

**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 and 154(P) of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with Section 5(2) of the High Court of the Provinces Act No.10 of 1996.

C.A.(PHC) APN No. 22/2020
H.C.Colombo No. HCBA 543/2019
M.C.Colombo NO. B/3594/1/18

Dinayadura Dulip Samantha de Silva
No. 255/3, Godella,
Moragalla,
Beruwala
(Presently at Colombo Remand Prison).

3rd Suspect-Petitioner-Petitioner

Vs.

01. The Hon. Attorney General
Attorney General's Department
Colombo 12.
02. Officer-in-Charge,
Police Narcotic Bureau,
Colombo 01.

Respondent-Respondents

BEFORE : ACHALA WENGAPPULI, J.
K. PRIYANTHA FERNANDO, J.

COUNSEL : Tirantha Walaliyadde P.C. with Amila
Indika and Maheeputhra Pathiratne for the
Suspect-Petitioner-Petitioner.
Panchali Witharana S.C. for the
Respondent-Respondents

ARGUED ON : 25th September, 2020

ORDER ON : 14th October, 2020

ACHALA WENGAPPULI, J.

The 3rd Suspect-Petitioner-Petitioner (hereinafter referred as the Petitioner) had invoked revisionary jurisdiction of this Court conferred under Article 138 of the Constitution seeking to set aside an order of the High Court of *Colombo* in HCBA/543/2019 made on 21.11.2019, by which the said Court had refused his application for bail . He also seeks an order from this Court enlarging him on bail.

On 07.12.2018, officers attached to *Yatiyanthota* Police Station have arrested the Petitioner, when he swam across the *Kelani* river, while carrying cash amounting to Rs. 1,600,000.00 in his possession and handed him over to the 2nd Respondent.

The Petitioner was produced before the Magistrate's Court of *Colombo* under case No. B/3594/01/2018 as the 3rd suspect, in relation to a detection of 231.054 kilo grams of Heroin from the multiday fishing trawler "*Yamuna Abdulla*", made by the officers attached to Police Narcotics Bureau on 05.12.2018, off the seas of *Beruwala* along with the brother of the Petitioner and another, who were named as the 1st and 2nd suspects respectively. The Petitioner was initially kept under a detention order during the period 08.12.2018 to 14.12.2018 and was committed to remand custody thereafter.

Upon information provided by the Petitioner during investigations, the officers of PNB have recovered two sets of satellite phones with SIM cards from his house at No. 295/03, *Godella, Moragalle, Beruwala* on 12.12.2018, along with a polythene bag containing cash amounting to Rs. 5,900,000.00 and three pass books belonging to his wife. They, in addition have recovered a piece of paper with names and figures scribbled on from the Petitioner.

The officers have also taken charge of a multiday fishing vessel, named "*Dori 2*", belonging to the Petitioner and its GPS set, while being berthed in the *Baruwala* fishery harbour and a *polysack* from its hold, which appeared similar to the other *polysacks*, recovered along with the detection of Heroin from the other vessel.

It is informed to the Magistrate's Court by the PNB, through its further reports filed in that Court their investigations revealed that, upon instructions of the Petitioner, his brother the 1st suspect had gone to sea in the fishing vessel belonged to the 2nd suspect to meet up with a vessel

belong to the Petitioner in high seas to receive a consignment of Heroin. They have then expected to hand it over to another vessel. It is also informed by the PNB, that after receiving the said consignment, the 1st and 2nd suspects have attempted to hand it over to a person called "Amila" and at that point of time they were arrested by the PNB officers. The Petitioner, using multiple telephone connections, was in contact with two persons based in Seychelles, who were introduced to him through his then fiancée (a Dutch national) and had overseered the entire operation.

The factual background, in relation to the instant application for revision is stated by the Petitioner as follows. The Petitioner is a qualified diver who later developed a relationship with one "Dori", a Dutch national, who had financed the purchase of the multiday fishing vessel *Dori 2*. The Petitioner operated the multiday fishing vessel using employees and used to finance long fishing expeditions. He had re-invested his profits from fishing, in a banana plantation off *Monaragala*.

After the return of his vessel, with a catch of over 3 ½ Metric tons of fish, which the Petitioner had sold at *Beruwala*. He was contemplating to purchase a vehicle. With this purpose in mind, he had travelled to *Yatiyanthota* from *Monaragala* and had withdrawn Rs. 1.5 Million, in addition to Rs. 100,000.00 he had with him (mistakenly stated in his Petition as Rs. 1,000,000.00), in case he wanted to complete the intended transaction. As he withdrew cash from the Bank, he felt suspicious of two individuals who were lurking around (who later transpired as undercover PNB officers) and decided to take the aqueous route by swimming across the *Kelani* river to prevent him being "robbed" but was arrested by *Yatiyanthota* Police on the other side of the river.

The Petitioner had sought to provide an explanation for the discovery of Rs. 5.9 Million from his house as he claims that those funds were meant for the loan installment of his Rs. 6 Million loan, funds allocated for the next fishing expedition which is in the range of Rs. 1.8 to 2 Million, given the fact that he had to provide adequate food, medicine and fuel for the crew and to the boat for the 40 to 45-day period at sea, and funds allocated for the essential repair work for his other boat.

It is stated by the Petitioner, he applied for bail from the High Court, but was denied and therefore seeks revision of the said order of refusal on the following exceptional grounds;

- a. absence of any *prima facie* evidence against the Petitioner to successfully maintain any of the charges referred to in the B report,
- b. incarceration of the Petitioner aggravated the mentality of his children in particular the youngest had to attend the scholarship,
- c. subsistence of family of Petitioner was threatened and his liabilities to the banks escalated due to incarceration,
- d. families of the employees who worked under him suffered economically due to the lapse of his business while he was in remand,
- e. absence of any antecedents against the Petitioner.

The Respondents have resisted the Petitioner's application for revision on the basis that he was identified by the investigators as the principal offender and was arrested while evading arrest. It was also stated by the Respondents that the grounds urged by the Petitioner are no

exceptional in nature and qualifies him to be enlarged on bail. They contended that the order of the High Court is a legally tenable order.

In view of the above considerations, this Court now turns its attention to consider validity of the challenge to the order of the High Court in refusing bail.

Learned President's Counsel, in support of the revision application, contended that the failure of the High Court, in taking into account of the prospect of total economic ruination of the Petitioner as a result of his continued incarceration over an investigation, which had not revealed any wrong doing on the part of the Petitioner and would not result in a strong prosecution against him, are sufficient to render the order of refusal of bail to be revised by this Court. He added that the deterioration of mental health of the younger child, owing to the long incarceration of the Petitioner, a fact that had been confirmed by the concerned medical professionals, should also have been considered by the High Court in favour of the Petitioner.

The High Court, in its impugned order had correctly applied the applicable law in relation to the application of the Petitioner, when it considered the issue whether there were exceptional circumstances, entitling the Petitioner to be enlarged on bail. The Petitioner is a suspect of committing offences under the Poisons Opium and Dangerous Drugs Ordinance as amended and Section 83 of the said Ordinance imposes the condition that unless in exceptional circumstances bail should not be considered, in relation to persons suspected or accused under the said Ordinance.

Having considered the grounds that had been urged before the Court, namely, the long period of incarceration, the Petitioner being the sole breadwinner of the family and the adverse effect of his continued incarceration on the mental health of his 7-year-old child, the High Court had termed them as set of personal circumstances and considered them as consequences that are common to all who are being in remand. It had also considered the long duration of remand and the claim of weak prosecution and that too had failed to satisfy the Court as exceptional grounds.

In this context, this Court notes that certain personal circumstances, although generally not considered as exceptional as they are common to most, who are placed under similar circumstances, has the potential of being considered as exceptional, if they pass beyond a certain threshold. In the judgment *Attorney General v Ediriweera* 2006 BLR 12 the Supreme Court sets out the said threshold;

"It is trite law that family circumstances are not considered to be exceptional but circumstances which are general and operative in almost all the cases. The facts and circumstances of the case must take it out of the ordinary, creating circumstances that are sufficiently exceptional to merit the grant of bail ...".

This Court must therefore review the impugned order, in order to verify whether the circumstances that had been urged, although generally considered as personal, satisfy the criterion of circumstances that "... take it out of the ordinary, creating circumstances that are sufficiently exceptional to merit the grant of bail".

The Petitioner, who owns multiday fishing vessels, apparently was carrying on a successful business venture in the fishery industry when he was arrested in connection with the detection of Heroin. He claims that he had re-invested profits from his fishing trade in agriculture through a banana plantation in *Monaragala*.

In support of the looming prospect of total "economic ruination" of the Petitioner, learned President's Counsel heavily relied on the fact that the banks, who lent money to him are demanding their overdue loan installments, and the boat which was under repair too needed funding. The young family also needed to be maintained and if the Petitioner could not restart his economic activity within a short period, he faces the gloomy prospect of total economic ruination, a prospect the Legislature never intended.

This claim of the prospect of economic ruination needed a closer scrutiny.

Learned President's Counsel submitted that the loan repayments and repair bills were accumulating due to his continued incarceration and therefore the Petitioner would be left with no income to service such facilities. In support of this claim, the letters of warning issued by such institutions were tendered.

The letter issued by Peoples Bank is dated 05.12.2019 indicated that a balance of Rs. 189,961.29 is due upon the Rs. 6 Million loan and the failure to settle the dues would follow legal proceedings intended to recover the said sum. The letter issued by Mechanical Engineer of Central Mechanical Workshop at *Beruwala*, informed the Petitioner's wife of the

importance of removing a vessel, kept at his workshop for over 23 months, without being repaired. That letter is dated 01.11.2018.

In relation to the Peoples Bank, the remaining balance is only Rs. 189,961.29 and it appears that the loan had been serviced even after the Petitioner was remanded. As for the repair bill, the letter was issued prior to his arrest and even then, the vessel was merely lying at the workshop for over 23 months, which indicates the remanding of the Petitioner is not the reason for that state of affairs. It does not indicate of any financial liability imposed on the part of the Petitioner on account of the said vessel.

Turning to the issue of the adverse effect on the mental health of his daughter, the medical reports indicate that she was diagnosed with "adjustment disorder" since July 2019 and receiving medical care under a Consultant Psychiatrist. Unfortunately, the mental trauma caused to family members due to they being separated from loved ones too is an inevitable but common result in these circumstances, and therefore would not help the Petitioner

Learned President's Counsel was confident that a future prosecution against the Petitioner, based on scanty evidence, would not last long, in view of its inherent weaknesses. This Court notes from the further reports filed by the PNB before the Magistrate's Court that it had undertaken a complex investigation, including digital forensics, into what they claim as an international drug smuggling operation. Therefore, this Court leaves that issue to be considered by the trial Court, if the Hon. Attorney General decided to forward an indictment against the Petitioner, upon the

completion of investigations, since the trial Court is the best place to deal with it.

Thus, it is clear that the personal circumstances urged by the Petitioner fails to pass beyond the threshold imposed by the Supreme Court; *"the facts and circumstances of the case must take it out of the ordinary, creating circumstances that are sufficiently exceptional to merit the grant of bail"* and therefore the order of the High Court is not tainted with any illegality or irregularity.

The application to revise the impugned order of the High Court is accordingly refused.

The petition of the Petitioner is dismissed.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FRENANDO J.

I agree.

JUDGE OF THE COURT OF APPEAL