

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

In the matter of an Application for Revision under and in terms of Article 138 of the Constitution read together with Section 365 of the Code of Criminal Procedure Act No. 15 of 1979 against the order dated 11.06.2020 refusing bail by the Hon. High Court Judge of Kandy.

CA (PHC) APN 131/2020

High Court of Kandy Bail
Application No: Bail/172/2019

Magistrate's Court of Kandy No:
B/515/2019

Muruges Pille Kamalwathi,
No. 151, Helagolla Watta, Thalathuoya

Petitioner

Vs.

1. The Hon. Attorney General
Attorney General's Department,
Colombo 12
2. The Officer-in-Charge
Police Station, Pallekele

Respondents

Shanmugam Udaya Kumar (Currently
incarcerated in the Pallekele Remand Prison)

Suspect

AND NOW BETWEEN

Muruges Pille Kamalwathi,
No. 151, Helagolla Watta, Thalathuoya

Petitioner-Petitioner

Vs.

1. The Hon. Attorney General
Attorney General's Department,
Colombo 12
2. The Officer-in-Charge
Police Station, Pallekele

Respondent-Respondents

Shanmugam Udaya Kumar (Currently
incarcerated in the Pallekele Remand Prison)

Suspect-Respondent

Before: **Prasantha De Silva, J.**

K.K.A.V. Swarnadhipathi, J.

Counsel: Isansi Danthanarayana for the Petitioner.

C. Mahawaduge SC for the Respondent.

Argued on: 15.11.2021

Decided on: 07.02.2022

Prasantha De Silva, J.

Order

This is an Application for Revision against the Order made by the learned High Court Judge on 11.06.2020 refusing to grant bail for the Suspect, namely Shanmugam Udaya Kumar.

It appears that the Officer-in-Charge of the Police Station of Pallekele had received an information on 11.04.2019 from the Prison Authority of the Dumbara Prison saying that the said Suspect was caught with an illegal substance at the Dumbara Prison.

Thereafter, the Officer-in-Charge of Pallekele [hereinafter referred to as the 2nd Respondent] had gone to the Dumbara Prison and arrested the Suspect for possession of 5g 60mg of heroin.

Since possession of heroin is an offence punishable under and in terms of Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929 as amended by Act No. 13 of 1954, the 2nd Respondent reported facts and produced the Suspect before the Magistrate's Court of Theldeniya on 12.04.2019. The learned Magistrate had remanded the Suspect till 26.04.2019 and remanded further, extending the period consecutively until now.

Subsequently, on 11.07.2019, the Petitioner made an application for bail, on behalf of the Suspect, bearing No. HC/Bail/172/2019 to the High Court of Kandy on the following grounds.

- I. The Suspect was arrested upon the allegation of being in possession 5g 60mg of heroin under and in terms of Section 54A of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929 as amended by Act No. 13 of 1954;
- II. The Petitioner states that the Suspect was arrested while he was taking a parcel to a prisoner in Dumbara Prison as the person who was supposed to take the said parcel, who was a friend of the Suspect, was sick on that day and the Suspect was asked to take a parcel to the Dumbara Prison and that he was not aware of the contents of the said parcel;
- III. The Government Analyst's report dated 24.11.2015 relating to the productions of this matter has already been received and as per the said report, the pure quantity of heroin is of 4g 867mg;
- IV. The Suspect was a farmer, and he is the sole breadwinner of his family. As the Petitioner is unemployed, the Suspect was looking after the Petitioner and her parents, and they are facing a great hardship if bail is refused.

The said application for bail was supported before the learned High Court Judge of Kandy and submissions were made on behalf of the Petitioner as well as the 1st Respondent. Having considered the submissions by both Counsel, the learned High Court Judge refused the application for bail on 11.06.2019, stating that, since it's a case where the Suspect was arrested for being in possession of more than 4g of heroin and the Petitioner has failed to show cause any exceptional circumstances in order to enlarge the Suspect on bail.

Being aggrieved by the said Order of the learned High Court Judge, the Petitioner invoked the Revisionary Jurisdiction of this Court on the basis that the said impugned Order is wrong, illegal, irregular, malicious, capricious, arbitrary and bad in Law. Hence, the Petitioner had moved to set aside the said Order, and had prayed for bail to be granted to the Suspect on any condition acceptable to Court.

In view of Section 83 (1) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1954;

“A person suspected or accused of an offence under section 54A or section 54B shall only be released on bail by the High Court on exceptional circumstances”.

Moreover, the Suspect has to satisfy Court that there are exceptional circumstances to enlarge the Suspect on bail. Thus, it imposes a limitation on the discretion of Court.

It is important to note that the manner in which the Court has to exercise such discretion was emphasized in the case of *Ramu Thamocharampillai vs. Attorney-General [2004] 3 S.L.R 180*;

“Where a statute vests discretion in a Court, it is of course unwise to confine its exercise within narrow limits by rigid and inflexible rules from which Court is never at liberty to depart. Nor indeed can there be found any absolutes or formula which would 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. But in order that like cases may be decided alike and that there will be ensured some uniformity of decisions it is necessary that some guidance is laid down for the exercise of that discretion”.

Their Lordships have thought it fit to add that “...interferences with one’s occupation, professional activities, business or trade are not circumstances which ordinarily would entitle a person to be allowed to stand out on bail, where the charge is serious and the sentence is heavy. The fact that he has not been charged in any Court previously is also not a relevant circumstance”.

In identifying such instances, the Supreme Court had quoted the following dicta from the Judgment of *The Queen Vs. Cornelis Silva 74 N.L.R 113*, with approval, where *Weeramantry J.* stated, grounds that are “by no means extraordinary as it is common to very many accused persons” would not satisfy the citation of ‘exceptional circumstances’ which warrants the granting of bail.

The Court wishes to draw the attention to cases which established the exceptional circumstances relating to granting of bail under Section 83 (1) of the Poisons, Opium and Dangerous Drugs Ordinance.

In *Malimbada Pathiranage Sriyani Dhammika Vs. Attorney General CA (PHC) APN No.16/2012 CA minute dated 14.06.2012*, the allegations levelled against the Suspect were that she was in possession of 3.59g of heroin. The Suspect was in remand for over one year after the issuance of the Government Analyst’s report without being indicted in the High Court. In addition, the facts that the Suspect has no previous conviction or pending cases and that she is a widow, were also considered and the Suspect was enlarged on bail.

In the case of *Gurusamy vs. Ramalingam CA 119/2000, HC Colombo 3222/02*, facts in brief are as follows. The Suspect was arrested for being in possession of 6.2g of heroin and he had been in remand for 23 months. Though the Government Analyst’s report was received, the indictment had not been filed. There were no pending cases nor convictions against the Suspect. The Court of Appeal in their Order did not refer to any of the above facts constituting exceptional circumstances, but Suspect was enlarged on bail ‘considering the long period of remand’.

In view of the aforementioned decisions, Court has to ascertain whether the Petitioner has satisfied Court and has established exceptional circumstances, which would warrant the granting of bail.

The Petitioner states that the matters set out in Paragraphs 12 and 13 are exceptional circumstances that Court could consider in relation to the granting of bail as prayed for.

It was submitted by the Petitioner that the Suspect was a farmer and he is the sole bread winner of the family. As the Petitioner was unemployed, the Suspect had been looking after the Petitioner and her parents, thus they are facing a great hardship since the Suspect was in remand prison.

Furthermore, the Petitioner states that the long-term of incarceration of her spouse taken together with the fact that the Prosecution has failed to forward the indictment after receiving the Government Analyst's report is an exceptional circumstance and the learned High Court Judge has failed to consider the said facts as exceptional circumstances.

However, in view of the aforementioned judicial decisions, it does not seem that the Petitioner has established exceptional circumstances to exercise discretion of Court with regard to the granting of bail.

Be that as it may, it was revealed that the Suspect in fact has five previous convictions pertaining to narcotic matters as at the time of his arrest in relation to this case.

The previous convictions of the Suspect revealed by the 2nd Respondent are as follows;

- Magistrate's Court Kandy Case No. 79164/2014-Possession of 2500mg of narcotic pills on 21.11.2014-Fine of Rs. 10,000/- imposed on 08.12.2014.
- Magistrate's circuit Court of Panwila Case No. B 594/2015 (Case No.32400)-Possession of 1720mg of ganja on 20.07.2015-Fine of Rs. 2,000/- imposed on 22.10.2015.
- Magistrate's Court Hulftsdorp Case No. B 45135/5/2016-Possession of 3840mg of heroin on 06.01.2016-Pleaded guilty to possession of 43mg as per GAR-Fine of Rs. 10,000/- imposed on 02.05.2016.
- Magistrate's Court Kandy Case No. B 44917/2017-Possession of 240mg of ganja on 02.12.2017-Fine of Rs. 2,000/- imposed on 22.02.2018 consequent to Charge Sheet been filed under Case No. 23153.
- Magistrate's Court Kandy Case No. 33344/2019-Possession of 30mg of heroin on 11.03.2019-Fine of Rs. 7,500/- imposed.

Furthermore, it was revealed that the 1st Respondent has forwarded an indictment against the suspect to the High Court of Kandy in Case No. 77/2021. Therefore, it is apparent that the Suspect was indicted and the matter was pending in the High Court of Kandy. Thus, it is appropriate for the High Court to consider bail pending trial.

Since the matter is pending in the High Court of Kandy, it is desirable for the learned High Court Judge to assess and examine the facts and circumstances of the Case realistically to exercise its discretion in favour of the Suspect/Accused, if they could satisfy the existence of exceptional circumstances.

Hence, application by the Petitioner seeking the Suspect to be enlarged on bail is dismissed without costs.

The Registrar of this Court is directed to send copies of this Order to the High Court of Kandy and the Magistrate's Court of Theldeniya.

JUDGE OF THE COURT OF APPEAL

K.K.A.V. Swarnadhipathi, J.

I agree.

JUDGE OF THE COURT OF APPEAL