

**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

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

**CA (PHC) APN 93/2021**

**Complainant**

High Court of Colombo Case No:

Vs.

**HC 624 /2019**

1. Mohomad Anvar Mohomad Ziyam
2. Nawasdeen Mohomad Zakir.
3. Rathnayake Mudiyanseelage Achala Kumari.
4. Wickramasinghe Arachchilage Don Amarasiri alias Japan Chuti.

**Accused**

**AND NOW**

Wickramasinghe Arachchilage Don  
Amarasiri alias Japan Chuti,

**4<sup>th</sup> Accused – Petitioner**

Vs.

Hon. Attorney General,  
Attorney General's Department,

Colombo 12.

**Complainant – Respondent**

Before – Menaka Wijesundera J.

Neil Iddawala J.

Counsel – Anuja Premaratna PC with Naushaya Rajapaksha for the

Petitioner.

Sudarshana De Silva DSG and Chathurangi Mahawaduge for the

State.

Argued on – 07.12.2021

Decided on – 17.12.2021

**MENAKA WIJESUNDERA J.**

The instant application has been filed to set aside the order dated 23.3.2021 and the subsequent order dated 2.8.2021 of the learned High Court Judge of Colombo.

The fourth accused petitioner (hereinafter referred to as the petitioner) has been indicted in the High Court for aiding and abetting the 1<sup>st</sup> accused to traffic 5947 grams of heroin and for conspiracy under the provisions of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act nu 13 of 1984.

The trial against the accused has commenced and witness nu 1 had been led partly, but the prosecution had not been able to conclude due to the lockdown situation in the country during the last few months.

The contention of the petitioner is that upon the arrest of the first accused in the substantive matter the house of the petitioner and his wife who is the 3<sup>rd</sup> accused had been searched and no illegal substance had been found but facts had been reported to the Magistrate on 22<sup>nd</sup> of March 2017.

Thereafter on the 27th of March 2017 the petitioner and his wife had surrendered to the Magistrates Court and they had been handed over to the remand custody.

The petitioner has further contended that the first accused had received telephone calls from a mobile number and the police had believed it to be belonging to the petitioner.

The wife of the petitioner had been enlarged on bail by the High Court due to her ill health.

Therefore the petitioner contended that

- 1) As his wife has to undergo serious medical treatment , that he being the only person available to take care of her that granting of bail may be considered on that ground ,
- 2) The petitioner being indicted for conspiracy and aiding and abetting the first accused for trafficking of heroin is beyond proof because he was nowhere in the scene at the time the first accused was arrested also to be considered as a ground suitable enough to enlarge the petitioner on bail .

The Counsel appearing for the respondents contended that at the time of considering bail for a suspect or accused facts of a case need not be gone in to and in the modern day and age abetment and conspiring to commit an offence is done in the most advanced and technical manner.

Anyhow keeping in mind the submissions of both parties it is pertinent to consider the law pertaining to bail when an accused is indicted under the provisions of the above mentioned act.

Persons, who have been indicted for offences of manufacturing trafficking importing or exporting or possession of heroin cocaine morphine or opium according to **section 83 of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act 13 of 1984**, shall be enlarged on bail only on **exceptional circumstances by the High Court.**

The term exceptional has not been defined in the said Act but in many of our cases decided under the provisions of the **Poisons Opium and Dangerous Drugs Ordinance**, many factors have been considered as being exceptional. Such as,

- 1) **the nature of the accusation,**
- 2) **the culpability of the accused**
- 3) **the severity of the sentence if found guilty**
- 4) **ill health of the suspect or the accused, if incase ration would precipitate the situation**
- 5) **the delay if it is inordinate according to the facts of the case and many others.**

Therefore what has developed right up to this point is that exceptionality would vary from case to case and according to the judgment cited by the petitioner that is **Carder vs. Officer in charge of Narcotics Bureau 2006 3 SLR 74 Basnayke J** has said that “these type of offences affect the society at large and the law should not be made impotent that it does not serve the society and the anti social elements should not be given license to create havoc in the society”, citing the case of **Abdul Hamidkari Pathan and etc vs. State of Gujarat and others (15)476**.

Therefore **as the trial has commenced and a further date has been fixed for further trial**, it is the opinion of this Court that this is not the correct juncture to go in to the culpability of the petitioner for the reason that it would cast aspersions on the innocence of the petitioner in the trial court.

The counsel for the petitioner has urged that his wife who is the 3<sup>rd</sup> accused in the substantive matter to be considered as exceptional for the reason that there is no other person to look in to the matter. In the case cited by the petitioner that is **Carder vs. the Officer in Charge of the Narcotics Bureau**, a case has been considered where the child being unattended by the parents when they both are incarcerated has been considered as being a suitable ground for bail. But in the said case there was no pending case or a previous conviction of similar nature. In the instant case the 3<sup>rd</sup> accused in the substantive matter, who is the wife of the petitioner, had been enlarged on bail for medical reasons and the petitioner in this matter being the only parent available to take care of the children in the absence of the mother undergoing urgent medical

**treatment is exceptional enough to consider bail in view of the judgment cited above.**

As such this Court enlarges the petitioner on bail and sets aside the order of the learned High Court Judge of Colombo and directs the Learned High Court Judge to enlarge the 4<sup>th</sup> accused petitioner **namely *Wickremasinghe Arachchilage Don Amarasiri alias Japan Chuti*** on suitable conditions of bail.

Hence the instant application for revision is allowed.

**Judge of the Court of Appeal**

**I agree.**

**Neil Iddawala J.**

**Judge of the Court of Appeal.**