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 Station,
Narcotics Bureau.

Complainant

Vs.

Court of Appeal
Revision Application No :
CA/ PHC/APN CPA 42/2021

Abdul Qadir Aboobucker,
(Presently at Negombo Remand Prison)

10th Suspect

High Court of Chilaw
Case No: B 113/2020

And

The Magistrate's Court of
Marawila **Case No**:
B 481/2020

Imad Aboobucker

Petitioner

Vs.

1. The Officer in Charge,
   Police Station,
   Narcotics Bureau

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

Respondents

And now between

Imad Aboobucker,
100 ½, W. A. Silva Mawatha,
Wellawatta, Colombo 06

Petitioner Petitioner

Vs.

1.Officer-in-Charge,
Police Station,
Narcotics Bureau

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

Respondents Respondents

Abdul Qadir Aboobucker,
(Presently at Negombo Remand Prison)

10th Suspect

BEFORE : Menaka Wijesundera J.

Neil Iddawala J.

Counsel : Anil Silva PC. With N Perera for Petitioner.
Chathuranga Bandara SC for Respondent.

Argued on : 03.08.2021
Decided on : 31.08.2021

Iddawala – J

The Petitioner has invoked the revisionary jurisdiction of this Court conferred under Article 138 of the Constitution seeking to set aside the order of the learned High Court Judge of Chilaw dated 09.02.2021 under Bail Application No. BA 113/20.

The petitioner is the son of the 10th suspect. The 10th suspect was arrested on 13.03.2020 by the Officers of the Police Narcotics Bureau upon presenting himself at the Bureau according to a message received by him, for aiding and abetting the import, trafficking, and possession of heroin under Section 54A & 54B of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984. He was produced before the learned Magistrate of Marawila under case No. B 481/2020 along with ten other suspects.

A bail application was filed on behalf of the 10th suspect in the High Court of Chilaw on 21.10.2020 bearing application no. BA 113/2020 where it was dismissed by the learned High Court Judge on 09.02.2021 for failing to present exceptional circumstances as required by section 83(1) of the Act. Being aggrieved by the said Order on 09.02.2021, the petitioner has preferred a revision application to this Court pleading that the Order be set aside, and the 10th suspect be enlarged on bail.

At the outset it shall be noted that, as the revisionary powers held by this Court are discretionary in nature, when a party files a revisionary application, he is required to satisfy the Court on the existence of exceptional circumstances that would shock the conscious of the Court. In such "exceptional circumstances", the revisionary power of the Court can be exercised for the following purposes as discussed extensively in **Attorney General v Ranasinghe and others** (1993) 2 SLR 81 at 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, exceptional circumstances have been averred by the petitioner which will be dealt in detail at a later stage of the order. In the event the circumstances averred are deemed to be of such exceptional nature warranting an intervention, this Court will exercise its revisionary jurisdiction against the impugned Order of the High Court. However, it is prudent to note that the Court of Appeal standing in revision holds the power to call for and examine the record of any case, whether already tried or pending in the High Court or Magistrate's Court. In terms of Section 364 of the Criminal Procedure Code Act, No. 15 of 1979,

> *"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."*

Bearing this in mind I now turn to examine the present application. The exceptional circumstances averred in this petition more or less reflects the same position taken up by the 10th suspect before the High Court of Chilaw and it must be noted that the Learned High Court Judge has evaluated the same in the impugned Order. Had the circumstances changed since then, the petitioner was free to file a fresh Bail Application to the same Court, but instead, a revisionary application has been filed against the Order of the High Court, citing the following exceptional circumstances.

a) The said Order is contrary to law and against the weight of evidence submitted in the bail application

b) The Learned High Court Judge has misdirected himself by not considering the illness of the 10th suspect as an exceptional circumstance warranting the suspect being enlarged on bail

c) The Learned High Court Judge has taken into consideration irrelevant matters in refusing to enlarge the 10th suspect on bail

d) The Learned High Court Judge has misdirected himself in holding that there are no exceptional circumstances warranting the release of the 10th suspect on bail

e) The Learned High Court Judge misdirected himself in not releasing the 10th suspect on bail, notwithstanding the fact that there was no clear and cogent evidence to implicate the 10th suspect in connection with this offence.

In light of these averments, I will first set upon an examination of the facts of the case, discussing the nature and the circumstances of the alleged offence committed by the 10th suspect and the law governing the release of such suspects on bail. The ensuing discussion will reveal whether a *prima facie* case has been made out against the 10th suspect.

According to the petition and facts revealed at the inquiry, 10th suspect is a businessman engaged in import of certain goods such as potatoes, textile, garlic and onions from Pakistan and has been operating under a Sole Proprietorship named K.I.M.S Enterprises for several years. On 12.03.2020 one of the containers imported by 10th suspect was searched by the Police Narcotics Bureau in Lunuwila, and upon opening a sealed container, had found gross quantity of 99 .478 kg of heroin hidden in the form of potatoes. According to the Government Analyst Report, the pure quantity of heroin was 67.765 kg.

The pure quantity of heroin underscores the gravity of the offence committed and the said quantity was found within a container which had the 10th suspect's name as its consignee. The petitioner admits this fact by stating in paragraph 9 of the petition that the container confiscated by the Narcotics Bureau was among the containers imported by the 10th suspect.

It is noteworthy to highlight the sheer quantity of heroin involved in this case which is 67.765 kg. 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 ……..".* **In Alawaththa Kankanamage Nandasena v OIC-Homagama Police** CA (PHC) APN 147/ 2017 Court of Appeal Minute dated 01.03.2019, K. K. Wickremasinghe J commenting on a discovery of 61.89 grams of heroin stated, "*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*". Whilst the petition avers *inter alia* that the 10th suspect, if released on bail, would appear in Court when noticed, the quantity of heroin discovered cannot be regarded lightly. Apart from this fact, there are other suspicious circumstances surrounding the events of 12.03.2020 which serves a linkage between the discovery by the Narcotics Bureau and the 10th suspect thus contributing to the establishment of a *prima facie* case against him.

As revealed during the inquiry, it is quite suspicious why a single container among the several received by the 10th suspect, made its way to Lunuwila, when the rest of the containers have been transported to a site in Colombo upon clearance by Customs. The State Counsel characterized it as an 'indecent hurry' to have this specific container delivered.

Additionally, the State Counsel submitted that the 10th suspect had direct contact, conducted monetary transaction, and has acted as the Sri Lankan counterpart in importation of goods from one Nadeem Chaudri, an exporter living in Pakistan. The petitioner himself admits that there has been a long-standing business relationship between the 10th suspect and the said Nadeem Chaudri spanning over a decade. It has been admitted in the petition that Nadeem Chaudri has requested the 10th suspect to receive the questionable container and upon clearance from Customs, instructed the same to be handed over to a groundman not known to the

10th suspect. This groundman, another Pakistani individual, has been named as the 1st suspect (now deceased) of the same case.

As such, the quantity of heroin in consideration, the suspicious circumstances involving the 10th suspect and the discovery of such quantity, and the 10th suspect's ties with Nadeem Chaudri directs towards a *prima facie* case against the 10th suspect.

The President's Counsel for the petitioner admitted the discovery made by the Narcotics Bureau on 12.03.2020 within the container released under the 10th suspect's name but denies having any prior knowledge that the contents of the container carried heroin. However, the question of knowledge cannot be examined at this juncture and has no bearing in deciding whether the 10th suspect can be released on bail as the facts have already revealed a *prima facie* case against him. I agree with the Learned High Court Judge that this is not the correct time to consider the defences put forward by the suspect as it should be done at the trial stage.

In **Channa Pieris v Attorney General** (1994) 1 SLR 1, Amerasinghe J went into a detailed discussion as to the threshold by which an arrest can be made and how this threshold changes depending on the stage the trial is at. Though Channa Pieris case (Supra) dealt with an arrest made under Emergency Regulations, I believe it can be used as a guidance in deciding the nature of the *prima facie* case made out against the 10th suspect and the distinction between the trial stage of a case and the bail stage.

> *"….an officer need not have clear and sufficient proof of the commission of the offence alleged. He is not called upon even to have anything like a prima facie case for conviction. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case.* ***The provisions relating to arrest are materially different to those applying to the determination of the guilt or innocence of the arrested person. One is at or near the starting point***

of criminal proceedings while the other constitutes the termination of those proceedings and is made by the Judge after the hearing of submissions from all parties. *The power of arrest does not depend on the requirement that there must be clear and sufficient proof of the commission of the offence alleged. What the officer making the arrest needs to have, are reasonable grounds for suspecting the persons to be concerned in or to be committing or to have committed the offence."* (Emphasis added)

Having regarded the *prima facie* case against the 10th suspect, I now turn to the law relating to the incarceration of the same. Consideration of bail with regard to persons suspected or accused of offences 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"

Therefore, this Court has no doubt that only the provisions of 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 Legislature itself, in enacting the amendments to the Poisons, Opium and Dangerous Drugs Ordinance in 1984 (hereinafter referred to as the Ordinance), has laid out stringent restrictions against the release of those suspected under the Ordinance, further highlighting the gravity of the circumstances surrounding the 10th suspect. During the Second reading (Parliament) debate of the proposed amendment Bill to the Ordinance, heavy emphasis was placed upon the high threshold by which a suspect under the Ordinance can be released on bail. It was

the intention of the Legislature to keep such suspects in prison until the conclusion of the trial unless exceptional circumstances present itself.

In fact, the original Amendment Bill of the Ordinance did not envisage a situation in which bail was granted by a Court of Law. The **Supreme Court's Special Determination** of the Bill (S. D. No 1 of 1984 -P/Parl**.**SC Minute dated 23.02.1984) paved the way in entrusting this discretion to courts and subsequently at the Committee Stage of the Bill, an amendment to the original Bill manifested itself in the present form of Section 83(1).

It is interesting to consider the intention of the legislature which transpired 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."*
>
> *"I think it is necessary to have stringent controls 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 Vol (28) Columns 628 to 654)

Moreover, His Lordship Chief Justice N.D.M. Samarakoon Q.C. in the Supreme Court majority determination (supra) on the draft Bill opined that the capital punishment imposed by the amendment bill does not violate the Article 11 of the Constitution.

The Legislative history of the Ordinance sheds light on the context within which the present application must be evaluated, pointing towards the burden of the petitioner in furnishing a strong case of exceptional circumstances meriting the release of the 10th suspect of bail.

The petitioner has relied upon the absence of previous convictions or pending cases to support his contention. This fact has been considered in the case of **Cader v Officer - In - Charge Narcotics Bureau** (2006) 3 SLR 74 at p 82 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".*

This further highlights the unique standing of a suspect under the Ordinance where the gravity of the offence itself impose limitations to the freedom of a suspect, thereby warranting a careful consideration of the exceptional circumstances to decide otherwise.

As such, when the *prima facie* case against the 10th suspect is viewed within the context of the legislative intention in enacting the Poisons, Opium and Dangerous Drugs Ordinance (under which the 10th suspect has been arrested), the circumstance of the present application favours the continued imprisonment of the 10th suspect till the trial is concluded.

Nevertheless, I would now turn to examine the two main exceptional circumstances averred by the petitioner: the illness of the 10th suspect and the prevalent COVID 19 situation. It must be noted that the Learned High Court Judge has evaluated the same in his Order dated 09.02.2021.

At the outset it must be noted that 'exceptional circumstances' is very subjective and cannot be given a firm description. It depends and varies on the circumstances of each case. There is a series of reported cases which had identified the term of exceptional circumstances in relation to granting bail. **Ramu Thamodarampillai v The Attorney General**, (2004) 3 SLR 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)

Petitioner in paragraph 17 of the petition avers that "Petitioner reliably understands that while in prison the 10th suspect's health condition is deteriorating and no proper medical treatment is afforded to him thereby putting his life in danger". However, the petitioner has failed to furnish any proof of such deteriorating health whilst the 10th suspect is being held in remand. Petitioner has not provided any prescription, health examination requested or received during the pendency of the incarceration to shed light on the current health condition of the 10th suspect.

The President's Counsel for the petitioner relied on a Medical Report dated 10.12.2020 by the long-standing physician of the 10th suspect which cites the kidney functioning and glucose control of the 10th suspect as being inadequate. However, it was brought to the notice of this Court that this Medical Report was not a result of a physical examination of the 10th suspect, rather a report given in his absence. In **Ramu Thamotharampillai v The Attorney General** (supra) at p. 193, commenting on an averment of ill health as an exceptional circumstance warranting the release on bail, it was held that "*But illness must be a present illness and that continued incarceration would endanger life or cause permanent impairment of health. Moreover, there must be evidence of the nature of illness and its effect".* The Judgment then quotes **Queen v Liyanage** 65 NLR 289 which states *"whatever may have happened earlier what we have to consider on these applications is the present physical and mental condition of the defendants. On this point, apart from their affidavits which state that medical attention has been rendered to several of them,*

that one had received the attention of a psychiatrist as well and that two of them had been admitted to hospital we have no expert medical evidence before us about the condition of any single defendant. Nor have we evidence as to how dangerous it would be to their health to let any of them remain in Fiscal's custody. While we sympathies with them in respect of the conditions under which, and the period for which, they were held in solitary confinement we do not feel, that we have sufficient material before us to enable us to say that their present health demands that they be released on bail."

Similarly in **Attorney General v Ediriweera** (2006) BLR 12 it was held "*…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 the continued confinement would imperil life or cause permanent impairment of his physical condition"*

Petitioner has submitted records to aver that the 10th suspect was admitted to hospital from 23.09.2013 - 11.10.2013 and that he underwent surgery on 24.09.2013. However, this Court holds that these records do not amount to the present state of the 10th suspect's condition of health and as such cannot be deemed an exceptional circumstance.

It is to be accentuated that, where the sentence of an alleged offence, if convicted, results in capital punishment or life imprisonment, the past medical history of a suspect alone would be insufficient to convince the court the existence of exceptional circumstances that would warrant the grant of bail. Thus, the petitioner is required to satisfy the court that the continued incarceration of the suspect would absolutely endanger or cause permanent damage to the suspect's life unless he is enlarged on bail. Therefore, a mere suspicion, doubt or anxiety in the mind of the suspect (or petitioner) would necessarily fail to establish satisfying grounds for exceptional circumstances that would shock the conscious of the court. Hence, in such environment, all efforts should be taken to present the current and actual health

condition of the suspect, supported by sound medical opinion in order to succeed in such a bail application.

The petitioner could have resorted to Section 69 of the Prison Ordinance No 16 of 1877 (as amended) which sets out the procedure by which a prisoner is allowed to be removed from prison for the purpose of observation or hospitalization. Under this Section, the Commissioner General of Prisons, by a Warrant of Transfer under his hand, can direct such prisoner to be removed to a government hospital for the purpose of further health examination and/or treatment. The petitioner has failed to adduce evidence of any such action to secure/evaluate the current health condition of the 10th suspect. In light of these circumstances, it is the considered opinion of this Court, that this Court cannot operate on assumptions of possible risks unless cogent evidence is presented.

I now turn to the assertion that the prevalent COVID 19 situation renders the 10th suspect especially vulnerable and prone to further deterioration in his health and possible death, thus amounting to an exceptional circumstance warranting the release on bail.

As this division held in **Herath Pathiranalage Sunil Wickrema Abeysinghe and Others v DG CIAOBC** CA/PHC/ APN 67/20 CA Minute dated 06.07.2021, impact of the Corona virus is applicable to all those in custody. Irrespective of the placement of the individual, be it in prison or freely roaming in society, the severity of the pandemic situation puts any person with non-communicable diseases at grave danger. Additionally, the petitioner has failed to provide any evidence to the effect that the 10th suspect cannot be treated within the confines of the prison, nor at a Government Hospital. In **The Queen v Cornelis Silva** 74 NLR 113 at p 114 Weeramantry J, while determining what constitutes an 'exceptional circumstance' held that, "*no means extraordinary*" and "*common to many accused person*" would not satisfy the criterion warranting the grant of bail. As such, this Court holds that the prevalence of the COVID 19 situation does not amount to an exceptional

circumstance in the present application. A perusal of the impugned Order presents that the Learned High Court Judge has come to the same conclusion.

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