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

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

Court of Appeal Case No.

CA (PHC) APN/0062/2017

High Court Colombo

Case No. 5494/2011

and 5495/2011.

Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT

Vs.

Kandiah Yoganathan,

No. 11/3,

Boyd Place,

Colombo 03.

ACCUSED

AND NOW BETWEEN

Kandiah Yoganathan,

No. 11/3,

Boyd Place,

Colombo 03.

ACCUSED-PETITIONER

Vs.

Hon. Attorney General

Attorney General's Department,

Colombo 12.

RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Dr. Romesh de Silva, P.C. with Niran Anketell and V. K. Niles instructed by Sanath Wijewardane for the Accused-Petitioner

: Suharshi Herath, D.S.G. for the Respondent

Argued on : 26-09-2023

Decided on : 02-02-2024

Sampath B. Abayakoon, J.

This an application by the accused-petitioner (hereinafter referred to as the petitioner) who is the accused in the High Court of Colombo Case No. 5494/2011, invoking the revisionary jurisdiction of this Court granted in terms of Article 138 of the Constitution.

The petitioner is seeking to challenge the order dated 20-03-2017 of the learned High Court Judge of Colombo, where the statement of a confessional nature alleged to have been made by the petitioner in terms of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, as amended, while in police detention at the Terrorist Investigation Division (TID), was allowed to be admitted as evidence.

When this matter was supported for a stay order and for notice, after having considered the petition, the affidavit and other supporting documents, this Court issued notice and also granted interim relief by suspending further proceedings before the High Court, initially, for a period of 14 days, which was extended from time to time. On 01-02-2019, the stay order was extended until the final determination of the application.

At the hearing of the application, this Court heard the submissions of the learned President's Counsel on behalf of the petitioner, as well as that of the learned Deputy Solicitor General (DSG) on behalf of the respondent, the Hon. Attorney General.

This is an action where the petitioner was indicted before the High Court of Colombo for committing an offence in terms of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 as amended by Amendment Act No.10 of 1982 and 22 of 1988 (hereinafter sometimes referred to as the PTA) by failing to inform the law enforcement authorities that a person called Kadiragamanadan Mahindan *alias* Vengayan, who was a member of the prohibited organization named LTTE, is engaged in getting the communication equipment belonging to the said organization released, despite the fact that it was well within his

knowledge, and thereby committing an offence violating section 5(a) of the PTA, punishable in terms of the section 5 of the said Act.

The alleged offence is said to have been committed between the period of 01-05-2004 and 30-04-2005.

Ironically, a second indictment bearing No. 5495/2011 has also been filed against the petitioner based on the same transaction for aiding the mentioned person to get the mentioned goods released, an offence punishable in terms of section 2(2)(11) of the PTA, for which I am unable to understand the rationale behind filing two separate indictments on the same matter.

It appears that the parties have consented before the trial Court for the taking up of Case No. 5494/2011 for trial first.

At the commencement of the trial, the indictment has been read over to the petitioner in Tamil language since the petitioner has informed the Court that he is not conversant in the Sinhala language and the petitioner has pleaded not guilty. However, when the first prosecution witness was called to give evidence, it has been agreed that he needs no interpretation of the evidence, which indicates that the petitioner is a person who understands the language of the Court, although he may not be fully conversant of the Sinhala language.

When PW-04, retired Superintendent of Police Nimal Ratnayake was giving evidence, the prosecuting State Counsel has sought to mark a statement, allegedly made by the petitioner to him in terms of section 16 of the PTA while under police detention as P-06.

The learned President's Counsel who represented the petitioner before the trial Court has objected to the said marking of the statement as evidence on the basis that the alleged statement was not a statement made voluntarily by the petitioner.

Accordingly, the learned trial Judge has proceeded to hold a *vior dire* inquiry in order to determine the admissibility of the statement sought to be marked as P-06 at the trial.

The evidence of PW-04 had been that while working in the TID in the same capacity, the petitioner was produced before him at his own request on 05-06-2010. The petitioner has indicated to him that he wants to make a confessional statement. PW-04 has informed him of the legal provisions relating to such a confession, and after being satisfied that the petitioner is willing to make the confession without any inducement, threat or promise, the witness has recorded his statement over two days, namely, on the 7th of May 2010 and 10th of May 2010. It is clear from his evidence that all the communication with the petitioner had been done in English language and the alleged confession made to him by the petitioner also had been in the English language. The PW-04 has translated the same to Sinhala language, recorded, and had later explained what was written by communicating with the petitioner in English.

At the inquiry, the PW-04 has been subjected to cross-examination by the learned Counsel for the petitioner. The witness has stated that he is conversant in Sinhala, Tamil and English languages. Although he has stated in his evidence in chief that it was the petitioner who agreed for the taking down of what he said to him in the Sinhala language, in fact PW-04 has not made any notes about this important fact. He has also admitted that he is aware that the President of the country has issued a circular informing that those who are detained under the PTA should be allowed to state what they have to say in whatever the language they prefer, and any such statement should be recorded in the language it was narrated. He has claimed that he informed the petitioner his above-mentioned right and told him that if he wants, he can write down whatever the confession he has to make. However, he has admitted that he did not record that fact either in his notes in relation to the confession.

When the learned President's Counsel who represented the petitioner wanted the witness to translate "ජේ. ආර්. ජයවර්ධන ලංකාවේ කීවෙනි ජනාධිපතිවරයාද ?" to English, the witness has fumbled, which has shed some light into the level of competency claimed by the witness.

On behalf of the prosecution, the Judicial Medical Officer (JMO) who has examined the petitioner on 06-05-2010 has given evidence, and has marked and produced as P-01, the Medico Legal Report in relation to the petitioner where he has not observed any new signs of injuries on the petitioner. However, he has confirmed that the petitioner communicated with him in English language during the examination. Several other police officers too have given evidence to substantiate the procedural matters in relation to the events that led to the alleged statement made by the petitioner to PW-04.

The petitioner has given evidence at the inquiry and has stated that he had his education in Jaffna and it was in Tamil medium. He has joined the Sri Lanka Customs on 15th January 1982, and at the time of arrest by the officers of the Terrorist Investigation Division (TID), he was serving in the capacity of a Customs Superintendent. He has stated that he is fully conversant in the Tamil language and since the work of the Customs Department is usually conducted in English, conversant in the English language as well. He has claimed that he can speak the Sinhala language, but cannot read or write.

Explaining the events that led to the recording of his statement by PW-04, he has stated that while in detention, he was taken before the PW-04 and he explained to him that his detention was for his meeting with the activists of the LTTE when he visited the North during the cease-fire agreement.

He has claimed that it was on that basis his statement was recorded over two days and it was never informed to him that the statement is being recorded in terms of section 16 of the PTA. He has denied that any of the relevant laws were

shown or explained to him, and has denied that he made a statement admitting the charges attributed to him.

It has been his position that any conversation he had with the PW-04, was in the English language but the statement was recorded in the Sinhala language, which he could not read, or write. He has stated that he was never asked to write down his statement in the language he preferred.

The petitioner had been subjected to cross-examination by the prosecution and it appears that the line of the cross-examination had been on the premise that the petitioner was well conversant in Sinhala, and, hence, he agreed to the statement being recorded in Sinhala. It has also been suggested to him that the due process was followed before his statement was recorded.

Before considering the evidence led at the inquiry in order to come to a finding whether the learned High Court Judge has reached a correct determination as to the voluntariness of the statement alleged to have been made to PW-04 by the petitioner, I think it is appropriate to draw my attention to the relevant legal provisions in that regard.

Subjected to the exceptions as provided by the Evidence Ordinance, no confession made to a police officer shall be proved against a person accused of any offence. **(Section 25(1) of the Evidence Ordinance)**

However, PTA provides for the receiving of such a confessional statement as evidence at a trial against the maker of such a statement. In terms of section 16 of the PTA, such a statement made by a suspect while in police custody, to a person who holds a rank of an Assistant Superintendent of Police or above, can be accepted as evidence against such person or any other person charged jointly, if the statement is not irrelevant in terms of section 24 of the Evidence Ordinance.

Section 16 of the PTA reads as follows;

> **16. (1) Notwithstanding the provisions of any other law, where any person is charged with any offence under this Act, any statement made by such person at any time, whether –**
>
> **a) It amounts to a confession or not;**
> **b) Made orally or reduced to writing;**
> **c) Such a person was or was not in custody or presence of a police officer;**
> **d) Made in the course of an investigation or note;**
> **e) It was or was not wholly or partly in answer to any question,**
>
> **May be proved as against such person if such statement is not irrelevant under section 24 of the Evidence Ordinance:**
>
> **Provided, however, that no such statement shall be proved as against such person if such statement was made to a police officer below the rank of an Assistant Superintendent.**
>
> **(2) The burden of proving that any statement referred to in the subsection (1) is irrelevant under section 24 of the Evidence Ordinance shall be on the person asserting it to be irrelevant.**
>
> **(3) Any statement admissible under subsection (1) may be proved as against any other person charged jointly with the person making the statement, if, and only if, such statement is corroborated in material particulars by evidence other than the statements referred to in subsection (1).**

Section 16 of the PTA has provided that such a statement can only be proved against a person only if it is not irrelevant in terms of section 24 of the Evidence Ordinance.

For matters of clarity, I will now reproduce the said section 24, which reads thus;

> **24. A confession made by an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the court to have been caused by any inducement, threat, or promise having reference to the charge against the accused person, proceedings from a person in authority, or proceeding from another person in the presence of a person in authority and with his sanction, and which inducement, threat or promise is sufficient in the opinion of the court to give the accused person grounds, which would appear to him reasonable, for supposing that by making if he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him.**

In this action, the prosecution has called several witnesses in order to establish that the alleged confession was made voluntarily without any inducement, threat or promise as referred before.

In terms of section 16(2) of the PTA, the burden of proving that any statement made under the PTA is irrelevant in terms of section 24 of the Evidence Ordinance is with the person asserting it to be irrelevant.

However, this provision has been subjected to consistent interpretation by our Superior Courts. It has been held that if it is the view of the Court that the statement sought to be marked as evidence appears to have been made under threat, inducement, or promise, though that fact is not strictly proved, the Court must refuse to accept that as evidence and the burden expected from an accused person by section 16(2) of the PTA is a very light burden.

In the case of **Mahadevan Yogakanthan Vs. Republic of Sri Lanka, C.A. Appeal 41/2010 decided on 12-06-2012, Ranjith Silva, J.** held as follows;

> *"According to this section it appears that the burden of proving that it was not voluntarily rest on the accused-appellant. But what is important is the language the legislature has used in Section 24 of the Evidence Ordnance. It states that 'when it appears to Courts' to guarantee the accused person in criminal proceedings absolute fairness. Thus, Section 24 does not require positive proof of improper inducement, threat or promise to justify the rejection of a confession. If the court, after proper examination and a careful analysis of the evidence and the circumstances of a given case, holds the view that there appears to have been a threat, inducement or promise, though this is no strictly proved, the Court must refuse to receive in evidence the confession. In other words, the burden appears to be, the burden cast by the subsection 2 of (16) of the Prevention of Terrorism Act is a very light burden because there is not much that the accused has to prove. From the given circumstances of the case sometimes a court of law may be able to decide whether it appears that the confession was not voluntarily."*

S. Vivekananda and Another Vs. S. Selvaratnam 79 (1) NLR 337 was a case decided before the provisions of the PTA came into operation as to the acceptability of a confession. It was held:

> *"Section 24 of the Evidence Ordinance does not require positive proof of improper inducement, threat, or promise to justify rejection of confession. If the court after a proper examination and careful analysis of the evidence and the circumstances of the given case comes to the view that there appears to have been a threat, inducement, or promise offered, though this is not strictly proved, then the court must refuse to receive in evidence the confession. The burden is on the prosecution to prove that the confession is*

voluntary and there is no burden of proof on the accused to prove the inducement, threat or promise."

Per Malcolm Perera, J.

> *"At the outset, the Court must determine the meaning of the word appears. I think what the Court has to decide is not whether it has been proved that there is a threat, inducement, or promise, but whether it appears to Court that such threat, inducement or promise, was present. I am inclined to the view that the word "appears" indicates a lesser degree of probability than it would have been, if the word "proof" as defined in section 3 of the Evidence Ordinance has appeared in section 24."*

Apart from the above requirements of finding whether there appears to be a threat, inducement or promise, in my view, it is also of paramount importance for a Court to satisfy that whatever the accused person may have said had been recorded correctly for such a statement to become relevant.

As pointed out by the learned President's Counsel, although a statement allegedly made in terms of section 16 of the PTA is admissible in a Court of law, the requirement of recording a statement in accordance with the relevant procedural steps as stipulated in the Code of Criminal Procedure Act is essential, in addition to the fulfilling of the requirements of section 16 of the PTA.

I am of the view that since the statement allegedly made by the petitioner amounts to an information regarding an offence which incriminates himself, such an information shall have to be recorded in accordance with the provisions of section 109 of the Code of Criminal Procedure Act.

The relevant section 109(1) and (2) reads as follows;

> **109. (1) Every information relating to the commission of an offence may be given orally or in writing to a police officer or inquirer.**

(2) If such information is given orally to a police officer or to an inquirer, it shall be reduced to writing by him in the language in which it is given and be read over to the informant: provided that if it is not possible for the officer or inquirer to record the information in the language in which it is given, the officer or inquirer shall request that the information be given in writing. If the informant is unable to give it in writing, the officer or inquirer shall record the information in one of the national languages after recording the reasons for doing so and shall read over the record to the informant or interpret in the language he understands.

The presidential direction spoken of by PW-04 when he was under cross-examination regarding the above requirement was the direction dated 18-07-1995 issued under the heading Directions Issued By Her Excellency The President Under Regulation 8 of The Emergency (Establishment of a Human Rights Task Force) Regulations No. 1 of 1995.

The relevant Regulation reads as follows.

5. A statement of a person arrested or detained should be recorded in the language of that person's choice who should thereafter be asked to sign the statement. A person who desires to make a statement in his or her own hand writing should be permitted to do so.

In this regard, I would also like to bring to my attention the provisions as to the language in terms of The Constitution of the country.

Article 18 of The Constitution provides that the official languages of Sri Lanka shall be Sinhala and Tamil, and the English language shall be the linked language.

The evidence of the PW-04 clearly establishes that although he may have showed and explained the necessary law and the rights of the petitioner, he has failed to make notes in that regard, especially of the fact whether the petitioner agreed

what he said in English language to be translated to Sinhala language and recording of the same. He has also failed to note that, in fact he informed the petitioner if he wants he can write down what he has to say.

I am of the view that these are factors that should have been viewed in favour of the petitioner by the learned High Court Judge in determining the voluntariness of the statement.

In the case of **Alim Vs. Wijesinghe (S.I. Police, Batticaloa) 38 CLW 95**, it was held that,

> *"Where the same facts are capable of an inference in favour of the accused and also an inference against him, the inference consistent with the accused's innocence should be preferred."*

It is clear from the evidence that the petitioner, although he is an ethnic Tamil, since his medium of work as a customs official over a long period of time, his preferred language had been English. If PW-04 who claims that he is competent in all three major languages, there cannot be any impediment for him to record the confessional statement alleged to have been made by the petitioner in the language it was narrated to him. There was no justification whatsoever for PW-04 to translate what was said by the petitioner to Sinhala language and record it.

PW-04 claims that after recording the statement in the Sinhala language, he translated it again to the petitioner and explained what was written, which cannot be considered as appropriate under any given circumstance. As pointed out correctly by the learned President's Counsel, such a procedure would amount to a double translation which cannot be accepted.

E.R.S.R. Coomaraswamy in his book **'The Law of Evidence' Volume 1 at page 395** states as follows.

> *"A confession is admissible against the maker, because there is a guarantee of credibility in that the statement is made voluntarily against the interest*

of the maker and it may be considered the best evidence. But there are invalidating circumstances which must always be considered, and the Court must be satisfied that the confession is voluntary and made without compulsion, for nemo tenetur se ipsum accusare- ***see Wills op. cit., 3rd Ed. 134."***

I find that the above considered obvious infirmities attached to the recording of the alleged statement by PW-04 has not been adequately considered by the learned High Court Judge before it was determined that the confessional statement can be admitted.

I am of the view that if considered in the correct perspective, there was no basis for the learned High Court Judge to allow the admission of the said statement intended to be marked as P-06 during the trial.

In her submissions before this Court, the learned DSG contended that the alleged statement made by the petitioner was voluntary and without any threat or inducement. However, I am not in a position to agree for the reasons as considered above. The learned DSG contended further that the petitioner has failed to adduce sufficient exceptional circumstances for this Court to exercise the discretionary remedy of revision granted to this Court by The Constitution.

The revisionary jurisdiction is a discretionary remedy available only in exceptional circumstances and in situations where positive miscarriage of justice has occasioned to a party.

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 Volume IV page 47)** it was stated 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."

I am of the view that this is a case where the PW-04 has violated several fundamental rules of procedure, which has occasioned a positive miscarriage of justice towards the petitioner.

For the reasons considered above, I hold that there was no legally tenable basis for the learned High Court Judge to determine that the statement intended to be marked as evidence by the prosecution in terms of section 16 of the PTA can be admitted as evidence in the case.

Accordingly, I allow the revision application by the petitioner and set aside the order dated 20-03-2017 of the learned High Court Judge of Colombo, where the statements sought to be marked as P-06 was allowed to be admitted as evidence and reject the said application of the prosecution.

The Registrar of the Court is directed to communicate this judgement to the High Court of Colombo for necessary action.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal