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

In the matter of an Application for Bail under and in terms of Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance No. 17 of 1929 as amended by Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

Officer in Charge,
Police Narcotics Bureau,
Colombo 01.

Court of Appeal Case No.
CA/BAL/0306/2023 **Complainant**

Magistrate's Court of Maligakanda **Vs.**

Case No. B 8322/23 Mohomed Alahudeen Mohamed Shiyam.

Suspect

AND NOW BETWEEN

Mohamed Halaldeen Mohamed Fazal.

Petitioner

Vs.

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

1st Respondent

2. Officer in Charge,
   Police Narcotics Bureau,
   Colombo 01.

Complainant-Respondent

BEFORE : **P. KUMARARATNAM, J.**
K.M.G.H. KULATUNGA, J.

COUNSEL: Shaminda Rodrigo with Eranda Sinharage for the Petitioner.
Wishwa Wijesuriya, SC for the Respondents.

INQUIRY ON: 20.02.2025

DECIDED ON: 06.03.2025

K.M.G.H KULATUNGA, J.

ORDER

1. This application for bail is filed under Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance. The petitioner is seeking bail for her husband Mohamed Alahudeen Mohamed Shiyam. According to the petitioner, the suspect was arrested on 05.03.2023, alleged to have been in possession of 101.5 grammes of Methamphetamine which according to the Government Analyst's Report contains 17.7 grammes of pure Methamphetamine.

2. The exceptional circumstances as advanced by the petitioner are delay and the improbability of the prosecution version.

Delay

3. The first ground of exceptionality advanced is that the suspect had been in remand since 15.03.2023 without any prospect of being charged. The learned State Counsel informed that the indictment had been dispatched under CR3/165/2024 to the High Court of Colombo and it is now registered in Court No. 07 under case No. 5069/24. As such, indictment has gone out within two years of the arrest and there is no delay of any excessive nature.

Improbability

4. According to the B Report annexed along with the petition, the suspect had been arrested whilst being in a house at Grandpass on a tipoff received by the police. The said narcotics is alleged to have been concealed in the knot of the sarong. Based on this, the learned Counsel for the petitioner submitted that it is practically not possible to conceal 100 grammes of drugs in the manner as described, and that it is highly improbable for a suspect to have any offensive narcotics in his personal possession in the manner as described when the police arrived. This is the second ground of exceptionality.

5. The learned State Counsel in opposition thereto, submits that the indictment has been dispatched within a reasonable period of time, in the circumstances of this offending. Further, it was his submission that there is no inherent improbability in the alleged manner of concealment as depicted in the B report.

6. The learned State Counsel also submits that the suspect has four previous convictions namely for the possession of 1100 milligrammes of heroin at the Mahara MC, the possession of 200 milligrammes of heroin at the Maligakanda MC, the possession of 120 milligrammes of heroin at the Maligakanda MC, and also the possession of 5 grammes of Cannabis in the Maligakanda MC. These convictions have been in 2018, 2019 and 2021.

7. The present detection had been in March 2023. The previous convictions, may be for user quantities, is relevant as it demonstrates a propensity to reoffend. This is also a circumstance that this Court should take cognizance of when considering bail under Section 83(2).

8. The primary ground of seeking bail is the alleged undue delay which is referred to as oppressive or excessive delay, which according to the

petitioner, is an exceptional circumstance. The legislature has in its wisdom limited the granting of bail in respect of certain offences under the Poisons, Opium and Dangerous Drugs Ordinance only upon satisfying Court of exceptional circumstances. Section 83 as amended by the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 41 of 2022 reads thus;

> *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 -*
>
> *a) of which the pure quantity of the dangerous drug, trafficked, imported, exported or possessed is 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, [sic] 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."*

9. No doubt, under the normal law at the pre-trial and pre-conviction stages granting of bail is the rule and the refusal is the exception. This is in accord with the presumption of innocence that which prevails during the pendency of the trial. However, when exceptional circumstances are by statute decreed as being a necessary prerequisite, then the legislature has intended that, persons accused of such offences be held in remand pending the determination of such trials. Considering section 83(1) of the Poisons, Opium and Dangerous Drugs Ordinance (prior to the amendment) in **Labukola Ange Wisin Gedera**

Ashani Dhanushshika v. OIC Divisional Crimes Investigation Unit Panadura [CA/PHC/APN/04/2016- CAM 06.10.2016] it was opined thus;

> *"The Petitioner's first point is that the suspect is in remand nearly for two years. The intention of the Legislature is to keep in remand any person who is suspected of or accused of possessing or trafficking heroine until the conclusion of the case. The Section 83(1) of the Poisons, Opium and Dangerous Drugs Ordinance express the intention of the Legislature. It is enacted by the Parliament that "No person suspected or accused of an offence under section 54A or section 54B of this Ordinance shall be released on bail, except by the High Court in exceptional circumstances."*

10. No doubt the provisions of section 83 has been enacted with the intent and purpose of containing and curbing the growing drug related offences. The Poisons, Opium and Dangerous Drugs Ordinance being a special statute could certainly prevail and override the provisions of other more general statutes. In relation to bail, section 83 has incorporated provisions which decrees in the mandatory form that bail should not ordinarily and as a rule be granted in cases involving serious drug offences under subsection (1) of section 54A and section 54B except in exceptional circumstances. When a special statute contains specific provisions for granting of bail such provisions cannot be ignored whilst considering such bail applications. Considering a similar issue in the Indian case of **Arun v. D. Pakyntein**, 2009(7) SCALE 568, (2009)16 SCC 496 it was opined that, "*where a statute confers drastic powers and provides for stringent penal provisions including the matters relating to grant of bail, the conditions precedent therefore must be scrupulously complied with.*"

11. Section 83(2) directs in the mandatory form and requires that the such accused or suspects should not be releases on bail except in exceptional circumstances. This simply means that remand is the rule and bail is the exception. This does not mean that establishing exceptional circumstances will *ipso facto* lead to granting of bail. Even if exceptional circumstances are made out if there be plausible reasons adduced by the prosecution justifying pre-trial detention then bail may yet be denied in certain circumstances (i.e.; propensity of reoffending or absconding).

12. Section 83(2) applies only to a very limited category of narcotic offences, where bail is denied unless the persons who are suspected or charged with these offences are able to demonstrate exceptional circumstances. As I see the Legislature by special bail provisions in Section 83(2) has intended to establish an effective bail system for specific narcotic offences for which the normal bail regime would not suffice and allow the continuity of the criminal activity and absconding. This is primarily in view of the unique nature and financial attributes of the narcotics offences. Unlike most other run-of-the-mill type of offences, most narcotics offences are committed in a very different context. For instance, trafficking in narcotics occurs systematically, usually in highly sophisticated and organised manner which also is extremely lucrative. This by itself is a huge incentive for an offender to continue with the criminal behaviour even after arrest and release on bail. Also, in view of the serious penal sanctions that may entail there is also the appreciable and real danger that such accused or suspects absconding.

13. Accordingly, in these circumstances, we are of the view that there is no inordinate delay, and the issue of improbability is not *per se* apparent. As such, it is a trial issue to be considered during the trial. However, in view of the multiple previous convictions it is apparent that there is a propensity of a serious nature of the suspect reoffending if enlarged on bail. In this regard, it is relevant to note that though the previous

convictions appear to be in respect of user quantities, now it has advanced to a commercial quantity.

Accordingly, we see no basis in law or otherwise to allow this application and therefore, this application is refused and rejected.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J.

I agree.

JUDGE OF THE COURT OF APPEAL