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

In the matter of an Application for Revision in terms of Article 138 of the Constitution.

Court of Appeal Case No.

CA/CPA/0097/23

High Court Chilaw

Case No. HCA 02/2022

Magistrate's Court Chilaw

Case No. 65858

The Officer in Charge,

Crimes Investigation Division,

Police Station,

Chilaw.

COMPLAINANT

Vs.

Karungu Aboobucker Ayisha Beebi

No. 331, Jayabima,

Chilaw.

ACCUSED

AND NOW

Karungu Aboobucker Ayisha Beebi

No. 331, Jayabima,

Chilaw.

ACCUSED-APPELLANT

Vs.

The Officer In Charge,

Crimes Investigation Division,

Police Station,

Chilaw.

COMPLAINANT-RESPONDENT

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW BETWEEN

Karungu Aboobucker Ayisha Beebi

alias Sarangu Aboobucker Ayisha Beebi,

No. 331, Jayabima,

Chilaw.

ACCUSED-APPELLANT-PETITIONER

Vs.

The Officer In Charge,

Crimes Investigation Division,

Police Station,

Chilaw.

COMPLAINANT-RESPONDENT-

RESPONDENT

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Anil Silva, P.C. with A. Bandara for the Accused-Appellant-Petitioner

: Dishna Warnakula, D.S.G. Respondent-Respondents

Argued on : 16-11-2023

Decided on : 21-03-2024

Sampath B. Abayakoon, J.

This is an application by the accused-appellant-petitioner (hereinafter referred to as the petitioner) seeking to invoke the revisionary jurisdiction of this Court granted in terms of Article 138 of The Constitution.

By this application, the petitioner is seeking to set aside the judgement pronounced by the learned Provincial High Court Judge of the North Western Province Holden in Chilaw, in case No-HCA/02/2022.

This is a judgement pronounced after hearing an appeal preferred before the High Court in terms of Article 154P of the Constitution, challenging the conviction and the sentence of the petitioner pronounced by the learned Magistrate of Chilaw.

The petitioner has been charged before the Magistrate's Court of Chilaw for committing four offences relating to a foreign job transaction.

The 1st count had been under the Penal Code where the petitioner has been charged for cheating, punishable in terms of section 403 of the Penal Code.

The 2nd count had been in terms of the Sri Lanka Bureau of Foreign Employment Act as amended for cheating Rs. 200,000/- from one Mohamed Fasoor, and thereby committing an offence punishable in terms of section 13 of the said Act.

The 3rd count had been to the effect that at the same transaction, she committed the criminal breach of trust, an offence punishable in terms of section 389 of the Penal Code.

The 4th count had been that the petitioner, at the same time and at the same transaction, had committed criminal misappropriation, punishable in terms of section 386 of the Penal Code.

After trial, the learned Magistrate of Chilaw by the judgement dated 08-03-2021 has found the petitioner guilty for the 1st, 3rd and 4th counts preferred against her and she had been acquitted on the 2nd count, namely, the count under which

the petitioner was charged in terms of the Sri Lanka Bureau of Foreign Employment Act.

After having considered the mitigatory circumstances urged on behalf of the petitioner, the learned Magistrate has sentenced her in the following manner.

On count 1, Rs. 1,500/- fine, and in default, 1 month simple imprisonment. In addition, she has been sentenced to 1-year simple imprisonment, which has been suspended for a period of 5 years.

On count 3 and 4, the petitioner has been sentenced for Rs. 1,500/- each fine, and in default, she has been ordered to serve one month each simple imprisonment.

In addition to the above, the learned Magistrate, acting in terms of section 17 of the Code of Criminal Procedure Act, and in terms of Assistance To and Protection of Victims of Crime and Witnesses Act No. 10 of 2023, has ordered the petitioner to pay Rs. 200,000/- as compensation to PW-01, and in default, to serve 3 months simple imprisonment.

It is against this conviction and the sentence; the petitioner has preferred this appeal to the Provincial High Court of the North Western Province Holden in Chilaw.

After hearing the appeal, the learned Provincial High Court Judge of the North Western Province Holden in Chilaw, of the judgement dated 09-08-2023, has partly allowed the appeal. It has been determined that the petitioner should stand acquitted of the 1st and the 3rd counts preferred against her as well.

However, the learned High Court Judge has affirmed the conviction of her for the 4th count, namely, the count relating to criminal misappropriation.

After having determined as such, the learned High Court Judge has decided to vary and enhance the sentence that has been imposed by the learned Magistrate of Chilaw on the 4th count preferred against the petitioner.

Accordingly, a sentence of 6 months rigorous imprisonment together with a fine of Rs. 1500/- has been imposed with a default sentence of one month imprisonment. It has also been ordered that the petitioner should pay Rs. 200,000/- to PW-01 as compensation, and in default, she should serve a sentence of 3 months simple imprisonment.

It is against this judgement; the petitioner has now preferred this revision application before this Court.

When this matter was supported for notice and for a stay order of the sentence, this Court, after having considered the facts, circumstances and the law, decided to issue notice and also to grant a stay order as prayed for in the petition.

At the hearing of this application, we heard the submissions of the learned President's Counsel in support of this application and the views expressed by the learned Deputy Solicitor General (DSG) in this regard.

The primary submission of the learned President's Counsel was on the basis that the learned High Court Judge, after determining the appeal, was misdirected when the sentence already imposed by the learned Magistrate of Chilaw in relation to the 4th count was enhanced, without following the due procedure. It was his view that such an enhancement of the sentence is illegal and should be set aside.

The learned DSG also viewed that this is a matter where this Court should clarify and correct, as there appears to be a miscarriage of justice due to the procedural defect in the manner in which the enhancement of the sentence was decided upon by the learned High Court Judge.

This is an application in revision filed by the petitioner seeking to challenge a judgement pronounced by the learned High Court Judge of the Provincial High Court of the North Western Province Holden in Chilaw exercising the appellate jurisdiction granted to the said Provincial High Court in terms of Article 154P of the Constitution.

For a person dissatisfied or aggrieved by such a judgement, the procedure that has to be adopted is to file a leave to appeal application before the same High Court and obtain leave to appeal to the Supreme Court or to file a special leave to appeal application before the Supreme Court in terms of High Courts of the Provinces (Special Provisions) Act No. 19 of 1990.

However, the law relating to the right of a person to seek the remedy of revision which is an extraordinary remedy that can only be exercised by the Court of Appeal in its discretion has been now settled by the Supreme Court, where it has been determined that irrespective of the requirement of obtaining leave to appeal before the Supreme Court, the revisionary jurisdiction of the Court of Appeal can also be sought by a party aggrieved by an appellate judgement of a Provincial High Court exercised in terms of Article 154P of the Constitution.

Buwaneka Aluvihare, J. in **SC Appeal No. 111-2015** with **SC Appeal No. 113-15** and **SC Appeal No. 114-15** decided on 27-05-2020 stated that;

> *"For the reasons set out in this judgement the said question of law is answered as follows; Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, does not oust the Revisionary jurisdiction of the Court of Appeal in respect of decisions made by a Provincial High Court exercising its appellate powers. Therefore, the revisionary jurisdiction of the Court of Appeal referred to in Article 138 of the Constitution of the Republic of Sri Lanka can be invoked in order to canvass a decision made by a Provincial High Court exercising its appellate powers."*

However, the fact remains that, for this Court to exercise revisionary jurisdiction, there must be exceptional circumstances pleaded and established before this Court to the Court's satisfaction.

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."

Although some irregularities in the Magistrate's Court case were also brought to the notice at the hearing of this application, the enhancement of the sentence by the learned High Court Judge was the main point of argument before this Court. Hence, I will now consider whether there exist any exceptional circumstances for this Court to intervene into the judgement of the learned High Court Judge of Chilaw in relation to the enhancement of the sentence.

It is undisputed that the learned High Court Judge, after allowing the appeal in relation to the 1st and the 3rd count (where the petitioner was convicted by the learned Magistrate) and thereby acquitting the petitioner of the said counts, had decided to enhance the sentence imposed upon the petitioner on the 4th count, which is the only count that now stand against the prtitioner as a result of the judgement pronounced in appeal.

The relevant section 336 of the Code of Criminal Procedure Act in relation to appeal from sentences which is also applicable to determining appeals preferred

to the High Court of the Provinces in terms of Article 154P of the Constitution reads as follows.

> **336. On an appeal against the sentence whether passed after trial by jury or without a jury, the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence, and pass other sentence warranted in law by the verdict (whether more or less severe) in substitution therefor as it thinks ought to have been passed and in any other case shall dismiss the appeal.**

The above-mentioned section clearly provides for the appellate Court to enhance the sentence if it finds it justifiable to so enhance.

However, when enhancing a sentence which amounts to varying the sentence upon which the accused person came before the appellate forum, it becomes necessary for the appellate Court to give an opportunity to the accused-appellant to show cause as to why the sentence against him should not be enhanced.

This procedure was followed in the case of **Bandara Vs. Republic of Sri Lanka (2002) 2 SLR 277,** where it was stated by **Gamini Amaratunga, J.,**

> *"We, therefore, called upon the accused-appellant to show cause why his sentence should not be enhanced and we gave him time to show cause. The learned Counsel appearing for the accused-appellant submitted that the accused-appellant is the father of an infant child; that he is the sole breadwinner of the family and that his incarceration will have an adverse impact on his family.*
>
> *We have carefully considered this submission, but we wish to state that we have also considered plight of the families of those 14 persons who perished in the accident due to the rash and negligent conduct of the accused-appellant. Therefore, we cannot give any relief to the accused-appellant on the basis of the submissions made on his behalf."*

The procedure upon which a sentence already entered can be enhanced upon an appeal was well considered by **Shiran Gooneratne, J.** in **SC Appeal No. 115-2019 decided on 04-04-2022**.

This was a case where the accused-appellant-petitioner was charged for negligent driving, failure to avoid an accident, failure to report an accident in terms of the Motor Traffic Act, and also for reckless and negligent driving, an offence punishable in terms of section 329 of the Penal Code.

After trial, the learned Magistrate found the said accused-appellant guilty for the 1st, 2nd and 4th counts and sentenced him, where the learned Magistrate imposed a simple imprisonment period of 3 months which was suspended for a period of 5 years in relation to the 4th count, in addition to the fine imposed on the said count. On the 1st and the 2nd count, he was imposed a fine only.

After hearing an appeal filed by the accused-appellant challenging the said conviction and the sentence, the relevant Provincial High Court affirmed the conviction on all counts but converted the suspended sentence into an active sentence of 3 months simple imprisonment.

After having considered the procedure followed to enhance a sentence in **Bandara Vs. Republic of Sri Lanka (supra)**, his lordship cited the judgement pronounced by the Supreme Court in **SC/SPL/LA No. 201/2006** where it was held that;

> *"It is a cardinal principle that the accused person ought to be given an opportunity to present to Court he might have against the enhancement of the sentence."*
>
> **Held:**
>
> The question of law raised by the petitioner is based upon a failure of natural justice by not affording an opportunity to the petitioner to be heard

prior to the said variation in sentence. A basic principle of procedural safeguards is that a man's defence must be heard fairly.

"*An omission to give a party to a suit an opportunity of being heard is not merely an omission of procedure, but is a far more fundamental matter in that it is contrary to the rule of natural justice embodied in the maxim audi alteram partem. (**Dharmadasa Vs. Piyadasa (2008) BLR 208**)*"

It is clear from the appellate judgement of the learned Provincial High Court Judge of the North Western Province Holden in Chilaw dated 09-06-2023, that no opportunity has been given to the petitioner to show cause as to why the sentence imposed on her by the learned Magistrate of Chilaw on the 4th count preferred should not be enhanced.

The reasons given by the learned High Court Judge are not reasons based after providing an opportunity to the petitioner to show cause in that regard.

Therefore, I am of the view that this procedural irregularity has caused a miscarriage of justice towards her which amounts to sufficient exceptional circumstances requiring the intervention of this Court under the revisionary jurisdiction granted to this Court in terms of Article 138 of the Constitution.

Therefore, I set aside the 6 months rigorous imprisonment period that has been imposed upon the petitioner on count 4 preferred against her where she now stands convicted in terms of the appellate judgement and reimpose the sentence given by the learned Magistrate of Chilaw in that regard, namely, a fine of Rs. 1500/- and in default, 1-month simple imprisonment.

Since the compensation which amounts to Rs. 200,000/- to be paid to PW-01 has been ordered in terms of section 17 of the Code of Criminal Procedure Act and also Assistance To and Protection of Victims of Crime and Witnesses Act No. 10 of 2023, which is an order in addition to the sentence imposed, the said order and the default sentence ordered by the learned Magistrate in that regard shall remain the same.

Subject to the above variation to the judgement of the learned Provincial High Court Judge of the North Western Province Holden in Chilaw. The revision application is partly allowed.

The Registrar of the Court is directed to communicate this judgement to the Provincial High Court of the North Western Province Holden in Chilaw and also to the Magistrate's Court of Chilaw for necessary action.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal