

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

In the matter of an application for Revision in terms of Article 138 of the Constitution read with Section 11 of the High Court of Provinces (Special Provisions) Act No 19 of 1990.

**Court of Appeal**

A.D. Ishanthi

**Revision Application No:**

No.04, Isiyogama,

**CA/PHC/APN/0143/2022**

Uswatakeiyawa.

**PETITIONER**

**High Court of Negombo**

1. Officer-in Charge,

**Bail Application No.137/2022**

Police station,

Pamunugama.

**MC Welisara**

2. The Attorney General

**Case No. B 3498/2021**

Attorney General's Department,

Colombo-12.

**RESPONDENTS**

**AND**

Kirindage Don Gemunu Priyantha

Perera.

(Presently in Mahara Prison)

**SUSPECT**

**AND NOW BETWEEN**

A.Nishanthi Pradeepthani

No.04 Isiyagama,

Uswatakeiyawa.

**PETITIONER-PETITIONER**

**Vs**

1. Officer-in Charge,

Police station,

Pamunugama.

2. The Attorney General

Attorney General's Department,  
Colombo-12.

**RESPONDENTS-RESPONDENTS**

Kirindage Don Gemunu Priyantha

Perera.

(Presently in Mahara Prison)

**SUSPECT-RESPONDENT**

**BEFORE**

**: Sampath B. Abayakoon, J.  
P. Kumararatnam, J.**

**COUNSEL**

**: Asthika Devendra for the Appellant.  
Kanishka Rajakaruna, SC for the  
Respondent.**

**ARGUED ON** : **03/04/2023.**

**DECIDED ON** : **30/05/2023.**

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### **JUDGMENT**

The Petitioner had applied for bail on behalf of the suspect in the High Court of Negombo in the case bearing No. Bail 137/2022. After an inquiry, the Learned High Court Judge had refused bail on 12.08. 2022. Aggrieved by the said order, the Petitioner had filed this Revision Application to revise the said order. The Petitioner is the wife of the suspect.

On 02.11.2022, upon receiving an information, the suspect was arrested by officers attached to the Anti-Corruption Unit of Colombo who were on petrol duty at Pamunugama Police area and recovered a parcel from his trouser pocket. The parcel contained some substances which reacted for Heroin (Diacetylmorphine). The substance weighed about 43.200 grams.

The suspect was produced and facts were reported to the Welisara Magistrate under Section 54A (1) (a) and (b) and of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 and a detention order was obtained for further investigations under Section 82(3) of the said Act.

The production had been sent to the Government Analyst Department on 17/11/2021. After analysis, the Government Analyst had forwarded the report to Court on 01/11/2022. According to the Government Analyst, 27.34 grams of pure Heroin (Diacetylmorphine) had been detected from the substance which was sent for the analysis.

Clarifying the name difference in the High Court Bail Application and the corresponding affidavit filed, the Petitioner confirmed that her name is A.Nishanthi Pradeepthani, as mentioned in her National Identity Card. As such she has mentioned both names in this Revision Application.

According to the Petitioner, the suspect is a three-wheeler driver by profession and sometime drives his lorry on hire as well. Further, he is a father of four children and two younger children are living under his care at present. He is the sole breadwinner of the family.

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

1. The suspect was arrested on 02.11.2021 and remanded to date without filing any charge which prejudice his rights and his family as well.
2. The suspect has undergone an eye surgery and after the surgery he was not provided with a clean environment in the prison.
3. The statement of objection of the 1<sup>st</sup> Respondent was filed on 06.06.2022 and it is mentioned in the said statement that it has been revealed that the suspect is a main suspect who takes large quantities of Heroin from Pamunugama, Isiyogama area and packs them in the Isiyogama area and distributes to several areas. However, the same was not mentioned in the B Report dated 03.11.2021 and /or any further reports filed before the Magistrate Court, Welisara. Therefore, the 1<sup>st</sup> Respondent has submitted false information before the Court to object to granting of bail to the suspect.
4. According to the 1<sup>st</sup> B Report, the suspect was searched at No.04, Isiyogama, Unswetakeiyawa and found drugs from his trouser pocket. The Petitioner states that aforementioned address is the address of the house of the Petitioner.

5. No drugs were found in the possession of the suspect by the police officers and he was taken to the police station and introduced Heroin at the police station upon the influence of a person called Roshan Dias.
6. No information was revealed relating to the trafficking of Heroin as per the B Report filed first and further reports filed before the Magistrate Court of Welisara.
7. The suspect has no previous conviction or pending case before any court.

The State opposing to bail submitted that the indictment pertaining to the offence is already being sent to the High Court of Negombo. 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 suspect is in remand for little more than one and half years. According to Government Analyst Report the pure quantity of Heroin detected is 27.34 grams.

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 **K.Sithum Shamika v. The Attorney General 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 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 27.34grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

According to the Learned High Court Judge, one of the reasons for the rejection of bail to the suspect is the non-availability of the Government Analyst report. The relevant portion is re-produced below:

(P9 2<sup>nd</sup> page )

මෙවැනි සැකකරුවන් ඇප මත මුදා හැරීමේදී විෂ වර්ග අඩං සහ අන්තරාදායක ඖෂධ පහතේ 83(1) වගන්තිය පරිදි සුවිශේෂී කරුණුවල පැවැත්ම අවශ්‍ය වේ. එසේවුවද වර්තමානයේ බන්ධනාගාරයන්හි තදබදය අවම කිරීමේ අවශ්‍යතාවය මත නිර්ණායක අනුගමනය කරමින් සැකකරුවන් ඇප මත මුදා හැරීමට අධිකරණයන් විසින් කටයුතු කරනු ලබයි. එහිදී ඔවුන් සන්නකයේ තිබූ බව දැක්වන මත්ද්‍රව්‍යන්හි දළ අගය එහි ශුද්ධ හෙරොයින් අගය වශයෙන් රස පරීක්ෂක වාර්තාව අනුව අනාවරණය ප්‍රමාණය සහ ඔවුන් රක්ෂිත බන්ධනාගාරගතව සිටින කාලය සැලකිල්ලට ගනු ලබයි.

මෙම සැකකරු සන්නකයේ තිබූ බව දැක්වන මත්ද්‍රව්‍යන්හි ශුද්ධ හෙරොයින් ප්‍රමාණය කවරේද යන්න තීරණය කිරීම සඳහා රජයේ රස පරීක්ෂකවරයාගේ වාර්තාව මේ වන තෙක් ලැබී නොමැත. එය ලැබී තිබෙන අවස්ථාවකදී එහි අඩංගු ශුද්ධ හෙරොයින් ප්‍රමාණය සැකකරු රක්ෂිත බන්ධනාගාරගතව සිටින කාලය සහ ඔහු සන්නකයේ තිබූ මත්ද්‍රව්‍යන්හි දළ අගය සැලකිල්ලට ගෙන එය මෙම අධිකරණය විසින් අනුගමනය කරනු ලබන නිර්ණායකයන් හා ගැලපෙන්නේ නම් සැකකරු ඇප මත මුදා හැරීමේ අවස්ථාව පවතී.

Hence the Learned High Court Judge has considered that the Government Analyst Report is one of the factors to be considered when deciding a bail application.

In this case the net quantity of the Heroin is 27.34 grams. Further the suspect is a first offender. I conclude these matters need to be considered when granting of bail to the suspect.

Further, the Counsel for the Petitioner argued that the statement of objection of the 1<sup>st</sup> Respondent was filed on 10.01.2023 in this Court and it is mentioned in the said statement that it has been revealed that the suspect is a main suspect who takes large quantities of Heroin from Pamunugama, Isiyogama area and packs them in the Isiyogama area and distributes to several areas. However, the same was not mentioned in the B Report dated 03.11.2021 and /or any further reports filed before the Magistrate Court, Welisara. Therefore, the 1<sup>st</sup> Respondent has submitted false information before the Court to object to granting of bail to the suspect.

Upon perusal of the B Reports filed by the Officer-in-Charge, Pamunugama Police Station nowhere mentioned that the suspect is the person from Isiyogama area takes large quantities of Heroin packs and distributes to several areas. As the 1<sup>st</sup> Respondent has taken up this position first time in this Court, I too agree with the Learned Counsel for the Petitioner that the 1<sup>st</sup> Respondent had submitted false information to object for bail.

The Counsel for the Petitioner contended that the Learned High Court had disregarded that the suspect had been falsely accused over a money transaction and the affidavit of the daughter of the person who caused the suspect to be so falsely accused. The relevant portion of the order of the Learned High court judge is re-produced below:

(P9- page 2)

මෙහිදී මෙම සැකකරු මුදල් ආරවුලක් මත අසත්‍ය චෝදනාවකට ලක් කර ඇති බවට පත්සම්කාරීය දක්වන අතර, ඒ සම්බන්ධයෙන් එම චෝදනාවට සැකකරු ලක් කිරීමට හේතු වූ පුද්ගලයා බව දක්වන අයගේ දියණියක විසින් ඉදිරිපත් කරන ලද දිවුරුම් ප්‍රකාශයක් ද ඉදිරිපත් කරයි. එසේවුවද වෙනත් යම් බාහිර හේතූන් මත එවැනි කරුණු ඉදිරිපත් කිරීම සිදුවිය හැකි බැවින් එම කරුණ පමණක් සැකකරු ඇප මත මුදා හැරීම සඳහා සුවිශේෂී කරුණක් ලෙස සැලකිය නොහැක.

On perusal of the said portion of the order the Learned High Court Judge, it reveals that the rejection is solely based on the assumption of the Learned High Court Judge.

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”.*



In this case, as per the submission of the Learned State Counsel, the indictment had already been dispatched to the High Court of Negombo. Trial has not commenced yet.

Hence, I consider the delay more than one and half years in remand falls into the category of excessive and oppressive delay considering the circumstances of this case. Considering other matters which had escaped the attention of the Learned High Court Judge of Negombo, the suspect has very good exceptional circumstances to consider this application in favour of him.

Offences under Section 54A(b) and 54A(c) 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.

Considering all these factors into account, especially the pure quantity of Heroin detected and the circumstances of the case, I consider this an appropriate case to grant bail to the suspect. Hence, I order the suspect to be granted bail with the 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 suspect 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 suspect.
6. To report to the Pamunugama Police Station on the 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 Revision Application is allowed and the Learned High Court Judge High Court of Negombo is hereby directed to enlarge the suspect on bail on the above bail conditions.

The Registrar of this Court is directed to send a copy of this Judgment to the High Court of Negombo and Officer-in-Charge of the Police Station Pamunugama.

The Application is allowed.

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**