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

In the matter of an application for Revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 404 of the Code of Criminal Procedure Act No.15 of 1979.

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

Complainant

C.A. Revision Application No:
CA (PHC) APN 115/2018

H.C. Colombo Case No: **HC/4682/2009**

Vs.

Sunil Sumanawansha Amarathunga,
No. 84, Buthgamuwa Road,
Kalapaluwawa, Rajagiriya.

Accused

AND NOW BETWEEN

Sunil Sumanawansha Amarathunga,
No. 84, Buthgamuwa Road,
Kalapaluwawa, Rajagiriya.

Accused-Petitioner

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Mahinda Samayawardhena, J.
COUNSEL	:	Palitha Fernando, PC with AAL Yajish Tennakoon and AAL Dilip Prasad for the Accused-Petitioner Nayomi Wickremasekara, SSC for the Complainant-Respondent
INQUIRY ON	:	16.01.2019
WRITTEN SUBMISSIONS	:	The Accused-Petitioner – On 23.01.2019
DECIDED ON	:	26.02.2019

K.K.WICKREMASINGHE, J.

The Accused-Petitioner has filed this revision application seeking to revise the order of the Learned High Court Judge of Colombo dated 17.09.2018 in Case No: HC/4682/2009, refusing to release the accused-petitioner on bail, pending an appeal.

Facts of the case:

The accused-petitioner (hereinafter referred to as the 'petitioner') was listed as witness no. 02 for the prosecution in case No. HC/4682/2009. The petitioner was treated as an adverse witness by the prosecution under section 154 of the Evidence

Ordinance. At the conclusion of the trial, the Learned High Court Judge acted in terms of section 449(1) of the Code of Criminal Procedure Act and summarily convicted the petitioner on two counts of perjury. Accordingly the petitioner was sentenced for a term of 1 year rigorous imprisonment for each count and was imposed a fine of Rs. 1000/= with a default term of 4 months rigorous imprisonment. The Learned High Court Judge further directed the terms of imprisonment to run consecutively. Thereafter an application for bail, pending appeal, was made on behalf of the petitioner which was refused by the Learned High Court Judge on 17.09.2018.

Being aggrieved by the said refusal, the petitioner preferred this revision application.

The Learned State Counsel for the complainant-respondent (hereinafter referred to as the 'respondent') raised a preliminary objection that the petitioner has not demonstrated any exceptional circumstances to invoke the revisionary jurisdiction of this Court.

In the case of **Attorney General V. Ediriweera [S.C. Appeal No. 100/2005] (2006 B.L.R. 12)**, it was held that,

> *"The norm is that bail after conviction is not a matter of right but would be granted only under exceptional circumstances."*

In the case of **Attorney General V. Letchchemi & another [S.C. Appeal 13/2006] (2006 B.L.R. 16)**, it was held that,

> *"The presumption of innocence that insures in favour of those suspected or accused or connected with the commission of an offence, ceases to operate after conviction by a court of competent jurisdiction."*

In light of above it is understood that law, as it stands today, requires a convicted person to demonstrate the existence of exceptional circumstances in order to get released on bail pending appeal. However in the case of **Ramu Thamotharampillai V. Attorney General [2004] 3 Sri L.R. 180**, it was held that,

> *"...This court is vested with a wide discretion to grant or refuse bail by section 325(3) with which we are now concerned. But this discretion must be exercised judiciously and not arbitrarily or capriciously. In Queen v Liyanage(6) the Court pointed out at page 291 "Even if our discretion to grant bail is unfettered it must still be judiciously exercised." But it pointed out at pages 292 and 293 "But it is not to be thought that the grant of bail should be the rule and the refusal of bail should be the exception where serious non-bailable offences of this sort are concerned."*
>
> ***Where a statute vests discretion in a court it is of course unwise to confine its exercise within narrow limits by rigid and inflexible rules from which a court is never at liberty to depart. Nor indeed can there be found any absolutes or formula which would invariably give an answer to different problems which may be posed in different cases on different facts.*** *The decision must in each case depend on its own peculiar facts and circumstances. But in order that like cases may be decided alike and that there will be ensured some uniformity of decisions it is necessary that some guidance should be laid down for the exercise of that discretion."*
>
> (Emphasis added)

Justice Gunasekara followed this position in the case of **Jayanthi Silva and two others V. Attorney General [1997] 3 Sri L.R. 117** in which it was held that,

> *"In Ramu Thamotheram Pillai v. Attorney-General (Supra) bail was refused to the Appellant who was convicted of attempted murder and sentenced to*

seven years rigorous imprisonment pending his appeal on the ground that no exceptional circumstances have been made out.

From a consideration of the decisions referred to above and the legal provisions as a general principle there is no doubt that exceptional circumstances must be established by an appellant if the discretion vested in a High Court to grant him bail pending the determination of his appeal is to be exercised in his favour. But this by no means should be taken to be the invariable and inflexible rule for Justice Vaithiyalingam, J. himself recognised it in the case of Thamotheram Pillai v. Attorney-General (Supra) when he observed thus ***"But the requirement of exceptional circumstances should not be mechanically insisted upon merely because the case is from the High Court. Even in the case of a High Court it is possible for an appellant to have been convicted of a trivial offence and to have been given a very light sentence****. For instance a man charged with murder may ultimately be found guilty of only causing simple hurt and be sentenced to a short term of imprisonment. In such a case the Court would not expect the appellant to show that exceptional circumstances existed before granting bail."* (Emphasis added)

We observe that these two cases were decided under the Administration of Justice Law and section 333 of the Code of Criminal Procedure Act which dealt with the law of bail prior to the enactment of the Bail Act in 1997.

In the case of **Attorney General V. Letchchemi & another (supra)** it was further held that,

"Bail after conviction in the High Court referred to in section 333(3) of the Code of Criminal Procedure Act No. 15 of 1979 has been incorporated in verbatim in Section 20(2) of the Bail Act No.30 of 1997. The settled law on

this is that where a section has been incorporated in verbatim, governing principles applicable are those contained in the principal enactment. The interpretation of the principal enactment has always held that there must be exceptional circumstances.

As section 20 of the Bail Act No. 30 of 1997 is identical to that contained in the Code of Criminal Procedure, in its implementation the earlier restricted view of the convicted person having to disclose exceptional circumstances for grant of bail must prevail..."

These decisions amply demonstrate that even though a petitioner is required to demonstrate exceptional circumstances in an application for bail pending appeal, such exceptional circumstances will certainly differ depending on the circumstances of each case.

The Learned State Counsel was correct in arguing that the age of the petitioner does not fall within the definition of the exceptional circumstances. However it is our considered view that the extreme old age of the petitioner should be considered together with other circumstances of this case such as the term of imprisonment and the possibility of the petitioner absconding. Therefore the existence of exceptional circumstances shall be decided on a consideration of the totality of the case.

The petitioner is a person of 70 years. The main consideration of the Learned High Court Judge in refusing the bail application was that the petitioner whilst giving evidence has been laughing and ridiculing Court. The Learned Counsel for the petitioner submitted that neither the Learned High Court Judge nor the State Counsel who made that observation had been present in Court at the time the petitioner testified and the Learned High Court Judge who observed the petitioner,

giving evidence, had not made such an observation. However upon perusal of the proceedings, we find that Court has made an observation as to the petitioner was laughing while giving evidence.

"ප්‍ර: තමුන් තව කීවානේ හුඟක් දෙයක් කීවා කියලා?

උ: නංගි ගැන දොස් කීවනේ (සිනාහාසෙමින් පිලිතුරු ලබාදෙයි)"

(At page 226 of the brief)

Nevertheless we are of the view that such facts dealing with the conviction should not be considered in granting bail, pending appeal.

The Learned President's Counsel for the petitioner further contended that according to prison regulations the 2 years imprisonment would lapse in less than 18 months and his appeal would be rendered nugatory even if it is decided in his favour. It was further submitted that the petitioner has not yet been informed that the appeal briefs are ready.

In the aforesaid case of **Ediriweera [S.C. Appeal No. 100/2005]**, it was held that,

> *"Delay is always a relative term and the question to be considered is not whether there was mere explicable delay as when there is a backlog of cases, but whether there has been excessive or oppressive delay and this always depends on the facts and circumstances of the case..."*

This Court has earlier observed that in the present system of criminal justice we do not see prolonged delays in preparing appeal briefs as it used to be. However we are of the view that the time period of preparing the brief should be always considered compared to the term of imprisonment. Therefore we think that it is

quite difficult to conclude hearing an appeal within 18 months given that the appeal brief of the instant case is not yet ready.

Considering above, we are of the view that the Learned High Court Judge erred in refusing to release the petitioner on bail pending appeal. Therefore we revise the order of the Learned High Court Judge dated 17.09.2019. We order the petitioner to be released on bail under following conditions;

1. A cash bail of Rs.50, 000/= (Rupees Fifty Thousand)
2. A surety bail of Rs. 100,000/= with two sureties. (Each surety acceptable to the High Court must enter into a bond which must be of Rs.100, 000/= each)
3. The passport and any other travel document of the petitioner must be handed over to the High Court of Colombo.

Accordingly this revision application is allowed.

Registrar is directed to forward copies of this order to the relevant High Court of Colombo and to the Controller General, Department of Immigration and Emigration.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL