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

In the matter of an application for Revision made under Article 138 of the Constitution, read together with Section 364 of the Code of Criminal Procedure Act No. 15 of 1979.

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

Court of Appeal No:
CA (PHC) APN CPA-168/2017
High Court Balapitiya
Case No. 584/03

Complainant

Vs.

1. Thusaya Hakuru Weerarathne
2. Puncha Hakuru Gunarathne Alias Soththiya

Accused

AND NOW

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

Complainant - Petitioner

Vs.

1. Thusaya Hakuru Weerarathne
2. Puncha Hakuru Gunarathne Alias Soththiya

Accused - Respondents

Before: **B. Sasi Mahendran, J.**
Amal Ranaraja, J.

Counsels: Suharshi Herath DSG for the Complainant Petitioner
Geeth Karunarathna for the 2nd Accused - Respondent

Argued On: 18.03.2025

Written Submissions: 06.05.2025 (by the Petitioner)
On 05.05.2025 (by the 2nd Accused-Respondent)

Order On: 14.05.2025

ORDER

B. Sasi Mahendran, J.

This is a revision application filed by the Petitioner, namely the Attorney General seeking to set aside the order of the Learned High Court Judge dated 13.09.2017 in the case bearing No. 583/03.

According to the Petitioner, the Accused- Respondents (hereinafter referred to as the Respondents) were indicted in the High Court of Balapitiya on the count of committing the offence of murder of one Ilandaridewa Neetha Kusumalatha on 08.04.1999 punishable under Section 296 of the Penal Code.

As stated by the Petitioner, after the case was fixed for trial de nova, on 23.04.2014, evidence of the prosecution witness Hewahakuru Sisilin, who was the eye witness of the incident was led. The Petitioner states that according to the evidence available, the deceased's nephew had been allegedly killed by a group of persons alleged to have including the two Respondents in this case on 07.04.1999. Thereafter, the deceased had complained about this murder implicating the Respondents. On 08.04.1999, the deceased and PW1 went to send a telegram to a relative inform g about the murder. On their way, the Respondents have approached them and attacked the deceased with a knife. During the attack, PW1 had attempted to save the deceased and as a result, PW1 had received cut injuries in her fingers. Thereafter, PW1 had informed the Police about the attack.

According to the Petitioner, the Learned High Court Judge acquitted the Respondents on 15.09.2017 based on the application made by the defence under Section 200 (1) of the Code of Criminal Procedure Act.

The Petitioner being aggrieved by this order, filed this revision application in this Court seeking to set aside the said order of the Learned High Court Judge.

The Petitioner has mentioned the reasons for them to invoke the revisionary jurisdiction of this Court which are as follows;

1. The Learned High Court Judge erred in law and in fact in considering the aggravating factors and made an illegal order, which warrants a conviction for the Respondents.
2. The Learned High Court Judge has failed to place the evidence of the case in its proper perspective and thereby made an illegal order.
3. The Learned High Court Judge has misled himself in analysing the evidence of the said eye witness Hewahakuru Sisilin.
4. The Learned High Court Judge has given a disproportionate weight when evaluating the contradictions and omissions which have been pointed out by the defence during the cross examination of the said eye witness.
5. The Learned High Court Judge has failed to cautiously analyse the evidence of the officer who gave evidence in place of the main investigating officer.
6. Learned High Court Judge when evaluating the evidence of the said eye witness, seems to have expected extreme consistency (photographic memory of the incident) without taking into consideration the fact that the witness was over 75 years of age at the time she was testifying and that she was giving evidence after almost 15 years from the date of the incident.

According to the Petitioner, the Court had acquitted the Respond on the basis that there are a number of contradictions in the evidence given by PW1. Those are the exceptional circumstances pleaded by the Petitioner to invoke the revisionary jurisdiction of this Court.

When the matter came up on 18.03.2025, the Counsel for the 2nd Respondent raised a preliminary objection regarding the maintainability of this application on the basis that under Section 15 of the Judicature Act, since there is an alternative remedy available, this revision application cannot be maintained. Also, she had brought to the notice that there was a defect in the affidavit.

According to Section 15 of the Judicature Act.

> "The Attorney-General may appeal to the Court of Appeal in the following cases:-
>
> a) from an order of acquittal by a High Court-
>
> (i) on a question of law alone in a trial with or without a jury;
>
> (ii) on a question of fact alone or on a question of mixed law and fact with leave of the Court of Appeal first had and obtained in a trial without jury;
>
> (b) in all cases on the ground of inadequacy or illegality of the sentence imposed or illegality of any other order of the High Court."

When we consider the averments in the petition, we observe that the main gravamen of the Petitioner is that the Learned High Court Judge had disbelieved PW1 on the basis of the contradictions in her evidence which indicates that this application is based on questions of mixed law and fact.

Therefore, there is a remedy available for the Petitioner to challenge the impugned order. Our Courts have held that when there is an effective alternative remedy available, the Courts are reluctant to exercise the revisionary jurisdiction.

There are no averments in the petition that the Petitioner has applied to obtain the order within the specific time period. Further, we find that the said order does not shock the conscience of the Court. The Learned High Court Judge has indicated the reasons for disbelieving PW1.

> "අවසාන වශයෙන් මෙම අධිකරණය නිරීක්ෂණය කරනු ලබන්නේ පැ.සා. 01 ගේ සාක්ෂිය මෙම අධිකරණය ඉදිරියේ දෙන ලද අනිකුත් ස්වාධීන සාක්ෂිකරුවන්ගේ සාක්ෂිවලින් තහවුරු වී නොමැති බව ය. විශේෂයෙන්ම පැ. සා. 05 සහ පැ. සා. 07 ගේ සාක්ෂි මගින් පැ.සා. 01 විසින් මෙම අධිකරණය ඉදිරියේ දෙන ලද සාක්ෂිය තහවුරු වනවාට වඩා පැ.සා. 01 ගේ සාක්ෂිය බිඳ වැටීමට ලක් කර ඇති බව ය.
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> පැ.සා. 01 ගේ සාක්ෂිය මෙම අධිකරණය විසින් පිළිගැනීමට ප්‍රතික්ෂේප කර ඇති අවස්ථාවකදී පැමිණිල්ල විසින් මෙහෙයවන ලද අනිකුත් සාක්ෂිකරුවන්ගේ සාක්ෂි විශ්ලේෂණය කිරීම අනවශ්‍ය බවට මෙම අධිකරණය තීරණය කරනු ලබයි. එලෙස තීරණය කරනු ලබන්නේ පැමිණිල්ල විසින් මෙහෙයවන ලද අනිකුත් සියලු සාක්ෂිකරුවන්ගේ සාක්ෂි මෙම අධිකරණය ඉදිරියේ පැමිණිල්ල විසින් මෙහෙයවා ඇත්තේ පැ.සා. 01 විසින් මෙම අධිකරණය ඉදිරියේ දෙන ලද සාක්ෂිය තහවුරු කිරීම සඳහාය."

This opinion was formed by the Learned High Court Judge who had the advantage of observing the demeanor and the deportment of the witnesses. We are mindful that the credibility of a witness is clearly a question of fact and an appellate Court would be reluctant to interfere with a finding of a fact by a trial Court.

I am mindful of the sentiments expressed by His Lordship Wood Renton CJ in Fradd v. Brown & Co. Ltd (1915) 18 NLR 302 at 304;

> "The House of Lords, in Montgomery v. Wallace-James [(1904) A. C. 73.], has pointed out the weight that is due in all matters affecting the credibility of witnesses to the decision of the tribunal which has had the advantage of seeing and hearing them, and there are innumerable-local judgments to the same effect. But it must be remembered that the law gives to litigants in this Colony a right of appeal, such cases as the present, against the finding of the court of first instance, even on questions of credibility, and in Khee Sit Nob v. Lim Thean Teng [(1912) A.C. 323] the Privy Council, while affirming the general rule above mentioned, was careful to explain that it would not be applicable where, in deciding between witnesses, the, trial Judge had clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or had given credence to testimony, perhaps plausibly put forward, which turned out on further analysis to be substantially inconsistent with itself or with indisputable facts. The Supreme Court of this Colony has repeatedly interfered on such grounds as these with the findings of courts of first instance on pure questions of fact, and even credibility."

Generally, the Learned High Court Judge who has the opportunity of observing the demeanor and the deportment of the witnesses comes to a finding with regard to the credibility of the witness.

Determination of the credibility of the witness could not be challenged by way of revision as our Courts generally allow the revision application if the Petitioner satisfies the Court that said order is illegal or irregular.

In Athurupana v. Premasinghe, SC Appeal No. 21/202, Decided on 14.05.2004, (2004 BLR 60 at page 63), His Lordship Sarath N. Silva, C.J held that;

> "Section 753 of the Civil Procedure Code which gives the ambit of the revisionary jurisdiction of the Court of Appeal empowers the Court to examine the record "for the purpose of satisfying itself as to the legality or propriety of any judgment or

order……..or as to the regularity of the proceedings" and thereupon "pass any judgment or make any order as the interests of justice may require."

The section has three elements that constitute the basis of the exercise of revisionary jurisdiction. They are:

i. the legality or propriety of the judgment or order called in question;
ii. the regularity of the proceedings;
iii. the need to pass any judgment or make any order in the interests of justice.

An examination of these elements demonstrate that every illegality, impropriety or irregularity does not warrant the exercise of revisionary jurisdiction. Such jurisdiction will be exercised only where the illegality, impropriety or irregularity in the proceedings has resulted in a miscarriage of justice, by the party affected being denied what is lawfully and justly due to that party. In such event the Court will in revision set right the illegality, impropriety or irregularity by passing "any judgment of making any order as interests of justice may require."

In the present application, the Petitioner has failed to establish that the said order of the Learned High Court Judge is illegal or irregular. Further, there is a right available for the Petitioner to invoke the appellate jurisdiction in terms of Section 15 of the Judicature Act.

For the above-mentioned reasons, we dismiss the application without costs.

JUDGE OF THE COURT OF APPEAL

Amal Ranaraja, J.

I AGREE

JUDGE OF THE COURT OF APPEAL