

**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 of the Democratic
Socialist Republic of Sri Lanka.*

Court of Appeal Case No:

CA/PHC/APN/0086/2023

High Court of Anuradhapura

Case No: HCRA/05/2023

Magistrate's Court of Anuradhapura

Case No: 94696

R.A. Prageeth Jaliya Jayathilake,
Authorized Officer in terms of the
National Authority on Tobacco and
Alcohol Act,
Wijayapura.

And

Public Health Inspector,
Municipal Council,
Colombo.

COMPLAINANT

Vs.

1. Ceylon Tobacco Company PLC,
No. 178,
Srimath Ramanathan Mawatha,
Colombo 15.

2. D.S. Gunasekara (Pvt) Ltd,
No. 394/2A,
Harischandra Mawatha,
Anuradhapura.

ACCUSED

AND

D.S. Gunasekara (Pvt) Ltd,
No. 394/2A,
Harischandra Mawatha,
Anuradhapura.

2ND ACCUSED-PETITIONER

Vs.

1. R.A. Prageeth Jaliya Jayathilake,
Authorized Officer in terms of the
National Authority on Tobacco and
Alcohol Act, Wijayapura.

And

Public Health Inspector,
Municipal Council,
Colombo.

2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

COMPLAINANT-RESPONDENTS

Ceylon Tobacco Company PLC,
No. 178,
Srimath Ramanathan Mawatha,
Colombo 15.

ACCUSED-RESPONDENT

AND NOW BETWEEN

D.S. Gunasekara (Pvt) Ltd,
No. 394/2A,
Harischandra Mawatha,
Anuradhapura.

2ND ACCUSED-PETITIONER-

PETITIONER

Vs.

1. R.A. Prageeth Jaliya Jayathilake,
Authorized Officer in terms of the
National Authority on Tobacco and
Alcohol Act,
Wijayapura.

And

Public Health Inspector,
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Colombo 12.

COMPLAINANT-RESPONDENT-
RESPONDENTS

Ceylon Tobacco Company PLC,
No. 178,
Srimath Ramanathan Mawatha,
Colombo 15.

ACCUSED-RESPONDENT-
RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Saliya Pieris, P.C. with Manoj Bandara, Hasitha
Gamage and Chinthaka Kulathunga for the
Petitioner, instructed by Sudath Perera Associates.
: Maheshika Silva, D.S.G. for the 2nd Respondent.

Argued on : 29-08-2024

Decided on : 20-11-2024

Sampath B. Abayakoon, J.

This is an application preferred by the 2nd accused-petitioner-petitioner (hereinafter referred to as the petitioner) seeking to invoke the revisionary jurisdiction granted to this Court in terms of Article 138 of The Constitution.

When this matter was supported for notice, after having considered the relevant facts, circumstances and the law, this Court issued notices on the respondent-respondents mentioned in the application. Accordingly, the respondents were represented and were allowed to file objections, if necessary.

At the hearing of this application, this Court heard the submissions of the learned President's Counsel in support of the application, as well as the submissions of the learned Deputy Solicitor General (DSG), who represented the 1st complainant-respondent-respondent, and the Hon. Attorney General.

It was agreed by the parties that this matter could be considered along with case number CPA-0085-23 filed before this Court, as both the applications have been based on similar facts and circumstances.

This is a matter where the petitioner was charged together with the 1st accused named in the charge sheet, who is Ceylon Tobacco Company PLC, before the Magistrate's Court of Anuradhapura under Case Number 94696 on the basis

that they violated section 34(1)(a) and/or section 34(1)(b) of the National Authority on Tobacco and Alcohol Act No. 27 of 2006 as amended by the Amendment Act No. 3 of 2015 (hereinafter referred to as the NATA Act).

The 1st complainant-respondent-respondent is an Authorized Officer appointed in terms of the Act, and also a Public Health Inspector attached to the Municipal Council of Colombo.

The allegation against the petitioner and the other accused had been to the effect that they failed to display the required pictorial warnings in terms of the NATA Act on the large cardboard boxes, in which cigarette packets produced by the 1st accused charged before the Magistrate's Court, were transported for distribution.

The facts mentioned in the petition filed before this Court and also the submissions made by the learned President's Counsel reveals that, as soon as the 1st complainant-respondent-respondent, who was a Public Health Inspector attached to the Municipal Council of Colombo, initiated proceedings against the petitioner before the Magistrate's Court of Anuradhapura, the petitioner, along with the other accused have filed an application before the Court of Appeal under the Case No. CA/WRT/492/2015, seeking a writ of certiorari to quash the charges filed against them on the basis that the 1st complainant-respondent-respondent has initiated proceedings against them on a wrong interpretation of the requirements of the NATA Act.

It had been contended before the Court of Appeal that NATA Act does not require the cardboard boxes, in which the petitioner transported cigarette packets manufactured by the Ceylon Tobacco Company PLC, to have the required pictorial warning.

The Court of Appeal has initially issued a stay order suspending the proceedings before the Magistrate's Court of Anuradhapura until the final conclusion of the application before the Court. However, the Court of Appeal, of the judgment dated 12-09-2019, has dismissed the said Writ Application. The Leave to Appeal

Application seeking to challenge the said order before the Supreme Court has also been dismissed without leave being granted.

It is clear from the judgment pronounced by **Mahinda Samayawardhena, J.** in **CA/WRT/492/2015 decided on 12-09-2019**, the argument of the petitioners in the said Writ Application had been that section 34 of the NATA Act as amended does not require the cardboard boxes, in which the 1st petitioner company transported cigarette packets, to have the required pictorial warning. It appears that the said argument has been formulated based on the English text of the Act which reads as follows.

34. (1) A manufacturer or an importer of a tobacco product shall cause to be displayed conspicuously and in legible print—

(a) on the top surface area of both front and back sides of every packet, package or carton containing the tobacco product manufactured or imported by such manufacturer or importer, health warnings, as may be prescribed, subject to the provisions of section 34A; and

(b) on every packet, package or carton containing the tobacco product manufactured or imported by such manufacturer or importer, a label or a statement specifying the tar and nicotine content in each tobacco product in such packet, package or carton.

(2) A person shall not sell, offer for sale, supply, distribute or store a packet, package or carton containing tobacco products unless health warnings as provided for in subsection (1)(a) and a label or a statement as provided for in subsection (1)(b), are displayed conspicuously in legible print on every packet, package or carton containing the tobacco products.

(3) Any person who contravenes the provisions of subsection (1) or subsection (2), commits an offence and on conviction after summary

trial by a Magistrate be liable to a fine not exceeding rupees fifty thousand or to an imprisonment of either description for a term not exceeding one year or to both such fine and imprisonment.”

When this matter was argued before the Court of Appeal, the learned President’s Counsel, who represented the petitioners, had contended that every packet, package or carton containing the tobacco products manufactured or imported does not refer to a cardboard box, in which such products are being transported. He has referred to the word “carton” as a much smaller cardboard box, which carry several cigarette packets in packed form, and not the large cardboard box as stated in the charges filed against the petitioners.

However, the Court of Appeal has disagreed with the said contention after studying the Sinhala text of the Act, in relation to the words mentioned in section 34, which is the official version of the Act. It had been observed that the Sinhala version is clearer without ambiguity, in which the requirement has been to have the required pictorial warning on all packets, packages or cardboard boxes (සෑම පැකට්ටුවක, ඇසුරුමක හෝ කාඩ්බෝක්සි පෙට්ටියකම).

The Court has proceeded to interpret the word “carton” used in the English translation of the Act as a reference made to the cardboard box mentioned in the official version of the Act. It had been determined that the petitioners need to adhere to the requirement of exhibiting the pictorial warning in the said boxes as well.

However, it is clear from the judgment that the Court of Appeal has recognized the fact of having an ambiguity between the official Sinhala version of the Act and its English translation, and has proceeded to clear the said ambiguity in pronouncing the relevant judgment.

It is an undisputed fact that after the judgment in the Writ Application was pronounced, and the Leave to Appeal Application filed before the Supreme Court was rejected, the petitioners have taken immediate steps to display the required pictorial warning on the large cardboard boxes as well.

When the matter was taken up before the Magistrate's Court of Anuradhapura, the 1st complainant-respondent-respondent has been represented by the Hon. Attorney General, and the parties have agreed to admit the evidence led in case number 94695 in relation to the case number 94696 of the same Court as well, which is the Magistrate's Court case under consideration in this revision application, on the basis that facts relating to both the cases are the same.

The learned State Counsel, who represented the 1st complainant-respondent-respondent, has called him to give evidence. He has explained the raid conducted by him in relation to the case and has stated that he took into his custody, several large cardboard boxes, which were used to transport cigarette packets, and initiated proceedings against the petitioner and the other accused in terms of the section 34(1)(a) or (b) of the NATA Act.

He has admitted that the contention of the accused at that time was that there is no necessity for them to have the pictorial warning on the large cardboard boxes, as 34(1)(a) or (b) does not require such warnings.

He has stated that when the matter was argued before the Court of Appeal in the Writ Application filed by the petitioners, their arguments were based on the English text of the relevant section, and the Court of Appeal has cleared any ambiguity between the official Sinhala text of the Act and its English translation by declaring that cardboard boxes, which are used to transport cigarette packets should also have the required pictorial warning.

He has also stated that after the Court of Appeal judgment, he, as an Authorized Officer appointed under the NATA Act, observed that the 1st accused company has taken steps to display the required pictorial warning on the cardboard boxes as well.

At the conclusion of the evidence of PW-01, the learned State Counsel making submissions before the learned Magistrate of Anuradhapura, has conceded that because of the ambiguity between the official Sinhala text of section 34 and the English translation of the same of NATA Act, the petitioner might have acted in

the manner as stated, and therefore, there is a question relating to the criminal liability of the petitioner and the other accused. It has also been stated that after the clearance of the said ambiguity by the Court of Appeal, the 1st accused company had taken due steps to correct the situation.

The learned State Counsel has informed the Court that the Hon. Attorney General does not intend to proceed with the complaint and has invited the Court to consider his submission in terms of section 189 of the Code of Criminal Procedure Act in making a suitable order, if the Court is satisfied in that regard.

This application has led to the order pronounced by the learned Magistrate of Anuradhapura on 14-10-2022, where the learned Magistrate has determined that he is not satisfied that there were sufficient reasons to allow the prosecution to withdraw the charges filed against the petitioner and the other accused in terms of section 189 of the Code of Criminal Procedure Act.

Accordingly, the learned Magistrate has rejected the application made under section 189, and has decided to proceed with the case.

The petitioner being aggrieved by the said determination had filed an application in revision against the said determination before the Provincial High Court of the North Central Province holden in Anuradhapura under Case Number HCRA/05/2023. After considering the relevant application together with the High Court of Anuradhapura Case Number HCRA/04/2023, which was filed seeking to challenge the same order pronounced in Magistrate's Court of Anuradhapura Case Number 94695, the learned High Court Judge of Anuradhapura by his order dated 06-08-2023 has dismissed both the above-mentioned revision applications.

It has been determined that the learned Magistrate was correct in refusing to act in terms of section 189 of the Code of Criminal Procedure Act, and the petitioner and the other accused had failed to establish sufficient exceptional circumstances for the Court to intervene into the order pronounced by the learned Magistrate.

The petitioner has come before this Court invoking the revisionary jurisdiction of this Court, seeking to challenge and set aside the order dated 08-06-2023 pronounced by the learned High Court Judge of Provincial High Court of the North Central Province holden in Anuradhapura, as well as the order dated 14-10-2022 by the learned Magistrate of Anuradhapura.

When this matter was argued before this Court, the learned DSG making submissions on behalf of the respondents submitted that the Hon. Attorney General has used his prosecutorial discretion in the correct manner. It was her submission that the alleged offence was based on a highly technical matter, where it might have occurred due to the ambiguity that existed in the official Sinhala version of the NATA Act and the English translation of the same. It was her contention that it was under those circumstances and also due to the fact that the 1st accused company had taken steps to comply with the said requirements, the Hon. Attorney General made the application to withdraw the charges against the petitioner and the other accused.

The learned President's Counsel who represented the petitioner was of the same view and submitted that the learned Magistrate of Anuradhapura has failed to appreciate the special circumstances that led to the charges being filed against the petitioner, and the ambiguity that existed in interpreting the relevant provision of the Act at that time.

He also brought to the notice of the Court that the 1st accused company is the only licensed manufacturer of cigarettes in Sri Lanka and also one of the largest contributors of revenue to the government by way of legitimate taxes paid. It was his submission that under the circumstances, the learned High Court Judge should have intervened and set aside the order by the learned Magistrate where the learned Magistrate refused to allow the withdrawal of the charges filed.

He submitted that both the learned Magistrate and the learned High Court Judge has considered the facts and the law on a wrong premise, therefore, the petitioner has established sufficient exceptional grounds for this Court to intervene and set

aside the relevant orders, and to acquit the petitioner and the other accused from the charges filed against them before the Magistrate's Court of Anuradhapura.

It is trite law that the remedy of revision being a discretionary remedy, the Court of Appeal will grant such a remedy only under exceptional circumstances. What constitutes exceptional circumstances had been defined over time by our Superior Courts when pronouncing judgments in relation to the applications, which required the Court's intervention using its discretionary powers of revision.

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 would also like to quote from the case of **Sadi Banda Vs. Officer In Charge of Norton Bridge Police Station (supra)** which I find relevant in the above context.

"The revisionary power of Court is a discretionary power. This is an extraordinary jurisdiction which is exercised by the Court and the grant of relief is entirely dependent of the Court. The grant of such relief is of course

a matter entirely in the discretion of the Court, and always be dependent on the circumstances of each case. Existence of exceptional circumstances is the process by which the extraordinary power of revision should be adopted. The exceptional circumstances would vary from case to case and their degree of exceptionality must be correctly assessed and gauged by the Court taking into consideration all antecedent circumstances using the yardstick whether a failure of justice would occur unless revisionary powers are invoked.”

As I considered above, it is abundantly clear that the petitioner and the 1st accused had not exhibited the required pictorial warning on the cardboard boxes used to transport cigarette packets manufactured by the 1st accused company on the belief that such warnings are not necessary on the cardboard boxes.

Although the official version of an Act passed by the legislature is the Sinhala Act, and the Sinhala Act shall prevail over the English or Tamil translations of the Act, it is common knowledge that it is the English translation that would be commonly used in interpreting the words mentioned in an Act passed by the legislature. It is clear that it was the very reason for the misinterpretation of the provisions of the Act by the petitioner.

However, what is also clear and relevant is the fact that the petitioner and the 1st accused company had taken immediate steps to correct the situation once the Court of Appeal provided a clear interpretation as to the requirements of the NATA Act.

I am in agreement with the submissions of the learned President's Counsel as well as the learned DSG that the learned Magistrate should have considered the application by the prosecution based on the above circumstances on a rational and reasonable basis, although the learned Magistrate has decided to consider otherwise.

The relevant section of the Code of Criminal Procedure Act under which the learned State Counsel, who represented the complainant, has made the application to withdraw the charges reads as follows.

189. If a complainant at any time before judgment is given in any case under this Chapter satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw the case the Magistrate may permit him to withdraw the same and shall thereupon acquit the accused, but he shall record his reasons for doing so :Provided, however, that anything herein contained shall not be taken to extend the powers of a Magistrate to allow the compounding of offences under the provisions of section 266.

When the said application was made before the learned Magistrate, there was no dispute of the fact that the petitioner and the 1st accused company had taken steps to comply with the requirements of the Act after the pronouncement of the Court of Appeal judgment. The submissions made before the Court clearly provide that the actions of the petitioner had been based on a misapprehension of the relevant law and not due to intentional violation of the law.

It is also clear that after having considered the relevant facts and the circumstances, and the interpretation of the law by the Court of Appeal, the Hon. Attorney General has used his prosecutorial discretion in a correct manner and not with the intention of allowing a guilty party to escape a crime.

Apart from the above considerations, it also needs to be noted that prosecutorial discretion has been used considering the highly technical nature of the offence as well.

Under the circumstances, I am of the view that the learned Magistrate of Anuradhapura had sufficient grounds before him to permit the complainant to withdraw the charges filed against the petitioner. I am unable to agree with the reasons given by the learned Magistrate of Anuradhapura in order to disallow the application for withdrawal of the complaint based on the judgment

pronounced by the Court of Appeal in CA/WRT/492/2015. I am of the view that the consideration should have been on the basis of the facts and the circumstances, as well as the law, taken as a whole.

I am also of the view that the learned High Court Judge of the Provincial High Court of the North Central Province holden in Anuradhapura was not correct when the learned High Court Judge decided to dismiss the revision application filed before it on the basis that he had no reasons to interfere with the order of the learned Magistrate.

It is my considered view that the petitioner had adduced sufficient exceptional grounds for this Court to intervene and set aside the order pronounced by the learned Magistrate of Anuradhapura on 14-10-2022 and also the order pronounced by the learned High Court Judge on 08-06-2023, as both the orders cannot be allowed to stand.

Accordingly, I set aside the said orders, allow the application to withdraw the charges, and acquit the petitioner and the other accused from the charges preferred against them before the Magistrate Court of Anuradhapura. Hence, I allow the revision application filed by the petitioner.

The Registrar of the Court is directed to communicate this judgment forthwith, to the Provincial High Court of the North Central Province holden in Anuradhapura, and also to the Magistrate's Court of Anuradhapura for information purposes, and necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal