

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

In the matter of an application for Bail under Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance (Amendment) Act No. 41 of 2022.

The Officer-in-Charge

Anti-Corruption Unit,

Police Station, Matara.

Court of Appeal

Complainant

Application No:

Vs

CA/Bail 0117/23

Hewa Pemanththulge Prabuddha

MC Matara case No.

Muthumal

BR/233/2019

Accused

NOW AND BETWEEN

Hewa Pemanththulge Wasantha

No.14,

Leela Hotel, Main Street,

Akuressa.

Petitioner

1. The Officer-in-Charge

Anti-Corruption Unit,

Police Station, Matara.

2. The Attorney General

Attorney General's Department

Colombo-12.

Respondents

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

COUNSEL : **Thanuka Nandasiri for the Petitioner.**
Jehan Goonesekera, SC for the
Respondents.

ARGUED ON : **08/06/2023.**

DECIDED ON : **28/08/2023.**

BAIL ORDER

P.Kumararatnam,J.

The Petitioner is the father of the Accused named in the Petition. The Petitioner filing this Application has invoked the jurisdiction of this Court to grant bail to the Accused upon suitable condition as this Court considers appropriate.

The Accused is the 2nd Suspect in the case bearing No. BR/233/19 of the Magistrate Court of Matara.

According to the B report filed in the Magistrate Court of Matara, the Accused and another person was arrested by the police officers attached to Anti-Corruption Unit of Matara Police Station on 19.01.2019 on the allegation of possession and trafficking of 19.411 grams of Heroin (Diacetylmorphine) which is punishable under Sections 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance No.17 of 1929. It was revealed that the Accused was in possession of 15.1 grams of substances while the other person was in possession of 11.141 grams of substances. As both had come on a motor bike bearing SP BFE-9081, it too had been taken in to custody by the police.

The substances recovered from the Accused and the other person had been sent to Government Analyst Department. According to Government Analyst Report, total 19.411 grams of pure Heroin detected in the parcels sent for analysis and 11.141grams of pure Heroin detected from the parcel recovered from the Accused.

The Counsel appearing for the Petitioner submitted that the indictment against the Accused and other person has been forwarded under case bearing No. HC 283/2020 by the Hon. Attorney General in the High Court of Matara.

According to the Petitioner, the Accused vehemently denies the charges levelled against him in the indictment. The Accused takes up the position that this a fabricated case against him by the police.

Although the Petitioner had filed a bail application in the High Court of Matara, the Learned High Court Judge had dismissed the same on the premise that the jurisdiction to grant bail is now vested with the Court of Appeal as per the amended Act No. 41 of 2022 of the Poison, Opium and Dangerous Drugs Act as the 1st charge in the indictment is for conspiracy of trafficking 19.411 grams of Heroin by the Accused and the other person.

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

1. The Petitioner has been in remanded from 19th January 2019. Now he has completed 4 years and five months in remand.
2. Heroin was not found in his possession. It was introduced by the 1st Respondent when he was taken in to custody.
3. The Accused 25 years old and most valuable part of his life has been sent in the remand.

The Counsel for the Petitioner submits that the Accused is in remand for more than 04 years. Considering the facts and the circumstances of this case, states that the prosecution will not be able to establish a prima facie case against the Accused.

According to the Learned State Counsel, the Accused had been indicted in the High Court of Matara and the trial is already commenced. PW1 has given evidence and he is due to be cross examined by the 2nd Accused named in the indictment. The first count on the indictment is preferred against the Accused and the other person who was arrested along with the Accused for conspiracy to traffic 19.41 grams of Heroin and the 4th count is in respect of the Accused aiding and abetting the 1st Accused to traffic 8.270 grams of Heroin. As the 1st count is in respect of pure quantities over 10 grams of Heroin and is punishable by death or life imprisonment and thereby vests jurisdiction in this Court. Further, the State Counsel submits that the time spent for preparing the indictment does not constitute an exceptional circumstance.

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.

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

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 **Labyndarage Nishanthi v. Attorney General CA (PHC) APN 48/2014** the court held that:

“It is trite law that any accused or suspect having charged under the above act will be admitted to bail only in terms of section 83(1) of the said Act and it is only on exceptional circumstances. Nevertheless, it is intensely relevant to note, the term ‘Exceptional

circumstances' has not been explained or defined in any of the Statutes. Judges are given a wide discretion in deciding in what creates a circumstance which is exceptional in nature.

There is plethora of cases in the legal parlor which had identified what creates an 'exceptional circumstances' in relation to granting bail..."

The Learned Counsel for the Petitioner contended that the Accused has been in remand more than 4 years. Hence, invite this Court to consider this as an exceptional circumstance.

Period in remand custody cannot be considered as an exceptional circumstance in all case. It has to be decided on a case-by-case basis to consider whether the remand period already spent could be considered as an exceptional circumstance.

In **Ashani Dhanushshika v. Attorney General [CA (PHC) APN 04/2016]** the court held that:

" In the present case the petitioner failed to establish any exceptional circumstances warranting this court to exercise the revisionary jurisdiction. The petitioner's first point is that the suspect is in remand nearly for two years. The intention of the legislature is to keep in remand any person who is suspected or accused of possessing or trafficking heroin until the conclusion of the case. The Section 83(1) of the Act expresses the intention of the legislature..."

In **Carder v. Officer-in-Charge, Narcotics Bureau (2006) 3 SLR 74** the court held that:

" ...Provision has been made in the Bail Act to release persons on bail if the period of remand extends more than 12

months. No such provision is found in the case of Poison, Opium and Dangerous Drugs Ordinance. Although bail was granted in some of the cases mentioned above, none of these cases refer to the time period in remand as constituting an exceptional circumstance. Hence bail cannot be considered on that ground alone.

According to the decisions cited above, the period spent in the remand custody cannot be considered as an exceptional circumstance in this case.

Further, the Counsel for the Petitioner contended that the prosecution will not succeed in securing a conviction against the Accused due to the presentation of inadmissible evidence against the Accused. Hence, he strenuously argued that the Accused should be released on bail.

I am not inclined to accept this argument as a suspect can only be released on bail under the Poisons, Opium and Dangerous Drugs Act as amended upon successful demonstration of that he has exceptional circumstances to be released on bail.

Further, facts of this case do not constitute exceptional circumstances. Issues pertaining to the case should only be considered at the trial stage.

In the case of **A.K.Nandasena v. The Attorney General [CA(PHC) APN 147/2017 the court held that:**

“...that facts of a case do not constitute exceptional circumstances and such issues need to be addressed at the trial stage.”

Hence, the facts of the case will not be addressed in considering this bail application.

In this case the pure quantity of the Heroin totally detected in the production by the Government Analyst is 19.411 grams.

The dangerous drugs found in the possession of the Accused indicates that he and the other person are drug dealers of large scale, dealing in commercial quantities and not user quantities.

Further, the delay more than 04 years in remand does not fall into the category of excessive and oppressive delay considering the circumstances of this case as the offences committed under Sections 54A(b) and 54A(c) with the conspiracy charge of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 and Act No. 41 of 2022.

Considering all the materials placed before this court, the Petitioner has failed to adduce that the Accused has exceptional ground/s to free him on bail. Hence, this bail application is refused.

The Registrar of this Court is directed to send a copy of this order to the High Court of Matara and officer-in-Charge of the Anti-Corruption Unit, Police Station, Matara.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL