

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA.

In The matter of an application for revision under and in terms of the article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka read together with the section 404 of the Code of Criminal Procedure Act No. 15 of 1979 for revising judgement / order of the High Court.

Court of Appeal Case No:
CPA / 105 /2021

The Hon. Attorney General.

Complainant

High Court of Gampaha Case No:
HC / 497 / 19

Vs.

1. Cardar Masthan Kamal Rahuman.
2. Anjani Madhushika Hettiarachchi.

Magistrate's Court of Mahara Case
No: **B 5003 / 17**

Accused

AND NOW IN BETWEEN

Hettiarachchige Piyumi Lakshani,
53/2, Swarna Chaithya Road,
Geandpass,
Colombo 14.

Petitioner

On Behalf of

Anjani Madhushika Hettiarachchi.

2nd Accused

Vs.

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

Complainant – Petitioner

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Tenny Fernando with W. Fernando for the Petitioner.

Sudharshana de Silva, DSG with Kanishka Rajakaruna, SC for
the State.

Argued on: 15.03.2022

Decided on: 06.04.2022

MENAKA WIJESUNDERA J

The instant application has been filed to set aside the order dated 05/07/2021 of High Court of Gampaha.

The second accused namely Anjani Madushika Hettiarachchi has been indicted in the High Court of Gampaha along with the first accused for

possession and trafficking of 93.43g of heroin on or about 25/11/2017 under the provisions of the Poisons, Opium and Dangerous Drugs (Amendment) Act No .13 of 1984.

The main contention of the counsel for the second accused is that the second accused has been in remand since 25/11/2017 up to date and although the indictment was served on the second accused on 25/08/2020, trial had not commenced up to date.

The counsel for the respondent conceded that the trial had not commenced but the case has been called on numerous occasions without being fixed for trial. He further contended that he could undertake to ensure that the trial would be fixed on the next date and it would be taken up and concluded without further delay. But the counsel for the second accused refused to accept the same.

Upon perusal of the court record, this court notes that,

- 1) The government analyst report has been received on 29/12/2017
- 2) The indictment had been forwarded to the High Court on 21/01/2020 which is after four years of the alleged offence.
- 3) The second accused had been served with the indictment on 25/08/2020
- 4) Since then the case had been **called** on more than twelve occasions up to date without being fixed for trial

Therefore this Court notes that the second accused had been in remand for six years upto date without trial being concluded.

In the instant matter, the second accused 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 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 anti-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.**

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.

It has been held in the case of AnuruddhaRatwatte and others v The Attorney general (2003)2 Sri L.R.39, it was held that,

“The right to liberty and security of person is a basic tenet of our public law and is universally recognized as a human right guaranteed to every person (vide Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights). Based on this right of liberty and security of person, Article 13 of the Constitution guarantees as a fundamental right to every person, the freedom from arbitrary arrest, detention and punishment, This Article covers all three stages at which a person’s liberty is deprived. They are-

- 1) At the stage of arrest of a person (Article 13(1))
- 2) At the stage a person is held in custody , detained or otherwise deprived of his personal liberty (Article 13(2))
- 3) At the stage a person is convicted is convicted and punished with death or imprisonment (Article 13(4))

In respect of all 3 stages the respective Sub-Articles specifically provide that the deprivation of personal liberty cannot take place except according “to procedure established by law”. In the 2nd and 3rd stages referred to above, being, continued custody detention or deprivation of personal liberty beyond the period the arresting authority could validly

detain and at the stage of punishment, it is further provided that such deprivation of liberty could only be effected by an order of a competent court. Therefore in respect of the 2nd and 3rd stages referred to above , two requirements have to be satisfied for a person to be lawfully deprived liberty, they are-

- 1) That it is on an order of a competent court;
- 2) That such order is made in accordance with the procedure established by law

A competent court is a court having jurisdiction in the matter and in the case we are dealing with it is the High Court at bar. Section 450(6) specifically provides that in any trial before High Court at bar “the court or the presiding judge thereof may give directions for the summoning, arrest, custody or bail of all persons charged before the Court on indictment or by information exhibited under this section.” It is been that the sub- section does not contain any provision as to the procedure that would apply in this regard...” (Emphasis added)

Therefore, in view of the judgment cited above, the right to liberty of any person has not been defined as an absolute right but it shall be restricted under certain circumstances. Therefore, suspects being kept in custody according to the procedure established by law would not amount to a violation of such right.

But in the instant matter, this court observes that the date of offence has been on 25.11.2017, the government analyst report has been received by 27/01/2018, but the indictment has been forwarded to the High Court after two years of the receipt of the government analyst

report. The second accused in this matter has been served with the indictment on 25/08/2020, but since then, matter had been called in the high court without being fixed for trial which we think is a mockery of justice.

One may argue at this juncture that the second accused is charged with a serious offence which if convicted the penalty is the death sentence. But, according to the Evidence Ordinance the presumption of innocence applies to all accused. Therefore, although the second accused is indicted with an offence if convicted warrants the death sentence there is a clear delay in the administration of justice in this matter. The term delay has been defined in the case of **Attorney General v Ediriweera [S.C. Appeal No.100/2005] (2006 B.L.R 12)** and it was held that, **“Delay is always a relative term and the question to be considered is not whether there was a mere explicable delay, as when there is a backlog of cases, but whether there has been excessive or oppressive delay and this always depends on the facts and circumstances of the case...”**

Therefore, the period of remand amounting up to nearly five years without a trial date being fixed clearly displays the fact that the conclusion of the trial remains to be very far and remote, which makes it an exceptional circumstance to enlarge the second accused namely AnjaniMadushikaHettiarachchchi on bail.

As such the suspect mentioned above in the instant revision application is enlarged on bail and we direct the learned high court judge to impose suitable conditions of bail and enlarge the above mentioned suspect on bail.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court of Appeal.