

CADER (ON BEHALF OF RASHID KAHAN)**VS****OFFICER - IN - CHARGE NARCOTICS BUREAU**

COURT OF APPEAL.

BALAPATABENDI J. (P/CA)

BASNAYAKE J.

CA 123/2005.

HC CHILAW HCBA 144/2004.

DECEMBER 8, 2005.

APRIL 24, 2006.

Poisons, Opium & Dangerous Drugs Ordinance amended by Act No. 13 of 1984 sections 54A, 54B 83-Bail refused by High Court - No exceptional circumstances - Period in remand-Is it a ground constituting an exceptional circumstance?-Bail Act - Does the suspect have a right of appeal against the refusal of bail by High Court? - High Court (Special Provisions) Act, 19 of 1990- Constitution-Article 154 P (3), Code of Criminal Procedure Act section 331-When does revision lie?

The petitioner seeks to revise the order of the High Court Judge refusing bail and to have the suspect released on bail. The charge was under the Poisons, Opium and Dangerous Drugs Ordinance for possession of 1490 Kg of heroin.

HELD:

- (1) Bail with regard to persons suspected or accused of offences involving possession of heroin is set out in section 83 where the accused could be released on bail in exceptional circumstances.
- (2) Exceptional circumstances have not been defined in the statute.
- (3) 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 Poison, Opium and Dangerous Drugs Ordinance.

Per Eric Basnayake. J. :

"These type of offences affect the society at large. The law should not be made impotent that it does not serve the Society and the anti-social elements should not be given licence to create havoc in Society."

- (4) Orders refusing to grant bail are considered as final Orders against which appeals lie. No appeal was filed in these cases and no reasons are given why he did not lodge an appeal. The petition was filed after four months and twenty days after the High Court pronounced its order and no exceptional circumstances have been mentioned.

Per Eric Basnayake. J. :

"Revision like an appeal is directed towards the correction of errors, but it is supervisory in nature and its object is due administration of justice and not primarily or solely the relevancy of grievances of a party. Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice".

APPLICATION in revision from an order of the High Court of Chilaw.

Cases referred to :

- (1) *Milroy Fernando vs. A. G.* CA Bail 542/90- H. C. Chilaw AB 2/89
- (2) *O. I. C. Police Narcotics Bureau vs Kanahala Gamage Suneetha*
(CA Rev. 3/2002, H.C. Colombo - BA 454/02)
- (3) *Gurusamy vs Ramalingam* CA 119/2000, HC Colombo 322/02
- (4) *Nevile Fernando vs. O. I. C. Terrorist Investigation Unit* CA 44/02,
HC Negombo B 24
- (5) *Abdul Cader Mohamed vs O. I. C. Police Narcotics Bureau* CA
PHC APN 209/2003
- (6) *Mohamed Siddik vs. O.I.C North Crime Division Peliyagoda* CA
(PHC) APN 150/2003) HC Colombo 1488/03
- (7) *In re Charles Rose* 14 Times LR 213
- (8) *Hikayat Singhe Vs Emperor* AIR 1932 pg 209
- (9) *Ram Chandra vs State* AIR 1952 MB 203 at 204

- (10) *State vs Veerapandy* 1979 cr. L. J. 455 at 458 (Mad)
- (11) *Emperor vs H. L. Hatchinson* ALR 1931 ALL 356 at 358
- (12) *Nagendra Nath vs King Emperor* AIR 1924 Cal 476
- (13) *Queen vs Liyanage* 65 NLR 2
- (14) *Madan Mohan Singhe vs State of Ultra Pradesh* 1986 Cr LJ 1441 at 1444 (All)
- (15) *Abdul Hamidkhan Pathan & etc vs State of Gujarat and Others* 1989 Cri L. J. 468 at 476 Guj
- (16) *Anuruddha Ratwatte and Others vs A. G.* 2003 2 SLR 39
- (17) *AG vs Gunawardana* 1996 2 SLR 149 at 156
- (18) *Colombo Apothecaries Ltd and Others vs. Commissioner of Labour* 1998 3 SLR 320
- (19) *In Re the Insolvency of Hayman Thornhill* 2 NLR 105
- (20) *Rustom vs Hapangama & Co* 1978 - 79 - 80) I SLR 356
- (21) *Gunawardana vs Orr* 2 ACR 172
- (22) *Ameer vs Rasheed* 6 CKLW 8
- (23) *Perera vs Silva* 4 ACR 79
- (24) *Alima Nachiya vs Marikar* 47 NLR 82
- (25) *Fernando vs Fernando* 72 NLR 549
- (26) *Hotel Galaxy (Pvt.) Ltd. Vs. Mercantile Hotels (Management Ltd* 1987 1 SLR 5
- (27) *Vanik Incorporation Ltd vs Jayasekera* 1997 2 SLR 365

M. Jiffry for Petitioner.

Anoma de Silva SC. for Attorney General.

Cur. adv. vult.

March 16, 2006.

ERIC BASNAYAKE J.

The petitioner is seeking to revise the order of the learned High Court Judge dated 5.1.2005 and to have the suspect released on bail. The petitioner in his petition filed in the High Court of Chilaw stated that the suspect was a driver by profession. While returning from Mannar the van driven by the suspect was stopped and searched by the 1st respondent and thereafter the suspect and another were taken

in to custody while two others who travelled in the van escaped. The suspect was thereafter produced before the Magistrate of Puttalam and remanded on a charge of possession of heroin. The petitioner submitted that the suspect did not have in his possession any dangerous drugs. The petitioner alleged that the suspect had made arrangements to marry. Further that the suspect has no previous convictions and is a person of good character. The learned High Court Judge refused bail on the ground that there were no exceptional circumstances to release the suspect on bail.

The suspect was arrested on 12.08.2004 by the 1st respondent on a charge under the Poisons, Opium and Dangerous Drugs Ordinance as amended for possession of 1,490 kg of heroin. The pure quantity is said to be 334 grams. The petitioner states that the suspect is 26 years of age and the bread winner of the family and his dependents including his mother is undergoing immense hardship and suffering due to the incarceration of the suspect. The petitioner does not mention any grounds to revise the order of the learned High Court Judge.

The principles relating to bail in heroin cases

Bail with regard to persons suspected or accused of offenses involving the manufacturing, trafficking, importing or exporting or **possession of heroin, cocaine, morphine** or opium is set out in section 83 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act 13 of 1984 which is 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”

The exceptional circumstances have not been defined in the statute. I shall mention here some cases where bail has been granted. In *Milroy Fernando vs. Attorney General* ⁽¹⁾ the accused was taken in to custody

with three others for possession of 14 kilo grams of heroin. The following facts transpired in this case, namely:

- * Heroin was found among the bales of textiles stored in a boat.
- * The suspect was merely a workman in the boat.
- * The suspect had been in remand for a period of 16 months.
- * The Government Analyst's report is not as yet available.
- * Therefore the indictment cannot be ready in the near future.

The suspect was released on Rs. 100,000/- cash bail with several other conditions. In *O. I. C. Police Narcotics Bureau vs. Kanahala Gamage Suneetha*⁽²⁾ the suspect was released on bail in a sum of Rs. 100,000/- in addition to other conditions. The facts are as follows:-

- * The suspect was arrested with 134.1 grams of heroin
- * The suspect was in remand for a period of over one year.
- * Indictment had already been sent.
- * There were neither previous convictions nor pending cases.
- * The husband of the suspect too had been in remand.
- * The six year old child was left behind unattended.

The court considered as a special circumstance the fact that both parents had been in remand and their child was left unattended.

In *Gurusamy vs. Ramalingam*⁽³⁾ 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*⁽⁴⁾ 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 despatched 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 *Abdul Cader Mohamed vs. O.I.C. Police Narcotics Bureau*⁽⁵⁾ the accused was charged for aiding and abetting the commission of the offence. He was in remand for a period of one year and four months. As the State Counsel did not object to bail, the court without giving reasons, granted bail on 10.11.2003 in a sum of Rs.100,000/- cash bail with two sureties who should be government servants. In *Mohamed Siddik vs.O.I.C North Crime Division, Peliyagoda*⁽⁶⁾ the suspect was arrested with six others. Nothing was recovered from this suspect. Hence the court enlarged the suspect on bail in a sum of Rs. 75,000/- with other conditions. No reference was made to 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 despatching 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.

Heroin has become a menace in our society. It is not easily detectable. Due to the fact alone, the tendency to commit this kind of crime repeatedly has become feasible. The repetitive factor prevalent in this sort of crime and the difficulty of detection are significantly strong reasons for refusing bail in this type of cases.

It appears that the above cases do not lay down a rule with regard to allowing or refusing bail. Therefore the rules that govern bail in other cases become relevant. *In re Charles Rose*⁽⁷⁾, granting or refusing bail, courts generally take in to consideration the following points:

- (1) The nature of the accusation;
- (2) The nature of the evidence in support of the accusation;
- (3) The severity of the punishment which conviction will entail;
- (4) The chances of the accused absconding if released on bail;
- (5) The character, means and standing of the accused;
- (6) The danger of the offence being repeated or
- (7) Whether the accused, if released on bail is likely to –
 - (a) tamper with the prosecution evidence or
 - (b) to get up false evidence in support of the defence
- (8) Larger interests of the public

These are not exhaustive or inflexible tests. It was held that save in exceptional cases persons accused of crimes with long terms of imprisonment should not be released on bail. *Hikayat Sinhe vs. Emperor*⁽⁸⁾ *Ram Chandra vs. State*⁽⁹⁾ at 204.

if a prima facie case has been made out by the prosecution, and if there appear reasonable grounds for believing that the person accused has been guilty of an offence punishable with death or imprisonment for life, he shall not be released on bail pending disposal of the case, unless extraordinary circumstances intervene favouring the accused. (State vs Veerapandy⁽¹⁰⁾ at 458 (Mad)

The grant of bail should be the rule, refusal of bail should be the exception *Per Mukerji J in Emperor vs. H. L. Hutchinson*⁽¹¹⁾ at 358 *Nagendra Nath vs. King Emperor*⁽¹²⁾. *Sansoni J in Queen vs. Liyanage*⁽¹³⁾ said, however that **“it is not to be thought that the grant of bail should be the rule and the refusal of bail, the exception, where serious non bailable - offences of this sort are concerned; bail is in such cases granted only in rare instances and for strong and special reasons, as for instance where the prosecution case is prima facie weak”**.

In *Madan Mohan Singhe vs. State of Ultra Pradesh*⁽¹⁴⁾ bail was refused even after one year in remand, due to the nature of the offence committed, namely double murder and the nature of the evidence in support. It should not be forgotten that in murder cases the accused commits the murder of one or more, comparatively few persons, while those persons dealing with drugs are causing the death of a number of persons in the society and or ruining their lives. Thus they are a hazard to the society and if released on bail, they are likely to continue their nefarious activity of continuing the business of traffickking in intoxicants clandestinely. These types of offences affect the society at large. The law should not be made so much impotent that it does not serve the society, and the anti social elements should not be given

license to create havoc in society. Law should be interpreted in such a manner that it gives protection to the society from anti - social elements which create havoc. Otherwise lawlessness and anti - social elements would affect the fibre of the society as a whole (*Abdul Hamidkhan Pathan and etc. vs. State of Gujarat and Others* ⁽¹⁵⁾ 476.

When a person is found guilty of possessing heroin, anything more than 2 grams, the mandatory punishment is either death sentence or life imprisonment. The severity of punishment may be one reason to have the suspects in remand until the conclusion of the trial. Another reason would be the repetition of the crime without detection. It is not possible for the police to be behind a particular suspect. Unlike in any other crime where the traces could be left behind; for example in a murder case, a dead body in the most likely circumstance would be found. In cases concerning heroin the offence can be committed without being detected as there wouldn't be any traces. Therefore I am of the view that not having previous convictions and not having any cases pending cannot be considered as grounds when considering bail.

Does the suspect have a right of appeal against the refusal of bail by High Court?

Orders refusing to grant bail are considered as final against which appeals lie (*Anuruddha Ratwatte and Others vs. The Attorney General*)⁽¹⁶⁾

High Court of the Provinces (Special Provisions) Act, No. 19 of 1990 makes provision with regard to appeals. Section 9 of the Act is as follows:

Section 9 : Any person aggrieved by (a)

- (b) a final order, judgment or sentence of a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction conferred on it by

paragraph (3) (a) or (4) of the Constitution may appeal therefrom to the Court of Appeal.

Article 154P (3)(a) is as follows: Every such High Court shall-

- (a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province.

The procedure is laid down in section 331 of the Code of Criminal Procedure Act which is as follows : 331 (1) An appeal under this Chapter may be lodged by presenting a petition of appeal or application for leave to appeal to the Registrar of the High Court within fourteen days from the date when the conviction, sentence or order sought to be appealed against was pronounced (4) The petition of appeal shall contain a plain and concise statement of the grounds of appeal.

No appeal was filed in this case. Instead the petition in this case was filed on 25.05.2005 that is four months and twenty days after the High Court pronounced its order. The petitioner in his petition does not mention any grounds under which he is challenging the learned High Court Judge's order. He does not allege that the learned High Court Judge failed to consider any exceptional circumstances. No such exceptional circumstances have been mentioned.

The petitioner does not disclose any reasons why he did not exercise the appellate jurisdiction of this court.

Does revision lie?

Revision like an appeal, is directed towards the correction of errors, but it is supervisory in nature and its object is due administration of justice and not primarily or solely, the relieving of grievances of a party. An appeal is a remedy, which a party who is entitled to it, may claim to have as of right and its object is the grant of relief to a party

aggrieved, by an order of court, which is tainted by error. Revision is so much regarded as designed for cases in which an appeal does not lie. *Attorney - General vs. Gunawardena*⁽¹⁷⁾ at 156, *Colombo Apothecaries Ltd. and Others vs. Commissioner of Labour*.⁽¹⁸⁾ The power of revision vested in this court is discretionary. The power will be exercised when there is no other remedy available to a party. It is only in very rare instances where exceptional circumstances are present that courts would exercise powers of revision in cases where an alternative remedy has not been availed of by an applicant. In *Re the insolvency of Hayman Thornhill Rustom vs. Hapangama & Co*⁽²⁰⁾ *Gunawardena vs. Orr*⁽²¹⁾ *Ameer vs. Rasheed*⁽²²⁾ *Perera Vs. Silva*⁽²³⁾ *Alima Nachiya vs. Marikar*⁽²⁴⁾ *Fernando vs. Fernando*⁽²⁵⁾ *Hotel Galaxy (Pvt) Ltd. Vs. Mercantile Hotels Management Ltd.*⁽²⁶⁾.

Dr. Ranaraja J. observed in the case of *Apothecaries* that (supra) “the petitioners have without seeking the remedy by way of appeal available to them as of right, sought revisionary relief which this court considered misconceived in the circumstances. The petitioners have failed to satisfy this court that there has been a miscarriage of justice or any exceptional circumstances requiring this court to exercise its discretionary revisionary jurisdiction.” Revisionary powers should be exercised where a miscarriage of justice has occurred due to a fundamental rule of procedure being violated, but only when a strong case is made out amounting to a positive miscarriage of justice. (*Vanik Incorporation Ltd vs. Jayasekera*).²⁷

The petitioner in this case had failed to exercise the statutory power that was available to him. He had failed to mention the grounds of appeal. He had also failed to mention any exceptional circumstances in order to come by way of revision. Due to the above reasons this application is refused.

BALAPATABENDI J. — I agree.

Application refused.