

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

In the matter of an Application made under and in terms of section 46 of the Judicature Act No. 2 of 1978 for the transfer of case No. HC /7207/14 – High Court of Colombo.

Rajaguru Wedawalauwa  
Premakumara Srinivasa Nirranjan  
Sampayo,  
No. 110/9, Sri Bodhiraja Mawatha,  
Polwatta,  
Pannipitiya.

**Petitioner**

CA No. 01/2019

Vs.

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

**Respondent**

**Before:** Hon. Justice Yasantha Kodagoda, PC (P/CA), and  
Hon. Justice Arjuna Obeyesekere

**Appearance:**

Uditha Egalahewa, PC with Damitha Karunaratne and  
Vishwa Vimukthi, instructed by Chandrakumar de Silva  
for the Petitioner.

9<sup>th</sup> May, 2019 - Dileepa Peeris, DSG for the Respondent

13<sup>th</sup> May, 2019- During the morning session when Motion dated 10<sup>th</sup> May 2019 was sought to be supported by President's Counsel for the Petitioner, Nayomi Kahawita, SC took notice on behalf of the Respondent.

13<sup>th</sup> May, 2019 - During the afternoon session when this matter was taken up and partially supported by learned President's Counsel for the Petitioner, Dilan Ratnayake, DSG appeared for the Respondent.

16<sup>th</sup>, 21<sup>th</sup> and 22<sup>nd</sup> May, 2019- Nerin Pulle, Snr. DSG with Dilan Ratnayake, DSG and Sahanya Narampanawe, SC appeared for the Respondent.

**Delivered on** - 22<sup>nd</sup> May, 2019

**Yasantha Kodagoda, PC, J./ President of the Court of Appeal**

### Order

At the commencement of the hearing, the President of the Court of Appeal inquired from the learned counsel for the Petitioner and the Respondent whether they have any objections to this bench hearing the instant Application, and both counsel indicated specifically that they have no objection. (Details regarding this matter is found in proceedings of 9<sup>th</sup> May 2019.)

This is an Application invoking the jurisdiction conferred on the Court of Appeal by section 46 of the Judicature Act.

This Application and Motion dated 10<sup>th</sup> May 2019 was supported by learned President's Counsel for the Petitioner on 9<sup>th</sup>, 13<sup>th</sup>, 19<sup>th</sup>, and 21<sup>st</sup> May 2019. The Respondent (Honourable Attorney General) was represented when this matter was supported, and was afforded an opportunity of being heard.

Learned Counsel representing the Respondent objected to both the issue of Notice and the grant of interim relief.

This Order relates to the Applications made on behalf of the Petitioner, in terms of prayers (a) and (b) of the Petition, seeking the issue of Notice on the Respondent and the stay of proceedings in High Court Colombo case bearing No. 7207/14 pending the hearing and final determination of this Application.

Briefly, the Learned President's Counsel's submissions arising out of the Petition dated 11<sup>th</sup> March 2019 were as follows:

- 1) In February 2012, the Respondent (Attorney General) presented two indictments containing similar charges to the High Court of Colombo against the Petitioner, and thereby instituted criminal proceedings against him. These two cases were assigned numbers HC 7206/14 and 7207/14. It is case No. 7207/14 that is the subject matter of this Application. There are two charges in case No. 7207/14, and they are that the Accused – Petitioner committed offences under section 454 of the Penal Code punishable in terms of section 459 of the said Code, and offence under section 400 of the Penal Code. In case No. 7207/14, the indictment was served on the Accused – Petitioner on 18<sup>th</sup> June 2014, and the Accused – Petitioner pleaded '*not guilty*' to the charges, and accordingly the case was fixed for trial.
- 2) On 7<sup>th</sup> November 2018, the trial commenced in case No. 7207/14.
- 3) The prosecution of the case has so far been conducted on behalf of the Respondent – Attorney General by two State Counsel.
- 4) The primary allegation of the Accused – Petitioner is that, the State Counsel who conducted the prosecution and the learned High Court Judge took turns in asking *leading questions* from the two prosecution witnesses who have testified so far before the High Court.
- 5) It was also alleged that, on certain occasions, the learned High Court Judge did not record the objections raised by learned President's Counsel who appeared for the Accused before the High Court.

- 6) It was alleged that, without merely seeking clarifications, the questions posed to the two witnesses by the learned High Court Judge were favourable to the prosecution.
- 7) Further, the learned High Court Judge intervened and compelled the prosecution to amend the indictment.
- 8) On 6<sup>th</sup> March 2019, following the completion of the examination-in-chief of prosecution witness Dr. Sheela Kuruwitage, learned President's Counsel appearing for the Accused – Petitioner had moved for an adjournment on the footing that, he was to encounter a *personal difficulty* from 2.30 pm onwards that day. However, the learned High Court Judge had refused the application, and hence the President's Counsel had to commence cross-examination and continue till 1.30 pm.
- 9) It was alleged that, during the cross-examination of prosecution witness Dr. Sheela Kuruwitage, the learned High Court Judge engaged in conduct towards the witness which amounts to *molycoddling* the witness.
- 10) Learned President's Counsel for the Petitioner also took offence to the fact that, at the end of the proceedings on 6<sup>th</sup> March 2019, while fixing the case for further trial, the learned High Court Judge directed the witness not to go to any other High Court to provide testimony and to come to his court and testify in at the trial which is the subject matter of this Application. Learned President's Counsel submitted that, this direction given by the learned High Court Judge to the witness, was evidence of the learned judge being *overzealous* of this particular case.
- 11) By letter dated 8<sup>th</sup> March 2019, learned President's Counsel for the Accused informed the Petitioner in writing a previous assertion made verbally that, *due to personal reasons, he is unable to continue to appear for the Accused in the High Court case.* The Petitioner's position is that, sequel to the withdrawal of the learned President's Counsel from defending him in the High Court, he has not been able to retain the services of a counsel to appear on his behalf and hence he is now deprived of the right to be defended.

12) The learned President's Counsel contended that, the afore-stated developments have resulted in the Petitioner being **denied a fair and impartial trial**, which he claimed as a violation of the Fundamental Rights enshrined in Article 13(3) of the Constitution. Therefore, it was submitted that, with the view to ensuring that interest of justice is met, the afore-stated High Court trial should be transferred from the court in which the particular High Court judge is presiding to another court.

On 9<sup>th</sup> May 2019, learned President's Counsel for the Petitioner could not conclude his submissions in support of his application for Notice being issued on the Respondents and for the grant of interim relief. Thus, by 3.25 pm this court had to adjourn proceedings. At that stage, the learned President's Counsel for the Accused – Petitioner brought to the attention of court that, further trial in the impugned case was scheduled to be resumed on the following day (10<sup>th</sup> May 2019), and that the Accused – Petitioner had still not been able to retain the services of a counsel to defend him (following the withdrawal of the previous counsel). At this stage, as is evidenced by the journal entries of this matter of 9<sup>th</sup> May 2019, learned Deputy Solicitor General for the Respondent upholding the highest traditions of the quasi-judicial office of the Honourable Attorney General submitted that, *even without an order from court, he is ready to give a formal undertaking that steps can be taken to ensure that the trial is not resumed until this matter is fully supported, and till this Court makes an order.*

In the circumstances, this Court did not make any order with regard to High Court case No. 7207/2014 that was to resume the following day. The understanding of this Court was that, learned Deputy Solicitor General would convey his undertaking to both the learned High Court judge and to the prosecuting State Counsel, and would thereby ensure that when the High Court trial comes up for further trial on the following day, the both the learned High Court judge and the State Counsel would not take any further steps and the resumption of further proceedings in the High Court would be postponed till this Court makes an order on the issue of formal Notice on the Respondent and an order with regard to the application for the grant of interim relief. In abundance of caution, the Registrar of this Court was directed to forward a copy of the proceedings of this court of 9<sup>th</sup> May 2019 to the learned High Court judge before 10.00 am on 10<sup>th</sup> May 2019 so that

the learned High Court Judge could take cognizance of the proceedings in this matter and refrain from taking any further action.

Since the learned Deputy Solicitor General for the Respondent informed court that he has to proceed overseas for an official engagement, of consent this matter was fixed for further support on 28<sup>th</sup> June 2019.

By Motion dated 10<sup>th</sup> May 2019, the Petitioner brought to the attention of this court the following:

That when High Court case No. 7207/14 was taken up on 10<sup>th</sup> May 2019, the Accused – Petitioner was *threatened* by the learned High Court Judge for approximately 10 minutes, alleging that his bail would be cancelled and that he could be imprisoned while the trial was proceeding. It has also been alleged that, the Accused was *severely reprimanded* for not having been able to retain a lawyer. In this backdrop, the learned High Court judge had proceeded to assign an Attorney-at-Law for the Accused – Petitioner and had fixed the trial for the 14<sup>th</sup> and 15<sup>th</sup> May 2019. Further, the learned High Court judge had ordered to Accused – Petitioner to submit additional personal bail amounting to Rs. 500,000/= and had made order *impounding* the passport. It was also alleged that the learned High Court judge had also caused the Accused to be in police custody until additional bail had been furnished.

An affidavit dated 15<sup>th</sup> May 2019 of the Petitioner was submitted to this Court in support of these allegations.

In the afore-stated affidavit, the Petitioner has stated that, on 10<sup>th</sup> May 2019, when the High Court trial was taken up, he was represented by an Attorney-at-Law for a limited purpose, and that the said Attorney-at-Law informed court that the Accused – Petitioner required further time to retain counsel to represent the Accused at the trial, and moved court for the trial to be taken up on another date. Further, the has averred that the said Attorney-at-Law informed the learned High Court Judge that there was a *pending transfer application before the Court of Appeal*. The said affidavit also makes reference to the fact that, learned State Counsel had objected to the afore-stated application, and had alleged that the Accused

was *intentionally trying to delay the proceedings before the High Court by filing a transfer application before the Court of Appeal* and therefore had moved the High Court to have further trial taken up on an early date. The State Counsel had also moved the High Court to have the bail already granted to the Accused cancelled and for him to be remanded.

Learned Snr. Deputy Solicitor General made the following submissions:

- I. That the Petition does not disclose material based upon which the Court of Appeal should exercise jurisdiction and transfer High Court Colombo case No. 7207/2014 to another High Court.
- II. That the allegations contained in the Petition are not substantiated by reliable evidence.
- III. That in this matter, the Court of Appeal should not take into consideration the contents of Motion dated 10<sup>th</sup> May 2019 and related material.
- IV. That Deputy Solicitor General Mr. Dileepa Peeris who appeared for the Respondent in the Court of Appeal on 9<sup>th</sup> May 2019 (a) had not documented in the related internal file of the Attorney General's Department the undertaking given by him to this Court, and (b) had not informed either the learned High Court judge or the State Counsel who appeared for the Honourable Attorney General in the High Court on 10<sup>th</sup> May 2019, of any undertaking given by him to this Court.

An examination of the proceedings of 10<sup>th</sup> May 2019 of High Court case No. HC 7207/2014 reveals the following:

- Upon commencement of the proceedings, learned counsel for the Accused had informed court that the President's Counsel appearing for the Accused will not be appearing for the accused. Hence, he has moved court to grant a date to obtain the services of a senior counsel. He has also submitted to court that an '*appeal*' has been presented to have the case transferred.

- In response, the learned State Counsel representing the Attorney General has submitted to court that, following the evidence of PW1, the accused had got *'frightened'* and therefore has filed an application in the Court of Appeal to have the case transferred to another court. That the accused seeks to scuttle and delay the trial. That the accused has influenced witnesses. That the State Counsel has received instructions to that effect. There is no objection to a *short postponement* being given to enable the accused to retain the services of a lawyer. That there is no *'prohibition order'* preventing the High Court from proceeding with the trial. That she has received instructions from the Deputy Solicitor General (ostensibly a reference to the learned Deputy Solicitor General who appeared for the Respondent in these proceedings on 9<sup>th</sup> May 2019), that there is no order from the court and that the trial could proceed. That she wishes that the court severely warns the accused not to interfere with witnesses. That if the court wishes, the court may cancel bail and remand the accused.
- The learned High Court judge has inquired from counsel who represented the accused as to why the services of another counsel could not be obtained since 15<sup>th</sup> March 2019, which was the last date of trial. The Attorney-at-Law who appeared for the accused at this stage had not directly responded to the query raised by the learned High Court judge, but had denied the allegation raised by the prosecuting State Counsel. However, subsequently, the said Attorney-at-Law has informed court that, during the intervening court vacation as senior counsel had proceeded overseas, it was not possible to retain the services of another counsel.
- In response to the afore-stated submission of the Attorney-at-Law representing the Accused, the State Counsel has submitted that, if the Accused could have obtained the services of a counsel to appear for him in the Court of Appeal, he could have retained the same Counsel to appear for him in the High Court as well.
- The learned High Court judge in his order has held that the reasons given by the accused regarding the inability to retain the services of a counsel is unacceptable. It has been observed by the learned High Court judge that the accused was intentionally taking steps to delay the ongoing trial. The learned High Court judge has observed that, according to the Attorney-at-Law who appeared for the accused, the Court of Appeal has not made an interim order staying the proceedings



of the High Court trial. Therefore, there is no bar in continuing with the trial. The Learned High Court judge has with the consent of the accused, assigned an Attorney-at-Law to appear for the accused at the trial. It has been observed by the learned judge that, the accused had appeared in the High Court with the intention of having the trial postponed. In these circumstances, the learned High Court judge has enhanced the bail already granted to the accused and has imposed a further condition that personal bail amounting to Rs. 5,00,000/= be submitted and the accused was directed to tender his passport to court. An order had been also made prohibiting foreign travel.

- Finally, the learned High Court judge has specifically inquired from the prosecuting State Counsel as to whether the Court of Appeal has either made an interim order or whether the prosecution has given an undertaking to the Court of Appeal that the trial would not be proceeded with. In response the State Counsel has informed court that, the Court of Appeal had made no order, that there was no such undertaking given and that, the only understanding between parties was that the accused should be given further time to retain the services of a counsel.

This court made inquiry from the Registrar of the Court of Appeal as to whether he complied with the direction made by this Court and communicated the proceedings of this court of 9<sup>th</sup> May 2019 to the learned High Court judge. He informed this Court that, following the preparation of proceedings of this court, he was able to transmit it to the learned High Court judge only in the afternoon of the 10<sup>th</sup> May 2019. Thus, it is apparent that, by the time the learned High Court judge took up case No. 7207/2014, he did not have the benefit of reading the proceedings of the Court of Appeal. Furthermore, it appears from the journal entries of High Court Colombo case No. 7207/2014, that the Registrar of the High Court had received the afore-stated journal entries of this Court on 10<sup>th</sup> May 2019, and brought it to the attention of the learned High Court judge on 13<sup>th</sup> May 2019. Upon a seeing of the said journal entries of this Court, the learned High Court judge has made no order or observations on the Case Record.

It is also apparent that, according to the record, when the High Court case came up on 10<sup>th</sup> May 2019, the prosecuting State Counsel has not communicated to the learned High Court judge the undertaking given by

Deputy Solicitor General Dileepa Peeris to this Court on 9<sup>th</sup> May 2019. In fact the State Counsel has acted in stark contrast with the expectation of this court and the undertaking given by the learned Deputy Solicitor General to this Court.

The position of the Senior Deputy Solicitor General who appeared in this Court on the 16<sup>th</sup>, 21<sup>st</sup> and 22<sup>nd</sup> May 2019 was that, the contemporaneous minute made by the Deputy Solicitor General in the corresponding file relating to this Application maintained by the Attorney General's Department, does not indicate that, the afore-said Deputy Solicitor General gave the afore-stated undertaking to the Court of Appeal. He also submitted that, the State Counsel had not been instructed by the said Deputy Solicitor General that an undertaking was given by him that further steps would not be taken in the High Court until this Court took a decision on the issue of Notice to the Respondent and the grant of interim relief.

This Court observes that, it is the duty of all Attorneys-at-Law who appear before a court of law, acting with due diligence and in good faith, to give effect to all undertakings given by them to court. Counsel representing the Honourable Attorney General are also professionally bound by such professional responsibility. As to why Deputy Solicitor General did not make a contemporaneous minute of the undertaking given by him to this Court, and whether he did not reveal the said undertaking to the prosecuting State Counsel, and what prompted him to act in such manner, is not a matter for this Court. That is a matter for the Honourable Attorney General.

The developments associated with case No. 7207/2014 in the High Court on 10<sup>th</sup> May 2019, is contrary to the undertaking given by Deputy Solicitor General Mr. Dileepa Peeris to this Court on 9<sup>th</sup> May 2019. If in fact Deputy Solicitor General Mr. Dileepa Peeris did not give such an undertaking, this Court would have made an order on 9<sup>th</sup> May 2019 staying the proceedings of High Court Colombo case No. 7207/2014, till an order was made by this Court regarding the issue of Notice and the grant of interim relief.

Some allegations contained in the Petition of the Petitioner if not refuted by the Respondent, are in the opinion of this Court capable of justifying the invocation of the jurisdiction of this Court in terms of section 46 of the Judicature Act. The averments of the Petitioner's Motion dated 10<sup>th</sup> May

2019, material contained in the Affidavit of the Petitioner dated 15<sup>th</sup> May 2019 and certain portions of the proceedings of the High Court on 10<sup>th</sup> May 2019, unless suitably explained, may buttress the allegations contained in the Petition of the Petitioner.

These are matters that have to be gone into after the Respondent is afforded an opportunity of filing Objections to this application, which may include evidence to rebut the positions taken up by the Petitioner.

In view of the foregoing, it is the view of this Court that, the Petitioner has met the initial threshold of establishing a prima-facie case in support of his application to transfer High Court Colombo case No. 7207/2014 to another court, and hence the Court directs Notice to be issued on the Respondent.

The purpose of filing this application seeking a transfer of High Court Colombo case No. 7207/2014 from the present trial court to another court may be rendered nugatory, if the relevant trial is permitted to continue in the present court, which this presently hearing the case. In the circumstances, interim relief as prayed for by the Petitioner in prayer (b) is granted, and hence this Court hereby directs that further proceedings in High Court Colombo case No. 7207/2014 is stayed till the final determination of this application.

This Court is conscious of possible repercussions arising out of the issue of an interim order that has the effect of staying an ongoing trial. In the circumstances, this Court is anxious that this matter be heard fully and disposed of as early as possible.

As the Respondent has participated in these proceedings, this Court will not fix a date for 'Notice Returnable'. In the circumstances, Court directs the Respondent to file his objections on or before 5<sup>th</sup> June 2019, the Petitioner to file counter-affidavit if any on or before 12<sup>th</sup> June 2019, and written submissions to be tendered a minimum of one week prior to the date of argument.

This application will be taken up for argument on 26<sup>th</sup> June 2019, on top of the list. Argument will be taken up till completion on a day-to-day basis.

A copy of this order together with the Petition, Motion dated 10<sup>th</sup> May 2019 and affidavit of the Petitioner dated 13<sup>th</sup> May 2019 is to be hand-delivered by the Registrar of this Court to the learned High Court judge. If upon a consideration of the material placed before this Court by the Petitioner and this order, the learned High Court judge were to decide on his own motion to recuse himself from hearing the High Court trial any further, the Respondent is directed to file a Motion in this Court informing this Court of that situation, and this matter will be mentioned enabling this Court to make a suitable ensuing order.

**President of the Court of Appeal**

**Arjuna Obeyesekere, J**

**I agree**

**Judge of the Court of Appeal**