

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
article 138 of the Constitution of
the Democratic Socialist Republic
of Sri Lanka.

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

Court of Appeal Revision
Application Case No: **CPA / 83 /21**

Complainant

High Court of Panadura Case No:
HC 4016 / 2020

Vs.

Samaraweera Arachchige Hashan
Rodrego,

Magistrate's Court of Panadura
Case No: **B 53378 /2018**

No.131, Moronthuduwa Road,
Wadduwa.

(Presently at the remand prison
of Kaluthara)

Accused

AND NOW

Samaraweera Arachchige Saman
Kumara Rodrigo,

No.131, Moronthuduwa Road,
Wadduwa.

Petitioner

Vs.

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

Complainant – Respondent

Before: Menaka Wijesundera J.

Neil Iddawala J.

Counsel: Geeth Karunaratna instructed by Thilini Karunaratna for the
Petitioner.

Priyani Abeygunawardena, SC for the state.

Argued on: 14.03.2022

Decided on: 07.04.2022

MENAKA WIJESUNDERA J.

The instant application has been filed to revise the order dated 22.06.2021 of High Court of Panadura. The accused in this matter had been taken into custody on 25.04.2018 for being in possession of heroin. The accused was indicted for being in possession of Heroin gram 2.23 in the High Court of Panadura in 2020 March. The indictment had been served on the accused on 05.10.2020. It has been fixed for trial on the same day for the 12.11.2020. But, on that day it had gone down to the 29.01.2021 due to the COVID situation. But, on that day the High Court judge had been on leave and the matter had been re-fixed for 24.02.2021. But, on that day the accused has not been produced by the remand officials and a bail application has been made, and the bail application has been refused. The

matter has been fixed for 22.04.2021, on that day the remand officials has not produced the accused. The matter had been refixed for the 16. 06.2021. Thereafter, a motion had been filled on 21.06.2021 for bail to be considered. On 22. 06.2021 the motion has been supported and bail has been refused.

Therefore, the grievance of the counsel for the accused is that, the accused had been in remand since 2018 and up to date without the trial being taken up. The counsel for the accused further says that he has no previous convictions but in 2017 before his arrest he has made a complaint to the Human Rights Commission of his impending arrest. The counsel for the accused also drew the attention of court to the JMO's report at page 111 which indicates injuries on the accused.

The state counsel appearing for the respondent stated, that the delay of taking up the trial had been due to the COVID-19 pandemic situation in the country. The counsel for the accused cited several judgements in favour of him.

In this matter the accused has been indicted under the provisions of the Poison, Opium and Dangerous Drugs (Amendment) Act No.13 of 1984, according to which if an accused or suspect is produced or charged under Section 54 (a) and (b) of the Act the said accused or suspect can be enlarged on bail only on exceptional grounds. The term exceptional has not been defined in the act but several matters had been considered in deciding the term exceptional such as,

- 1) The nature of the accusation
- 2) The culpability of the accused
- 3) The severity of the sentence of the convicted

- 4) The health condition of the petitioner which would be aggravated by the incineration

Therefore, what has been decided so far is that the exceptionality would be decided by the facts of each case. This has been discussed in the case of **Carder v OIC Narcotics Bureau 2006 SLR 74** by Basnayake J.

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 the 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 enshrined in the Constitution.

Counsel for the accused strenuously urged the accused is in remand for four years without the trial being taken up and not knowing when it will be but this Court notes that the proceedings have been postponed due to COVID pandemic situation which had been beyond the control of the Court and the prosecution.

In the case of **Attorney General v Ediriweera [S.C Appeal No. 100/2005] (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 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...”**

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 on 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 v Attorney General (Sri Lanka law reports 2006 pg 202)** where he has stated that “**...fundamental rights of petitioners guaranteed by the Article 13(2) has been infringed ...being detained in custody merely upon being produced in courts and incarcerated without a remedy until the conclusion of their trials.**”

Hence in the instant matter, although the case against the accused has been postponed due to matters beyond the control of Court and prosecution , the delay in adjudicating the charge against him makes it an exceptional circumstance to allow the instant matter in view of the afore mentioned decided cases.

As such, the instant application for revision is allowed and this Court directs the learned High Court judge to enlarge the accused namely Samaraweera Arachchige Hashan Rodrego on suitable conditions of bail.

Judge of the Court of Appeal.

I agree.

Neil Iddawala J.

Judge of the Court of Appeal.