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,
Anti-Vice Division,
Police Station, Kandy.

Court of Appeal Case No.
CA/BAL/0136/2024

Complainant

Magistrate's Court of Kandy
Case No. B 71508/2024

Vs.

Liyanage Don Achala Niroshan Nanayakkara.

Suspect

AND NOW BETWEEN

Ovity Gedara Lekamlage Thisari Sandeepani.

Petitioner

Vs.

1. Officer in Charge,
   Anti-Vice Division,
   Police Station, Kandy.

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

Respondents

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

COUNSEL: Dhanya Gunawardena for the Petitioner.
Oswald Perera, SC for the Respondents.

INQUIRY ON: 25.02.2025

DECIDED ON: 21.03.2025

K.M.G.H. KULATUNGA, J.

ORDER

1. This is an application preferred under Section 83(2) of Poisons, Opium and Dangerous Drugs Ordinance by the petitioner on behalf of the suspect Liyanage Don Achala Niroshan Nanayakkara. He had been arrested on 23.01.2024. At the time of arrest, it is alleged that he had in his possession 16.5 grammes of Methamphetamine, of which the pure quantity according to the Government Analyst is 12.65 grammes. The learned Counsel for the Petitioner, Mr. Dhanya Gunawardena made this application on the basis of the improbability of the version as narrated by the Police in the first B Report.

2. According to the B Report marked 'Y', a group of officers from the Kandy Narcotics Unit had proceeded to the house of the suspect on information and arrested the suspect at his house and upon searching, a packet containing the narcotics was found in his trouser pocket. Mr. Gunawardena's submission is that it is highly improbable to find a person in front of his house with narcotics in his trouser pocket. He

submitted that the suspect may be a user but not a person trafficking and admitted a previous conviction for possession of cannabis which he says is of a small quantity and a pending *cocaine indictment* in the High Court of Kandy. Further, as an additional ground submitted that there is no indictment sent up until now and there is a delay which according to him is excessive.

3. In opposition to this application, State Counsel Mr. Oswald Perera submitted that in Paragraph 06 of the objections, the respondents have adverted that there are two previous convictions and pending cases. According to the learned State Counsel, the previous convictions are as follows;

    i. In 2021, the possession of cannabis, and then in 2021 September again Charged and find for possession methamphetamine, both in the Magistrate Cout of Kandy.

    ii. In 2023, he was arrested for possessing cocaine and bail was granted on 12.12.2023.

    iii. Within one month thereof, he is now apprehended for the present matter on 23.01.2024.

4. The petitioner admits having a pending cocaine indictment in the High Court of Kandy, Therefore, it is apparent that the suspect has been apprehended for the present offending whilst being on bail for a similar matter. The State Counsel also submitted that, IB Extracts are now called for and steps will be taken to forward indictment in due course without delay. He argued that in this context there is no delay but steps are being taken to indict expeditiously.

5. Mr. Gunawardena once again submitted that the suspect was employed in Italy and had returned during the Covid outbreak and is presently running a business (guest house in Kandy and that he may be a user).

6. Under Section 83(2), this Court is empowered to consider bail if exceptional circumstances are made out. As to what circumstances may be exceptional is not exhaustively defined but is determined in the contest and circumstances of each case. No doubt, if there is an inherent improbability or a glaring contradiction in the initial B Report as to the circumstances of the arrest or recovery that may be considered as an exceptional circumstance. A suspect being arrested opposite to his own house is nothing unusual and such person having a packet of narcotics in his possession is not an improbability in that sense. Therefore, I see no apparent improbability in the version of the respondents in this matter. The suspect denies possession and alleges that it was an introduction. This is a competing version to that of the Police. It is, if at all, a trial issue to be considered by the trier of fact. Therefore, it is unfortunate that these circumstances as averred by the petitioner is far from being improbable.

7. As for the delay, according to the State Counsel, steps are being taken and the matter is being followed up to dispatch the indictment without any delay. That being so, in the present application, what is now relevant is the propensity of the suspect to reoffend. This is further compounded by the fact that he is once again apprehended for a narcotics offence whilst being on bail from the High Court of Kandy for a similar offence. The frequency of reoffending is quite rapid. This by itself is a ground that disentitles the suspect for relief in this application.

8. As for the law, 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. This provision in the first instance requires that person suspected of offences involving over 10 grammes or more of pure narcotics is required to be denied bail. This is couched the mandatory form. However, the discretion is conferred to consider bail in exceptional circumstances. This provision does not create an entitlement as of right to obtain bail by establishing exceptional circumstances. In the converse, a discretion is conferred on the Court to consider bail. The end result is that making out exceptional circumstances *per se* will neither entitle a suspect as of a right to be enlarged on bail nor compel this Court to grant bail. It is a discretion that is conferred.

10. In the exercise of the said discretion, when exceptional circumstances are made out, this Court may, if brought to its notice, consider other factors such as flight risk, propensity of reoffending or absconding. If there be such circumstances, bail may not be granted even if exceptional circumstances are made out. Presence of exceptional circumstances will not *ipso facto* mandate the granting of bail.

11. Section 83(2) applies 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 has, by special bail provisions in Section 83(2), established an effective bail system for specific narcotic offences for which the normal bail regime would not suffice and allow the continuity of the criminal behaviour and the risk of absconding. This is primarily in view of the unique nature and particular attributes of the narcotics offences. Unlike most other offences, narcotic offences are committed in a very different context. For instance, trafficking in narcotics occurs systematically in a highly sophisticated and organised manner, that is extremely lucrative. This by itself is a compelling incentive for an offender to continue with the criminal behaviour even after arrest and release on bail. Similarly in view of the serious penal sanctions that may entail there is also the appreciable and real danger of such accused or suspects absconding.

12. Therefore, repeated offending in the form of previous convictions and pending cases is relevant in considering bail under Section 83(2). In the above circumstances, we see no lawful basis to allow this application and are left with no option but to reject and dismiss this application.

This application is accordingly dismissed and the Registrar of this Court is directed to transmit a copy of this order to the Registrar of the High Court of Colombo and the Officer in charge of the Police Narcotics Bureau.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J.

I agree.

JUDGE OF THE COURT OF APPEAL