

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

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

Inspector of Excise
Excise Office
Kasbawa.

Complainant

Vs.

Court of Appeal Application No:
CA/ PHC/APN/1/22

Perumal Sudesh

High Court of Homagama
No: **BA 46/2021**

Suspect

And between

Magistrate's Court of Kesbewa
No: **B2216/20**

Perumal Sathis Kumar
3rd Stage, no 100 Badowita,
Mount Lavinia

Petitioner

Vs.

1. Hon. Attorney General
Attorney General's Department,
Colombo 12
2. Inspector of Excise
Excise Office
Kasbawa

Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Suranga Bandara for the Petitioner
Ridma Kuruwita SC for the Respondents.

Argued on : 23.05.2022

Decided on : 16.06.2022

Iddawala – J

This is an application for revision filed to revise an order of the High Court of Homagama dated 08.11.2021 which refused to enlarge the suspect on bail under the Poison Opium and Dangerous Drugs Act No 13 of 1984. On 08.12.2020 suspect was arrested under the Act and produced before the Magistrate Court of Kesbewa on 09.12.2020 upon which he was remanded. Thus, the suspect has been in remand custody for nearly 1 year and 5 months. The Government Analyst report was issued on 25.03.2021 wherein the pure quantity of heroin has been identified as 35.26g.

B report filed in the Magistrate Court which prompted the incarceration of the suspect does not disclose from where the alleged substance was found in the suspect's person. But during the bail inquiry before the High Court, the learned High Court Judge has called a report from the Excise Department and in it, it has been disclosed that the substance was retrieved from the suspect's trouser pockets. The petition contends that neither the B report nor any further reports submitted against the suspect reveal any indication as to how the suspect concealed heroin. During oral submissions, the counsel for the petitioner contended this omission cast a serious doubt as to whether the suspect had exclusive possession of the

alleged substance and thereby contending that there was no material before the Magistrate to satisfy the incarceration of the suspect. The petition further submits that although the High Court has found that excise officers defaulted in reporting where heroin was concealed in the suspect's person, the High Court has failed to consider such fact as an exceptional circumstance. It is the contention of the petition that such fact amounts to an exceptional circumstance warranting the revision of the High Court order dated 08.11.2021 to enlarge the suspect on bail.

Upon a perusal of the brief, it is evident that at the time of ordering the suspect to be remanded, there was no material before Court delineating the specific place from which heroin was recovered from the suspect. Such an instance is provided for in Section 114 of the Code of Criminal Procedure Act No 15 of 1979 (as amended) (*hereinafter the CPC*) as *"If upon an investigation under this Chapter it appears to the officer in charge of the police station or the inquirer that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate's Court, such officer or inquirer shall if such person is in custody release him on his executing a bond with or without sureties as such officer or inquirer may direct to appear if and when so required before a Magistrate's Court having jurisdiction to try or inquire into the offence."* In the same light, reference can be made to Section 116 of the CPC which provides for the duty of officer or inquirer to forward case to a Magistrate's Court if sufficient information is well founded. Hence, both Section 114 and 116 of the CPC dictate that a person cannot be deprived of liberty unless for good reason. These sections along with Sections 115, 120 (1), (2), (3) enable judicial scrutiny and control over any investigation. This is a power given to the judiciary to supervise the progress of the investigation with a view to ensuring that once a suspect is remanded, the suspect would not continue to remain in custody in the absence of sufficient and important materials. These provisions are laid out to ensure that all suspects are treated with fairness during investigations since everyone is presumed

innocent until proven guilty. At this juncture, I would like to echo an observation made by His Lordship Justice Fernando in **Victor Ivon v Sarath N. Silva** (1998) 1 SLR 340: “A citizen is entitled to a proper investigation – one which is fair, competent, timely and appropriate – of a criminal complaint, whether it be by him or against him. The criminal law exists for the protection of his rights – of person, property and reputation – and lack of a due investigation will deprive him of the protection of law”

It is pertinent to refer to **Udumulla Kankanamalage Sumathipala v Attorney General** CA/PHC/APN 9/2010 CA Minute dated 19.07.2010 delivered by His Lordship Justice Sisira de Abrew. In the said case, the suspect was arrested for being in possession of 50 g of heroin and in the B report filed by the police, the police failed to state the particular place (the body of the suspect) where heroin was found although they claimed that heroin was found in the possession of the suspect. Among other facts considered by the Court, the period of incarceration, the absence of an indictment led to the conclusion of releasing the suspect on bail.

The omission by the excise officers to specifically delineate where heroin is found in the suspect’s person is a grave situation that must be given due judicial regard. Based on such deficient evidence the suspect has been languishing in prison since 09.12.2020. The counsel for the respondent asserted that the suspect has previous conviction for possession of 3,700mg of heroin and was convicted and sentenced on 17.06.2010 in Magistrate Court of Mt Lavinia Case No B 4687/07 wherein a fine of Rs. 10,000/- was imposed. Apart from the said submission, the respondent failed to give any indication as to when an indictment would be forwarded against the suspect.

Therefore, in the instant matter in view of all the material stated above this Court is of the opinion that the learned High Court Judge has failed to consider the above-mentioned material in the impugned order which

makes it an exceptional circumstance to set aside the said order dated 08.11.2021 and enlarge the above-mentioned suspect on bail.

Hence, the instant application for revision is allowed and this Court directs the learned High Court Judge of Homagama to enlarge the above-mentioned suspect on appropriate conditions of bail.

The Registrar of this Court is directed to dispatch a copy of this order to the High Court of Homagama, forthwith.

Application allowed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera-J

I agree.

JUDGE OF THE COURT OF APPEAL