

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 the Poisons,
Opium and Dangerous Drugs (Amendment)
Act No. 41 of 2022.*

Court of Appeal No:

The Officer in Charge,

CA/BAL/87/23

Police Narcotics Bureau,

Colombo 01.

COMPLAINANT

Magistrate Court Maligakanda

Vs.

Case No: B 22102/21

Themuni Dewage Priyankara *alias*

Sampath

SUSPECT

AND

Vithana Gamage Asoka Damayanthi,

U D 52 B, C, Dharmarama Road,

Dematagoda.

PETITIONER

Vs.

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

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

RESPONDENTS

3. Themuni Dewage Priyankara *alias*
Sampath
(Presently detained in Colombo Remand
Prison)

SUSPECT-RESPONDENT

Before : Sampath B. Abayakoon, J.
: P. Kumararatnam, J.
Counsel : Chamara Wannisekara for the petitioner
: Ridma Kuruwita, SC for the State
Inquiry on : 25-07-2023
Order on : 02-11-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner seeking bail for her brother namely, Themuni Dewage Priyankara alias Sampath (hereinafter referred to as the

suspect) who is the suspect in the Magistrate's Court of Maligakanda Case No B22102/21.

The suspect has been arrested by the officers of the Police Narcotic Bureau (PNB) on 03-11-2021, while allegedly having in his possession 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 516 grams.

According to the B-report filed before the Magistrate of Maligakanda 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. 150000/- was also recovered from the custody of the suspect.

The suspect has been in remand from the date of the arrest, and according to the Government Analyst Report dated 22-02-2022, the substance produced before the Government Analyst had been identified as a substance having 225.6 grams of Diacetylmorphine, namely, Heroin.

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 and had alleged that the suspect was brutally assaulted by the police after his arrest.

The petitioner has submitted two grounds as she termed as exceptional grounds that warrant the intervention of this Court to grant bail for the suspect.

The said grounds are as follows;

- (1) The hardships experienced by the family members of the petitioner without the care and the protection of the suspect.
- (2) Extended incarceration could cause irreparable damage to the suspect.

At the hearing of this bail application, the learned Counsel for the petitioner contended, among other ground urged, that the fact of the suspect being in remand custody over a period of time without his case being heard before a competent Court should constitute sufficient exceptional grounds to grant bail for the suspect.

The learned State Counsel opposing the bail application submitted that the indictment against the suspect in this regard has now been filed before the High Court of Colombo on 12-05-2023, although it has not yet been served on the accused. He contended that there was no delay on the part of the investigating authority since the indictment had been filed, which provides no basis to grant bail for the suspect on the basis of delay.

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 21.185 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 suspect has been arrested and produced before the Court on 04-11-2021, and the indictment has been filed on 12-05-2023.

The suspect who is now an accused in the High Court case has been allegedly arrested with over half a kilogram of a substance suspected to be Heroin and the pure quantity of the Heroin has been determined by the Government Analyst as

225.6 grams. This is a quantity with a high street value and can be made use of to distribute among a large number of potential users.

Under the circumstances, I am not in a position to agree that the time period so far taken in the case against the accused constitute an unwarranted delay in commencing legal proceedings against the accused.

Accordingly, the application for bail is refused. As I do not find a basis to grant bail on exceptional circumstances to the suspect who is now an accused before the High Court.

The Registrar of the Court is directed to communicate this order to the Magistrate's Court of Maligakanda and the OIC of the Police Narcotics Bureau for necessary information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal