**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 read with Article 146 of the Constitution and Sections 364 and 365 of the Criminal Procedure Act No 15 of 1979, as amended.

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

**Court of Appeal Case No: CA PHC (APN) 135/21** **Complainant**
**High Court (Trial-at-Bar)** **vs.**
**Case No: HC/TAB/2446/2021**

1. Perpetual Treasuries Limited
2. Sandresh Ravindra Karunanayake
3. Lakshman Arjuna Mahendran
4. Arjun Joseph Aloysius
5. Palisena Appuhamilage Don Kasun Oshadee Palisena
6. Geoffrey Joseph Aloysius
7. Chitta Ranjan Hulugalla
8. Muthurajah Surendren
9. Ajahn Gardiye Punchihewa
10. Badugoda Hewa Indika Saman Kumara

**Accused**

**And Now Between**

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

**Complainant-Petitioner**

**vs.**

1. Perpetual Treasuries Limited
2. Sandresh Ravindra Karunanayake
3. Lakshman Arjuna Mahendran
4. Arjun Joseph Aloysius
5. Palisena Appuhamilage Don Kasun Oshadee Palisena
6. Geoffrey Joseph Aloysius
7. Chitta Ranjan Hulugalla
8. Muthurajah Surendren
9. Ajahn Gardiye Punchihewa
10. Badugoda Hewa Indika Saman Kumara

**Accused-Respondents**

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| **Before:** | **N. Bandula Karunarathna J.**<br>**&**<br>**Dr. Ruwan Fernando J.**<br>**&**<br>**Sampath B. Abayakoon J.** |
| **Counsel**: | Priyantha Nawana SASG, PC with Lakmini Girihagama SSC, Udara Karunathilake SC and Chathuri Wijesuriya SC for the complainant-petitioner.<br><br>Gamini Marapana PC, Navin Marapana PC, Kaushalya AAL, U. Wickramasinghe AAL, Saumya Hettiarachchi for the 1st, 4th, 5th, 6th and 8th accused-respondents instructed by Sanath Wijewardana AAL.<br><br>Faisz Mustapha PC, Faizer Mustapha Marker AAL, Shavendra Fernando PC, Jeewantha Jayathilake AAL, Ralitha Amarasena AAL for the 2nd accused-respondent instructed by Paul Rathnayaka Associates.<br><br>Romesh de Silva PC, Niran Anketell AAL, Hafeel Fariz AAL, Sahan Kulathunga AAL and Vishwaka Peiris AAL for the 7th accused-respondent instructed by Rasika Wellappili.<br><br>Niranjan Irriyegolla AAL and Mahesh Senarathna AAL for the 9th accused-respondent.<br><br>Manoj Bandara AAL, Hasith Gamage AAL and Thiyagaraj Rushani AAL for the 10th accused-respondent instructed by Sudath Perera Associates. |
| **Written Submissions:** | By the complainant-petitioner on 09.03.2022<br><br>By the 1st, 4th, 5th, 6th and 8th accused-respondents on 16.03.2022<br><br>By the 2nd accused-respondent on 14.03.2022<br><br>By the 9th accused-respondent on 09.03.2022<br><br>By the 10th accused-respondent on 09.03.2022<br><br>By the 7th accused-respondent on 16.03.2022 |
| **Argued on :** | 09.03.2022 |
| **Decided on :** | **07.04.2022** |

**N. Bandula Karunarathna J.**

This revision application has been filed by Attorney General, the complainant-petitioner (hereinafter sometimes referred to as the "petitioner") seeking to revise order dated 06.12.2021 of the High Court at Bar in case number HC TAB No. 2446/2021. By the said order, the learned judges of the High Court at Bar upheld certain preliminary objections raised on behalf of the accused-respondents and held that several charges contained in the 'information' which is in lieu of an indictment served on the accused-respondents cannot be maintained in law and therefore discharged all the accused from the impugned charges.

When this application was listed before this Court for support, a preliminary objection was raised on behalf of the accused-respondents that this Court lacked jurisdiction to hear and determine this revision application in that the petitioner, had failed to exercise its statutory right of appeal to the Supreme Court in terms of section 451 (3) and (4) (as amended by Act No.21 of 1988) read with section 331 of the Code of Criminal Procedure Act and would not be entitled in terms of the law, to invoke the revisionary jurisdiction of this Court in terms of Article 138 of the Constitution.

The petitioner (Attorney General) states that the accused-respondents (respondents) stood as accused persons before the High Court of Colombo to be tried at a trial-at-Bar in case number HC/TAB/ 2446/2021 for a series of offences. The offences, which the respondents were charged, with, arose in the course of transactions in relation to the issuance of Treasury bonds at the Central Bank of Sri Lanka (CBSL) between 01.02.2015 and 31.03.2016. The first complaint on the matter concerning the irregularities in the issuance of Treasury bonds was first made on 25.11.2016 by Dr. Indrajith Coomaraswamy, who held office of the Governor of CBSL from 04.07.2016 to 31.12.2019.

The petitioner states that a criminal investigation commenced in consequence of the complaint of the then Governor and the matter was inquired into by a Commission of Inquiry (CoI) appointed in terms of the Commission of Inquiry Act No 17 of 1949, as amended by Act No 16 of 2008, by His Excellency the then President of Sri Lanka on receipt of various complaints and concerns that there had been serious irregularities in the issuance of Treasury bonds during the period from 01.02.2015 to 31.03.2016, causing economic loss to the government and to the public.

The criminal investigation and the inquiry proceedings of the Commission had disclosed the commission of a series of offences under the penal laws of the land; other breaches of the statutes including the Monetary Law Act No 58 of 1949, as amended (MLA); the Registered Stocks and Securities Ordinance No 07 of 1937, as amended by Act Nos 32 of 1995 and 02 of 2004 (RSSO); and, regulations made under the RSSO.

The Petitioner states that, consequent to the collection of evidence and the material in the course of the CoI and the police investigations in relation to Treasury bond auctions, the petitioner took steps to prosecute the offenders who were implicated in committing offences under the Penal Code and the RSSO in three cases respecting three different time periods. In relation to the specific Treasury bond auction that took place on 31.03.2016, the petitioner exhibited information dated 15.02.2021 seeking the appointment of three judges of the High Court to try the respondents above named at a trial-at-Bar, in terms of section 450 (4) of the Code of Criminal Procedure Act No 15 of 1979, as amended (CCPA). The petitioner further states that, in pursuance of the information exhibited, the Chief Justice appointed a three- judge panel of the High Court to try

the respondents at a Trial-at-Bar on 18.02.2021 consequent to the request made by the petitioner to that effect.

The charges against the respondents were filed before Court constituted as a High Court-at-Bar in pursuance of the information dated 15.02.2021 exhibited by the petitioner. The petitioner states that Treasury bonds, being government securities, are transferable interest-bearing instruments, which were initially issued in scrip form or by means of written certificates and were charged upon and payable out of the consolidated fund of the Government of Sri Lanka in terms of the RSSO. Treasury bonds are, at present, issued in scripless form in consequence of amendments made to the original Registered Stock and Securities Ordinance No 07 of 1937; and, accounts, as applicable, are maintained electronically at CBSL for facilitation of the trade in Treasury bonds with the expansion of electronic transactions consistent with technological advancements. The Treasury bond, being a government security, is issued through a process of auction to primary dealers, which include commercial banks; companies or other persons appointed by the Monetary Board as primary dealers having regard to the interests of the national economy in terms of the RSSO read with MLA.

The Central Bank has the sole and the exclusive power of appointing primary dealers for the trading in Treasury bonds with the authority of regulating, supervising and monitoring such primary dealers with respect to their transactions in Treasury bonds in order to ensure ethical and orderly behaviour of the market participants.

A primary dealer is, accordingly, subject to a code of conduct for the promotion and development of an orderly market for scripless Treasury bonds under the provisions of the RSSO and its regulations and any breach of such conduct that impinges upon market manipulation and insider-dealings is criminalized in terms of section 56 A of the RSSO. The petitioner states that the 1st accused-respondent (the 1st respondent) is a company registered under the Companies Act No. 07 of 2007, the 4th respondent is a beneficial owner of the 1st respondent -company and a director of the holding company of the 1st respondent -company while the 6th respondent; the 7th respondent; the 8th respondent; and, the 9th respondent were directors of the 1st respondent-company; and, the 5th respondent functioned as its Chief Executive Officer (CEO) during the period of time relevant to the charges served against them. The 1st respondent-company, pursuant to its application dated 17.10.2012 was appointed as a primary dealer on 01.10.2013 to engage in the trade of treasury bills and treasury bonds.

The petitioner states that the charges were served on the respondents on 25.05.2021 along with the material including those of witness-statements and documents in 60 volumes consisting of over 23,000 pages by the High Court for the respondents to be tried at a trial-at-Bar. The petitioner further states that the petitioner either supplemented or discovered the documents as and when the respondents informed court that some documents were either missing or they could not be located in the volumes of dossiers. After the service of charges on the respondents along with the documents, the case was called before the High Court-at-Bar from time to time. An application was made by the prosecution on 01.04.2021 for an inquiry in terms of section 450 (8) of the CCPA to try the 3rd and the 9th respondents in absentia who had, by then, been reported to have left the island.

The High Court-at-Bar allowed the application and fixed the inquiry to try them (the 3rd and the 9th accused) in absentia, for 29.04.2021. The petitioner states that the High Court-at-Bar, after the

inquiry, ordered that the trial against the 3rd and the 9th respondents to be held in absentia after being satisfied that they had left the island. The petitioner states that the prosecution, on 11.10.2021, took pre-trial steps including the service of notice in terms of section 7 of the Evidence (Special provisions) Act No 14 of 1995. The respondents participated at pre-trial steps and obtained access to the computers and computer systems, in respect of which, the prosecution gave notice and complied with all orders made by the High Court-at-Bar in that behalf. When the case was called on 25.10.2021, the trial was fixed from 6th-10th December 2021 and 24th-28th January 2022. Court, accordingly, issued summons on prosecution witness Nos (1), (3), (4), (8) and (19). Learned Counsel did not raise any objection based on the charges or on any other ground and did not resist the motion of the prosecution motion to summon witnesses for the trial fixed from 06th-12th December 2021.

The case was called on a motion filed by the prosecution with notice to the respondents in order to seek an order from court to record the evidence of Dr. Coomaraswamy, the then Governor of CBSL from 04.07.2016 to 31.12.2019 and the first prosecution witness, on an audio-visual link as that witness was reported to be resident overseas. The petitioner states that learned counsel objected only to the application of the prosecution and insisted on the physical presence of Dr. Coomaraswamy to testify. The High Court-at-Bar, after hearing submissions of counsel, reserved its order for 23.11.2021. The petitioner states that the court pronounced its order on 23.11.2021 refusing that application by a majority decision to record the evidence of Dr. Coomaraswamy on a contemporaneous audio-visual link. Learned Counsel for the 1st, the 4th, the 5th, the 6th, and the 8th Respondents, thereupon, informed court of his intent to raise an objection only on the alleged violation of the right to a fair trial as money lying in the account of the 1st respondent-company had been frozen by CBSL.

The High Court-at-Bar, thereupon, fixed the matter for inquiry only into that objection of the learned counsel on 01.12.2021. The petitioner states that the High Court-at-Bar, heard submissions of the learned counsel for the 1st, the 4th, the 5th, the 6th and the 8th respondents and the submissions in response by the counsel for the prosecution. The 7th respondent, thereupon, raised an objection without any notice to the prosecution in advance, on the basis that the 1st respondent-company, being an incorporated entity, could not have been charged under the Offences Against the Public Property Act No 12 of 1982, as amended (PPA); and, submitted that the 7th respondent, in consequence, could not be charged in terms of count number 8. The learned counsel for the other respondents, thereupon, chose to associate themselves with the position advanced by the learned counsel for the 7th respondent. The learned counsel for the prosecution replied in opposition to the objections raised against the maintainability of charges under the PPA.

The High Court-at-Bar, upon conclusion of the submissions by counsel, fixed the matter for order and trial on 06.12.2021. The High Court-at-Bar pronounced its order upholding the objections raised by learned counsel for the 7th respondent and other respondents and held that a company could not be charged under the PPA for committing offences in respect of public property. The High Court-at-Bar further proceeded to discharge the 1st to 10th respondents from counts 1 to -11.

The petitioner states that the said order is manifestly erroneous making the petitioner entitled to seek the intervention of this Court *ex debito justitiae* in terms of Article 138 read with Article 146 of the constitution of the Republic of Sri Lanka. The said order has the inefficacious effect of

shocking the conscience of court owing to its *ex-facie* illegality and, also on its adverse impacts that could have on the administration of criminal justice system *vis-a vis* corporate entities under the PPA. The only remedy available to the petitioner, is to seek a review of the impugned order by way of revision before this Court as a party is not vested with a statutory right of appeal to challenge an order of this nature made in the course of proceedings prior to the trial within the meaning of section 451 (3) of the CCPA.

The grounds upon which the intervention by way of revision is sought, constitute exceptional circumstances of manifest illegality in the impugned order for the petitioner to invoke the extra-ordinary jurisdiction of this Court in revision as provided for constitutionally and statutorily. The petitioner states that, in the absence of a remedy in the form of a statutorily available appeal, the invocation of the revisionary jurisdiction of this Court is the only effective and efficient remedy conceivable under the law, which is expeditiously available to the petitioner.

In the circumstances, being aggrieved by the order of the High Court-at-Bar, the petitioner, seeks to invoke the jurisdiction of this Court by way of revision in terms of Article 138 read with Article 146 of the Constitution on the following grounds;

(i) The said order is contrary to the law;

(ii) The said order is replete with illegality as it states that the PPA is a separate law even though it is applicable to 'some' offences under the Penal Code when all penal offences under the PPA are only referable to the Penal Code;

(iii) The said order is manifestly erroneous as it failed to appreciate that the offences that are found in PPA are the self-same offences with the self-same constituent elements of the offences as defined in the Penal Code;

(iv) The said order is illegal as it deliberately and arbitrarily disregarded the fact that the PPA had changed, altered or amended only the penal section of the relevant provision of the Penal Code dealing with each offence relating to the property under the Penal Code;

(v) The said order is impermissibly tainted with unlawfulness as it unreasonably failed to recognize the real effect of the PPA, which was to enhance the punishment for the relevant offence when committed on the property belonging to the government (public property) as defined in terms of section 12 of the PPA;

(vi) The said order is clearly devoid of legal authority as it restricts the applicability of the PPA only to the officials of government institutions including those of departments and to natural persons being such other average men and women;

(vii) The said order suffers from impermissible irrationality as it has the effect of immunizing corporate entities against offending on public property;

(viii) The said order is invalid as it fails to consider that the reference to the PPA in terms of the charges is only to give notice to the respondents that the relevant charge carries an

enhanced sentence if the specific proprietary aspect, being the property belonging to the government, is established on evidentiary proof;

(ix) The said order is in obvious error as it fails to reason-out the exclusion of the definition to 'person' under section 10 of the Penal Code particularly when every section of the PPA commences with any person...

(x) The said order is unjustifiably wrong as it arbitrarily disregards the application of the definition assigned to 'person' in terms of section 2 of the Interpretation Ordinance, as amended;

(xi) The said order is manifestly erroneous in law as it restricted the 'person' only to include such category of persons referred to in sub-paragraph (vi) above, without any rational or legal basis; and, without making reference to either of legal provisions, which define 'person' under the law;

(xii) The said order is wrong as it fails to appreciate the distinction between the imputation of liability and the imposition of the sentence as the former is not dependent on the latter especially when a body corporate is charged before a court of law;

(xiii) The said order is bad in law as the learned Judges have abdicated their power of interpreting a penal law purposively in compliance with the explicit definition to the term 'person' together with the rules of interpretation; and, instead surrendered their judicial power to an obsolete Indian judgment, which, in any event, now stands overruled by subsequent jurisprudence;

(xiv) The said order is irreconcilable as the learned Judges had not ruled that the offence of criminal misappropriation, in its abstract form under the Penal Code, was not sustainable *vis-à-vis* a body corporate especially when there was neither challenge nor objection to such a charge by the defence;

(xv) The said order is invalid in law as the learned Judges failed to appreciate that charges under the Penal Code could still have sustained after a deletion of the reference to the PPA;

(xvi) The said order, if permitted to stand, would irretrievably offer immunity to body corporates to commit offences against public property, which is against the rule of law and the public policy of the state;

(xvii) The said order is infested with the inefficacious scenario of stimulating the incorporation of body corporates to be used as the tool and modus operandi of committing offences as defined in the PPA against the public property; and,

(xviii) The said order deprived the prosecution of its legitimate expectation of presenting evidence to determine facts in issue especially in relation to the lifting of corporate veil

considering the serious criminal charges, with which, the 1st respondent-company was charged, in which event, the issue on impossibility of sentencing a corporate body would not have arisen.

The petitioner states that the said order *inter alia* is pertinently bad in law in as much as the learned Judges have proceeded to discharge the respondents of counts 1 to 11 in breach of specific provisions of the criminal procedure in view of the reasons given below:

(i) The said order is impermissibly erroneous as the learned Judges erred in law in failing to consider *ex-mero motu* powers of court and amend the charges in the exercise of powers of court under section 167 of the CCPA;

(ii) The said order is manifestly devoid of attributes of a judicial pronouncement as learned Judges erred in law in failing to give reasons as to why they did not exercise the powers of court under section 167;

(iii) The said order is in violation of rules of natural justice as the learned Judges did not afford the opportunity to the petitioner to invoke section 167 of the CCPA and amend the charges in breach of the cursus curiae of court; and,

(iv) The learned Judges erred in law in failing to give effect to statutory provisions in criminal procedure particularly when there is a sacrosanct duty to uphold them by learned Judges presiding a criminal trial.

The petitioner says that the matters urged in the foregoing two paragraphs constitute exceptional grounds and questions of law warranting the intervention of this Court in the exercise of powers of court under the CCPA and the Constitution to rectify the series of errors of law committed by the learned Judges presiding a trial-at-Bar, over matters of public and national importance, which have not, thus far, litigated in the criminal justice system under the applicable laws referred to above.

Unless and until the said order is either revised and set-aside, grave prejudice and injustice will be caused to the administration of criminal justice, in general; and, to the prosecution, in particular, in this case and in respect of two other cases where all or some of the respondents, along with others, are being prosecuted on identical charges in case numbers HC/TAB/2445/2021 and PTB/01/05/2019, trials of which, are also to be fixed shortly. The petitioner further says that circumstances set-out above *ex debito justitae* invest with the petitioner the need to seek an interim order staying further proceedings of the case number HC/TAB/2446/2021 as the impugned order of the court dated 06.12.2021 made prior to the trial has the ill-effect of invalidating as much as eleven charges against the respondents without lawful justification as averred above.

Unless further proceedings are stayed by way of an interim order issued by this Court, the prosecutions will encounter the inefficacious situation of complying with the impugned order of the High Court-at-Bar, which is tainted with a series of illegalities, causing grave prejudice and injustice to the prosecution case, when the case is called on next date. The learned President's Counsel for the petitioner submitted that the extraordinary powers of revision, this court is ordained by Article 138 of the Constitution, is distinct in character. Such powers of revision are

exercisable by this Court for correction of all errors of law and fact specially to avert miscarriage of justice.

The powers of revision have been exercised by appellate courts irrespective of the fact that an appeal was available or not. This was decided by Bonser CJ in Ranasinghe v Henry 1 NLR 303. The learned counsel for the petitioner says that this position has been followed for well over 125 years without any aberration even in cases where the right of appeal was available. It was exercised in some of the cases and exercised unsuccessfully in some other cases (Potman vs IP, Dodangoda 74 NLR 45).

In Elangakoon vs OIC, Eppawala 2007 (1) SLR 398, considered all relevant principles relating to the exercise of revisionary powers of court and recognized the absence of another remedy as an undeniable basis for a party to invoke the revisionary jurisdiction of the Court of Appeal.

The learned Senior ASG further submitted that the Supreme Court, dealing with a case where the right of appeal is given to the Supreme Court against a judgement of the Provincial High Court in the exercise of its appellate jurisdiction in terms of section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990, held as follows in Wijesiri Gunawardane and Others vs Muthukumarana and Others [SC Appeal No 111/2015; 113/2015; and, 114/2015, SC Minutes of 27 May 2020]).

> "For the reasons set out in this judgement the said question of law is answered as follow: Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended, does not oust the revisionary jurisdiction of the Court of Appeal in respect of decisions made by a Provincial High Court exercising its appellate powers. Therefore, the revisionary jurisdiction of the Court of Appeal referred to in Article 138 of the Constitution of the Republic of Sri Lanka can be invoked in order to canvass a decision made by a Provincial High Court exercising its appellate powers."

It was the contention of the counsel for the petitioner, Attorney General that the Supreme Court, after considering legal principles in the context of almost all judicial precedents on the point of law raised before it, stated the law very clearly that the jurisdiction of the Court of Appeal, as vested in terms of Article 138 of the Constitution, does not stand ousted merely because the statutory right of appeal is given to the Supreme Court. The Supreme Court by taking the view that the argument on Section 9 of High Court of the Provinces (Special Provisions) Act No 19 of 1990 Act has vested the appellate power in the Supreme Court, thereby completely ousting the revisionary jurisdiction of the Court of Appeal in respect of such matters, as advanced by the learned counsel for the respondents in the instant case, is premised on the assumption that the revisionary jurisdiction and the appellate jurisdiction are one and the same.

It is only if the former is a subset of the latter, could the taking away of the appellate power results in automatically suspending the revisionary powers. However, he further argued that the court negated this argument and held that, historically, it has been the opinion of our Courts that the revisionary jurisdiction is distinct from appellate jurisdiction. One basic distinction would be that while the appellate rights are statutory, the exercise of revisionary power is discretionary. Although revisionary jurisdiction shares characteristics with the appellate jurisdiction, they are not one and the same.

The next question considered by the Supreme Court in Wijesiri Gunawardane case (*supra)* is whether the removal of one jurisdiction could result in the negation of the other? And posed a question of law 'whether the express provision of the right of appeal ousts the revisionary jurisdiction of the Court of Appeal'. The Supreme Court, having considered the historical development of the appellate and revisionary jurisdiction has concluded that our courts have considered these two jurisdictions to be complementary to each other and not necessarily antagonistic. This is amply demonstrated by the tendency of the courts to allow revisionary applications irrespective of the right of appeal.

The learned counsel for the petitioner further says that the Supreme Court went on further and stated that the existence of right of appeal does not uniformly and blankly result in undermining the revisionary jurisdiction. Having recourse to an appeal does not *ipso facto* act as an ouster of the revisionary jurisdiction. On the contrary, it is the court's prerogative to decide, at its discretion, to refuse a revisionary application where it appears that the existence of a parallel right of appeal does not give rise to an exceptional circumstance. Thus, where these jurisdictions are separate but complementary to each other, an express provision of right of appeal does not result in ousting the revisionary jurisdiction.

Even when one assumes, without conceding, that there is a right of appeal for the petitioner under section 451 (3) of the CCPA, the above precedent clearly lays down that it still does not exclude the petitioner from invoking the revisionary jurisdiction of the Court of Appeal. The learned counsel for the petitioner submitted that the Supreme Court finally held that nothing less than an express removal of these powers would be required to achieve such a result. Therefore, section 451 (3) cannot be said to have ousted the revisionary jurisdiction of the Court of Appeal being a power vested by the Constitution since section 451 (3) does not contain any express provision for such ouster. The learned Senior ASG argued that the above contention of the respondents does not hold any merit. The ratio decided in the above case is clearly in favour of the petitioner-Attorney-General to take cognizance of this application for revision in light of the following legal positions:

i. Firstly, there is no right of appeal under Section 451 (3) of CCPA because the impugned order was not made ' at a trial'; and,

ii. Secondly, even if the appellate power is vested with the Supreme Court, the revisionary jurisdiction of this Court is not ousted.

Therefore, it was submitted on behalf of the petitioner that the jurisdictional objections raised by learned counsel on behalf the respondents are without merit in light of the above legal reasoning as they do not have a legal basis to prevent the Court of Appeal from entertaining the application of the Attorney General for revision and considering the matters for the grant of the relief sought. The petitioner, in the circumstances, moves that this Court takes up the application for notice as it involves critically important questions of law on the imputation of criminal liability on an incorporated legal entity of a company for offences under the Public Property Act.

The petitioner further moves that the facts of this case present a factual and legal basis for this Court to act *ex mero motu* and issue notice on respondents and fix the matter for support for

interim relief in view of the urgency involved as the trial in HC/ TAB Case No 2446/2021 has been fixed for 27.04.2022.

The preliminary objection raised in the instant matter by Mr. Romesh De Silva PC for the 7th accused-respondent deals with the lack of power of the Attorney General, to file a revision application and a proxy in relation to such application before the Court of Appeal.

The learned President's Counsel for the 7th respondent submitted that the application for revision must be dismissed in *limine* for the following grounds;

(i) The Attorney General not being a corporation or legal person, cannot have and maintain this application and invoke the revisionary jurisdiction of this Court;

(ii) The Attorney General is an office which is a creature of statute. He must act within the powers granted to him by statute. He is not empowered by law to file the instant application;

(iii) There is no provision for the Attorney General to grant a proxy to an Attorney at Law to file an application for revision;

(iv) The only ground urged for this court to entertain the application for revision is that there is no appeal from the impugned Order. However, there is an appeal available in law and therefore the application for revision must be dismissed.

(v) The application for revision has to be filed in the Supreme Court and not in the Court of Appeal.

(vi) The party seeking revision is not an original party in the lower court and therefore cannot make an application for revision.

The learned President's Counsel for the 7th respondent argued that there is no right given to the Attorney General to institute a revision application. In these circumstances the Attorney General has no power to file an application for revision. The Attorney General has not said under what law he has the power to file an application for revision. The counsel further argued that as the Attorney General has no power to file an application for revision and thus the application must be dismissed in *limine*. Also, in terms of section 15 of the Judicature Act, the Attorney General is given specific power to appeal.

The other argument raised for the 7th respondent is that the Attorney General appears on his own and unless in exceptional circumstances, cannot file a proxy. In this case the incumbent Attorney General has stated his own name with his office and filed a proxy. This proxy is fatally irregular and the learned President's Counsel further states that on the face of the proxy, it is given by the incumbent holder of the office, Hon. Sanjay Rajaratnam PC.

The section 393(4) of the Criminal Procedure Code which states that the Attorney General can appoint a state counsel or an attorney at law to conduct a prosecution. In the cases of sanctioning appeals from acquittals, like in the case of *nolle prosequi*, the Attorney General must personally

make such decision under section 401 of the Criminal Procedure Code. The Attorney General does not file a proxy in criminal appeals filed by the Attorney General.

The Attorney General appears in a prosecution either by himself or through a nominated Attorney at law who may or may not be an officer of the Attorney General's Department. However, there is no question of filing proxy. It is my view that there is no provision in the criminal procedure code as well as in the civil procedure code to prohibit filing a proxy by the Attorney General. It was the practice in our Courts to file a proxy whenever necessary on behalf of the Hon Attorney General.

When considering this objection raised by the 7th respondent it is important to note section 27 of the Civil Procedure Code. Section 27(1) of the Civil Procedure Code contemplates the filing of a proxy which sets out the ingredients of a proxy. However, section 27(3) states that "The Attorney General may appoint a registered attorney to act especially in any particular case or to act generally on behalf of the state."

It is important to note that even in that matter, there is no question of filing a proxy. The Attorney General has the power to act by himself or through a registered attorney. There is no proxy filed in a fundamental right case when the Attorney General is named as a party to the proceedings in terms of the Constitution and the Rules of the Supreme Court. Proxies are filed on behalf of government functionaries or public officials, and law officers of the Attorney General appear on behalf of such public officers or ministers on the instructions of the proxy holder.

However, when the Attorney General appears in any case there is no question of a proxy. He can appear personally or could nominate an Attorney-at-Law to appear on his behalf. Again, there is no question of proxy.

It was stated on behalf of the 7th respondent says that the Attorney General cannot file a revision application and this application for revision has to be dismissed because the Attorney General has appeared as a normal litigant by filing a proxy of an Attorney. Further, it was argued that this is a dangerous precedent and if allowed would require the Attorney General to file proxies in all cases. If this application is allowed objections would be taken in the Supreme Court in all fundamental rights' cases when the Attorney General appears without proxy. Furthermore, objections may be even taken in other matters when a State Counsel appears on behalf of the Attorney General without proxy.

The Learned Counsel for the 7th respondent submits that this is an important question of law. It is his submission that the Attorney General cannot file a revision application. However, even if he could have, he should have filed the application for revision in his name as a suitor but without a proxy.

It is my view, that by filling the proxy on behalf of the Attorney General by the Attorney General himself he has not violated any written law and therefore, it should not be considered as fatal by filing the proxy on behalf of the Attorney General by Hon. Sanjaya Rajarathnam himself in the present case. Attorney General has a right to sue and be sued.

On behalf of all the respondents it was argued that the Court of Appeal lacked jurisdiction to hear and determine this application, in as much as the State, having failed to exercise its statutory right of Appeal to the Supreme Court, in terms of section 451 (3) and (4) (as amended by Act No.21 of 1988) read with section 331 of the Code of Criminal Procedure Act. All respondents further argued

that the Attorney General was not entitled in terms of the law, to invoke the revisionary jurisdiction before the Court of Appeal in terms of Article 138 of the Constitution.

The revisionary jurisdiction of the Court of Appeal is accordingly sought to be invoked by the petitioner under Article 138 of the Constitution.

Article 138 (1) and (2) of the Constitution reads as follows;

> "138. (1) The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be [111] [committed by the High Court, in the exercise of its appellate or original jurisdiction or by any Court of First Instance], tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes, suits, actions, prosecutions, matters and things [112] [of which such High Court, Court of First Instance] tribunal or other institution may have taken cognizance:
>
> 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.
>
> (2) The Court of Appeal shall also have and exercise all such powers and jurisdiction, appellate and original, as Parliament may by law vest or ordain."

The 'marginal note' to Article 138, reads as, "Jurisdiction of the Court of Appeal". The body of the said Article (1) is what that defines the 'Appellate Jurisdiction' of the Court of Appeal, when it states that "The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by the High Court and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum of all causes, suits, actions, prosecutions, matters and things of which the High Court, ... may have taken cognizance."

The use of the words "an appellate jurisdiction" in that Article, is significant, in that it is intended to 'qualify' the words "by way of appeal, revision and restitutio in integrum" which follow, in the sense that "appeal, revision and restitutio in integrum" are intended to constitute "a single indivisible composite appellate jurisdiction" and not “three distinct and separate divisible jurisdictions.”

In the case of Abeygunasekera vs Setunga and Others 1997 (1) SLR 62, the Supreme Court too, recognised that "conceptually, the expression 'appellate jurisdiction' includes powers in appeal and revision".

Thus, when we consider the words "...shall have and exercise subject to the provisions of the Constitution or of any law" in Article 138, it is apparent that when the Legislature in 1988, by an ordinary piece of legislation, amended section 451 of the CCPA and transferred to the Supreme Court, one limb of the indivisible composite 'appellate jurisdiction' that was originally vested with this Court, namely, the 'forum jurisdiction' vested in the Court of Appeal, "by way of Appeal". It in effect stripped this Court of, not only the jurisdiction which this Court, until then exercised "by way of appeal" but also it extinguished the rest of the composite "appellate jurisdiction" by way of "revision and restitutio in integrum" as well.

When analysing the Judgment of the Court of Appeal in Nandasena Gotabhaya Rajapakse vs AG and Others, CA PHC APN 25/2019 CA minutes of 18.06.2019, it is clear that this Court had also adopted a similar though not an identical view, when the Court expressed the view as follows;

> "It is not legally possible to create an artificial division of the appellate powers of appeal and revision over any Judgment, sentence or order made by the Permanent High Court at Bar by splitting them among the Supreme Court and Court of Appeal. When Section 12B of the Judicature (Amendment) Act No. 9 of 2018 specifically made provisions that an appeal against any Judgment, sentence or order of the Permanent High Court at Bar, should be made within the stipulated time frame to the Supreme Court, it is not possible even to consider the position that the Legislature had limited the apex Court's appellate jurisdiction only to entertain an appeal against such Judgment, sentence or order and thereby leaving the power of revision with the Court of Appeal under Article 138 as a residual jurisdiction."

A similar position was also taken by the Court of Appeal in Senanayake and others Vs Koehn and others 2002 (3) SLR 381, this judgment would also be of persuasive value with regard to the question, as to whether this court, continues to be vested with any revisionary Jurisdiction, when by law the right of appeal from a judgment or order of the Commercial High Court lay only to the Supreme Court? The Court of Appeal expressed the specific view that:

> "The petitioner has not invited this court to examine the legality or the propriety of the judgment of the Commercial High Court. Even the petitioner concedes that it is a matter for the Supreme Court to decide in appeal. The petitioner's contention is that there is no provision to obtain a stay order from the Supreme Court in a situation where an appeal is made to the Supreme Court from a judgment of the Commercial High Court and therefore this court should stay the operation of the judgment until the Supreme Court decides the appeal. It is not for this court to decide whether there is any such provision or not."
>
> "In my opinion it is implicit in the provisions of section 753 of the Civil Procedure Code that this court's power to make orders, including interim orders, depends upon necessity to examine the legality of the impugned order. In this case there is no such direct necessity as the petitioner has not invited this court to make a finding on the legality of the judgment of the Commercial High Court. "Then it is the function of this court to examine the legality of the judgment of the Commercial High Court to satisfy itself that the petitioner is entitled to the relief prayed for?"
>
> "If this court ventures into such an exercise it is an indirect usurpation of the exclusive jurisdiction conferred on the Supreme Court by the legislature. It is, therefore, my considered view that it is not proper for this court to examine the legality of the judgment of the Commercial high Court even for the limited purpose of satisfying itself that the petitioner is entitled to the relief prayed for."
>
> "No Court shall stay the operation of any order made by any other court without examining the legality or propriety of such order or at least without satisfying itself that there exists a necessity to examine such question... ... In the circumstances this court cannot and shall not grant the relief sought by the petitioners. In view of this it is not necessary to decide

questions No. 1 to 4 set out earlier in this order. Accordingly formal notice is refused and the application is dismissed without costs."

The same question also arose in the case of Laksiri vs Officer in Charge Anti Vice Squad and Another 2012 (1) SLR 131 as to whether this Court still had the jurisdiction to entertain a revision application preferred in terms of Article 138 of the Constitution, from an order of a High Court of the Provinces [in deciding an appeal from a conviction of a Magistrate's Court] despite section 9 of Act No. 9 of 1990.

After considering the case law, on the power of the Court of Appeal to decide on a revision application given exceptional circumstances, even where there is an alternative remedy which can be obtained from a parallel court or an inferior court it was held in Laksiri v. Officer in Charge Anti Vice Squad and Another (*supra*) as follows;

> "Although Article 138 of the Constitution gives forum jurisdiction to The Court of Appeal to invoke the revisionary jurisdiction, such jurisdiction is subject to the provisions of the Constitution and the Law. Thus Article 138 has to be read subject to Section 9 of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990."

Mark Fernando J. in Weeragama v Eksath Lanka Wathu Kamkaru Samithiya 1994 (1) SLR 293 held;

> "The jurisdiction of the Court of Appeal is not an entrenched jurisdiction because Article 138 provides that it is subject to provisions of any law. Hence it was always constitutionally permissible for the jurisdiction to be reduced or transferred by ordinary law."
>
> "Therefore, we find that Court of Appeal will not have jurisdiction to entertain a matter by way of revision in derogation of the statutory powers specifically conferred on the Supreme Court, by the 13th Amendment to the Constitution read with Section 9 of the High Courts of the Provinces (Special Provisions) Act No. 19 of 1990, even in exceptional circumstances..... For the reasons adumbrated we refuse to issue notice and dismiss this application for revision."

It was held in Martin vs Wijewardena 1989 (2) SLR 409 that, "A right of appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only and enabling article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail or take advantage of that jurisdiction is governed by several statutory provisions in various Legislative Enactments.

The other provisions cited in the petition of the Attorney General, under Article 146 of the Constitution; sections 364 and 365 of the Code of Criminal Procedure Act are irrelevant to this preliminary objection raised by the respondents.

Sections 364 and 365 of the Code of Criminal Procedure Act is as follows;

> "364. The Court of Appeal may call for and examine the record of any case, whether already tried or pending trial in the High Court or any Magistrate's Court: for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed therein or as to the regularity of the proceedings of such court.

365. (1) The Court of Appeal may in any case record the proceedings which has been called for by itself or which otherwise comes to its knowledge in its discretion exercise any of the powers conferred on it by Chapter XXVIII.

365. (2) any order under this section shall not be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or-by attorney-at-law in his own defence.

365. (3) anything in this section shall not be deemed to authorize the Court of Appeal to convert a finding of acquittal into one of conviction"

The petitioner has a statutory right of appeal to the Supreme Court. The Argument placed before this Court, on behalf of the petitioner, is untenable in Law.

In this revision application, the petitioner says that;

(a) he does not have a right of appeal to the Supreme Court, against the Order sought to be impugned in this revision application.

(b) as regards the right of appeal, against such orders, transferred by law, from this Court to the Supreme Court, the Court of Appeal, still was retained, a residuary revisionary jurisdiction, in terms of Article 138 of the Constitution.

The aforesaid position, now sought to be taken by the petitioner, is diametrically opposed to the position taken by him, with regard to other revision applications, before Court of Appeal, made by accused persons similarly placed, in respect of similar Orders made against them, by similar High Courts at Bar, where the petitioner, took up the very same objection that the respondents, in this application, are now taking, namely;

(a) That a right of appeal to the Supreme Court did and does exist from any order of a High Court -at Bar, made at any stage of the trial.

(b) That when the right of appeal, against such Orders, stands transferred by law, from this Court, to the Supreme Court and the Court of Appeal does not retain any 'residuary revisionary jurisdiction in terms of Article 138 of the Constitution.

The petitioner did have a right of appeal to the Supreme Court from the said order sought to be impugned in this application, under and by virtue of section 451 (3) and (4) (as amended by Act No.21 of 1988) read with section 331 of the Code of Criminal Procedure Act. In this case, the petitioner did not invoke its said statutory right of appeal to the Supreme Court.

In most jurisdictions courts have the function of applying the law in its various forms in matters brought before it, very often requiring the court to find the applicable rules and then interpret their meaning and effect on the particular case that is being adjudicated. In this process a court may be confronted with a situation where fair resolution of the case is called for, but the situation is not covered by a pre-existing legal rule. It is possible to argue that every adjudication amounts to the filling of a gap: the dispute or issue being determined is open until resolved by the court.

Although such an argument may be made, this is not the approach here. For present purposes we will assume that a legal lacuna exists where an appropriate legal rule to be applied by a court

to the situation before it is not evident, is uncertain, unclear or does not exist. Such a problem is usually solvable provided that the court concerned is endowed with the jurisdiction to fill the crack. If a particular court does not have such jurisdiction, it should identify the gap to be filled by other means, such as legislation or superior adjudication in order to provide justice.

The position taken up by the petitioner, (the Attorney General) in Nandasena Gotabhaya Rajapakse vs AG and Others, CA PHC APN 25/2019 CA minutes of 18.06.2019 and the reasoning of this Court contained in page 21, in the judgment, should apply to the facts of this case as well. It is as follows:

> "It is not legally possible to create an artificial division of the appellate powers of appeal and revisionary powers over any Judgment, sentence or order made by the Permanent High Court at Bar by splitting them among the Supreme Court and Court of Appeal. When Section 12 B of the Judicature (Amendment) Act No. 9 of 2018 specifically made provisions that an appeal against any Judgment, sentence or order of the Permanent High Court at Bar, should be made within the stipulated time frame to the Supreme Court, it is not possible even to consider the position that the Legislature had limited the apex Court's appellate jurisdiction only to entertain an appeal against such Judgment, sentence or order and thereby leaving the power of revision with the Court of Appeal under Article 138 as a residual jurisdiction."
>
> "Such an approach to the provisions of Section 12 B, as proposed by the Petitioner, would create a situation where the Court of Appeal, an inferior Court to the Supreme Court, is conferred with power of revision over conviction, sentence, or orders by the Permanent High Court at Bar, whilst the apex Court could only hear appeals from such High Court."

The learned President's Counsel for the respondents also wished to draw the attention to the observations of the Court of Appeal at page 26 of the aforesaid judgment, to certain other inconsistencies in accepting the submission that, a residuary revisionary jurisdiction in terms of Article 138 still lay with the Court of Appeal, despite the fact that the right of appeal had only been granted, in terms of section 12(b) (1) of the Judicature Amendment Act number 9 of 2018, to the Supreme Court.

These observations would apply with equal force to the current petition of the petitioner, inviting the Court of Appeal to exercise such a residuary revisionary jurisdiction in terms of Article 138 of the Constitution.

The Court of Appeal said in the aforesaid case as follows;

> "If the Petitioner's contention is accepted, then, this Court in exercising its revisionary powers under Article 138 could consider the validity of a Judgment, Sentence and Order of a Permanent High Court and make its own determination on it. Then, the petitioner could appeal against that determination of this Court to the Supreme Court. Thus, conceding to the application of the petitioner by which he invokes the revisionary jurisdiction of this Court under Article 138, this Court, in effect, creates another opportunity for him to have such a judgment, sentence or order of the Permanent High Court at Bar reviewed by an appellate Court, circumventing the clear Legislative intent of restricting the petitioner's right of appeal only to the Supreme Court."

> “When there is clear and unambiguous expression of legislative intent in restricting the right of appeal only to the Supreme Court, and thereby limiting the right of appeal only to a single instance, this Court cannot and should not recognise such an attempt for an indirect review by this Court without clear statutory provisions indicating such a shift in the legislative intent. In the absence of any statutory provisions to that effect, recognizance of such an indirect review would certainly undermine the clear and unambiguous intention of the Parliament."

The position taken up, by the petitioner, is contrary, to and is diametrically opposed to, the position and the interpretation then placed on his behalf, by the learned Additional Solicitor General appearing for the Attorney General in the aforesaid case, on the words "at a trial" in section 451(3), now relied on by him, in support of this application, but then also relied on by him, in opposition to the similar application in revision, made by the 1st accused petitioner, in the aforesaid case.

The position now taken up by the petitioner, regarding the very same provisions in Sections 451(3) and (4) of the Code of Criminal Procedure Act (CCPA), is untenable in law.

The said provisions of sections 451(3) and (4) of the CCPA read as follows:

Section 451 (3)

> "Anything to the contrary in this Code or any other law notwithstanding, an appeal shall lie from any judgment, sentence or order pronounced at a trial under section 450. Such appeal shall lie to the Supreme Court and shall be heard by a Bench of not less than five Judges of the Court nominated by the Chief Justice. It shall be lawful for the Chief Justice to nominate himself to such Bench. (Emphasis added)”

Section 451 (4)

> “The provisions of this Code and of any other written law governing appeals to the Court of Appeal from judgments, sentences and orders of the High Court in cases tried without a jury shall, *mutatis mutandis*, apply to appeals to the Supreme Court, under sub-section (3) from judgments, sentences and orders pronounced at a trial held before the High Court at Bar under section 450"

The restrictive interpretation now sought to be placed on sub-section 451(3) quoted above by the petitioner is, by seeking to interpret the words 'at a trial' in the said sub-section (3) to mean "an order of this nature made in the course of the proceedings prior to the trial", as stated in paragraph 40 of the application to this Court. This is an attempt to read into that sub-section words which are not there, whilst ignoring the words, "under section 450" appearing immediately after the words "at a trial", in that sub-section 451(3). Such an attempt, is contrary to all norms of statutory interpretation. Thus, it is clearly untenable in law.

The rules of interpretation do not permit the reading into a statute, words that are not there, for the purpose of placing a restrictive interpretation to particular words of the statute. It is also contrary to the most fundamental norm of interpretation that no provision or particular words in the statute can be considered "in isolation", particularly, when such words themselves are, in fact not used in isolation, in that statute. No words in any particular section of the statute can be

ignored, so as to attempt to give the rest of the words a meaning, other than that 'intended' by the Legislature.

The words 'at a trial' in section 451(3) have also not been used in isolation. They are used in conjunction with the words under section 450. As such that if those six words,'at a trial' and 'under section 450', in section 451(3) are to be given their true and intended meaning in the statute, they cannot be read or interpreted, separately. All six words, must necessarily be read, examined, understood and interpreted in conjunction with each other, in order to gather their true and intended meaning, as envisaged by the Legislature. Therefore, the relevant provisions in section 450 must also be examined as well.

The portions of Section 450 of the CCPA relevant to this aspect of the matter, are sub -sections 1, 2, 3, 4, 5 (b) (d) (f), 6 and 7 of Section 450, which read as follows;

> (1) Notwithstanding anything to the contrary in any other written law or any other provision of this Code, the trial of any person for any offence punishable under section 114, 115 or 116 of the Penal Code shall be held before the High Court at Bar by three Judges without a jury.
>
> (2) Where the Chief Justice is of the opinion that owing to the nature of the offence or the circumstances of and relating to the commission of the offence, in the interests of justice, a trial at Bar should be held, the Chief Justice may by order under his hand direct that the trial of any person for that offence shall be held before the High Court at Bar by three Judges without a jury.
>
> (3) A trial before the High Court under this section may be held either upon indictment, or upon information exhibited by the Attorney-General.
>
> (4) Notwithstanding anything to the contrary in this Code or any other law, the Attorney-General may exhibit to the High Court information in respect of any offence to be tried before the High Court at Bar by three Judges without a jury.
>
> (5) (b) A trial by the High Court at Bar shall, unless exceptional circumstances so warrant be heard from day to day to ensure the expeditious disposal of the same. The inability of a particular Attorney-at-law to appear before the High Court at Bar on a particular date for personal reasons (including engagement to appear on that date in any other court or tribunal) shall not be a ground for postponing the date of commencement of the trial or be regarded as an exceptional circumstance warranting the postponement of the trial.
>
> (5) (d) Where any Judge of the High Court at Bar dies, or resigns, or requests to be discharged from hearing the whole or part of any trial, before or after its commencement, or refuses or becomes unable to act, the Chief Justice may nominate another Judge of the High Court of Sri Lanka in his place, to hear whole or any part of such trial.
>
> (5) (f) Where a new Judge has been nominated under paragraph (d) it shall not be necessary for any evidence taken prior to such nomination to be retaken and the High Court at Bar shall be entitled to continue the trial from the stage at which it was immediately prior to such nomination.

(6) At any trial before the High Court at Bar under this section, the court or the presiding Judge thereof, may give directions for the summoning, arrest, custody or bail of all persons charged before the court on indictment or by information exhibited under this section:

Provided, however, that any such person shall not be admitted to bail except with the consent of the Attorney-General.

(7) Any person indicted or charged on an information before the High Court under this section may at least two weeks before the commencement of such trial, by application in writing to the High Court request that he be furnished with copies of the statements made by the witnesses whom the prosecution intends to produce at the trial and the court may direct that copies of all such statements or documents, or of only such statements and documents as the court in its discretion thinks fit, be given by the Attorney-General to such person

Section 450 sub-section (1) refers to the mandatory instances when "the trial.... before the High Court at Bar by three Judges without a jury" must be held, whilst Section 450 sub-section (2) refers to another instance, other than in terms of subsection 1, where a trial at Bar could be held., at the discretion of the Chief Justice.

Sub section (2) reads as follows:

"Where the Chief Justice is of the opinion that owing to the nature of the offence or the circumstances of and relating to the commission of the offence, in the interests of justice, a trial at Bar should be held, the Chief Justice may by order under his hand direct that the trial of any person for that offence shall be held before the High Court at Bar by three Judges without a jury".

The words 'at a trial' under section 450 in section 451(3), were intended to mean and must necessarily be given the meaning 'at a trial at Bar', referred to in section 450.

It is clear, that those words refer to the type of the trial at which the judgment, sentence or order sought to be appealed against, had been made and not to the stage of the trial at which, such judgement, sentence or order sought to be appealed against, was made. The words "At any trial before the High Court at Bar" in sub-section 6 of section 450, quoted above, puts this issue beyond any doubt.

As alleged by the petitioner in paragraph 40 of his petition, if the Court of Appeal were to hold that the words 'at a trial' in section 451(3) must necessarily mean an order made in the course of the proceedings prior to the trial, and this Court apply that same interpretation to the words "At any trial" in sub-section 6 of section 450. Then the provisions of that sub-section enabling the Court to make orders summoning, making orders of arrest, remanding to fiscal custody or releasing on bail of all persons charged before court would be rendered nugatory and meaningless.

If the words "At any trial" appearing before the words" before the High Court at Bar" in sub-section 6 of section 450, are also interpreted to mean, as applying to a stage of the proceedings" and that, as such, any of the said orders of, "the court or the presiding Judge thereof", summoning, arresting, detaining in custody or releasing on bail of persons charged before the court, could only be made, 'after the trial proper has commenced', would be unimaginable.

Section 451 (4) is as follows;

> “The provisions of this Code and of any other written law governing appeals to the Court of Appeal from judgments, sentences and orders of the High Court in cases tried without a jury shall, mutatis mutandis, apply to appeals to the Supreme Court, under sub-section (3) from judgments, sentences and orders pronounced at a trial held before the High Court at Bar under section 450".

Those provisions of that sub-section (3) of section 451, therefore, bring into play the provisions contained in section 331 of the CCPA.

Section 331 reads as follows;

> Section 331 (1). “An Appeal under this chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced"

It is important to bear in mind that those provisions in section 331, do not contain the words 'at a trial', nor do they in any way restrict the operation of the words 'An Appeal' in that section. As such, it is not in accord with any rule of interpretation, to read into that section, any other words, that would qualify the words "the conviction, sentence or order sought to be appealed against".

It is also not in accord with any rule of interpretation, to read into that section, the words, 'made after the commencement of the trial', after the words, "conviction, sentence or order" in that section, as the learned Counsel for the petitioner is now attempting to do, in respect of section 451(3) of the CCPA, for the purpose of placing a 'non-existing' restriction or limitation on the interpretation of the 'scope of that subsection'. Therefore, any attempt to give those three words, ' at a trial' in section 451(3), any other form of restrictive meaning, by linking them "to a stage of the trial", 'after its commencement' as contended for by the learned President's Counsel appearing for the petitioner, would only result in perverting the ordinary and common sense meaning of the plain and unambiguous words in the statute.

If the Legislature intended section 451(3) of the Code to, apply only to Orders made at a particular 'stage of the trial', such as only after the trial proper has commenced, as the counsel for the petitioner now contends, then the Legislature would undoubtedly have clearly indicated that 'intent' by clearly and unambiguously stating in Section 451(3), that "an appeal shall lie from any judgment, sentence or order pronounced "after the commencement of the trial", instead of saying, as it did, "at a trial under section 450".

Where the Legislature intended the need, for any triggering event, either for coming into existence of 'a right of appeal' or for the 'applicability' of any particular provision in a statute it has always specifically said so. A clear example for this is Section 171, which reads as follows;

> Section 171. Whenever an indictment or charge is altered by the court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine with reference to such alteration any witnesses who may have been examined.

Therefore, both prior to the amendment in 1988 transferring that right of appeal from this Court to the Supreme Court and thereafter, the legislature drew no distinction between the 'stages of the trial' at which orders, such as the impugned one were made, such as, 'prior to' or 'after', the commencement of the 'trial proper', before a High Court at Bar, as is evident from the analysis above.

It is trite law that 'no particular sections' or 'no particular words' of a statute can be interpreted in isolation. A statute must be interpreted as a whole, especially when the section sought to be interpreted makes specific reference to another provision of the same statute, which does not contain any words qualifying the words now sought to be interpreted, namely the words `at a trial' in section 451(3). The general rule of construction is not to look at the words but to look at the context.

The words of wisdom by Lord Green MR: in Bidie vs General Accident, Fire and Life Insurance Corporation [1948] 2 All ER 995, at page 998, "The first thing one has to do in construing words in a section of an Act of Parliament", observed as follows;

> "Is not to take those words in vacuo, so to speak and attribute to them what is sometimes called their natural and ordinary meaning. Few words in the English language have a natural or ordinary meaning in the sense that they must be so read that their meaning is entirely independent of their context... It is to read the statute as a whole and ask oneself the questions: in this state, in this context, relating to this subject-matter, what is the true meaning of the word"

It was held by Lord Blackburn in Turquand vs Board of Trade [1886] 11 AC 286, at page 291;

> "In construing this Act [English Bankruptcy Act] of course like every other Act, we must take the whole of the Act together, as this is a very long Act, containing, I think about sixty pages of very closely printed matter, it requires, in order that we may be certain that we omit nothing, that one should look carefully at it altogether and consider all clauses."

As stated by Bindra, Interpretation of Statutes, 10th edition, at page 689;

> "It is a fundamental principle in the construction of statutes that the whole and every part of the statute must be considered in the determination go the meaning of any of its parts. In construing a statute, as a whole, the courts seek to achieve two principal results to clear up obscurities and ambiguities in the law and to make the whole of the law and every part of it harmonious and effective. It is presumed that the legislature intended that the whole of the statute should be significant and effective. Different sections, amendments and provisions relating to the same subject must be construed together and read in the light of each other."

The position of the Petitioner in Paragraph 42 of his Petition that, "in the absence of a remedy in the form of a statutorily available appeal the invocation of the revisionary jurisdiction of this Court is the only effective and efficient remedy available under the law, which is expeditiously available for the Petitioner", is incorrect, in that as shown above, he did in fact have a right of appeal to the Supreme Court and hence (b) the reason adduced for the invoking of the alleged residuary revisionary jurisdiction in this Court namely that he was left without a remedy is also totally flawed and untenable.

The petitioner, without having even attempted to invoke the appellate jurisdiction, as he could well have done, cannot now contend that the only remedy available to him with regard to the impugned order, is to now invoke the revisionary jurisdiction of this Court under Article 138 of the Constitution, on the untenable basis;

(a) that, he does not enjoy a 'right of appeal to the Supreme Court' against the impugned order, in terms of Section 451(3) of the CCPA,

(b) that this Court yet retains a 'residuary', Revisionary Jurisdiction, despite the transfer of the Jurisdiction of the Court of Appeal 'by way of appeal' has been transferred to the Supreme Court, a position which the learned Presidents' Counsel on behalf of this same Petitioner, strenuously contended against in the case of Nandasena Gotabhaya Rajapakse Vs Attorney General (*supra)*.

in the case of Anuruddha Ratwatte and Others vs The Attorney General (2003) 2 SLR 39, the Supreme Court too, faced with the same issue, acted to enable and recognize the Right of Appeal of the litigant and not to defeat it.

The case of Nandasena Gotabhaya Rajapakse vs The Attorney General [CA PHC APN 25/2019 CA Minutes of 18-06-2019], wherein,

i. Several accused were indicted before the Permanent High Court at Bar [HC/PTB/02/2018];

ii. The Counsel for the accused raised certain preliminary objections to the jurisdiction of the Court, this was before the accused even pleaded to the charges, and hence well prior to the commencement of the 'trial proper' as described by the learned President's Counsel for the Petitioner, in this case;

iii. Upon an objection raised on behalf of the Attorney General, (at whose instance, the information to court, was filed before the said permanent High Court at Bar, was filed and the petitioner, in the case now before this court) to the said preliminary objections, the said preliminary objections raised on behalf of the accused in that case were overruled by the Permanent High Court at Bar by order dated 11.02.2019;

iv. Against the said order, the accused tendered to the Permanent High Court at Bar a Petition of appeal addressed to the Supreme Court, that was refused to be accepted by the Permanent High Court at Bar;

v. The 1st accused-petitioner, then filed a revision application before the Court of Appeal - CA PHC APN 25/2019. The accused persons, also preferred a direct petition of appeal to the Supreme Court against the said overruling order of Permanent High Court at Bar;

vi. The Attorney General objected to the said revision application, stating that revision does not lie in the circumstances of the case whenever there was a right of appeal given to the Supreme Court;

vii. The Court of Appeal dismissed the revision application by order dated 18.06.2019, stating that this Court did not have jurisdiction to hear and determine the said revision application.

viii. This Court considered this submission in detail with reference to authorities and held that,

> "where the right of Appeal is to the Supreme Court there cannot be a position that this Court still retains a 'residuary Revisionary Jurisdiction', in as much as, that could lead to contradictory judgments of the Supreme Court and the Court of Appeal on the same matter".

The attention of this Court is also drawn to the following passages in the said judgment:

> "The important feature to be noted in this section is that there is no right of appeal to the Court of Appeal. In effect, an accused who had been tried by a Permanent High Court at Bar has only one right of appeal whereas an accused who had been tried by the High Court of the Republic has two, firstly to the Court of Appeal and therefrom to the Supreme Court. These legislative provisions make it clear that the Legislature had consciously limited the right of appeal from a Permanent High Court at Bar to only one instance. The divisional bench of the Supreme Court nominated by the Chief Justice is placed under a duty in respect of such an appeal as it shall be heard and disposed of expeditiously."
>
> "If the Petitioner's contention is accepted, then, this Court in exercising its revisionary powers under Article 138 could consider the validity of a Judgment, Sentence and Order of a Permanent High Court and make its own determination on it. Then, the Petitioner could appeal against that determination of this Court to the Supreme Court. Thus, conceding to the Application of the Petitioner by which he invokes the revisionary jurisdiction of this Court under Article 138, this Court, in effect, creates another opportunity for him to have such a judgment, sentence or order of the Permanent High Court at Bar reviewed by an appellate Court, circumventing the clear Legislative intent of restricting the Petitioner's right of appeal only to the Supreme Court."
>
> "When there is clear and unambiguous expression of legislative intent in restricting the right of appeal only to the Supreme Court, and thereby limiting the right of appeal only to a single instance, this Court cannot and should not recognise such an attempt for an indirect review by this Court without clear statutory provisions indicating such a shift in the Legislative intent. In the absence of any statutory provisions to that effect, recognizance of such an indirect review would certainly undermine the clear and unambiguous intention of the Parliament."

It is trite law that if an appeal from the order sought to be impugned is possible, such appeal would have been to the Supreme Court. While undoubtedly Article 138 gives the power to the Court of Appeal to exercise jurisdiction in revision, this power is exercised subject to the law and the Constitution.

In the light of the reasoning elaborated by this Court in Nandasena Gotabhaya Rajapakse vs The Attorney General (*supra*) and the several other cases cited above, where the Court of Appeal itself had previously held that when the right to decide by way of an appeal originally granted to this Court and that has been later transferred to the Supreme Court, as in this instance, the Court of Appeal cannot have and exercise any revisionary jurisdiction under Article 138, of the constitution.

This Court would accordingly uphold the preliminary objection.

This application of the petitioner is misconceived in law and this Court does not possess the jurisdiction to hear and determine the same.

We dismiss this revision application in *limine.*

Considering the circumstances of this case, we make no order for costs.

**Judge of the Court of Appeal**

**Dr. Ruwan Fernando J.**

**I agree.** **Judge of the Court of Appeal**

**Sampath B. Abayakoon J.**

**I agree.** **Judge of the Court of Appeal**