

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

In the matter of an application to Transfer of Case No. HCV/2923/2019 in the High Court of Vavuniya under Article 138(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 46 of the Judicature Act No. 2 of 1978.

C.A.TRF No.0012/2023

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

Complainant

Vs

1. Jeyaratnam Sri Ranga
No. 61/1, Fonseka Road,
Colombo 05.
(Presently at Magazine New Remand
Prison)
2. Gabada Gedara Don Amarasiri
Senarathna
3. Padi Gamage Sugath Roshan Sanjiwa
4. Rathnayaka Mudiyansele
Harischandra Bandara
5. Walpola Gamaralalage Padmarala
6. Herath Mudiyansele Ajith
Priyadharsha Herath

Accused

AND NOW BETWEEN

Jeyaratnam Sri Ranga

No. 61/1, D.S. Fonseka Road,

Colombo 05.

(Presently at Magazine New Remand
Prison)

Accused – Petitioner

Vs

1. Hon. Attorney General

Complainant – Respondent

2. Gabada Gedara Don Amarasiri
Senarathna

3. Padi Gamage Sugath Roshan
Sanjiwa

4. Rathnayake Mudiyansele
Harischandra Bandara

5. Walpola Gamaralalage Padmarala

6. Herath Mudiyansele Ajith
Priyadharshana Herath

Accused – Respondents

Before: Hon. Justice N. Bandula Karunaratna, (P/CA)
Hon. Justice M.A.R. Marikar

Counsel: Thishya Weragoda with Sanjaya Marambe and P.H.
Welikumbura for the Accused–Petitioner instructed by
Niluka Dissanayake
Janaka Bandara (DSG) for the Attorney General

Argued on: 02/08/2023

Decided on: 29/08/2023

M. Ahsan R. Marikar, J.

INTRODUCTION

1. The application made by the Petitioner is to transfer Case No. HCV/2923/2019 from the High Court of Vavuniya to any other High Court under Section 46(1)(a) of the Judicature Act No.2 of 1978.
2. In the said petition dated 17th July 2023, the following reliefs had been sought by the Accused-Petitioner.
 - a. issue Notice on the Complainant – Respondents;
 - b. issue an Interim Order staying proceedings in Case No. HCV/2923/2019 pending before the High Court of Vavuniya until the final determination of this matter;
 - c. issue an Order transfer the Case No. HCV/2923/2019 from the High Court of Vavuniya to any other High Court under Section 46(1)(a) and/or 46(1)(b) of the Judicature Act No. 2 of 1978;
 - d. grant an Order to rehear the matter if transferred by calling all the witnesses who have been examined before the High Court of Vavuniya from which the transfer is made and take their evidence afresh;
 - e. grant Costs;
 - f. Grant such other and further relief Your Lordship’s Court shall seem meet.

BACKGROUND OF THE CASE

3. The Accused-Petitioner had made this application to this court to transfer the High Court Case No. HCV/2923/2019 from the High Court

of Vavuniya to any other court, on the grounds that the High Court Judge specially appointed to hear and determine this case is not impartial and is biased.

4. The following grounds have been set out in the petition dated 17th July 2023 to support the contention of the Accused-Petitioner to state that the High Court judge of Vavuniya is biased.

- i. The High Court Judge of Vavuniya hearing this case had allowed the State Counsel to bring Prosecution Witness No.3 to the chambers without any representation of the Accused-Petitioner.
- ii. Without giving a proper hearing to the Accused-Petitioner, the High Court Judge presiding over the High Court Case No. HCV/2923/2019 directed the SSP of the area to investigate matters pertinent to Prosecution Witness No.3 under the Witness Protection Act No. 04 of 2015¹.
- iii. The said High Court Judge had cancelled the bail of the Accused-Petitioner, acting under the Witness Protection Act and failed to consider the health condition of the Accused-Petitioner.
- iv. The said High Court Judge had refused to grant the trial dates requested by the Accused-Petitioner's Counsel and made controversial comments referred to in paragraph 78 of the petition dated 17th July 2023.

¹Hereinafter referred to as Witness Protection Act.

5. On the said grounds, the case was supported by Attorney-at-Law Thishya Weragoda to grant the reliefs prayed for in the prayer of the petition.
6. The Deputy Solicitor General Janaka Bandara (hereinafter referred to as DSG) appeared for the Attorney General and vehemently objected for the said application to transfer the High Court Case No. HCV/2923/2019 from the High Court of Vavuniya and submitted that the High Court Judge M.M.M. Mihal is specially appointed by His Lordship the Chief Justice to hear and determine the High Court Case No. HCV/2923/2019. The DSG reiterated that at no stage had the High Court Judge acted biased against the Accused-Petitioner and/or acted not impartial.
7. On the said grounds, the DSG had moved to dismiss the Accused-Petitioner's petition *in limine*.

DISPUTED FACTS

8. In considering the facts related in the petition and on perusal of the documents and the arguments put forward by the Accused-Petitioner and the Deputy Solicitor General, the following points need to be considered to arrive at my conclusion whether the interim orders and/or notice can be issued to the Respondents.
 - I. Has the High Court Judge M.M.M. Mihal been appointed by the Chief Justice to hear and determine the High Court Case No. HCV/2923/2019 at the Vavuniya High Court?

II. Is the said High Court Judge M.M.M. Mihal not impartial and biased towards Accused-Petitioner?

III. If not, can the Accused-Petitioner maintain this application?

I. Has the High Court Judge M.M.M. Mihal been appointed by the Chief Justice to hear and determine the High Court Case No. HCV/2923/2019 at the Vavuniya High Court?

9. On perusal of P4 proceedings dated 21st February 2022, the High Court Case No. HCV/2923/2019 had been called before the High Court Judge of Vavuniya M. Ilancheliyan. The indictment had not been served on the Accused-Petitioner as the State Counsel had raised an objection to hear the case before High Court Judge Ilancheliyan as the said High Court Judge was interviewed by the Accused-Petitioner on a TV program.

10. On that, the said High Court Judge had referred the matter to His Lordship the Chief Justice to appoint another High Court Judge to hear and determine the High Court Case No. HCV/2923/2019.

11. Subsequently, High Court Judge M.M.M. Mihal had been appointed by the Chief Justice to hear and determine the High Court Case No. HCV/2923/2019. The proceedings had commenced before High Court Judge M.M.M. Mihal from 8th November 2022. The indictment had been served and Witness No.1 had been called to give evidence on the same day.

12. On the said circumstance, it is obvious that High Court Judge M.M.M. Mihal had been specially appointed by His Lordship the Chief Justice to hear and determine the High Court Case No. HCV/2923/2019.

II. Is the said High Court Judge M.M.M. Mihal not impartial and biased towards Accused-Petitioner?

13. The Counsel for the Accused-Petitioner argued that the High Court Judge M.M.M. Mihal is not impartial and is biased against the Accused-Petitioner when conducting the proceedings. To support that he brought to the notice of the Court the following facts.

- i. The High Court Judge M.M.M. Mihal had entertained the Prosecution Witness No.3.
- ii. Without giving a proper hearing to the Accused-Petitioner, the High Court Judge presiding over the High Court Case No. HCV/2923/2019 directed the SSP of the area to investigate matters pertinent to Prosecution Witness No.3 under the Witness Protection Act No.4 of 2015.
- iii. The said High Court Judge had cancelled the bail of the Accused-Petitioner acting under the Witness Protection Act and failed to consider the health condition of the Accused-Petitioner.
- iv. The said High Court Judge had refused to grant the trial dates requested by the Accused-Petitioner's Counsel and made controversial comments referred to in paragraph 78 of the petition dated 17th July 2023.

14. On the aforesaid grounds, the Accused-Petitioner's Counsel raised the argument that the High Court Judge M.M.M. Mihal is biased against the Accused-Petitioner.
15. Thus, he refused to entertain the Bail Application under the Witness Protection Act even after considering the Accused-Petitioner's health condition at that time.
16. Furthermore, the said High Court Judge refused to grant the requested dates by the Counsel for the Accused-Petitioner for the trial.
17. The Deputy Solicitor General appearing for the 1st Respondent vehemently denied the aforesaid facts and argued other than the submissions made by the Counsel for the Accused-Petitioner from the Bar table, there are no documents or proof that the Learned High Court Judge is biased against the 1st Accused-Petitioner or any other accused.
18. In considering the aforesaid submissions and the documents pertinent to this action, the High Court Judge M.M.M. Mihal had been appointed for Case No. HCV/2923/2019 by the Chief Justice to hear and determine this case expeditiously.
19. It is to be noted that the incident pertinent to High Court Case No. HCV/2923/2019 had occurred in the year 2011. The present High Court Judge had commenced the proceeding on 8th November 2022 after 11 years of the incident.
20. On perusal of the proceedings marked and produced as P7 to P17, the High Court Judge M.M.M. Mihal had taken steps to expeditiously conclude this case.

21. When the evidence was given by the witnesses as per the proceedings dated 8th November 2022 page 31, Witness No.1, the wife of the deceased person of the accident pertinent to this action, had specified that she was taken to the 1st Accused-Petitioner's house.
22. Subsequently, Prosecution Witness No.3 had complained to the High Court Judge in open court, that he was threatened to give evidence in favour of the Accused-Petitioner.
23. Furthermore, as per the proceeding dated 22nd February 2023, the State Counsel had made an application to make the Prosecution Witness No.2 an adverse witness as per the evidence given by him.
24. These facts are part and parcel of the proceedings of Case No. HCV/2923/2019. The High Court Judge M.M.M. Mihal had made an order on 23rd February 2023 page 76 of the same day's proceedings. On that, he had specifically given reasons for the grounds on which he is ordering to investigate the matters pertinent to the interference of the Prosecution Witnesses.
25. Following the said proceedings, any person will be able to follow the orders given by the High Court Judge, considering the situation prevailing before him. On that, I do not see any bias or that the High Court Judge is not impartial towards the Accused-Petitioner.
26. On the other hand, the Learned High Court Judge as per the proceedings had taken measures to conclude this case expeditiously.
27. Therefore, granting short dates to conclude this matter is not a ground for the Accused-Petitioner to raise that the High Court Judge is biased.

28. As the said High Court Judge had been specially appointed by the Chief Justice to hear and determine this action, he had to conclude the case expeditiously.
29. Both parties have admitted in open court that presently the Accused-Petitioner is granted bail. Therefore, I do not have to consider the facts related to the Accused-Petitioner's bail condition that was cancelled during the investigation carried out by the SSP Vavuniya under the Witness Protection Act.
30. In view of the aforesaid facts and documents, I do not see any merit of the application made by the Accused-Petitioner, that the High Court Judge M.M.M. Mihal is not impartial and/or biased pertinent to the Case No. HCV/2923/2019 in the High Court of Vavuniya.

III. If not, can the Accused-Petitioner maintain this application?

31. Beside these facts the Counsel for the Accused-Petitioner cited the case **Abdul Hasheeb V Mendis Perera and Others**².

In this case it is established that in a transfer application; 'the tests for disqualifying bias are (i) the test of real likelihood of bias and (ii) the test of reasonable suspicion of bias. Although the facts pertinent to that case are totally different, the test applied in that case will not be applicable in the instant action as the Accused-Petitioner has not proved or that there is no iota of evidence that the High Court Judge MMM Mihal is biased or not impartial.'

²[1991] 1 SLR 243.

32. In the case of **Sivasubramaniam V Sivasubramaniam**³ Justice Athukorale had specified that;

‘A party to an action who seeks a transfer of a pending action must adduce sufficient grounds to satisfy the Court that it is expedient to make order for its transfer... A transfer would not be ordered on a light ground.’

33. In view of that, in the instant application, the Accused-Petitioner has failed to show sufficient material that the High Court Judge is biased to transfer this case to another court.

CONCLUSION

34. In the above circumstances, it is the view of this court that the Accused-Petitioner at this stage had not proven any material to issue the interim order prayed for in the prayer (b) and/or to issue notice to the Respondents. On that we dismiss the petition dated 17th July 2023 subject to payment of tax cost to the 1st Respondent.

Judge of the Court of Appeal

N. Bandula Karunarathna, J. (P/CA)

I agree

President of the Court of Appeal

³[1980] 2 SLR 58.