

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

In the matter of an application for
Revision in terms of Article 138 of
the Constitution of the Democratic
Socialist Republic of Sri Lanka.

Kariyakarawanage Sidney Ivan
Fernando,
Gorakadeniya,
Munamaldeniya.

Petitioner

C.A. Revision Application No:
CA (PHC) APN 107/2018

H.C. Kuliyaipitiya Case No:
HBA 16/2018

M.C. Kuliyaipitiya Case No: **B**
32951/17

Vs.

1. Officer-in-Charge,
Police Station,
Kuliyaipitiya.
2. Hon. Attorney General,
Attorney-General's
Department,
Colombo 12.

Respondents

Kariyakarawanage Sithum Shamika
Fernando,
Gorakadeniya,
Munamaldeniya.

(Presently in Wariyapola remand
prison)

Suspect

AND NOW BETWEEN

Kariyakarawanage Sithum Shamika
Fernando,
Gorakadeniya,
Munamaldeniya.

(Presently in Wariyapola remand
prison)

Suspect-Petitioner

Vs.

1. Officer-in-Charge,
Police Station,
Kuliyapitiya.

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

Respondents-Respondents

BEFORE : K. K. Wickremasinghe, J.
Mahinda Samayawardhena, J.
COUNSEL : AAL Nihara Randeniya for the Suspect-
Petitioner
Nayomi Wickremasekara, SSC for the
Respondent-Respondents
INQUIRY ON : 18.01.2019
WRITTEN SUBMISSIONS : The Suspect-Petitioner – On 05.02.2019
The Respondents-Respondents – On
05.02.2019
DECIDED ON : 19.03.2019

K. K. WICKREMASINGHE, J.

The suspect-petitioner has filed this revision application seeking to set aside the order of the Learned High Court Judge of Kulipitiya dated 03.07.2018, in Bail Application No: HBA/16/2018 and seeking to enlarge suspect-petitioner on bail.

Facts of the case:

The suspect-petitioner (hereinafter referred to as the 'petitioner') was arrested by Police, Kuliyaipitiya on or about 20.06.2017 for possessing and trafficking of 25.760g of heroin. According to the Government Analyst's report the amount of pure heroin is 03.04g. (Page 31 of the brief)

Two bail applications on behalf of the petitioner were made before the Learned High Court Judge of Kuliyaipitiya. The bail application no. HBA/54/2017 was dismissed on 29.01.2018 and the bail application no. HBA 16/2018 was dismissed on 03.07.2018.

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

The Learned Counsel for the petitioner submitted following grounds of revision in the petition and written submissions;

1. The Learned High Court Judge erred in law by failing to consider that the petitioner has been in remand custody for a period of more than 19 months
2. The Learned High Court Judge erred in law by failing to consider the exceptional circumstances averred by the petitioner
3. The Learned High Court Judge failed to consider that the weight of the particular heroin parcel sent to the Government Analyst was 1.8g higher than the weight of the parcel recovered by the police at the time of arrest of the petitioner
4. The Learned High Court Judge failed to consider that the 2nd respondent still fail to indict the petitioner in the High Court even after 15 months from receiving the Government Analyst's report
5. The Learned High Court Judge erred in law by failing to consider that the petitioner has no opportunity to interfere with the witnesses or to taint the evidence against him or otherwise to obstruct the course of justice since all the witnesses are Police witnesses
6. The Learned High Court Judge failed to consider that the petitioner was only 18 years of age at the time of arrest and at present he is 19 years old
7. The Learned High Court Judge failed to consider that the petitioner lost the opportunity to have further education or vocational training due to his arrest.

The Learned Counsel for the petitioner further submitted that he wishes to mainly rely on ground no.3 and 4 averred above. Accordingly the Learned Counsel for the petitioner submitted that there is a discrepancy in weight mentioned in the B report

and weight of the parcel sent to the Government Analyst's Department. We observe that according to the Government Analyst's report, they received a parcel of 27.55g while it was mentioned in the B report filed by the Police, the recovered parcel was of 25.76g. Therefore the discrepancy is of 1.79g. We are of the view that the Learned High Court Judge was not empowered to consider discrepancies in a production during a bail application which is quite different from the trial. Further considering that neither the indictment was served nor the trial was commenced we are of the view that the Learned High Court Judge was not in a position to consider such discrepancy as an exceptional circumstance.

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 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...”

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.

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

These decisions amply demonstrate that it is mandatory to prove existence of exceptional circumstances to get bail in terms of section 83 of the Poisons, Opium and Dangerous Drugs Act (as amended).

The Learned Counsel for the petitioner submitted that the 2nd respondent failed to indict the petitioner in the High Court even after 15 months from receiving the Government Analyst's report. The Learned SSC for the respondent, on this point, counter argued that bail cannot be granted on considering the time period of remand alone. We observe that the Government Analyst's report was issued on 28.10.2017. Only 09 months had lapsed at the time of the order of the Learned High Court Judge dated 03.07.2018. Therefore the Learned High Court Judge was correct in refusing to consider the time period as constituting exceptional circumstances at that point of time. However we observe that now it has been 01 year and 05 months without forwarding an indictment against the petitioner even after receiving the Government Analyst's report. The Learned SSC for the respondent has not informed this Court, at the stage of inquiry, about the processing of indictment or whether they are taking any steps to expedite the said process.

The Learned Counsel for the petitioner has submitted the case of **CA (PHC) APN 109/12** to this Court as well as to the High Court. In the said case it was held that,

"This is an application to revise the order of the learned High Court Judge dated 29th June 2012 wherein he had refused to grant bail. However learned State Counsel concedes that this suspect had been on remand for more than two years without being served an indictment. She further concedes that the suspect had no previous convictions. However learned State Counsel submits that the suspect had been in possession of 4.35 grams of hereon. Therefore, the quantity alleged to have been in possession of the

suspect is considerably large. The State Counsel has no objection for bail being granted as the suspect has been in remand without any indictment being served on him for nearly two years. Considering the above facts we are of the view that the suspect should be released on bail..."

The above decision is quite different from the instant case since the Learned State Counsel had no objection in the aforesaid case while the Learned SSC has objected to grant of bail in the instant case. However we are mindful of the fact that the petitioner is kept in remand for 1 year and 05 months without an indictment being served.

We further consider that the petitioner was 18 years old at the time of arrest. Keeping such a young person in remand prison even without an indictment would cause more harm to the suspect since he is exposed to an environment of many suspects and convicts with pending trials and appeals from serious crimes.

Considering the undue delay in taking steps to forward the indictment and the vulnerability of the suspect we decide to enlarge the petitioner on bail. However we refuse to consider rest of the grounds averred by the petitioner such as an illness of his father and discrepancies in the production as exceptional circumstances.

We decide to release the suspect on bail on following conditions;

1. A cash bail of Rupees Fifty Thousand (Rs.50,000/-) with two sureties acceptable to the High Court of Kuliyaipitiya.
2. The suspect must report to the Officer-in-Charge, Police Station Kuliyaipitiya on last Sunday of every month between 9.00 a.m. and 12 noon until the case is concluded.

3. The passport and any other travel document of the petitioner must be handed over to the High Court of Kuliypitiya.

We reserve the right to the Learned High Court Judge of Kuliypitiya to cancel bail and remand the suspect, considering the circumstances of case, at any stage of the trial.

The Registrar of this Court is directed to forward copies of this order to the relevant High Court of Kuliypitiya, to the Officer-in-Charge, Police Station, Kuliypitiya and to the Controller General, Department of Immigration and Emigration.

Accordingly this revision application is allowed.

JUDGE OF THE COURT OF APPEAL

Mahinda Samayawardhena, J.

I agree,

JUDGE OF THE COURT OF APPEAL