

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

In the matter of an application for bail under
and in terms of Section 404 of the Code of
Criminal Procedure Act No 15 of 1975.

The Democratic Socialist Republic of Sri
Lanka.

Complainant

Court of Appeal Application
Number: CA/Bail/35/2019

Vs.

HC Gampaha Case No:
HC 136/2018

Kanapathi Ramesh Kumar alias
Manthre Kanna

Accused

And Now Between

Kanapathi Ramesh Kumar alias
Manthre Kanna

Accused – Petitioner

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

Complainant – Respondent

BEFORE : K. K. Wickremasinghe, J.
Devika Abeyratne J

COUNSEL : Mr. Tenny Fernanado, AAL for the Petitioner
Ms. Cathuri Wijesuriya SC for the Respondent AG

ARGUED ON : 10.07.2020

DECIDED : 04.09.2020

K.K.WICKREMASINGHE J.

This is a matter of an application for Bail under section 404 of the Code of Criminal Procedure Act, No. 15 of 1979.

Facts of the Case

Upon the information received by the Police Narcotic Bureau, the Accused – Petitioner (hereinafter referred to as the Petitioner) was arrested on or about 25.09.2015 for having in possession of a gross quantity of 5kg and 246g which was brought down to 2kg and 723g of pure net quantity of Diacetyl Morphine (Pure Heroin) after the Government Analyst Report.

The Petitioner was produced before the Learned Magistrate of Mahara and was ordered to be held in remand custody. Subsequently, the Petitioner was indicted before the High Court of Gampaha for trafficking and possession of 2kg and 723g of pure heroin for offences punishable under Sections 54A (b) and 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance as Amended by Act No. 13 of 1984 to which the Petitioner pleaded not guilty. The Learned High Court Judge ordered the Petitioner to be held in remand custody.

Legal Analysis

The Learned State Counsel for the complainant-respondent (hereinafter referred to as the 'respondent') raised two preliminary objections at the very outset of this matter as follows;

1. *The Court of Appeal has no Jurisdiction to try and determine this application.*
2. *The Petitioner has failed to submit any exceptional circumstances.*

The two preliminary objections may be dealt with separately by this Court.

1. Whether the Court of Appeal has no Jurisdiction to try and determine this application

The Sections 54A (b) and 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance as Amended by Act No. 13 of 1984 reads as follows;

Any person who -

(b) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a licence of the Director, trafficks in any dangerous drug set out in Column II of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High Court without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part;

(d) except as permitted by or otherwise than in accordance with the provisions of this Chapter or a licence of the Director, possesses any dangerous drug set Out in Column II of Part III of the Third Schedule in excess of the amount set out in the said Column II shall be guilty of an offence against this Ordinance and shall on conviction by the High

Court without a jury be liable to the penalty set out in the corresponding entry in Column III of that Part.

The Petitioner invoked the jurisdiction of this Court under and in terms of Section 404 of the Criminal Procedure Act No. 15 of 1979. Section 404 of the Criminal Procedure Act reads as follows;

“The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive; and notwithstanding anything to the contrary in this Code or any other law the Court of Appeal may in any case direct that any person in custody be admitted to bail or that the bail fixed by the High Court or Magistrate be reduced or increased, or that any person enlarged on bail by a Judge of the High Court or Magistrate to be remanded to custody”.

The Respondent states that the Power of the Court of Appeal under Section 404 of the Criminal Procedure Act is not original jurisdiction in light of ***Attorney General and Others v Sumathipala (2006) 2 SLR 126*** .

In contrary to the above, the Learned Counsel for the Petitioner submitted that Paragraph 10 of the Petition refers to the dismissal order of bail dated 12.06.2019 annexed and marked as X4 where he has pleaded to consider part and parcel of this petition. The Petitioner has not averred that he has aggrieved by the said order. Further the Petitioner cannot rely on both since one contradict the other.

In the case of ***Attorney General and Others v Sumathipala (Supra)*** the Supreme Court analyzed the nature of power of Court of Appeal under section 404 of the Code of Criminal Procedure

Code Act to see whether it is an appellate and revisionary or original jurisdiction. In ***Attorney General and Others v Sumathipala (Supra)*** it was analyzed as follows;

"Section 402 and the amended section 403(1) read as follows:

"402 - when any person other than a person accused of a non- bailable offence appears or is brought before a Court and is prepared at any time at any stage of the proceedings before such Court to give bail such person shall be released on bail: Provided that the Court if it thinks fit may instead of taking bail from such person discharge him on his executing a bond without sureties for his appearance as herein after provided.

403(1) - A Magistrate or a Judge of the High Court, at any stage of any inquiry or trial, as the case may be, may in his discretion release on bail any person accused of any non-bailable offence: Provided that a person alleged to have committed or been concerned in committing or suspected to have committed or to have been concerned in committing, an offence punishable under section 114, 191 and 296 of the Penal Code shall not be released, at any stage of any inquiry or trial, except by a Judge of the High Court."

Considering the aforementioned sections, along with section 404 of the Code of Criminal Procedure Act, it is apparent that for the Court of Appeal to consider making a direction under section 404 there should be an order from the Judge of the High Court or a Magistrate".

When considering the aforementioned cases, it is apparent that in order for the Court of Appeal to make a direction under section 404 there should be an order from a Judge of the High Court or a Magistrate.

Accordingly, it was held that in terms of the section 404 of the Code of Criminal Procedure Act, the Court of Appeal has only the appellate and revisionary jurisdiction.

2. **Whether the Petitioner has failed to submit any exceptional circumstances.**

It is trite law that the suspects and accused under the Poisons Opium and Dangerous Drugs Ordinance shall be kept in remand unless exceptional circumstances are demonstrated. Thus, section 83 of the **Poisons Opium and Dangerous Drugs [amendment] Act No.13 of 1984** reads that "*No person suspected or accused of an offence under section 54A or section 54B of this ordinance shall be released on the bail, except by the High Court in exceptional circumstances.*"

In the case of **Attorney General V. Ediriweera** [S.C. Appeal No. 100/2005] (2006 B.L.R. 12), it was held that,

"The norm is that bail after conviction is not a matter of right but would be granted only under exceptional circumstances."

In the case of **Labynidarage Nishanthi V. Attorney General** [CA (PHC) APN 48/2014], it was held that,

"It is trite law that any accused or suspect having charged under the above act will be admitted to bail only in terms of section 83(1) of the said Act and it is only on exceptional circumstances. Nevertheless it is intensely relevant to note, the term "exceptional circumstances" has not been explained or defined in any of the Statutes. Judges are given a wide discretion in deciding in what creates a circumstance which is exceptional in nature.

There are plethora of cases in the legal parlor which had identified what creates an "exceptional circumstances" in relation to granting bail..."

In light of above it is understood that law, as it stands today, requires petitioner to demonstrate the existence of exceptional circumstances in order to get released on bail.

In the instant case, the petitioner states that the matters averred in paragraphs 11 and 12 of the Petition to be considered as circumstances in exceptional nature. The grounds set under the aforesaid averments are reproduced as follows;

- I. The Petitioner is continuously languishing in remand custody for almost of a period of 3 years and 8 months.
- II. The trial pertaining to the instant application is being dragged out over a period more than 1 year due to non-availability of productions and also due to the Prosecution Witness No.01.
- III. The long delay in keeping the Petitioner in remand custody without proceeding the trial is a clear violation of his Human Rights.
- IV. The Petitioner cannot be convicted and sentenced pertaining to the alleged incident in the strength of the evidence of the prosecution.
- V. The Petitioner is still in his tender age and that the long delay in concluding the trial would take away from his young formative years.
- VI. The Petitioner will not abscond if release on bail.
- VII. There is no likelihood of the Petitioner committing any further offences.

In the case of CA (PHC) APN 64/2009 (decided on 07.08.2009) W.L.R. Silva, J held that,

“...If an accused cannot assign exceptional circumstances he will have to be kept on remand and when an accused had been on remand for 03 years because he had no exceptional circumstances will that by itself constitute exceptional circumstances. If that is treated as an exceptional circumstance, in my view it would be an anomaly because the fact that there aren't any exceptional circumstances finally mature into exceptional circumstances. The fact that he had no exceptional circumstances becomes a qualification after 03 years. If that was the intention of the legislature, the section itself would have stated the exceptional circumstances should not be insisted after 03 years and there is no such qualification, no such jurisdiction found in the particular provision dealing with bail. In any case, if the period of incarceration is out of a provision and depending on the nature of the charges the Court of course can consider on certain circumstances the long period of incarceration as constituting an exceptional circumstances...”

In light of above it is understood that even though the period of remand cannot be considered alone as an exceptional circumstance. Moreover, when enlarging a petitioner on bail, the nature of the offence should be taken into consideration and also salient to note that the gravity of the charge. The amount of pure heroin recovered in the instant case was 2kg and 723g, which is so severe in nature and a heavy sentence to be imposed. Certainly there is a risk of Petitioner to abscond Courts, since the punishment prescribed in the Poisons, Opium and Dangerous Drugs Act is either death sentence or life imprisonment.

In the case of ***Ranil Charuka Kulathunga V. Attorney General*** [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 ..."

In Conclusion, I am of the view that the petitioner has failed to establish exceptional circumstances in order to invoke the jurisdiction of this Court and in light of Section 404 of the Criminal Procedure Code Act No 15 of 1979, this Court has no original jurisdiction to try and determine this application. Therefore, this bail application is hereby dismissed without costs.

Judge of the Court of Appeal

Devika Abeyratne J.

I agree

Judge of the Court of Appeal