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.

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

C.A. Revision Application No:
CA (PHC) APN 166/2017

H.C. Negombo Case No: **318/14**

Hettige Anuruddha Priyankara alias Hettiarachchige Anuruddha Priyankara Kularathna
(Presently in Negombo Remand Custody)

Accused

AND NOW BETWEEN

Hettige Anuruddha Priyankara alias Hettiarachchige Anuruddha Priyankara Kularathna
(Presently in Negombo Remand Custody)

Accused-Petitioner

Vs.

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

Complainant-Respondent

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	AAL Neranjan Jayasinghe with AAL Sachithra Harshana for the Accused-Petitioner Nayomi Wickremasekara, SSC for the Complainant-Respondent
ARGUED ON	:	27.09.2018
WRITTEN SUBMISSIONS	:	The Accused-Petitioner – On 18.09.2018 The Complainant-Respondent – On 15.10.2018
DECIDED ON	:	05.12.2018

K. K. WICKREMASINGHE, J.

The petitioner filed this revision application seeking to set aside the order of the Learned High Court Judge of Negombo dated 14.09.2017 in Case No: 318/2014 refusing to enlarge the petitioner on bail.

Facts of the case:

The accused-petitioner (hereinafter referred to as the "petitioner") was arrested on or about 14.07.2012 by the Police Narcotics Bureau for allegedly having in possession and for trafficking of heroin. Thereafter the petitioner was indicted in the High Court of Negombo under case No. 318/2014 for offences punishable under section 54A (b) and 54A (c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act no.13 of 1984.

A bail application on behalf of the petitioner was made on 23.04.2015 and it was refused by the Learned High Court Judge. The Learned Counsel for the petitioner has submitted that several other bail applications were made on 27.03.2017 and

15.06.2017 and all the applications were refused only orally by the Learned High Court Judge without giving written orders. The Learned Counsel further submitted that another bail application was made before the Learned High Court Judge of Negombo on 14.09.2017 and the same was refused due to absence of exceptional circumstances.

However we observe that a motion had been filed on 13.06.2017 requesting the case to be called on 15.06.2017 to make a bail application on behalf of the petitioner (Page 101 of the brief). Accordingly the Learned High Court Judge had taken up the case on 15.06.2017. Thereafter dates were granted for the petitioner to file affidavits, written submissions and the respondent to file objections. On 14.09.2017 both parties had made their oral submissions and the Learned High Court Judge had dismissed the application on the same day. The Learned High Court Judge in the said order dated 14.09.2017 had held as follows;

> "...අද දින චූදිත වෙනුවෙන් පෙනී සිටින නීතිඥ මහතා ප්‍රකාශ කර සිටින්නේ පැ.සා. 01 ගේ සාක්ෂි මෙහෙයවීම සම්බන්ධයෙන් නිශ්චිත දිනයක් නොමැති බැවින් සහ චූදිතගේ මවට සැත්කමක් සිදු කිරීමට නියමිත බැවින් ඇප ලබාදෙන ලෙසයි. නමුත් එම ඉදිරිපත් කරන ලද කරුණු යුවිශේෂී කරුණු නොවන බැවින්ද, මේ සඳහා ඇප පනත බල නොපාන බැවින්ද මා එම ඇප ඉල්ලීම ප්‍රතික්ෂේප කරමි..." (Page 147 of the brief)

Therefore above contention of the Learned Counsel for the petitioner that the bail applications were refused only orally turned out to be not true. Further we are unable to find any proceedings related to the bail application made on 27.03.2017 since the petitioner has submitted only the journal entry of the said date.

In the case of **Dahanayake and others V. Sri Lanka Insurance Corporation Ltd. and others (2005) 1 Sri L.R. 67**, it was held that,

"If there is no full and truthful disclosure of material facts, the Court would not go into the merits of the application but will dismiss it without further examination..."

Further we observe that mother of the petitioner had previously filed a revision application in this Court under Case No. CA (PHC) APN 50/2015 and it was refused on 03.08.2016.

The Learned Counsel for the petitioner has submitted several grounds to invoke the revisionary jurisdiction of this Court and few of them are reproduced below;

i) The petitioner is in the remand custody for a long period of time without a trial,

ii) The mother of the petitioner is suffering from a severe disease called "Rheumatic Valvular Heart Disease",

iii) The petitioner is the sole breadwinner of the family,

iv) There is no prospect of the petitioner absconding after getting released on bail,

v) There is no risk of the petitioner fleeing overseas if he is enlarged on bail,

vi) There is no risk of witnesses being tampered or the investigations being interfered by the petitioner, if bail is granted,

vii) The petitioner has no previous convictions and/or pending cases.

The Learned Counsel for the petitioner has submitted that the petitioner is continuously languishing in the remand custody from the date of arrest without having the trial commenced due to non-availability of prosecution witnesses. Accordingly the Learned Counsel has submitted the case of **Rev. Dhammadinna V. OIC, Criminal investigations Department [CA 310/92] decided on**

21.05.1992. However we are unable to find the said judgment since a copy of the judgment was not submitted and proper case reference/citation was not provided by the Learned Counsel for the petitioner. It was further contended that also the suspect being ordered to be kept in the remand custody continuously and thereby refraining his right to liberty is a clear contravention of the fundamental rights guaranteed by Article 13 of the Constitution and amounts to a violation of Human Rights guaranteed by the Article 09 of the Universal Declaration of Human Rights and Article 09 of the International Covenant on Civil and Political Rights.

The Article 09 of the Universal Declaration of Human Rights reads that *"No one shall be subjected to arbitrary arrest, detention or exile."*

Article 13 of the Constitution of Sri Lanka reads that;

> *"13. (1) No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.*
>
> *(2) Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent court according to procedure established by law and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.*
>
> *(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."*

In the case of **Joseph Perera alias Bruten Perera V. The Attorney General and Others (1992) 1 Sri L.R. 199**, it was observed that,

> *"...On similar lines, there are provisions in our Constitution. Article 15(2) provides that the exercise and operation of the right of freedom of speech and expression shall be subject to such restrictions as may be prescribed by law in the interests of racial and religious harmony or in relation to parliamentary privilege, contempt of court, defamation or incitement to an offence.* ***Article 15(7) further provides that "the exercise and operation of all the fundamental rights declared and recognised 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 the due recognition and respect of the rights and freedoms of others or of meeting the just requirements of the general welfare of a democratic society."*** (Emphasis added)

In the case of **Anuruddha Ratwatte and others V. The Attorney General (2003) 2 Sri L.R. 39**, it was held that,

> *"The right to liberty and security of person is a basic tenet of our public law and is universally recognized as a human right guaranteed to every person (vide Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights).* ***Based on this right to liberty and security of person, Article 13 of the Constitution guarantees as a fundamental right to every person, the freedom from arbitrary arrest, detention and punishment. This Article covers all 3 stages at which a person's liberty is deprived.*** *They are-*
>
> ***(i) at the stage of arrest of a person (Article 13(1));***

(ii) at the stage a person is held in custody, detained or otherwise deprived of his personal liberty (Article 13(2));

(iii) at the stage a person is convicted and punished with death or imprisonment (Article 13(4));

In respect of all 3 stages the respective Sub-Articles specifically provide that the deprivation of personal liberty cannot take place except according "to procedure established by law". *In the 2nd and 3rd stages referred to above, being, continued custody detention or deprivation of personal liberty beyond the period the arresting authority could validly detain and at the stage of punishment,* ***it is further provided that such deprivation of liberty could only be effected by an order of a competent court. Therefore in respect of the 2nd and 3rd stages referred to above, two requirements have to be satisfied for a person to be lawfully deprived of personal liberty, they are-***

i. that it is on an order of a competent court;

ii. that such order is made in accordance with the procedure established by law;

A competent court is the court having jurisdiction in the matter and in the case we are dealing with it is the High Court at Bar. Section 450(6) specifically provides that in any trial before the High Court at Bar "the court or the presiding judge thereof, may give directions for the summoning, arrest, custody or bail of all persons charged before the Court on indictment or by information exhibited under this section." It is seen that the sub-section does not contain any provision as to the procedure that would apply in this regard..." (Emphasis added)

In light of the above decisions it is understood that the right to liberty is not an absolute right and it shall be restricted under certain circumstances. Therefore suspects being kept in custody according to the procedure established by law would not amount to a violation of such right.

We observe that the trial in the instant case was postponed due to the absence of PW 01. The Learned SSC for the respondent has submitted that the trial was fixed for 2018.10.26 and PW 02 and PW 03 were summoned. The above two witnesses were the officers who were involved in the raid with chief investigation officer-PW 01. Therefore the prosecution was prepared to commence the trial with PW 02 or PW 03 even with the absence of PW 01.

In the case of **Attorney General V. Ediriweera [S.C. Appeal No. 100/2005] (2006 B.L.R. 12)** it was held 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..."*

After perusing the proceedings of the High Court, it was elicited that on 17.05.2017 it was informed that the PW 01 was in ICU of National Hospital, Colombo due to injuries caused by gunfire (Page 137 of the brief). Thereafter the case was fixed for 04.09.2017 and on that day the Learned High Court Judge was on official leave. Accordingly the case was fixed for 14.09.2017. On that day the bail application (as already mentioned above) was refused and the Learned High Court Judge had fixed the trial to be taken up on day to day basis. Accordingly the dates were fixed for 18.01.2018, 19.01.2018 and 22.01.2018 (Page 104 of the brief). We are of the view that the trial being postponed due to the absence of a

witness, especially when he was injured while on duty, was beyond control of the Learned High Court Judge. Therefore such grounds cannot be considered as exceptional circumstances since these incidents are unavoidable.

In the case of **Cader (on behalf of Rashid Kahan) V. Officer in Charge, Narcotics Bureau (2006) 3 SLR 12**, it was held that,

> *"...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 case of Poison, Opium and Dangerous Drugs Ordinance. Although bail was granted in some of the cases mentioned above. None of these cases refer to the time period in remand as constituting an exceptional circumstance. Hence bail cannot be considered on that ground alone. It appears from the cases cited above that there is no guiding principle with regard to the quantity found either. The fact of dispatching the indictment too cannot be considered either for or against the granting of bail. In one of the cases mentioned above, the fact of not sending the indictment was considered in favor of granting bail while in another case, sending the indictment was not considered to refuse bail..."* (Emphasis added)

In the case of **W.R.Wickramasinghe V. The Attorney General [CA (PHC) APN 39/2009],** it was held that,

> *"When Section 3 of the Bail Act is considered it is seen that the Bail Act shall not apply to a person accused or suspected of having committed or convicted of an offence under*
>
> *1. The Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979,*
>
> *2. Regulations made under the Public Security Ordinance, or*

3. Any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law.

It is therefore seen that when the legislature enacted the Bail Act it was not the intention of the legislature to release each and every suspect who has been on remand for a period exceeding 24 months."

In the case of **Shiyam V. OIC, Narcotics Bureau and another (2006) 2 SLR 156,** it was held that,

"...Therefore, even if I am to agree with the submissions of the learned President's Counsel for the appellants, yet the provisions of section 83(1) of the Poisons, Opium and Dangerous Drugs Act would be applicable and the proper forum for making an application for bail when a person is suspected or accused of an offence under section 54A or 54B of the Poisons, Opium and Dangerous Drugs Act would be the High Court where such bail would be granted only in exceptional circumstances. The criteria therefore set out by section 3(1) of the Bail Act for exclusions are clearly dealt with by the provisions contained in section 83(1) of the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 0f 1984...I hold that the provisions in the Bail Act would have no application to the Poisons, Opium and Dangerous Drugs Act..."

In the case of **Labukola Ange Wisin Gedara Ashani Dhanushshika V. AG [CA (PHC) APN 04/2016],** it was held that,

"In the present case the petitioner has fail to establish any exceptional circumstances warranting this court to exercise the revisionary jurisdiction. The petitioner's first point is that the suspect is in remand nearly for two

years. The intention of the legislature is to keep in remand any person who is suspected or accused of possessing or trafficking heroin until the conclusion of the case. The section 83(1) of the Poisons, Opium, and Dangerous Drugs Ordinance expresses the intention of the Legislature..."

In the case of **CA (PHC) APN 64/2009 (decided on 07.08.2009)** W.L.R. Silva, J held that,

"...If an accused cannot assign exceptional circumstances he will have to be kept on remand and when an accused had been on remand for 03 years because he had no exceptional circumstances will that by itself constitute exceptional circumstances. If that is treated as an exceptional circumstance, in my view it would be an anomaly because the fact that there aren't any exceptional circumstances finally mature into exceptional circumstances. The fact that he had no exceptional circumstances becomes a qualification after 03 years. If that was the intention of the legislature, the section itself would have stated the exceptional circumstances should not be insisted after 03 years and there is no such qualification, no such jurisdiction found in the particular provision dealing with bail..."

According to the aforesaid cases, law as it stands today does not permit an accused under Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 0f 1984 to be released considering the remand period. The intention of the Legislature can be construed that the accused or suspects under the said Act shall be remanded until the conclusion of the trial. Therefore a wide discretion has been given to Courts to consider what constitutes exceptional circumstances in granting bail.

The Learned Counsel for the petitioner further averred that the petitioner was arrested by the Police Narcotic Bureau maliciously and foisted the substance in

order to fabricate a case against him. However we are not inclined to consider the facts and evidence of the case and that would be the duty of the Learned High Court Judge.

The Learned Counsel for the petitioner has submitted that the mother of the petitioner is heavily suffering from a severe decease called "Rheumatic Valvular Heart Disease" and therefore it has become necessary for her to undergo a surgery of "Aortic Valve Replacement". The Learned Counsel further submitted that the sister of the petitioner is unable to look after mother as she is already living with her own family after getting married.

However in the case of **Ranil Charuka Kulathunga V. AG [CA (PHC) APN 134/2015],** it was held that,

> *"The petitioner submits several grounds to consider bail. The Petitioner states that he is a married person with two school going children. The persons getting married and having children is not an exceptional ground. It is the normal day to day life of the people..."*

In the case of **W.M.F.G. Fernando V. Rev Sr. Marie Bernard and others [C.A.1108/99 (F)],** it was held that,

> *"It is trite law that the purpose of revisionary jurisdiction is supervisory in nature, and that the object is the proper administration of justice. In **Attorney General v Gunawardena (1996) 2 SLR 149** it was held that: "Revision, like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is the due administration of justice and not, primarily or solely, the relieving of grievances of a party. An appeal is a remedy, which a party who is entitled to it, may claim to have as*

of right, and its object is the grant of relief to a party aggrieved by an order of court which is tainted by error. . "

In the case of **Ediriweera (supra)** it was held that,

"...The Accused-Respondent who seeks bail must not only show ill-health, but must prove it by medical reports which reflects his or her current and existing state of health relevant to the time of the application for bail. He must additionally show that the illness was not only a present one but that continued confinement would imperil life or cause permanent impairment of his physical condition..."

It is trite law that revisionary power of Court shall be invoked only upon the demonstration of exceptional circumstances. Therefore the revisionary power cannot be used in order to relieve grievances of petitioners. Even though the practice of Court is to consider the health issues of the petitioners as an exceptional circumstance we do not think health issues of family members would fall within the same ambit. In the instant application we are unable to consider the health of the petitioner's mother as constituting an exceptional circumstance especially when the mother has another child to look after her.

The Learned Counsel for the petitioner has submitted that the difference between bail pending trail and bail pending appeal should be considered in granting bail since the presumption of innocence is not rebutted in a bail pending trial.

In the case of **Attorney General V. Letchchemi & another [S.C. Appeal 13/2006] (2006 B.L.R. 16),** it was held that,

"Bail after conviction in the High Court referred to in section 333(3) of the Code of Criminal Procedure Act No. 15 of 1979 has been incorporated in verbatim in Section 20(2) of the Bail Act No.30 of 1997. 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.

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..."

In the case of **Labynidarage Nishanthi V. Attorney General [CA (PHC) APN 48/2014]**, it was held that,

"It is trite law that any accused or suspect having charged under the above act will be admitted to bail only in terms of section 83(1) of the said Act and it is only on Exceptional circumstances. Nevertheless it is intensely relevant to note, the term "exceptional circumstances" has not been explained or defined in any of the Statutes. Judges are given a wide discretion in deciding in what creates a circumstance which is exceptional in nature..."

However as we already mentioned, the principles for granting bail for suspects or accused under the Poisons, Opium and Dangerous Drugs Act are different from the other accused for whom the Bail Act applies.

The Learned Counsel for the petitioner has submitted that there is no prospect of the petitioner absconding and/or there is no risk of investigations being interfered by the petitioner because the investigations pertaining to the instant matter have already been completed.

The Learned Counsel for the petitioner submitted that the fact that whether there was a possibility of witnesses being tampered and interfered by an accused was

considered in the case of **Ranjit Singh V. State of M.P & Ors decided on 27 September, 2013 Criminal Appeal No. 545 of 2013**. However we are unable to find the said judgment since the Learned Counsel has not submitted proper case reference/citation.

The Learned Counsel for the petitioner has averred that the petitioner has no pending cases before any Court of law other than the instant case.

However the Learned SSC for the respondent brought to the attention of this Court that the petitioner was convicted by the Magistrate's Court of Maligakanda under case No. 68387/12 for possession of 1500mg of heroin. The petitioner was sentenced for four years which was suspended for 5 years and was imposed a fine of Rs.16, 000/=. We observe that this case was pending at the time of the case of CA (PHC) APN 50/2015 and this Court had considered the aforesaid fact in refusing the bail by the order dated 03.08.2016. We are mindful that the petitioner neither in the petition nor in the written submissions has revealed of this conviction.

In the case of **Lt. Commander Ruwan Pathirana V. Commodore Dharmasiriwardene & others (2007) 1 Sri. L.R. 24**, it was held that,

> *"...Any party who misleads Court, misrepresents facts to Court, suppresses material facts from Court or utters falsehood in Court will not be entitled to obtain redress from Court and an application made by such party will be dismissed in limine without considering the merits of such application. As I pointed out earlier the petitioner is guilty of suppression of material facts and as such he is not entitled to obtain any relief from this Court. The petition of the petitioner can be dismissed on this ground alone..."*

In the case of **Labukola Ange Wisin Gedara Ashani Dhanushshika (supra)**, it was held that,

> *"The suspect in the present case has been previously convicted on similar offences. Therefore, remanding itself, of a person of this caliber cannot be an exceptional circumstance to grant bail..."*

We think that there is a higher risk of absconding since the petitioner has already been convicted for a similar offence and punishment for the instant case, if convicted, would be death penalty or life imprisonment.

In the case of **Ranil Charuka Kulathunga (supra),** it was held that,

> *"The quantity of cocaine involved in this case is 62.847 grams, which is a commercial quantity. If Petitioner is convicted, the punishment is death or life imprisonment. Under these circumstances, it is prudent to conclude the trial early while the Petitioner is kept in custody..."*

Therefore the Learned High Court Judge was correct in refusing to enlarge the petitioner on bail.

In the case of **M.Roshan Dilruk Fernando V. AG [CA (PHC) 03/2016],** it was held that,

> *"It is settled law that the extraordinary jurisdiction of revision can be invoked only on establishing the exceptional circumstances. The requirement of exceptional circumstances has been held in a series of authorities.* ***Ameen v. Rasheed 3 CLW 8, Rastom v. Hapangama [19787-79] 2 Sri L R 225, Cader (on behalf of Rashid Kahan) V s Officer - In - Charge Narcotics Bureau, [2006]3 Sri LR 74, Colombo Apothecaries Ltd. and others V. Commissioner of Labour [1998] 3 SriLR 320*** *are some of the authorities*

where it has been emphasized that unless the existences of the exceptional circumstances are been established in cases where an alternative remedy is available, revisionary jurisdiction cannot be invoked..."(Emphasis added)

In the case of **Mariam Beebee V. Seyed Mohamed (1995) 68 NLR 36** it was held that,

"The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this court. Its object is the due administration of justice and the correction of errors, sometimes committed by this court itself, in order to avoid a miscarriage of justice..."

Therefore we are of the view that the petitioner has failed to establish exceptional circumstances in order to invoke the revisionary jurisdiction of this Court. The order of the Learned High Court Judge was not arbitrary, illegal or unlawful and therefore we see no reason to interfere with the same. For the above reasons, we affirm the order dated 14.09.2017 and refuse to enlarge the petitioner on bail.

This revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J

I agree,

JUDGE OF THE COURT OF APPEAL