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

In the matter of an Application under and in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Johnston Xavier Fernando
Rathkarawwa,
Maspotha,
Kurunegala

(Presently at Remand Prison Kegalle)

1st Accused- Petitioner

C.A.(PHC)APN No. 104/2018
H.C. Kurunegala No. HC 08/2016

Vs.

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

Respondent

BEFORE	:	**JANAK DE SILVA, J. &** **ACHALA WENGAPPULI, J.**
COUNSEL	:	Romesh de Silva P.C. with Sugath Caldera and Niran Ankatel instructed by Sanath Wijewardena for the Accused-Petitioner. Nayomi Wickramasekera S.S.C. with Udara Karunathilake S.C for the Respondent.
ARGUED ON	:	12th September 2018
DECICED ON	:	17th September,2018

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ACHALA WENGAPPULI, J.

The 1st Accused-Petitioner *Jhonston Xavier Fernando* (hereinafter referred to as the "Petitioner"), with his petition, supported by an affidavit of one *Johann Stanislaus Fernando,* invokes revisionary jurisdiction of this Court, seeking to revise *inter alia* orders made by the High Court of Kurunegala in case No. 8/2016 on 3rd September 2018.

It is stated that the Petitioner was indicted by the Hon. Attorney General before the said High Court, with two other accused along with others unknown to the prosecution, for conspiring to commit criminal misappropriation of Rs. 3,828,596.50 belonging to *Yanthampalawa* branch of

Lanka Sathosa Limited and committing criminal misappropriation of the said sum of money, offences that are punishable under Section 5(1) of the Offences against Public Property Act No. 12 of 1982 read with Sections 133(b), and 102 of the Penal Code.

The indictment was served on the Petitioner on 28th March 2016 by the High Court and he was enlarged on bail by the Court after recording his plea of "not guilty" to the counts against him. He did not violate any conditions on which he was enlarged on bail. The trial against the Petitioner and other two accused has commenced on 3rd September 2018 and it is stated that at the "commencement of the trial the Petitioner was remanded pending the conclusion of the trial". The prosecution, having commenced the examination in chief of prosecution witness No. 1, sought an early adjournment pending perusal of the documents it relied on which were in the custody of Court. The trial Court granted an adjournment of trial until 11th September 2018.

At that stage, learned Counsel for the Petitioner, made an application for bail and with the delivery of the impugned order, the High Court had refused his application.

It is stated by the Petitioner that the said order should be revised upon the following circumstances, which he relied on as exceptional;

i. said order remanding him is palpably wrong,
ii. it interferes with the liberty of the Petitioner,
iii. he is deprived of liberty and wrongfully incarcerated,

iv. order made by the High Court in refusing bail is palpably wrong, interferes with liberty and he was wrongfully incarcerated,

v. order made remanding the Petitioner has been granted *ultra vires* and in excess of jurisdiction,

vi. the remand order and not releasing him on bail violates the fundamental rights of the Petitioner which include *inter alia* personal liberty, the presumption of innocence and the freedom of movement,

vii. the order is *ex facie* an error and/or error on the face of the record,

viii. orders dated 3.9.2018, remanding and not granting bail is an anathema to the rule of law and the fundamental principles undergirding the Constitution,

ix. the remand order and refusal to grant bail violates the principles of law governing the citizens of this Country and the judiciary and is perverse.

When this matter came up for support before us on 12th September 2018, learned President's Counsel, made extensive submissions in support of the application. Learned Senior State Counsel, in her reply on behalf of the Respondent, whilst objecting to granting any relief, made submissions in support of the impugned order of the High Court of Kurunegala. Thereafter, the parties have agreed to have a final order pronounced on the application without proceeding to other procedural steps of filing of objections etc.

Learned President's Counsel submitted that the impugned order is in violation of the rights conferred upon the Petitioner by Article 13(2) of the Constitution and contrary to the spirit of the legislative provisions contained in the Bail Act No. 30 of 1997, particularly Section 2 where it is stated that *"grant of bail shall be regarded as the rule and the refusal to grant bail as the exception."*

In support of his claim, that it is the provisions of Bail Act that applies in relation to the Petitioner and not the provisions of Offences against Public Property, he contended that when he was refused bail by the Magistrate's Court on the basis of the provisions contained in the Offences against Public Property Act, the Petitioner moved the High Court to revise the said order and considering the fact that he has paid back the amount involved, he was enlarged on bail by the High Court. Therefore, it is his contention that it is the provisions of Bail Act that applies to him.

With that submissions, learned President's Counsel for the Petitioner, particularly invited our attention to Section 7, where it's proviso clearly states "... where the person has appeared before Court on summons ... he shall be enlarged on his own recognisance or on him giving an undertaking to appear when required...". Since the Petitioner had first appeared before the High Court on summons, it was mandatory for the Court to release him on his mere undertaking that he would appear in Court, and he was therefore enlarged on bail. He further contended that Section 7 has no provisions to "remand" a person and the High Court had not referred to any provision of law in making the cancellation of the subsisting bail order made by the very Court.

Learned President's Counsel further submitted that when the indictment was served upon the Petitioner, he was not "remanded" as there was no reason to act under Section 14 of the Bail Act, although the High Court made a variation of bail conditions upon its initial order granting bail, whilst acting in revision.

In making submissions on factual matters, learned President's Counsel stated that the succeeding Judge, at the commencement of trial, had read over the indictment to the Petitioner for the 2nd time and recorded his plea again, an incorrect procedure which has no statutory support. Thereafter, the High Court remanded the three accused when it patently lacked jurisdiction to do so. The High Court did not comply with the mandatory provisions of Section 15 of the Bail Act, as it failed to record its reasons as to why it cancels a subsisting bail order and the Court had no discretion over the question of bail.

Learned President's Counsel submitted that the Petitioner, since his enlargement on bail by the High Court twice before the commencement of trial, had not violated any of the bail conditions which warranted cancellation of his bail.

It is contended by the Petitioner that when a person comes before Court, it could act under Section 7 of the Bail Act in granting bail and could also act under Section 14 if it refuses bail. But in remanding the Petitioner and refusing to enlarge him on bail by cancellation of the existing bail order, the High Court did not act under provisions of Section 14 of the Bail Act, in violation of the principles of law enunciated in the

judgment of the divisional bench of the Supreme Court in ***Anuruddha Ratwatte v The Attorney General*** (2003) 2 Sri L.R. 39, where it was held that;

> *"In terms of the mandatory requirements of Section 14(1) such a cancellation could have been done only on :-*
>
> *(i) an application being made by a police officer;*
>
> *(ii) hearing the accused appellant personally or through his attorney-at-law:*
>
> *(iii) if the court had reasons to believe that any one of the grounds as specified in paragraph (a) (i) to (iii) or paragraph (b) have been made out.*

In addition, the learned President's Counsel, challenging the basis on which he claims that the bail was cancelled, being *"it is the practice of the Court"*, relied on several other authorities, including the judgment of ***Rupathunga v Attorney General and Another*** (2009) 1 Sri L.R. 170, where Silva J observed that;

> *" ... these are orders which could be founded as capricious, arbitrary and unjust ... what shocks the conscience of this Court is that the High Court Judge has not even cared to provide an opportunity to the accused, at least to show cause as to why bails should not be cancelled instead has considered some extraneous matters which are not even covered by Section 14 and has rushed to the conclusion that bail should be cancelled which I say is indecent."*

In resisting the application of the Petitioner, learned Senior State Counsel invited our attention to the judgment of the divisional bench of the Supreme Court in ***Attorney General v Gunawardena*** (1996) 2 Sri L.R. 149, where the scope of the revisionary jurisdiction has been described in following terms;

> *"Revision, like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is the due Administration of Justice and not, primarily or solely, the relieving of grievances of a party."*

Learned Senior State Counsel also insisted the complained act should also *"occasion a failure of justice"* as per the judgment of CA(Rev) No. 931/84 - C.A.M. of 24.07.1991.

It is her contention that it is the provisions of Offences against Public Property Act that applies to the instant situation as per the judgment of CA(PHC) APN 35/2016 - C.A.M. of 07.10.2016 and not the Bail Act as contended by the learned President's Counsel and under proviso to Section 8(1) of the Act No. 12 of 1982, an accused could be kept in remand until conclusion of his trial, unless he is released on bail in "exceptional circumstances".

Referring to the chronology of relevant events, learned Senior State Counsel referred to the following facts;

i. the Petitioner was indicted on 8th February 2016 for offences committed under Offences against Public Property Act,

ii. on 2nd May 2016, the matter was fixed for trial by the High Court on 24th and 25th August 2018 by summoning witnesses,

iii. upon a motion by the 3rd accused, the said trial dates were vacated, and the case was called in open Court on 1st August 2016. Thereafter, the case was fixed for trial on 28th and 29th September 2016 with summons issued on PW 1 to PW 10,

iv. On 28th September 2016, the Petitioner sought postponement and the trial was accordingly vacated. It was re-fixed for trial on 22nd February 2017,

v. On 22nd February 2017, the trial was re-fixed to 23rd October 2017 and had to be again put off on the application of the Petitioner. Thereupon, the High Court has ordered that the trial to be taken up on day to day basis from 3rd September 2018 and informs the parties to be ready.

In replying to the submissions of the learned President's Counsel that the High Court had taken the plea of the Petitioner for the 2nd time on the 3rd September 2018 without a legal basis, learned Senior State Counsel referred to Section 196 of the Code of Criminal Procedure Act No. 15 of 1979, which contained the applicable statutory provisions.

It is her submission that Section 9 of the Offences against the Public Property Act had imposed a duty on trial Courts to give priority to trials where the accused are prosecuted under offences recognised by its provisions and it is at the stage of adjournment, the High Court made order remanding the Petitioner, acting under provisions of Section 263 of the Code of Criminal Procedure Act No. 15 of 1979. It also empowered the High Court to make order remanding an accused after recording its reasons. She also invited out attention to the provisions of Act No. 14 of 2005 by which a proviso was introduced to Section 263 directing trial Courts to conduct trials on day to day basis *"as far as practicable"* .

It is the contention of the learned Senior State Counsel that no exceptional circumstances were made out by the Petitioner, making him entitle to the discretionary relief he sought from this Court.

In view of the submissions made by the parties, it is appropriate to consider the applicable legal principles in relation to the application of the Petitioner.

The apex Court, in ***Anuruddha Ratwatte v The Attorney General*** (supra) held thus;

> *"The right to liberty and security of person is basic tenet of our public law and is universally recognised as a human right guaranteed to very person (vide Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights). Based on this right to liberty and security of person, Article 13 of the Constitution guarantees as a fundamental right to every person, the freedom from arbitrary arrest, detention and punishment."*

Article 13(2) of the 1978 Constitution reads thus;

> *"Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent Court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law."*

Therefore, in view of the above quoted judicial pronouncement and the Constitutional provision, the Petitioner must satisfy this Court that the impugned order made by the High Court remanding him on 3rd September 2018, is made not in accordance with the procedure established by law.

It is noted at the outset, that there is no agreement by the contesting parties to this application about the applicable law, at least to the extent that whether it is the provisions of the Bail Act or the provisions of the Offences against Public Property Act.

In addressing the issue of applicability of the provisions of Offences against Public Property Act, learned President's Counsel contended that this issue was "laid to rest" when the Petitioner was enlarged on bail as per his revision application filed before the Provincial High Court holden in Kurunegala. However, the proceedings of the relevant revision application No. HCR 31/2015 on 28.05.2015, does not support such a conclusion. It is evident from the proceedings, that the prosecution had no objection to enlarge the Petitioner on bail since he had taken steps to pay the full amount as indicated in the documents. It is under these

circumstances, the Provincial High Court had tacitly revised the order of the Magistrate's Court and proceeded to grant bail to the Petitioner.

It is also noted by this Court that the indictment filed by the Hon. Attorney General contained offences that are punishable under Offences against Public Property Act. The Petitioner is yet to challenge the validity of these counts before an appropriate forum and the proceedings on 3rd September 2018 before the High Court, reveals that the learned prosecuting Counsel had informed the trial Court that this fact is an element of the offences the Petitioner was charged with and therefore the prosecution would present evidence is support of it during the course of the trial.

In these circumstances, the submissions of the learned President's Counsel that *Lanka Sathosa Limited* does not satisfy the definition of "public corporation" as it is registered under Companies Ordinance should not be considered by this Court as it would then pre judge a fact in issue before the trial Court, in the absence of any specific relief prayed from this Court requesting it to do so by the Petitioner.

In CA 1821/2006 C.A.M. of 02.07.2007, Silva J, having considered the reasoning for the contrary view to this, as held by Sriskandarajah J in ***Gunasekara and Others v Karunanayake*** (2005) 2 Sri L.R. 18, concluded " *... that the provisions of Bail Act do not apply in a case where a suspect is charged for an offence under the Offences against Public Property Act No. 12 of 1982*". A similar view was adopted by this Court in CA(PHC) APN 35/2016 - C.A.M. of 07.10.2016, as relied on, in support of their contention by the Respondents.

The Respondent, relied on the provisions of Section 263 of the Criminal Procedure Code as the provision under which the High Court has acted upon making the remand order impugned by the Petitioner.

Section 263, after the amendment by Section 9 of the Code of Criminal Procedure (Amendment) Act No. 14 of 2005, reads as follows;

> "(1) *If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the court may from time to time order a postponement or adjournment on such terms as it thinks fit for such time as it considers reasonable and may remand the accused if in custody or may commit him to custody or take bail in his own recognizance or with sureties for his appearance*
>
> *Provided however that every trial in the High Court, with a jury or without a jury, shall as far as practicable, be held day to day.*
>
> (2) *Where the accused has attended the court on summons he shall be enlarged on his own recognizance or on his simple undertaking to appear, unless for reasons to be recorded court orders otherwise."*

The impugned order was made by the High Court at the end of the proceedings for the day on 3rd September 2018 and therefore qualifies to be treated as an order made under Section 263, since this section carries a marginal note which reads as "Power to postpone or adjourn proceedings." Section 263(2) permits the trial Court to make an order

"otherwise" to the express options envisaged in the said sub section. Therefore, it is clear that the order of remand made by the High Court was in fact based on a statutory provision, contrary to the claim by the Petitioner.

The failure of the High Court, in making the impugned order, to refer to a statutory provision, by itself would not invalidate or could be considered as procedural irregularity which warrants exercise of revisionary powers of this Court in view of the judgment of the Supreme Court in ***Kumaranatunga v Samarasinghe*** (1983) 2 Sri L.R. 63, where it laid down the principle that;

> *"It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another Statute which conferred that power".*

The said sub section (2) of Section 263, confers power to a trial Court, at the adjournment stage of a trial to "enlarge" an accused "on his own recognizance or his simple undertaking to appear." This subsection also reserves the power to the trial Court to order "otherwise" but it must record its reasons for doing so.

Section 263 is not a totally a new provision of procedure that had been introduced by the Code of Criminal Procedure Act for the first time.

In the Criminal Procedure Code , Section 289 did contain more explicit provision as it empowered to "... remand the accused if in custody or may commit him to custody or take bail in his own recognizance or sureties for his appearance."

In Section 149(1) of the Administration of Justice Law No. 44 of 1973, it was stated that the trial Court " ... may remand the accused or take bail for his appearance."

Section 263(2) of the Code of Criminal Procedure Act No. 15 of 1979 is not explicit in the conferment of power to a trial Court in remanding the accused at adjournment as its predecessors in the Criminal Procedure Code and Administration of Justice Law. However, the trial Court could order "otherwise" by making a remand order. Obviously, there is discretion on the trial Court to enlarge the accused on bail or to make order "otherwise".

It was decided in ***Dayananda v Weerasinghe and Others*** (1983) 2 Sri L.R. 84 by the Supreme Court that;

> *"The fact remains that the remand orders were made by the Magistrate in the exercise of his judicial discretion. Even if such orders were made on false or misleading reports it does not help the Petitioner in this case because orders made by a Judge in the exercise of his judicial discretion do not come within the purview of the special jurisdiction of the Supreme Court under Article 126 of the Constitution, even though such orders may be the result of a wrongful exercise of the Judge's judicial discretion. In such an*

event an aggrieved person's remedy is to invoke the appellate or revisionary powers of the Appellate Courts."

This position was reiterated in ***Danny v Sirinimal Silva and Others*** (2001) 1 Sri L.R. 29 as the apex Court held;

"Remanding a person is a judicial act and as such a Magistrate should bring his judicial mind to bear on that matter before depriving a person of his liberty."

The emphasis of bringing the judicial mind of Court to bear upon the relevant factors in determining the question of whether to remand an accused or enlarge him on bail is therefore based on the discretion conferred upon the relevant Court, to be exercised either way depending of the circumstances of the case before it.

The important question is the way in which such a discretion should be exercised by a Court. This aspect had received attention by the apex Court. In ***Thamodarampillai v Attorney General*** (2004) 3 Sri L.R. 180, it was held that;

"Where a statute vests discretion in a court it is of course unwise to confine its exercise within narrow limits by rigid and inflexible rules from which a court is never at liberty to depart. Nor indeed can there be found any absolutes or formula which would invariably give an answer to different problems which may be posed in different cases on different facts. The decision must in each case depend on its own peculiar fads and circumstances. But

in order that like cases may be decided alike and that there will be ensured some uniformity of decisions it is necessary that some guidance should be laid down for the exercise of that discretion.

Lord Denning pointed out in ***Ward v James****(1965) 1 AER 563. "The cases all show that when a statute gives a 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 measure 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 all part of the evolutionary process."*

As such, this Court should now venture to consider the question, whether the High Court exercised its discretion reasonably in the given situation, now challenged by the Petitioner seeking to revise it.

Lord Denning's recommendation for the Courts to lay down the considerations which should be borne in mind in exercising any discretion was carried out in ***In Re Aturupana*** 51 N.L.R. 21 by Gratian J, sitting alone, with reference to Section 289 of the Criminal Procedure Code, in following terms;

"Under our Criminal Procedure Code bail "shall be fixed with due regard to the circumstances of the accused and shall not be excessive "- section 396 of the Code. The fixing of bail calls for the exercise of judicial discretion and for the most anxious care in

each case. As has been pointed out in a series of decisions of the English Courts, the main consideration that should apply is whether it is probable that the accused will appear to stand his trial. The other matters for consideration include the nature of the accusation, the nature of the evidence in support of the accusation, and the severity of the punishment which conviction will entail. Section 289 (4) also lays down that where the accused has attended the Court on summons he shall be enlarged on his own recognizance or on his simple undertaking to appear, unless for reasons to be recorded the Court orders otherwise."

Then, this Court must turn its attention to address the issue whether the High Court has exercised its discretion reasonably in this particular instance ?

As reproduced above, the Respondent drew our attention to the fact that the High Court had to re-fix trial dates several times for the trial against the Petitioner and his co-accused to commence before it, owing to applications for postponements by them. The prosecution witnesses had to be summoned and re-summoned due to the change of the trial date and it had taken over two years and seven months to commence trial since the service of the indictment on the accused.

In this regard, it is important to recognise the remedy provided by the Legislature to make some positive impact on the much publicised and serious problem of laws delays which dented the confidence reposed to by the general public on the system of administration of justice. With the amendment introduced to Section 263(1) by the Act No. 14 of 2005, it is

stated that "... *every trial in the High Court, with a jury or without a jury, shall as far as practicable, be held day to day.*" The said proviso does not make a distinction between jury and non- jury trials and imposes a mandatory duty on the trial Courts with the use of the word "shall" to have the trial be held day to day basis.

This Court was very critical of the instances that were brought to its notice of any disregard to this positive legislative provision.

In ***Gunasiri and two Others v Republic of Sri Lanka***(2009) 1 Sri L.R. 39, de Abrew J states thus;

> *"I would like to make the following observation in this case. It is unfortunate that the trial Judge has taken 2 years to hear and conclude this case although it could have been concluded within 7 days. This kind of sloppy conduct will result in erosion of public confidence in the judicial system of this country. Criminal Trials must be heard on a day to day basis. Justice demands the adoption of the said procedure by the Judges in lower Courts. The adoption of the said procedure will retain public confidence in the judicial system and help both the trial judge and counsel in the discharge of their duties."*

The prosecution is not spared either when it found wanting with the compliance of the rule to conduct prosecutions expeditiously. A divisional bench of this Court, in ***Wickramasinghe v Attorney General*** (2010) 1 Sri L.R. 141, had imposed a duty on the prosecution to conclude criminal prosecutions during a specified time line, in view of Sections 16 and 17 of the Bail Act, as it was held;

"... it is the duty of the prosecution to have the case concluded within a period of two years. Contention that in this country it takes more than two years to conclude a criminal case and therefore the intention of the legislature was, when enacting the Bail Act, to keep a suspect/accused on remand for more than two years is also untenable because no one can say that the Legislature was unaware of the situation of criminal courts of this country when the Bail Act was being enacted."

In view of these considerations it is obvious, that the trial Courts must make a conscious and genuine effort to have the proceedings in a criminal trial on day to day basis if any meaningful progress to be achieved in the problem the amendment sought to address. The limitation contained in this proviso termed as "as far as practicable", if it is understood by the trial Courts, in the context of circumstances that are unavoidable in its strictest sense, would minimise its misuse by all the stake holders in the criminal justice system.

Then the question arises, whether the High Court, in compliance of its mandatory duty of conducting the trial expeditiously, had thereby acted unreasonably in exercising its discretion, conferred on it under Section 263(1) in remanding the Petitioner ?

At the end of the proceedings for the day and in adjournment, the High Court made order refusing to enlarge the Petitioner on bail. By doing so, the High Court had effectively rescinded an existing order of

bail, given in favour of the Petitioner by the same Court when it served indictment on him.

Learned President's Counsel, in his submissions complained that the High Court failed to direct the Petitioner to show cause before it made order cancelling the existing bail order and more importantly had failed to give its reasons by remanding him with a short sentence simply stating that he is remanded. This, according to the learned President's Counsel is a grave irregularity that vitiates the subsequent order.

Clearly this submission is made in the light of the relevant provisions contained in the Bail Act. However, it is the collective reasoning of the line of authorities that were decided in pre Bail Act era, that when a Court makes an order of cancellation of bail, depriving the accused of his freedom, should show cause the accused as to why his bail should not be cancelled.

When the proceedings before the High Court on 17th October 2017 are examined carefully, it is evident that the High Court did give notice to the Petitioner that the subsisting bail order would be rescinded once the trial commences. He was advised by the High Court that he could attend Parliament sessions from the remand. This was the day on which all parties expressed their acceptance that the trial once commenced on 3rd September 2018, would proceed on day to day basis.

As submitted by the Petitioner, that there are two orders made by the High Court that deprived his liberty. The 1st order is the one made at the commencement of the proceedings that the accused are remanded. Then the 2nd order was made in refusing to grant bail at the point of adjournment. The Petitioner admits that he was not treated differently with any other accused in the case by the High Court.

Contrary to the claim, the High Court, under the title "Order" clearly laid down its reasons for refusing the application for bail made by the Petitioner.

The reasons that are attributed for the refusal to enlarge the Petitioner on bail as per the order of High Court dated 3rd September 2018, are as follows;

a. It has been the consistent practice of the trial Court to remand the accused as all cases are taken up for trial on day to day basis or at very short intervals,
b. In order to ensure the presence of the accused to their trial,
c. There will be no postponement of trial under any reason for both parties.

Thus, it seems that this is essentially a question of trial management by the Court by continuing with the trial on a day to day basis while the accused are in remand, which is in conflict with the individual freedom of the Petitioner. However, as already noted the question that had to be decided by this Court is whether the High Court

had exercised its discretion reasonably in making the impugned order remanding the Petitioner at the adjournment.

In the light of the statutory provisions and the observations expressed by this Court on delays in taking up trials, the High Court had acted on a statutory provision which had conferred a discretion on it to remand the accused at adjournment on the reasons that it had given. These reasons, when considered in the light of the long delay in the trial getting off the ground and the Petitioner's contribution to it with his other concerns could well have impacted negatively on the Petitioner, leading to a reasonable belief of his continued participation in the trial. In these circumstances, we are unable to conclude that the High Court had acted unreasonably when it, in ensuring the uninterrupted continuation of trial, decided to remand him. Given the history of repeated postponements of the trial, the concern of the High Court to bring the trial to its conclusion without undue delay had to be understood in the proper context.

We would venture to observe that the trial Courts must be given wider latitude in determining the best way to manage the trial, mainly to ensure effective compliance with the mandatory statutory provisions concerning the conduct of trials. It is common knowledge in the Criminal Justice System criminal trials are regularly postponed due to a variety of reasons, although the genuineness of some of the reasons are obviously doubtful. As Lord Denning said *"when a statute gives a discretion the courts must not fetter it by rigid rules from which a Judge is never at liberty to depart ..."* and therefore, it is not for this Court to identify and classify them. It is best to leave to assess the situation that had arisen to the discretion to the trial Judge who is in the best position to decide the issue. But this Court

stresses that when it does exercise its discretion to the detriment of the accused, it must take all possible steps to ensure strict compliance to the applicable statutory provisions and its adherence to rules of natural justice.

The order of the High Court, in remanding the Petitioner, is not obnoxious to the provisions of the Section 14 of the Bail Act, even if it has relevance to the instant matter, and to the judgment of ***Anuruddha Ratwatte v The Attorney General*** (supra), in exercising discretion under Section 263 of the Code of Criminal Procedure Act.

In Section 14(1)(a)(ii) of the Bail Act, it is stated that if the Court has reason to believe that such a person would " ...otherwise obstruct the course of justice" it could cancel a subsisting bail order. Some relevant extracts of the speech of the Hon. Minister of Justice, in presenting the Bail Act to Parliament are reproduced in the judgment of the divisional bench of the Supreme Court in ***Shiyam v Officer in charge, Narcotics Bureau and Another*** (2006) 2 Sri L.R. 156 in the following manner;

> *"The intention of the legislature that there should be situations where bail could be refused is also clear by the statement that stated the principal reasons for the refusal of bail. Referring to such refusal, the then Hon. Minister of Justice, Prof. G. L. Peiris stated that,*
>
> *"Mr. Speaker, there are only four principal reasons for the refusal of bail.....The fact of the reasons, Mr. Speaker, is that the person concerned will not appear to stand trial. In other words, he will abscond, he will be a fugitive from justice. In that situation,*

obviously, you cannot grant bail. The second reason is interference with witness or obstruction of the course of justice that will frustrate the objectives of a fair, impartial and objective trial..." (emphasis added)

It is clear from the said statement as to the intention of the Legislature in incorporation the phrase " ...otherwise obstruct the course of justice" as it meant to negate the adverse effect on the trial by an action of an accused *"that will frustrate the objectives of a fair, impartial and objective trial."*

Thus, it is clear that the Bail Act too had provisions, under which a trial Court could remand an accused at adjournment of a criminal trial, in acting under Section 14(1)(a)(ii) of the Bail Act, it is stated that if the Court has reason to believe that such an accused would " otherwise obstruct the course of justice" by absenting himself.

In ***Cader v Officer in Charge, Narcotics Bureau*** (2006) 3 Sri L.R. 74, it was held that;

*"Revisionary powers should be exercised where a miscarriage of justice has occurred 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. (**Vanik Incorporation Ltd v Jayasekera**(1997) 2 Sri L.R. 365)."*

In view of the above reasoning, we conclude that the Petitioner has failed to make a case with exceptional circumstances where a positive miscarriage of justice had occasioned. Accordingly, we make order refusing the application of the Petitioner seeking to revise the impugned orders of the High Court dated 3rd September 2018.

We make further order dismissing the petition of the Petitioner.

JUDGE OF THE COURT OF APPEAL

JANAK DE SILVA, J.

I agree.

JUDGE OF THE COURT OF APPEAL