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

In the matter of an appeal in terms of Section 331 of the Code of Criminal Procedure act 15 0f 1979 to the Court of Appeal.

Thewa Hettige Upali Lakshman Silva,
No. 71, Hospital Road,
Dehiwala.

Petitioner

Vs.

Court of Appeal Application No:
BAA/0001/22

High Court of Kuliyapitiya Case No:
HCBA/Kuliyapitiya/027/2021

Magistrate's Court of Kuliyapitiya Case No:
B 80262/20

1. Officer-in-Charge,
Chief Inspector of Police,
Police Station,
Pannala.

2. Hon. Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents

Thewa Hettige Dimuth Lakshitha Silva,
(Currently incarcerated at Wariyapola Prison)

Suspect

AND NOW BETWEEN

Thewa Hettige Upali Lakshman Silva,
No. 71, Hospital Road,
Dehiwala.

Petitioner -Appellant

Vs.

1. Officer in-Charge,
Chief Inspector of Police,
Police Station,
Pannala.

2. Hon. Attorney General,
Department of the Attorney General,
Colombo 12.

Respondents- Respondents

Thewa Hettige Dimuth Lakshitha Silva,
(Currently incarcerated at Wariyapola prison)

Suspect

Before : Menaka Wijesundera J
Neil Iddawala J

Counsel : Tharika Suriyarachchi instructed by Lahiru Galapaththige for the Appellant.

Indika Nelummini, SC for the State.

Argued on : 06.12.2022

Decided on : 24.01.2023

Iddawala – J

This is an appeal filed against the order of the learned High Court Judge of the Kuliyapitiya High Court in case No. HCBA/Kuliyapitiya/027/2021 delivered on 13.10.2021. The impugned order refused the bail application made in terms of section 83(1) of the Poisons, Opium, and Dangerous Drugs Ordinance, No. 17 of 1929, as amended by Act No. 13 of 1984 (*hereinafter, the Ordinance*) on the basis that *inter alia,* no exceptional circumstances had been established by the petitioner-appellant (*hereinafter referred to as the appellant*).

The facts of the case according to the B Report submitted to Kuliyapitiya MC are as follows. The suspect has been arrested on 09.09.2020 while travelling in his car by the police officers who were on duty at a road block. Upon searching the suspect, 100 grams of Diacetylmorphine alias 'heroin' has been found in his pocket. The pure quantity of the findings is yet to be confirmed by the Government Analyst's report. The suspect had been arrested under Section 54(B) of the Ordinance and the learned High Court Judge of Kuliyapitiya had rejected the bail application of the appellant by the aforementioned order dated 13.10.2021. It is the contention of the appellant before this Court that such order is illegal, wrongful, contrary to law, and unreasonable based on eight grounds submitted by the appellant.

The High Court Judge of Kuliyapitiya had considered the bail application in an inquiry held on 01.10.2021 where submissions were made by either party, and the order was reserved for 13.10.2021. However, this Court observes that two final orders have been issued by the learned High Court Judge of Kuliyapitiya for the same bail application on the same date, i.e. 13.10.2021. One order is from pp. 69-73 and the other order from pp. 74-

77 in the Appeal Brief. Nevertheless, both orders have refused the bail application, even though the content and reasoning are different from one another.

In perusing the journal entries, a side note on page 54 of the Appeal Brief indicates that the order was filed on 13.10.2021 *("2021/10/13 දිනැති නියෝගය ගොනු කලා. 2021/10/13")* and below that note another side note indicates that 'proceedings dated 13.10.2021 is filed 11.11' *("2021/10/13 දිනැති සටහන් ගොනු කළා 11/11").* It is unclear and ambiguous as to which order was issued at first and the purpose of issuing a subsequent order. Furthermore, no reasons have been provided or recorded in this regard. Once a judgment/order is delivered, it is considered to be the end of the proceedings as far as the judge who made the decision is concerned (*functus officio*). Generally, a judge cannot amend, alter, vary, interpolate or review his or her judgment or order. However, there are certain exceptions.

The courts have inherent powers to revise orders under certain circumstances. In **Jeyaraj Fernandopulle vs Premachandra De Silva and Others,** *1996 1 Sri L.R. 70* it was held that, *"However, all Courts have inherent power in certain circumstances to revise an order made by them such as -*

> *(i) An order which has not attained finality according to the law or practice obtaining in a Court can be revoked or recalled by the Judge or Judges who made the order, acting with discretion exercised judicially and not capriciously.*
>
> *(ii) When a person invokes the exercise of inherent powers of the Court, two questions must be asked by the Court:*
>
> > *(a) Is it a case which comes within the scope of the inherent powers of the Court?*
> >
> > *(b) Is it one in which those powers should be exercised?*

(iii) A clerical mistake in a judgment or order or some error arising in a judgment or order from an accidental slip or omission maybe corrected.

(iv) A Court has power to vary its own orders in such a way as to carry

out its own meaning and where the language is doubtful, to make it plain or to amend it w here a party has been wrongly named or described but not if it would change the substance of the judgment.

(v) A judgment against a dead party or non-existent Company or in certain circumstances a judgment entered in default or of consent will be set aside.

(vi) The attainment of justice is a guiding factor.

(vii) An order made on wrong facts given to the prejudice of a party will be set aside by way of remedying the injustice caused.

It is the view of this Court that, if a judge is to issue a subsequent final order on the same matter due to *per incuriam* or such other instances which warrants a correction as elaborated in the aforementioned case, it has to be properly rectified with reasons, proper recording, and giving due notice to the relevant parties. If such a process is not followed, then both orders are deemed to be vitiated. The situation becomes highly complicated when both orders are issued on the same date as has occurred in the instant application. In the instant matter, there are two specific orders, with no means of identifying which order was issued at first and which was issued subsequently.

As filing two final orders/judgments for the same matter is a rare occurrence, not provided for by the statutory laws, this Court would like to resort to Indian jurisprudence at this juncture which has previously dealt with a similar situation. In ***Behari Lal and Another Vs M.M. Gobardhan Lal and Others*** *AIR 1948 All 353*, Raghubar Dayal J. states that,

"It is within the realm of possibility that the reviewing Court and the appellate Court may finally dispose of the review and the appeal without knowing the existence of the other. What would be then the legal position about the two orders? It may be said that whichever order was decided first would be operative and the subsequent order would be held to have been passed without jurisdiction. It may be argued that the order of the appellate Court should be preferred to the order of the reviewing Court. It would be very difficult if the two orders happen to be passed on one and the same date because it would not be possible then to piece the two orders according to their respective priority in time. Surely such a remote possibility could not have been contemplated by the Legislature without providing for it and the interpretation of the various provisions of the Civil Procedure Code should, if possible, be such as to avoid the happening of such a contingency in which it would be difficult to see as to which order should be treated as a valid order and which should not be treated as a valid order."

In the above case the Court makes a determination on a matter where there are two judgements by two different judges by way of review and appeal. The circumstances of the instant case are not quite similar to the facts of the above case, and are more intricate. The same judge has delivered two orders on the same date. As she enters the subsequent order (if it was entered following the proper processes), the first order vitiates. No judge is entitled to issue two judgments on the same exact issue. Therefore, it is impossible for this Court to determine which order of the learned High Court judge is operative for this appeal as both final orders are issued on the same date. Thus, as the legality of the orders issued by the High Court Judge being is in doubt.

Therefore, this Court deems both orders by the learned High Court Judge of Kuliyapitiya dated 13.10.2021 to be invalid. The conduct of the learned High Court Judge is condemned by this Court as it is found to be deleterious in administering justice efficiently. It is expected from all judges to exhibit and promote high standards of judicial conduct so as to reinforce public confidence, which is the cornerstone of judicial

independence. It is an irrevocable duty of a judge to act with due diligence and assiduousness at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary.

This Court rescinds the purported order/s. The appellant may file a fresh application, if he is so advised, in a proper forum, as per the changes brought about by the newly enacted Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 41 of 2022.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL