

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

*In the matter of an application for bail
made under section 83 (2) of Poisons,
Opium and Dangerous Drugs (Amendment)
Act No. 41 of 2022.*

Court of Appeal No:

The Democratic Socialist Republic of Sri Lanka

CA/BAL/0105/23

COMPLAINANT

Magistrate Court Welisara

Vs.

Case No: BR 2358/20

Gnanasekaram Suresh Kumar

ACCUSED

High Court of Colombo

AND NOW BETWEEN

Case No- 3539/22

Gnanasekaram Suresh Kumar

ACCUSED-PETITIONER

Vs.

1. The Officer in Charge,

Police Station,

Pamunugama.

2. The Attorney General

Attorney General's Department

Colombo 12

RESPONDENTS

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Nihara Randeniya for Accused-Petitioner
: Jehan Goonasekara, SC for the State
Inquiry on : 07-06-2023
Order on : 31-07-2023

Sampath B. Abayakoon, J.

This is an application by the accused-petitioner (hereinafter referred to as the accused), namely, Gnanasekaram Suresh Kumar, seeking bail for himself. Initially, he was the suspect in the Magistrate Court of Welisara Case No. B2358/20, and now the accused in the High Court of Colombo case No- HC 3539/22.

The accused has been arrested by officers of the Pamunugama police on 26-08-2020, for an alleged offence of possession and trafficking of 41.400 grams of Heroin, 2 Kg. and 500 grams of Cannabis and 21.380 grams of the drug methamphetamine, commonly known as Ice.

According to the B-report filed before the Magistrate of Welisara by the Officer in Charge of Pamunugama police in that regard, these are offences punishable in terms section 54A and 54B of the Poisons Opium and Dangerous Drugs Ordinance as amended.

The accused has been in remand since, and according to the Government Analyst Report dated 22-02-2021, the substances produced before the Government Analyst had been identified as having 10.0 grams of diacetylmorphine, namely, Heroin, the dried vegetable matter as cannabis sativa L, and the white crystal substance as Methamphetamine.

The indictment of this case has been filed dated 14th December 2021 before the High Court of Colombo on one count in terms of the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act No 01 of 2008 for the possession of Methamphetamine, two counts of the possession and trafficking of 10 grams of Heroin, and two counts of trafficking and possession of Cannabis in terms of the section 54A (b) and (d) of the Poisons Opium and Dangerous Drugs Ordinance.

It is apparent that the indictment had been filed before the High Court of Colombo as the exclusive jurisdiction to hear and determine as to the offences in terms of section 02 of Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act No 01 of 2008 is vested with the High Court of the Western Province holden in Colombo.

According to the certified copy of the High Court case record made available to this Court along with the petition of the accused, the case has been mentioned before the High Court for the first time on 26-05-2022. After the pre-trial conference, the trial has been fixed for 28-11-2022 and despite the summons being served on the PW-01, he has been absent on that day, which has resulted in the case been postponed to 19-05-2023. When this bail application was taken up for inquiry on 07-06-2023, this Court had no information as to whether the trial was taken up for hearing on the earlier mentioned date.

In his application for bail before this Court, the accused has denied that he was arrested as the police claimed in the B-report or had any dangerous drugs in his possession.

However, the main ground pleaded by the accused seeking bail was the delay in him being tried for the alleged offences as an exceptional ground, which entitles him seek bail before this Court.

The previous section 83 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 was repealed and replaced by a new section 83 by Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022 in the following manner.

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 purposes of this section “dangerous drug” means Morphine, Cocaine, Heroin and Methamphetamine.

Section 84 and 85 are the provisions where it has been stipulated that a suspect or an accused shall not be detained in custody for a period exceeding 12 months from the date of arrest and up to another period of 12 months on an application made by the attorney General to the High Court.

Although, section 83 that existed until the Amendment Act No. 41 of 2022 came into being had vested the power to grant bail for a person suspected or accused of an offence committed under section 54A or 54B of the Poisons, Opium and Dangerous Drugs Ordinance to the relevant High Court in exceptional circumstances, the amendment has provided for different jurisdictions to grant bail under mentioned circumstances.

Under the provisions of section 83 (2) of the Amendment Act No. 41 of 2022, notwithstanding the provisions of sections 84 and 85, if the pure quantity of the dangerous drug trafficked, imported, exported or possessed is 10 grams or above in terms of the Government Analyst Report, in such circumstances only the Court of Appeal that has the exclusive jurisdiction to grant bail in exceptional circumstances for a person accused or suspected of committing an offence in terms of section 54 A or 54 B of the Ordinance.

Although the accused had been indicted for having in his possession and trafficking several dangerous drugs, it is the 2nd and the 3rd counts in the indictment that attract the jurisdiction of this Court to consider bail under exceptional circumstances of the accused, as the pure quantity of the drug mentioned is 10 grams of Heroin.

What constitutes exceptional circumstances have not been defined in the Statute.

Our uSperior Courts have considered various situations at various times as exceptional in deciding to grant bail for suspects in terms of the Poisons, Opium and Dangerous Drugs Ordinance.

In **CA (PHC) APN No.16-12 decided on 14-06-2012**, the Court of Appeal considered failing to file an indictment even one year after the receipt of the Government Analyst Report as relevant in granting bail for a suspect.

However, it needs to be noted that there are several other instances where the Court of Appeal did not consider the time period a suspect person has been incarcerated as relevant exceptional circumstances in order to grant bail.

In the case of **CA (PHC) APN No. 9-2010 decided on 19-07-2010**, the Court of Appeal considered the facts reported by police in the B-report as relevant to consider whether there are exceptional circumstances to grant bail to a suspect. Similarly, there are judgements, which say that facts cannot be considered as exceptional circumstances.

The above varied decisions by our Superior Courts clearly establish the fact that whether a certain situation amounts to exceptional circumstances or not, has to be considered on a case-by-case basis, unique to each application before the Court.

It is the view of this Court that if the relevant B-report and other material placed before the Court by the relevant investigation authority, provides a sufficient basis to consider granting bail to a suspect, there exists no impediment for this Court to consider them as relevant in determining whether exceptional circumstances exist under a given situation.

In the matter under consideration, even though the indictment dated 14-12-2021 had been forwarded to the relevant High Court, the trial has not commenced until 16th May 2023, may be due to the heavy workload of the Court.

I am of the view that having considered the relevant facts and the circumstances of the matter under consideration, nearly a three-year period of incarceration of the accused without trial has provided sufficient basis to grant bail to the accused under exceptional circumstances.

Accordingly, the accused is granted bail on the following conditions.

1. Cash bail Rs. 100.000/=

2. Two sureties with Rs. 250,000/= each surety bail. The sureties should be close family members of the petitioner and should tender affidavits to the Court indicating their relationship to the accused.
3. The accused is ordered to report to the OIC of Pamunugama police station on every last Sunday of the month between 9.00 a.m. and 12 noon.
4. The suspect is prevented from traveling overseas until the conclusion of the trial against him. If he is possessed of a passport, he shall surrender the passport to the Registrar of the High Court of Colombo. If he has not obtained a passport, he shall file an affidavit in that regard.
5. The Registrar of the High Court of Colombo is directed to inform the Controller of Immigration and Emigration that a travel ban has been imposed on the suspect until the conclusion of this case and is also ordered to provide the necessary details in this regard to the Controller.

Registrar of this Court is directed to communicate this bail order to the High Court of Colombo for the necessary compliance of the order.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal