

**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.

Alawaththa Kankanamage  
Nandasena,  
No. 62/25, Wijayaba Place, Weliwita,  
Kaduwela.

**Petitioner**

C.A. Revision Application No:  
CA (PHC) APN 147/2017

H.C. Avissawella Bail Application No:  
HCBA/23/2015

M.C. Homagama Case No: 6602/B

**Vs.**

01. Officer in Charge,  
Police Station,  
Homagama.

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

**Respondent-Respondents**

Malalgodage Shriyani,  
No. 162/25, Wijayaba Place,  
Pittugala, Malabe.

**Petitioner-Respondent**

BEFORE : K. K. Wickremasinghe, J.  
Janak De Silva, J.

COUNSEL : AAL Weerasena Ranhewa with AAL  
Surangi Sandamali for the Petitioner-  
Petitioner  
Nayomi Wickremasekara, SSC for the  
Respondent-Respondents

INQUIRY ON : 30.11.2018

WRITTEN SUBMISSIONS : The Petitioner-Petitioner – On 10.07.2018 &  
28.08.2018  
The Respondents-Respondents – On  
23.07.2018

DECIDED ON : 01.03.2019

**K. K. WICKREMASINGHE, J.**

The petitioner has filed this revision application seeking to set aside the order of the Learned High Court Judge of Awissawella dated 26.10.2016, in Bail Application No: 23/2015/Bail.

**Facts of the case:**

The Police had arrested one A.K.Tharidu Madushanka on information that trafficking of heroin was done using easy cash system and upon investigating it was revealed that the petitioner (hereinafter referred to as the ‘petitioner’) too was involved in trafficking of heroin. Thereafter the police had searched the house of the petitioner and found a substance that looked like heroin. The petitioner was produced before the Learned Magistrate of Homagama under B report No. 6602 for trafficking and possession of 198 grams and 640 milligrams of heroin.

According to the Government Analyst's report the pure amount of heroin was 61.89 grams.

An application for bail on behalf of the petitioner was made before the High Court of Awissawella on 27.05.2015. The Learned High Court Judge dismissed the said application on 26.10.2016 due to lack of exceptional circumstances.

Being aggrieved by the said dismissal, the petitioner preferred a revision application to this Court.

Following grounds have been averred in the petition to revise the order of the Learned High Court Judge;

1. The petitioner has been held in remand custody for approximately 03 years without bail and no charge sheet has been issued in the Magistrate's Court up to date
2. The Government Analyst's report had been issued on 23.04.2015 and a period of more than 02 years lapsed since then without a charge sheet being issued against the petitioner
3. According to the bail report produced in the High Court by the respondent-respondent (hereinafter referred to as the 'respondent') the petitioner has no previous convictions or any trials pending against him
4. The Learned High Court Judge has made a direction to expedite the formulation and issuance of the charge sheet against the petitioner but no such steps have been taken by the respondent
5. The trial in the Magistrate's Court of Homagama has not even commenced as of the time of filing this application and therefore a great prejudice would be caused if the petitioner is not release on bail

6. The petitioner is suffering from an illness, a condition that has been pointed out even during the bail inquiry in the High Court.

We observe that the aforesaid grounds of revision in the petition were submitted to the High Court as well. The Learned High Court Judge has considered these same grounds before refusing to enlarge the petitioner on bail. Further the petitioner has not submitted any documents related to his health even though the petitioner in his petition has averred that he is suffering from an illness.

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

Therefore it is mandatory to submit relevant medical reports with an application for revision which in fact is a discretionary remedy.

The Learned Counsel for the petitioner further submitted that it is paramount to prove exclusive possession of the substance to get the conviction in a heroin case. Accordingly the Learned Counsel has submitted the facts of the case and contended that it is not possible to get a conviction on the accused even if he is in remand.

As per section 83(1) of the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 Of 1984 it is mandatory for an accused or a suspect under the said Act

to demonstrate exceptional circumstances to the satisfaction of Court in order to get released on bail.

In the case of **Labyndarage 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.*

*There are plethora of cases in the legal parlor which had identified what creates an "exceptional circumstances" in relation to granting bail...”*

In the case of **Shiyam V. OIC, Narcotics Bureau and another (2006) 2 Sri L.R. 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 of 1984...I hold that the provisions in the*

*Bail Act would have no application to the Poisons, Opium and Dangerous Drugs Act...*”

Above decisions amply demonstrate the necessity of demonstrating exceptional circumstances in a bail application made under the said Act. Our Courts have continuously taken the view that facts of a case do not constitute exceptional circumstances and such issues need to be addressed at the stage of trial. Therefore we are of the view that this Court is not inclined to consider the facts of the case under this revision application which was filed to revise the bail order of the Learned High Court Judge.

The Learned Counsel for the petitioner submitted that the petitioner has been held in remand for approximately 03 years without bail and it should be considered as an exceptional circumstance.

However 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...”*

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

*“In the present case the petitioner failed 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 Act expresses the intention of the legislature...”*

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 **Cader (on behalf of Rashid Kahan) V. Officer in Charge, Narcotics Bureau (2006) 3 Sri L.R. 74**, 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)

According to the decisions cited above, our law does not consider the period of remand as an exceptional circumstance. It is well settled law that the principles governing bail under the Poisons, Opium and Dangerous Drugs Act are manifestly different from the general principles of bail under the Bail Act. As it was pointed out in the case of **Labukola Ange Wisin Gedara Ashani Dhanushshika**(supra) and in the case of **W.R.Wickramasinghe**(supra), the intention of the Legislature can be construed as to keep suspects and accused under the Poisons, Opium and Dangerous Drugs Act in remand until the conclusion of the case.

Further at the stage of inquiry of the instant application, on 30.11.2018, the Learned SSC for the respondent informed this Court that the indictment connected



to this case was being dispatched on the same day to the High Court of Avissawella.

In the case of **Ranil Charuka Kulathunga V. Attorney General [CA (PHC) APN 134/2015]**, 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...”*

The amount of pure heroin recovered in the instant case was 61.89 grams. Certainly there is a risk of absconding since the punishment prescribed in the Poisons, Opium and Dangerous Drugs Act is either death sentence or life imprisonment.

For above reasons, we do not wish to interfere with the bail order of the Learned High Court Judge of Avissawella dated 26.10.2016. We refuse to release the petitioner on bail.

Accordingly the 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