

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

*In the matter of an application for bail under
and in terms of section 83 (2) of Poisons,
Opium and Dangerous Drugs
(Amendment) Act No. 41 of 2022.*

Court of Appeal No:

The Attorney General,

CA/BAL/0052/23

Attorney General's Department,

Colombo 12.

High Court Galle

COMPLAINANT

Case No: HC 4943/2019

Magistrate Court Negombo

Vs.

Case No: B 1074/2013

Sarukkali Kankanamge Austin

(Presently at the Boossa Remand Prison)

ACCUSED

AND NOW BETWEEN

Sarukkali Kankanamge Austin

(Presently at the Boossa Remand Prison)

ACCUSED-PETITIONER

Vs.

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

COMPLAINANT-RESPONDENT

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

2nd RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Kasun Sarathchandra with Umayangi Indatissa for
the petitioner
: Chathurangi Mahawaduge, S.C. for the State
Inquiry on : 12-07-2023
Order on : 05-10-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner seeking bail for himself namely, Sarukkali Kanakanamge Austin (hereinafter referred to as the accused) who is the accused in the High Court of Galle Case No. 4943/19.

The accused has been arrested by the officers of the Police Narcotics Bureau on 13-12-2013, for an alleged offence of possession and trafficking of Heroin and for possessing two pistols and ammunition in Dodanduwa area in Galle.

Accordingly, the petitioner had been produced before the Magistrate's Court of Negombo under the B-report No B 1074/2013 on the basis that the arrest was made in consequent to an investigation commenced in that Court's jurisdiction. It had been informed that after his arrest, 10 Kilograms and 104 grams of a substance suspected to be of Heroin, two pistols and 25 rounds of ammunition was discovered based on a statement made by him in terms of section 27 of the Evidence Ordinance, which are offences punishable in terms section 54A of the Poisons, Opium and Dangerous Drugs Ordinance as amended and other relevant statutes.

The petitioner has been in remand since, and according to the Government Analyst Report the substance produced before the Government Analyst had been identified as a substance having 3158.22 grams of Diacetylmorphine, namely, Heroin.

The petitioner has denied that he was arrested with any drug in his possession, and had claimed that the indictment against him was without any legal basis.

In his application for bail before this Court, the petitioner has claimed that the fact of the suspect being in remand since the year 2013, without the charges against him being determined and the medical conditions of the petitioner as exceptional circumstances, among other grounds for this Court to consider granting of bail for him.

The learned Counsel for the petitioner in addition to the above grounds also contended in his submissions before the Court the fact that the alleged detection of the Heroin was not from his possession but at a house should be considered by the Court in the bail application before the Court.

However, it was admitted that after the service of the indictment in 2019 the trial has now commenced and three witnesses have concluded their evidence.

It was the submission of the learned State Counsel that this was a complicated investigation where 13 suspects were arrested and several recoveries were made

from various locations. It was her position that the trial now commenced, several main witnesses have testified and the trial can be concluded without any further delay. The learned State Counsel moved for the dismissal of the application considering the serious nature of the charges against the petitioner.

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 3158.52 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.

It appears from the material produced before this Court and the submission of the parties that this is a matter where the police had conduct extensive investigations because of the quantity recovered and the other relevant factors. Under the circumstances, it is the view of this Court that this a matter where investigators as well as the prosecuting authority need time to conclude investigations and to file the relevant indictment. I am of the view that although there had been some delay in filing the indictment against the petitioner, it is not a delay that constitutes an extraordinary delay.

Similarly, it appears from the High Court proceedings and the indictment, the prosecution is required to lead the evidence of several witnesses to prove the charges against the petitioner, which in my view, is not a matter that can be

considered as an exceptional reason given the complicated nature of the investigations conducted.

I do not find reasons to accept that there are medical grounds where the petitioner needs to be outside of the prisons system for treatment.

I am of the view that since the trial against the petitioner has now commenced an ongoing, releasing the petitioner at this juncture is not warranted as the grounds adduced in that regard would not fall under exceptional circumstances given the relevant facts and the circumstances.

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

However, I would like to bring to the notice of the learned High Court Judge of Galle the time it has taken to conclude the trial, and direct that the learned trial Judge should explore every possibility of expeditiously concluding the matter.

The Registrar of the Court is directed to communicate this order to the High Court of Galle for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal