

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

In the matter of a Revision in terms of
Article 138 of the Constitution read with
Section 364 and 404 of the Criminal
Procedure Code Act No.15 of 1979.

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

Complainant

CA/PHC/APN

Vs.

Vishvanathan Dushyanthan

CPA/145/2019

Accused

HC Colombo HC 26/18

And Now Between

Vishvanathan Dushyanthan

Accused Petitioner
(Presently in remand
custody in Colombo)

BEFORE

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

COUNSEL : AAL Neranjan Jayasinghe for the Petitioner
Ms. Chathuri Wijesuriya SC for the Respondent AG

ARGUED ON : 02.7.2020, 03.07.2020

DECIDED : 31.07.2020

K.K.Wickremasinghe J.

This is a Revision Application for Bail filed by the Petitioner in terms of Article 138 of the Constitution read with Section 364 and 404 of the Criminal Procedure Code Act No.15 of 1979. The Petitioner in this case has filed this revision application to revise the order of the Learned High Court Judge of Colombo dated 06.04.2019 in Bail Application No: HC Colombo 26/18 refusing to enlarge the petitioner on bail. The instant order is concerned with, whether the Petitioner is entitled to be enlarged on Bail under exceptional circumstances.

Facts of the Case:

The petitioner was arrested with two others on or about 23.05.2016 within the jurisdiction of Grandpass Police for being in possession and for trafficking of 151.60g of Diacetyl morphine (Pure Heroin). The petitioner along with two others were arrested while they were travelling in a cab (car). The second suspect tried to escape nevertheless the police caught him. At the time of arrest the driver of the cab stated that he was only the driver of cab (car) belongs to the taxi service company named 'NAMDO'.

The government analyst report dated 23.08.2016 relating to productions of this matter revealed that the pure quantity of Diacetyl morphine was 151.6g. The petitioner was indicted in the High Court of Colombo under case No. HC 26/2018 for offences punishable under section 54A (b) and 54A (c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by Act no.13 of 1984.

The second suspect was released on bail by the order of the Learned Magistrate of Maligakanda dated 18.07.2018. The Petitioner had filed a Bail application bearing No. HC Colombo 26/18 and the Learned High Court Judge of Colombo had refused to grant bail on the basis that there were no exceptional circumstances.

Being aggrieved by the said dismissal, the petitioner preferred a revision application to this Court.

In his Petition, the petitioner has submitted the following grounds as exceptional circumstances;

1. The Learned High Court Judge had failed to take into consideration that the medical condition coupled with long incarceration constitutes an exceptional ground for the court to grant bail pending trial.
2. The Learned High Court Judge had failed to take into consideration that no previous convictions or pending cases regarding drug related offences.
3. The Learned High Court Judge had failed to record the grounds on which the bail application was made.
4. The order of the Learned High Court Judge is against the presumption of innocence.
5. The difficulty of the petitioner in a prison environment post-surgery.

Section 83 (1) of the Poisons Opium and Dangerous Drugs [amendment] Act No.13 of 1984, reads as follows:

"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."

In the case of ***Lunumoderage Nishanthi v. AG [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...”

According to Section 83 of the Poisons Opium and Dangerous Drugs [amendment] Act No.13 of 1984, the intention of the legislature can be construed as to keep the suspects under the said Act, in remand unless exceptional circumstances are demonstrated.

It is brought to the attention of the court that the Petitioner who is presently in the remand custody is said to have been in remand since 23.05.2016. Court notes that the petitioner has been in remand over a period of 3 years and the petitioner has no previous convictions or pending cases with regard to drug related offences.

The Learned Counsel for the Petitioner contended that the Petitioner is a heart patient of a serious condition for which he is instructed to undergo a surgery. Moreover, the Learned High Court Judge in his orders dated 13/1/2020, 30/1/2020 and 27/2/2020 has directed the relevant prison authorities to take steps to take the petitioner to the National Hospital of Colombo in order to carry out his treatments in which the prison authorities have yet failed to comply with the said order. Further it was noted that the prison authorities were unable to carry out the orders of the Learned High Court Judge on 30/1/2020 and 27/2/2020. Medical reports of the cardiologist revealed that 70% of mid vessel is blocked and recommended intervention.

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 facts 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, it constitutes an exceptional circumstance when a long period of remand is coupled with such other medical conditions. In the instant case the Accused Petitioner needs immediate medical attention and if not his life may be in danger.

Therefore, after considering above mentioned facts this court is of the view that the ends of justice will be met by enlarging the suspect on bail.

The Accused Petitioner is enlarged on bail under stringent conditions as follows:

1. Cash bail of Rupees Five Hundred Thousand (Rs. 500,000/=)
2. Surety bail of Rupees Two Million (Rs. 2,000,000/=) each, with two sureties acceptable to the Learned High Court Judge of Colombo.
3. The Accused Petitioner is ordered to report to the Police Narcotics Bureau Colombo 01 on every Sunday of each month between 8.30 am to 12.30 pm.
4. Not to intervene or threaten the witnesses.
5. To hand over the Passport or any other travel document to the relevant High Court
6. Not to apply for a new Passport or any travel document.

In case, if the Accused Petitioner violates any of the bail conditions mentioned above, he will be remanded until final determination of the case.

Registrar is directed to send a copy of the bail order to the High Court Judge of Colombo, Controller General of the Department of Immigration and Emigration and the Prison Authorities.

Judge of the Court of Appeal

Devika Abeyratne J.

I agree

Judge of the Court of Appeal