THILANGA SUMATHIPALA

v

INSPECTOR-GENERAL OF POLICE AND OTHERS

COURT OF APPEAL
SOMAWANSA, J.,
SRIPAVAN, J. AND
ABEYRATNE, J.
CA. BAIL APPLICATION NO. 171/2004
7TH, 9TH, 15TH AND 17TH JUNE 2004

Bail – Code of Criminal Procedure Act, No.15 of 1979, section 404 – Offence under Immigrants and Emigrants Act, No. 20 of 1948 as amended by Act, No.68 of 1961, sections 45(1), 97 – Jurisdiction of the Court of Appeal to grant bail – Constitution, Articles 13(2), 13(5), 18, 23(1), and 138(2) – Sinhala version differs from English version? – Offensive Weapons Act, section 10 – Bail Act, No. 30 of 1997 , section 5 – Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979, section 3 – Special Law and General Law – Undue influence.

The accused-petitioner in remand custody in respect of an alleged offence of aiding and abetting one "A" to travel abroad using as genuine a forged passport sought bail in terms of section 404 of the Code of Criminal Procedure Act.

It was contended on behalf of the State that section 404 does not vest any form of original jurisdiction in the Court of Appeal and a person accused of an offence under section 45/ section 47 of the Immigrants and Emigrants Act (I.E.Act) cannot be granted bail.

HELD

Per Sripavan J.,

> "If a strict interpretation is given to section 47(1) I.E.Act it would mean that the petitioner has no remedy at all until his case is concluded; does it mean that the State imposes a punishment on the petitioner indirectly by keeping him in remand custody for an uncertain period of time; obviously that was not the intention of the Legislature when it enacted Article 13(5). Any strict interpretation to section 47(1) would in my view be unconstitutional and unreasonable in terms of the Special Law of the land."

(1) If two conditions are possible between a statute and the Constitution the court must adopt the one which will ensure smooth and harmonizing

working of the Constitution and eshew the other which will lead to absurdity and deny justice to a citizen. A generous and purposive approach is necessary in the process of building democratic tradition.

Per Sripavan, J.

"Where the statute fails to provide a solution or offers a solution that is inconsistent with the basis of natural justice and the provisions of the Constitution the court is forced to frame a new precedent that will not exhibit these defects."

Per Abeyratne, J.

"English version of Article 138(2) differs from the Sinhala version. The English version of section 404, Criminal Procedure Code differs from the English version. The Sinhala version of section 5 of the Bail Act is different from the English Act. Art. 18(1) and Art. 13(1) of the Constitution makes it imperative to place reliance on the Sinhala text in preference to the English.

(ii) If as the State claims an individual is left bereft of any relief or remedy with regard to matters where deprivation of liberty occurs solely due to inadvertance or omission on the part of the legislature resulting in a lacuna or because of restrictive elucidation as a consequence of ambiguity or conflict in interpretation of laws an individual is jeopardised and prejudiced with regard to his right of liberty which demand immediate attention by an appropriate forum to which he is entitled as of right as a human being and this is being denied him, then the protective provisions of the Constitution are activated and is the only remedy available to him.

(iii) A judicial review of the entirety of the objections indicate a clear transgression in the realm of speculation.

APPLICATION for bail.

Cases referred to :

1. *Rev: Singarayar et al* v *Attorney-General* – Srikantha's Law Reports 11 page 154.
2. *Boswel* v *Attorney-General* – (1988) 1 Sri LR page 1 at 3.
3. *Kushi Ram* v *State* – (1959) AIR Allahabad 77 at 79.

D.S.Wijesinghe, P.C., with *D.P. Kumarasinghe*, P.C. *Denzil Gunaratne*, *Kolitha Dharmawardena* and *Navin Marapana* for petitioner.

Palitha Fernando, Deputy Solicitor-General, with *Yasantha Kodagoda*, Senior State Counsel and *A.Wengappuli*, State Counsel for respondents.

Cur.adv.vult

June 18, 2004

SRIPAVAN, J.

The accused-petitioner (hereinafter referred to as the petitioner) who is presently in remand custody in respect of an alleged offence of aiding and abetting one Dhammika Amarasinghe to travel abroad in July 1999 using as genuine a forged passport, seeks bail in terms of section 404 of the Code of Criminal Procedure Act, No.15 of 1979, pending trial.

In view of certain questions of fundamental importance, a Divisional Bench was constituted by His Lordship, the President of the Court of Appeal in order to consider, *inter alia* whether the Court of Appeal has jurisdiction to grant bail in terms of section 404 of the said act.

The jurisdiction conferred on the Court of Appeal in terms of Article 138 of the Constitution is two fold, namely, an appellate and revisionary jurisdiction as provided in Article 138(1) and an appellate and original jurisdiction as Parliament may by law vest as provided in Article 138(2). Learned President's Counsel submitted that the jurisdiction vested in the Court of Appeal in terms of section 404 of Act, No. 15 of 1979 is original and as such this Court has jurisdiction to grant bail to the petitioner. The learned counsel for the respondents however submitted that section 404 vests jurisdiction in the Court of Appeal primarily to make three types of orders, namely, Appellate and / or Revisionary jurisdiction and that section 404 does not vest any form of original jurisdiction in the Court. Though both counsel submitted that there is inconsistency between the Sinhala text and the English in respect of section 404 it was agreed that the Sinhala text shall prevail. It was the submission of the learned President's Counsel that the words "ඕනෑම අවස්ථාවේදී" (at any stage) appearing in the Sinhala text and not found in the English version gives an express conferment of an original jurisdiction in the Court of Appeal. It has been found that section 404 of Act, No.15 of 1979 has been interpreted in two reported cases in *Rev. Singarayar et al* v *The Attorney-General* (1) a Divisional Bench of this Court held "that the power given to the Court of Appeal by section 404 of the Code of Criminal Procedure Act is an appellate power and that a pre requisite for its exercise is the existence of an order of an original court." In *Benwell* v *The*

Attorney-General (2) Sharvananda, C.J. (as he then was) made the following observations:-

> "Counsel made reference to section 404 of the Code of Criminal Procedure Act, No. 15 of 1979 which *inter alia*, provides that "notwithstanding anything to the contrary in this Code or any other law, the Court of Appeal may in any case direct that any person in custody be admitted to bail." It was urged that in any event, the Court of Appeal had powers under this section to admit the appellant to bail. In my view, this section does not support counsel's submissions. The expression "in any case" only refers to the cases referred to in the two previous sections, viz, 402 and 403 of the Code, and is not of general application. The Court of Appeal is empowered in the exercise of its appellate jurisdiction to admit any person in custody to bail in the cases referred to in section 402 and 403."

As averred in paragraph 27 of the petition, the Magistrate has refused to grant bail to the petitioner, Hence, the existence of an order of an original Court was in force at the time the petitioner made this application, for this Court to exercise its jurisdiction.

The Code of Criminal Procedure Act, No. 15 of 1979 is a general law purporting to deal with the procedure. The Immigrants and Emigrants Act, No. 20 of 1948 as amended by Act, No. 68 of 1961 was enacted, *inter alia* to regulate the departure from Sri Lanka of citizens and persons other than citizens of Sri Lanka. Looking at the preambles in the two Acts, it may be said with more justification that in the context in which both apply to this case, the Code of Criminal Procedure is a General Act and the Immigrants and Emigrants Act is a Special Act. By an amendment made to section 47 of the Immigrants and Emigrants Act by Act, No. 42 of 1998, the legislature brought into operation the following new section.

> "Notwithstanding anything in any other law-
>
> (a) every offence under paragraph (a) or paragraph (b) or paragraph (c) or paragraph (d) or paragraph (e) or paragraph (f) or paragraph (g) of sub section (1) of section 45.
>
> (b) every offence under subsection (2) of section 45 in so far as it relates to paragraph (a) or paragraph (b) or paragraph (c)

or paragraph (d) or paragraph (e) or paragraph (f) or paragraph (g) of sub section (1) of that section.

(c) .....

(d) .....

(e) .....

shall be non-bailable and no, person **accused** of such an offence **shall in any circumstances** be admitted to bail (emphasis added)

With the institution of criminal proceedings against the petitioner in the Chief Magistrate's Court, Colombo in case No. 55305/01 the petitioner became an accused of having committed offences in terms of section 45(1)(b) read with section 45(2) of the Immigrants and Emigrants Act. Accordingly, section 47 as amended by Act, No. 42 of 1998 become applicable to the petitioner. By this section the legislature makes it clear that in any circumstances, the petitioner cannot be enlarged on bail. Binda on *"Interpretation of Statutes"* (8th Ed) at page 151 lays down the principle in the following manner.

> "If the Special Act is made after the General Act, the position is even simpler. Having made the General Act if the legislature afterwards makes a Special Act in conflict with it, we must assume that the legislature had in mind its own General Act when it made the Special Act and made the Special Act which is in conflict with the General Act, as an exception to the General Act."

It is also a well recognized rule of interpretation that when a special provision is made in a special statute, that special provision excludes the general provision in the general law. (Vide *Kushi* v *The State* (3).

Accordingly, by section 47 the legislature intended that a person accused of an offence under section 45 of the Immigrants and Emigrants Act shall not in any **circumstances** (emphasis added) be admitted to bail. The cardinal rule of construction is to give effect to the words of the statute. It is only in situations where there is doubt or difficulty as to the interpretation that the Court may look

to the object of the enactment or the purpose for which it was made. If the meaning is clear and quite unambiguous that meaning must be accepted by the Court irrespective of other considerations. Dr. Justice A.R.B.Amerasinghe in his book titled "*Judicial Conduct, Ethics and Responsibilities*" at page 284 observes that "The function of a Judge is to give effect to the expressed intention of Parliament. If legislation needs amendment, because it results in injustice, the democratic processes 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."

However, Article 13(5) of our Constitution states that every person shall be presumed innocent until he is proved guilty. Article 13(2) further provides that a person shall not be deprived of personal liberty except upon and in terms of the order of a judge made in accordance with procedure established by law. If a strict interpretation is given to section 47(1) of the Immigrants and Emigrants Act, it would mean that the petitioner has no remedy at all until his case is concluded in the Magistrate's Court. Does it mean that the State imposes a punishment on the petitioner indirectly by keeping him in remand custody for an uncertain period? Obviously that was not the intention of the legislature when it enacted Article 13(5) of the Constitution. Any strict interpretation of section 47(1) of the Immigrants and Emigrants Act would in my view be unconstitutional and unreasonable in terms of the Supreme Law of our land. What would be the position if after the end of the trial the petitioner is found not guilty? Any interpretation in this context must be made in a manner respecting the petitioner's liberty, taking into account the fundamental rights enshrined in the Constitution. Being paramount law, the Constitution is outside the purview of the Courts, but a statute would be invalid if it contravenes any express provision of the Constitution. Effect has to be given to the paramount law to which all other laws must yield.

In the circumstances, I am of the view that if two constructions are possible between a statute and the Constitution, the Court must adopt the one which will ensure smooth and harmonious working of the Constitution and eschew the other which will lead to absurdity and deny justice to a citizen. Practical considerations rather than formal logic must be the governing principle in the interpretation of

the Constitution. A generous and purposive approach is necessary in the process of building democratic traditions. Every grievance of a citizen must be remedied by a Court. In deciding what is just, reasonable or wise, a Court must act with responsibility and self restraint. Where the statute fails to provide a solution or offers a solution that is inconsistent with the basic notions of justice and the provisions of the Constitution, the Court is forced to frame a new precedent that will not exhibit those defects.

The petitioner has been in remand custody for the last five months. There is no cogent material before Court to establish that the witnesses were intimidated by the petitioner and the respondents made complaints to the Magistrate to that effect. Considering the totality of the material placed. I am of the considered view that the petitioner be enlarged on bail subject to strict conditions imposed by this Court.

SOMAWANSA, J. – I agree.

ABEYRATNE, J.

This application is preferred to this Court under section 404 of the Code of Criminal Procedure Code for the grant of bail by the accused-petitioner who is presently charged with aiding and abetting a person to obtain an "irregular" passport and visa to travel to the United Kingdom. The charge is contemplated under the relevant sections of the amended Immigrants and Emigrants Act.

At the commencement of the inquiry a query *ex mero motu* by learned member of the bench as to whether this Court had the original jurisdiction to entertain an application of this nature received an encouraging response from learned Senior State Counsel which resulted in the embarkation on a voyage of discovery. At this juncture suffice it to state, that the pronouncement of the three Bench decision in the case of, *Rev.Singarayer* v *The Attorney-General (supra)* and the interpretation accorded to section 404 of the Code of Criminal Procedure Act, No. 15 of 1979 was the cause of this excursion.

Learned President's Counsel appearing for the accused-

petitioner strenuously urged Court to consider the effect of section 404 of the Code of Criminal Procedure which endowed this Court with original jurisdiction in the nature of forum jurisdiction to entertain applications of this nature. According to learned counsel, Article 138(2) of the Constitution also empowered this Court to exercise original jurisdiction. It was submitted on behalf of the petitioner that the Singarayer case was decided *per incurriam* as the three Bench judgment was predicated on a misconception of the law, in that the earlier provision of law in the form of section 396 of the 1898 Criminal Procedure Code was identical to the present provision of law in force contained in section 404 of the Code of Criminal Procedure Code, that is Act, No. 15 of 1979. Section 396 of the Code and section 404 of the present Code were construed to be identical and equated with each other, disregarding the vital factor that they differed in the quintessence and section 404 of the wider scope than section 396. Learned Council for the petitioner also observed that this was the first occasion on which the State was adopting a stance of this nature with regard to bail matters coming within the purview of the Immigrants and Emigrants Act.

Learned Counsel for the State veering away from the conventional approach usually indulged in by the Attorney-General in a matter of this nature perhaps in accordance with the dictates of the developing complexities of a modern society maintained that the Court of Appeal had no original jurisdiction. The thrust of this argument is that the Court of Appeal has no jurisdiction to grant bail in cases connected to the Immigrants and Emigrants Act. Learned Counsel for the State rejected the favourable interpretation of section 404 and Article 138(2) adduced by the learned President's Counsel for the petitioner as construing to mean that the Court of Appeal had the original jurisdiction to grant bail in immigration and emigration matters. The State took refuge in the submission that the Court of Appeal like the Supreme Court was a creature of Statute and hence only powers expressly conferred by statute as opposed to by implication, could be exercised. As an illustration learned State Counsel cited section 10 of the Offensive Weapons Act where the Court of Appeal is conferred exclusive jurisdiction in the matter of granting bail. Reference was also made with regard to election petitions. The attitude of the State to matters of this nature

under the Immigrants and Emigrants Act in the past and present in the other divisions of this Court escaped the vigilance of the learned Deputy Solicitor General who led the State team.

In addressing judicial attention to the peculiarities of the present situation, it becomes germane to the issues involved to consider that the ordinary meaning of the word jurisdiction is "the authority by which courts and judicial officers take cognizance of and decide cases-the legal right by which judges exercise their authority". Jurisdiction that is referred to, may be either appellate, revisionary or original - appellate can be described as the power vested in the appellate court to review and revise the judicial action of an inferior court evidenced by an appealable order or an appealable judgment pronounced by such court. The power and authority to take cognizance of a cause and proceed to its determination not in it's initial stages but only after it has been finally decided by an inferior court. Revisionary jurisdiction includes the power to review and re-examine for purpose of correction on questions of fact rather than law. It is an extraordinary jurisdiction exercised for the purpose of amendment, correction, re-arrangement or even improvement. In the light of this background suffice it to state, for the purpose of brevity, that original jurisdiction means jurisdiction in the first instance to take cognizance of a cause at its inception, try it and pass judgment upon the law and facts.

Appellate and revisionary jurisdiction presupposes prior decision as a requisite for determination by the Court of Appeal whereas original jurisdiction does not envisage that particular requirement.

Learned Counsel for the petitioner further resubmitted that the arguments adduced by the State were specious and but a shroud to obscure the motivation and are therefore untenable in law, lacks, merit and is an attempt to split hairs in the absence of the most trivial of ambiguity and technicalities.

It is now a duty incumbent on this Court to winnow the wheat from the chaff and examine the provisions of law to determine whether this Court has jurisdiction to hear and decide on the merits of this bail application.

The English version of Article 138(2) of the Constitution, states as follows:- "The Court of Appeal shall also have and exercise all such powers and jurisdiction appellate and original as Parliament may by law vest or ordain."

This is a positive pronouncement that original jurisdiction can be exercised by the Court of Appeal if Parliament has conferred or decreed so.

The Sinhala version of Article 138(2) states an almost identical translation which is as follows:-

පාර්ලිමේන්තුව විසින් කලින් කල නීතියෙන් පවරනු ලැබිය හැකි හෝ නියම කරනු ලැබිය හැකි හෝ නියම කරනු ලැබිය හැකි පරිදි වූ සියළු බලතල හා අධිකරණ අභියාචනාධිකරණ බලය වශයෙන් හෝ මුල් අධිකරණ බලය වශයෙන් හෝ වන අධිකරණ බලය අභියාචනාධිකරණයට ඇත්තේ ය. අභියාචනාධිකරණය විසින් ඒ සියළු බලතල යහ අධිකරණ බලය ක්‍රියාත්මක කළ යුත්තේ ය.

The difference is that the words කලින් කල which mean from "time to time" are significantly missing. The Sinhala version contemplates the proclamation of laws which affect the jurisdiction of the appellate court from "time to time" at opportune instances.

It is redundant to mention that by virtue of Article 18 and Article 23(1) of the Constitution it is the Sinhala Act which must prevail in the event of conflict between the English and Sinhala texts.

The English version of section 404 of the Code of Criminal Procedure Code Act, No.15 of 1979 reads thus:-

THE AMOUNT OF EVERY BOND EXECUTED UNDER THIS CHAPTER SHALL BE FIXED WITH DUE REGARD TO THE CIRCUMSTANCES OF THE CASE AND SHALL NOT BE EXCESSIVE; AND NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS CODE OR AND OTHER LAW THE COURT OF APPEAL MAY IN ANY CASE DIRECT THAT ANY PERSON IN CUSTODY BE ADMITTED TO BAIL OR THAT THE BAIL FIXED BY THE HIGH COURT OR MAGISTRATE'S COURT BE REDUCED OR INCREASED OR THAT ANY PERSON ENLARGED ON BAIL BY A JUDGE OF THE HIGH COURT OR MAGISTRATE BE REMANDED TO CUSTODY.

The Sinhala version differs from the English version.

An examination of the Sinhala version reveals that the difference between the two versions may have resulted through inad-

vertence or with deliberation but nevertheless modifies the interpretation to be given respectively to the meanings of the two different sections.

The Sinhala version is as follows:-

මේ පරිච්ඡේදය යටතේ අත්සන් කරනු ලබන පෑම බැඳුම්කරයකට මුල් නඩුවේ අවස්ථාගත කරුණු ගැන නිසි සැලකිල්ල ඇතිව නියම කරනු ලැබිය යුතු අතර එය අධික නොවිය යුතුය. තවද මේ සංග්‍රහයේ හෝ වෙනත් යම් නීතියක පටහැනිව කුමක් සඳහන්ව ඇත්ද අත් අඩංගුවේ සිටින යම් තැනැත්තෙකු ඇප පිට නිදහස් කරන ලෙස හෝ මහාධිකරණය විසින් හෝ මහේස්ත්‍රාත්වරයෙකු විසින් නියම කරන ලද ඇප මුදල අඩු හෝ වැඩි කරන ලෙස හෝ මහාධිකරණ විනිශ්චයකාරවරයෙකු හෝ මහේස්ත්‍රාත්වරයෙකු විසින් ඇප පිට මුදවා හරින ලද යම් තැනැත්තෙකු අත් අඩංගුවේ රිමාන්ඩ් භාරයේ තබන ලෙස හෝ ඕනෑම අවස්ථාවක දී අභියාචනාධිකරණය විසින් විධාන කරනු ලැබිය හැකිය.

On an analysis of section 404 it is clear that section 404 refers to four distinct matters.

The first part deals with the amount of a bond not being excessive, the second part deals with the empowering of the Court of Appeal to:-

"Notwithstanding anything to the contrary in the Code or any other law the Court of Appeal may in any case direct that any persons in custody be admitted to bail."

The third part deals with

"That the bail fixed by the High Court or Magistrate be reduced or increased ...."

The fourth part deals :-

"That any person enlarged on bail by a judge of the High Court or Magistrate be remanded to custody ...."

A methodical analysis of the entire section reveals that the second part involves the exercise of original jurisdiction by the Court of Appeal. It is significant that though the English version has a *semicolon* after the words *"excessive"* at the end of the first part, the Sinhala version has a fullstop-signifying the termination and not the continuation of the earlier part. In the English version the first part and the second part are conjoined together by the use of the word

"and" which denotes an addition. *"And"* is a word used to join sentences, words and phrases.

In the Sinhala version the first part is completely separated from the second part by the use of the word "තවද" after the "*fullstop*". The word "තවද" means *furthermore of moreover*. The use of the word is conclusive on the fact that it is a complete sentence.

"Notwithstanding anything to the contrary in this Code or any other law the Court of Appeal may *in any* case direct that any person in custody be admitted to bail."

The Sinhala version is of a more imperative nature and conveys the intention of the legislature more emphatically.

The words *in any case* and ඕනෑම අවස්ථාවකදී mean more or less the same idea. "*Any case*" would denote "ඕනෑම කාරණයකදී" නඩුවකදී and "ඕනෑම අවස්ථාවකදී" would mean any occasion. It would seem that the dictates of common sense prevent the necessity to spilt hairs on the subject.

Therefore, it would seem that the English version of section 404 of the Code of Criminal Procedure lays down specifically, that "notwithstanding any thing to the contrary in this Code or any other law the Court of Appeal may *in any case* direct the admission to bail."

Accordingly it would not be incorrect to state that one need have no perspicacity to conclude that there is no ambiguity manifest in this section to prevent the Court of Appeal from exercising original jurisdiction.

Unfettered original jurisdiction is granted to the Court of appeal by virtue of section 404 of the Code of Criminal Procedure Code. The Sinhala version is clear and unambiguous when it states:-

තවද මෙම සංග්‍රහයේ හෝ වෙනත් යම් නීතියක පටහැනිව කුමක් සඳහන්ව ඇත්ද අත් අඩංගුවේ සිටින යම් නැනැත්තෙකු ඇප පිට නිදහස් කරන ලෙස ඕනෑම අවස්ථාවක දී අභියාචනාධිකරණය විසින් විධාන කරනු ලැබිය හැකිය.

and the corresponding English version unequivocally states that:-

"Notwithstanding anything to the contrary in this code or any other law the Court of Appeal may *in any case* direct that any person in custody be admitted to bail."

The Sinhala version buttresses and fortifies the position with even greater clarity by the absence of a *semicolon* and the presence of a *fullstop.* With the use of the word තවද meaning further more/moreover instead of the English word *"and"* which necessarily in Sinhala would be සහ and not....

