

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

In the matter of an application for Bail under Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance (Amendment) Act No. 41 of 2022.

Court of Appeal

Daluwathumulla Gamage Neil Nandana

Application No:

28th Suspect-Petitioner

CA/Bail 0094/22

MC Colombo case No.

Vs

B/35602/2020

1. Officer In-Charge

Special Unit

Criminal Investigations Department

Colombo-01.

2. The Attorney General

Attorney General's Department

Colombo-12.

Respondents

BEFORE

**: Sampath B. Abayakoon, J.
P. Kumararatnam, J.**

COUNSEL

**Harishke Samaranayake for the
Petitioner.**

**Sudharshana De Silva, DSG for the
Respondent.**

ARGUED ON : 23/03/2023.

DECIDED ON : 22/05/2023.

BAIL ORDER

P.Kumararatnam,J.

The Petitioner filing this Application has invoked the jurisdiction of this Court to grant bail to him upon suitable condition as this Court considers appropriate.

The Petitioner is the 28th Suspect in the case bearing No. B/35602/01/20 of the Magistrate Court of Colombo. After his arrest he was placed under a detention order from 24/08/2020 to 28/06/2021.

According to the B report filed, the Petitioner was arrested as there were justifiable reasons for suspecting committing an offence and/or abetting to commit offences under Section 54(a), (b) of the Poisons, Opium and Dangerous Drugs Act No. 13 of 1984 as amended and under Sections 2(1) (a) (b) (c) (d), 03 (a) of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979.

It was further mentioned that upon information provided by the Petitioner, two T56 weapons, two pistols, four T56 magazines of weapons, 82 number 7.62 live bullets, 39 number of 9mm live bullets,

11 KG 888.256 grams of Heroin and two electronic scales had been recovered by the Criminal Investigation Department.

The vehicle bearing number SP-CAK-8628 arrested along with the Petitioner also had been sent to the Government Analysts Department.

The production had been sent to the Government Analyst Department and after analysis, the Government Analyst had forwarded the report to Court on 10/09/2021. According to the Government Analyst, 7895.5 grams of pure Heroin (Diacetylmorphine) and 18.8 grams of Morphine had been detected from the substance sent for the analysis. In addition, traces of Heroin had been detected in the electronic scales.

The Counsel appearing for the Petitioner contended that there are 32 suspects so far produced under this case and among them 1st to 13th, 16th to 17th and 19th ,20th to 27th suspects were granted bail by the Court. Further, 18th and 29th suspects were discharged and 14th,19th and 32nd suspects have gone abroad. 30th suspect has not furnished bail while 31st suspect is in remand for a different offence. Now, pertaining to this case only the Petitioner and 15th suspect are in remand.

Although the Petitioner had filed a bail application in the High Court of Colombo, the Learned High Court Judge had dismissed the same on the premise that the jurisdiction to grant bail is now vested with the Court of Appeal as per the amended Act No. 41 of 2022 of the Poison, Opium and Dangerous Drugs Act.

The Petitioner has a previous conviction relating to Cannabis and has a pending case before the High Court of Tangalle.

The contention of the Respondents is that as the instant investigation revolves around large scale trafficking of narcotic substance and illicit weapons. Therefore, this application should be dismissed.

The Petitioner has pleaded following exceptional circumstances in support of his Bail Application.

1. The Petitioner has been detained under a detention order from 24/08/2020 to 28/06/2021 where he has been remanded up to the date of filling this application for more than two years and four months without indictment being served on him.
2. Almost all the suspects are released on bail including the main suspect of this case.
3. The one and only evidence against the Petitioner is the recoveries made under Section 27 of the Evidence Ordinance.
4. The Respondents have failed to seek extension of remand custody of the Petitioner under Section 85 of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.
5. All most all the other evidence are statements made by co-suspects of this case. Hence, they are inadmissible against the Petitioner unless corroborated by an independent witness.
6. There is no cogent evidence to proceed with the Petitioner under the Prevention of Terrorism Act.

The Counsel for the Petitioner submits that the suspect is in remand for more than two years. Considering the facts and the circumstances of this case, that the prosecution will not be able to establish a prima facie case against the Petitioner. Further, the Counsel submits that the Respondents have failed to seek extension of remand custody of the Petitioner under Section 85 of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

According to the Learned Deputy Solicitor General, the Petitioner had been indicted in the High Court of Galle and the indictment is due to be served on him. According to the DSG, the Petitioner is indicted for possession and trafficking of 7805.5 grams of Heroin and possession and trafficking of 18.8 grams of Morphine punishable under the

Poisons, Opium and Dangerous Drugs Ordinance, possession of two T56 guns and two pistols punishable under the Firearms Ordinance and possession of 121 live bullets punishable under the Explosive Act. Hence, Learned DSG submitted that the delay is not an exceptional circumstance to be considered to enlarge the suspect on bail. Further, the DGS submits that the time spent for preparing the indictment does not constitute an exceptional circumstance.

The Section 83 of the Poisons, Opium and Dangerous Drugs Act which was amended by Act No. 41 of 2022 states:

83. (1) Subject to the provisions of sections 84, 85 and subsection (2) of this section, a person suspected or accused of an offence under sections 54A and 54B of this Ordinance, shall not be released on bail by the High Court except in exceptional circumstances.

(2) Notwithstanding the provisions of sections 84 and 85, a person suspected or accused of an offence under subsection (1) of section 54A and section 54B-

(a) of which the pure quantity of the dangerous drug, trafficked, imported, exported, or possessed is ten grammes or above in terms of the report issued by the Government Analyst under section 77A; and

(b) which is punishable with death or life imprisonment,

shall not be released on bail except by the Court of Appeal in exceptional circumstances.

