

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In the matter of an application for Revision under Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read with section 404 of the Code of Criminal Procedure Act No 15 of 1979.

The Democratic Socialist Republic of Sri Lanka.

Court of Appeal Case No: **CA (PHC)**

APN 106 / 21

Negombo High Court Case No: **HC 312**

/ 17

Complainant

Vs.

Noberst Padmanadam alias Robert

Accused

AND NOW BETWEEN

Noberst Padmanadam alias Robert

Accused – Petitioner

Languishing In remand prison,
Negombo

Vs.

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

Complainant – Respondent

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Tenny Fernando for the Accused – Petitioner.

Chathurangi Mahawaduge, SC for the Complainant – Respondent.

Argued on: 24.02.2022

Decided on: 30.03.2022

MENAKA WIJESUNDERA J.

The instant application for revision has been filed to set aside the order of the High Court dated 18.3.2021 to obtain bail for the accused petitioner (hereinafter referred to as the petitioner namely **Norbert Padmanadan alias Robert**.

On 8.4.2016 the petitioner had been arrested for being in possession of 198.84 grams of heroin by the Police Narcotics Bureau (hereinafter referred to as the PNB).

The petitioner was indicted for the same and indictment was served on the 10.11.2017.

Trail had commenced on 13.11.2018 and the evidence of Prosecution witness (hereinafter referred to as PW1) had been started.

On 25.2.2019 PW1 had been concluded.

On 7.6.2019 PW2 had been present and the prosecution has moved that the relevant documents were not in Court and trial had been refixed.

19.9.2019 PW2 had been present but the prosecution had not led him but had moved Court to warn PW2 to be present on notice and had moved summons on PW3.

On 10.12,2019 PW3 had not been present and prosecution had informed Court that he was involved in a raid.

On 11.5.2020 when the case was called for trial it had been the lockdown period during the covid pandemic.

On 1.6.2020 when the trial was taken up the accused had not been present.

On 4.9.2020 when the trial was due to be taken up the prosecution has informed Court that PW3 had been detained by the CID for questioning for a drug related offence, hence the accused had moved for bail but the trial judge had refused on the ground that the prosecution had informed Court that they would not be leading PW2, 3, 6 and had moved summons PW 5 and 6.

On 17.12.2020 the accused had moved for bail once more and had been refused on 18.3.2021 which is the impugned order which is being canvassed in revision.

In the instant matter the petitioner had been indicted under the provisions of the Poisons Opium and Dangerous Drugs Ordinance as amended by the Act no 13 of 1984 under which if an accused person is charged under section 54 A or B he shall be enlarged on bail by the High Court only on exceptional grounds as per section 83 of the act.

The term exceptional has not been defined in the act but in many of our decided cases so far it has been defined and many factors had been considered as being exceptional such as,

- 1) The nature of the accusation,
- 2) The culpability of the accused,
- 3) The severity of the sentence if convicted,
- 4) The health condition of the accused or the suspect which would be aggravated by the incarceration.

Hence up to now what has evolved is that the exceptionality would be decided by the facts of each case, but in the case of Carder vs. OIC Narcotics Bureau 2006 3 SLR 74 Eric Basnayake J had said that,

“these types of offences affect the society at large and the law should not be made impotent that it does not serve the society and the anty social elements should not be given license to create havoc in the society” citing the case of Abdul Hamidkari Path and etc vs. the State of Gujarat and other 15 476.

Therefore while making note of the law pertaining to the instant matter this Court takes in to consideration the numerous times the substantive case has gone down on numerous occasions without trial being taken up due to the applications of the prosecution.

The law pertaining to the instant matter has provided for the accused person to be remanded until the conclusion of the trial if not for exceptional circumstances, but it is not meant to be used to keep the accused persons in remand for uncertain lengthy periods violating the basic right of a person for free movement provided for by the Constitution itself.

The proceedings in the High Court clearly indicates the lack of preparation by the prosecution on numerous occasions, which were sometimes unavoidable and sometimes due to sheer lack of preparedness for the case which this Court notes with disappointment. (As per proceedings dated 7.6.2019, 19.9.2019, 10.12.2019)

According to the petitioner he had been in remand for nearly 7 years.

But the respondents have stated very vehemently that Court should take in to account the serious nature of the charge and that trial has already commenced and the petitioner has not stated any exceptional grounds.

But this Court is very much aware of the seriousness of the charge and the sentence if convicted, but that does not provide for any person to be incase rated for long periods of time without the trial concluding.

Therefore there is a delay in the proceedings against the accused and in the judgment cited by the petitioner by KumidiniWickramasinghe J the term delay has been considered very illustriously and it has concluded that a delay of 7 years as being *‘excessive and oppressive’*.

In the case of CA/PHC/APN68/2021 this bench has considered the delay in commencing the trial in a similar matter and it was held that the delay in commencing the trial had been reasonably explained which does not constitute exceptional circumstances.

According to Chapter III, Article 13(4) of the Constitution which says that “ No person shall be punished with death or imprisonment except by order of a competent court, made in accordance with procedure established by law. The arrest, holding in custody, detention or other deprivation of personal liberty of a person, pending investigation or trial, shall not constitute punishment.”

Therefore, it has been enshrined in the Constitution itself that a person under arrest should not be detained in custody depriving his personal liberty, pending investigation or trial without a justifiable reason.

The same has been very lengthily discussed by the former Chief Justice Sarath Silva in the judgment of Sumanadasa Vs. Attorney General (Sri Lanka Law reports 2006 pg 202) where he has stated that “...fundamental rights of the petitioners guaranteed by the Article 13(2) have been infringed ... being detained in custody merely upon being produced in courts and incarcerated without a remedy until the conclusion of their trials.

As such in view of the facts and the law cited above this Court is of the opinion that the instant application for revision should be allowed and the impugned order dated 18.3.2021 be set-aside and the petitioner namely Norbert Oadmanadanalis Robert be enlarged on suitable conditions of bail to the High Court.

As such we direct the learned High Court Judge to enlarge the petitioner on suitable conditions of bail and the Registrar of this Court is directed to convey the above order to the relevant High Court.

Judge of the Court of Appeal.

I agree

Neil Iddawala J.

Judge of the Court of Appeal.