

**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/0126/23
MC Negombo
Case No. M 25498

The Head Quartes Inspector
Police Station
Negombo

COMPLAINANT

Vs.

Muthusamy Palanikumar
No.65/138, Crow Island,
Mattakkuliya,
Colombo-15.

SUSPECT

AND NOW BETWEEN

Muthusamy Palanikumar
No.65/138, Crow Island,
Mattakkuliya,
Colombo-15.

SUSPECT-PETITIONER

(Presently in Negombo Prison)

Vs.

1. The Head Quarters Inspector
Police Station
Negombo

COMPLAINANT-RESPONDENT

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

2nd -RESPONDENT

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

COUNSEL : **Asela Serasinghe for the Petitioner.**
Jehan Gunasekara, SC for the
Respondents.

ARGUED ON : **14/07/2023.**

DECIDED ON : **11/10/2023.**

ORDER

P.Kumararatnam,J.

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

The Petitioner was arrested on 27.10.2020 by the Police officers attached to the Negombo Police Station. He was produced before the Magistrate of Negombo in the case bearing No. M 25498.

The Petitioner was arrested upon an information. When the Petitioner was travelling towards the 'Major Raj' grounds in Kurana, the police had checked van bearing number WP NC 9322 and found a parcel wrapped in two white shopping bags in his left side trouser pocket. Another parcel was found in the front cabin of the van. In both parcels found some brown coloured substance suspected to be Heroin, (Diacetylmorphine). The substance found in both parcels weighed about 1060 grams. The Petitioner was the driver of the Van bearing No. WP NC 9322 at the time of his arrest.

The Suspect was produced and facts were reported to the Negombo Magistrate under Sections 54A (b) and (d) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984. The van also produced in the Court.

The production had been sent to the Government Analyst Department and after analysis, the Government Analyst had forwarded the report to the Negombo Magistrate Court on 05/02/2021. According to the Government Analyst, 88.97 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis in two parcels.

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

1. The Suspect has been in remand custody nearly three years without indictment being filed.
2. The Suspect is the sole breadwinner of the family.
3. The Petitioner had no knowledge whatsoever about the existence of narcotics concealed and hidden inside the cubby-hole of the van in which he was transporting tourists.

4. The B report dated 28.10.2020 does not state as to when (what time) the Petitioner was arrested.
5. No narcotics or illicit items were recovered from the Petitioner's possession or custody.

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 has not been forwarded to the High Court even after receiving the Government Analyst Report to Court.

The suspect is in remand more than two years. According to Government Analyst Report the pure quantity of Heroin detected is 88.97 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 88.97 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 Negombo on 05.02.2021. Although 18 months passed after receiving the Government Analyst Report by the Court, the State has failed forward indictment against the Petitioner.

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 nearly about 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 Petitioner 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 pure quantity of Heroin detected and the circumstances of the case, I consider this an appropriate case to grant bail to the Petitioner. Hence, I order the Petitioner 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 Petitioner 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 Petitioner.
6. To report to the Negombo Police Station 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 Magistrate of Negombo is hereby directed to enlarge the Petitioner on bail on the above bail conditions.

The Registrar of this Court is directed to send a copy of this order to the Magistrate Court of Negombo and the Officer-in-Charge, Police Station, Negombo.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL