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/0633/2023

Officer-In-Charge
Police Station
Grandpass

MC Maligakanda
Case No:B 20460/23

Complainant

Vs

Subhaweera Gamage Malani Chandralatha,
No. 233/351A,
Henamulla Camp,
Madampitiya Road, Colombo 15

Suspect

And Now Between

Inoka Nishanthi Hettiarachchi,
No. 233/351A,
Henamulla Camp,
Madampitiya Road, Colombo 15

Petitioner

Vs

1. Officer-in-Charge,
   Police Station,
   Grandpass.

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

Respondents

Subhaweera Gamage Malani Chandralatha,
No. 233/351A,
Henamulla Camp,
Madampitiya Road, Colombo 15.
(Presently detained in Magazine Remand Prison)

Suspect-Respondent

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

Counsel : Kasun Liyanage withThilakkana Indunil
for the Petitioner

Jehan Gunasekera, S.C.
for the Respondents

Argued on : 04/04/2024

Decided on : 06/06/2024

ORDER

R. Gurusinghe J

This is an application by the petitioner seeking bail for her mother, namely Subhaweera Gamage Malani Chandralatha, who is the suspect (hereinafter referred to as the suspect) in Case No. B 20460/2023 in the Magistrate's Court of Maligakanda. The suspect was arrested by the Officers of the Grandpass Police Station on 28-05-2023, for allegedly being in possession of 50.0 grams of heroin and 100.0 grams of Methamphetamine, 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. In addition to the above, it is alleged that the suspect was in possession of 3 Kilograms of Cannabis and some unidentified capsules.

The petitioner has made this application under the provisions of Section 83 (2) of the Ordinance.

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 must establish that there are exceptional circumstances which warrant releasing the suspect on bail.

The police report to the Magistrate's Court stated that upon receiving information from an informant, they searched a house in the Henamulla area and also bodily searched the suspect, where they found a key to a padlock in the blouse worn by the suspect. The police were able to open a bathroom using that key. The police found a large haul of Dangerous Drugs, including 50.61 grams of heroin and 101.1 grams of Methamphetamine, inside the bucket kept in the bathroom. Accordingly, a 59-year-old woman was arrested, and the contraband were also taken into custody.

The petitioner has pleaded the following as exceptional circumstances in seeking her mother to be enlarged on bail.

i. In the initial 'B' report dated 29.05.2023 even though it was alleged that, the key to a bathroom in which the aforementioned haul of illegal substance had been detected and recovered from inside the blouse of the suspect, no such key, being decisive evidence, had been listed as a production.

Three materials, namely a basket in which the illegal substances had allegedly been placed, a bunch of keys, and a mobile phone, were listed as productions under the numbers PR 2225/23, 2226/23, and 2227/23 only on the next date, i.e. 30.05.2023, by way of a further report.

This material omission regarding PR 2225/23, 2226/23, and 2227/23 in the initial 'B' report cast a *prima facie* doubt on the raid's veracity.

In proof thereof, a Certified Copy of the said further Report dated 30.05.2023 is hereby marked produced as **X4** and pleaded a part and parcel hereof.

ii. Although what had been referred to in the initial 'B' report dated 29.05.2023 as having been recovered from inside the blouse of the suspect was a **key (**යතුර**),** what was produced before the Court by way of a further report dated 30.05.2023, was a **bunch of keys (**යතුරු කැඩල්ල**),** and this material discrepancy again casts a *prima facie* doubt on the veracity of the raid.

iii. Even though it was alleged in the said 'B' report that 'වසා දමා තිබූ නාන කාමරයේ දොරට යෙදීමේදී එහි යතුර බවට දොර විවෘත වීමෙන් හඳුනා ගන්නා ලදී' it has not been revealed in the said 'B' report whether this so called 'bathroom' was located inside or outside of the suspect's home being a material fact which has a direct bearing upon 'exclusive possession' of the contraband so seized.

iv. Although a large haul of contraband was alleged to have been recovered from the possession of the suspect, no Detention Order had been obtained by the police to further probe into the source of this illegal substance or to identify the trafficking network, which again casts a *prima facie* doubt on the veracity of the raid.

v. The suspect is 69 years old woman having been born in 1954 and suffering from a severe wheezing condition and high blood sugar

hence an indefinite detention in the remand custody might make her susceptible to the deteriorated health condition.

In proof thereof, a copy of the National Identity Card of the suspect is hereby marked produced as **Y7** and a copy of the suspect's clinic book from Health Curative Department of Colombo Municipal Council as **Y8** and pleaded a part and parcel hereof.

vi. Any other ground the Counsel representing the Petitioner may plead before your Lordships' and Ladyships' Court at the stage of inquiry.

The respondents have filed objections to the petitioner's application and stated that the petitioner has failed to establish or even state acceptable exceptional circumstances to invoke the jurisdiction of this Court, as warranted by section 83 of the Ordinance. In addition, they repeated the facts stated in the B report to the Magistrate's Court and moved for the dismissal of the petitioner's application.

The petitioner stated in her petition that at the time of the arrest of her mother, the petitioner, her husband, and her mother (the suspect) were living in a small slum house, which was due to be demolished soon. A group of police arrived at their house while the suspect was sleeping and the house was searched but found nothing incriminatory. Further it was stated that, the suspect was never searched and no key to a bathroom was recovered from inside her blouse. The suspect was taken to the police station by the said group of police officers only to record her statement. The petitioner also stated that the bathroom referred to in the initial 'B' report dated 29-05-2023, was a common bathroom which is meant for the use of the dwellers in the area and is located outside the suspect's house. It was further stated that the impugned bathroom is in a dilapidated condition with its roof partially displaced, and a key to such a bathroom was never recovered from the possession of the suspect. They have tendered photographs of the alleged bathroom and the vicinity marked Y1 to Y5. An affidavit sworn in by the petitioner's husband produced marked Y6.

The police have failed to state in the 'B' report the fact that the bathroom was not within the suspect's house. Their position initially was that they found the key to that bathroom inside the blouse worn by the suspect. However, that key was not listed as a production in the initial 'B' report. Subsequent to the 'B' report on 30-05-2023, they produced a bunch of keys, instead of a key referred to earlier. A Counsel for the petitioner pointed out, referring to the photographs, that there was no hasp or staple on the exterior of the door for a padlock and it has only a slide latch lock. Furthermore, there is a huge gap between the door

and the roof. It was further stated that the roofing sheets were broken and removable. That alleged bathroom is situated facing the passage between the slums, which has access to anybody.

The Learned State Counsel for the respondents stated that he was not sure whether the photograph shown, was of the alleged bathroom. The respondents have filed comprehensive objections to the petitioner's application. However, they have not denied the correctness of the photographs or made any observations regarding those photographs. The suspect is now a 70-year-old woman suffering from wheezing and high blood sugar. The petitioner has pleaded that the suspect had no previous convictions, and this fact was not refuted in the objections.

In the case of Banda v. Haramanis 21 NLR 141 De. Sampayo J. held that *"possession to be criminal must be actual and exclusive, for criminal liability does not attach to constructive possession."*

The Learned State Counsel for the respondents, citing some case laws, submitted that the facts of the case do not constitute exceptional circumstances, and such issues need to be addressed at the trial stage.

It is true that at the stage of considering bail, it would not be proper for the Court to express any opinion on the merits or demerits of the case. However, the Court can refer to the material on record, which would be necessary to give reasons for granting or refusing bail.

I considered, the material available on the case record especially that the suspect is now a 70-year-old woman suffering from wheezing and high blood sugar. The suspect has no criminal history. Further, the alleged bathroom was not a part of the suspect's house. The observations made in this order, should not be prejudiced by either party in the trial.

Taking into consideration the facts and circumstances of the case, I decide this is an appropriate case to grant bail to the suspect. Hence, I order the suspect to be released on bail on the following conditions:

1. A Cash bail of Rs. 250,000/- (Two Hundred and Fifty Thousand).

2. Provide two sureties. Each such surety must enter into a bond of Rs. 1,000,000/- (One Million).

3. To surrender her passport, if any, to the Court. An overseas travel ban is imposed on the suspect until the conclusion of the case.

4. To report to the OIC of the Grandpass police station 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 Magistrate's Court of Maligakanda and the Officer-in-Charge of Police Station Grandpass.

Judge of the Court of Appeal.

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

Judge of the Court of Appeal.