIC Uhana and others* – CA Rev. 907/89.
9. *H.S. Watuhewa* v *S.B. Guruge* – CA 141/90 – CAM 25.09.1990.
10. *Biso Menike* v *Ran Banda and others* – CA 95/98 – CAM 09.01.2002
11. *U. Tilakaratne* v *OIC Kekirawa* – CA 346/01 – CAM 16.12.1992.
12. *Forest* v *Leefe* – 13 NLR 119

Upul Jayasuriya with *P. Radhakrishnan* for appellant-appellant-petitioner.
Ayesha Jinasena SSC for 1st and 2nd respondent-respondents.

October 4, 2007

SARATH DE ABREW, J.

This is an application for revision filed by the 2nd Defendant-Appellant-Petitioner (hereinafter referred to as the Petitioner) to set aside the impugned order dated 16.03.2006 (P3) of the High Court of

Anuradhapura refusing to take cognizance of the Petition of Appeal dated 01.03.2004 preferred to that Court by the Appellant-Petitioner. In this case the 2nd defendant-appellant-petitioner and 04 others were charged in the Magistrate Court of Thambuttegama with committing offences of unlawful assembly and mischief by fire punishable under section 140 and section 419 respectively of the Penal Code. After trial on 11.02.2004 the 1st, 3rd, 4th and 5th accused were acquitted and discharged of the aforesaid charges while the 2nd defendant-appellant-petitioner was acquitted and discharged with regard to the 1st charge but found guilty and convicted of the 2nd charge under section 419 of the Penal Code read with section 179 of the Code of Criminal Procedure, and identification and sentence was put off to 02.03.2004. Being aggrieved of the aforesaid verdict of guilty, without waiting for the sentence to be imposed, on the 14th day after the conviction, on 01.03.2004, the petitioner preferred an Appeal against the conviction to the High Court of Anuradhapura in terms of section 320(1) of the Code of Criminal Procedure. On the following day 02.03.2004, the learned Magistrate of Thambuttegama, after perusal of the finger-print report which revealed no previous convictions, imposed a sentence of Rs. 1500/- fine and imprisonment for a period of one year on the petitioner and sent up the record for hearing of the Appeal to the High Court of Anuradhapura.

On hearing of the Appeal at the High Court, the prosecution had raised a preliminary objection of law as to the maintainability of the said Appeal on the following grounds.

(a) That the High Court lacked jurisdiction since the appeal had been lodged on a date before the imposition of punishment.

(b) That an Appeal in terms of section 320(1) of the Code of Criminal Procedure shall be only against a judgment or final order of the Magistrate and that since the order dated 11.07.2004 does not include the sentence, it is not a judgment or final order which attracts the appellate jurisdiction of the High Court.

The learned Judge of the High Court of Anuradhapura, after due inquiry, had delivered the impugned order on 16.03.2006 upholding the aforesaid preliminary objection of the prosecution and accordingly had dismissed the Appeal of the petitioner for want of jurisdiction. It is

against the aforesaid impugned order (P3), that the petitioner is seeking to invoke the revisionary powers of this Court in order to set aside the abovementioned order of the High Court refusing to entertain the Appeal, urging on his behalf questions of law and fact listed (a) to (i) in paragraph 09 of the petition dated 15.07.2006.

The respondents-respondents (hereinafter referred to as the respondents) did not file objections but on the inquiry date of 06.12.2006 the learned Senior State Counsel on behalf of the respondents raised a two-fold preliminary objection on questions of law to be argued and decided, before the main matter is adjudicated on its merits. Thereafter the matter was fixed for inquiry with regard to the following preliminary objection raised by the respondents.

(a) *Has the petitioner exhausted other remedies available to him before filing this Revision Application?*

(b) *Has any delay being caused in filing this Revision Application?*

On the question of the aforesaid preliminary objection, both parties have filed two sets of written submissions with case law authorities and have also tendered oral submissions when the matter was argued on 23.05.2007. In order to arrive at a just and reasonable conclusion with regard to the aforesaid preliminary objection, this Court has perused the entirety of the petition and affidavit of the petitioner and P1-P3 documents and the copious but illuminating written submissions and case law authorities filed by both parties.

The revisionary powers of this Court is a discretionary power and its exercise cannot be demanded as of right unlike the statutory remedy of Appeal. Certain pre-requisities have to be fulfilled by a petitioner to the satisfaction of this Court in order to successfully catalyse the exercise of such discretionary power. This is best illustrated in *T. Varapragasam & another* v *S.A. Emmanuel*[1] where it was held that the following tests have to be applied before the discretion of the Court of Appeal is exercised in favour of a party seeking the revisionary remedy.

(a) The aggrieved party should have no other remedy.

(b) If there was another remedy available to the aggrieved party then revision would be available if special circumstances could be shown to warrant it.

(c) The aggrieved party must come to Court with clean hands and should not have contributed to the current situation.

(d) The aggrieved party should have complied with the law at that time.

(e) The acts complained of should have prejudiced his substantial rights.

(f) The acts or circumstances complained of should have occasioned a failure of Justice.

Based on sound principles that have been repeatedly built up, upheld and handed down by our Superior Courts during the last millenium, the following too could be added to the aforesaid list of pre-requisites in order to successfully invoke revisionary discretion.

(a) There should not be any unreasonable delay in filing the application[2]

(b) There should be full disclosure of material facts and show *uberrima fides* as non-disclosure is fatal.

(eg. *M.A. Sirisena* v *C.D. Richard Arsala & others.*[3])

(c) As the conduct of the petitioner is intensely relevant to the granting of relief, such conduct should not be repellant to the attraction of exercise of revisionary power.

(eg. *W.K.M.B. Perera* v *The People's Bank.*[4])

(d) The petitioner should plead or establish exceptional circumstances warranting the exercise of revisionary powers.

(eg. *Dharmaratne and another* v *Palm Paradise Colombo Ltd. and others.*[5])

(e) The existence of exceptional circumstances should be expressly pleased in the petition.

(eg. *UDA* v *Ceylon Entertainments Ltd. & another.*[6])

In the light of the above principles that govern the invoking of revisionary powers of our Superior Courts, It is now pertinent and opportune to identify and examine the several points in dispute and the several contentions of law which springs to the eye with regard to the preliminary objection raised on behalf of the respondent, which may be briefly set out as follows:

(a) Has the petitioner pursued the alternative remedy of filing an Appeal against the impugned order P3.

(b) If so has the petitioner produced this Petition of Appeal which is a document material to this application under Rule 3(1)(a) of the Court of Appeal (Appellate Procedure) Rules 1990.

(c) Has the petitioner filed this Appeal under the correct provisions of law to the correct forum.

(d) Even if an Appeal is pending or not, does it preclude the petitioner from invoking the revisionary powers of this Court, provided there are exceptional circumstances.

(e) If so has the petitioner expressly pleaded or established such exceptional circumstances.

(f) Notwithstanding the above has the petitioner successfully established an error or illegality on the face of the record to warrant intervention by the exercise of revisionary powers.

(g) Is there an unreasonable and unexplained delay in filing this revision application.

(h) Has the petitioner suppressed material facts or failed to show *uberrima fides* towards Court.

(i) Has the very conduct of the petitioner contributed to the current situation and was the conduct of the petitioner repellant towards the attraction and invoking of the discretionary revisionary powers.

Before this Court proceeds to examine the aforesaid contentions it is pertinent to note that the very petition and affidavit of the petitioner is *per se* defective for the following reasons.

(a) Firstly, though the caption states "In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka" and bears the Court of Appeal Revision Application No. CA (PHC) APN 99/2006, both the Petition and the Affidavit are addressed "To His Lordship the Honourable Chief Justice and the other Honourable Justices of the Supreme Court of the Democratic Socialist Republic of Sri Lanka." As the intention of the petitioner appears to be to invoke the revisionary jurisdiction of the Court of Appeal under Article 138 of the

Constitution, this is a fundamental defect as the purported Petition and Affidavit is not addressed to the Honourable President and the other Honourable Justices of the Court of Appeal. The petitioner has not made any attempt to correct this position and amend his pleadings even on a latter date under Rule 3(8) of the Court of Appeal (Appellate Procedure) Rules of 1990.

(b) Secondly, the Petition has been drafted in such a way where it appears to be a mixture of a Petition of Appeal and a Petition in a Revision application. Paragraph 09 of the petition refers to "the appellant respectfully prefers this Appeal to Your Lordships Court" while the prayer to the petition states "where the appellant respectfully prays that Your Lordship's Court be pleased to" and sub-paragraph (a) to the prayer states "Issue notice of this Appeal to the respondents-respondents." On the other hand the caption of the Petition speaks of a "Revision Application" while paragraph 10 of the Petition speaks of "Revision Jurisdiction."

On an analysis of the juxtaposition of words Appeal and Revision in the purported Petition and the contraplex meanings generated by the Petition as to whether the relief is sought from the Supreme Court or the Court of Appeal, it appears to this Court that the pleadings of the petitioner are in total disarray and are ambiguous giving rise to the conclusion that draftsman of the pleadings was either totally negligent or was completely lost in the realms of revision and appeal, confused as to whether the relief should be sought in what form or what forum.

In a revision application of this nature the pleadings should not be ambiguous but specific and negligence on the part of the draftsman of the pleadings should accrue to the disadvantage of the petitioner and the Petition must be rejected on this ground alone.

However as this matter has escaped the attention of Court at the time of support and issue of notice and has not been canvassed by the respondents at the inquiry, this Court would now proceed to examine the validity of the Preliminary objection raised by the respondents.

The main contention of the respondent was that the petitioner had not exhausted other remedies available to him before filing this

Revision Application. The bone of contention was that even if the petitioner had filed an Appeal against the impugned order (P3), it has not been directed to the proper forum under the proper provision of the law inasmuch as no proper legally tenable Appeal is pending. In Paragraph 11 of the petition, the petitioner had averred that the petitioner had preferred a Petition of Appeal to the High Court of Anuradhapura against the impugned order addressed to the Court of Appeal. The learned Senior State Counsel for the respondents, quoting several case law authorities, had argued that there was no provision in law for the petitioner to file a second Appeal against the learned Magistrate's order to the Court of Appeal, but the Appeal against the impugned High Court order should have been directed to the Supreme Court section 09 of the High Court of the provinces (Special Provisions) Act No. 19 of 1990, with leave from the High Court or Special Leave from the Supreme Court.

For the following two-fold reasons this Court is inclined to decide the issue in favour of the respondents in that the petitioner has failed to satisfy Court that he has pursued an alternative remedy of a legally tenable Appeal before filing this Revision Application.

(A) Firstly, the petitioner had failed to file a copy of this Petition of Appeal filed in High Court Anuradhapura along with the Petition and Affidavit at the time of filing this revision application, though he had filed same marked X1 very much later along with his written submissions filed on 11.07.2007. Rule 3(1)(a) and (b) of the Court of Appeal (Appellate Procedure) Rules of 1990 is clear as crystal on this matter. All copies of documents material to the application has to be filed along with the petition and affidavit. Where a person is unable to tender any such document, he shall state the reason for such inability and seek leave of Court to furnish such document later. This Petition of Appeal filed against the impugned order is a vital document material to the application to bolster the Petitioner's position that he has pursued the alternative remedy of Appeal. However, the petitioner has neither produced same at the time of filing of the application nor sought permission to furnish it later. This is a clear violation of Rule 3(1)(a) and (b) and therefore the petitioner is precluded from producing the document later and using it to support his written submissions.

(B) Secondly, in the 03 Judge Bench Supreme Court decision in *Wickremasekera* v *Officer-in-Charge, Police Station, Ampara*[7] it was

held that the Court of Appeal does not have appellate jurisdiction in terms of Article 138(1) of the Constitution read with Article 154(6) in respect of decisions of the Provincial High Court made in the exercise of its appellate jurisdiction and it is the Supreme Court that has the jurisdiction in respect of appeals from the High Court as set out in section 9 of the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990. Therefore, in the light of the above authority, the petitioner should have appealed to the Supreme Court under section 09 of the Act No. 19 of 1990, and not to the Court of Appeal. The proposition that Appeals from the High Court exercising appellate jurisdiction should be directed to the Supreme Court and not the Court of Appeal in further strengthened by the provision in section 5C of the High Court of the Provinces (Special Provisions) Amendment Act No.54 of 2006 where the Supreme Court is vested with appellate jurisdiction from civil appeals heard by the High Court. Therefore, for the aforesaid reasons, this Court has to conclude that the petitioner has failed to satisfy court that he has pursued the alternative remedy of filing a legal Appeal before seeking to invoke the revisionary powers of this Court.

However, it is manifestly clear and well settled law that whether or not the alternative remedy has been pursued or exhausted revision would lie in the following situations.

(a) Presence of profound exceptional circumstances where revision would lie to avert a miscarriage of Justice.

(b) Presence of an error or illegality on the face of the record which would occasion a failure of Justice.

The legal principle with regard to (a) above is succinctly stated in *Camillus Ignatius* v *OIC Uhana & others*[8] where it was held that "the powers of the Court of Appeal are wide enough to embrace a case where an appeal lies but in such a case an application for revision should not be entertained save in exceptional circumstances." The above principle of law is also contained in the following case law authorities.

Eg.(1) *M.A. Sirisena* v *C.C. Richard Arsala & others (supra).*

(2) *H.S. Wattuhewa* v *S.B. Guruge*[9].

Therefore in processing this application of the petitioner, notwithstanding the fact whether the alternative remedy has been pursued or not, it is the duty of this Court to examine and verify as to the presence of such exceptional circumstances before opening the gateway for revision.

Existence of exceptional circumstances is the process by which the Court should select the cases in respect of which the extraordinary power of revision should be adopted. This practice has taken deep root in our law and got cemented into a rule of procedure when dealing with revision applications. The exceptional circumstances would vary from case to case and their degree of exceptionality must be correctly assessed and gauged by Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked. Exceptional circumstances could broadly be categorized under three limbs as follows.

(a) Circumstances exceptional in fact bound to lead to a miscarriage of justice.

(b) Circumstances exceptional in law, such as an error or illegality on the face of the record bound to lead to a failure of Justice.

(c) Circumstances exceptional in both fact and law, which would be a mixture of both (a) and (b) above, having the same result.

In the light of the above findings and observations it is now pertinent to peruse the petition and written submissions of the petitioner in order to determine whether the petitioner has pleaded or established such exceptional circumstances. It is abundantly clear that the petitioner has not specifically or expressly pleaded such exceptional circumstances in the body of the petition other than the substantial questions of law referred to in paragraph 09 of the Petition in the format of an Appeal.

In *Biso Menika* v *Ranbanda & others*[10] and followed by *Urban Development Authority* v *Ceylon Entertainments Ltd. & another (supra)* the rigid rule was formulated that in order to justify the exercise of revisionary jurisdiction of the Court of Appeal on examination of either the petition or affidavit must reveal a specific plea as to the existence of special circumstances. If the above rigid test is to be applied in this case, then necessarily the application of the petitioner should be dismissed for want of a specific plea as to the presence of exceptional

circumstances. However, in *Dharmaratne and another* v *Palm Paradise Cabones Ltd. and others (supra)* the Supreme Court adopted a much less rigid approach in that it was held that the petitioner should plead or establish exceptional circumstances warranting the exercise of revisionary powers.

Therefore it is now open to this Court to ascertain from a perusal of the written submissions filed by the petitioner whether he has successfully established such exceptional circumstances. On a perusal of paragraph 05 B and C of the aforesaid written submissions it is explicit that the petitioner has based his argument as to the presence of exceptional circumstances on the bedrock of illegalities on the face of the record as enumerated in paragraph 05C of the aforesaid written submissions. The crux and thrust of the petitioners argument basically is that a verdict of guilty entered under section 185 of the Code of Criminal Procedure Act No. 15 of 1979, is a judgment or final order contemplated in section 320(1) of the above code against which an appeal lies, and a different interpretation given by the learned High Court Judge of Anuradhapura in her impugned order (P3) would amount to an illegality in law which constitute sufficient exceptional circumstances to enable the opening of the gateway to the revisionary remedy.

For the following reasons, this Court is not in a position to agree with the aforesaid contention of the petitioner.

(a) Section 185 of the Code states as follows:-

> "If he finds the accused guilty he shall forthwith record a verdict of guilty and pass sentence upon him according to law and record such sentence". It is abundantly clear that the finality of the order does not stop with the recording of a verdict of guilty but flows beyond that in the same natural transaction to the recording of a sentence, where then only, the entire process would come to a halt and reach finality.

Therefore the judgment or final order appealable under section 320(1) of the Code does not encompass an order of verdict of guilty as contemplated under section 185 of the Code.

(b) In paragraph 05 C (ii) of the written submissions, in interpreting section 279 of the Code, the petitioner is clearly attempting to mislead Court by suppressing the latter portion of the section

which is to his disadvantage. Section 279 reads "The judgment in every trial under this Code shall be pronounced in open Court after the verdict is recorded or save as provided in section 203 at some subsequent time ..... . Therefore the petitioner's claim that the fact that the judgment was not pronounced on the day the verdict was recorded in the Magistrate's Court of Thambuttegama was an illegality is clearly unfounded and is a figment of his imagination. On the contrary, the wording of section 27 clearly stipulates that in a case of conviction, the judgment comprises of the verdict and sentence. Hence the appealable final order or judgment contemplated in section 320(1) would necessarily be after the passing of sentence.

(c) Though the petitioner has argued that the learned Magistrate has taken 19 days to pass sentence in contravention of section 203 of the Code, section 203 relates to passing of judgment in High Court trials and has no relevance at all to the matter in hand which relates to a trial in the Magistrate's Court. The conduct of the petitioner in making irrelevant and misleading submissions should accrue to his disadvantage.

(d) On a corollary of the above findings it is abundantly clear that the word "judgment" contemplated in section 320(1) of the Code against which an appeal lies, consists of the verdict and sentence to make it a final order. This view has been also expressed in *U. Tilakaratne* v *OIC, Kekirawa.*[11]

(e) The petitioner submitted *Forest* v *Leefe*[12] in support of his argument that the verdict of guilty constituted a final judgment which was appealable under section 320(1) of the Code. In the above case the learned Magistrate has made an order absolute under section 109 of the then Code of Criminal procedure in order to abate a Public Nuisance. This Order was considered a final judgment against which an appeal would lie. This case could be distinguished from the matter in hand where a verdict of guilty will not reach finality until the sentence is passed. Hence the petitioner's argument in this respect is rejected.

Due to the aforesaid findings, this Court has no alternative but to conclude that the petitioner has miserably failed to substantiate presence of exceptional circumstances by way of illegality or error on the face of the record, and accordingly his plea for invoking of discretionary revisionary powers of this Court must necessarily fail.

As the first preliminary objection of the respondent should succeed in view of the above findings, it is purely academic to discuss the 2nd preliminary objection as to the question of delay. Suffice it to say that the impugned order (P3) is dated 16.03.2006 while the petition has been filed on 24.07.2006, entailing an unexplained delay of 04 months and 8 days. In the absence of an explanation to the contrary this delay could be considered unreasonable. The ill-health of the instructing Attorney, as pronounced from the Bar Table, may not be considered a satisfactory explanation as the same Counsel who appeared in this Court for the petitioner had also defended his rights in the High Court of Anuradhapura.

Therefore, taking into consideration the entirety of the submissions adduced by both parties, this Court upholds the preliminary objection raised by the respondents, and for several other reasons set out in this judgment, conclude that this is not a fit and proper case to invoke the discretionary revisionary powers of this Court. Accordingly we dismiss the application of the petitioner. In all the circumstances of this case, we make no order as to costs.

IMAM, J. – I agree.

Application dismissed.