

**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*

The Officer in charge
Police Station
Hikkaduwa.

Complainant

**Court of Appeal
Case No CA BAL 39/20**

Vs.

Hikkaduwa Widhanaralage
Don Chamal Niroshan
No. 140/B, Wewala
Hikkaduwa

**Magistrate's Court of Galle
Case No: B 25840/20**

(Presently at Galle remand Prison)

Suspect

AND NOW BETWEEN

Hikkaduwa Widhanaralage
Don Chamal Niroshan
No. 140/B, Wewala
Hikkaduwa

(Presently at Galle remand Prison)

Suspect -Petitioner

Vs.

1. Officer in Charge,
Police Station,
Hikkaduwa

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

Respondents

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Kaneel Maddumage with
Selvaraj Dushyanthen for the
petitioner

Chathurangi Mahawaduge State
Counsel for the 1st and 2nd
respondents.

Argued on : 08.06.2021

Written Submissions on : 15.06.2021

Decided on : 29.06.2021

Iddawala – J

The 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 Victims and Witnesses Protection Act).

The Petitioner has been made a suspect of the Case No: 23259 in Magistrate Court of Galle, for allegedly committing offences under the Sections 354, 314 and 410 read with Sections 140 and 146 of the Penal Code by kidnapping the virtual complainant of the said case and assaulting his vehicle on 17.11.2019 along with several other suspects including his brother. The brother, who is the first suspect of the case, has been arrested on 15.12.2019. The second suspect of the case was arrested and produced to court on 20.01.2020. However, although there have been several attempts to arrest the petitioner by the police they were reportedly unsuccessful.

Thereafter, the virtual complainant of the said original case (Case No: 23259) has complained to the police that the petitioner has inflicted death threats to the driver of the complainant through a phone call on 17.12.2019. Several B Reports have been subsequently filed reporting that the petitioner is evading the arrest.

A fresh B Report was filed by the Police on 31.01.2020 alleging that, *inter alia*, the petitioner has caused hurt to the virtual complainant of the above case using a sharp weapon on 27.11.2019 which is an offence punishable under the Sections 315 and 317 of the Penal Code. Accordingly, action was instituted against the petitioner under the case no: B 25840/20 in Magistrate Court of Galle which is the matter connected to this bail application.

The Petitioner has surrendered to the Court on 24.02.2020 by a way of motion filed by his Attorney-at-Law and has been ordered to be remanded until 02.03.2020. Accordingly, when the Petitioner was produced to the Court, the original B Report was amended to charge the petitioner under the provisions of the Victims and Witnesses Protection Act. Accordingly, he has been charged under Section 8(1) (a) of the said Act and had been detained in remand custody for 08 months.

Any suspect who is charged under the Victims and Witnesses Protection Act shall be enlarged on bail only under exceptional circumstances by this Court. **Section 10(1) (a)** of the Act states that:

“An offence under section 8 or 9 shall be cognizable and non-bailable and no person suspected, accused or convicted of such and offence shall be enlarged on bail, unless under exceptional circumstances by the Court of Appeal.”

In these circumstances, it is very clear that provisions of the Bail Act, No.30 of 1997 have no application with regard to the offences under the

Victims and Witnesses Protection Act. This contention is clearly recognized and indicated in the Section 3 of the Bail Act. Therefore, the petitioner has to satisfy this court that there are *exceptional circumstances* which can justify the granting of bail to him.

The term “exceptional circumstances” is not defined in the Victim and Witnesses Protection Act. It gives an onus to a suspect/accused to establish that there are some unusual, unique or uncommon circumstances surrounding his case before a court is convinced in releasing him on bail. Hence, this court cannot give a definite interpretation on what would amount to be “exceptional circumstances” that may lead to enlarge a suspect on bail. It depends on the circumstances of each case. Each application is decided on the particular facts of that individual case and no two cases are exactly the same. Therefore, “exceptional circumstances” is very subjective and court has to interpret each case according to the situation by exercising judicial discretion contrary to the general consideration of other bail applications where the courts take into account a wide range of relevant factors which can be described as “surrounding circumstances”. Therefore, a circumstance which can be considered as ‘exceptional’ in one case may not necessarily be an exceptional circumstance in another case.

However, it should be noted that, although the surrounding circumstances (relevant factors) of a case might not amount to be exceptional circumstances when considered separately, they may be constituted as exceptional circumstances when one or more such surrounding circumstances are amalgamated and considered together, depending of the nature of the case.

In this present application the petitioner has averred the following reasons as the exceptional circumstances warranting for his enlargement on bail.

1. He is 36 years old, married and father to a child of 1 year and five months old who was only 09 nine months. He is the sole bread winner of his family and his family is suffering from financial hardships while he is remand custody.
2. He himself surrendered to the court in the substantive case abiding the law.
3. 1st respondent has misused the provisions of Victims and Witnesses Protection Act with an ulterior motive to restrict the petitioner's liberty. His wife has made several complaints to the higher law enforcement authorities against the first respondent and several other police officers attached to the Hikkaduwa police station.
4. The learned Magistrate of Galle had failed to observe that the police had abused the provisions of the Act and the identification of the petitioner had not been properly established according to the initial B Report filed by the 1st respondent.
5. The investigations are still pending in the case B25840/20 and it has not been referred to the Hon. Attorney General for instruction or to prepare the indictment. Therefor the petitioner has no alternative to expedite the matter under section 10(2) of the Act.
6. He has been in remand custody for last 8 months at the time of this application.

Additionally, at the inquiry of this application the Counsel for the petitioner brought to the attention of the court that the petitioner has been held in remand custody for more than 15 months at the time of inquiry. He highlighted that even the relevant medical report concerning the alleged incident of causing hurt has not been prepared after a lapse of 15 months and emphasized that the due administration of the process has been delayed. He also argued and contradicted the position of the respondents

that the alleged offence of the petitioner fall within the ambit of the Victims and Witnesses Protection Act.

The 1st and 2nd respondents filed their statements of objection and strongly objected to the enlargement of petitioner on bail. The 2nd respondent objected on the ground that the instant bail application was made in terms of Section 10 (1) (a) of the Victims and Witnesses Protection Act, and the petitioner has failed to submit any exceptional circumstances which this court has to be satisfied to enlarge the petitioner on bail and petition should be dismissed *in limine*.

The Court should carefully consider the above listed circumstances in determining whether they qualify to be 'exceptional' as it is well highlighted that each case differs from the other depending on the facts. The long period in remand is listed in many bail applications as an exceptional circumstance warranting to a bail of a suspect. However, the period of incarceration, which is done out of a provision alone cannot be considered as an exceptional circumstance.

The Counsel for petitioner submitted a reported case of another division of this Court **CA/ BAIL/2/2020** -CA minutes dated 19.11.2020 where it was held that "*in the instant case the petitioner is in remand for over 12 months. It is also not clear if and when indictment will be served on the petitioner. Considering above in the interest of justice this Court decides to enlarge the petitioner on bail subject to stringent conditions*".

And in **CA/BAL/0024/2020** CA minutes dated 29.04.2021 the suspect was enlarged on bail after 2 years in remand custody.

In the case of CA **(PHC) APN 64/ 2009** CA minutes 07.08.2009 W.L.R Silva J held that:

“.....In any case, if the period of incarceration is out of a provision and depending on the nature of the charges the Court of course can consider on certain circumstances the long period of incarceration as constituting an exceptional circumstance.”

Contrary to this, another division of this Court in case **No. CA/BAL/ 36/2019** CA minutes dated 23.09.2020 did not grant bail to the suspects who had been in remand for nearly 13 months, depending on the circumstances of that case. When all these cases are carefully analyzed it is clear that the court has considered to enlarge or refuse a suspect on bail purely depending on the unique circumstances of each case.

In most of the bail applications, the petitioners list the situation of their families as a factor which constitute exceptional circumstance. However, a person getting married and having children or being a sole bread winner, in other words, leading a family life, are a part of a normal life style of a normal person which is banal in nature and not uncommon to be considered as exceptional. The hardships that imprisonment might impose on a suspect's family is not an exceptional circumstance by itself. In the judgment of **The Queen v Cornelis Silva** 74 NLR 113, it was stated that the grounds that are "*common to many accused persons*" will not be qualified to be considered as exceptional.

In **CA. No. BAL 34/2019** CA minutes dated 29th May, 2020, it was held that: *“.....personal circumstances as urged by the Petitioner, though entitled to sympathy of this Court, fail to satisfy the requirement as imposed on him by Section 10(1) (a) of Assistance to and Protection of Victims of Crime and Witnesses Act No.4 of 2015, making him entitle to be enlarged on Bail”.*

Moreover, the Counsel for the petitioner argued that the offence allegedly committed by the petitioner does not fall within the ambit of the Victims and Witnesses Protection Act. The Section 8 of the Act lays out that:

. (1) *Any person who-*

*(a) **threatens a victim of crime or a witness with injury to his person, reputation or property or to the person or reputation or property of any other in whom such victim of crime or witness has an interest, with the intention of causing alarm** to such victim of crime or witness or to cause such victim of crime or witness to refrain from lodging a complaint against such person with a law enforcement authority or testifying at any judicial or quasi-judicial proceedings or to compel such victim of crime to withdraw a complaint lodged or legal action instituted against such person ; or*

*(b) **voluntarily causes hurt to a victim of crime or a witness, with the intention of causing such victim of crime or witness to refrain from lodging a complaint against such person with a law enforcement authority, or testifying at any judicial or quasi-judicial proceedings or to compel such victim of crime to withdraw a complaint lodged or legal action instituted against such person, or in retaliation for a statement made or testimony provided by such victim of crime or witness in any court of law or before a Commission, against such person, commits an offence, and shall on conviction by a High Court, be sentenced to a term of imprisonment not exceeding ten years***

In this case there is a series of complaints against the petitioner alleging that he has threatened the driver of the victim of the Case No: 23259 and injured the victim with a sharp weapon. As highlighted above the provisions of the Act is wide enough to cover a range of offences committed against victims and witnesses and even against a property or anyone

whom they have an interest in. Therefore, the prima facie case against the petitioner, if proved, falls within the inclusive categories of offences listed in the Act without a room for doubt about its eligibility to be listed within the ambit of the Act.

This Act is a well-developed and advanced piece of legislation introduced as a long overdue reform to address the issues faced by the victims and witnesses of crimes. It purports to protect them from different offences committed to dissuade them from coming forward or actively engaged in the process of 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.

That is why the provisions of the Act reach a level of such comprehensiveness, to ensure that any type of offence against the victims and witnesses are not excluded and to deter any impact such offences might have on the proper administration of justice.

However, with effect to such strong provisions, the Act also lays down specific provisions to safeguard the suspects and accused as well, as the proper administration of justice includes the safeguarding of rights of all the parties involved.

Section 10(2) of the Witnesses and Victims Protection Act is as follows: -

“A trial against a person accused of having committed any offence under section 8 or under section 9 shall 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.”

Thus the Act gives due recognition to the Fundamental Rights entitled to any citizen as provided by the Constitution, the supreme law of the country. **The Article 13(4)** of the Constitution stipulates 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”*.

Accordingly, the Victims and Witnesses protection Act not only aims to safeguard the rights and entitlements of the victims and the witnesses against the offences, but also set up many procedures and establishments to expedite due process and smooth functioning of the crimes/actions of this nature. Hence a proper mechanism should always be in force in dealing with the process under this law and it should be applied fairly to all the parties in order to ensure that the purposes of the law are not by any mean defeated.

In view of that, an inordinate delay which cannot be justified, in the administration of justice should not be tolerated. The alleged incident in this instant case took place on 27.01.2020 (P10). However neither the Information Book Extracts (IBE's) have been finalized nor the Medical Report pertaining to incident have been filed even after a lapse of 15 months. This fact was brought to the notice of the court by the Counsel for the petitioner at time of inquiry and it was conceded by the State Counsel appearing for the respondents. Hence, it is obvious upon the above reasons that the indictment is not forwarded with regard to the instant case and it is also not clear if and when indictment will be served on the petitioner. In general, when there is no prima facie case against the accused /suspect or when there is any inordinate delay in the process which cannot be explained or justified, they can be considered as exceptional circumstances.

I am of the view in that circumstances, intervention of the court is permissible to use its discretion to enlarge a suspect on bail. Accordingly, this court is vested with a wide discretion to grant or refuse bail under Section 10 (1) (a) of the Victims and Witness Protection Act. The discretion given by the law must be exercised judiciously and not arbitrary or capriciously.

In that light, even though the most of the circumstances submitted by the petitioner may not amount to be exceptional circumstances when considered intrinsically, they incline to be relevant factors or surrounding circumstances which court may consider for bail application in general.

Therefore, I am of the view that the reasons set out above and the other combining 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. 30,000.00
2. Surety bail of 200,000.00 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 Hikkaduwa on every Sunday between 8:30 am to 12:30 pm.
4. Passport or any travel document belonging to the petitioner should be surrendered to the Magistrate Court Galle.

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:

1. Prohibit communication or coming into close proximity of the victim/s, witness/es or any other person/s connected to this case or connected cases.
2. 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 Galle and to the relevant authorities.

Judge of the Court of Appeal

Menaka Wijesundera - J

I agree.

Judge of the Court of Appeal