

**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:

CA/BAL/0107/22

The Officer in Charge,

Police Narcotics Bureau,

Colombo 01.

COMPLAINANT

Magistrate Court Mahara

Vs.

Case No: 2177/21

Nissanka Arachchige Aruni Priyabhashini

SUSPECT

AND NOW BETWEEN

Ratnabarana Moolacharilage Sudath

Premashantha,

No. 25/33, Kandy Road,

Peliyagoda.

PETITIONER

Vs.

1. The Officer in Charge,
Police Narcotics Bureau,
Colombo 01.

COMPLAINANT-RESPONDENT

2. The Attorney General
Attorney General's Department
Colombo 12

RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Tenny Fernando for the petitioner
: Jehan Gunasekara, S.C. for the State
Inquiry on : 11-07-2023
Order on : 02-10-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner seeking bail for his wife namely, Nissanka Arachchige Aruni Priyabhashini (hereinafter referred to as the suspect) who is the suspect in the Magistrate Court of Mahara case No. 2177/21.

The suspect has been arrested by the officers of the Special Task Force (STF) on 15-07-2021 along with another female while allegedly engaging in packeting a substance suspected to be Heroin. When the substance was weighed at the Police Narcotic Bureau (PNB) it has been found that the substance had a gross weight of 194.050 grams.

According to the B-report filed before the Magistrate of Mahara by the Officer-in-Charge of the PNB in that regard, this is an offence punishable in terms section 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended. It has been reported that at the time of the arrest a sum of Rs. 557400/- was also recovered from the house where the suspects were arrested.

The suspect has been in remand from the date of arrest, and according to the Government Analyst Report dated 06-12-2021, the substance produced before the Government Analyst had been identified as a substance having 118.94 grams of Diacetylmorphine, namely, Heroin.

In the application for bail before this Court, the petitioner has claimed that in fact the suspect was not arrested as claimed by the police but, only came to the house at the request of the police officers to give a statement and was arrested. It was the position of the petitioner that his wife had nothing in her possession at the time of the arrest. It has been claimed that at the time of arrest the police party took into their custody a sum of Rs. 915000/-, which was the money kept in the house for a heart surgery of the father of the suspect and not Rs 557444/- as claimed by the police.

In the petition and the submissions before the Court in relation to the bail application of the petitioner it was urged the fact that the suspect being in remand since 15-07-2021 without being charged before a competent Court as exceptional circumstances for this Court to consider granting of bail to the suspect. It was brought to the attention of the Court that the Government Analyst Report is available since 06-12-2021, but still no charge or charges have been preferred against the suspect.

The learned State Counsel opposing the bail application submitted that the indictment is under consideration and it will be dispatched to the relevant High Court without delay. The learned State Counsel also raised an objection on the

basis that the facts mention by the petitioner as to the arrest are falsehood on the face of the petition and therefore should be disregarded.

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 effective 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.

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 118.94 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 investigative 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 before the Court on 15-07-2021, and the Government Analyst Report is available from 06-12-2021. It is apparent that even after two years from the arrest, the prosecuting authorities have not been able to charge the suspect in a competent Court of Law.

I am not satisfied with learned State Counsel's submission that the indictment will be dispatched, which is not a satisfactory reasoning for the delay in initiating proceedings against the suspect.

I am of the view that the investigating agencies have an additional responsibility of making sure that no person is kept in remand custody unnecessarily without being charged in a competent Court of law, enabling that person to plead to the charge and seek redress from the Court.

I am of the view that when it comes to the circumstances of this case, the delay in conducting proper investigations and filing the relevant charges provides sufficient exceptional circumstance to grant bail for the suspect.

Accordingly, the suspect is ordered to be released on the following bail conditions.

1. Cash bail Rs. 100.000/=
2. Two sureties with Rs. 500,000/= each surety bail. One of the sureties should be the petitioner. The other surety shall also be a family member of a close relative of the suspect and he or she shall file an affidavit indicating the relationship before signing the bail bond.
3. The suspect is ordered to report to the OIC of the Police Narcotics Bureau in Colombo every last Sunday of the month between 9.00 a.m. and 12 noon until the conclusion of the case against her.
4. The suspect is prevented from traveling overseas until the conclusion of the case. If she is possessed of a passport, she shall surrender the passport to the Registrar of the Magistrate Court of Mahara. If she has not obtained a passport, she shall file an affidavit in that regard before being released on bail.
5. The Registrar of the Magistrate Court of Mahara is directed to inform the Controller of Immigration and Emigration that a travel ban has been imposed on the suspect until the conclusion of this case, and is also ordered to provide the necessary details in that regard to the Controller.

The Registrar of the Court is directed to communicate this bail order to the Magistrate Court of Mahara and to the OIC of the PNB for necessary compliance.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal