

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

In the matter of an application for Bail as under and in terms of Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance of 17 of 1929 as amended by section 04 of the Act No.41 of 2022.

Court of Appeal Bail Application Officer-in-Charge
CA Bail/0088/23 Police Station
Galle Harbour.

Complainant

MC Galle

Vs.

No. B 1193/2018

Mohammed Saali Mohammed Nihar
No.25/1 B, Second Lane,

High Court of Galle

Katugoda

Case No. HC 5620/21

Galle.

Accused

AND NOW BETWEEN

Fathuma Raseena Cassim
No. 25/1 B, Second Lane,
Katugoda
Galle.

Petitioner

Vs.

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

First-Respondent

2. The Officer-in-Charge
Police Station
Galle Harbour

Second-Respondent

Mohammed Saali Mohammed
Nihar

(Presently in remand prison)

Accused-Respondent

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

COUNSEL : **Aruna Epa with Navinda Kalansuriya**
and Dhammika Perera for the
Petitioner.
Ridma Kuruwita, SC for the
Respondents.

ARGUED ON : **27/07/2023.**

DECIDED ON : **06/11/2023.**

ORDER

P.Kumararatnam,J.

The Petitioner is the wife of the Accused named in the indictment in the High Court of Galle case bearing No. HC 5620/2021. The Petitioner has filed this bail application under Section 83(2) of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

According to the B report filed by the police, upon information the Accused was arrested on 12.11.2018 and recovered some substance which reacted for Heroin. The substance weighted about 25.10 grams.

The Accused was produced in the Magistrate Court of Galle under Section 54A (b) and (c) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984. Further a detention order under Section 83(3) of the said Act was obtained for further investigation.

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

1. The Petitioner states that the total period of four years and nine months have already lapsed since the Accused has been remanded.
2. The Accused is 59 years old, a freelance Labourer and the sole bread winner of the family.

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 Galle.

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 **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 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.

In this case the pure quantity of Heroin detected in the production by the Government Analyst is 14.130 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

The 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.

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 Petitioner states that the Government Analyst Report was received on 28.06.2019 and the indictment was served on the Accused after two years and three months since the receipt of the Government Analyst Report.

The Petitioner states that the matter was taken up for trial on 09.06.2022. The matter was called again on 05.07.2022, 18.10.2022 and 20.02.2023. Even after lapse of nearly two years of service of indictment, the evidence of PW1 is not concluded yet.

Although three bail applications were made before the High Court of Galle, the Accused was not granted bail by the High Court.

Offences under Section 54A(c) 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 Heroin detected and the other 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 Galle Harbour 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 is allowed and the Learned High Court Judge Galle 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 Galle and Officer-in-Charge of the Galle Harbour Police Station.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL