

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 Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

Court of Appeal No:

CA/BAL/0115/23

The Officer in Charge,
Police Narcotic Bureau,
Colombo 01.

COMPLAINANT

Magistrate Court Maligakanda

Vs.

Case No: 14354/22

Nanda Kumar Shivandan

SUSPECT

AND NOW BETWEEN

Nona Shereen Saine Ahammed

PETITIONER

Vs.

(1) Hon. Attorney General
Attorney General's Department
Colombo 12

(2) Officer in Charge
Police Narcotic Bureau
Colombo 01

RESPONDENTS

Nanda Kumara Shivanandan

SUSPECT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Tenny Fernando for the Petitioner
: Kanishka Rajakaruna, S.C. for the Respondent
Inquiry on : 05-07-2023
Order on : 25-09-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner seeking bail for her husband, namely, Nanda Kumar Shivanandan (hereinafter referred to as the suspect) who is the suspect in the Magistrate's Court of Maligakanda Case No. 14354/22.

The suspect has been arrested by the officers of the Police Narcotic Bureau (PNB) on 03-06-2022, 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 PNB in that regard, upon receiving an information that the suspect had received a consignment of Heroin few days before, the suspect had been arrested when he was near the Colombo High Court. After interrogating him, the officers of the PNB have searched the house of the suspect and had recovered 76.330 grams of a substance suspected to be Heroin, three satellite phones and batteries from an almirah belonging to the suspect. In addition, they have allegedly recovered Rs. 782000/- from the same almirah.

It has been reported that this is an offence punishable in terms section 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended.

The suspect has been produced before the Magistrate on 04-06-2022 and in remand since, and according to the Government Analyst Report dated 29-07-2022 the substance produced before the Government Analyst had been identified as a substance having 24.60 grams of Diacetylmorphine.

It has been subsequently reported to the Court that after conducting further investigations based on the information provided by the suspect and the items of evidence discovered, the PNB recovered further 1.030 KG of Heroin from another person.

In her application for bail before this Court, the petitioner has claimed that the suspect was not arrested as claimed by the PNB, but while he was taken to be fingerprinted after he attended another High Court case which was called before the High Court of Colombo on that day, and taken to his house where the PNB could not find any discriminating evidence against him.

In her petition to this Court the petitioner has alleged that the officers of the PNB introduced heroin onto her husband subsequently and falsely accused him in order to built a case against him.

In paragraph 16 of the petition, the petitioner has urged four ground which she claims as exceptional circumstances for this Court to consider bail for her husband.

At the hearing of this application, the submissions made by the learned Counsel for the petitioner revolved mainly around the facts relating to the arrest of the suspect on the basis that it did not occur in the manner claimed by the police and no heroin was recovered from the possession of the suspect and the PNB has failed to substantiate a *prima facie* case against the suspect. It was his position that fact should be considered as an exceptional ground to grant bail for the suspect.

It was the contention of the learned State Counsel in opposing the bail that the petitioner has failed to adduced any ground before the Court that can be considered as exceptional. He brought to the notice of the Court that the Hon. Attorney General has now received the relevant extracts of the investigations carried out by the PNB, and it has been decided to indict the suspect. He informed that the indictment will be dispatched to the High Court of Colombo within the next two days in that regard.

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 became operative 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 in 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 54A or 54B of the Ordinance.

For the purposes of this section, a dangerous drug has been defined as Morphine, Cocaine, Heroin and Methamphetamine.

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 had a pure quantity of 24.60 grams, this is a matter which comes within the purview of this Court to consider bail for the suspect under exceptional circumstances.

What constitutes exceptional circumstances have not been defined in the Statute.

Our Superior Courts have considered various situations at various times as exceptional in deciding to grant 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 the 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 allegedly arrested not only with Heroin but also with three satellite phones which may be used for the purpose of trafficking of drugs, and according to the B report filed, at the time of the arrest, Rs. 782000/- in various denominations had also been recovered from the same almirah where they found the heroin. In my view these are matters of fact that needs to be determined by a trial Court at a trial, which cannot be considered at this stage to grant bail, on the basis of exceptional circumstances.

It appears from the Magistrate Court record that the police have conducted extensive investigations in this matter.

According to the submission made before the Court by the learned State Counsel, the relevant extracts have now been received by the Hon. Attorney General and it has been decided to indict the suspect, although the indictment has not yet been dispatched to the relevant High Court.

Under the circumstances, and having considered the nature of the investigations that had been carried out by the police, I am not in a position to conclude that there was an unnecessary delay in the part of the investigators and the prosecuting authority in filing charges against the suspect in this matter.

As I have considered before, the matters urged by the petitioner in her petition and the submissions made on behalf of her in the Court cannot be considered exceptional grounds to consider bail for the suspect.

Accordingly, the application for bail is dismissed for want of merit.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal