

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

*In the matter of an application for
bail in terms of Section 10 (1)(a) of
the Assistance to and Protection of
Victims of Crimes and Witnesses
Act, No.4 of 2015.*

**Court of Appeal:
BAL-0035-20**

**Magistrate's Court of Matale:
B 807/2020**

The Officer in charge
Police Station
Matale.

Complainant

- Vs.
1. Kudanuge Darshana Upul
Kumarasiri alias Pathum
 2. Dambarawe Gedara Sujeewa
Premasiri alias Indika

Suspects

AND NOW BETWEEN

Kudanuge Darshana Upul
Kumarasiri alias Pathum

(Presently at Pallekale Prison)

1st Suspect-Petitioner

Vs.

1. Officer in Charge,
Police Station,
Matale.

Complainant-Respondent

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

Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Duminda De Alwis with Chamini De
Alwis for the Petitioner
Chathuri Wijesuriya, SC for the
Attorney General

Argued on : 28.04.2021
:

Decided on : 11.05.2021

Iddawala – J

The 1st suspect petitioner (hereinafter referred to as the petitioner) of this case has made this bail application in terms of section 10(1) (a) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No.4 of 2015 (hereinafter referred to as the Witnesses and Victims Protection Act).

The petitioner has been made the second accused of the Case 62/2018 in High Court of Matale for allegedly committing offences under the Sections 296 and 380 of the Penal Code. On or about 27.11.2019, the petitioner, together with the first accused, has allegedly threatened a witness of the said High Court Case. Accordingly, he has been arrested on 11.07.2020 for committing an offence punishable under the Section 8(1) (a) Witnesses and Victims Protection Act and action has been instituted against him regarding the alleged incident under the case B 807/2020 in the Magistrate Court of Matale.

According to the Petition, on 27.11.2019 Chandra Kumarihami, the prosecution witness No.1 of the Case No 62/2018 of High Court Matale

lodged a complaint at the Matale Police Station stating that a three wheeler approached with two men and threatened her while she was walking out of the court premises. She has identified those two men as the first and second accused of the High Court case. Following her complaint the two suspects made a statement to the Police Station on 02.12.2019, and in their statements they have admitted meeting with the complainant but denied having threatened her.

Subsequently on 04.12.2019, the complainant (witness No 1 of the High Court case) has indicated that no further investigation by the Police is required regarding the incident, as her intention of making the complaint was to inform the High Court of Matale about the said incident at its next proceedings of the case.

On 20.07.2020, she made another complaint alleging that the first accused of the High Court case threatened her again at the court premises and the second accused of the case, i.e the petitioner of this instant case was not present at the time of this incident. Accordingly, further action has been instituted against the first accused of the High Court Case under case B 860/2020 in the Magistrate Court of Matale concerning this latter incident

Thereafter, the first suspect petitioner was taken into custody on 11.07.2020 based on the complaint made on 27.11.2019 ,after seven months from the date of complaint, under section 8(1)(a) of the Witnesses and Victims Protection Act.

In terms of the Section 10(1) (a) of the Witnesses and Victims Protection Act, an offence under section 8 or 9 shall be cognizable and non-bailable and no person suspected, accused or convicted of such an offence shall be enlarged on bail, unless under exceptional circumstances by the Court

of Appeal. Accordingly, the provisions of the Bail Act, No.30 of 1997 have no application to the offences under the Witnesses and Victims Protection Act which is clearly stated in the Section 3 of the Bail Act as well.

Therefore, the Legislature's intention in laying down these provisions is clear that the people charged with these types of offences, *should* be denied bail unless they can demonstrate exceptional circumstances. At the time of the enactment of this law, the legislators considered the problems faced by the victims and witnesses of crimes, such as threats, harassments, intimidations, retaliations or reprisals and other criminal offences. These are purported to dissuade them from coming forward complaining to the police and testifying in courts or as a punishment for complaining and testifying, thus hindering the effective administration of justice.

These considerations have been clearly included in the Victims and Witnesses Protection Act where the objectives of the Act emphasize the upholding of the rights and entitlements of the victims and the witnesses and providing for proper mechanisms to promote, protect and enforce such rights and entitlements.

However, the courts have to have a more cautious approach when dealing with bail applications under this particular law. In such applications it is necessary to strike a balance, as far as that can be done, between protecting the rights of the victims, witnesses and safeguarding the proper administration of justice and ensuring the liberty of the individuals.

In the exercise of its discretion in granting bail under exceptional circumstances, the courts will accord recognition to the right to freedom which is protected by the Constitution itself, the supreme law of the country. The Article 13(4) of the Constitution stipulate that 'the arrest, holding in custody, detention or other deprivation of personal liberty of a

person, pending investigation or trial, shall not constitute punishment’ while the Article 13 (5) emphasizes that “every person shall be presumed innocent until he is proved guilty”.

Moreover, while the Witnesses and Victims Protection Act ensures the rights and entitlements of the victims and the witnesses it also provides for the provisions to safeguard the rights of the suspects as well.

Section 10(2) of the Witnesses and Victims Protection Act requires that a trial against a person accused of having committed any offence under section 8 or under section 9 should be taken up before any other business of that court and shall be held on a day to day basis and not be postponed during the course of such trial, except due to unavoidable circumstance which shall be specifically recorded.

In that approach it should be considered what constitutes to be ‘exceptional circumstances’ that an accused an accused person who is charged with an offence referred to in the section 8 or 9 of the Witnesses and Victims Protection Act shall *satisfy* permitting his or her release in the interest of justice.

The word “*satisfy*” implies the onus that must be discharged by the accused/suspect person. Our courts have refrained from attempting to formulate a comprehensive definition of what constitutes “*exceptional circumstances*” as that would vary from case to case. Thus, a considerable degree of opportunity is given to an applicant of bail to establish exceptional circumstances which, case-by-case, may relate to the nature of the offence, the personal circumstances of the applicant, or anything else unusual, unique, exclusive or different that may warrant to his / her release.

On behalf of the first and second respondents, the learned State Counsel mentioned a case **APN 147/2017** CA minutes dated 01.03.2019, which was decided under section 83(1) of the Opium, Poisonous and Dangerous Drugs (Amendment) Act No. 13 of 1984. The facts of this case have no direct application to this instant case but it shows the mandatory requirement of existence of exceptional circumstances to the satisfaction of this court, to get released on bail under this specific law. As stated above under the provisions of Witnesses and Victims Protection Act ,the establishment of existence of ‘exceptional circumstances’ is compulsory to enlarge a suspect/accused on bail.

Accordingly, this court is vested with a wide discretion to grant or refuse bail under Section 10 (1) (a) of the Witness and Victims Protection Act. The discretion given by the law must be exercised judiciously and not arbitrary or capriciously.

As in the celebrated case of **R. v. Wilkes** 1770 Burr. at p.253 Lord **Mansfield C.J.** stated :

“It is indeed in the discretion of the Court to bail a person so circumstanced. But discretion when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by humour, it must not be arbitrary, vague and fanciful but legal and regular”.

In **Queen Vs Liyanage** 65 NLR 289 @ p 291-293 Sansoni J (as he was then) pointed out that

“In considering an application for bail, a court follows well-settled principles which have been laid down from time to time. Even if our discretion to grant bail is unfettered it must be still be judiciously

exercised..... But it is not be thought that the grant of bail should be the rule and the refusal of bail should be the exception where non bailable offences of this sort are concerned; bail in such cases granted only in rare instant and for strong special reasons, as for instance where the prosecution case is prima facie weak.”.

In **Ramu Thamotharampillai Vs Attorney General** (2004) 3 SLR 180 @ p190 held that

“Where a statute vests discretion in a court it is of course unwise to confine its exercise within narrow limits by rigid ad inflexible rules from which a court is never at liberty to depart nor indeed there be found any absolutes or formula which could invariably give an answer to different problems which may be posed in different cases on different facts. The decision must in each case depend on its own peculiar facts and circumstances.

In this present application, the petitioner has stated in his petition that -

- i. He is married and has a child of 3 years old.
- ii. He is the sole bread winner of this family.
- iii. Therefore, his wife and child are undergoing financial difficulties for their daily bread.

In addition, the following are the matters in brief, which the petitioner has submitted to this Court as exceptional circumstances for enlarging him on bail.

- i. The learned magistrate failed to hold a proper inquiry that a prima facie evidence exists against the petitioner in order to cancel the existing bail order and to commit him to the remand custody.

- ii. That the learned magistrate failed to consider that at the time of cancel of his existing bail, there was no proper investigation carried out but a mere complaint lodged by the aforesaid Chandra Kumarihami against the petitioner.
- iii. The police station of Matale had not held any inquiry and no further investigation carried out with regard to the complaint made by aforesaid Chandra Kumarahami.
- iv. The petitioner was arrested more than seven months after the complaint made.

The 1st complainant respondent and 2nd respondent filed their statement of objections along with documents marked R¹ to R⁸.

In general, when a bail application is considered the courts have to take into account a wide range of relevant factors which can be described as “*surrounding circumstances*”. But under this law, for a suspect to be enlarged on bail, there should exist exceptional circumstances, subject to the discretion of the Courts. As highlighted above, these exceptional circumstances should be based on the facts relating to each case, and one exceptional circumstance which can be considered in one case may not necessarily be an exceptional circumstance in another case.

The *surrounding circumstances* (relevant factors) which are submitted for consideration may not be exceptional circumstances singularly. However, when one or more surrounding circumstances are amalgamated and considered together, it can be constituted as an exceptional circumstance, depending of the nature of the case.

The first and the second exceptional circumstances mentioned by the petitioner are that the learned magistrate failed to hold a proper inquiry to satisfy whether any prima facie evidence exists against the petitioner.

In terms of **Section 10(3) of the Victims and Witnesses Protection Act:**

“If after an inquiry by a Court, it is found that there exists prima-facie material to conclude that a person who at the relevant point of time was on bail in respect of any offence alleged to have been committed by him, has committed an offence under section 8 or section 9, the bail granted to such person by the Court which conducted the inquiry shall be cancelled and such person shall be placed on remand till the end of the trial in respect of the offence which he had been enlarged on bail.”

After careful consideration of the above section, it is clear when a person is alleged to have been committed an offence punishable under section 8 and/or 9 of the Victims and Witness Protection Act, the courts need not have an inquiry before commit a suspect to the remand custody. The section 10(3) applies only when -

- i. Person who has already committed some offence and been enlarged on bail;
- ii. Has further committed an offence under Sect. 8 or 9 of Victims and Witness Protection Act.

In such circumstances, the courts shall -

- a) Conduct an inquiry
- b) Cancel the bail already granted
- c) Remand the suspect until the conclusion of that case.

Therefore, Section 10(3) does not preclude any Court from taking any action, without an inquiry, against the suspect on a charge under section 8 and 9 of the Victims and Witnesses Protection Act. In this instant case the complainant respondent filed a separate action under Case No.807/2020 in the Magistrate Court Matale. The suspect petitioner has been remanded for this particular case, but the original bail granted by the High Court has not been cancelled or varied.

Therefore, these exceptional circumstances Nos. (i) and (ii) stated in the petition has no application in this instance.

In this instant case, the first complaint was made by the said Chandra Kumarihami on 27.11.2019 (marked as R1 along with the objection of 1&2 Respondents) and the statements of the suspects were recorded on 02.12.2019 (R2 and R3). In the meantime, on 04.12.2019, complainant (witness No 1 of the High Court Case) informed the police that she did not wish the Police to hold further inquiry (R4).

However, after 7 months, on 11.07.2020, the first suspect petitioner was arrested based on the above complaint (R1).

The complainant (witness No 1 of the High Court Case) has made a further statement on 16.02.2021 (R8) in which she has clearly stated that both the first and second suspects of the High Court case No B 62/2018, were involved in the incident that took place on 27.11.2019, but only the first accused of the High Court Case was involved in the second incident that took place on 20.07.2020. It was revealed at the inquiry that; the petitioner was not brought to the High Court on 20.07.2020 due to the prevailing pandemic situation of the area, during that period. The R8 further reveals that the complainant (1st Witness of the High Court Case) was also

originally a suspect in that case and subsequently converted to be the 1st prosecution witness.

There is a clear distinction and difference in the descriptions of the incident explained by the complainant in her two statements (R¹ and R⁸).

In the second statement (R8) the presence of two police officers was mentioned at the time of the both incidents. However, this fact has not been stated in her first complaint made to the Police (R1) regarding the first incident and so far, no statements have been recorded from the two police officers mentioned therein. The 1st suspect petitioner was arrested more than seven months after the complaint was made and he has been held in remand custody for more than ten months without a charge being served under the Victims and Witness Protection Act.

I am of the view that the above combined *surrounding circumstances*, constitute an exceptional circumstance in this instant case. Therefore, in the interest of justice, this court inclines to enlarge the suspect on bail subject to the following stringent conditions: -

1. A cash bail of Rs. 20,000/-.
2. Surety bail of Rs. 50,000/- each with two sureties applicable to the learned Magistrate.
3. The suspect petitioner is directed to report to the Officer in Charge of the Police Station Matale on the first and third Sunday of every month between 8:30 am to 12:30 pm.

Further to above, the following conditions are imposed on the suspect petitioner in terms of section 10(b) of the Victims and Witness Protection Act:

- i. Prohibit communication or coming into close proximity of the witness/es or any other person/s connected to this case or High Court of Matale case No. bearing 62/2018
- ii. If the suspect petitioner violates any of the bail conditions mentioned above, he will be remanded until the final determination of the case.

Registrar of this Court is directed to send copies of this bail order to the learned Magistrate of Matale and to the relevant authorities.

Judge of the Court of Appeal

Menaka Wijesundera-J

I agree.

Judge of the Court of Appeal