

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

In the matter of application for Revision
in terms of Article 138 of the
Constitution of the Democratic
Socialist Republic of Sri Lanka.

Court of Appeal No:
CA/PHC/APN 0005/2023
High Court of Embilipitiya
Case No: HCE/65/2006

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

COMPLAINANT

Vs.

1. Hettiarachchige Nishantha alias Manik
2. Galagamaralage Chandrakumara alias
Kumara
3. Basnayakelage Nimal Pathmasiri alias
Basnayake
4. Wickramasinghe Hettiarachchige
Jagath alias Ajith

ACCUSED

NOW AND BETWEEN

Basnayakelage Nimal Pathmasiri alias
Basnayake

(Presently in Welikada Prison)

3rd ACCUSED-PETITIONER

Hon.Attorney General

Attorney General's Department

Colombo-12.

COMPLAINANT- RESPONDENT

BEFORE : **Sampath B. Abayakoon, J.**
P. Kumararatnam, J.

COUNSEL : **K.A.D.K. Jayalath for the 3rd Accused-**
Petitioner.
Sudharshana De Silva, SDSG with
I.M.M.Fahim, SC for the Complainant-
Respondent.

ARGUED ON : **25/03/2024**

DECIDED ON : **26/07/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named Accused-Petitioner (hereinafter referred to as the Petitioner) with 1st, 2nd and 4th Accused were indicted in the High Court of Embilipitiya on following charges:

1. On or about the 12th October 2001 at Mauara, within the jurisdiction of this court, the accused with persons unknown to the prosecution, committing an offence punishable in terms of Section 141 of the Penal Code read together with section 32 of the Penal Code for being members of an Unlawful Assembly armed with Deadly weapons with the common objective of committing Robbery.
2. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a Gold Ring Punishable in terms of section 146 read together with Section 383 of the Penal Code.
3. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 210/- and a Wrist Watch punishable in terms of section 146 read together with Section 383 of the Penal Code.
4. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 510/- and a Gold Chain punishable in terms of section 146 read together with Section 383 of the Penal Code.

5. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 20,000/- punishable in terms of section 146 read together with Section 383 of the Penal Code.
6. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 200/- and a Gold Chain punishable in terms of section 146 read together with Section 383 of the Penal Code.
7. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 1600/- punishable in terms of Section 146 read together with Section 383 of the Penal Code.
8. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 3060/- punishable in terms of Section 146 read together with Section 383 of the Penal Code.
9. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 10,050/- punishable in terms of Section 146 read together with Section 383 of the Penal Code.
10. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 4500/- punishable in terms of Section 32 read together with Section 383 of the Penal Code.
11. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 210/- and a Wrist Watch punishable in terms of Section 32 read together with Section 383, of the Penal Code.
12. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money

Rs. 510/- and a Gold Chain punishable in terms of Section 32 read together with Section 383 of the Penal Code.

13. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 20,000/- punishable in terms of Section 32 read together with Section 383 of the Penal Code.
14. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 18,000/- and a Gold Chain punishable in terms of Section 32 read together with Section 383 of the Penal Code.
15. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 1600/- punishable in terms of Section 32 read together with Section 383 of the Penal Code.
16. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 3060/- punishable in terms of Section 32 read together with Section 383 of the Penal Code.
17. While being members of the said Unlawful Assembly armed with Deadly Weapons committing the offence of Robbery of a sum of Money Rs. 10,050/- punishable in terms of section 32 read together with Section 383 of the Penal Code.

As the Appellant absconded the court in this case, after an inquiry this case was fixed in absentia of him under Section 241 of the Code of Criminal Procedure Act No. 15 of 1979 and a warrant was issued against him.

On 14.09.2011 the 2nd and 4th Accused pleaded guilty to the charges and the Learned High Court Judge found them guilty of charges 1-9 in the indictment. After hearing the mitigation of 2nd and 4th Accused, the Learned High Court Judge imposed a sentence of 5 years rigorous imprisonment

separately on count 01-09 and further, ordered the sentences to run concurrent to each other.

The trial proceeded against the Petitioner in absentia and the Learned High Court Judge found the Petitioner guilty of counts 1st, 3rd, 6th, 8th, and 9th. The Petitioner was acquitted on counts 2nd, 5th, and 7th. The Petitioner was sentenced to 15 years rigorous imprisonment on each count on 13.03.2012 and the sentences were ordered to run concurrent to each other.

The Petitioner was arrested on an open warrant on 22.07.2019 and produced before the High Court of Embilipitiya. An inquiry was held under Section 241(3) of the Code of Criminal Procedure Act No.15 of 1979. At the end of the inquiry the learned High Court Judge had rejected the application in terms of 241(3) of the CPC and affirmed the judgment and sentence imposed on 13.03.2012.

From the date of order dated 12.07.2021 the Petitioner has been serving the sentence and presently he is sick and partially paralysed and his eyesight also affected due his incarceration.

The Petitioner submits following exceptional circumstances amongst other question of law that may be urged by the Counsel at the hearing of this application.

- a) The judgment of the Learned High Court Judge dated 13.03.2021 is contrary to law.
- b) The Learned High Court Judge failed to consider the severity of the death threats and neglected to consider that the Petitioner had run for his life due to death threats.
- c) The Learned High Court Judge had failed to consider the notable disparity in the punishment given to 2nd and 4th Accused as oppose to the punishment of the Petitioner.

It is settled law that revision is a discretionary remedy, and such power shall be invoked only upon demonstration of exceptional circumstances.

In **Ramu Thamodarampillai v. The Attorney General [2004] 3 SLR 180** the court held that:

“the decision must in each case depend on its own peculiar facts and circumstances”.

In **Marian Beebee v. Seyed Mohamed 69 CLW 34** the court held that:

“Power of revision is an extraordinary power of the court which is independent and distinct from the appellate jurisdiction. The object of revisionary jurisdiction is to ensure the due administration of justice and the correction of all errors in order to avoid a miscarriage of justice”.

In the case of **Rasheed Ali v. Mohammed Ali and Others [1981] 1 SLR 262**, the court held that:

“...the powers of revision vested in the Court of Appeal are very wide and the Court can in a fit case exercise that power whether or not an appeal lies. When, however, the law does not give a right of appeal and makes the order final, the Court of Appeal may nevertheless exercise its powers of revision, but it should do so only in exceptional circumstances. Ordinarily the Court will not interfere by way of review, particularly when the law has expressly given an aggrieved party an alternative remedy such as the right to file a separate action, except when non-interference will cause a denial of justice or irremediable harm”.

In **Commissioner of Police v. Tanes (1957-58) 68 CLR 383**, the court held that:

"It is a deep-rooted principle of the law that before anyone can be punished or prejudiced in his person or his property by any judicial or quasi-judicial procedure, he must be afforded adequate opportunity of being heard ... "

In this case the Petitioner had absconded the court in the year 2008 and was arrested in the year 2019 after seven years of the judgment. Although he had come to Sri Lanka twice in 2015 and 2018, he had not taken any endeavour to check the progress of his case. Further, he had taken up the position that he was under death threat from an underworld figure who had died some time back. The learned High Court Judge had very correctly considered these matters in detail and had concluded that his absence to court was mala fide. Therefore, his application under Section 241(3) of the CPC was rejected very correctly.

Sentencing is the prerogative of the court. Accused who plead guilty will usually receive a reduced sentence. The rational behind this is that it encourages accused who know they are guilty to enter a guilty plea at the earliest possible stage, so saving court time and money and saving witnesses from having to attend court to give evidence. Further, victims are saved from secondary victimization.

In this case the 2nd and 4th Accused had pleaded guilty to their respective charges on 14.11.2011. The Learned High Court Judge after considering the submissions of both parties passed the sentence which he considered appropriate.

The Petitioner in this case absconded the court after the service of the indictment and he twice came to Sri Lanka but not taken any endeavour to check the status quo of his case. He was arrested by the Sevanagala Police

after seven years of the warrant issued against him. Hence, the learned High Court Judge had very correctly considered all these circumstances at the 241(3) CPC inquiry and passed the sentence imposed on him on 13.03.2012. Therefore, the contention he advances under disparity of sentence cannot be considered as an exceptional circumstance.

Considering all the materials placed before this court, I am of the view that this is not a matter where extraordinary power of revision of this court should be exercised in term of Article 138 of the Constitution. The Petitioner has not submitted sufficient exceptional grounds which warrant the intervention of this Court.

Therefore, this revision application is dismissed.

The Registrar of this Court is directed to send this judgement to the High Court of Embilipitiya for necessary implementation.

JUDGE OF THE COURT OF APPEAL

Sampath B.Abayakoon, J.

I agree.

JUDGE OF THE COURT OF APPEAL