

**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 of the Democratic  
Socialist Republic of Sri Lanka.

C.A. Revision Application No:  
CA (PHC) APN 179/2017

H.C. Negombo Case No: HCAB 55/2017

M.C. Negombo Case No: B/3691/2015

Mallawa Arachchige Samantha  
Kumara,  
No. 36/30 E, Kothalawalapura,  
Dumriya Niwasa,  
Rathmalana.

**Petitioner**

Vs.

1. O.I.C.  
Police Narcotic Bureau,  
Colombo 01.

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

**Respondent**

BEFORE : K. K. Wickremasinghe, J.  
Janak De Silva, J

COUNSEL : AAL Seevali Amithirigala with AAL H.  
Kumudu Wijesuriya, AAL Pathum Wijepala

and AAL Tharana Karunathilake for the  
Petitioner

Nayomi Wickremasekara, SSC for the  
Respondent

INQUIRY ON : 05.09.2018

WRITTEN SUBMISSIONS : The Petitioner – On 04.10.2018

The Respondent – On 15.10.2018

DECIDED ON : 02.11.2018

**K. K. WICKREMASINGHE, J.**

The petitioner filed this revision application seeking to set aside the order of the Learned High Court Judge of Negombo dated 29.05.2017 in Bail Application No: HCAB 55/2017.

**Facts of the Case:**

The petitioner was arrested with another on 23.12.2015 with a quantity of Heroin 497g and 600mg and was produced before the Learned Magistrate of Negombo under case No. 3691/15. Thereafter the petitioner was remanded. The Government analyst's report indicated that the amount of pure heroin was 158.65 grams. The wife of the petitioner had filed a bail application in the High Court of Negombo on behalf of the petitioner and the Learned High Court Judge had refused the same on 14.12.2016. Another bail application was filed before the same Court on 14.02.2017 since the indictment was not filed by that time. The Learned High Court Judge dismissed the said application on 29.05.2017 as there were no exceptional circumstances to grant bail.

Being aggrieved by the said dismissal, the petitioner filed a revision application in this Court seeking to revise the order of the Learned High Court Judge of Negombo dated 29.05.2017.

The Learned Counsel for the petitioner submitted that the order of the Learned High Court Judge was contrary to law since the Learned High Court Judge had failed to consider that the petitioner had no previous convictions and/or pending cases.

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. The requirement of exceptional circumstances is stated in section 83 of the said Ordinance as amended by the Poisons Opium and Dangerous Drugs [amendment] Act No.13 of 1984.

In the case of **Labyndarage 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...”*

In the case of **Attorney General V. S.R. Dammika Gunawardene [CA (PHC) APN 151/2016]**, it was held that,

*“In the case of Mohamed Shiyam, it was held that for an offence of committed under the above act, section 83 of the said act will be applicable*

*and according to section 83, bail will be granted only on exceptional circumstances.*

*In the case of CA (PHC) APN 119/2009 a case where the quantity was 4.7 gms. It was held that "the first ground the fact that the suspect had been on remand for over 4 years cannot be taken as constituting the exceptional circumstance in view of the punishment that could be imposed for an offence of this nature where the charge carries a sentence of life imprisonment or death..."*

The Learned Counsel for the petitioner has submitted the case of **C.A. No. 53/2000 (PHC)**, in which it was held that,

*"The suspect has no previous convictions or pending cases. Considering the long period of incarceration, we enlarge the suspect..."*

Accordingly the Learned Counsel for the petitioner contended that the time period of incarceration coupled up with other facts, such as having no previous convictions or pending cases would constitute an exceptional circumstance.

However, we observe that the suspect in the aforesaid case was taken into custody in connection with a fraud at the State Mortgage Bank. The petitioner of the instant revision application had been remanded for offences of trafficking and possession of heroin under the Poisons Opium and Dangerous Drugs Ordinance. Therefore the gravity and the nature of the offences and the punishments to be imposed are different in both cases.

In the case of **Ranil Charuka Kulathunga V. AG [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...”*

Therefore we are mindful that there is a higher risk of absconding since the punishment to be imposed if convicted is death sentence or life imprisonment.

The Learned Senior State Counsel for the respondent has submitted that the indictment was sent to the High Court of Negambo on 12.12.2017. Presently the case has been fixed for hearing on 09.01.2019.

The Learned Counsel for the petitioner has submitted following two cases in support of his contention;

**1. Gurusamy V. Ramalingam [CA. 119/2000]**

**2. W. Neville Fernando V. O.I.C., Terrorist Investigation Unit [CA. 44/2002]**

In these two cases suspects were released on bail. However in the case of **Cader (on behalf of Rashid Kahan) V. Officer in Charge, Narcotics Bureau (2006) 3 SLR 74**, Justice Basnayake, observed as follows;

*“In Gurusamy vs. Ramalingam, the facts are as follows:*

- \* The quantity of heroin in possession - 6.2 grams.*
- \* The period of remand - 23 months.*
- \* The Government Analyst's Report was sent on 31.07.2001*
- \* There were neither previous convictions nor pending cases.*

*\* The indictment had not been sent although the State Counsel was given five dates to forward the same.*

*The Court of Appeal in their Order did not refer to any of the above facts constituting exceptional circumstances, but bail in a sum of Rs. 100,000/- cash bail "considering the long period of remand". In **Neville Fernando vs. O. I. C. Terrorist investigation Unit** the Court of Appeal on 6.2.2003 enlarged the suspect on cash bail in a sum of Rs. 50,000/- in addition to other conditions. The facts in this case are:*

*\* The suspect was taken in to custody with 14 Kilo grams of heroin*

*\* The suspect had been on remand for a period of one year ten months.*

*\* The Indictment had already been dispatched to the relevant High Court*

*The learned Counsel for the suspect submitted to court that trial would not be taken for at least five months due to the heavy trial roll. His Lordship Justice Edirisuriya held that "ends of Justice will be met by granting bail" and again the court does not refer to any of the above facts constituting exceptional circumstances.*

*...In the six cases mentioned above, it was only in one case the court considered the facts constituting exceptional circumstances in granting bail. In all the other cases the court refrained from referring to a specific ground as constituting exceptional circumstances. Therefore, the question is, should the facts of those cases be considered as constituting exceptional circumstances? In Milroy Fernando's case the court allowed bail after considering the extent to which the suspect had been involving in the*

*commission of the crime. Could we consider the period in remand as a ground constituting an exceptional circumstance? Provision has been made in the Bail Act to release persons on bail if the period of remand extends more than 12 months.. No such provision is found in the case of Poison, Opium and Dangerous Drugs Ordinance. Although bail was granted in some of the cases mentioned above. None of these cases refer to the time period in remand as constituting an exceptional circumstance. Hence bail cannot be considered on that ground alone. It appears from the cases cited above that there is no guiding principle with regard to the quantity found either. The fact of dispatching the indictment too cannot be considered either for or against the granting of bail. In one of the cases mentioned above, the fact of not sending the indictment was considered in favor of granting bail while in another case, sending the indictment was not considered to refuse bail...” (Emphasis added)*

We agree with the observation of the Justice Basnayake in the aforesaid case. We are of the view that a suspect of a case is not entitled to bail merely because another suspect was granted bail in a previous heroin case. A wide discretion has been vested with Courts in deciding what constitutes exceptional circumstances since statutes do not precisely define the same.

In the case of **Ramu Thamocharampilla V. Attorney General (2004) 3 Sri. L.R. 180**, it was held that,

*“The decision must in each case depend on its own peculiar facts and circumstances. But in order that like cases may be decided alike and that there will be ensured some uniformity of decisions it is necessary that some guidance should be laid down for the exercise of that discretion...”*

However we are unable to find any guidelines on exceptional circumstances from the case of *Wasantha Neville Fernando* since Justice Edirisuriya had not laid down the same. In the said case it was held that,

*“Having considered the submissions made by Mr. Kulatunga I am of the view that the ends of Justice will be met by granting bail to the suspect...”*

We are not given the opportunity of knowing the submissions which satisfied that Court to grant bail. Therefore we are not inclined to grant bail in the instant application following the aforesaid decision, simply because both cases are under the Poisons Opium and Dangerous Drugs Ordinance. It is our considered view that each Court has discretion to decide what constitutes exceptional circumstances depending on the facts of each case.

In the case of **Rasheed Ali v. Mohamed Ali (1981) 2 SLR 29** it was held that,

*“It is well established that the powers of revision conferred on this Court are very wide and the Court has the discretion to exercise them whether an appeal lies or not or whether an appeal where it lies has been taken or not. But this discretionary remedy can be invoked only where there are exceptional circumstances warranting the intervention of the Court...”*

Further we observe that by the time the Learned High Court Judge considered the second bail application, remand period of the petitioner was one year and 04 months.

In the case of **Labukola Ange Wisin Gedara Ashni Dhanushika V. AG [CA (PHC) APN 4/2016]**, it was held that,

*“In the present case the petitioner failed to establish any exceptional circumstances warranting this court to exercise the revisionary jurisdiction.*



*The petitioner's first point is that the suspect is in remand nearly for two years. The intention of the legislature is to keep in remand any person who is suspected or accused of possessing or trafficking heroin until the conclusion of the case. The section 83(1) of the Act expresses the intention of the legislature..."*

Accordingly the Learned High Court Judge was correct in refusing to consider the incarceration period as an exceptional circumstance. We are of the view that the Learned High Court Judge would get a better opportunity to consider enlarging the petitioner on bail when the trial commences in January 2019.

In the case of **Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284**, it was held that;

*"In any event to exercise revisionary jurisdiction the order challenged must have occasioned a failure of justice and be manifestly erroneous which go beyond an error or defect or irregularity that an ordinary person would instantly react to it - the order complained of is of such a nature which would have shocked the conscience of court."*

In the case of **M.Roshan Dilruk Fernando V. AG [CA (PHC) 03/2016]**, it was held that,

*"It is settled law that the extraordinary jurisdiction of revision can be invoked only on establishing the exceptional circumstances. The requirement of exceptional circumstances has been held in a series of authorities."*

In the case of **Dharmaratne and another V. Palm Paradise Cabanas Ltd (2003) 3 SLR 24**, where it was held that,

*"Existence of exceptional circumstances is the process by which the court selects the cases in respect of which the extraordinary method of*

*rectification should be adopted. If such a selection process is not there revisionary jurisdiction of this court will become a gateway of every litigant to make a second appeal in the garb of a Revision application or to make an appeal in situations where the legislature has not given a right of appeal... ”*

We do not see any illegality, irregularity or defect in the order of the Learned High Court Judge of Negombo dated 29.05.2017. Therefore we affirm the same. However we reserve the right to the petitioner to make another bail application before the High Court when the trial commences.

The revision application is hereby dismissed without costs.

**JUDGE OF THE COURT OF APPEAL**

**Janak De Silva, J.**

I agree,

**JUDGE OF THE COURT OF APPEAL**

Cases referred to:

1. Labyndarage Nishanthi V. Attorney General [CA (PHC) APN 48/2014]
2. Attorney General V. S.R. Dammika Gunawardene [CA (PHC) APN 151/2016]
3. C.A. No. 53/2000 (PHC)
4. W. Neville Fernando V. O.I.C., Terrorist Investigation Unit [CA. 44/2002]
5. Ranil Charuka Kulathunga V. AG [CA (PHC) APN 134/2015]
6. Cader (on behalf of Rashid Kahan) V. Officer in Charge, Narcotics Bureau (2006) 3 SLR 74

7. Ramu Thamothersampillai V. Attorney General (2004) 3 Sri. L.R 180
8. Rasheed Ali v. Mohamed Ali (1981) 2 SLR 29
9. Labukola Ange Wisin Gedara Ashni Dhanushika V. AG [CA (PHC) APN 4/2016]
10. Bank of Ceylon V. Kaleel and others [2004] 1 Sri L R 284
11. M.Roshan Dilruk Fernando V. AG [CA (PHC) 03/2016]
12. Dharmaratne and another V. Palm Paradise Cabanas Ltd (2003) 3 SLR 24