

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 the
Democratic Socialist Republic of Sri
Lanka.

Democratic Socialist Republic of Sri
Lanka.

Complainant

Court of Appeal Revision Application

No: **CPA / 133 / 21**

High Court of Panadura Case No:

HC 3649 / 2018

Magistrates Court of Moratuwa Case

No: **B 1481 /17**

Vs.

Hathkotuwa Gamage Pushpakumara

Accused

AND NOW BETWEEN

Hathkotuwa Gamage Pushpakumara

Accused – Petitioner

Vs.

Hon. Attorney General

Attorney General's Department

Colombo 12.

Complainant – Respondent

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Kasun Liyanage for the Petitioner.

Chathurangi Mahawaduge SC for AG.

Argued on: 27.07.2022

Decided on: 10.08.2022

MENAKA WIJESUNDERA J.

The instant revision application has been filed to obtain bail to accused petitioner namely Hathkotuwa Gamage Pushpakumara under the provisions of the Poisons, Opium and Dangerous Drugs Act No.13 of 1984.

In the instant matter the accused petitioner (hereinafter referred to as the petitioner) has been taken into custody on 27/11/2017 for being in possession of 3.5 grams of Heroin and for trafficking of the same. Indictment has been forwarded on 18/08/2019.

The Counsel appearing for the petitioner states that the petitioner has been languishing in remand ever since his arrest without the trial being taken up and he further concedes that the petitioner has four similar previous convictions and one pending case of murder. But he invites Court to take in to consideration the long period of remand without the trial being taken up as a ground for the accused petitioner to be enlarged on bail. He further alleges that the officers who investigated the matter also have been implicated for similar offences.

The Counsel appearing for the respondent vehemently objected to this application and stated that the petitioner is a habitual offender and the case has not been taken up due to the Corona virus which had prevailed in the country, the current fuel situation In the country and the repetitive obtaining of medical reports with regard to the mental condition of the petitioner.

Having considered the submissions of both parties this Court observes the law pertaining to the instant matter. According to the provisions of the Poisons, Opium and Dangerous Drugs Ordinance, bail can be considered only upon exceptional circumstances which has not been defined in the Act. But in many of our decided cases the term exceptional has been defined to be as being varying from case to case according to the facts of the case. A demarcation of the boundaries of the exceptional circumstances is purely a subjective exercise and as such it cannot be given a rigid interpretation. What is recognized as an exceptional circumstance in one case may not be so in another. As such, the facts of each case must be carefully examined in deciding whether or not the circumstances presented are exceptional. In the instant matter, the exceptionality, the petitioner is urging this Court to consider is the long period of remand without the case being taken up.

In the case of ***Attorney General v Ediriweera (Supra)*** it has been held **“delay is always a relative term and the question to be considered is not whether there was mere explicable delay, as when there is a backlog of cases, but whether there has been excessive or oppressive delay and this always depends on the facts and circumstances of the case”**.

An inordinate delay shows a clear lapse in the process of administration of justice which constitute an exceptional circumstance on enlargement on bail. In the instant case this Court observes indictment has been served on the petitioner on 02/11/2018 and medical reports with regards to the mental condition of the petitioner had been called on two occasions. Thereafter, case has been called with regard to the receipt of the productions for two or three occasions. Thereafter, bail application had been made previously and it has been refused. Thereafter, due to Corona virus it has gone down many times and finally for the current fuel situation, the trial had not been taken place.

Hence, it is obvious to this Court that the trial in this matter has been delayed due to various reasons which had been beyond the control of the petitioner. Hence, what this Court has to consider at this point is whether it is fair to incarcerate the petitioner without a definite date of the trial being taken up. The Counsel appearing for the respondent stated that the next date for the case to be mentioned in Court is during the vacation hence the trial being taken up in the near future seems to be very remote.

It is very clear according to Section 83(1) of the instant Act **“no person suspected or accused of an offence under Section 54(a) or 54(b) shall be released on bail except by High Court in exceptional circumstances.”**

In the instant matter, according to the facts stated above, there is no indication of a definite trial date, hence the incarceration of the petitioner until such time is a violation of his personal liberty because an accused is remanded for the purpose of ensuring that he or she appears to face the trial but not as part of the sentence which would be imposed if he is found guilty. Hence, in the instant matter as the trial has prolonged from the service of indictment since 2018 up to date without a future date of the trial not being evident, is sufficiently exceptional to consider bail in the instant matter.

Hence, this Court considers the instant application to be a fit case to revise the impugned order dated 12/11/2021 and enlarge the petitioner namely Hathkotuwa Gamage Pushpakumara on following conditions of bail

- (1) A cash bail of Rs.500,000
- (2) Two sureties to the value of Rs 1 million each
- (3) The suspect to report to the relevant police station on every Sunday of the month before 2pm
- (4) The petitioner to surrender the passport if any to the Registrar of the High Court

The registrar of this Court is directed to convey the instant order to the relevant High Court. As such the instant application for revision is allowed.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court of Appeal.