

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

In the matter of an application for Revision in terms of Article 138 of the Constitution read with Section 364 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal

Application No:

CA (PHC) APN 76/2022

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

High Court of Colombo

No.HC/624/2019

MC Maligakanda case No.

B/6098/2017

Vs.

1. Mohomed Anwer Mohomed Ziyam
2. Nawasdeen Mohomed Zakir
3. Rathnyake Mudiyanseelage Achala Kumari
4. Wickramasinghe Arachchilage Don Amarasiri alias Japan Chuti

ACCUSED

AND NOW

2. Nawasdeen Mohomed Zakir

ACCUSED-PETITIONER

The Attorney General

Attorney General's Department

Colombo-12.

COMPLAINANT-RESPONDENT

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

COUNSEL : **Sarath Konghage, PC with Premasiri**
Perera for the Petitioner.
Sudharshana De Silva, DSG with Malik
Azees, SC for the Respondent.

ARGUED ON : **08/05/2023.**

DECIDED ON : **12/06/2023.**

BAIL ORDER

The Accused-Petitioner (hereinafter referred to as the 'Petitioner') was indicted in the High Court of Colombo by the Complainant- Respondent (hereinafter referred to as the 'Respondent') for the following counts:

1. Conspiracy and aiding and abetting the 1st,3rd and 4th Accused to commit the offence punishable under Sections 54A(b) of the Poisons, Opium and Dangerous Drugs ordinance as amended by the Act No.13 of 1984 read with Sections 113 (b) and 102 of the Penal Code in respect of 5947 grams of Heroin (Diacetylmorphine).
2. Aiding and abetting the 1st Accused to commit the offence of trafficking of Heroin punishable under Sections 54A(b) of the Poisons, Opium and Dangerous Drugs ordinance as amended by the Act No.13 of 1984 in respect of 5947 grams of Heroin (Diacetylmorphine).

The trial at the High Court commenced on 30.09.2020. Although PW1 started to give evidence but could not complete his evidence due to covid-19 pandemic and some other difficulties faced by the country.

Though the Petitioner had made several applications for bail before the High Court of Colombo, he was not granted bail by the Learned High Court Judge. Lastly, he had applied for bail on 03.02.2022 and after an inquiry, the Learned High Court Judge had refused bail on the same day. Aggrieved by the said order, the Petitioner had filed this Revision Application to revise the said order.

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.

Despite the fact that the Learned DSG contended about the maintainability of this application before this Court in view of the recently amended Act No. 41 of 2022 to the Poisons, Opium and Dangerous Drugs Ordinance, this Court has decided to consider this application as a bail application as the Petitioner only seeks bail for him.

The Section 83 of the Poison, Opium and Dangerous Drugs Ordinance 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.

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

In this case, the pure quantity of Heroin detected in the production by the Government Analyst is 5947 grams. Therefore, by virtue of the new amendment to the Poisons, Opium and Dangerous Drugs Ordinance, this Court has jurisdiction to consider granting of bail.

On 07.03.2017, the Petitioner was arrested by officers from the Colombo Crime Division alleging that he had aided and abetted the 1st Accused named above to traffic 5947 grams of Heroin (Diacetylmorphine). The Petitioner was arrested at Pallanhenana Junction, Kochchikade since he was suspected to be the driver of the car bearing No.WP KO 7261 which was the suspected vehicle alleged to have been used for the transportation of Heroin. According to the Petitioner, he was arrested solely upon the information given by the 1st Accused.

The 1st Accused named in the Petition was arrested on 06.03.2017 and was produced to the Magistrate Court of Maligakanda 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 a detention order was obtained for further investigations under Section 82(3) of the said Act.

The production had been sent to the Government Analyst Department on 07/03/2017. After analysis, the Government Analyst had forwarded the report to Court on 20/12/2017. According to the Government Analyst, 5947 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

The contention of the prosecution is that the Petitioner was the driver of the vehicle bearing No. WP KO 7261 in which the Heroin had been transported to Colombo. According to the Petitioner, no illegal substance

was recovered either from him or inside the vehicle at the time he was taken into custody by the officers of the Colombo Crime Division. According to the Government Analyst, no traces of Heroin was found in the vehicle referred above. The Petitioner further alleges that according to the evidence given by PW1 so far in the High Court Colombo Case bearing No. 624/2019 does not reveal any evidence regarding his complicity.

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

1. The Learned Trial Judge has erred in law by failing to consider the facts, material evidence and the circumstances averred by the Petitioner in the bail application made by his Counsel to the High Court.
2. The Learned Trial Judge has erred in law by failing to consider the exceptional circumstances in this regard.
3. The Learned Trial Judge has erred in law by failing to consider the fact that the Petitioner did not have possession of Heroin at any time.
4. The Learned Trial Judge has erred in law by failing to consider the facts that the Petitioner was indicted only for conspiracy and aiding and abetting for the alleged offence of the 1st Accused.
5. The Learned Trial Judge has erred in law by failing to consider the facts that the Petitioner was arrested solely on the alleged information given by the 1st Accused.
6. The Learned Trial Judge has erred in law by failing to consider the facts that the 3rd and 4th Accused who are husband and wife and was indicted for the similar offences of the Petitioner were granted bail on 10.12.2019 and 17.12.2021 respectively, thereby treated the Petitioner in unequal and unfairly between accused persons and therefore creating a discrimination.

7. The Learned Trial Judge has erred in law by failing to consider that there would be a substantial miscarriage of justice to the Petitioner in the event, that if he is not enlarged on bail.
8. The Learned Trial Judge has erred in law by failing to consider the fact that the right to a fair trial of the Petitioner was violated.
9. The Learned Trial Judge has erred in law by failing to consider the facts that though the said indictment was filed on 19.08.2019, only half of the evidence-in-chief of PW1 had been led.
10. The Learned Trial Judge has erred in law by failing to consider the fact that the Petitioner has been in remand custody for over 5 years and 4 months.

According to the Learned Deputy Solicitor General (DSG), the Petitioner was arrested in connection of aiding and abetting the 1st Accused for trafficking of 5947 grams of Heroin. Indictment had already been filed in the High Court of Colombo and the case number is HC 624/2019. The trial has already begun and PW1 has started to give evidence. Hence, Learned Deputy Solicitor General submitted that the delay is not an exceptional circumstance to be considered to enlarge the suspect on bail. Further, the time spent for preparing the indictment does not constitute an exceptional circumstance.

The Learned President's Counsel for the Petitioner submits that the suspect has been in remand for more than five years. Considering the facts and the circumstances of this case, the prosecution will not be able to establish a prima facie case against the Petitioner.

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. Due care must be exercised after taking into account the facts and circumstances of each 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 **CA(PHC) APN 17/12 and CA(PHC) APN 16/12** the court observed the fact that indictment was not served even after the laps of one year from the producing of the Government Analyst’s Report was considered as exceptional circumstances.

In **CA(PHC)APN 107/2018** decided on 19.03.2019 held that remanding for a period of one year and five months without being served with the indictment was considered inter alia in releasing the suspect on bail.

According to the Petitioner, at present his family is going through untold hardship without proper income and care. His sister and father both are medically condemned persons. At present only his mother is looking after them. To support his claim medical reports of his sister and father are attached to the petition.

The Counsel for the Petitioner had drawn the court’s attention regarding some circumstances which are certainly going to affect the prosecution’s case. The Learned DSG opposing this submission submitted that the evidence or circumstances should not be considered when adjudicating a bail application.

In **Nasher v. Director of Public Prosecution [2020] VSCA 144** the court held that:

*“a combination of delay, onerous custodial conditions, and **the relative weakness of the prosecution case may**, when considered with all relevant circumstances, compel the conclusion that exceptional circumstances have been established”.* [Emphasis added]

In a bail inquiry when the Petitioner brings to the notice of the Court the circumstances which could be capable of shaking the prosecution case,

the Court has the discretion to tentatively look to the facts and circumstances of the case to ascertain whether a reasonable ground exists or not either to grant or refuse bail. The Court should not probe into the merits of the case, but restrict itself to the material placed before it. But, even for the purpose of bail any benefit of doubt arising in the case must accrue to the Petitioner.

Dr.A.R.B.Amerasinghe in his book titled “Judicial Conduct, Ethics and Responsibilities” at page 284 observes that:

“However, Article 13(5) of our Constitution states that every person shall be presumed innocent until he is proved guilty. Article 13(2) further provides that a person shall not be deprived of personal liberty except upon and in terms of the order of a judge made in accordance with procedure established by law.

The State imposes a punishment on the suspect indirectly by keeping him in remand custody for an uncertain period. Obviously, that was not the intention of the legislature when it enacted Article 13(5) of the Constitution”.

One of the grounds urged by the Petitioner is that the Learned Trial Judge has erred in law by failing to consider the facts that the Petitioner was arrested solely on the alleged information given by the 1st Accused.

If the prosecution does not have any incriminating evidence against the Petitioner other than the confessional statement of the co-accused, this circumstance could be considered in adjudicating his bail application.

Next, considering the fact that there has been a delay of more than 5 years since the remand, it falls into the category of excessive and oppressive delay taking into account the circumstances of this case. Although the Government Analyst Report was received by the Magistrate Court of Maligakanda on 20.12.2017, the Hon. Attorney General had forwarded the indictment only on 10.01.2019.

Further, granting bail to 3rd and 4th Accused who are husband and wife and was indicted for the similar offences of the Petitioner at the very early stage, rendered that the Petitioner had been treated in an unequal and unfairly manner which certainly created a discrimination among the Accused and the Petitioner.

Offences under Section 54A(b) of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 is no doubt serious offences but seriousness of the offence alone cannot form a ground to refuse bail. In considering these matters, the court must bear in mind the presumption of innocence.

Further, bail should never be withheld as punishment. Granting of bail is primarily at the discretion of the Courts. The discretion should be exercised with due care and caution taking into account the facts and circumstances of each case.

Considering the above factors, this court has come to a conclusion that the Petitioner has established exceptional grounds for the granting of bail. Hence, the Petitioner is granted bail with following condition.

1. Cash bail of Rs.50,000/=.
2. To provide 02 sureties. They must sign a bond of two million each.
3. The suspect and the sureties must reside in the address given until conclusion of his case.
4. Not to approach any prosecution witnesses directly or indirectly or to interfere with.
5. To surrender his passport if any, to court and not to apply for a travel document. The Controller of the Immigration and Emigration is informed of the travel ban on the Petitioner.
6. To report to the Colombo Crime Division, Colombo-09 on the last Sunday of every month between 9am to 1pm.
7. Any breach of these conditions is likely to result in the cancellation of his bail.

The Learned High Court Judge of Colombo is hereby directed to enlarge the Petitioner on the above bail conditions.

The Registrar of this Court is directed to send a copy of this order to the Officer-in-Charge of the Colombo Crime Division, Colombo-09 and the High Court of Colombo.

The Application is allowed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL