

**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 83 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.41 of 2022 of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No.

The Officer-in-Charge

CA BAL 0108/2022

Police Narcotics Bureau,

High Court of Colombo

Colombo-01

Case No. HCB 940/22

MC Colombo

COMPLAINANT

Case No. B/69190/1/22

Vs.

1. Danansuriya Mudiyansele Rumesh

Gimhan

2. Kankari Archchilage Gamunu

Sampath Kumara

SUSPECTS

AND NOW BETWEEN

Kumbalakara Arachchighe Sadeesa Imali
No.236, Aluthgama Road,
Yatadolawatta,
Mathugama.

PETITIONER

Vs.

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

RESPONDENTS

Kankari Archchilaghe Gamunu
Sampath Kumara

2ND SUSPECT-RESPONDENT

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

COUNSEL : **Kalinga Indatissa, PC with Rashmini
Indatissa, Razanal Salin and Tarinda
Rathnayake for the Petitioner.**
**Ridma Kuruwita SC for the
Respondents.**

ARGUED ON : **22/05/ 2023**

DECIDED ON : **05/07/2023.**

ORDER

P.Kumararatnam,J.

The Petitioner is the wife of the 2nd Suspect (hereinafter referred to as 'the Suspect') had applied for bail in the High Court of Colombo in the case bearing No. HCB 940/2022. After an inquiry, the Learned High Court Judge of Colombo has informed the Petitioner that in view of the Amendment Act No.41 of 2022 to the Poisons, Opium and Dangerous Drugs Ordinance Act No.41 of 2022, the High Court lacks jurisdiction to hear and determine the said application. As such, the Petitioner has filed this bail application before this Court.

The Petitioner states that the Suspect as at April 2022, was attached as an officer of the Judicial Service Commission to the Colombo Chief Magistrate's Court. Up to his arrest the Suspect has put up 17 years of unblemished service and had served in several courts in several parts of the country.

The Petitioner further states, that on or about 22.04.2021 officers attached to Police Narcotics Bureau arrested a person for possession and trafficking of Heroin. Upon interrogation the person arrested had divulged the name of 1st Suspect as the person who had given Heroin to him. As per the instructions of the police, the arrested person had contacted the 1st Suspect and informed him to come and collect the

money derived from selling of Heroin provided to him. When the 1st Suspect came with a Heroin parcel to be given to the person already arrested by the police, the officers arrested the 1st Suspect named in the Petition, along with a parcel near the Gothatuwa Police Station. The investigation revealed that the 1st Suspect is a police officer attached to Gothatuwa Police Station. The parcel recovered from 1st Suspect contained some substance which reacted for Heroin (Diacetylmorphine). The 1st Suspect was arrested and the substance recovered from him was weighed at the Police Narcotics Bureau. The substance weighed about 750 grams. The 1st Suspect was then produced before the Magistrate of Colombo under case No.69190 on 22.04.2022.

In the subsequent B reports filed by the Respondent disclosed that the 1st Suspect had implicated the Suspect as the person who had given the Heroin parcel to the 1st Suspect. Receiving this information, before police could arrest him, the Suspect had surrendered to Court on 05.05.2022 and is remanded to date. The Respondent did not at any stage produced the person who was initially found in possession of prohibited substance and provided information about 1st Suspect as a suspect in this case.

The 1st and the 2nd suspects were produced and facts were reported to the Colombo Magistrate under Section 54A (d) and (b) 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 productions recovered from the 1st Suspect was sent to the Government Analyst Department on 25/04/2022. After analysis, the Government Analyst had forwarded the report to Court on 21/10/2022. According to the Government Analyst, 501 grams of pure Heroin (Diacetylmorphine) had been detected from the substance recovered from the 1st Suspect.

The Respondent in their objections stated that the investigation notes pertaining to this case has been received by them and is under consideration under Hon. Attorney General Reference No.CR3/133/2023.

The Petitioner has been in remand for little more than 01 year as at now.

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

1. That no Heroin or any other prohibited substance was found in the possession of the Suspect.
2. That the Suspect has been falsely implicated by the 1st Suspect.
3. That operation of law, any statement made by the 1st Suspect implicating the Suspect or anyone else cannot be used as evidence in a court of law.
4. That the remand and detention of the Suspect is totally unwanted.
5. The Petitioner had been in remand for little over 01 year.

The State opposing to bail submitted that the indictment pertaining to the offences under the Poisons, Opium and Dangerous Drugs Act is under consideration. 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.

Exceptional circumstances are not defined in the statute. Hence, what constitutes 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 indictment was considered inter alia in releasing the suspect on bail.

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

In a bail inquiry when the Petitioner brings to the notice of the Court the circumstances which could be capable of shaking the prosecution case, the Court has the discretion to tentatively look to the facts and circumstances of the case to ascertain whether a reasonable ground exists or not either to grant or refuse bail. The Court should not probe into the merits of the case, but restrict itself to the material placed before it. But, even for the purpose of bail any benefit of doubt arising in the case must accrue to the Suspect.

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

“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”.

One of the grounds urged by the Learned President’s Counsel is that the Suspect was arrested solely on the alleged information provided by the 1st Suspect.

If the prosecution does not have any incriminating evidence against the Suspect other than the confessional statement of the co-accused, this circumstance could be considered in adjudicating his bail application. Further, the investigating agency has failed to name the person who

was initially arrested with Heroin in this case. Further, no information available in the file as to his whereabouts.

Considering these circumstances very carefully, there is likelihood of success in the case framed against the Suspect. This is only an assessment of likelihood and not a prediction or judgment. Further, the Suspect has been deprived of advancing this argument due to delay in sending out indictment to the High Court by the Hon. Attorney General. Considering the above factors, this court has come to a conclusion that the Petitioner has established exceptional grounds for the granting of bail.

The Offences under Section 54A(d) and (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 are no doubt serious offences but seriousness of the offences alone cannot form a ground to refuse bail. In considering these matters, the court must bear in mind the presumption of innocence.

Taking all these into account, especially the pure quantity of Heroin detected, the period in remand, and other 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.50,000/=.
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 Police Narcotics Bureau Cololmo-01 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 Colombo 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 Colombo 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