

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. 62/2019
H.C. Homagama No. BA/33/19

1. The Attorney General
Attorney General's Department,
Colombo 12.
2. Officer-in-Charge
Organised Crime Division,
Mihindu Mawatha,
Colombo 12.

Respondent-Petitioners

Vs.

Kompannage Asanka Chanaka
Fonseka,
200/42/1,
4th Lane,
William Jayasuriya Mawatha,
Kesbewa.

Suspect-Respondent

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

COUNSEL : Janaka Bandara S.S.C. for the Respondent-
Petitioners.
Suspect -Respondent is absent and
unrepresented.

WRITTEN SUBMISSIONS

TENDERED ON : 12. 10.2020

ORDER ON : 23. 10.2020

ACHALA WENGAPPULI, J.

The 1st Respondent-Petitioner, the Hon. Attorney General (hereinafter referred to as the Petitioner), had invoked revisionary jurisdiction of this Court conferred under Article 138 of the Constitution, seeking to set aside an order made by the High Court of *Homagama* on 12.06.2019 in BA 33/2019, enlarging the Suspect-Respondent (hereinafter referred to as the Respondent), who was suspected of possessing 1.010 Kilo grams of Heroin, having being detected with the said quantity of the dangerous drug.

In his application seeking bail and in order to satisfy the High Court that there exist exceptional circumstances warranting bail, the Respondent relied on the fact that his continued incarceration had resulted in mental stress on his wife which will in turn have an adverse impact of her six-

month pregnancy, in view of the fact that she already miscarried in the recent past. He also urges that the educational activities of his children are curtailed due to his remanding and that they too are under mental stress.

This application for bail was initially to be taken up for inquiry by the High Court on 24.06.2019 but was inquired into on 12.06.2019, upon an application of the Respondent by a motion dated 29.05.2019, citing medical condition. He had annexed copies of his medical records and sought the intervention of Court to call a report from the Medical Officer in Charge of *Kalutara* Prison Hospital to the said motion.

During the inquiry on 12.06.2019, the President's Counsel who appeared for the Respondent submitted that the Respondent had to be admitted thrice to *Nagoda* Hospital over an "illness" in his kidneys during the month of May and the medical reports confirm that his kidneys and urinary tubes indicate inflammation and the Prison Hospital had no facilities to treat the Respondent.

Learned State Counsel, who resisted the application for bail, submitted that the judgment of the Supreme Court in *The Attorney General v Ediriweera* (2006) 1 Sri L.R. 25, the apex Court had laid down the applicable criterion when an applicant cites medical grounds as exceptional grounds in seeking bail and the conditions referred to in the medical reports that had been relied upon by the Respondent does not satisfy the said criterion.

The High Court, however, decided to enlarge the Respondent on bail on two grounds which it considered as exceptional. The High Court notes that the Respondent has an "illness" ("අසනීපයක්") and the Prisons Hospital had no facilities to treat that "illness". The High Court accordingly had enlarged the Respondent upon cash bail of Rs. 3 Million and furnishing of four sureties, who would sign Rs. 6 Million certified bond each on his behalf. A travel ban was also imposed on the Respondent. The High Court, in considering the Respondent's application favourably, noted that he undertook not to repeat the offending act.

In the instant application, the Petitioner, in seeking to revise the said order, states that "*the learned High Court Judge has misinterpreted the term exceptional circumstances*" under Section 83(1) of the Poisons, Opium and Dangerous Drugs Ordinance as amended. The reliefs as prayed for by the Petitioner included stay of the said order of the High Court enlarging the Respondent on bail.

The Respondent, through his Counsel had resisted the application for revision filed at the initial stage and to granting of interim relief in staying the said order of the High Court. He also filed objections. This Court, having considered the submissions of the parties, decided to grant interim relief to the Petitioner on 22.07.2019.

Since the grant of interim relief, the Respondent did not appear before this Court nor had perused his objections through Counsel. Learned President's Counsel who represented the Respondent informed this Court he had not received instructions to appear on Respondent's behalf thereafter.

It was informed to this Court by the learned Senior State Counsel that the Respondent had since absconded the proceedings pending before the High Court and the efforts to re-arrest him proved futile. He therefore moved this Court to have this matter inquired into.

This Court, in view of the fact that the Respondent did have proper notice of this application, is of the view that the matter could be taken up for inquiry in the absence of the Respondent at this stage.

Section 83(1) of the Poisons, Opium and Dangerous Drugs Ordinance states that;

"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."

Since the Respondent is suspected of an offence under Section 54A of the said Ordinance, the High Court must satisfy that there exist exceptional circumstances to release him on bail.

The exceptional grounds taken into consideration by the High Court in enlarging the Respondent on bail is that he has an "illness" and that could not be treated at the Prison Hospital.

As correctly submitted by the learned Senior State Counsel the applicable criterion had already been laid down by the Supreme Court, when an applicant relies on medical grounds, in his efforts to satisfy the existence of exceptional circumstances.

It is stated by the Supreme Court in the said judgment that such an applicant must "... place such sufficient material before the Court to enable a finding that he present state of health dictates/demands that he be released on bail." It further states that "... who seeks must not only show ill-health, but must prove it by medical reports, which reflects his or her current and existing state of health relevant to the time of application for bail. He must additionally show that the illness was not a present one but that continued confinement would imperil life or cause permanent impairment of physical condition. There must be evidence of the nature of the illness and the probable effect of sustained incarceration of his condition."

In relation to the existence of exceptional circumstances, the Supreme Court added that "*exceptional circumstances only exist, when facts 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, then and only then should bail be granted after conviction.*"

Learned Senior State Counsel, in support of the revision application of the Petitioner, submitted to this Court that "*exceptional ground has to be circumstance that is out of ordinary and/or an instance which is not habitually or commonly occurring*" and the High Court had fallen into error when it held that an "*illness*", which could have been adequately treated by any Government Hospital and therefore not an unusual one, was taken an exceptional ground to grant bail, and that error qualifies it to be considered as an illegality warranting the exercise of an extraordinary remedy of revision.

It is already noted by this Court, that the learned State Counsel had placed heavy reliance on the application of the criterion as laid down in *The Attorney General v Ediriweera* (supra), in resisting the Respondent's application for bail before the High Court. The first of the two tier criterion on which the High Court should have considered the Respondent's application is whether the medical reports indicate that the Respondent had satisfied the Court of the "*current and existing state of health relevant to the time of application for bail*". The second step would be for him to "*additionally show that the illness was not a present one but that continued confinement would imperil life or cause permanent impairment of physical condition*".

Perusal of the impugned order of the High Court, unfortunately does not indicate, whether it had considered the application of the Respondent in the light of the principles that had been enunciated in the said judgment of the Superior Court, at all. The order merely states that the "*illness*" of the Respondent is accepted as an exceptional ground. In coming to the said conclusion, the High Court had failed to note that the medical report issued by the Prisons Hospital only indicate its inability to provide treatment to the Respondent's "*illness*". It also failed to note that the Respondent was regularly provided with adequate necessary medical treatment for his "*illness*" at Nagoda Hospital. There is no material provided by the Respondent that the facilities that are available at the said hospital are inadequate to treat his illness and therefore his "*continued confinement would imperil life or cause permanent impairment of physical condition*". The High Court also failed to note that the said report, the medical doctor had added that although there was inflammation of his

kidney and ureters, the ultrasound scan revealed that he had no kidney stones. This diagnosis brings the illness of the Respondent to a general medical condition where any other suspect might have suffered and received treatments at a Government Hospital and therefore not an exceptional medical condition.

In addition to these, the High Court had failed to note that the Respondent, having deviated from the circumstances he had already identified as exceptional grounds in his petition, supported by an affidavit, had introduced totally a new ground belatedly, by way of a motion and without any factual reference, in his petition on which he was successful in convincing the Court to grant bail. This is not the accepted manner in dealing with such applications since the opposing party had no way of challenging the new ground, since it was not mentioned in the petition. The method of introducing new material that had been adopted by the Respondent in this instance is clearly not keeping with the accepted procedure in such applications, and therefore could be termed as an instance of an irregularity of proceedings.

Thus, the impugned order of the High Court is clearly tainted with an illegality when it failed to apply the binding criterion as laid down in *The Attorney General v Ediriweera* (supra), to the material placed before it. It had taken irrelevant factors into its considerations while failing to consider relevant ones and therefore the impugned order is ought to be revised by this Court exercising its revisionary jurisdiction.

The order of the High Court of *Homagama* dated 12.06.2019 is therefore set aside.

Application of the Petitioner is accordingly allowed.

JUDGE OF THE COURT OF APPEAL

K. PRIYANTHA FERNANDO, J.

I agree.

JUDGE OF THE COURT OF APPEAL