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

The Democratic Socialist Republic of Sri Lanka

Complainant

Vs.

Court of Appeal
Revision Application No:
CA/ PHC/APN 68/21

High Court of Colombo
Case No: HC 8396/16

Katugahage Chinthaka Kumara Dias (currently incarcerated in the remand Prison)

Accused

And now between

Katugahage Chinthaka Kumara Dias (currently incarcerated in the remand Prison)

Accused-Petitioner

Vs.

Hon. Attorney General
Attorney General's Department
Colombo 12

Complainant-Respondents

BEFORE	:	Menaka Wijesundera J Neil Iddawala J
COUNSEL	:	Niranjan Jayasinghe for the petitioner.
		Sudharshana De Silva DSG with Chathuranga Bandara SC for the Respondents.
Argued on	:	09.11.2021
Decided on	:	30.11.2021

Iddawala – J

This is an application for revision filed on 10.05.2021 against the order of the Learned High Court Judge of Colombo dated 16.03.2021 in case No. HC 8396/16. The said order refused to grant bail to the accused-petitioner (petitioner) who was indicted under the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 for possession and trafficking of 6.9996 kilograms of heroin. Being aggrieved, the petitioner has preferred the present revision application praying for *inter alia* setting aside the order of the Learned High Court Judge of Colombo dated 16.03.2021. The petitioner has no previous convictions or pending trials of similar nature.

The facts of the case are such that the petitioner was arrested on 14.07.2014 by the Police Narcotics Bureau and subsequently served with an indictment on 25.10.2016. According to the case brief, the first day of trial was fixed for 07.03.2017. However, the trial is yet to commence. As such, the petitioner has been incarcerated for five years since being served with an indictment, and for seven years since he was arrested. Consequently, petitioner has filed a bail application before the High Court of Colombo citing *inter alia*, the lack of a *prima facie* case against the petitioner and delay in the trial despite the indictment being served as exceptional circumstance. In his order dated 16.03.2021, the Learned High Court Judge has rejected both grounds and refused the release of the petitioner on bail. As such, the petitioner has invoked the revisionary

jurisdiction of this court to set aside the order of the Learned High Court Judge on primarily two grounds:

1. High Court has erroneously held that lack of a *prima facie* case does not amount to an exceptional circumstance.
2. The delay in the present case is not merely explicable.

The counsel for the petitioner mainly focused on the latter ground during the argument stage and as such, this court will firstly decide on the same.

The seven years of incarceration since the arrest of the petitioner and the commencement of trial can be broken down in to two periods based on the submissions presented by the respondent and explanations understood by this court.

1. Period from arrest of the petitioner to the date fixed for trial
2. Period from the date fixed for trial to present.

The petitioner was arrested on 14.07.2014 alleging 9 kilograms and 50 grams of heroin was found in his possession. Petitioner was detained under the Prevention of Terrorism Act and facts have been reported to the Magistrate Court thereunder. The petitioner was named as the 7th suspect in Case No. B2733/2014 on 11.10.2014 and subsequently indicted in case No HC 8396/16 for possession and trafficking of 6.9996 kilograms of heroin by indictment dated 30.08.2016. The indictment was served on the petitioner on 25.10.2016 and the first date of the trial was fixed for 07.03.2017. As such, the petitioner has spent close to two years and eight months in the period between the arrest of the petitioner and the first date fixed for trial.

In Attorney General v Letchchemi and another SC Appeal 13/2006, the Supreme Court refers to 'usual delay' in distinguishing delay that is common to all in remand prison due to administrative and other reasons, and delay that is 'inordinate' and exceptional. The petitioner has been detained and facts of his detention has been duly reported to the Magistrate and indictment has been served against him. He has been arrested with a commercial quantity of heroin and the ensuing investigation would take a reasonable amount of time to conclude. The same goes to the time utilised by the Attorney General's Department in analysing the evidence and deciding whether there is a reasonable

prospect of securing a conviction. There is no evidence of circumstances surrounding the arrest/detention of the petitioner other than those that are common to all remand prisoners in a likely situation. As such the time period between the arrest of the petitioner and the date fixed for trial does not amount to a delay in exceptional nature.

Now this court will determine the allegations of delay within the period between the first date fixed for trial to present. In deciding whether the impugned decision of the High Court has erroneously decided that such delay does not amount to an exceptional circumstance, guidance can be gained from R v Zakir Rehman and Wood [2005] EWCA Crim.2056 :(2006) 1 Cri App Rep(S) 77 which held "..... *it* is *the opinion of the Court that* is *critical as to what exceptional circumstances are. Unless the judge* is *clearly wrong* in *identifying exceptional circumstances when they do not exist, or clearly wrong* in *not identifying exceptional circumstances when they do exist, this Court will not readily interfere."*

At this juncture, it is pertinent to examine the law relating to the grant of bail under the Poisons, Opium and Dangerous Drugs Ordinance as amended by Act No. 13 of 1984 (hereinafter the Ordinance), under which the petitioner was incarcerated.

Section 83(1) of the Ordinance reads *"No person suspected or accused of an offence under Section 54A or Section 54B of this Ordinance shall be released on bail, except by the High Court in exceptional circumstances"*. In framing the law relating to bail under the Ordinance, the Legislature has conceptualised a mechanism in which the trial is to be concluded expeditiously while the accused is incarcerated. It is only in exceptional circumstances; would the accused be released on bail. To that end, the petitioner averred the ground of delay as an exceptional ground which denied the petitioner due administration of justice.

At the outset, it must be noted that repeatedly, judicial precedent on delay as an exceptional circumstance has stressed the importance of subjectivity. As such, a careful analysis of facts on a case-by-case basis is warranted and a generalised approach of overarching implications is discouraged. This court takes this opportunity to reiterate

that the issue of delay must be construed according to the facts and circumstances of each case.

In Attorney General v Ediriweera 2006 [B.L.R.] 12, it was held that *" delay is always a relative term and the question to be considered is not whether there was mere explicable delay, as when there is backlog of cases, but whether there has been excessive or oppressive delay, and this always depends on the facts and circumstances of the case. Where delay in bringing a man to the conclusion of his litigation is as great as to the amount of oppression a Court will only then interfere and grant bail."*

The first date fixed for trial was 07.03.2017, and since then the petitioner has been languishing in prison. The impugned bail application was filed on 02.03.2021 by which time the petitioner has been incarcerated for nearly 4 years. As an explanation for such a period, the Deputy Solicitor General submitted two grounds:

1. The fatal injury sustained by the main witness PW^1 while he was carrying out a raid on behalf of the Police Narcotic Bureau which incapacitated him from giving evidence
2. The exigencies created by the COVID 19 Pandemic.

The extenuating circumstances of the COVID 19 Pandemic began its assault on the administration of justice after March of 2020. This is well accepted by this Court. Therefore, the main issue to be determined is whether the delay occasioned by the absence of the main witness PW^1 and other facts, amounts to an oppression of the petitioner's rights.

When deciding on the matter, a careful examination of the case brief is warranted. As such, this court will now set out the manner in which matters were conducted since the first date fixed for trial (07.03.2017) to present.

On 07.03.2017, PW^1 was present, and he was directed to appear when notices of summons were received. The case was then taken off the Trial Roll to obtain certain telephone records. After obtaining such records, the case was re-fixed for trial on

7.12.2017. On 7.12.2017 the prosecution informed that PW^{1} has taken ill, and a new date was requested. On the next day of the trial (21.02.2018) prosecution informed that PW^{1} has been injured during the course of carrying out his official duties and is unable to give evidence. The matter was re-fixed for 23.03.2018 and on that day as well, PW^{1} was not present. The prosecution has informed the court that PW1 was in remand custody pursuant to a separate case filed against him. As such the case was re-fixed for 27.08.2018. On that day, while PW^{1} was present. It is stated that he was not in a position to give evidence due to his medical conditions as a result of the injuries he sustained previously. From September 2018 to beginning of 2019, the trial has been postponed on two occasions, on 15.03.2019 and on 21.10.2019, the High Court Judge was on leave. The case brief reflects that bail inquiries ensued and on 22.10.2019, the High Court Judge has transferred the case to High Court No. 01 since he was presiding the case filed against PW^{1} in a separate matter. On 23.04.2021, the case came up for trial and on that day PW^{1} was present. Yet, as he was required to give evidence in another matter before the same High Court, the case was postponed.

As such, it is apparent from a careful consideration of the case brief that during the period between 07.03.2017 to present, PW^{1} was present at times and absent at others due to his health predicaments. Moreover, the trial has been postponed on several occasions due to administrative reasons. Furthermore, the timeline was impacted by the COVID 19 Pandemic.

When considering the absence of PW^{1} in particular, the relevant provisions are laid out in the Code of Criminal Procedure in Section 263 which sets out the power to postpone or adjourn proceedings:

> *"(1) If from the absence of a witness or any other reasonable cause it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or*

trial, the court may from time to time order a postponement or adjournment on such terms as it think fit for such time as it considers reasonable and may remand the accused if in custody or may commit him to custody or take bail in his own recognizance or with sureties for his appearance"

As such, the law provides for the postponement or adjournment of a trial in the absence of a witness in instances where the court believes it necessary or advisable.

It was submitted by the Deputy Solicitor General that the main witness PW^1 sustained fatal injuries (being shot at during a raid involving drug trafficking) which left PW^1 in a critical condition. In the Witten Objections, the respondent has referred to CA(PHC)APN 166/2017 which entertained a similar matter involving the same witness PW^1. The judgement observed *"the trial being postponed due to the absence of a witness, especially when he was injured while on duty, was beyond control of the Learned High Court Judge. Therefore, such grounds cannot be considered as exceptional circumstances since these incidents are unavoidable"*

During the argument stage, it was revealed that the main witness PW^1 of the present case was a witness in other cases of similar nature. Parallel to the proceedings of the impugned trial, he has been incapacitated to give evidence on such other cases as well. The Deputy Solicitor General referred to one such case in which witness PW^1 has recently given evidence. It was the contention of the Deputy Solicitor General that PW^1 can give evidence even for the present case and that the issue of the trial being halted for the lack of witness PW^1, is no longer at play. The Deputy Solicitor General further submitted that the trial will be taken up on the next day, i.e., 28.01.2022.

In the Judgement of Maddepolage Nanda Malini Perera v OIC, Police Narcotic Bureau CA(PHC)APN 150/2019 decided on 31.07.2020, referred to by the petitioner (which involved the same PW1), the court observed that the circumstances of the case did not

show that the trial can commence in the foreseeable future. In that case, the State Counsel representing the Attorney General failed to render an assurance to court as to the possibility of commencing and concluding the trial expeditiously. There was doubt even as to when the witness could give evidence. The circumstances are not so in the present case.

When viewed within the matrix of facts thus detailed, an acceptable and reasonable explanation has been submitted for the delay in commencing the trial from 07.03.2017 to present, which does not point to exceptional circumstances.

With regards to the averment by the petitioner that there lacked a *prima facie case* against him, the facts and circumstances are indicative of the opposite. More than 6 kilograms of heroin was found in his possession which is no doubt a commercial quantity. In this regard, the gravity of the offence, sentence involved if the petitioner is found guilty at the trial and the high possibility of the petitioner failing to appear before court if released on bail should be considered (CPA 22/2021 CA Minute dated 26.10.2021 delivered by this Court). Though the petitioner has no previous convictions or pending cases of similar nature, in Cader (On Behalf of Rashid Khan) v OIC Narcotics Bureau (2006) 3 SLR 74, His Lordship Justice Eric Basnayake succinctly expressed the approach a court must take in such an instance:

"When a person is found guilty of possessing heroin, anything more than 2 grams, the mandatory punishment is either death sentence or life imprisonment. The severity of punishment may be one reason to have the suspects in remand until the conclusion of the trial. Another reason would be the repetition of the crime without detection. It is not possible for the police to be behind a particular suspect. Unlike in any other crime where the traces could be left behind; for example, in a murder case, a dead body in the most likely circumstance would be found. In cases concerning heroin the offence can be committed without being detected as there wouldn't be any traces. Therefore, I am of the view that not having previous convictions and not having any cases pending cannot be considered as grounds when considering bail."

Therefore, this court see no reason to interfere with the order of the Learned High Court Judge in dismissing the application of the petitioner.

This court would be in remiss of its duty if a determination is not made regarding the Learned High Court Judge's reliance of CA(PHC)APN 145/2009 CA Minute dated 16.12.2009. The Learned High Court Judge has referred CA(PHC)APN 145/2009 to hold that lack of *prima facie* case does not amount to an exceptional circumstance when considering a bail application. As such, there arise a need to clarify the implications of CA(PHC)APN 145/2009.

CA(PHC)APN 145/2009 was a revision application filed against an order of the High Court which refused to grant bail to the petitioner on the basis that he failed to establish exceptional circumstances. In this case, the accused petitioner submitted the lack of a *prima facie* case against him as amounting to an exceptional circumstance. His Lordship Ranjith Silva, in delivering the judgement in CA(PHC)APN 145/2009, observed that it was a case where the investigations were yet to be concluded. His Lordship observed that "*it would be utterly unreasonable to expect the prosecution to present a prima facie case before the investigation is over. That fact that there isn't a prima facie case against the suspect does not constitute exceptional circumstances in order to grant bail* ***at this juncture****'* (Emphasis added)

Hence, it is clear that the Court of Appeal in CA(PHC)APN 145/2009 did not express a ***general view*** that in every case requiring the establishment of exceptional circumstances for the grant of bail, an argument of lack of *prima facie* case would fail *in limine*. In CA(PHC)APN 145/2009, the court arrived at such a conclusion based on the peculiar facts placed before the court, i.e., the incomplete investigation. As such, it was erroneous of the High Court to rely on CA(PHC)APN 145/2009 as setting a general precedent which rejects lack of *prima facie* case as an exceptional circumstance in all instances, without distinguishing the facts of the case.

At its crux, this application deals with the rights of the petitioner to be free from arbitrary arrest, detention and punishment as enshrined in Article 13(2) of the Constitution of

the Democratic Socialist Republic of Sri Lanka. However, such a right is not absolute. Article 13(2) is subject to the operation of Article 15(7) which reads as follows:

> *"The exercise and operation of all the fundamental rights declared and recognized by Article 12, 13(1), 13(2) and 14 shall be subject to such restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others, or of meeting the just requirements of the general welfare of a democratic society. For the purposes of this paragraphs "law" includes regulations made under the law for the time being relating to public security"*

In Thavaneethan v Dayananda Dissanyake Commissioner of Election (2003) 1 SLR 74 at page 98, Fernando J held that *"Article 15 does not permit restrictions on fundamental rights other than by plenary legislation - which is subject to pre-enactment review for constitutionality."* The Ordinance and the Section 83(1) contained therein, falls within the ambit of such 'plenary legislation' which acts as an exception to the fundamental rights enshrined in Article 13(2) of the Constitution. By imposing a heavy burden on persons accused of committing an offence under the Ordinance and requiring them to prove the existence of exceptional circumstances for granting of bail, the Legislature identified a "proximate and reasonable nexus between the restriction" (see Joseph Perera Alias Bruten Perera v The Attorney General 1992 1 SLR 199) of Article 13(2) and one or more grounds envisaged in Article 15(7). One must merely refer to the Hansard records of 1984 Vol (28) to ascertain the grave danger drugs posed to the society back in 1984 and the legislative recognition of the same which warranted the enaction of Section 83(1) of the Ordinance.

Sri Lankan society has significantly transformed since 1980's and at present the drug menace is most threatening. The factors that surrounded such enactment at that time and the realities of four decades later are completely different. With the advent of technology and the globalised nature of drug syndicates, there is a dire need to revisit the legal framework that was conceived decades ago. Yet, it is not within the power of the judiciary to formulate such an intervention. Within the context of separation of

powers as envisaged by the Supreme law of the land: Constitution, the judiciary cannot step into the shoes of the Legislature. When viewed within the realities of complexity in investigations, delay in obtaining required reports from Government and other agencies, heavy workload vested on the court system and extenuating circumstances presented by the COVID 19 Pandemic, there are serious challenges to the due administration of justice.

As such, there is a need for legislative intervention to remedy lacunas of the system, to adopt, amend and modify such statutory provisions and to re-cast the role of the judicial system in an appropriate manner befitting the present. It is not the place for the judiciary to intervene.

Therefore, in the totality of the aforesaid circumstances I see no reason to interfere with the conclusion of the learned High Court Judge. The High Court of Colombo is directed to give priority to this matter and conclude the trial expeditiously. Registrar of the Court of Appeal is directed to communicate this Order to the relevant High Court.

Application is dismissed.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera- J.

I agree.

JUDGE OF THE COURT OF APPEAL