

**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*

The Director General,
The Commission to Investigate
Allegations of Bribery or Corruption.
No 36, Malalasekara Mawatha,
Colombo 07

Complainant

Court of Appeal
Revision Application No :
CA/ PHC/APN 67/20

Vs.

High Court Case No :
HCB 2063/2015

1. Herath Pathiranalage Sunil
Wickrema Abeysinghe
No. 42/73, Baddagana North
Pitakotte

2. Mohoppu Gamage Mahinda Kithsiri
No. 170/1, Thundanda
Homagama
(Presently at Wellikada Prison)

Accused

And

Herath Pathiranalage Sunil Wickrema
Abeysinghe
No. 42/73, Baddagana North
Pitakotte

Accused-Appellant

Vs.

The Director General
The Commission to Investigate
Allegations of Bribery or Corruption
No 36, Malalasekara Mawatha,
Colombo 07

Complainant-Respondent

And

Muthugalage Jayantha Sirisena
Muthugala
No. 42/73, Baddagana North
Pitakotte
*(On behalf of Herath Pathiranalage
Sunil Wickrema Abeysinghe)*

Petitioner

Vs.

The Director General
The Commission to Investigate
Allegations of Bribery or
Corruption
No 36, Malalasekara Mawatha,
Colombo 07

**Complainant- Respondent-
Respondent**

And now between

1. Herath Pathiranalage Sunil
Wickrema Abeysinghe
No. 42/73, Baddagana North
Pitakotte

Accused-Appellant-Petitioner

2. Muthugalage Jayantha
Sirisena Muthugala
No. 42/73, Baddagana North
Pitakotte

Petitioner-Petitioner

Vs.

The Director General
The Commission to Investigate
Allegations of Bribery or
Corruption
No 36, Malalasekara Mawatha,
Colombo 07

**Complainant-Respondent-
Respondent- Respondent**

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Saliya Peiris P.C. with S Jayawardena
for the petitioner.
Wasantha Perera SSC for the
respondents.

Argued on : 15.06.2021

Decided on : 06.07.2021

Iddawala – J

The accused-appellant-petitioner and the petitioner-petitioners (hereinafter referred as the 1st petitioner and 2nd petitioner respectively) have invoked the revisionary jurisdiction of this Court conferred under Article 138 of the Constitution seeking to revise the judgment of the High Court of Colombo dated 22.05.2020 in the Case No HCB 2063/2015.

The 1st petitioner has been convicted for offences committed under Section 14(b) read with Section 25 (3) of the Bribery Act, for soliciting or accepting gratification as an inducement or a reward to do or forebear to do an act in his capacity as a Judicial Officer. He has been sentenced for four years of rigorous imprisonment and a fine of Rs. 5,000.00 for each of the four counts he has been charged with by the learned judge of High Court of Colombo on 20.02.2020. In addition to the above sentence a fine of Rs.300,000.00 has also been imposed in default of which a term of 2 years of rigorous imprisonment was imposed.

Being aggrieved by the said conviction and sentence the 1st petitioner preferred an appeal to this Court. After the appeal was preferred, the 2nd petitioner has made an application to the High Court on behalf of her husband for bail pending appeal and it has been refused by the learned High

Court Judge on 22.05.2020 on the ground that petitioner has not established exceptional circumstances. Being aggrieved by the said Order the petitioners preferred the present application to this Court.

In this instant case the learned High Court Judge has refused to enlarge petitioner on bail on the ground that the petitioner had not established exceptional circumstances. This court has to consider whether the refusal of the application for bail by the learned High Court Judge by his order dated 22.05.2020 was correct or not.

I wish to consider the relevant provisions which vested the power to grant bail to a convicted prisoner, with the High Court, since I am dealing with the legality of the order of the learned High Court Judge. The relevant provision is **section 333(3) of the Criminal Procedure Code** which reads as follows

“When an appeal against a conviction is lodged, the High Court may subject to subsection (4) admit the appellant to bail pending the determination of the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance.”

Accordingly, a High Court Judge is empowered to grant bail to a convicted prisoner. It is a well-established principle that when the Court considered bail pending appeal under section 333(3) of the Criminal Procedure Code, the convicted prisoners were released on bail only in exceptional circumstances. A series of reported cases have endorsed this requirement.

In the case of **King Vs Keerala** 48 NLR 202, it was held that *“this Court (the Court of Criminal Appeal) does not grant bail in the absence of exceptional circumstances”*.

In **Queen Vs Rupasinghe Perera** 62 NLR 238 Basnayake CJ observed as follows; *“Bail is not granted by the Court of Criminal Appeal unless there are exceptional circumstances”*.

In **Queen Vs Cornelis Silva** 74NLR 113 the accused had been convicted and sentenced to a term of four years' rigorous imprisonment. The appellant's application for bail pending appeal was refused on the ground that no exceptional circumstances had been established.

In **D.K. Lionel V Attorney General** Rev.H.C.C.41/74 SC minutes 23. 1.1975 bail was refused on the ground *that no special circumstances were shown to exit for the granting bail.* In **Salahahudeen V Attorney General** 77 NLR 262 Samerawickrame, J. held “... *that it is a settled principle that the release of a prisoner on bail pending an appeal to the Court Criminal of Appeal will only be granted in exceptional circumstances.*”

The Bail Act, No. 30 of 1997 also has made provisions in respect to granting bail for a convicted prisoner which is in force since 28th November, 1997. The relevant provisions of the Bail Act are **section 20(2) and 20(3)** which read as follows.

(2) When an appeal against a conviction by a High Court is preferred, the High Court may subject to subsection (3) release the appellant on bail pending the determination of his appeal. An appellant who is not released on bail shall, pending the determination of the appeal be treated in such manner as may be prescribed by rules made under the Prisons Ordinance.

(3) Where the accused is sentenced to death, execution shall be stayed and he shall be kept on remand in prison pending the determination of the appeal.

Hence, a high court is permitted to grant bail to a convicted prisoner subject to the condition stated in Section 20 (3) of the Bail Act.

It is therefore seen that section 20(2) of the Bail Act and section 333 (3) of the Criminal Procedure Code is identical. Hence, statutory provisions relating to

granting of bail prior to and after the enactment of the Bail Act remain unchanged. Therefore, requirement to establish exceptional circumstances to grant bail pending appeal should exist even after the enactment of the Bail Act.

Cases decided after the introducing of the Bail Act, No.30 of 1997 have also followed the same principle of the requirement to establish “exceptional circumstances” in bail pending appeal.

In **Ediriweera Vs. Attorney General** 2006 1 SLR 25 it was held in the majority decision of Balapatabandi J that *“It is a settled principle that the release of a person on bail pending appeal to the Court of Appeal will only be granted in exceptional circumstances”*.

Even in the dissenting judgement of this case it was clearly stated that an exceptional circumstance is essential to grant bail even after implementation of the Bail Act. Abrew J in his dissenting judgement highlighted that: *“... It is therefore seen that section 333(3) of the Criminal Procedure Code was in terms identical with section 20(2) of the Bail Act. Thus, statutory provisions relating to granting of bail prior to and after the enactment of the Bail Act remain unchanged. Therefore, requirement to establish exceptional circumstances to grant bail pending appeal should exist even after the enactment of the Bail Act”*

Further it was stated in **Jayanthi Silva and Two Others Vs. Attorney General** (1997) 3 SLR 117, by D.P.S. Gunasekera J that: *“Over the years a principle has evolved through judicial decisions that bail pending appeal from convictions by the Supreme Court would only be granted in exceptional circumstances.”*

However, considering the above decisions it should be noted that, while the requirement to establish exceptional circumstances in bail pending appeal is similar to the other bail applications, these circumstances will depend on the facts of each case.

In the case of **Sunil Sumanawansa Amarathunga Vs. Hon. Attorney General** CA (PH C) APN 115/2018 K.K. Wickremasinghe, J. upheld that: *“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.”*

In the case of **Attorney General V. Letchchemi & another** [S.C. Appeal13/2006] (2006 B.L.R. 16), it was held that: *“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 ...”* and it was further held that *“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”* .

Therefore, when the provisions of Bail Act are carefully examined the sections 19 and 20 which deal with Bail pending appeal did not insist on exceptional circumstances and one can argue that the concept of existing of an “exceptional circumstance” is not a statutory requirement even now.

However, it is clearly established that our courts have taken a strong stance that exceptional circumstances should be established in order to release a convict on bail pending appeal. We are bound to be guided and to follow the decisions of the Apex courts.

Therefore, now this Court has to consider whether the petitioner in this present case has, in fact, established exceptional circumstances.

The petitioner has submitted following as exceptional circumstances.

1. The prevailing situation of the country due to COVID 19 pandemic and the vulnerability of the petitioner to be a victim of the pandemic due to his old age.
2. The marriage of the petitioner's daughter is scheduled to be held and the petitioner is required to be present at the event.
3. The petitioner's son is bedridden and petitioner is required to contribute to the expenses of son.
4. The second petitioner has undergone severe mental pressure due to the above circumstances and is currently under the treatment of a psychiatric.
5. The prolong delay that would occur in the hearing of the appeal and therefore a prolonged imprisonment of petitioner pending appeal is not reasonable.
6. Strength of the grounds of appeal and the reasonable prospect of success.

At the inquiry, the President's Counsel for the petitioner informed the Courts that he didn't wish to pursue the points 2, 3 & 4 above. He relied predominantly on point 1 and 5, the danger imposed by the COVID 19 and the prolonged delay of the hearing.

Additionally, at the inquiry of this application before the High Court and this Court, the President's Counsel for the petitioner brought to the attention of the court that the petitioner is a diabetes patient and the possibility of him getting infected with the Covid 19 is very high, therefore his life is in danger compared to the other inmates in the prison. Senior State Counsel appeared for 1st and 2nd respondents while denying the point raised by the President's Counsel for the petitioner conceded the fact that petitioner is being in the remand hospital for a long period. Senior State Counsel further reiterated that the petitioner is being treated well and looked after in the proper manner by the prison authorities. If this Court considers the request of the petitioner and enlarged him on bail, it will set a precedent which will be like an opening

of flood gates where all the inmates in remand custody or otherwise will plead the same concession.

In **Ediriweera Vs. Attorney General** (supra), Balapatabandi J. considered the age of the accused appellant and the grave illness of the appellant's father and allowed to see his father on humanitarian grounds. However, this majority decision was set aside in the appeal **Attorney General Vs. Ediriweera** 2006 BAL 12 by Justice Shiranee Thilakawardena with S N Silva CJ and Dissanayake J agreeing.

The Senior State Counsel stressed that it was observed in **Ramu Thamocharampillai Vs Attorney General** decided in 1975 and reported in 2004 3 SLR 180 that ; *"The illness must be a present illness and that continued incarceration would endanger life or cause permanent impairment of health. Moreover, there must be evidence of the nature of the illness and its effect"*.

Moreover, in the Court of Appeal case of **Ediriweera Vs. Attorney General** (supra) Abrew J in his dissenting judgement refused granting the bail to highlighting that; *"There is no evidence before Court that the petitioner's health condition cannot be treated either at the prison hospital or at any hospital in Sri Lanka.*

Coronavirus disease (COVID-19) is not just an illness and it is an infectious disease (pandemic) caused by a newly discovered coronavirus widespread over the whole country and the entire world. I have no doubt that COVID -19 has had a significant effect, globally and nationally, on both individuals and institutions. One of these is the operation of the criminal justice system of our country. It is a well-known fact that the COVID-19, like other infectious diseases, poses a higher risk to populations that live in close proximity to each other. And it affects older people and individuals with non-communicable illnesses such as cardiovascular disease, diabetes, chronic

respiratory disease, and hypertension. While the effect of COVID-19 should be considered as a unique factor, since its impact is applicable to all the persons held in custody, it should be carefully considered whether the situation of the petitioner is, in fact, different from the others who experience similar circumstances while in prison.

It was confirmed at the inquiry that the petitioner is in the prison hospital at present, where he is separated from other prisoners and given proper treatments and attention considering the vulnerability of him to the effects of the pandemic. If such measures have been taken to eliminate the risk factor of the petitioner being subject to the COVID-19, then I do not find an 'exceptional circumstance' in the situation of the petitioner than that of other prisoners.

The petitioner has averred that the prolonged delay of the appeal to be an exceptional circumstance. The ground of delay in preparing appeal briefs and the delay in taking up the appeal for argument has been discussed and decided in several reported cases. In **Queen vs. Rupasinghe Perera (supra)**, the main ground urging to support for bail pending appeal was that the hearing of the appellant's appeal was likely to be delayed as the preparation of the transcript of shorthand notes of the proceedings was likely to take more than usual time owing to the length of the trial in the course of which over 100 witnesses were examined and more than 400 exhibits were produced. Basnayake CJ remarked as follows: *"The applicant has not satisfied the Court that this is a case in which we should take the exceptional and unusual course of granting bail."*

In **Attorney General Vs. Ediriweera (SC) (supra)** Shiranee Thilakawardena J remarked 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. *Where delay in bringing a man to the conclusion of his litigation is as great as to the amount of oppression a Court will only then interfere and grant bail.”* (emphasis added)

When the principles decided by the above cases are applied to the circumstances of this case, the prolonged delay in taking up the appeal for argument do not fall within the category of exceptional circumstances.

Further, it was revealed at the inquiry that this appeal was listed for argument last month (May-2021) but could not be proceeded due to the prevailing situation of the country. Therefore, it is evident that whatever the delay that may have occurred in the proceedings has been unavoidable and it was not an ‘excessive’ or ‘oppressive’ delay.

Furthermore, it is noteworthy to record that this Court has taken steps to publish a public notice directing all the Attorneys-at-Law to appeal to the Courts by way of a motion requesting its immediate attention and consideration, if there is a need for urgent consideration and disposal of any matter pending in Courts.

Additionally, the President’s Counsel for the petitioner pointed out that the petitioner has been convicted for offences which are non-violent and do not include an injury or the use of force to another person. Though the convicted offences may not be non-violent crimes, they are nevertheless offences condemned by the society which can create a lasting impact even without the use of force or resulting injury.

Further, it should be re-emphasized that, determining whether the grounds urged by the petitioner would amount to be exceptional circumstances is a discretion to be exercised by the Courts.

In **Ward v James (1965)** 1 AER 563 @ p571 Lord Denning pointed out that; *"..... that when a statute gives a discretion, the courts must not fetter it by rigid rules from which a Judge is never at liberty to depart. Nevertheless, the courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. This would normally determine the way in which the discretion is exercised and this ensures some measure of uniformity of decision. From time to time the considerations may change as public policy changes and so the pattern of decision may change. This is all part of the evolutionary process."*

In the celebrated case in 1770 **R. v. Wilkes 1770** Burr. at p.253 Lord Mansfield C.J. made the following well known pronouncement. *"It is indeed in the discretion of the Court to bail a person so circumstanced. But discretion when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful but legal and regular."*

In **Queen vs. Liyanage** 65 NLR 289 at p.291 it was pointed out; *"In considering an application for bail, a Court follows well-settled principles which have been laid down from time to time. Even if our discretion to grant bail is unfettered, it must still be judicially exercised"*.

Whether the grounds urged by the petitioner amounts to be exceptional circumstances has to be considered along with the above principles and should not to be considered solely on humanitarian or imaginary grounds and it should be governed by rule and be legal and regular.

To grant bail pending appeal, exceptional circumstances pleaded has to be such that the court will come to the natural and probable conclusion that justice can only be done by considering to grant bail under the circumstances, which is not reflected in this case.

Therefore, for the reasons explained above, this court is unable to satisfy that any such 'exceptional circumstances' exist in the current situation to consider the granting of the bail pending appeal.

Accordingly, the application is dismissed.

Judge of the Court of Appeal

Menaka Wijesundara J.

I agree.

Judge of the Court of Appeal