

**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(2) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No.41 of 2022.

Court of Appeal No.

The Republic of Sri Lanka

CA BAL 0163/2023

COMPLAINANT

High Court of Colombo

Vs.

Case No. HCB 3970/22

Lekam Wasam Liyanage Suranga

MC Maligakanda

Malinda

Case No. B/4211/21

No.101/19 Kelanitissagama, Wheragoda

Wellampitiya.

(Presently in remand custody)

ACCUSED

AND NOW BETWEEN

Ramyalatha Nanayakkara

No.101/19 Kelanitissagama, Wheragoda

Wellampitiya.

(For Lekam Wasam Liyanage Suranga

Malinda.

Currently in remand prison)

PETITIONER

Vs.

1. The Hon. Attorney General
Attorney General's Department
Colombo-12
2. The Officer-in-Charge
Police Station,
Modera,
Mattakkuliya.

RESPONDENTS

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

COUNSEL : **Hafeel Farisz with Rajith**
Samarasekera for the Petitioner.
Ridma Kuruwita SC for the
Respondents.

ARGUED ON : **07/07/2023**

DECIDED ON : **25/09/2023**

ORDER

P.Kumararatnam,J.

The Petitioner who is the mother of the Accused had applied for bail to the Accused in this Court, by virtue of the new Amendment Act No.41 of 2022 to the Poisons, Opium and Dangerous Drugs Ordinance.

On 08.03.2021, upon an information a police team led by SI/Vishwanath of Modera Police Station had gone to Kelanitissagama.

After meeting, the informant had shown a house to be the house of the Accused. When they were waiting had seen a person coming from the house wearing a cream-coloured pair of shorts and a dark blue collarless T-shirt. When the person turned back to go into the house, SI/Vishvanath held him by his right hand. Upon checking a rose-coloured cellophane bag was recovered from his right-side short pocket. As the parcel contained some substance which reacted for Heroin (Diacetylmorphine) the police party arrested the Accused. Thereafter, the police team had carried out a search in his house and the surrounding of the house. As nothing else found, the Accused was brought to the Modera Police Station. The substance recovered from him was weighed at the Modera Police Station. The substance weighed about 100.300 grams. The Accused was then produced before the Magistrate of Maligakanda under case No. B 4211/21 on 09.03.2021.

The Accused was produced and facts were reported to the Maligakanda Magistrate under Section 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 and a detention order was obtained for further investigations under Section 82(3) of the said Act.

The productions recovered from the Accused was sent to the Government Analyst Department on 18/03/2021. After analysis, the Government Analyst had forwarded the report to Court on 30/06/2021. According to the Government Analyst, 31.20 grams of pure Heroin (Diacetylmorphine) had been detected from the substance recovered from the Accused.

The Petitioner has been in remand for more than 02 years as at now.

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

1. That no Heroin or any other prohibited substance was found in the possession of the Accused.

2. That the Accused has been falsely complicated by the police.
3. That the Accused is the sole breadwinner of the family.
4. The Accused's wife has abandoned his family and left children under the care of his sick mother who is the Petitioner in this application.
5. The Petitioner is a cancer patient and currently seeks treatment from the Apeksha Hospital, Maharagama.
6. The Accused had been in remand for over 02 years.

The State opposing to bail submitted that the indictment pertaining to the offences under the Poisons, Opium and Dangerous Drugs Act is already being sent to High Court of Colombo. Hence, 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.

Exceptional circumstances are not defined in the statute. Hence, what constitutes 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 **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.

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 grams 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 31.20 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

The Accused has no previous or pending case before any of the Court in the Island.

In a bail inquiry when the Petitioner brings to the notice of the Court the circumstances which could be capable of shaking the prosecution case, the Court has the discretion to tentatively look to the facts and circumstances of the case to ascertain whether a reasonable ground exists or not either to grant or refuse bail. The Court should not probe into the merits of the case, but restrict itself to the material placed before it. But, even for the purpose of bail any benefit of doubt arising in the case must accrue to the Accused .

Dr.A.R.B.Amerasinghe in his book titled “Judicial Conduct, Ethics and Responsibilities” at page 284 observes that:

“However, Article 13(5) of our Constitution states that every person shall be presumed innocent until he is proved guilty. Article 13(2) further provides that a person shall not be deprived of personal liberty except upon and in terms of the order of a judge made in accordance with procedure established by law.

The State imposes a punishment on the suspect indirectly by keeping him in remand custody for an uncertain period. Obviously, that was not the intention of the legislature when it enacted Article 13(5) of the Constitution”.

The main ground taken up by the Counsel is that the Accused was not arrested as described in the investigation noted put up by the police. There is a serious discrepancy between the initial B report filed and the investigation notes of the police.

In the B report filed on 21.03.2021 it is reported that while the police party on mobile duty at Wellampitiya area, a person who was behaving suspiciously arrested near a house with assessment No.101/19, Kelanitissagama, Weheragodalla. Upon search a cellophane bag was recovered from his black coloured short’s pocket he was wearing at that time.

Contrary to the facts reported in the B report, the chief investigating officer, in his police notes stated that upon an information received by PC 50142 Asela had gone to Weheragodalla, met the informant, identified the house and arrested the Accused at his house and recovered a cellophane bag from his cream-coloured short’s pocket he was wearing at that time.

The Accused’s wife sworn an affidavit on 01.04.2021 and sated that the Accused was not arrested as described by the police. He was arrested at about 8.15 am while he was sleeping in the above-mentioned address.

She further averred that nothing was recovered from her husband's possession at the time of his arrest.

Considering these contradictory positions very carefully, there is likelihood of success in the case framed against the Accused. This is only an assessment of likelihood and not a prediction or judgment. Further, the Accused has been deprived of advancing this argument due to delay in sending out indictment to the High Court by the Hon. Attorney General.

Considering the above factors, this court has come to a conclusion that the Petitioner has established exceptional grounds for the granting of bail.

The Offences under Section 54A(d) and (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 are no doubt serious offences but seriousness of the offences alone cannot form a ground to refuse bail. In considering these matters, the court must bear in mind the presumption of innocence.

Taking all these into account, especially the pure quantity of Heroin detected, the period in remand, and other 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.50,000/=.
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 Modera Police Station Colombo-15 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 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 Judgment to the High Court of Colombo and Officer-in-Charge of the Modera Police Station Colombo-15.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL