

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

Court of appeal case no. CA/PHC/APN/63/2015	Naggarathnam Nagalechchimi Alias Rajeshwari, 162/585/A, Kimbulaela, Madampitiya Road, Colombo 15.
H.C. Gampaha case no. 121/14	Accused Petitioner
M.C. Mahara case no BR979/13	Vs.
	1. Officer in Charge, Police Narcotic Bureau, Colombo 01.
	2. Hon. Attorney General, Attorney's Department, Colombo 12.
	Respondents.

Before : P.R. Walgama J.

: L.T.B. Dehideniya J.

Counsel : Tenny Fernando for the Petitioner.

: Himali Jayanetti SC for the Respondents.

Argued on : 08.03.2016

Written submissions filed on 03.05.2016 and 30.06.2016

Decided on : 07.09.2016

L.T.B. Dehideniya J.

This is an application to revise the order of the Learned High Court Judge of Gampaha refusing bail. The 2nd Accused Petitioner (the Petitioner) is indicted for an offence of aiding and abetting to traffic 144 grams of

Heroin, punishable under section 54 of the Poison Opium and the Dangerous Drugs Ordinance. Several applications were made before the High Court for bail and all of them were rejected. This application is to review the order of the Learned High Court Judge dated 20.05.2015

The Petitioner based her application on several grounds. The Petitioner's contention is that the long period of incarceration, having a child of 14 years of age, denial of a fair trial by keeping her in remand together constitutes exceptional circumstances. She further argues that the fundamental right of the presumption of innocence guaranteed by the Constitution is violated by remanding her. The learned SSC objected to this application.

The refusal of an application for bail is a final order within the meaning of the Criminal Procedure Code. It has been observed by Eric Basnayake J. in the case of Cader (On behalf of Rasheed Kahan) Officer In Charge Narcotic Bureau [2006] 3 Sri L R 74 that "*the orders refusing to grant bail are considered as final orders which appeals lie.*" The Petitioner, as of a right, would have appealed against the order of the Learned High Court Judge, but have opted to petition this Court to invoke the revisionary jurisdiction, which is a discretionary remedy of Court, instead of exercising his right of appeal.

The revisionary power of this Court is very wide and the Court is not precluded from exercising revisionary jurisdiction even if the alternative remedy of appeal is available; if exceptional circumstances warrant the intervention of Court. Revision is basically a discretionary remedy. The one, who moves Court to exercise this discretionary remedy, must aver and establish that there are exceptional circumstances for the Court to intervene. It has been held in the case of Rustem v. Hapangama [1978-79-80] Sri L R 352 that;

The trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise its powers in revision.

The appellant has not indicated to Court that any special circumstances exist which would invite this Court to exercise its powers of revision, particularly since the appellant had not availed himself of the right of appeal under section 754(2) which was available to him.

The Petitioner' argument that a long period of incarceration can be considered as an exceptional circumstance cannot be applied to a case under this Ordinance. Section 83 of the Ordinance made it mandatory to keep an accused person or a person suspected for an offence of this nature in remand custody until the conclusion of the case unless there are exceptional circumstances to release on bail. Therefore, long period of remanding does not contribute to constitute exceptional circumstances. It does not deny a fair trial too. The Attorneys At Law are permitted to meet their clients in the remand prison. Even in the present case, the Petitioner was represented by lawyers of his choice. Therefore, remanding a person does not deny a fair trial.

The Constitution guarantees the presumption of innocence. Article 13(5) provides that;

(5) Every person shall be presumed innocent until he is proved guilty: Provided that the burden of proving particular facts may, by law, be placed on an accused person.

This presumption applies at the trial stage. The prosecution has to prove the guilt of the accused person beyond the reasonable doubt; a person cannot be released on bail on that presumption. The Constitution itself provide for remanding a person until conclusion of the trial. Article 13(4) provides that remanding a person is not a punishment.

(4) No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.

The fundamental right of liberty is guaranteed under Article 13(1) of the Constitution which reads;

No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.

This is also subject to laws prevailing in the country. Article 15(7) reads thus;

(7) The exercise and operation of all the fundamental rights declared and recognized by Articles 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interests of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society.

The legislature in its wisdom, enacted that a person accused of or suspected of a crime of this nature be remanded until the case is concluded. Under these circumstances, keeping a person in remand until the case is concluded is not a violation of the presumption of innocence.

The other ground urged by the Petitioner is that she is having a 14 year old child. The child is being looked after by the grandmother. This child is not in tender age where the close attention is necessary. He can attend to his own things. What is necessary at this age is to guide him. I do not believe that a person of the Petitioner's caliber: a person having previous convictions and pending cases on drug trafficking, again accused of an offence of same nature committed within the operational period of the suspended sentence: can guide her son in correct path.

The grounds urged by the Petitioner as exceptional circumstances do not constitute exceptional circumstances.

The Petitioner was arrested while involved in trafficking a large amount of Heroin, 144 grams. It is a commercial quantity. She has previous convictions. The present case is on an offence committed within the operational period of the suspended sentence. Under these circumstances, the Petitioner cannot be released on bail unless there are exceptional circumstances. The Petitioner has not established exceptional circumstances. The Learned High Court Judge has correctly refused the bail application. Even this revision application is considered on merits, I do not see any reason to interfere with the finding of the Learned High Court Judge.

Accordingly, the application dismissed.

Judge of the Court of Appeal

P.R.Walgama J.

I agree.

Judge of the Court of Appeal