

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

In the matter of an application for Bail under Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance (Amendment) Act No. 41 of 2022.

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

Court of Appeal

Complainant

Application No:

Vs

CA/Bail 0145/23

Thaufik Mohammed Muas Mohammed

HC Negombo case No.

(Presently in remand prison)

HC 494/2019

Accused

MC Fort Case No.

B 1072/2016

AND NOW

Fathima Shazmin Muazz
No.56/6A, Asiri Lane, Kalubowila,
Dehiwala.

Petitioner

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

Respondent

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

COUNSEL : **Harith Hettiarachchi with Mark Anton**
For the Petitioner.
Kanishka Rajakaruna, SC for the
Respondent.

ARGUED ON : **25/07/2023.**

DECIDED ON : **03/11/2023.**

BAIL ORDER

P.Kumararatnam,J.

The Petitioner is the wife of the Accused named in the Petition. The Petitioner filing this Application has invoked the jurisdiction of this Court to grant bail to the Accused upon suitable condition as this Court considers appropriate.

The Accused is the 15th Accused named in the indictment filed in the High Court of Negombo in the case bearing No. HC 494/2019.

According to the objections filed by the Respondent, the Accused was arrested at the Katunayake International Airport on 04.04.2016 upon the allegation that he had coordinated with some others to bring down 111.82 Kilogram of Heroin (Gross) to Sri Lanka.

The detection pertains to this case is a joint operation carried out by the Police Narcotics Bureau and the Sri Lanka Navy upon an information received from PW01 named in the indictment. This joint operation had resulted the Salutes arresting 17 persons including the Accused for the

offences committed under the Poisons, Opium and Dangerous Drugs Act No.13 of 1984.

The recovered substances were sent to the Government Analysts and the Report confirmed 48 kilograms, 588 grams and 156 milligrams of pure Heroin had been detected from the substances.

The Hon. Attorney General has indicted the Accused in the High Court of Negombo on the allegation that between 01.01.2016 and 31.03.2016 at Negombo, Galle, Colombo and other places unknown to the prosecution that the Accused committed the offence of conspiracy, with others, by trafficking, or abetting to traffic a dangerous drug as set out in Section 54A (d) of the Poisons, Opium and Dangerous Drugs Act as amended by Act No. 13 of 1984, to traffic 48 Kilograms 588 grams and 146 milligrams of Heroin punishable under Section 54A (b) the said Ordinance read with sections 113a and 102 of the Penal Code.

It was further alleged that the Accused abetted the 14th Accused named in the indictment to traffic 48 kilograms 588 grams and 146 milligrams of Heroin and thereby committed an offence liable to the penalty set out in the indictment.

Although the Petitioner had filed a bail application in the High Court of Negombo, the Learned High Court Judge had dismissed the same on 30.07.2021.

According to the Petitioner, the Accused vehemently denies the charges levelled against him in the indictment. The Accused takes up the position that this a fabricated case against him by the police.

The Petitioner further submits that the Accused began his career as a wharf executive in 1992, and rose to prominence as a businessman. The Accused was the Managing Director of the Colombo Fresh International (PVT) Ltd.

The Accused's business was actively involved in freight forwarding operations and also served as freight forwarder to the Isabela Sea Food

Company, where the 16th Accused in this case was the proprietor of the said company.

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

1. The Accused has been in remanded from 04.04.2016. Now he has completed 7 years and 04 months in remand.
2. The Accused 52 years old and father of three children. He is the sole breadwinner of the family.
3. His business has gone into bankruptcy owing to continuous incarceration.
4. There are no previous or pending case against the Accused.

The Section 83 of the Poison, 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.

(3) For the purpose of this section “dangerous drug” means Morphine, Cocaine, Heroin and Methamphetamine.

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.

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 **Labyndarage Nishanthi v. Attorney General CA (PHC) APN 48/2014** the court held that:

“It is trite law that any accused or suspect having charged under the above act will be admitted to bail only in terms of section 83(1) of the said Act and it is only on exceptional circumstances. Nevertheless, it is intensely relevant to note, the term ‘Exceptional circumstances’ has not been explained or defined in any of the Statutes. Judges are given a wide discretion in deciding in what creates a circumstance which is exceptional in nature.

There is plethora of cases in the legal parlor which had identified what creates an ‘exceptional circumstances’ in relation to granting bail...”

The Learned Counsel for the Petitioner contended that the Accused has been in remand more than 07 years. Hence, invite this Court to consider this as an exceptional circumstance.

Period in remand custody cannot be considered as an exceptional circumstance in all case. It has to be decided on a case-by-case basis to consider whether the remand period already spent could be considered as an exceptional circumstance.

In **Ashani Dhanushshika v. Attorney General [CA (PHC) APN 04/2016]** the court held that:

“ In the present case the petitioner failed to establish any exceptional circumstances warranting this court to exercise the revisionary jurisdiction. The petitioner’s first point is that the suspect is in remand nearly for two years. The intention of the legislature is to keep in remand any person who is suspected or accused of possessing or trafficking heroin until the conclusion of the case. The Section 83(1) of the Act expresses the intention of the legislature...”

In **Carder v. Officer-in-Charge, Narcotics Bureau (2006) 3 SLR 74** the court held that:

“ ...Provision has been made in the Bail Act to release persons on bail if the period of remand extends more than 12 months. No such provision is found in the case of Poison, Opium and Dangerous Drugs Ordinance. Although bail was granted in some of the cases mentioned above, none of these cases refer to the time period in remand as constituting an exceptional circumstance. Hence bail cannot be considered on that ground alone.

According to the decisions cited above, the period spent in the remand custody cannot be considered as an exceptional circumstance in this case.

The Counsel for the Petitioner submits that the suspect is in remand for more than 07 years. Considering the facts and the circumstances of this case, the Counsel further states that the prosecution will not be able to establish a prima facie case against the Accused. Although the University of Colombo scrutinised significant amount of data in the Accused's laptop and SIM card of his mobile phone, found no evidence corroborating the purported baseless allegation of aiding and abetting in the present case.

Further, the Counsel for the Petitioner contended that as the prosecution will not succeed in securing a conviction against the Accused due to the presentation of inadmissible evidence against the Accused. Hence, he strenuously argued that the Accused should be released on bail.

I agree with the learned State Counsel that the factual and evidentiary matters pertain to the investigations can only be tested at the trial upon the witnesses being cross examined and shall not be tested at the time of hearing this bail application considering the nature of this case. The Accused can only be released on bail under the Poisons, Opium and Dangerous Drugs Act as amended upon successful demonstration of that he has exceptional circumstances to be released on bail.

In the case of **A.K.Nandasena v. The Attorney General [CA(PHC) APN 147/2017 the court held that:**

“...that facts of a case do not constitute exceptional circumstances and such issues need to be addressed at the trial stage.”

Hence, the facts of the case will not be addressed in considering this bail application.

In this case the pure quantity of the Heroin totally detected in the production by the Government Analyst is 48 kilogram, 588 grams and 228 milligrams. The involvement of the Accused very well indicates that he and the other persons are suspected drug dealers of large scale, dealing in commercial quantities and not user quantities.

Further, the delay more than 07 years in remand does not fall into the category of excessive and oppressive delay considering the circumstances of this case as the offences committed under Sections 54A(b) with the conspiracy charge of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984.

Considering all the materials placed before this court, the Petitioner has failed to adduce that the Accused has exceptional ground/s to free him on bail. Hence, this bail application is refused.

The Registrar of this Court is directed to send a copy of this order to the High Court of Negombo and officer-in-Charge of the Police Narcotics Bureau Colombo-01.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL