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 and Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

Complainant

Vs.

Court of Appeal Application No: **CPA/32/2021**

High Court Colombo Case No: **HC 6474/2013**

Saruwa Liyanage Sunil,
Polosmiriya,
Maraba,
Akuressa.
(Presently at Welikada Prison)

Accused

And now

Saruwa Liyanage Sunil,
Polosmiriya,
Maraba,
Akuressa.
(Presently at Welikada Prison)

Accused-Petitioner

Vs.

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

Complainant-Respondent

And now between

Saruwa Liyanage Sunil,
Polosmiriya,
Maraba,
Akuressa.
(Presently at Welikada Prison)

Accused-Petitioner-Petitioner

Vs.

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

Complainant-Respondent-Repondent

BEFORE	:	Menaka Wijesundera J. Neil Iddawala J.
COUNSEL	:	Sarath Jayamanne, PC With Darshana Kuruppu, Vineshka Mendis, and Prashan Wickramaratne for the Petitioner M. Tennakoon, DSG for the Respondents.
Argued on	:	02.06.2022
Decided on	:	20.06. 2022

Iddawala – J

This is a revision application filed on 22.02.2021 by the accused-petitioner-petitioner (hereinafter the petitioner) canvassing the order granted by the High Court of Colombo on 06.01.2021 refusing to grant him bail pending appeal.

The petitioner was convicted of statutory rape under Sections 364(2), 364(2)(e) of the Penal Code by order dated 17.01.2020. He was sentenced to a term of fifteen years of Rigorous Imprisonment and a fine of 25,000/- (default of 1 year of Rigorous Imprisonment) and compensation of Rs. 250,000/- to the Prosecutrix which carried a default sentence of two years Rigorous Imprisonment. Against such conviction and sentence, petitioner has filed an appeal. Meanwhile, the petitioner filed an application for bail pending appeal, which the High Court refused on 06.01.2021. Aggrieved by such refusal, the petitioner has filed the instant application, invoking the revisionary jurisdiction of the Court of Appeal.

In the confines of the present revision application, this Court shall limit itself to inquiring into whether the impugned order is deemed illegal so as to warrant the invocation of Article 138 of the Constitution. Any other contentions presented by the learned President's Counsel for the petitioner on discrepancies in evidence presented by the complainant-respondent, corroboration of evidence, and any other discussion on merits of the case will have to be addressed in the main appeal against the original conviction. In support of such a construction, this Court would like to echo the words of His Lordship Justice Sisira de Abrew in **Sulaiman Lebbe Mohamad Uvais v Director General, The Commission to Investigate Allegations of Bribery and Corruption** CA/PHC/APN/ 86/2010 CA Minute dated 3.2.2011: "*Although the learned trial Judge rejected the evidence of the complainant at page 14 of the judgment, he, at page 24, 25,*

and 26 accepted his evidence. Whether the above observation is sufficient to vitiate the conviction or not must be decided by the Court of Appeal hearing the main appeal. Even if this is considered to be a misdirection Court of Appeal hearing the main appeal is empowered to affirm the conviction under provisos to Section 334 of the Criminal Procedure Code and Article 138 of the Constitution after considering the evidence of the case. The Court hearing an application to release an accused person on bail pending appeal should not pre-empt the hearing of the appeal. This view is supported by the judgment of the Supreme Court in Attorney General Vs Ediriweera [2006] BLR page 12 wherein Justice Thilakawardene remarked thus: "In any event our Courts have held consistently, that in an application for bail after conviction, the appellate Court should not pre-empt the hearing of the substantive appeal. For these reasons, I reject the above contention of the learned PC.".

Instead, this Court will focus on determining whether the petitioner has sufficiently dispensed the burden to invoke the revisionary jurisdiction of the Court of Appeal against the impugned order of the learned High Court judge. Prominent legal authorities have highlighted the crucial test of exceptional circumstances as a precondition to invoking the revisionary jurisdiction of the Court. The Court observed in **Ediriweera v. The Attorney General** (2006) 1 SLR 25 that, *"It is a settled principle that the release of a prisoner on bail pending an appeal to the Court of Criminal Appeal will only be granted in exceptional circumstances."* This was reiterated in **Ramu Thamotharampillai v. The Attorney General** (2004) 3 SLR 180, where the Court affirmed the principle that the Court would require the appellant to show the existence of exceptional circumstances to warrant the grant of bail pending appeal. However, which facts would satisfy the threshold of exceptionality must be construed within the confines of the factual matrix of the case concerned. Therefore, it is a subjective assessment, contingent on the peculiar facts of each case. The

instant application deals with a conviction of statutory rape where a term of fifteen-year Rigorous Imprisonment has been imposed by the High Court. Within such a context, it is incumbent upon this Court to determine whether the circumstances averred by the petitioner satisfactorily dispense the threshold of exceptionality required.

The exceptional circumstances averred by the petitioner are contained in paragraph 7 of the petition. They are succinctly that there is a reasonable prospect of petitioner's main appeal being allowed and as such, the delay in hearing petitioner's appeal will render any judgment in his favour futile; suicidal thoughts and mental instability of petitioner's child; petitioner being the sole breadwinner of the family; and his businesses and employs being negatively impacted by his imprisonment; the petitioner being present at Court on all dates of trial and will not abscond; and the petitioner being more susceptible to COVID-19 when at prison. These grounds were similar to the grounds raised before the High Court (Vide page 61 of the Brief). Whilst the said grounds were averred in the petition of the instant application, the same were not relied on during oral submissions. The learned President's Counsel representing the petitioner confined his submissions to the admissibility of a video recorded evidence of the child prosecutrix as envisioned by Section 163A and Section 163A (5) of the Evidence Ordinance as amended by Act No. 32 of 1999. However, as held by **Sulaiman Lebbe Case** (supra), these are matters forming the crux of the appeal filed by the petitioner and are to be determined by the Court sitting in appeal. Hence, this Court will refrain from passing judgment on the material facts pertinent to the conviction and sentence of the petitioner and will limit its determination on whether the impugned order of the High Court dated 06.01.2021 is illegal or irregular to the extent of shocking the conscience of this Court.

In the impugned order the learned High Court judge carefully analyses the submission on the health condition of the petitioner's child and holds the

following: "එම නිසා වෛද්‍ය වාර්තා අනුව රෝගියා හට සත්‍ය වශයෙන්ම එවැනි සියදිවි හානි කර ගැනීමේ අදහසක් තිබුණේද යන්න සම්බන්ධයෙන් මෙම වෛද්‍ය වාර්තා ඇසුරෙන් නිගමනයකට ඒමට හැකියාවක් නැත." (Vide page 61 of the Brief). On a perusal of the said medical records and the impugned order, this Court finds no reason to interfere with the reasoning of the learned High Court judge who held the purported medical condition of the petitioner's child as not amounting to an exceptional circumstance. Similarly, the impugned order has dismissed the submissions on the petitioner's status as the sole breadwinner of the family and the negative repercussions of his incarceration on his employees. I see no reason to interfere with such dismissal as such facts carry no exceptionality. The reference to the implications of COVID 19 on the petitioner is also dismissed as this Court has held time and again on previous occasions.

Mapping out the expanse of the revisionary jurisdiction of this Court under Article 138, it was held in ***Bank of Ceylon v. Kaleel and others*** *(2004) 1 SLR 284* as follows:

> *"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."* (page 284)

Similarly, it was held in ***Wijesinghe Vs Tharmaratnam*** *(Sri Kantha's LR VOL IV 47), "Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of court." (*page 49)

Hence, it is the considered view of this Court that the reasons averred by the petitioner, do not sufficiently establish that the impugned order by the learned High Court judge, is an error, defect, or irregularity which has

prejudiced the petitioner's substantial rights or occasioned a failure of justice as per Article 138 of the Constitution. They do not point towards any illegal, irrational, capricious or arbitrary decision on the part of the learned High Court Judge, and the reasons averred fail to satisfy the test of exceptional circumstances.

When considering the application for revision by the petitioner, it must be must be taken together with the fact that the petitioner has been convicted on a severe charge of statutory rape with a significant sentence of fifteen years of Rigorous Imprisonment, and if the impugned order is reversed and the petitioner enlarged on bail, due to the severity of the offence and the level of penalty, there is a risk of the petitioner absconding. The risk of absconding by the petitioner puts more weight on satisfying the court as to the existence of exceptional circumstances. As Vythialingan J held in **Thamotharampillai** (above),

> "*When the offence is grave and the sentence is heavy the temptation to abscond in order to avoid serving the sentence in the event of his appeal failing would of course be great. In such cases the court would still require the appellant to show the existence of exceptional circumstances to warrant the grant of bail pending appeal*." (page 190-191)

In any case, roughly two years have passed since the conviction on 17.01.2020, and the petitioner's appeal against the conviction is fixed for argument on 12th of September 2022. When viewed within the ordinary manner in which Courts function in Sri Lanka and the time spent to conclude proceedings, the petitioner has failed to satisfy the Court that his circumstances with relation to delay are unreasonable to the extent of exceptionality. This Court cannot deem such a period of time oppressive so as to constitute a serious miscarriage of justice. Hence, it can be

surmised that there is no significant delay in hearing the petitioner's appeal amounting to an exceptional circumstance.

It is pertinent at this point to also note the proviso to Article 138(1) of the Constitution:

> "*Provided that no judgement, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice."*

In light of the above, it is the considered opinion of this Court that the petitioner has failed to establish exceptional circumstances which justifies the invocation of the discretionary revisionary jurisdiction of this Court. The petitioner has not been able to establish that, as Per Article 138 of the Constitution that his substantial rights have been prejudiced, nor that the impugned order of the learned High Court Judge is manifestly erroneous so as to occasion a failure of justice. Thus, the petitioner has not been able to establish how the impugned order is a miscarriage of justice that shocks the conscience of the Court.

Application is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL