

**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 83 (2) of the Poisons, Opium and Dangerous Drugs Ordinance No. 13 of 1984 as Amended Act No. 41 of 2002 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal No:
CA/BAL/0360/2023**

Hon. Attorney General
Attorney Generals' Department
Colombo 12.

HC Homagama
Case No: HC 29/2023

Complainant

vs

MC Kesbewa
Case No: B 77/2022

Maraba Kodithuwakku Arachchige Niroshana

Accused

And Now Between

Maraba Kodithuwakku Arachchige Niroshana
(Presently in Remand Custody)

Accused - Petitioner

Vs

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Complainant-Respondent

Before :

R. Gurusinghe J
&
M.C.B.S. Morais J

Counsel : Shanaka Ranasinghe, P.C., with
Anushika Ranasinghe
for the Petitioner

Jehan Gunasekera, S.C.
for the Respondent

Argued on : 04/04/2024

Decided on : 29/05/2024

ORDER

R. Gurusinghe J

The petitioner is the accused in the High Court of Homagama, bearing Case No. HC 29/2023, where he is accused of being in possession and trafficking of 20 grams of heroin, which is an offence punishable under Section 54 of the Poisons, Opium and Dangerous Drugs Ordinance (hereinafter referred to as the Ordinance) as amended by Act No. 13 of 1984.

The petitioner filed this application in terms of section 83 (2) of the Ordinance as amended by Act No. 41 of 2022. The accused was arrested on 09-01-2022 for allegedly being in possession of 30 grams of heroin. As per the Government Analyst report, the pure quantity of heroin is found to be 20 grams.

The provisions of section 83 of the Poisons, Opium, and Dangerous Drugs Ordinance, as amended by Act No. 41 of 2022, state;

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 in 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.”

In terms of the above provisions, the petitioner has to satisfy that there are exceptional circumstances which warrant granting bail to the petitioner. The petitioner has submitted the following as exceptional circumstances.

- i. The petitioner is being held in custody for two years and three months from the date of arrest.
- ii. The presumption of innocence ensured by the Constitution of the Republic is in favour of the accused.
- iii. The petitioner is a father of two children aged 8 and 6.
- iv. The petitioner is the sole breadwinner of the family.
- v. The wife of the petitioner is unemployed, and due to the petitioner’s arrest and being held up in remand custody, his family is under great financial difficulty.
- vi. The petitioner was self-employed, and he was carrying on Embroidery Work under the name of “Dulanjali Embroider”

In addition to the above, the petitioner has pleaded that he had no previous convictions, and no other pending cases against him.

The respondents have filed objections to the petitioner's bail application and stated that, the petitioner had failed to establish any acceptable exceptional circumstances to invoke the jurisdiction of this Court, as warranted by Section 83 of the Ordinance. The respondent further submitted that the Hon. Attorney General had indicted the petitioner in terms of Section 54 of the Ordinance as amended by Act No. 13 of 1984, in the High Court of Homagama under Case No. HC 29/2023.

What constitutes exceptional circumstances is not defined in the statute. Our Superior Courts have considered various situations as exceptional circumstances in granting bail for suspects in terms of the Ordinance.

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 the Bail Application of CA Bail/0109/22, P. Kumararatnam, J., quoting from the judgment of the Supreme Court of Victoria, stated as follows:

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.”

The pure quantity of heroin involved in this case is 20 grams. The petitioner was self-employed and carrying on Embroidery Work and he was the sole breadwinner of the family. The Petitioner is a father of two minor children aged 8 and 6. The petitioner has been in remand custody for two years and four months as of now. The petitioner has no previous convictions or pending cases other than the present case. Although more than two years passed after the arrest of the petitioner, the trial has not commenced in the High Court. Further, there is no indication of commencing the trial in the near future. The delay of more than two years in remand falls into the category of excessive and oppressive delay considering the circumstances of this case. In considering these matters, the court must bear in mind the presumption of innocence.

In the case of Attorney-General V Sugulebbe Latheef and Another [2008] 1 Sri LR Page 225, the Supreme Court stated *inter-alia*, “*the right to a fair trial amongst other things include the following: -*

..... 7. The right of an accused to be tried without much delay.”

Taking into consideration the circumstances of the case, I hold this is an appropriate case to grant bail to the accused-petitioner. Hence, I order the accused to be released on the following conditions:

1. A Cash bail of Rs. 200,000/- (Two Hundred Thousand).

2. Provide two sureties. Each such surety must enter into a bond of Rs. 1,000,000/- (One Million).
3. To surrender his passport, if any, to the Court. An overseas travel ban is imposed on the accused until the conclusion of the case. The High Court Judge is directed to inform of the overseas travel ban on the accused to the Controller of Immigration and Emigration.
4. The permanent address of the accused should be provided to the High Court of Homagama, and such residence should not be changed without leave of the Court until the conclusion of the case.
5. To report to the Police Narcotics Bureau, Colombo, on the last Sunday of every month between 9.00 a.m. and 1.00 p.m.

The Registrar is directed to send copies of this order to the High Court of Homagama and the Officer-in-Charge of the Police Narcotics Bureau, Colombo.

Judge of the Court of Appeal.

M.C.B.S. Morais J.

I agree.

Judge of the Court of Appeal.