

**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 Ac No.41 of 2022.

The Officer-in-Charge
Police Narcotics Bureau,

Colombo-01.

Court of Appeal

Application No:

COMPLAINANT

CA/Bail/0064/2023

Vs

MC Negombo

Warnakulasuriya Mudalige Nuwan

No.M/41585/21

Dhanushka Fernando

2nd SUSPECT

AND NOW BETWEEN

Lakshika Janadarie Gamage

No.134/191, Stasepura 2nd Phase,

Colombo-14.

PETITIONER

Vs

1. Officer-in Charge,

The Police Narcotics Bureau

Colombo-01.

2. The Attorney General

Attorney General's Department,

Colombo-12.

RESPONDENTS

Warnakulasuriya Mudalige Nuwan

Dhanushka Fernando

(Presently in Negombo Prison)

2nd -SUSPECT

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

COUNSEL : **Asitha Vipulanayake with Sewvandi**
Meththananda for the Petitioner.
Kanishka Rajakaruna, SC for the
Respondents.

ARGUED ON : **26/05/2023.**

DECIDED ON : **14/07/2023.**

ORDER**P.Kumararatnam,J.**

The Petitioner had applied for bail to the 2nd Suspect (hereinafter referred to as the 'Suspect') named in M.C.Negombo Case No. M/41585/2021. The Petitioner is the wife of the Suspect.

On 15.11.2021, in the morning at the Katunayake International Airport a Tunisian National named Himidi Mounir was arrested by the officers attached to Sri Lanka Customs, Katunayake Airport upon an allegation relating to possession of Cocaine in excess of 03 Kilograms. Although the substance was recovered from the possession of the Tunisian National who has named as 1st Suspect in this case, the Suspect and another person who was named as 3rd Suspect in this case were arrested of the allegation that they had aided and abetted the Tunisian National to possess and traffic Cocaine in Sri Lanka. The Suspect and the other person were arrested by the officers attached to the Police Narcotics Bureau, who had conducted further in investigation near the GIGI Hotel at Colpetty, Colombo-03 around 19.35 p.m. on the same day. The car bearing No. CP CAH 0620 in which the Suspect had come there also taken in to the police custody.

The suspect and other two were produced and facts were reported to the Negombo Magistrate under Section 54A (b), (c) and (d) and of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 read with Section 102 of the Penal Code 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 08/03/2022. After analysis, the Government Analyst had forwarded the report to Court on 14/09/2022. According to the Government

Analyst, 3.7658 kilograms of pure Cocaine had been detected from the substance sent for the analysis.

According to the Petitioner, the Suspect worked in the Postal Department and else he did the part time job in holidays as a Tourist Guide.

According to the Petitioner the Suspect is the sole breadwinner of the family. The Suspect has a five-year-old child. He has no previous conviction or pending case. He has been incarcerated for more than 19 months as at now.

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

1. There is no positive evidence to establish that the Suspect had aided and abetted the Tunisian national in commission of the offences of trafficking in and possession of 3.7658 kilograms of Cocaine.
2. No drugs were found in his possession of the Suspect by the police officers at the time of his arrest.
3. The Petitioner had been in remand over 19 months to date.

The State opposing to bail submitted that the investigation notes pertaining to this case has been received by the Hon. Attorney General and at present it is under consideration under AG reference No.CR3/70/2023. 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 about 19 months.

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 Cocaine detected in the production by the Government Analyst is 3.7658 kilograms. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

The Learned Counsel for the Petitioner submitted that the Suspect had gone with the other person to visit a guest of other person in the GIGI Hotel at Colpetty on that day. While the other person was in the car the Suspect had gone to the Hotel to meet his friend. Due to a misunderstanding the officers from police Narcotics Bureau had arrested the Suspect. Hence the Learned Counsel for the Petitioner

argued that there is no positive evidence to establish that the Suspect had aided and abetted the Tunisian national to possess and traffic Cocaine.

In this case, as per the submission of the Learned State Counsel, the investigation revealed that the Suspect and the other person arrested on aiding and abetting charges were the agents of a drug dealing network run by a person called “Jerry”. The investigation further revealed that the Suspect had been in communication with “Jerry” and acted in terms of command received from “Jerry”.

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 about 19 months in remand falls into the category of excessive and oppressive delay considering the circumstances of this case.

The Offence under Section 54A (b), (c) 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 Cocaine detected is 3.7658 kilograms, which certainly a very high 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 forward indictment and conclude the High Court case expeditiously keeping the Suspect in remand.

Considering all these factors into account, especially the pure quantity of Cocaine detected, the nature of the charge/s going to be framed against the Suspect and other circumstances of the case, I consider this is not an appropriate case to grant bail to the Suspect at this stage. Hence, I refuse to release the Suspect on bail.

Hence, the bail application is hereby dismissed.

The Registrar of this Court is directed to send a copy of this order to the Magistrate Court of Negombo 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