

**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(2) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Section 04 of the Poisons, Opium and Dangerous Drugs (Amendment) Act No.41 of 2022.

Court of Appeal
Bail Application No:
CA Bail 0039/2023

Officer-in-Charge
Police Narcotics Bureau,
Colombo-01.

COMPLAINANT

MC Colombo No.
B 62727/02/2022

Vs.
Matalge Randil Madushanka Dias

SUSPECT

AND NOW BETWEEN

Boyagodage Nishani
½,P 14,Kadirana Waththa,
Mattakkuliya, Colombo-15.

PETITIONER

Vs

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

RESPONDENTS

Matalge Randil Madushanka Dias
(Presently in remand custody)

SUSPECT

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

COUNSEL : **Sandeepani Wijesooriya for the**
Petitioner.
Ridma Kuruwita, SC for the
Respondent.

ARGUED ON : **23/05/2023.**

DECIDED ON : **11/07/2023.**

ORDER**P.Kumararatnam,J.**

According to the Petitioner the Suspect was arrested on 01.01.2022 by the officers attached to the Police Narcotics Bureau, Colombo-01 on the allegation of possession of 116 grams of Heroin. The Petitioner is the wife of the Suspect.

According to the Respondent, On 18.04.2021, the suspect was arrested by officers attached to the Police Narcotics Bureau and recovered a bag from the Suspect while he was travelling by a motor bike bearing No.WP BAY 4138. The bag contained some substances which reacted for Heroin (Diacetylmorphine). The substance weighed about 116 grams. The police also taken into their custody the motor bike in which he had arrived.

The Suspect was produced and facts were reported to the Colombo 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.

The production had been sent to the Government Analyst Department on 05/01/2022. After analysis, the Government Analyst had forwarded the report to the Colombo Magistrate Court on 17/11/2022. According to the Government Analyst, 91.25 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

According to the Petitioner, the Suspect is a CCTV Technician and he has been employed by the Cinnamon Lakeside Hotel, Colombo. As a part time earning, he used to engage in CCTV maintaining service privately. On the day of arrest, the Suspect was called by a lady known

to him named as Niru Shekala and she requested to repair the CCTV system of her residence situated at No.175/2/D/3, Halmulla Road, Sedawatta, Wellampitiya. As soon as the Suspect entered the house of said Niru Shekala, the officers attached to Police Narcotics Bureau had arrested him.

The Petitioner further state that after the arrest when the Suspect was brought to her residence, the Suspect was bleeding and his attire were torn. Then the police officers assaulted the Suspect in the presence of the Petitioner and her child. At the time the Petitioner was at her advance stage of pregnancy.

The Learned Magistrate after perusing the MLR of the Suspect had observed that the Suspect had sustained injuries and therefore, refused to issue a detention order as requested by the police.

The Learned Magistrate further directed the Prion Authority to refer the Suspect to General Hospital, Colombo for medical treatment and ordered the Prison Authority to submit the relevant medical report to the Court.

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

1. That nothing recovered from the possession of the Suspect.
2. That the Heroin mentioned in the report was an introduction by the police.
3. The Suspect was severely beaten while in police custody.
4. The Suspect is in remand since 01.01.2022 to date.

The Learned State Counsel while objecting for bail submitted that the Petitioner has failed to adduce any exceptional circumstances in this case. Hence requested this court to dismiss this application in *limine*.

The suspect is in remand for little more than one year and five months. According to Government Analyst Report the pure quantity of Heroin detected is 91.25 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 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 91.25 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

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 05.01.2022 and the analyst report was received by the Magistrate Court, Colombo on 17.11.2022. Although nearly 07 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 one year and five months in remand falls into the category of excessive and oppressive delay considering the circumstances of this case. Considering other matters, 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(d) 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 period in remand 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 Police Narcotics Bureau, Colombo-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