(3) For the purpose of this section “dangerous drug” means Morphine, Cocaine, Heroin and Methamphetamine.

Exceptional circumstances are not defined in the statute. Hence, what is exceptional circumstances must be considered on its own facts and circumstances on a case by case.

In **Ramu Thamodarampillai v. The Attorney General [2004] 3 SLR 180** the court held that:

“the decision must in each case depend on its own peculiar facts and circumstances”.

In **Labyndarage Nishanthi v. Attorney General CA (PHC) APN 48/2014** the court held that:

“It is trite law that any accused or suspect having charged under the above act will be admitted to bail only in terms of section 83(1) of the said Act and it is only on exceptional circumstances. Nevertheless, it is intensely relevant to note, 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.

There is plethora of cases in the legal parlor which had identified what creates an ‘exceptional circumstances’ in relation to granting bail...”

The Learned Counsel for the Petitioner contended that the Petitioner has been detained under a detention order from 24/08/2020 to 28/06/2021 where he has been remanded up to the date of filing this application for more than two years and four months without indictment being served on him.

Period in remand custody cannot be considered as an exceptional circumstance in all case. It has to be decided on a case-by-case basis to consider whether the remand period already spent could be considered as an exceptional circumstance.

In **Ashani Dhanushshika v. Attorney General [CA (PHC) APN 04/2016]** the court held that:

“ In the present case the petitioner failed to establish any exceptional circumstances warranting this court to exercise the revisionary jurisdiction. The petitioner’s first point is that the suspect is in remand nearly for two years. The intention of the legislature is to keep in remand any person who is suspected or accused of possessing or trafficking heroin until the conclusion of the case. The Section 83(1) of the Act expresses the intention of the legislature...”

In **Carder v. Officer-in-Charge, Narcotics Bureau (2006) 3 SLR 74** the court held that:

“ ...Provision has been made in the Bail Act to release persons on bail if the period of remand extends more than 12 months. No such provision is found in the case of Poison, Opium and Dangerous Drugs Ordinance. Although bail was granted in some of the cases mentioned above, none of these cases refer to the time period in remand as constituting an exceptional circumstance. Hence bail cannot be considered on that ground alone.

According to the decisions cited above, the period spent in the remand custody cannot be considered as an exceptional circumstance in this case.

Further, the Counsel for the Petitioner contended that as the prosecution will not succeed in securing a conviction against the Petitioner due to the presentation of inadmissible evidence against the Petitioner. Hence, he strenuously argued that the Appellant should be released on bail.

I am not inclined to accept this argument as a suspect can only be released on bail under the Poisons, Opium and Dangerous Drugs Act as amended upon successful demonstration of that he has exceptional circumstances to be released on bail.

Further, facts of a case do not constitute exceptional circumstances. Issues pertaining to the case should only be considered at the trial stage.

In the case of **A.K.Nandasena v. The Attorney General [CA(PHC) APN 147/2017 the court held that:**

“...that facts of a case do not constitute exceptional circumstances and such issues need to be addressed at the trial stage.”

In **The Attorney General v. Madapathage Dona Thilaka alias Shyamali [SC Appeal 53/2021]** decided on 30/11/2022, His Lordship Thuraiaraja, PC, J. held that:

“Therefore, under these circumstances, no material is before the Court of Appeal to come to a decision regarding if the witness is creditworthy, nor is it relevant to the granting of bail in this application in the first place. Hence, it cannot be considered as an “exceptional ground” in considering an application for revision”.

Hence, the facts of the case will not be addressed in considering this bail application.

The Counsel for the Petitioner argued that the Respondents have failed to seek extension of remand custody of the Petitioner under Section 85 of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

This is a clearly a wrong submission of the scope and ambit of Section of 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Amendment Act No. 41 of 2022. The new amended Section 83(2) very clearly excluded the Sections 84 and 85 of the Poisons, Opium and Dangerous Drugs Act when a bail application of a person suspected or accused of an offence under subsection (1) of Sections 54A and 54B are considered.

In this case the pure quantity of the Heroin detected in the production by the Government Analyst is 7895.5 grams and the pure quantity of the Morphine is 18.8 grams. Further, he had been indicted for possession of two T56 weapons, Two pistols and ammunitions.

Considering the pure quantity of the Heroin and the Morphine detected in this case, if convicted, the Petitioner will either be sentenced to death or life imprisonment. Similar sentence has also been prescribed for possession of T56 guns. Considering the gravity of the offences committed, there is a high risk of absconding.

Further, the delay more than two years in remand does not fall into the category of excessive and oppressive delay considering the circumstances of this case as the offences committed under Section 54A(b) and 54A(c) of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 and Act No. 41 of 2022 and under Section 22(3) of the Firearms Ordinance are serious offences.

In **Ranil Charuka Kulatunga v. Attorney General [CA(PHC) APN 134/2015]** the court held that:

“ the quantity of cocaine involved in this case is 62.847 grams, which is a commercial quantity. If Petitioner is convicted, the punishment is death or life imprisonment. Under these circumstances, it is prudent to conclude the trial early while the petitioner is kept in custody.”

Considering all the materials placed before this court, the Petitioner has failed to adduce that he has exceptional ground/s to free him on bail. Hence, this bail application is refused.

The Registrar of this Court is directed to send a copy of this order to the Director, Criminal Investigation Department and the High Court of Gampaha.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL