

**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 **to**  
**revise the Order of the Learned**  
**High Court Judge dated 2019/05/08**  
**and 2018/01/06.**

**C.A.(PHC) APN No. 73/2019**

**H.C. Gampaha No. HC 109/2014**

Mudugamuwe Arachchige  
Wasantha Charunda Keeerthiratne  
(Currently in Mahara Remand  
Prison)

**Accused-Petitioner**

Vs.

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

**Complainant-Respondent**

BEFORE : ACHALA WENGAPPULI, J.  
DEVIKA ABEYRATNE, J.

COUNSEL : Kamal Suneth Perera for the Accused-  
Petitioner.  
Panchali Witharana S.C. for the A.G.

ARGUED ON : 26.02.2020 & 30.06.2020

DECIDED ON : 17<sup>th</sup> July, 2020

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ACHALA WENGAPPULI, J.

The Accused-Petitioner (hereinafter referred to as the Petitioner) invokes the revisionary jurisdiction of this Court in seeking to set aside an order made by the High Court of *Gampaha* on 16.01.2018 by which he was remanded by cancelling the existing bail order in case No. HC 109/14. The other order sought to be impugned by the Petitioner is the order of the said High Court dated 08.05.2019, by which it had refused his subsequent application for bail.

In stating the circumstances under which the said impugned orders were made, the Petitioner states that he was arrested in connection with a murder and after about two years was bailed out on 13.05.2010 upon the order made by the High Court of *Gampaha* in application No. HCBA

266/2009. He was indicted for that offence in case No. 29/2016 before the same Court.

On 09.04.2013 he was arrested by officers attached to Police Narcotics Bureau and was produced before the Magistrate's Court of *Attanagalla* in case No. B 693/13, by introducing Heroin. He was enlarged on bail by the High Court in application No. HCBA 219/13 by its order dated 05.05.2014. He was indicted for possession of Heroin in case No. 110/14 before the same Court.

The Petitioner was arrested by the PNB officers in May 2016, as he claims, again after introducing Heroin. He was enlarged on bail by the High Court in application No. HCBA 137/16 by order dated 24.10.2016, *"even before the receipt of Government Analyst report"*.

Thereafter, the Petitioner was arrested by the PNB officers for the third time with three others on 14.10.2017 and produced before the Magistrate's Court of *Attanagalla* in case No. 2598/17. The Petitioner was enlarged on bail by the High Court of *Gampaha* in application No. HCBA 67/2019 on 01.04.2019.

In paragraph 8 of his petition addressed to this Court, the Petitioner states that;

*" ... he could not appear before High Court of Gampaha on 16.11.2017 as he was in remand custody under B 2598/17 and was not produced to Court by the Prison officers on that day, and he was produced to High Court for HC 109/14 on 16.01.2018 by the Prison officers on that day the learned High Court Judge cancelled his bail, without hearing him personally or his lawyer, citing the*

*reason that he might involve in other crimes if he was released on bail."*

He then identifies several "exceptional" grounds in paragraph 12 of his petition, inviting this Court to exercise its revisionary jurisdiction in consideration of them. These grounds include the failure of the High Court to note that there was no condition to re-offend, no evidence of him posing a flight risk, he has right to bail and no previous convictions, the Court had acted in violation of its own previous order, results in indefinite incarceration, is violative of presumption of innocence and of his rights under ICCPR Act No. 56 of 2007 and set up a wrong judicial precedent.

At the hearing of this application, learned Counsel for the Petitioner submitted that the High Court made order cancelling his existing bail order without giving him a hearing. Therefore, learned Counsel contends that the said Court had come to the conclusion without any evidence or information that there is a greater possibility that he might evade appearing before Court. He relied on the judgment of this Court in CA (PHC) Application No. 58/2013 – decided on 03.09.2013 where it was reiterated that "... *the Court is entitled to cancel a bail bond (after hearing the accused) for violating the bail conditions ...*" and in this instance there was no opportunity afforded to the Petitioner to offer his explanation. He also referred to the original order by which the Petitioner was enlarged on bail, which had no condition imposed on the Petitioner not to re-offend. Thus, it was contended that the impugned order of cancellation of bail was made contrary to law and the subsequent order of the said Court in refusing bail, too is dependent on the legality of the order of cancellation.

Learned State Counsel, in her objections listed out following, as pending cases against the Petitioner;

- a. HC 140/19 of High Court *Gampaha* for possession and trafficking of 20 grams of Heroin on 27.05.2016,
- b. HC 183/19 of High Court *Gampaha* for possession and trafficking of 6 grams of Heroin on 16.10.2017,
- c. HC 110/14 of High Court *Gampaha* for possession of an automatic weapon and live cartridges on 09.04.2013,
- d. HC 109/14 of High Court *Gampaha* for possession and trafficking of 11.25 grams of Heroin on 09.04.2013.

In resisting the Petitioner's application for revision, learned State Counsel submitted that there are no exceptional circumstances upon which this Court could grant him relief.

The indictment against the Petitioner in High Court *Gampaha* case No. 109/14 alleged that he possessed and trafficked 11.25 grams of Heroin, offences under Section 54A(b) and (c) of the Poisons Opium and Dangerous Drugs Ordinance as amended. The applicable provision on bail is found at Section 83(1) where it is stated that accused should be enlarged on bail only in exceptional circumstances.

It is evident from the certified proceedings of the said case; the Petitioner was enlarged on bail by the High Court on 07.10. 2014 after serving indictment, upon the same conditions that were imposed by that Court on 05.05.2014.

The 1<sup>st</sup> impugned order dated 16.01.2018 was made when the Petitioner was represented by his Counsel on a trial date and the High

Court, having noted that the trial could not proceed since the Petitioner was rearrested and remanded on an allegation of committing a similar offence, cancelled his bail on the footing that the Petitioner would reoffend and poses high degree of flight risk. The Petitioner claims that there was no evidence before the High Court of him posing a flight risk. But the proceedings of HC 29/16 on 11.01.2018 indicate that he was arrested on a warrant issued by that Court due to his unexplained absence in Court and his sureties have withdrawn from their suretyships. Learned High Court Judge who presided over on 11.01.2018 is the same Judge who made the 1<sup>st</sup> impugned order on 16.01.2018 after a lapse of mere 5 days since his previous order. Clearly the Petitioner's claim there was no evidence as to the flight risk, put at its lowest, is an obvious misstatement. The question of a flight risk, a legitimate concern to the High Court should be taken into account in considering bail.

The 2<sup>nd</sup> impugned order dated 08.05.2019 is an order by which the High Court had refused the Petitioner's application to enlarge him on bail applying similar considerations as it did on 16.01.2018. This particular order is a common order made in relation to bail applications made to the High Court in Case Nos. 29/2016, 109/2014 and 110/2014. The Court considered that case No. 29/2016, the Petitioner was accused of committing murder, while case Nos. 109 and 110/14 were in relation to possession of Heroin and also of an automatic weapon with live ammunition respectively.

The alleged murder was committed in 2008 whereas the detection in relation to possession of Heroin and firearm was made in 2013, whilst he was on bail. When the Court made the said 2<sup>nd</sup> order, the Petitioner was

accused of yet another instance of possessing Heroin, where he was indicted in Case No. HC 67/19.

It was urged on behalf of the Petitioner that he was remanded for a long period of time and was enlarged on bail in relation to one of his already pending cases.

The main thrust of the Petitioner's contention on the order dated 16.01.2018 was the High Court failed to show cause him as to why his bail bond should not be cancelled.

Upon perusal of the said impugned order, it is evident that the Petitioner was not present on a trial date and his Counsel informed Court that he was remanded in relation to a subsequent allegation. It would have been clearer if the High Court, in cancelling the existing bail order, referred at least to the gist of the submissions of the Counsel for the Petitioner, before making the said order. However, the short Court order contains material that were placed before it by the Petitioner and it's reasons for cancelling the existing bail order.

Learned Counsel for the Petitioner invited to pronounce that this Court emphasises that the High Courts, in such circumstances, be guided by the provisions of Section 14 of the Bail Act No. 30 of 1997, where it was made mandatory for the Court to have an application to cancel existing bail order by a "Police officer" and to hear the accused through his pleader, before it proceeded to cancel an existing bail order. He admits, however, that the provisions of the Bail Act have no application to the instant matter.

When the High Court made the 1<sup>st</sup> impugned order on 16.01.2016, in Case No. 109/14 against the Petitioner was fixed for trial and it could not

be taken up for trial as scheduled due to absence of the Petitioner, who was remanded by a different Court.

In this situation, the applicable provisions are contained in Section 263(1) of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 14 of 2005. Applicable parts of the said sub section are to the effect that whenever it becomes necessary or advisable to postpone the commencement of trial, the Court may remand the accused if in custody or may commit him to custody or take bail in his own recognizance.

In this instance, the Petitioner's alleged conduct resulted in the postponement of the commencement of his trial before the High Court and he was accused committing a similar offence on 27.05.2016, whilst being on bail for several cases that are pending before the same Court. It is his contention that Heroin was introduced on him by overzealous officers of the PNB due to their personal animosity towards him. However, this Court nor the High Court cannot decide the Petitioner's claim for it is the trial Court that had been empowered to decide such disputed questions of fact, upon hearing evidence.

When the Counsel for the Petitioner informed Court that he was accused of similar offence, it is reasonable for that Court to infer that the Petitioner poses a greater flight risk with another case is pending, in addition to the one he already has, both of which carried sentence of death or life imprisonment, if found guilty.

It appears that the Petitioner was content with merely informing Court that he was framed by the PNB officers through his Counsel when making application for bail. There is no material even to suggest that he



had complained the atrocious conduct of the PNB officers in foisting these very serious allegations on him due to their personal animosity to any authority, which is the reasonable conduct expected of such a person.

The Petitioner also stated in his petition that "... learned High Court Judge failed to observe that the Petitioner appeared in Court in all the dates in this Case except when he was remanded ..."and described the said ground as an exceptional ground.

In stating this particular ground as exceptional, the Petitioner qualifies himself to his declaration to "this case". There is a valid reason for this selective assertion. This is due to the fact that in Case No. HC 29/16, the Petitioner did not appear before the High Court on a trial date and was produced before that Court on 11.01.2018, being arrested upon execution of a warrant of arrest. On that day, his sureties sought to withdraw from their suretyships and the Court made order remanding the Petitioner. This is a clear attempt to mislead this Court by the Petitioner and in the light of the misstatement referred to above, this Court is convinced that the Petitioner did not come to this Court with clean hands. The relief he seeks being a discretionary remedy, his conduct is very material in determining this application.

In relation to the 2<sup>nd</sup> impugned order, the Petitioner has clearly failed to establish before the High Court that there were exceptional circumstances. When three of his applications for bail is taken up, it is not clear whether the Petitioner had addressed the Court on two different legal regimes that are applicable to these applications. In relation to the allegation of murder, it is the provisions of Bail Act that are applicable

while in relation to other two allegations of possession of Heroin it is the provisions of Poisons Opium and Dangerous Drugs Ordinance are applicable.

In view of the above considerations, this Court finds no illegality or irregularity in the impugned orders made by the High Court. Since the Petitioner has failed to satisfy this Court that the grounds that were described by him are exceptional in order to exercise its revisionary powers. Considered in the light of his contumacious conduct, he is not entitled to any relief. His application is accordingly refused.

In these circumstances, his petition is dismissed without costs.

**JUDGE OF THE COURT OF APPEAL**

**DEVIKA ABEYRATNE, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**