

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

In a matter under Article 154P of the Constitution read with Articles 138 and 139 of the Constitution, the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (as amended)

CA (Rev.) Application No. CA/CPA/18 /2021
HC Case No. Bail/339/2020
MC Case No. B1536/20

Kamani Shriyantha Abeysekara
No. L/1/1, Elvitigala Flats,
Colombo 08.

Petitioner

-VS-

1. Officer-in-Charge,
Colombo Crime Division,
185, Kolonnawa Rd, Colombo

Complainant-Respondent

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

Respondent

3. Gnendra Shani Abeysekara
(Presently at Remand Prison)

Suspect-Respondent

And Now in An Application for Revision Between

Kamani Shriyantha Abeysekara
No. L/1/1, Elvitigala Flats,
Colombo 08.

Petitioner-Petitioner

-VS-

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Complainant-Respondent-Respondent

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

Respondent-Respondent

3. Gnendra Shani Abeysekara
(Presently at Remand Prison)

Suspect-Respondent-Respondent

Before: **N. Bandula Karunaratna J.**

&

R. Gurusinghe J.

Counsel: Viran Corea and Ms. Thilini Vidanagamage, Arnold Priyanthan, instructed by Mrs. Gowri Sangary Thavarasha for the Petitioner - Petitioner

Rohantha Abeysuriya PC, ASG for the Respondent- Respondent.

Argued on: 15.06.2021

Decided on: **16/06/2021**

N. Bandula Karunaratna J.

This is an application for Revision against the order of the Learned High Court Judge, Gampaha dated 09.12.2020. The Petitioner - Petitioner (herein after referred to as the Petitioner) is the wife of the suspect-Respondent (herein after referred to as the suspect), namely Shani Abeysekara, a Senior Superintendent of Police attached to the Sri Lanka Police, who is currently interdicted from the service with effect from 07.01.2020.

It is evident that the suspect Shani Abeysekara has joined the Sri Lanka Police on 10.02.1986 as a Sub-Inspector of Police. During his 34 years tenure in the Police Service, he has served in many capacities at the VIP Security Division of Police Special Task Force, President's Security Division, prior to his posting to the Criminal Investigation Department (CID), upon a special request made by then Deputy Inspector General of Police. Then, he was appointed as the Director of the CID and later transferred on 21.11.2019 as the Personal Assistant to the Deputy Inspector General of Police in Galle range, after the 2019 Presidential election.

The Petitioner states that on 07.01.2020, he was interdicted from the Police Service. During his career of over 34 years, the suspect Shani Abeysekara was actively involved in the investigation of a number of high-profile cases including, the attempted murder of former President Chandrika Bandaranaike Kumaratunga in 1999; the LTTE Attack on the Katunayake International Airport in 2001; the murder of Yvonne Johnson at Royal Park Condominium in 2005; the kidnapping and disappearance of 11 youths by Naval Intelligence personnel in 2008 - 2009; the double murder case

in Angulana in 2009; and the kidnapping and disappearance of the Journalist Prageeth Eknaligoda in 2010. Furthermore, the suspect was awarded a certificate of commendation by the Secretary-General of the International Police Organisation (INTERPOL), greatly appreciating his remarkable professionalism and excellent support to the INTERPOL Response Team in relation to the global response to the Easter Sunday attacks in Sri Lanka. It is important to note that the suspect has been a key prosecution witness in over 100 trials including over 20 murder trials that led to convictions.

The Petitioner states that on or about 31.07.2020, the Suspect was arrested from his residence on purported allegations that the Suspect has falsely introduced certain weapons that fall within the provisions of the Offensive Weapons Act, Firearms Ordinance and the Explosives Act and fabricated false evidence to frame a false case against and arrest a former Deputy Inspector General of Police, namely Vass Gunawardena, pursuant to Magistrate Court Case No. B/1536/20 that had been filed on or about 09.07.2020. On arrest, the Suspect was produced to the Learned Magistrate of Gampaha at his residence in case B/1536/ 20. After the submissions made by both parties to consider bail the Learned Magistrate fixed the case for Order on 07.08.2020. Upon the said Order, the suspect was remanded and his application for bail was dismissed, citing lack of jurisdiction.

The Petitioner thereafter instituted Bail Application No. 339/20 on behalf of the suspect, in the High Court of Gampaha. This Application for Revision is preferred from the Order of the Learned High Court Judge of Gampaha dated 09.12.2020, whereby the Application for Bail was rejected.

The Petitioner named as the 1st Complainant-Respondent-Respondent, the Officer in Charge of Unit 01 of the Colombo Crimes Division and as the 02nd Respondent-Respondent, the Hon. Attorney General.

The Petitioner states that the suspect is entitled to be released on bail inter alia on the following grounds:

- (a) The Complainant's failure to establish prima facie to the reasonable satisfaction of the court that there was material in support of any of the allegations;
- (b) There are no reasonable grounds for believing that the suspect is likely to have committed the offence alleged against him;
- (c) The suspect has been arrested without following the due process and procedure;
- (d) The unsubstantiated allegations are ill-founded and based on purported positions taken up by witnesses who are bereft of any reasonable credibility;
- (e) Given the circumstances of the arrest, there are doubts as to the genuineness of the prosecution and such has been done for a collateral purpose;
- (f) The physical condition of the suspect requires him to have specialised medical attention;
- (g) There is a prolonged delay in disposal of the proceedings for no fault of the suspect;
- (h) Blatant infringement of rights guaranteed to the suspect under the Constitution.

The 01st Complainant-Respondent filed objections dated 23.10.2020, objection to the Application for Bail on the grounds of sections 14(1)(a)(i) and 14(1)(a)(ii) of the Bail Act, No. 30 of 1997.

Sections 14(1)(a) (i) and 14(1)(a)(ii) state that;

"14 (1) Notwithstanding anything to the contrary in the preceding provisions of this Act, whenever a person suspected or accused of being concerned in committing or having committed a bailable or non-bailable offence, appears, is brought before or surrenders to the court having jurisdiction, the court may refuse to release such person on bail or upon application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a subsisting order releasing such person on bail if the court has reason to believe :

(a) that such person would,

- (i) not appear to stand his inquiry or trial;
- (ii) interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice.

The Petitioner says that the purported allegation against the suspect is based on the statement of Police Inspector Wilwalaarachchi and the instance of Naligamage Dilip Asanga Naligama. (hereinafter referred to as Naligama) Thus, the suspect has been arrested on the purported suspicion that the weaponry which was found on 11.03.2014 at a shed in the land at 107/01, Raniswala, Kalagedihena, which belongs to the said Naligama were allegedly weapons that were found at a different place by the suspect and others. They fabricated evidence to create a false case. The weaponry comprised 6 numbers of T-56 firearms, 1 number of 38 revolver, 2 pistols, 11 blank cases of 9mm bullets, 10 blanks cases of 9 x 19 mm bullets, 303 cases of 8.5 bullets, 215 cases of 7.62 bullets, 4 bullets of 38 S.P.L., 04 12 Bore shotguns 3 air-rifles, 1 Repeater shotgun, 2 numbers of T-56 Ammo, 3 cases of R.P.G. shells, green colour 5.58 kg Claymore Bomb with the charger and 1 hand grenade.

The Petitioner states that the following details were transpired from the Objections of the 01st Complainant-Respondent:

- (a) The CID has conducted investigations on the abduction and murder of Mohammed Siyam on 22.05.2013 under Colombo Chief Magistrate Court Case No. B/3279/05/2013.
- (b) Police Constable Dias and Police Constable Rampati Devayalage Sameera Susantha, who had been working at the house and the office of the Former Deputy Inspector General, Vass Gunawardena, have voluntarily come to the CID on 11th & 18th November 2013 and given evidence before the Learned Magistrate that on 04.06.2013, the said IP Wilwalaarchchi has taken some weaponry in a Cab which were used in the murder of Siyam.

- (c) According to these statements of Police Constable Dias and Police Constable Rampati Devayalage Sameera Susantha and the said IP Wilwalaarchchi, the suspect in this case and the other investigating officers have found the aforesaid weaponry at a shed in the land at 107/01, Raniswala, Kalagedihena, which belongs to said Naligama.
- (d) Under Detention Order No. DML/PTA/24/ 2014, the said IP Wilwalaarachchi had been detained from 03.03.2014.
- (e) The CID has produced the extracts of the said weaponry to the 02nd Respondent, Attorney General on 27.05.2014 under File bearing No. OW/216/2014. Thereafter, the Attorney General has opened an advice File bearing No. C/155/2014/CM. Such weaponry has been thereafter sent to the Government Analyst.
- (f) The said IP Wilwalaarchchi had been detained for about three (03) months from 03.03.2014 and was discharged on 30.05.2014 upon the advice of the Attorney General.
- (g) Thereupon on 04.03.2014, Magistrate Court has ordered the CID to arrest and produce the said Police Constable Dias, Police Constable Sameera Susantha, Asanga Naligama and Chiranthi Sanjeevani in courts.
- (h) There was a Revision Case in the High Court bearing reference HC MCA 17/16 pertaining to the said Order dated 04.03.2015, which has been subsequently dismissed on 30.06.2017 after preliminary objections were raised.
- (i) Consequently, on 09.12.2019, the Attorney General has advised the CID under the said CID file C/155/14/CM to arrest Police Constable Dias, Police Constable Sameera Susantha, Asanga Naligama and Chiranthi Sanjeevani. By this time, the suspect in the present case had been transferred out of the CID, to DIG office in Galle.
- (j) Thereafter, on 03.06.2020, the Attorney General has further advised under the said CID file C/155/14/CM on 03.06.2020 to release Police Constable Sameera Susantha and the said Constable Dias and thus they were released on 03.06.2020, and further advised on 11.06.2020 to release Asanga Naligama and Chiranthi Sanjeevani and they have been released on 15th & 12th June 2020, respectively.
- (k) After producing of Asanga Naligama and Chiranthi Sanjeevani on 09.06.2020 to the CID through their lawyer, statements have been recorded from them. In the said statements, Asanga Naligama and Chiranthi Sanjeevani have made allegations against the suspect, Shani Abeysekara and other investigating officers, including IP Wilwalaarachchi who discovered the cached weapons from the said Naligama's land

for fabricating evidence by placing the weaponry on the said land and taking pictures of the said weaponry.

(l) The said Asanga Naligama had also referred to a telephone conversation between him and said IP Wilwalaarchchi, which is claimed to be contained in a DVD.

(m) Upon the said statements being made, the suspect Shani Abeysekara was arrested on 31.07.2020.

The Petitioner states that it also transpired from the said Objections that investigations have been carried out from 29.07.2020 and statements have been recorded from 09 witnesses. The case has been instituted against the suspect solely upon the statements of five (05) witnesses, namely: Naligamage Dilip Asanga Naligama of No. 96/ 05, Pukwatta Road, Attanagalla; Arachchige Chiranthi Sanjeevani of No. 96/ 05, Pukwatta Road, Attanagalla; Rathanayake Mudiyanseelage Irosh Chaminda Wilwalaarachchi of Wathsala, Jaya Sevana, Kelin Weediya, Mahawa; and Samaratunga Appuhamilage Don Samarapala Dias Samaratunga of Millagolla, Kumbukgate, Kurunegala, and Ranpati Devayalage Sameera Susantha of Mayakadawara, Magulagama, Hettipola.

The Petitioner further states that the revision application bearing reference HC MCA 17/16 pertaining to the said Order dated 04.03.2015, which has been subsequently dismissed on 30.06.2017 after preliminary objections were raised, was filed by the Attorney General and an interim order was given therein staying the Learned Magistrate's directive to arrest the said four (04) persons. In the circumstances, the petitioner argues that the suspect Shani Abeysekara cannot be found fault with for not having arrested them. When the advice was received in the advice file OW/ 216/ 2014 bearing AG's Department Reference No. C/155/ 2014/ CM on or around 09.12.2020, all four suspects including the Petitioner's husband, had ceased to be attached to the CID, due to their transfers to different divisions. The suspect Nishantha Silva left the country several months before the complaint was made and these investigations even initiated. There were no travel restrictions in place where the said Nishantha Silva was concerned, when he is said to have left the country.

The petitioner further says that the statements given by the said five (05) witnesses in 2020 are completely inconsistent with the statements given by them in 2014. The statement given by Dias in 2020, was not the same as the one given in 2014. Further, he has mentioned that he was kidnapped by the CID when he was in Sanjeevani Wickramasinghe's house. She was a close associate of Sarathchandra who is also convicted along with the said Vass Gunawardena for the murder of Siyam. In 2020, Sameera Susantha has mentioned that his statement in 2014 was given out of fear of the CID but at the end, by making a special request from the courts, he has mentioned that he put the weapons into the car when Vaas Gunawardena ordered him to do so. It was revealed that weapons from Thanthirimale & Wilachchiya Police Stations were issued directly to Vass Gunawardena and the then OIC in Thanthirimale & OIC in Wilachchiya Police Stations was charge-sheeted and disciplined for giving the guns to the said DIG Vass Gunawardena. The CID reported these facts in 2014 to both the Colombo MC under B/3250/3/14 and to the Attorney General. Thus,

both CCD and the AG's Department are aware that these weapons were in the said Vass Gunawardena's custody.

The Petitioner states that it is apparent that these are some of the very same weapons whose recovery by the suspect Shani Abeysekara is sought to be impugned by the Respondents, without any explanation as to how weapons proven to have been in Vass Gunawardena's custody, came into the custody of the suspects.

It was established that several of the weapons were traced to be in the custody of Vass Gunawardena. In addition to the evidence relating to the Thanthirimale & Wilachchiya incident, Vass Gunawardena himself, in his dock statement in case No.: H/C TAB 7193/14, testified that some of the cache of explosives & weapons that were found were those he had acquired during and after the war against the LTTE. However, Vass Gunawardena failed to substantiate the actions taken by him in relate to these weapon recoveries. The facts and circumstances relating to those weapons that it belonged to LTTE and that they were recovered from the said house were in fact mentioned in the judgement of the aforesaid case H/C TAB 7193/14.

The Petitioner states that the said Wilwalaarachchi is a friend of Asanga Naligama whose wife is Chiranthi Sanjeewani. Wilwalaarachchi, the said Dias and Susantha have been close associates of convicted murderer Former Deputy Inspector General Vass Gunawardena. It was transpired from the statement of the said Dias that one Sanjeewani Wickramasinghe has been a close associate of Sarathchandra who is also convicted along with Vass Gunawardena for the murder of Siyam. The incident is alleged to have happened on 11.03.2014 and it has only been reported on 24.06.2020.

The reasons by the Attorney General for objecting to bail, as reflected in the statement of objections are as follows:

- (a) Further statements are to be recorded from witnesses with regard to the allegations against the suspect Shani Abeysekara pertaining to alleged fabrication of evidence involving the weaponry that was found upon the statement of Wilwalaarachchi and at the instance of Naligama.
- (b) Pertaining to the alleged incident relating to Sergeant 53572 Samaratunge Appuhamilage Don Samarapala Dias, who had been working at the Monaragala Police Station and who had gone to Galle for special duty with a T-56 weapon and who has been arrested at a house of a female resident of Kalagedihena, but had not been considered as a witness and instead taken a voluntary statement.
- (c) Further investigations are to be done upon recording the statement of the said resident named Kalagedihena Sanjeewani Wickramasinghe, at whose house the witness Sergeant 53572 Samaratunge Appuhamilage Don Samarapala Dias had been arrested.
- (d) Statements of suspect Hewa Dewage Nawaratne Premathilake are yet to be recorded and accordingly further investigations are to be conducted. In order to

record the statements from the suspect Premathilake, Mahara remand prison was visited but the suspect Shani Abeysekara and he has requested to refer the firearms investigation extracts of the Siyam Murder Case, prior to such statement being given. An Order was given to accommodate the said request on 29.10.2020 but this was not done due to the curfew imposed at the time in the area of Gampaha Magistrate Court. Therefore, another order is yet to be taken to get the statement.

- (e) Statements are to be recorded to discover how the suspect Shani Abeysekara obtained the possession of the two 12 Bore repeater shotguns bearing numbers 9912307/1878, and No. 9911318/1877 of the Thanthrimale Police Station and the 12 Bore shotguns bearing No. 9407088 of Serunuwara Police Station, and further investigations are to be carried out to discover how the suspect got hold of other weaponry (T-56, Pistols etc.) to fabricate evidence to create a false case.
- (f) A further statement is to be recorded from the Witness, Police Inspector Wilwalaarachchi. Furthermore, recordings relating to the telephone conversation between Wilwalaarachchi and Police Constable Dias are to be obtained from Wilwalaarachchi.
- (g) Further investigations are to be done in relation to telephone records, as it is with the Government Analyst Department
- (h) The suspect Shani Abeysekara and others cannot be considered as normal persons due to the reason that they possess investigative skills and have held senior positions in the Police Department. Therefore, they might possess the ability to interfere with the witnesses.
- (i) If the suspect Shani Abeysekara in the present case granted bail, it will hinder the investigations and there is a possibility of absconding or leaving the country like the other suspect Nishantha Silva.

It is important to note that the date of the alleged offence is 11.03.2014 and the complaint has been received to the CID only on 09.06.2020 and to the CCD on 24.06.2020. At the time of the arrest, the suspect Shani Abeysekara has not been in possession of any illegal weaponry and there is no substantial evidence to link the possession of the said weaponry to the suspect other than the statements given by the aforesaid witnesses. There are no instances of prior wrongful conduct or convictions against the suspect Shani Abeysekara whatsoever. There are no pending cases against the suspect. There is no evidence to reasonably suggest that the suspect would be absconded, not submit to the jurisdiction of court and legal process.

Also, I would like to indicate that there is no evidence before this Court to say that the suspect Shani Abeysekara would interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice.

It is my view that on account of the unusual and extraordinary delay in lodging the first complaint despite every ability to do so demonstrates very strongly that the allegations against the suspect Shani Abeysekara are a result of falsification and embellishment and a creature of after-thought. On account of the said unusual and extraordinary delay, the complaint has not only lost the benefit of the advantage of spontaneity, but also smacks of the introduction of a fabricated, false version and an exaggerated account or concocted story involving a set of collaborators or conspirators, to unduly cause prejudice and harm to the suspect Shani Abeysekara, for collateral purposes. Not only that the said delay has not been satisfactorily or credibly explained. It is crystal clear that the statements given by the said witnesses in 2020 are contradictory to statements given by them in 2014.

Upon the statements of apparent backers and supporters or collaborators of the convicted Murderers, purported facts have been reported in B/1536/20 to the Learned Magistrate's Court of Gampaha against the suspect, in a blatant attempt to frame allegations through fabrication of false evidence pertaining to purported commission of offences under the Penal Code and for the purported possession of a cache of firearms, explosives and ammunition in a manner that constitutes offence under the Offensive Weapons and the Explosives Act. However, no credible evidence had been brought to the attention of the Court to substantiate this position or credibly establish a semblance of a prima facie case. The Case No. B/3250/03/2014 has been instituted on 27.02.2014 upon the arrest of said Wilwalaarachchi on 24.02.2014 and following the recovery of the cached weapons and ammunition from No. 107/01, Raniswala, Kalagedihena. Suspects had been arrested and released by the CID upon the advice of the Attorney General under the said Advice File No. OW/216/2014 and also bearing reference C/155/14/CM. The reasons for these decisions are not before this Court.

The Petitioner's contention was, after a lapse of 6 years, some witnesses who are said to be associates of said former Deputy Inspector General, Vass Gunawardena, may have made false allegations. Thereupon, the suspect Shani Abeysekara was arrested without any credible or reasonable evidence and produced before the Learned Magistrate of Gampaha, on the uncredulous allegation that the suspect Shani Abeysekara has committed offenses of "fabrication of false evidence" under the Penal Code, and "offences related to possession of firearms and ammunition under the Offensive Weapons Act, Firearms Ordinance and the Explosives Act".

There is a long line of authorities that a Revision is discretionary remedy and to invoke such jurisdiction it is necessary to establish exceptional circumstances. Further, if there is an alternative remedy, the revisionary jurisdiction is not available. Even if there is an alternative remedy is available, if there are exceptional circumstances, the Revision is also available as a relief.

In the case of Buddhadasa Kaluarachchi v. Nilamani Wijewickrama 1990 (1) SLR 262 at page 267 onwards S.N.Silva J. (as he was then) considering the cases of Atukorale v. Samyanathan 41 NLR

165 and Rustom v. Hapangama & Co.(1978-79) 2 Sri LR 225 and Sumanathangam v Meeramohideen 60 NLR 394, it has been held that the Court of Appeal has the power to act in Revision, even though the procedure by way of Appeal is available, in appropriate cases.

Section 139 of the Constitution of the Democratic Socialist Republic of Sri Lanka states as follows:

" The Court of Appeal may in the exercise of its jurisdiction affirm, reverse, correct or modify any order, judgment, decree or sentence according to law, or it may give directions to such court of first instance, tribunal or other institutions or order a new trial or further hearing upon such terms as the Court of Appeal shall think fit.

(2) The Court of Appeal may further receive and admit new evidence additional to or supplementary of, the evidence already taken in the court of first instance touching the matters at issue in any original case, suit, prosecution or action as the justice of the case may require."

The section empowers the Court of Appeal with wide powers.

The power to grant bail is a discretionary power vested in judges and it is meant to be exercised liberally. The Supreme Court has consistently reiterated that "bail is the rule, jail is an exception". The primary purpose of bail is to ensure the accused person's compliance with investigation, and subsequent presence at the trial if they are released after arrest. The refusal to grant bail deprives individuals of liberty by confining them in jails without trial and conviction.

At present, the power to grant bail is exercised sparingly. Sometimes courts even routinely reject bail for minor offences. It is pertinent to note that a majority of those belong to marginalised communities. Without grant of bail by the lower courts, the accused persons are required to approach the High Court, Court of Appeal or the Supreme Court. Consequently, most accused persons remain incarcerated as undertrials for extended periods of time.

Section 14 of the Bail Act No. 30 of 1997 gives the reasons for which the Court may refuse bail. The first part of sub section (1) of that section reads;

"Notwithstanding anything to the contrary in the preceding provisions of this Act, whenever a person suspected or accused of being concerned in committing or having committed a bailable or non-bailable offence, appears, is brought before or surrenders to the court having jurisdiction, the court may refuse to release such person on bail or upon application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a subsisting order releasing such person on bail if the court has reason to believe: "(emphasis added)

This section applies to bailable or non bailable offences in the equal force and the grounds that the Court can refuse bail are also specified. The Court must have reasons to believe that those grounds exist. Those grounds are;

- (a) that such person would
 - (i) not appear to stand his inquiry or trial;
 - (ii) interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice; or
 - (iii) commit an offence while on bail; or

- (b) that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

Section 2 of the Bail Act No. 30 of 1997 reads as follows;

“Subject to the exceptions as hereinafter provided for in this Act, the guiding principle in the implementation of the provisions of this Act shall be, that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.”

It was decided in The Queen vs Liyanage and others 65 NLR 289 at 292

“Much stress was laid in the arguments of Counsel for the defendants on the presumption of innocence and the liberty which an individual is entitled to. This Court will never cease to safeguard the liberty of the subject. "The favour shown to freedom" will always influence Judges who approach questions affecting that liberty. But it is not to be thought that the grant of bail should be the rule and the refusal of bail should be the exception where serious non-bailable offences of this sort are concerned; bail is in such cases granted only in rare instances and for strong and special reasons, as for instance where the prosecution case is prima facie weak.”

This rule was changed by the Legislature with the enactment of the Bail Act No.30 of 1997. Admitting to bail was made the rule and the refusal was made the exception.

Under section 4 of the Act, a person suspected or accused of being concerned in committing, or having committed a bailable offence was made entitle to bail subject to the provisions of the Act. Section 5 provided that a person suspected or accused of being concerned in committing, or having committed a nonbailable offence may at any time be released on bail at the discretion of the court. By section 7, the Court was empowered to release on bail any person suspected or accused of, being concerned in committing or having committed, a non- bailable or bailable offence that appears, is brought before, or surrenders, to the court having jurisdiction. Therefore, it is very clear that the intention of the Legislature is to change the rule relating to bail.

It has been held in the case of Dachchani Vs The Attorney-General 2005 (2) SLR 152 that;

The Bail Act, No. 30 of 1997 which came into operation on 28th November, 1997 is the applicable law. By the enactment of the Bail Act the policy in granting bail has undergone a major change. The rule is the grant of bail. The Rule upholds the values endorsed in human freedom. The exception is the refusal of bail and reasons should be given when refusing bail.

Per Sriskandarajah J.

"By the enactment of the Bail Act there is a major change in the legislative policy and the Courts are bound to give effect to this policy. The High Court judge in the impugned Order has erred in not taking into consideration the policy change that has been brought in by the enactment and mechanically applied the principle that the accused have failed to show exceptional circumstances when this requirement is no more a principle governing bail pending appeal"

In the case of Anuruddha Ratwatte and others V. The Attorney General 2003 (2) SLR 39 at 48,49 it has been held that;

It is seen that Section 14(1) would apply notwithstanding anything to the contrary in the other provisions of the Act, in respect of persons suspected or accused of being concerned in or having committed a bailable or non-bailable offence. It covers two situations

- (i) when such person appears or is brought before or surrenders to, the court having jurisdiction;
- (ii) when an application is made to cancel a subsisting order releasing such person on bail.

In both situations the court may refuse to release the suspect or accused on bail or cancel a subsisting order of bail only if the court has reason to believe that such person would act in the manner specified in paragraph (a), (i) to (iii) referred to above or the court has reason to believe that the gravity and public reaction to the offence may give rise to public disquiet.

The learned Additional Solicitor General submitted that until the investigations are completed the suspect should not be released on Bail. Due to the Covid 19 pandemic further investigations were delayed and therefore one more month would be enough to complete the rest of the investigations. The suspect Shani Abeysekera was arrested on the 31.07.2020 and almost 10 months completed on the 31.05.2021. There is no valid reason to keep him in custody as this offence is a bailable offence considering the jurisdiction of the Court of Appeal.

The High Court had no jurisdiction to enlarge a suspect on bail, when remanded for an offence under the Offensive Weapons Act, No. 18 of 1966, prior to the Amendment Act, No. 2 of 2011. The contention of the learned Additional Solicitor General was that under section 10 of the Offensive Weapons Act the exclusive jurisdiction to grant bail to a suspect was with the Court of Appeal, prior to the said amendment but now it is with the High Court.

Prior to the Amendment Act, No. 2 of 2011, Section 10 of the Offensive Weapons Act, No. 10 of 1966 enacts that "notwithstanding anything to the contrary in the Code of Criminal Procedure Act or in any other law, no person charged with or accused of an offence under the Offensive Weapons Act shall be released on bail except on the order of the Supreme Court."

The learned President's Counsel for the respondent submitted that the High Court has the exclusive jurisdiction to enlarge a suspect on bail under the said Amended section 10 of the Offensive Weapons Act No. 2 of 2011.

It was decided in the case of Attorney General vs Nilanthi 1997 (2) SLR 203 that,

“the section applies only to instances where a person has been 'charged with' or 'accused of an offence under the said Act, in accordance with Chapter 14 of the Code of Criminal Procedure Act, No. 15 of 1979. The Learned Counsel further submitted that the report that had been filed in this case is a report under section 115 of the Code of Criminal Procedure Act and therefore the suspect had not been 'charged with' or 'accused of when the application for bail was taken up for inquiry at the High Court of Hambantota. In support of her contention, she relied on the judgment in Tunnaya alias Gunapala v. O.I.C. Police Station, Galewela and submitted that the report filed in this case did not constitute an 'institution of proceedings', as contemplated in terms of the Code of Criminal Procedure Act, No. 19 of 1979.”

“The Offensive Weapons Act, No. 18 of 1966 was enacted at the time when this type of criminal trial was taken up before the Supreme Court and Commissioners of Assize before the Assize Courts and in the District Court on indictments. Most of the Criminal Assizes were presided over by the Supreme Court Judges. Even then the legislature in its wisdom thought it fit to give exclusive jurisdiction to the Supreme Court to grant bail in cases where Offensive Weapons were involved. With the promulgation of the Second Socialist Republican Constitution and the establishment of the new court structure the exclusive jurisdiction that was granted to the Supreme Court was vested with the Court of Appeal. Presently High Courts are discharging functions similar to that of an 'Assize Court' in the olden days. Therefore, a proper reading of the section 10 of the Offensive Weapons Act would mean that no person charged with or accused of an offence under the Offensive Weapons Act shall be released on bail except on an order of the Court of Appeal.”

Dr. Justice A.R.B. Amerasinghe in his book titled "Judicial Conduct, Ethics and Responsibilities" at page 284 observes that;

"The function of a Judge is to give effect to the expressed intention of Parliament. If legislation needs amendment, because it results in injustice, the democratic processes must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years."

However, Article 13(5) of our Constitution states that every person shall be presumed innocent until he is proved guilty. Article 13(2) further provides that a person shall not be deprived of personal liberty except upon and in terms of the order of a judge made in accordance with procedure established by law.

The State imposes a punishment on the suspect indirectly by keeping him in remand custody for an uncertain period. Obviously, that was not the intention of the legislature when it enacted Article 13(5) of the Constitution.

The Petitioner's main concern is that the suspect Shani Abeysekera is over 59 years of age and is currently on medication for high blood pressure. He is medically advised and requires constant

attention and treatments. Not only that he has suffered a heart attack while being transported by the Prison Authorities, overnight between multiple holding facilities in Gampaha and Polonnaruwa. As a result, it was revealed that the suspect has been medically advised to schedule to undergo surgery for insertion of one or more stents. The suspect Shani Abeysekara has already been exposed to and contracted Covid-19 while in remand, and was fortunate to have survived it. However, the Petitioner says that there remains a risk of contracting same again, as well as aggravated risks associated with his current heart health condition and diabetes. Thus, and otherwise, the Petitioner fears for the life, health and safety of the suspect. There are many documents marked as 'A-6', to establish the fact of suspect having contracted Covid-19 while under the custody of the Prison Authorities.

The suspect has been in remand custody for the last 10 months. There is no cogent material before this Court to establish that the witnesses were intimidated by suspect Shani Abeysekara. Considering the totality of the material placed before us, I am of the considered view that the suspect Shani Abeysekara be enlarged on bail subject to strict conditions imposed by this Court.

We act in revision and set aside the order of the Learned High Court Judge dated 09.12.2020 marked as A-2. We order to release the suspect Shani Abeysekara on bail on the following terms.

1. Cash bail of Rs. 25,000/- (Rupees Twenty-Five Thousand)
2. Personal bail of Rs 1,000,000/- (Rupees One Million) with two sureties.
(The Learned High Court Judge Gampaha has to decide the suitability of the sureties.)
3. The suspect Shani Abeysekara should surrender the passport and any other travel document in his custody to the High Court of Gampaha.
4. The suspect Shani Abeysekara should not leave the country without obtaining prior permission from the High Court of Gampaha.
5. If the suspect Shani Abeysekara or any surety is changing the address given in the bail bond, should inform Court and the Complainant Respondent forthwith.

We direct the Registrar of this Court to communicate this order to the High Court of Gampaha forthwith.

Judge of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal