

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST**  
**REPUCLIC 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 read with section 404 of the code of criminal procedure ACT No. 15 of 1979.

CA (PHC) APN - 67/2014

High Court Negombo

Case No. **BA 169/2009**

Magistrate's Court Negombo

Case No. B 3307/2007

W.A.Chamila Sudarshani Fernando  
301/21, H.A. Perera Road, Modara,  
Colombo - 15.

**PETITIONER**

Vs.

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

**REOPONDENT**

Thelpe Upananda

**ACCUSED**

(Presently at Remand Prison)

**RESPONDEND**

**Before : W.M.M.Malanie Gunarathne, J**  
**: P.R.Walgama, J**

**Counsel : Tenny Fernando for the Petitioner.**  
**: Himali Sayanetti SC for A.G.**

Argued on : 27.05.2015

Decided on : 30.07.2015

CASE NO- CA (PHC) APN- 67/2014- ORDER- 30.07.2015

**P.R.Walgama, J**

The petitioner by way of her Petition tendered to this Court had moved for bail in terms of Section 404 of the Criminal Procedure Code to the accused in case bearing No. 169/2009, in the High Court of Negombo. The Petitioner is the legal wife of the said accused. He stood indicted in the above case under Section 54 A (c) and 54 A (b) of the Dangerous Drugs

and Opium Act as amended by Act No. 13 of 1984, for possessing and trafficking 92.4 grams of heroin.

#### Section 404

“the amount of every bond executed under this chapter shall be fixed with due regard to the circumstances of the case and shall not be excessive, and notwithstanding any thing to the contrary in this Code or any other law, the Court of Appeal may in any case direct that any person in custody, be admitted to bail or that bail fixed by the High Court or Magistrate be reduced or increased ,or that any person enlarged on bail by a Judge of the High Court or Magistrate to be remanded to custody.”

It is submitted by the Petitioner that the Accused was arrested on the 28<sup>th</sup> of September 2007 at the Bandaranayake International Airport by the officers attached to the Police Narcotic Bureau, and was produced before the Magistrate of Negombo and thereupon was remanded.

The Hon. Attorney General has filed the indictment and the trial is now in progress. After the indictment was served on the Accused the Petitioner has moved for bail on four occasions, but was unsuccessful in her attempts.

It is salient to note that the court can admit an accused to bail, who is in remand on a charge of above nature, only in terms of Section 83 of the Dangerous Drugs and Opium Act, on

establishing exceptional grounds as postulates in the above section.

In the instant matter the Accused had been in remand well over 7 ½ years, and had kept without continuing with the trial for 3 ½, even after serving the indictment.

In the above setting and to buttress the position of the Petitioner the Learned Counsel has alluded to many cases decided on the identical issue where the accused was admitted to bail. Nevertheless a cursory glance at the cases cited by the Counsel are mainly on a different footing.

Further it is noted that the Petitioner has come by way of a revision against the order dated 27.08.2013 of the Learned High Court Judge, by which order bail has been refused. It is apparent that the Petitioner has made the instant application for bail after 10 months from the date of the order. It is contended by the Counsel for the Respondent that said delay has not been explained by the Petitioner, and the Petitioner has not established any exceptional circumstance which warrants the exercise the revisionary jurisdiction of this court.

In addition to the afore said the Learned High Court Judge has considered the fact, that the Accused has a previous conviction, in refusing bail.

The fundamental ground on which the Counsel for the petitioner has urged for bail is the long period of

incarceration. But it is viewed from the proceeding that the trial has commenced and is now in progress. Hence the conclusion of the same may not take a long period. Therefore this court is of the view that if the Accused is admitted to bail his tendency to commit the same cannot be prevented.

Therefore it is obvious that in the cases cited by the Counsel for the petitioner, even this court has granted bail in certain cases on different considerations.

It is trite law that Court should adhere to the Section 83 of the above Act when granting bail for an Accused charged under Section 54 A or 54 B of the said Act.

#### Section 83

“No person suspected or accused of an offence under Section 54 A or 54 B of this Ordinance shall be released on bail, except by the High Court in exceptional circumstances.”

The cardinal principle that was recognized in the above Section 83 was the proof of the existence of exceptional circumstances, in releasing an Accused on bail.

It is pertinent to note that 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 line of authorities which has identified what creates exceptional circumstances are been followed by this Court, in granting bail on appropriate situation. In the benchmark decision in the case of RAMU THAMODARAMPILLAI .VS. THE ATTORNEY GENERAL, (2004) 3 SRI.L.R. 180 has dealt with identical issue and had observed thus;

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

The above principle is also enshrined in the case of MOHOMED SHIYAM .VS. THE ATTORNEY GENERAL decided on 29.03.2006. held, that for an offence committed under Section 54 A and 54B of the above Act, it is Section 83 of the said Act will be applicable, and only on exceptional circumstances the court can admit the accused to bail. The determination of Their Lordships were, that it is the Section 83 of the above Act will apply, which means the bail could be granted only on exceptional circumstances. Therefore it is obvious that the Legislature has recognized the unfettered discretion vested in court in deciding what constitute exceptional circumstances when granting bail to an Accused charged under the above sections in the said Act.

For the foregoing reasons this Court is of the view, that the reasons adduced by the Petitioner as exceptional do not buttress the petitioner's position to get relief as prayed for in the petition.

Thus Petitioner's application for bail is dismissed without costs.

Application is dismissed accordingly.

**JUDGE OF THE COURT OF APPEAL**

W.M.M.Malanie Gunarathne, J

I agree.

**JUDGE OF THE COURT OF APPEAL**