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 from the Order for Cancellation of Bail delivered by the learned High Court Judge of Kandy as dated 05th October 2023, in High Court of Kandy Case No. HC 141/2020.

Court of Appeal Case No.

CPA/132/2023

Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Vs.

High Court Kandy

Case No. HC 141/2020

Rajapakse Gedara Ravindu Ratnayake

ACCUSED

AND NOW

H. H. Rupika Sanjeewani Dharmadasa

No. 16, Kiwlwkada,

Getalawa, Kokawewa.

PETITIONER

Vs.

The Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Rajapakse Gedara Ravindu Ratnayake

(Presently in prison)

ACCUSED-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Mohan Weerakoon, P.C. with Sandamal Senal Mathugama for the Petitioner

: Janaka Bandara, D.S.G. with Jayalakshi de Silva, S.S.C. for the Respondents

Argued on : 15-12-2023

Decided on : 31-01-2024

Sampath B. Abayakoon, J.

This is an application by the petitioner acting on behalf of the accused-respondent, who is the accused in High Court of Kandy Case Number HC/141/2020, invoking the revisionary jurisdiction granted to this Court in terms of Article 138 of The Constitution.

The petitioner is seeking to challenge the order made by the learned High Court Judge of Kandy on 5th October 2023, where the accused-respondent (hereinafter referred to as the accused) was ordered to be remanded pending further trial.

When this matter was supported before this Court for notice, after having considered the relevant facts and circumstances, this Court decided to issue notice to the complainant-respondent, namely the Hon. Attorney General.

At the hearing of this application, this Court heard the submissions of the learned President's Counsel, as well as that of the learned Deputy Solicitor General (DSG) on behalf of the Hon. Attorney General in order to determine the application before the Court.

At the conclusion of the arguments on this matter, the learned DSG agreed that ordering the release of the accused pending the final determination of the application would be justifiable given the relevant facts, the circumstances and the law. Accordingly, this Court ordered the immediate release of the accused from remand custody on the earlier bail conditions the accused had previously complied.

This is an action where the accused had been indicted before the High Court of Kandy for committing the offence of grave sexual abuse of a minor, which is an offence punishable in terms of section 365B (2) (b) of the Penal Code as amended by Penal Code (Amendment) Act No. 2 of 1995 and 16 of 2006.

The accused has appeared before the High Court on notice on 16-09-2020, and after serving the indictment and other relevant documents on the accused, the learned High Court Judge of Kandy has released the accused on bail.

Thereafter, the trial against the accused has commenced on 21-07-2022 as he has pleaded not guilty to the charge. At the conclusion of the evidence of the victim, namely PW-01 and her mother (PW-02) on 05-10-2023, the prosecuting State Counsel has urged the learned High Court Judge to issue summons on PW-03, 04, 06 and 08.

When the above application was made, the learned High Court Judge has made the impugned order sought to be challenged before this Court on behalf of the accused.

For matters of clarity, I will now reproduce the order in its entirety.

> අධිකරණයෙන්: -
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> මේ අවස්ථාවේ මෙම නඩු විභාගයේ පැමිණිල්ලේ සාක්ෂි අංක 1 සහ කැඳවන ලද පැමිණිල්ලේ සාක්ෂි අංක 2 ගේ සාක්ෂිය මා ඉදිරියේ සම්පූර්ණයෙන්ම විභාග කරන ලද අතර එම සාක්ෂිකරුවන්ගේ සාක්ෂි දෙදෙනාගේම සැලකිල්ලට ගත් විට අපරාධ නඩු විධාන සංග්‍රහ පනතේ 263 (2) පැහැදිලි කිරීම් යටතේ කරුණු සලකා බැලීමට එම නඩුකරයේ එකී සංශෝදනයේ සාක්ෂි මගින් පැහැදිලිවම කරුණු අනාවරණය කරගෙන ඇති හෙයින් විශේෂයෙන්ම පැමිණිල්ලේ සාක්ෂි අංක 1 ගේ සාක්ෂිය පැමිණිල්ලේ සාක්ෂි අංක 2 ගේ සාක්ෂිය මගින් තවදුරටත් මනාව තහවුරු වීම යන කරුණු ගත් විට අපරාධ නඩු විධාන සංග්‍රහයේ 263 (2) පැහැදිලි කිරීම් යටතේ වන විදිවිධාන අනුව අධිකරණයට චුදිතයෙකු අධිචෝදනා පත්‍රයේ සඳහන් අධිචෝදනාව චුදිත විසින් කරන ලද්දේ යැයි යන්නට පැහැදිලිව සාක්ෂි අනාවරණය වන තත්වයක් තුල චුදිත බන්ධනාගාර භාරයේ තබා එතැන් සිට නඩු විභාග කිරීමට ඇති විදිවිධාන අනුගමනය කරමින් මෙම නඩුවේ ඉදිරි විභාගය චුදිත බන්ධනාගාරයේ තබා විභාග කිරීමට නියෝගයක් නිකුත් කරමි. පෙර ඇප චුදිතගේ අවලංගු කරමි.
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> විභාගය සඳහා කැඳවන්න 2024 ජනවාරි 04.

It appears that although an application for summons had been made by the learned prosecuting State Counsel, no order has been made in the proceedings for the day with regard to the summons for the other witnesses, other than the above order, remanding the accused.

Accordingly, the accused has been remanded. It appears from the documents tendered to this Court, that on 31-10-2023, the Attorney-at -Law for the accused has filed a motion seeking to make an application for bail for the accused before the High Court on 01-11-2023. However, the learned High Court Judge has refused to mention the matter in open Court on the basis that since the remanding order had been made in terms of section 263 of the Code of Criminal Procedure Act, there is no reason to consider bail for the accused.

I would now reproduce the relevant section under which the learned High Court Judge has decided to remand the accused after hearing the prosecution witness number 1 and 2.

> **263. (1) If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may from time to time order a postponement or adjournment on such terms as it thinks fit for such time as it considers reasonable and may remand the accused if in custody or may commit him to custody or take bail in his own recognizance or with sureties for his appearance:**
>
> **Provided however that every trial in the High Court, with a jury or without a jury, shall as far as practicable, be held day to day.**
>
> **(2) Where the accused has attended the Court on summons he shall be enlarged on his own recognizance or on his simple undertaking to appear, unless for reasons to be recorded Court orders otherwise.**
>
> ***Explanation*** **- If sufficient evidence has been obtained to raise a reasonable suspicion that the accused may have committed an offence and it is likely that further evidence will be obtained by a remand, this is a reasonable cause for a remand.**
>
> **(3) An inquiry or trial in a Magistrate's Court shall not be postponed or adjourned on the ground of the absence of a witness unless the Magistrate has first satisfied himself that the evidence of such witness is material to the inquiry or trial and that reasonable efforts have been made to secure his attendance, and has recorded the name of such witness and the nature of the evidence which he is expected to give.**
>
> **(4) Every person remanded or committed to custody under this section shall be so remanded or committed by warrant addressed to**

the superintendent of a prison and the provisions of section 264 shall apply to every such warrant.

It appears that the learned High Court Judge has relied on the explanation that appears after subsection (2), which has interpreted the reasonable cause for a remand under the section.

However, it needs to be noted that although the learned High Court Judge has relied on the explanation of section 263 to remand the accused pending further trial, he has not followed the mandatory provision of section 263 (1) where the trial shall, as far as practicable, should be held day to day.

Not only that, the summons to the other witnesses the prosecution intended to call on the next date of the trial has not been ordered, as I have observed previously. As a result, the case will have to be invariably postponed to a further date, which will result in further incarceration of the accused.

I find that the learned High Court Judge has failed to give a reason as to why the further trial cannot be held day to day in his order of remand.

Under the circumstances, the only assumption that can be made is that the remanding of the accused for a period of 3 months had been done as a punitive measure.

I am of the view that the learned High Court Judge was misdirected as to the relevant law applicable for granting or remanding of an accused or a suspect person as provided for by statutory provisions in relation to bail, enacted by the legislature in its wisdom.

I find that the learned High Court Judge has failed to consider the relevant provisions of the Bail Act No. 30 of 1997, which has been enacted by the legislature to provide for release on bail of persons suspected or accused of being concerned in committing or of having committed an offence; to provide for the granting of anticipatory bail, and for matters connected therewith or incidental thereto.

The section 2 of the Bail Act provides that grant of bail to be the guiding principle, subject to the exceptions as provided for in the Act, and refusal to grant bail should be the exception.

Section 27 of the Bail Act provides that the provisions of the Act should prevail in case of conflict or inconsistency.

The relevant section 27 reads as follows.

> **27. The provisions of this Act shall have effect notwithstanding anything to the contrary in the Criminal Procedure Code Act, No. 15 of 1979 and in any other written law, other than the Release of Remand Prisoners Act, No. 8 of 1991 and accordingly, in the event of any conflict or inconsistency between the provisions of this Act and such other written law, other than the Release of Remand Prisoners Act, No. 8 of 1991, the provisions of this Act shall prevail.**

Therefore, it is quite obvious that although section 263 of the Code of Criminal Procedure Act provides for the remanding of a person pending further trial, the provisions of the Bail Act shall prevail over the said provision when it comes to the question of bail or cancellation of bail for that matter.

I find that the learned High Court Judge has failed to draw his attention to the section 14 of the Bail Act before the impugned order was made.

Section 14 of the Bail Act reads as follows;

> **14. (1) Notwithstanding anything to the contrary in the preceding provisions of this Act, whenever a person suspected or accused of being concerned in committing or having committed a bailable or non-bailable offence, appears, is brought before or surrenders to the Court having jurisdiction, the Court may refuse to release such person on bail or upon application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a**

subsisting order releasing such person on bail if the Court has reason to believe:

(a) that such person would

(i) not appear to stand his inquiry or trial;

(ii) interfere with the witnesses or the evidence against him; or

otherwise obstruct the course of justice; or

(iii) commit an offence while on bail; or

(b) that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

(2) Where under subsection (1), a Court refuses to release on bail any person suspected or accused of being concerned in or having committed an offence or cancels a subsisting order releasing such person on bail, the Court may order such suspect or accused to be committed to custody.

(3) The Court may at any time, where it is satisfied that there has been a change in the circumstances pertaining to the case, rescind or vary any order made by it under subsection (1).

The above-mentioned provision clearly stipulates that a cancellation of an existing bail order can be made only under limited circumstances as mentioned in paragraphs (a) and (b) of section 14 of the Bail Act.

In the case of **Anuruddha Ratwatte Vs. The Attorney General (2003) 2 SLR 39** it was held:

"In terms of the mandatory requirements of section 14(1) such cancellation could have been done only on:-

(i) *An application being made by a police officer;*

(ii) *Hearing the accused appellant personally or through his attorney-at-law;*

(iii) *It the court had reasons to believe that any one of the grounds as specified in paragraph (a)(i) to (iii) or paragraph (b) have been made out.*

I find that the reasons given by the learned High Court Judge to cancel bail of the accused does not fall within the ambit of section 14 of the Bail Act to justify cancellation of bail. I am of the view that any cancellation of bail given to an accused shall be under limited circumstances as provided for in section 14 of the Bail Act, whatever the section 263 of the Code of Criminal Procedure Code says to the contrary.

Another matter where I cannot agree as to the events that have taken place is the learned High Court Judge's decision to refuse to entertain an application for bail after the accused was remanded.

In terms of section 14(3) of the Bail Act, even after remanding a person in terms of the Bail Act, such a person has a right to be heard in relation to the rescinding or variation of an earlier made order under section 14(1) of the Bail Act.

In the case of **Rupathunga Vs. Attorney General and another (2009) 1 SLR 170,** Silva, J. observed that;

> *"… these are orders which could be founded as capricious, arbitrary, and unjust… what shocks the conscience of this Court is that the High Court Judge has not even cared to provide an opportunity to the accused, at least to show cause as to why bail should not be cancelled, instead has considered some extraneous matters which are not even covered by section 14 and has rushed to the conclusion that bail should be cancelled which I say is indecent."*

It was held in the case of **Hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd. (1987) 1 SLR 05** that;

> *"It is settled law that the exercise of the revisionary powers of the appellate Court is confined to cases in which exceptional circumstances exist warranting its intervention."*

In the case of **Wijesinghe Vs. Thamaratnam, (Srikantha Law Reports Vol-IV page 47)** it was held that;

> *"Revision is a discretionary remedy and will not be available unless the application discloses circumstances which shocks the conscience of the Court."*

In the case of **Vanik Incorporation Ltd. Vs. Jayasekare (1997) 2 SLR 365**, it was held thus;

> *"Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice."*

For the reasons as stated above, I am of the view that the petitioner has established, sufficient exceptional circumstances before this Court for this Court to interfere into the impugned order made by the learned High Court Judge as the said order has been made without giving due consideration to the relevant law in that regard.

Another matter that needs to be stated is that although, maybe inadvertently, by applying this procedure of remanding the accused without having a basis as stipulated in terms of section 14 of the Bail Act, the learned High Court Judge may have given several grounds of appeal that can be canvassed by the accused in case of a conviction against him for the charge, if the accused decides to challenge such a conviction in the appropriate forum.

It must be emphasized that trial Judges should be mindful of such an eventuality when making orders of this nature.

Accordingly, the order made on 05-10-2023 by the learned High Court Judge of Kandy which ordered the remanding of the accused is hereby set aside as it cannot be allowed to stand.

The order made by this Court previously on 15-12-2023, to release the accused pending the conclusion of the trial against him is affirmed.

The Registrar of the Court is directed to communicate this order to the High Court of Kandy for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal