

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

*In the matter of an application for revision
in terms of Article 138 of the Constitution
of the Democratic Socialist Republic of Sri
Lanka*

The Attorney General of the Democratic
Socialist Republic of Sri Lanka
Complainant

Vs.

Court of Appeal
Revision Application No :
CA/ PHC/APN 128/20

Tokhirova Tukhtabanu alias Jesmin

Accused

High Court of Colombo
Case No : HC 182/17

And

Tokhirova Tukhtabanu alias Jesmin
Accused-Appellant

Vs.

The Attorney General of the Democratic
Socialist Republic of Sri Lanka
Complainant-Respondent

And between

Tokhirova Tukhtabanu alis Jesmin

Accused-Appellant-Petitioner

Vs.

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

**Complainant-Respondent-
Respondent**

And now between

Tokhirova Tukhtabanu alis Jesmin

**Accused-Appellant-Petitioner-
Petitioner**

The Attorney General of the Democratic
Socialist Republic of Sri Lanka

**Complainant-Respondent-
Respondent-Respondent**

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Arul Anandam PC with Lakni Silva for the petitioner. Priyani Abeygunawardena, SC for the respondent.
Argued on	:	16.11.2021
Written Submissions on	:	24.11.2021
Decided on	:	07.12.2021

Iddawala – J

The instant petition was filed on 24.09.2020 to revise the order of the Provincial High Court of Colombo in Case No. HC/182/17 dated 14.07.2020 which refused to grant bail pending appeal to the petitioner. The grounds for appeal averred by the petitioner are as follows:

1. The learned High Court Judge has erred in the interpretation of exceptional circumstances
2. The learned High Court Judge has erred in the interpretation of the judgments referred to in the said Order
3. The learned High Court Judge has misconstrued the medical papers annexed to the petition
4. The learned High Court Judge has erred in law in not rejecting objections of the complainant-respondent
5. Petitioner notes that she was unable to contact her lawyers to file this application at the earliest opportunity as the prison officers did not allow to make communication with outsiders due to covid-19

This application concerns the petitioner, an Uzbekistan individual, who has been convicted under section 360C (2) read with section 360C(1)(b) of the Penal Code as amended by the Penal Code (Amendment) Act, No. 16 of 2006 for committing an offence of trafficking on 27.02.2020. Petitioner was sentenced to a term of 7 years imprisonment, a fine of rupees fifty thousand with a default sentence of 10 months and in addition, under section 17 of the Code of Criminal Procedure code, compensation to the victim and a fine if defaulted.

The facts of the case are such that the petitioner has brought a woman from Uzbekistan under the guise of providing her with employment as a babysitter and forcing her to become a sex worker. The petitioner has confiscated the passport of the said victim, thereby affording her no other alternative but to engage in sex work in order to sustain

herself. However, the victim eventually managed to escape, upon which she has lodged a complaint at a Police station. The petitioner was arrested on 19.01.2017 and was convicted on 27.02.2020. Against such conviction, the petitioner filed an appeal. During the pendency of such appeal, an application for bail pending appeal has been filed under section 20(2) of the Bail Act No. 30 of 1997 on 19.05.2020 before the Provincial High Court of the Western Province Holden in Colombo. The said application was refused by the Learned High Court Judge on 14.07.2020. Against the said order, the petitioner has invoked the revisionary jurisdiction of this Court by way of the present application filed on 24.09.2020.

In reference to the time lapse between the delivery of the impugned order dated 14.07.2020 and the filing of the present revision application on 24.09.2020, the President's Counsel appearing for the petitioner referred to the Coronavirus Disease 2019 (COVID-19) (Temporary Provisions) Act No. 17 of 2021, which is in operation for a period of two years commencing from March 1, 2020. Section 2 of the said Act provides for relief in respect of inability to comply with prescribed time periods where it states that

(1) Where any court, tribunal or any other authority established by or under any law is satisfied that, a person was prevented from-

(a) instituting or filing any action, application, appeal or other legal proceeding, as the case may be, within the period prescribed by law for such purpose; or

(b) performing any act which is required by law to be done or performed within a prescribed time period,

due to any COVID - 19 circumstance, it shall be competent for such court, tribunal or any other authority established by or under any law to allow, admit or entertain an action, application, appeal, other proceeding or act, referred to in paragraph (a) or (b), notwithstanding the lapse of the time period prescribed by law for such purpose and subject to the provisions of section 9, the period within which such

person was subject to such COVID - 19 circumstance shall be excluded in calculating the said prescribed time period.

In the subject matter of revisionary applications, the legislature does not provide a specific time bar for the filing of the same whereas; such shall be filed within a reasonable time that would depend on the circumstances of each case. According to the present matter before court, the impugned order of the Learned High Court Judge dates back to 14.07.2020, whereas the revisionary application was filed on 24.09.2020 amounting to a delay of little more than two months that notably comes within the ambit of the exempted time duration provided by the Act of No. 17 of 2021 in calculating the prescribed time bar due to COVID-19 pandemic. Thus, the contention of the President's Counsel appearing for the petitioner as to the reasoned delay in filing the instant revisionary application can be accepted by this Court.

There is a wealth of judicial precedent on the subject of bail pending appeal. In *Muthugala Jayantha Sirisena Muthugala v The Director General of CIABOC CA(PHC) APN 67/20 CA Minute dated 06.07.2021*, this Court carefully analysed the law contained in section 333(3) of the Code of Criminal Procedure and Sections 20(2) and 20(3) of the Bail Act No. 30 of 1997 as well as the concurrent judicial precedent. As such this Court held that the requirement to establish exceptional circumstances to grant bail pending appeal should exist even after the enactment of the Bail Act. The judgement held: *"...it is clearly established that our courts have taken a strong stance that exceptional circumstances should be established in order to release a convict on bail pending appeal, we are bound to be guided and to follow the decisions of the Apex Courts."* This Court further held that when considering the said requirement of exceptional circumstances, each case must be analysed on its own facts.

Hence, the main legal contention to be decide by this Court is whether the petitioner has satisfactorily established exceptional circumstances warranting her release upon bail pending appeal.

Prior to such an examination, this Court notes that the petitioner, in averment 11 of petitioner's written submissions, has averred that in the instant application, the need for establishing exceptional circumstances does not arise. This is a misconception of the

law pertaining to bail pending appeal. The petitioner makes references to Halkandaliya Lekamlage Premalal Jayasekera v Commissioner General of Prisons CA (Writ) Application No. 295/2020 dated 07.09.2020 in which a Member of Parliament was allowed to attend Parliament pending of an appeal filed against a conviction in the case of murder. However, this case has no relevance to the present application before this Court, and the said Judgment does not dispense with the requirement to establishing exceptional circumstances in a case of bail pending appeal. The President's Counsel appearing for the petitioner also referred to Hattuwan Pedige Sugath Karunarathne v Hon. Attorney General SC Appeal 32/2020 SC Minute dated 20.10.2020 cited in The Bar Association Law Journal Vol XXV 2020 in passing during argument and this Court observes that the said Judgment of His Lordship Justice Aluwihare is of no relevance to the present matter in hand.

This Court will now evaluate the exceptional circumstances averred by the petitioner. Before the High Court, the petitioner referred to her children and how in her absence, they are left to neglect. In examining the said submissions, the Learned High Court Judge has carefully analysed the case law precedent on the matter and has determined that they do not amount to exceptional circumstances warranting the grant of bail. This Court has no reason to interfere with such determination. In her petition, the petitioner refers to certain medical conditions and the requirement of psychiatric and other treatments. Upon a perusal of the medical reports submitted in support of the petitioner's contention, it appears that some of the reports annexed belongs to a different individual and not the petitioner. Similarly, the petitioner has filed prescriptions for contraceptives which has no relevance to the purported medical conditions of the petitioner. It is this Court's view that the petitioner has deliberately attempted to mislead the court and to make a mockery of the justice system. However, this is not the only instance in this petition where serious doubts have been cast as to the *uberrima fides* of the petitioner.

The Learned State Counsel brought to the attention of this Court that the petitioner has had a previous conviction pertaining to an incident of similar nature. Thus, the petitioner was convicted on 28.03.2011 under HC Colombo Case No 5187/2010 pursuant to an indictment involving procurement and human trafficking where the

petitioner was sentenced to a total period of nine years. The petitioner appealed against the sentence before the Court of Appeal and as such the sentence was reduced on a plea of leniency. The judgment (C.A. No 81/2011 CA Minute dated 21.10.2015) at page 2 referred to the submissions of the counsel for the petitioner as thus: *“he begs mercy of this Court and submits that being a mother, she had to look after her two children and now that she has realised the consequences of her conduct she will not lead to the same life once she leaves the prison”*

This fact was not revealed by the petitioner. Whilst *“... Any party who misleads the court, misrepresent facts to Court, suppresses material facts from Court or utters falsehood in Court will not be entitled to obtain redress from Court...”* (Lt. Commander Rowan Pathirana v Commodore Dharmasiriwardena & Others (2007) 1 SLR 24), the fact of a previous conviction of a similar nature has a direct impact on deciding whether or not bail should be granted to the petitioner. In Hettige Anuruddha alias Priyankara Hettiarachchige Anuruddha Priyankara Kularatne v Attorney General CA(PHC)APN 166/2017 CA Minute dated 05.12.2018 at page 16, Her Ladyship Justice K. K. Wickremasinghe attributed the existence of a prior conviction on a similar offence to a high risk of absconding.

I have pursued the proceedings and the order of the learned High Court Judge of Colombo and I find no reason to interfere with his order and I find no exceptional circumstances to act in revision.

Accordingly, application is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL