

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

In the Matter of an Application for Revision
under 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.

**CA (PHC) APN 18/2016
H.C. Colombo Revision
Application No. 7844/2015**

Hon. Attorney General

Complainant

Vs.

Mohammed Rafaideen Mohommad
Irfath

Accused

And Now

Mohammed Rafaideen Mohommad
Irfath
9/5, Muhandiram Patumaga,
Colombo 12.
(Currently Languishing in the Remand
Prison, Welikada)

Accused Petitioner

Vs.

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

Respondent

Before : **H.C.J. Madawala , J**
&
L.T.B. Dehideniya, J

Counsel : Tenny Fernando for the petitioner
Warunika Hettige SSC for AG.

Argued On : 29/06/2016

Written Submissions On : 05/08/2016

Decided on : 29 / 09 /2016

H. C. J. Madawala , J

The petitioner seeks to revise the order dated 16/10/2015 of the Learned High Court Judge of Colombo in Case No. HC 7844/15 refusing bail and to have the suspect released on bail. The Petitioner who is the Accused of the High Court case No. 7844/2015 is a citizen of Sri Lanka. The Respondent who is the Complainant of the matter before the High Court indicted the Accused Petitioner under HC 7844/2015 upon the allegation of having committed offences under section 54A(b) and 54A(c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act No 13 of 1984.

The Narcotic Bureau alleged that they recovered 1300 of Grams of Heroin contained in 13 cellophane bags contained in a one parcel from the possession of the Accused Petitioner upon a raid carried out on a tip off received by them. It is alleged by the Narcotics Bureau that the Accused Petitioner was arrested on 23/8/2013 while standing in front of Alias Children's Park, Mattakkuliya holding a plastic bag in his hand, which is improbable as it, clearly visible from the face of the record.

The Petitioner denies allegation level against him that officers attached to police Narcotic Bureau detected such an amount of Heroin in his exclusive possession and further he alleged nothing incriminating found in his possession at the time he was arrested. The Petitioner alleges that he was arrested by the police and foisted the substance in order to fabricate the case against him since they were unable to apprehend the principle offender.

The Petitioner has annexed a true copy of the Government analyst report forwarded to the accused and the indictment indicates the pure Heroin quantity as 480.92 grams. The indictment was forwarded by the Hon. Attorney General on 9th of June 2015 and on same day counsel for the 1st Accused made an application for bail which was not considered by the Hon. Trial judge but proceeded to fix for trial. The Petitioner through his counsel again made a bail application in the open court but the Learned High Court Judge refused the said bail application without recording reasons for the refusal on 16/10/2015. Being aggrieved by the aforesaid order of the Learned High Court judge the Petitioner states that the said order is illegal, wrongful and contrary to the law and or unreasonable due to the following reasons. Namely,

- 1- That the Learned High Court Judge has failed to give due consideration on the ground that the Petitioner is in the incarceration for 2 years and that he would be in a better position to face his trial which amounts to a denial of a fair trial.
- 2- That the Learned High Court Judge has not even recorded any reasons for the refusal of the bail application the clearly shows the arbitrarily nature of the discharging the judicial discretion vested in him by law and there by caused miscarriage of justice.

- 3- That the Learned High Court Judge has failed to consider that the fact that keeping a person in the custody for uncertain period of time would infringed the fundamental rights of that person guaranteed under the constitution of the country.
- 4- That the Learned High Court Judge failed to consider that fact that the Accused should be given fullest opportunity to fight for his case as the presumption of innocence operates in favour of the Accused Petitioner.

When this matter came up for inquiry on 24/6/2016 both parties were heard in support of their cases and argument was concluded. Thereafter both parties were directed to file their Written Submissions. On 5/8/2016 both parties had filed there written submissions at the registry and order was fixed for 29/9/2016.

When this case was taken up for argument the Accused Petitioner's main contention was that the Learned High Court Judge has not given reason for his order dated 16/10/2015 for refusing bail on the Accused Petitioner. The High Court Judge has refused to grant bail on 16/10/2015. The petitioner has filed the revision application on 23/2/2016. The exceptional Circumstances are required to grant bail under the Poisons Opium and Dangerous Drug Ordinance. On a perusal of the recorded we find that the Learned High Court Judge has not given any reasons for his refusal to grant bail. This itself is an exceptional Circumstances. Hence we are of the view that the Accused Petitioner has placed before us an exceptional Circumstances to grant relief for him. An order which does not give reason is not an order acceptable in Law. We are of the view that the Learned High Court Judge has acted arbitrarily in his matter.

In the present case there is a Prima facie case that has been made out of trafficking and possession of heroin, the quantity of Heroin being 480.920Grams of Heroin which is a commercial quantity, the punishment for which is death or life imprisonment. It was

contended by the Respondent that it is not prudent to take up the trial and to grant bail at this stage and that there is a very high possibility of the Petitioner absconding and not being present at his trial in view of the grave punishment if imposed.

On a consideration of the fact of this case we find that there is a delay by the Accused Petitioner in making this revision application to court. The order of the Learned High Court Judge dated 16/10/2015 and the Petitioner has filed the instant revision application on 23/2/2016 with the delay being over 4 months we find that the Petitioner is guilty of laches.

In the case of **S.M.A.A Priyantha Jayakody V. Officer in Charge, Police Station Mawarala. Case No CA/PHC/119/2004** and **Camillus Ignatious V. OIC Uhana Police Station (Rev) CA 907/98, MC Ampara 2587** it was held that,

“that a mere delay of 4 months in filing a revision Application was fatal to the prosecution of the Revision Application.”

The Petitioner is charged for an offence under the Poisons Opium and Dangerous Drugs Ordinance. (namely trafficking and Possession of 480.92 grams of Heroin) The Ordinance at Section 83(1) states as follows,

- (1) *“No person suspected or accused of an offence under section 54A or section 54B of this Ordinance shall be released on bail, except by the High Court in exceptional Circumstances.*
- (2) *Notwithstanding the provisions of subsection (1), the provisions of the Criminal Procedure (Special Provisions) Law Now. 15 of 1978, shall, so long as that law is in force, apply to and in relation to any person suspected or accused of an offence under this Ordinance.”*

In the case of **Cader (On behalf of Rashid Kahan) Vs. Officer-In-Charge Narcotics Bureau SLR 2006 Vol. 3, Page 74** it was held ;

- (1) Bail with regard to persons suspected or accused of offences involving possession of heroin is set out in section 83 where the accused could be released on bail in exceptional circumstances.*
- (2) Exceptional circumstances have not been defined in the statute.*
- (3) Provision has been made in the Bail Act to release persons on bail if the period of remand extends more than 12 months- No such provision is found in the Poison, Opium and Dangerous Drugs Ordinance.*

Per Eric Basnayake J;

“These type of offences affect the society at large. The law should not be made impotent that it does not serve the Society and the antisocial elements should not be given license to create havoc in Society.”

- (4) Orders refusing to grant bail are considered as final Orders against which appeals lie. No appeal was filed in these cases and no reasons are given why he did not lodge an appeal. The petition was filed after four months and twenty days after the High Court pronounced its order and no exceptional circumstances have been mentioned.*

Per Eric Basnayake, J;

“Revision like an appeal is directed towards the correction of errors, but it is supervisory in nature and its object is due administration of justice and not primarily or solely the relevancy of grievances of a party. 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.”

It was granting or refusing bail, courts generally take in to consideration the following points;

- (1) The nature of the accusation;
- (2) The nature of the evidence in support of the accusation;
- (3) The severity of the punishment which conviction will entail;
- (4) The chances of the accused absconding if released on bail;
- (5) The character, means and standing of the accused;
- (6) The danger of the offence being repeated or
- (7) Whether the accused, if released on bail is likely to-
 - (a) Tamper with the prosecution evidence or
 - (b) To get up false evidence in support of the defence
- (8) Larger interests of the public.

These are not exhaustive or inflexible tests. It was held that save in exceptional cases persons accused of crimes with long terms of imprisonment should not be released on bail.

On consideration of the whole case we find that although there is a delay in making the application for revision by the Petitioner the Learned High Court Judge in not giving reasons for his order had used his judicial discretion arbitrarily in that grave miscarriage of justice had occurred to the accused. As such we are of the view that relief should be granted to the Accused petitioner.

Accordingly we set aside the order dated 16/10/2015 of the Learned High Court Judge of Colombo in HC case No. 7844/2015 and we direct the Learned High Court Judge to reconsider the bail application of the Accused Petitioner a fresh and give reasons for same. Accordingly we allow this Revision Application without cost.

The Registrar is directed to send a copy of this order to the Learned High Court Judge of Colombo.

Judge of the Court of Appeal

L.T.D.Dehideniya, J

I agree.

Judge of the Court of Appeal