

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

In the matter of an application for Revision of an order made by the Provincial High Court of the North Western Province holden at Chilaw, in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 404 of the Code of Criminal Procedure Act No. 15 of 1979.

The Democratic Socialist Republic of Sri Lanka

Court of Appeal

Revision Application No:

COMPLAINANT

CA/PHC/APN/0122/2022 Vs

High Court of Chilaw

1. Anjan Polage Sudath Kumara

Bail Application No.152/21

Sandaruwan Fernando

MC Marawila

2. Kurukulasuriya Anton Madushantha

Case No. B 264/2021

Fernando

ACCUSED

AND NOW BETWEEN

Kurukulasuriya Anton Madushantha

Fernando

(Presently in Negombo Prison)

ACCUSED-PETITIONER

Vs

1. Officer-in Charge,
The Police Narcotics Bureau
Colombo-01.
2. The Attorney General
Attorney General's Department,
Colombo-12.

RESPONDENTS

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

COUNSEL : **Kalinga Indatissa PC, with**
K.N.Wilathagamuwa and M.B.W.Akram
for the Petitioner.
Jayalakshi De Silva, SC for the
Respondents.

ARGUED ON : **30/03/2023.**

DECIDED ON : **09/06/2023.**

ORDER**P.Kumararatnam,J.**

The Petitioner who is the 2nd Suspect named in M.C.Marawila Case No. B 264/2021 had applied for bail in the High Court of Chilaw in the case bearing No. Bail 152/2021. After an inquiry, the Learned High Court Judge of Chilaw had refused bail on 09.09.2022. Aggrieved by the said order, the Petitioner had filed this Revision Application to revise the said order.

On 19.02.2021, the Petitioner was arrested at Wennappuwa by officers attached to the Police Narcotics Bureau upon an allegation relating to possession of Heroin in excess of one Kilogram. Although the substance was recovered from the possession of the 1st Accused, he too was arrested of the allegation that he had aided and abetted the 1st Accused to traffic Heroin. The Petitioner was arrested as he travelled with the 1st Accused in a vehicle bearing No.251-4641. According to the detectives, both the Petitioner and the 1st Accused came in the van and alighted with the Heroin parcel which was in the possession of the 1st Accused.

The suspect was produced and facts were reported to the Marawila Magistrate under Section 54A (b) and (d) and 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 22/02/2021. After analysis, the Government Analyst had forwarded the report to Court on 06/07/2021. According to the Government Analyst, 513.5 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

According to the Petitioner, although he had done clothing business, at the time of arrest he was without a permanent income.

The Petitioner is 37 years old, married and a father of a toddler. He is the sole breadwinner of the family. He has no previous conviction or pending. He has been incarcerated for more than two years.

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

1. The suspect has no previous conviction or pending case before any court.
2. No drugs were found in his possession of the Petitioner by the police officers.
3. The Petitioner had been in remand over two years.

The State opposing to bail submitted that the indictment pertaining to the offences under the Poisons, Opium and Dangerous Drugs Act is already being sent to the High Court of Chilaw on 09.11.2021. Hence, 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.

The suspect is in remand for little more than two years. According to Government Analyst Report, the pure quantity of Heroin detected from the possession of 1st Accused is 513.5 grams.

Accordingly, 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”.

The Section 83 of the Poison, 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.

In this case, the pure quantity of Heroin detected in the production by the Government Analyst is 513.5 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

The Learned High Court Judge considering that the indictment has already been forwarded to the High Court by the 2nd Respondent, held that the bail could only be adjudicated after the trial. The relevant portion is re-produced below:

(Page 27 of the brief – Order of the High Court Judge)

02 වන වූදින වෙනුවෙන් ඉදිරිපත් කරන අනෙක් කරුණ වන්නේ වූදින විසින් කිසිදු අවස්ථාවක හෙරොයින් සන්නකයේ තබා නොගැනීම සහ මාරුවල මහෙස්ත්‍රාත් අධිකරණ නඩු අංක බී.264/21 දරණ මුල් බී වාර්තාවේ මෙම වූදින හෙරොයින් රැගෙන ආ බවට කිසිදු සඳහනක් නොමැති වීම සම්බන්ධයෙනි. නීතිපතිවරයා විසින් මෙම 02 වන වූදිනට අධිචෝදනා ගොනු කර ඇති අවධියකදී මහෙස්ත්‍රාත් අධිකරණයේ බී වාර්තා වල සඳහන් කරුණු සලකා බලා ඇප දීමට හැකියාවක් නොමැති අතර මෙම වූදිනට එරෙහිව ඇති 03 වන චෝදනාව වන ඩයිඇසිටයිල් මොර්ෆීන් හෙවත් හෙරොයින් ග්‍රෑම් 513.5 ක් සන්නකයේ තබා ගැනීම හා ජාවාරම් කිරීමට මම වූදින විසින් 01 වන වූදිනට ආධාර අනුබල දුන්නේද යන්න සම්බන්ධයෙන් සාක්ෂිකරුවන්ගෙන් සාක්ෂි මෙහෙයවා තීරණය කළ යුතු අතර එම කරුණු මත මෙම වූදිනට ඇප දීමට හැකියාවක් නොමැති හේතුව මත ප්‍රතික්ෂේප කරමි.

Next, the Learned President’s Counsel for the Petitioner argued that the statement of objection of the Respondent was filed on 06.02.2023 in this Court and it is mentioned that the information pertaining to this raid was received by PC 22368 Priyantha and the name of the Petitioner was also disclosed by the informant. However, disclosing of Petitioner’s name by the informant was not mentioned in the B Report dated 20.02.2021 and /or any further reports filed before the Magistrate Court, Marawila. Therefore, the Learned President’s Counsel submitted that the Respondent has submitted false information before the Court to object to granting of bail to the Petitioner.

In this case, as per the submission of the Learned State Counsel, the indictment had already been dispatched to the High Court of Chilaw and the trial is yet to be commenced.

I agree with the learned State Counsel that the factual and evidentiary matters pertain to the investigations can only be tested at the trial upon the witnesses being cross examined and shall not be tested at the time of hearing this bail application considering the nature of this case.

Further, I do not consider the delay more than two years in remand falls into the category of excessive and oppressive delay considering the circumstances of this case.

The Offence under Section 54A(b) and (d) of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 and read with Section 102 of the Penal Code is a serious offence and the seriousness of the offence should be considered when bail is considered.

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..”

In this case the pure Heroin detected is 513.5 grams, which certainly a commercial quantity. Considering the seriousness of the sentence prescribed under the Poison, Opium and Dangerous Drugs Ordinance, there is a high risk of absconding. Hence, it is prudent to conclude the High Court case expeditiously keeping the Petitioner in remand.

Considering all these factors into account, especially the pure quantity of Heroin detected, the charge in the indictment against the Petitioner

and other circumstances of the case, I consider this not an appropriate case in which to interfere with the bail order of the Learned High Court Judge of Chilaw dated 09.09.2022. Hence, I refuse to release the Petitioner on bail.

Hence, the revision application is hereby dismissed.

The Registrar of this Court is directed to send a copy of this Judgment to the High Court of Chilaw and Officer-in-Charge of the Police Narcotics Bureau, Colombo-01.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL