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

In the matter of an application for revision under and in terms of section 11(1) of the High Court of the Provinces (Special Provisions) Act No.19 of 1990 read with section 20(2) of the Bail Act No. 30 of 1997.

The Democratic Socialist Republic of Sri Lanka

Complainant

C.A. Revision Application No:
CA (PHC) APN 61/2018

H.C. Colombo Case No:
HC 5793/2011

Vs.

Liyana Arachchige Manoj Bimsara Dissanayake,
No. 01/235, Rathnapura Road,
Balangoda.

Accused

AND BETWEEN

Liyana Arachchige Manoj Bimsara Dissanayake,
No. 01/235, Rathnapura Road,
Balangoda.

Accused – Applicant

Vs.

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

Respondent

AND NOW BETWEEN

Liyana Arachchige Manoj Bimsara Dissanayake,
No. 01/235, Rathnapura Road,
Balangoda.

Accused – Applicant-Petitioner

Vs.

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

Respondent-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J.
COUNSEL	:	AAL Maithri Gunarathne with AAL Ashan Nanayakkara instructed by AAL C. Godakumbura for the Accused-Applicant-Petitioner Janaka Bandara, SSC for the Respondent-Respondent
ARGUED ON	:	06.08.2018
WRITTEN SUBMISSIONS	:	The Accused-Applicant-Petitioner – On 14.09.2018 The Respondent-Respondent – On 26.09.2018

DECIDED ON : 18.10.2018

K.K. WICKREMASINGHE, J.

The Accused-Applicant-Petitioner has filed a revision application in this court seeking to set aside the order made on 06.04.2018, by the Learned High Court Judge of Colombo, refusing to enlarge the Accused-Applicant-Petitioner on bail.

Facts of the case:

The Accused-Applicant-Petitioner (hereinafter referred to as the 'Petitioner') was indicted for committing an offence punishable under section 389 of the Penal Code. At the conclusion of the case, after having heard the submissions made by the prosecution and defence, the Learned High Court Judge of Colombo had convicted the petitioner by the judgment dated 18.01.2018. Accordingly following sentences had been imposed on the petitioner;

i) A term of 03 years rigorous imprisonment,

ii) A fine of Rs.500,000/- with a default term of nine months simple imprisonment,

iii) A compensation of Nine Million Rupees (09 million) to be paid to PW 01 with a default term of 18 months simple imprisonment.

Being aggrieved by the said judgment, the petitioner had filed an appeal in this Court on 22.01.2018. Thereafter the petitioner had filed a bail pending Appeal dated 25.01.2018 under section 20(2) of the Bail Act No. 30 of 1997. The Learned

High Court Judge of Colombo has dismissed the said application by the order dated 06.04.2018 due to absence of exceptional circumstances.

Being aggrieved by the said dismissal, the petitioner preferred a revision application to this Court.

In the petition, the petitioner has averred that the order of the Learned High Court Judge of Colombo refusing bail was contrary to law on several grounds and few of those grounds were reproduced in the written submission as follows;

i) Impugned order dated 06.04.2018 is against the ruling principles of bail,

ii) There is no barrier to grant bail to an accused if the time period to process the appeal goes for more than the period of imprisonment,

iii) Possibility of winning the appeal by the petitioner is very likely,

iv) The Learned High Court Judge had failed to consider that petitioner would not be able to pay the fine and compensation if he is kept behind bars,

v) Hon. Attorney General has made a different submission in another case on the same date.

Upon perusal of the brief, we observe that the petitioner has not submitted the indictment and the order of the sentence to this Court. Rule 3 (1) of the Court of Appeal [Appellate Procedure] Rules of 1990 states that;

> "Every application by way of revision or restitutio in integrum under Article 138 of the Constitution shall be made in like manner together with copies of the relevant proceedings (including pleadings and documents produced), in the Court of First instance, tribunal or other institution to which the application relates."

Therefore the petitioner has not complied with the aforesaid rule. It is well settled law that the compliance of rules is imperative and mandatory. However we will not dismiss the application *in limine* since there are several important legal issues to be addressed.

The Learned Counsel for the petitioner has submitted that after the enactment of the Bail Act No. 30 of 1997, the scope of granting bail had been drastically expanded and even non-bailable offences stipulated in Code of Criminal Procedure Act were considered to be bailable offences as far as the circumstances can be established before Courts. The Learned Counsel further submitted that the long title of the Bail Act is expressly clear as to which group of persons could seek bail from courts, hence one cannot differentiate an accused-having committed an offence as a person not qualified to seek bail. The long title of the Bail Act reads as follows;

> "AN ACT to provide for release on bail of persons suspected or accused of being concerned in committing or of having committed an offence; to provide for the granting of anticipatory bail and for matters, connected therewith or incidental thereto."

The Learned Counsel has submitted the case of **Dachchini V. Attorney General (2005) 2 S. L.R. 152** in which it was held that,

> *"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 the 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...

Therefore the Learned Counsel contended that upon the Bail Act coming into operation in the year 1997, all the decisions on not granting bail before the said Act had become obsolete and no relevance.

However we observe that said judgment of the Court of Appeal was overruled by the Supreme Court judgment of **Attorney General V. Letchchemi & another [S.C. Appeal 13/2006] (2006 B.L.R. 16)**, in which it was held that,

*"**The presumption of innocence** that ensures in favour of those suspected or accused or connected with the commission of an offence, **ceases to operate after conviction by a court of competent jurisdiction.**"(Emphasis added)*

It was further held that,

"Bail after conviction in the High Court referred to in section 333(3) of the Code of Criminal Procedure Act No. 15 of 1979 has been incorporated in verbatim in Section 20(2) of the Bail Act No.30 of 1997. The settled law on this is that where a section has been incorporated in verbatim, governing principles applicable are those contained in the principal enactment. The interpretation of the principal enactment has always held that there must be exceptional circumstances.

As section 20 of the Bail Act No. 30 of 1997 is identical to that contained in the Code of Criminal Procedure, in its implementation the earlier restricted

view of the convicted person having to disclose exceptional circumstances for grant of bail must prevail..."

In the case of **Attorney General V. Ediriweera [S.C. Appeal No. 100/2005] (2006 B.L.R. 12)**, it was held that,

"The norm is that bail after conviction is not a matter of right but would be granted only under exceptional circumstances."

In the case of **R V. Muthuretty [54 NLR 493]** it was held that,

"That in bail pending appeal, Court will not grant bail as a rule, bail granted only in exceptional circumstances..."

In the benchmark decision of **Ramu Thamotharampillai V. Attorney General (2004) 3 Sri. L.R 180**, it was held that,

"The decision must in each case depend on its own peculiar facts 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..."

In the case of **P.M.R.H. Indrani Perera and 2 others V. P.C.M.M. Fernando [S.C. Appeal No. 151/2011],** it was stated that,

"Broom's' Legal Maxims – 10th Edition – at page 82 sets out the application of the maxim in England. "Every court is the guardian of its own records and master of its own practice" and where a practice has existed it is convenient, except in cases of extreme urgency and necessity, to adhere to it, because it is the practice, even though no reason can be assigned for it;

for an inveterate practice in the law generally stands upon principles that are founded in justice and convenience."

The Supreme Court has taken the view that bail should not be granted as a right for a person who was convicted by a competent Court. Therefore now it is settled law that an applicant does not enjoy the same privilege of an ordinary person, maybe in the capacity as a suspect, once a competent court decides his guilt. Accordingly we reject the above contention of the Learned Counsel for the petitioner.

The Learned Counsel for the petitioner in his second ground of revision has averred that in the event of imposing a short period of imprisonment (like 2-3years), there is no barrier to grant bail to an accused if the process of the appeal could consume a much longer time. The Learned Counsel has submitted the case of **Ediriweera V. Attorney General (2006) 1 Sri L.R. 25** to support said contention.

However it is imperative to note that said Judgment was overruled by the Supreme Court in the Appeal of **Attorney General V. Ediriweera [S.C. Appeal No. 100/2005] (2006 B.L.R. 12).** Accordingly we are inclined to follow the Supreme Court Judgment instead of the factual findings of the majority decision of Court of Appeal in the said Ediriweera case.

In the case of **Harbhajan Singh V. State of Punjab (1977) Cr LR 1424**, it was held that,

"The factors which the Appellate Court is to consider in an application for bail pending appeal were... (b) Whether circumstances are such as likely to delay the decision of the appeal for an unreasonable time. It would afford scant satisfaction to the accused if after serving their full or substantial portion of their sentence, their appeal succeeds and they are merely

acquitted of the charge. This factor cannot be ignored and should be one of the considerations for granting bail..."

The Learned SSC for the Respondent has submitted that the trial Court has managed to prepare the appeal brief from the trial brief which consisted over 1500 pages (as per the Paragraph 10 of the petition) within 07 months from the conviction and said appeal brief of the instant case has already been sent to this Court on 09.07.2018. It was further submitted that the said appeal of the petitioner is now listed under case No. CA/81/2018.

We are of the view that in the present system of criminal justice we do not see prolonged delays in preparing Appeal briefs as it used to be. Therefore it would not be appropriate to follow this ground in modern day context especially when judicial officers and staff in Courts are taking every possible step to expedite the trial and appeal proceedings.

At this stage we will consider final ground of exceptional circumstance since it is quite similar to above said second ground which addresses the time factor in the appeal process. The Learned Counsel for the petitioner has submitted that the double standard taken by the Hon. Attorney General in two places on the same date should be considered as an exceptional circumstance. Accordingly the Learned Counsel contended that the Learned SSC for the respondent has submitted before this Court that 03 year period of sentencing was no way an exceptional ground to grant bail and thereafter the same Senior State Counsel had gone to Case No. 11309 in the Magistrate's Court of Homagama and had taken an opposite view.

Answering the said contention of the Learned Counsel for petitioner, the Learned SSC for the respondent has submitted that circumstances of the two cases are different. The accused in the Magistrate's Court of Homagama was sentenced to a

term of six months whereas the petitioner of instant case was sentenced to a term of 3 years. Accordingly we are of the view that it is quite difficult to conclude an appeal within a period of 6 months no matter how expeditious the current appeal process is. Therefore the time factor should be considered comparative to the term of imprisonment.

In the aforesaid case of **Ediriweera [S.C. Appeal No. 100/2005]**, it was held that,

> *"Delay is always a relative term and the question to be considered is not whether there was mere explicable delay, as when there is a backlog of cases, but whether there has been excessive or oppressive delay and this always depends on the facts and circumstances of the case..."*

Further we observe that there is a term of 9 months imprisonment as the default sentence for the fine and a term of 18 months imprisonment as the default sentence for the compensation. The petitioner was sentenced to a term of 03 years rigorous imprisonment for the substantive charge. Therefore in the event of failure to pay the said fine and the compensation the total period of imprisonment would be 5 years and 03 months. The petitioner had not paid the said fine or the compensation even on the date of the bail order of the Learned High Court Judge. In such a background, where the fine and the compensation to be paid is a huge amount, there is a likelihood of absconding without paying the same.

We will consider the third and fourth grounds of exceptional circumstances, as averred by the petitioner, together. Accordingly in the petition which was submitted to this Court, the petitioner has averred that the Learned High Court Judge of Colombo had failed to consider that the petitioner will not be able to pay the fine and the compensation if he is kept behind bars. However upon perusal of the petition submitted to the High Court, we observe that the petitioner had not

averred that particular ground as an exceptional circumstance. Therefore it is unjustifiable to state that the Learned High Court Judge had failed to consider such ground when in fact the petitioner had not averred the same before High Court.

The Learned Counsel for the petitioner has further submitted that possibility of the petitioner winning the appeal should be considered as an exceptional circumstance to invoke the revisionary jurisdiction of this court. Accordingly the Learned Counsel has pointed out errors in the Judgment of the Learned High Court Judge dated 18.01.2018 and has submitted that the petitioner has a *prima facie* case to get him acquitted in the appeal as the Learned High Court Judge had failed to appreciate the civil aspects of original case. The petitioner himself has submitted that trial proceedings (Appeal brief) consist of over 1500 pages. If that is to be true, it will be unreasonable for us to conclude that there is no *prima facie* case against the petitioner, merely because he states the same, without taking a single glance at the appeal brief. However, we are not bound to consider the merits of the main appeal under a revision application seeking for bail.

The Learned SSC has submitted that there is another pending trial against the petitioner in Colombo High Court under case No. HC 5828/2011 where the petitioner was charged with another accused for cheating and misappropriating a sum of six million rupees from the same complainant of case No. HC 5793/2011. The Learned High Court Judge had correctly considered this fact in refusing the bail application.

The Learned Counsel for the petitioner has submitted the mental health of the son of the petitioner to be considered as an exceptional circumstance.

However in the case of **Ranil Charuka Kulathunga V. AG [CA (PHC) APN 134/2015]**, it was held that,

> *"The petitioner submits several grounds to consider bail. The Petitioner states that he is a married person with two school going children. The persons getting married and having children is not an exceptional ground. It is the normal day to day life of the people."*

We observe that the Learned High Court Judge of Colombo has held as follows;

> "මෙම නඩුවේ චූදිත අභියාචක ඇප ලබාගැනීම සඳහා ඉදිරිපත් කළ කරුණු අතර ඔහුගේ ළමයාගේ මානසික සෞඛ්‍ය ගැන වාර්තාවක් ඉදිරිපත් කර ඇත. එය වෛද්‍ය වාර්තාවක් නොවේ. එය මනෝ චිකිත්සකයෙකු වශයෙන් සඳහන් වන අයෙකු විසින් සකස් කරන ලද වාර්තාවක්ය. එම වාර්තාවේ ලැයිස්තුගත කර තිබෙන සියලුම කරුණු තත්වයන් යටතේ එම ළමයා සාමාන්‍ය තත්වයන් හෝ සාමාන්‍යයට වඩා ඉහල මට්ටමේ කුසලතාවයක් තිබෙන බව දක්වා ඇත..." (Page 150 of the brief)

In the case of **Dharmaratne and another V. Palm paradise Cabanas Ltd and others (2003) 3 SLR 25**, it was held that by Amarathunga J,

> *"Thus the existence of exceptional circumstances is the process by which the Court selects the case in respect of which this extra ordinary method of rectification should be adopted"*

In **Attorney General V. Gunawardena (1996) 2 S.L.R. 149** it was held that,

> *"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..."*

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284,** it was held that;

> *"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."*

Considering above, we see no reason to revise the order of the Learned High Court Judge of Colombo. We are of the view that the petitioner has failed to demonstrate exceptional circumstances to the satisfaction of this Court in order to invoke the revisionary jurisdiction.

Therefore this revision application is dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Dachchini V. Attorney General (2005) 2 S.L.R. 152
2. Attorney General V. Letchchemi & another [S.C. Appeal 13/2006] (2006 B.L.R. 16)
3. AG V. Ediriweera [S.C. Appeal No. 100/2005]
4. R V. Muthuretty [54 NLR 493]
5. Ramu Thamotharampillai V. Attorney General (2004) 3 Sri. L.R. 180
6. P.M.R.H.Indrani Perera and 2 others V. P.C.M.M. Fernando [S.C. Appeal No. 151/2011]
7. Ediriweera V. Attorney General (2006) 1 S. L.R. 25
8. Harbhajan Singh V. State of Punjab (1977) Cr. L.R. 1424
9. Ranil Charuka Kulathunga V. AG [CA (PHC) APN 134/2015]
10. Dharmaratne and another V. Palm paradise Cabanas Ltd and others (2003) 3 SLR 25
11. Attorney General V. Gunawardena (1996) 2 S. L.R 149
12. Bank of Ceylon V. Kaleel and others (2004) 1 S. L.R 284