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

In the matter of revision in terms of Article 138 of the Constitution read with section 364 and 365 of the Criminal Procedure Code Act No. 15 of 1979.

Court of Appeal No:

CA (PHC) APN 0127/21

HC Embilipitiya

Case No. 53/2020

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

Bodahandi Santhaka Kumara De Silva,

Pragathi Mawatha,

Ahungalla.

ACCUSED

AND BETWEEN

Dawunda Wickrama Rajapaksa Wasala

Munasinghe Mudiyanse Ralahamilage

Rambukwelle Walawwe Ishan Udayanga,

No. 669/1/A,

Kiriibban Ara, Sewanagala

PETITIONER

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

Bodahandi Santhaka Kumara De Silva,

Pragathi Mawatha,

Ahungalla.

ACCUSED- RESPONDENT

AND NOW BETWEEN

Dawunda Wickrama Rajapaksa Wasala

Munasinghe Mudiyanse Ralahamilage

Rambukwelle Walawwe Ishan Udayanga,

No. 669/1/A,

Kiriibban Ara,

Sewanagala.

PETITIONER- PETITIONER

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : J. De Silva with Ravindra Jayarathna for the Petitioner-Petitioner

: Chathurangi Mahawaduge, SC with Kanishka Rajakaruna, SC for the Respondent-Respondent

Argued on : 13-03-2023

Decided on : 08-05-2023

Sampath B Abayakoon, J.

This is an application in revision by the petitioner-petitioner namely, Dawunda Wickrama Rajapaksa Wasala Munasinghe Mudiyanse Ralahamilage Rambukwelle Walawwe Ishan Udayanga, being aggrieved by the order dated 05-08-2021 of the learned High Court Judge of Embilipitiya.

The petitioner-petitioner (hereinafter referred to as the petitioner) has stood surety for the accused in the High Court of Embilipitiya Case Number 53-2023 for a sum of Rs. One Million. Along with the petitioner, two other persons have also stood surety for the accused for the same amount. The accused in the above case has absconded the Court, and accordingly, after holding a due inquiry in

terms of section 241 of the Code of Criminal Procedure Act No. 15 of 1979, the learned High Court Judge of Embilipitiya has decided to proceed with the trial against the accused in his absence.

Consequent to that, the learned High Court Judge has allowed the three sureties to show cause as to why their surety bail bonds should not be forfeited. After hearing the petitioner and the 2nd surety, the learned High Court Judge, being satisfied that they have failed to show sufficient cause as to why their bail bonds should not be forfeited, had made the following order.

> "ඉදිරිපත් වී ඇති කරුණු කිසිවක් ඇපකරුවන් විසින් මෙම අධිකරණයේ නියෝගය මත මහේස්ත්‍රාත් අධිකරණයේ ඇප තැන්පත් කිරීමේදී අත්සන් කරන ලද බැදුම්කරයේ චුදිත ඉදිරිපත් නොකරන්නේ නම් තමා විසින් රජයට ගෙවීමට බැදෙන මුදල ලෙස දක්වා බැදුම්කරයට යටත් වූ රුපියල් ලක්ෂ දහය බැගින් වන මුදලේ ප්‍රමාණය අඩු කිරීමට හේතුවක් නොවන බවට තීරණය කරමි.
>
> ඉහත හේතු මත අද දින සාක්ෂි ලබා දෙන ලද මහේස්ත්‍රාත් අධිකරණයේ 2019-01-03 වන දින චුදිතට ඇප තබන ලද පළමු හා දෙවන ඇපකරුවන් වන පිළිවලින් දවුන්ද වික්‍රම රාජපක්ස වාසල මුදියන්සේගේ උදයසිරි රාලහාමිලාගේ රඹුක්වැල්ලේ වලව්වේ නිශාන් උදයංග රඹුක්වැල්ල සහ කොටුවේගෙදර දනුෂ්ක ජයවීර යන ඇපකරුවන් විසින් 2019-01-03 වන දින අත්සන් කරන ලද ඇප බැදුම්කරයේ සඳහන් රුපියල් ලක්ෂ දහය (1000000/-) බැගින් වන මුදල් රාජසන්තක කිරීමට තීරණය කරමි. ඊට අමතරව 2019-01-03 දිනැතිව කොටුවේගෙදර දනුෂ්ක ජයවීර යන අයවලුන් විසින් චුදිත වෙනුවෙන් තබා ඇති රුපියල් පසළොස් දහසක (15000/-) මුදල් ඇපයද රාජසන්තක කරමි. මෙම රාජසන්තක කරන ලද මුදල දඩ මුදලක් ලෙස අයකර ගැනීමට තීරණය කරමි. නොගෙවන්නේනම් වසර 2 ක සිර දඬුවම් නියම කරමි.
>
> ඇපකරුවක් දෙදෙනාම මාසයට රුපියල් ලක්ෂ 2 (200000/-) බැගින් වන වාරික මගින් දඩ මුදල අධිකරණය ඉදිරියේ ගෙවන බවට දන්වා සිටි. ඒ අනුව මාසික වාරික මගින් අදාළ මුදල් ගෙවිය යුතු බවට නියම කරමි......"

The petitioner has come before this Court seeking to challenge the above order of the learned High Court Judge by way of a revision application on the basis that the procedure followed by the learned High Court Judge after deciding to forfeit the bail bond was not according to the law, and hence, it amounts to an illegal order.

In other words, the petitioner has not challenged the decision to forfeit his bail bond, but the recovery procedure the learned High Court Judge has decided to follow in the above-mentioned order.

For matters of clarity, I would now reproduce in its entirety, the relevant section 422 of the Code of Criminal Procedure Act, which provides for the procedure on forfeiture of bonds.

> **422 (1) Whenever it is proved to the satisfaction of the court by which a bond under this code has been taken, or when the bond is for appearance before a court to the satisfaction of such court that bond has been forfeited, the court shall record the grounds of such proof and may call upon any person bound by such bond, to pay the penalty thereof or to show cause why it should not be paid.**
>
> **(2) If sufficient cause is not shown and the penalty is not paid the court may proceed to recover the same by issuing a warrant for the attachment and sale of the movable or immovable property belonging to such person.**
>
> **(3) Such warrant may be executed within the local limits of the jurisdiction of the court which issued it and it shall authorize the distress and sale of any movable or immovable property belonging to such person without such limits when endorsed by the Judge within the local limits of whose jurisdiction such property is found.**
>
> **(4) If such penalty be not paid and cannot be recovered by such attachment and sale the person so bound shall be liable by order of**

the court which issued the warrant to simple imprisonment for a term which may extend to six months.

(5) The court may at its discretion remit any portion of the penalty mentioned and enforce payment in part only.

It is abundantly clear that in terms of section 422(2), once it is decided to forfeit a bail bond, the 1st mode of recovery shall be by issuing a warrant for the attachment and sale of the movable or immovable property belonging to the person against whom the forfeiture order was made.

In accordance with subsection (4) of the same section, it is only if such penalty still not been paid, and cannot be recovered by such an attachment, a Court can sentence a person for a period of 6 months simple imprisonment.

In the case of **Kaluarachchige Chandrasoma Vs. The Attorney General CA(PHC) APN 133/12 decided on 06-11-2012, A.W.A. Salaam, J.** (as he was then) held that any forfeiture of a bail bond should be done in accordance with the specific provisions of the Code of Criminal Procedure Act as provided for in section 422.

In the case of **Manohar Aranraj and Mahalingam Gopinaath Vs. The Attorney General, decided on 21-09-2017, Sisira De Abrew, J.** in agreement with **Nalin Perera, J.** (as he was then) and **Vijith K. Malalgoda, P.C., J.** held that a Magistrate is empowered to act under section 422 (4) of the Code of Criminal Procedure Act, only after he complied with section 422 (2) of the CPC.

His Lordship took guidance from the case of **De Silva Vs. S.I. Police Kandy 63 C.L.W. page 109**, which states;

"The order for forfeiture should be set aside as the learned Magistrate has failed to comply with the provisions of section 411 (1) and (4) of the Code of Criminal Procedure Act. He should have recorded the grounds of proof that the bond had been forfeited and it is only if the penalty cannot be recovered

by attachment and sale that he could have imposed the sentence on him for imprisonment."

Per Sisira De Abrew, J.

"Section 441 of the old CPC has been reproduced as section 422 (4) of the CPC. As I observed earlier, the learned Magistrate had failed to comply with section 422 (1) (2) of the CPC. Therefore, he could not have acted under section 422 (4) of the CPC. It appears that the learned Magistrate was too quick in sentencing the appellants."

It is my considered view that although the above-considered case was in relation to a Magistrate Court order, the applicable provision in the Code of Criminal Procedure Act is the same. I find that although the learned High Court Judge has correctly followed the procedural steps as mentioned in section 422(1) of the Code, the learned High Court Judge was misdirected when it was ordered that in default of paying the sum mentioned in the bail bond, the petitioner shall serve a prison term of two years.

As considered above, the learned High Court Judge should have ordered the attachment and sale as provided for in section 422(2) and if it fails only, the provisions of section 422(4) should have been applied. There again, the penalty should have been for a simple imprisonment term which may extend up to 6 months and not as ordered by the learned High Court Judge.

Under the circumstances, this Court has no option but to set aside the learned High Court Judge's order up to the extent of vacating the order where it was stated that the forfeited amount should be recovered as a fine and in default, the petitioner shall serve a two-year prison term.

The learned High Court Judge is directed to follow the provisions of section 422(2) of the Code of Criminal Procedure Act in order to recover the forfeited amount and to act under section 422(4) only if the amount cannot be recovered in terms of section 422(2).

The application of the petitioner is allowed up to the above extent.

The Registrar of the Court is directed to forward this judgement to the High Court of Embilipitiya for necessary implementation.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal