

**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
and a bail application under section 83(2) of
the Poisons, Opium and Dangerous Drugs
Ordinance No. 13 of 1983 read with Act No.
41 of 2022.*

Court of Appeal No:

CA/PHC/APN 0011/23

HC Colombo

Case No. 4093/22

The Hon. Attorney General

COMPLAINANT

Vs.

Kalupanage Mangalika

ACCUSED

AND NOW BETWEEN

Kalupanage Wimalawath Perera,

No. 134/7,

Hemson Town, Kelaniya.

PETITIONER

ON BEHALF OF

Kalupanage Mangalika

(Currently languishing in remand)

Vs.

The Hon. Attorney General,

Attorney General's Department,

Colombo 12.

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Tenny Fernando for the Petitioner

: Kanishka Rajakaruna, SC for the Respondent

Argued on : 27-03-2023

Decided on : 06-04-2023

Sampath B Abayakoon, J.

This is an application in revision by the petitioner on behalf of Kalupanage Mangalika (hereinafter referred to as the accused) being aggrieved by the order dated 5th January 2023 by the learned High Court Judge of Colombo. The accused is presently in remand custody.

We heard the learned Counsel for the petitioner, as well as the learned State Counsel for the respondent in relation to this application.

The accused has been arrested by the officers of the Colombo Crimes Division on 22nd June 2021 on the allegation that she had in her possession 102 grams and 192 milligrams of Heroin. However, according to the Government Analyst Report, the pure quantity of the said Heroin was 41.81 grams.

The accused had preferred an application for bail under the provisions of the Poisons, Opium and Dangerous Drugs Ordinance to the High Court of Colombo. The learned High Court Judge of Colombo, being satisfied that the accused had established sufficient exceptional circumstances which entitled her to be granted bail, had granted bail to the accused by his order dated 17th February 2022.

The accused had been indicted before the High Court of Colombo by the indictment dated 05-05-2022 by the Hon. Attorney General for offences in terms of section 54A of the Poisons Opium and Dangerous Drugs Ordinance. The indictment had been served on the accused on 5th January 2023.

When the indictment was served on the accused, the learned Counsel for the accused had moved for bail in terms of section 195 of the Code of Criminal Procedure Act, informing the Court that she is already on bail granted by the High Court of Colombo. However, it appears from the proceedings, when this application was made on that day, the learned State Counsel who prosecuted had objected to the accused being granted bail on the basis that the pure quantity of Heroin alleged to have been found in the possession of the accused was 41.8 grams. It had been his position that since the pure quantity of the drug was more than 10 grams, in terms of Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022, it is only the Court of Appeal that can grant bail under exceptional circumstances. He has urged that since the High Court has no jurisdiction to grant bail, the accused should be remanded.

It appears that the learned High Court Judge has accepted the said argument by the learned State Counsel and remanded the accused by his order dated 05-01-2023.

This Court is in no position to agree with the order by the learned High Court Judge remanding the accused on the basis that he has no jurisdiction to grant bail in terms of Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022 in view of the previous order of bail granted to the accused by the same High Court.

The Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022 has been certified by the Speaker of Parliament on 23-11-2022. Until then, the law applicable for granting of bail to a suspect arrested for an alleged offence in terms of section 54A or 54B of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1994 was in accordance with Section 83 of the Ordinance.

For matters of clarity, I would now reproduce the relevant Section 83, which reads thus;

83. (1) no person suspected or accused of an offence under section 54A or section 54B of the Ordinance shall be released on bail, except by the High Court in exceptional circumstances.

It is clear from the bail order pronounced by the learned High Court Judge of Colombo in case No-HCEBA/29/22 on 17-02-2022 that, when the said bail order was pronounced, The Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022 was not in existence.

Therefore, it is clear that when the accused was indicted before the High Court of Colombo, she was on a bail order granted in accordance with the law by the same High Court.

The learned High Court Judge of Colombo has ordered the re-remanding of the accused on the basis of section 195(d) and apparently after having considered the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

Section 195 of the Code of Criminal Procedure Act stipulates the procedure that should be adopted by a High Court Judge upon receipt of an indictment by the Court.

Section 195 (d) of the Code of Criminal Procedure Act reads as follows.

195. (d) Subject to the provisions of section 403 direct the accused to execute a bond to appear in Court for his trial or by warrant addressed to the superintendent of any prison authorize the detention of the accused pending trial.

The relevant bail provision considered by the learned High Court Judge in terms of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022 to determine that he has no jurisdiction to grant bail reads as follows.

83. (2) Notwithstanding the provisions of sections 84 and 85, a person suspected or accused of an offence under subsection (1) of section 54A and section 54B-

(a) of which the pure quantity of the dangerous drug, trafficked, imported, exported or possessed is ten grammes or above in terms of the report issued by the Government Analyst under section 77A; and

(b) which is punishable with death or life imprisonment,

shall not be released on bail except by the Court of Appeal in exceptional circumstances.

It is the view of this Court that Section 195(d) does not envisage a situation where a person already on bail in relation to the alleged offence or offences for which an indictment has been preferred to the Court can be remanded pending trial. Section 195 provides for a High Court to order an accused to execute a bond to appear in Court for his trial if the Court thinks desirable, although such an accused has already been released on bail by a competent Court. There may be

situations where an accused person has not been granted bail by the time the indictment is served on the accused. It is on such instances, that the learned High Court Judge can order detention on that person pending trial until or unless he is granted bail by a competent Court, if that competent Court is not the High Court which served the indictment on the accused.

In the instant case, the accused has appeared before the High Court after being granted bail by a competent Court as stated earlier. Under the circumstances, it is the view of this Court that it was not open to the prosecuting State Counsel to make submissions on the basis of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022 arguing that the High Court has no jurisdiction to grant bail. Such an argument can have substance only in a situation where the accused has not been granted bail, if the pure quantity of the drug was over ten grams as provided for in the Amendment.

It is the view of this Court that this is common sense more than anything else.

Once a person is granted bail by a competent Court, that person can be remanded again if any of the bail conditions have been violated by such a person. It is the view of this Court that since there is no indication that the accused has violated the bail conditions imposed on her, the learned High Court Judge was misdirected as to the relevant law when it was ordered that the accused shall be kept in remand custody and that he has no jurisdiction to grant bail. The question of jurisdiction to grant bail would not arise in the instant matter.

Accordingly, the order dated 05-01-2023 by the learned High Court Judge of Colombo where the accused has been remanded is hereby set aside. The learned High Court Judge is directed to order the release of the accused forthwith on the bail conditions she has already fulfilled in accordance with the bail order made on 17-02-2022 by the High Court of Colombo.

The Registrar of the High Court of Colombo is directed to call for the original case record No. B52348/05/21 from the Magistrate Court of Colombo where the accused has deposited her bail money and the sureties have entered their bail

bonds and file it along with the High Court case record if it has not been done as yet for the purposes of relevant action if the accused violates the bail order made by the High Court.

The Registrar of this Court is directed to communicate this order to the High Court of Colombo for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal