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

In the matter of an application for bail in terms of the Section 83 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.41 of 2022.

Court of Appeal

Application No.

CA Bail 0005/2025

The Officer-in-Charge

Police Narcotics Bureau,

Colombo-01.

COMPLAINANT

Vs.

Magistrate Court Matara

Case No: BR 1669/2021

Ellagoda Gamage Kawindu Tharaka

(In remand prison)

9th SUSPECT

AND NOW BETWEEN

Ellagoda Gamage Kawindu Tharaka

No.2/6, Thurki Gammanaya,

Midigama, Ahangama.

9th SUSPECT-PETITIONER

Vs.

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

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

RESPONDENTS

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

COUNSEL : **Vindiya Ekanayake for the Petitioner.**
Wishwa Wijesuriya, SC for the Respondents.

ARGUED ON : **01/04/2025.**

DECIDED ON : **02/06/2025.**

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ORDER

P.Kumararatnam,J.

The Petitioner is the 9th Suspect named in the Mahara Magistrate Court Case No. B/1669/21.

According to the report submitted by the Police Narcotics Bureau, Cololmbo-1, the Petitioner and 05 others were arrested upon an investigation carried out consequent to a tip off received by the Sri Lanka Navy Intelligence Unit. Acting on that information a multi-day fishing boat named as "SAKI DUWA" was taken into custody along with the Petitioner and 05 others by the Sri Lanka Navy in the Sea on the 12th of June 2021. 03.300 kilograms of Heroin was recovered in the boat.

The detection was promptly informed to the Police Narcotics Bureau Colombo-01 and a police team headed by IP Pathum Kumara arrested the persons in the multi-day fishing boat and produced before the Colombo Magistrate Court on 13.06.2021 under case number mentioned above.

Upon a Court order the contraband had been sent to the Government Analyst's Department and according to the Government Analyst Report dated 27.10.2022, 2420.2 grams of pure Heroin (Diacetylmorphine) had been detected in the parcel.

The Petitioner and others were produced and facts were reported to the Colombo Magistrate under Section 54A (d), (c) and (b) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984.

Upon a Court order the Petitioner and others were placed under a detention order to facilitate the Police Narcotics Bureau to conduct further investigation with regard to the detection.

According to the Petitioner he is a fisherman by profession and when he and others were processing and unloading fish to the fish market they were arrested with a load of fish.

The Petitioner alleges that he along with others were taken into custody by the Sri Lanka Navy on a mere conjecture without any reasonable suspicion in the sea. The Petitioner further alleges that no Heroin or any other contraband had been in the multi-day fishing boat at the time of their arrest in the sea.

The Petitioner submits that he and five others had been in remand for little over four years without filing any charge against them.

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

1. Non-existence of a prima-facie case against the Petitioner.
2. Improbability of the version of the prosecution.
3. The Petitioner has been in remand custody for little over 4 years.
4. Other Suspects were granted bail except 4-9th Suspects including the Petitioner.
5. In the previous bail application although the learned State Counsel undertook the responsibility of filing indictment within two months, up to now no indictment preferred against the Petitioner.

The State opposing to bail submitted that the dossier of the investigations has been received by the Attorney General's Department and registered under CR3/430/2023. Due to the complexity nature of the investigation, the Attorney General seek further time to forward indictment against the Petitioner and others. Hence, 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.

The Petitioner is in remand for little over 4 years. According to Government Analyst Report, the pure quantity of Heroin detected from the possession of the Petitioner and others is 2420.2 grams.

The 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".*

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.

In this case, the pure quantity of Heroin detected in the production by the Government Analyst is 2420.2 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

The Counsel for the Petitioner submits that undue and long delay in keeping the Petitioner in remand custody is a clear violation of his human rights and is against the presumption of innocence guaranteed under the Article 13(5) of the Constitution.

A court can consider evidence in a bail inquiry. During a bail hearing, the court typically evaluates various factors to determine whether a Suspect should be granted bail, such as the risk of flight, the likelihood of reoffending, and the safety of the community. The court may also review evidence related to the Suspect's criminal history, ties to the community, and the specifics of the current charges.

Ultimately, the Court's role during a bail inquiry is to weigh the available evidence to decide if the defendant can be trusted to return for trial or if they pose a danger to public safety.

In this case the Petitioner and others alleged to have committed Offences under Section 54A(d), (c) and (b) of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984.The offences are very serious offences and the seriousness of the offence should be considered when bail is considered.

I agree with the learned State Counsel that this is not appropriate case to consider the factual and evidentiary matters pertain to the investigations at this stage. It can only be tested at the trial upon the witnesses being cross examined and re-examined.

In **Ranil Charuka Kulatunga v. Attorney General CA (PHC) APN 134/2015** the court held that:

> *"The quantity of cocaine involved in this case is 62.847 grams, which is a commercial quantity. If Petitioner is convicted, the punishment is death or life imprisonment. Under these circumstances, it is prudent to conclude the trial early while the Petitioner is kept in* custody*."*

In **Carder (On behalf of Rashid Kahan) v Officer-in-Charge Narcotics Bureau** [2006] 3 SLR 74 the Court held that:

> *"Heroin has become a menace in our society. It is not easily detectable. Due to the fact alone, the tendency to commit this kind of crime repeatedly has become feasible. The repetitive factor prevalent in this sort of crime and the difficulty of detection are significantly strong reasons for refusing bail in this type of cases."*

In this case the pure Heroin detected is 2420.2 grams, which certainly a very high commercial quantity. Considering the seriousness of the sentence prescribed under the Poison, Opium and Dangerous Drugs Ordinance, there is a high risk of absconding.

Hence, I do not consider the delay little over 04 years in reman falls into the category of excessive and oppressive delay considering the circumstances of this case.

Considering all these factors into account, especially the pure quantity of Heroin detected, the charges going to be framed against the Petitioner and others and circumstances of the case, I consider this is not an appropriate case to sanction bail to the Petitioner at this stage. Hence, I refuse to release the Petitioner on bail.

Hence, this Bail Application is dismissed.

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

JUDGE OF THE COURT OF APPEAL

K.M.S. Dissanayake, J.

I agree.

JUDGE OF THE COURT OF APPEAL