

**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 as amended by section 04 of the Act No.41 of 2022.

Court of Appeal

The Attorney General

Application No:

Attorney General's Department

CA Bail/180/2023

Colombo-12.

High Court of Colombo

COMPLAINANT

No.HC/2260/20

Vs.

MC Nugegoda case No.

Karunaluge Dinushaka Sanjeewa

B/2089/2019

Fernando alias Chuty

ACCUSED

AND NOW

Karunaluge Dinushaka Sanjeewa

Fernando alias Chuty

ACCUSED-PETITIONER

Vs.

1. The Officer-in-Charge

Organized Crimes Prevention Division

Mihindu Mawatha

Colombo-12.

COMPLAINANT-RESPONDENT

2. The Attorney General

Attorney General's Department

Colombo-12.

RESPONDENT

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

P. Kumararatnam, J.

COUNSEL : **R.H.Weerasena with Nisansala
Dissanayake for the Petitioner.**

**Jehan Gunasekara, SC for the
Respondents.**

ARGUED ON : **28/07/2023.**

DECIDED ON : **07/11/2023.**

BAIL ORDER

P.Kumararatnam,J.

The Petitioner filing this Application has invoked the jurisdiction of this Court to grant bail to him upon suitable condition as this Court considers appropriate.

On 18.06.2019, the Petitioner was arrested by officers from the Organized Crimes Prevention Division alleging that he had in his possession 52.100 grams of substances suspected to be Heroin (Diacetylmorphine).

The Petitioner was produced, and facts were reported to the Nugegoda Magistrate under Section 54A(b) and 54A(c) 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 on 20/06/2019. After analysis, the Government Analyst had forwarded the report to Court on 03/01/2020. According to the Government Analyst, 18.256 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

The Petitioner was indicted in the High Court Colombo under two counts namely:

1. On 18.06.2019 the accused Petitioner had possessed 18.256 grams of Heroin punishable under Section 54A (d) of the Poisons, Opium and Dangerous Drugs (Amendment) Act No.13 of 1984.
2. The accused Petitioner on the same day and in the same course of transaction had trafficked 18.256 grams of Heroin punishable under Section 54A (b) of the Poisons, Opium and Dangerous Drugs (Amendment) Act No.13 of 1984.

The contention of the prosecution is that the Petitioner who was loitering near Malani Bulathsinhala Mawatha, Boralessgamuwa was taken into custody by the officers of the Organized Crime Prevention Division and recovered a parcel contained Heroin from his trouser pocket. The arrest was done upon an information received by the officers.

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

1. The Petitioner is in remand custody more than 4 years to date.
2. The Petitioner is the sole breadwinner of the family and the family is going through untold hardships due his prolong incarceration.

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”.

According to the Learned State Counsel, the Petitioner was arrested for possession and trafficking of 18.256 grams of Heroin. Steps had already been taken to indict the Petitioner in the High Court of Colombo and the case number is HC 2260/2020. The trial is fixed and summons had already been sent to all necessary witnesses. Hence, 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.

The Counsel for the Petitioner submits that the suspect is in remand for little more than four years. Considering the facts and the circumstances of this case, the prosecution will not be able to establish a prima facie case against the Petitioner.

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 17/12 and CA(PHC) APN 16/12** the court observed the fact that indictment was not served even after the laps of one year from the producing of the Government Analyst’s Report was considered as exceptional circumstances.

In **CA(PHC)APN 107/2018** decided on 19.03.2019 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. Although the trial was fixed on 21.06.2021, up to now the trial is not commenced in the High Court of Colombo.

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 18.256 grams. Hence, this Court has jurisdiction to consider granting of bail as per the new amendment.

In this case, as per the submission of the Learned State Counsel that the indictment has been dispatched to the High Court High Court of Colombo and the trial date had been already fixed. Although the indictment had been forwarded and the case is fixed for trial, the delay more than four year in remand does not falls into the category of excessive and oppressive delay considering the circumstances of this case.

The Counsel for the Petitioner urged this Court to consider that detaining a suspect without trial being commenced for an extended period of time amounts to a violation of his fundamental rights which can be considered as an exceptional ground.

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.

I consider the delay more than four 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 Petitioner has very good exceptional circumstances to consider this application in his favour.

Considering all these factors into account, I order bail to the Petitioner with following strict bail conditions.

1. Cash bail of Rs.100,000/=.
2. To provide 02 sureties. They must sign a bond of two million each.
3. The Petitioner 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 Petitioner.
6. To report to the Organized Crimes Prevention Division, Mihindu Mawatha, Colombo-12 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 Learned High Court Judge of Colombo is hereby directed to enlarge the Petitioner on the above bail conditions.

The Registrar of this Court is directed to send this order to the Officer-in-Charge of the Organized Crimes Prevention Division, Mihindu Mawatha, Colombo-12 and the High Court of Colombo.

JUDGE OF THE COURT OF APPEAL

SAMPATH B. ABAYAKOON, J.

I agree.

JUDGE OF THE COURT OF APPEAL