

**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 11 of the High Court of Provinces (Special Provisions) Act No 19 of 1990.

Mohamed Shifas Sathar

Court of Appeal

100, Kew Road, Colombo-12.

Application No:

Presently

Bail/36/2022

Remand Prisoner No.5235

MC Colombo No.

Colombo Remand Prison,

B-10661/08/19

Colombo-09.

PETITIONER

1. The Officer-in-charge
Colombo Crimes Division,
Colombo-09.
2. The Director
Colombo Crimes Division,
Colombo-09.
3. The Attorney General
Attorney General's Department
Colombo-12.

RESPONDENTS

BEFORE

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

COUNSEL : **Hijaaz Hizbullah with Shifan Maharooof
for the Petitioner.
Kanishka Rajakaruna, SC for the
Respondent.**

ARGUED ON : **07/03/2023.**

DECIDED ON : **10/05/2023.**

BAIL ORDER

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

The Petitioner was arrested on 25th April,2019 under the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979.He was detained under a detention order from 25th April,2019 to 17th October,2020 and was produced before the Magistrate of Colombo. Since then, he has been in remand custody and has passed over 3 years without being charged.

The contention of the Petitioner is that he was arrested on the allegation that he had link with one Mohamed Ibrahim Iflal, who was his employer. However, best of his knowledge his employer Mohamed Ibrahim Iflal has been released. Further, few of the suspects produced under the same B report have also been released on bail.

Although it was reported in the B report that upon the statement made by the Petitioner and 2nd suspect Mohamed Mohideen Mohamed Riyaz 21 hand grenade were recovered among other items, when indictment was considered by the 4th Respondent the Petitioner and the said

Mohamed Mohideen Mohamed Riyaz were separately indicted in the High Court of Colombo. Although the recovery of 21 grenades was done jointly, the Petitioner was indicted along with five other accused for committing conspiracy to manufacture 21 explosive devices punishable under Section 3(b) of the Prevention of Terrorism (Special Provisions) Act No.48 of 1979 and for manufacturing 21 explosive devices without permission punishable under Section 3(b) of the Prevention of Terrorism (Special Provisions) Act No.48 of 1979.

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

1. The suspect is a father of two children, and he is the sole breadwinner of his family.
2. Due to his prolonged incarceration his family has undergone extreme hardship financially and emotionally.
3. Irrespective of whether he is convicted or acquitted a pre-trial detention of more than three years is grossly unjust, unfair, illegal, and not provided for by law.
4. If he is to have a fair trial, he would have to be able to afford adequate, effective, and competent legal representation and he would not be able to do this whilst in remand custody.

The State opposing to bail submit that the indictment had already been sent to the High Court of Colombo and the trial is yet to be commenced. The Learned State Counsel submits further as the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 has been amended by Act No.22 of 2022 [Certified on 29th of March,2022], the granting of bail is now vested with the High Court where the indictment is pending.

Section 15B of the Prevention of Terrorism (Temporary Provisions) (Amendment) Act, No.12 of 2022 states:

“Notwithstanding anything to the contrary in the provisions of this Act, if the trial against a person remanded or detained under this

Act has not commenced after the expiration of twelve months, from the date of arrest, the Court of Appeal may release such person on bail, upon an application in that behalf, made by the suspect or an Attorney- at-Law on his behalf:

Provided however, notwithstanding the provisions of subsection (2) of section 15, the High Court may in exceptional circumstances release the suspect on bail subject to such conditions as the High Court may deem fit:

Provided further, where the trial against an accused in respect of whom the indictment has been forwarded and filed in the High Court, has not commenced after the expiration of twelve months from the date of such filing, the High Court may consider to release such person on bail, upon an application in that behalf made by the accused or an Attorney- at-Law on his behalf.”

The Above cited Section 15B of the Prevention of Terrorism (Temporary Provisions) (Amendment) Act No.22 of 2022 very clearly confer the jurisdiction to this Court to grant bail. If the trial against a person remanded or detained under this Act has not commenced after the expiration of twelve months from the date of arrest this Court may consider of granting bail without exceptional circumstances.

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

“The function of a Judge is to give effect to the expressed intention of Parliament. If legislation needs amendment, because it results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years”.

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”.

In this case the suspect’s pre-trial detention of more than 3 years along is quite sufficient to consider granting of bail. With other circumstances urged in the Petition also certainly strengthen his plea to grant bail.

The consideration of circumstances may vary to case to case. Hence, the Court must consider 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 **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, ..”.

Considering all these factors into account, I decided to grant bail to the Petitioner with strict bail conditions stated below:

1. Cash bail of Rs.200,000/=.
2. To provide 02 sureties. They must sign a bond of two million each.
3. The Petitioner 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 Officer-in-Charge of the Colombo Crime Division on the last Sunday of the month between 9 am to 1pm.
7. Any breach of these conditions is likely to result in cancellation of his bail.

The Magistrate Court of Colombo is hereby directed to enlarge the suspect 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 and Magistrate 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