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

In the matter of an Application to Revise an order of the High Court Judge of Kuliyapitiya refusing the grant of bail pending appeal in the case no HC 176/2013 under the provisions of the Criminal Procedure Act No 15 of 1979.

CA (PHC) rev. Bail 54/2017

High Court Kuliyapitiya
176/2013

Rajapakse Aratchige Thushara Ranjan Rajapakse.

Accused Appellant Petitioner

Hon. Attorney General

Respondent

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

K.K.Wickremasinghe J.

Counsel: AAL Dr. Ranjith Fernando for the Accused Appellant Petitioner

SSC Nayomi Wickramasinghe for the A.G

ARGUED ON: 12/01/2018

Written submission of the Petitioner submitted on: 06/02/2018

Objection of the Respondent submitted on: 28/08/2017

DECIDED ON: 23/02/2018

K.K.Wickremasinghe J.

This is a revision application filed by the Accused-Petitioner against the order of the learned High court Judge of Kuliyapitiya refusing to grant bail, pending appeal. The Accused-Appellant- Petitioner on 1st March 2010 together with the 2nd and 3rd Accused and others unknown to the prosecution, committed the offence of Robbery of various items of goods valued over Rs.1.8 Million committing an offence punishable under Sec. 380 read with 32 of the Penal Code. At the same time / same transaction, the 4th Accused did assist A1, A2 and A3, in concealment of stolen property, thereby committing an offence punishable under Sec. 396 of the Penal Code.

On the 12th of October 2016 A1 (the Accused- Appellant- Petitioner of the instant case) was convicted, A2, A3 were acquitted and A4 pleaded guilty for count 02. Petitioner was convicted and accordingly sentenced for 8 years in Rigorous Imprisonment, a Fine of Rs. 35,000/- with a default sentence of 3 years and ordered compensation in a sum of Rs 300,000/-

The learned counsel for the petitioner states that the following matters were placed before the High Court at the hearing of the application for bail pending appeal

- No previous convictions / 1st time offender.
- No record of ever having absconded or warrant being issued in the MC or HC .
- Serious health condition of his father and mother who were his dependents.
- No evidence that there had been any interference with any witness.

It is noted that the following were listed by the learned High Court Judge as the grounds for refusal:

- During the trial there had been an interference with the witness.
- No material / evidence were placed before Court that there were no such interference.
- Therefore if bail is granted it would appear that the Court approves such interference.
- Since no material had been placed before the court to-date refusing allegation of interference, if such material is placed before court in the future, bail can be considered.

The learned counsel for the petitioner states that the learned Trial Judge erred in Fact and Law by refusing to grant bail pending appeal where the matters of record amounts to "exceptional circumstances". He further states that such circumstances are not defined or itemized and should not be searched mechanically; such would vary with the facts, circumstances and background of the given case.

The co-accused in the second count (4th accused) who pleaded to 'assisting in the concealment of the property robbed' by the petitioner was given a suspended sentence and was called as a prosecution witness. The learned counsel for the petitioner argues that this is not acceptable under provisions of Evidence Ordinance and consequently prejudiced the case against the petitioner.

Further the learned counsel for the petitioner states that, the allegation was that the petitioner had attempted to influence the 4th accused with regard to his court attendance. This is not withstanding the affidavit tendered by 4th accused (and 1st accused-petitioner) which were filed in court but not addressed although the court had required such material to negate allegations of interference.

It is also recorded that there is no evidence that items allegedly robbed (as per schedule in indictment) were identified by the PW1- Namal Sujeewa in court and produced in evidence. This would be an essential item of evidence to establish robbery of the subject matter alleged in the indictment without which the evidence against the petitioner must fail.

The learned counsel for the petitioner concludes his argument stating that it is apparent that the facts and circumstances of this case necessarily take it out of the ordinary, creating circumstances that are sufficiently exceptional to merit the grant of bail despite the conviction. Further, the matter set out hereinafter would constrain and impel the court to the conclusion that justice can only be done by granting of bail pending appeal against the conviction and 8 year sentence imposed on the accused- appellant- petitioner.

The learned counsel for the respondent states the following objections:

a) The petitioner has not demonstrated any exceptional circumstances to invoke the Revisionary Jurisdiction of the Court of Appeal.
b) The petitioner has sought for bail pending appeal. Therefore, demonstration of exceptional circumstances is a precondition to such application and the petitioner failed to demonstrate such exceptional circumstances.

The instant case is a Revision application and therefore the petitioner has to show exceptional circumstances;

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 **Ramu Thamodaram Pillai V Attorney General [2004] 3 SLR 180**

"Lord Denning pointed out in Ward v James. 'This cases all show that when a statute gives discretion the courts must not fetter it by rigid rules from which a Judge is never at liberty to depart. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. This would normally determine the way in which the discretion is exercised and this ensures some measures of uniformity of decision. From time to time the considerations may change as public policy changes and so the pattern of decision may change. This is part of the evolutionary process.

What then are the considerations which ought to weigh with a court when it is called upon to exercise the discretion vested it by section 325(3). The main consideration is, of course, whether if his appeal should fail the 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 great. In such cases the court would still require the appellant to show the existence of exceptional circumstances to warrant the grant of bail pending appeal.

But the illness must be a present illness and that continued incarceration would endanger life or cause permanent impairment of health. Moreover, there must be evidence of the nature of the illness and its effect.

In ***Liyanage's case (65 NLR 289)*** *The accused were charged with the very serious offence of conspiracy to overawe by means of criminal force or the show of criminal force the lawfully established Government of Ceylon, to overthrow the Government otherwise than by lawful means and wage war against the Queen, One of the grounds urged for the grant of the bail was the ill health of the accused persons and affidavits were filed in regard to this. Bail was refused on the ground that there was no sufficient material before Court to say that their present health demands that they be released on bail."*

In the instant case the petitioner submits about his parents' illness and not even his own ill health in order to show that his present health conditions demands to enlarge him on bail.

In the case of **Lanumoderage Nishanthi V AG (CA(PHC) APN 48/2014)** it was held that *"It is trite law that any accused or suspect of having charges under the*

above act will be admitted to bail only in terms of section83(1) of the said act and it is only on exceptional circumstances".

Therefore considering the rationale observed by our superior courts, in granting bail to an accused sentenced for 8 years for the wrongdoing, it is clear, that the learned High court Judge was correct in refusing to enlarge the accused on bail.

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.

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. (P/CA)

I agree,

PRESIDENT OF THE COURT OF APPEAL