

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 Attorney General

CA/BAL/0113/2022

Attorney General's Department

Colombo 12

COMPLAINANT

High Court of Colombo

Case No: HC3906/22

Vs.

Warnakulasuriya Patabendige Inoka

Priyanthi Vaas

01/02/R/05, Kadirana Watta

Mattakkuliya

ACCUSED

AND NOW BETWEEN

Warnakulasuriya Patabendige Inoka

Priyanthi Vaas

01/02/R/05, Kadirana Watta

Mattakkuliya

ACCUSED PETITIONER

Vs

The Attorney General

Attorney General's Department

Colombo 12

COMPLAINANT-RESPONDENTS

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Ruwan S Jayawardena for the Petitioner

: Ridma Kuruwita, SC for the State

Inquiry on : 19-06-2023

Order on : 29-08-2023

Sampath B. Abayakoon, J.

This is an application by the accused -petitioner (hereinafter referred to as the petitioner) seeking bail for herself, who is the accused in the High Court of Colombo Case No. HC-3906/2022.

The petitioner has been arrested by the officers of the Police Narcotic Bureau (PNB) on 26-10-2021, for an alleged offence of possession and trafficking of Heroin.

According to the B-report filed before the Magistrate of Maligakanda by the Officer in Charge of the said division, at the time of the arrest, she was having in her possession 52 grams and 380 milligrams of a substance suspected to be of Heroin, which is an offence punishable in terms section 54A of the Poisons Opium and Dangerous Drugs Ordinance as amended.

The suspect has been in remand since, and according to the Government Analyst Report dated 21-01-2022, the substance produced before the Government Analyst had been identified as a substance having 19 grams and 10 milligrams of Diacetylmorphine, namely, Heroin.

The indictment dated 4th July 2022 against the petitioner has been preferred to the High Court of Colombo and had been served on the petitioner on 22-09-2022. At the hearing of this application on 19-06-2023, it was informed that the trial against the petitioner has now been fixed for 07-07-2023 and 18-07-2023.

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

In paragraph 15 of her petition, the petitioner has pleaded the following grounds for the consideration of the Court, on the basis that the said grounds constitute exceptional circumstances for this Court to grant bail to the petitioner.

- (1) The petitioner has been incarcerated for more than one year for unfounded allegations and further states that the said allegations are preposterous and vehemently denied by the petitioner.
- (2) That there are no previous convictions and pending cases against the petitioner.
- (3) Petitioner married to Mapalagama Manuge Sanjeewa since 30th June 1995 and he died on 28th of March 2021.

At the hearing of the application, the learned Counsel for the petitioner contended that although the matter was previously fixed for trial before the High Court, the matter was postponed on two occasions, as the PW-01 was not in a position to give evidence as he has met with an accident. It was his

position that under the circumstances, there is no certainty whether the trial can be concluded without any further delay. It was pointed out that the petitioner has already been in remand custody for nearly two years without the trial being taken for hearing and she is a person with no previous convictions.

The learned Counsel urged the Court to consider the above facts and the period of incarceration of the petitioner as exceptional circumstances and grant bail for the petitioner.

It was the position of the learned State Counsel that since the trial has now been fixed for two days, it will take place without any further delay, hence, it cannot be considered as a sufficient exceptional ground to consider bail for the suspect. The learned State Counsel objected to the bail being granted to the petitioner on the basis that no exceptional circumstances exist for the Court to grant bail for the petitioner.

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.

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 19.01 grams, this is a matter which comes within the purview of this Court to consider bail for the petitioner 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 26-10-2021, and the indictment had been served on 22-09-2022, without any undue delay.

Although the case has been postponed on two previous occasions because of the unavailability of the PW-01, since the trial has now been fixed for two days

in the month of July 2023, that was within a year of serving the indictment, it cannot be said or presumed at this stage that the trial will not take place without any further delay on account of the unavailability of the PW-01 to give evidence before the Court.

In fact, the learned Counsel for the suspect filed a motion, which he supported after this matter was fixed for the order, did file a copy of the proceedings of the High Court on 11-07-2023 where the evidence of PW-02 had been taken and it had been informed to the Court that the PW-01 is not in a position to give evidence as he is in a serious condition after having met with an accident. However, it is clear that the learned trial judge has taken steps to commence the case and proceed with the matter without the evidence of PW-01.

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 as it is a matter that has to be determined based on the evidence led before the trial Court.

For the above reasons considered, I find no reasons to allow bail for the petitioner under exceptional circumstances. The application for bail is refused for want of merit.

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

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal