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.

Democratic Socialist Republic of Sri Lanka

Complainant

1. Rajapakse Mudiyanselage Nihal Rajapakse.
2. Waraddana Mudiyanselage Balasooriya.

Accused

Court of Appeal CA (PHC)
APN 102/2016

High Court Kandy 183/2007

AND NOW

1. Rajapakse Mudiyanselage Nihal Rajapakse.
2. Waraddana Mudiyanselage Balasooriya .

Accused –Petitioners

Vs.

Hon. Attorney General
Attorney General's Department
Colombo.

Complainant-Respondent

Before: P.Padman Surasena J. (P/CA)

K.K.Wickremasinghe J.

Counsel: AAL Amila Palliyage with AAL Nihara Randeniya and AAL Sandeepani Wijesooriya for the Petitioner

DSG Dilan Ratnayake for the A.G

Written submission of the Petitioner submitted on: 23/05/2017

Written submission of the Respondent submitted on: 23/11/2016

ARGUED ON: 29/11/2017

DECIDED ON: 22/02/2018

JUDGEMENT

K.K.Wickremasinghe J.

The Accused- Petitioners (hereinafter referred to as "Petitioners") were the accused in the indictment filed in the High Court of Kandy. The Petitioners were indicted for torturing two men namely Rohitha Upasaka Liyanage and Ekanayake Mudiyanselage Sarath Bandara Ekanayake on or around 29/07/2005 which is punishable under section 2 (4) of the Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment Act No. 22 of 1994.

After the trial the learned judge convicted both the accused as charged and imposed following sentences:-

- A term of 7 years in rigorous imprisonment for both counts and made an order to run the sentences imposed on both counts concurrently, and
- A fine of Rs. 10,000/- each carrying a default sentence of 06 months imprisonment.

Being aggrieved by the said conviction and sentences the petitioners preferred an appeal to the Court of Appeal, but was rejected as it was not yet listed to be heard in this court.

After the petition of appeal, the petitioners made applications for bail pending appeal to the High court by way of affidavits in terms of sec 20 (2) of the Bail Act No. 30 of 1997.

The learned High court Judge in her order refused the petitioners applications on bail pending appeal on the basis of inter alia that the petitioners were failed to prove their application.

The petitioners being aggrieved by the aforesaid order have now invoked the revisionary jurisdiction in this court on the following grounds:

a) The learned High Court Judge has failed to consider the exceptional circumstances addressed by the petitioners in the petition to the High court.

b) The learned High court Judge had not considered the period of imprisonment to be served by the petitioners in terms of the Prison Ordinance – in concurrence it would be consume a considerable amount of time in listing and hearing appeals.

c) The learned High court Judge has not considered the law relating to bail pending appeal.

d) Miscarriage of justice to the Petitioners in the event that they are not enlarged on bail.

The learned counsel for the petitioner has submitted the following legal and exceptional circumstances to be considered. :-

That it is pertinent to consider whether the term of imprisonment itself constitute exceptional circumstances which warrant granting bail to the petitioners.

The learned counsel for the petitioner drew the attention to the sentence imposed by the learned High court Judge. The sentence imposed on the petitioners only a term of 7 years of rigorous imprisonment as the learned High court Judge has made an order to run the sentences imposed on count 1 and 2 concurrently. However this cannot be viewed as an exceptional circumstance.

In regard to the above argument of the petitioner, Sec 94 of the Prison Ordinance in which the Minister has power to make rules and regulations including the implementation of sentences and furthermore the remissions entitle by the prisoners due to their good behavior in prison.

Sec 94 of the Prison Ordinance reads as follows:

(1) "The minister may from time to time make all such rules, not inconsistent with the Ordinance or any other written law relating to prisons, as may be necessary for the administration of the prison in Sri Lanka, and carrying out or giving effect to the provisions and principles of this Ordinance.

(2) In particular or without prejudice to the generality of the foreign powers, the Minister may make rules for all or any of the following purposes or matters:-

(g) the computation sentences;

(j) rewards for good conduct and remission of sentences to be allowed to prisoners for industry and good conduct, and in conditions in which such remissions may be allowed."

Section 94(1) clearly demonstrates that the power vested within the Minister is wide and he can make regulations on standing orders pertaining to the computation of sentences and remissions entitle by the prisoners for the good behavior time to time.

The learned counsel for the petitioner has also submitted the departmental standing order amounts to subsidiary legislature which also can be considered by Court of Law when arriving at a decision. According to the terms of the Prisons regulations, a year in the prison is considered to be less than an ordinary year.

It is submitted further by the learned counsel that the Petitioners in this matter upon being aggrieved by the conviction and the sentence of the High court have now appealed to this court and has conceded to the fact that there must be exceptional circumstances to grant bail pending appeal to a convict Therefore time would be consumed for listing and hearing appeals in concurrence with the actual period of imprisonment is less than 5 years.

The Supreme Court held in **Ramu Thamodaram Pillai V Attorney General [2004] 3 SLR 180** *" Having regard to the delays coming up for hearing after it had been filed, if Magistrate and District Judges had been given a discretion to grant or refuse bail pending appeal then, if an application of bail have been refused, it could have well happened that the appellant would have been confined*

in goal though not as a prisoner serving his sentence of imprisonment but as a appellant under special treatment in such manner as may be prescribed by prison regulations, for a much longer period than the term of imprisonment to which he had been sentenced."

The Respondent in his objections has taken two preliminary objections. The learned counsel for the Respondent states that the petitioners have filed this application nearly four months after the impugned order was delivered. The main grievances of the petitioners were their incarceration pending appeal. Therefore the petitioners seeking their release on bail have incurred an undue delay in coming to court and seeking the discretionary remedy of revision.

The respondent has cited the following case for consideration:

Issadeen Vs The Commissioner of National Housing [2003] 3 SLR10.

The appellant claiming to be the owner of the premises in suit sought to quash a recommendation of the Commissioner of National Housing to vest the said premises. It was held "*This is an appeal from the judgment of the Court of Appeal dated 05.02.1996. By that judgment, the Court of Appeal dismissed the application of the petitioner-appellant for writ of certiorari quashing the order of the Commissioner of National Housing vesting premises No.14, Collingwood Place, Colombo 6 as stated in letter dated 27.08.1992 (X2) on the basis that the appellant was guilty of laches. On an application made to this court, special leave to appeal was granted only on the question as to whether the finding of the Court of Appeal that the petitioner was guilty of laches was correct."*

As the second preliminary objection to this application, learned counsel for the petitioners states that the petitioners has an alternative remedy of appeal from the impugned order of the High Court and also that the petitioners have the right of appeal from the order of refusal of bail pending appeal by the High Court. However the petitioners who were claiming to be aggrieved by their pending appeal had not made use of their right of appeal promptly but instead has allowed the appealable time to pass by and then resorted to this application. It is pertinent to note that the reason why the statutorily available alternative remedy was not pursued has not been explained by the petitioner. The respondent cites the case Gunasekara V Weerakoon 75 NLR 202 and Ha[illegible]20[illegible]59 and

states this provided a justiciable basis for the Court of Appeal to dismiss this application.

The oral submissions made on behalf of the petitioners by their learned counsel in the high court; has raised 3 grounds as "exceptional"

(1) The 7 year sentence was not a long sentence to deny enlarging the convicts on bail.
(2) The petitioners were sole breadwinners of their families and that both were married with children.
(3) The 9 year old child of one petitioner and the wife of the other were having medical issues.

The learned counsel for the respondent states that the learned High Court judge had carefully considered each of these exceptional grounds before arriving at the decision.

The exceptional circumstances raised by the petitioner in this Court of Appeal that was not raised in the High Court of Kandy. Hence the learned High Court Judge could not have considered matters not urged before the court.

The petitioners cited regulations under prisons ordinance with regard to the duration of the sentence and also stated the delay to hear an appeal as grounds in the oral arguments. When considering the enlargement of a person bail pending appeal the respondent wishes to submit to court that a court should take the maximum precautions to ensure that the convict concerned would be within the grasp of the law to serve the sentence if his appeal is dismissed.

Thus a court considering the issue of bail pending appeal must always look to granting bail on exceptional circumstances established to the satisfaction of that court.

In the decided case of **Jayanthi Silva and another V AG [1997] 3 SLLR 117** Justice D.P.S. Gunasekara discussed at length the considerations that a court must give mind prior to enlarging a convict on his bail pending appeal.

In the instant case there are no exceptional circumstances adduced by the petitioner.

In the case of **Rustom V Hapangama and Co. [1978/79] 2 SLR 225** it was held;

"The power 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 what matters would amount to exceptional circumstances and what would not. Nor is it desirable, in a matter which rests so much on discretion of the Court to categories these matters exhaustively or to lay down rigid, and never to be departed from, rules for their determination. It must depend entirely on the facts and circumstances of each case and one can only notice the matters which court have held to amount to exceptional circumstances in order to find out the essential nature of these circumstances. It has been held that where the delay in determining an appeal would render the decision in appeal nugatory the court would act in revision even if an appeal was pending or available"

In the case of **Gnanapandithen and another V Balanayagam and another [1998] 1 Sri LR 391 at page 397** it was held that;

"The question whether the delay is fatal to an application in revision depends on the particular facts and circumstances of the case."

Furthermore, the petitioners are relying on the said departmental standing order for the 1st time in Court of Appeal and have failed to place the said question of law before the learned High Court Judge at the time of making the application for bail pending appeal to the High Court.

The learned counsel appearing in the High Court drawn to the attention of the court that the sentence imposed by the learned trial judge is only 7 years and therefore it would take a considerable period of time to determine their appeals. However the learned trial judge has failed to consider the said question of law in the impugned order.

Considering above this court is of the view that the circumstances mentioned by the learned counsel for the petitioner do not constitute exceptional circumstances to urge this court to allow the revision application.

Therefore considering the rationale observed by our superior courts, in granting bail to an accused charged under the said act, it is clear, that the learned High court Judge was correct in refusing to enlarge the accused on Bail.

Hence, this court sees no reason to interfere with the findings of the learned High court Judge and thereby the revision application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

P. Padman Surasena J.

I agree,

PRESIDENT OF THE COURT OF APPEAL