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

In the matter of an Application under and in terms of Article 138 of The Constitution.

Court of Appeal Case No.

CA(PHC) 97/2019

Officer in Charge,

Police Station of Aralaganwila.

PLAINTIFF

High Court Polonnaruwa

Case No: Rev/20/2018

Vs.

Magistrate Court Polonnaruwa

Case No: AR/892/18

1. Hetti Arachchilage Gunasena

No. 63, Kalukale, Polonnaruwa.

2. Herath Mudiyanselage Karunarathna,

No. 395, Kalukale,

Polonnaruwa.

ACCUSED

AND

Herath Mudiyanselage Karunarathna,

No. 395, Kalukale,

Polonnaruwa.

2ND ACCUSED APPELLANT

Vs.

Officer in Charge,

Police Station of Aralaganwila.

PLAINTIFF-RESPONDENT

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT

AND NOW

Herath Mudiyanselage

Karunarathna,

No. 395, Kalukale,

Polonnaruwa.

2ND ACCUSED-PETITIONER-

APPELLANT

Vs.

Officer in Charge,

Police Station of Aralaganwila.

PLAINTIFF-RESPONDENT-

RESPONDENT

The Attorney General,

Attorney General's Department,

Colombo 12.

RESPONDENT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Nuwan Bopage with Hansaka Chandrasinghe and R. D. Shariff for the 2nd Accused-Petitioner-Appellant

: Ridma Kuruwita, S.C. for the Respondent

Argued on : 02-08-2023

Written Submissions : 27-07-2023 (By the 2nd Accused-Petitioner-Appellant)

Decided on : 16-11-2023

Sampath B. Abayakoon, J.

This is an appeal by one Herath Mudiyanselage Karunaratne who has named himself as the 2nd suspect-petitioner-appellant (hereinafter referred to as the appellant) on the basis of being aggrieved by the order dated 24-04-2019 pronounced by the learned Provincial High Court Judge of the North Central Province Holden in Polonnaruwa.

After having considered the revision application filed, the learned High Court Judge has refused to issue notice to the respondents mentioned in the application filed by the appellant. The said order has been pronounced on 11-12-2019.

This was an application seeking to challenge an order pronounced by the learned Magistrate of Polonnaruwa on 06-06-2018 in terms of section 106 of the Code of Criminal Procedure Act.

The Officer-In-Charge (OIC) of the Aralaganwila police station has filed a report before the learned Magistrate of Polonnaruwa informing that two persons named in the report, which includes the appellant, along with some others are organizing a protest against the officials of the Wildlife Department by obstructing the Polonnaruwa-Mahiyangana main road over their failure to protect them from the damages caused by wild elephants in the Grama Niladhari Division of Kalukale within the Aralaganwila police area.

The OIC has sought a prevention order from the Court in terms of section 106 of the Code of Criminal Procedure Act on the basis that such a protest would disrupt the vehicular traffic and the normal day-to-day affairs of the general public of the area and cause a public nuisance.

When this application was supported before the Court on the same day, it has been informed to the learned Magistrate that about 200 protesters have already blocked the main road and had set fire to tyres on the road. It appears that this has prompted the learned Magistrate to order the immediate stoppage of the protest in terms of section 106 of the Code of Criminal Procedure Act.

More than six months after the order of the learned Magistrate of Polonnaruwa, the appellant has filed the revision application invoking the revisionary jurisdiction of the Provincial High Court of the North Central Province holden in Polonnaruwa, where the learned High Court Judge refused to issue the notice. The application has been supported on the basis that the impugned order of the learned Magistrate was not in accordance with the relevant section 106 of the Code and the said order amounts to denying the fundamental rights

of the appellant's right to freedom of speech and expression guaranteed in terms of Article 14 of The Constitution.

The learned High Court Judge, after having considered the submissions of the learned Counsel for the appellant has determined that the learned Magistrate has acted within the powers vested in him when the prohibition order was issued as it was required at that time to prevent disturbances that would cause to the normal life of the people of the area as a result of the protest. It has been determined that section 106 of the Act in itself has provided for a remedy for the appellant if he was dissatisfied of the order at that time. The learned High Court Judge has observed that the freedoms guaranteed by the Constitution can only be enjoyed without causing violation of the same freedoms guaranteed to others. The notice has been refused on the basis that there exist no exceptional circumstances to consider that the learned Magistrate was wrong in his order.

When this matter was argued before the Court, the leaned Counsel for the appellant submitted the same grounds as mention earlier and was of the view that the learned Magistrate should have ordered the protesters not to block the road and since the order amounts to a total ban on the protest, it amounts to an order beyond the powers vested in the learned Magistrate. The learned Counsel invited the Court to make a determination as to the legality of the impugned order, although any determination made by this Court now would amounts to an academic exercise only.

It was the view of the learned State Counsel that the order by the learned High Court Judge, as well as that of the learned Magistrate, was within the parameters of the law which require no disturbance from this Court.

The learned State Counsel brought to the notice of the Court the inordinate delay by the appellant to invoke the revisionary jurisdiction of the High Court as a matter that should be considered relevant in this instance.

For matters of clarity, I will now reproduce the relevant section 106 of the Code of Criminal Procedure Act No. 15 of 1979, under which the impugned order has been pronounced.

> **106. (1) In cases where in the opinion of a Magistrate immediate prevention or speedy remedy is desirable the Magistrate may by a written order stating the material facts of the case and served in manner provided by section 99 direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if the Magistrate considers that such direction is likely to prevent or tends to prevent obstruction, annoyance, or injury, or risk of obstruction, annoyance, or injury to any persons lawfully employed, or danger to human life, health or safety, or a riot or an affray.**
>
> **(2) An order under subsection (1) may in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the persons against whom the order is directed be made ex parte.**
>
> **(3) An order under subsection (1) may be directed to a particular person or to the public generally when frequenting or visiting a particular place, and in the latter case a copy of the order shall be posted up as provided by subsection (2) of section 99.**
>
> **(4) Any Magistrate may rescind or alter any order made under subsection (1) by himself or by his predecessor in office.**
>
> **(5) An order under this section shall not remain in force for more than fourteen days from the making thereof unless, in cases of**

danger to human life, health, or safety, or a likelihood of a riot or an affray, the Minister by notification in the Gazette otherwise directs.

Section 106 is the provision where temporary orders in urgent cases of nuisance can be made by a Magistrate in order to prevent or tends to prevent, any obstruction, annoyance, or injury to any person lawfully employed, or danger to human life, health or safety, or a riot or an affray, having regard to the relevant facts and the circumstances.

It clearly appears from the Magistrate's Court case record that although the initial application had been under the section 106(1) of the Act, since it had been reported that at the time the application was supported, the protest has commenced while obstructing the main road, the order has been made *ex parte* considering the urgency of the matter at hand in terms of section 106(2) and (3).

Although it was the contention of the learned Counsel for the appellant that the learned Magistrate had no legal basis to stop the protest altogether as done in this instance, given the right for the freedom of expression, I am not in a position to agree.

It is my firm view that no person is entitled to disrupt the rights of others in the guise of exercising such a right. As the reported facts clearly show, what the police have sought from the learned Magistrate has been for an order to prevent the protestors obstructing the main road and preventing the vehicular movement in that road. It appears that the intention of the protestors had been to cause the maximum possible disruption to the normal life of the persons who are using the road, who may have had nothing to do with the reasons for the protest.

Although it would have been better for the learned Magistrate to be more specific as to the order, I do not find a reason to accept that the order has prevented the protestors from engaging in any protest without causing nuisance to others. It is clear that the protest has been over a long-standing issue faced by the protestors due to the human-elephant conflict. If the protestors wanted to continue with the protest in a peaceful manner, there was no impediment for them to make an application before the Court in terms of section 106(4) of the Code of Criminal Procedure Act seeking to rescind or alter the order made.

As I have mentioned above, the appellant had a clear alternative remedy within the relevant section itself, in section 106(4), if he was dissatisfied of the order of the learned Magistrate.

It was held in the case of **Rashid Ali Vs. Mohamed Ali (1981) 1 SLR 262,** that;

> *"Ordinarily the Court of Appeal will not interfere by way of review particularly when the law has expressly given an aggrieved party an alternative remedy such as right to file a separate action except when non interference will cause a denial of justice or any irremediable harm."*

It needs to be noted further, that any order made in terms of the section can remain in force for a period of fourteen days only, unless the subject Minister decides to act under section 106(5) and otherwise directs by way of a publication in the Gazette.

Under the circumstance, I am of the view that the appellant had no basis whatsoever to seek the discretionary revisionary jurisdiction of the High Court after a long delay of almost six months after the expiry of the order made by the learned Magistrate of Polonnaruwa.

It is trite law that the remedy of revision is not available for a person who slept over his rights without any valid reason.

In his application before the High Court, the appellant has failed to aver any valid reason for the delay in coming before the Court.

In the case of **Bisomenike Vs. R. de Alwis (1982) 1 SLR 268,** which was a case decided based on an application for a writ, a similar remedy granted upon discretion of the Court, it was held:

> *"A Writ of Certiorari is issued at the discretion of the Court. It cannot be held be a writ of right or one issued as a matter of course. The exercise of this discretion by Court is governed by certain well accepted principles. The Court is bound to issue it at the instance of a party aggrieved by the order of an inferior tribunal except in case where he has disentitled himself to the discretionary relief by reason of his own conduct, submitting to jurisdiction, laches, undue delay or waiver… The proposition that the application of writ must be sought as soon as injury is caused is merely an application of the equitable doctrine that delay defeats equity and longer the injured person sleeps over his rights without any reasonable excuse the chance of his success in writ application dwindles and the Court may reject a writ application on the ground of unexplained delay… An application for a Writ of Certiorari should be filed within a reasonable time."*

The appellant has failed to adduce any reason or reasons before the High Court as to his delay in coming before the Court when the application for revision was supported for notice.

I am of the view that fact also should have been considered by the learned High Court Judge among other considerations when it was decided to refuse the application of the appellant.

For the aforementioned reasons, I find no basis to allow the appeal of the appellant as it is devoid of merit.

The appeal is dismissed.

The Registrar of the Court is directed to communicate this judgment along with the original case record to the relevant High Court, as well as the Magistrate's Court for information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal