

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

*In the matter of an application for
bail in terms of Section 10 (1)(a) of
the Assistance to and Protection of
Victims of Crimes and Witnesses
Act, No.4 of 2015.*

The Officer in charge
Police Station
Walasmulla.

Complainant

**Court of Appeal Case
No: CA /BAL/0025/2020**

Vs.

**Walasmulla
Magistrate's Court Case
No: BR /256/2019**

Kattadige Janaka Pushpakumara
Palugoda ,Temple Road
Athpitiya, Walasmulla

Suspect

And now

Ruwanmunige Lilawathi
Palugoda, Temple Road
Athpitiya, Walasmulla

Petitioner

Vs.

1. Officer in Charge,
Police Station,
Walasmulla.

Complainant-Respondent

2. Hon. Attorney General,
Attorney General's
Department, Colombo-12

Respondent

Kattadige Janaka Pushpakumara
Palugoda , Temple Road
Athpitiya, Walasmulla

Suspect Respondents

(Presently at Angunakolapalassa
Prison)

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Shabdika Wellappili with Sharmal
Herath for the petitioner

Panchali Witharana SC for the
Attorney General

Argued on : 15.03.2021

Decided on : 29.04.2021

Iddawala -J

The petitioner of this case has made this application in terms of section 10(1) (a) of the Assistance to and Protection of Victims of Crime and Witnesses Act, No.4 of 2015 (hereinafter referred to as Witnesses and Victims Protection Act) requesting bail on behalf of her son who is the suspect respondent of this case. The suspect respondent, along with two other suspects, were arrested for allegedly committing offences punishable under the Section 8(2) and Section 8(3) of the said Act and he is named as the 2nd suspect of the respective case; BR 256/2019 in the Magistrate Court of Walasmulla.

The similar applications have been made on behalf the other two suspects of the above Magistrate Court case in the cases BAL -0024-20 (first suspect) and BAL-0026-20 (third suspect). In those two applications, the petitioners have requested bail for their husbands. At the beginning of the arguments the counsel for the petitioners in all three cases and the counsel for the respondents agreed to consider all these cases together as they involve one and the same incident.

It is alleged that on 2019.04.13, these three suspect respondents have threatened and committed offences against the victim and witnesses of a case concerning a statutory rape. The legal action of this original case is instituted under the Case No. BR-10/2019 and the suspect respondent is named as its main suspect. All three suspect respondents were charged under the provisions of Witnesses and Victims Protection Act concerning the said incident on 2019.04.13 and even though the suspect respondent was not physically present at this incident since he has been the suspect of the original case (Case No. BR-10/2019) he was also arrested on charges of aiding and abetting the alleged crime.

Any suspect who is charged under the Witnesses and Victims Protection Act shall be enlarged on bail only under exceptional circumstances by this Court.

Section 10(1) (a) of the Witnesses and Victims Protection Act is as follows:

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“An offence under section 8 or 9 shall be cognizable and non-bailable and no person suspected, accused or convicted of such an offence shall be enlarged on bail, unless under exceptional circumstances by the Court of Appeal.”

In these circumstances, it is very clear that provisions of the Bail Act, No.30 of 1997 have no application to the offences under the Witnesses and Victims Protection Act. Section 3 of the Bail Act has also recognized this contention as follows.

Section 3 of the Bail Act:

*(1) Nothing in this Act shall apply to any person accused or inspected of having committed, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act. No 48 of 1979, Regulations made under the Public Security Ordinance or any **other written law which makes express provision in respect of the release on bail** of persons accused or suspected of having committed, or convicted of, offences under such other written law".*
(emphasis added)

Therefore, the petitioner has to satisfy this court that there are exceptional circumstances which can justify the granting of bail to the suspect respondent.

The court has to be more cautious when dealing with bail applications under this particular law. In such applications it is necessary to strike a balance, as far as that can be done, between protecting the rights of the victims, witnesses and safeguarding the proper administration of justice and ensuring the liberty of the individuals.

As observed above, the section 10 (1) (a) of the Witnesses and Victims Protection Act stipulates that an accused person who is charged with an offence referred to in the section 8 shall be incarcerated unless he (or she) satisfies this court that exceptional circumstances exist which in the interests of justice permit his or her release. The word “*satisfies*” implies the onus that must be discharged by the accused/suspect person. Our courts have refrained from attempting to formulate a comprehensive definition of what constitutes “*exceptional circumstances*” as that would be attempting to define the indefinable. A considerable degree of opportunity is given to an applicant of bail to establish exceptional circumstances which, case-by-case, may relate to the nature of the offence, the personal circumstances of the applicant, or anything else unusual or different that may warrant to his / her release.

In addition, a measure of flexibility in the judicial approach to the determination of “*exceptional circumstances*” is also permitted. In the exercise of its discretion a court will accord recognition to the right to freedom which is protected by the Constitution itself, the supreme law of the country.

Article 13(4) and Article 13 (5) of the Constitution state–

*“13 (4). No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. **The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.***

(5) Every person shall be presumed innocent until he is proved guilty”. (emphasis added)

Moreover, when carefully perusing the Witnesses and Victims Protection Act, it can be observed that there are provisions specifically to safeguard the rights of the suspects as well as the victims and witnesses.

Section 10(2) of the Witnesses and Victims Protection Act is as follows: -

*“A trial against a person accused of having committed any offence under **section 8 or under section 9 shall be taken up before any other business of that court and shall be held on a day to day basis and not be postponed** during the course of such trial, except due to unavoidable circumstance which shall be specifically recorded.”*

(emphasis added)

The objectives of the Act are set out in the Section 2 and it covers a vast area, including the upholding of the rights and entitlements of victims of crimes and witnesses and providing for proper mechanisms to promote, protect and enforce such rights and entitlements. It specifies that the Act stipulates the offences that may be committed against victims of crime and witnesses and the penal sanctions that may be imposed on persons who commit such offences. Rights of the victims of crimes and their entitlements are stipulated in detail in Sections 3 and 4 while the entitlements of the witnesses are given in Section 5 of the Witnesses and Victims Protection Act.

In this case, the following are the matters in brief, which the petitioner has submitted to this Court as exceptional circumstances for enlarging her son on bail.

- i. There are no evidence to prove that her son has involved physically in the alleged incident or he has abetted or supported it. Further he is under remand custody for over a year
- ii. The incident on 13.04.2009 cannot be maintained under Witnesses and Victims Protection Act
- iii. The case No. BR 256/2019 is based on belated statements which were not included in the original B report;
- iv. The complaint made by the plaintiff of the case BR 256/19 seems malicious as he has failed to inform the police of the alleged misconduct immediately and to disclose any reason as to how the alleged assault has been a threat to withdraw or refrain from giving evidence in the case BR 10/2019.
- v. He is working as a mason and earn day to day living and therefore they are a family with a low income
- vi. Suspect respondent is the sole bread-winner of their family;

“Exceptional circumstances” is very subjective and varies depending on the facts of each case and it has to be interpreted according to the situation. It is a discretion of the Courts.

In the celebrated case **in 1770 R. v. Wilkes** 1770 Burr. at p.253 **Lord Mansfield C.J.** made the following well known pronouncement.

“It is indeed in the discretion of the Court to bail a person so circumstanced. But discretion when applied to a Court of Justice, means sound discretion guided by law. It must be governed by rule, not by

humour, it must not be arbitrary, vague and fanciful but legal and regular.”

Lord Denning in **Ward v. James** 1965 1AER at p.571 stated that -

“From time to time consideration may change as public policy changes and so the pattern of decision may change. This is all part of the evolutionary process.”

The suspect-respondent of this instant case was remanded after being produced before the Magistrate on 03.05.2019. The suspect respondents of the case of BAL 0024-20 and BAL-0026-20 were arrested on 17.04.2019 and 03.07.2019 respectively. An identification parade has also been held to identify the third suspect. Accordingly, these suspects have been held in remand custody for nearly a period of two years.

The Counsel for petitioner submitted a reported case of another division of this Court **CA/ Bail/2/2020** where it was held that “

“in the instant case the petitioner is in remand for over 12 months. It is also not clear if and when indictment will be served on the petitioner. Considering above in the interest of justice this Court decides to enlarge the petitioner on bail subject to stringent conditions.”

In the above case the Court referred to the case **CA (PHC) APN 64/ 2009** where **W.L.R Silva J** held that:

“.....In any case, if the period of incarceration is out of a provision and depending on the nature of the charges the Court of course can consider on certain

circumstances the long period of incarceration as constituting an exceptional circumstance.”

Contrary to this another division of this Court in case **No. CA/BAL/36/2019** has not granted bail to the suspects who had been in remand for nearly 13 months, depending on the circumstances of that case.

As stated above, this court cannot give a definite interpretation regarding exceptional circumstances that may lead to enlarge a suspect on bail. It depends on the circumstances of each case.

In general, when there is no prima facie case against the accused /suspect or when there is an inordinate delay in the process which cannot be explained or justified, they can be considered as exceptional circumstances.

In this instant application the suspect respondent is being in remand for nearly two years. Neither the charges have been framed nor the indictments have been served in the above cited two cases (BR 256/2019 and BR 10/2019 Walasmulla MC). The 1st and 2nd respondents of this case have not given, to the satisfaction of this Court, any explanation or justification for the delay in serving indictments in either case, which constitutes an exceptional circumstance in this case.

Considering the above, in the interest of justice, this Court inclines to enlarge the suspect respondent on bail. Therefore, this Court directs the learned Magistrate of Walasmulla to enlarge this suspect respondent on bail subject to the following conditions: -

1. A cash bail of Rs. 25,000/-.
2. Surety bail of Rs. 50,000/- each with two sureties applicable to the learned Magistrate.

3. The suspect petitioner is directed to report to the Officer in Charge of the Police Station Walasmulla every Sunday of the week between 8:30 am to 12:30 pm.
4. The following conditions are imposed to the suspect respondent in terms of section 10(b) of the Victims and Witness Protection Act
 - i. Prohibit communication or coming into close proximity of the victims or witnesses or any other persons connected to this case
 - ii. Not to involve in any other criminal offences
5. If the suspect respondent violates any of the bail conditions mentioned above, he will be remanded until the final determination of the case.

Registrar of this Court is directed to send copies of this bail order to the learned Magistrate of Walasmulla and to the relevant authorities.

Judge of the Court of Appeal

Menaka Wijesundera

I agree.

Judge of the Court of Appeal