

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

In the matter of an application for Bail in terms of Section 83 of the Amended Act No.41 of 2022 to the Poisons, Opium and Dangerous Drugs Ordinance.

Court of Appeal Bail Application

No.CA Bail/0166/23

HC/Negombo Case No.

HC/191//2021

MC Welisara

Case No. B 739/19

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Warnakulasooriyage Maduranga Fernando.

(Presently at Negombo Prison)

ACCUSED

AND NOW BETWEEN

Ravichandran Nirojani

No. 134/21/A, Paramananda Vihara Mawatha, Kotahena,

Colombo-13.

PETITIONER

Vs

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

RESPONDENT

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

COUNSEL : **Hafeel Farize with Rajith**
Samarasekera for the Petitioner.
Kanishka Rajakaruna, SC for the
Respondents.

ARGUED ON : **28/06/2023.**

DECIDED ON : **13/09/2023.**

ORDER

P.Kumararatnam,J.

The Petitioner filing this Application has invoked the jurisdiction of this Court to grant bail to her husband who is the Accused in this case upon suitable condition as this Court considers appropriate.

The Accused and three others were arrested on 27.03.2019 by the Police officers attached to the Special Task Force personnel attached to

the Organized Crime Investigation Division, operating from the Sri Jayawardenapura STF Camp. The Accused along with three others were produced before the Magistrate Court of Welisara in the case bearing No. B/739/19. Further all had been detained under a detention order issued by the Learned Magistrate of Welisara to conduct further investigation.

The Accused and others were arrested upon an information. As per the information a van bearing No. WP PA 8668 was checked by the officers of the STF. A bag was found in the possession of the Accused who was seated in front seat of the vehicle. One suspect was driving and the other two suspects were seated in the rear seat of the van. When the bag was checked a small parcel was found inside the bag. The parcel contained some substances which reacted for Heroin (Diacetylmorphine). The substance weighed about 106.156 grams. The Accused and the others were handed over along with the production to the Organised Crime Prevention Unit, No. 09, Mihindu Mawatha, Colombo-12 for further investigation and necessary action.

The Accused was produced and facts were reported to the Welisara 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 other three suspects were produced for aiding and abetting the Accused to commit offences mentioned above.

The production had been sent to the Government Analyst Department on 03.04.2019 and after analysis, the Government Analyst had forwarded the report to the Welisara Magistrate Court. According to the Government Analyst, 20.867 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

Prior to the recent Amendment to the Poisons, Opium and Dangerous Drugs Act No.41 of 2022, two applications for bail had been preferred before the High Court of Negombo under case No. HC 191/21 but were dismissed by the Learned High Court Judge on 01.02.2022 and

06.10.2022 respectively. Further a Revision Application was filed before this Court under case No. CPA 56/2022 against the order dated 01.04.2022 of the Learned High Court Judge but was refused by the Court of Appeal on 06.12.2022.

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

1. Although the Government Analyst Report was obtained on 31.10.2019 and proceedings instituted within the High Court of Negombo from 05.07.2021 onwards.
2. The initial refuse of the application for bail by the Learned High Court Judge by order dated 01.04.2022 and Revision by Court of Appeal against the order of the Trial Judge, that bail would be considered upon the conclusion of the main witnesses of the prosecution and the matter be expedited. Yet after nearly after 1 year and 08 months passing of the initiating of the proceedings in the High Court of Negombo and up to a year (11 months) past the order issued by the Learned Trial Judge, only on 19.01.2023 has the examination-in-chief of the prosecution witness No. 1 had been initiated after repeated instances of non-appearance to Court by the witness.
3. The order dated 06.10.2022 by the Learned Trial Judge dismissing the application for bail viewed that the interestedness and conduct of the prosecution witnesses or lack thereof and the disinterestedness of the continuing the action by the prosecution can be considered as a circumstance in determining bail to the Accused.
4. Petitioner states close upon 4 years (3 years and 11 months) have elapsed from the time of arrest of the Accused and due to the prolong delay under circumstances that are not directly attributable to the Accused. It is a grim prospect of even the prosecution's case concluding in the near future.

5. The law related to the present issue allows for the Accused individual to be held in remand, unless there are exceptional circumstances. However, detain the Accused for indefinite and prolonged periods without the trial being concluded, would be a violation of their fundamental rights, guaranteed by the Constitution.
6. The Constitution itself states that a person arrested should not be held in custody depriving his personal liberty, pending investigation or trial without a justifiable reason.
7. There had been no previous convictions nor other pending cases against the Accused.

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 against the Accused has already been forwarded to the High Court of Negombo and the examination-in-chief of PW 1 has started but not concluded yet. The Hon. Attorney General has forwarded the discharge papers against the others who were arrested along with the Accused.

The suspect is in remand more than three years. According to Government Analyst Report the pure quantity of Heroin detected is 20.867 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.

In this case the pure quantity of Heroin detected in the production by the Government Analyst is 20.867 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

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 Government Analyst Report pertaining to this case has been received by the Magistrate Court of Kandy on 31.10.2019. The indictment was sent to the High Court of Kandy after 09 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 just commenced in the High Court of Negombo but the prosecution was not able to conclude the examination-in-chief of PW01.

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 Accused 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 period in remand, pure quantity of Heroin detected and the circumstances of the case, I consider this an appropriate case to 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 Officer-in-Charge, Organized Crimes Prevention Unit, No. 09, Mihindu Mawatha, Colombo-12 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 Bail Application is allowed and the Learned High Court Judge of Negombo 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 Negombo and Officer-in-Charge, the Organized Crimes Prevention Unit, No. 09, Mihindu Mawatha, Colombo-12.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL