IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

Court of Appeal Case No.
CA (PHC) APN 27/2016

High Court Case No.
HC 5675/11

Sicille Priya Carmini Kothalawala,

(Presently in the Remand Prison of Welikada)

6th Accused Petitioner

Vs.

Hon. Attorney General,

Attorney General's Department, Colombo 12

Complainant- Respondent

Before : P.R.Walgama J.

L.T.B. Dehideniya J.

Counsel : Romesh De Silva PC with Saliya Peiris for the 6th Accused Petitioner.

Wasantha Bandara Senior Additional SG with Dilan Rathnayake SSC and Verunika Hettige SC for the Complainant Respondent.

Argued on : 18.03.2016

Decided on : 24.03.2016

L.T.B. Dehideniya J.

This is an application for revision from an order of the Learned High Court Judge of Colombo. The 6th Accused Petitioner's (hereinafter some time called and referred to as the Petitioner) application to release on bail has been denied by the Learned High Court Judge. Being aggrieved by the said order, the Petitioner presented this application to revise the said order.

The Petitioner says that she was a non executive director of Golden Key Credit Card Company Limited (hereinafter some time called and referred to as the

company) and was not involved in the day to day business of the company. She further says that she resigned from the director post on 31st October 2008. On 31st December 2008 she had left the country for medical treatment to Singapore and after three months went to UK. She submitted several medical certificates to show that she was under medical treatment while in UK. The Petitioner says that she being an elderly lady of 74 years, has decided to spend her last years in Sri Lanka, came back to the Island against the medical advice, knowingly that she will be apprehended at the arrival. She had been taken to custody at the airport by the emigration officers and was handed over to the police. On the request of the cardiologist who accompanied her to Sri Lanka, she was admitted to the Durdans Hospital and was remanded to the prison custody. Later she was transferred to the National Hospital of Sri Lanka and from there to the prison hospital.

The petitioner applied for bail from the High Court and the State objected to. After inquiry, the Learned High Court Judge refused bail on two grounds i.e. she was absconding for a long time and that she is a share holder and her husband is the major share holder of the company. Being aggrieved by the said order, the Petitioner moved in revision.

The Complainant Respondent (the Hon. Attorney General) (hereinafter some time called and referred to as the Respondent) objected to the application on several grounds. Firstly a preliminary objection was raised on the ground that there is no exceptional circumstances to invoke the discretionary remedy of revisionary jurisdiction and an alternative remedy - right to appeal - is available. State further objected to this application under section 14 of the Bail Act No. 30 of 1997 that the Petitioner is capable of absconding from trial and there could be a public disquiet if the Petitioner is released on bail because the amount of money involved in this case is of very high magnitude.

At the inquiry, the Learned PC for the Petitioner submitted that the age and the medical condition of the Petitioner itself can be considered as exceptional circumstances. He further argued that the order of the Learned High Court Judge is not in accordance with the section 14 of the Bail Act. The Learned ASG argued that the alternative remedy of appeal is available as of a right and in such situations the discretionary remedy of revision is not available. His contention is that there are no exceptional circumstances to invoke the revisionary jurisdiction.

The Petitioner is a lady of 74 years of age. The Respondent submits that the authenticity of the medical reports issued by the doctors in UK cannot be verified and therefore it cannot be relied upon. But the medical report issued by the JMO Colombo is an authentic document. That report was submitted to Court on the order of the Learned Magistrate. The JMO was of the onion that she should be kept under ICU care for 48 hours and then to transfer to another hospital only if there is no objection medically by the doctors treating her. This report suggests that the Petitioner was in need of intensive care when she was remanded and when she is out of danger, her health condition has to be managed properly. Even if the medical reports issued by the doctors in UK are not accepted as suggested by the Learned ASG, still there is evidence to show that the Petitioner is sick elderly woman who needs medical attention.

There is a long line of authorities that a revision is discretionary remedy and to invoke such jurisdiction it is necessary to establish exceptional circumstances. Further, if there is an alternative remedy, the revisionary jurisdiction is not available. The Learned President's Counsel for the Petitioner does not challenge this position. His argument is that even if there is an alternative remedy is available, if there are exceptional circumstances, the revision is also available.

In the case of Buddhadasa Kaluarachchi v. Nilamani Wijewickrama [1990] 1 Sri L R 262 at page 267 onwards S.N.Silva J. (as he was then) considering the

cases of Atukorale v. Samyanathan 41 NLR 165, Rustom v. Hapangama & Co. (1978-79) 2 Sri LR 225 Sumanathangam v Meeramohideen 60 NLR 394 it has been held that the Court of Appeal has the power to act in revision, even though the procedure by way of appeal is available, in appropriate cases and an appeal from the judgment with the present backlog of cases in the appellate Court would be considerably delayed.

BUDDHADASA KALUARACHCHI v. NILAMANI WIJEWICKRAMA AND ANOTHER. [1990]1Sri L R 262 at 267

Section 139 of the Constitution of the Democratic Socialist Republic of Sri Lanka states as follows :

" The Court of Appeal may in the exercise of its jurisdiction affirm, reverse, correct or modify any order, judgment, decree or sentence according to law, or it may give directions to such court of first instance, tribunal or other institutions or order a new trial or further hearing upon such terms as the court of appeal shall think fit.

(2) The Court of Appeal may further receive and admit new evidence additional to or supplementary of, the evidence already taken in the court of first instance touching the matters at issue in any original case, suit, prosecution or action as the justice of the case may require. "

The section empowers the appellate court with wide powers.

Similar powers are envisaged in section 773 of the Civil Procedure Code.

But the appellate court will be guided by the provisions of section 758 (e) & (f). The appellate court would in law have to consider the demand or the form of relief claimed. If there is no relief claimed to set aside the judgment and decree for the dissolution of marriage by either party, I am of the view that the appellate court would not grant a relief which no

party had prayed for. However wide the jurisdiction of the court of appeal may be it can only exercise it in a properly constituted appeal from judgment presented to it by an aggrieved party.

It was submitted by the Learned Counsel for the first defendant respondent that there are no exceptional circumstances for the petitioner to come by way of revision, as the plaintiff-petitioner had appealed from the order of the Trial Judge dated 25.5.89. This is an action for divorce filed as far back as on 27.8.82 and it had taken nearly 7 years for the District Court to conclude the trial. An appeal from the judgment dated 25.5.89 with the present backlog of cases in the appellate court would be considerably delayed, even if application is made to accelerate the appeal, for final determination in my view would be considerably prolonged. In the circumstances I am of the view, this is an apt case to exercise the revisionary powers of the court. It was held in Atukorale v. Samyanathan (3): "The powers given to the Supreme Court by way of revision are wide enough to give it the right to revise any order made by an original court whether an appeal has been taken against it or not".

The trend of recent decisions is that the Court of Appeal has the power to act in revision even though the procedure by way of appeal is available in appropriate cases. In Rustom v. Hapangama & Co. (4) it was held that the powers by way of revision conferred on the appellate court are very wide and can be exercised whether an appeal has been taken against an order of the original court or not. However such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exeptionable circumstances are, is dependant on the facts of each case.

Vythialingam, J. stated in Rustom v. Hapangama & Co. (supra) "where an order is palpably wrong and affects the rights of a party also, this

court would exercise its powers of revision to set aside the wrong irrespective of whether an appeal was taken or was available."

In Sinnathangam v. Meeramohideen (5) T. S. Fernando, J. said "We do not entertain any doubt that this court possesses the power to set aside an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated. It only remains for us to examine whether there is a substantial question of law involved here and whether this is an appropriate case for us to exercise the powers of revision vested in this court".

I am of the view that this is an appropriate case for us to exercise the powers of revision considering the time already taken in the District Court to enter a decree of dissolution of the marriage.

I am in respectful and full agreement with the view expressed. It must take some time for the appeal to be heard. In this circumstance I am of the view that the court should exercise its revisionary powers.

In the present case also the Petitioner has the right to appeal but the appeal will take a considerable time to conclude and the Petitioner will have to be in remand custody until such time. The Petitioner's health condition is considered with the time consumption of an appeal, my view is that it constitutes exceptional circumstances.

The petitioner is indicted in the High Court of Colombo on several counts. The first count is that she has committed an offence punishable under section 38(1) read with 36(1) of the Finance Companies Act, No. 78 of 1988 as amended by the Finance Companies (Amendment) Act. No 23 of 1991. The other charges are aiding and abetting to commit offences punishable under section 391 and 386 of the Penal Code. The Petitioner admits that she was a director of the company, but she says that she has resigned from the post of director on

31.10.2008. The charges are for the period from 23.03.1999 to 24.12.2008 during which the Petitioner was a director of the company. Therefore, her resignation has no direct bearing. What the Court has to decide in this application is whether the Petitioner can be released on bail or is it necessary to keep her under remand custody until the case is concluded.

Releasing a suspect or an accused on bail is governed by the Bail Act of No.30 of 1997. Prior to the enactment of the Act, the rule of releasing on bail was twofold. Under section 402 of the Criminal Procedure Code, the rule in relation to the bailable offences, is to release on bail and the exception is to remand.

> *402. When any person other than a person accused of a non-bailable offence appears or is brought before a court and is prepared at any time at any stage of the' proceedings before such court to give bail such person shall be released on bail:*

It has been held in the case of Pathirana and another v. O.I.C. Nittambuwa Police [1988] 1 Sri L R 84 that the accused is entitled as of right to be released on bail at any stage of the proceedings. An order of remand in such circumstances is an illegal order.

Section 403 of the Criminal Procedure Code provides that the Court can grant bail on its discretion.

> *403. (1) A Magistrate or a Judge of the High Court, at any stage of any inquiry or trial, as the case may be, may in his discretion release on bail any person accused of any non-bailable offence:*

The rule in such cases is to remand and the bail is the exception. In such cases the accused had to establish exceptional grounds to obtain bail,

> *THE QUEEN v. D. J. F. D. LIYANAGE and others 65 NLR 289 at 292*
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> *Much stress was laid in the arguments of Counsel for the defendants on the presumption of innocence and the liberty which an individual is*

entitled to. This Court will never cease to safeguard the liberty of the subject. "The favour shown to freedom" will always influence Judges who approach questions affecting that liberty. But it is not to be thought that the grant of bail should be the rule and the refusal of bail should be the exception where serious non-bailable offences of this sort are concerned; bail is in such cases granted only in rare instances and for strong and special reasons, as for instance where the prosecution case is prima facie weak:

This rule was changed by the Legislature with the enactment of the Bail Act No.30 of 1997. Admitting to bail was made the rule and the refusal was made the exception. Section 2 of the Bail Act reads thus;

Subject to the exceptions as hereinafter provided for in this Act, the guiding principle in the implementation of the provisions of this Act shall be, that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.

Under section 4 of the Act, a person suspected or accused of being concerned in committing, or having committed a bailable offence was made entitle to bail subject to the provisions of the Act. Section 5 provided that a person suspected or accused of being concerned in committing, or having committed a non-bailable offence may at any time be released on bail at the discretion of the court. By section 7, the Court was empowered to release on bail any person suspected or accused of, being concerned in committing or having committed, a non- bailable or bailable offence that appears, is brought before, or surrenders, to the court having jurisdiction. Therefore it is very clear that the intention of the Legislature is to change the rule relating to bail.

It has been held in the case of Dachchaini Vs The Attorney-General [2005] 2 Sri L R 152 that;

i. The Bail Act, No. 30 of 1997 which came into operation on 28th November, 1997 is the applicable law.

ii. By the enactment of the Bail Act the policy in granting bail has undergone a major change. The rule is the grant of bail. The Rule upholds the values endorsed in human freedom. The exception is the refusal of bail and reasons should be given when refusing bail.

Per SRISKANDRAJAH, J.

"By the enactment of the Bail Act there is a major change in the legislative policy and the Courts are bound to give effect to this policy. The High Court judge in the impugned Order has erred in not taking into consideration the policy change that has been brought in by the enactment and mechanically applied the principle that the accused have failed to show exceptional circumstances when this requirement is no more a principle governing bail pending appeal"

Section 14 of the Bail Act gives the reasons for which the Court may refuse bail. The first part of sub section (1) of that section reads

Notwithstanding anything to the contrary in the preceding provisions of this Act, whenever a person suspected or accused of being concerned in committing or having committed a ***bailable or non-bailable*** *offence,* ***appears, is brought before or surrenders to the court*** *having jurisdiction, the* ***court may refuse to release such person on bail*** *or upon application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a subsisting order releasing such person on bail* ***if the court has reason to believe*** *:"(emphasis added)*

This section applies to bailable or non bailable offences in the equal force and the grounds that the Court can refuse bail are also specified. The Court must have reasons to believe that those grounds exist. Those grounds are;

a) that such person would "

(i) not appear to stand his inquiry or trial;

(ii) interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice; or

(iii) commit an offence while on bail; or

(b)that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

In the case of Anuruddha Ratwatte And Others V. The Attorney General [2003] 2 Sri L R 39 at 48, 49 it has been held that;

It is seen that Section 14(1) would apply notwithstanding anything to the contrary in the other provisions of the Act, in respect of persons suspected or accused of being concerned in or having committed a bailable or non-bailable offence. It covers two situations

(i)when such person appears or is brought before or surrenders to, the court having jurisdiction;

(ii)when an application is made to cancel a subsisting order releasing such person on bail.

In both situations the court may refuse to release the suspect or accused on bail or cancel a subsisting order of bail only if the court has reason to believe that such person would act in the manner specified in paragraph (a), (i) to (iii) referred to above or the court has reason to believe that the gravity and public reaction to 310 the offence may give rise to public disquiet.

The Learned ASG stressed his objections only on two grounds, that is firstly that the Petitioner would not stand her trial and secondly that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

The reason for the first ground urged by the Learned ASG is that the petitioner was absconding for a long time. Absconding is not a reason to refuse bail under section 14 (1) (a)(i) of the Bail Act. The Learned President's Counsel for the Petitioner stressed on this point. My view is that purposely keeping away from Court can be considered against the Petitioner when the probabilities of not standing trial are considered. In the present case it is true that the Petitioner was absent from Court for a long time, but the police was unable to arrest and produce her before Court even after issuing a Red Notice until she decided to come back to the Island. She came back knowingly that she will be apprehended on the arrival. As expected, she was arrested at the airport. If the Petitioner wanted to stay away from the trial, she would have stayed where she was and would have received better medical facilities. With all that, she came back to Sri Lanka voluntarily. The Learned ASG submitted that there is no evidence to show that she came voluntarily. She was not brought to Sri Lanka by any authority. As such, her return is a voluntary act. Under these circumstances, there is no reason to believe that the Petitioner will not stand for trial.

The second point urged by the Learned ASG is that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet. The Learned ASG submits that the large amount of money involved in this case had a negative impact on financial institutes of this country. He further says that it being the depositors' money, there could be public disquiet. It is true that the amount of money involved in this case is of very high magnitude. But the Learned ASG did not submit any evidence to show that the financial institutes of this country had any impact because of the financial crisis of the Golden Key

Credit Card Company. (All the charges in the indictment are in relation to the said company.) Except the Petitioner, all the other accused, including the husband of the Petitioner who was considered as the major shareholder of the company by the Learned High Court Judge, were released on bail and only the Petitioner is in remand. Therefore there is no reason to believe that there could be a public disquiet in releasing the Petitioner on bail.

At this stage I would like record my disapproval on certain submissions made by the Learned ASG. He suggested that this Court could issue a directive to the High Court to give priority to this case and to take up on day to day basis to finish early and to keep the Petitioner in remand until then. I do not incline to agree with this suggestion. If this case gets priority and is taken up day to day basis, all the other cases in that Court will not reach to the conclusion during that period. The litigants in those cases also have a legitimate right to get their cases heard. Therefore, if I direct to give priority to this case, I am denying the rights of the other litigants, who have nothing to do with this case, just to avoid one person releasing on bail; especially when there is no reason to keep that person in remand. Therefore, I cannot agree with this suggestion.

The Learned President's Counsel for the Petitioner submitted that the rule in relation to the bail under the Bail Act is to give bail and the exception is the refusal. In response to this Learned ASG submitted that if this rule is adopted even a rapists will go free. I believe that this is not the view of the Attorney General's Department, but is the personal view of the Learned ASG. The golden rule of our law is that a person is presumed to be innocent until he/she is proved to be guilty. Therefore any person accused or suspect of a rape cannot and should not be called as a rapist. He is only an accused or a suspect of a rape with the constitutional safeguard (*Article 13(5) of the Constitution*) of innocence until he is proved to be a rapist. Therefore I wish to record my disapproval on the comment made by the Learned ASG on the rule of bail enacted by the

Legislature. The duty of the Court is to give effect to the laws enacted by the Parliament and it is for the Parliament to decide whether any law should prevail or not.

I act in revision and set aside the order of the Learned High Court Judge dated 23.02.2016 marked as P 15(a). I order to release the 6th Accused Petitioner on bail on the following terms.

1. Cash bail of Rs. 100000/- (Rupees One Hundred Thousand)
2. Personal bail of Rs 1000000/- (Rupees One Million) with two sureties. (The Learned High Court Judge has to decide the suitability of the sureties.)
3. The 6th Accused Petitioner should surrender the passport and any other travel document in her custody to the Court.
4. The 6th Accused Petitioner should not leave the country without obtaining prior permission from the High Court.
5. If the 6th Accused Petitioner or any surety is changing the address given in the bail bond, should inform Court and the Complainant Respondent forthwith.

I direct the Registrar of this Court to communicate this order to the High Court Colombo.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal