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/0432/2023
MC Kesbewa
Case No: BR19/2020

Delpachitra Acharige Chaminda,
No. 69/05 School Lane,
Weniwelkola, Kahathuduwa,
Polgasowita

Suspect-Petitioner

Vs -

1) Officer-in-Charge
Police Station,
Piliyandala.

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

Respondents

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

Counsel : Sharon Seresinhe **for the Suspect - Petitioner**

I.M.M. Fahim, SC, **for the Respondents**

Argued on : 20.11.2023

Decided on : 12.12.2023

ORDER

R. Gurusinghe J

The petitioner is the suspect in case bearing no. BR 19/2020 in the Magistrate's Court of Kesbewa. The petitioner was arrested on 03-01-2020 by the officers attached to the Piliyandala Police Station, allegedly for being in possession of 40.5 grams of heroin. The petitioner has been in custody since then.

The petitioner pleaded the following as exceptional circumstances for the consideration of Court to grant him bail.

1. The petitioner has been incarcerated for three years and five months, and no meaningful action has been taken against him.

2. The petitioner's mother is 83 years old and was maintained by him. She has no source of income owing to the petitioner's long period of incarceration.

3. The petitioner's wife is unable to carry on daily activities as she has many health issues. Further, she is unable to meet her medical expenses. Medical reports are annexed as P5.

4. Petitioner is 45 years old, a goldsmith, and has a jewellery workshop. The petitioner further states that at the time of his arrest, he was in possession of Rs. 28,000/- cash, which he had earned from his jewellery business and not from trafficking heroin.

The respondents have filed objections and stated that the petitioner has failed to mention that he has few previous convictions. The facts of this case do not constitute exceptional circumstances to grant bail. The petitioner is now indicted in the High Court.

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."

Exceptional circumstances are not defined in the statute. Therefore, what amounts to exceptional circumstances must be considered on its own facts and circumstances on a case-by-case basis.

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".

The petitioner has been in custody since 02-01-2020, only a month less than four years. Although the indictment has been dispatched, the indictment was not served on the suspect. The petitioner has previously sought bail from the High Court, and the application was refused. Proceedings relevant to that application are filed as P1. Though the objection has been taken on the basis that the petitioner has failed to divulge previous convictions, Counsel for the petitioner in the High Court has clearly submitted that the petitioner had few previous convictions and that proceedings were filed by

the petitioner. The petitioner was convicted for being in possession of 3 grams of cannabis Sativa-L (Ganja) and 2 grams of cannabis Sativa-L. In addition, he has been convicted of being in possession of 8 drams and 240 drams of liquid that is used to make illicit liquor (*Goda*).

The trial against the appellant has not started. The petitioner has already been incarcerated for nearly four years. The presumption of innocence ends only upon conviction. The court holds the discretion to grant bail, which should be exercised with due care, taking into account the facts and the circumstances of each case.

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."*

Taking into consideration the quantity of heroin detected, the period in custody without the trial being started, and other circumstances, bail is granted to the petitioner on the following conditions.

1. Cash bail of Rs. 200,000/-.

2. To provide two sureties acceptable to the Learned High Court Judge. The sureties must sign a bond of Rs. 1,000,000/- each.

3. To surrender the passport of the accused, if any, to the Court and an overseas travel ban is imposed on the petitioner until the conclusion of the trial.

4. To report to the police station in Piliyandala on the 1st Sunday of every month between 9.00 a.m. and 1.00 p.m.

The Registrar of this Court is directed to send copies of this Order to the High Court of Homagama and to the OIC of the Piliyandala Police Station.

Judge of the Court of Appeal

M.C.B.S. Morais J.

I agree.

Judge of the Court of Appeal.