

**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 of the Democratic Socialist Republic of Sri Lanka.

**Court of Appeal Bail Application** Officer-in-Charge

**CA (PHC) APN/0048/21** Police Station

**High Court of Colombo** Maradana.

**Case No. HCBA/27/2021**

**Complainant**

**MC Maligakanda**

**No. B 35316/2018**

Jarith Mohomed Najan

Udumbugala, Perariyakulam

Vavuniya.

**2<sup>nd</sup> Suspect**

**AND BETWEEN**

Nadeera Ruwanthi

No.9B ¼, Hilda Mahal,

Hilda Mawatha

Dehiwala.

**Petitioner**

**Vs**

1. The Attorney General

Attorney General's Department

Colombo-12.

**1<sup>st</sup>-Respondent**

2. The Officer-in-Charge  
Police Station  
Maradana.

**2<sup>nd</sup>-Complainant-Respondent**

**AND NOW BETWEEN**

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

**1<sup>st</sup>-Respondent-Petitioner**

1. The Officer-in-Charge  
Police Station  
Maradana.

**2<sup>nd</sup>-Complainant-Respondent**

Jarith Mohomed Najan  
Udumbugala, Perariyakulam  
Vavuniya.

**2<sup>nd</sup> Suspect-Accused-Respondent**

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

**COUNSEL** : **Janaka Bandara, DSG for the 1<sup>st</sup>**  
**Respondent-Petitioner.**  
**M.S.M.Imtias for the 2<sup>nd</sup> Suspect-**  
**Accused-Respondent.**

**ARGUED ON** : **31/05/2023.**

**DECIDED ON** : **20/07/2023.**

\*\*\*\*\*

**ORDER**

**P.Kumararatnam,J.**

The 2<sup>nd</sup> Suspect-Accused-Respondent (hereinafter referred to as “the Respondent”) had applied for bail in the High Court of Colombo in the case bearing No. HCBA 27/2021. After an inquiry, the Learned High Court Judge had granted bail on 02.03.2021. Aggrieved by the said order, the 1<sup>st</sup> Respondent-Petitioner (hereinafter referred to as the “Petitioner”) had filed this Revision Application to revise the said order.

The Respondent was arrested along with one of his friends called Thuwan Nisam Sahabdeen Saaman on 08.11.2018 by the officers attached to the Maradana Police Station. The police officers had recovered some substances from the possession of the Respondent which reacted for Heroin (Diacetylmorphine). The substance weighed about 250.230 grams.

The Respondent was produced and facts were reported to the Maligakanda Magistrate under Section 54A (d) and (b) and of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Act No.13 of 1984 and was subjected to seven days detention order issued by the Learned Magistrate Maligakanda.

The production had been sent to the Government Analyst Department on 12/11/2018. After analysis, the Government Analyst had forwarded

the report to Maligakanda Magistrate Court on 29/04/2019. According to the Government Analyst, 64.686 grams of pure Heroin (Diacetylmorphine) had been detected from the substance sent for the analysis.

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

1. The Learned High Court Judge has not properly interpreted 'Exceptional Circumstances' under Section 83 of the Poisons, Opium and Dangerous Drugs (Amendment) Act no. 13 of 1984.
2. The duration of time spent in remand is not an exceptional circumstance; Cursus curiae, the Superior Courts of Sri Lanka, reflecting the intention of the legislature have determined that where serious offences entailing grave sentences are concerned, it is prudent to keep the suspect or accused in remand until the conclusion of the trial.
3. The Learned High Court Judge has totally misunderstood and/or misled himself on the trite law pertaining to granting of bail in narcotic related matters in light of the existing case law of the Superior Courts of the country.
4. The Petitioner, therefore, respectfully submits that the Learned High Court Judge had erred in law and fact in granting bail for the Respondent considering the duration of time he is spent remand and,
5. The Learned High Court Judge has disregarded the serious nature of the offence committed by the Respondent and the impact to the society.
6. Moreover, the Learned High Court Judge has completely misunderstood and/or disregarded the fact that the indictment has already been dispatched by the Hon. Attorney General at least 6 months back and the same was scheduled to be served on the Respondent in another parallel Court in few days' time after the purported bail inquiry and on that ground itself the bail Court

is seized of its jurisdiction to consider bail with the operation of Section 195(d) of the Code of Criminal Procedure Act No.15 of 1979 as amended.

According to the Respondent, indictment was not filed in the High Court of Colombo until the date of delivering the order by the Learned High Court Judge granting bail to the Respondent. The Respondent was arrested allegedly for aiding and abetting the 1<sup>st</sup> Suspect as per the B report filed by the police.

According to the police the Heroin parcel was recovered from the handle of the three-wheeler driven by the 1<sup>st</sup> Suspect. The Respondent was only traveling in the three-wheeler when he was arrested by the police.

The Respondent pleads following exceptional circumstances to consider bail for him.

- The time period spent in the remand custody which was two years and 04 months as at the time of bail application in the High Court.
- The absence of prima facie case against the Respondent as there was no evidence incrimination the Respondent for aiding and abetting.

The Respondent was arrested on 08.11.2018 and the Government Analyst Report dated 29.04.2019 was received by the Magistrate court and the order granting the bail was made by the High Court on 02.03.2021 which is approximately after 2 years and 04 months.

This revision application was filed by the Petitioner on 26.03.2021 and stay order was granted after support on 31.03.2021 and ever since the Respondent was arrested, he has been in remand custody for about 4 years and 07 months.

The Learned Deputy Solicitor General 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 was filed on 08/09/2020 in the High Court of Colombo. No proof submitted before this Court as to the commencement of trial.

The Respondent is in remand for little over 04 years and 7 months. According to Government Analyst Report the pure quantity of Heroin detected is 64.686 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 **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 64.686 grams. Hence, this court has jurisdiction to consider granting of bail as per the new amendment.

According to the Learned High Court Judge, the sole reason for granting of bail to the Respondent is detaining the Respondent without any legal action for an extended period of time. Hence, the Learned High Court Judge considered this as an exceptional ground.

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]

Upon perusal of the Government Analyst Report, the production had been received by them on 12.11.2018 and the analyst report was received by the Magistrate Court, Maligakanda on 29.04.2019. The prosecution had forwarded indictment against the Respondent only

after about 17 months since receiving of the Government Analyst Report, which is one of the deciding factors in a case of this nature.

The right to trial without undue delay is found in numerous international and regional human rights instruments; for example, the International Covenant on Civil and Political Rights (Article 14(3)(c), the American Convention on Human Rights (Article 8(1), the African Charter on Human and People's Rights (Article 7(1)(d), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (Article 6(1).

When a person is kept in remand without filing charges for a considerable period of time, he or she should be released on bail pending indictment. Otherwise, this will lead to prison overcrowding.

Hence, I consider the delay more than 04 years and 07 months in remand falls into the category of excessive and oppressive delay considering the circumstances of this case.

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.

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.

According to the B report filed, the Heroin was recovered from the three-wheeler handle driven by the 1<sup>st</sup> Suspect in this case. The Respondent was traveling in the rear of the vehicle. Nothing recovered from his possession at that time. Considering the evidence available against the Respondent, there is likelihood of success in the defence case. This is only an assessment of likelihood and not a prediction or



judgment in respect of the High Court case filed against the Respondent.

Considering all these factors into account, especially the pure quantity of Heroin detected, the time consumed to forward indictment and the other circumstances of the case, I dismiss this revision application and affirm the order of the Learned High Court Judge dated 02.03.2021.

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

**JUDGE OF THE COURT OF APPEAL**

**SAMPATH B. ABAYAKOON, J.**

I agree.

**JUDGE OF THE COURT OF APPEAL**