

**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 154P of the Constitution read with Section 11 of the High Court of the Province Act No.19 of 1990 and in terms of Article 138 (1) of the Constitution read with Section 404 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal
Revision Application No:
CA(PHC)APN/0063/2022

Udatiyawalage Upali
53/8/A, Sapumal Place
Kalaegana,Galle.

PETITIONER

High Court of Galle
Bail Application No.203/2021

1. Officer-in Charge,
Police Station,
Galle.

MC Galle
Case No. B 37872

2. The Attorney General
Attorney General's Department,
Colombo-12.

RESPONDENTS

AND NOW BETWEEN

Vijayapura Damayanthi
53/8, Sapumal Place
Kalaegana,Galle.

PETITIONER-PETITIONER

Vs

1. Officer-in Charge,

Police Station,

Galle.

2. The Attorney General

Attorney General's Department,

Colombo-12.

RESPONDENTS-RESPONDENTS

Udatiyawala Ramesh Kumar

SUSPECT

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

COUNSEL : **Senaka Ullandupitiya with Sameera**
Raasagala for the Petitioner.
Ridma Kuruwita, SC for the
Respondent.

ARGUED ON : **09/05/2023.**

DECIDED ON : **13/06/2023.**

ORDER**P.Kumararatnam,J.**

The Petitioner had applied for bail on behalf of the suspect in the High Court of Galle in the case bearing No. BA 203/2021. After an inquiry, the Learned High Court Judge had refused bail on 29.03.2022. Aggrieved by the said order, the Petitioner had filed this Revision Application to revise the said order. The Petitioner is the mother of the suspect.

On 18.04.2021, upon receiving an information, the suspect was arrested by officers attached to Galle Police Station and recovered a parcel from his sarong knot. The parcel contained some substances which reacted for Heroin (Diacetylmorphine). The substance weighed about 126.405 grams. The police also taken into their custody a vehicle bearing No. SP CBK 6017 and cash Rs.38000/- from the custody of the Suspect.

The Suspect was produced and facts were reported to the Galle Magistrate under Section 54A (1) (d) and (b) and 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 on 22/04/2021. After analysis, the Government Analyst had forwarded the report to Galle Magistrate Court on 04/10/2021. According to the Government Analyst, 10.72 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis. Although the police had noted the weight as 126.405 grams, according to the Government Analyst the substance weighed about 129.20 grams in excess about 3 grams.

According to the Petitioner, the Suspect had engaged in land and vehicle brokering in addition to running a small boutique at his residence. The suspect is a married person and blessed with a child. He is the sole breadwinner of the family and spends money for his younger brother's studies.

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

1. The Learned High Court Judge had failed to consider that the Suspect had been incarcerated since 19.04.2021.
2. The Learned High Court Judge had failed to consider that it would take a long time to serve an indictment.
3. The Learned High Court Judge had failed to consider that the version of the 1st Respondent-Respondent is highly improbable.
4. The Learned High Court Judge had failed to give due consideration that the prosecution will face a frontal attack in respect of the major discrepancy between the weight of the substance recovered by the police officers and the weight received by the Government Analyst.
5. The Learned High Court Judge had failed to evaluate the version of the Suspect in the impugned order.
6. The Learned High Court Judge had failed 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.

One of the preliminary objections taken up by the State is that the Petitioner has failed to explain the delay of four months invoking the revisionary jurisdiction before this Court. Hence, the State pleads that this matter should be dismissed *in limine* as no valid reason had been explained by the Petitioner for his delay.

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 under AG reference No.CR3/389/2022 within reasonable period of time.

The suspect is in remand for little more than more than two years. According to Government Analyst Report the pure quantity of Heroin detected is 10.72 grams.

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”.

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 in 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 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.

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

According to the Learned High Court Judge, the sole reason for rejection of bail to the suspect is non submission of exceptional circumstances by the Petitioner.

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.

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]

Upon perusal of the Government Analyst Report, the production had been received by them on 22.04.2021 and the analyst report was received by the Magistrate Court, Galle on 04.10. 2021. Although nearly 19 months passed after receiving the Government Analyst Report, which is one of the deciding factors in a case of this nature, the prosecution is unable to forward indictment to the High Court to date. This is a very serious laps on the part of the prosecution.

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 to prison overcrowding.

Hence, I consider the delay more than two years in remand falls into the category of excessive and oppressive delay considering the circumstances of this case. Considering other matters which had escaped the attention of the Learned High Court Judge of Galle, 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(b) and 54A(c) 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 Galle 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 Revision Application is allowed and the Learned High Court Judge High Court of Galle 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 Judgment to the High Court of Galle and Officer-in-Charge of the Police Station Galle.

The Application is allowed.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL