

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

*In the matter of an application for bail in terms of section 83 (2) of Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022.*

**Court of Appeal No:**

CA/BAL/144/23

The Officer-in-Charge,

Police Station,

Moratuwa.

**COMPLAINANT**

**Magistrate Court Moratuwa**

**Vs.**

**Case No:** B 1570/20

Wannakawatta Waduge Nilantha Wijeya

Srilal Fernando

**SUSPECT**

**AND NOW BETWEEN**

Kachchakaduge Sudharshani

Fernando,

No. 404/8, Galle Road,

Rawathawaththa, Moratuwa.

**PETITIONER**

**Vs.**

1. The Officer-in-Charge,  
Police Station,  
Moratuwa.

**COMPLAINANT-RESPONDENT**

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

**RESPONDENT**

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : I. B. S. Harshana for the Petitioner

: Jehan Gunasekara, S.C. for the Respondents

Inquiry on : 26-06-2023

Order on : 06-09-2023

**Sampath B. Abayakoon, J.**

This is an application by the petitioner seeking bail for her husband namely, Wannakawattha Waduge Nilantha Wijaya Srilal Fernando (hereinafter referred to as the suspect) who is the suspect in the Magistrate Court of Moratuwa Case No. B 1570/2020.

The suspect has been arrested by the officers of the Moratuwa police 09-09-2020, for an alleged offence of possession and trafficking of Heroin.

According to the B-report filed before the Magistrate of Moratuwa by the Officer-in-Charge of the Moratuwa police in that regard, at the time of his arrest, he was having in his possession 55200 milligrams of a substance suspected to be of Heroin, which is an offence punishable in terms section 54A and 54B of the Poisons, Opium and Dangerous Drugs Ordinance as amended.

The suspect has been in remand since, and according to the Government Analyst Report, the substance produced before the Government Analyst had been identified as a substance having 24.171 grams of Diacetylmorphine, namely, Heroin.

In her application for bail before this Court, the petitioner has claimed that the fact that the suspect being in remand nearly three years without being charged before a competent Court as exceptional circumstances for this Court to consider granting of bail on the suspect.

The previous section 83 of the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 was repealed and replaced by a new section 83 by Poisons, Opium and Dangerous Drugs (Amendment) Act No. 41 of 2022 in the following manner.

**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.**

**(3) For the purposes of this section “dangerous drug” means Morphine, Cocaine, Heroin and Methamphetamine.**

Although, section 83 that existed until the Amendment Act No. 41 of 2022 became effective had vested the power to grant bail for a person suspected or accused of an offence committed under section 54A or 54B of the Poisons, Opium and Dangerous Drugs Ordinance to the relevant High Court in exceptional circumstances, the amendment has provided for different jurisdictions to grant bail under mentioned circumstances.

Under the provisions of section 83 (2) of the Amendment Act No. 41 of 2022, notwithstanding the provisions of sections 84 and 85, if the pure quantity of the dangerous drug trafficked, imported, exported or possessed is 10 grams or above in terms of the Government Analyst Report, in such circumstances only the Court of Appeal which has the exclusive jurisdiction to grant bail in exceptional circumstances for a person accused or suspected of committing an offence in terms of section 54A or 54B of the Ordinance.

For purposes of this section, a dangerous drug has been defined as Morphine, Cocaine, Heroin and Methamphetamine.

Section 84 and 85 are the provisions where it has been stipulated that a suspect or an accused shall not be detained in custody for a period exceeding 12 months from the date of arrest and up to another period of 12 months on an application made by the Attorney General to the High Court.

Since it has been established that the substance alleged to have been found in the possession of the suspect was Heroin, and had a pure quantity of 24.171 grams, this is a matter which comes within the purview of this Court to consider bail for the suspect under exceptional circumstances.

What constitutes exceptional circumstances have not been defined in the Statute.

Our Superior Courts have considered various situations at various times as exceptional in deciding to grant bail for suspects in terms of the Poisons, Opium and Dangerous Drugs Ordinance.

In **CA (PHC) APN No.16-12 decided on 14-06-2012**, the Court of Appeal considered failing to file an indictment even one year after the receipt of the Government Analyst Report as relevant in granting bail for a suspect.

However, it needs to be noted that there are several other instances where the Court of Appeal did not consider the time period a suspect person has been incarcerated as relevant exceptional circumstances in order to grant bail.

In the case of **CA (PHC) APN No. 9-2010 decided on 19-07-2010**, the Court of Appeal considered the facts reported by the police in the B-report as relevant to consider whether there are exceptional circumstances to grant bail to a suspect. Similarly, there are judgements, which say that facts cannot be considered as exceptional circumstances.

The above varied decisions by our Superior Courts clearly establish the fact that whether a certain situation amounts to exceptional circumstances or not, has to be considered on a case-by-case basis, unique to each application before the Court.

It is the view of this Court that if the relevant B-report and other material placed before the Court by the relevant investigation authority, provides a sufficient basis to consider granting bail to a suspect, there exists no impediment for this Court to consider them as relevant in determining whether exceptional circumstances exist under a given situation.

In this matter, the suspect had been arrested and produced before the Court on 09-09-2020 and the Government Analyst Report dated 09-02-2021 had been issued indicating the pure quantity of the drug which has been identified as Heroin.

This Court is of the view that the alleged offence committed by the suspect as mentioned in the B-report provides no basis to consider that this is a complicated matter where investigations have to be conducted extensively.

According to the submission made before the Court by the learned State Counsel, the indictment has now been dispatched to the relevant High Court of Panadura and the trial has been fixed for the 30<sup>th</sup> October 2023, which is three years after the arrest of the suspect. However, he was not able to provide the number of the High Court case at the inquiry.

Although it is reported that the Hon. Attorney General has now sent the indictment to the relevant High Court to be served on the accused, I am of the view that it would not compensate for the unnecessary delay in filing an indictment due to the attitudes of the investigating agencies. I am of the view that the investigating agencies have an additional responsibility of making sure that no person is kept in remand unnecessarily without being charged in a competent Court of law, enabling that person to plead to the charge and seek redress from the Court.

I am of the view that when it comes to the circumstances of this case, the delay in conducting proper investigations and filing the relevant charges provides

sufficient exceptional circumstance to grant bail to the suspect. I am of the view that under the circumstances of this case, delay in serving the indictment, and the time it may take to conclude the case, are also material factors that need to be taken into consideration in this bail application.

Accordingly, the suspect is ordered to be released on the following strict bail conditions.

1. Cash bail Rs. 100,000/=
2. Two sureties with Rs. 250,000/= each surety bail. One of the sureties should be the petitioner.
3. The suspect is ordered to report to the OIC of the Moratuwa police every last Sunday of the month between 9.00 a.m. and 12 noon until the conclusion of the trial before the High Court.
4. The suspect is prevented from traveling overseas until the conclusion of the trial against him. If he is possessed of a passport, he shall surrender the passport to the Registrar of the Magistrate Court of Moratuwa. If he has not obtained a passport, he shall file an affidavit in that regard.
5. The Registrar of the Magistrate Court of Moratuwa is directed to inform the Controller of Immigration and Emigration that a travel ban has been imposed on the suspect until the conclusion of this case and is also ordered to provide the necessary details in this regard to the Controller.

The Registrar of the Court is directed to communicate this bail order to the Magistrate Court of Moratuwa for necessary compliance.

If the learned Magistrate has already dispatched the original case record to the High Court of Panadura by the time this bail order reaches the Court, the learned Magistrate of Moratuwa is directed to give necessary directions to forward this bail order to the Registrar of the High Court of Panadura giving reference to the relevant High Court case number which should be available in the sub file maintained in the Court.

In such a scenario, it is directed that this bail order shall be considered as a bail order pronounced in the relevant High Court case and the learned High Court Judge of Panadura is directed to give effect to the bail order.

Judge of the Court of Appeal

**P. Kumararatnam, J.**

I agree.

Judge of the Court of Appeal