JAYANTHI SILVA AND TWO OTHERS

v.

ATTORNEY-GENERAL

COURT OF APPEAL.
GUNASEKERA, J., P/CA.,
SILVA, J.
C.A. 875/96, 2/97, 13/97.
H. C. COLOMBO 50001/91.

Criminal Procedure – Criminal Procedure Code read with sections 102 and 113(B) of Penal Code – Offence Triable by a Magistrate's Court and also by a High Court – If convicted by the Magistrate's Court entitled to Bail as of right pending appeal in view of section 323 Criminal Procedure Code – If conviction by the High Court a discretion is vested in the Judge of the High Court to consider Bail – Section 333(3) – Exceptional Circumstances – Section 325(3) Administration of Justice Law.

The High Court refused an application for Bail. In Revision it was contended that the requirement of exceptional circumstances to be established for Bail to be granted pending appeal if the conviction was before the High Court imposes an unwarranted fetter on an accused so convicted as against an accused convicted for a similar offence before a Magistrate Court and was discriminatory.

Held:

1. As the law stands today under the provisions of the Code of Criminal Procedure Act the statute itself draws a distinction between cases where an appeal against a conviction is preferred from an order made by a Magistrate Court (Section 323(i)) and an order made by a High Court (Section 333 (3)).

2. The words 'The High Court' may subject to Section 333(4) may admit the appellant to bail pending the determination of his appeal in subsection 3 of Section 333 clearly vests a discretion in the High Court to decide whether to grant Bail to an accused who have been convicted or to refuse to grant Bail pending his appeal.

The discretion to grant or refuse Bail must be exercised judicially and not arbitrarily or capriciously.

3. Over the years a principle has evolved through judicial decisions that Bail pending appeal from conviction by Supreme Court would only be granted in exceptional circumstances.

***Per* Gunasekera J.**

> "The fact that an accused has in fact absconded whilst being on Bail pending his appeal in one case or several cases should not be taken into account to the disadvantage of another accused whose application for Bail is being considered."

4. The appellate court would interfere where a Judge has given weight to considerations which are irrelevant or taken into account extraneous considerations in exercising his discretion which would amount to an abuse of the discretion vested to act judicially.

5. Appellate court should not consider the fact that an accused has been on Bail pending his appeal as a relevant factor in the event of the dismissal of the appeal as a reason as to why he should not serve the sentence imposed.

APPLICATION in Revision from the Order of the High Court of Colombo.

Cases referred to:

1. *Ramu Thamotheram Pillai v. Attorney-General* S.C. 141/75
2. *Ward v. James 1965* – 1 All E. R. 563 at 571
3. *King v. Keerala* – 48 NLR 202
4. *John Henry Charles Earnest Howeson, Louis Hardy* – 1936 25 Criminal Appeal Courts 167
5. *Queen v. Rupasinghe Perera* – 62 NLR 238
6. *Queen v. Coranelis Silva* – 72 NLR 113
7. *Salahudeen v. Attorney-General* – 77 NLR 262
8. *Queen v. Punchi Banda et al* – 62 CLW 15
9. *Queen v. Suppar Navaratnam* – SC 11 MC Jaffna Criminal appeal No. 138/62
10. 1936, 25 Criminal Appeal Report 167
11. *Ormered v. Tedmerden Joint Stock Mills Company Ltd.*, 1882 – QBD 669 at 679
12. *Charles Ostenton Company v. Johnson* – 1941 2 All ER 245 at 259

D. S. Wijesinghe, P.C. with *Lal Karunaratne* for the petitioner in 875/96.

Ranjit Abeysuriya, P.C. with *Anil Silva* for the petitioner in 2/97.

Tilak Marapona, P.C. with *Nalin Laduwahetti* for petitioner in 13/97.

S. Samaranayake, S.C. for Attorney-General in 875/96.

A. H. M. D. Navaz, S.C. for Attorney-General in 2/97 and 13/97.

Cur. adv. vult.

August 7, 1997.

D. P. S. GUNASEKERA, J. (P/C.A.)

The three Applications in Revision were considered together as the question involved was the same and was concerned with the same order made by the Learned High Court Judge on 4.12.96 refusing an application for bail pending appeal. After hearing Counsel for the petitioners and the Attorney-General by our Order dated 14th March 1997 we set aside the Order of the Learned High Court Judge refusing bail and directed that the accused be released on bail pending appeal subject to the conditions set out therein.

The three accused-respondents were indicted before the High Court of Colombo with having conspired to cheat the General Manager of the People's Bank, Colombo punishable under section 403 read with sections 102 and 113(B) of the Penal Code and were convicted after trial and sentenced to a term of 5 years R.I and to a fine of Rs. 50,000/- each on 30.7.96. Against the said conviction and sentence they had preferred an appeal. Pending the consideration of their appeals the petitioners had filed three applications for bail on behalf of the accused-respondents in terms of the provisions of section 333 of the Code of Criminal Procedure Act.

The grounds urged on behalf of the accused-respondents for the granting of bail *inter alia* were as follows

(1) Considering the serious misdirections made by the Learned High Court Judge there was a reasonable prospect of the appeal being allowed by the Court of Appeal.

(2) That a period of 5 years imprisonment has been considered as a short period for the granting of bail pending appeal.

(3) The long period of time taken in the High Court of Colombo for the preparation of the appeal briefs and the delay in hearing the appeals would make any order in favour of the accused by the Court of Appeal futile.

(4) The accused-respondents were suffering from a mental disorder called 'manic depression' (4th accused) and the 3rd accused from 'Diabetis mellistus' which needed proper specialist medical care.

(5) That the accused-respondents had never been charged for any offence apart from this case in which they were convicted.

(6) That they were the sole bread winners of their families and that their wives and children would be destitute if they are incarcerated and the education of their children would suffer.

(7) That the accused-respondents have been present in the High Court on all dates of trial and would not abscond in the event of their appeals are dismissed.

At the hearing of these applications Mr. Abeysuriya P.C. submitted that an offence punishable under section 403 read with 113(B) and 102 of the Penal Code was triable by a Magistrate's Court and also by a High Court but was regarded as being non bailable. If convicted an accused so convicted had a right of appeal. If the conviction was before a Magistrate's Court an accused so convicted is entitled to bail as of right pending his appeal in view of section 323 of the Code of Criminal Procedure Act, but if the conviction was before a High Court a discretion is vested in the Judge of the High Court to consider whether bail should or should not be granted during the pendency of the appeal in terms of section 333(3) of the Code. It was therefore the contention of Learned President's Counsel that the requirement of exceptional circumstances to be established for bail to be granted pending appeal if the conviction was before the High Court imposes an unwarranted fetter on an accused so convicted as against an accused convicted for a similar offence before a Magistrate's Court and was discriminatory.

We are unable to agree with this contention of learned President's Counsel since the decision of **Vaithyalingam, J. in** *Ramu Thamotheram Pillai v. Attorney General*[1] decided over twenty-five

years ago the provisions of law relating to bail has undergone a change. At the time of the said decision the applicable provision was section 325 (3) of the Administration of Justice Law which read as follows: "when an appeal against a conviction was lodged, the court may admit the appellant to bail pending the determination of his appeal and this provision was applicable to all three courts exercising criminal jurisdiction namely, the Magistrate's Court, the District Courts and the High Courts and the same principles laid down as guidelines for the exercise of the discretion vested under the section was of general application to all three courts. It was decided in that case that in deciding how the discretion should be exercised the determining factor was not the Court from which the appeal had been preferred but the facts and circumstances of each case and Vaithyalingam, J. rejected the contention of learned Counsel for the petitioner that the legislative history of the section shows that what the legislature intended was that ordinarily bail should be granted unless there were good grounds for refusing it.

As the law as it stands today under the provisions of the Code of Criminal Procedure Act the statute itself draws a distinction between cases where an appeal against a conviction is preferred from an order made by a Magistrate's Court and an order made by a High Court. The relevant provisions are sections 323(1) and 333(3).

Section 323(1) dealing with appeal from Magistrate's Courts provides that "When an appeal has been preferred the court from which the appeal is preferred shall order the appellant if in custody to be released on his entering into a recognizance in such sum and with or without a surety or sureties as such, court may direct conditions to abide the judgment of the Court of Appeal and to pay such costs as may be awarded."

Provided always that the appellant may if the court from which the appeal is preferred thinks fit instead of entering into a recognizance give such other security by deposit of money with such court or otherwise as that court may deem sufficient.

323(2) provides that "Upon the appellant's entering into such recognizance or giving such other security as aforesaid he shall be released from custody."

Section 333 dealing with appeals from convictions by the High Courts in subsection 3 provides that "when an appeal against a conviction is lodged the High Court may subject to subsection (4) admit the appellant to bail pending the determination of his appeal. An appellant who is not admitted to bail pending the determination of the appeal be treated as in such manner as may be prescribed by rules made under the Prisons Ordinance.

Therefore we are of the view that the argument that an accused who had been convicted by a High Court in respect of an offence for which he could have been tried and convicted by a Magistrate's Court is entitled to bail as of right pending his appeal is untenable.

The words "the High Court may subject to subsection (4) may admit the appellant to bail pending the determination of his appeal in subsection (3) of section 333" clearly vests a discretion in the High Court Judge to decide whether to grant bail to an accused who have been convicted or to refuse to grant bail pending his appeal. The discretion to grant or refuse bail must be exercised judicially and not arbitrarily or capriciously. Lord Denning MR in the case of *Ward v. James*[2] at 571 stated that "the cases all show that when a statute gives a discretion the Courts must not fetter it by rigid rules from which a Judge is never at liberty to depart. Nevertheless the Courts can lay down the considerations which should be borne in mind in exercising the discretion and point out those considerations which should be ignored. This will normally determine the way in which the discretion is exercised and thus ensure some measure of uniformity of decisions. From time to time the considerations may change as public policy changes and so the pattern of decisions may change. This is all part of the evolutionary process."

Over the years a principle has evolved through judicial decisions that bail pending appeal from convictions by the Supreme Court would only be granted in exceptional circumstances.

In *King v. Keerala*[3] in considering an application for bail pending appeal made under the provisions of section 15 of the Court of Criminal Appeal Ordinance 23 of 1938 provided that "the Court of Criminal Appeal **may if they think fit** on the application of the

appellant admit the appellant to bail pending the determination of his appeal. Wijewardena, J. held that "the Court of Criminal Appeal does not grant bail in applications for bail in the absence of exceptional circumstances."

In that case the appellant had been convicted on a charge of culpable homicide not amounting to murder and sentenced to two years rigorous imprisonment on 7th January 1942. He filed the petition of appeal to the Court of Criminal Appeal on 8th January and the hearing of the appeal had been set down for 2nd February 1942. The grounds on which the application for bail was made were

(a) that the accused was allowed bail pending trial in the Supreme Court;

(b) The accused is a person of good character with no previous convictions; and

(c) the accused is unable to retain Counsel unless he is enlarged on bail.

In his judgment Wijewardena J. referred to the case of *John Henry Charles Earnest Howeson, Louis Hardy.*[4] In that case the accused had been convicted at the Central Criminal Court on 21st February 1936 of an offence punishable under section 84 of the Larceny Act and the 1st accused sentenced to 12 months imprisonment and 2nd to 9 months. The application for bail pending appeal was refused after the grant of a certificate for appeal by the trail Judge holding that there were no exceptional circumstances sufficient to justify the granting of bail. In refusing bail Talbot, J. made the observation that **"there is every reason to anticipate that the hearing of the appeal will not be postponed for long."**

In *Queen v. Rupasinghe Perera*[5] Basnayake C.J. with Sansoni, J. and Sinnathamby, J. held that bail is not granted by the Court of Criminal Appeal unless there are exceptional circumstances.

In *Queen v. Coranelis Silva*[6] the accused had been convicted of attempted murder and sentenced to four years imprisonment.