Articles 18 and 23(1) of the Constitution makes it imperative to place reliance on the Sinhala text in preference to the English. It is significant to observe that the query addressed to the Secretary-General of Parliament in the course of the proceedings of this Court as to which text prevailed in authority with regard to applicability of sections 404 of the Sinhala and English acts evoked the response that the Sinhala text prevails and that the English text is a mere translation of the Sinhala text which is in the official language of the country. This obviates the necessity to indulge in the futile exercise of academic discourse or dependence on the guidance of decided cases and regard the same as authority in an attempt to establish Judge made law. In the context of this factual background it has to be considered whether it would not be ludicrous to resort to a case decided two decades and an year ago. The case of Rev. Singarayar although decided by a Bench of three learned Judges reflects an instance of judicial apathy by having been misled by the learned State Counsel to believe that section 396 of the earlier Criminal Procedure Code was identical to section 404 of the present Code of Criminal Procedure Act, No. 15 of 1979. Learned State Counsel did not direct the attention of the Bench to the clause, inherently part of section 404 of the Code of Criminal Procedure Code, namely :-

"Notwithstanding anything to the contrary in this Code or any other law ...."

This was not included in the earlier section 396 of the 1898 Criminal Procedure Code.

The inclusion in the section 404 in the present Code of Criminal Procedure Act, No. 15 of 1979 of the words:-

"the Court of Appeal" and "*in any case*" should clinch the matter even in the eyes of the mentally negligible. This, in the opinion of this Court invests the Court of Appeal with original jurisdiction. Addressing attention further to the case of Singarayar, (*supra*) it was held that the power vested in the Court of Appeal by section 404 of the Code of Criminal Procedure Act is an appellate power and that a pre-requisite for it's exercise is the existence of an order from an original Court the case of "*Nithyananthan and others* v *A.G.*[4] was also was similar in nature.

The circumstantial background in the Singarayar case is not exactly relevant to the issues involved, but suffice it to state, that it was regarding a bail application made under the Prevention of Terrorism (Special Provisions Act). The mistake in that case was the fact that the Bench was led to believe that section 404 of the Code of Criminal Procedure Act corresponds to section 396 of the Criminal Procedure Code of 1898. This proves to be a fallacy as the clause "Notwithstanding anything to the contrary in this Code or any other law was absent..." This court is inclined to the view that through inadvertent mistake, heedlessness, lack of attention, want of care, carelessness, failure to pay careful and prudent attention to the progress of a proceeding in Court has resulted in this kind of situation; regrettably, this can be classified as *per incuriam*; this generates the cause to vacate or set aside a decree as clearly, there has been a mistake or excusable neglect and the error hence made cannot be pursued blind folded and thus be perpetuated.

In view of the above, to dwell on the case of *Ganapathipillai*[5] important to section 396 of the earlier Criminal Procedure Code would be redundant; similarly, the necessity to indulge in discourse about the evolution of the law until the enactment of the Code of Criminal Procedure and surmise, deduce or conjecture the intention of the legislature and split hairs with regard to the interpretation of words and idiosyncracies and whimsical fancies of jurists is obviated. This court is inclined to the view that there is a clear exposition of the law reflected in the relevant statute in unambiguous, unequivocal terms. That is that the Court of Appeal has original jurisdiction.

This brief judicial review would be incomplete without reference to certain sections of the Bail Act of 1997 and it's relevance. Section

5 states that subject to provisions of section 13, (which refers to offences entailing life sentences or death sentences) a person accused of being concerned in committing, or having committed a non bailable offence may at any time be released on bail at the discretion of court. The word *"court"* in the absence of reference to specific court would include the entire hierarchy of the Courts structure.

However, section 5 would be applicable only if section 3 of the Bail Act, No. 30 of 1997 is unrestrictive.

An analytical and critical appraisal of section 3 of the English and Sinhala versions of the Bail Act inclines one to the view that the two versions differ in substance. The Sinhalese version is wider in scope than the English version which is more restrictive. When the two sections differ it is *sine qua non* that recourse should be to the Sinhala text. Although the Bail Act in section 28 refers to the event of inconsistency between the Sinhala and Tamil versions the Sinhala version should prevail. Articles 18 and 23(1) stipulate that inconsistency and conflict between English and Sinhala versions should be resolved by reference to the Sinhala version.

An examination of the English version of section 3 of Bail Act, No. 30 of 1997 reveals that:-

3(1) 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 provisions in respect of the release on bail of persons accused or suspected of having committed, or convicted of offences under such written law.

Sub section (2) is not germane to the issue involved and therefore will not be the subject of discussion here.

It is manifestly clear that three instances are in contemplation:-

Firstly, the Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979.

Secondly, Regulations made under the Public Security Ordinance.

Thirdly, 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 written law.

This in effect excludes, application of the Bail Act to the three categories of offenders cited in the earlier three instances who come within the purview of the three Acts in contemplation.

Section 3 states thus:

1979 අ-ක 48 දරණ ත්‍රස්තවාදය වැලැක්වීමේ (තාවකාලික විධිවිධාන) පණත යටතේ හෝ මහජන ආරක්ෂක පණත යටතේ නියෝග යටතේ හෝ වරදක් සිදුකර ඇති බවට හෝ වරදකට වරදකරු වී ඇති බවට චෝදනා ලැබ සිටින හෝ සැක කරනු ලබන තැනැත්තන් ඇප පිට නිදහස් කිරීම සම්බන්ධයෙන් ප්‍රකාශිත විධිවිධාන සලසා ඇත්තේ යම් ලිඛිත නීතියක් යටතේ ද එම ලිඛිත නීතිය යටතේ හෝ වදරක් සිදු කර ඇති බවට හෝ වරදකට වරදකරු වී ඇති බවට චෝදනා ලැබ සිටින හෝ සැකකරනු ලබන තැනැත්තෙකුට මේ පණත යටතේ කිසිවක් අදාල නොවේ.

The Acts referred to are:

Firstly, the Prevention of Terrorism Act, No. 48 of 1979 (Temporary Provisions Act) and secondly, Regulations made under the Public Security Act.

Four categories of offenders are in contemplation-

Having committed an offence,

Convicted of an offence,

Accused of an offence,

suspected of

සම්බන්ධයෙන් ප්‍රකාශිත විධිවිධාන සලසා ඇත්තේ යම් ලිඛිත නීතියක් යටතේ ද එම ලිඛිත නීතිය යටතේ,

ඉහත සඳහන් වර්ග වලට අයත් තැනැත්තන් මේ පණත (ඇප පණතේ) කිසිවක් අදාල නොවේ මේ අනුව,

පණත් දෙකටත් වර්ග හතරක තැනැත්තන්ට පමණක් යම් ලිඛිත නීතියක් යටතේ ඇප සම්බන්ධයෙන් ප්‍රකාශිත විධිවිධාන සලසා ඇත්තේ නම් – ඇප පණතේ ආවරණය එම තැනැත්තන්ට අහිමි වේ.

The Sinhala Act refers to these four stage of offenders, as being regulated by *written law*, (මේ පණත යටතේ කිසිවක් අදල නොවේ) who are excluded from the purview of the Bail Act, No. 30 of 1997.

All others are encompassed under the provisions of the Bail Act with wide ranging effect.

It is abundantly clear that section 3 read along with section 5 of the Sinhala version of the Bail Act unambiguously refers to the jurisdiction of Courts to grant bail in non-bailable offences subject to the limitations mentioned in section 3 of the Bail Act, No. 30 of 1997. Obviously, in the context of section 5 the "Court" does not include the Magistrate's Court as the jurisdiction of that particular court is excluded by statute with regard to grant of bail in Immigration and Emigration matters. Section 29 of the Bail Act refers to the definition of "non bailable". It is redundant to indulge in academic discourse on this matter but, suffice it to say that the opinion expressed in Bindra, Interpretation of Statues, 7th edition with regard to interpretation does not need any elaboration as the relevant sections of the Acts as illustrated above are lucidly and transparently indicative of the intention of the legislature *in re* the appropriate forum referred to unerringly by learned President's Counsel appearing for the accused petitioner as *Forum Jurisdiction* possessed by the Court of Appeal. In conclusion it could be observed that it is trite but a truism that the Court of Appeal has the original jurisdiction to entertain an application of this nature.

It is observed with regret that for one year and two decades after the decision in the Singarayar case thousands of applicants have succeeded in their bail applications before this Court, with no objection ever been taken to the jurisdiction of this Court, with regard to cases under the Immigrants & Emigrants Act, but this innovative change sought to be introduced and supported by the respondents in Court as perhaps *raison detre* come in the wake of the respondents appearing before another division of this court which has been entertaining and adjudicating upon bail application made with regard to sections on 45 and 47 (1), of the Immigrants and Emigrants Act daily, and stating to court upon inquiry by the Bench that the respondents have no objection to

enlarging suspects on bail and furthermore, signify consent to bail granted. At the least, it is regrettable that no application was ever made before that particular division of the court which regularly dealt with matters of that nature to lay by the determination of those cases until the decision with regard to the objection supported by the respondents in this court were determined.

It would be incomplete to terminate this brief exposition of the position with regard to lack of jurisdiction without reference to the fact as to whether the Immigrants and Emigrants Act being a later law *a special law* than the Code of Criminal Procedure *a general law* affects the jurisdiction of Court. Section 47(1) of the Immigrants and Emigrants Act states that:-

.....shall be non bailable and no person accused of such an offence shall in any circumstances be admitted to bail.

It is significant that there is no prohibition for a court to grant bail.

The preceding section of the Immigrants and Emigrants Act, section 46, deals with the fact that all offences under the Act must be tried in the Magistrate's Court. This necessarily pre supposes the fact, that the Magistrate's Court has no Jurisdiction to grant bail in these matter – the only logical conjecture stemming from this position would be that the jurisdiction for the Court of Appeal to grant bail under section 404 has not been eroded upon. Had it been so, one could have logically envisaged a situation of the nature that has arisen with regard to the Antiquities Act to repeat itself in the same form of manifestation. The Antiquities Act was amended in May 1998, the same year as the amendment to the Immigrants and Emigrants Act in July, it is significant that the amendment to the Antiquities Act – section 15C – contained the words.

Notwithstanding anything to the contrary in the Code of Criminal Procedure Act, No. 15 of 1979 or any other written law, no person charged with, or accused of an offence under this Ordinance shall be released on bail."

It is logical to presume that had the legislature intended the

later amendment to have the strict prohibition contained in the earlier one with reference to the Code of Criminal Procedure, in the latter amendment it would have expressly stated so.

Furthermore, if a presumption of an ouster of jurisdiction is to be concluded as has been held in the Indian case of *Prosunno Coomar* v *Koylash Chunder Paul Per* Peacock, J.

"the jurisdiction of the ordinary courts of judicature is not to be taken away by putting a construction upon an act of the legislature which does not clearly say that it was the intention of the legislature to deprive such courts of their jurisdiction..."

The position of the State if accepted, apart from depriving a person of his liberty would leave him in a state of utter helplessness, sans any remedy and totally devoid of any forum to ventilate his grievances – this certainly cannot be deemed to be the intention of the legislature. For example, even the Prevention of Terrorism Act provided relief for person in custody under that Act, and therefore, the very contemplation of such a possibility is obnoxious and repugnant in the background of the provisions of the Constitution – the proposition to say the least, is totally untenable in law and inconceivable. Reflections on Articles 12 and 13(5) of the Constitution would prove inconsistent and irreconcilable where, until proof of guilt has been established the presumption of innocence has been jettisoned prematurely.

The Constitution has been adopted and enacted as the Supreme law of the Democratic Socialist Republic of Sri Lanka in which case all other enactment's and laws are subordinate, and the provisions of the Constitution take precedence. Accordingly this Court is inclined to the view that as in instances of this nature if as the State claims, an individual is left bereft of any relief or remedy with regard to matters where deprivation of liberty occurs solely due to inadvertence or omission on the part of the legislature resulting in a *lacuna* or because of restrictive elucidation as a consequence of ambiguity or conflict in interpretation of laws an individual is jeopardized and prejudiced with regard to his right of liberty which demand immediate attention by an appropriate forum to which he is entitled as of right as a

human being and this is being denied him, then the protective provisions of the Constitution are activated and is the only remedy available to him. Similarly, in this instance section 404 of the Code of Criminal Procedure is very clear and unambiguous with regard to jurisdiction of the Court of Appeal. Conversely, to an inquisitive mind section 47(1) appears to pose a question with regard to jurisdiction. If the question cannot be resolved in the manner enumerated above the only manner of solution would be to have recourse to the Constitution as the supreme law of the country and the applicability of section 404 once again would be unquestionable.

The argument was adduced on behalf of the State that in Immigrants & Emigrants matters only "suspect" as opposed to "accused" could aspire for bail, and the State considers this as a salient factor when opposing or consenting to the grant of bail. It is worthwhile considering the fact as to whether a "suspect" who is granted bail is re-remanded when he becomes an "accused" subsequently, and if so whether it would be tantamount to discrimination as Article 13(5) of the Constitution presumes innocence until proved guilty. In the alternative if not so, whether there would be equality in the eyes of the law as that too is a concept recognized as applicable by Article 12 of the Constitution.

Therefore, in accordance with the analytical legal reasoning indulged in by this judicial review, on the question of jurisdiction I am inclined to the view that even my insatiable curiosity with regard to this matter stands resolved, and I hold that there is no merit whatsoever in the submissions made by the respondents, and furthermore, that the Court of Appeal does possess jurisdiction by virtue of Articles 138(2) and section 404 of the Code of Criminal Procedure Act, No.15 of 1979 and thus could entertain applications pertaining to matters preferred under the Immigrants and Emigrants Act and it's amendments.

In dealing with the second aspect of the matter under consideration the State objected to the grant of bail for the petitioner on grounds of undue influence that had been exercised both with regard to lay witnesses and the judicial officers who were involved in the determination of this case. It was conceded that no complaints were ever made with regard to influencing judicial

officers and it was merely a matter of conjecture and speculation because of the deviation from adopted normal practice by the aforementioned officers. The State further predicated their objections on the alleged tampering with witnesses and obstructing the course of justice. Relevant documents, relating to the charges against the petitioner were alleged to be missing and this was attributed to the accused-petitioner. It was contended on behalf of the petitioner that if witnesses were sought to be influenced and were so influenced it was by the instigating police officers against the petitioner, and that no witnesses ever complained of intimidation. A judicial review of the entirety of the objections stated by the respondents indicate a clear transgression in the realm of speculation. Accordingly, I cannot visualize any merit in the objections to the grant of bail and consequently reject them. A *fortiori,* bail is granted hereby under appropriate conditions. 650

Application allowed.