

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

*In the matter of an application for bail
made under section 83 (2) of Poisons,
Opium and Dangerous Drugs (Amendment)
Act No. 41 of 2022.*

Court of Appeal No:

The Officer in Charge,

CA/BAL/0033/2023

Crime Division

Western Province Southern Range

Nugegoda

COMPLAINANT

Magistrate Court Homagama

Case No: BR 45911/2021

Vs.

Karannagodage Wasantha Kumara Perera

SUSPECT

AND NOW BETWEEN

Kuda Singappulige Maslin Kanthi

No-26/7, Meegodadeniya

Meegoda.

PETITIONER

Vs.

1. The Officer in Charge

Crime division

Western Province Southern Range

Nugegoda

2. The Attorney General

Attorney General's Department

Colombo 12

RESPONDENTS

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Asthika Devendra with Wasnatha Widanage and G.

Kolatuwewa for Petitioner

: Kanishka Rajakaruna, SC for the State

Inquiry on : 24-05-2023

Order on : 18-07-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner seeking bail for her son namely, Karannagodage Wasantha Kumara Perera (hereinafter referred to as the suspect) who is the suspect in the Magistrate Court of Homagama Case No. B 45911/2021.

The suspect has been arrested by the officers of the Crime Division of Western Province Southern Range on 29-07-2021, for an alleged offence of possession and trafficking of Heroin.

According to the B-report filed before the Magistrate of Homagama by the Officer in Charge of the said division, at the time of his arrest, he was having in his possession 02 Kilograms and 447 milligrams of a substance suspected to be of Heroin, which is an offence punishable in terms section 54A and 54B of the Poisons Opium and Dangerous Drugs Ordinance as amended.

The suspect has been in remand since, and according to the Government Analyst Report, the substance produced before the Government Analyst had been identified as a substance having 1.3843 Kilograms of Diacetylmorphine, namely, Heroin.

In her application for bail before this Court, the petitioner has denied that her son was arrested as the police claimed in the B-report or had any dangerous drug in his possession. She has claimed that this was an introduction by the police on her son.

In paragraph 13 of her application, the petitioner has pleaded the following grounds for the consideration of the Court on the basis that the said grounds are exceptional circumstances for this Court to grant bail to the suspect.

- (1) That over one year and five months have lapsed from the time of the arrest of the suspect.
- (2) Although that the Government Analyst report was obtained on 14-10-2021, an indictment has not yet been sent.
- (3) That the suspect is 43 years old and is married. The suspect is a father of two sons aged 21 and 18 respectively.

- (4) The suspect's wife is currently engaged in an employment in Cyprus. The petitioner respectively states that the children of the suspect who is engaged in higher studies are in her care.
- (5) The husband of the petitioner (the father of the suspect) is currently suffering from kidney stones and chronic kidney disease and is prone to failing ill regularly, the petitioner is responsible for looking after her husband.
- (6) That there are no previous convictions and pending cases against the suspect.
- (7) Weaknesses of the prosecution case.
- (8) Any other and further exceptional circumstances that the petitioner may urge at the time of hearing this application.

The previous section 83 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 was repealed and replaced by a new section 83 by Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022 in the following manner.

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.

(3) For the purposes of this section “dangerous drug” means Morphine, Cocaine, Heroin and Methamphetamine.

Although, section 83 that existed until the Amendment Act No. 41 of 2022 came into being had vested the power to grant bail for a person suspected or accused of an offence committed under section 54A or 54B of the Poisons, Opium and Dangerous Drugs Ordinance to the relevant High Court under exceptional circumstances, the amendment has provided for different jurisdictions to grant bail under mentioned circumstances.

Under the provisions of section 83 (2) of the Amendment Act No. 41 of 2022, notwithstanding the provisions of sections 84 and 85, if the pure quantity of the dangerous drug trafficked, imported, exported or possessed is 10 grams or above in terms of the Government Analyst Report, in such circumstances, only the Court of Appeal which has the exclusive jurisdiction to grant bail in exceptional circumstances for a person accused or suspected of committing an offence in terms of section 54 A or 54 B of the Ordinance.

For purposes of this section, a dangerous drug has been defined as Morphine, Cocaine, Heroin and Methamphetamine.

Section 84 and 85 are the provisions where it has been stipulated that a suspect or an accused shall not be detained in custody for a period exceeding 12 months from the date of arrest and up to another period of 12 months on an application made by the attorney General to the High Court.

Since it has been established that the substance alleged to have been found in the possession of the suspect was Heroin, and it had a pure quantity of 1.3843 Kilograms, this is a matter which comes within the purview of this Court to consider bail for the suspect under exceptional circumstances.

What constitutes exceptional circumstances has not been defined in the Statute.

Our Superior Courts have considered various situations at various times as exceptional in deciding to grant or to refuse bail for suspects in terms of the Poisons, Opium and Dangerous Drugs Ordinance.

In **CA (PHC) APN No.16-12 decided on 14-06-2012**, the Court of Appeal considered failing to file an indictment even one year after the receipt of the Government Analyst Report as relevant in granting bail for a suspect.

However, it needs to be noted that there are several other instances where the Court of Appeal did not consider the time period a suspect person has been incarcerated as relevant exceptional circumstances in order to grant bail.

In the case of **CA (PHC) APN No. 9-2010 decided on 19-07-2010**, the Court of Appeal considered the facts reported by police in the B-report as relevant to consider whether there are exceptional circumstances to grant bail to a suspect. Similarly, there are judgements, which say that facts cannot be considered as exceptional circumstances.

The above varied decisions by our Superior Courts clearly establish the fact that whether a certain situation amounts to exceptional circumstances or not, has to be considered on a case-by-case basis, unique to each application before the Court.

It is the view of this Court that if the relevant B-report and other material placed before the Court by the relevant investigation authority, provides a sufficient basis to consider granting bail to a suspect, there exists no impediment for this Court to consider them as relevant in determining whether exceptional circumstances exist under a given situation.

In this matter, the suspect had been arrested and produced on 29-07-2021, and the Government Analyst Report dated 14-10-2021 has been received by the relevant Magistrate Court without any undue delay.

According to the submission made before the Court by the learned State Counsel, the indictment has been dispatched to the High Court of Homagama on 02-02-2023 by the Hon. Attorney General, and the matter has been scheduled to be mentioned on 02-06-2023.

The Magistrate Court case record bears testimony that given the quantity of the drug detected, the investigating authority had been conducting extensive investigations into the matter, and it is the view of the Court that this is a matter that requires investigations in the like manner.

Under the circumstance, I am not in a position to conclude that there was a delay in the part of the prosecuting authority to send the indictment to the relevant High Court.

Although the suspect is a married person, it appears that he has no family responsibilities as his grown-up children are being provided for by his wife who is employed overseas.

It has not been established that the petitioner is the only person who is responsible for looking after his father even though it is not an exceptional circumstance that can be considered to grant bail for him.

The suspect having no previous convictions is not an exceptional circumstance, and I have no obvious basis to conclude any weakness of the prosecution case which warrants granting of bail to the suspect.

For the above reasons considered, the application for bail for the suspect is refused for want of merit.

The Registrar of the Court is directed to communicate this order to the High Court of Homagama for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal