

**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 4 of the Amended Act No.41 of 2022 to the Poisons, Opium and Dangerous Drugs Ordinance.

Court of Appeal Bail Application The Officer-in-Charge
No.CA Bail/0016/23 Police Station
Mount Lavinia.

COMPLAINANT

MC Moratuwa Jayasundara Mudiyansele
Case No. B 857/20 Wasantha Kumara

SUSPECT

AND NOW BETWEEN

Sujeewa Fernando
No.30/6, Dewala Road, Angulana,
Moratuwa.

PETITIONER

Vs

1. The Officer-in Charge,

Police Station,

Mount Lavinia.

2. The Attorney General

Attorney General's Department,

Colombo-12.

RESPONDENTS

Jayasundara Mudiyansele

Wasantha Kumara

(Presently in Prison)

SUSPECT

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

COUNSEL : **Suranga Bandara for the Petitioner.**
Jayalakshi De Silva, SC for the
Respondent.

ARGUED ON : **12/05/2023.**

DECIDED ON : **21/06/2023.**

ORDER**P.Kumararatnam,J.**

The Petitioner filing this Application has invoked the jurisdiction of this Court to grant bail to her husband who is the Suspect in this case upon suitable condition as this Court considers appropriate.

The Suspect was arrested on 19.05.2020 by the STF officers and handed over to the Litigation Unit of the Mount Lavinia Police Station. He was produced before the Magistrate of Moratuwa in the case bearing No. B/857/20.

The Suspect was arrested by the STF officers who were at Angulana Station Road, roadblock set up by them. The Suspect was arrested when he came to pass the roadblock on his motorbike. When STF officers checked him found a parcel found from his trouser pocket. The parcel contained some substances which reacted for Heroin (Diacetylmorphine). The substance weighed about 50.270 grams. Further, at the time of his arrest Rs.99000/- was also recovered from his possession. The Suspect was handed over along with the production to the Mount Lavinia Police for further investigation and necessary action.

The Suspect was produced and facts were reported to the Moratuwa Magistrate under Section 54A (a) and (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984.

The production had been sent to the Government Analyst Department and after analysis, the Government Analyst had forwarded the report to the Moratuwa Magistrate Court on 22/12/2020. According to the Government Analyst, 22.95 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

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

1. The Suspect has been in remand custody little more than three years.
2. The Attorney General has not made an application to the High Court of the Province to extend the period of detention as required by Section 84 of the Poisons, Opium and Dangerous Drugs Act.

The Learned State Counsel 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. According to the State, all steps has been taken to send out indictment against the Suspect once the investigation notes are received by the Hon. Attorney General.

The suspect is in remand almost three years. According to Government Analyst Report the pure quantity of Heroin detected is 22.95grams.

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 basis.

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 107/2018** decided on 19.03.2019 the court 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 her family is going through untold hardship without proper income and care.

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.

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 22.95 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

The Counsel for the Petitioner urged this Court to consider that detaining a suspect without any legal action for an extended period of time amounts to a violation of his fundamental rights which can be considered as an exceptional ground.

The Learned State Counsel has submitted that the investigation dossier has not been received so far from the Police Narcotics Bureau.

The Government Analyst Report pertaining to this case has been received by the Magistrate Court of Moratuwa on 22.12.2020. Although more than one and half years have passed since the receipt of the Government Analyst Report by the Court, the investigation agency has failed to submit the relevant investigation dossier to Hon. Attorney General to consider charges against the Suspect.

Due to inordinate delay in submitting the investigation notes pertaining to this case to Hon. Attorney General, justice has been denied to the Suspect. The legal maxim portrait that justice delayed is justice denied. Although all the steps are important in criminal cases, sending investigation notes to prosecuting authority is more important among others. Hence, in a case of this nature or in all cases where the investigation is over, the prosecuting authority should use their power in the interest of public, to get down all necessary information to decide whether a prima facie case could be made out against a suspect who has been in remand for a considerable period of time. Further, I consider it is appropriate to call for explanation from the law enforcement agencies for unreasonable delay in forwarding investigation notes to the prosecuting authority. Otherwise, the people will lose trust on the system.

The Learned Magistrate of Moratuwa has rightly called for an explanation from the Senior Superintendent of Police, under whose supervision the Mount Lavinia Police Station is coming. Although the Mount Lavinia Police has reported in writing to the Magistrate on 22.06.2022 that the relevant investigation noted had been dispatched

to the Police Narcotics Bureau under reference No. MT/OW/774/2022, up to date the investigation notes are not received by the Attorney General.

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]

The right to trial without undue delay is found in numerous international and regional human rights instruments; for example, the International Covenant on Civil and Political Rights (Article 14(3)(c), the American Convention on Human Rights (Article 8(1), the African Charter on Human and People’s Rights (Article 7(1)(d), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6(1).

When a person is kept in remand without filing charges for a considerable period of time, he or she should be released on bail pending indictment. Otherwise, this will lead not only to prison overcrowding but also violates his or her fundamental rights which have been guaranteed under the Constitution.

Hence, I consider the delay tittle more than three years in remand falls into the category of excessive and oppressive delay considering the circumstances of this case. Hence, considering all the circumstances of this case, the suspect has very good exceptional circumstances to

consider this application in his favour. Further, remanding a suspect without filing any charge will prejudice his rights and his family as well.

Offences under Section 54A(a) and 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 all these factors into account, especially the pure quantity of Heroin detected and the circumstances of the case, I consider this an appropriate case to grant bail to the suspect. Hence, I order the suspect be granted bail with following strict conditions.

1. Cash bail of Rs.100,000/=.
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 suspect.
6. To report to the Mount Lavinia Police Station 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 Bail Application is allowed and the Learned Magistrate of Moratuwa is hereby directed to enlarge the suspect on bail on the above bail conditions.

The Registrar of this Court is directed to send a copy of this order to the Magistrate Court of Moratuwa and Officer-in-Charge of the Police Station Mount Lavinia.

The Application is allowed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL