

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

In the matter of an application for Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 404 of the Code of Criminal Procedure Act No.15 of 1979.

Court of Appeal Application No: The Democratic Socialist Republic
No.CA (PHC) APN/0097/22 of Sri Lanka

HC/Colombo Case No:

HC/3364/2021

COMPLAINANT

Vs

Hendagoda Priyantha Chandralal
(Presently in remand prison)

ACCUSED

AND NOW BETWEEN

B.M.Lalitha Sadaseeli Perera
16/18, Dehiwala Road
Maharagama.

PETITIONER

Vs

The Attorney General
Attorney General's Department,
Colombo-12.

COMPLAINANT-RESPONDENT

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

COUNSEL : **Tenny Fernando for the Petitioner.**
Ridma Kuruwita, SC for the
Respondents.

ARGUED ON : **27/05/2023.**

DECIDED ON : **31/08/2023.**

ORDER

P.Kumararatnam,J.

The Petitioner filing this Application has invoked the revisionary jurisdiction of this Court to revise the order of the Learned High Court Judge dated 28/07/2022 and to grant bail to her husband who is the Accused in this case upon suitable condition as this Court considers appropriate.

The Accused was arrested on 25.02.2020 by the Police officers attached to Police Narcotics Bureau, Colombo-01. He was produced before the Magistrate of Mount Lavinia in the case bearing No. B/722//2020. Four persons including the Accused were arrested on that day and Accused was the 2nd Suspect named in the B report.

The Accused was arrested upon an information provided by the 1st Suspect named in the B report. The 1st Suspect who was a Maldivian National was arrested with 3.03 Kilograms of substances suspected to be Heroin first on 25.02. 2020. Upon interrogation the Accused was arrested with possession of 01.10 Kilograms of substance believed to be Heroin. Upon further investigation the detectives arrested 3rd and 4th Suspects subsequently on the charge of aiding and abetting drugs.

The Accused and the Suspects were produced and facts were reported to the Colombo Magistrate under Sections 54A (d) and (b) 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 and after analysis, the Government Analyst had forwarded the report to the Mount Lavinia Magistrate Court. According to the Government Analyst, 225.1 grams of pure Heroin (Diacetylmorphine) had been detected from the substance recovered from the Accused and 600 grams of pure Heroin (Diacetylmorphine) had been detected from the substance recovered from the 1st Suspect.

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

1. Court has granted bail for the principal suspect arrested on the same day with 3.03 Kilograms of Heroin, on 09.12.2021 on the basis of delay of sending out indictment, statement given under the provisions of 127 of the Criminal Procedure Code and several other factors.

2. The prosecution version is not credible, and the Accused has been falsely implicated.
3. The 3rd and 4th Suspects arrested along with the Accused and the 1st Suspect were discharged from the proceedings by the Hon. Attorney General.
4. The 1st Suspect has made a statement under section 127 of the Code of Criminal Procedure Act describing manner in which the incident or rather how the arrest has been made by the Police Narcotics Bureau.
5. The Accused is the sole breadwinner of the family and the child is a child with special requirements.
6. The Accused himself is a patient suffering from number of ailments.
7. The Accused is in remand for about 30 months as at today.

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, indictment has already been forwarded to the High Court of Colombo and pre-trial was over and the case is fixed for trial now.

The suspect is in remand nearly about 30 months. According to Government Analyst Report the pure quantity of Heroin detected is 225.1 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 basis.

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 Poisons, 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.

The Learned 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.

The Learned Counsel brought the attention of this Court as to how the other Suspects arrested along with the Accused were granted bail by the Learned High Court Judges who heard their respective bail application.

According to the police investigation the 1st Suspect is the prime suspect in this case. The pure quantity of Heroin recovered from his possession is 600 grams. But he was granted bail on 09.12. 2021. The Learned High Court after taking into account the delay in remand custody and the 127-statement made under the Code of Criminal Procedure Act the regarding the manner of his arrest by the police has granted bail to him.

But the Learned High Court Judge who heard the bail application of the Accused has failed to consider the delay as an exceptional circumstance.

Further, the 3rd and 4th Suspects who were produced in this case have been granted bail well before their discharge by the Hon. Attorney General.

The Government Analyst Report pertaining to this case has been received by the Magistrate Court on 20.08.2020. The indictment was sent to the High Court of Colombo after 14 months of the receipt of the Government Analyst Report by the Magistrate Court.

Although more than three years passed after the arrest of the Accused, the trial has not commenced in the High Court of Colombo. According to the bail refusal order of Learned High Court Judge dated 28.07.2022 the refusal of bail based on non-submission of exceptional circumstances by the Accused. Although on the same day the Learned High Court Judge has concluded the pre-trial conference and fixed the case for trial, after passing one year of the order, the trial has not commenced as at today.

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]

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 taking his or her case for trial for a considerable period of time, he or she should be released on bail pending trial. Otherwise, this will lead not only to prison overcrowding but also violates his or her fundamental rights which have been guaranteed under the Constitution.

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. Hence, considering all the circumstances of this case, the suspect has very good exceptional circumstances to consider this application in his favour. Further, remanding a suspect without commencing his or her trial will prejudice his or her rights and family as well.

Offences under Section 54A(d) and 54A(b) 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 and the circumstances of the case, I consider this an appropriate case to revise the order of the Learned High Court Judge dated 28.07.2022 and grant bail to the Accused. Hence, I order the Accused 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 Accused 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 Accused.
6. To report to the Police Narcotics Bureau, Colomb-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 Revision Application is allowed and the Learned High Court Judge of Colombo is hereby directed to enlarge the Accused on bail on the above bail conditions.

The Registrar of this Court is directed to send a copy of this order to the High Court of Colombo and the Officer-in-Charge, Police Narcotics Bureau, Colombo-01.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL