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

In the matter of an application for Bail as under and in terms of Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance of 17 of 1929 as amended by section 04 of the Act No.41 of 2022.

Court of Appeal Bail Application: The Attorney General
CA Bail/0043/24 Attorney General's Department
HC Colombo Colombo-12.
Case No. HC 4291/2023 **Complainant**
MC Mahara **Vs.**
No. B 2501/2021 Hewawasam Enderage Nuwan Dhanushka

Accused

NOW BETWEEN

Narmada Geethanjali Liyanage
No.118/20, Hakgaha Watta Road,
Kalapaluwawa,
Rajagiriya.

Petitioner

Vs.

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

2. The Attorney General
   Attorney General's Department
   Colombo-12.

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Respondents

AND

Hewawasam Enderage Nuwan Dhanushka

Accused

BEFORE : **P. Kumararatnam, J.**
K.M.S.Dissanayake, J.

COUNSEL : **Geeth Karunarathna with Kanchana Sandamali for the Petitioner.**
Jehan Gunasekara, SC for the Respondents.

ARGUED ON : **18/03/2025.**

DECIDED ON : **19/05/2025.**

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ORDER

P.Kumararatnam,J.

The Petitioner is the wife of the Accused named in the in-B Report filed in the Magistrate Court of Mahara case bearing No. B 2501/2021.The Petitioner has filed this bail application under Section 83(2) of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.

According to the B report filed by the police, upon information the Accused was arrested on 11.08.2021 and recovered some substance which reacted for Heroin and Methamphetamine in his house. The substance suspected to be Heroin weighed about 40.93 grams and suspect Methamphetamine weighed about 34.91 grams. Additionally, 4.772 kilograms of Cannabis Sativa L also recovered from the Accused.

The Accused was produced in the Magistrate Court of Mahara under Sections 54A (b) and (c) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984.

The Petitioner has pleaded following exceptional circumstances in support of her Bail Application.

1. That the Government Analyst Report dated 29.10.2021 pertaining to the instant matter was filed before the learned Magistrate on 21.12.2021 and even after laps of 01 year and 02 months from issuance of the Government Analyst Report the Attorney General had failed to serve the indictment to the Accused.
2. The Accused has no previous or pending case before any Court.

3. The Accused is a father of 04 children and the sole breadwinner of the family.
4. He is in remand for little more than 03 years and 08 months.
5. Although indictment was served and pending before the High Court, the trial is not started yet.

The Learned State Counsel submitted that the delay is not an exceptional circumstance to be considered to enlarge the suspect on bail. Further, the time spent for preparing the indictment does not constitute an exceptional circumstance. According to the State, indictment has already gone to the High Court of Colombo.

Exceptional circumstances are not defined in the statute. Hence, what is exceptional circumstances must be considered on its own facts and circumstances on a case by case.

In **Ramu Thamodarampillai v. The Attorney General [2004] 3 SLR 180** the court held that:

> *"the decision must in each case depend on its own peculiar facts and circumstances".*

In **CA(PHC)APN 107/2018** decided on 19.03.2019 the court held that remanding for a period of one year and five months without being served with the in indictment was considered inter alia in releasing the suspect on bail. According to the Petitioner, at present her family is going through untold hardship without proper income and care.

The Section 83 of the Poison, Opium and Dangerous Drugs Act which was amended by Act No. 41 of 2022 states:

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 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, shall not be released on bail except by the Court of Appeal in exceptional circumstances.

shall not be released on bail except by the Court of Appeal in exceptional circumstances.

In this case the pure quantity of Heroin detected in the production by the Government Analyst is 12.43 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

No Methamphetamine was detected in the production sent to the Government Analyst.

The Counsel for the Petitioner urged this Court to consider that detaining a suspect without any legal action for an extended period of time amounts to a violation of his fundamental rights which can be considered as an exceptional ground.

The Suspect has no previous or pending case in any of the Court.

In **Nasher v. Director of Public Prosecution [2020] VSCA 144** the court held that:

*"**a combination of delay**, onerous custodial conditions, and the relative weakness of the prosecution case may, when considered with*

all relevant circumstances, compel the conclusion that exceptional circumstances have been established". [Emphasis added]

The Petitioner states that the Government Analyst Report was received on 29.10.2021 and the indictment was sent to the High Court on 03.02. 2023.Even though the indictment filed in the High Court, it takes long time to commence the trial. Further the Petitioner contends that the substances were not recovered from the exclusive possession of the Accused.

Offences under Section 54A(c) and 54A(b) of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 is no doubt serious offences but seriousness of the offence alone cannot form a ground to refuse bail. In considering these matters, the court must bear in mind the presumption of innocence.

Further, bail should never be withheld as punishment. Granting of bail is primarily at the discretion of the Courts. The discretion should be exercised with due care and caution taking into account the facts and circumstances of each case.

It was brought to the notice of the Court that the trial has not commenced due to non-presence of the prosecution witnesses. This has no doubt caused the great prejudice to the Accused.

Considering all these factors into account, especially the period in remand, the pure quantity Heroin detected and the other circumstances of the case, I consider this an appropriate case to grant bail to the Accused. Hence, I order the Accused be granted bail with following strict conditions.

1. Cash bail of Rs.100,000/=.
2. To provide 02 sureties. They must sign a bond of two million each.
3. The Accused and the sureties must reside in the address given until conclusion of his case.

4. Not to approach any prosecution witnesses directly or indirectly or to interfere with.
5. To surrender his passport if any, to court and not to apply for a travel document. The Controller of the Immigration and Emigration is informed of the travel ban on the Accused.
6. To report to the Officer-in-Charge, Police Narcotics Bureau on the second and last Sunday of every month between 9am to 1pm.
7. Any breach of these conditions is likely to result in the cancellation of his bail.

The Bail is allowed and the Learned High Court Judge is hereby directed to enlarge the Accused on bail on the above bail conditions.

The Registrar of this Court is directed to send this order to the High Court Colombo and the Officer-in-Charge, Police Narcotics Bureau, Colombo-01.

JUDGE OF THE COURT OF APPEAL

K.M.S.Dissanayake, J.

I agree.

JUDGE OF THE COURT OF APPEAL