

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 (Amendment) Act No. 41
of 2022.*

Court of Appeal No:

Denepitiya Widanalage Dona Pavani

CA/BAL/127/23

Udeshika,

No. 380/A, 16th Lane, Wawegodahena,

Malamulla, Panadura.

PETITIONER

Magistrate Court Maligakanda

Vs.

Case No: B 6410/22

1. The Officer in Charge,

Police Station,

Borella.

COMPLAINANT-RESPONDENT

2. The Attorney General,

Attorney General's Department,

Colombo 12.

2ND RESPONDENT

3. Wijendra Naidelage Chalana

Madushanka Shanthapriya,

No. 157/1B, Mihindu Mawatha,

Colombo 12.

(Presently in Remand custody)

SUSPECT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Asthika Devendra with Wasantha Sandaruwan
instructed by Eranda Sinharage for the petitioner

: Malik Aziz, S.C. for the State

Inquiry on : 04-08-2023

Order on : 23-11-2023

Sampath B. Abayakoon, J.

This is an application by the petitioner seeking bail for her husband, namely, Wijendra Naidelage Chalana Madhushanka Shanthapriya (hereinafter referred to as the suspect) who is the suspect in the Magistrate's Court of Maligakanda Case No B-6410/2022.

The suspect had been arrested by the police officers of the Borella police on 02-03-2022 while allegedly having in his possession a substance believed to be Heroin. When the substance was weighed, it has been found that the substance had a gross weight of 204 grams and 246 milligrams.

According to the B-report filed before the learned Magistrate of Maligakanda by the Officer-in-Charge of the Borella 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.

The suspect has been in remand from the date of the arrest, and according to the Government Analyst Report, the substance produced before the Government Analyst had been identified as a substance having 36.6 grams of Diacetylmorphine, namely, Heroin.

In the application for bail before this Court, the petitioner has claimed that the suspect was not arrested in the manner as claimed by the police and had denied the charges against the suspect. The petitioner has submitted the period of incarceration of the suspect without being tried and concluded by the Court and his medical conditions which require sufficient attention, as exceptional grounds that warrants the intervention of this Court to grant bail for the suspect.

At the hearing of this bail application the learned Counsel for the petitioner contended that the fact the suspect being in remand custody over one and half years without a case being filed against him, if there was evidence against him, constitute sufficient exceptional grounds to grant bail for the accused.

The learned Counsel submitted several medical reports obtained to substantiate the health condition of the suspect, it was pointed out that the suspect is suffering from a heart decease, hypertension as well as type 11 diabetes and currently undergoing treatment at the prison hospital. He submitted that the suspect needs required medical care outside of the prison system and urged the Court to consider that also as an exceptional circumstance and grant him bail upon suitable conditions.

The learned State Counsel opposing the bail application submitted that the alleged medical condition of the suspect can be considered only if the condition is life threatening. His position was that suspect has been receiving adequate medical care within the prison and his condition has been reported stable. He

admitted that the relevant extracts in relation to the investigations carried out by the police has not yet been received by the Hon. Attorney General to consider an indictment against the suspect.

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 suspect was Heroin, and had a pure quantity of 36.6 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 had been arrested and produced before the Magistrate's Court on 02-03-2022, and the relevant Government Analyst Report is available from 22-04-2022 but so far even the relevant extracts have not been forwarded to the Hon. Attorney General. I do not find that this is a detection that require extensive investigation to justify the delay in the part of the investigating authorities.

The medical reports provided shows that the suspect is a person having several medical conditions which require constant medical attention, which appears to be the very reason why he has been receiving treatment at the prison hospital over a period of time.

Having considered the medical condition of the suspect, and the prospect of a charge not being filed against the suspect in the near future, I am of the view that the said grounds constitute sufficient exceptional grounds to grant bail for the suspect.

It is ordered that the suspect 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 suspect and that surety shall tender an affidavit indicating the relationship he or she is having to the suspect before signing the bail bond.
- (3) The suspect is ordered to report to the OIC of the Borella 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 suspect 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 Magistrate's Court of Maligakanda. 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 Magistrate's Court of Maligakanda is directed to inform the Controller of Immigration and Emigration that a travel ban has been imposed on the suspect 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 Magistrate's Court of Maligakanda for necessary compliance, and also to the OIC of the Borella police.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal