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

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

Court of Appeal No:

CA/CPA/0153/2022

High Court Hambantota

Case No. HCA 14/2018

Magistrate's Court Hambantota

Case No. 42328

The Officer in Charge,

Police Station,

Ambalantota.

COMPLAINANT

Vs.

Hathagala Patabandige Chaminda,

Baminiyanvila,

Mamadala.

ACCUSED

AND BETWEEN

Hathagala Patabandige Chaminda,

Baminiyanvila,

Mamadala.

ACCUSED-APPELLANT

Vs.

1. The Officer in Charge

Police Station,

Ambalantota.

COMPLAINANT-RESPONDENT

2. The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

Hathagala Patabandige Chaminda,

Baminiyanvila,

Mamadala.

ACCUSED-APPELLANT-PETITIONER

Vs.

1. The Officer in Charge

Police Station,

Ambalantota.

COMPLAINANT-RESPONDENT-

RESPONDENT

2. The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Nayantha Wijesundara instructed by Dinesh de Silva for the Petitioner

: Jehan Gunasekara, S.C. for the Respondent

Argued on : 05-09-2023

Decided on : 14-12-2023

Sampath B. Abayakoon, J.

This is an application invoking the revisionary jurisdiction of this Court granted in terms of Article 138 of The Constitution.

When this matter was supported for notice, this Court having considered the relevant facts and the circumstances, decided to issue notice to the respondents mentioned. The respondents were allowed to file their respective objections accordingly.

At the hearing of this matter, this Court heard the submissions of the learned Counsel for the accused-appellant-petitioner (hereinafter referred to as the petitioner) and also the submissions of the learned State Counsel who represented the respondents.

In the prayer of the petition filed before this Court by the petitioner, several main reliefs have been sought. He has sought to set aside the judgement of the Provincial High Court of the Southern Province Holden in Hambantota in Case Number HCA/14/2018 dated 16-09-2022. The petitioner has also sought to get the conviction and the sentence of him in the Magistrate's Court of Hambantota Case Number 42328 set aside. In the alternative, he is seeking to have a suspended sentence imposed on him in lieu of the sentence imposed upon him in the Magistrate's Court of Hambantota Case Number 42328.

It appears from the averments of the petition that the petitioner is seeking to challenge the judgement by the learned Provincial High Court Judge of the Southern Province Holden in Hambantota, where he challenged the sentence imposed upon him in the Magistrate's Court of Hambantota Case Number 42328.

The learned Counsel for the petitioner informed at the outset of the hearing that although it has been mentioned that the petitioner is challenging the conviction of him by the Magistrate's Court, he is also challenging the sentence imposed upon him. It is clear from the High Court case record that the petitioner has only challenged his sentence when the matter was taken up before the High Court.

The petitioner has been charged before the Magistrate's Court of Hambantota on four counts.

He has been charged for setting fire to the house of one Sunil Bandara and his family members on 16-05-1999, and thereby causing mischief, punishable in terms of section 419 of the Penal Code.

He has been charged for house trespass of the house belonging to Sunil Bandara, and thereby committing an offence punishable in terms of section 433 of the Penal Code.

In addition to the above two charges, he has been charged for causing grievous hurt to one Hathagala Patabandige Jinadasa, and thereby committing an offence

punishable in terms of section 317 of the Penal Code, and at the same time and at the same transaction, causing hurt to Sunil Bandara, one Manel and Wijesekara Arachchige Podi Nona, and thereby committing an offence punishable in terms of section 314 of the Penal Code.

After trial, the learned Magistrate of Hambantota has found the petitioner guilty for the 1st, 2nd and the 4th counts preferred against him and had found the petitioner guilty for the count 3 in terms of section 314 of the Penal Code instead of section 317 for which he was charged by his judgement dated 28-06-2007.

The petitioner has been sentenced by the learned Magistrate accordingly. It is clear from the sentencing order that the learned Magistrate has considered the fact that the petitioner has no previous convictions, his age, the fact that he is married and is having a child and the other mitigatory circumstances before passing the sentence on the petitioner.

The petitioner has been sentenced in the following manner.

1. On the 1st count, 1-year rigorous imprisonment and in addition Rs.1500/- fine.
2. On count 2, 3 months rigorous imprisonment and a fine of Rs.100/-.
3. On count 3, 9 months rigorous imprisonment and in addition Rs.1000/- fine.
4. On count 4, 6 months rigorous imprisonment and in addition Rs.1000/- fine.

It has been ordered that if the petitioner fails to pay the total fine, he shall be sentenced for a period of 4 months simple imprisonment. The total period of rigorous imprisonment imposed upon the petitioner was two and half years in total.

The petitioner has appealed against his conviction and sentence. However, when this matter was taken up for consideration before the learned Provincial High Court Judge of the Southern Province Holden in Hambantota, it has been

observed that the petitioner has in fact challenged only the sentence imposed upon him.

Accordingly, the learned High Court Judge has considered whether the sentence imposed was in order.

The learned Counsel who represented the petitioner before the High Court has taken up two grounds of appeal, namely,

1. The Magistrate's Court failed to follow the provisions of section 182(1). Therefore, the sentencing order is *ab initio void*.
2. The sentence was against the law.

Section 182 of the Code of Criminal Procedure Act refers to the requirement of a Magistrate to frame a charge against the accused. The contention had been that although there is a charge sheet available in the Magistrate's Court case record, it has not been initialed and dated.

The judgement of the learned High Court Judge clearly demonstrates that the learned High Court Judge has well considered this contention. It has been observed that the journal entry dated 12-07-2001 indicates that the petitioner had been charged and he has pleaded not guilty to the charge, although the learned Magistrate who charged the petitioner has not signed the charge sheet.

However, the learned High Court Judge has found that the trial has proceeded on the basis of the accused pleading not guilty to the charges. When the defence was called after the prosecution case, the petitioner has given evidence and had admitted that the charge sheet was read and explained to him, which goes on to show that the petitioner very well knew that the trial proceeded against him only because he pleaded not guilty to the charge.

The learned High Court Judge has drawn his attention to section 436 of the Code of Criminal Procedure Act, which reads as follows.

436. Subject to the provisions hereinbefore contained any judgment passed by a Court of competent jurisdiction shall not be reversed or altered on appeal or revision on account –

(a) of any error, omission, or irregularity in the complaint, summons, warrant, charge, judgment, summing up, or other proceedings before or during trial or in any inquiry or other proceedings under this Code ; or

(b) of the want of any sanction required by section 135,

unless such error, omission, irregularity, or want has occasioned a failure of justice.

It has been correctly determined that there was no failure of justice, or prejudice caused to the petitioner merely because the charge sheet had not been signed by the learned Magistrate.

It is quite apparent from the judgement of the learned High Court Judge that the mitigatory circumstances that were considered by the learned Magistrate in imposing the sentence on the accused has been well considered to come to a finding whether the sentence was excessive.

At the hearing of this revision application, it came to light that the petitioner along with some others including another brother of him had gone to attack the house, which was set on fire. The injured persons are his own father and the mother and the other family members. When the other brother of the petitioner was attempting to enter the house forcibly, one of the inmates of the house has shot at the person and he has been killed. However, no charges had been framed against him as it has been determined that he was acting in exercising his right of private defence on that occasion.

The above facts go on to show that the action of the petitioner is a situation where it cannot be considered as a mere dispute between the parties, but a grievous crime. Having considered the facts and the circumstances, it appears

from the sentencing order that the learned Magistrate has been very much lenient and had well considered the relevant facts and the circumstances and the mitigatory factors in sentencing the petitioner.

The learned High Court Judge of Hambantota in his well-considered judgement had found no reason to interfere with the sentencing order of the learned Magistrate, and had dismissed the challenge to the sentence by the petitioner.

The petitioner has come before this Court invoking the discretionary remedy of revision of this Court. The discretionary remedy of revision is available to a person only on exceptional circumstances.

It was held in the case of **hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd (1987) 1 SLR 5** that,

> *"It is settled law that the exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In the case of **Wijesinghe Vs. Thamararatnam (Sriskantha Law Report Vol. IV page 47)** that,

> *"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the Court."*

In the case of **Vanik Incorporation Ltd. Vs. Jayasekare (1997) 2 SLR 365** it was observed,

> *"Revisionary powers should be exercised where a miscarriage of justice has occasioned due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

It is also settled law that the exceptional circumstances relied on by a petitioner in an application of this nature need to be specifically pleaded before the Court.

In paragraph 16 of the petition, the petitioner has pleaded the following grounds as the exceptional circumstances available to him to get the judgement of the learned High Court Judge revised.

a. The petitioner is 50 years old and father of 2 daughters who respectively is of 14 and 10 years of age. The petitioner is the sole breadwinner of the family and his wife is unemployed.
b. The petitioner is under clinical treatment for a chronic illness in his spine, which requires constant medical care.
c. Unless the petitioner is imposed a suspended sentence, he will lose his employment.
d. The alleged offence has taken place more than 23 years ago and the petitioner was unmarried and was about 27 years of age at that time. Thereafter, the petitioner has lived a happy and peaceful family life as a law-abiding citizen and is employed in the government sector as well.
e. The petitioner's brother has died in the alleged transaction of events after being shot by one of the virtual complainants.

It is abundantly clear from the facts considered during the hearing of this application that the incident where his brother died was of his own making. The petitioner had been found guilty for causing injuries to his own mother and the father, and setting fire to the house where they lived, which needs to be viewed very seriously.

The learned Magistrate who pronounced the sentencing order has well considered the mitigatory circumstances that were relevant and the factors mentioned by the petitioner as exceptional circumstances before this Court.

I am unable to agree that any of the circumstances mentioned falls within the meaning of an exceptional circumstance for the petitioner to succeed in the application before this Court. I find no reason to accept that the judgement of the learned Provincial High Court Judge of the Provincial High Court of the Southern Province Holden in Hambantota or the sentence by the learned

Magistrate of Hambantota as occasions where miscarriage of justice has occurred or decisions that shocks the conscience of the Court.

Accordingly, the revision application preferred by the petitioner is dismissed for want of any merit.

The Registrar of the Court is directed to communicate this judgment to the Provincial High Court of the Southern Province Holden in Hambantota and to the Magistrate's Court of Hambantota for information and necessary procedural steps.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal