

**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 read with the Section 365 of the Code of Criminal Procedure Act No.15 of 1979 as amended.

CA Revision

Application No:

CA (PHC) APN 150/2019

The Democratic Socialist Republic
of Sri Lanka

High Court of Negombo

Case No: 318/14

Complainant

Vs

Hettige Anuradha Priyankara Alias
Hettiarachchige Anuradha Priyankara
Kularathana

(Presently in Negombo Remand
Prison Custody)

Accused

And now Between

Maddepolage Nanda Malini Perera
No.24/150, D/4, 2/2,
Gothami Road,
Housing Scheme, Gothami Road,
Borella.

Petitioner

Vs

1. The Officer-In-Charge,
Police Narcotics Bureau,
Police Headquarters,
Colombo 12.

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

(On behalf of the Democratic
Socialist Republic of Sri Lanka)

Respondents

Hettige Anuradha Priyankara Alias
Hettiarachchige Anuradha Priyankara
Kularathana

(Presently in Negombo Remand
Prison Custody)

Accused-Respondent

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

Counsel : Anuja Premaratne, PC with Tarangee
Muthukumarana for the Petitioner

Panchali Witharana, SC for the Respondent

Argument On : 30.06.2020

Judgment on : 31.07.2020

Devika Abeyratne,J

The Petitioner *Maddepola Nanda Malini Perera*, who is the mother of the accused-respondent (hereinafter referred to as the accused) invokes the revisionary jurisdiction of this Court seeking to set aside

the orders dated 11.7.2019 and 15.10.2019 of the learned High Court Judge of *Negombo*.

The Petitioner submits that the accused was arrested on 14.7.2012 on the allegation of possession and trafficking of heroin and subsequently indicted on two charges for possession and trafficking of 130.28 grams of heroin under the Poisons, Opium and Dangerous Drugs Ordinance Act No.13 of 1984 as amended.

The application for bail by the accused on 23.4.2015, has been refused and the revision application to this Court in CA(PHC) APN 50 of 2015 has been refused on 3.8.2016.

Thereafter, as per paragraph six of the petition, five bail applications to the High Court of *Negombo* has been refused by the learned Judge. Further, the application in revision in CA (PHC) APN 166 of 2017 to this Court has also been refused on the basis that there were no exceptional circumstances.

It is submitted on behalf of the accused that he has been in remand since **14.07.2012**, and the indictment dated **04.07.2014** was served on **02.10.2014**. The trial was fixed initially for **02.02.2015**. (according to one journal entry **2.3.2015**) was postponed due to the absence of PW 1.

On a perusal of the journal entries it is noted that on the dates fixed for trial namely, 23.4.2015, 3.9.2015, 22.9.2015, 26.1.2016, 12.10.2016, 7.12.2016, 30.1.2017, 17.05.2017, 4.9.2017, 18.01.2018, PW 1 has failed to appear on summons, and the trial has been postponed on that ground.

The trial fixed for 26.10.2018 had been postponed on the ground that PW 1 was indisposed and the prosecution has informed Court that the trial will commence with PW 2 on the following trial date. However, although PW 2 was present in Court on the next trial date being 29.03.2019, the prosecution has informed Court that they intend to commence the trial with PW 1 Inspector *Rangajeewa*.

On **11.7.2019** , although Inspector *Rangajeewa* was present in Court it has been informed that due to his ill health he is not able to testify and the trial has been postponed once again.

It is submitted that a bail application was pending when the case was fixed for trial on **11.07.2019** , however, the State has resisted and objected to granting of bail and by order dated 11.07.2019 the accused has been refused bail.

On the next trial date of **15.10. 2019** due to PW 1's absence the case has been postponed to 10.2.2020.

It is submitted in paragraphs 18 and 19 of the petition that the failure of the prosecution to secure the attendance of State witnesses has resulted in a violation of a fundamental right of free movement of the accused and the continuous and indefinite incarceration of the accused without being found guilty, is in contravention of the presumption of innocence, and to consider these facts as exceptional circumstances.

The learned State Counsel has raised a preliminary objection among the other objections on the grounds; that the petitioner has failed to demonstrate any exceptional circumstances to invoke the revisionary jurisdiction of this court; that the impugned orders are not illegal, irregular, malicious, capricious or arbitrary; the application has been preferred approximately three months after the impugned order dated 15.10.2019 and no explanation has been given for the undue delay; failure to annex copies of the orders dated 11.07.2019 and 15.10.2019 and thus has not complied with Rules 3(1) (a) and 3 (1) (b) Court of Appeal (Appellate Procedure) Rules of 1990. (However, at the inquiry this objection was withdrawn as copies of the orders were available with the application).

The State Counsel has also revealed the previous conviction of the accused who was sentenced on 28.01.2013 for 2 years rigorous imprisonment suspended for 05 years and a fine of Rs.16000/= for possession and trafficking 80 mg of heroin on or about 22.01.2012 at the *Maligakanda* Magistrate's Court in Case No 68387/12. This fact although disclosed by the petitioner in the revision application states that the quantity of the heroin to be 1.5 grams .

At the hearing of the application, the State Counsel submitted that the Petitioner has no *locus standi* to make the application as there is no documentary proof to establish the nexus to the accused and also no documentary proof to prove the averments in paragraph 22 to 25 of the petition.

In the objections dated 25.06.2020 the respondent Attorney General has admitted the averments in paragraphs 3,4,5,15, 20,22,23,24, and 20 of the petition of the Petitioner. Therefore, the objections regarding paragraphs 22 to 24 does not arise and this Court decides to reject the submission of the State Counsel on that point.

With regard to *locus standi*, it is correct that there is no documentary proof such as a birth certificate that the petitioner is the mother of the suspect. However, in the affidavit of the Petitioner submitted together with the petition she has sworn to the fact that the accused is her son which can be accepted when there is no evidence to the contrary.

In ***Lansage Basil Vs Hon Attorney General*** SC Appeal 20/2017, SC (SPL) LA No. 192/2016, decided on 03.07.2020 it was held by Justice Sisira De Abrew with the concurrence of Justice Vijith K.Malalgoda and Justice P.Padman Surasena that dismissing revision application on the basis that the father of the suspect had no *locus standi* is wrong and directed Court to hear the revision application on merit.

In that case it was alleged that the suspect was in possession of 3.89 grams of heroin and the learned High Court Judge had refused the application for bail. The father of the suspect filed a revision application seeking to revise and set aside the said order of the Court of Appeal where the learned Senior State Counsel who appeared for the Attorney General has raised an objection that the Petitioner had no *locus standi* to maintain the application for revision based on the authority on *Senathilaka vs Attorney General* [1998]3 SLR 290.

In ***Senathilaka's*** case the accused who did not face the trial was convicted and sentenced and did not appeal against the conviction and sentence. When his father filed a revision application it was held that the father of the accused did not have *locus standi*.

In **Lansage Basil's** case (Supra) his Lordship Justice Abrew has stated;

"His Lordship Justice Jayasuriya in the above case has not expressed a general view that the father of the accused in each and every case has no locus standi to maintain a revision application."

In the light of the above given reasons it is my considered opinion that in the instant case the Petitioner has *locus standi* to prefer this application.

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

The Petitioner has stated that the accused at 23 years of age was employed as a Wharf Clerk in a company based in *Peliyagoda* and for additional income was hiring a three-wheeler when he was arrested and since then, is in remand custody for the past 7 years.

It is further stated that as her husband is deceased and the daughter is married living with her family in another compound it is the accused son who was looking after her. The petitioner is a cancer patient waiting to undergo surgery which has been postponed due to the long absence of her only son. (the only document to prove she is a cancer patient is dated in 2014).

Apart from the cancer treatment it is stated that she is suffering from Rheumatic Valvular Heart disease which has to be attended by way of an Aortic valve Replacement surgery which too has been postponed due to the absence of the accused and her position is that due to the incarceration of the accused she is undergoing immense hardship.(this medical condition has not been established by documentary evidence.)

From the available material it has not been established that the presence of the suspect is necessary or crucial for the Petitioner to get treatment for her health conditions.

In the Case of **Ediriweera vs Attorney General** 2006 1 SLR Pg 25, where the ill health of the Petitioner was adverted to for consideration of bail, it was held by his Lordship Justice *Abrew* that there was no evidence before Court that the Petitioner's health condition cannot be treated either at the Prison Hospital or at any hospital in Sri Lanka and thus, the ill health of the accused does not come under exceptional circumstances.

In the Supreme Court, her Ladyship Justice *Thilakawardena* elaborated on the above in **Attorney General vs Ediriweera** reported in 2006 [B.L.R.] page 12 that,

".....it is incumbent upon the accused seeking bail after conviction to place such sufficient material before court to enable a finding that the present state of health dictates/demands that he be released on bail. In this case, in the absence of such material, his state of health does not merit consideration as an exceptional circumstance."

Thus, in the instant case, in the absence of any documentary evidence to substantiate the petitioner's ill health or the necessity of the presence of the suspect to attend on her medical needs, are not considered as exceptional circumstances.

The indictment against the accused in High Court *Negombo* in case HC/ 318/14 alleges that he possessed and trafficked 130.28 grams of heroin, which are offences punishable under Section 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended.

The applicable provision on bail is section 83(1) where it provides for the accused to be enlarged on bail only in exceptional circumstances.

Section 83 of the Act ;

"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”.

Exceptional circumstances are not defined in the statute. Admittedly, it will have to be considered on its own facts and circumstances on a case by case basis.

The Petitioner strenuously contended that the trial not being taken up for a long period of time by itself is an exceptional circumstance which warrants the accused being enlarged on bail. And that want of exceptional circumstances cannot be construed to warrant the indefinite remanding of the accused.

This Court in CA (PHC) APN 166/2017 has considered at length the revision application for bail for this accused on almost similar submissions and delivered order on 5.12.2018 refusing the petitioner's application on the failure to establish exceptional circumstances.

Approximately one and a half years have passed since that order. However, it is disappointing to note that the trial has not yet commenced in the High Court.

In **Ranil Charuka Kulathunga vs The Attorney General** CA (PHC) APN 34/2015 it was held,

“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 CA (PHC) APN 151/16 decided on 1.11.2017 this Court has revised the order of the learned High Court Judge of Colombo who had granted bail to the accused on the basis of; lack of staff in the High Court; the evidence of prosecution Witness No 1 not concluded and the accused being in remand for 2 years. The Attorney General moved in revision and this court allowed the application on the grounds that no

exceptional circumstances have been proved in the High Court and the order granting bail was set aside.

In the instant case, trial has not commenced, and the circumstances do not show that it can commence in the foreseeable future and the State Counsel has not informed or given an assurance to Court of the possibility of commencing and concluding the trial expeditiously.

In **Attorney General V. Letchchemi and another** S.C. Appeal 13/2006) it was held;

“...According to the facts and circumstances of the case, unless it can be proved that the delay is inordinate, beyond the period of sentence and therefore exceptional in terms of the particulars to that case, as the usual delay is something that is common to all cases in this country and not exceptional.”

On the face of the record it is established that after the indictment was served in 2014 (the government analyst report is dated **21.8.2012**) the prosecution had sufficient time to commence the trial. In the earliest trial dates there is no acceptable grounds on record for the absence of PW 1, only that PW 1 is not there. This is not an acceptable position. Furthermore, at one stage, it is on record that the State Counsel has given an undertaking to Court on **26.10.2018** that the case will commence with PW 2, however, went back on the commitment on the following trial date (**29.3.2019**) when PW 2 was present in Court. Already over one year has lapsed from that day. It is also apparent from the conduct of PW 1 that it is doubtful when he will be ready to give evidence in this case.

In **Attorney General vs Ediriweera** (supra) it was held;

“.....Delay is always a relative term and the question to be considered is not whether there was mere explicable delay , as when there is a backlog of cases, but whether there has been excessive or oppressive delay and

this always depends on the facts and circumstances of the case.....”

When considering the facts of this case, the delay of seven years from the date the suspect, now the accused, was remanded can fall in to the category of excessive and oppressive delay in my considered opinion.

In the above circumstances, as Justice *Edirisuriya* decided in *Neville Fernando vs O.I.C Terrorist Investigation Unit* CA 44/02 , HC Negombo B 24 , referred to in the decision of Justice *Eric Basnayake* in *Cader (on behalf of Rashid Kahan) vs O.I.C Narcotics Bureau* [2006] 3 SLR in page 74 at page 77, “ends of justice will be met by granting bail’ in the instant case.

However, considering the gravity of the offences, the quantity of the substance, and the sentence that has to be imposed if convicted, the following bail conditions are imposed.

1. Cash bail of Rs 400,000/=.
2. Surety Bail to the value of Two Million with Two sureties capable to sign bonds with properties valued over Rs 2,000,000 each.
3. The accused to handover his passport to courts if he is possessed with a passport.
4. The Immigration and Emigration department to be notified not to issue a passport without clearance from Courts.
5. Accused to report to the O.I.C Police Narcotics Bureau between 9 am and 1 pm on the last Sunday of each month.
6. The suspect advised not to interfere with witnesses and to be present on all court days.
7. Violation of any one of the bail conditions will result in the cancellation of bail.

The High Court of *Negombo* is directed to enlarge the accused on the above conditions and to take appropriate measures to conclude the trial expeditiously.

Registrar is directed to communicate a copy of this order to the OIC Police Narcotics Bureau and the Registrar High Court *Negombo*.

Application is allowed.

JUDGE OF THE COURT OF APPEAL

K.K.Wickremasinghe,J

I Agree

JUDGE OF THE COURT OF APPEAL