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.

The Democratic Socialist Republic of Sri Lanka.

Complainant

Court of Appeal Case No.
CA/BAL/0263/2024

High Court of Panadura
Case No. 4024/2020

Vs.

Mawanane Hewa Nuwan Krishantha Jayasekara.

Accused

AND NOW BETWEEN

Mawanane Hewa Nuwan Krishantha Jayasekara.

Accused-Petitioner

Vs.

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

Respondent

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

COUNSEL : Amila Nawalage for the Petitioner.
Jehan Gunasekara, SC for the Respondent.

INQUIRY ON : 13.02.2025

DECIDED ON: 04.03.2025

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

ORDER

1. The accused-petitioner has preferred this application for bail under Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance. He had been arrested for this offence on 25.10.2018 and has been in remand since then for the past six years and four months. He had been indicted in respect of this arrest in the High Court of Panadura with four counts of which the 1st and 2nd counts are for the possession and trafficking of 56.518 grammes of pure heroine. It is in respect of these counts that he has been held in remand. According to his Counsel Mr. Amila Nawalage the main ground of exceptionality is the delay of six years and four months.

2. It is common ground that the accused-petitioner had been indicted on 03.05.2020 and the trial is now pending before the High Court and further trial is scheduled for 23.05.2025. According to Mr. Nawalage, the delay in progressing with the trial is primarily due to the absence and non-availability of PW-1 due to the said witness being sick on several occasions. A certified copy of journal entries and proceedings from 30.06.2020 to 05.03.2024 are annexed to the petition and journal entry of 19.12.2024 and the proceedings of 19.12.2024 also have been made available to this Court. According to which it is evident that several dates have been obtained and the trial had been

postponed due to the absence of PW-1. Apart from the said postponements this matter has also been postponed due to the High Court Judge been on official duty and presiding over another urgent trial so on and so forth. The State Counsel did accept the fact that the several postponements were obtained due the non-availability of PW-1.

3. That being so, when this mater had been mentioned on 19.12.2024, a serious defect in the indictment (a misjoinder) had been brought to the notice of Court by the learned defence Counsel. The learned Trial Judge upon recording the said objection has now fixed this matter for further trial for 23.05.2025.

4. Mr. Nawalage's main contention was that several years after filing the indictment it has now transpired that there is a serious defect in the indictment which will be an impediment to the expeditious trial and a conviction on this indictment.

5. This accused was initially arrested whilst travelling in a vehicle and a certain quantity of heroine is alleged to have been seized from his possession at that point which appear to be a pure quantity of 49.692 grammes. Thereafter, the accused is alleged to have been taken to another premises where at another pure quantity of 6.826 grammes of heroine, a firearm and ammunition have been recovered. In formulating counts 1 and 2, the Attorney General has lumped up and charged in respect of the total amount of pure heroine recovered at the two separate instances referred to above. It is submitted that there is no legal basis to join or lump up the narcotics recovered at two different times and places in one count and that joining counts 3 and 4 with the 1st quantity of heroine recovered is also in violation of the provisions as to joinder in the Code of Criminal Procedure Act.

6. The learned State Counsel appearing for the respondents did concede the current position as aforesaid and did indicate that the matter will be considered before the next trial date namely 23.03.2025. The issue for determination

before this forum in this bail application is the existence or the absence of a circumstance that may be considered exceptional. The trial has still not been concluded even after the lapse of almost five years of filing the indictment. The 1st witness appears to be under cross-examination.

7. No doubt, by virtue of the provisions of Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance, the law decrees that the persons suspected or accused of being in possession of 10 grammes or more of a dangerous drug will have to suffer incarceration until the conclusion of the trial or the determination of the matter. The legislature has thought and intended so though incarceration is a serious deprivation of the living and liberty of such persons which is inconsistent with the presumption of innocence. In those circumstances, persons responsible for the incarceration of suspects or accused are required to diligently and expeditiously take steps to conclude the legal process and trials in such instances. If there be any remissness, negligence or any conduct of a lackadaisical nature then the time elapsed due to such a reason will be considered and become excessive and oppressive in nature which may well be an exceptional ground that entitles an accused for bail under Section 83(2).

8. As for the issue of delay, the mere lapse of time will not by itself be exceptional unless such effluxion of time is excessive or oppressive. As held in **Attorney General v. Ediriweera** (S.C. Appeal No. 100/2005), "*Delay is always a relative term and the question to be considered is not whether there was mere explicable delay, as when there is a backlog of cases, but whether there has been excessive or oppressive delay and this always depends on the facts and circumstances of the case…*".

9. When one cumulatively considers the postponements in this matter, it appears that they cannot be justified in its totality and then to cap it all now late in the day, it transpires that there is a serious misjoinder or an error which may

render the charges defective or illegal. If a charge is defective or the indictment is illegal, one cannot lawfully convict or to that matter acquit an accused on such a defective charge. This apparent flaw in the indictment or the defect in the charges by lumping up and joining as aforesaid *prima facie* appears to be a serious objection. The failing of such a charge in the first instance and then blissfully continuing to prosecute without realizing the defect is by itself conduct that is remis and unpardonable. This fact will create a serious uncertainty as to whether if this trial can proceed in this form. The learned State Counsel appearing in this Court whilst conceding the raising of the said objection had no probable response as to the substance of the objection or as to how the prosecution intends to proceed with.

10. This to my mind this is a circumstance which can be considered as being exceptional in context. The accused-petitioner had been languishing in remand for six years and four months which is an extremely long period of time by any standard. When criminal proceedings are pursued where the accused is held in remand there is a greater burden to ensure that matters are considered well, steps taken consciously and that trials are proceeded with diligently.

11. In the above circumstances, we are of the considered opinion that the intermittent absence of PW-1 and the alleged misjoinder considered along with the lapse of six years and four months amounts to an exceptional circumstance that entitles the accused to be released on bail.

12. According the accused is granted bail subject to the following conditions.
    1. cash bail in a sum of Rs. 200,000.00;
    2. to provide two sureties who should execute bonds to the value of Rs. 1,000,000.00 each and one of the sureties should be a close relative of the accused-petitioner;
    3. Sureties are required to provide certificates from the Grama Sevaka from the respective residential areas of such sureties;

4. to surrender the Passport or any travel document of the petitioner if he has any, to the Registrar of the High Court of Panadura;
5. to report to the Officer-in-Charge of the Police Narcotics Bureau on last Sunday of every month before 12 noon;
6. further, a travel ban is imposed until the final determination of this matter and the Registrar is directed to inform the Controller of Immigration and Emigration of this order for necessary action; and

13. This application is accordingly allowed and the Registrar of this Court is directed to transmit a copy of this order to the Registrar of the High Court of Panadura.

JUDGE OF THE COURT OF APPEAL

P. Kumaratnam, J.

I agree.

JUDGE OF THE COURT OF APPEAL