

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

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

Court of Appeal

The Officer-in-Charge

Bail Application No:

Excise Office,

CA Bail 0205/2023

Kesbewa.

COMPLAINANT

Vs

MC Homagama

Maddumage Don Nishantha

Case No.B 46502/2021

Karunaratne

SUSPECT

AND NOW BETWEEN

Punchi Hewage Dilhani Pubudumala

No.65/1 C,Balage Watta,

Brandigampola,Waga.

PETITIONER

Vs

1. The Officer-in-Charge

Excise Office,

Kesbewa.

COMPLAINANT-RESPONDENT

2. The Attorney General

Attorney General's Department,

Colombo-12.

RESPONDENT

Maddumage Don Nishantha

Karunaratne

SUSPECT-RESPONDENT

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

COUNSEL : **Sandeepani Wijesooriya with Nuwan**
Jayawardena for the Petitioner.
Kanishka Rajakaruna, SC for the
Respondents.

ARGUED ON : **23/06/2023.**

DECIDED ON : **11/09/2023.**

ORDER

P.Kumararatnam,J.

The Petitioner who is the wife of the Suspect-Respondent (hereinafter referred to as the Suspect) named in M.C.Homagama Case No. B 46502/21 had applied for bail to the Suspect in terms of Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Amendment Act No 41 of 2022.

On 18.09.2021, upon an information the Suspect was searched near Makumbura area near Kottawa by the Excise Officers attached to Kesbewa Office. Upon search some brown colour powder was recovered from the possession of the Suspect. As the substance found in the possession of the Suspect was reacted for Heroin, the Suspect was arrested and produced in the Magistrate Court of Homagama. When the substance recovered from the Suspect weighed at Excise Department, the gross quantity showed 100 grams.

The Suspect was produced and facts were reported to the Homagama Magistrate under Section 54A (d) 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 28/10/2021. After analysis, the Government Analyst had forwarded the report to Court on 28/01/2022. According to the Government Analyst, 19.57 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

The Suspect is 42 years old, married and father of a three year old child. He has been incarcerated for nearly 22 months to date.

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

1. The Government Analyst Report was received 13 months ago and no indictment has been filed by the 2nd Respondent until the institution of this bail application.
2. The place and time of arrest and the place where the Heroin was recovered from the Suspect were not mentioned in the B Report and in the Affidavit dated 29.09.2021 filed by the said Excise Officer who arrested the Suspect.
3. No evidence to state that the Suspect had exclusive possession of the said Heroin.

The Learned State Counsel further submitted that the delay is not an exceptional circumstance to be considered to enlarge the suspect on bail.

The suspect is in remand for nearly about 22 months. According to Government Analyst Report, the pure quantity of Heroin detected from the possession of the Accused is 19.57 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”.

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.

In this case, the pure quantity of Heroin detected in the production by the Government Analyst is 19.57 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

The Learned Counsel for the Petitioner submitted that although it is alleged that the Heroin was recovered from the Suspect, there was no reference in the B report to the effect from where the Heroin was recovered by the Excise Officers.

This contention of the Counsel for the Petitioner was not clarified by the officer who filed his objection by way of an Affidavit dated 14.06.2023. In the said affidavit at the averment 08 sub section II states:

“Accordingly, according to the information received the Suspect was found near the Makumbura area in Kottawa, and upon search by the Excise Officers, was found to be in possession of a brown powder suspected to be Heroin and was arrested on 18.09.2021 for possession and trafficking of dangerous drugs”.

No description was given as to where the Heroin was recovered from the Suspect. The Learned State Counsel too had failed to clear this point in his submission made to this Court.

The Counsel for the Petitioner cited the case of **CA (PHC)APN 109-2010** where **Justice Sisira de Abrew** has held that the police had failed to state in the B report the exact place from where the Heroin was detected and it has been considered to enlarge the suspect on bail.

In this case the Excise Officer not only fail to mention the exact place where the Heroin was recovered in B report, also failed to mentioned the same in his objections too. Further the Learned State Counsel too had failed to clarify this lacuna in his submissions.

The Counsel for the Petitioner submits further that although the Government Analyst Report was received 13 months ago and no indictment has been filed by the 2nd Respondent up to now.

Hence, 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]

Hence, I consider the delay about 22 months in remand falls into the category of excessive and oppressive delay considering the circumstances of this case.

Offence under Section 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 period in remand, the circumstances of arrest and the other circumstances of the case, I consider this an appropriate case to grant bail to the Suspect. Hence, I order the Suspect 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 Suspect 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 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 Suspect.
6. To report to the Excise Office, Kesbewa 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 Bail is allowed and the Learned Magistrate of Homagama is hereby directed to enlarge the Suspect on bail on the above bail conditions.

The Registrar of this Court is directed to send a copy of this order to the Magistrate Court of Homagama and the Officer-in-Charge, Excise office, Kesbewa.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL