**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 Station,
Kuliyapitiya.

**Court of Appeal Case No.**
**CA/BAL/0050/2024**

**Complainant**

**High Court of Kuliyapitiya**
**Case No. HC 94-2022**

**Vs.**

Jayakodi Kankanamlage Damith.

**Accused**

**AND NOW BETWEEN**

Himali Jayakodi Wijerathne,
Anukkane,
Anukkane.

**Petitioner**

**Vs.**

1. Officer -in -Charge,
   Police Station,
   Kuliyapitiya.

**Complainant-Respondent**

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

**Respondent**

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

**COUNSEL:** Nihara Randeniya for the Petitioner.
Jehan Gunasekara, SC for the Respondents.

**INQUIRY ON:** 23.01.2025

**DECIDED ON:** 18.02.2025

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

1. This is an application for bail made under Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance on behalf of the accused-petitioner Jayakodi Kankanamlage Damith. According to the learned Counsel of the petitioner, the accused was arrested on 11.11.2019 for being in possession of 104.35kg of Heroine and its pure quantity is 36.452kg. The Government Analyst's Report is dated 30.09.2020 and the indictment has been dispatched on 24.03.2022. Now, the accused stands indicted in the High Court of Kuliyapititya.

2. The main contention of the petitioner is the delay. It is submitted that the accused had now been in remand for over five years. It is the submission

that the delay in concluding the trial is mainly due to the absence and non-availability of witness No.01 which the petitioner claims to be a delay that is oppressive and excessive.

3. The learned State Counsel submitted that the delay cannot be attributed only to the prosecution as the defence moved and obtained dates for cross-examinations and further cross-examinations. It is also submitted that the accused is now indicted for a commercial quantity and the prosecution had made every endeavor to proceed with the trial without delay. There was no mention of previous convictions or of any other matters pending of a similar nature.

4. Considering the sum total of the respective submissions, the critical and contentious issue is the delay which according to the petitioner is excessive undue and oppressive. It is common ground that the accused has now been in remand for five years. No doubt by any standard person being deprived of his liberty and free living for a period of five years is considerable and serious. This is pre-trial and pre-conviction remand. An accused certainly has the benefit of the presumption of innocence. However, Section 83(2) of the Poisons, Opium and the Dangerous Drugs Ordinance specifically provides for and decrees that a person suspected or accused of being in possession or trafficking 10 grammes or more shall not be released on bail except by the Court of Appeal in exceptional circumstances. The clear intention of the legislature which is manifest from the plain reading of this Section is that in the normal course of event such a suspect or accused requires to be held in detention or remand until the conclusion of the trial.

5. 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 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."*

6. No doubt, under the normal law during 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 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."*

7. 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.*

8. 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. The period in 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…".*

9. Now to consider if the accused in this matter is entitled to any benefit or if there be any ground that may be considered in his favour to grant bail. What is significant is that this provision is couch in a negative form where it is expressly stated that such person shall not be released on bail except in exceptional circumstances. However, as I see, this court is vested with a discretion to consider bail in exceptional circumstance for such an accused. Does the lapse of five years in the circumstances of the present application amount to a circumstance that may be considered to be the exceptional? In view of Section 83(2), it is clear that the mere lapse of time will not become exceptional. This was very clearly elaborated and laid down by Justice Ranjith Silva, in CA (PHC) APN 64/2009.

10. The above dicta stand to reason and is consistent with the clear intention of the legislature. However, to my mind the legislature certainly will certainly not intend or permit the holding a person in custody at pleasure and to investigate and prosecute at the leisure of those who are so empowered. Thus, as stated time and again by this Court, when the liberty of a suspect or an accused is denied by incarceration there is then a corresponding duty and an obligation cast upon those who hold such suspect or accused in custody to consciously and expeditiously investigate and institute action if there be evidence and to ensure the conclusion of the trial without undue delay.

11. Any delay if explained and is reasonable or is due to a normal course lapse of time peculiar to the legal process, such delay will not be undue, excessive or oppressive. This is for the simple reason that a normal

delay applicable and common to all such matters cannot become exceptional in relation to offences under the Poisons, Opium and Dangerous Drugs Ordinance.

12. That being so if the delay is due to or is attributable to the lackadaisical conduct or lack of due diligence of the respondents or persons so responsible for the incarceration such delay may well be considered as being undue, oppressive or excessive. The rationale for this is the presumption of innocence and the constitutional right of freedom from arbitrary arrest and detention. When a statute deprives the liberty be it pretrial or pending conviction it necessarily infers that such denial is permitted only for such a period as is reasonably required to diligently investigate and expeditiously institute and conclude criminal proceedings. The reasonable period is not an absolute or a fixed time frame but is relative and will depend on the circumstances time required in the normal course of proceedings. Time lag will become exceptional only if the period goes beyond the normal time taken in such system in the ordinary course.

13. It is common ground that the indictment is dated 24.03.2022 and the first date of trial was 17.07.2023. The petitioner tendered to Court a certified copy of journal entries of the High Court case bearing No. HCC-094/22. According to which on 23.01.2023, PW-1 was absent as he was on personal leave, on 18.03.2024 PW-1 was once again absent as he was reported sick, similarly, on 03.07.2024 once again PW-1 was absent due to ill health and on 03.10.2024 once again PW-1 was reported sick and was absent.

14. That being so according to the submission of the learned Counsel on 04.11.2024, trial was fixed for 04.11.2024. On which day the examination chief of PW-1 was concluded but the date was sort on behalf of defence foe cross-examination. Then 03.12.2024, time was moved for further cross-examination on the basis that the Counsel required to

obtain instructions. Next on 09.12.2024, PW-1 was once again absent due to ill health and now further trial stands fixed for 28.01.2025. The above is the sequence of events that culminated at the trial. The learned Counsel for the petitioner submitted with extreme gusto that it is the absence of witness No. 01 that has contributed immensely and primarily to the delay of the trial. The State Counsel countering and in response submitted that at least on two occasions the defence has obtained further time and to that extent the defence has also contributed to the delay. The postponements which the State Counsels so relied are those on 04.11.2024 and 03.12.2024.

15. In the right of the above submissions, I will now consider the merits of the same. When tracing back to the inception, the arrest was on 11.11.2019. Within ten months, the Government Analyst's Report was received on 30.09.2020. However, the indictment had been signed on 24.03.2022 which is after two years and four months of the arrest. Then, the pre-trial has concluded and the trial date has been set for 23.01.2023 and now the 1st witness is still under cross-examination with further trial set for 28.01.2025. The end result and the glaring fact is that the 1st witness's evidence could not have been concluded during the last two years by any standards even considering the work load of our Court system, this is a delay which is significant and relevant. As it is evident in this case, the primary cause of a great part of the delay is the absence of PW-1. Though, on many occasion the reason for attribution of ill health, there is nothing placed before us to substantiate such an illness. Whatever may be the reason. The absence of PW-1 has caused the delay. The delay during the trial stage, further at the point of indicting, there had been a time lapse of two years and four months. The cumulative effect is that there is an undue delay attributable to the respondent of the prosecution and the time taken is well beyond the reasonable time which in the circumstances appears to us as being exceptional.

16. We are mindful that the pure quantity is 36.452grammes. However, this accused appears to have no previous convictions or pending matters. Nothing of that sort was brought to our notice. In these circumstances, we are of the view that the accused is entitled to be enlarged on bail. Accordingly, bail is granted subject to the following conditions;
    1. cash bail in a sum of Rs. 500,000.00;
    2. to provide two sureties who should execute bonds to the value of Rs. 1,000,000.00 each;
    3. Sureties are required to provide certificates from the Grama Sevaka from respective residential areas of such sureties;
    4. to surrender the Passport or any travel document of the Suspect-petitioner, if he has any, to the Registrar of the Magistrate's Court of Kaduwela;
    5. to report to the Officer-in-Charge of the Kuliyapitiya Police Station on every second and fourth Sunday of the 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

17. 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 Kuliyapitiya.

**JUDGE OF THE COURT OF APPEAL**

P. Kumaratnam, J

I agree.

**JUDGE OF THE COURT OF APPEAL**