

ANURUDDHA RATWATTE AND OTHERS
v
THE ATTORNEY-GENERAL

SUPREME COURT
S.N.SILVA, C.J.
EDUSSURIYA, J.
YAPA, J.
J.A.N. DE SILVA, J., AND
WEERASURIYA, J.
SC APPEALS NOS. 2/2003 TO 16/2003 (TAB)
5TH AND 19TH JUNE, 2003

Trial at bar – Bail – Code of Criminal Procedure Act, sections 403(1), 450, 450(6) and 451(3) – Bail Act, sections 2, 14 and 15 – Arbitrary order refusing bail – Duty to give reasons as per section 15 of Bail Act.

Fourteen appellants were under trial before a High Court at Bar in terms of section 450 of the Code of Criminal Procedure Act (“the Code”). Prior to the commencement of the trial, they were on bail except the 12th accused. At no stage did the Deputy Solicitor-General conducting the prosecutions object to bail for any accused. In fact when the trial commenced also, he said he had no objection to releasing the accused appellants on bail. But the High Court remanded the appellants initially and made a final order dated 23.4.2003 remanding all of them to custody on the sole ground that the trial was being held on four days of the week. When the appellants lodged an appeal against that order under section 451(3) of the Code, the High Court rejected it on the ground that the order was an “interim order” against which there is no right of appeal.

Held :

1. The impugned order was a final order (in respect of bail) appealable under section 451(3) of the Code.
2. The power of the High Court to grant bail is contained in sections 403(1) and 450(6). However, the Code is silent as to the grounds on which an order could be made.
3. (Of consent) The applicable law regarding the basis of an order for bail is as contained in the Bail Act, No.30 of 1997 ("the Act"). In terms of section 2 of the Act, granting bail is the rule and refusal is the exception. The grounds of refusal are contained in section 14 and the court is required by section 15 to state the reasons for refusal in writing.
4. The High Court had in refusing bail acted arbitrarily in violation of the fundamental rights of the appellants under Article 13 of the Constitution and failed to adduce reasons set out in section 14 of the Act or to give reasons under section 15. The Attorney-General has not adduced any material that would warrant a refusal of bail as per section 14 of the Act.

APPEAL from a judgment of the High Court

D.S. Wijesinghe, P.C. with *Gaston Jayakody* for appellants.

Shavindra Fernando, Senior State Counsel with *A. Vengappuli*, State Counsel for Attorney-General

Cur.adv.vult.

July 11, 2003.

SARATH N SILVA, C.J.

These appeals have been filed by the accused facing trial before the High Court at Bar held in terms of section 450 of the Criminal Procedure Code Act, No. 15 of 1979, as amended by Act, No. 21 of 1988. The appeals are from the order dated 3.4.2003, refusing applications for bail made on their behalf.

The said order has been made by a majority of judges in respect of the 1st accused with one judge dissenting and, 'by all the judges in respect of the other accused-appellants. The only reason given in order dated 3.4.2003 for refusing the applications for bail is that the trial is being held on 4 days of the week. In the dissenting order the 1st accused-appellant is allowed bail on the basis of the medical grounds that had been urged.

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The accused-appellants filed appeals to this Court from the said order and the High Court on 23.4.2003, purported to reject the appeals on the basis that the order appealed from is an interim order and that there is no right of appeal in terms of section 451(3) of the Code of Criminal Procedure Act. The accused then moved this Court to exercise jurisdiction in terms of section 451(3) in respect of the appeals that have been filed. They also moved for an order from this Court directing the High Court to forward the petitions of appeal that have been filed.

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The motion of the accused-appellants was considered by this Court on 19.05.2003. Senior State Counsel had no objection to an order being made directing the High Court to forward the appeals for consideration by this Court, but submitted that the trial should proceed in the High Court. Accordingly, the Court made a direction to forward the appeals and the relevant proceedings but to continue the trial.

When the appeals came up for hearing on 5.6.2003, all counsel agreed that the question of releasing the accused on bail should be considered in terms of the Bail Act, No.30 of 1997, to which no reference whatsoever had been made by the High Court. In these circumstances with the agreement of Counsel and as an interim measure, the High Court was directed to consider the release on bail of the accused in terms of Section 14 of the Bail Act on the basis of the relevant material and to make an order giving reasons as required by Section 15 of the Act, if necessary.

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Pursuant to the said direction only written submissions had been tendered by counsel. No material was adduced in terms of Section 14(1) of the Bail Act to support a refusal of bail. In so far as the stance of the Attorney-General is concerned, the only difference appears to be that whereas throughout the proceedings Deputy

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Solicitor-General had no objection to the release of the accused on bail, he had raised a formal objection without any supporting material in his written submissions. The majority of judges of the High Court have referred to this as a "belated objection to the accused being released on bail."

The judges of the High Court at Bar appear to have understood the interim order made by this Court differently. Two judges constituting the majority have sought to give reasons for the earlier order from which the appeals have been filed. The other judge has considered the provisions of Section 14(1)(a) of the Bail Act and has held that no ground is made out to refuse the application for bail. He has made an order that all accused should stand out on bail. 50

Learned Senior State Counsel submitted that the order made pursuant to the interim direction by this court should be considered, as the final order and the accused-appellants should present fresh appeals if they are dissatisfied with that order. I cannot possibly agree with such a submission. The appeals have been filed from the order dated 3.4.2003 refusing the applications for bail. It is only when this Court found that the applications for bail had not been considered with reference to the applicable law, that a direction was made to enable the matter to be considered on the basis of relevant material. No material has been adduced before the High Court as required by Section 14(1) and the majority of judges have sought to give reasons for the earlier order refusing bail. At the time the interim direction was made no final judgment had been given by this Court in respect of the appeals and it was specifically stated in the proceedings of 5.6.2003 that the Court would continue the proceedings in order to give a final judgment in the matter. In the circumstances the accused are now entitled to have the appeals that have been filed considered by this Court. 60 70

I have to now consider the order dated 23.4.2003 of the High Court purporting to reject the appeals that have been filed. Section 451(3) of the Code of Criminal Procedure Act, as amended by Act, No.21 of 1988 states as follows :

"Any thing to the contrary in this Code or any other law notwithstanding an appeal shall lie from any judgment, sentence or order pronounced at a trial under section 450. Such appeal shall be

to the Supreme Court and shall be heard by a Bench of not less than five judges of that Court nominated by the Chief Justice. It shall be lawful for the Chief Justice to nominate himself to such Bench".

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It is seen from this provision that an appeal lies from any judgment, sentence or order pronounced at a trial held in terms of section 450. The judges of the High Court have noted that the order appealed from is an interim order and that the provisions of Section 451(3) would not apply. The term "order" is not defined in the Code of Criminal Procedure Act. In the circumstances it should in its ordinary sense be taken to mean a formal expression of a decision made by Court in respect of any matter together with the reasons for such decision. An interim order is one made pending a final order being made in the same matter. Whether a decision is to be considered as an order operating as an interim order or not has to be considered from the perspective of the effect that the order has, in respect of the matter pending before Court and the parties to whom it relates.

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In this instance the order of the High Court refusing the application for bail has the effect of the accused being incarcerated and thereby deprived of their personal liberty. Every day spent in incarceration constitutes deprivation of personal liberty. Looking at the matter, from this perspective it is clearly seen that the order is final in its effect. It is a formal expression of a decision by the High Court which directly affects the accused who are thereby deprived of their personal liberty and I am of the view that an appeal lies to this Court from the order made on 3.4.2003 in terms of Section 451(3). The High Court has not referred any provision of law in rejecting the appeals that have been addressed to this Court. An appeal addressed to a superior court should as a rule be submitted to that Court except where specific provision is made empowering the original court to reject such appeal. Section 451(4) of the Code of Criminal Procedure Act states that the provisions of the Code governing appeals to the Court of Appeal from a judgment, sentence and orders of the High Court shall *mutatis mutandis*, apply to appeals to the Supreme Court. The procedure for lodging of appeals to the Court of Appeal from the High Court is provided for in Section 331 of the Code of Criminal Procedure Act. Section 332

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provides that if the appeal is not given in the manner prescribed in the Act it may be returned to the appellant for the purpose of it being amended within time to be fixed by the Court or immediately. It further provides that if it is not amended as directed, the Court may, for reasons to be recorded by it reject it. This is the only provision which empowers the original Court to reject an appeal. In this instance there is no question of any non compliance of the provisions of Section 331. In the circumstances the order of the High Court made on 23.4.2003, rejecting the petitions of appeal is set aside and the appeals are considered on the basis that they have been lawfully presented in the exercise of the right of appeal given to the accused in terms of Section 451(3) of the Code of Criminal Procedure Act.

In considering the appeals I would first advert to the facts relating to the remanding and release on bail of the accused-appellants. The accused-appellants have appeared before the Magistrate of Teldeniya and remanded by orders made by that Court on different dates that range from the month of December 2001 to the month of March 2002. The first accused appellant was released on bail by the Court of Appeal on 29.05.2002 on the basis of an order which contains comprehensive reasons. The 2nd to 9th accused-appellants were similarly released on bail by the Court of Appeal for reasons given on 4.10.2002. The 10th and 11th accused-appellants were also released by the Court of Appeal on 14.10.2002. The 12th accused-appellant continued to be in remand. The other accused-appellants have been released on bail by the Magistrate's Court. Thus except for the 12th accused all the accused were on bail at the time the proceedings of the Trial at Bar commenced. They appeared before the High Court on 15.11.2002 and were served with the indictment presented by the Attorney-General. On that day an application for bail was made on behalf of the 12th accused appellant to the High Court. The Deputy Solicitor-General objected to this application which was refused by the High Court. The High Court made order on that day enhancing the security ordered in respect of the accused-appellants and ordered that in addition to bail that had been furnished there should be further personal security in a sum of Rs.250,000/- with two sureties, each. The trial was then fixed for 20.1.2003.

When the trial was to commence the accused-appellants took certain objections to the indictment and the jurisdiction of the High Court. Submissions were made in respect of these objections on the 20th and the High Court gave its order on 21st rejecting the objections and thereafter pleas of not guilty were recorded. At the end of the day's proceedings on 21.1.2003, an application for bail was made on behalf of the 12th accused. In response to this the Deputy Solicitor-General made a clear submission that he has no objection to the release of the 12th accused and for that matter in respect of any other accused. At that stage the High Court made an order remanding the accused-appellants till the next date, being 22.1.2003. On that day too the Deputy Solicitor-General had no objection to releasing the accused-appellants on bail. But, the High Court refused the application for bail and committed the accused-appellants to custody. Thereafter several applications have been made in particular with regard to the 1st accused-appellant for bail, supported by medical evidence and other material. The Deputy Solicitor-General had no objection to these applications, but they have been refused by the High Court without any reasons being given therefor. These appeals relate to the final application for bail which was made on the last date of the court sittings in the previous term immediately preceding the court vacation that ensued. As noted above the only reason given by the majority of judges is that the trial is being heard on 4 days of the week.

President's Counsel for the accused-appellants urged the following grounds in respect of that order-

1. that the order has been made contrary to the provisions of the Bail Act and in particular the provisions of Section 14(1) which specify the grounds on which bail may be refused.

2. that the High Court has failed to give reasons for the refusal of bail as required by Section 15 of the Bail Act;

3. that in any event none of the grounds on which bail could be refused, in terms of Section 14(1) have been made out in this instance, to justify the refusal of bail;

4. that Deputy Solicitor-General representing the Attorney-General has at every stage submitted that he has no objection to the accused-appellants being released on bail.

The grounds urged by President's Counsel pertain mainly to the provisions of the law that would apply in respect of the refusal to release the appellants on bail. The High Court, as noted above has not in the order appealed from referred to any provision of law in terms of which bail was refused and the accused committed to remand custody. The preceeding narrative of the facts reveals that at the end of the day's proceedings on 21.1.2003, when Deputy Solicitor-General had made a categorical submission that he had no objection to the release of the 12th accused (who was the only person in custody at that stage) or any other accused, the High Court without hearing the accused made an order remanding them to custody. On the subsequent occasions too, the High Court, in the face of submissions by Deputy Solicitor-General that there was no objection refused the applications for bail made on behalf of the accused-appellants. It appears from the tenor of these orders that the High Court acted on the basis that it had an absolute discretion in the matter of committing the accused to remand custody. The orders made without any application by the prosecutor, without hearing the accused and without giving reasons, cannot be explained on any other basis. In this context it is incumbent on this Court to deal with the basic premise of our law with regard to detention in custody and deprivation of personal liberty.

The right to liberty and security of person is a basic tenet of our public law and is universally recognized as a human right guaranteed to every person (vide Article 9 of the Universal Declaration of Human Rights and Article 9 of the International Covenant on Civil and Political Rights). Based on this right to liberty and security of person, Article 13 of the Constitution guarantees as a fundamental right to every person, the freedom from arbitrary arrest, detention and punishment. This Article covers all 3 stages at which a person's liberty is deprived. They are-

- (i) at the stage of arrest of a person (Article 13(1));
- (ii) at the stage a person is held in custody, detained or otherwise deprived of his personal liberty (Article 13(2));
- (iii) at the stage a person is convicted and punished with death or imprisonment (Article 13(4));

In respect of all 3 stages the respective Sub-Articles specifically provide that the deprivation of personal liberty cannot take place except according "to procedure established by law". In the 2nd and 3rd stages referred to above, being, continued custody detention or deprivation of personal liberty beyond the period the arresting authority could validly detain and at the stage of punishment, it is further provided that such deprivation of liberty could only be effected by an order of a competent court. Therefore in respect of the 2nd and 3rd stages referred to above, two requirements have to be satisfied for a person to be lawfully deprived of personal liberty, they are-

- i. that it is on an order of a competent court;
- ii. that such order is made in accordance with the procedure established by law;

A competent court is the court having jurisdiction in the matter and in the case we are dealing with it is the High Court at Bar. Section 450(6) specifically provides that in any trial before the High Court at Bar "the court or the presiding judge thereof, may give directions for the summoning, arrest, custody or bail of all persons charged before the Court on indictment or by information exhibited under this section." It is seen that the sub-section does not contain any provision as to the procedure that would apply in this regard. In the circumstances ordinarily the provisions of Section 403(1) of the Code of Criminal Procedure Act which gives discretion to the High Court to release on bail any person accused of any non-bailable offence would apply. The Code of Criminal Procedure Act is silent as to the grounds on which such an order could be made.

It is in this context of a discretion lying on the court that there have been several judgments which deal with the grounds that should be considered by court in such circumstances. The majority judges at the Trial-at-Bar have referred to these judgments where the matter of granting or refusing bail has been considered on the basis of a wide discretion vested in the court.

The Bail Act, No.30 of 1997 was passed by Parliament as stated in the long title to "provide for release on bail of persons suspected or accused of being concerned in committing or of having committed an offence...." A person is considered as being suspect-

ed of having committed an offence at the stage of investigation and he would be considered as an accused after he is brought before a court on the basis of a specific charge that he committed a particular offence. He would remain an accused until the trial is concluded and a verdict of guilty or not guilty is entered or he is discharged from the proceedings. Thus the provisions of the Bail Act would apply in respect of all stages of the criminal investigation and the trial. 270 075

Section 2 of the Act gives the guiding principle in respect of the implementation of the provisions of the Act. It is specifically stated that "the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception."

Section 14(1) being the provision which would apply in respect of this case reads as follows :

"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 :- 280 081

(a) that such person would - 290 081

(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.

It is seen that Section 14(1) would apply notwithstanding anything to the contrary in the other provisions of the Act, in respect of persons suspected or accused of being concerned in or having

committed a bailable or non-bailable offence. It covers two situations - 300

(i) when such person appears or is brought before or surrenders to, the court having jurisdiction;

(ii) when an application is made to cancel a subsisting order releasing such person on bail.

In both situations the court may refuse to release the suspect or accused on bail or cancel a subsisting order of bail only if the court has reason to believe that such person would act in the manner specified in paragraph (a), (i) to (iii) referred to above or the court has reason to believe that the gravity and public reaction to the offence may give rise to public disquiet. 310

In either situation where the court refuses to release such person on bail or cancels or varies a subsisting order of bail, Section 15 requires the court to "state in writing the reasons for such refusal, cancellation, recession or variation as the case may be."

Thus the court should have reasons to believe that such person would act in the manner specified in Section 14(1) (a), (i), (ii) or (iii) or that there would be public disquiet as provided in (b) and follow up by stating in writing the reasons for the refusal or cancellation of bail. 320

In this case the accused-appellants appeared before the High Court on notice being issued for the service of indictments. Except for the 12th accused the others had been released on bail. The High Court enhanced the bail that had been ordered and those accused appellants continued to be on bail. On 21.01.2003 when the High Court committed the accused appellants to remand custody the court in effect cancelled the previous order for enhanced bail made by the court itself on 15.11.2002. However it is seen that the order placing the accused in remand custody, which is contained in a single line does not even state that the previous order made by that very court is cancelled. I have to note that the order placing the accused-appellants in remand custody has been perfunctorily made without there being any application, without a hearing, without grounds being adduced and without any reasons stated in writing. 330

In terms of the mandatory requirements of Section 14(1) such a cancellation could have been done only on :-

- (i) an application being made by a police officer;
- (ii) hearing the accused appellant personally or through his attorney-at-law: 340
- (iii) if the court had reasons to believe that any one of the grounds as specified in paragraph (a) (i) to (iii) or paragraph (b) have been made out.

The accused appellants have been committed to remand custody without there being any compliance with any of the requirements set out above. However, the accused did not appeal from that order to this Court and continued to remain in custody. In respect of the particular order appealed from, I note that it would come in the first situation referred to above, namely, a refusal to release the accused on bail. 350

In this situation as well the court could refuse the release on bail only if it has reason to believe that any of the grounds as provided in paragraph (a) (i) to (iii) or paragraph (b) have been satisfied.

The order appealed from does not refer to any such ground and the Attorney-General has not adduced any material to establish any of these grounds. Furthermore no reasons have been given for the refusal to release on bail as required by Section 15. The only reason given is that the trial is being held on 4 days of the week. This reason is far removed from the grounds that may warrant a refusal of bail as stated in Section 14(1) (a) (i) to (iii) and (b). 360 These grounds relate to the conduct of the accused and the public reaction to the commission of the offence and not the number of days the trial is being held. In any event the reason stated is irrelevant immediately prior to the court vacation.

Furthermore Section 15 specifically provides that where the court refuses to release on bail any person or cancels a subsisting order releasing a person on bail or rescinds or varies an order, it shall state in writing the reasons for such refusal, cancellation or rescission or variation as the case may be. 370

In this instance no reasons have been given by the High Court for the refusal to release the accused-appellant on bail. Therefore I have to conclude that in refusing to release the accused-appellant on bail the High Court has not taken into account the procedure and the grounds as set out in Section 14(1) of the Bail Act No.30 of 1997 and has further failed to give reasons as required by Section 15 in respect of such refusal.

As noted above the Attorney-General has not adduced any material that would warrant a refusal of bail as provided for in Section 14(1) (a) or (b).

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In the circumstances I allow these appeals and set aside the order dated 3.4.2003 refusing the application for bail made in respect of accused-appellants.

I make order that the accused-appellants remain on the bail that had been previously ordered by the High Court on 15.11.2002, since the subsequent orders committing the accused-appellants to remand custody have been made contrary to the provisions of the Bail Act, No. 30 of 1997. The 12th accused-appellant is also released on the same bail ordered by the High Court in respect of the other accused by the order dated 15.11.2002.

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EDUSSURIYA, J. - I agree.

YAPA, J. - I agree.

J.A.N. DE SILVA, J. - I agree.

WEERASURIYA, J. - I agree.

Appeals allowed.