

**WICKRAMASINGHE VS. ATTORNEY GENERAL
AND ANOTHER**

COURT OF APPEAL
SISIRA DE ABREW. J.
ABEYRATNE. J.
LECAM VASAM. J.
CA (PHC) 39/2009
HC NEGOMBO HCAB 490/2006
DECEMBER 8, 2009
JANUARY 22, 2010

Bail Act 30 of 1997 – Section 2, Section 3 (1), Section 14, Section 16, Section 17 – Could a suspect be kept on remand for a period exceeding 24 months? - Should Section 16 – Section 17 of the Bail Act be read subject to Section 14 ? - What is the purpose of remanding a suspect/accused? - What is the maximum period that a suspect to whom the Bail Act applies can be kept on remand? - Interpretation of Statutes – Prevention of Terrorism (Sp. Prov.) Act 48 of 1979.

The accused was arrested on 28.9.2006 in connection with the offence of murder. The High Court on 30.3.2009 refused bail. The accused had been on remand for 3 years and 5 months. The accused sought to revise the said order.

Held:

- (1) Grant of bail shall be regarded as the rule the refusal to grant bail is the exception.

Per Sisira de Abrew. J.

“The purpose of remanding a suspect/accused is to ensure his appearance in Court on each and every day that the case is called in Court; if the Court feels that, he would appear in Court after his release on bail Court should enlarge him on bail. Court should not remand a suspect/accused in order to punish him”.

- (2) Section 14, Section 16, Section 17 of the Bail Act do not state that “Notwithstanding anything to the contrary in the provisions of the Act – but Section 16 states ‘subject to the provisions of Section 17, and it does not state subject to the provisions of Section 14 – therefore Section 16 and Section 17 are not subject to Section 14.

- (3) When one considers Section 3 and Section 16 it is clear that the suspect/accused to whom the Bail Act does not apply can be kept on remand for a period exceeding two years but not the suspects to whom the Bail Act applies.

Per Sisira de Abrew. J.

“The maximum period that a suspect to whom the Bail Act Applies can be kept on remand is 2 years, the period of 2 years is considered only if the Attorney General acts under Section 17. If there is no application under Section 17 the maximum period that a suspect/accused to whom the Bail Act applies can be kept on remand is 1 year”.

Held further

- (4) The mere fact that the results of applying a statute may be unjust or absurd does not entitle this Court to refuse to put it into operation, it is however common practice that if there are two different interpretations, so far as the grammar is concerned of the words in the Act the Courts adopt that which is just reasonable and sensible rather than one which is or appears to them to be none of those things.
- (5) The role of the Judge is to give effect to the expressed intention of Parliament, as it is the bounden duty of any Court and the function of every Judge to do justice within the stipulated parameters.

APPLICATION in Revision from an order of the High Court, Negombo refusing bail.

Case referred to:

1. *Jayawathie vs. Attorney General* – CA 189/2004 CAM 27/4/2006 (Overruled)
2. *Holmen vs. Bradfield Rural District Council* – 1949 2 KB 1 at 7
3. *Sebastian Fernando vs. Katana MPCS* – 1900 – 1 Sri LR 342 (SC)
4. *Attorney General vs. Sumathipala* – 2006 2 Sri LR 126

Senerath Jayasundera for petitioner.

Vijith Malalgoda SSC for respondent.

March 04th 2010

SISIRA DE ABREW, J.

The accused in this case was arrested on 28.09.2006 in connection with an offence of murder. Learned High Court Judge has, by his order dated 30.03.2009, refused to grant bail. The accused has been on remand for over a period of three years and five months. The Petitioner has filed this petition to revise the said order of the learned High Court Judge. Learned Counsel for the Petitioner contended that in view of sections 16 and 17 of the Bail Act No. 30 of 1997 (Bail Act) the accused cannot be kept on remand for a period exceeding 24 months. Learned DSG citing *M. H. Jayawathi vs. Attorney General*⁽¹⁾ contended that a suspect could be kept on remand for period exceeding 24 months. His Lordship Basnayake in the said case decided that Sections 16 and 17 of the Bail Act must be read subject to Section 14 of the Bail Act. His Lordship therefore held that a suspect could be kept on remand for a period exceeding 24 months. Therefore the most important question that must be decided in this case is whether Section 16 and 17 of the Bail Act should be read subject to Section 14 of the Bail Act. When considering this question one must consider whether the Bail Act should apply to any suspect taken into custody in respect of any offence. To find an answer to this question, Section 3(1) of the Bail Act should be considered. It reads as follows:

“Nothing in this act shall apply to any person accused or suspected of having committed, or convicted of, an offence under, the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, Regulations made under the Public Security Ordinance or any other written law which makes express provision in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law.”

When Section 3 of the Bail Act is considered it is seen that the Bail Act shall not apply to a person accused or suspected of having committed or convicted of an offence under

1. The Prevention of Terrorism (Temporary Provisions) Act No 48 of 1979,
2. Regulations made under the Public Security Ordinance, or
3. Any other written law which makes express provisions in respect of the release on bail of persons accused or suspected of having committed, or convicted of, offences under such other written law.

It is therefore seen that when the legislature enacted the Bail Act it was not the intention of the legislature to release each and every suspect who has been on remand for period exceeding 24 months. Thus the legislature when enacting the Bail Act, did not intend to keep each and every suspect on remand for an period. In this connection one must not forget Section 2 of the Bail Act. It says that grant of bail shall be regarded as the rule and the refusal to grant bail as the exception. His Lordship Justice Basnayake in *M.H. Jayawathi vs. Attorney General (supra)* observed thus:

“Only cases that fall outside section 14 would come under sections 16 and 17. To that extent section 16 and 17 are subject to section 14.” If this position is going to be accepted where would we draw the line? If the above position is correct can a suspect who has been on remand for a period exceeding five years be kept on remand. If such a person is convicted and sentenced he would have served a good part of his sentence. Further I ask the question: Can a suspect be kept on remand without being prosecuted for an indefinite period? In finding an answer to this question I would like to consider a judicial decision considered by His Lordship *Basnayake* in *Jayawathi’s case (supra)*. *Holmen vs. Bradfield Rural*

District Council⁽²⁾ Fennimore J said: "Of course the mere fact that the results of applying a statute may be unjust or absurd does not entitle this court to refuse to put it into operation. It is, however, common practice that if there are two different interpretations, so far as the grammar is concerned, of the words in the Act, the courts adopt that which is just, reasonable and sensible rather than one which is, or appears to them to be, none of those things." Assuming that there are two different interpretations of the words in the Bail Act, is it reasonable, sensible or justifiable to keep a suspect or accused on remand indefinitely without being prosecuted? I think not. For these reasons I think that courts will have to interpret the law giving a meaningful interpretation to the intention of the legislature. In this regard it is pertinent to consider a passage of the judgment of Justice Fernando in *Sebastian Fernando vs Katana MPC*⁽³⁾ "Statutes which encroach upon the rights of the citizen have to be "strictly" construed: they should be interpreted, if possible, to respect such rights, and if there is any ambiguity, the construction which is in favour of the freedom of the individual should be adopted. Statutes which impose pecuniary burdens or penalties are subject to the same rule. If there are two reasonable constructions, one of which will avoid the penalty, that construction must be preferred."

A bench of five judges of the Supreme Court in *Attorney General vs. Sumathipala*⁽⁴⁾ observed: "A judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the judge thinks is desirable in the interests of justice. Therefore the role of the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any court and the function of every judge to do justice within the stipulated parameters." [Justice Shirani Bandaranayake at 143].

Justice Dr. Amerasinghe in his book titled 'Judicial Conduct, Ethics and Responsibilities' page 284 expressed the view thus: The function of a judge is to give effect to the

expressed intention of the Parliament. If legislation needs amendment, because its results in injustice, the democratic process must be used to bring about the change. This has been the unchallenged view expressed by the Supreme Court of Sri Lanka for almost a hundred years.”

Purpose of remanding a suspect/accused is, in my view, to ensure his appearance in Court on each and every day that the case is called in Court. If the Court feels that he would appear in Court after his release on bail, Court should enlarge him on bail. Court should not remand a suspect/accused in order to punish him.

Sections 14, 16 and 17 of the Bail Act are as follows:

Section 14 (1): “Notwithstanding anything to the contrary in the preceding provisions of this Act, whenever a person suspected or accused of being concerned in committing or having committed a bailable or non-bailable offence, appears, is brought before or surrenders to the Court having jurisdiction, the Court may refuse to release such person on bail or upon application being made in that behalf by a police officer, and after issuing notice on the person concerned and hearing him personally or through his attorney-at-law, cancel a subsisting order releasing such person on bail if the court has reason to believe:

(a) that such person would

(i) Not appear to stand his inquiry or trial:

(ii) Interfere with the witnesses or the evidence against him or otherwise obstruct the course of justice; or

(iii) Commit an offence while on bail; or

(b) That the particular gravity of, and public reaction to, the alleged offence may give rise to public disquiet.

(2) Where under subsection (1), a court refuses to release on bail any person suspected or accused of being concerned

in or having committed an offence or cancels a subsisting order releasing such person on bail, the court may order such suspect or accused to be committed to custody.

- (3) *The court may at any time, where it is satisfied that there has been a change in the circumstances pertaining to the case, rescind or vary any order made by it under subsection (1)."*

Section 16 "Subject to the provisions of section 17, unless a person has been convicted and sentenced by a court, no person shall be detained in custody for a period exceeding twelve months from the date of his arrest."

Section 17 "Notwithstanding the provisions of section 16, on application made in that behalf by the Attorney-General at, the High Court holden in any Zone or a High Court established under Article 154P of the Constitution may, for good and sufficient reasons that shall be recorded, order that a person who has not been convicted and sentenced by a Court, be detained in custody for a period in excess of twelve months:

Provided that the period of detention ordered under this section, shall not in any case exceed three months at a time and twelve months in the aggregate."

Does section 14 of the Bail Act say that 'notwithstanding anything to the contrary in the provisions of this Act?' The answer is no. Does it say 'Notwithstanding the provisions of section 16 and 17 of the Bail Act? The answer is no. But section 16 of the Bail Act says 'subject to the provisions of section 17.... ' It does not say 'subject to the provisions of section 14... 'For the above reasons, I hold that section 16 and 17 of the Bail Act are not subject to the provisions of section 14.

Contention that a suspect/accused who completes two years on remand will be arrested on the following day of his

release on bail for an offence that may be committed by him and therefore he should not be released on bail is, in my view, untenable because in such an event it is the duty of the prosecution to have the case concluded within a period of two years. Contention that in this country it takes more than two years to conclude a criminal case and therefore the intention of the legislature was, when enacting the Bail Act, to keep a suspect/accused on remand for more than two years is also untenable because no one can say that the legislature was unaware of the situation of criminal courts of this country when the Bail Act was being enacted. One can argue that the legislature was aware of the situation of the criminal courts and that was the very reason that it made provisions to release suspects/accused to whom the Bail Act applies after a lapse of two years. When one considers sections 3 and 16 of the Bail Act it is clear that the suspects/accused to whom the Bail Act does not apply can be kept on remand for a period exceeding two years but not the suspects to whom the Bail Act applies. For these reasons I hold that the maximum period that a suspect to whom the Bail Act applies can be kept on remand is two years. The period of two years is considered only if the Attorney General acts under section 17 of the Bail Act. If there is no application under section 17 the maximum period that a suspect/accused to whom the Bail act applies can be kept on remand is one year. For these reasons, with due respect to His Lordship Basnayake I am unable to agree with the view expressed by His Lordship in *M. H. Jayawathi vs Attorney General (supra)*.

For the above reasons I set aside the order of the learned High Court Judge dated 30.3.2009 and direct the learned High Court Judge to release the accused on bail on suitable conditions.

ABEYRAHNE, J. – I agree.

LECAMWASAM, J. – I agree.

Application allowed.