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. 17 of 1929 as Amended by Section 04 Act No. 41 of 2002 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Court of Appeal No:
CA/BAL/0638/2023

High Court Gampaha
Case No: HC 81/2022

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

1. Duwage Sithum Wishmitha Alwis
(Currently held in Remand Custody)

Suspect

And Now Between

Mohamad Fareed Fathima Fasmila,
No. 993/1, Waragoda Road,
Kelaniya

Petitioner

Vs.

1. Officer-in-Charge,
Police Narcotic Bureau,
Colombo 01.

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

Respondents

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

Counsel : Hafeel Fariz with Shannon Tillekeratne
for the Petitioner

Fahim Mashood, S.C.
for the Respondents

Argued on : 30/04/2024

Decided on : 05/06/2024

ORDER

R. Gurusinghe J.

This is an application by the petitioner seeking bail for her husband, namely Duwage Sithum Wishmitha Alwis, who is the accused (hereinafter referred to as the accused), in Case bearing No. HC 81/2022 in the High Court of Gampaha. The accused is charged with possession and trafficking of 32.05 grams of heroin which are offences punishable under Section 54A (b) and 54A (d) of the Poisons, Opium and Dangerous Drugs Ordinance (hereinafter referred to as the Ordinance), as amended by Act No. 13 of 1984. The accused was arrested on 31-03-2021 by the Officers of The Police Narcotic Bureau, Colombo for allegedly being in possession of 186.0 grams of heroin. According to the Government Analyst report, it was revealed that the brown colour powder sent to the Government Analyst contained 32.05 grams of heroin.

The petitioner has filed this bail application in terms of the provisions of Section 83 of the Ordinance as amended by Act No. 41 of 2022.

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."

Under the above provisions, the petitioner has to establish that there are exceptional circumstances which warrant releasing the accused on bail.

The petitioner has pleaded the following as exceptional circumstances to consider bail.

(i) The petitioner states that the suspect was not, in fact, arrested in the manner narrated by the police, and accordingly, there lies no prima facie case against the suspect.

(ii) The petitioner states further that the suspect has been remanded for a long period (more than 2 years), which has badly affected the petitioner and the family as the suspect played a major role in the family. Therefore, the whole family is in a difficult situation.

The respondents have filed objections to the petitioner's application. The respondents have stated that the grounds mentioned in the petition cannot be considered as exceptional circumstances. They have also noted that the accused has already been indicted in the High Court of Gampaha. The respondents have further submitted that the accused has been indicted before the High Court of Negombo under Case No. HC 405/2014 for possession and trafficking of 3.94 grams of heroin. They have produced a copy of the indictment marked R1. The respondents also pointed out that the petitioner has manifestly suppressed and failed to disclose the pending case mentioned above.

The two grounds urged by the petitioner, as exceptional circumstances cannot be considered exceptional, in order to grant bail to the accused.

In the case of *The Queen v N.L. Cornelis Silva 74 NLR 113* , Weeramantry,J. states as follows;

"The grounds urged in support of his application are firstly that the sentence came as a surprise to him and that he therefore could not make provision for the education of his children and the other affairs of the family and secondly that he needs an opportunity to collect the necessary finances to conduct his appeal and the appeal of his eldest son who has also been convicted along with him.
The first of these reasons scarcely bears examination while the difficulty envisaged in the second ground is by no means extraordinary as it is one which would be common to very many accused persons."

The petitioner has failed to reveal that the accused has been indicted in the High Court of Negombo for a similar offence, which is a material fact when considering granting bail to an accused person. Further, the accused has two previous convictions for being in possession of heroin, one in 2015 and another in 2016. In both matters, he had been fined and imposed two years of rigorous imprisonment, and the term of imprisonment was suspended for seven years. Apparently, the accused has been involved in two similar offences during the operational periods of the abovementioned two suspended sentences. The petitioner has suppressed those material facts from the court. There is a high probability that the accused might get involved in further offences if granted bail at this stage.

In the above circumstances, the application for bail cannot be considered in terms of Section 83 (2) of the Ordinance. The application is dismissed.

Judge of the Court of Appeal.

M.C.B.S. Morais J.
I agree.

Judge of the Court of Appeal.