

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

*In the matter of an application for  
Special Leave to Appeal in terms of  
Article 128 of the Constitution of the  
Democratic Socialist Republic of Sri  
Lanka.*

The Democratic Socialist Republic of  
Sri Lanka.

**SC/Appeal 53/2022**

SC/SPL/LA 188/2021

Court of Appeal No. CPA 132/2020

High Court Colombo No. 613/19

**COMPLAINANT**

**Vs.**

Madapathage Dona Thilaka Alias  
Shyamali

**ACCUSED**

AND BETWEEN

Madapathage Dona Thilaka Alias  
Shyamali

**ACCUSED - PETITIONER**

**Vs.**

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

**COMPLAINANT-RESPONDENT**

AND NOW BETWEEN

Attorney General  
Attorney Generals Department,  
Colombo 12.

**COMPLAINANT – RESPONDENT-  
APPELLANT**

***Vs***

Madapathage Dona Thilaka Alias  
Shyamali

**ACCUSED-PETITIONER-RESPONDENT**

**BEFORE** : **S. THURAIRAJA, PC, J**  
**A. H. M. D. NAWAZ, J AND**  
**A.L. SHIRAN GOONERATNE, J**

**COUNSEL** : Dilan Ratnayake, Senior Deputy Solicitor General with Maheshika  
Silva, DSG for the Complainant-Respondent-Appellant  
Nissanka Nanayakkara, PC with Naveen Hettiarachchige for the  
Accused-Petitioner-Respondent

**WRITTEN SUBMISSIONS:** Complainant-Respondent-Appellant on 13<sup>th</sup> October 2022.  
Accused-Petitioner-Respondent on 29<sup>th</sup> September 2022

**ARGUED ON** : 25<sup>th</sup> October 2022

**DECIDED ON** : 30<sup>th</sup> November 2022

**S. THURAIRAJA, PC, J.**

The Complainant-Respondent-Appellant, namely the Attorney General ("hereinafter referred to as the "Complainant-Appellant") filed an application in this Court, against the order by the Court of Appeal dated 19<sup>th</sup> May 2022, praying for the Accused-Petitioner-Respondent (hereinafter referred to as the "Accused-Respondent"), to be taken back into custody.

This Application precedes from a complaint filed by the Complainant-Appellant at the Magistrate Court of Maligakanda, where the Accused-Respondent was ordered to be kept in remand custody, following which she was indicted in the High Court of Colombo on the 3<sup>rd</sup> June 2019, and was charged with:

*Possessing and trafficking a quantity of 43.723 grams of heroin, punishable under Sections 54A (b) and 54A (c) of the Poisons, Opium and Dangerous Drugs Ordinance as amended by the Amending Act No. 13 of 1984.*

A bail application was made on the 25<sup>th</sup> November 2019, and was refused by the High Court judge on the same date. Another application was filed on the 14<sup>th</sup> June 2020 and was refused on said date, where the High Court judge stated that the Accused-Respondent failed to bring any exceptional circumstances to consider bail as required by under Section 83 of the Poisons, Opium and Dangerous Drugs Ordinance. Another bail application was made on 31<sup>st</sup> July 2020 and was refused by the learned High Court Judge on same date citing that although it was a serious concern, the fact that Sub Inspector Udara Chathuranga, the main investigating officer in this case, was arrested on suspicion for another drug trafficking offence, was not a reason strong enough to be considered as an exceptional circumstance.

Thereafter the Accused-Respondent appealed to the Court of Appeal for judgement to be set aside. After hearing submissions of both parties, the Judge of the Court of Appeal delivered order dated 08<sup>th</sup> June 2021, allowing the appeal and

dismissing the judgement of the High Court. The Accused-Respondent was then granted bail on the following conditions,

- i. cash bail of Rs. one million*
- ii. surety bail of Rs. two million each*
- iii. petitioner to surrender her passport to relevant High Court, and the Registrar to inform the Director of Immigration and Emigration not to allow the petitioner to leave the country.*
- iv. The petitioner to report to the police Narcotics bureau on every Sunday of the month.*

**(CPA 132/2020)**

Being seriously concerned with the said order of the Court of Appeal, the Hon. Attorney General, Complainant-Appellant made an appeal to this Court seeking the above judgment to be set aside on the grounds set out in the Petition dated 29<sup>th</sup> September 2022. On 13<sup>th</sup> October 2022, Court granted Leave to Appeal on the following questions of law,

*"Did the Court of Appeal err in law by considering "the morality" as a yardstick or an exceptional ground in considering an application for revision in relation to an offence committed under the Poisons, Opium and Dangerous Drugs ordinance?"*

*"Did the Court of Appeal err in law by holding that the "credibility of a witness" in considering a bail application to be an item of "exceptional circumstance"?"*

In determining the same, the facts and circumstances of this application needs to be considered.

## **The Facts**

The Accused-Respondent, namely Madapathage Dona Thilaka Alias Shyamali was arrested by the Police Narcotic Bureau on 2<sup>nd</sup> February 2018, for alleged possession of 120 grams of brown powder suspected to be heroin. During the investigation, it was referred to the Government Analyst, who found 43.732 grams of diacetylmorphine (heroin) in the said brown powder.

Hon. Attorney General, preferred an indictment against said Accused-Respondent. When the matter was pending trial at the High Court, the Accused-Respondent prayed for bail. The Petitioner-Respondent stated that the fact that the main investigating officer, namely Sub Inspector Udara having been arrested on suspicion for another incident involving drugs subsequent to her arrest was an exceptional circumstance under Section 83 of the Poisons, Opium and Dangerous Drugs Ordinance.

The Petitioner-Respondent then filed a revision application to the Court of Appeal, for the Court to grant bail. After hearing the revision application, the Court of Appeal delivered judgement on 08<sup>th</sup> June 2021, and granted bail to the Accused-Respondent. The learned SDSG submits that the Accused-Respondent has suppressed very important material facts, namely her previous convictions on drug related matters was not submitted to the Court of Appeal in her revision application, of which the Court of Appeal has not seriously considered.

Given that this application is based on the granting of bail under the Poisons, Opium and Dangerous Drugs (Amendment) Act, No. 13 of 1984, Section 83 (1) on bail is of relevance. This provides that:

*No person suspected or accused of an offence under section 54A or 54B of this Ordinance shall be released on bail, except by the High Court in exceptional circumstances.*

The said offences under Section 54A and 54B are as follows:

*54A. Prohibition against manufacture, trafficking, import or export and possession of dangerous drugs.*

*54B. Abetting in the commission of an offence under section 54A.*

However, exceptional circumstances are not defined in the said Ordinance, and are considered on a case-by-case basis. This can be seen in the decision of **Ramu Thamodarampillai vs The Attorney General SC 141/75 (2004) 3 SLR 180**, where His Lordship Vythialingam, J held that,

*“the decision must in each case depend on its own peculiar facts and circumstances.”*

As the case at hand deals with the possession and trafficking of heroin, it is essential to establish that heroin falls within the definition of a dangerous drug under Sri Lankan law. As per Article 48 of Chapter V of the Poisons, Opium, and Dangerous Drugs Ordinance,

*(1) the drugs, substances, articles or preparations, specified for the time being in Groups A, B, C, D and E in Part I of the Third Schedule, shall be deemed to be dangerous drugs*

The narcotic drug heroin, also referred to by its chemical name diacetylmorphine can be found in the 49<sup>th</sup> place in the Third Schedule of the Conventions Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act No. 1 of 2008. Hence, it is established that heroin is a dangerous drug which falls within the prohibition under Section 54A. As the Accused-Respondent was in possession of 43.723 grams of heroin, we can further establish that she committed the offence of possessing and trafficking said heroin. Bail application must therefore be considered under Section 83 to determine whether exceptional circumstances apply.

As per the order of the High Court Judge, bail was refused on three accounts,

1. First account dated 25<sup>th</sup> November 2019

2. Second account dated 14<sup>th</sup> June 2020
3. Final account dated 31<sup>st</sup> July 2020.

The Sub Inspector Udara, the main investigating officer and witness providing evidence at the trial of the Accused-Respondent, as well as a few other police officers were arrested on suspicion after the indictment of Accused-Respondent for trafficking and smuggling of dangerous drugs.

The stance of the Accused-Respondent was that the fact that the Sub Inspector and witness providing evidence at her trial being arrested on suspicion at the time of indictment of Accused-Respondent, for another drug-related offence was enough to constitute exceptional circumstances as under Section 83 of the Poisons, Opium and Dangerous Drugs (Amendment) Act No. 13 of 1984. This, according to the Accused-Respondent, would constitute an exceptional circumstance because it allegedly infers unreliability of the witness.

However, the High Court judge stated on all three instances that the Accused-Respondent failed to bring any exceptional circumstances to consider bail, and the said exceptional circumstance of the Sub Inspector being arrested for a separate incident, while serious, did not constitute a serious enough issue to be categorized as an exceptional circumstance under Section 83, stating;

*“මෙම නඩුවේ ප්‍රධාන වැටලීම් නිලධාරියා වෙනත් නඩුවක සැකකරුවෙක් ලෙස සිටීම පමණක් වුදිනට ඇප නියම කිරීම සඳහා වූ සුවිශේෂ කරුණක් ලෙස සැලකිය නොහැකි බව මාගේ අදහසයි. එම කරුණ ප්‍රධාන වැටලීම් නිලධාරියාගේ සාක්ෂියේ සාක්ෂිමය විශ්වසනීයත්වයට බලපාන කරුණක් විය හැකි නමුත් එය වුදිනට ඇප නියම කිරීම සඳහා වූ සුවිශේෂ කරුණක් ලෙස මේ අවස්ථාවේ සැලකිය නොහැක.”*

For ease of reference, the translation of the above statement says that

*“In my opinion, the fact that the chief investigating officer in this case is a suspect in another case cannot be considered as a special factor for granting bail to the accused. That fact may affect the evidentiary*

*credibility of the evidence of the chief raiding officer but it cannot be considered as an exceptional ground for granting bail to the accused at this time."*

The Court of Appeal considered the High Court judge's decision to be flawed, and that their finding as to the officers who conducted the raid being accused in other similar cases as not an exceptional ground to be considered for bail under Section 83, was not seen as,

*"being very correct because it causes a serious doubt in the investigations conducted by these officers as to the truthfulness of the same, therefore the question arises whether **it is morally** correct to keep an accused in remand until the conclusion of the trial under those circumstances. **(Emphasis Added)***

Further, the conclusion of the trial appears rushed as the Judge of the Court of Appeal had also quoted that

*"although the trial has commenced the current corona situation in the country which has affected the smooth running of the judicial system might delay the conclusion of the trial hence in view of the exceptional behavior of the investigative officers, this court decides to enlarge the petitioner on bail."*

In answering the first question of law, it appears that the judge of the Court of Appeal has considered "morality" as a yardstick or an exceptional ground in considering an application for revision in relation to an offence committed under the Poisons, Opium and Dangerous Drugs ordinance, where it was stated that

*"the question arises whether it is morally correct to keep an accused in remand until the conclusion of the trial under those circumstances"*

As per the Oxford Dictionary, "morality" is defined as



*“principles concerning the distinction between right and wrong or good and bad behaviour”,*

whereas the same defines “law” to be

*“the system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties”.*

It is of utmost importance to note that while these two are similar and often rely on one another, all persons in law are aware of the distinctions drawn between the two grounds in the study of Jurisprudence as morality not being an essential criterion for legality as they are in fact, different to one another. Hence, using morality as a yardstick for justice not only muddies the waters of law, but it would also set an unclear precedent.

In the present case, the morality of the decision of the High Court to keep the Accused-Respondent in remand custody until the conclusion of the trial has been questioned by the Court of Appeal, and in the Court of Appeal, it was decided that this was,

*“not fair and justifiable”,*

and bail was granted to Accused-Respondent on this account.

However, in case of **Cader (On Behalf of Rashid Khan) vs Officer-In-Charge Narcotics Bureau CA 123/2005 (2006) 3 SLR 74** His Lordship Eric Basnayake, J held that,

*“These types of offences affect the society at large. The law should not be made impotent that it does not serve the Society and the antisocial elements should not be given licence to create havoc in Society.”*

Stemming from the fact that heroin is a drug that is difficult to detect in most cases, the tendency of criminals to resort to committing this type of crime has been quite high.

I must also observe that Accused-Respondent had suppressed very important material in revision application to the Court. The Accused-Respondent failed to bring to the attention of court regarding two previous convictions of similar nature.

- i. Possession of 1000 mg of heroin – Rs. 75000 fine imposed on 11.03.1997 **(Maligakanda Magistrates Court Case Number 73873/1997)**
- ii. Possession and trafficking of less than one gram of heroin – A sentence of one year of Rigorous Imprisonment imposed suspended to seven years by High Court of Colombo on 14.03.2012. Accused-Respondent was arrested for the present case during the operative period of this suspended sentence. **(Colombo High Court Case Number 5846/2011)**

However, the Learned Judge of the Court of Appeal, while having acknowledged this fact as;

*“that the petitioner has failed to state the previous convictions, which this court is unable to endorse.”*

has failed to give sufficient weight to this in the final conclusion, and appears to have disregarded it. As such it is merely an acknowledgement of the same but appears not to have had any real effect on the conclusion which is irregular in an application of this nature.

Furthermore, drawing from Hon. Eric Basnayake, J in **Cader (On Behalf of Rashid Khan) vs Officer-In-Charge Narcotics Bureau** (Supra),

*"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."*

We can see that the Accused-Respondent has hidden the fact she was previously penalized for committing two previous similar offences. Considering the morality of the decision of the High Court seems insignificant in the face of her penchant to commit offences under the Poisons, Opium and Dangerous Drugs ordinance.

Hence, as there is no legal basis of considering morality as a yardstick in an application for or revision in relation to an offence committed under the Poisons, Opium and Dangerous Drugs ordinance, I am of the view that the Court of Appeal has erred in considering morality as a yardstick or an exceptional ground in an application for revision in relation to an offence committed under the Poisons, Opium and Dangerous Drugs Ordinance.

In order to arrive at a conclusion on whether the creditworthiness of the witnesses is questionable, the tests of creditworthiness that can be tested on the witnesses can be referred to.

An important test of creditworthiness is whether the witness is an interested or disinterested witness. Hon. Rajaratnam J. in **Tudor Perera v. AG SC 23/75 (Supreme Court Minutes dated 1<sup>st</sup> November 1975)** perceived that when considering the evidence of an interested witness who may wish to conceal the truth, such evidence must be inspected with due diligence. The independent witness will normally be favoured over an interested witness in case of conflict. In the present case, since the witness is neither a close relative, nor a person whose interests are closely associated with the Accused-Respondent, it appears that there are no circumstances of affiliation shedding doubt on the independence of the witness, and his evidence will be evaluated by the trial court.

There are further elements to be considered in the issue regarding the credibility of witnesses.

Firstly, that at the time of the initial trial, the Sub Inspector was arrested on suspicion of possessing and smuggling large quantities of narcotics, however, it must be emphasised that he was only suspected in an ongoing investigation, and at the time there was no conclusion to the trial finding him guilty of the crimes he was accused of. At the time of granting bail to the Accused-Respondent by the Court of Appeal, he was not a convict.

Secondly, it must be noted that the incident that the witness is being investigated and inquired for is a case that has no relation to the present case at hand, and the two cases are not part of the same transaction. Sub Inspector Udara Chathuranga, at the time of being questioned at the High Court, was detained by the Criminal Investigation Department for a separate investigation. While the offences may be similar, it is clear that both of the incidents are totally independent of one another, and thus it is the view of this Court that he is more than capable of presenting clear evidence for this case. Further, as he was the main officer responsible for the current investigation into the Accused-Respondent, it is crucial that he stands as a witness, to paint a picture of the events that took place.

In deciding whether the Court of Appeal erred by finding that the witness, the chief investigating police officer, was an uncreditable witness, it is essential to refer to previous judgements.

In the case of **Kumara De Silva And 2 Others Vs. Attorney General CA 4/2003 (2010) 2 SLR 169** it was held that

*“Credibility is a question of fact, not of law. The acceptance or rejection of evidence of witnesses is therefore a question of fact for the trial Judge.”*

Hence, as seen in the above judgement, it is inappropriate for someone other than the trial judge to conclude whether or not a witness has credibility. If the trial judge finds him not to be creditworthy, it is a matter to be considered among other things such as whether other witnesses are available. Hence, creditworthiness must be decided by a court of first instance, which has not been done. The trial judge has not found fault with the credibility of the witness, and therefore it is of no relevance to the appellate judge.

Furthermore, when employing the tests relevant to this case, we can see that the creditworthiness of the witness has not been impugned as of yet. Even if the conduct of the said witness does not constitute a creditworthy action, this Court is of the view that it is not a serious enough concern to be classified as an “exceptional circumstance” under Section 83.

This is especially so as creditworthiness of witness is not a matter which is relevant to the granting of Bail. It is a consideration that is redundant to the questioning of whether there are exceptional circumstances and cannot bear any weight as a ground for granting bail.

This is due to the fact that the character of people would not be of great importance when being presented as a witness in an unrelated case, for the simple reason that the said witness merely appeared in official capacity, regarding an official function in that capacity.

Therefore, under these circumstances, no material is before the Court of Appeal to come to a decision regarding if the witness is creditworthy, nor is it relevant to the granting of Bail in this application in the first place. Hence, it cannot be considered as an “exceptional ground” in considering an application for revision.

Considering all, it appears that the finding of the Judge of the Court of Appeal is unsubstantiated and flouts the accepted norms of law. I am inclined to answer both

questions of law presented in front of this Court in the affirmative. Therefore, I set aside the order given by the Court of Appeal.

Appeal is allowed. Bail order is cancelled.

Further, on the request of the learned SDSG and considering all the facts I direct the learned High Court Judge to take Accused-Respondent back into custody, and to conclude trial expeditiously.

***Appeal Allowed***

**JUDGE OF THE SUPREME COURT**

**A. H. M. D. NAWAZ, J**

I agree

**JUDGE OF THE SUPREME COURT**

**A.L. SHIRAN GOONERATNE, J**

I agree

**JUDGE OF THE SUPREME COURT**