Pending his appeal application for bail was made to the Court of Criminal Appeal. The application was refused the court holding that no exceptional circumstances had been established with the observations by Weeramanthry, J. that "the mere circumstance that the hearing of the appeal is not likely to take place for a fortnight or a month is of itself no ground."

In *Salahudeen v. Attorney-General*[7] Samarawickrema, J. refused bail to an accused who had been convicted of attempted culpable homicide and sentenced to three years rigorous imprisonment pending his appeal on the ground that no exceptional circumstances had been made out.

In *Ramu Thamotheram Pillai v. Attorney-General* (Supra) bail was refused to the Appellant who was convicted of attempted murder and sentenced to seven years rigorous imprisonment pending his appeal on the ground that no exceptional circumstances have been made out.

From a consideration of the decisions referred to above and the legal provisions as a general principle there is no doubt that exceptional circumstances must be established by an appellant if the discretion vested in a High Court to grant him bail pending the determination of his appeal is to be exercised in his favour. But this by no means should be taken to be the invariable and inflexible rule for Justice Vaithiyalingam, J. himself recognised it in the case of *Thamotheram Pillai v. Attorney-General* (*Supra*) when he observed thus "But the requirement of exceptional circumstances should not be mechanically insisted upon merely because the case is from the High Court. Even in the case of a High Court it is possible for an appellant to have been convicted of a trivial offence and to have been given a very light sentence. For instance a man charged with murder may ultimately be found guilty of only causing simple hurt and be sentenced to a short term of imprisonment. In such a case the Court would not expect the appellant to show that exceptional circumstances existed before granting bail. In this regard even under the Court of Criminal Appeal Ordinance the position was the same. Thus in the case *Queen v. Punchibanda et al*[8] at 15. The petitioners were charged with being members of an unlawful assembly the common object of which was to cause hurt and also with murder.

They were found guilty only of the charge of unlawful assembly and were sentenced to six months rigorous imprisonment. The application for bail was allowed. In his judgment Weerasuriya, J. made no reference to exceptional circumstances but said, that "in view of the short sentence and as I understand from the Deputy Registrar of the Court of Criminal Appeal that the appeal filed by the petitioners will not be listed for hearing at the next sitting of the Court of Criminal Appeal and also in my opinion, it is unlikely that the petitioners will abscond in the event of their appeals being dismissed. I Order that each of them be released on his furnishing bail." Thus it is to be seen that although the case was one of a conviction of trial before the Supreme Court the Court took into consideration the nature of the offence of which the appellants were convicted, the lightness of the sentence imposed, the improbability of their absconding and the delay in hearing the appeal in granting bail.

What then are the considerations to be taken into account in determining the question as to whether an accused who has been convicted before the High Court should or should not be released on bail pending his appeal when exercising the discretion vested. As was stated by Vaithiyalingam, J. "the main consideration of course is whether if his appeal should fail the appellant would appear in court to receive and serve his sentence. When the offence is grave and the sentence is heavy the temptation to abscond in order to avoid serving the sentence in the event of his appeal failing would of course be grave. In such cases the Court would require the appellant to show the existence of exceptional circumstances to warrant the grant of bail pending appeal." Some of the other factors that have been considered to be relevant in deciding this question as set out in the decided cases are the nature of the offence of which the appellant has been convicted, the lightness of the sentence imposed the improbability of the accused absconding, the likelihood of the appellant committing other offences, the likelihood of the appellant taking revenge on the witnesses who have testified against him at the trial, the existence of tension between the parties which might be inflamed as a result of the convicted person being released on bail pending the determination of his appeal, the chances of success or failure of the appeal the delay in the hearing of the appeal, a present

illness that such continued incarceration would endanger the life of the appellant or cause permanent impairment of his health these considerations however, are not exhaustive. For instance in the case of *Queen v. Suppar Navaratnam*[3] where the appellant was indicted for attempted murder but was found guilty of voluntarily causing grievous hurt and sentenced to 3 years rigorous imprisonment there were a number of grounds on which the application for bail was supported. One of which was that whilst the appellant was in prison his wife had given birth to her first child who was been neglected by the appellant's parents as they had disapproved of his marriage. This was considered to be an exceptional circumstances which was sufficient to justify his being released on bail pending his appeal.

In the instant case it was submitted by all three President's Counsel appearing for the petitioners that the learned Trial Judge had failed to consider the long delay that would lapse between the conviction of the accused-appellants and the hearing of their appeals and contended that in the order refusing bail dated 4.12.96 according to the observations of the learned Trial Judge herself that "the preparation of the appeal brief of this case would take a period of two years since the briefs for 1994 are being currently prepared" and submitted that by the time the appeals of the accused appellants are heard that at least more than half the period of the sentence of five years would have to spend by them in incarceration in terms of the provisions of subsection (3) to section 333 of the Code of Criminal Procedure Act and that the Administrative delay in the preparation of the appeal briefs by the High Court should not be held against them for refusing bail pending their appeals. In support of this contention learned Counsel relied on the observations of Talbot, J. in the case reported in 1936 25 Criminal Appeal Report 167[10] that "there is every reason to anticipate that the hearing of the appeal would not be postponed for long," and Weeramanthry, J. in *Queen v. Coranelis Silva* (*Supra*) that "the mere circumstance that the hearing of the appeal is not likely to take place for a fortnight or a month is itself no ground."

In addition to the grounds urged above Mr. D. S. Wijesinghe P.C. appearing for the petitioner in C.A. 875/96 filed on behalf of the 3rd accused-respondent submitted that the 3rd accused-respondent being the sole bread winner of his family was totally responsible for

the education of his two children one of whom was presently studying at the Symbiosis College of the University of Poona, India. It was submitted that the 3rd Accused-Respondent while in service of the People's Bank had been guest lecturer at the National Institute of Business Management and at the Professional Education Service at Alexandra College, Colombo and was supplementing his income from those sources which he made use of to finance the education of his child in India. He had been deprived of that income on account of his incarceration and that the Professional Education Service of Alexandra College had indicated its willingness to continue to employ him on payment of Rs. 15,000/- per month. In the event he looses that income the education of that child would get disrupted and submitted a letter from the Professional Education Service of Alexandra College to that effect. This is a matter that has been urged as an exceptional circumstances before this court and we are unable to consider this fact as an exceptional circumstances since this matter had not been urged before the learned High Court Judge as we are of the view that had this matter being urged before the learned High Court Judge perhaps the learned High Court Judge may have taken this fact as a matter in his favour.

Mr. Marapana P.C. appearing for the petitioner in C.A. 13/97 in addition to the submissions made by the other Counsel submitted that there is every chance that the appeal of the 4th accused-respondent would succeed since the learned Trial Judge had misdirected herself in having failed to consider the items of evidence that were favourable to the 4th accused-respondent which clearly showed that his conviction cannot be sustained and contended that it was a matter that should have been taken into consideration by the learned Trial Judge in considering the application made on his behalf. In our view this may not be a relevant fact in the present context because unlike prior to 1974 when an application for bail pending appeal had to be made to the Appellate Court at present the application has to be made to the same Court in which the accused-appellant was convicted and it is very unlikely that the trial Judge who convicted the accused would take the view that the accused had been wrongly convicted.

It is to be observed that in the petitions and affidavits of the petitioners filed before the High Court in the application for bail

pending appeal it has been specifically averred that the accused-appellants had appeared in the High Courts on all dates of trial and would not leave the country and would appear to receive and serve their sentence if their appeals were dismissed.

This averments made by the petitioners had not been denied by the Respondent nor has any affidavits been filed by any officer of the Criminal Investigations Department who had done the investigations into the case controverting this position and intimating to court that there is credible information that the accused-appellants were making arrangements to leave the country or that there is every likelihood of their doing so.

On a consideration of the Order the Learned High Court Judge appears to have acted on extraneous and irrelevant considerations in holding that the petitioners have not made exceptional circumstances. Whilst correctly holding that it is untenable that an accused convicted of an offence who seeks bail pending appeal need not establish exceptional circumstances to be granted bail the Learned Judge had proceeded to state "learned Senior State Counsel has strongly objected to bail being granted on the basis that no exceptional circumstances have been made out and that in any event if the accused were granted bail that they would abscond. We find no support at all for the submission that the accused would abscond in the event they are granted bail made by the Senior State Counsel since no affidavit have been filed to that effect to which we have referred earlier.

The fact that an accused has in fact absconded whilst being on bail pending his appeal in one case or several cases should not be taken into account to the disadvantage of another accused whose application for bail is being considered. The learned High Court Judge appears to have been influenced by this irrelevant factor in refusing bail in the instant case for in the order refusing bail it is stated thus at page 16 "since the decision of Vaithiyalingam, J. circumstances have arisen in this country which also must be taken into account in considering such bail applications. The advent of migration of labour, easier modes of travel, accessibility of opportunity to travel to those to whom such facilities were not

available in the mid seventies has led to a consequential mobility of accused which places law enforcement officers at a distinct disadvantage. Hampered by overwork, under staffing, and lack of access to modern technology due to budgetary constraints only comprehends the existent problems. All these directly or indirectly assist the accused in absconding the due process of law. The number of accused who leave the island after obtaining bail are often only detected when the order of the Appellate Court come back for enforcement by the original courts and by then the accused are long gone often on false papers and documents and it makes it almost impossible to trace their whereabouts.

The figure of absconding accused during the last year has affected the hearing of 40% of the cases in this Court alone. The case of the Deputy Director of Education Nanayakkara stands as one of the best examples, where the Supreme Court has affirmed the conviction and sentence of an offence committed more than 10 years ago but the accused who is employed in the U.S.A. cannot be imposed his sentence by this court because he is absconding the due process of law. As in all such cases confiscation of the bail bond does not help as the monies had in any event being advanced by the accused himself with the result even the sureties go unpunished."

Lord Denning MR in Ward v. James (Supra) at 570 stated that "whenever a Statute confers a discretion on a Court or a Judge the Court of Appeal has jurisdiction to review the exercise of that discretion and dealt with the circumstances in which an Appellate Court would interfere with the exercise of the discretion vested in a Trial Judge See also the case of *Ormered v. Tedmerden Joint Stock Mills Company Limited*[11] at 679.

In *Charles Ostenton & Company v. Johnson*[12] at 259 stated that "the true proposition is that the Appellate Court can and will interfere if it is satisfied that the Judge was wrong. Thus it will interfere if it can see that the Judge has given no weight (or no sufficient weight) to those considerations which ought to have weighed him" we are of the view that the Appellate Court would also interfere where a Judge has given weight to considerations which are irrelevant or taken into account extraneous considerations in exercising his discretion which would amount to an abuse of the discretion vested to act judicially.

Before we conclude we think that it is appropriate to make an observation which is relevant and which should be given due consideration. It is to be observed in our experience in sitting on the bench dealing with appeals from the High Courts in criminal cases that there is a tendency of Counsel who appear for the appellants who have been granted bail pending their appeals to move this Court to give preference to those cases in which the accused are in custody pending their appeals and when their appeals are ultimately taken up to submit that circumstances of their clients have changed during the period that they have been on bail pending appeal. Such as that they have since got married and have infant children who need their attention and care, or have secured employment and are gainfully employed or are studying for professional examinations and that giving effect to the custodial sentences imposed by the Trial Courts in the event of their appeals being dismissed should be avoided.

We are of the considered and firm view that an accused-appellant who has persuaded the Trial Court to exercise its discretion in his favour in granting bail pending the determination of his appeal should not be permitted to take advantage of the benefit of the discretion exercised in his favour to avoid serving a custodial sentence which has been imposed on him after due consideration and that the Appellate Court should not consider the fact that an accused has been on bail pending his appeal as a relevant factor in the event of the dismissal of the appeal as a reason as to why he should not serve the sentence imposed.

J. A. N. DE SILVA, J. – I agree.

Applications allowed.
Accused released on bail.