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

Court of Appeal Case No.
CA/BAL/0284/2024

Complainant

Magistrate Court of Maligakanda
Case No. B 18144/2023

Vs.

Walimuni Dewage Hashan Prabodha Gangathilaka.

Suspect

AND NOW BETWEEN

Wattoru Karalige Roshanthi Sanjeewani Fernando.
A3/S/4/A, George R De Silva Road,
Kotahena,
Colombo 13.

Petitioner

Vs.

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

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

Respondents

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

COUNSEL: Sammani Mallawaarachchi with Pramodya Thilakarathne for the Petitioner.
Oswald Perera, SC for the Respondents.

INQUIRY ON: 27.01.2025

DECIDED ON: 21.02.2025

K.M.G.H KULATUNGA, J.

1. This application for bail is made under Section 83 (2) of the Poisons, Opium, and Dangerous Drugs Ordinance, as amended by Act No. 41 of 2022. seeking bail for the Suspect Walimuni Dewage Hashan Prabhodha Gnanatilaka. The suspect had been arrested on 12.05.2023. It is alleged that he was in possession of a gross quantity of 37.760 grammes of methamphetamine of which the pure quantity according to the Government Analyst is 27.68 gramme.

2. The learned Counsel for the Petitioner, in support of this application, submitted that the suspect had been in remand for 16 months since his arrest and no indictment has been filed up until this date of inquiry. The learned

Counsel submitted that there are no previous convictions or pending cases either.

3. The next circumstance urged is the discrepancy between the weight referred to in the B Report when weighed by the PNB and the Government Analyst when weighed at the point of examining. The said weights respectively are 37.76 grammes and 35.09 grammes.

4. The learned State Counsel Mr. Oswald Perera objecting to this application submitted that indictment has been dispatched on 27.11.2024 to the High Court of Colombo and is now registered under case No. 5162/2024 in High Court No. 02. Further notices are due to be dispatched to have the same served. Therefore, it is his argument that the respondents have diligently and promptly taken steps to institute criminal actions within one year of the arrest, which he submits is a very short period, and thus there is no delay of any nature as the matter is now pending before court. Accordingly, objected on the basis that the Petitioner had failed to make out exceptional circumstances.

5. It was argued that in these circumstances the mere lapse of time pending the service of the indictment will not become excessive or oppressive as there is no unnecessary delay on the part of the respondents.

6. Now let's consider the respective submissions made by the parties. The petitioner relies on two grounds namely the delay and the discrepancy of the weight at two points of the chain of productions. As for the delay though the Counsel for the petitioner submitted that an indictment had not gone out it is apparent that the same has been dispatched on 27.11.2024. In the normal course of events, it is apparent that the indictment has been dispatched within a reasonable time in the current contest. Now it is for the next step to follow service of the indictment and the attendant's pre-trial steps. There is no undue delay in following the process as at now

7. What may be exceptional is not the delay or the *per se* lapse of time. It is the excessive or oppressive delay. 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…*".

Therefore, the time lapse following the normal procedure in this instance cannot be considered as being exceptional.

8. As for the discrepancy in the weight, there appears to be a difference of approximately 2.75 grammes. In considering this difference in relation to the total quantity it is if at all a trial issue to be decided by the Trial Judge. Accordingly, the time lag between the arrest and now cannot be considered as being excessive or oppressive for it to become exceptional.

9. Section 83 of the Ordinance as amended by the Act No. 41 of 2022 is as follows;

> *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 imprisoment,[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."*

10. In respect of less than 10 grammes of Narcotics (pure quantity) the High Court is empowered to grant bail under Section 83(1). In respect of 10 grammes and above, the exclusive original jurisdiction to consider bail is vested with the Court of Appeal. In both fora granting of bail in exceptional circumstances only. But what is critical and significant is that whilst Section 83(1) is subject to the Provisions of Section 84 and 85, Section 83(2) prevails over and is not subject to Sections 84 and 85 of this Ordinance. Sections 84 and 85 reads as follows;

> *84. A suspect or an accused who has not been tried and has not been convicted and sentenced by a Court under the provisions of subsection (1) of section 54A and section 54B, shall not be detained in custody for a period exceeding twelve months from the date of his arrest.*
>
> *85. Notwithstanding the provisions of section 84, on application made in that behalf by the Attorney-General to the High Court established under Article 105 or a High Court established by Article 154P of the Constitution such court may, for good and sufficient reasons that shall be recorded, order that a suspect or an accused who has not been tried and has not been convicted and sentenced by a Court under the provisions of subsection (1) of section 54A and section 54B, be detained in custody for a period in excess of twelve months: Provided that, the period of detention ordered under this section, shall not in any case exceed three months at a time and twenty four months in the aggregate.*

11. It is by virtue of these two sections the upper limits of the period of remand have been fixed which entitles the suspect to be enlarged on bail. Therefore, an upper limit of 12 months is placed and with the option to extend. This is applicable to the High Court acting under section 83(1) but not to the Court of Appeal. The effect and import of this distinction and difference is that the mere lapse of time without any fault or default on the part of prosecution entitles a suspect for bail when the quantity is less than 10 grammes, whereas it has no application to the Court of Appeal. The resulting position

therefore is that the usual and normal time taken to process and progress with the investigation and criminal procedure common to all such actions cannot be considered as exceptional by the mere effluxion of such time. This is the reason and rationale why the lapse of time to become exceptional requires another operative cause or attribute such as the failure to diligently take steps to file actions or the repeated and wanton absence of witnesses when the matter is fixed for trial. This is the logic behind the following *dicta* of Justice Ranjith Silva, in CA (PHC) APN 64/2009 (decided on 07.08.2009);

> *"…If an accused cannot assign exceptional circumstances he will have to be kept on remand and when an accused had been on remand for 03 years because he had no exceptional circumstances will that by itself constitute exceptional circumstances. If that is treated as an exceptional circumstance, in my view it would be an anomaly because the fact that there aren't any exceptional circumstances finally mature into exceptional circumstances. The fact that he had no exceptional circumstances becomes a qualification after 03 years. If that was the intention of the legislature, the section itself would have stated the exceptional circumstances should not be insisted after 03 years and there is no such qualification, no such jurisdiction found in the particular provision dealing with bail…".*

12. We are mindful that denial of bail is certainly serious and grave. This is especially so as the time in remand may not be redressed if in the event the suspect is acquitted. However, as Sectio 83 (2) has decreed in the mandatory form, that a suspect involved in an offence of narcotics of ten grammes and above be kept in remand until such suspect is able to satisfy court of circumstances that may be considered exceptional. Therefore, unless exceptional circumstances are made out, this court is unable to consider enlarging the suspect on bail.

13. It is now settled law that the time spent in remand due to the lack of exceptional circumstance cannot by itself create a circumstance that is exceptional which otherwise would not have been there. This, in effect, is that the period of remand due to the absence of exceptional circumstances, will not, by itself, amount to or be converted to an exceptional circumstance. This

was succinctly expounded by Justice Ranjith Silva in **CA (PHC) APN 64/2009** (decided on 07.08.2009) as follows;

> *"…If an accused cannot assign exceptional circumstances he will have to be kept on remand and when an accused had been on remand for 03 years because he had no exceptional circumstances will that by itself constitute exceptional circumstances. If that is treated as an exceptional circumstance, in my view it would be an anomaly because the fact that there aren't any exceptional circumstances finally mature into exceptional circumstances. The fact that he had no exceptional circumstances becomes a qualification after 03 years. If that was the intention of the legislature, the section itself would have stated the exceptional circumstances should not be insisted after 03 years and there is no such qualification, no such jurisdiction found in the particular provision dealing with bail…".*

14. The intention of the legislature is clear that any person charged with an offence falling within the provisions of Section 83 (2) of the Poisons, Opium, and Dangerous Drugs Ordinance bears the onus of establishing and satisfying that there is some unusual or uncommon circumstance in his case before this court is justified in releasing him on bail.

15. As regards the lapse of 19 months, what may be exceptional is not the *per se* lapse of time, but the excessive or oppressive delay. 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…*".

16. The lapse of 19 months in the present circumstances which is ostensibly required to complete the further investigation as directed by the Attorney General cannot lawfully be considered as being excessive or oppressive for the

purposes of granting bail under Section 83 (2). Accordingly, in the absence of exceptional circumstances, we see no reason in law or otherwise to grant bail. This application is accordingly rejected and dismissed.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J

I agree.

JUDGE OF THE COURT OF APPEAL