

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

The Democratic Socialist Republic of Sri Lanka

Complainant

V.

**Court of Appeal Case No.**  
**CA(PHC) APN-157/2019**

**High Court of Balapitiya**  
**Bail Application No. 3784/2019**

**High Court of Balapitiya**  
**Case No. HC 1219/2009**

1. Mapalagama Manage Susantha
2. Buvendra Kumara Ketagoda Gamage
3. Nanayakkara Liyanarachchi Nalaka Vajira Jayawardena
4. Hegoda Arachchi Piyal Kamantha

Accused

AND NOW

Buvendra Kumara Ketagoda Gamage

Accused Appellant

V.

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

Complainant Respondent

AND NOW BETWEEN

Buvendra Kumara Ketagoda Gamage

Accused Appellant Petitioner

V.

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

Complainant Respondent Respondent

AND NOW BETWEEN

Buvendra Kumara Ketagoda Gamage

Accused Appellant Petitioner Petitioner

V.

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

Complainant Respondent Respondent  
Respondent

**BEFORE**

: **K.K. WICKREMASINGHE, J**  
**K. PRIYANTHA FERNANDO, J**

**COUNSEL**

: Nihara Randeniya for the Petitioner.

Lakmali Karunanayake DSG for the Respondent.

**ARGUED ON**

: 26.02.2020

**ORDER ON**

: 13.03.2020

**K. PRIYANTHA FERNANDO, J.**

01. Accused-Appellant-Petitioner-Petitioner (Petitioner) was indicted with 3 others in the High Court of Balapitiya for robbery punishable in terms of section 380 of the Penal Code. After trial the learned High Court Judge convicted the Petitioner for the said offence and was sentenced on 12.12.2018, to rigorous imprisonment for 5 years. Petitioner was further imposed a fine of Rs. 10, 000/- and also ordered to pay the complainant Rs. 1,000,000/- as compensation. Petitioner appealed against the above conviction to the Court of Appeal under case No. HCC 337/2018.
02. Petitioner pursued an application for bail pending appeal in the High Court of Balapitiya in application No. 3700/2019, where bail was refused by the learned High Court Judge on 14.06.2019. Thereafter, the Petitioner filed another application for bail pending appeal in the High Court in application No. 3784/2019. The learned High Court Judge dismissed the above mentioned 2<sup>nd</sup> application on 22.11.2019 without issuing notice to the Respondent. Reason stated for the dismissal was that the Petitioner has failed to submit any change in circumstances after the refusal of the 1<sup>st</sup> application for bail pending appeal. Being aggrieved by the above dismissal of the 2<sup>nd</sup> application, Petitioner filed the instant revision application to get the order of the learned High Court Judge dated 22.11.2019 revised/set aside and to grant bail pending appeal to the Petitioner.
03. Learned counsel for the Petitioner contended that the learned High Court Judge's order is arbitrary and would shock the conscience of this court. As exceptional circumstances, counsel

submitted that the prevailing health condition of the Petitioner warrants granting of bail. It was further submitted that as the sentence imposed is 5 years, substantial part of the sentence would be served by the time the appeal is decided.

04. Learned Deputy Solicitor General for the Respondent submitted that the circumstances urged by the Petitioner cannot be considered as exceptional. Further, learned DSG submitted that Medical Reports received by the court do not support the application of the Petitioner.
05. It is settled law that bail pending appeal from the High Court would be granted only in exceptional circumstances (*Ediriweera V. Attorney General C.A. (PHC) 25/2005, Attorney General V. Letchchemi and another S.C. Appeal 13/2006*).
06. Exceptional circumstances may vary from case to case. Sri Lankan Superior Courts have considered long delay in hearing the appeal and ill health of an Appellant (although those circumstances are not exhaustive) as exceptional circumstances to grant bail pending appeal.
07. In his petition in the 2<sup>nd</sup> application for bail (No. 3784/2019) in the High Court, the Petitioner has clearly averred in paragraphs 10 and 11, his inability to submit the relevant medical certificates pertaining to his illness. He also has averred that, although he requested for the medical certificates from the Superintendent of Prisons, Galle and also from the Medical Officer, they had refused to give him. Hence, the Petitioner has requested the High Court to issue an order to the Superintendent of Prisons, Galle to submit the relevant medical certificates pertaining to his illness.
08. The learned High Court Judge, without making such directive or making any order with regard to that application, has dismissed the revision application *in limine*, stating that there had been no change in circumstances. In my view, the learned High Court Judge should have called for the Medical Reports from the prison authorities in the interest of justice, as the prison authorities have refused to release the same to the Petitioner. It was incumbent upon the learned High Court Judge to go through the Medical Reports, to come to a finding whether there were changes in circumstances and whether the ill health of the Petitioner could have considered as an

exceptional circumstance to grant bail. Hence, it is my considered view that the learned High Court Judge fell into error when he dismissed the 2<sup>nd</sup> bail application on 22.11.2019 for want of change in circumstances, without giving an opportunity for the Petitioner to obtain the Medical Reports through Court to prove the availability of the change in circumstances.

09. Upon filing the instant revision application, on the request of the Petitioner, this court as per journal entry dated 17.12.2019, has ordered the Superintendent of Prisons, Galle to produce the relevant Medical Reports of the Petitioner. This court has received the certified copies of the Medical Reports of the Petitioner from the prison authorities on 16<sup>th</sup> January 2020.
10. According to the Medical Reports submitted, Petitioner has undergone surgery in the year 2013 to remove a tumor in the bladder. No Medical Reports for the period between 2013 and 2018 have been submitted. Which means, Petitioner has failed to submit any Medical Reports for any of his illnesses for the period between year 2013 and 2018 when he was on bail pending trial. After conviction, he has undergone investigation procedures for a complaint of hematoma. He had been seen by the consultant Urological surgeon. Petitioner's complaint is being investigated by the specialist doctors, and there is no evidence before court that the Petitioner's health condition could not be treated at the prison hospital or any other government hospital. Consultant Urological Surgeon Dr. Dimantha de Silva has recommended few more investigating procedures and that the Petitioner should not get exposed to smoke as it increases the risk of recurrence of his earlier sickness that he was treated. Medical Report does not recommend or state that Petitioner's health would be at risk in prison. There is no evidence before this court to the effect that there is more smoke inside the prison than outside. Thus, the Petitioner's complaint of ill health is insufficient to constitute 'exceptional circumstances' even at this stage.
11. The ground, that there would be an inordinate delay in hearing the appeal, also was urged by the Petitioner to be considered as an exceptional circumstance. Petitioner was convicted and sentenced to imprisonment for 5 years on 12.12.2018. In default of payment of fine and compensation, he was sentenced further to 6 months and 18 months simple imprisonment respectively.

12. In case of *Ediriweera V. Attorney General* [2006] 1 Sri L.R. 25, Majority Court held, the fact that the final determination of the appeal could take many years could be considered as a 'long delay' and thus falls under the category of exceptional circumstances.
13. In case of *Harbhajan Sing and Others V. The State of Punjab* [1977] Cri. L.J. 1424, Court observed;

*"...the petitioners who have been sentenced to seven years' imprisonment would have undergone nearly the whole, or in any case, a substantial part of their sentence by that time. That is a factor which we are unable to ignore in the present case. Nor can we accede to the stand that the delay in this context is irrelevant to the issue."*

Court further held that the administration of justice is a matter of substance and not merely one of academics. It would afford scant satisfaction to the Accused if after serving their full or substantial portion of their jail sentence, their appeal succeeds and they are merely acquitted of the charge. This factor cannot be ignored.

14. However, in case of *Attorney General V. Letchchemi and another (supra)*, Court held;

*"...According to the facts and circumstances of the case, unless it can be proved that the delay is inordinate, beyond the period of sentence and therefore exceptional in terms of the particulars to that case, as the usual delay is something that is common to all cases in this country and not exceptional."*

Court further held that the improbability of the convicted person not absconding would not be a relevant consideration in application for bail pending appeal, although it could be relevant in an application for bail pending trial.

15. In light of the above case precedents, the delay in hearing the appeal has to be substantial to consider that as an exceptional circumstance. Unless it can be proved that the delay is inordinate, beyond the period of sentence, or at least that the Petitioner has served nearly the whole or a substantial part of the sentence by the time the appeal was heard, the mere delay would not be exceptional to grant bail pending appeal.
16. It is important to note that it is not the term of the sentence of imprisonment that is relevant here, but the delay in hearing the appeal in comparison to the term of the sentence.
17. In the instant case, the substantive appeal is already fixed for argument on 10.06.2020. By that time the Petitioner has served about 18 months out of the sentence of 5 years, which cannot be taken as a whole or substantial portion of the sentence imposed. The delay is neither unusual, nor exceptional. Hence, this ground should necessarily fail.
18. In the above premise, although the learned High Court Judge was in error in dismissing the application *in limine*, I find that the Petitioner has failed to submit exceptional circumstances to grant bail pending appeal.

Hence, Revision application is dismissed.

**JUDGE OF THE COURT OF APPEAL**

**K.K. WICKREMASINGHE, J**

I agree.

**JUDGE OF THE COURT OF APPEAL**