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.

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

Court of Appeal Case No.
CA/BAL/0628/2023

Complainant

High Court of Homagama
Case No. 158/2020

Vs.

1. Mohamed Farook Mohamed Faroon.
2. Dasanayake Ranasinghe Mudiyansa Ralahamilage Janaka Thushara Eheliyagoda.

Accused

AND NOW BETWEEN

Hewagamage Roshani Cooray.

Petitioner

Vs.

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

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

Respondents

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

COUNSEL: Shamindra Rodrigo with Eranda Sinharage for the Petitioner.
Wishwa Wijesuriya, SC for the Respondents.

INQUIRY ON: 13.02.2025

DECIDED ON: 17.03.2025

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

ORDER

1. The petitioner had filed this application for bail under Section 83(2) of the Poisons, Opium and Dangerous Drugs Ordinance on behalf of 2nd accused, Dasanayake Ranasinghe Mudiyansa Ralahamilage Janaka Thushara Eheliyagoda. Petitioner is the mother of the 2nd accused.

2. The 2nd accused had been arrested on 07.03.2018 by the Police Narcotics Bureau at Kaduwela along with another (1st accused). They now stand indicted in the High Court of Homagama Case No. HC/158 of 2020. The 1st accused is indicted for possession and trafficking of

198.148 grammes of heroin and the 2nd accused for aiding and abetting to commit the said offences. Further, the 2nd accused is also charged for the possession and trafficking of 2013.572 grammes of heroin.

3. The main ground of exceptionality is the delay of almost six and half years and also the ill-health of the 2nd accused. It is submitted that the 2nd accused was arrested on 07.03.2018 and had been indicted on 05.10.2020. The trial is now scheduled for 26 and 27.03.2025. The main complaint is that the trial has not commenced even after the lapse of six and half years. It is submitted that the delay was due to the failure to provide documents and according to the petitioner it is attributable to the prosecution.

4. In addition thereto, the learned Counsel also submits that the 2nd accused is suffering from a health issue and has been on and off referred for treatment whilst in remand. This submission is made on the journal entry dated 04.05.2022 of the High Court of Homagama. However, apart from this there is no other material or any averment to that effect in the petition or the supporting affidavit.

5. The learned State Counsel, Mr. Wishwa Wijesuriya opposing this application submitted that the quantity involved is of a commercial nature. As for the health condition, it is argued that there is no material supporting to the assertion of the ill-health in the petition. As for the delay, State Counsel, Mr. Wijesuriya submitted that on a perusal of the journal entries annexed it is apparent that the trial has been continuously and repeatedly delayed and postponed due to the defence requesting for documents on a piecemeal basis and also due to the change and absence of the Defence Counsel.

6. The learned State Counsel drew our attention to the fact that the indictment has been dispatched as early as 05.10.2020. Then, there had been a delay in producing the suspects from the remand and the

indictment has been served on 19.03.2021. Thereafter, it appears that due to the Covid pandemic the matter has been postponed and mentioned on several days and finally fixed for trial on 29.03.2022 on which day PW-1 had been present but he had been temporarily discharged and the matter had been mentioned on 04.05.2022. The 2nd accused had been indisposed on that day and rescheduled for 01.07.2022 on which day the matter had been postponed apparently due the Covid pandemic. This had been mentioned on several days thereafter and a request for documents (telephone records) had been made by the accused. Matter had been then fixed for trial for 08.12.2022 on which day PW-1 had been present and the defence had moved for a postponement. On 02.02.2023, once again the matter was postponed as the Judge was not available. Thereafter, 25.05.2023, PW-1 had been present however as the information books have been required in the High Court of Panadura for another case and also as the defence had informed that they have not received certain police notes, the matter has then been refixed. On 22.06.2023 there had been no representation for the accused and the matter had been once again postponed. Thereafter, the proceedings are not available and according to the State Counsel this is now fixed for trial on 26.03.2025.

7. According to the material placed before this Court and the B Report dated 13.03.2018, it appears that on information a three-wheeler had been observed. A person had walked up to the three-wheeler and the person in the three-wheeler had then handed over a parcel to the person who came. Both these persons have been arrested and heroin has been found from both the accused. The 2nd accused had a bunch of keys and on information divulged by the 2nd accused a house had been searched and upon opening a cupboard with the said keys, another quantity of a brown powder (heroin) had been recovered. It is on these recoveries that the aforesaid indictment had been preferred.

8. Certainly, a six and half year period is by any standard is a long lapse of time. The learned State Counsel submitted that the delay cannot be attributed solely to the prosecution as the defence moved and obtained postponements. It is also submitted that the accused is now indicted for a commercial quantity and the prosecution had indicted without delay. There was no mention of previous convictions or of any other matters pending of a similar nature.

9. Considering the sum total of the respective submissions, the critical and contentious issue is the delay of six and a half years which according to the petitioner is excessive, undue and oppressive. Certainly, a 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.

10. An accused certainly is presumed to be innocent. 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 events such a suspect or accused requires to be held in detention or remand pending trial.

11. 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."

12. Under the normal law granting of bail is the rule and the refusal is the exception during the pre-trial stages. This is in consonance 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."

13. 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 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.

14. 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.*"

15. 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 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…".

16. 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. Section 83(2) is couch in the negative form where it is expressly stated that *such person shall not be released on bail* except in exceptional circumstances. As to my mind, this court is vested with a discretion to consider bail in exceptional circumstances for such an accused. Does the lapse of over six 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 the above dicta. The above dicta stand to reason and is consistent with the intention of the legislature. However, to my mind the legislature certainly will not intend or permit the holding a person in continuous custody at the pleasure to investigate and prosecute at the leisure of the authorities. 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 persons in custody to consciously investigate and to expeditiously institute action and then to ensure the conclusion of the trial without undue delay.

17. Any delay if explained and is reasonable or is attributable to the 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.

18. 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, such denial is permitted only for such a period as is reasonably required to investigate and 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.

19. That is the law as it stands interpreted today. The question to be determined is whether the lapse of six and half years is oppressive, excessive or undue. The time lapse had been due to certain unavoidable events: the Covid pandemic; the non-availability of the Defence Counsel on at least two trial dates; and documents and notes of officers have been requested on a staggered and piecemeal basis by the defence. On an overall evaluation, it is apparent that the defence had been responsible for the delay to a greater extent proportionately. The State has been very prompt in filing the indictment. In such circumstances, can the 2nd accused claim the benefit of such delay to create a ground and justify the granting of bail? I don't see any rational basis in logic reason or in law as to how the defence can claim such delay to be undue and be considered in his favour when the defence is primarily responsible. One cannot benefit by his or her own wrong. In these circumstances, it is apparent that the petitioner has failed to make out that the delay is oppressive or excessive or to that matter is undue.

20. As for the health reason, there is hardly any material placed before this Court firstly, to determine if there is any health issue and then, if such health issue cannot be treated whilst in remand and the continuous incarceration is life threatening.

21. The quantity of narcotics alleged to have been recovered appears to be of a commercial nature. Bail pending trial in drug matters is denied by statute and the rationale is the serious tendency to reoffend for the simple reason that the drug offences of this magnitude are notorious to be highly lucrative and rewarding. Considering the aforesaid, no doubt the 2nd accused had been in remand for a long time however the petitioner had failed to establish any circumstance that this Court can consider as being exceptional. The trial is now set for 26.03.2025. Accordingly, we see no basis to grant bail and this application is accordingly, refused and dismissed.

JUDGE OF THE COURT OF APPEAL

P. Kumararatnam, J.

I agree.

JUDGE OF THE COURT OF APPEAL