

**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.*

Court of Appeal No:

CA/CPA/0057/2023

Mannage Oshan Dharshana Wijesiri

‘Wijaya Niwasa’,

Konkarahena,

Kirama.

High Court Gampaha

Bail Case No. HCBA 190/23

PETITIONER

Vs.

Magistrate’s Court Mahara

Case No. B 4045/22

1. Mannage Dilshan Harshana Wijesiri

2. The Officer in Charge,

Criminal Investigations Department,

Colombo 01.

3. The Attorney General,

Attorney General’s Department,

Colombo 12.

RESPONDENTS

AND NOW BETWEEN

Mannage Oshan Dharshana Wijesiri,
'Wijaya Niwasa',
Konkarahena,
Kirama.

PETITIONER-PETITIONER

Mannage Dilshan Harshana Wijesiri

SUSPECT-RESPONDENT

Vs.

1. The Officer in Charge
Criminal Investigations Department,
Colombo 01.

2. The Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENT-RESPONDENTS

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.

Counsel : Saliya Peiris, P.C. for the Petitioner
: Jehan Gunasekera, S.C. for the Respondent

Inquiry on : 27-07-2023

Order on : 27-10-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner-petitioner (hereinafter referred to as the petitioner) invoking the revisionary jurisdiction of this Court granted in terms of Article 138 of The Constitution.

The petitioner has filed an application for bail before the High Court of Gampaha seeking bail for his brother, namely, Mannage Oshan Dharshana Wijesiri who is a suspect named in the Magistrate's Court of Mahara Case No. B 4045-22.

The Officer In Charge (OIC) of Public Complaints Division of the Criminal Investigation Department has reported facts to the learned Magistrate of Mahara of a complaint received on 09-11-2022 of illegally detaining, assaulting and threatening several students of the Kelaniya University by a group of other students informing that the actions of those offending students are offences in terms of section 140, 314, 316, 434, 486 read with section 32 and 146 of the Penal Code, and in terms of section 3, 4 and 5 of Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No. 20 of 1998.

The suspect had been named as one of the perpetrators of the said crimes. On 09-01-2023, the said OIC has filed a further report informing the Court that the suspect along with another suspect required in relation to this complaint has been arrested while engaging in another act on 03-01-2023 and remanded by Kaduwela Magistrate's Court for an identification parade. He has requested the Court for a direction that the two suspects to be produced in this case.

The suspect is in remand custody since. The petitioner who is the brother of the suspect has filed the bail application which led to the impugned order by the High Court of the Western Province Holden in Gampaha as bail can only be granted for a suspect remanded in terms of the Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No. 20 of 1998 by the relevant High Court.

After hearing the learned Counsel for the petitioner as well as the objections raised by the learned State Counsel on behalf of the respondents named, the learned High Court Judge of the High Court of the Western Province Holden in Gampaha has refused the said bail application by his order dated 18-05-2023.

For matters of clarity, I would now reproduce the relevant order of refusal which reads;

"මෙම සැකකරුව අත්අඩංගුවට ගෙන ඇත්තේ ප්‍රමාණවත් කරුණු නිව්යදීය. එසේම වෙනත් වරදකට ඇප මත සිටියදී මෙම වරදට අත්අඩංගුවට ගෙන ඇත. එවැනි විටෙක කෙසේ වෙතත් අධිකරණයක් ඇප ලබා දීමට පියවර නොගනී. විශ්වවිද්‍යාලයේ විභාගයක් පවතින බව දැනදැනම රක්ෂණ බන්ධනාගාරගත විය හැකි ක්‍රියාවන්හි යෙදුණු තැනැත්තෙකුට එහි ප්‍රතිඵලය තමා විසින්ම වින්දදරාගැනීමට සිදු වේ. විශ්වවිද්‍යාල ශිෂ්‍යත්ව එම කරුණ තේරුම් නොගැනීමට හේතු නිව්ය නොහැක. ඉදිරිපත් වී ඇති කරුණු වලට අනුව සැකකරු විසින් කර ඇත්තේ සරල වරදක් නොව ඉතා ප්‍රබල වරදකි. එම ඉදිරිපත් වූ කරුණු වලට අනුව මෙම අවස්ථාවේ ඇප ලබාදුනහොත් මෙම සැකකරුට විභාගය ලිවීමට හැකි වන නමුත් පවතින තත්වය යටතේ මෙම සැකකරු ඊට වඩා බරපතල ක්‍රියාවල යෙදීමට ඉඩ ඇති බව බැලූ බැල්මට පෙනේ. ඒ අනුව ඇප ඉල්ලීම ප්‍රතික්ෂේප කරමි."

The learned President's Counsel who represented the petitioner at the hearing of this application contended that the incident that led to the remanding of the suspect was an incident occurred between two student fractions of the Kelaniya University. It was his position that although such violent behaviour as stated in the B-report cannot be condoned under any circumstances, a Judge is duty bound to follow the relevant law in granting or refusing bail to a suspect arrested

and produced under the relevant Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No. 20 of 1998.

The learned President's Counsel drew the attention of the Court to section 9 of the Act, which refers to the provisions of granting or refusing bail, and was of the view that the learned High Court Judge has failed to correctly follow the said provisions in refusing bail to the suspect. He invited the Court to consider the period of incarceration of the suspect from his date of arrest and other attendant circumstances to consider revising the order of the learned High Court Judge and grant bail for the suspect. He expressed the view that it appears from the order, the bail has been refused for the suspect as a punitive measure, which should not have been the case.

The learned State Counsel who represented the respondents vehemently objected for the bail being granted to the suspect referring to the facts and the circumstances relating to the offences alleged to have been committed by the suspect along with others in this matter. He was of the view that the learned High Court Judge has correctly considered the bail provisions of the relevant Act and had only refused to grant bail on the basis that bail cannot be considered at that juncture. The learned State Counsel was of the view that the petitioner has failed to adduce sufficient exceptional circumstances for this Court to interfere into the order made by the learned High Court Judge, and moved for the dismissal of the revision application filed by the petitioner.

As pointed out very correctly by the learned State Counsel and admitted by the learned President's Counsel, the reported facts of the relevant incident or incidents which led to the arrest of the suspects are matters that cannot be taken lightly under any circumstances. The mentioned facts show the inhumane nature of the actions of the suspects towards some other fellow students who were not prepared to toe their line of thinking at the university. No person is entitled to cause such harassment as reported by the police to the Court to anyone, be it a fellow student, or any other human being.

Any application for bail in relation to a person suspected of crimes of this nature needs to be considered in relation to the relevant facts and circumstances applicable to each case under consideration.

The relevant bail provision for a suspect arrested and remanded under the provisions of the Act is section 9 of the Act. The relevant section 9 reads as follows,

9.(1) A person suspected or accused of committing an offence under subsection (2) of section 2 or section 4 of this Act shall not be released on bail except by the judge of a High Court established by Article 154P of the Constitution. In exercising his discretion to grant bail such Judge shall have regard to the provisions of section 14 of the Bail Act, No. 30 of 1997.

(2) Where a person is convicted of an offence under subsection (2) of section 2 or section 4 of this Act, and an appeal is preferred against such conviction, the Court convicting such person may, taking into consideration the gravity of the offence and the antecedents of the person convicted, either release or refuse to release, such person on bail.

It is clear from the provisions of section 9 that the granting of bail should be by using the discretion of the relevant learned High Court Judge, however, should have regard to the provisions of section 14 of the Bail Act No.30 of 1997 in deciding on bail for a suspect.

Section 14 of the Bail Act reads as follows,

14. (1) Notwithstanding anything to the contrary in the preceding provisions of this Act, whenever a person suspected or accused of being concerned in committing or having committed a bailable or non-bailable offence, appears, is brought before or surrenders to the court having jurisdiction, the court may refuse to release such person

on bail or upon application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a subsisting order releasing such person on bail if the court has reason to believe:

(a) that such person would,

(i) not appear to stand his inquiry or trial;

(ii) interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice; or

(iii) commit an offence while on bail; or

(b) that the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

(2) Where under subsection (1), a court refuses to release on bail any person suspected or accused of being concerned in or having committed an offence or cancels a subsisting order releasing such person on bail, the court may order such suspect or accused to be committed to custody.

(3) The court may at any time, where it is satisfied that there has been a change in the circumstances pertaining to the case, rescind or vary any order made by it under subsection (1).

According to the provisions of section 15 of the Bail Act, a Judge is required to state his reasons in writing in a case where the bail is refused for a suspect, the reasons for such refusal, cancellation or recession or variation as the case may be.

Section 16 of the Bail Act provides that subject to the provisions of section 17, where the Attorney General can file an application before the relevant High Court for the extension of the remand period of a suspect beyond a period of 12 months, no person shall be detained in custody for a period exceeding 12 months from

the date of his arrest unless the person has been convicted and sentenced by a Court.

Under the provisions of section 17, the period of detention can only be extended up to another period of 12 months.

It is my considered view that in view of the bail provisions in the Prohibition of Ragging and Other Forms of Violence in Educational Institutions Act No. 20 of 1998 which requires a Judge to adhere to the provisions of section 14 of the Bail Act when allowing or refusing bail to a suspect, a learned High Court Judge is duty bound to make sure any order of refusal of bail in accordance with the provisions of section 14 of the Bail Act No. 30 of 1997.

In terms of section 14(1) of the Bail Act, bail can be refused for a person who comes within the provisions of the Act on the following basis.

- a. That such person would,
 - Not appear to stand his inquiry or trial;
 - Interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice; or
 - Commit an offence while on bail; or
- b. That the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

Since the Act requires any refusal of bail has to be reasoned out in writing, it is important for our Judges to give a reason compatible with the provisions of section 14 of the Bail Act when bail is refused for a suspect under the provisions of the Bail Act.

It needs to be noted that in terms of section 2 of the Bail Act, grant of bail is the guiding principle in implementing the provisions of the Bail Act. That is the very reason why the refusal to grant bail should be in writing and with valid reasoning under the provisions of the Bail Act.

When it comes to the facts and the circumstances of the matter under consideration before this Court, if the learned High Court Judge thought it fit to refuse bail after having considered the relevant provisions of the Bail Act, I do not find any reasons to disagree with such a conclusion in refusing bail considering the serious nature of the allegations levelled against the suspect.

However, it is with regret I need to mention that the learned High Court Judge has failed to follow the correct guidelines in refusing bail to the suspect. His determination that the suspect was arrested when he was out on bail in relation to another offence appears to be a misdirection as to the relevant facts. Although I do not find anything wrong in his determination that the allegations against the suspects are serious and if allowed bail, he would be in a position to sit for his university exams, his determination that if released on bail, the suspect would commit more serious offences and therefore bail would be refused for him, is not a clear and sound reason, which cannot be determined as a reason that falls under the grounds of refusal to grant bail in terms of the Bail Act.

Although the learned State Counsel argued that the learned High Court Judge has followed the relevant provisions of the law when refusing bail for the suspect, I am not in a position to agree with the said determination of the learned High Court Judge.

Accordingly, I set aside the order dated 18-05-2023 by the learned High Court Judge of Gampaha, as it cannot be allowed to stand. Although this Court has strong views of the offences alleged to have been committed by the suspect, the suspect has been in remand custody from 01-01-2023. By the time this order is pronounced, he would have been in remand custody for over 10 months. Having considered the maximum period a person can be kept under remand custody in terms of section 16 of the Bail Act, I am of the view that the suspect should be released on bail as there cannot be any reason to believe that the offences may give rise to public disquiet any longer.

Accordingly, the suspect is released on following bail conditions.

1. Cash bail Rs. 25000/-.
2. Surety bail with two sureties for a sum of Rs. 250000/- each. One of the sureties should be the petitioner, while the other surety also shall be a family member or a close relative of the suspect. The other surety shall file an affidavit indicating his or her relationship to the suspect before signing the bail bond on behalf of him.
3. The suspect is prevented from traveling overseas until the conclusion of the case against him. If he has obtained a passport, he shall surrender the passport to the Magistrate's Court of Mahara before being released on bail. If he has not obtained a passport as yet, he shall file an affidavit in that regard to the Court before being released.
4. The Registrar of the Magistrate's Court of Mahara is directed to inform the Controller of Immigration and Emigration that a travel ban has been imposed on the suspect by providing necessary information to the Controller.

The Registrar of the Court is directed to communicate this bail order to the Magistrate's Court of Mahara for necessary compliance, and to the High Court of Gampaha for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal