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

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

Court of Appeal No:
CA//PHC/APN/0127/2022

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

High Court of Ampara
Case No. HC/AMP/896/2004

COMPLAINANT

Vs.

1. Abdul Kareem Nasheer
2. Mohamed Paaruk Abusali

ACCUSED

NOW AND BETWEEN

1. Abdul Kareem Nasheer

1st ACCUSED-PETITIONER

Vs.

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

COMPLAINANT-RESPONDENT

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

COUNSEL : **Tenny Fernando for the Petitioner.**
Dishna Warnakula, DSG for the
Respondent.

ARGUED ON : **08/02/2024**

DECIDED ON : **03/05/2024**

JUDGMENT

P. Kumararatnam, J.

The above-named 1st Accused Petitioner (hereinafter referred to as the Petitioner) was indicted along with 2nd Accused by the Attorney General on following charge:

On or about the 10th November 2011 the accused jointly committed the murder of Mohamed Ibrahim Riyaz which is an offence punishable under Section 296 of the Penal Code.

When the indictment was read and explained to the Petitioner and the 2nd Accused, they opted for a non-jury trial. Accordingly, the case was fixed for trial. Before, the commencement of the trial it was reported that the Petitioner and the 2nd Appellant had gone abroad without the leave of the Court. Hence, an inquiry under Section 241(1) of the Code of Criminal Procedure Act No.15 of 1979 was held and trial proceeded in absentia of them.

At the trial, the prosecution had led twelve witnesses and marked several productions and closed the case. Learned High Court Judge having satisfied that the evidence presented by the prosecution established a prima facie case against the Petitioner and the 2nd Accused, by his judgment dated 31.07.2009 convicted the Petitioner and the 2nd Accused as charged and sentenced them to death.

The Petitioner being aggrieved by the judgment of the Learned High Court Judge of Ampara, had filed this revision application stating to consider following exceptional circumstances:

- a) The entire trial beginning at the trial court is irregular as the Section 241 inquiry was based on hearsay evidence;
- b) The Prosecution relied only on a single piece of evidence that the deceased was seen in morning with the Petitioner which is not a sufficient piece of circumstantial evidence to convict the Petitioner for the offence of murder;
- c) To attract the last scene theory the Prosecution had failed to establish the exact time to death of the deceased;
- d) The Learned High Court Judge had failed to consider the concept of last scene theory in his impugned judgment; and

-
- e) The Learned High Court Judge in his impugned judgment had no considered the well-established principles pertaining to circumstantial evidence in analysing the evidence for the Prosecution.

At the very outset of the hearing of this matter, the Learned Deputy Solicitor General representing Hon. Attorney General informed that she is taking up several preliminary objections as to the maintainability of this application before this Court, and moved this Court to dismiss of this application in limine. The Application was allowed.

The background of the case is briefly as follows:

According to PW1, he is the father of the deceased. On the date of the incident, i.e. 10/11/2001, The Appellant and 2nd Accused had gone to this witness's house and accompanied his deceased son who was 16 years of age at that time. At that time the deceased was carrying on a love affair with the sister of the 2nd Accused. After leaving with them, the deceased did not return home on that day. On the following day after receiving an information, he had gone to the Ampara Hospital and identified his son's body.

PW2, who was a teacher by profession and help her husband who ran a retail shop. On the day of the incident, when she was at her shop, three persons had come to her shop and asked for tea. After staying some time, the said persons went towards the jungle. After some time, school children who were returning home after school informed PW2 that a person was lying fallen with blood under a wood apple tree. They also told her that they had passed this information to the nearby Army camp. When she saw the body, she identified the dead body as one of the persons who visited her shop with two others. According to her, the dead person is the youngest among the other persons who came to her shop. She was attended the identification parade and identified the Appellant and the 2nd Accused as persons who accompanied the deceased and came to her shop.

It is well settled law that the revision is a discretionary remedy that can be granted only upon exceptional circumstances. In the petition filed by the Petitioner does not disclose any specific exceptional circumstances, which he relies upon. The main contention is that irregular procedures had been adopted to conduct the trial.

In **Wijesinghe v Tharmaratnam** (Sri kantha Law Report Vol-IV 47), the court held that:

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

In **Hotel Galaxy (Pvt) Ltd. V Mercantile Hotels Management Ltd.** 1987 1 SLR 5 the Court held 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 this case the Petitioner had gone abroad without the leave of the Court. When he absconded, the Petitioner was aware very well that a serious case was pending against him before the High Court of Ampara. As such, the prosecution, furnishing necessary information through the police, led evidence under Section 241(1) of the Code of Criminal Procedure Act No. 15 of 1979 and proceeded the case against the Petitioner and the 2nd Accused in absentia of them.

There is no any irregular procedure adopted by the Court as claimed by the Petitioner. The Petitioner, in his affidavit admitted that he was continuously in overseas due to his poor income. But he had left the country without informing or getting prior approval of the High Court of Ampara. Therefore,

the Petitioner now cannot argue that the procedure adopted by the Court under Section 241(1) of the CPC was irregular.

The Petitioner submits that the delay in lodging this revision application before this Court is since he was continuously in overseas due to his poor income and his application under Section 241(3) of the CPC to hear was dismissed on 31.08.2022. As such, he instructed his Counsel to file this case and therefore, he further, submits that he is not guilty of laches.

The Learned DSG, in her preliminary objections submits that this application for revision was filed by the Petitioner after an inordinate delay. According to her, the Petitioner and the 2nd Accused were convicted in absentia and the sentenced them on 31.07.2009. The Petitioner had arrived in Sri Lanka in May, 2022 and had been arrested at the airport and produced before the High Court of Ampara. An inquiry under Section 241(3) of the CPC was held and the Learned High Court Ampara refused the application for a trial in denovo on 31.08.2022. This revision application was filed against the order of Learned High Court Judge of Ampara. The Petitioner has taken one and half months to come before this Court. The delay is not satisfactorily explained.

Delay is a fatal error that would cause an application to be dismissed in *limine*, if the petitioner fails to adduce sufficient and reasonable explanations for such delay.

This matter was discussed at length in **Rajapakse vs The State** (2001) 2 SLR 161 which stated the following:

“...if this Court were to act in revision the party must come before Court without unreasonable delay. In the instant case there is a delay of 13 months.

In this regard vide Justice Ismail’s judgement in **Camillus Ignatious vs. OIC of Uhana Police Station** (Rev) CA 907/89 M.C. Ampara 2587 (Application in revision) where His Lordship was of the view that a mere delay of 4 months

in filing revision application was fatal to maintain a revision application before the Court of Appeal. His Lordship further added –

“These matters must be considered in limine before the Court decides to hear the accused-petitioner on the merits of his application. Before he could pass the gateway to relief his aforesaid contumacious conduct and his unreasonable and undue delay in filing the application must be considered and determination made upon those matters before he is heard on the merits of the application.”

The Learned DSG further submitted that the Petitioner has never pleaded or averred that he was unaware of the case proceedings to trial in absentia or the fact that he was unaware of the conviction and sentence at any point from the date of such order or judgment or until application under Section 241(3) of the CPC was made. Hence, the Petitioner is time barred and has now made this application in revision before this Court as he is compelled to do so due to the unexpected arrest and imposition of the sentence.

The Petitioner admitted in evidence before the High Court that he did not attend the trial after the indictment was served on him except for one day. He had admitted that he did not take permission from Court to leave the country knowing that he required to sign every month at the police station in terms of bail conditions imposed on him. This clearly shows the Petitioner has deliberately evaded the Court and violated the bail conditions as well as the obligation to appear in Court.

In **Sudarman De Silve v Attorney General** [1986] 1 SLR 09 the Court held that:

“Contumacious conduct on the part of an accused is relevant only where the exercise of a discretion vested in the court is involved.”

In this case the Learned High Court Judge in his judgment dated 31.07.2009 considered all evidence presented and concluded that the Petitioner and the 2nd Accused were guilty to the charge of murder.

Considering all the circumstances of this case, especially the delay, the contumacious conduct of the Petitioner and the absence of exceptional circumstances, this Court conclude that this is not an appropriate case to use discretionary power in favour of the Petitioner.

Therefore, this revision application is dismissed.

The Registrar of this Court is directed to send this judgment to the High Court of Ampara for information.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL