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

In the matter of an Application for Revision in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A.(PHC) APN No. 135/2019
H.C.Colombo No. HC 7735/2015

Democratic Socialist Republic of Sri Lanka.

Complainant

Vs.

01. Tharmaraja Susendran alias Suse.
02. Kirubananda Gauthaman alias Gauthaman.
(Both are presently at Colombo Remand Prisons)

Accused

AND NOW BETWEEN

Kirubananda Gauthaman alias Gauthaman..

2nd Accused-Petitioner

Vs.

01. The Hon. Attorney General
Attorney General's Department
Colombo 12.

Complainant-Respondent

02. Tharmaraja Susendran alias Suse.

1st Accused-Respondent

BEFORE	:	**HON. JUSTICE ACHALA WENGAPPULI** **HON. JUSTICE DEVIKA ABEYRATNE**
COUNSEL	:	Kapila Waidyaratne P.C. with Amila Palliyage, Duminda de Alwis and Nipuna Jagodaarachchi for the 2nd Accused-Petitioner. Azard Navavi D.S.G. for the A.G.
ARGUED ON	:	23rd January, 2020
DECICED ON	:	07th February, 2020

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HON. JUSTICE ACHALA WENGAPPULI

The 1st and 2nd accused-petitioners, by their individual applications (bearing Nos. CA(PHC)APN 134/2019 and CA(PHC)APN 135/2019),have invoked the revisionary jurisdiction conferred on this Court by Article 138 of the Constitution, seeking to revise an order made by the High Court of *Colombo* on 01.11.2019 in case No. HC 7735/2015 refusing to enlarge them on bail pending trial.

It is stated that the 1st accused-petitioner was indicted for committing offences of trafficking in and possession of 1097.52 grams of Heroin, which are punishable under Sections 54A(b) and 54A(d) of Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984, while the 2nd accused-petitioner was accused of aiding and

abetting the 1st accused-petitioner in commission of the offence of possession of said quantity of Heroin.

Trial of the 1st and 2nd accused-petitioners had commenced on 16.01.2017 and the trial Court pronounced its judgment on 30.03.2017 convicting the 1st accused-petitioner only of possession of Heroin. The 2nd accused-petitioner too was convicted for aiding and abetting the 1st accused-petitioner in possession. The two accused-petitioners were punished by the High Court, with the imposition of imprisonment for life in respect of the offences they were convicted of.

The accused-petitioners have appealed against their conviction and sentence. Their appeal bearing No. 222 - 223/17 was decided by this Court on 02.10.2019 by setting aside the conviction and sentence imposed on them and ordering a retrial. In the said judgment, this Court ordered the Prison Authorities to produce the accused-petitioners in the High Court on 21.10.2019 "... to decide on bail by the learned High Court Judge."

On that day, both accused-petitioners have made applications to the High Court to enlarge them on bail pending retrial. The prosecution resisted the application and the High Court, having considered the submissions of the Counsel, refused bail. In compliance of the directive of this Court, the High Court decided to take the trial against the accused-petitioners expeditiously and fixed 1st, 5th, 8th and 11th of November 2019 as dates of trial with the agreement of all Counsel of the accused-petitioners.

However, on 1st November 2019, the trial did not commence. The prosecution had informed the High Court that its main witness, IP

Rangajeewa, is named as an accused in a trial before the Permanent High Court at Bar in case No. 493/19 and he is unable to give evidence with a focused or concentrated mind ("මානසික ඒකාග්‍රතාවය") in the instant prosecution. Learned Prosecutor submitted that the witness's evidence, if taken under such stressful circumstances, would adversely affect his case. Learned Prosecutor was hopeful that the trial of the PW1 would be concluded "soon" and the High Court to postpone the trial against the accused-petitioners to a date in January 2020.

Learned President's Counsel, who represented the accused-petitioners, have thereafter strongly urged the High Court to consider bail, since it is not possible to predict the time that would be taken to conclude the trial of the PW1, which is pending before the Permanent High Court at Bar. They urged that the two accused-petitioners were incarcerated for well over a six-year period, pending their trial and appeal.

In replying to the submissions of the learned President's Counsel, it is stated by the learned State Counsel that he had based his objection to bail upon a report tendered by the Officer-in-Charge of the Police Narcotics Bureau (P6). This report was issued by the said officer in respect of the 1st accused-petitioner. In this report it is alleged that the 1st accused-petitioner poses a flight risk. This concern was expressed by the said Officer, after conducting "investigations" in respect of the 1st accused-petitioner, which had revealed that he is planning to leave Sri Lanka illegally, if enlarged on bail.

This contention of the prosecution was strongly challenged by the learned President's Counsel who represented the accused-petitioners

before the High Court. They submitted the following grounds for consideration of the High Court as exceptional circumstances.

a. the sources through which the Officer-in-Charge had obtained information that the 1st accused-petitioner poses flight risk is not disclosed,
b. one of the three grounds of objection to bail is the serving of a "life sentence" imposed on the 1st accused-petitioner, which in fact, had already been set aside by the Court of Appeal and is indicative of the "malice" of the officer concerned towards the said accused- petitioner,
c. the detecting officer had admitted as having made false entries,
d. there were two other suspects who were arrested subsequent to the arrest of the 1st accused-petitioner, whilst occupying an undisclosed apartment and, having introduced the drugs which was in their possession to the said accused-petitioners, the officers have let those two suspects off from any criminal proceedings. During the appeal, learned Deputy Solicitor General who appeared for the Respondent could not provide an answer when this issue was raised.

The 2nd accused-petitioner contended that;

a. the report of the Officer-in-Charge of PNB is dated 01.11.2017,
b. the "life sentence" imposed, has in fact already been set aside by the Court of Appeal,
c. although the learned Prosecutor "gave evidence" before the High Court, that the two other unknown suspects who were later

arrested were enlarged on bail, nowhere during the previous trial it was shown that they were released from the proceedings,

d. it was wrong to incarcerate the accused-petitioners simply because PW1 is under stress of a criminal trial.

After the submissions of the Counsel, the High Court had proceeded to consider them and concluded that there were no circumstances that were revealed before it, which warranted it to reconsider the order it had made on 23.10.2019, in refusing bail.

When the two applications of revision filed by the 1st and 2nd accused-petitioners were taken up for hearing before this Court on 23.01.2020, it was indicated by the learned President's Counsel that a common ruling could be pronounced on the two applications although the circumstances relating to each of them are slightly different.

In support of their contention of the illegality of the impugned order of the High Court in these two applications, the accused-petitioners have sought to challenge the legality of the said order on following grounds;

i. although the High Court, had considered that it should reconsider the order of 23.10.2019 in respect of bail, it had desisted from doing so, mainly due to the new ground that had been urged by the prosecution that there exists a flight risk,

ii. there was no material that is sufficient to justify that there is a flight risk other than a bare assertion by the Officer-in-Charge in the report P6, which was tendered to Court rather

belatedly. In the objection filed by the Complainant Respondent, the Officer-in-Charge of PNB asserted that there exists a "very high likelihood" of the 2nd accused-petitioner "fleeing the country through illegal/illegitimate means and absconding the trial" and making such unfounded allegations against the accused-petitioners clearly indicative of malice against them.

iii. the 1st accused-petitioner is in remand since his arrest on 13.02.2013 while the 2nd accused-petitioner, although initially enlarged on bail pending the instant trial, was re-remanded upon an allegation of his subsequent involvement of an abetment to possess 85 kg of Heroin whilst on bail, which had later ended up with his subsequent discharge from that proceedings.

In support of their application to this Court seeking to enlarge them on bail, learned President's Counsel submitted that:

a. the accused-petitioners have long been continually incarcerated for a period well over six years upon this allegation without bail,
b. the allegation of a flight risk is not based on any material, but a bare assertion, made out of malice towards the accused-petitioners,
c. in ordering a re-trial, this Court had directed the High Court to "conclude this case expeditiously", but due to circumstances that are not directly attributable to the accused-petitioners, their trial

could not be concluded "expeditiously" and had no prospect of even commencing it in the near future,

The indictment against the accused-petitioners allege that they have committed offences which had been described under Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance as amended. Section 83(1) of the said Ordinance reads *"No person suspected or accused of an offence under Section 54A or Section 54B of this Ordinance shall be released on bail, except by the High Court in exceptional circumstances."*

In determining the question of bail for any suspect or accused against whom an allegation of commission of an offence under Section 54A or 54B of the said Ordinance, such suspect or accused would have to satisfy the High Court of the existence of "exceptional circumstances" if he is to be enlarged on bail.

In ***Shiyam v Officer-in-Charge, Police Narcotics Bureau & another*** (2006) 2 Sri L.R. 156, the Supreme Court had determined that the provisions in the Bail Act No. 30 of 1997 would have no application in relation to the suspects or accused who have been alleged to have committed an offence under Poisons, Opium and Dangerous Drugs Ordinance.

The conceptual as well as practical connotations that are involved in applying the requirement of "exceptional circumstances" in relation to instances of bail pending appeal, had received consideration by the then Supreme Court in the judgment of ***Thamotharampillai v Attorney General*** (reported subsequently in (2004) 3 Sri L.R. 180). This judgment was

generally followed by the Courts as the binding judicial precedent which dealt extensively with the concept of "exceptional circumstances".

Their Lordships were considering the question, if bail was to grant to a convicted accused, pending his appeal; whether to continue with the then applicable requirement of the existence of exceptional circumstances, which was a statutory requirement imposed under Section 15(1) of the Court of Criminal Appeal Act, when the newly enacted Section 325(3) of the Administration of Justice Law No. 44 of 1973 which repealed the provisions of the said Act, had not imposed such a statutory requirement.

Having considered the applicable statutory provisions, several authorities on the point and the practicalities that are involved in the exercise of the discretion the Legislature has conferred on the Courts, *Vythialingam* J, stated in the said judgment;

> *"That the intention of the legislature in enacting section 325(3) was not to make the grant of bail a matter of course unless good grounds were shown to the contrary is made clear by section 325(2). That sub-section enacts that when an appeal against an acquittal is lodged the court may issue a warrant directing that the accused be arrested and brought before it and may commit him to prison pending the determination of the appeal or admit him to bail. If convicted persons have a right to be out on bail pending the determination of their appeal unless good grounds are shown to the contrary then it is absolutely essential that persons acquitted of any charge should be free pending the*

determination of the appeal against their acquittal, for there is no conviction against them at all. Yet the legislature has thought it fit to vest in the court a discretion to commit even such persons to prison or admit them to bail pending the determination of the appeal.

It may well be that this was because persons who are acquitted may leave the country and so put themselves outside the jurisdiction of the Courts of this country, except through the difficult and expensive process of extradition. But the exercise by the court of the discretion under this sub-section is not limited by the Act to this ground alone. The discretion is very wide and may be exercised by the court in appropriate circumstances. It is, however, unnecessary for the purpose of this case to consider in what circumstances the court would exercise the power vested in it by section 325(2).

It is clear that these were the applicable considerations that are identified by the Court in respect of consideration of applications for bail pending appeal. The operative criterion was clearly the existence of exceptional circumstances. The Supreme Court had deliberately desisted from defining the term "exceptional circumstances" or to list out what could be considered as "exceptional circumstances".

A similar discretion is vested in the High Court, as found in the wording of Section 83(1) of the Poisons, Opium and Dangerous Drugs Ordinance, when it was amended by Act No. 13 of 1984.

The said Section which reads, *"No person suspected or accused of an offence under Section 54A or Section 54B of this Ordinance shall be released on bail, except by the High Court in exceptional circumstances"*, and as such imposes a limitation on the discretion of Courts, in explicit terms, of granting bail to the class of suspects or accused it had specified, should be done, only "in exceptional circumstances".

In applying the discretion conferred upon Courts by the enactment of the said provision of law, the Courts have insisted on the establishment of exceptional circumstances by the prospective applicant for bail. The manner in which the Courts should exercise such discretion was considered by the Supreme Court in ***Thamotharampillai v Attorney General*** (supra) as it is stated that;

> *"Where a statute vests discretion in a Court it is of course unwise to confine its exercise within narrow limits by rigid and inflexible rules from which Court is never at liberty to depart. Nor indeed can there be found any absolutes or formula which would invariably give an answer to different problems which may be posed in different cases on different facts. 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 identifying such instances, the Supreme Court had quoted the following dicta from the judgment of ***The Queen v Cornelis Silva*** 74 NLR 113 with approval, where *Weeramantry* J stated grounds that are "no means extraordinary" and "common to many accused person" would not satisfy the criterion of "exceptional circumstances", which warrants grant of bail. Their Lordships have thought it fit to add that " ... *interference with one's occupation, professional activities, business or trade are not circumstances which ordinarily would entitle to a person to be allowed to stand on bail, where the charges is serious and sentence heavy. The fact that he has not been charged in any Court previously is not also not a relevant circumstance.*"

With these reasoning of ***Thamotharampillai v Attorney General*** (supra) in mind, this Court now proceeds to consider the revision applications filed by the two accused-petitioners.

The main thrust of the challenge mounted on the validity of the order of the High Court, in its refusal to grant bail, was on the continued incarceration of the two accused-petitioners, which period now exceeds six years in total, due to non-availability of the main prosecution witness. It was urged that the High Court was not in a position to carry out the direction of this Court by taking up the re-trial expeditiously itself is an exceptional ground.

It is submitted by learned President's Counsel that the 1st accused-petitioner was in continued detention since his arrest on 13.02.2013 to date while the 2nd accused-petitioner, who was initially enlarged on bail was re-remanded on 06.05.2016, upon an application by the prosecution on the basis that he had re-offended whilst on bail by committing a drug offence.

This subsequent allegation against the 2nd accused-petitioner was later withdrawn and he had been discharged from the relevant criminal proceedings.

The 1st accused-petitioner, as evident from the record, was in remand over a period of almost seven years. The 2nd accused petitioner, after his re-remand order, has spent over three and half years in remand custody. It is correct that their freedom was curtailed by long periods of legal custody, when the years are counted from the date of arrest and remand.

However, it must be noted that their status differed significantly during this period of time. They were initially remanded as suspects with the detection of dangerous drugs. Then when the indictment was served their status changed in to accused from suspects. Still they were protected by the presumption of innocence. After they were convicted, and pending determination of their appeal, their status altered to that of accused-appellants, but no presumption of innocence applied. Then the re-trial was ordered and the accused- petitioners have returned to the state of being accused.

When the appeal of the accused-petitioners was lodged after their conviction and sentence on 30.03.2017, as noted above their status changed to convicted prisoners. Until the appeal was decided on 02.10.2019, they remain in the status of accused-appellants. Over this 31-month long period they spent in remand pending determination of appeal could not be termed as a period pending trial and had to be excluded from the equation. The trial had taken only about two and half months to reach its

conclusion. When viewed in the light of the different status where different criterion is applied in relation to bail, the submissions that the accused-petitioners have spent very long time awaiting their trial is not a very accurate reflection of the material that had been placed before the High Court.

On the issue of long period of detention pending appeal, the judicial precedents clearly indicate that fact itself had not been considered as an "exceptional circumstance" for granting of bail. The determination that " ... the delay in deciding the appeal would not amount to an exceptional ground" is the consistently adopted and followed approach by the superior Courts as indicative from the judgment of Court of Criminal Appeal by *Basnayake* CJ, in ***The Queen v Rupasinghe Perera*** 62 N.L.R. 228 and ***The Queen v Cornelis Silva*** 74 NLR 114 where *Weeramantry* J delivered the judgment.

The question in relation to the detention pending trial has been considered by this Court in ***Cader v Officer-in-Charge of Narcotic Bureau*** (2006) 3 Sri L.R. 74, where *Basnayake* J, having posed the question, "Could we consider the period in remand as a ground constituting an exceptional circumstance?" had thereafter proceeded to answer it in following terms, in the light of the six instances cited as precedents where bail had been considered favourably by this Court;

> *"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 despatching 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 favour of granting bail while in another case, sending the indictment was not considered to refuse bail."

When the impugned order of the High Court is considered in the principles enunciated in the judgments referred to above, this Court is unable to be in agreement with the submissions made by the accused-petitioners, in support of their revision applications that the impugned order of the High Court in refusing their bail is not a legally tenable one.

The accused-petitioners have relied upon the judgment of this Court in CA (PHC) APN 38/2019 - decided on 01.08.2019 where the accused-petitioner was successful in obtaining bail pending trial. However, the circumstances are quite different in the matter before the Court of Appeal in the said application. In the said application, the Court of Appeal had held "learned High Court Judge has failed to consider that the Petitioner was already on bail by this Court, and the fact that the conviction was set aside and retrial has been ordered."

In the instant matter, this Court had directed the High Court to consider bail but had not enlarged them on bail when it decided to set aside the conviction and sentence. Hence, the issue to be determined is whether the High Court had exercised its discretion judicially in refusing to enlarge the accused-petitioners on bail pending trial.

The question when does a revision lie was considered in depth in the judgment of ***Kulatilake v Attorney General*** (2010) 1 Sri L.R. 212, where it was held;

> *"It is trite Law that the revisionary jurisdiction of this Court would be exercised if and only if exceptional circumstances are in existence to file such an application. Moreover, it must be noted that the Courts would exercise the revisionary jurisdiction, it being an extra ordinary power vested in Court, especially to prevent miscarriage of justice being done to a person and/or for the due administration of justice."*

It was noted by the Court of Appeal in ***R v Rehman and Wood*** (2006) 1 Cri App Rep(S) 77 that:

> *"There will be cases where there is one single striking feature, which relates either to the offence or offender, which causes that case to fall within the requirement of exceptional circumstances. There can be other cases where no single factor by itself will amount to exceptional circumstances, but the*

collective impact of all the relevant circumstances truly makes the case exceptional."

Therefore, this Court must then consider the question whether the accused-petitioners have established exceptional circumstances before the High Court to its satisfaction and thereafter, in order to exercise powers of revision of this Court over the impugned order of the High Court, whether the accused-petitioners have established exceptional circumstances.

Therefore, this Court will first consider the question whether the accused-petitioners were denied bail pending trial by the High Court when they have established exceptional circumstances for them to be enlarged on bail. In this undertaking this Court will have to consider the material placed by the accused-petitioners, and decide whether there was one striking feature or whether the collective impact that could have been consider by the High Court as exceptional.

The grounds that were placed before the High Court were already referred to in this judgment. The complaints that the sources on which the Officer-in-Charge asserted that there was flight risk were not disclosed cannot be an exceptional circumstance, although it would have been very much better if there was some material placed before the High Court adding credence to the investigation said to have been carried out by the PNB, enabling the High Court to exercise the discretion rather than making a bare statement in the report and in the affidavit. However, considering the ages of the two accused-petitioners, both being in their late

twenties are subjected to a sentence of life, it is reasonable to assume that there exists a probable flight risk.

Even in ***Thamotharampillai v Attorney General*** (supra) the Supreme Court justified remanding an accused pending appeal against his acquittal in view of a flight risk as it was observed that,

> *"If convicted persons have a right to be out on bail pending the determination of their appeal unless good grounds are shown to the contrary then it is absolutely essential that persons acquitted of any charge should be free pending the determination of the appeal against their acquittal, for there is no conviction against them at all. Yet the legislature has thought it fit to vest in the court a discretion to commit even such persons to prison or admit them to bail pending the determination of the appeal.*
>
> *It may well be that this was because persons who are acquitted may leave the country and so put themselves outside the jurisdiction of the Courts of this country, except through the difficult and expensive process of extradition."*

The misstatement in the objections of the Officer-in-Charge that the accused-petitioners are currently under a life sentence as a fact, construed by them as indicative of malice towards them, though made irresponsibly, could well be a result of failure to update their records.

In relation to the contention that the "disappearance" of two suspects, who were later arrested on the same day, learned Deputy Solicitor General made submissions that in fact they have been discharged from criminal proceedings by the Hon. Attorney General, and during the appeal hearing he could not appraise Court since he was unaware of that factual position at that point of time.

The fact that PW1 had made inconsistent notes as to his whereabouts is clearly a matter for the High Court to consider at the appropriate stage. The application for bail was made by the accused-petitioners before the re-trial was commenced. The credibility of a witness will have to be addressed by a trial Court after the material evidence had been placed before it and not otherwise.

The ground that bail was refused because the prosecution witness is under the stress of a criminal trial was not directly considered by the High Court in denying bail but only in the context of postponing the scheduled trial.

Thus, it is clear that the High Court's decision to deny bail pending trial was due to non-establishment of exceptional circumstances and due to the reasons already considered, could not be faulted.

In its judgment of ***Attorney General v Ediriweera*** 2006 [B.L.R.] 12, the Supreme Court had sought to identify a criterion in determining whether a particular situation could be considered as exceptional. It has been stated by the apex Court that *"exceptional circumstances only exist, when the fact and circumstances of the case are such that they constrain or impel*

the Court to the conclusion that justice can only be done by the granting of bail." When the said criterion is applied to the material placed before the High Court by the accused-petitioners, the conclusion reached by the Court is quite justified since no exceptional circumstances were made out.

In ***R v Rehman and Wood*** (supra), Lord Woolf CJ also stated that:

> *"... it is the opinion of the Court that is critical as to what exceptional circumstances are. Unless the judge is clearly wrong in identifying exceptional circumstances when they do not exist, or clearly wrong in not identifying exceptional circumstances when they do exist, this Court will not readily interfere."*

The High Court, in making the impugned order, is not in the wrong when it did not identify any exceptional circumstances when they did not actually exist. In relation to the existence of exceptional circumstances warranting exercise of revisionary powers conferred on this Court, it is clear that the grounds that were relied upon is essentially impinges on the long period of incarceration as its underlying theme. None of these could be considered as grounds that are "extraordinary" and are not "common to many accused persons".

In ***Attorney General v Ediriweera*** (supra), the Supreme Court observed that

" delay is always a relative term and the question to be considered is not whether there was mere explicable delay, as when there is backlog of cases, but whether there has been excessive or oppressive delay and this always depends on the facts and circumstances of the case. Where delay in bringing a man to the conclusion of his litigation is as great as to the amount of oppression a Court will only then interfere and grant bail."

Hence, the accused-petitioners have failed to satisfy the requisite criterion in exercising revisionary jurisdiction of this Court.

The accused-petitioners have sought an order from this Court enlarging them on bail. Learned President's Counsel submitted that the non-availability of PW1 would extend to several months upon the information they received. Learned Deputy Solicitor General however claimed that very soon, the prosecution would be able to commence and conclude the trial.

It is therefore evident that the prospect of the commencement of the trial and the time period involved with it is at variance with each party to this application. The next date of trial is fixed in February 2020. This Court therefore leaves the question of bail pending trial to the relevant High Court because it is that Court which could assess any application for bail realistically and exercise its discretion in favour of the accused-petitioners, if they could satisfy that there exist exceptional circumstances.

The applications of the 1st and 2nd accused-petitioners are accordingly refused.

Their petitions are dismissed without costs.

JUDGE OF THE COURT OF APPEAL

HON. JUSTICE DEVIKA ABEYRATNE

I agree.

JUDGE OF THE COURT OF APPEAL