

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

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

Court of Appeal No:

Democratic Socialist Republic of Sri Lanka

CA/BAL/204/23

COMPLAINANT

Vs.

High Court Kuliyaipitiya

Selladore Muththukumar Lahiru

Case No: HC 89/2020

Madushan *alias* Selladore

Muthkumaralage Lahiru Madhusankha

Magistrate Court Hettipola

ACCUSED

Case No: B 119/2019

AND NOW BETWEEN

Selladore Hashan Buddhika,

No. 49, Seegiri Janapadaya, Motemulla,

Yogiyana.

PETITIONER

Vs.

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

COMPLAINANT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Tenny Fernando for the Petitioner
: Kanishka Rajakaruna, S.C. for the Respondent
Inquiry on : 20-07-2023
Order on : 25-10-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner seeking bail for his brother Selladore Muththukumar Lahiru Madhushan alias Selladore Muthukumaralage Lahiru Madhusanka (hereinafter referred to as the accused) who is now the accused in the High Court of Kuliyaipitiya Case No. HC 89/2020.

The accused had been arrested by the officers of the Hettipola police on 17-02-2019 while allegedly having in his possession a substance believed to be Heroin and Kash. When the substance was weighed, it has been found that the substance believed to be Heroin had a gross weight of 25 grams, and the substance believed to be Kash has a gross quantity of 19.933 grams.

According to the B-report No-119/2019 filed before the Magistrate of Hettipola by the Officer-in-Charge of the Hettipola police in that regard, this was 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, the police have recovered two mobile phones and a sum of Rs. 90000/- as well, from the possession of the accused.

The accused has been in remand from the date of the arrest, and according to the Government Analyst Report dated 30-09-2019 the substance produced before the Government Analyst had been identified as a substance having 20.345 grams of Diacetylmorphine, namely, Heroin. The other substance produced for identification had been identified as a substance consists of parts of the hemp plant (Cannabis Sativa L).

In the application for bail before this Court, the petitioner has claimed that the accused was not arrested in the manner as claimed by the police and had denied the charges against the Accused, He has submitted that the long period of incarceration of the accused without his case being tried and concluded by the Court as an exceptional ground that warrants the intervention of this Court to grant bail for the accused.

At the hearing of this bail application, the learned Counsel for the petitioner contended that the fact the accused being in remand custody for more than four years without his case being heard before the relevant High Court should constitute sufficient exceptional grounds to grant bail for the accused.

The learned State Counsel opposing the bail application submitted that the indictment dated 05-09-2020 in this regard was filed before the High Court of Kuliyaipitiya and the matter has now been fixed for the hearing. It was his contention that the alleged delay should not be considered as a reason to grant bail for the accused.

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 accused was Heroin, and had a pure quantity of 20.345 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 accused had been arrested and produced before the Magistrate's Court on 17-02-2019, and although the indictment had been filed, the trial has not commenced even well over four years after the arrest. The facts also reveals that the accused had been an 18-year-old youth at the time of his arrest.

It appears from the High Court proceedings that the trial has not commenced as yet, some three years after the indictment was sent to the Court.

Given the pace the proceedings have so far proceeded, it cannot be determined that the trial will come to a conclusion any time soon without any further delay.

It is my considered view that fact in itself constitute sufficient exceptional ground to release the accused on bail pending the conclusion of the trial against him.

It is ordered that the accused shall be released on the following conditions of bail.

- (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 close relative or a family member of the accused and that surety shall tender an affidavit indicating the relationship he or she is having to the accused before signing the bail bond.
- (3) The accused is ordered to report to the OIC of the Hettipola police every last Sunday of the month between 9.00 a.m. and 12 noon until the conclusion of the case against him.

- (4) The accused is prevented from traveling overseas until the conclusion of the case. If he is possessed of a passport, he shall surrender the passport to the Registrar of the High Court. If he has not obtained a passport, he shall file an affidavit in that regard before being released on bail.
- (5) The Registrar of the High Court of Kuliyaipitiya is directed to inform the Controller of Immigration and Emigration that a travel ban has been imposed on the accused 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 High Court of Kuliyaipitiya for necessary compliance and also to the OIC of the Hettipola police.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal