

**TUNNAYA ALIAS GUNAPALA
v.
OFFICER IN CHARGE, POLICE STATION, GALEWELA**

SUPREME COURT.
BANDARANAYAKE, J., FERNANDO, J.,
AND KULATUNGA, J.
S.C.APPEAL NO. 22/90.
OCTOBER 23 1990.

Criminal Procedure – Investigation – the Code of Criminal Procedure Act, Section 115 (3), 116, 120 and 136.

Section 116(1) requires that a suspect be sent in custody to a magistrate's court with jurisdiction when the information is well founded in the case of a non-bailable offence i.e. when the Police Officer or inquirer comes to a conclusion that there is sufficient evidence in the sense that a substantial case is made out at an early stage of an investigation which can properly be sent before a Magistrate. Thereafter it is necessary for the Magistrate to make an order for the detention of the suspect. On the other hand, if the offence is bailable, the section even permits the Police Officer or inquirer to take security from the suspect for his appearance before Court. The section also provides for productions to be sent to the Court immediately without being kept at the Police Station for further investigations if necessary, and for witnesses to be bound over to appear and testify at the trial. The fact that the Police can take bail and release the suspect if the offence is bailable under sub-section (1) and the fact that investigations can continue under sub-section (3) and the use of the word "suspect" and not "accused" in the language of sub-section (1) used to refer to this person clearly point to the fact that no proceeding has yet been instituted against that person as an accused. Producing a *suspect* before a Magistrate's Court in custody in terms of Section 116 (1) has nothing to do with the institution of proceeding under Section 136 (1) (d) of Chapter XIV or any other clause of that section. The purpose of producing a suspect before a Court for a non-bailable offence under Section 116 (1) is both for the purpose of detaining such a person as well as enabling the Court to take cognisance of the matter enabling it to make further orders under the Section, as a Court order is necessary for experts to examine productions and express opinions. The provisions of Section 116 (1) usually denote the completion of a Policeman's investigative endeavours.

When a suspect is produced before a Magistrate under Section 116 (1) of the Code in respect of a non-bailable offence it is necessary for the Magistrate to make an order for the detention of the suspect until the final report under Section 120 of the Code is filed. This he can do under the provisions of Section 120 (1) and the investigation can continue.

A final report made under Section 120 will be filed upon conclusion of the investigation. It is to be noted that Section 115 (3) does not permit a Magistrate to release on bail in the first instance a person arrested for the offence of murder. This means he must make a consequential order of detention when a suspect is produced in custody in connection with an alleged murder under Section 116 (1). The point is that one is still at the investigative stage when a suspect is forwarded under custody to the Court in terms of Section 116 (1). It is wrong to treat it as an automatic institution of proceedings.

When proceedings are instituted under Chapter XIV on the other hand the Magistrate takes cognisance of the accusation contained in the Police report or in a written complaint or upon the taking of evidence as the case may be in terms of Section 136 (1).

Section 136 (1) is read with the provisions of Section 135 when appropriate. It is to be noted that the language of all the clauses in Section 136 (1) contemplates a person *accused* of an offence and not a mere suspect.

Equating a report under Section 116 (1) to an institution of proceedings is wrong.

Where no proceedings are in fact instituted upon the report under Section 116 (1) the Magistrate had jurisdiction to release the suspect on bail subject to the terms of the proviso to Section 115 (1) of the Code if a period of three month's since the suspect's arrest has expired. The provisions of Section 115 (3) speak of a suspect being entitled to bail if proceedings are not instituted within 3 months of the date of his arrest.

Cases referred to :

1. *Attorney-General v. Punchi Banda* (1986) 1 Sri LR 40 (C. A.)
2. *Regina v. Perera alias Madawatte* 57 NLR 35
3. *Lamanatissa de Silva v. Sub-Inspector of Police Matara* 62 NLR 92
4. *Perera v. Sub-Inspector of Police, Kirulapone* 67 NLR 125
5. *Muttiah v. Regina* 74 NLR 313
6. *Ceylon Insurance Company v. Perera* 74 NLR 553
7. *Romulus Fernando v. O.I.C. Marawila* (1982) 1 Sri LR 400

APPEAL from a judgment of the Court of Appeal.

Jayampathy Wickremaratne with *Kapila Elikewela, H. Vithanachchi* and *A. Panditharatne* for Appellant.

Upawansa Yapa, Deputy Solicitor-General with *D. de Livera* State Counsel of Attorney-General.

Cur. Adv. vult.

February 01, 1991.

BANDARANAYAKE, J.

This appeal involves the interpretation of certain provisions of the Criminal Procedure Code. I.G. Ananda, the 2nd suspect was arrested by the Galewela Police for having committed or being concerned in committing the murder of one E.J. Jasinghe. There is no indication of the date of arrest. Ananda was produced before the Dambulla Magistrate on 1.9.89 and remanded to prison custody. The first suspect, I.G. Weerasinghe has not been arrested. On 20.12.89 i.e after the expiration of a period of three months from the date on which he was first produced before the Magistrate, an application for bail was made on behalf of Ananda to the Magistrate. This application was refused by the Magistrate on the footing that there was a report before the Magistrate setting out facts clearly showing that the suspect committed an offence and proceedings had therefore been instituted against him. The Magistrate went on to hold that as there was a "definite allegation" that Ananda had committed an offence, proceedings had been instituted and therefore the Court was without jurisdiction to grant bail under the proviso to s. 115 (3) of the Code. The Magistrate stated he was following the dicta of a decision of the Court of Appeal in *Attorney-General v. Punchi Banda and Others* ⁽¹⁾.

An application was next made on behalf of Ananda to the Court of Appeal to revise the aforesaid order of the Magistrate and grant bail. The Court of Appeal held that "the filing of a report making a definite allegation that a suspect committed the offence complained of is sufficient to constitute an institution of proceedings within the meaning of s. 115 of the Criminal Procedure Code" and dismissed the application for bail. The correctness of that decision is presently impugned before us. Leave to appeal to the Supreme Court was granted by the Court of Appeal on an application made that certain questions contained in Paragraph 7 of the application filed before the Court of Appeal be treated as substantial questions of law to be determined by the Supreme Court which the Court of Appeal upheld. The contents of the said Paragraph 7 of the petition filed before the Court of Appeal were as follows :

- (i) Did the Court of Appeal err in holding that the filing of a report of the progress of investigations which made a definite allegation that the suspect committed an offence was sufficient to constitute an institution of proceedings within the meaning of s. 115 (3) read with s. 136 (1)(d) of the Code of Criminal Procedure?.
- (ii) Did the Court of Appeal err in not holding that nothing but the filing of the "plaint" at the conclusion of investigations amounts to an institution of proceedings within the meaning of s. 115 (3)?.
- (iii) Did the Court of Appeal err in holding that the Magistrate may proceed to hold a preliminary inquiry under s. 145 of the said Act even when investigations have not admittedly been concluded?.
- (iv) Did the Court of Appeal err in holding that the application for bail on behalf of the 2nd suspect should be made under s. 403 of the Act?.

Before answering these questions I must say that it was not sufficient for the Court of Appeal to merely refer to averments in an application before it and state they are fit for adjudication by the Supreme Court when granting leave to appeal to the Supreme Court under Article 128 of the Constitution. The Court of Appeal must apply its mind to the questions that arise and formulate what the Court thinks are substantial questions of law in a proper manner. What has been done is far from satisfactory as the formulation of the questions set out in paragraph 7 of the said petition are themselves vague and confusing. However, having regard to the issue as presented by the Magistrate in his order and the reasoning in the judgment of the Court of Appeal I am of the view that the grounds on which bail has been refused raise substantial questions of law to found an appeal in this Court.

To get back to the order of the Magistrate, it reads as follows: Quoting from the order the relevant portion translates as....." Punchi Banda's case (*Attorney-General v. Punchi Banda*) aforesaid clearly lays down how proceedings may be lawfully instituted. What it says is that where there is a report setting out facts clearly showing that he (the suspect) committed the offence, then, proceedings

are deemed to have been instituted against him....". Next, the Court of Appeal held that - quote -" The ways in which proceedings shall be instituted in a Magistrate's Court are given in s. 136 of the Code. Section 136 (1)(d) provides that when any person is brought before a Magistrate in custody without process accused of having committed an offence which such Court has jurisdiction to hear or inquire into, proceedings are instituted. There must therefore be a definite allegation that the suspect has committed the offence complained of for this condition to be satisfied..... In the circumstances I hold that the filing of a report making a definite allegation that the suspect committed the offence complained of is sufficient to constitute an institution of proceedings within the meaning of s. 115 of the Code. I therefore dismiss the petitioner's application to revise the order of the Magistrate dated 20.12.89".

That then is the issue before us; as to whether the filing of a report before a Magistrate's Court making a definite allegation that the suspect committed the offence complained of is by itself sufficient to constitute an institution of criminal proceedings in a Court and which consequently may affect the grant of bail under s. 115 (3). Such a definite allegation could be made when the investigation is completed and a report is made in terms of s. 120(3) or when an officer in charge of a Police Station thinks that an information is well founded and reports in terms of s. 116 (1) of the Code. It is apparent from the judgment in *Attorney-General v. Punchi Banda (supra)* and the Magistrate's order and the judgment of the Court of Appeal that all those Courts were dealing with a report under s. 116 (1) of the Code. Counsel for the State confirmed that that is what the State is contending for.

Learned Counsel for the State supporting the grounds on which the decisions of the Courts below were founded submitted :

- (i) The commencement of non-summary proceedings is not a bar to the continuation of investigations by the Police - cited.
Regina v Perera alias Medawatte. ⁽²⁾
- (ii) It is the content of the report that matters in considering whether proceedings have been instituted ; and not any particular provision under which it purports to have been filed;

- (iii) If the report is in accordance with s. 116, the Magistrate cannot act under s. 115 (3).
- (iv) The requirement of s. 136 (1)(d) is bringing a person accused of having committed an offence which such Court has jurisdiction to inquire into or try before the Court ; A condition of s. 136 (1)(d) is that there should be an accusation ; that condition is satisfied when there is a definite allegation.
- (v) When there is a definite allegation the condition contained in s. 136 (1)(d) is satisfied i.e there is then an accusation.
- (vi) No formal plaint need be filed. Plaintiff is a convenient term. A Magistrate can commence an inquiry at the scene of an offence.
- (vii) As the Magistrate has held that the s. 115 stage had passed he should have commenced non-summary proceedings which he has failed to do.
- (viii) In any event the suspect is not without remedy as the Court of Appeal could admit a person to bail under the provisions of s. 404 of the Code.

A consideration of the meaning and scope of s. 116 and of s. 136 (1)(d) of the Code thus becomes necessary. Section 116 is a section contained in that part of the Code dealing with the investigation of offences and the powers of Police Officers and inquirers to investigate. It is a step in the process of investigation. It is the counterpart of s. 114 which permits the release of an accused if evidence is deficient. Section 116 (1) requires that a suspect be sent in custody to a Magistrate's Court with jurisdiction when the information is well founded in the case of a non-bailable offence. That is to say that the suspect should be so forwarded when the Police Officer or inquirer comes to a conclusion that there is sufficient evidence in the sense that a substantial case is made out at an early stage of an investigation which can properly be sent before a Magistrate. Thereafter it is necessary for the Magistrate to make an order for the detention of the suspect. On the other hand, if the offence is bailable the section even permits the Police Officer or inquirer to take security from the suspect for his appearance before Court. The section

also provides for productions to be sent to the Court immediately without being kept at the Police Station for further investigations if necessary, and for witnesses to be bound over to appear and testify at a trial. The fact that the Police can take bail and release the suspect if the offence is bailable under sub-section (1) and the fact that investigations can continue under sub-section (3) and the use of the word "suspect" and not "accused" in the language of sub-section (1) used to refer to this person clearly point to the fact that no proceeding has yet been instituted against that person as an accused. Producing a *suspect* before a Magistrate's Court in custody in terms of s. 116 (1) has nothing to do with the institution of proceedings under s. 136 (1)(d) of Chapter XIV or any other clause of that section. The purpose of producing a suspect before a Court for a non-bailable offence under s. 116(1) is both for the purpose of detaining such a person as well as enabling the Court to take cognisance of the matter enabling it to make further orders under the section as a Court order is necessary for expert witnesses to examine productions and express opinions. The provisions of s. 116 (1) usually denote the completion of a Policeman's investigative endeavours. The Magistrate once seized of the matter may then require further probing by forensic experts of evidence already gathered; the findings and opinions of such specially skilled persons may tend to confirm the State's case against the prisoner.

Now, when a suspect is produced before a Magistrate under s. 116 (1) of the Code in respect of a non-bailable offence it is necessary for the Magistrate to make an order for the detention of the suspect until the final report under s. 120 of the Code is filed. This he can do under the provisions of s. 120 (1) and the investigation can continue. For instance, the Police may have been making inquiries over a period of time upon a complaint. Having gathered evidence which justifies an arrest a suspect is taken into custody and incriminating evidence such as a weapon of offence or a document connecting the suspect to the crime is found and it is necessary to take blood or saliva samples or specimens of nails or hair for comparison. In such a case it may be said that the Police have sufficient grounds to believe the information is well founded and before the expiry of 24 hours in compliance with the provisions of s. 37 transmit the suspect in custody to the Magistrate. Further investigations regarding the productions will continue under s. 116. A final report made under s. 120 will be filed upon conclusion of

the investigation. It is to be noted that S. 115 (3) does not permit a Magistrate to release on bail in the first instance a person arrested for the offence of murder. This means he must make a consequential order of detention when a suspect is produced in custody in connection with an alleged murder under s. 116 (1). The point is that one is still at the investigative stage when a suspect is forwarded under custody to the Court in terms of s. 116 (1). It is wrong to treat it as an automatic institution of proceedings.

When proceedings are instituted under Chapter XIV on the other hand the Magistrate takes cognisance of the accusation contained in the Police report or in a written complaint or upon the taking of evidence as the case may be in terms of s. 136 (1). Section 136 (1) is read with the provisions of s. 135 when appropriate. It is to be noted at this stage that the language of all the clauses in s. 136 (1) contemplates a person *accused* of an offence and not a mere suspect. The next step is for the Magistrate to take cognisance of the offence complained of and decide whether there is sufficient ground to issue process if the person is not in custody or take a necessary step if already detained ; or conduct the examination required by s. 139 (2) wherever necessary when an accused person is brought before the Magistrate in terms of s. 136 (1)(d) of the Code and make other consequential orders pending inquiry or trial. The bringing of a person before the Court without process accused of having committed an offence in terms of s. 136 (1)(d) can happen for example, when a drunken person is arrested for misconduct in public causing annoyance to any person, an offence punishable under s. 488 of the Penal Code and produced in custody before a Magistrate who then may act under s. 139 (2). This provision in clause (d) should not be confused with the other situation of a *suspect* being taken before a Magistrate in custody during an investigation in terms of s. 116 (1) when the investigating authority is of the opinion that the information in his possession that the suspect has committed a non-bailable offence is well founded. In such a situation that suspect is detained pending further investigation and the Magistrate is obliged to assist the further investigation by making appropriate judicial orders. That is all s. 116 (1) contemplates. It is a step prior to the institution of criminal proceedings. Equating a report under s. 116 (1) to an institution of proceedings is wrong. The submissions of counsel for the State in the Court of Appeal in the case of *Attorney-General v. Punchi Banda* aforesaid appearing at pages 42, 43, 44 & 45 of that report as to whether proceedings

have been instituted or not with reference to s. 116 (1) and s. 136 (1)(d) of the Code are unwarranted. The statements on the law (obiter) in the case appearing at page 44 of the report to wit:-...." If after investigations the officer in charge of a Police Station finds that a definite allegation could be made against the suspect then the Police would produce the suspect before the Magistrate with that allegation..... proceedings are automatically instituted under the provisions of s. 136 (1)(d)", and at page 45 of the report....." once a suspect is taken before the Magistrate..... on the basis that information is well founded then by virtue of s. 136 (1)(d) proceedings are instituted and the Magistrate is directed to start an inquiry under s. 145", are wrong in law and should not be followed. These statements of that Court are obiter dicta as the issue that had to be decided in that appeal was whether the Magistrate could have granted bail under s. 403 (2) of that Code in the context of the facts of that case. It would appear that the Court has failed to examine the provisions of s. 116 as a whole, but looked only at that part of sub-section (1) dealing with non-bailable cases. The Magistrate in the instant case has followed that judgment.

Learned Counsel for the appellant relied on the following cases in support of his submission that in a case of murder investigated by the Police it is only when the Police have completed investigation and submitted a report to Court alleging that the suspect has committed or been concerned in committing the offence of murder could it be said that proceedings have been instituted against such person. Such a report is often referred to as a plaint. Counsel relied on the following cases in support of this submission: *Lamanatissa de Silva v. Sub-Inspector of Police, Matara*⁽³⁾, *Perera v. Sub-Inspector of Police, Kirulapone*⁽⁴⁾, *Muttiah v. Regina*⁽⁵⁾, *Ceylon Insurance Company v. Perera*⁽⁶⁾, *Romulus Fernando v. O.I.C Marawila*⁽⁷⁾.

In this view of the law it is seen that the appellant has been kept in custody for over a period of three months without proceedings being instituted against him. It is to be noted that the application for bail has been made after three months from the date on which he was *produced* before the Court and remanded. No material is available before us as to the date on which the suspect was *arrested*. The provisions of s. 115 (3) speak of a suspect being entitled to bail if proceedings are not instituted within three months of the date of his arrest. As this is a relevant matter in the context of the

issue before us it is regrettable that the State was unable to inform this Court of the date of arrest of the suspect. In fact no proceedings have been properly instituted before the Magistrate on the material before this Court. The State has been content to take the position that the suspect has his remedies if he wants to be released from custody on bail under other provisions of law, to wit: s. 403 of the Criminal Procedure Code. Counsel for the State resting upon his proposition that proceedings have begun contends that the Magistrate should have proceeded under s. 145 of the Code. The matter seems to rest at that.

This Court is unable to accept the submissions of the Deputy Solicitor-General as they are patently wrong in law.

As no proceedings were in fact instituted upon the report under s. 116 (1) the Magistrate had jurisdiction to release the petitioner on bail on 20.12.89 subject to the terms of the proviso to s. 115 (1) of the Code as a period of three months since the suspect's arrest had expired. No reasons as to why bail should not be granted have been urged before us. No steps as far as this Court is aware have been taken so far as to institute proceedings against the petitioner.

The appeal is allowed. The order of the Magistrate dated 20.12.89 and the judgment of the Court of Appeal are set aside. The petitioner is admitted to bail upon his entering into a bond in a sum of Rs. 2000/- with one surety to attend Court as directed. Magistrate to take necessary steps accordingly.

FERNANDO, J. – I agree.

KULATUNGA, J. – I agree.

Appeal allowed.