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

IN THE MATTER OF AN APPLICATION TO REVISE THE ORDER OF THE HIGH COURT OF KALUTARA REFUSING THE GRANT OF BAIL PENDING APPEAL IN CASE NO. HC 384/2011 UNDER THE PROVISIONS OF THE CRIMINAL PROCEDURE ACT NO. 15 OF 1979.

C A (PHC) APPLICATION NO. 04/2014

H.C. KALUTARA 384/2011

Kaluperuma Kelum Dushmantha de Silva,
Moragalla,
Beruwala.

PETITIONER

(on behalf of his father)

Ratnasiri Silva Kaluperuma
(Presently incaserated / serving sentence)
Accused Appellant Petitioner

Vs.

The Hon. Attorney General

RESPONDENT

BEFORE **A.W.A. SALAM, J.**

W.M.M. MALINI GUNARATNE, J.

Dr. Ranjit Fernando

FOR THE ACCUSED APPELLANT PETITIONER

Rajindra Jayaratne, SC

FOR THE RESPONDENT

Argued on 11th March 2014.

Decided on 26th May 2014

Malinie Gunaratne, J.

The Petitioner to this case, acting on behalf of his father (Accused – Appellant) moves this Court to revise the Order made by the High Court Judge, Kalutara, refusing to grant bail pending Appeal to this Court against the sentence in that Court.

The Accused – Appellant had been indicted on three (03) counts before the High Court of Kalutara, having committed Grave Sexual Abuse on a male child of 18 years of age, on the 24th of July, 26th of July and 27th of July 2004, an offence punishable under Sec.365 (B) (2) B of the Penal Code as amended by Act No. 22/1995 and 28/1998.

At the trial, the Accused – Appellant tendered a plea of guilt in respect of all three (03) counts and the learned High Court Judge convicted him and sentenced seven (07) years Rigorous Imprisonment on each count (to run concurrently) together with a fine of Rs.2,500/- and an order of compensation in a sun of Rs.200,000/- on each count payable to the victim with default terms in the event of non-payment. Against the said sentence the Accused – Appellant had preferred an Appeal.

The Accused – Appellant applied for bail pending Appeal from the High Court of Kalutara. The High Court Judge refused such application by his Order dated 19.12.2013, on the grounds that there were no exceptional circumstances.

The present application has been made on behalf of the Accused – Appellant seeking to revise the Order of the Kalutara High Court Judge, dated 19.12.2013, refusing the grant of bail pending appeal.

It is a settled principle that release on bail pending appeal to the Court of Appeal will only be granted in exceptional circumstances.

In King vs. Keerala 48 N.L.R. 202, Wijewardana J. held, the Court of Criminal Appeal does not grant applications for bail in the absence of exceptional circumstances. In The Queen vs. B. Rupasingha Perera 62 N.L.R.238, Basnayake C.J. with Sansoni J. held, bail is not granted by the Court of Appeal unless there are exceptional circumstances. Weeramanthri J. held in, The Queen vs. Koranelis Silva 74 N.L.R. 113, release on bail pending appeal to the Court of Criminal Appeal will only be granted in exceptional circumstances.

Learned Counsel for Petitioner submitted that he was aware that bail is not usually granted pending the hearing of an Appeal and that it is granted only in exceptional circumstances. The circumstances relied on by the Petitioner are set out in Paragraph 8 of the Petition and the relevant matters which were placed before the High Court Judge at the hearing of the application for bail pending appeal are set out in Paragraph 6 of the Petition.

One of the questions that arose for determination was whether, in an application for bail pending appeal, would the Court consider, no previous convictions. It is not a matter that could be taken up and decided by Court in the granting of bail. The view of this Court is, it is an insufficient ground, for the granting of bail.

The second ground is that no record of ever having absconded or warrant issued in the High Court or Magistrate Court. It was held in R. Muthuretty vs. The Queen 54 N.L.R. 493, the improbability of the convicted person not absconding would not be a relevant consideration in application for bail pending appeal, though it could be relevant in an application for bail pending trial.

As stated by Vaithiyalingam J. in Thamotharan Pillai vs. Attorney General (Supra) S.C. 141/75 "The main consideration of course is whether if his appeal should fail the Accused - Appellant would appear in Court to receive and serve his sentence. When the offence is grave and the sentence is heavy the temptation to abscond in order to avoid serving the

sentence in the event of his appeal failing would of course be grave. In such cases the Court would require the Accused - Appellant to show the existence of exceptional circumstances to warrant the grant of bail pending appeal".

In this context, it is important to note, that this Accused – Appellant has been sentenced to a period of seven years rigorous imprisonment on each count. (21 years to run concurrently). In such cases where the sentence is severe there is a likelihood of the temptation and the propensity to abscond and flee from justice.

In the case of Ramu Thamotherampilai vs. A.G. (S.C. 141/75) the Court followed the well recognized and uninterrupted practice of not granting bail pending appeal to any convict sentenced to a term of imprisonment of seven years or more and that this should be a norm to be adhered to. Therefore, after conviction, bail would be granted only under exceptional circumstances.

What are the considerations to be taken into account in determining the question as to whether an accused who has been convicted before the High Court, should or should not be released on bail pending his appeal when exercising the discretion vested. As stated by Vaithiyalingam J. the main consideration of course is whether if his Appeal should fail the Appellant would appear in Court to receive and serve his sentence.

In addition to the above the Court also has to consider the nature of the charges and the severity of the sentence, in granting bail, pending appeal.

At the hearing of this application and in the written submissions filed in this Court, learned Counsel for the Petitioner submitted, that the learned High Court Judge had failed to consider the suspended sentence imposed by the learned High Court Judge of Kandy, on the accused for a similar offence. Further submitted the Accused – Appellant would have presumed justifiably that there would be no variance of disparity in sentencing principles between two parallel High Courts.

It is relevant to note that against the said sentence the Accused – Appellant had preferred an appeal. In Attorney General vs. Ediriweera, S. C. Appeal No.100/2005, Shirani Thilakawardana J. held, "In an application for bail after conviction the Appellate Court should not pre-empt the hearing of the substantive appeal and pronounced upon the merits of the appeal. The merits of the conviction are therefore a matter solely to be determined by the Appellate Court hearing the Appeal". Therefore, the judicial disparity in sentencing cannot be regarded as exceptional circumstances to warrant the granting of bail.

In M. Salahadeen vs. Attorney General 77 N.L.R. 262, Samarawickrama J. held, the release of a prisoner on bail pending appeal to the Court of Criminal Appeal will only be granted in exceptional circumstances.

From a consideration of the decisions referred to above and the legal provisions as a general principle there is no doubt that exceptional circumstances must be established by an Appellant if the discretion vested in a High Court to grant him bail.

A perusal of the decided cases would appear to indicate that the requirement of exceptional circumstances has been strictly insisted on and in my view no sufficient case of exceptional circumstances as understood by this Court has been made out.

The learned High Court Judge was of the view that the Petitioner had not shown any exceptional circumstances to grant bail. I do not see any reason to vary the Order of refusing bail, made by the High Court Judge of Kalutara.

Accordingly, I dismiss the revision application.

JUDGE OF THE COURT OF APPEAL

I agree

ACTING PRESIDENT OF THE COURT OF APPEAL