

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

CA Case No: CA/BAL/17/2020

CA Appeal No: CA/APN/81/2018

**PHC (Colombo) Case No:
5793/2011**

In the matter of an application for Bail under and in terms of Section 20 (2) of the Bail Act No. 30 of 1997, with Section 404 of the Code of Criminal procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

PLAINTIFF

Vs.

Liyana Arachchige Manoj
Bimsara Disanayake,

No.825,

Singhepura, Pelawatte

Battaramulla.

ACCUSED

THEN

Liyana Arachchige Manoj
Bimsara Disanayake,

No.825,

Singhepura, Pelawatte

Battaramulla.

ACCUSED – APPELLANT

Vs.

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

RESPONDENT

AND NOW BETWEEN

Liyana Arachchige Manoj
Bimsara Disanayake,
No.825,
Singhepura, Pelawatte
Battaramulla.

**ACCUSED-APPELLANT-
PETITIONER**

Vs.

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

RESPONDENT-RESPONDENT

Before – Menaka Wijesundera J.

Neil Iddawala J.

Counsel – Mr. Kalinga Indatissa, PC with Harin Suddhasena for the
Petitioner.

SSC. Mr. Janaka Bandara with SC Ms. Chathurangi
Mahawaduge for the respondent.

Argued on: 18/02/2021

Decided On: 03/03/2021

MENAKA WIJESUNDERA J.

The instant application for bail is filed by the petitioner under section 404 of the Code of Criminal Procedure Act no 15 of 1979 (hereinafter referred to as CPC) and in terms of section 20 (2) of the Bail Act no 30 of 1997.

The Attorney General has taken up a preliminary objection stating that if a party comes under section 404 of the CPC it should be by way of revision or an appeal.

The accused petitioner had been charged under section 389 of the Penal Code and had been convicted for the same for a period of

- 1) 3 years imprisonment
- 2) Fine of Rs 500000/ in default 9 months imprisonment
- 3) Compensation of Rs 9 million in default 18 months imprisonment.

Being aggrieved by the said conviction and judgment and sentence the accused petitioner had filed an appeal and the said appeal is pending before this court. On filling an appeal the petitioner has filed a bail application before the High Court and the said application has been refused. The said refusal had been canvassed before this court and the Supreme Court and before both courts the accused petitioner had been unsuccessful.

The accused petitioner had filed a second bail application before the High Court in 2019 February and in that too the accused petitioner had been unsuccessful. Hence upon the refusal of the said application the instant application under section 404 of the CPC has been filed.

Hence what this court has to decide right now is whether the accused petitioner can come before this court under section 404 of the CPC without a revision or an appeal. The position of the accused petitioner is that since he has the second refusal by the High Court he can canvass this application. The section cited by the accused petitioner reads as follows,

“404 The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive; and notwithstanding anything to the contrary in this Code or any other law the Court of Appeal may in any case

direct that any person in custody be admitted to bail or that the bail fixed by the High Court or Magistrate be reduced or increased, or that any person enlarged on bail by a Judge of the High Court or Magistrate to be remanded to custody.”

The position of the respondents is that in view of the above section the accused petitioner must come by way of revision or an appeal and bases the submission on a judgment of their Lordships of the Supreme Court. That is,

“ATTORNEY - GENERAL AND OTHERS VS SUMATHIPALA BY SHIRANI BANDARANAYAKE, J. which goes on to say,

“Counsel made reference to section 404 of the Code of Criminal Procedure Act, No. 15 of 1979 which inter alia, provides that ‘notwithstanding anything to the contrary in this Code or any other law the Court of Appeal may in any case direct that any person in custody be admitted to bail. It was urged that in any event, the Court of Appeal, had powers under this section to admit the appellant to bail. In my view, this section does not support Counsel’s submissions. The expression ‘in any case’ can only refer to the cases referred to in the two previous section, viz.402 and 403 of the Code, and is not general application. The Court of Appeal is empowered in exercise of its appellate jurisdiction to admit any person in custody to bail in the cases referred to in section 402 and 403.”

“Accordingly it is apparent that in terms of the section 404 of the code of Criminal Procedure Act, the Court of Appeal has only the appellate and revisionary jurisdiction.”

Therefore it is the considered view of this court that section 404 of the CPC cannot be considered in isolation of sec 402 and 403 of the CPC, and on the other hand when it is considered together, section 404 of the CPC is clearer, and it empowers this court to vary the orders made under sections 402 and 403 by a magistrate or a high court judge, but it does not say as to how it should be done, but the judgment cited by the respondents that is AG VS Sumathipala’ case their Lordships of the Supreme Court has analyzed and have said that it has to be by way of a revisionary or an appellate procedure.

If that is so then this court has no power to hear and adjudicate this matter, unless this court is presented with an application of revision or appeal. It has been held in *Soysa vs Silva and others (2002 2SLR 235)* that the,

“The Power given to a superior Court by way of revision is wide enough to give it the right to revise any order made by an original Court. Its object is the due administration of justice and the correction of errors, sometimes committed by the Court itself in order to avoid miscarriage of justice.”

Therefore even if the instant application is not an application of revision if the circumstances demand this court can consider this as a application of revision in order for due administration of justice.

But in order to convert this matter into a revision application this court has to have exceptional circumstances, as per the judgments in

- 1) Kadiramanpulle vs. Ceylon Paper Sacks Limited (2001 3SLR 112)
- 2) Dharmarathne and Another vs. Palm Paradise Cabanas LTD. and others (2003 3SLR 25).

But the contention of the accused petitioner is that upon considering the term of imprisonment of 3 years imposed by the learned High Court Judge in January 2018, if he had not filed a petitioner of appeal, he has already served his term of imprisonment, in view of computation of time in the prison which creates an exceptional circumstance in which this court can consider this application as a revision application.

But the second contention of the respondent is that there cannot be a second bail pending appeal application once the Court Appeal assumes jurisdiction upon filling of a petitioner of appeal upon a final judgment.

But it is strenuously urged by the petitioner that there is no bar in the Bail Act to pursue a second bail pending appeal application. But the legality of the second bail pending appeal application can also be considered once this application is considered as an application of revision.

Hence upon consideration of all the submissions made by both parties it is the considered view of this court that taking in to consideration the view held by their Lordships of the Supreme Court in ATTORNEY –

GENERAL AND OTHERS VS SUMATHIPALA (2006) 2 Sri L.R. and the circumstances urged by the accused petitioner the instant application should be converted into a revision application and be heard as an application to based on the order dated 4th July 2019 of the learned High Court Judge.

Hence the objection of the respondents is hereby upheld but the instant application is to be considered as a revision application.

Judge of the Court of Appeal

Neil Iddawala J.

I agree

Judge of the Court of Appeal.