

**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*

Officer in Charge
Police Narcotics Bureau
Colombo 01

Complainant

CA Revision Application No Vs. 1. R. S. G. Sajith Akalanka
CPA -0099-20 2. D.M. Nishantha Priyadarshana
3. Lumin Chandula Wickramasinghe

HC Colombo– HC 636/19

MC Mt. Lavinia –

B/100/18

Suspects

AND BETWEEN

Lumin Chandula Wickramasinghe

3rd Suspect Petitioner

Vs

1. Officer In Charge
Police Narcotics Bureau
Colombo 01
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

AND NOW BETWEEN

Nalin Chathuranga Wickramasinghe
No. 15 Wimalasiri de Mel Road,
Rathmalana

Petitioner

Vs

1. Officer In Charge
Police Narcotics Bureau
Colombo 01
2. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
3. Lumin Chandula Wickramasinghe
(Currently held in Remand Custody)

Respondent- Respondents

BEFORE : Menaka Wijesundera J.

Neil Iddawala J.

COUNSEL : Wimal Wickramasinghe for the Petitioner
: Panchali Witharana, State Counsel for the
1st & 2nd Respondents

Argued on : 08.03.2021

Decided on : 30.03.2021

Iddawala J. –

The Petitioner has invoked the revisionary jurisdiction of this Court conferred under Article 138 of the Constitution seeking to set aside an order of the learned High Court Judge of Colombo dated 20.03.2020 in Bail Application No – HC 636/2019.

The petitioner is the brother of the 3rd respondent-respondent (herein after referred to as 3rd respondent). The 3rd respondent was arrested together with two other suspects on 13. 01.2018 by the Officers of the Police Narcotics Bureau at the 'Mount Waves Hotel' in Mount Lavinia and was produced before the learned Magistrate of Mount Lavinia under case No. MC.B/100/18 for aiding and abetting for trafficking and

possession of heroin. An indictment was filed on 27.06.2019 bearing the Case No HC 636/19.

A bail application was filed on behalf of the 3rd respondent in the High Court of Colombo in terms of Section 83 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act, No 13 of 1984 and it was refused by the Order of the Learned High Court Judge of Colombo dated 02.12.2019. Thereafter another bail application was preferred and it was also refused by the Order dated 20.03.2020 due to the absence of exceptional circumstances.

Being aggrieved by the said Order on 20.03.2020, the petitioner preferred a revision application to this Court pleading that the Order be set aside and the 3rd respondent be enlarged on bail

The 1st and 2nd respondents have objected to this application on the grounds that there are no exceptional circumstances to invoke the revisionary jurisdiction and no exceptional circumstances to grant bail in terms of the Section 83 (1) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No 13 Of 1984.

First it should be considered whether the petitioner can maintain the revision application.

The 3rd respondent was arrested on 13.01.2018 by the 1st respondent on a charge under Section 54A & 54B of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No 13 Of 1984 for possession of 496.861 grams of heroin (diacetylmorphine).

According to the Report of the Government Analyst's filed (marked as X5) in the appeal brief the pure quantity is 347.563 grams. At the time of the impugned Order made by the learned High Court Judge, the

indictment has been served on the 3rd respondent on 13.12.2019 and trial has been fixed.

It has been well established in many reported cases that the Orders refusing to grant bail are considered as final Orders for which appeal is available. This contention has been discussed at length in the cases **Anuruddha Ratwatte and Others vs. The Attorney General** 2003 2 SLR 39 and in **Cader vs. Officer - In - Charge Narcotics Bureau** 2006 3 SLR 74

However, in this instant case, no appeal against the Order of the High Court was filed by the 3rd respondent. Instead of filling an appeal, this present revision application was filed on 27.08.2020, that is precisely after five months and seven days from the date ,the High Court pronounced its order. On the other hand, the petitioner does not disclose any reasons as to why the 3rd respondent did not exercise the appellate jurisdiction of this court.

However, in terms of Section 364 of the Criminal Procedure Code Act, No. 15 of 1979, this Court has power to call for and examine the record of any case whether already tried or pending in the High Court or Magistrate's Court.

Section 364 states:

“The Court of Appeal may call for and examine the record of any case whether already tried or pending in the High Court or Magistrate's court, for the purpose of satisfying itself as to the legality or propriety of any sentence or order passed therein or as to the regularity of the proceedings of such court.”

The revisionary power of this Court is discretionary and when a party files a revision application, he must satisfy the court that there are exceptional circumstances which shock the conscious of Court. In such “exceptional circumstances”, the revisionary power of the Court can be exercised for the following purposes as discussed extensively in **Attorney General vs. Ranasinghe and others** 1993 2 SLR p 81 @ p 85

- 1) To satisfy this court as to the legality of any sentence or order passed by the High Court or Magistrate’s Court.
- 2) To satisfy this court as to the propriety of any sentence or order passed by such court.
- 3) To satisfy this court as to the regularity of the proceedings of such court.

In the present application, the petitioner has submitted as exceptional circumstances, the following: -

- i. *The learned High Court Judge erred in law by refusing bail without considering submissions made on behalf of the 3rd respondent.*
- ii. *The learned High Court Judge erred in law by refusing bail where the original jurisdiction being vested to High Court.*
- iii. *The learned High Court Judge erred in law by refusing bail stating that trial being fixed for hearing.*
- iv. *The 3rd respondent has been in remand custody since 14.01.2018 which is an exceptional circumstance which warrant to enlarge bail.*

- v. *The 3rd respondent has no previous conviction or pending cases.*
- vi. *The charge against 3rd respondent is for aiding and abetting which cannot be maintained.*
- vii. *The petitioner states that there is a discrepancy in Government Analyst's report and the original quantity which was taken into custody by 1st respondent.*

Consideration of bail with regard to persons suspected or accused of offenses involving the manufacturing, trafficking, importing or exporting or possession of heroin, cocaine, morphine or opium is set out in section 83 (1) of the Poisons, Opium and Dangerous Drugs Ordinance as follows:

"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"

A close examination of this section makes it very clear that the provisions of the Bail Act, No. 30 of 1997 has no application under this law of Poisons, Opium and Dangerous Drugs Ordinance.

Section 3 of the Bail Act:

(1) Nothing in this Act shall apply to any person accused or inspected of having committed, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act. No 48 of 1979, Regulations made under the Public Security Ordinance

*or 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”.*

Section 16 of the Bail Act:

*Subject to the provisions of section 17, unless a person has been convicted and sentenced by a court, no person shall be detained in custody for **a period exceeding twelve months** from the date of his arrest. (emphasis added)*

This contention has drawn the attention of the Court in several reported cases. In **Shiyam v Officer-in-Charge, Police Narcotics Bureau & another** (2006) 2 Sri L.R. 156, the Supreme Court held:

“.....that the provisions in the Bail Act, No. 30 of 1997 would have no application in relation to the suspects or accused who have been alleged to have committed an offence under Poisons, Opium and Dangerous Drugs Ordinance.”

Therefore, this Court has no doubt that only the provisions of the section 83 (1) of the Poisons, Opium and Dangerous Drugs Ordinance is applicable in granting bail for offences which fall under sections 54A and 54B of this Ordinance. Hence, the grounds for consideration of granting

bail under the Bail Act may not necessarily be grounds/exceptional circumstances considered for granting bail under the Section 83 (1) of Poisons, Opium and Dangerous Drugs Ordinance.

The first Legislative Enactment in this connection was the *Opium and Bhang Ordinance of 1878*. Thereafter the Poisons, Opium and Dangerous Drugs Ordinance was enacted and it was brought into operation in 1936.

With the increase of the influx of such dangerous drugs in early '80s, the Legislature had to take stringent measures to counter this menace and introduced the Poisons, Opium and Dangerous Drugs Ordinance (Amendment) Act No 13 of 1984.

At the second reading debate of the bill it was stated that:

“The first bill defines the offences and lays down the penalties. Some may think that the death penalty is too harsh a penalty. we do not think so. Many countries have come to the stage where they accept the death penalty. Similarly, stringent measures have been taken regarding the granting bail.”

The intention of the Legislature was to have:

“a stringent control over the granting of bail when a person is accused under this law, and when there is a prima facie case against him he should not be given bail except in exceptional circumstances.”

(Hansard of 22.03.1984 Volume 28 Columns 628 to 654)

The original form of this section 83 (1) in the Bill did not carry any provision for the Court to grant bail but it is at the Committee Stage

consideration of the Bill, the present provision was introduced after giving due recognition to the determination of the Supreme Court. (**SC Determination No.1 of 1984. P/Parl**)

Therefore it is evident that, the intention of the Legislature had been to conclude the cases as expeditiously as possible, if the offence committed falls under section 54A and 54B, and if there is a prima facie case against the accused/suspect. However, the Courts are empowered to consider a bail, only under "**exceptional circumstances**".

This piece of legislation (Amendment Act No.13 of 1984) was introduced nearly four decades ago. The present day volume of investigations, institutions of cases, workload of trial courts and the congestion in remand prisons are comparatively high. Therefore, the delay in the process is foreseeable. The remedies for these concerns are matters to be addressed by the law makers and the Court cannot exceed its discretion given by a law beyond its legitimate limits and step into the shoes of the legislature

Lord Denning pointed out in **Ward v James** (1965) 1 AER 563 @ p571

"..... that when a statute gives a discretion the courts must not fetter it by rigid rules from which a Judge is never at liberty to depart. Nevertheless the courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. This would normally determine the way in which the discretion is exercised and this ensures some measure of uniformity of decision. From time to time the considerations may change as public policy changes and so the pattern of decision may change. 'This is all part of the evolutionary process.'"

Accordingly, plausible situations like a delay in serving indictment and the suspects being held in remand custody for a long period alone could

not be considered as grounds which constitute exceptional circumstances.

However, the punishments for offenses committed under Sections 54A and 54B are either death sentence or life imprisonment. Thus, it is prudent to conclude trials concerning offences of this nature expeditiously while the accused are kept in remand custody.

In the case of **Ranil Charuka Kulathunga V. Attorney General** CA (PHC) APN 134/2015, it was further 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 petitioner has also averred not having previous convictions or pending cases as an exceptional ground. This has been considered in the case of **Cader Vs Officer - In - Charge Narcotics Bureau** (supra) **Basnayake J** observed that :

"When a person is found guilty of possessing heroin, anything more than 2 grams, the mandatory punishment is either death sentence or life imprisonment. The severity of punishment may be one reason to have the suspects in remand until the conclusion of the trial. Another reason would be the repetition of the crime without detection. It is not possible for the police to be behind a particular suspect. Unlike in any other crime where the traces could be left behind; for example, in a murder case, a dead body in the

most likely circumstance would be found. In cases concerning heroin the offence can be committed without being detected as there wouldn't be any traces. Therefore, I am of the view that not having previous convictions and not having any cases pending cannot be considered as grounds when considering bail”.

Accordingly, as emphasized in the above case and several other reported cases, not having previous convictions and not having any cases pending alone cannot be considered as grounds which constitute exceptional circumstances when considering bail offences under the Sections 54A or 54B of Poisons, Opium and Dangerous Drugs Ordinance.

The Petitioner has further claimed that there is a discrepancy in the Government Analyst Report as to the original quantity which was taken into custody. However, the report (X⁵) suggests that, among the 496.81 gram of 'brown coloured powder' that was taken into the custody there were 347.563 grams of heroin. It does not contradict the provisions under which the petitioner was arrested nor amount to be an exceptional ground to consider bail.

'Exceptional circumstances' is very subjective, and cannot be given a firm description. It depends and varies on the circumstances of each case. In general, when there is no *prima facie* case against the accused /suspect or any inordinate delay in the process which cannot be explained or justified, it can be considered as exceptional circumstances. However, as specified above, the particulars concerning this instant case do not satisfy these requirements of not having a *prima facie* case or an inordinate delay in the process.

There is a series of reported cases which had identified the term of "exceptional circumstances" in relation to granting bail under Section 83(1). In the case of **Ramu Thamodarampillai .Vs. The Attorney General**, 2004 3 SRI.L.R. 180 has dealt with an identical issue, and had observed thus:

*".....the decision must in each case **depend on its own facts and circumstances**. But, in order that like cases will be decided alike, there should be uniformity of decisions, it is necessary that guidance should be laid down for the exercise of that discretion"* (emphasis added)

In this instant case, indictments have been served on the accused and case has been fixed for trial. The pure quantity of heroine involved in this case is 347.563 grams which is a very high quantity. It is also noteworthy to observe that the learned High Court Judge has given alternative dates in this case to avoid delays and to expedite the trial.

Hence, for the reasons explained above, I am of the view that the impugned Order is not illegal, irregular or arbitrary and well within the ambit of the law. Therefore, this court is not inclined to disturb the Order of the learned High Court Judge. The application is dismissed, accordingly.

Judge of the Court of Appeal

Menaka Wijesundera J.

I agree.

Judge of the Court of Appeal