

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

An application in terms of Article 138
of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

CA/PHC/APN/47/2019

The Democratic Socialist Republic
of Sri Lanka

Negombo HC NO: 402/15

Complainant

VS-

1. Thalangama Liyanage Nelum
Madu Nishanthi

2. Tennakoon Mudiyansele
Anuradha Sarath Kumara
Bandara

Accused

And Now Between

Thennakoon Mudiyanseelage
Anuradha Sarath Kumara Bandara
(Presently at Remand Prison
Negombo)

Petitioner

VS-

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

Respondent

Before : **K.K.Wickremasinghe,J**
Devika Abeyratne,J

Counsel : Chandana Sri Nissanka for the Accused-Petitioner
Panchali Vitharana SC for the AG

Argued On: 02.07.2020 and 28.07.2020

Order On : 26.08.2020

Devika Abeyratne,J

This is an application by the accused petitioner (hereinafter referred to as the petitioner) by which he invokes the revisionary jurisdiction of this Court seeking to set aside the order dated 29.11.2018 delivered by the learned High Court Judge of *Negombo* refusing to enlarge him on bail.

In case No HC 402/15 in the High Court of *Negombo*, the petitioner is the second accused indicted alleging that he conspired to traffic and abetted the trafficking of heroin, offences punishable under section 54 A (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended to be read with Section 113 (B) of the Penal Code, and Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance as amended and read with Column II of Part III of the Third Schedule to the said Ordinance.

The circumstances in which he was arrested and subsequently charged for the above offences can be summarized as follows;

A couple was taken in to custody by the Narcotics officers on receipt of information at the *Bandaranayake International Airport* on 28.6.2014 who recovered 60 grams of Heroin in their possession. After inquiry, a lady from *Dematagoda* was taken into custody who is the wife of the petitioner and the first accused in Case No. HC 402/15.

The petitioner who had been working in Qatar at the time of the incident has come back to Sri Lanka and has been arrested on 20.10.2014 and is in remand since then, which is over 5 years and 7 months at the time of submission of the application.

According to the Government Analyst report, the pure quantity of the Heroin is 20.12 grams.

It is submitted that several bail applications on behalf of the petitioner has been refused and on the refusal of the application for Bail before the High Court of *Negombo* dated 29.11.2018, the petitioner has preferred this revision application.

The petitioner has identified the grounds as exceptional circumstances in paragraphs 6 and 7 of the petition and invited this Court to exercise its revisionary jurisdiction in consideration of them.

These grounds include the following; the High Court has failed to consider section 83 (1) of the Poisons, Opium and Dangerous Drugs Ordinance ; the petitioner being in remand custody for over 5 years and seven months; the first accused being granted bail; the petitioner returning to Sri Lanka and assisting with the inquiry; the petitioner not having pending cases or previous convictions; as he was not in Sri Lanka at the time of detection he has not been charged for possession of heroin; his school going daughter is under psychiatric treatment and her studies have been affected because of his incarceration; the trial which was initially fixed for 4.10.2016 has been postponed for various reasons and the evidence in chief of PW 1 has not been concluded as at the date of submission of this application.

In resisting the petitioner's application for bail, the learned State Counsel contended that there are no exceptional circumstances upon which this Court could grant bail and that being in remand custody for a considerable period of time is not an exceptional ground to obtain bail.

The learned Judge has considered the order in CA/ PHC/APN 64/09 decided on 7.8.2009 and decided that if convicted of the charges against him, the petitioner would face life imprisonment or death sentence therefore, there is a possibility of him absconding, if bail is granted.

In the case of **Ranil Charuka Kulathunga vs The Attorney General** CA (PHC) APN 34/2015 it was held,

"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."

In the instant case it appears that the indictment was served on 4.12.2015 and although the trial was to commence on 21.12.2015, as at 6.6.2019 the prosecution has failed to conclude the evidence of PW 1. Further, there is no assurance from any reliable source that the trial could conclude in the forceable future.

Be that as it may, this Court has to consider the quantity of pure heroin which is 20.12 grams. If the accused is convicted the penal sanction would be the death sentence. In such a situation there is a possibility of the petitioner absconding courts although he returned to Sri Lanka soon after the incident.

The petitioner has brought to the notice of Court the illness of the daughter as an exceptional ground. Except for the Diagnosis Ticket dated 29.01. 2018, where head injury has been observed after a fainting attack at home, there is no other cogent evidence to consider the necessity of the presence of the petitioner for the wellbeing of the daughter.

The petitioner has also submitted that the 1st accused has been granted bail, that he has assisted in the inquiry having come from Qatar soon after the incident and therefore, he cannot be considered as an absconder. These facts cannot be considered as exceptional circumstances. What has been pleaded as exceptional circumstances are personal circumstances that do not fall in to the category of exceptional circumstances.

In ***The Queen vs Cornelis Silva*** 74 NLR 113, it is stated that the grounds that are "*common to many accused persons*" will not qualify to be considered as exceptional and therefore, the personal circumstances as urged by the accused-petitioner, though highlighted for the first time before this Court, fail to satisfy the requirement imposed on him by Section 83(1) of the Poisons, Opium and Dangerous Drugs Ordinance as amended.

On a consideration of the order of the learned High Court Judge, in the given circumstances of the case, it cannot be considered as *illegal, malicious, capricious or arbitrary*.

It is noted that the trial has taken a long time to conclude although he was indicted in December 2015.

However in ***Labukola Ange Wisin Gedera Ashni Dhanudhika Vs Attorney General*** CA (PHC) APN 4/2016, decided on 06.10.2016 and CA (PHC) APN 110/2009, it has been 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*”. Similarly, in the case of **CA (PHC) APN 110/2009**, a case where the quantity was 4.7g of heroin, it was held that, “*The fact that the suspect had been in remand for over 4 years cannot be taken as constituting exceptional circumstance in view of the punishment that could be imposed for an offence of this nature where the charge carries a sentence of life imprisonment or death*”.

Considering the delay in conducting the trial, I direct the trial Judge to conclude the case expeditiously considering the time that has lapsed and endeavour to hear the case day to day.

In the above circumstances, the application of the accused petitioner to revise the impugned order of the High Court is refused and the application is accordingly dismissed without costs.

JUDGE OF THE COURT OF APPEAL

I Agree,

K.K.Wickremasinghe,J

JUDGE OF THE COURT OF APPEAL