

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

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

Kodagodage Damayanthi  
Weerawansha  
No. 118/8 Rukgaha Thotupola Rd  
Kurusa Handiya,  
Alubomulla.

Court of Appeal

Case No:

**CA/PHC/APN/69/2021**

**Petitioner**

High Court of Panadura

Case No: 3701/2018

Magistrate Court of Panadura

Case No: 75756

**Vs.**

1. Hon. Attorney General,  
Attorney General's Department  
Colombo 12
2. Officer-in-charge Criminal  
Investigation  
Division Police Station  
Panadura South

**Respondents**

3. Pradeep Nishantha Kumara  
(Presently in Kaluthara Remand  
Prison)

**First Accused-Respondent**

**BEFORE** : Menaka Wijesundera J  
Neil Iddawala J

**COUNSEL** : Ajith P. Perera with Udara Perera for  
the petitioner.  
P. Abeygunawardena, SC for the  
respondent.

**Argued on** : 15.12.2021

**Decided on** : 10.01.2022

**Iddawala - J**

The petitioner of this instant 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 Witnesses and Victims Protection Act) requesting bail on behalf of her husband who is the first accused respondent (hereinafter referred to as the accused-respondent) of the instant matter.

Accordingly, the accused-respondent is alleged to have committed an offence that comes under the purview of section 8(1) of the Witnesses and Victims Protection Act by threatening a witness, namely Sakunthala Rajapaksha on 04.10.2019 during the time period prior to the commencement of court proceedings where she has been a prosecution witness under case no. 3701/2018 instituted in the High Court of Panadura against the accused-respondent for the offence of Procuration, an offence punishable under section 360 (A) 1 of the Penal Code (Amendment) Act No. 22 of 1995. As revealed at the inquiry, the accused-respondent was acquitted on 30.07.2021 by the High Court.

While, pending of the High Court case against the accused respondent, on 04.10.2019 the accused-respondent has been taken into remand custody and the

bail application made on behalf of the accused-respondent on 24.01.2020 has been subsequently rejected by the Learned High Court Judge of Panadura determining that the remand order made by the Learned Judge was made under the provisions of the Witnesses and Victims Protection Act.

Hence, the petitioner of the instant matter has filed this bail application before the Court of Appeal in terms of section 10(1) (a) of the Witnesses and Victims Act, No. 4 of 2015 invoking the jurisdiction of this Court whilst requesting bail on behalf of her spouse who is presently incarcerated at Kalutara Remand Prison.

In such a backdrop, when drawing attention to the relevant legal principles that govern the matter in question, reference can be made to section 3 of the Bail Act which provides as follows:

*“Nothing in this Act shall apply to any person accused or inspected of having commuted, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act. No 48 of 1979, Regulations made under the Public Security Ordinance or any other written law which makes express provisions in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law.”*

As such, section 10(1) (a) of the Witnesses and Victims Protection Act in the subject matter of granting of bail has expressly provided that,

*‘If an offence comes under the purview of section 8 or 9, such shall be cognizable and non-bailable and no person suspected, accused or convicted of such offence shall be enlarged on bail, unless under exceptional circumstances by the Court of Appeal.’*

Hence, it is to be noted that the petitioner of this case is legally required to satisfy this Court on the existence of exceptional circumstances that justify the granting of bail to the accused-respondent.

Accordingly, the petitioner in her bail application has relied upon the following

grounds as amounting to exceptional circumstances that warrants the grant of bail in favour of her petition,

1. The accused-respondent had met with an accident in 2006 where his spine was severely damaged and as a consequence, he is unable to walk properly and leading a miserable life.
2. Accused-respondent is 51 years of age and as the Kalutara remand prison is badly infected with covid-19, he finds it difficult to recover from the illness he is suffering thereby placing his life at a great danger.
3. The studies and mental health of his daughter has been severely affected by the prolonged remand imprisonment of the accused-respondent
4. The petitioner herself is a principal of a government school who is leading a respectable life
5. There are no previous convictions or any other pending cases against the accused-respondent
6. The order to remand the accused-respondent had been made by the learned High Court Judge of Panadura on the basis of CCTV footage where he could see but not hear any content of the alleged conversation
7. Mere recording of a statement in open court from an unreliable witness, who the petitioner claims to be a prostitution by profession does not amount to an inquiry by Court as envisaged under section 10(3) of the Protection of Victims and Witnesses Act.
8. If the seating arrangements were not changed due to covid and it remained as it was before where the accused and witnesses were segregated, the alleged incident would not have taken place inside the court premises.
9. The accused-respondent has been in remand for more than 26 months due to the collapse of the judicial and administration of justice system as a

consequence of covid-19 pandemic and it is not reasonable and justifiable to continue to keep the accused-respondent under such unusual circumstances, in a life threatening environment.

As observed above, section 10 (1) (a) of the Witnesses and Victims Protection Act stipulates that, an accused person who is charged with an offence referred to in section 8 shall be incarcerated unless he (or she) satisfies this court that exceptional circumstances exist, which in the interests of justice, permits his or her release.

It is important to note that the word “*satisfies*” implies that the onus is vested upon the petitioner to prove before the court with evidence as to the exceptional circumstances relied upon by such petitioner.

Our courts have refrained from attempting to formulate a comprehensive definition as to what would constitute “*exceptional circumstances*” as it would amount to an attempt to define the indefinable. A considerable degree of opportunity is given to an applicant of a bail application of the present nature to establish exceptional circumstances which, on a case-by-case basis, may relate to the nature of the offence, the unique personal circumstances of the applicant, or any other unusual or different circumstances that may warrant the grant of bail in favour of the applicant.

Hence, it is to be emphasized that the exceptional grounds submitted by the petitioner in the present matter shall be analysed on a subjective, case-by-case approach in order to ascertain whether such grounds would warrant the grant of bail to the accused-respondent.

At the outset, it is to be noted that the grounds averred by the petitioner with regard to the circumstances created by the Covid-19 pandemic, the negative implications of the psychological impact on the daughter of the accused-respondent due to the long period of remand of her father, does not amount to exceptional circumstances, but only amounts to surrounding factors that fail to singularly warrant the grant of bail.

At this juncture it is pertinent to note that the accused-respondent was acquitted from all charges in the substantive matter by order of the Learned High Court Judge of Panadura dated 30.07.2021. It is in such a context that the time period of incarceration of the accused-respondent must be analysed in order to determine whether such fact amounts to an exceptional factor that warrants the grant of bail.

Accordingly, the accused-respondent in the instant matter has been in remand custody for more than 26 months without the serving of an indictment or any indication as to the due completion of the investigation and the presentment of a progress report by the investigators. Furthermore, any reasonable justification explaining such prolonged procedural delay has not been presented before this Court by the State Counsel for the respondents.

Commenting on whether a prolonged period of time constitutes an exceptional circumstance warranting the grant of bail, the State Counsel appearing for the respondent relied on CA/PHC/APN/68/21 CA Minute dated 30/11/2021 where a bail application was refused in a case where the applicant was in remand custody for 7 years. It is the considered view of this Court that the said order has no application to the instant application as it concerned an accused-petitioner who was indicted under the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for the possession and trafficking of 6.9 Kilograms of Heroin, (which entails capital punishment or life imprisonment, if convicted), where the indictment had been duly served. Furthermore, it was a case where acceptable reasons were presented before the Court in explanation of the delay in the commencement of the trial.

Hence, it shall be noted that the facts of the instant matter and the facts of CA/PHC/APN/68/21 are fundamentally different from one another and cannot be held in comparison. Additionally, this Court would prefer to highlight the importance of considering each case by its peculiar facts when the grant/refusal of bail is considered. Each case presents itself with unique facts which must be duly analysed within the context of applicable statutory provisions and relevant judicial precedent.

When considering the totality of facts and circumstances presented before this Court, the following facts

- I. The conclusion of the substantive matter where the accused-respondent have been acquitted of all charges,
- II. The lack of undertaking/ assurance by the 1<sup>st</sup> and 2<sup>nd</sup> respondents on the possibility/timeline on when an indictment would be preferred against the accused-respondent,
- III. Incarceration of accused-respondent in remand custody for a period of 26 months without an indictment being served

are collectively created a serious impact on the integrity of the due administration of justice.

Nevertheless, it shall be noted that, according to the above facts of the present case, incarceration of accused respondent for more than 26 months itself does not necessarily amount to an exceptional circumstance that warrants the grant of bail to the accused-respondent but is the inordinate and unexplained delay in the process of administration of justice that creates an exceptional circumstance in favour of the accused-respondent in the instant matter.

Additionally, it is important to note that, when dealing with bail applications of this nature the courts are required to undertake a cautionary approach towards balancing and protecting the rights of the victims and witnesses while safeguarding the proper administration of justice and liberty of individuals.

In the exercise of its discretion in granting bail under exceptional circumstances, the courts will accord recognition to the Fundamental Rights guaranteed under Article 13 of Constitution, and also take note of section 10(2) of the Witnesses and Victims Protection Act that provides for the safeguarding of the rights of the suspects whilst ensuring the rights and entitlements of the victims and the witnesses.

Considering the above, in the interest of justice, this Court inclines to enlarge the accused respondent on bail subject to the following conditions: -

1. A cash bail of Rs. 25,000/-.
2. Surety bail of Rs. 50,000/- each with two acceptable sureties.
3. The accused respondent is directed to report to the Officer in Charge of the Police Station Panadura last Sunday of every month between 8:30 am to 12:30 pm.
4. The following conditions are imposed to the suspect respondent in terms of section 10(b) of the Witnesses and Victims Protection Act
  - i. Prohibit communication or coming into close proximity of the witnesses or any other persons connected to this case.
  - ii. Not to involve in any other criminal offences.
5. If the accused respondent 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 High Court and Magistrate Court of Panadura.

**Judge of the Court of Appeal**

**Menaka Wijesundera-J**

I Agree

**Judge of the Court of Appeal**