

**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 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the provisions in Chapter XXIX of the Code of Criminal Procedure Act to revise the Order of the Learned High Court Judge dated 13.10.2022.

Court of Appeal Bail Application	Maarimuththulage Nadeeka
No.CA (PHC) APN/0138/22	Sandamali
High Court of Gampaha	(Suspect-presently at Kalutara
Case No. HC/92/2020	Prison)
	Ranasinghe Siriyawathie
	72/12/A,New Kelani Bridge,
	Wellampitiya.

PETITIONER

Vs

1. The Attorney General
Attorney General's Department
Colombo-12.
2. The Officer-in Charge,
Police Station,
Kadawatha.

RESPONDENTS

ORDER**P.Kumararatnam,J.**

The Petitioner had applied for bail on behalf of the suspect in the High Court of Gampaha in the case bearing No. BA 92/2022. After an inquiry, the Learned High Court Judge had refused bail on 13.10.2022. Aggrieved by the said order, the Suspect-Petitioner had filed this Revision Application to revise the said order. The Petitioner in BA 92/2022 is the mother of the Suspect-Petitioner. As she passed away on 16.12.2021 the Suspect-Petitioner (Hereinafter referred to as “the Petitioner”) filed this revision application before this Court.

On 26.10.2019, upon receiving an information, the Petitioner was arrested by officers attached to the Kadawatha Police Station and recovered a parcel from her possession. The parcel contained some substances which reacted for Heroin (Diacetylmorphine). The substance weighed about 165.250 grams. The police also taken into their custody a three-wheeler bearing No. WP QD 4840 in which the Petitioner had arrived.

The Petitioner was produced and facts were reported to the Mahara Magistrate under Section 54A (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 04/11/2019. After analysis, the Government Analyst had forwarded the report to Mahara Magistrate Court on 13/09/2021. According to the Government Analyst, 72.7 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis. Although the police had noted the weight as 165.250 grams, according to the Government Analyst the substance weighed about 153.0 grams, which shows 12.250 grams less than the original weight.

According to the Petitioner, she is a married person and blessed with three children and she is the sole breadwinner of the family as her husband is suffering from kidney and liver failure.

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 Petitioner had been incarcerated since 26.10.2019.
2. 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 in 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 Petitioner under AG reference No.CR3/186/2023.

The Petitioner is in remand for more than more than three years. According to Government Analyst Report the pure quantity of Heroin detected is 72.7 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 72.7 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 Petitioner is non submission of exceptional circumstances.

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 04.11.2019 and the analyst report was received by the Magistrate Court, Mahara on 13.09.2021. Although nearly 22 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. 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 three 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 Gampaha, the Petitioner has very good exceptional circumstances to consider this application in his favour. Further, remanding a Petitioner without filing any charge will prejudice his or her rights and his or her 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, the time consumed to forward indictment and the other circumstances of the case, I consider this an appropriate case to grant bail to the Petitioner. Hence, I order the Petitioner 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 Petitioner and the sureties must reside in the address given until conclusion of her case.

4. Not to approach any prosecution witnesses directly or indirectly or to interfere with.
5. To surrender her 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 Petitioner.
6. To report to the Kadawatha 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 her bail.

The Revision Application is allowed and the Learned High Court Judge of Gampaha is hereby directed to enlarge the Petitioner 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 Gampaha and Officer-in-Charge of the Police Station Kadawatha.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL