

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.

Officer-in-Charge,
Police Narcotics Bureau,
Colombo 01.

Complainant

C.A. Revision application No:
CA (PHC) APN 145/2017

Vs.

H.C. Negombo Case No: **HCAB 31/2017**

Nurdhi Zahidha

1st Suspect

M.C. Negombo Case No: **B/1711/2015**

AND BETWEEN

Nurdhi Zahidha
(Presently at Negombo Remand
Prison)

Petitioner

Vs.

1. Officer-in-Charge.,
Police Narcotics Bureau,
Colombo 01.

2. Hon. Attorney General,
Attorney General's Department,

Colombo 12.

Respondents

AND NOW BETWEEN

Nurdhi Zahidha

(Presently at Negombo Remand
Prison)

Petitioner-Petitioner

Vs.

1. Officer-in-Charge.,
Police Narcotics Bureau,
Colombo 01.

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

Respondents-Respondents

BEFORE	:	K. K. Wickremasinghe, J. Janak De Silva, J
COUNSEL	:	AAL Rushdie Habeeb with AAL Chinthaka M. Arachchige for the Petitioner-Petitioner Nayomi Wickremasekara, SSC for the Respondents-Respondents
ARGUED ON	:	30.08.2018
WRITTEN SUBMISSIONS	:	The Petitioner-Petitioner – On 17.10.2018 The Respondents-Respondents – On 16.10.2018

DECIDED ON : 28.11.2018

K. K. WICKREMASINGHE, J.

The petitioner-petitioner has filed this revision application seeking to set aside the order of the Learned High Court Judge of Negombo dated 31.05.2017 in Bail Application No: HCAB 31/2017.

Facts of the case:

The petitioner-petitioner (hereinafter referred to as the 'petitioner') and three others were arrested on or about 09.09.2015 by the officers of Narcotic Bureau at the Bandaranayake International Airport for possession of heroin. Thereafter all the suspects were produced before the Learned Magistrate of Negombo under case No. B/1711/2015 and the Learned Magistrate made an order to detain them until 15.09.2015.

On 15.09.2015, the petitioner and the 2nd suspect were remanded further and the other two suspects were released. A bail application was filed on behalf of the petitioner on 15.06.2016, in the High Court of Negombo in terms of section 83 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act no 13 of 1984 and it was refused on 27.10.2016.

Thereafter another bail application was filed on behalf of the petitioner on 20.01.2017 in the High Court of Negombo. The Learned High Court Judge refused to enlarge the petitioner on bail by the order dated 31.05.2017 due to the absence of exceptional circumstances.

Being aggrieved by the said refusal, the petitioner preferred a revision application to this court.

The Learned Counsel for the petitioner submitted that the petitioner was engaged in a business of importing garments from India. The 2nd suspect had given Rs.20,000/= to the petitioner and requested her to purchase four Black Label bottles. Thereafter the 2nd suspect had requested the petitioner to give the remaining money to one Mohammed Iyal at the Airport of Chennai. Accordingly she had done the same. After taking the money, the said Mohammed Iyal had asked the petitioner to go and have a cup of tea and return while he was taking care of her baggage. Thereafter the petitioner had left India with her bags. The Learned Counsel further submitted that the petitioner had no knowledge that she was carrying a prohibited drug inside her bag. She had thought that there were few bottles of liquor.

Accordingly the Learned Counsel has submitted following two cases;

1. The case of **Van Der Hultes V. Attorney General (1989) 1 Sri. LR 204**, in which it was held that,

"Mens rea is an essential ingredient of the offences of possessing and attempting to export heroin under sections 54A and 54B of Opium and Dangerous Drugs Ordinance amended by Act No. 13 of 1984."

2. The case of **King V. Haramanis 48 NLR 403**, in which it was held that,

"As a matter of law the prosecution is neither bound to assign nor prove a motive as to why a criminal act was done...But when the facts themselves are not clear, and there is also the absence of an intelligible motive, theses combined factors may have the effect of creating doubts in favour of the accused"

However we are not inclined to consider the merits of a case, which is pending in a lower court, for the purpose of granting bail. Therefore we are unable to consider the *mens rea* of an accused or facts of the case as exceptional circumstances. These matters should be considered at the trial in the High Court.

The Learned Counsel for the petitioner has further submitted that the petitioner is 60 years of age and has no previous convictions or any pending cases. The Learned Counsel has submitted the case of **Peter Singho V. Werapitiya [55 NLR 155]** in which the Court has observed as follows;

“The accused had advisedly taken the risk of putting his “good character” in issue. It was, therefore, open to the prosecution, if they could, to prove his “bad character” under section 54 of the Evidence Ordinance. Instead of doing so they suggested to him in cross-examination (and he was forced to admit) that there was pending against him at the time a criminal case in which he was charged with forgery. “The mere fact that a man has been charged with an offence is no proof that he committed the offence. Such a fact is irrelevant; it goes neither to show that the prisoner did the acts for which he is actually being tried nor does it go to his credibility as a witness”. Maxwell v. D.P.P (1).”

However we observe that the case of **Peter singho** had dealt with the admissibility of a question that was asked from an accused in cross-examination with regard to pending criminal cases against him. We find no relevance between the said decision and the instant revision application.

We observe that the petitioner was arrested by the narcotic officers with a gross quantity of 190 grams of heroin and according to the Government Analyst's report the pure amount of heroin was 101.81grams. (Page 59 and 60 of the brief)

In the case of **Ranil Charuka Kulathunga V. AG [CA (PHC) APN 134/2015]**, it was held that,

“The quantity of cocaine involved in this case is 62.847 grams, which is a commercial quantity. If Petitioner is convicted, the punishment is death or life imprisonment. Under these circumstances, it is prudent to conclude the trial early while the Petitioner is kept in custody...”

The Learned SSC for the respondent contended that it is in fact the trial judge who has the best opportunity to correctly appreciate the impact of enlarging the petitioner on bail during the trial. We are of the view that the Learned High Court Judge has a better opportunity to assess the mindset of the accused and the Learned Judge can consider the time period of the trial to grant bail accordingly.

The Learned Counsel for the petitioner has submitted several cases including the cases of **Milroy Fernando V. Attorney General (CA Bail 542/90-H.C. Chilaw AB 2/89)** and **O.I.C, Police Narcotics Bureau V. Kanahala Gamage Suneetha (C A Rev. 3 /2002, H .C. Colombo - BA 454/02)**.

However in the case of **Cader (on behalf of Rashid Kahan) V. Officer in Charge, Narcotics Bureau (2006) 3 SLR 12**, Justice Eric Basnayake, observed as follows;

*“The exceptional circumstances have not been defined in the statute. I shall mention here some cases where bail has been granted. In **Milroy Fernando vs. Attorney General(1)** the accused was taken in to custody with three others for possession of 14 kilo grams of heroin. The following facts transpired in this case, namely:*

- * Heroin was found among the bales of textiles stored in a boat.*
- * The suspect was merely a workman in the boat.*

- * *The suspect had been in remand for a period of 16 months.*
- * *The Government Analyst's report is not as yet available.*
- * *Therefore the indictment cannot be ready in the near future.*

*The suspect was released on Rs. 100,000/- cash bail with several other conditions. In **O.I.C, Police Narcotics Bureau vs. Kanahala Gamage Suneetham(2)** the suspect was released on bail in a sum of Rs.100, 000/- in addition to other conditions. The facts are as follows:-*

- * *The suspect was arrested with 134.1 grams of heroin*
- * *The suspect was in remand for a period of over one year.*
- * *Indictment had already been sent.*
- * *There were neither previous convictions nor pending cases.*
- * *The husband of the suspect too had been in remand.*
- * *The six year old child was left behind unattended.*

The court considered as a special circumstance the fact that both parents had been in remand and their child was left unattended.

*...In the six cases mentioned above, it was only in one case the court considered the facts constituting exceptional circumstances in granting bail. In all the other cases the court refrained from referring to a specific ground as constituting exceptional circumstances. Therefore, the question is, should the facts of those cases be considered as constituting exceptional circumstances? In Milroy Fernando's case the court allowed bail after considering the extent to which the suspect had been involving in the commission of the crime. Could we consider the period in remand as a ground constituting an exceptional circumstance? **Provision has been made in the Bail Act to release persons on bail if the period of remand extends more than 12 months. No such provision is found in the case of Poison, Opium and Dangerous Drugs Ordinance. Although bail was granted in***

some of the cases mentioned above. None of these cases refer to the time period in remand as constituting an exceptional circumstance. Hence bail cannot be considered on that ground alone. It appears from the cases cited above that there is no guiding principle with regard to the quantity found either. The fact of dispatching the indictment too cannot be considered either for or against the granting of bail. In one of the cases mentioned above, the fact of not sending the indictment was considered in favor of granting bail while in another case, sending the indictment was not considered to refuse bail... ” (Emphasis added)

We agree with the above reasoning of Justice E. Basnayake since Court is vested with a wider discretion to decide what constitutes exceptional circumstances. Accordingly we are of the view that similar facts of another case do not constitute exceptional circumstances for the instant application unless Court has laid down a certain rule to grant bail in the particular judgment.

In the case of **W.R.Wickramasinghe V. The Attorney General [CA (PHC) APN 39/2009]**, it was held that,

“When Section 3 of the Bail Act is considered it is seen that the Bail Act shall not apply to a person accused or suspected of having committed or convicted of an offence under

- 1. The Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979,*
- 2. Regulations made under the Public Security Ordinance, or*
- 3. Any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law.*

It is therefore seen that when the legislature enacted the Bail Act it was not the intention of the legislature to release each and every suspect who has been on remand for a period exceeding 24 months.”

In the case of **Shiyam V. Attorney General (2006) 2 Sri L.R 156**, it was held that,

“...Therefore, even if I am to agree with the submissions of the learned President’s Counsel for the appellants, yet the provisions of section 83(1) of the Poisons, Opium and Dangerous Drugs Act would be applicable and the proper forum for making an application for bail when a person is suspected or accused of an offence under section 54A or 54B of the Poisons, Opium and Dangerous Drugs Act would be the High Court where such bail would be granted only in exceptional circumstances. The criteria therefore set out by section 3(1) of the Bail Act for exclusions are clearly dealt with by the provisions contained in section 83(1) of the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984...I hold that the provisions in the Bail Act would have no application to the Poisons, Opium and Dangerous Drugs Act...”

In the case of **Labukola Ange Wisin Gedara Ashani Dhanushshika V. Attorney General [CA (PHC) APN 4/2016]**, it was held that,

“In the present case the petitioner failed to establish any exceptional circumstances warranting this court to exercise the revisionary jurisdiction. The petitioner’s first point is that the suspect is in remand nearly for two years. The intention of the legislature is to keep in remand any person who is suspected or accused of possessing or trafficking heroin until the

conclusion of the case. The section 83(1) of the Act expresses the intention of the legislature...”

Accordingly we are of the view that the remand period of the petitioner cannot be considered as an exceptional circumstance.

The Learned Counsel for the petitioner has submitted that the 2nd suspect was released on bail after six months.

However it is pertinent to note that the Learned High Court Judge in the order dated 31.05.2017 has held as follows;

“...එම සැකකරු ඇප මත මුදා හැරීම මෙම සැකකාරියට අදාළ සුවිශේෂී කරුණක් ලෙස සැලකීමට හැකියාවක් නොමැත්තේ, එක් එක් නඩුවේ උද්ගත වූ සිද්ධිමය කරුණු එක් එක් සැකකරුට අදාළව බොහෝවිට ආවේණික විය හැකි බැවිනි.

මෙම සැකකාරියට චෝදනා කොට ඇත්තේ, හෙරොයින් ආනයනය කිරීම, ජාවාරම් කිරීම, සන්නකයේ තබා ගැනීම බව පෙනී යන අතර 02 වන සැකකරුට මෙම සිද්ධිමය කරුණු අනුව සැලකිය හැක්කේ එම වරදට අනුබල දීම සිදුකොට ඇති බවය...” (Page 31 of the brief)

According to the B reports of 1711/2015 the petitioner had a bag containing three liquor bottles and two Cadbury chocolates. The officers had recovered heroin inside the aluminum cover of those chocolates. The second suspect was arrested subsequently as he had come to collect the aforesaid bag of liquor bottles. It was revealed that the 3rd suspect was not involved in the offence but driving the vehicle that was hired by the 2nd suspect. The 4th suspect was a friend of the said 2nd suspect. Therefore we agree with the above finding of the Learned High Court Judge since the petitioner was the key offender of the instant case and the heroin was allegedly recovered from her possession.

In the case of **Soysa V. Silva and Others (2000) 2 Sri L.R. 235**, it was held that,

"This power of revision is an extraordinary power which is quite independent of and distinct from the Appellate Jurisdiction of the Court of Appeal. Its object is the due administration of Justice and the correction of error, sometimes committed by the Court itself, in order to avoid miscarriage of Justice (Merino B.F. vs Seyed Mohamed(1)). The power given to a Superior Court by way of revision is wide enough to give it the right to revise any order made by an original Court, whether an appeal has been taken against it or not. This right will be exercised in which an appeal is pending only in exceptional circumstances as, for example, to ensure that the decision given on appeal is not rendered nugatory..."

In the case of **Ramu Thamotheerampillai V. Attorney General (2004) 3 Sri. L.R 180**, it was held that,

"The decision must in each case depend on its own peculiar facts and circumstances. But in order that like cases may be decided alike and that there will be ensured some uniformity of decisions it is necessary that some guidance should be laid down for the exercise of that discretion..."

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284**, it was held that;

"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would

instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."

Accordingly we see no miscarriage of justice, illegality or error in the order of the Learned High Court Judge of Negombo dated 31.05.2017. Therefore we see no reason to interfere with the same.

The revision application is hereby dismissed without costs.

JUDGE OF THE COURT OF APPEAL

Janak De Silva, J.

I agree,

JUDGE OF THE COURT OF APPEAL

Cases referred to:

1. Van Der Hultes V. Attorney General (1989) Sri. LR 204
2. King V. Haramanis 48 NLR 403
3. Peter Singho V. Werapitiya [55 NLR 155]
4. Ranil Charuka Kulathunga v. AG [CA (PHC) APN 134/2015]
5. O.I.C, Police Narcotics Bureau V. Kanahala Gamage Suneetha (C A Rev. 3 /2002, H .C. Colombo - BA 454/02)
6. Milroy Fernando V. Attorney General (CA Bail 542/90-H.C. Chilaw AB 2/89)
7. Cader (on behalf of Rashid Kahan) V. Officer in Charge, Narcotics Bureau (2006) 3 SLR 12
8. W.R.Wickramasinghe V. The Attorney General [CA (PHC) APN 39/2009]
9. Shiyam V. Attorney General (2006) 2 Sri L.R. 156
10. Labukola Ange Wisin Gedara Ashani Dhenushshika V. Attorney General [CA (PHC) APN 4/2016]
11. Soysa V. Silva and Others (2000) 2 Sri L.R. 235
12. Ramu Thamothersampillai V. Attorney General (2004) 3 Sri. L.R 180
13. Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284