

**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/0255/23
HC/Kandy Case No.
HC/277/2021**

The Democratic Socialist Republic of Sri Lanka.

COMPLAINANT

Abdul Masahir Abdul Badurdeen

ACCUSED

AND NOW BETWEEN

Abdul Badurdeen Fathima Aneesa
No.R.B.22,
Maligawatta Place,
Colombo-10

PETITIONER

Vs

1. The Head Quarters Inspector
Head Quarters Police Station,
Teldeniya

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

RESPONDENTS

Abdul Masahir Abdul Badurdeen

ACCUSED

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

COUNSEL : **Punarji Karunasekara for the**
Petitioner.
Kanishka Rajakaruna, SC for the
Respondents.

ARGUED ON : **19/07/2023.**

DECIDED ON : **19/10/2023.**

ORDER

P.Kumararatnam,J.

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

The Suspect was arrested on 13.03.2020 by the Police officers attached to Teldeniya Police Station. He was produced before the Magistrate of Teldeniya.

The Suspect was arrested upon an information that the Suspect was engaging in trafficking Heroin in Teldeniya Police area. As per the information Suspect was arrested in Digana Town with the contraband. The parcel contained some substances which reacted for Heroin (Diacetylmorphine). The substance weighed about 81.410 grams. The Suspect was handed over along with the production to the Teldeniya Police Station for further investigation and necessary action.

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

The production had been sent to the Government Analyst Department and after analysis, the Government Analyst had forwarded the report to the Teldeniya Magistrate Court. According to the Government Analyst, 15.329 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

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

1. The Accused has been in remand custody more than three years.
2. The Accused is the sole breadwinner of the family and father of 04 children.
3. Wrong previous conviction certificate had been filed in the High Court.

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 already been forwarded to the High Court of Kandy.

The suspect is in remand more than three years. According to Government Analyst Report the pure quantity of Heroin detected is 15.329 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 15.329 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.

Although more than three years passed after the arrest of the Accused, the trial has not commenced in the High Court of Kandy. Further, no indication of commencing the trial in near future.

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 more than 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 Accused 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 period in remand, the pure quantity of Heroin detected and the 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.100,000/=.
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 Teldeniya 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 High Court Judge of Kandy is hereby directed to enlarge the Accused on bail on the above bail conditions.

The Registrar of this Court is directed to send this order to the High Court of Kandy and the Head Quarters Inspector, Police Station, Teldeniya.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL